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Climate Change Lawsuit Heads to Supreme Court

Florida Sues EPA Over New Water Quality Standards

Presidential Oil Spill Commission Makes Case for Reform

Water Log

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Beyond the Horizon: the Gulf Oil Spill Crisis

Analyzing the Economic, Environmental, and Legal Implications of the Oil Spill

February 18, 2011
Mississippi College School of Law
Jackson, MS

American Bar Association's

40th Annual Conference on Environmental Law

March 17-19, 2011
Salt Lake City, Utah

American Bar Association's

Environmental Justice Symposium

April 1, 2011

University of Mississippi
School of Law
Oxford, MS

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Landmark Climate Change Lawsuit Heads to the Supreme Court

Niki L. Pace

This past December, the U.S. Supreme Court agreed to consider the appeal of a landmark climate change nuisance lawsuit. However, it will not be the case brought by Mississippi residents in the aftermath of Hurricane Katrina. In the Mississippi case, *Comer v. Murphy Oil*, the Court denied the Mississippi residents' request for an appeal. Still, the outcome of *Connecticut v. American Electric Power* will significantly impact future climate change nuisance lawsuits brought in the United States and bears watching.

Comer v. Murphy Oil

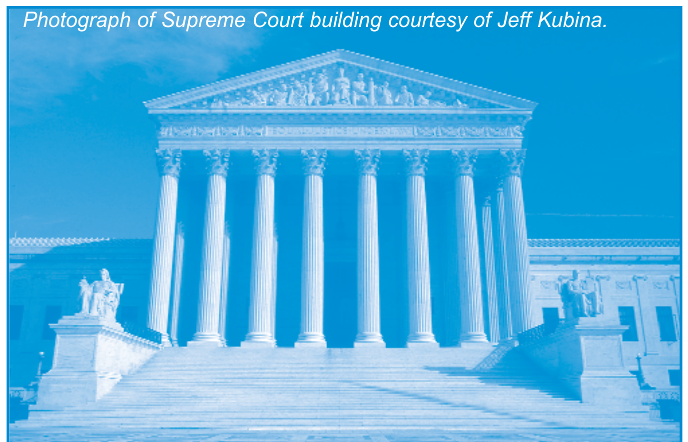
On January 10th, the U.S. Supreme Court denied review of Mississippi residents' climate change lawsuit.[1] In *Comer v. Murphy Oil*, Mississippi residents brought a tort suit against numerous energy companies alleging a causal connection between the energy companies' greenhouse gas emissions and alleged property damage after Hurricane Katrina. The case arrived at the Supreme Court following an unusual procedural ruling. Last May, the Fifth Circuit Court of Appeals, after granting review *en banc* (meaning by the full judicial membership of the Fifth Circuit), found itself without a sufficient number of judges to rehear the case.[2] In a 5-3 decision, the Fifth Circuit reinstated the district court's dismissal of the lawsuit.[3] The Mississippi residents appealed the merits of this procedural ruling to the Supreme Court, not the merits of the underlying factual claims regarding climate change and property damage. With the U.S. Supreme Court's denial, the Mississippi case is effectively dismissed.

Connecticut v. American Electric Power

While the Supreme Court declined to hear *Comer*, it did grant review of a companion climate change tort lawsuit on December 6, 2010.[4] *Connecticut v. American Electric Power* raises many similar questions to those argued in *Comer*, including standing (the ability to sue) and public nuisance. One significant distinction, however, is that the claims in *Connecticut v. AEP* are brought by states rather than private individuals (as in *Comer*).

In *Connecticut v. AEP*, eight states and the city of New York brought suit against six electric power companies who own and operate coal-fired power plants across the United States. According to the states, the six companies are the "five largest emitters of carbon dioxide in the United States and … among the largest in the world."[5] The states assert that impacts of climate change, exacerbated by the power companies' actions, are harming the environment, residents, and property of the states and will cost them billions of dollars; the harms will accelerate over the coming decades if no action is taken. The states seek to force the power companies to cap and reduce their carbon dioxide emissions. Unlike the property owners in *Comer*, the states are not seeking monetary damages.

