A Struggle for Survival: The Historic Wetlands Lawsuit Against Big Oil and Gas

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Architecture fits human society into a place. In most instances that “place” is at least relatively stable, although both it and the society that makes a home there may have to adjust to each other. In and around New Orleans, however, humans chose to develop a society and make homes in one of the most impermanent and environmentally dynamic places in the world. And that society has not only failed to adjust to its environment but has exacerbated the natural dynamism of the place.

In essence, New Orleans is not much more than a mud castle surrounded by a roil of water, but only in the wake of Hurricane Katrina did people living there begin to recognize that reality. And only in July 2013 did any public entity take a concrete step to address the problems humans themselves created. That's when the Southeast Louisiana Flood Protection Authority East (SLFPAE)—the levee board responsible for protecting metropolitan New Orleans on the east bank of the Mississippi River—filed a lawsuit against Exxon, Mobil, Chevron, BP, Shell, Marathon, and 92 other oil, gas, and pipeline companies. But what's at stake in this lawsuit is the future of much of coastal Louisiana, including its port traffic (18% of all commercial shipping in the U.S. passes through Louisiana) and energy infrastructure (roughly 20% of the nation's refining capacity).

Until mid-October 2013, I was vice president of the SLFPAE and one of the architects of the lawsuit, an action which is the culmination of geologic history, engineering, and law—and which has opened up great seismic faults that are shifting Louisiana politics.

First, the geology: the Gulf of Mexico once reached north to Cape Girardeau, Missouri, but as sea level fell the Mississippi River system built land from there to the present mouth of the river by depositing sediment into what had been water. In total, the river built approximately 40,000 square miles of land in seven states, including all of coastal Louisiana. There are no rocky cliffs on Louisiana's coast; the entire coast is basically sediment held together by plant life. In Louisiana, the most densely populated areas are inland from the Gulf itself, inland from the mix of water and earth that is called marsh; in the New Orleans metropolitan area, people live within a levee system as well.

Editor’s Note

Since the writing of this article, there have been significant developments on the SLFPAE lawsuit. The Louisiana Legislature passed a bill brought by Senator Brett Allain aimed at retroactively removing the power of the SLFPAE to file the lawsuit. The bill stripped the SLFPAE’s authority to file the lawsuit by putting limits on the types of government agencies that can file suits against oil and gas companies. The bill was signed into law by Governor Jindal and has since been ruled unconstitutional by 19th Judicial District Court Judge Janice Clark. On Friday, February 13, 2015, U.S. District Judge Nannette Jolivette Brown dismissed the SLFPAE lawsuit on the grounds that the authority failed to make a strong enough financial claim against the defendants. The SLFPAE must now decide whether to appeal the decision.

Second, the engineering: multiple human triumphs—at least they seemed so when accomplished—have been destroying this coast for decades. Approximately 1,900 square miles of land have melted into the ocean, and the land loss is continuing at the rate of a football field every 50 minutes. Causes of the land loss include the construction of the levee system, which prevents river sediment from replenishing the land it made by flooding; the decline of sediment in the river—the river now carries less than half its historic sediment load, and just six dams on the upper Missouri River built by the Army Corps of Engineers retain about half of all that missing sediment; and various engineering works built to benefit the shipping industry, including the Gulf Intracoastal Waterway, which runs from Texas to Florida, and jetties which extend two and a half miles out into the Gulf and escort much of the sediment remaining in the river out into deep water, where it is of no earthly use replenishing the land.

There is also one other major factor in land loss: the operations of the oil and gas industry. The industry has dredged 10,000 miles of canals and pipelines through coastal Louisiana, every inch of which has allowed salt water intrusion, changed salinity, interfered with natural hydrology, and killed plant life—thus leading to the erosion of land.²

No serious person, including those in the industry, disputes that oil and gas operations have caused substantial land loss. A U.S. Geological Survey (USGS) study in which industry scientists participated concluded that energy industry activities accounted for 36% of all the state's land loss³. Evidence is also growing that oil and gas companies have extracted so large a volume of material that the land has sunk⁴; the impact of oil's role in subsidence may not be entirely reflected in the USGS study.

Now, finally, the law: The SLFPAE filed suit because of this land loss. Its argument is simple—and essentially irrefutable. Even the suit’s opponents don’t dispute the reasoning. There is a saying down here: The levees protect the people, and the land protects the levees. The lost land once served as a buffer, which protected metro New Orleans from hurricanes by cutting down storm surge; without that

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protection, a more devastating storm surge pounds against the levee system. The increased—and increasing—storm surge requires the levee board to spend more money to protect lives and property. No one disputes this either. The board’s case is further strengthened by two facts. Most industry operations were conducted under permits, and those permits required the companies to minimize damage they caused and restore the land when they were done. Beginning in 1980, Louisiana law explicitly required areas to be “restored as near as practicable to their original condition.” But by 1980, the industry had largely captured the regulatory agency and these requirements were not enforced. In addition, Louisiana jurisprudence is based on civil law, as opposed to the common law tradition of the other 49 states. In civil law there is a doctrine called “servitude of drain” which prohibits one party from altering the natural flow of water on another person’s property. To the extent they increased storm surge, oil and gas operations clearly did that.

