



**Louisiana Sea Grant Legal Program**  
**Louisiana Coastal Law Email Update Service**  
**Issue #28, June 2009**

**Cases**

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**In re Katrina Canal Breaches Consolidated Litigation, 2009 WL 1424537 (E.D. La. 5/21/2009)**

The U.S. District Court for the Eastern District of Louisiana recently denied class certification for a proposed class action involving victims of Hurricane Katrina. The proposed plaintiffs were residents of New Orleans who lived east of the Inner Harbor Navigational Canal ("INHC" or "Industrial Canal"). The plaintiffs allege that they suffered a variety of injuries when a barge owned by the Lafarge Company struck and caused the breach of the east wall of the Industrial Canal during Hurricane Katrina. The plaintiffs asserted that a total of 14,831 properties were affected by Lafarge's negligence in mooring the barge which cause it to break lose during the storm, resulting in the breach and flood.

In order to obtain certification of the class action, the plaintiffs had the burden to prove that because of common questions of law or fact, a class action was superior to other available methods of recovery.<sup>1</sup> The plaintiffs were unable to meet this burden, therefore the class action was denied.

The plaintiffs' claims of damage by the barge were based on eyewitness encounters during the storm. One eyewitness claims to have heard a sound "like an explosion" and then saw "what appear[ed] to be a metal structure like a barge, only the tip of it" near the breach. The defendants in the proposed action argued that Hurricane Katrina resulted in multiple breaches producing multiple sources of flooding of the class areas. The court noted that there was a question of causation, but that issue was not reached in the class certification stage.

**News**

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**H.B. 439 seeks to label foreign catfish; Former Agriculture Commissioner, Odom, supports.**

House Bill 439, sponsored by state Rep. Noble Ellington, D-Winnsboro, would require all retailers and restaurants to label any catfish they sell with the country of origin. The bill addresses safety concerns and encourages the use of American-made catfish. "If people know and have a choice to buy domestic food...they'll buy domestic," Ellington said. Former state Agriculture Commissioner Bob Odom and current commissioner Mike Strain support the legislation as "a positive forward emphasis on marketing all Louisiana and all American products." The bill is currently before the House floor.

Source: Sarah Chacko, *Odom supports catfish labels*, The Advocate (May 7,2009) (on file with the LSGLPP)

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<sup>1</sup> Fed. R. Civ. P. 23(b)(3).

### **Tilapia found in Plaquemines, eradication to follow**

Unwanted tilapia, a non-indigenous species of fish often seen on local menus, have recently been found in the waterways of Plaquemines Parish. Secretary of Wildlife and Fisheries, Robert Barham, has authorized the use of strong toxicants to exterminate the invasive species. The Wildlife and Fisheries Department fears that the tilapia, which are usually contained to aquaculture farms, may begin to overtake the native fish species. The department is on high alert and prepared to take extreme measures, but Paul Schafland, a Florida Fish and Wildlife Conservation Commission agent recommends population management. "I'm not saying (Louisiana) should welcome tilapia, only that the end result might not be as dire as people usually think." As Wildlife and Fisheries awaits lab tests from LSU on the exact species of tilapia, the waterways from Diamond south to Port Sulfur are closed to commercial and recreational fishing. Louisiana law prohibits the possession of tilapia except by licensed aquaculture operations, none of which exist in Plaquemines Parish.

Source: Bob Marshall, *Section of Plaquemines waterways to be poisoned to kill foreign fish*, The Times-Picayune (May 6, 2009) (on file with the LSGLPP)

### **D.C. Federal Court hears claims in MRGO case**

A class action suit filed in the U.S. Court of Federal Claims by eastern New Orleans, Lower Ninth Ward, and St. Bernard property owners claims that the Army Corps of engineers failed to properly maintain the MRGO channel, resulting in the flooding of their homes. The Justice Department special counsel, Fred Disheroon, contends that the case was filed too late. Disheroon said that most of the wetlands loss caused by the MRGO ended in 1980. However, plaintiff's attorney, Chuck Cooper, said that the case was filed well within the six-year time limit set by federal law for such cases. Cooper argued that the effects of the MRGO "are by no means at an end, and will get worse, and that's the primary reason it's being closed." Court of Claims Judge Susan Braden has issued no immediate ruling and said that much of the information needed for this case was still pending in a MRGO-related case before U.S. District Judge Stanwood Duval.

