

# LOUISIANA COASTAL LAW

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## Changes in Coast Guard Regulation of Commercial Fishing Industry Vessels

By Eden Davis

Congress passed the Coast Guard Authorization Act of 2010 (CGAA) in October of 2010. In Section 604 of the CGAA, Congress made several changes to the regulation of commercial fishing industry vessels. These changes were made to enhance worker and vessel safety, altering the Commercial Fishing Industry Act of 1988. The new laws change Chapter 45 and 51 of Title 46 of the U.S. Code and 46 CFR Part 28. All changes will be enforced starting October 15, 2012.

### Parity for All Vessels

- There are no longer different standards for federally-documented and state-registered vessels operating on the same waters.<sup>1</sup>

### Items Required to be on Board all Vessels

- Each vessel must be equipped with fire extinguishers, life preservers, flame arrests and visual distress signals. The CGAA now allows the Coast Guard to add any other equipment to the requirements if the equipment minimizes the risk of injury to the crew during vessel operations, and if the Secretary of the Coast Guard determines that a risk of serious injury exists that can be eliminated or mitigated by that equipment.<sup>2</sup>
- Instead of a radio being required on board, the current legislation requires a marine radio that can

communicate effectively to land-based search and rescue facilities is required.<sup>3</sup>

- Radar reflectors and anchors are no longer required to be on board. Instead, it is now required that all vessels have nautical charts, ground tackle, navigation equipment, compasses and publications on board.<sup>4</sup>
- Congress has removed the requirement that medicine chests be on board. The new requirement is that medical supplies sufficient for the size and area of operation of the vessel be on board.<sup>5</sup>

### Survival Craft

- Life floats and buoyant apparatuses are no longer acceptable as survival craft on commercial fishing vessels operating beyond three nautical miles. Now, all commercial fishing vessels must carry lifesaving

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equipment that ensures no part of an individual is immersed in water.<sup>6</sup>

#### Records of Equipment, Maintenance and Required Instructions and Drills

- To ensure compliance with the new requirements, each vessel operating beyond three nautical miles must keep a record on board of equipment, maintenance, and required instruction and drills.<sup>7</sup>

#### Replacement of Boundary Line with Three Nautical Miles Line

- These safety standards previously applied to vessels that operated beyond the boundary line. Because the boundary line is not shown on most charts and is not consistently measured around the country, the new standards apply to vessels that operate three nautical miles from the baseline from which the territorial sea of the U.S. is measured or beyond three nautical miles from the coastline of the Great Lakes.<sup>8</sup>

#### Periodic Examinations of Vessels

- Each vessel operating beyond three nautical miles must be examined at dockside at least once every two years by the Coast Guard and a certificate of compliance must remain on board the vessel.<sup>9</sup>

#### Required Training for Commercial Fishing Vessel Operators

- Each individual in charge of a vessel that operates beyond three nautical miles must pass a training program that has been approved by the Secretary of the Coast Guard. The program will be based on professional knowledge and skill obtained through sea service and hands-on training, including training in seamanship, stability, collision prevention, navigation, fire fighting and prevention, damage control, personal survival, emergency medical care, emergency drills, and weather. The training program will require that the individual demonstrate ability to communicate in an emergency situation and understand information found in navigation publications. Credit will be given for recent past experience in fishing vessel operation. A certificate will be given to those successfully completing the program.<sup>10</sup>

- Each individual that operates a vessel beyond three nautical miles and successfully completes the training program approved by the Coast Guard must complete refresher training at least once every five years as a condition of maintaining the validity of their certification. There will be an electronic database listing the names of the individuals who have successfully completed the training program.<sup>11</sup>

#### Design, Construction and Maintenance Standards for Newly-Built Commercial Fishing Vessels

- Commercial fishing vessels which are less than 50 feet overall in length, built after January 1, 2010, and operating beyond three nautical miles must be constructed in a manner that provides the level of safety equivalent to the minimum safety standards for recreational vessels.<sup>12</sup>
- “Overall in length” means the horizontal distance of the hull between the foremost part of the stem and the aftermost part of the stern including fittings and attachments.<sup>13</sup>

#### Grant Programs for Training and Research

- A fishing safety training grant program will be established to provide funding to municipalities, port authorities, other public entities, not-for-profit organizations and any other qualified person who provides commercial fishing safety training. The grant money awarded will be used to conduct fishing vessel safety training for vessel operators and crewmembers and for the purchase of safety equipment and training aids for the program.<sup>14</sup>
- A fishing safety research grant program will also be established to provide funding to individuals in

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Editors: Jim Wilkins and Melissa Trosclair Daigle  
Layout: Jessica Schexnayder

Sea Grant Legal Program (225) 578-5931 FAX: (225) 578-5938  
227B Sea Grant Bldg., LSU E-mail: sglegal@lsu.edu  
Baton Rouge, LA 70803 <http://www.lsu.edu/sglegal>



academia, members of non-profit organizations, businesses involved in fishing and maritime matters, and other persons with expertise in fishing safety in order to conduct research on methods of improving the safety of the commercial fishing industry, including research on vessel design, emergency and survival equipment, enhancement of vessel monitoring systems, communications devices, de-icing technology, and severe weather detection.<sup>15</sup>

- All grant money will be issued on a competitive basis. For each grant program there will be \$3,000,000 appropriated for each fiscal year, 2010-2014. The federal share of the cost to carry out any activity under the grant must not exceed 75%.<sup>16</sup>

#### Changes to the Federal Advisory Committee on Commercial Fishing Safety

- The Federal Advisory Committee on Commercial Fishing Safety will now be named the Commercial Fishing Safety Advisory Committee.<sup>17</sup>
- There will now be 18 members on the committee instead of 17.<sup>18</sup>
- Now, three members on the Advisory Committee will be members who represent the general public. These three individuals, whenever possible, should represent an independent expert or consultant in maritime safety, a marine surveyor who provides services to commercial fishing vessels and a person familiar with issues affecting fishing communities and families of fishermen.<sup>19</sup>
- The Commercial Fishing Safety Advisory Committee is reauthorized until September 30, 2020.<sup>20</sup>

#### Load Lines for Vessels 79 Feet or Greater in Length

- A load line is the line where the hull of the ship meets the water surface. The load line is to be positioned on ships in order to indicate the legal limit of how much weight a ship may carry.
- Fishing vessels over 79 feet in length, built after July 1, 2012, must be load lined.<sup>21</sup>

- Fishing vessels built on or before July 1, 2012, that undergo a substantial change to the dimension of or type of vessel after July 1, 2012, must comply with an alternative load line compliance that is developed in cooperation with the fishing industry and proscribed by the Coast Guard.<sup>22</sup>

#### Classification of Vessels

- Vessels will now be certified as fishing, fish tender or fish processing vessels.<sup>23</sup>
- All fishing vessels that are at least 50 feet overall in length and are built after July 1, 2012, must now comply with the guidelines in 46 U.S.C § 4503. Section 4503 requires that vessels meet all survey and classification requirements prescribed by the American Bureau of Shipping or other similarly qualified organization approved by the Coast Guard. The vessel must have on board a certificate issued by the American Bureau of Shipping or other organization evidencing compliance with the requirements.<sup>24</sup>
- If a fishing vessel, fish tender vessel or fish processing vessel is at least 50 feet overall in length and is built before July 1, 2012, and is 25 years of age or older, then the vessel must comply with an alternative safety compliance program that is developed in cooperation with the commercial fishing industry and proscribed by the Coast Guard.<sup>25</sup>
- If a fishing vessel, fish processing vessel, or fish tender vessel built before July 1, 2012, undergoes a substantial change to the dimension of the vessel or type of vessel after July 1, 2012, the vessel must comply with the alternate safety compliance program.<sup>26</sup>
- Vessels owned by a person that owns more than 30 fishing vessels are not required to meet the alternate safety compliance requirements until January 1, 2030, if that owner enters into a compliance agreement with the Coast Guard that provides a fixed

schedule for all the vessels owned by that person to meet the requirements.<sup>27</sup>

• A fishing vessel, fish processing vessel, or fish tender vessel that was classified before July 1, 2012, will remain subject to the requirements of the classification society approved by the Coast Guard.<sup>28</sup>



(Endnotes)

- 1 46 U.S.C. §4502(b) (2011).
- 2 46 U.S.C. § 4502(a).
- 3 *Id.*
- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 46 U.S.C. § 4502(f).
- 8 *Supra*, note ii
- 9 *Supra*, note vii.