At the district court, the power companies successfully argued that the political question doctrine precluded review.[6] The political question doctrine extends from the constitutional separation of powers among the three branches of government: executive, legislative, and judicial. Where another branch of government is better suited to


Photograph of Supreme Court building courtesy of Jeff Kubina.

Photograph courtesy of ©Nova Development Corp.

resolve an issue, the political question doctrine functions to "restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[7] Matters found to be political questions are deemed non-justiciable, meaning the court will not rule on those issues. This does not, however, mean that just because a case has political implications the court cannot hear the matter.

The states appealed this ruling to the Second Circuit Court of Appeals which ruled the matter was not precluded by the political question doctrine and the parties had standing to bring their action.[8] Particularly, the Second Circuit focused on the long history of judicial review in common law nuisance actions and noted that "where a case appears to be an ordinary tort suit" a nonjudicial policy determination is not required.[9] As observed by the Second Circuit, "Nowhere in their complaints do plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing and will continue to cause them injury."[10]

Having found that the political question doctrine did not preclude review, the Second Circuit next considered whether the states had standing to bring their lawsuit. In environmental cases, standing decisions are generally framed in the context of the three-part test articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*. Under *Lujan*, a plaintiff must demonstrate that she has suffered a particularized injury which is fairly traceable to the defendant's actions and redressable by the court.[11] Not only can a state sue for harms to the state itself, a state can also sue in its *parens patriae* capacity. *Parens patriae* literally means "parent of the country" and refers to a state's ability to sue on behalf of harms to its citizenry much like a parent might sue on behalf of a minor child.[12]

The Second Circuit found the states satisfied standing as to both Article III proprietary standing and *parens patriae* standing. With regard to *parens patriae*, the court noted that the States alleged "that the injuries resulting from carbon dioxide emissions will affect virtually their entire population" and expressed doubt "that individually plaintiffs filing a private suit could achieve complete relief."[13] As to Article III standing, the Second Circuit, applying the *Lujan* test, found that the states suffered both future and current injuries as a result of the power companies' actions. In particular, California (one of the states in this case) suffered declining water supplies and flooding resulting from earlier melting of the snowpack which injured property owned by California. The Second Circuit found the harms were fairly traceable to the power companies' GHG emissions and redressable by the court.

Now, on appeal to the Supreme Court, the power companies raise three questions for consideration: 1) whether the states have standing; 2) whether there is a federal common law cause of action that is not preempted by the Clean Air Act; and 3) whether the matter is a non-justiciable political question. To date, oral arguments have not been scheduled in this case but speculation abounds over the potential outcome. A ruling in this case has the potential to significantly impact the viability of climate change tort lawsuits in the future.

Endnotes

1. In re: Comer, No. 10-294, 2011 WL 55857 (Jan. 10, 2011).
2. Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010).
3. *See* Niki Pace, *Fifth Circuit Dismisses Climate Change Lawsuit*, 30:2 WATER LOG 14 (2010) (providing more detailed discussion of Fifth Circuit *en banc* decision).
4. American Electric Power Co. v. Connecticut, 131 S.Ct. 813 (2010).
5. 582 F.3d 309, 314 (2nd Cir. 2009).
6. Connecticut v. American Electric Power, 406 F.Supp.2d 265 (S.D.N.Y. 2005).
7. United States v. Munoz-Flores, 495 U.S. 385, 394 (1990).
8. Connecticut v. American Electric Power, 582 F.3d 309 (2nd Cir. 2009).
9. 582 F.3d at 331.
10. *Id.*
11. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
12. 582 F.3d at 334.
13. *Id.* at 338.

FLORIDA SUES EPA OVER NEW WATER PROTECTION STANDARDS

April Killcreas[1]

On December 7, 2010, the state of Florida filed a lawsuit against the Environmental Protection Agency (EPA) over finalized protective measures intended to reduce pollution in Florida's waters. The EPA maintains that these standards will work to eliminate unsafe algae blooms – the "green sludge" that currently coats the surface of much of the state's water.[2] Formed by phosphorus and nitrogen pollution from excessive fertilizer present in stormwater runoff, these algae blooms could prove toxic not only to humans but also to the animals that inhabit Florida's waterways. To rectify this problem, the EPA's new standards set specific limits on phosphorus and nitrogen pollution levels in the state's lakes, rivers, springs, and streams.