Source: Susan Finch, *D.C. Federal Judge hears claims in MRGO case*, The Times-Picayune (May 6, 2009) (on file with the LSGLPP)

### **Kenner City Council approves breakwater project in Lake Pontchartrain**

The Kenner City Council approved an ordinance authorizing the Mayor to grant a letter of no objection for the construction of a 14-foot tall concrete and steel breakwater project to protect the Duncan Pumping Station. The project will attempt to knock down waves which otherwise hit the pumping station. In order to build the structure, the Army Corps of Engineers will need a temporary easement for equipment storage and a permanent right-of-way for a bridge to the structure. The letter of no objection was mandatory in order for the Mayor to grant the necessary servitudes. Bids for the project will start coming in at the end of this month; the project is expected to cost between \$5 and \$10 million, and construction should take nine to ten months.

Source: Mary Sparacello, *Kenner City Council expected to approve breakwater project in Lake Pontchartrain*, The Times Picayune (May 6, 2009) (on file with the LSGLPP)

### **Terrebonne and Lafourche floodgates put to work as more wetlands are lost.**

The persistent loss of wetlands has forced Terrebonne and Lafourche parish levee officials to constantly monitor the parishes' floodgates to keep high tides from flooding yards, parking lots, and low-lying communities. The floodgates were anticipated for use primarily during hurricanes,

but without the protection of barrier islands and a healthy marsh, strong south winds and high tides are threatening communities like those along Bayou Lafourche. Historically the gates are closed about 15 times per year. However, floodgates were closed last month four times and sometimes for as long as 22 days. The South Lafourche Levee District was even forced to build an \$18 million lock complex in Golden Meadow to allow boats to pass through Bayou Lafourche, while trying to protect the inland communities from high water. Director of the Barataria-Terrebonne National Estuary Program, Kerry St. Pe', said that the only permanent solution is building new land in Terrebonne. "We need to create large land masses," he said. "We need ridges, cypress swamps, maritime forests and wetlands, and not in 50 or 100 years, we need them now."

Source: Nikki Buskey, *Wetlands loss forces floodgates to close more often*, The Daily Comet (May 4, 2009) (on file with the LSGLPP)

### **Little of stimulus money to go to coasts, levees**

The Army Corps of Engineers will spend about \$175 million in stimulus package money on Louisiana projects, but only a small percentage of that will be directed to key coastal restoration or levee projects, as state officials requested. Corps officials have complained that the problem with the stimulus package, The American Recovery and Reinvestment Act of 2009, is its restrictions on the \$4.6 billion set aside for the corps on projects that don't require additional funding when the stimulus money is used up. "Basically, Recovery Act funds will be used to complete increments of work on previously started projects and in some cases complete projects," said a statement released by the Corps. However, many of the projects that the state wants financed have either not yet received any appropriations or are early in the planning and design stages. The stimulus funds will be used for existing projects like the Davis Pond freshwater diversion, a variety of maintenance projects along the Atchafalaya, the Morganza-to-the-Gulf Levee, the Larose-to-Golden Meadow levee project, and for maintenance on the Bonnet Carre Spillway.

Source: Mark Schleifstein, *Little of stimulus money to go to coasts, levees*. The Times-Picayune (April 29, 2009) (on files with the LSGLPP)

### **Group wants a closer look at how the lower Mississippi can be managed for coastal restoration**

A resolution approved by the Coastal Protection and Restoration Authority states that the U.S. Army Corps of Engineers is supposed to look at how the river could be used for flood protection, coastal restoration and navigation in the Louisiana Coastal Protection and Restoration Program report. The resolution found that "sustainable restoration of the river and all it supports can be achieved only by redirecting the freshwater and sediments of the river into the nearshore, stemming the direct loss of these valuable resources to the deep waters of the Gulf of Mexico." However, it also states that any possible redirection of the river must be balanced with ensuring the continuation of navigation needs on the river. Sean Duffy, president of Gulf States Maritime Association, cautioned that the navigation industry needs to be included in the discussion of coastal restoration. He said, "Talking about re-engineering the Mississippi River without talking to river pilots is like closing Interstate 10 and telling people they'll just have to find a different route to get where they're going." The state is planning to meet with the navigation interests soon about upcoming coastal projects.