The board is suing to get the industry to restore the land it destroyed or, in places where this is impossible—where what was once land is now open water and no sediment is available for restoration—to compensate it so it can augment the flood protection system. That will likely cost billions of dollars.

More importantly, the SLFPAE’s area has suffered less damage from the oil and gas industry than most of the Louisiana coast. If other entities further west follow the board’s lead, the liability of the industry rises to several tens of billions.

Thus we get into politics. Not surprisingly, then, the lawsuit—and the very question of “place”—is shaking Louisiana politics. People used to say, “The flag of Texaco flies over the Louisiana capitol.” We’re in the process of seeing whether that’s still true. Hours after the lawsuit was filed, Governor Bobby Jindal—at the time he happened to be at an event in Aspen with such donors (and defendants) as the Koch brothers—demanded it be withdrawn. If it wasn’t, he threatened to gut the board and seek legislation to kill the lawsuit in the state legislature. The legislature convened March 10. Numerous bills, each taking a different angle of attack, have been filed seeking to do that.

The board refused to withdraw the suit, and he has tried to gut the board. But the SLFPAE was created after Hurricane Katrina by reformers who insulated it from political pressure by making sure that, unlike nearly all other boards in the state, its commissioners do not serve at the governor’s pleasure. Jindal has nonetheless been able to replace three members, including me, because our terms expired, and the three new appointees passed a “litmus test” of opposition to the suit. But a 6-3 majority of the board still supports it. That majority has resisted tremendous pressure to cave in, and I am confident it will continue to resist that pressure. But what happens to the lawsuit will be determined as much by state legislators as by the courts.

Initially, no elected official spoke up for the lawsuit. Many condemned it. It looked like we had no chance of surviving the legislature. But the logic of our arguments, and the illogic of the governor’s, have been eroding his position even faster than the sea is eating away at the coast.

The Louisiana Oil and Gas Association (LOGA) has argued that the suit will cost jobs and end cooperation with the industry. But in a deposition under oath, LOGA President Don Briggs admitted he had no evidence to support his
contention and could not name a single company which even considered the state’s legal climate when deciding whether to operate here. Meanwhile the state’s Master Plan to restore the coast—a plan with a $50 billion price tag for a bare-bones effort and $100 billion to do it right—has one great weakness: there is no funding for it. Our lawsuit is designed to provide funding for the Master Plan, not interfere with it. True, the industry is cooperating in many areas, and, true, that cooperation is worth millions of dollars a year. But with liability in the tens of billions, that amounts to letting the industry off for less than one tenth of a penny on the dollar. Even in Louisiana, that’s a sweet deal.

Meanwhile, not only do the industry’s and the governor’s arguments against the suit make no sense, Garret Graves, who until this February had been for six years the governor’s point man on coastal issues and chief critic of the lawsuit, himself has been making our case for us. First he conceded, “I’m the first one to admit there’s liability there.” Then a few weeks later he said, “Businesses should be operating in compliance with existing regulations.” Exactly what our lawsuit demands. Remind me, Mr. Graves, why the state opposes the suit?

Soon after we filed our lawsuit, James Carville told me we had permanently changed the political conversation in the state. As I write this today, Jefferson and Plaquemines Parishes filed their own lawsuits against oil companies. Both parishes are heavily Republican, and Jefferson has the biggest population in the state and the best-organized delegation in the legislature. Other parishes are considering filing lawsuits in the immediate future. This place may have a chance to survive after all.

John M. Barry is a prize-winning and New York Times best-selling author whose books have won multiple awards. The National Academies of Science named his 2004 book The Great Influenza: The story of the deadliest pandemic in history, a study of the 1918 pandemic, the year’s outstanding book on science or medicine. His earlier book Rising Tide: The Great Mississippi Flood of 1927 and How It Changed America, won the Francis Parkman Prize of the Society of American Historians for the year’s best book of American history and in 2005 the New York Public Library named it one of the 50 best books in the preceding 50 years, including fiction, nonfiction, and poetry.

Barry’s work has resulted in his involvement in public policy matters on water. After Hurricane Katrina, the Louisiana congressional delegation asked him to chair a bipartisan working group on flood protection, and from its founding in 2007 until October 2013 he served on the Southeast Louisiana Flood Protection Authority East, which oversees levee districts in metropolitan New Orleans, and on the Louisiana Coastal Protection and Restoration Authority, which is responsible for the state’s hurricane protection. Barry has worked with state, federal, United Nations, and World Health Organization officials on influenza, water-related disasters, and risk communication.