



State of Illinois • Rock Island County
BIG ISLAND RIVER CONSERVANCY DISTRICT
2528 58th Ave. W. • Milan, IL 61264

August 14, 2015

Mississippi River Commission
P.O. Box 80
Vicksburg, MS 39181-0080

Dear President and Commissioners:

Our District continues to appreciate this commission more and more and its ability to draw good folks together to share their experiences, knowledge, and goodwill. It is here we come without fear. It is here we come with hope. It was with the help of this commission and those you attract to your meetings, including Mike Klingner, President of the Upper Mississippi Illinois Missouri Rivers Association (UMIMRA), Rob Rash, Executive Vice President of the Mississippi Valley Flood Control Association and Mike Reed, Superintendent of Sny Island Levee & Drainage District, that we were able to bring vital truths to a court of law. These truths ultimately protected our Milan/Big Island Local Flood Protection Project from a wrongful condemnation and kept our vital covenant with the USACE intact. Through this nearly three year crisis we felt the loyalty and devotion of this commission to our mutual goals.

The two topics we would like to cover are as follows:

1. Lawsuits and Growing Concerns over "Waters of the United States Act," Effective 28 Aug 2015
2. Historic Litigation Case #13TX109- A court case determination impacting all levee sponsors and their Local Cooperation Agreements with the USACE.

Waters of the United States Act (WOTUS)

As you may be aware, within two (2) days of the May 2015 publication of the new, "Waters of the United States Act (WOTUS)," over half the country, 27 states, including Arkansas, Mississippi, and Missouri, have taken action against this rule. The many lawsuits claim the WOTUS Rule's:

- "Vagueness and over-breadth" violates the U.S. Constitution.
- "Opaque and unwieldy" identification of jurisdictional waters is vague and uncertain.
- Makes it difficult and confusing where and when the most basic activities undertaken by levee sponsors, flood control boards, farmers, municipalities and/or residents regardless of where they may live may be subject to drastic criminal and civil penalties under the Clean Water Act.
- Needs to further articulate such terms such as "neighboring", "riparian area" and "floodplain."
- Needs to remove such words as "ditches," "subsurface connections," and "groundwater," and "perennial flow waters," which are generating confusion.

Though the intention of WOTUS is to further protect the nations' streams, wetlands, and other resources, there are obvious concerns and claims in court regarding this Act which may impact and/or may overburden the responsibilities of Levee Sponsors.

Big Island, as one of 27 River Conservancy Districts in the State of Illinois and as a levee sponsor, would appreciate hearing what concerns the Mississippi River Commission may have or may have heard from other levee sponsors on this new WOTUS rule and what changes to improve the Act may be in progress.

Illinois Court Rules Again in Favor of Levee Sponsors

Recap

On October 4, 2013, the City of Rock Island (City) filed Illinois case 13TX109, to condemn all rights to five of Big Island River Conservancy District's (BIRCD) levee easements, totaling over 5.5 acres of critical infrastructure of the Milan/Big Island Local Flood Protection Project (MBILFPP). The City claimed the condemnation would automatically assign Milan/Big Island's Local Cooperation Agreement (LCA) with the USACE to the City. This in turn, the City claimed, would allow the City to "*step into the shoes*" of Big Island, as the authorized levee sponsor. That the City could then proceed to *sever and realign MBILFPP without the approval of its authorized levee sponsors*, Milan and Big Island.

Without question, this case involved defending the authority, status, and standing of all levee sponsors on federally built flood protection projects, including the review process for alterations. This court case's final determination impacts all local levee sponsors, the Corps of Engineers' relationship with their sponsor, and the way we jointly do business.

On August 11, 2014, Judge Lori Lefstein, State of Illinois, Rock Island County, 14th Judicial Circuit Court, dismissed with prejudice the City's motion which would have condemned five of Big Island's levee easements. The court's ruling affirmed Illinois law, federal regulation 33 U.S.C. Section 408, and the authority of local sponsors over any alteration to their flood protection projects. **However, the City continued to challenge these issues.**

Dismissal & Denial Followed

- **September 9, 2014**, the City appealed to the Appellate Court for the Third District of Illinois.
- **December 15, 2014**, the Third District Appellate Court **dismissed** the City's appeal.
- **February 27, 2015**, the City requested Judge Lefstein to reconsider her August 11, 2014, Opinion and Judgment and find that the City had express authority under the Illinois Local Improvement Act to condemn the easements of BIRCD.
- **On March 30, 2015**, Judge Lefstein **denied** both the City's request for an oral hearing on its motion and the City's motion for reconsideration.

Court Sanctions the City of Rock Island

On November 24, 2014, a hearing was held by Judge Lefstein, 14th Judicial Circuit Court, Rock Island County, Illinois, on the, " Motion For Attorneys ' Fees & Costs." This was a petition granted by the Court to the intervenors- BIRCD, the Village of Milan, Blackhawk Township & Blackhawk Township Road District, and the City of Rock Island residents .