Source: Amy Wold, *Group asks for look at river link*, The Advocate (April 16, 2009) (on file with the LSGLPP)

### **Corps plan to protect state criticized**

According to a coastal scientist, if the U.S. Army Corps of Engineers coastal protection plan gets implemented as written, about one third of Louisiana's surviving wetlands will end up behind a levee. John Lopez, coastal sustainability program director with the Lake Pontchartrain Basin Foundation, was one of the representatives of the several coastal groups that expressed concerns. Lopez said that groups are worried that the Corps has paid too little attention to the potential benefits of coastal land features such as barrier islands and land bridges, and has focused too much on levees. Lopez also criticized the report for not providing recommendations for certain areas that are designated as "critical." In response, Tim Axtman, with the protection and restoration office in the Corp's New Orleans district, referred to computer models that showed coastal restoration in the southeast portion of the state could provide hurricane protection, but other areas of the state likely will not have that effect and the coastal restoration effort needs to be strategically targeted where it will do the most good. Other concerns were that the plan did not focus enough on evacuation routes and that the plan did not have enough public participation. Five hundred people were targeted to be involved in forming the Corps' plan, but only 114 Louisiana citizens actually participated.

Source: Amy Wold, *Corps plan to protect state criticized*, The Advocate (April 15, 2009) (on file with the LSGLPP)

### **Pre-Katrina drainage suits dismissed**

The 5<sup>th</sup> U.S. Circuit Court of Appeals has dismissed several claims in a massive flood-control suit that actually predates the 2005 storm. The cases came from the southeast Louisiana urban drainage project (SELA), after the rain-driven floods in 1995. As a part of the SELA project, a contractor installed a large culvert near Napoleon Avenue, which sparked a lawsuit by angry homeowners against the city's Sewer and Water Board. The Water Board then filed third party claims against several contractors, all of which were thrown out by a state judge in early 2005. While the Water Board was awaiting an appeal, Katrina hit. The neighborhood in question was severely flooded by the hurricane, but it was unknown how much damage had been done before and after the storm. The 5<sup>th</sup> Circuit has responded by holding that the three contractors cannot be require to continue defending themselves on issues that were litigated at the pre-Katrina civil trial.

Source: Allen M. Johnson Jr., *Drainage suit ruling Ok'd*, The Advocate (April 15, 2009) (on file with the LSGLPP)

### **Gov. Jindal announces start of Plaquemines Parish coastal restoration project**

After nearly six years of planning, the Governor has announced the start of the \$28 million marsh restoration project in Plaquemines Parish, which is the first-ever state attempt at piping sediment from the Mississippi River into the marshes to build new land. The Bayou Dupont restoration project is expected to produce 500 acres of new marshland. A small step in comparison to the 16,000 acres lost annually, but a step nonetheless. The project will divert sediment dredged by the Army Corps of Engineers from the Mississippi into the marsh. The Army Corps dredge more than 60 million cubic yards of mud from the river each year, but less than 20 percent of that is used to rebuild the marshes. Gov. Jindal said, "The rest is waste. This has to stop." If the state used all of the wasted sediment, it would basically cut the land loss rates by two-thirds. According to the Governor's costal restoration advisor, Garret Graves, "(The Corps) is hamstrung by two things: one, their own regulations; and two, funding." By law, the Corps must dispose of dredged sediment in the most cost-effective manner, which often rules out transporting the sediment to the marsh. With the Plaquemines project, the pipeline is already in place to ship the sediment over five miles away to the marsh. Dredging is expected to begin this summer and more than 2.3

million cubic yards of sandy mud will flow through the pipes by next spring. \$4.3 million of the project will be paid for by state money and the federal Breaux Act will supply \$24 million.

