Liability, Wetlands, and Legal Activism in Louisiana

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In one of the most imaginative plans for rebuilding storm protection to emerge in the aftermath of Hurricane Sandy, a professional engineering and design team proposed to wrap the coastline of Lower Manhattan with an artificial fringe of tidal marshes. The New York Times called it “a fringe of mossy wetlands strapped like a beard to Lower Manhattan’s chin”1. Renderings of the project, which circulated shortly after the disaster struck, showed an eco-tone2 of vegetation protruding into the New York Harbor; a living barrier to absorb the massive energy released by future storm-surge. With billions of dollars of real estate and millions of lives at stake, the calls to fund such ‘soft-infrastructure’ projects that recreate biological communities in order to build resiliency into landscapes where habitat destruction has long exacerbated existing risks continue to sound far and wide. But the question remains: Who will pay for it?

Even in New York City where Mayor Bloomberg’s $20 billion-dollar climate adaptation plan announced this past June did just that—with pledges to install new wetlands and restore existing ones citywide—many analysts now doubt whether the mayor’s successor will be up to the monumental task. If the next mayor does decide to follow through with Bloomberg’s plan, the project to recreate wetlands would be funded using Congressional recovery funds and other federal finance related to Hurricane Sandy. But outside the five boroughs, the question of who pays for the loss of wetland-based storm prote

WETLAND WITHER

It was a point emphasized this past month when the Southeast Louisiana Flood Protection Authority (SLFPA), the group responsible for the physical and operational integrity of the country’s most complex flood risk management system, filed a petition against approximately one hundred oil, gas, and pipeline companies for alleged damages of the region’s vast wetland ecosystem. “For nearly a century, the oil and gas industry has continuously and relentlessly traversed, dredged, drilled, and extracted in coastal Louisiana,” the petition explains. Pointing to data from public agencies cataloguing degradation from the, “extensive network of oil and gas access and pipeline canals that slash the coastline at every angle,” the petition’s tone turns solemn. “What remains of these coastal lands is so seriously diseased that if nothing is done, it will slip into the Gulf of Mexico by the end of this century, if not sooner.” In an age of rising sea levels, the end of New Orleans, and a retreat from the Big Easy is entirely imaginable.

Now consider the rather peculiar and novel wager at play in the SLFPA’s petition. The SLFPA’s first priority is to maintain the region’s vast man-made flood protection system—a manufactured complex of levees and floodwalls that together serve as the “final line of defense” against looming inundation and destruction. However under

2 In ecology, an ‘ecotone’ is a transition area between two biomes, or where two communities meet and integrate.
Louisiana law its guardianship is broader. According to SLFPA, the SLFPA is in a kind of inter-species alliance. Not only is it charged to monitor the integrity of Louisiana’s coastal lands but the land itself is also an “essential complement” to the SLFPA’s system of flood protection. The petition’s claim thus rests on the fact that coastal lands “assist” the SLFPA in protecting the people and property on the coast of Louisiana, shielding it in part from catastrophic flood events.

In each instance—the proposal to construct new wetlands in New York City and the lawsuit to restore destroyed wetlands in Louisiana— the cause of action emerges from the importance of ‘ecosystem services’. The term is used by economists to capture the benefits humans derive from the spaces in which they find themselves; a dynamic complex of plants, animals, microorganisms, and other non-living elements that together have the aesthetics of a functional unit. Yet despite the obvious importance of the ecological world that sustains us, one does not need to look far these days to see that financial markets do a poor job when it comes to capturing the true environmental costs of economic activities.

It’s a fact not lost on economists who have recently suggested creating entirely new marketplaces where everything from regulatory services for ecosystem service’s like air purification and nutrient recycling could be valued and traded.

**A PERFECT MARKET FOR A PERFECT MARKET FAILURE**

In places like California marketplaces for ecosystems services already exist. Much like the carbon credits traded across the state, experimental trading systems for wetland credits are opening up from Southern California and beyond. Ecosystem credits cut up the world into so many hectares and then hold up the promise to restore or recreate an equivalent habitat for each unit of habitat a purchaser cannot avoid destroying or compromising. In contrast, the SLFPA’s position is more direct in that it seeks to establish the damages to ecosystems as a negligent act.

Through it all the goal of the SLFPA’s case will be to put a financial price on storm protection through the courts. To accomplish this, its lawyers plan to convince the court that impairing the region’s ability to enjoy the benefits of its ecosystem services is a negligent act, and in the process, to pin billions of dollars of costs to repair and remediate decades of natural resource damages onto the energy companies. That is, onto the shoulders of a sector that has been the central source of the region’s financial gain and employment for almost a century.

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3 The idea of ‘alliance’ here is borrowed from Bruno Latour, a political philosopher whose work has developed the idea to draw attention to the way humans ally themselves with the non-human world to pursue their goals. See, Latour, B. 2013. *An Inquiry into Modes of Existence*. Harvard Press: Boston, MA.

