As 2012 draws to a close, I would like to thank you for being a member of the Association of State Wetland Managers. You have many choices about who you choose to make part of your professional network. We are honored that you have chosen us. Every year when I sign the membership renewal letters I am very pleased to see so many familiar names. We hope that you find being a member is useful and interesting and you will renew your membership. Thank you if you have already done so.

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ASWM’s Strategic Plan Open for Comment

Your opportunity to comment on the ASWM Strategic Plan for 2013-2017

We are currently in the process of developing a new 5-year strategic plan and encourage your input. The draft was developed by updating our previous plan, with input from the Board, and will be finalized at our annual meeting in March. Please provide any comments or suggestions to Peg Bostwick at peg.bostwick@aswm.org by January 11. Thank you!

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Implications to Floodplains and Wetland Managers of Arkansas Game and Fish Commission v. United States by Jon Kusler, Esq.

On December 4, 2012 the U.S. Supreme Court issued a unanimous decision with impact on how government agencies at all levels of government will need to address flooding. See Arkansas Game & Fish Commission v. United States, U.S., No. 11-597, reversed and remanded 12/4/12.

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This issue of Wetland News includes our new 5-year strategic plan and I encourage you to read it and let us know if you have any suggestions or ideas. We’ve revised it based on our past 5-year strategic plan and received comments from the ASWM board. Now we are sharing it with you. If you have suggestions or comments, please forward them to Peg Bostwick at peg.bostwick@aswm.org by January 11. We will adopt the plan formally at our annual meeting during the State/Federal/Tribal Coordination Workshop in March.

Many have pointed out that the holidays coincide with the shortest days of the year. This week the hours of daylight seem sparse and the hours of darkness much too long. But next week the days will begin to grow longer and, bit by bit, bring warmth and light and more light and then growing things and spring. The cycle of rebirth starts again. The sheer magnitude of it is staggering. A forest that looks dead and frozen will be transformed. The natural world holds wonders and miracles we barely understand. We have so many lessons left to learn.

My Very Best Wishes for this Holiday Season and the Seasons Beyond!

Jeanne Christie
Executive Director

Next Steps for Clean Water Act Guidance/Rulemaking

This past week Dave Evans Director of the USEPA Wetlands Division talked about next steps for Clean Water Act jurisdiction in a meeting with the National Council of State Legislators. He indicated that USEPA is currently deciding what the order will be for next steps to clarify Clean Water Act jurisdiction. The agency could issue the guidance that has received extensive public comment and then issue a proposed rule. Or it could proceed directly to issuing a proposed rule and possibly issue the guidance at a later date. It could elect to do neither, however, USEPA Office of Water has indicated that taking action to clarify CWA jurisdiction is a high priority. USEPA has also completed a draft study of the science of water connectivity. The document provides information about scientific studies that quantify the importance of wetlands and other waters and their relationships or ‘connectivity’ to larger, more navigable rivers. USEPA has announced it plans to seek Science Advisory Board (SAB) review of the document. The document will not be available to the public until after it has completed SAB review.

ASFPM Releases Hurricane Sandy Recovery Actions

The Association of State Floodplain Managers (ASFPM) released a paper outlining 23 suggested actions that communities, property owners, states, and the federal policy and funding decision-makers can take to support a more resilient recovery and rebuilding following Hurricane Sandy. These actions would lead to less damage and suffering in future events, resulting in more resilient communities and reduced federal taxpayer costs. We must rebuild in a way that will reduce vulnerability to flooding, hurricanes, and other large storms in the future in order to avoid the human suffering and economic disruption that follows. We know that large events like Hurricane Sandy and Irene WILL happen again.
In the devastating aftermath of a significant event like Sandy, there also exists a window of opportunity for communities and property owners to make wise redevelopment choices that will help support the economic and social vitality for generations to come. While such choices can be politically unpopular in the short term when the focus is to get back to normal, choosing a better path now can lead to reduced misery, suffering, and hardship for families and businesses alike. It is much harder during a “sunny day,” or after the event has been forgotten, to make needed changes than it is right now when people are faced with the consequences of the storm and more receptive to significant, although sometimes disruptive actions that can result in effective mitigation. This includes recommendations for protecting and restoring natural floodplains and coastal systems. ASFPM recommendations can be found at: http://www.floods.org/ace-files/documentlibrary/Hot_Topics/HurricaneSandyRecovery_ASFPM_Actions_12-13-12.pdf

Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads

The EPA has revised its Phase I stormwater regulations to clarify that a National Pollutant Discharge Elimination System (NPDES) permit is not required for stormwater discharges from logging roads. In Northwest Environmental Defense Center v. Brown (NEDC), 640 F.3d 1063 (9th Cir. 2011), a citizen suit was filed alleging violations of the Clean Water Act for discharging stormwater from ditches alongside two logging roads in state forests without a permit. The court held that because the stormwater runoff from the two roads in question is collected by and then discharged from a system of ditches, culverts, and channels, it is a point source discharge of industrial stormwater for which an NPDES permit is required.