Source: Chris Kriham, *Gov. Bobby Jindal announces start of coastal restoration project in Plaquemines Parish*, The Times-Picayune (April 14, 2009) (on file with the LSGLPP)

### **Public Trust Doctrine Could Aid Management of U.S. Ocean Waters**

Since Congress lifted a moratorium on offshore drilling last year, lawmakers have been battling with the issue of how best to regulate U.S. ocean waters to allow oil, wave and wind energy development, while sustainably managing critical fisheries and marine animal habitats. A new policy paper, published April 10 in *Science* by Duke University experts, argues that establishing a public trust doctrine for federal waters could be an effective and ethical solution. The public trust doctrine is a “simple but powerful legal concept,” says lead author Mary Turnipseed, that obliges governments to manage certain natural resources in the best interests of their citizens, without sacrificing the needs for future generations. The doctrine is already well-established in the United States at the state level, and extending it to the federal waters would help federal agencies better manage conflicts between the many users of the federal oceans.

Source: *Public Trust Doctrine Could Aid Management of U.S. Ocean Waters*, Science Daily (April 13, 2009) (on file with the LSGLPP)

### **Shrimp Season begins, but the Louisiana industry is profoundly altered**

May 11 marks the beginning of the Louisiana shrimp season, but the number of active shrimpers is down to 5,000, a quarter of what it was in the mid-1980s. Simple economics, an increase of imports, and higher contents of freshwater have been cited as reasons for decline. In the last decade, foreign shrimp imports have taken over the U.S. market and now LA provides only five percent of the nation’s shrimp. However, the decrease in the size of the fleet alone has not caused this; many biologists actually recommended a downsizing of the fleet. On top of the foreign competition, the shrimp population is being threatened by the freshwater diversions in an effort to rebuild the state’s marshes. The interaction between the shrimp population and freshwater in the marshes is a looming question for the state. Brown Shrimp live easier in saltwater and many fishers historically have been opposed to project that push fresh water into the shrimp habitats. But without the fresh water for restoration, the marsh, which supports the young shrimp, could eventually wash away.

Source: Chris Kirkham, *Shrimp season opens today, but crush of imports has profoundly altered La. Industry*, The Times-Picayune (May 10, 2009) (on file with the LSGLPP)

### **Lawmakers push Department of Interior for response on offshore drilling**

In an April 17 decision, the D.C. Circuit of the U.S. Court of Appeals issued a decision that has Louisiana lawmakers worried about the future of offshore drilling. The court ruled that a five-year Outer Continental Shelf Oil and Gas Leasing Plan, issued by the Bush Administration, irrationally relied on an insufficient environmental impact study by the National Oceanographic and Atmospheric Administration. The court remanded the case to Ken Salazar, Secretary of the Department of the Interior, for a more complete analysis. Senators Mary Landrieu, D-La., John McCain, R-Ariz., Lisa Murkowski, R-Alaska, and Mark Begich, D-Alaska are concerned about the effects of the court case and have sent a leader to Salazar asking for clarification. It is unclear whether the Bush Administration plan was remanded in whole or just with respect to the Alaskan drilling. The Interior Department has been silent on the ruling for over three weeks leading to concerns in Louisiana like that of Rep. Bill Cassidy, R-Baton Rouge who said, “Offshore energy production drives Louisiana’s economy, creates well-paying jobs, funds Louisiana’s government,

lowers energy prices and is a critical component of America's long-term energy security... We deserve and answer."

Source: Bruce Alpert, *Lawmakers ask Salazar for quick response on offshore drilling*, The Times-Picayune (May 12, 2009) (on file with the LSGLPP)

### **Obama Administration opposes adding wind coverage to flood insurance**

In a letter to the House Financial Services Committee, Homeland Security Secretary Janet Napolitano stated that adding wind coverage would increase the "exposure to catastrophic risks" for a program that has a growing debt of \$19 billion. This is precisely the same position taken by the Bush administration. Many Gulf coast residents, like Rep. Gene Taylor, D-Miss, complain that adding wind coverage to private flood protection insurance is so expensive as to make it unavailable. Napolitano explained that not only would voluntary federal wind coverage "create significant problems involving coordination of benefits and adversely affect competition and selection among the various public and private wind programs," but by law, the federal government could not offer the coverage for less than what private insurance companies offer. Rep-Charlie Melancon, D-Napoleonville, said that this creates a major hurdle, but he vowed to continue seeking a legislative fix.

