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Mr. Larry Ellis
City Forester, City of Orange Beach
P.O. Box 458
Orange Beach, AL 36561

RE: Trees over navigable waterways (MASGC 07-007-06)

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Dear Mr. Ellis:

Thank you for bringing your question about damaged trees over a navigable waterway to the Mississippi-Alabama Sea Grant Legal Program. We are always happy to answer questions from people who work in local government. This letter contains the results of my research into your question. Please understand that the Legal Program does not provide legal representation, so this letter does not constitute formal legal advice. It is my interpretation of the relevant legal information.

Facts

These are the facts as I understand them. A navigable creek runs through a subdivision in Orange Beach. The residents of the subdivision are having difficulty boating on the creek because of storm-damaged trees that are leaning over it. These trees, some of which are dead, are located on one undeveloped parcel. You have written the landowner about the problem but have received no response. Orange Beach has an ordinance dealing with hazardous trees affecting roads and utilities, but does not have an ordinance that specifically deals with hazardous trees over waterways.

Question Presented

You have asked who has jurisdiction in this situation, with emphasis on the authority of state and federal agencies.

Short Answer

The City of Orange Beach and the State of Alabama, and possibly the U.S. Army Corps of Engineers, have jurisdiction in this situation. I will describe the relevant authorities below.

City Authority

Sec. 54-1 of the Orange Beach Code of Ordinances incorporates offenses against the state law of Alabama. Any person who commits an offense under state law, within the corporate limits of the City of Orange Beach, is considered to have committed that offense against the City of Orange Beach.

It is an offense under Alabama law to obstruct a navigable waterway.¹ It is therefore an offense under the Orange Beach Code of Ordinances to obstruct a navigable waterway. The City, using its general police power, can require the landowner to remedy the problem.

State Authority

As noted above, obstructing a navigable watercourse is a violation of state law under Ala. Code § 33-7-3. This statute dates to the nineteenth century, when there were far fewer state agencies than today, and accordingly does not specify which agency is obligated to enforce it.

I contacted the state Attorney General's office and was told by one of their legal staff that no state agency has been explicitly charged with enforcement of § 33-7-3. However, she said that the Marine Police Division of the Alabama Department of Conservation and Natural Resources will enforce the statute if there is a safety issue. The Marine Police District IV headquarters are located in Orange Beach at 27557 Larry C. Kelley Lane. Their phone number is (251) 981-2673.

Federal Authority

The U.S. Army Corps of Engineers (Corps) has jurisdiction over obstructions to navigation in or on the navigable waters of the U.S. Before it could exercise jurisdiction in this case, the Corps would need to make a determination of the creek's navigability in accordance with 33 CFR § 329.14. By the Corps' regulations, navigable waters of the U.S. are "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."²

If a waterway is navigable for jurisdictional purposes, the Corps has authority, in coordination with the U.S. Coast Guard, to remove obstructions that present a hazard to navigation.³ While this authority is primarily used to remove wrecked and abandoned vessels, it can also include other obstructions. Corps regulations define an "obstruction" as "anything that restricts, endangers or interferes with navigation," and a "hazard to navigation" as "an obstruction, usually sunken, that presents sufficient

¹ Ala. Code § 33-7-3.

² 33 CFR § 329.4.

³ *Id.* §§ 245.1 – 245.60.

danger to navigation so as to require expeditious, affirmative action such as marking, removal, or redefinition of a designated waterway to provide for navigational safety.”⁴ The factors for determining whether a hazard to navigation exists are listed in 33 CFR § 245.20.

Under the Corps regulations primary responsibility for removal of obstructions lies with the owner.⁵ The District Engineer will attempt to identify the owner and have him or her remove the obstruction.⁶ If the obstruction constitutes a hazard to navigation, the Corps may remove it, depending on the circumstances.⁷ If the Corps removes the obstruction, the owner may be liable for removal costs.⁸ The District Engineer may also go to court to force the owner to remove the obstruction.⁹ Orange Beach is located in the Corps’ Mobile District. The phone number for the District Engineer is (251) 690-2512.

Summary

As you can see, the City has several avenues open to it: it can enforce the state statute itself; it can seek to have the Marine Police enforce the state statute; or it can seek to have the Corps of Engineers enforce the federal regulations. Enforcement by the state or Corps could present difficulties, however. The Marine Police may not enforce the statute if there is no safety issue, and the Corps may determine that the creek is not “navigable” within its jurisdictional definition. Enforcement by the City would not raise these issues.

I hope the information in this letter is helpful to you. If you have any further questions about this or any other subject, please feel free to email or call. Thank you very much for bringing your question to the Mississippi-Alabama Sea Grant Legal Program.

Sincerely,



Josh Clemons
Research Counsel

⁴ *Id.* § 245.5.

⁵ *Id.* § 245.10(b).

⁶ *Id.*

⁷ *Id.* §§ 245.10(c) – (e), 245.50.

⁸ *Id.* § 245.60.

⁹ *Id.* § 245.35.