Florida alleges that the EPA, in establishing these new water protection standards, has invaded the state's traditional right under the Clean Water Act (CWA) to take responsibility for water quality management. Though the EPA contends that these standards were implemented to improve water quality and safety throughout the state, Florida officials argue that the costs of implementing the new standards on a statewide basis would significantly outweigh any water quality benefits that may result. The lawsuit is currently pending in federal district court in Florida.

Background

In July 2008, the Sierra Club and other environmental groups filed a citizen's suit against the EPA, claiming the Administrator had impermissibly failed to issue numeric nutrient limitations for phosphorus and nitrogen present in Florida's surface waters. Under the CWA, the states are responsible for controlling water quality, but the EPA has the discretion to implement additional standards if the Administrator determines that a revised or new standard is necessary for the state to remain in compliance with the Act.[3] Responding to these allegations, in January 2009, the Administrator made a formal determination that specific numeric criteria for phosphorus and nitrogen were necessary to assure that levels of these pollutants in Florida waters did not violate the CWA.

As a settlement of the 2008 lawsuit, the EPA executed a consent decree in August 2009, committing the agency to propose standards for these pollutants for Florida's fresh waters by January 2010 and to finalize these standards by October 2010. Standards for Florida's estuarine and marine waters, under this decree, are to be proposed and finalized in 2011. On November 14, 2010, Lisa Jackson, the current EPA Administrator, signed and approved the final rule establishing specific phosphorus and nitrogen levels for Florida's freshwater lakes and streams. The rule is currently set to take effect on March 6, 2012, allowing affected cities and businesses an adequate amount of time to implement the new standards. The EPA's promulgation of this final rule is the final agency action that the state of Florida is challenging under the Administrative Procedure Act (APA) in their recently filed lawsuit.

Florida's Legal Claims

Florida contends that the EPA has overstepped its authority by issuing a federal rule governing pollutant levels in state waters.[4] The CWA's emphasis on cooperative federalism specifically grants states the responsibility to develop standards for pollutants within state waters. By approving the final rule regulating the amount of phosphorus and nitrogen permitted in Florida's waters, the EPA has, from Florida's point of view, usurped a duty traditionally left to the state. To remain in compliance with the CWA, Florida has adopted a comprehensive Total Maximum Daily Load (TMDL) program to regulate pollutants in the state's waterways. This program has improved the quality of Florida's water, and, according to state officials, the EPA arbitrarily interfered in Florida's successful pollution abatement program in violation of the CWA.

Under the APA, a court may set aside a final agency action – such as the final rule establishing pollutant standards enacted by the EPA – that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[5] Florida cites numerous reasons why the EPA's new water quality standards should be invalidated as arbitrary and capricious under the APA.

Florida argues that the necessity determination underlying the EPA's final rule exceeded the agency's statutory authority. Under the CWA, a determination of necessity must be based on a scientific analysis of water quality criteria and must demonstrate that federal intervention is required to promote compliance with the Act. In order to issue a necessity determination, the Administrator must provide conclusive evidence that federal standards are necessary to maintain the quality of state waters before imposing fed-

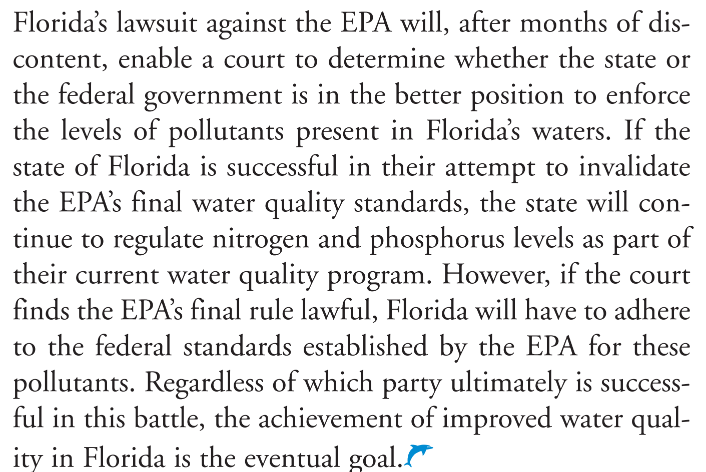
eral standards upon the state. According to Florida officials, the EPA provided little conclusive evidence that a federal standard would benefit state waters to the extent that the state water quality programs should be supplanted by federal rules. Accordingly, the state contends that, in issuing the rule pursuant to the necessity determination, the EPA acted outside the scope of its authority granted by the CWA.