Source: Bruce Alpert, *Obama opposes adding wind coverage to flood insurance*, The Times-Picayune (May 12, 2009) (on file with the LSGLPP)

### **Louisiana Sea Grant assists with the placing of artificial reefs in Lake Pontchartrain**

Louisiana Sea Grant, the Lake Pontchartrain Basin Foundation, and other organizations have recently deployed four new artificial reef structures into Lake Pontchartrain. The artificial reefs, which are a collection of 180 hollow concrete balls resembling "wiffle" balls, are intended to create ecological hotspots for game fish and the anglers who chase them. The most recent placement of reefs is "Phase two" of the project; the first reefs were placed in the lake between 2000 and 2004. After decades of dredging the lake for rangia clam shells used on south Louisiana roads, the bottom of the lake has very few features around which aquatic life can find shelter. The concrete structures are intended to provide a safe haven for small shrimp, crabs, and bait fish, which should then attract larger game fish and finally Louisiana anglers.

Source: Chris Kirkham, *Artificial reefs may help restore a diversity of fish species to Lake Pontchartrain*, The Times-Picayune (May 13, 2009) (on file with the LSGLPP)

### **Vitter releases hold on FEMA nominee**

New FEMA head Craig Fugate was recently confirmed after Senator David Vitter (R-La.) lifted his hold on the nomination process. Vitter was exercising his privilege to prevent a motion from reaching a vote due to concerns that he had about Grand Isle residents being able to build critical buildings in a high velocity flood, or V- zone. Specifically, he wanted a gym, a library, and a fire station to be built. Vitter has come under immense pressure by not only the White House but from fellow members of the legislature because with less than a month before hurricane season, his hold was preventing FEMA from having a chief administrator.

Vitter has also come under fire for an email that he sent to his supporters, which not only claimed that the White House was attempting to "strong arm" him into releasing the hold, but also asked for contributions to his re-election campaign. Senator Mary Landrieu (D-La), who sits on the committee that approved Fugate's nomination without objection, said "Senator Vitter recognized

that with hurricane season less than three weeks away, we need Craig Fugate to take the reins at FEMA.”

Source: Gerald Shields, *Vitter releases hold on FEMA nominee*, The Advocate (May 13, 2009) (on file with LSGP)

### **Sen. Landrieu and EPA Head, Lisa Jackson lead a water management study in the Netherlands**

Louisiana Senator Mary Landrieu, EPA administrator Lisa Jackson, and several other officials took a Congressional trip to the Netherlands to study the country’s integrated water management system. After the catastrophic 1953 flood, Dutch officials and engineers developed a comprehensive flood protection system and have become known as international leaders in the field of integrated water management. The Netherlands have now successfully built a 10,000-flood protection plan. “The Dutch are teaching us that we do not have to retreat from the water,” Landrieu said, “They are taking land back from the water. They are on the offensive, not the defensive.” “It is clear that we need the same national commitment to our coastal communities’ protection that is ingrained in the culture of the Netherlands. I am working to get Congress to understand the commitment we need.”

Source: Stephen Sabludowsky & Bayou Buzz Staff, *Louisiana Senator Landrieu, EPA Head, Jackson lead Netherlands Delegation*, The Bayou Buzz, [www.bayoubuzz.com](http://www.bayoubuzz.com) (5/26/09) (on file with the LSGP)

### **Hurricane Season predicted to be Near Normal, but NOAA recommends preparedness.**

The 2009 Hurricane season has begun and NOAA forecasters predict that a near-normal season is most likely this year. However, they stressed that citizens should still prepare for the possibility of a storm. NOAA’s prediction center calls for a fifty percent probability of a near-normal season, a twenty-five percent probability of an above-normal season and a twenty-five percent probability of a below-normal season. Forecasters also say that there is a seventy percent chance of having nine to fourteen named storms, of which four to seven could become hurricanes, including one to three major hurricanes. Gerry Bell, Ph.D., lead seasonal hurricane forecaster at NOAA’s Climate Prediction Center, said, “This outlook is a guide to the overall expected seasonal activity. However, the outlook is not just about the numbers, it’s about taking action. Prepare for each and every season regardless of the seasonal outlook. Even a near- or below-normal season can produce landfalling hurricanes, and it only takes one landfalling storm to make it a bad season.