4 The bees would agree. In 2012 three new studies pointed to the role of ‘neonicotinoid’ pesticides in bee colony collapse disorder, a crisis that has put a question mark over an entire agricultural sector dependent on the free benefit of pollination delivered by bees. For the companies operating in the agro-chemical sphere, the inertia of prevailing practices and ideas of public safety are finite. This year over a hundred million acres of farmland in the United State will again be gassed with neonicotinoid chemicals. But with the EPA currently investigating the link between the pesticides and colony collapse disorders, the shell of immunity from the long-term environmental consequences of an entire class of chemicals maybe expiring.

Today the list of projects the SLFPA seeks money to complete is long and expensive. As the petition explains, the SLFPA is seeking compensation to fund, among other activities, “extensive wetland creation, reef creation, land bridge construction, hydrologic restoration, shoreline protection, structural protection, bank stabilization, and diversion projects.”

As the potential groundbreaking case makes its way through the court system, the questions that will be asked of it are already here. Can the courts accomplish what the marketplace has so far failed to achieve? And if they do, what kinds of insurance exposures might be triggered? In Louisiana and New York ‘wetlands’ and ‘marshes’ have emerged as the basic unit whose degraded function must be restored, but deciding where liability should fall is an intricate proposition. For the SLFPA’s legal team, the difficulty next will be to prove causation for long-term environmental damages on the scale of thousands of square miles of wetland habitat. A closer look at the language of the petition provides a few helpful indicators of their plan to do this, as well as a chance to think through the insurance implications as the case continues to evolve in real time.

SALTWATER AS POLLUTANT

According to the SLFPA, the cause of the wetland damage is not the canals per se, but the “corrosive saltwater” the canal system continues to introduce to the coastal lands with greater volume and velocity. When saltwater enters a freshwater habitat it weakens the biological communities, resulting in severe erosion and widespread death of vegetation. The SLFPA is arguing that this, in turn, “has caused and will continue to cause increased storm surge risk and attendant increased flood protection costs to the SLFPA and the levee districts that it governs.”

Without outright calling saltwater a pollutant, the petition’s argument is built around the idea of saltwater acting as a contaminating fluid. In a pragmatic engineering sense, the goal of the lawsuit is to contain the saltwater. Meanwhile, the SLFPA frames its argument as an issue of environmental justice: the oil and pipeline companies must be held responsible for restoring the wetlands insofar as the creation of their access network allowed saltwater to be released into a freshwater habitat, and in the process has impaired the habitat’s ability to help the SLFPA carry out its duties to keep the public safe.

While this is all clear enough, the problem is that the petition does not use the word ‘pollution’ or ‘pollutant’, consequently the case’s insurance implications hinge on two questions. First, is saltwater a pollutant? And second, if it is a pollutant, has a ‘pollution event’ occurred? If the answer is yes to both, the pipeline owners and upgraders named in the petition have a strong argument for having the costs of legal defense and remediation covered under environmental insurance policies like fixed site pollution policies, while engineers and other design professionals may seek coverage under professional liability policies. The SLFPA’s legal team has reported that the board will be asking for billions of dollars.

Even in the absence of knowledge of the courts eventual decision on saltwater’s status as a pollutant, at this early moment it’s still possible to think through the potential ways a policy might behave. Recent coverage enhancements found in environmental contracts already suggest the potential avenues through which clients could conceivably argue for extending coverage. Over the past five years, it has become a standard practice for insurance carriers to indemnify the costs incurred by “natural resource damages”. A policy specimen from XL Insurance Company helps describe this particular coverage:
“NATURAL RESOURCE DAMAGE means physical injury to or destruction of, as well as the assessment of such injury or destruction, including the resulting loss of value of land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act 16 U.S.C. 1801 et. seq.), any State, Local or Provincial government, any foreign government, any Native American tribe or, if such resources are subject to a trust restriction on alienation, any member of a Native American tribe.”

In short, this could potentially extend to cover ecosystem services, should the courts decide coverage does apply.

Of course whether this coverage will be extended will depend on whether a ‘pollution event’ has occurred. Environmental insurance products are like nets made of nets; one can only catch what passes through the sieve of the insuring agreements. In most cases the sieve is a ‘pollution condition’.

CONCLUSION

For now the potential insurance implications will continue to be ambiguous. With over a hundred defendants asked to pay the costs associated the loss of Louisiana’s wetlands, a large number of insurance companies will likely be involved. With billions of dollars in general liability (GL) claims at stake, and policies that often include lengthy exclusions for any ‘pollution conditions’, it’s conceivable that some insurance carriers might even argue themselves that the gradual, cumulative, and historical release of saltwater into the interior coastlands should be treated as a pollution event, so as to better exclude it under their GL policies, which likely hold some form of restricted pollution coverage.

Other companies involved in the legal action, particularly those holding environmental insurance contracts, will be in a different situation. Either way, a heated debate between the carrier and policyholder holder is likely in the works. While there’s no such thing as a guarantee in the world of insurance, without the advocacy and insight of an experienced team of environmental insurance brokers like those here at Aon, businesses will face a complicated battle when it comes to securing the assurances they’ve been promised.

Often the stakes of this battle are immense. In Louisiana, the stakes are nothing short of the future of an entire region and the balance sheet of a hundred companies asked to foot the bill. As the SLFPA warns at the end of its petition, “Unless immediate action is taken to reverse these losses and restore the region’s natural defense, many of Louisiana’s coastal communities will vanish into the sea.”