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D.C. Circuit: Nationwide Permits are "Final Action"

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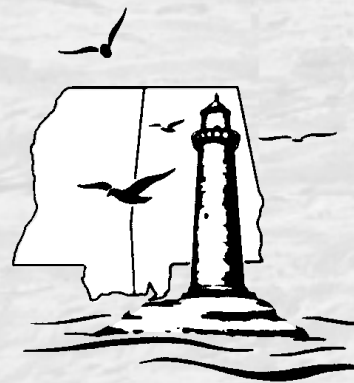
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D.C. Circuit: Nationwide Permits are “Final Action”

Natl. Assn. of Home Builders v. U.S. Army Corps of Engineers, 417 F.3d 1272 (D.C. Cir 2005)

Jonathan Lew, 2L, Roger Williams University School of Law

Introduction

The D.C. Circuit Court of Appeals recently found that the issuance of nationwide permits by the U.S. Army Corps of Engineers (Corps), pursuant to § 404(e) of the Clean Water Act, constitutes a “final agency action” under the Administrative Procedure Act that is subject to judicial review. In addition, the court found that the appellants¹ may challenge the Corps’ compliance with the Regulatory Flexibility Act (RFA) but lack the requisite standing to challenge the agency’s action under the National Environmental Policy Act (NEPA).

Background

The Clean Water Act (CWA) grants the Corps the power to issue permits for discharges of dredged or fill material on a general or individual basis.² If a proposed activity is covered by a general permit, the party may proceed with the activity without obtaining any further permits because a general permit is issued class-wide (state, regional, or national) and covers a category of activities that are similar in nature. On the contrary, if the proposed activity is not covered by a general permit, the party must obtain an individual permit, which requires a more comprehensive application process. The individual permit process involves “site specific documentation and analysis, public interest review, public notice and comment, and if necessary, a public hearing.”³ A party that does not meet the conditions for a general permit or obtain an individual permit faces both civil and criminal penalties.

The appellants challenged the Corps’ issuance of several general permits called nationwide permits (NWP) claiming that the new NWP were imposing limits that exceeded the Corps’ statutory authority under the CWA and violated both the RFA and NEPA. Specifically, appellants challenged the “activity-specific” general permits that are replacing NWP 26 which, at one time, authorized a party to discharge dredged or fill materials affecting up to ten acres without applying for an individual permit. The National Association of Home Builders’ (NAHB’s) dissatisfaction stemmed from the Corps’ reduction of authorized maximum per project acreage impact from ten acres to one-half acre. In addition, the activity-specific general permits require preconstruction notification for impacts greater than one-tenth acre.

See Final Action, page 8

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Miss. Court Requires Administrative Exhaustion in Contamination Suit

Town of Bolton v. Chevron Oil Co., No. 2004-CA-00865-COA (Miss. App. Aug. 2, 2005)

Gerald Woodward, 3L, Stetson University College of Law

The Court of Appeals of Mississippi has ruled that the appellants in a consolidated appeal of a circuit court decision must exhaust their available administrative remedies before they can pursue common law causes of action for money damages against an oil company in state court.

Background

Appeals arose from the dismissal of separate complaints concurrently filed by the Town of Bolton, Mississippi (Town) and two landowners, Mary George W. McMullan and Hilda McRaney (landowners), against Chevron Oil Company, Chevron Texaco Corporation and J.R. Pounds, Inc. (Chevron). The complaints alleged that Chevron had caused property leased from the Town and landowners to become contaminated with harmful and hazardous substances as a consequence of its oil and/or natural gas exploration and production activities thereon. The Town and landowners sought to

recover money damages from Chevron under various common law theories including tort, breach of contract, and fraud. In the trial court Chevron's motion for dismissal of the complaints was granted on the basis that the plaintiffs had failed to first exhaust their administrative remedies through the Mississippi Oil and Gas Board (Board). The Town and landowners separately appealed the lower court ruling; the appellate court consolidated these individual appeals into a single action.

The Appeal

On appeal the plaintiffs argued that since they had plead common law theories of recovery, and the Board had no jurisdiction or competence to adjudicate disputes rooted in common law or authority to award the types of damages sought, an adequate remedy was not available through the administrative process. Enforcement of a requirement for exhaustion would thus be futile and would cause them irreparable harm, as it would foreclose their right to recover monetary damages under their common law causes of action. Additionally, the dispositive questions were of law and therefore did not depend upon the expertise of the Board to resolve. The plaintiffs further moved that if the court found against them on the question of exhaustion, then their common law causes of action should be stayed pending exhaustion of their pursuit of administrative remedies through actions of the Board.

The Court's Analysis

Generally, Mississippi requires the exhaustion of administrative remedies before a plaintiff is permitted to pursue resolution of a dispute in state court.¹ However, when no adequate administrative remedy is available, the requirement for exhaustion does not apply.² Mississippi case law has set out a number of factors to be considered in determining whether exhaustion should be required: whether the pursuit of the administrative remedy would result in irreparable harm; whether the agency clearly lacks jurisdiction; whether the agency's position is clearly illegal; whether the dispositive question is one of law; whether exhaustion would be futile; and whether, comparatively, the action could be disposed of with less expense and more efficiently in the



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judicial arena.³ In *Chevron U.S.A., Inc. v. Smith* the Mississippi Supreme Court held that “plaintiffs seeking to have oil producers clean up byproduct pollution must seek restoration from the Mississippi Oil and Gas Board before a court can assess the appropriate measure of damages.”⁴ The Town and landowners argued that *Chevron* did not apply, since they specifically sought money damages and did not seek to have the defendants remediate the contaminated property.

The court found that the types of materials alleged to have contaminated the leased property were encompassed by the definition of “oil field exploration and production waste” as defined by Mississippi law.⁵ Under state law the Board has exclusive jurisdiction to “regulate the use, manufacture, production, ownership, investigation and *noncommercial disposal of oil field exploration and production waste*.”⁶ Thus, in the view of the court, the Board clearly possessed jurisdiction. The court then took notice that the Board’s authority extended to making reasonable rules, regulations, standards and orders, and issuing permits; assessing penalties for violations of applicable statutes and Board regulations, and for willful concealment of information or for the making of false reports to the Board; enforcing any penalties it assesses, and suing to obtain injunctions for the purpose of restraining violations or threatened violations.⁷ In addition, any citizen of the state may notify the Board of an actual or threatened violation and if the Board fails to take action on this notice within ten days the party serving notice may bring suit for an injunction so long as the Board is named as a party to that suit.⁸

Therefore, to the extent that the harm suffered by the appellants involved the alleged contamination of their property, the court found that the Board did indeed have the exclusive authority to require the responsible parties to clean up the contamination. The court stated that “[i]t would contravene the public interest . . . to allow the landowners to pursue a monetary award without requiring them to first present their allegations to the Oil and Gas Board to secure decontamination of the property.”⁹ However, the court did not ignore the fact that the cleanup of the property, while the overarching public policy concern in this case, was not the primary remedy sought by the Town and landowners. They also sought money damages, including punitive damages, against the defendants for their alleged tortious and/or illegal actions. The court agreed that McMullan and McRaney should be granted a stay on their common law causes of action in order to preserve those causes against the running of the statute of

limitations. Since statutes of limitations do not run against subdivisions of the state in civil cases, the common law claims of the Town of Bolton did not need to be stayed.