Florida officials further argue that the EPA arbitrarily determined that it was necessary to establish standards for Florida's water quality. The EPA's conclusion that it was necessary to supplant Florida's water quality measures with a federal standard was the reason that the final rule was adopted and is, accordingly, subject to challenge under the APA. The necessity determination, according to Florida, was not based strictly upon water quality factors within the scope of the CWA and was simply designed as a means to induce the environmental groups' settlement of the previously mentioned 2008 lawsuit. Furthermore, Florida argues that EPA officials did not produce adequate evidence demonstrating the need for federal water quality standards, particularly in light of the fact that Florida was in the process of developing pollutant standards under the EPA-approved TMDL program. Because the EPA's determination irrationally singled out the state of Florida and was not adequately supported by scientific evidence, Florida officials maintain that the agency's conclusion was arbitrary and capricious under the APA.

Moreover, Florida contends that many of the standards outlined by the EPA are not attainable in many bodies of water; consequently, in this regard, the EPA arbitrarily mandated a stricter standard of water quality than that which occurred naturally in certain areas. For instance, in Bone Valley, many lakes have naturally high levels of phosphorus due to its presence in the underlying soils. The EPA's rule requires that the state limit the phosphorus present in the water to a level lower than that which naturally occurs in these lakes, meaning that, in many instances, the EPA's standards are virtually impossible to attain.

EPA's Response

On the other hand, the EPA maintains that the final rule articulated in November will "improve water quality, protect public health, aquatic life and the long term recreational uses of Florida's waters which are a critical part of the State's economy."[6] Though the state of Florida has indicated that the federal standards will be, in some instances, impossible to apply as well as extremely costly, EPA officials contend that the final rule requires the implementation of cost-effective standards rooted in common sense, with the ultimate goal of reducing dangerous levels of nitrogen and phosphorus pollution. The EPA characterizes the standards as flexible measures to be applied on a case-by-case basis to allow the people of Florida to have access to a clean and healthy water supply. Where the standards are impracticable due to local environmental factors, the EPA has noted that the flexibility of the standards allow for adjustments, as long as the goal of improving water quality is realized.[7]



Conclusion

Florida's lawsuit against the EPA will, after months of discontent, enable a court to determine whether the state or the federal government is in the better position to enforce the levels of pollutants present in Florida's waters. If the state of Florida is successful in their attempt to invalidate the EPA's final water quality standards, the state will continue to regulate nitrogen and phosphorus levels as part of their current water quality program. However, if the court finds the EPA's final rule lawful, Florida will have to adhere to the federal standards established by the EPA for these pollutants. Regardless of which party ultimately is successful in this battle, the achievement of improved water quality in Florida is the eventual goal.

Endnotes

1. 2012 J.D. Candidate, University of Mississippi School of Law.
2. Press Release, EPA, EPA Finalizes Common Sense Standards to Protect Florida Waters (Nov. 15, 2010), *available at* http://yosemite.epa.gov/opa/admpress.nsf/Press%20Releases%20By%20Date!OpenView&Start=100.
3. 33 U.S.C. § 1313(c)(4)(B) (2010).
4. Complaint at 2, Florida v. Jackson, No. 3:10-cv-00503-RV–MD (N.D. Fla. Dec. 7, 2010).
5. 5 U.S.C. §§ 701 – 706 (2010).
6. EPA, Federal Water Quality Standards for the State of Florida, *available at* http://water.epa.gov/lawsregs/rulesregs/florida_index.cfm .
7. Press Release, *supra* note 2.

Photograph of sewage outfall in Delray Beach courtesy of Steve Spring/Marine Photobank.