Source: National Oceanic and Atmospheric Administrations, *NOAA Issues Atlantic Hurricane Season Outlook, Encourages Preparedness*, NOAA News, [www.noaanews.noaa.gov/stories2009/20090521\\_atlantichurricane.html](http://www.noaanews.noaa.gov/stories2009/20090521_atlantichurricane.html)

## **Louisiana Register**

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### **Emergency Rule-Department of Wildlife and Fisheries, Wildlife and Fisheries Commission.**

#### **Fishing Closure—Plaquemines Parish**

Recreational and commercial fishing closed in Plaquemines Parish in those waters bounded on the north by St. Jude Road, on the east by the Mississippi River main levee, on the south by Milan Drive and on the west by the back levee of the drainage ditch. No person shall take or possess or attempt to take any species of fish from waters within the closed area. No person shall possess while on the waters of the close area any fishing gear capable of taking fish. This

Declaration of Emergency shall remain in effect for a period of 90 days, beginning May 7, 2009, unless circumstances dictate that it be extended or that the closure be lifted.

Fishing Closure-Plaquemines Parish, 35 La. Reg. 5 (May 20, 2009). See <http://doa.louisiana.gov/osr/reg/0905/0905.pdf> for more information.

### **Emergency Rule-Department of Wildlife and Fisheries, Office of Fisheries**

#### **Fishing Closure—South of Plaquemines Parish**

As authorized by the above rule recreational and commercial fishing, in the waters located just south of Port Sulphur in Plaquemines Parish, will remain closed until reopened by Secretary of Wildlife and Fisheries, Robert J. Barham. Specifically, those waters bounded on the north by St. Jude Road, on the east by the Mississippi River main levee, on the south by Milan Drive and on the west by the back levee of the drainage ditch. Secretary of Wildlife and Fisheries, Robert J. Barham,

Fishing Closure-South of Plaquemines Parish, 35 La. Reg. 5 (May 20, 2009). See <http://doa.louisiana.gov/osr/reg/0905/0905.pdf> for more information.

### **Federal Register**

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#### **Notice-Department of Commerce, National Oceanic and Atmospheric Administration**

NOAA Coastal and Marine Habitat Restoration Project Grants; Notice of funding availability under the American Recovery and Reinvestment Act.

NOAA seeks applications for funding of coastal and marine habitat restoration through the American Recovery and Reinvestment Act of 2009. NOAA anticipates that up to \$170 million may be available; typical awards are expected to range between \$1.5 million to \$10 million and will be administered by NOAA's Office of Habitat Conservation. Applications should be submitted for any project that is to be considered for this funding, even for those projects put forth to the Federal Government as examples by internal and external restoration partners or submitted as applications to other NOAA competitions.

NOAA Coastal and Marine Habitat Restoration Project Grants, Notice of funding, 74 Fed. Reg. 43, 9793 (March 6, 2009)

### **Louisiana Attorney General Opinions**

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#### **08 Att'y Gen. 0290 (May 7, 2009)**

The Department of Wildlife and Fisheries should not use the State Land Office online inventory map for the legal purpose of determining whether to issue or renew oyster leases. The Department should only issue or renew leases once a reasonable investigation into the question of ownership of the property in question is complete and, based on the findings, a determination is made that the state owns the water bottoms to be leased. After such a determination is made, no claim, other than the State's, to any water bottoms suitable for oyster culture by any person shall be valid until adjudicated upon by a court of competent jurisdiction in a suit between the state and the claimant pursuant to La. R.S. 56:423 (D).