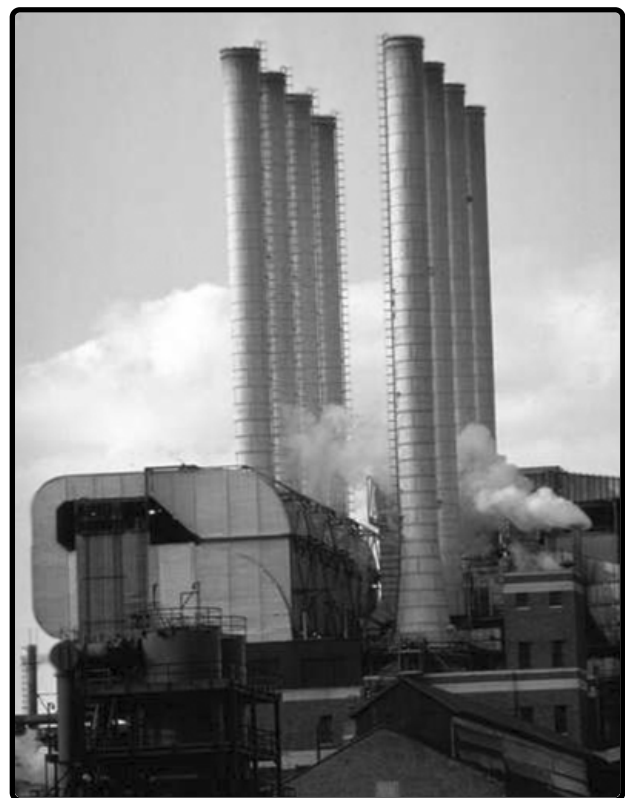
Conclusion

The appeals court upheld the lower court’s ruling that the Town and landowners’ action was subject to the requirement of exhaustion with regard to administrative remedies, but reversed the dismissal of McMullan’s and McRaney’s common law causes of action and remanded to the circuit court to stay those actions pending the plaintiffs’ exhaustion of administrative remedies. ✓

ENDNOTES

1. *State v. Bebe*, 687 So.2d 702, 704 (Miss. 1996).
2. *Campbell Sixty-Six Express, Inc. v. J. & G. Express, Inc.*, 141 So.2d 720, 726 (Miss. 1962).
3. *Pub. Employees’ Retirement Sys. v. Hawkins*, 781 So.2d 899, 906 (Miss. 2001).
4. 844 So.2d 1145 (Miss. 2002).
5. Miss. Code § 53-1-3(t).
6. *Id.* § 53-1-17(7) (emphasis added).
7. *Town of Bolton v. Chevron Oil Co.*, No. 2004-CA-00865-COA at ¶ 18 (Miss. App. Aug 2, 2005).
8. *Id.*
9. *Id.* at ¶ 28.

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Alabama Appeals Court Upholds Antidegradation Policy

Alabama Dept. of Envtl. Mgt. v. Legal Envtl. Assistance Found., Inc., Nos. 2030878 and 2040311, 2005 WL 1925756 (Ala. Civ. App. Aug. 12, 2005)

Alina Johns, 3L, Stetson University College of Law

Background

The Federal Antidegradation Policy,¹ authorized by the Clean Water Act, requires each state to adopt a policy for dealing with antidegradation and a process for implementing that policy. This state antidegradation policy should define the limits for dumping pollutants into the state's waterways. Alabama, through the Alabama Department of Environmental Management (ADEM) and the Alabama Environmental Management Commission (the Commission) developed such a policy² but failed to include a process for implementing it.

Upon discovering this discrepancy, the Legal Environmental Assistance Foundation (LEAF) made a complaint to the U.S. Environmental Protection Agency (EPA). The EPA responded through its Regional Administrator for Region IV, in Atlanta, by letter to ADEM. The letter stated that Alabama's policy was lacking procedures for implementation and that the state should take measures to amend the policy. If new procedures were not submitted within ninety days the Regional Administrator would recommend that the EPA Administrator in Washington "prepare and publish proposed federal regulations setting forth a revised statewide antidegradation policy."³

ADEM responded by implementing procedures⁴ which allowed the maximum amount of pollutants permissible under the federal regulations. The EPA Administrator approved these procedures on August 25, 1999. LEAF sued, and ultimately the Alabama Supreme Court found the procedures to be invalid because they violated the Alabama Administrative Procedure Act and the Alabama Environmental Management Act.⁵

On June 26, 2002, the Commission adopted a new policy⁶ which implemented procedures in much the same way that the previous illegal procedures had done. LEAF responded again with legal action. LEAF moved for summary judgment, which the trial court granted in

part. The court then granted partial summary judgment as to the rest of the counts in LEAF's complaint in favor of ADEM on May 24, 2004. On June 9, 2004, the trial court vacated its previous rulings and granted summary judgment on all counts in favor of LEAF. The Commission and ADEM appealed the final judgment, but the appellate court found that since the trial court entered its final judgment within thirty days that it was legally proper.

ADEM and the Commission appealed on all rulings. The appellate court reversed on every count.

Notice

LEAF asserted a challenge based on a section of the Alabama Code which states that "[u]nless different notice provisions are specifically required elsewhere by law" ADEM is to provide 45 days' public notice of an impending public hearing of the Commission on the proposed adoption, amendment, or repeal of a state environmental rule and simultaneously is to "make available ... summaries of the reasons supporting [the] adoption, amendment, or repeal."⁷ ADEM had issued a "summary of reasons" which it believed fulfilled this requirement. LEAF argued that this set of explanations did not justify some of the provisions that later followed. The trial court agreed, but the appellate court reversed stating that, in its estimation, LEAF could have responded by opposing the reasons given, despite the fact that some of the provisions which later followed did not fall under the reasons.