- 10 46 U.S.C. § 4502(g).
- 11 *Id.*
- 12 46 U.S.C. § 4502(h).
- 13 46 U.S.C. § 2101.
- 14 46 U.S.C. § 4502(i).
- 15 46 U.S.C. § 4502(j).
- 16 46 U.S.C. § 4502(i)(j).
- 17 46 U.S.C. § 4508.
- 18 *Id.*
- 19 *Id.*
- 20 *Id.*
- 21 46 U.S.C. § 5102(b).
- 22 *Id.*
- 23 46 U.S.C. §4503.
- 24 *Id.*
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*

## Flooding, Spillways and Legal Implications

*By Eden Davis*

In areas of the Midwest, April 2011 rainfall was four times more than normal. The rainwater passed down the Mississippi River through Tennessee, Mississippi and Louisiana. The high water and fear of increased flooding of metropolitan areas led to the opening of three spillways along the Mississippi River: The Bird’s Point-New Madrid Floodway, the Morganza Floodway and the Bonnet Carré Spillway. With the opening of these floodways, the Mississippi River level was lowered by inundating land with fast-moving water. While the property flooded by the Bonnet Carré Spillway is owned entirely by the Army Corps of Engineers (Corps), the Morganza Spillway and Bird’s Point Spillway are on flowage easements. When these spillways were opened, private land was flooded, causing damage to agricultural land and homes.

Property damage is abundant, and who is to blame? Some view it merely as an act of God, while others blame the

Corps for selectively flooding some areas in order to protect more populous areas. Some property owners may claim that the Corps “took” their property without paying for it. The Fifth Amendment requires that if property is taken for public use by the government, the property owner must be justly compensated.<sup>1</sup> If the Corps possesses flowage easements over the land, then these property owners have already been compensated for the easement right and the property owners are fully aware that the Corps has the power to flood their property if necessary.

That is not to say that the release of waters into the floodways is without environmental damage. The release of farm chemicals, sediment and other contaminants that are in the Mississippi River waters onto the land and into waters of the states of Louisiana and Missouri has caused problems, such as potentially causing fish kills and algal blooms in Lake Pontchartrain. In fact, Missouri filed suit for an injunction to

prevent the opening of the Bird's Point-New Madrid floodway on the basis that the release of Mississippi waters into the floodway violated the Clean Water Act. Moreover, flooding of the Atchafalaya Basin may have resulted in a population loss to the endangered black bear living in the Atchafalaya basin. This article will examine the legal implications that arose when the Bonnet Carré spillway, Morganza floodway and the Bird's Point-New Madrid floodway were utilized.

### Bonnet Carré Spillway

The Bonnet Carré Spillway is the southernmost floodway of the Mississippi River.<sup>2</sup> The Spillway, located in St. Charles Parish, Louisiana, is crucial because it protects New Orleans and other downstream communities from flooding when the Mississippi rises beyond its carrying capacity. The Spillway protects New Orleans and other cities by diverting a portion of the floodwaters into Lake Pontchartrain and then into the Gulf of Mexico, bypassing New Orleans. It was first opened during the flood of 1937 and has been opened eight times thereafter in order to lower river stages at New Orleans.<sup>3</sup>

The Bonnet Carré Spillway consists of two main components: a control structure along the east bank of the Mississippi River and a floodway which conveys the diverted floodwaters into the lake. The control structure is a mechanically controlled concrete weir that runs parallel to the river for over a mile and a half. Confined by guide levees, the floodway stretches nearly six miles to Lake Pontchartrain.<sup>4</sup>

The decision to open the Bonnet Carré Spillway is the responsibility of the Mississippi River Commission (MRC) President. The MRC, along with the Corps, operate the Bonnet Carré, the Bird's Point and the Morganza. The MRC President has broad jurisdiction over when to open all three spillways. For the Bonnet Carré, the MRC President relies heavily on the recommendations of the New Orleans district commander, who is responsible for the actual operation of the Bonnet Carré structure and floodway. When the Mississippi River flow exceeds 35,396 cubic meters per second (cfs), the

spillway should be opened to prevent flooding down river. Also, in making the decision to open the spillway, the MRC and the Corps consider environmental, hydrologic, structural, navigational and legal factors.<sup>5</sup> The decision to open the Bonnet Carré spillway is made when existing conditions, combined with predicted stages and discharges, indicate that the mainline levees in New Orleans and other downstream communities will be subjected to unacceptable stress caused by high water.<sup>6</sup>

When the decision is made to open the spillway, two cranes that move along tracks atop the structure are used to individually lift each timber, called "pins," from the required number of bays. The timbers are raised from their vertical position across the weir opening and are laid horizontally on top of the structure for later use in its closing. All together, there are 350 bays that require about 36 hours to lift all 7,000 wooden timbers in the structure. If there is a need for a quick opening, there are emergency procedures that can release 20 timbers at a time and reduce the opening time to three hours.<sup>7</sup>

### Morganza Floodway

The Morganza Floodway is located at river mile 280 in south central Louisiana, thirty-five miles northwest of Baton Rouge, Louisiana. The Floodway begins at the Mississippi River, extends southward to the East Atchafalaya River levee, and eventually joins the Atchafalaya River basin floodway near Krotz Springs, Louisiana. The purpose of the Morganza Floodway is to divert excess floodwater during times of emergency flooding from the Mississippi River into the Atchafalaya Basin. The floodway alleviates stress on the mainline levees downstream the Mississippi River.<sup>8</sup> The floodway has only been opened twice, in 1973 and 2011.<sup>9</sup>

The floodway consists of two structures: the Morganza Floodway and the Morganza Control Structure. These structures are intended to pass up to 600,000 cfs of water, or 4.5 million gallons per second, into the Atchafalaya river and eventually to the Gulf of Mexico. Construction of both structures was completed in 1954. The floodway is

twenty miles long and five miles wide; it consists of a stilling basin, an approach and outlet channel, and two guide levees. The control structure contains a concrete weir, two sluice gates, seventeen scour indicators, and 125 gated openings.<sup>10</sup>

The decision to open the Morganza floodway relies on current and projected river flows and levee conditions, river currents and potential effects on navigation and revetments, extended rain and state forecasts, and the duration of high-river states. When river flows at Red River Landing are predicted to reach 1.5 million cfs and rising, the Corps and the Mississippi River Commission consider opening the Morganza floodway.<sup>11</sup>

#### The Bird's Point-New Madrid Floodway

The Bird's Point-New Madrid floodway reduces flood stages and prevents flooding of Cairo, Illinois; Cape Girardeau, Missouri; Hickman, Kentucky; Paducah, Kentucky; Golconda, Illinois; Grand Tower, Illinois and Reevesville, Illinois.<sup>12</sup> The Bird's Eye- New Madrid Floodway is the first key location of the Mississippi River levee system located on the west bank of the Mississippi River in Mississippi County and New Madrid County Missouri, just below the confluence of the Ohio and Mississippi Rivers. The boundary of the three-to-ten mile wide floodway is defined by the fifty-six mile long frontline levee between Bird's Point, Missouri, and New Madrid, Missouri, on the east and the thirty-six mile long setback levee on the west. The frontline and setback levees end without connecting near New Madrid, leaving a 1,500-foot gap that serves as a floodway. The area within the floodway contains a little more than 130,000 acres.<sup>13</sup>