The EPA did not intend for logging roads to be regulated as industrial facilities. However, in light of NEDC, the EPA has revised 40 CFR 122.26(b)(14) to clarify the Agency’s intent. The EPA believes that stormwater discharges from forest roads, including logging roads, should be evaluated under section 402(p)(6) of the Clean Water Act which allows for a broad range of flexible approaches better suited to address the complexity of forest road ownership, management, and use. The Federal Register Notice and supporting documentation can be found here.

The rule was signed on November 30, just days before the Supreme Court was scheduled to hear oral arguments for the case. EPA’s final rule now makes most of the arguments moot. See EPA Preempts Forest Roads Supreme Court Case with Final Rule.

Reminder: Save the Date for the State/Federal/Tribal Coordination Workshop, March 19-21, 2013
Planning is underway for the Association of State Wetland Managers’ State/Federal/Tribal Coordination Meeting: Conserving Wetlands and Waterways for Future Generations. It is scheduled March 19-21 at the National Conservation Training Center near Shepherdstown, West Virginia.

The purpose of this annual workshop is to support state and tribal wetland program managers, federal agencies and other wetland professionals as they respond to challenges in the coming year. For more information about the workshop including registration and hotel reservation information visit: http://aswm.org/wetland-programs/-states-and-tribes-login-req/3099-state-2013 The agenda is not posted yet. We are planning to add it to the website in early January.
Mission:
The ASWM mission is to promote the protection and restoration of wetlands and related aquatic resources, to apply sound science to wetland management, and to provide training, education and capacity building for our members and the public.

Long Range Vision – Wetland Management in 2022:

While ASWM does not propose specific actions beyond the 2017 horizon, near term actions will be undertaken with awareness of longer term visions for wetland protection and management. A decade from now, in 2022, the nation will celebrate the 50th anniversary of the federal Clean Water Act. Given continued advancement of wetland science; improvement of wetland tools and techniques; increased cooperation among water agencies, organizations and disciplines; and ongoing education of the public regarding the economic and ecological values of wetlands, we foresee:

• A nationwide reduction in the rate of loss of wetland acreage and functions.

• Increased ability to evaluate and protect the ecological services provided by wetlands.

• A regulatory program that offers great clarity, consistency, and interagency coordination,

• Concrete progress in adapting the management of wetlands to climate changes such as increased temperature, changing hydrology, and sea level rise.

• Increased state and tribal implementation of wetland programs, and increased public awareness and participation in wetland protection.

Strategic Plan Goals for 2013 – 2017:

The following goals are supported by the specific actions listed in this plan.

A. To be a recognized leader in advocating for science-based wetlands conservation, protection and management. Ensure that state and tribal programs are fully integrated into national wetland policy.

B. To build the capacity of wetland managers and public officials at all levels of government to participate in wetland policy development and to build strong, science-based wetlands programs.

C. To educate wetland managers, public officials, and others with regard to current wetland science and the use of new technologies and techniques for wetland planning, assessment, restoration and enhancement, mitigation, regulation and management.

D. To integrate wetlands into broader water programs including water quality protection, flood protection, wildlife management, watershed management, climate change adaptation, and ecosystem-based planning.

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E. To sustain an active and growing membership.

F. To be fiscally competent and administratively responsible.

Goal A: To be a recognized leader in advocating for science-based wetlands conservation, protection and management. Ensure that state and tribal programs are fully integrated into national wetland policy.

Activities to achieve Goal A:

• Identify priority needs for wetland research and applied science.

• Conduct science and management studies and publish results electronically. Such studies will continue to address a broad range of timely subjects such as wetlands and natural hazards (e.g. flooding), wetland restoration, stream restoration, and wetlands and climate change.

• Publish reports on new wetland management methods and technology and provide review drafts and final documents on the web.

• Increase the reach of Wetland Breaking News.