Adoption of Matter by Reference

LEAF's next contention regarded the adoption of matter by reference in violation of other statutes. Their argument had three components: "(1) that the rule's reference to the list adopts matter by reference in contravention of Ala.Code 1975, § 41-22-9; (2) that the reference to the list adopts future matter by reference in violation of Ala.Code 1975, §§ 22-22A-8 and 41-22-5; and (3) that the reference to the list improperly delegates environmental rulemaking authority to the EPA."⁸ The code that provided them with these arguments reads as follows: "[a]n agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or reg-

ulation which has been adopted by any other agency of this state or any agency of the United States or by a generally recognized organization or association approved by the joint committee administrative regulation review. The reference shall fully identify the adopted matter by date and otherwise. The agency shall have available copies of the adopted matter for inspection and the rules shall state where copies of the adopted matter can be obtained and any charge therefore as of the time the rule is adopted.”⁹

As to LEAF’s first contention, the court found that merely referring to another document does not constitute adoption of that document by reference. As to LEAF’s second contention, the court held that for the sake of efficiency it believed that the way the rule was set up was adequate. Lastly, the court held that since ADEM was required to draft these rules based on federal law and subject to federal approval it did not violate the Alabama statute.

110% Rule

Under the federal policy, state antidegradation policies must require those who wish to pollute the waterways to show that there are not viable alternatives. ADEM’s revised policy states that if an alternative costs 110% of the method being requested or more, then it would not be deemed a viable alternative. The appellate court again reversed in favor of ADEM, making reference to a 1997 letter from the agency’s attorney that referred to a manual from the EPA which stated that 110% was an acceptable measure.

Void for Vagueness

The last argument LEAF asserted was that the policy is void for vagueness under the Due Process clause of the Alabama Constitution.¹⁰ The phrase at issue reads as

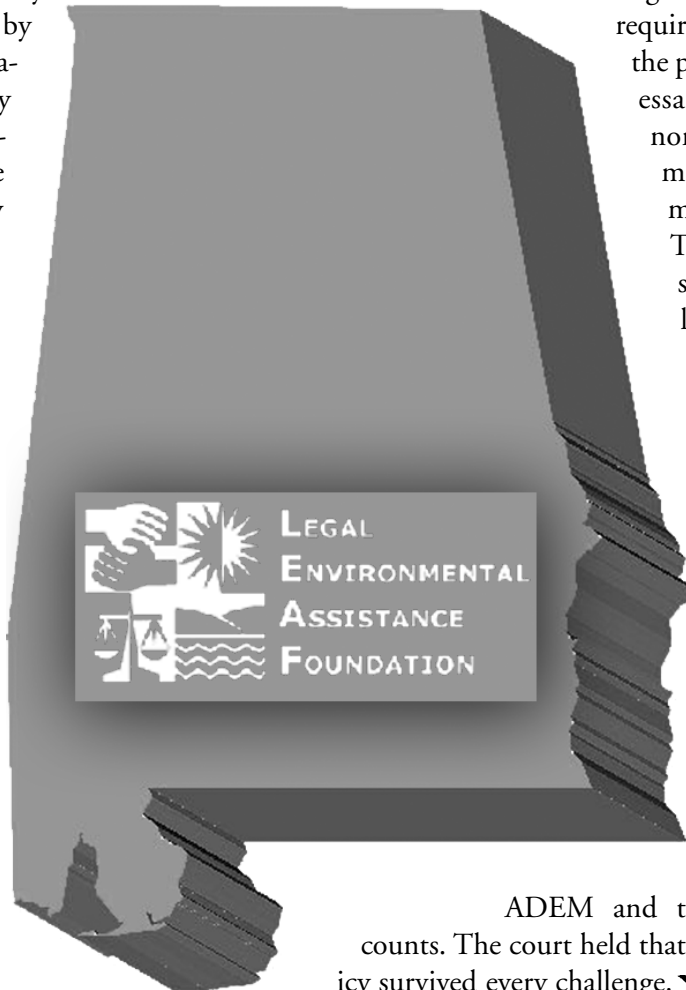
follows: “[a]pplicants for [new or expanded discharges to Tier 2 waters] are required to demonstrate that the proposed discharge is necessary for important economic or social development as a part of the permit application process.”¹¹ This phrase was meant to summarize an EPA regulation¹² which is eleven lines long. The appellate court, noting that the EPA regulation has been criticized for being vague as well, found that the Alabama policy’s vagueness did not rise to an unconstitutional level.

Conclusion

The appellate court reversed the trial court in favor of ADEM and the Commission on all counts. The court held that the antidegradation policy survived every challenge. ♡

ENDNOTES

1. 40 C.F.R. § 131.12.
2. Ala. Admin. Code r. 335-6-10-.04.
3. *Alabama Dept. of Env'tl. Mgt. v. Legal Env'tl. Assistance Found., Inc.*, Nos. 2030878 and 2040311, 2005 WL 1925756 at *1 (Ala. Civ. App. Aug. 12, 2005) (“*ADEM v. LEAF*”).
4. Ala. Admin. Code r. 335-6-10-.04(03).
5. *Ex parte Legal Env'tl. Assistance Found., Inc.*, 832 So.2d 5. (Ala. 2002).
6. Ala. Admin. Code r. 335-6-10-.12.
7. Ala. Code § 22-22A-8(a).
8. *ADEM v. LEAF* at *7.
9. Ala. Code § 41-22-9.
10. Ala. Const. art. I, § 6.
11. *ADEM v. LEAF* at *11 (quoting Ala. Admin. Code r. 335-6-10-.12).
12. 40 C.F.R. § 131.12(a)(2).



Florida Court Upholds Dock Permit Denial

Manatees Protected from Recreational Hazards on Inland Waters

Florida Marine Contractors, et al. v. Williams, 378 F.Supp.2d 1353 (M.D. Fla. 2005)

Emily Plett-Miyake, 3L, *Vermont Law School*

On July 13, 2005, the U.S. District Court in Tampa, Florida held that the U.S. Fish and Wildlife Service was correct in denying an application to construct recreational docks and similar structures on Florida's inland waterways after determining that such action was likely to have more than a "negligible impact" on the West Indian manatee, commonly known as the Florida manatee.

Background

Plaintiffs, who are landowners, marine contractors, and a marine contractors' industry association, sought Clean Water Act § 404 permits from the U.S. Army Corps of Engineers to construct docks and other similar structures on Florida's inland waterways. The docks were to be used for recreational purposes, including the operation and docking of recreational motorboats. The waterways in question are inhabited by Florida manatees.