When flooding reaches a critical level of 60 feet in Cairo, Illinois, or when flow exceeds 2,360,000 cfs, the floodway is placed into operation by artificially breaching the frontline levee with dynamite. The floodway is designed to divert 550,000 cfs, approximately one-fourth of total flow, from the Mississippi River during a flood. This should provide an estimated seven feet of stage lowering in the vicinity of Cairo. The frontline levee has two fuseplug levee sections: an

eleven-mile section at the upper end and a five-mile section at the lower end. Under the current operating plan developed in 1986, the floodway is activated when sections of the frontline levee overtop. In addition to natural overtopping, the plan of operation involves detonation of explosives at critical locations of the frontline levee. Explosive material is loaded into pipes imbedded in the levee; this process takes approximately fifteen hours.<sup>14</sup> Detonation has been used twice, in 1937 and 2011, in order to relieve the rising floodwaters. The operation of the floodway is directed by the MRC president.<sup>15</sup>

#### Legal Issues

##### *Fifth Amendment and Government Takings*

With the opening of the Bird's Point-New Madrid spillway and the Morganza Spillway, homes and private property were flooded. In the Bird's Point-New Madrid Spillway there are ninety residences and thousands of acres of farmland.<sup>16</sup> The Atchafalaya Basin, the land that is flooded with the opening of the Morganza Spillway, is dotted with residences and camps. The Bonnet Carré spillway is owned entirely by the Corps, and has no habitable structure in it, but each time it is opened, the quality of the water in Lake Pontchartrain is affected, causing complaints by those who depend on the lake for their livelihoods and for recreation. While it may seem unfair that the Corps took an action that caused immense damage to private property, the Corps had previously compensated the landowners for rights to flowage and/or development easements.<sup>17</sup>

A flowage easement gives the government the right to flood private property in order to operate flood control structures, like the Morganza and Bird's Point spillways.<sup>18</sup> It was unnecessary for easements to be obtained for the Bonnet Carré because the Corps bought in full the ownership to land stretching from the Mississippi River to Lake Pontchartrain for the potential operation of the spillway.<sup>19</sup> The lower Atchafalaya basin land, which is flooded when the Morganza floodway is operated, is subject to both flowage and development easements. When a development

easement is obtained, the landowner surrenders the right to develop a designated parcel of property. Landowners retain their title, oil and gas, timber and use benefits.<sup>20</sup>

When the government obtains a flowage easement, they obtain perpetual rights to flood the property, to prohibit construction or maintenance of any structure for human habitation, and to approve all other structures constructed on flowage easement land, except wire fencing.<sup>21</sup> Flowage easements are found in the property deed to which the easement is attached and thus burdens each successive landowner.<sup>22</sup>

Congress required that the Corps obtain flowage easements on all the land that would be subject to potential flooding from the operation of the Morganza Spillway and the Bird's Point-New Madrid Spillway.<sup>23</sup> A flowage easement gives the Corps the right to periodic water storage on the property, but not the right to exercise complete control over the property.<sup>24</sup>

An owner of land with an attached flowage easement may mow, clear, plant vegetation, or otherwise use as desired, as long as that use is not in conflict with the terms of rights acquired by the government. The owner can sell or lease the land, subject to the restrictions of the easement, or construct a wire fence along the boundary line. However, the landowner may not construct or maintain any structure for human habitation, permanent or temporary, on the flowage easement land. An owner cannot place or construct any "other structure" or add to existing structures on the flowage easement land without prior written approval of the District Engineer. "Other Structures" are structures including but not limited to buildings, ramps, ditches, channels, dams, dikes, wells, earthen tanks, ponds, roads, utility lines, and tramways.<sup>25</sup>

Even though there are restrictions against structures for human habitation in place, there are currently residences dotting both the Morganza Spillway and the Bird's Point Spillway.<sup>26</sup> While the Corp's regulations state that no habitable structure can exist, they do. The only valid way in which a landowner could build a habitable structure would be to

obtain a release from the Assistant Secretary of the Army for Civil Works.<sup>27</sup> Generally, the restriction on human habitation will not be recommended for release. Human habitation in the potential flood plain places an undue limitation on the congressionally authorized operation of the program.<sup>28</sup> However, if it can be demonstrated that the release allowing habitation will not result in a significant threat to human life, health or safety and will not place or suggest any restriction for the operation of the project, the release may be approved.<sup>29</sup> According to Executive Order 11988, the Assistant Secretary of the Army for Civil Works must consider alternatives that avoid the construction or maintenance of habitable structures in the floodplain wherever practical.<sup>30</sup> Any landowner requesting relief from the restriction on human habitation in a floodplain or project pool must also demonstrate that there is no practical alternative to the location of the habitable structure.<sup>31</sup> If it can be demonstrated that there would be adequate warning time to evacuate the structure in the event of a flood that would inundate the site and that non-flooded egress out of the area would be available for evacuation, then it may receive approval.<sup>32</sup> The human habitation restriction is a property right acquired by the Federal Government that must be released by deed.<sup>33</sup>

The landowners in the Bird's Point-New Madrid Spillway and the Morganza Spillway were compensated for flowage easements on their property.<sup>34</sup> The flowage easement compensation amount is the difference in property value before and after the flowage easement was obtained.<sup>35</sup> Fifty-seven thousand acres of flowage easements were obtained in the Bird's Point-New Madrid Floodway, and over 100,000 acres in the Morganza.<sup>36</sup> Moreover, each year, every property owner is notified of the right the Corps has to flood their property.<sup>37</sup>

Landowners in the Bird's Point Spillway have filed suit under the Fifth Amendment Takings Clause, claiming their property was taken by the government without just compensation. A taking occurs when the government encroaches upon or occupies private land for a public purpose. A taking requiring just compensation requires that the government

physically occupy the private property, or that the property owner be deprived of the economic benefits of ownership by regulation.<sup>38</sup> The United States Supreme Court has stated that a taking, within the meaning of the Takings Clause, includes any action that deprives the owner of all or most of his or her interest in the private property, such as prohibiting certain uses of the property or destroying or damaging it.<sup>39</sup> However, if the government acts under authority already obtained through an easement, though the action may impair the land's use, the owner has no reasonable expectations otherwise, and it will not amount to a takings under the Fifth Amendment.<sup>40</sup>

Landowners in Missouri are claiming that the breach of the Bird's Point-New Madrid Levee resulted in a "taking" of their property. The landowners claim that although the Corps obtained flowage easements when the Flood Control Act of 1928 was passed and again with alterations in 1965, the Corps did not obtain modified flowage easements after changes were made to the Flood Control Act in 1983.<sup>41</sup> According to the landowners, the Corps never obtained the necessary flowage easements to allow execution of the 1983 flood plan.<sup>42</sup> The landowners further claim that to the extent any easements did exist, they were insufficient to allow the flowage of water and debris over the land and property in the force and magnitude during the flood created on May 2, 2011. They claim that the scope and use of the easements, to the extent any such easements existed, were exceeded. Some landowners claim that the Corps had never obtained an easement to flood their property.<sup>43</sup>

The breach of the levee caused deep sand and sediment deposits on the farmland in the Spillway.<sup>44</sup> The river scoured large sections of land, leaving holes and crevasses on formerly arable cropland.<sup>45</sup> According to the landowners, this damage is permanent in nature and cannot be repaired.<sup>46</sup> Corn, wheat and soybean crops were destroyed. Ninety residences were destroyed. Farm operations and equipment were destroyed.<sup>47</sup>

In order for the landowner's to prevail, they must prove that the easement did not provide for the kind of flooding that occurred on May 2, 2011, that the damage to the property

was permanent, and that the land no longer has any economic value. The government will argue that most of the landowners in the Spillway had flowage easements placed on their land, and thus the landowners cannot demand compensation for the flood damage as they were already compensated for the right to flood the property. The landowners should have been well aware that at any point the Corps could flood their land if necessary. The terms of the flowage easement are in the deed to the property, and the Corps sent yearly notices to the landowners reminding them of the easement rights.