• Make wetland science information available electronically and organize it by management or policy issue.

• Encourage the exchange of information among wetland scientists, managers, and policy makers through the formation of ad hoc committees or workgroups to investigate priority issues and to report out on current research and development.

• Conduct open forums, workshops, webinars, conference calls, discussion boards and symposia to provide opportunities for wetland scientists, managers, and other resource professionals to share information and integrate sound science into management and regulatory programs.

• Coordinate policy discussions with other state and professional associations, including Association of Clean Water Administrators (ACWA), Environmental Council of the States (ECOS), Association of State Floodplain Managers (ASFPM), Association of Fish and Wildlife Agencies (AFWA), and others.

Goal B: To build the capacity of wetland managers and public officials at all levels of government to participate in wetland policy development and to build strong, science-based wetland programs.

Activities to achieve Goal B:

• Provide direct technical assistance to states, tribes and others requesting our assistance.

• Analyze the implications of proposed policy changes on wetland resources from an ecological perspective and provide a summary of findings in plain language to help assist and inform decision-makers. Likewise analyze the implications of proposed policy changes from a legal perspective and provide plain language analyses to help assist and inform scientists and resource managers.

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• Distribute information to wetland managers and others.

• Identify wetland program and policy development issues that have strategic importance for the Association. Issues may be identified by the Executive Director, the Board, or individual members; the Board and the Executive Director will define priorities for the Association and agree on appropriate actions. Members representing a range of geographic and programmatic interests will be involved in follow up actions.

• Respond appropriately, effectively and promptly to hot-button issues (such as proposed federal wetland program changes or legal decisions) as they arise. The Executive Director will communicate with the Board as appropriate on significant issues to reach a rapid consensus on a recommended response.

• Actively pursue partnerships with federal agencies, tribes, states, nonprofit organizations, the regulated community and other organizations and interest groups.

• Prepare analyses of important legal, science, and policy issues in partnership with other organizations, e.g., state nonprofit organizations, academic institutions, scientific organizations, law schools, etc.

• Host electronic media for the National Floodplain Function Alliance and other organizations dedicated to wetland protection.

• Make mapping tools readily available to states, tribes, and others.
  
  o Support the work of the National Wetland Inventory in order to maintain the primary source of geographic information for the states and tribes.

  o Host “Wetlands One-Stop” through the ASWM webpages.

• Provide support for state/tribal review of reissuance of COE Nationwide permits, and similar recurring issues.

• Hold online discussions, conference calls, webinars, training seminars, workshops, and symposia pertaining to a broad range of topics associated with wetland protection and management.

• As approved by the Board, provide formal comments to the public record on proposed rules, guidance, and other policies and programs and participate in the preparation of amicus briefs.

Goal C: To educate wetland managers, public officials, and others with regard to current wetland science and the use of new technologies and techniques for wetland planning, assessment, restoration and enhancement, mitigation, regulation, and management.

Activities to achieve Goal C:

• Increase the availability of wetland information to members and others, including providing forums and opportunities for interested parties to share information and discuss solutions to current issues.

• Identify key partners, describe the purpose(s) of partnering with them and formalize relationships with them.

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• Respond in a concrete and appropriate manner – e.g. through development of fact sheets or issue papers, formation of workgroups, or development of ASWM recommendations – to new or ongoing wetland concerns. These include but are not limited to:

  o Section 404 Assumption
  o State Programmatic General Permits
  o Section 401 Certification
  o Renewal of Corps Nationwide Permits
  o Wetland mapping, including the National Wetland Inventory
  o Stream and wetland restoration, enhancement, preservation and mitigation
  o Significant legal decisions related to the scope of Clean Water Act jurisdiction or other topics impacting state and tribal wetland regulation
  o Wetland and water quality standards
  o Wetlands and climate change, including sea level rise and other climate change adaptation measures
  o Wetland ecological services including economic evaluation
  o New wetland issues as they arise.

• Publish *Wetland Breaking News* on a monthly basis.

• Develop an on-line bulletin board that will allow members to address questions to the wetland community at large, and that will support discussions among wetland managers.

• Develop a series of web-based information pages, fact sheets and Qs and As on identified strategic and hot button issues.

• Organize monthly webinars on technical wetland issues to provide training and continuing education for members.

• Conduct an annual tribal-state-federal meeting.

• Conduct an annual membership meeting.

• Hold online discussions, open webinars, and training seminars pertaining to a broad range of wetland topics.