The Corps determined that the issuance of the permit might threaten the Florida manatee, a listed species under the Endangered Species Act (ESA). This finding triggered an ESA § 7 consultation with the U.S. Fish and Wildlife Service (Service), through which the Service found that the construction and use of the docks would result in "incidental taking" of manatees under the Marine Mammal Protection Act (MMPA).¹ Due to an absence of necessary precautions² the Service found that the proposed project would have more than a negligible impact on the species. Based on these findings, the Service concluded that the permit application should be denied.

The plaintiffs challenged the denial under the Administrative Procedure Act,³ arguing that the MMPA "does not apply to residential docks built on Florida's inland waters, and, therefore, the Service unlawfully applied the Act's provisions to deny their permit applications."⁴ The issues before the court were: (1) whether the MMPA provisions establishing a moratorium on taking and importation of marine mammals and generally banning taking permits for marine mammals cor-

rectly govern the Service's consideration of permit applications, and (2) whether the MMPA applies to Florida's inland waters without limitations for hazard attributable to recreational activities. The court held in the affirmative for both issues.

The Marine Mammal Protection Act

The MMPA was passed by Congress in 1972 "to protect marine mammal species and population stocks that are or may be 'in danger of extinction or depletion as a result of man's activities.'"⁵ Stating its aim as preventing marine mammals "from diminish[ing] beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and...below their optimum sustainable population,"⁶ Congress specifically recognized the importance of varied habitats: "[e]fforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species...from the adverse effect of man's actions."⁷

Congress imposed a moratorium on the taking and importation of marine mammals, banning the issuance of all take permits in § 1371. While there are a number of exceptions, all are very limited and are to be narrowly applied. Section 1372(a)(2) makes it unlawful for "any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States." Various other provisions grant exclusive jurisdiction over marine mammal conservation and management to the federal government, preempting state authority.

The Court's Reasoning

Neither party to the case disputed the factual finding that the proposed project was likely to harm and result in the incidental take of manatees at levels exceeding nominal harm. Rather, they disagreed over whether the MMPA could properly be used to deny the permit, based on possible jurisdictional limitations in the statute. The question was whether an exception in the MMPA that allows incidental takings having only a "negligible impact" on a marine mammal species⁸ applied to the plaintiffs' proposed activities.

The plaintiffs did not make the argument that the exception applied to them. Rather, they argued that the MMPA does not apply to takings that occur in a

state's inland waters when such takings are caused by recreational activities. The issue that the court addressed then became "whether section 1371 applies to a state's inland waters without limitations for hazards attributable to recreational activities."⁹ Here, the court found that Congress did address the precise question before them.

The court referred to language in the statute that recognized the importance of the entire ecosystems of which marine mammals are a part, the unambiguous intent of the MMPA to protect those marine mammals and stop their depletion, the usurpation of state authority over the species by federal management, and numerous findings from legislative history to support the finding that "Congress clearly expected the protections of the Act to apply to all areas within the states, including internal waters."¹⁰ The court also commented that the plaintiffs' suggestion that the MMPA does not apply to inland waters weakens the protections afforded to marine mammals by nullifying state laws and failing to replace them with federal laws. This interpretation, the court opined, would clearly lead to an absurd result.

After determining that the clear objective of the MMPA is to protect marine mammals from man-made dangers in all of their natural habitat, including inland waters, the court turned to § 1371. "The moratorium on takings and permits in section 1371 undoubtedly was designed to further the objectives set forth in section 1361...Congress clearly designed section 1371 to end the taking of marine mammals without regard to the nature of the activity that caused the taking or the precise location within the habitat where the taking has occurred."¹¹ The court found that the exception did not apply here because it had been factually determined that the project would result in a more than negligible impact, and because "applying the moratorium provisions of section 1371 to a state's inland waters would not constitute an expansion of the geographic scope of the Act."¹² In fact, "[t]o hold that section 1371 does not extend to certain areas inhabited by marine mammals would divorce this section from the Act's objective by permitting 'man's activities' of a recreational nature to continue unabated in areas making up marine mammal habitats."¹³

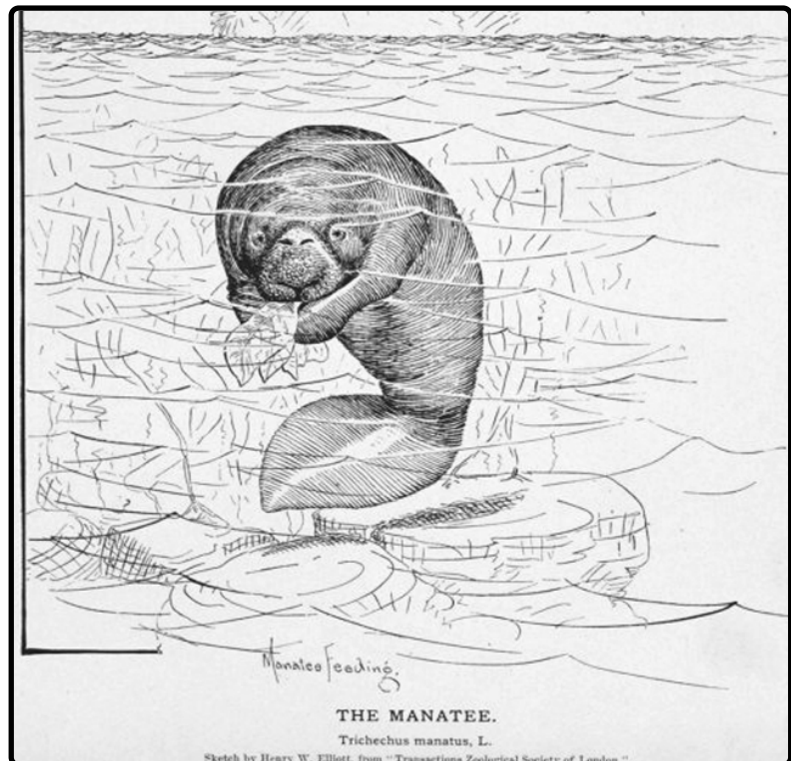
Conclusion

Finding that the Service's construction and application was in accordance with the clear intent of Congress as expressed in provisions of the MMPA, the court upheld the Service's decision to deny the plaintiffs' permit. ✓

ENDNOTES

1. 16 U.S.C. §§ 1361-1421h. The MMPA defines "take" as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." 16 U.S.C. § 1362(13). Takings that are incidental to otherwise lawful activities are permitted under certain conditions. 50 C.F.R. § 18.27.
2. For example, speed zones, sign postings, and enforcement that would protect the manatees in the area from harm.
3. 5 U.S.C. § 706.
4. 378 F.Supp.2d at 1356.
5. 16 U.S.C. § 1361(1).
6. *Id.* § 1361(2).
7. *Id.*
8. *Id.* § 1371(a)(5)(A).
9. 378 F.Supp.2d at 1360.
10. *Id.* at 1361.
11. *Id.* at 1362.
12. *Id.* at 1364.
13. *Id.*

Sketch of manatee courtesy of NOAA's Historic NMFS Collection



Final Action, from page 1

Both parties moved for summary judgment. The district court granted summary judgment to the Corps, finding that the issuance of new NWP's did not constitute a final agency action because the appellants still have an opportunity to apply for individual permits and are "not legally denied anything until [their] individual permit[s] are rejected."⁴ The appellants appealed the district court's ruling.