Even if the flowage easement did not provide for the type of flooding that occurred on May 2, the damage to the land must be permanent, and the land must no longer hold economic value in order to be compensated under the Takings Clause. If there is land in the spillway that once had a home on it, but now it can be used for profitable farmland, the owner will not be compensated for a takings of the land (but will be compensated for the taking of the home) because the land still has value. Flowage easements may contain terms that specify what sort of damage can result in compensation to the landowner. For example, in some of the flowage easements in the Bird's Point-New Madrid Spillway, there are express terms that allow for compensation for the value of the land if the flooding results in sand or sediment deposits.<sup>48</sup> The compensation value is the difference in the market value of the property prior to and after the damage.

If the property damage fails to rise to the level of a takings, it is unlikely that the landowner will receive any compensation for the damage under other theories of recovery such as negligence. The federal government, including the Corps, is immune from tort liability under the Flood Control Act of 1928 which states "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods of flood waters at any place."<sup>49</sup> This means that if the damage does not rise to the level of a takings, then the landowner will receive no compensation from the government, even though it was their actions that caused the damage. Although governments are immune from

tort action, governments are never immune from constitution claims for just compensation under the Fifth Amendment.<sup>50</sup>

#### *Clean Water Act*

The federal Clean Water Act (CWA), as adopted by Missouri and Louisiana, prohibits any person from polluting the waters of the state or from placing any contaminant in a location in which it can cause pollution of the waters of the state.<sup>51</sup> This statute applies not only to individuals, but also to agencies or departments of the federal government, such as the Corps.<sup>52</sup> Pollution is broadly defined as contamination or other alteration of the physical, chemical or biological properties of any water of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or any discharge into the water of liquid, gaseous, solid, or radioactive substances that will or is certain to create a nuisance or render the waters harmful, detrimental or injurious to public health, safety or welfare or to domestic, industrial, agricultural, recreational, or other legitimate beneficial uses, or to wild animals, birds, fish or other aquatic life.<sup>53</sup>

The state of Missouri sought an injunction on April 26, 2011, in order to prevent the Bird's Point-New Madrid frontline levee from being breached because the floodwaters would cause the release of farm chemicals into the environment and cause those chemicals, along with sediment and other contaminants, to enter into waters of the state of Missouri, therefore violating the Missouri water pollution prevention laws which mirrored the CWA.<sup>54</sup> The pollution of the waters of Missouri from a point source, such as the channel created with the levee breach, would be a violation of the CWA. Moreover, the area inside the two Missouri levees has petroleum storage tanks, farm chemical storage buildings and LP gas tanks<sup>55</sup> that could pollute state waters if they leaked during flooding.<sup>56</sup> Under Missouri revised statute section 644.076(1), the Missouri Department of Natural Resources had the authority to seek an injunction to prevent the Corps from breaching the frontline levee because the Missouri statute containing the CWA was in imminent danger of being violated.<sup>57</sup>

Missouri claims that the Corps has waived their sovereign (governmental) immunity in Section 313 of the CWA and is liable for a violation of the CWA. Section 313 states that each agency of the federal government, including the Army Corps of Engineers, when engaged in activity which may result in the discharge or runoff of pollutants, is subject to and must comply with all state requirements respecting the control and abatement of water pollution.<sup>58</sup>

Missouri did not obtain an injunction from the federal district court, and Missouri is unlikely to obtain a remedy on the appellate level for two reasons. First, under Missouri Clean Water Law, the Corps breaching the levee by allowing water to flow into the floodway is not in violation because Congress has determined that state water pollution control laws are not to impair the Corps' authority to maintain navigation.<sup>59</sup> Second, *Story v. Marsh* is compelling authority that Congress has committed the operation of floodways and spillways to the Corps' broad authority to operate levees under the Corps' discretion.<sup>60</sup> *Story v. Marsh* involved the Corps artificially crevassing the frontline levee of the Bird's Point-New Madrid floodway during high flood stages on the Mississippi river. The 8<sup>th</sup> Circuit held that the decision of the Corps to artificially crevass the upper and lower fuse plug sections of the frontline levee was not judicially reviewable.<sup>61</sup>

A court would likely hold that the Corps did not waive their sovereign immunity; a waiver would allow a state or an individual to sue a component of the federal government. Waivers of sovereign immunity must be unequivocally expressed by Congress, may not be implied, cannot be used when the state actor is performing a discretionary function, and must be strictly construed in favor of the United States.<sup>62</sup> While Missouri alleges that a waiver is provided by section 313(a) of the CWA, section 511(a) of the CWA provides a limitation on this waiver of sovereign immunity. Section 511(a) states that,

This chapter shall not be construed as (1) limiting the authority of functions of any officer or agency of the United States under any other law or regulation

not inconsistent with the chapter, [or] (2) affecting or impairing the authority of the Secretary of the Army (a) to maintain navigation...

It would appear then that the Army Corps of Engineers does not have to comply with section 313 of the CWA when compliance with state-law CWA requirements would interfere with the Corps' authority "to maintain navigation."<sup>63</sup> The Corps apparently can pollute the waters of the United States if it is necessary to maintain navigation. The purpose of the Flood Control Act, which allows for the breach of the frontline levee, is to control flooding and to maintain navigation.<sup>64</sup> If the Corps could not breach the frontline levee in a case of extreme high water levels of the Mississippi River, there could be grave threats to navigation if the levees failed or overtopped. River channels could be altered and there could be vessel accidents. There is no doubt that many federal activities can be regulated by the CWA pursuant to section 313(a), but Missouri cannot require the Corps to comply with state water pollution laws when the Corps action is intended to maintain navigation.

Although the decision to breach the levee had some adverse environmental impacts, the Corps had discretion to breach the levee and flood the spillway for navigational purposes, and that action is not reviewable by a court. The Corps' decision to breach the frontline levee at the Bird's Point-New Madrid Spillway was an action committed to agency discretion by law. The Eighth Circuit Court of Appeals, in an earlier decision involving this very levee system and an injunction issued by the district court, held that Congress committed the operation of the floodway to the discretion of the Corps.<sup>65</sup>

Under the Administrative Procedure Act (APA), when an action is committed to agency discretion, the substance of the decision made by the agency is unreviewable.<sup>66</sup> Judicial review is permitted unless "agency action is committed to agency discretion by law."<sup>67</sup> Congress seems to have determined that the management of the levee and the need to relieve pressure to avoid massive and uncontrolled damage

in the area downstream and to more heavily populated areas are the kinds of decisions that must be left to those with the expertise and ability to act quickly and decisively.<sup>68</sup>

It is possible that Louisiana could file suit against the Corps, making the same claim as Missouri: a violation of the CWA for utilization of the spillways causing pollution to the waters of Louisiana, such as Lake Pontchartrain and the Atchafalaya River. Again, although there would be both a CWA violation and potential negative environmental impacts in those bodies of waters because of the Corps' action, the Corps is immune from suit for the same reasons discussed above, because the opening of the spillways was done in part to maintain navigation on the Mississippi River.

#### *Endangered Species*

The Endangered Species Act (ESA) requires federal agencies, in consultation with the U.S. Fish and Wildlife Service and/or the NOAA Fisheries Service, to ensure that actions the agencies authorize, fund or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species. No person or agency can take any action that causes the "taking" of any listed species of endangered fish or wildlife.<sup>69</sup> "Taking" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in this conduct.<sup>70</sup>

The opening of the Morganza and Bonnet Carré spillways by the Corps has placed endangered and threatened species in jeopardy. There are many endangered or threatened species that live in the Atchafalaya Basin as well as Lake Pontchartrain. These species include the Louisiana Black Bear, West Indian Manatee, Louisiana Pearlshell Mussel, Pink Mucket Mussel, Kemp's Ridley Sea Turtle and the Gulf and Pallid Sturgeon.<sup>71</sup>

Morganza is the critical habitat for the Louisiana black bear.<sup>72</sup> Morganza, as a critical habitat, is a geographical area in which are found the physical or biological features essential

to the conservation of the black bear.<sup>73</sup> With the opening of the Morganza spillway, approximately fifty Louisiana black bear were forced from the Morganza Floodway.<sup>74</sup> The action of the Corps placed the Louisiana black bear in jeopardy and damaged the critical habitat (Morganza Spillway) of the bear. While placing an endangered species in jeopardy and negatively affecting the species' critical habitat is a violation of the ESA, the Fish and Wildlife Service (FWS) has an emergency exemption for such behavior.<sup>75</sup>