This summer on June 1, 2015, the Court sanctioned the City under Illinois Rule 137. Sanctions are reserved only for the "most egregious cases" of misconduct. Based on discussion, case law and Supreme Court Rule 137, the Court found the City in violation of Rule 137 on such grounds including:

- The City and their attorneys' written arguments were without merit, "baseless" and "objectively unreasonable." (pg 2, 10-11 of Opinion June 1, 2015);
- "The City has persisted in an unreasonably analysis of the applicable statutes and case law." (pg 6 of Opinion June 1, 2015); and
- "[T]he City ignored what it obviously should have known." (pg 11 of Opinion June 1, 2015)

Federal Supremacy Rule Applied

In "January of 2014, the City filed a brief claiming it was not subject to Section 408 because the City was not a person within the meaning of the act." Contrary to the City's claim, the Court found Federal Law 33 U.S.C. Section 408 supersedes Illinois State law, the Local Improvement Act. Furthermore, the court found the fact that other political subdivisions/entities are subject to these same rules as are businesses and individuals. (pg 8 of Opinion June 1, 2015)

Local Cooperation Agreement Remains Intact

The City stated "the local sponsors' contract with the federal government would be assigned to the City once BIRCD's easements were acquired." The City further claimed it could simply "*step into the shoes*" of BIRCD as the authorized levee sponsor. However, "*[a]s a basic matter of contract law, the assignment of a contract can only occur if a party to the contract voluntarily assigns it to another party.*" Since the local sponsors stated no intention of assigning the contract to the City, and the RIDCOE verified BIRCD & Milan's Local Cooperation Agreement (LCA) was in good standing, the Court honored the Local Sponsors' critical covenant with the USACE and kept their LCA intact. (pg 9 of Opinion June 1, 2015) Relationships matter. They always matter.

Local Sponsors Bring Truths to Court

The intervenors were awarded for intervening and bringing various truths to the courts. These truths included the vital role of Levee Sponsors and their Local Cooperation Agreements with the USACE. Bringing these truths to the court allowed the court "*to timely exercise its gate keeping function*" and to "*prevent an unlawful condemnation.*" BIRCD's early intervention allowed the court to consider the applicable provisions of the Navigable Waters Act (33 U.S. C. sec. 401 et.seq.), the revised Eminent Domain Act of 2007 (735 ILCS 30/1-1et seq.), and the Illinois Municipal Code (65 ILCD 5/1-1-1 et. seq.) ." (pg 3-4 of Opinion and Judgment June 1, 2015)

City Ordered to Pay

On June 1, 2015, "[b]ecause of the City's conduct" and "violations of Rule 137," the City was ordered to pay all the fees and costs requested pursuant to Supreme Court Rule 137 by all the intervenors- BIRCD, Village of Milan, Blackhawk Township and Blackhawk Township Road District, and the City of Rock Island's own residents- in an amount totaling \$173, 459.00 plus interest]. (pg 10-11 of Opinion June 1, 2015)

The City publicly announced they would appeal. However, following this announcement, the City of Rock Island's residents elected two new aldermen to the City's Council. The primary platform for these two new alderman was their campaign promise to end " this wasteful spending of taxpayer dollars" in pursuit of condemning Big Island's levee easements. Post the Court's ruling on June 1, 2015, to sanction the City under Illinois Rule 137, the City had a legal opportunity to file further appeals. However, it was a decision by the City's Council with its two new aldermen that it would be *prudent not to pursue* this path of litigation in condemning BIRCD's levee easements or to continue to pursue its Jumer's Crossing project to sever and realign the MBILFPP without the permission of its authorized Local Sponsors.

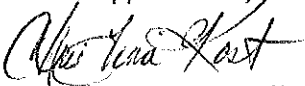
Rather, the newly formed City Council announced the City would seek alternate plans more consistent to coexist with the MBILFPP.

Conclusion

We, the Local Sponsors, and our attorneys HuschBlackwell, remain extremely pleased to receive such a thorough and thoughtful order from the Court that will ultimately benefit all Levee & Drainage Districts and River Conservancy Districts who may face similar challenges to their authority, their flood protection projects and their Local Cooperation Agreements with the USACE. We have received numerous calls from Levee & Drainage Districts from Arkansas, Illinois, Iowa, Missouri, and other states expressing relief with this positive outcome. This case without question underscored the vital role of all Levee Sponsors, the importance of the federal built flood protection projects, and how each of us, whether a levee sponsor or not, must honor these unique and vital covenants between the USACE and their Levee Sponsors and the people's trust upon which these life safety infrastructures were built.

We truly acknowledge this commission for your devotion and dedication to your stakeholders. Our hearts on Big Island are bursting with thanks for each of you, including your Director Mr. T. Stephen Gambrell and dear friend to us all, Mr. George C. Grugett.

Warmest Appreciation,



Christina Kost, Liaison Officer
Big Island River Conservancy District