Final Agency Action & the APA

The appeals court first addressed whether the Corps' issuance of the NWP's was a final agency action subject to challenge under the Administrative Procedure Act (APA) and whether such challenge was ripe for review. The APA empowers a federal court to review a "final

any further project specific review. Parties that do not meet the NWP's requirements have only two options: apply for individual permits or modify their projects. Either way, the NWP's directly affect the investment and project development choices.

Next, the court turned to the issue of ripeness to consider whether the issues were ready for judicial review and the hardship to the parties of withholding court consideration.⁷ The court found the issues ripe because the appellants alleged the Corps exceeded its statutory authority in drafting NWP's and its action was arbitrary and capricious. Even though the appellants could still apply for an independent permit, no further factual development would be necessary to evaluate the appellants' challenges. The court also found that by postponing the review of the appellants' claims, they were left with only the two aforementioned options: to modify the projects or wait and try to get an individual permit. Either way, the court found that a considerable hardship existed and that judicial review was appropriate.

*The court found that
the NWP's directly
affect investment
and project
development choices.*

agency action"; an agency action is reviewable if it is definitive and has a direct and immediate effect on the day-to-day business of the party challenging it.⁵ The court found that both conditions were satisfied in the issuance of the NWP's. The action was definitive because the NWP's are not tentative or interlocutory - any party may discharge fill and dredged materials into navigable waters if they meet the required conditions; no other procedure is required. Even though the appellants could apply for individual permits, additional administrative proceedings are "different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action."⁶ The court also held that the NWP's had a direct and immediate effect on the appellants because they create legal rights and impose binding obligations by authorizing certain discharges of dredged and fill materials without

Review under the RFA

The court then addressed whether the appellants could challenge the Corps' compliance with the RFA. A challenge under the RFA requires that the challenged rule be subject to the RFA.⁸ The Corps argued that the NWP's are not "rules" and therefore are not subject to judicial review under the RFA. But the court found that the NWP's fit within the statutory definition of rules because they are "legal prescription[s] of general and prospective applicability which the Corps has issued to implement the permitting authority the Congress entrusted to it in section 404 of the CWA."⁹

The Corps also argued that NWP's are not rules because the agency did not issue a notice of rulemaking. However, because NWP's "grant rights, impose obligations, and produce significant effects on private interests" the court considered them rules.¹⁰

Environmental Assessment under NEPA

Finally the court addressed the issue of whether or not the appellants had standing to challenge the Corps' compliance with NEPA. The appellants claimed that the Corps violated NEPA by failing to prepare a Programmatic Environmental Impact Statement (PEIS) for the NWP's.

A question of standing involves both constitutional limitations on federal court jurisdiction and prudential limits on its exercise.¹¹ Here, the court found that it was fairly self-evident that constitutional standing (which requires injury in fact, causation, and redressability) was adequate; however, with respect to prudential standing the issue remained whether the appellants' grievance fell within the zone of interests protected by NEPA.

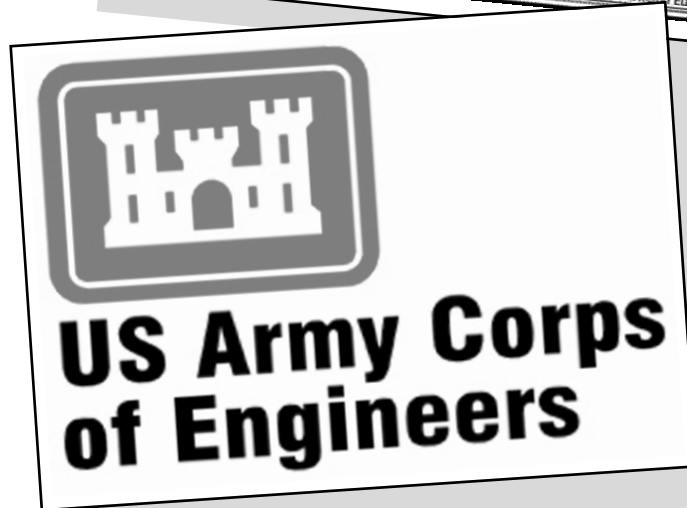
The Nationwide Public Projects Coalition (NPPC), the only appellant claiming that the Corps violated NEPA, asserted that the Corps' failure to issue more lenient NWP's prevented its members from improving the environment. The court held that the NPPC failed to demonstrate by a "substantial probability" that it had any qualifying interest. The court found the NPPC's proposed harm to be too speculative because it never mentioned a specific project that will not be undertaken because of the more restrictive NWP's.

Conclusion

With its ruling, the D.C. Circuit has required the federal district courts to hear claims that have been brought by plaintiffs who have been significantly affected by limitations set forth in general permits. It is no longer necessary to try to apply for an independent permit when a general permit has already restricted one's interests. ✓

ENDNOTES

1. Appellants include the National Association of Home Builders, the National Stone, Sand and Gravel Association, the American Road and



Blueprint graphic courtesy of ©Nova Development Corp.
Logo courtesy of the U.S. Army Corps of Engineers

Transportation Builders Association, the Nationwide Public Projects Coalition, the National Federation of Independent Businesses, and Wayne Newnam, an Ohio homebuilder.

2. 33 U.S.C. § 1344(a).
3. *Natl. Assn. of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1275 (D.C. Cir 2005) ("NAHB").
4. *Natl. Assn. of Homebuilders v. Army Corps of Engineers*, 297 F.Supp.2d 74, 80 (D.D.C. 2003).
5. *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980).
6. *Id.* at 242.
7. *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967).
8. *See* 5 U.S.C. § 611(a)(1).
9. *NAHB*, 417 F.3d at 1284.
10. *Id.* at 1285.
11. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Court Defers to Corps' Findings in Terminal Project

Shoreacres v. Waterworth, 420 F.3d 440 (5th Cir. 2005)

Benjamin N. Spruill, 3L, *Roger Williams University School of Law*

Opponents of the Bayport terminal project for Galveston Bay challenged the Army Corps of Engineers' issuance of a dredge and fill permit, arguing that the Corps violated the federal Clean Water Act and the National Environmental Policy Act. The Fifth Circuit Court of Appeals deferred to findings of the Corps and approved the dredge and fill permits, allowing development plans to proceed.