Typically, if the Corps wishes to take action that would jeopardize an endangered or threatened species or a critical habitat of an endangered or threatened species, the Corps would consult with the FWS in order for the FWS to suggest reasonable and prudent alternatives which would prevent a violation of the ESA.<sup>76</sup> Normally, the Corps would also need to conduct a biological assessment as part of the ESA and the National Environmental Policy Act (NEPA) since breaching the levee would probably be considered a major federal action significantly affecting the human environment. In a biological assessment, the Corps would need to identify any endangered or threatened species that would likely be affected by Corps action.<sup>77</sup> But, when emergency circumstances exist, such as flooding or loss of life or property, there is an expedited informal consultation in which the FWS proposes alternative procedures that are consistent with the ESA.<sup>78</sup>

When the decisions to flood the Bonnet Carré and Morganza spillways were made, there was no time to conduct a formal consultation with the FWS or to prepare a biological assessment. Decisions had to be made promptly to prevent excess damage to river communities. Under the FWS's emergency exemption, the spillways were opened, but under certain conditions.<sup>79</sup> Several water quality-monitoring stations were placed in the Atchafalaya Basin. The Louisiana Department of Wildlife and Fisheries Inland Fisheries Division increased their monitoring efforts through the basin during and after the flood event in order to document effects on endangered and threatened species.<sup>80</sup> Flood-fight personnel were placed

to monitor and report sighting to Louisiana Department of Wildlife and Fisheries for tracking of the black bears. The Corps also cooperated with Louisiana Department of Wildlife and Fisheries as well as the FWS to monitor bear movements and possibly fund a study to comply with the ESA requirements.<sup>81</sup>

Species living in Lake Pontchartrain are going to be negatively affected by the opening of the Bonnet Carré Spillway. The opening of the Bonnet Carré Spillway forced an enormous quantity of water surging through the Bonnet Carré Spillway west of New Orleans into Lake Pontchartrain, altering the temperature, dissolved oxygen and salinity of Lake Pontchartrain.<sup>82</sup> Due to the opening, the salinity dropped to about 1.5 parts per thousand from its typical 3 to 4.5 range. Usually the water of Lake Pontchartrain is brackish, but with the addition of the waters from the Mississippi, the lake became composed of primarily freshwater. Although some fish and other species are adaptable to varying salinities at least for short periods, the species that require a salt water environment were forced to swim towards the gulf or die.<sup>83</sup>

Not only did the composition of Lake Pontchartrain change, but the fertilizer from the Mississippi River could have provided food for a huge algae bloom later in the summer.<sup>84</sup> If the algae bloom had occurred, it could have depleted the oxygen in the water, causing a transient dead zone due to oxygen depletion at the bottom of the lake. According to Dennis Demcheck, USGS hydrologist, the lake will flush itself out because it is subject to the tides of the Gulf. Demcheck warns that during the algal blooms, there is an increased health risk to humans because of the neurotoxins produced by the algae.<sup>85</sup> The alteration of salinity, temperature and dissolved oxygen could also affect many species of fish and shellfish in Lake Pontchartrain.

#### *Suspension of Oyster Crop Insurance*

The inundation of fresh water into Lake Pontchartrain and other coastal areas is perpetuating problems with oyster production. When oysters are overwhelmed with

excess freshwater, they die.<sup>86</sup> This happened last summer during the Deepwater Horizon oil spill when the sediment diversions off the Mississippi River were used as an attempt to flush oil from the marshes. Typically, Louisiana produces roughly two hundred and fifty million pounds of in-shell oysters a year.<sup>87</sup> Just like last year, it is projected that oyster production is going to be cut in half. President of Motivait Seafoods and Chairman of the Louisiana Oyster Task Force, Mike Voisin, believes that this number is going to continue to shrink in half for the next two or three years because of the opening of the Morganza and Bonnet Carré spillways.<sup>88</sup>

A decrease in oyster production hurts oyster farmers financially, though usually farmers can rely on oyster crop insurance to protect them from catastrophic losses. Louisiana oyster farmers can purchase oyster crop insurance that will cover anywhere from sixty-five to ninety percent of their expected oyster harvest.<sup>89</sup> During hurricane Katrina, oyster farmers were able to get federal crop insurance to cover their losses, but currently, that coverage is not available. As a result of the Deepwater Horizon oil spill, the federal crop insurance program for oysters was suspended because crop insurance only pays for damages created by nature, not manmade damages, and the federal program had trouble distinguishing the full source of damage. The federal crop insurance program for oysters has not been reinstated since the Deepwater Horizon spill. The suspension in oyster crop insurance coupled with the crop loss being caused by the opening of the spillways, a manmade disaster, will prevent oyster farmers from recovering insurance funds for their financial losses.

#### Conclusion

The opening of the Morganza floodway, Bonnet Carré spillway and Bird's-Point New Madrid floodway posed various legal problems. Landowners whose homes and property were inundated with water may claim that under the Fifth Amendment, they are owed compensation from the federal government for taking their private land. In order for a landowner to be compensated under "takings" law, the

government must diminish the property's economic value to the extent that it becomes overly burdensome for the property owner to bear that cost for the public good. There is no set amount of loss under federal law that will require compensation but the courts will judge it on a case-by-case basis,<sup>90</sup> and total deprivation of economic value will almost always be a taking.<sup>91</sup> Not only is this a very high burden, but most of the landowners in the floodways had already been partially compensated by the government when the Corps purchased a flowage easement, or a right to flood the property, if necessary.

States and individuals may claim that the Corps or MRC violated the CWA when they released the polluted waters of the Mississippi River onto farmland or into state water bodies. Not only is there concern that the polluted Mississippi did corrupt land or water in Louisiana or Missouri, but also that the floodwaters disrupted petroleum storage tanks, farm chemical storage tanks and LP gas tanks. Although there are grave pollution concerns, the Corps is allowed to violate the CWA if necessary for navigational purposes.

There is concern that the opening of the floodways and spillway caused the death of members of an endangered species. Federal agencies, such as the Corps, do not have the ability to authorize activity which would jeopardize or "take" a member of an endangered species of animal. There are several endangered species, including the Louisiana black bear and the pallid sturgeon, that lived in the area inundated by the floodwaters. Typically, any action of a federal agency that would endanger a member of an endangered species would require consultation and approval by the FWS, but an emergency exemption exists. The emergency exemption was used with the opening of the floodways and spillway, under conditions of immense monitoring and the placement of several water quality-monitoring stations.

Lastly, oyster farmers lost much of this year's oyster crop with the inundation of fresh water from the Mississippi River onto the fragile oyster beds. In the past, oyster crop

insurance would have compensated oyster farmers for this loss, but after the Deepwater Horizon oil spill, the insurance program was suspended. This year, oyster farmers that were left without a crop will not receive any relief from insurance programs.

There are many legal issues that arose with the opening of the Morganza floodway, Bonnet Carré spillway and the Bird's-Point New Madrid spillway. These issues are not slight; they affect property value, pollution of public and private lands, the loss of members of an endangered species and the lack of compensation for oyster farmers who lost their entire crop. Although many people were adversely effected by the floodwaters, the Corps' activity was considered essential by other groups, namely river communities in the flood's path, in order to prevent disaster. Such societal tradeoffs never leave everyone satisfied and the best we can do is to have serious discussions before such actions are necessary to ensure that all parties are informed and their concerns are heard. Then, we must follow the letter of the law.



(Endnotes)

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- 4 *Id.*
- 5 *Id.*
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- 7 *Id.*
- 8 *Morganza Floodway*, U.S. Army Corps of Engineers, <http://www.mvn.usace.army.mil/bcarrre/morganza.asp>.
- 9 *Atchafalaya River Basin Publication*, U.S. Army Corps of Engineers, p. 42, [http://www.mvn.usace.army.mil/pao/bro/wat-res98/waterres98\\_4of16.pdf](http://www.mvn.usace.army.mil/pao/bro/wat-res98/waterres98_4of16.pdf).
- 10 *Supra*, note 8
- 11 *Id.*
- 12 *The Mississippi River & Tributaries Project: Controlling the Project Flood*, pg. 2.
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[Point-New%20Madrid%20info%20paper%20FINAL%200426.pdf](#).