**Goal D: To integrate wetlands into broader water programs including water quality protection, flood protection, watershed management, climate change adaptation and ecosystem-based planning.**

**Activities to Achieve Goal D**

• Identify opportunities to integrate wetlands with other water quality, water quantity, floodplain management, and biodiversity-focused programs.

• Provide for ongoing consideration of climate change adaptation and mitigation.

• Identify links between stream and wetland management – in particular in state dredge and fill programs – and support improved stream protection and restoration/mitigation in this context.

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• Participate in forums hosted by other water programs and organizations.

• Identify specific program and science areas where there are opportunities to integrate wetlands into related and/or larger programs, and disseminate that information.

• Maintain existing partnerships and establish new partnerships with organizations working on related but not wetland-specific activities.

• Identify opportunities to change and revise public policy and programs to better integrate wetlands with other water programs.

• Hold meetings, webinars, conference calls, etc. to explore, share and better understand wetland issues and challenges. Provide wetlands program information at cross-discipline meetings and conferences.

• Develop and distribute information on the web and through other avenues to provide ideas and direction on how to include wetlands in related and broader programs.

• Develop joint policy statements or science white papers with related organizations and programs on wetland/water program issues and opportunities.

**Goal E: To sustain an active and growing membership.**

**Activities to achieve Goal E:**

• Have a systematic plan to recruit and retain members.

• Provide opportunities and services meaningful to our members such that they value their membership, including training through a professional webinar series.

• Provide special services for members, including provision of Insiders Edition via e-mail, and member-only access to some web page material.

• Publish a bi-monthly newsletter for members.

• Have a process for encouraging, recruiting, preparing, mentoring and honoring members actively participating in the Association.

• Have an annual membership drive and analyze the results. Retain 90% of current members.

• Have state agency membership in 50 states.

• Provide our members with an annual report.

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Activities for achieving Goal F:

- Maintain a written fiscal policy and financial guidelines and procedures for staff and officers. Accurately track all income and expenses.

- Ensure that the Secretary/Treasurer is actively involved in oversight of finances and provides the Board with quarterly reports on aggregated income and expenses. Obtain Board approval of the annual budget.

- Continue an active fundraising program that seeks to draw income from diversified sources - foundations, government, individual contributions, memberships, businesses, workshops and other earned income.

- Develop and utilize an attractive, professional funding request package to be used in soliciting support for the association.

- Review the current annual work plan and approve the upcoming work plan at each March Board meeting.

- Actively utilize the ASWM website and/or other electronic media to request support for Association activities. (note: for example this could include selling and placing of ‘sponsor’ spots on web products).

Please provide any comments or suggestions to Peg Bostwick at peg.bostwick@aswm.org by January 11. Thank you!
The Court held that government flooding of lands need not be permanent to be a Fifth Amendment “taking” of property without payment of just compensation. Governments have long been held liable for long duration and/or repeated flooding under certain circumstances. So, the decision is to a considerable extent consistent with existing law. But the ruling of the case is not necessarily confined to long duration or repeated flooding.

The Court makes it clear that permanent flooding is not needed for a ‘taking.” This was in some doubt prior to the decision. The case also broadened the factors government agencies and courts will need to look at in deciding whether flooding results in a taking in a specific instance. See the discussion below.

It is likely that decision will result in many new flood-related cases despite the efforts of the Court to limit the scope and impact of the decision.

Such an increase in litigation is likely because much of the U.S. is subject to “temporary” flooding to one extent or another. Temporary flooding ranges from the shallow inundation of parking lots and basements by seasonal rains to deep high velocity inundation by rivers, coastal storm surges and tides.

Governments and private landowners often increase the velocity and depth of flood waters on adjacent lands when they install on their own lands drainage ditches and culverts, levees or dams, roads and bridges, houses and other structures. Virtually all grading or fills may temporarily increase flood heights and velocities on other lands, opening the door to many new suits.

The note which follows describes the history of the case, the case holding, and what it may mean to floodplain and wetland managers. The note also briefly discusses existing, prior case law with regard to temporary flooding as a taking and temporary floodplain regulations as a taking.

**Facts of the Case**

This case involves a claim by the Arkansas Game and Fish Commission that flood releases from an U.S. Army Corps of Engineers dam destroyed trees in a 23,000-acre state wildlife preserve 115 miles downstream from a Corps dam. In July 2009 the Court of Federal Claims had found the United States liable for over $5.7 million in compensation for its taking of property by flooding. See Arkansas Game and Fish Commission v. United States, 87 Fed. Cl. 594 (2009). The Corps of Engineers had repeatedly released water from its dam causing damage to forest and wildlife resources despite complaints from the Arkansas Fish and Game Commission.