Texas Court Lifts Injunction and Allows Subdivision Construction

Photograph by Waurene Roberson

April Killcreas[1]

The development of a new subdivision on Galveston Island, Texas became the focus of litigation after the developers proposed filling several acres of wetlands. The developers sought a Clean Water Act (CWA) permit from the U.S. Army Corps of Engineers (Corps) to fill the requisite wetlands. After the Corps issued the permit, other residents of the island challenged the decision in court. On review, a Texas court enjoined the permit, concluding that the Corps had not adequately complied with the National Environmental Policy Act (NEPA). The injunction prompted the Corps to supplement its original findings and request that the court lift the injunction and allow construction on the Anchor Bay subdivision to begin.

Background

In 2002, Anchor Bay, Ltd. requested a development permit from the Corps to fill in several acres of wetlands to construct the Anchor Bay subdivision on the west end of Galveston Island, Texas.[2] The proposed development would affect 150 acres of coastal uplands and 3.63 acres of wetlands on the island. Due to the size, the project could potentially have an adverse impact on the environment. For the Corps to issue a permit to fill the wetlands pursuant to § 404 of the CWA, Anchor Bay had to first comply with the procedural requirements of the NEPA, which compels federal agencies to consider any environmental impacts attributable to their proposed actions.[3]

To meet these requirements, the Corps conducted an environmental assessment (EA) in 2003 and a revised EA in 2007. Both EAs resulted in a "finding of no significant impact" (FONSI) which means that, because the environmental impacts of filling the wetlands were negligible (according to the agency), the Corps could issue the development permit without preparing a comprehensive Environmental Impact Statement (EIS). Accordingly, the Corps issued Permit SWG-2007-388 to Anchor Bay on September 7, 2007.[4]

However, Anchor Bay's construction was suspended due to a lawsuit filed on November 27, 2007 by environmental groups and Galveston Island homeowners' associations. The plaintiffs requested that the court void the permit due to the Corps' alleged failure to meet its procedural obligations under NEPA and the CWA. The court concurred with the plaintiffs, concluding that the Corps' brief analysis did not justify its finding that the environmental impact of filling the wetlands would be insignificant. Thus, the court held that the Corps' FONSI was arbitrary and capricious, a finding that prohibited the project from continuing until the Corps fully satisfied NEPA.[5]

On May 25, 2010, the Corps filed an Addendum to their 2007 EA, which more specifically outlined their reasoning behind the FONSI and attempted to fully comply with the requirements set forth in NEPA.[6] Accordingly, the Corps requested that the court lift the injunction and allow the development project to proceed.

NEPA

The essential purpose of NEPA is to require federal agencies to take a hard look at any environmental consequences associated with their proposed actions. In order to fully consider these consequences, federal agencies must comply with certain procedural requirements, such as the preparation of EAs. However, NEPA does not actually mandate that agencies implement the most environmentally protective decision as their final course of action.[7]

To comply with NEPA, federal agencies must prepare either a less rigorous EA, which would be appropriate for actions where the agency is unsure of the environmental impacts involved, or a comprehensive EIS, if the action stands to have a clearly significant effect on the human environment.[8] Should the EA reveal that the proposed action will, in fact, have a significant effect on the human environment, then the agency must prepare a full EIS; however, if the EA indicates that no significant environmental impact will result from the action, the agency may issue a FONSI and proceed with the action.[9]

Thus, whether an agency should prepare an EA or an EIS turns on the significance of the impacts that the proposed action may have on the environment. NEPA regulations indicate that a project's effects are significant if "it is reasonable to anticipate a cumulatively significant impact on the environment."[10] Cumulative impacts on the environment result "from the incremental impact of the action" when considered in addition to other past, present, and future actions.[11] Since the Corps initially failed to meaningfully consider the cumulative impacts that the

development would have on coastal uplands and wetlands, the court enjoined the permit until the Corps properly took these effects into account.