Background

In 1998, the Port of Houston (Port) sought to construct the Bayport terminal at an undeveloped portion of land on the northwest coast of Galveston Bay, Texas. The terminal design called for seven cargo ship berths, three cruise ship berths, and the necessary infrastructure and facilities. As required by the Clean Water Act (CWA), the Port applied for a dredge and fill application with the Army Corps of Engineers (Corps). After the procedural requirements of public notice and comment, publication of several environmental impact statements (EISs), and publication of a Record of Decision, the Corps granted the permit to the Port on January 5, 2004.

The City of Shoreacres and several other environmental and professional interest groups challenged the validity of the Corps' issuance of the dredge and fill permit. Shoreacres sought rescission of the permit under both the CWA and the National Environmental Policy Act (NEPA). Having been denied a remedy in district court, Shoreacres appealed to the Fifth Circuit Court of Appeals.

Court Deference to Agency Action

A federal court's ability to review and overturn a federal agency's decision is described by the Administrative Procedure Act (APA). Specifically, the Fifth Circuit could set aside the Corps' decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with the law."¹ Critical to rescission of the permit was whether the Corps acted in a manner outlined in the APA; if the agency acted within the scope of the statute, the court would give substantial deference to the Corps' decision.

Wetlands Jurisdiction

Shoreacres first challenged the Corps' dredge and fill permit by arguing that the Corps inaccurately assessed the amount of wetlands at the site that is regulated by the CWA. Potentially, 146 acres of wetlands at the Bayport terminal site fell under the wetlands jurisdiction of the CWA. The Corps had authority to regulate these waters, including the Bayport terminal site; however, the Corps estimated that only 19.7 of those acres fell within its regulatory jurisdiction. Shoreacres argued that the 19.7 acres was a gross underestimation of the wetland acreage within the Corps' regulatory control, inferring that if more wetlands were within the jurisdiction of the CWA, a dredge and fill permit would not be issued. Because other methodologies determined wetland jurisdiction encompassed the entire 146 acres, Shoreacres argued that the Corps' method was an abuse of discretion. The court, however, found the Corps' failure to use other methods to determine wetland jurisdiction irrelevant to an abuse of discretion analysis. The Port offered extensive mitigation for environmental damages resulting from the Bayport terminal construction. The court agreed with the Corps that the mitigation package justified issuance of the dredge and fill permit, even if all 146 acres were regulated by the CWA.

Shoreacres also argued that the court should not defer to the Corps' decision because the wetlands jurisdiction analysis was an error of law, not fact. When an agency commits an error of law, a court can analyze the decision, giving no deference to the earlier decision. Here, the court found that wetlands jurisdiction was an issue of fact, based on scientific data to be analyzed by the agency. Because the Corps properly decided a factual issue, the court deferred to the Corps' findings.

Practicable Alternatives

Shoreacres next argued that a dredge and fill permit cannot be issued if there is a "practicable alternative"

to the proposed discharge and that the Corps abused its discretion because it did not consider any alternative sites, specifically Shoal Point and Pelican Island.² A practicable alternative, defined as one that “is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes,” was not accessible to the Port.³ The court dismissed both sites as practicable alternatives because they were located outside Harris County. The Port intended to fund the Bayport terminal construction cost from the proceeds of a bond issue and restrictions on the bond prevented any spending outside Harris County. Although alternative funding was possible, the court ruled that “a mere, unsupported theoretical possibility of acquiring the alternative site... does not constitute a showing that the alternative site is reasonably obtainable” and again deferred to the Corps’ decision.⁴

The “No-Action” Alternative

Shoreacres claimed that the Corps failed to meet the procedural requirements of NEPA in three instances. First, NEPA requires that the Corps consider alternatives for construction of the Bayport terminal, including other development sites, and the alternative of no project. As part of its final EIS, the Corps did not consider the existence of a similar project located on the southwest coast of Galveston Bay at Shoal Point. Shoreacres argued that the Corps’ failure to consider the Texas City project in the no-action alternative analysis was arbitrary and capricious because Shoal Point was an existing condition that was relevant to the issuance of the Bayport dredge and fill permit. The Shoal Point project, however, was still in planning stages and development was not guaranteed. Instead of viewing it as an existing condition, the Corps viewed the Shoal Point project as merely a possibility when analyzing the no-action alternative. The court did not find this treatment of the Shoal Point project as either arbitrary or capricious and deferred to the findings of the Corps.

Channel Dredging

Shoreacres claimed under both the CWA and NEPA that the Corps acted arbitrarily by failing to consider that the Houston Ship Channel would be deepened to



Aerial view of Galveston Bay courtesy of NASA

accommodate larger vessels traveling to the Bayport terminal. Shoreacres argued that deepening of the Houston Ship Channel would alter the Galveston Bay ecosystem by changing salinity levels. NEPA required the Corps to consider indirect adverse environmental effects of issuing a dredge and fill permit. Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁵ Scant evidence, however, showed that the channel would require deepening, as present and future vessel traffic could traverse the channel at the current depth. Additionally, the Corps’ issuance of the dredge and fill permit could never cause the channel to be dredged; as the court reasoned, only an act of Congress can effectuate channel deepening.

NEPA – The Split Alternative

Finally, the Corps rejected a proposal to split the Bayport project, building some cargo berths at Bayport and others at Shoal Point, because it was environmentally unacceptable. Because the Corps issued a separate dredge and fill permit for a six-berth terminal at Shoal Point to Texas City, in addition to the Bayport project, Shoreacres contended that existence of both ports is environmentally unacceptable as well. However, the court found that under NEPA the Corps could separately approve two different permits.

Conclusion

As required by the APA, the court was highly deferential to the findings of the Corps. Holding that the

Fifth Circuit Finds Contract Has “Salty Flavor”

Hoda v. Rowan Cos., Inc., 419 F.3d 379 (5th Cir. 2005)

Josh Clemons

In July the U.S. Court of Appeals for the Fifth Circuit addressed an age-old question that has vexed legal scholars since Hammurabi: does torquing bolts on a blow-out preventer from a jack-up drilling rig used as a work platform constitute a maritime contract?