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- 25 *Supra*, note 17.
- 26 *Supra*, note 16.
- 27 *Supra*, note 23.
- 28 *Id.*
- 29 *Id.*
- 30 Executive Order 11988 (1977).
- 31 *Supra*, note 23.
- 32 *Id.*
- 33 *Id.*
- 34 33 U.S.C. § 702(a-11).
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- 36 *Supra*, note 12; *Supra*, note 9.
- 37 *Supra*, note 12.
- 38 Am. Jur. 2d, Eminent Domain § 9 (2006).
- 39 10 A.L.R. Fed. 2d 231 (2006).
- 40 *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)
- 41 *Supra*, note 16.
- 42 *Id.*
- 43 *Id.*

44	<i>Id.</i>	75	50 CFR 402.05 (2011).
45	<i>Id.</i>	76	16 U.S.C. § 1536(a)(3) (2011).
46	<i>Id.</i>	77	16 U.S.C. § 1536(c)
47	<i>Id.</i>	78	<i>Supra</i> , note 38.
48	<i>Id.</i>	79	<i>Supra</i> , note 37.
49	33 U.S.C. § 702(c) (2011).	80	<i>Id.</i>
50	<i>Pacific Bell v. City of San Diego</i> , 96 Cal. Rptr. 2d 897, 904 (Ct. App. 2000).	81	<i>Id.</i>
51	Mo. R.S. § 644.051.1(1) (2011); LAC 33:IX § 301 (2011).	82	“Mississippi River Floodwater Could Create Long-Term Toxic Impact,” PBS News Hour, Jim Lehrer, May 18, 2011, <a href="http://www.pbs.org/newshour/bb/weather/jan-june11/floods_05-18.html">http://www.pbs.org/newshour/bb/weather/jan-june11/floods_05-18.html</a> .
52	Mo. R.S. § 644.016(26); LAC 33: IX § 107.	83	<i>Id.</i>
53	<i>Id.</i>	84	<i>Id.</i>
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55	<i>Id.</i>	86	“Southern Floods Inundate La. Fisheries,” NPR Staff, May 29, 2011, <a href="http://www.npr.org/2011/05/29/136765609/southern-floods-inundate-la-fisheries">http://www.npr.org/2011/05/29/136765609/southern-floods-inundate-la-fisheries</a> .
56	<i>Supra</i> , note 18.	87	<i>Id.</i>
57	Mo. R.S. § 644.076(1).	88	<i>Id.</i>
58	33 U.S.C. § 1323(a) (2011).	89	Oyster Insurance Program Executive Summary Publication, The Gulf Oyster Industry Council.
59	33 U.S.C. § 1313(a).	90	<i>Penn Central Tranp. Co. v. City of New York</i> , 438 U.S. 104 (1978).
60	<i>Story v. Marsh</i> , 732 F.2d 1375, 1379 (8th Cir. 1984).	91	<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992).
61	<i>Id.</i>		
62	<i>United States v. Testan</i> , 424 U.S. 392, 399 (1976); <i>Ruckelshaus v. Sierra Club</i> , 463 U.S. 680, 686 (1983).		
63	<i>Supra</i> , note 23.		
64	<i>Supra</i> , note 11.		
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66	5 U.S.C. § 701(a)(2) (2011).		
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69	16 U.S.C. § 1531 et seq.		
70	16 U.S.C. § 1532(19).		
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72	Environmental Impacts, U.S. Army Corps of Engineers New Orleans District 2011 Flood Response Publication, p. 7, May 19, 2011.		
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## Prior Converted Croplands: Courts Reign in the Power of the Army Corps of Engineers

By Annabelle Pardi and Lauren Weiss

Under the Clean Water Act (CWA), a permit is required to conduct certain activities within wetlands. However, lands that do not support wetland vegetation under normal circumstances are exempt from the statutory definition of wetlands. This exemption is crucial for the millions of acres of wetlands that have been converted to other uses over time. Prior converted croplands (PCCs) are former wetlands converted from a non-agricultural use to lands used for production of a commodity crop prior to December 23, 1985. PCCs are no longer considered wetlands because the land has been manipulated and cropped to the extent that it no longer exhibits important wetland characteristics.<sup>1</sup>

In order to be classified as a PCC, land must meet all of the following criteria: 1) the land must have specific hydrologic features, 2) the land must have had an agricultural commodity planted or produced on it at least once prior to December 23, 1985, and 3) the land cannot have been abandoned.<sup>2</sup> PCC designation is important, as PCCs are exempt from wetland regulations administered by the Army Corps of Engineers and EPA (Section 404 of the Clean Water Act).

### *History of Prior Converted Croplands and the Clean Water Act*

The CWA seeks to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”<sup>3</sup> Since 1972, under Section 404 of the CWA, it is illegal to discharge dredged or fill material into the “navigable waters” of the United States.<sup>4</sup> Under related CWA regulations, the Corps jurisdiction over “navigable waters” includes jurisdiction over wetlands.<sup>5</sup>

Wetlands are defined as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under *normal circumstances* do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”<sup>6</sup> (emphasis added). The Corps is responsible for determining what conditions are ‘normal’ for a given area. In 1977, The

Army Corps of Engineers released Final Rules clarifying ‘normal conditions.’ These rules made it clear that the Corps had no intention of asserting jurisdiction over those areas that were once wetlands, but have been transformed into dry land for various purposes.<sup>7</sup> Thus, former wetlands that were altered to dry land prior to the passage of the CWA were exempt from the definition of ‘wetlands.’ This position was affirmed in two Regulatory Guidance Letters in the 1980’s.<sup>8</sup>

In 1987, the Corps issued the Wetland Delineation Manual and made the use of this manual mandatory in making wetland determinations.<sup>9</sup> The manual requires present evidence of wetland indicators such as wetland hydrology, hydric soils, and wetland vegetation to make “a positive wetland determination.” The manual provides an exception for atypical situations where unauthorized activities, natural events, or manmade wetlands are involved. A situation is not atypical where “areas have been drained under [the Corps’] authorization or that did not require [the Corps’] authorization.”<sup>10</sup>

The definition of “navigable waters” under the jurisdiction of the CWA was edited in 1993 to state that “waters of the United States [do] not include prior converted cropland.”<sup>11</sup> Thus, if a former wetland has been converted to another use that alters its wetland characteristics to such an extent that it is no longer a “water of the United States,” that area will no longer come under the Corps’ regulatory jurisdiction for purposes of Section 404. The intent of the Corps was to “regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time.”<sup>12</sup>

PCCs, by definition, have been modified to no longer exhibit natural hydrology or vegetation. Due to this manipulation, PCCs no longer perform the functions or have the values that the area did in its natural wetland condition. For this reason, the EPA and Corps treat PCCs differently than wetlands for the purposes of the CWA.<sup>13</sup> The only method for PCCs to return to the Corps’ jurisdiction under this regulation is for the cropland to be abandoned.<sup>14</sup> Abandonment occurs

when the PCC is not planted with an agricultural commodity for more than five consecutive years and the requisite wetland characteristics return.<sup>15</sup> Once abandoned, the PCC becomes subject to regulation under the Clean Water Act Section 404.

In February 2005, the Natural Resources Conservation Service (NRCS) and U.S. Department of the Army stated that while a PCC may meet the wetland hydrology criterion, production of an agricultural commodity or maintenance or improvement of drainage systems on the PCC area is exempt from the swampbuster provisions.<sup>16</sup> A certified PCC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the PCC determination is no longer applicable and a new wetland determination is required for CWA purposes. However, recent actions by the Corps have changed the way PCCs are regulated.