The Court’s 8-0 decision reverses a ruling in March 2011 by the U.S. Court of Appeals for the Federal Circuit that damages from...
government-caused flooding needed to be permanent before it could constitute a taking of property requiring compensation under the Fifth Amendment (Arkansas Game and Fish Commission v. United States, 637 F.3d 1366 (Fed. Cir. 2011); 62 DER A-29, 3/31/11). The Court of Appeals had held that “government-induced flooding can give rise to a taking claim only if the flooding is ‘permanent or inevitably recurring.'”

The case is of considerable importance to government wetland and floodplain managers who temporarily flood lands by the design, construction and operation of dams and other flood control structures, management of public lands, construction of roads and culverts, construction and operation of stormwater facilities, issuance of permits which may result in temporary flooding, grading and filling, or carrying out other activities which temporarily flood and damage other lands.

**What Are the Implications of the Decision to Wetland and Floodplain Managers?**

Over the past ninety years, courts have quite often held that temporary flooding is a compensable taking in some specific circumstances. See, for example, Pumpelly v. Green Bay Co., 13 Wall. 166 (S.Ct. 1872). Arkansas Fish and Game Commission clarifies that temporary flooding is compensable and sets forth in some detail the factors relevant to a determination of taking (discussed below). However, the impact of the case will depend, in large measure, upon what the lower court will do with this case on remand and what changes government agencies may make in policies in response to the case. There will likely be many new cases claiming a temporary flooding and temporary taking at federal, state, or local levels despite the efforts of the Supreme Court to narrow the scope of the decision.

Landowners subject to even limited amounts of temporary flooding caused or exacerbated by governments may now claim (whether successful or not) a temporary taking including situations in which flooding would formerly be a common law “tort” but not an unconstitutional taking. This is significant because governments are to a considerable extent protected from tort claims by sovereign immunity but they are not protected from “takings” claims. And, the Supreme Court has made it absolutely clear that temporary flooding may be a taking.

Litigation based upon this decision will likely be time consuming, expensive, and technical. And courts are likely to be ill-equipped to deal with complex technical issues raised by the decision. None the less they will need to do so.

The Court’s decision will influence how government agencies and courts analyze a takings claim. The Court found “no solid grounding in precedent for setting flooding apart from other government intrusions on property.” The Court concluded that “No magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. This Court has drawn some bright lines, but in the main, takings claims turn on situation-specific factual inquiries. See Penn Central Transp. Co. v. New York City, 438 U. S. 104, 124.”

The case will likely result in greater care in the design, construction and operation of dikes, dams, levees and other flood control measures by the Corps of Engineers, Bureau of Recreation, state water resource agencies, and local government water management agencies.
Floodplain agencies will need to defend a broader range of floodplain management decisions which temporarily increase flooding on private or other government lands.

Floodplain and wetland regulatory agencies will also need to exercise greater care in issuance of permits that result in or increase temporary flooding. The case will likely result in additional suits where government agencies issue permits or approve subdivisions which result in temporary flooding. This will strengthen arguments that governmental units should adopt and enforce “no adverse impact” regulations.

The case may also result in arguments that temporary floodplain regulations are a taking despite many cases upholding such regulations. See the discussion below. Arguments will undoubtedly be made that if temporary flooding is a taking, then temporary floodplain regulation should also be a taking although floodplain and floodplain regulations are quite different in a number of important respects. For example, flooding involves a physical invasion of lands, regulations do not.

What Factors Will a Court Need to Consider in Deciding Whether Temporary Flooding Is a Taking?
The Court in Arkansas remanded the case to the Federal Circuit to carry out more detailed fact finding with regard to a number of issues including “causation, foreseeability, substantiability, and the amount of damages.” The Court also described or referenced a broader set of factors which may be relevant to determination of “taking” in a specific instance. These factors include the following. I have stated some of the factors or issues as questions although they are not presented as questions in the decision. Direct quotations of the Court are in quotation marks.

Character of the land. A court will need to consider the “character of the land” in deciding whether a temporary taking has occurred. It is not altogether clear what the Court means by this but relevant questions may include: What, if any, flooding is naturally occurring? If flooding is naturally occurring, what are its characteristics (e.g., depth, velocity, frequency, etc.)? What use was being made of the land? What impact did flooding have on the uses?