Facts

Defendant Rowan Drilling Co., Inc. owns the *Gorilla II*, a jack-up drilling rig operating on the Outer Continental Shelf for oil production company Westport. A jack-up drilling rig is “a drilling rig used in offshore drilling whose drilling platform is a barge from which legs are lowered to the bottom when over the drill site and which is raised above the water and supported on the legs to conduct drilling operations.”¹ For legal purposes a jack-up drilling rig is considered a vessel.

The *Gorilla II* serviced a Westport wellhead off the Louisiana coast that had no fixed platform. Westport contracted with Greene’s Pressure Testing and Rentals to provide labor on the rig under individual work orders. Under the contract, called the “Master Service Agreement,” Greene’s responsibilities included “hydrostatic testing, hydraulic torque wrench service, nut splitters, casing cutting, pipeline/production and miscellaneous rental tool equipment.”²

Greene’s was enlisted to help with the installation and changing of blow-out preventers on the wellhead, which involved the torquing up and torquing down (tightening and loosening) of bolts on the preventers. Rowan personnel used the *Gorilla II*’s crane and other equipment to place and align the blow-out preventers, and place the nuts and bolts on them for torquing (or perform the same activities in reverse for removal of preventers).

The torquing was performed by Greene’s personnel, among them plaintiff Billy Hoda. Hoda tripped over hoses on the rig’s deck while torquing bolts. According to Hoda, the fall caused “severe injuries to his body and mind, including but not limited to, low

back and other serious and permanently disabling injuries to the body and mind that will prevent him from performing his regular job on information and belief, and occupation requiring manual labor.”³

Lawsuit

Hoda sued Rowan on the grounds that the company was negligent in keeping the work area cluttered and unstable. Rowan in turn sued Greene’s and Atlantic Insurance Company (Atlantic) for indemnification against Hoda’s claim. This third-party complaint was based on an indemnity provision in the Master Service Agreement. Hoda settled his claim with Rowan, but the dispute over indemnification between Rowan and the other parties remained alive. This was the dispute at issue in this case.

Legal Issues

The controversy before the court was the enforceability of the Master Service Agreement’s indemnity provision. Rowan wanted the provision enforced so that it could

Photograph of man working on crane courtesy of ©Nova Development Corp.



be reimbursed by Greene's and Atlantic for the money it paid to Hoda. Greene's and Atlantic, for obvious reasons, did not want the provision enforced.

In Louisiana, the enforceability of indemnity provisions is governed in part by the Louisiana Oilfield Anti-Indemnity Act.⁴ The Act invalidates such indemnity provisions if the contract is non-maritime. The precise issue the court had to decide, then, was whether the Master Service Agreement was a maritime contract.

The Court's Analysis

The court looked to its decision in the 1990 case of *Davis & Sons, Inc. v. Gulf Oil Corp.*⁵ for guidance on determining whether a contract is maritime. *Davis* lays out a two-pronged approach. The court should examine the "historical treatment in the jurisprudence," and also apply a "six-factor fact specific inquiry."⁶ The factors are: "(1) what does the specific work order in effect at the time of injury provide? (2) what work did the crew assigned under the work order actually do? (3) was the crew assigned to work aboard a vessel in navigable waters? (4) to what extent did the work being done relate to the mission of that vessel? (5) what was the principal work of the injured worker? and (6) what work was the injured worker actually doing at the time of injury?"⁷ The court also observed that the maritime or non-maritime nature of a contract is a function of its "nature and character, not...its place of execution or performance."⁸

Although the court had never before considered the question of whether a contract for the type of bolt-torquing in which Hoda was engaged was maritime, it did find some guidance in its examination of the "historical treatment in the jurisprudence." At first, the history seemed to favor Greene's and Atlantic: oil and gas production is not generally considered a traditional maritime activity, and the fact that work is done on a jack-up drilling rig is not, by itself, enough to render that activity maritime. In a previous case the court had held that work being done on a jack-up rig under a contract to gather geophysical data was not maritime just because the rig, which functioned as a work platform, was a vessel.⁹

However, in that case the court also opined that "a specialty services contract related to oil and gas exploration and drilling takes on a salty flavor when its performance is more than incidentally related to the execution of the vehicle's mission."¹⁰ Rowan argued that the contract in this case was like that in two other cases in which contracts to provide casing services on jack-

up rigs were held to be maritime because the contract work was "inextricably intertwined with the maritime activities of the rig and its crew."¹¹ Dismissing Greene's counterarguments, the court declared that "Greene's services were 'inextricably intertwined' with the activity on the rig, were dependent on Rowan's placement of the equipment on which Greene's employees worked, and could not be performed without the rig's direct involvement."¹² This analysis indicated that the contract was maritime.

The court's examination of the *Davis* factors further established the contract's "salty flavor." The court did not provide detail of its analysis other than to note that the only factor that might possibly conflict with its determination was the fourth: that the work being done relate to the mission of the vessel. Otherwise, the factors showed that there was a "functional interrelationship of Greene's work with the rig" adequate to render the contract maritime.¹³ The court was careful to note that this decision was based on the specific facts and does not mean that "oil and gas services contracts are maritime whenever they contribute to the mission of the jack-up drilling rig."¹⁴

Conclusion

The appeals court upheld the trial court's decision that this contract is maritime, and that the indemnity provision is therefore enforceable. Greene's and Atlantic must indemnify Rowan for the injuries Billy Hoda sustained while working aboard the jack-up drilling rig. ♡

ENDNOTES

1. *Merriam-Webster Online Dictionary* <<http://www.m-w.com/>>.
2. *Hoda v. Rowan Cos., Inc.*, 419 F.3d 379, 381 (5th Cir. 2005).
3. Pl.'s Compl. for Damages ¶ 8 (Sept. 6, 2002).
4. La. Stat. Ann. § 9:2780.
5. 919 F.2d 313 (5th Cir. 1990).
6. *Hoda* at 381.
7. *Id.* (quoting *Davis*, 919 F.2d at 316).
8. *Id.* (emphasis in original; internal quotes omitted).
9. *Dominique v. Ocean Drilling & Exploration Co.*, 923 F.2d 393 (5th Cir. 1991).
10. *Hoda* at 382 (paraphrasing *Dominique*).
11. *Id.* (internal quotes omitted).
12. *Id.* at 383.
13. *Id.*
14. *Id.*

Galveston Bay, from page 11

Corps did not act in a capricious or arbitrary way nor abused its discretion, the court upheld the issuance of the dredge and fill permit for the Bayport terminal. ✓

ENDNOTES

1. 5 U.S.C. § 706.
2. *Shoreacres v. Waterworth*, 420 F.3d 440, 447-48 (5th Cir. 2005).
3. *Id.* at 448.
4. *Id.* at 449.
5. *Id.* at 452.