### ***The Stockton Rules***

In January 2009, the Army Corps of Engineers Jacksonville Field Office prepared an Issue Paper regarding its approach to jurisdictional wetlands determinations in the Everglades Agricultural Area (EAA). The EAA is an area of former wetlands that was converted to agricultural use.<sup>17</sup> In the EAA, active pumping is used to artificially lower the water table elevation by 18 to 36 inches below the surface in order to keep the land farmable.

The Issue Paper identified the standards that the Jacksonville District would apply to pending applications for jurisdictional determinations where there was a proposed change in use from farming on former wetlands.<sup>18</sup> The Issue Paper stated, "Under the Natural Resources Conservation Service regulations, once a property changes from agricultural use to non-agricultural use, a PCC designation is no longer applicable." Thus PCCs that are shifted to non-agricultural uses become subject to regulation by the Corps. The Corps must use NRCS regulations to determine if an area is a PCC under the CWA. Since a NRCS determination that land is a PCC is only valid while an area is devoted to an agricultural use, the PCCs that are changed from an agricultural to a non-agricultural use become subject to regulation under

Section 404 of the CWA. The Issue Paper further found that active management such as continuous pumping to keep out wetland conditions was not a "normal condition" within the regulations.<sup>19</sup> The paper concluded that such a transformation would be considered an 'atypical situation' within the meaning of the Wetlands Manual and is therefore subject to regulation by the Corps.<sup>20</sup>

The Jacksonville Issue Paper was renamed the Stockton Rules (as it was signed by Stockton, the Director of Civil Works) and adopted by the Corps headquarters as being the national position of the agency. No notice-and-comment period occurred before this memorandum was issued.

### ***Recent Developments and Judicial Reactions***

The Stockton Rules were recently challenged in *New Hope Power Co. v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010). The basic facts are as follows: New Hope Power Company wanted to construct and operate a renewable energy facility on land previously used by the Okeelanta Corporation to farm sugarcane. The property used drains, pumps, and other devices to prevent the area from becoming saturated with water. In 1993, the Miami Regulatory Field Office of the Corps wrote a letter to New Hope indicating that the property was prior converted wetlands.<sup>21</sup> As such, the property did not fall under the jurisdiction of the Corps and New Hope did not need a permit to build its facility. The facility was built. In 2008, New Hope sought to expand the renewable energy facility by building an ash monofill<sup>22</sup> on approximately 150 acres of cropland. In September 2009, the Corps became aware of the construction and sent New Hope a letter stating that commencement of the project prior to the Corps' authorization would constitute a violation of federal laws and subject New Hope to possible enforcement action.<sup>23</sup> Under the Stockton Rules, the New Hope property was subject to regulation by the Corps because the property was a PCC now used for non-agricultural purposes. Moreover, the New Hope property required continuous pumping to keep out wetland conditions. These transformations would be considered an "atypical situation" within the meaning of the Wetlands Manual, subjecting the property to regulation by the Corps

under Section 404 of the CWA. In December 2009, New Hope filed a complaint under the Administrative Procedure Act (APA) seeking to set aside the Stockton Rules.

The complaint filed by New Hope alleged that the Stockton Rules were a final agency action subject to judicial review under the APA. The U.S. Supreme Court typically focuses on two conditions which must be satisfied for an agency action to be considered “final” for the purpose of APA review. First, “the action must mark the consummation of the agency’s decision-making process” and second, “the action must be one by which the rights or obligations have been determined, or from which legal consequences will flow.”<sup>24</sup> The *New Hope* court found that the first condition was met because the decision to implement the challenged policy had been completed using definitive language and no further modification of the policy is being considered.<sup>25</sup> Additionally, the challenged policy was in place for over a year and had been uniformly implemented throughout the United States. The court also determined that the second condition, whereby the action gave rise to legal consequences, had been met. Prior to the shift in policy under the Stockton Rules, PCCs were exempt from CWA regulation unless abandoned. Following the issuance of the Stockton Rules, PCCs are no longer automatically exempt from CWA – rather they will be subject to regulation where they are converted to non-agricultural use or where they involve continuous pumping. The court found that the Stockton Rules provide a new interpretation of the Corps’ position. The Stockton Rules gave rise to legal consequences for New Hope, who now must comply with rules that previously did not exist. The court, taking all these factors into consideration, held the Stockton Rules to be a final agency action, ripe for judicial review.

New Hope alleged that the Army Corps of Engineers improperly extended its jurisdiction under the CWA by enacting the Stockton Rules without following procedures required by the Administrative Procedure Act (APA). Under the APA, notice of proposed rulemaking must generally be published in the federal register. After providing notice, the agency has to give interested persons an opportunity to participate in the rulemaking process through the submission of written data, views, or arguments with or without

opportunity for oral presentation.<sup>26</sup> The notice-and-comment requirements apply to all agency rules, which are defined broadly as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”<sup>27</sup> If the document expresses change in substantive law or policy that the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA’s legislative rulemaking procedures.<sup>28</sup> The Corps argued that they did not engage in rulemaking, but rather the Stockton Rules are policy statements not subject to notice-and-comment requirements.<sup>29</sup> However, the court held that the Corps implemented new rules, thus they were procedurally improper because no notice-and-comment procedures were used.

The court reasoned that before the Stockton Rules, PCCs that were shifted to non-agricultural use were treated as exempt. Following the Stockton Rules, the Corps found that wetland exceptions for PCCs are lost upon conversion to a non-agricultural use. The court found this position to be inconsistent with prior agency documents, including the plain language of the Wetlands Manual, which is by its terms binding on field offices. Additionally, prior to the Stockton Rules, continuous pumping to preserve a converted cropland’s state did not impact a property’s entitlement to a PCC designation. Following the Stockton Rules, the Corps changed its policy for properties where dry lands are maintained using continuous pumping. Thus, the Stockton Rules broadly extended the Corps’ jurisdiction and sharply narrowed the number of exempt PCCs.<sup>30</sup> The court held the Stockton Rules to be a definite shift in the Corps’ substantive rules regarding their jurisdiction over wetlands and PCCs.

### **Conclusion**

The court in *New Hope* held that the Stockton Rules must be set aside. Additionally, the court prohibited the Corps from engaging in rulemaking without engaging in appropriate notice-and-comment procedures.<sup>31</sup> On April 13, 2011, United States Army Corps of Engineers appealed the decision in

the Eleventh Circuit Court of Appeals.<sup>32</sup> After filing their appeal, the United States Army Corps of Engineers moved for a voluntary dismissal of their own appeal. The motion was granted on May 13, 2011 and the case was dismissed.<sup>33</sup> The repercussions of the dismissal of the Corps' appeal remain to be seen. However, it is clear that this case will have a tremendous impact on the Corps regulation of wetlands and PCC under Section 404 of the CWA.



(Endnotes)

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2 7 C.F.R. § 12.2; 58 Fed. Reg. 45008, 45032 (Aug. 25, 1993)

3 33 USC 1251(a)

4 33 U.S.C.A. § 1344 (West)

5 40 C.F.R. § 117.1

6 33 CFR 328.3(b)

7 42 Fed. Reg. 37122, 37128 (July 19, 1977)

8 RGL 86-9 (Aug. 27, 1986) (ECF No. 18-10); *see also* RGL 05-06 (Dec. 7, 2005) (ECF No. 18-11) (stating that RGL 86-9 still applies).

9 Environmental Laboratory, U.S. Army Corps of Engineers Wetlands Delineation Manual., Wetlands Research Program Technical Report Y-87-1 (1987) (online edition)

10 Environmental Laboratory, U.S. Army Corps of Engineers Wetlands Delineation Manual., Wetlands Research Program Technical Report Y-87-1 (1987) (online edition); *See also New Hope Power Co. v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272, 1275 (S.D. Fla. 2010)

11 33 CFR 328.3(a)(8); 58 Fed. Reg. 45008, 45032 (Aug. 25, 1993)

12 Corps Issued Regulatory Guidance Letter – RGL 86-9 (August 27, 1986)

13 58 Fed. Reg. 45008-01, at 45032 (Aug. 25, 1993)

14 *Id.*, at 45033.