Degree of intention and foreseeability. To what degree is the flooding the “intended or foreseeable result of authorized government action”? Courts have not typically addressed intention in flood/taking cases although they have addressed these issues in flood-related negligence and trespass cases. With the widespread preparation of government flood maps, almost all major flooding is now “foreseeable” to one extent or another. It will be interesting to see what courts do with intent in future temporary flood taking cases.

Continuation and/or repetition of flooding over time. The Court in Arkansas observed, quoting from another case, that “continuance of them (flooding acts) in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence.”

Amount of damage. As one might expect, the “amount of damages” caused by the flooding is an important factor in determining whether a taking has occurred and, if so, how much has been taken.

Time. The Court mentioned “time” as a relevant factor. The duration of flooding is seemingly a straightforward issue. However, it may be anything but straightforward in situations where flooding repeatedly occurs. The date from which repeated flooding is alleged to constitute a temporary taking is relevant to not only a determination whether a taking has occurred but when a statute of limitation or repose begins to run.

Permanence. Was the flooding and damage “permanent”? Flooding is, in general, not permanent although some types of flooding such as coastal sea level rise from climate change may be.

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Inevitable recurrence. Was the flooding “inevitably recurring?” Most flooding will reoccur sooner or later whether over a 10 year, 50 year, 100 year, 500 year, or a longer time period. What time frame is to be used in deciding whether flooding may be an “inevitable recurrence” and a taking?

Severity of interference. What the Court means by severity of “interference” is not altogether clear. It, arguably, refers to the impact of flooding on the uses of land and water and may include duration, permanence, recurrence and other factors.

Substantiality. How “substantial” was the flooding and the flood damages? Relevant questions may include: How much flooding occurred and how much damage resulted from the flooding? In addition, what is the nature of this damage? Loss of life? Injuries? Monetary losses?

Causation. What was the cause or causes of the flooding and the damage resulting from the flooding? Was the flooding solely due to the actions of the government? Were there multiple causes for the flooding (common)? Were there intervening causes? If there are multiple causes for the flooding and flood damages, how are damages to be apportioned?

Reasonable investment-backed expectations. What were the landowner’s “reasonable, investment-backed expectations?” To what extent were they impacted by the flooding? How does knowledge of flooding prior to purchase of land affect legally recognized expectations?

State water rights law. The Court noted but did not discuss the possible relevance of Arkansas water law to a taking. State water law issues relevant to a taking may include appropriation rights, public trust, navigable servitude, riparian law, and government prescriptive rights.

Courts will undoubtedly need to address other factors as well in determining whether a taking has occurred in a specific circumstance such as

- Did the flooding occur in emergency conditions? Courts have long held that flooding may not be a taking if carried out in an emergency. Was there an emergency? When does flooding rise to the level of an emergency?

- What impact, if any do the Flood Control Act of 1926 and Federal Tort Claims Act have on a determination of “taking” in situations in which these statutes may apply?

- When does statutes limitation or repose begin to run in a temporary flood/taking case?

- When are threats to public health or safety or the prevention of nuisances a defense to a temporary taking claim?

Impact of the Arkansas Decision on Existing Case Law: When Do Activities Causing Temporary Flood Damage Rise to the Level of an Unconstitutional “Taking?”

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As discussed above, many courts have held temporary flooding of various durations to be a taking in specific circumstances. They have typically decided whether particular flooding and flood damages are a “taking” without distinguishing “permanent” versus “temporary” taking in many instances. The Arkansas decision is consistent with these cases although it also clarifies that temporary flooding can be a temporary taking and provides a clarified list of factors relevant to determination of temporary taking. See above. The Arkansas decision gives indirect support to the argument that temporary flooding may be a taking rather than tort although it does not address this important issue.

Some courts have held that where government actions flood and physically damage private lands, the damage may be compensable as a tort (e.g., nuisance, negligence or trespass), although the flooding and damage may not rise to the level of a “taking”. See Nolan v. City of Eagan, 673 N.W.2d 487 Minn., 2003) in which the court quoted from Nelson v. Wilson, 58 N.W.2d 330 (Minn., 1953): “Whether occasional flooding is of such frequency, regularity, and permanency to constitute a taking and not merely a temporary invasion for which the landowner should be left only to a possible recovery of damages is a question of degree, and each case must stand on its own peculiar facts.” See also South Fl. W. Mgmt. D. v. Basore, 723 So.2d 287 (Fla., 1998) (Court held that flooding of a lettuce crop was not a temporary taking.); Dutton v. City of Crest Hill, 547 F. Supp. 38 (D., Ill. 1982). (Repeated flooding of house by sewage may not rise to the level of a taking by city although this may be a tort.) However, see Associates, MEA v. Cty, Edgewater, 706 So.2d 50 (Fla., 1998). (Temporary flooding of house by improperly functioning stormwater system was a temporary taking.)