The Corps' Addendum

To properly address the cumulative effects of the proposed development on the uplands, wetlands, and coastal hazards surrounding the project area, the Corps prepared an Addendum to its EA to explain its justification for issuing a FONSI.[12] In this Addendum, the Corps conceded that the construction will affect 150 acres of coastal uplands and put the natural environment at risk; yet, the Addendum noted that the damage will be mitigated by offsetting approximately 20 acres of uplands from development. Since the impacts of the Anchor Bay construction will be localized to a small area, the plan proposed mitigating acreage, and the quality of the affected uplands is low, the Corps concluded that the cumulative upland impacts are insignificant.[13]

With regard to wetlands, the Addendum noted that, though the project will consume 3.63 acres of wetlands, 37.06 acres will be donated to a conservation organization and 5.85 man-made acres of wetlands will be added to the project area to offset the environmental damage. Though natural wetlands will be lost, the project would compensate for these losses by creating additional wetland acreage. The development's impacts on wetland acreage will contribute little to the total wetland losses that have occurred on Galveston Island to date; thus, the Addendum concludes that the construction's impacts on wetlands will not be cumulatively significant.[14]

The Addendum further noted that the proposed construction will have little impact on the coast, though the project area was previously listed as a region of Imminent and High risk for coastal hazards. The project will be located in the interior of Galveston Island, in an area that is afforded great protection by a dune ridge to the south, and the Corps does not expect that the development will affect flood heights or contribute to subsidence. Moreover, the Corps planned for canals to be constructed in upland areas protected by bulkheads to reduce erosion. The Corps also made mitigating design factors an integral part of the proposed development to reduce the risk of coastal hazards, providing for minimal coastal excavation, planting wetland vegetation to protect the shorelines, and incorporating hard structures including breakwaters to reduce wave energy and prevent erosion. Due to these mitigating factors, the Corps concluded that the project is designed to minimize the cumulative coastal effects.

After reviewing the Addendum, the court determined that the Corps had provided a reasonable explanation of its assertion that the development would result in no significant impact to the environment. As long as the Corps has provided adequate justification for the reasoning behind its FONSI, the court is not authorized to question the accuracy or the wisdom of these explanations.[15] Because the Corps did present the court with reasonable explanations of the finding that uplands, wetlands, and coastal hazards would not be significantly impacted by the Anchor Bay project, the court granted the request to lift the injunction of Permit SWG-2007-388.

Conclusion

The court's decision to lift the injunction of Permit SWG-2007-388 will, after seventeen months of litigation, finally allow for construction of Anchor Bay subdivision to begin. This ruling demonstrates that the Corps is adequately evaluating permit applications and considering the cumulative effects that may occur on Galveston Island.

Endnotes

1. 2012 J.D. Candidate, University of Mississippi School of Law.
2. Galveston Beach to Bay Preserve, Inc. v. U.S. Army Corps of Eng'rs, No. G-07-0549, 2010 WL 3362266, at *1 (S.D. Tex. Aug. 25, 2010).
3. 42 U.S.C. § 4332(2)(C) (2010).
4. *Galveston Beach*, 2010 WL 3362266, at *1
5. *Id.* at *2.
6. *Id.*
7. *See* Sabine River Authority v. U.S. Department of Interior, 951 F.2d 669, 676 (5th Cir. 1992).
8. *See* O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 228 (5th Cir. 2007).
9. *Sabine River Authority*, 951 F.2d at 677.
10. 40 C.F.R. § 1508.27(b)(7) (2010).
11. *Id.* § 1508.7.
12. *Galveston Beach*, 2010 WL 3362266, at *4.
13. *Id.*
14. *Id.* at *5.
15. *Id.*

Photograph by Waurene Roberson

Mississippi Court Reviews Public Access to Paw Paw Island

Mary McKenna[1]

In 2003, a dispute arose between Paw Paw Island Land Company and Issaquena and Warren Counties Land Company (IWCLC) regarding a claim of a prescriptive easement over land providing access to Paw Paw Island. Paw Paw Island is mostly owned today by Paw Paw Island Land Company. The island's only land-based access road (Paw Paw Road), however, crosses over land owned by IWCLC. When IWCLC notified Paw Paw Island Land Company that a segment of Paw Paw Road, in addition to a boat ramp and parking area, would have to be relocated to accommodate IWCLC's building plans, Paw Paw Island Land Company filed suit, claiming a prescriptive easement over the road, the parking area, and the boat ramp. The lower court found, among other things, that Paw Paw Road was public for the first 0.13 miles and private thereafter. On appeal, the Mississippi Supreme Court affirmed the final judgment, holding that Paw Paw Island Land Company had failed to prove a prescriptive easement.