15 58 Fed. Reg. 45008, 45032

16 The Swampbuster provision of the 1985 Farm Bill was aimed at reducing the conversion of wetlands for agricultural purposes. If a landowner drains, fills, levels, or otherwise alters a wetland he or she may lose eligibility for U.S. Department of Agriculture (USDA) program benefits. *See* 16 U.S.C. §§ 3801-3845 (1988).

17 Fla. Stat. Ann. § 373.4592 (West)

18 *New Hope Power Co. v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272, 1276 (S.D. Fla. 2010)

19 *Id.*

20 *Id.*

21 *See* Letter from Charles A. Schnepel, Chief, Regulatory Section, the Corps' Miami Field Office to John M. Bossart, KBN Engineering (May 26, 1993) (ECF No. 18-3)

22 The ash monofill would essentially serve as a landfill for waste from the renewable energy facility. *See New Hope*, 746 F. Supp. 2d at 1277.

23 Letter from Krista Sabin, Project Manager, Jacksonville District Corps of Engineers to Rebecca Kelner, P.E., Jones Edmunds & Assocs. (Sept. 1, 2009) (ECF No. 18-33)

24 *Bennet v. Spear*, 520 U.S. 154, 177-178 (1997).

25 *New Hope Power Co. v. U.S. Army Corps of Engineers*, Case No. 10-22777-CIV-MOORE/SIMONTON.

26 5 U.S.C.A. § 553 (West).

27 5 USC 551(4), 552.

28 *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383-84 (D.C. Cir. 2002).

29 *New Hope*, 746 F. Supp. 2d at 1281-82.

30 *Id.*

31 *Id.*

32 *New Hope Power Co. and Okkelanta Corp. v. U.S. Army Corps of Engineers, and Steven Stockton*. Case: 11-11674, United States Court of Appeals for the 11<sup>th</sup> Circuit, Civil Appeal Statement

33 *Id.*

## Article Review – Is Sea Level Rise “Foreseeable”? Does it Matter?

By Mary McDaniel

In James Wilkins’s law review article *Is Sea Level Rise “Foreseeable”? Does it Matter?*,<sup>1</sup> Wilkins examines Gulf Coast states’ and local governments’ flood mitigation and land-use policies, the general duty of states and local governments to mitigate flood damage, and how such policies impact a government’s potential liability for failure to mitigate. Poor planning decisions and lack of land use controls will become more evident each passing year as the combination of storm surge, sea level rise, and subsidence cause flooding in areas that historically did not flood. The erection of structural defenses will continue to destroy irreplaceable natural resources such as marshes and intertidal zones. Such effects will cause courts to reexamine how much deference to afford local governments.

Wilkins’s research reveals that only rarely are state or local governments held liable for permitting development projects that later flood from known hazards; in fact, no courts in Gulf of Mexico states have found local governments liable for such actions. Local governments have been shielded from liability by the defense of discretionary function immunity and a strong public policy to absolve local governments of responsibility for decisions that have failed to mitigate damage. Even when immunity is not applicable, courts have been reluctant to find governments negligent for approving development in flood risk areas when the destruction is caused by an unpredictable and intermittent event such as riverine flooding, surface inundation from rain events, or flooding from coastal storms. Wilkins argues that as improved predictive capabilities evolve and the observable rise of sea level continues, courts may be more willing to find a government negligent for failure to implement policies to protect public safety and mitigate flood damage. A government’s defenses erode when affected areas can be identified with great accuracy.

Wilkins spends considerable time analyzing court holdings from each of the five Gulf Coast states by examining cases that implicate a government’s liability for land-use and planning decisions. Currently, Florida is the only state that requires local land use planning. Its planning requirements go far beyond the other Gulf Coast states, yet Florida has not required plans to include measures designed to mitigate risks from sea level rise. In a few instances, governments have been found negligent and subject to a waiver of sovereign immunity for actions that cause flooding. Texas’s wall of sovereign immunity for governmental entities has rarely been breached, and a single flooding event has never been considered a taking. In Alabama, where there are fewer cases related to flooding events, the courts have found local governments liable for failure of drainage systems, public works projects that lead to flooding, and for approving development that causes flooding. In Mississippi, negligence-based causes of action for flooding fall under the Mississippi Tort Claims Act. Immunity applies

if the action taken involves an element of choice or judgment and if the choice is related to social, economic, or political policy. Government actions that have been held to impose a ministerial duty are not afforded immunity. Mississippi courts have not required a finding of negligence to grant injunctions to correct government-created flooding conditions.

When Wilkins examines Louisiana cases, he finds that Louisiana courts have been reluctant to find local governments liable for negligence associated with enforcing floodplain regulations, but have found liability for negligence in approving development that causes or exacerbates flooding in neighboring, pre-existing developments. He also examines cases related to the Mississippi River-Gulf Outlet. Forty years ago, in *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971), the court was flatly dismissive of assertions that the U.S. Army Corps of Engineers’ negligence in digging a navigation channel through the marshes caused widespread flooding in Orleans Parish and St. Bernard Parish. After Katrina, the trial court rejected the Corps’ defense of discretionary function immunity, reasoning that because the Corps had undertaken the responsibility for safety, it was negligent in failing to install protection or acquiring funding to do so. Often the court’s distinctions between protected policy decision and those that are not protected are nebulous and seem result-oriented. Courts seem less willing to accept immunity defenses when the scale of the disaster is so large.

Whether the courts in Gulf Coast states will find governments liable for failure to mitigate in the context of development and land use planning has not been tested. Factors such as the development of sophisticated predictive technology and the outreach of organizations engaged in informing communities of the risk they face from sea level rise and storm surge will influence the amount of liability a court is willing to attribute to a government. Courts may become more willing to find liability for failure to control development, for construction practices, and for poor land use planning when a government has access to technology capable of predicting flooding events with greater certainty and is able to plan for and mitigate risks. The foreseeability of destructive flooding events makes it reasonable to expect governments to develop precautionary policies to protect public safety. The social, economic, and environmental costs will continue to accrue as long as local and state governments are not required by statute - and held accountable by courts - for failure to plan for predictable flooding events.

(Endnotes)

1 James Wilkins, *Is Sea Level Rise “Foreseeable”? Does it Matter?*, 26 J. Land Use & Env’tl. Law 437 (2011).





Sea Grant College Program  
 Sea Grant Legal Program  
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 Baton Rouge, LA 70803-7507

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## ANNOUNCEMENTS

The Louisiana Sea Grant Law and Policy Program (SGLPP) would like to congratulate Heather Kirk, a second year law student at LSU’s Paul M. Hebert Law School, on placing first in the Louisiana State Bar Association Environmental Law Section’s 20<sup>th</sup> Annual Environmental Law Essay Contest. The paper, entitled “Foreign Claims for Transnational Environmental Damage: A Case Study of the Deepwater Horizon Incident in the Gulf of Mexico,” is an extension of research completed while Heather was an intern for the SGLPP.

SGLPP is also pleased to announce that Melissa Daigle, the legal coordinator for the SGLPP, has recently been promoted to Research Associate and Resiliency Specialist for the SGLPP. Melissa will continue her existing role with the SGLPP, while expanding her research and outreach efforts in the area of coastal resiliency. Most recently, Melissa has been working with numerous coastal communities on the Coastal Resilience Index (CRI). The CRI is a self-assessment

that can provide community leaders with a simple and inexpensive method of predicting if their community will reach and maintain an acceptable level of functioning after a disaster. If you would like to have the CRI administered in your community, please contact Melissa at [mtrosc2@tigers.lsu.edu](mailto:mtrosc2@tigers.lsu.edu) or 225-578-9968.



### LCL E-mail Update Service

*The Louisiana Sea Grant Legal Program disseminates an e-mail/web-based update to our biannual newsletter four times a year. These updates cover environmental law news relevant to the LSL’s audience, summaries of recently introduced environmental legislation and regulations and recent court decisions. To subscribe to the LCL E-mail Update Service, send an e-mail to [mtrosc2@lsu.edu](mailto:mtrosc2@lsu.edu).*



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