Courts have held in a number of Section 1983 cases that a flood-related tort does not necessarily rise to the level of an unconstitutional Section 1983 taking. See, for example, York v. City of Cedartown, 648 F.2d 231 (5th Cir., 1981); Dutton v. City of Crest Hill, 547 F. Supp. 38 (D., Ill. 1982). This defense may apply not only to “taking” claims but to due process and equal protection claims. See, e.g., Johnson v. Barker, 799 F.2d 1396 (9th Cir., 1986) (Court rejected defamation, false arrest, malicious prosecution and abuse of process and negligence claims by hikers who violated restricted access zone around Mt. St. Helens as not rising to the level of a Constitutional injury. The court reasoned: “It is well settled that section 1983 `imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.”)

It is often advantageous to a governmental unit to be vulnerable to suit only in tort because sovereign immunity defenses and tort claim act restrictions such as monetary caps to awards then apply.

A taking (temporary or permanent) is quite clear where government causes outright destruction of private land or permanent and continuous damage from erosion, mud slide, or landslide. See, e.g., United States v. Cress, 243 U.S. 316 (S.Ct., 1917) (Court held that raising water levels of Cumberland River by dams so that lands not normally flooded were subjected permanently to frequent overflows, impairing them to the extent of one-half their value was a taking).

But, when there is no outright destruction and a natural hazard event merely increases in frequency or severity of damage the issue of "taking" is not so clear. In deciding whether taking has occurred in such contexts, courts have, to a considerable extent, relied on common law nuisance concepts and have considered a number of factors including the frequency of the flooding and damage and the seriousness of the injury to particular activities. See, for example, Fromme v. United States, 412 F.2d 1192 (Ct. Cl., 1969) (Court affirmed a referee’s report that flooding of agricultural land used for grazing of cattle once every fifteen years was not sufficient to constitute a taking for public use.); Sanguinetti v. United States, 264 U.S. 146 (S.Ct., 1924) (Intermittent flooding of agricultural land by navigational canal not a taking.); Danforth v. United States, 308 U.S. 271
In light of *Arkansas Fish and Game v. U.S.* landowners damaged by flooding will no longer need to allege a permanent invasion. Nevertheless suits will need to address a broad range of other complicated legal and factual issues. Such complexity is illustrated by a North Carolina case, *North Carolina Supreme Court in Lea Co., v. North Carolina Bd. of Transportation*, 304 S.E.2d 164 (N.C., 1983) in which the court wrestled with issues of flood frequency, the permanency of harm, and impact on the landowner. The court observed that the plaintiff needed to show a "permanent invasion" of rights for a claim to rise to a taking (something a landowner will no longer need to do). The plaintiff in that case argued that flooding with a statistical return frequency of "from once in every twenty-six to once in every one hundred years" was enough to constitute a taking. The court cited a variety of cases that "intermittent, but inevitably recurring, overflows" may constitute a taking. The court observed that "(o)rdinarily, a mechanical approach should not be taken with regard to frequency of flooding required to constitute a taking...." and further observed that:

The frequency of flooding which will constitute a taking generally will vary with the use to which the property is put. A frequency of flooding sufficient to establish a taking of high density urban residential property, for example, may well fail to be sufficient to establish a taking of low lying grazing lands or other agricultural lands. The issue will hinge to a great extend upon whether the value of the property has been substantially impaired by the additional flooding caused by the State's structures.

The court in this case held that the flooding which caused substantial injury to plaintiff's high density apartments in an urban area was a taking. The measure of damages was the “difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking...less any special or general benefits.”

This decision is interesting from another perspective because the court, as a matter of law, limited consideration of damages to the 100-year flood:

Although floods of a magnitude of greater than a 100-year flood are statistically foreseeable, we hold as a matter of law that evidence concerning damage resulting from increased flooding above the level of increased flooding the State's structures would cause during a 100-year flood is inherently too speculative and remote in its nature to be relied upon by our courts.