Photograph of dredge bucket courtesy of NOAA



Your Generosity Poured in to Katrina Kids!

Waurene Roberson

People from the Sea Grant College Program and NOAA are some of the most caring and generous people in the world, as the picture below clearly shows. You are all awesome, look what you have done!

In the wake of the disaster left by Hurricane Katrina, the country was worried and perplexed, unsure of what they could do to help. We at the Mississippi-Alabama Sea Grant Legal Program and the Sea Grant Law Center were no different. Only seven hours north of the devastated area, with all roads south closed, and communications down, we felt as helpless as anyone across the country. The giant relief programs were turning down donations and volunteer time in favor of dollars and checks, but that didn't satisfy the need to *do* something.

During the course of some brainstorming on this problem, we thought of all the beautiful conference bags, pens and pencils out there - collecting dust in closets, or still in their boxes, left over from one conference or another. An "aha!" moment occurred and we sent out

emails on the listservs, asking for those and other school supplies for the children who had lost everything, whether still in the devastated area or evacuees.

We knew that everyone would want to help, but the response was astounding in scope and hugely affirming! Boxes began to arrive daily (two whole pallets of supplies arrived one day) and our office became infamous among delivery services and post office personnel. The vacant office we used to store these items as we assembled filled bookbags began to overflow with your generosity and the generosity of all the friends you recruited to the cause!

We never dreamed that y'all would send such an abundance: 627 filled backpacks, an additional 200 unfilled book bags, ten boxes of assorted teacher's supplies, six boxes of new (spiffy) t-shirts, two big boxes of toys, children's books and many boxes of other assorted items!

There are a few more pictures and a distribution map on the the website for your enjoyment:

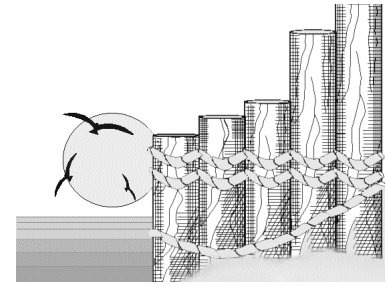
<http://www.olemiss.edu/orgs/SGLC/KatrinaKids/pictures.htm>

<http://www.olemiss.edu/orgs/SGLC/KatrinaKids/angels.htm>

<http://www.olemiss.edu/orgs/SGLC/KatrinaKids/map.htm> ✓



Lagniappe (a little something extra)



Around the Gulf...

Hurricane Katrina spawned many unforgettable images of destruction. Among those, perhaps none captured the immense power of a storm surge better than the pictures of Mississippi's massive floating casino barges lying askew on the north side of U.S. Highway 90, hundreds of feet from their berths, after the waters subsided. The casinos' vital economic importance to the state spurred the legislature to quickly pass a bill allowing **land-based casinos** for the first time. The governor signed the bill into law on October 17. For political reasons, since they were first authorized in 1990 Mississippi's non-tribal casinos have been relegated to the navigable waters of the Mississippi River, its tributaries, and the Gulf of Mexico. They may now be built on land 800 feet from their former locations. Before Katrina, Mississippi's casino gambling industry employed almost 18,000 people and generated annual revenues of \$740 million for the state. The new legislation will encourage rapid rebuilding; several hard-hit casinos plan to be operating by very early next year, and the Imperial Palace, which was the least damaged, anticipates reopening by Christmas.

The Mississippi Department of Marine Resources (DMR) has stepped in to **pay oyster fishers to help with debris removal** in the aftermath of Katrina. DMR's program is intended both to help oyster fishers who have lost at least an entire season of oystering and to clean up and rehabilitate the state's oyster reefs. The storm surge from Katrina devastated the reefs by scouring them out and dropping debris, which was picked up as buildings were destroyed on land. The program was opened to oyster fishers who have held an oyster license within the last two years. Funds will come from money DMR received after last year's Hurricane Ivan.

Shrimpers also enjoyed some temporary relief from the government in the wake of Katrina. On September 22 NOAA Fisheries (formerly the National Marine Fisheries Service, or NMFS) authorized shrimp trawlers in Alabama, Mississippi, and Louisiana to ply their trade without using turtle excluder devices, or TEDs. Debris from the storm was clogging the devices, not only rendering them virtually useless for saving turtles, but also severely limiting the amount of shrimp that could be caught. During the temporary authorization the shrimpers must limit their tow times (the time the trawl doors enter the water until they are removed from the water) to fifty-five minutes or less. The authorization was set to expire on October 22; however, after Hurricane Rita struck, NMFS extended it until November 23 and expanded its range to include some Texas waters. TEDs protect endangered sea turtles, including the very endangered Kemp's Ridley, from being caught in the nets.

In addition, after Katrina and Rita NMFS put into effect **emergency consultation procedures** under the Endangered Species Act (ESA) and the Magnuson-Stevens Act (MSA). The ESA requires federal agencies to consult with NMFS when their activities may affect ESA-listed species and/or critical habitat. Similarly, the MSA requires consultation when federal agency activities may adversely affect essential fish habitat. NMFS regulations allow for expedited consultation procedures in case of emergency; here, the procedures were implemented for activities associated with the protection of human life and property, protection of the environment, and for projects whose rapid completion is required for the recovery of the areas affected by the storms. Such activities may include road and bridge building, channel dredging, and cleanup of debris and hazardous materials.

As this issue is going to press, the U.S. District Court in Tampa has issued an opinion **overturning a ban on grouper fishing** in the Gulf of Mexico. NMFS had restricted fishing of all grouper species in order to protect one species, red grouper. The agency was sued by two recreational fishing groups, the Coastal Conservation Association and the Fishing Rights Alliance. The court invalidated portions of the rule, although some restrictions remain. *Water Log* will cover the case, *Coastal Conservation Assn. v. Gutierrez*, in more detail in our next issue. ✓

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•DECEMBER 2005 •


Water and Civilization: 4th International Water Conference
December 1, 2005, Paris, France
 <http://www.iwha.net>


Southeast Regional Technical Seminar on
Hydraulic Analysis for Spillways
December 6, 2005, Charlotte, NC
 <http://www.damsafety.org>

•FEBRUARY 2006 •

Aquaculture America 2006
February 13-16, 2006, Las Vegas, Nevada
 <http://www.was.org>

•MARCH 2006 •

16th Annual AEHS Meeting & West Coast Conference on Soils,
Sediments, & Water
March 13-16, 2005, San Diego, CA
 <http://www.aehs.com/conferences>

Fourth World Water Forum
March 16-22, 2006, Mexico City, Mexico
 <http://worldwaterforum4.org.mx>



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