This is, of course, only one case. How other courts will treat frequency of flooding in determining whether a taking has occurred and the measure of damages remains to be seen. There is also the issue how damages are to be calculated. Is flooding that occurs statistically at least once in each hundred year period sufficiently “permanent flooding” with full compensation due or is such flooding only temporary flooding with limited damages awarded?

**Floodplain Moratoria on Rebuilding After a Disaster and Other Temporary Regulation of Floodplains**

Many communities have adopted temporary floodplain regulations after a flood disaster. These regulations typically prohibit reconstruction of flood damaged properties within a specified period of time such as one or two years. Courts have broadly endorsed such regulations as discussed below and this support should not be disturbed by *Arkansas Game and Fish Commission v. United States*.

Temporary regulatory taking cases have focused upon the duration and restrictiveness of the regulations. The length of time a landowner must wait from the time he or she applies for a permit, zoning, amendment, etc. *continued on next page*
to the time the permit is ultimately denied or accepted is relevant to taking including temporary taking. It is not, however, an inflexible "stand alone" test for taking. Courts have sustained moratoria on development or redevelopment in hazard areas in a variety of contexts and for varying durations. See, for example, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (S.Ct., 2002) in which Supreme Court upheld Tahoe Regional Planning Agency temporary ordinances which had applied for 32 months to “high hazard” (steep slope) zones near Lake Tahoe against a claim that the ordinances were a taking of private property. The Court concluded that “the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim….” But the Court refused to recognize any hard and fast rule for determining the duration which would be valid and which would not.

Courts want to know not only the duration of a delay but the reason for the delay (e.g., whether caused by the landowner) and the uses allowable during the delay. For example, an Ohio court in C & D Partnership v. City of Gahanna, 474 N.E.2d 303 (Ohio, 1984) held that a delay in approving a subdivision plat due to severe flooding was not the basis for a valid Constitutional challenge to regulations.

Normal delays in processing permits do not constitute a temporary taking. Chief Justice Rehnquist in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (S.Ct., 1987) observed, in discussing "temporary taking" that “quite different questions… arise in the case of normal delays in obtaining building permits, changing in zoning ordinances, variances, and the like…. See also Valley View Industrial Park v. City of Redmond, 733 P.2d 182 (Wash., 1987) (Delay which occurred in processing of building permit applications did not justify damages for interim taking where delay did not extend beyond reasonable period for issuance of permits. Processing of permits for a project of this nature required a minimum of 4-6 months.)

Courts have also upheld building moratoria for particular, fixed periods of time. See, for example, Carl Bolander & Sons v. City of Minneapolis, 378 N.W.2d 826 (Minn., 1985) (Minnesota court upheld 60 day moratorium on building permits while the city clarified plans on use of area as a public park.); Bradfordville Phipps Limited Partnership v. Leon County, 804 So. 2d 464 (Fla., 2001) (Florida court of appeal held that temporary moratorium on development in an area until a stormwater plan could be implemented was not a taking.); Wild Rice River Estates v. City of Fargo, 705 N.W.2d 850 (N.D., 2005), cert. denied, 547 U.S. 1130 (S.Ct. 2006). (Court held that 21 month moratorium on building permits for flood areas were not a temporary taking.) The South Carolina Supreme Court in Sea Cabins v. City of Myrtle Beach, 548 S.E.2d 595 (S.C., 2001) held that city denial of a permit to rebuild a pier for four years after Hurricane Hugo was not a temporary taking in light of the economic uses for the entire property.

Conclusion
The impact of the Arkansas case upon floodplain and wetland managers will depend, in large measure, upon what the lower court will do with the case on remand and what changes government agencies make in policies in response to the case. However, as a result of the decision there will likely be many new cases claiming a temporary taking at federal, state, or local levels. And, these cases are likely to be expensive and dominated by expert testimony, technical studies, and hydrologic and hydraulic models. Government floodplain and wetland managers will need to be more careful in undertaking activities which even temporarily increase flooding on private lands including operation of flood control measures and issuance of permits. They will need, in administering their programs, to look at the factors considered by courts in determining whether a taking occurs.

The case should not undermine temporary floodplain moratoria of sort adopted by communities after disasters although there will likely be arguments that if temporary flooding is a taking, temporary regulation should also be a taking. Flooding, whether temporary or permanent, involves a physical intrusion onto private lands; temporary regulations do not.
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