Background

Paw Paw Island was created in 1935 when the main channel of the Mississippi River was diverted through a large tract of land in Louisiana west of the Mississippi River.[2] As a result, the river diversion formed an island wholly in the state of Louisiana that was land-locked and water-locked, depending on river stages. Land-based ingress and egress was then limited to access from Mississippi.[3] When river levels are high, approximately six months each year, there is no land access to the island. When river levels are low, the island is accessible via a road atop the Mississippi River levee, also known as Paw Paw Road, and a low-water bridge, which spans the Paw Paw Chute (the river channel that separates the island from the Mississippi state border).[4]

Before the island's formation and until 1969, the land from which the island was formed and the island itself was owned by Jack Wyly and the Alluvial Lands Company, Ltd. (Alluvial).[5] Paw Paw Road traversed land owned by the Anderson-Tully Corporation (ATCO), which had owned the property since 1928. ATCO, a timber company, used its land for timber-farming operations and also leased hunting and fishing rights to local hunting clubs.

In 1969, Wyly and Alluvial sold their island estate to Crown Zellerback (CZ), a timber company that used the land for timber-farming operations.[6] CZ additionally leased hunting and fishing rights on the island to the Paw Paw Island Hunting Club (Hunting Club). The lease lasted from 1969 to 1994, during which the Hunting Club built a boat ramp and parking area on ATCO's property. In 1995, CZ sold its estate to Paw Paw Island Land Company, which continues to own most of Paw Paw Island today.[7]

The lower court found . . . that Paw Paw Road was public for the first 0.13 miles and private thereafter.

In 2002, ATCO sold its land to Issaquena and Warren Counties Land Company.[8] Today, IWCLC owns land on both sides of the Mississippi River levee, the land over which Paw Paw Road crosses, and a small portion of Paw Paw Island itself. (The Board of Mississippi Levee Commissioners owns the levee and leases some land to IWCLC.) Prior to the 2002 sale of ATCO's property, however, IWCLC had the property surveyed to determine boundaries and to lay out plats for fifteen home sites. The surveyor recommended relocation of a segment of Paw Paw Road in order to allow for home sites along Paw Paw Chute. In 2003, IWCLC informed Paw Paw Island Land Company by letter that the parking area, boat ramp, and a small segment of the road would have to be relocated to make room for the future homes.[9]

In response, Paw Paw Island Land Company filed suit claiming a prescriptive easement over the land providing access to Paw Paw Island. Additionally, Paw Paw Island

Land Company claimed a prescriptive easement over the parking area and boat launch located on IWCLC's land, alleging prior use by Paw Paw Island Land Company's predecessors in title.[10] In the mean time, IWCLC continued with its plans to relocate a segment of the road and build houses.

When the trial began in December 2003, IWCLC had already completed the new road segment and had moved power lines and phone cables alongside it. In the interim, IWCLC allowed Paw Paw Island Land Company to use the new road segment and make improvements at its own expense; use the boat ramp; and use the previously defined parking area.[11] But by July 2005, each of the fifteen home sites had been deeded, one house had been completed, ten others were in progress—some of which were to be built directly on a segment of the old roadbed—and IWCLC had informed Paw Paw Island Land Company that a new gate was in place, blocking access to a portion of the old road.[12] As a result, the Board of Supervisors of Warren County (Board) demanded by letter that IWCLC remove the gate to allow public access to what it claimed was a "county road" and to cease construction of its home sites.[13] IWCLC immediately sought relief in court and the two cases were consolidated in October 2005.

The subject matter of the case turned on the whether the status of Paw Paw Road was public or private, and if the road was private, whether a prescriptive easement existed over it. Paw Paw Road begins at Highway 465 and runs west from the highway to a gate southwest of the levee. This first segment of the road, measuring 0.13 miles, is a public road without dispute. The road then continues from the gate, west and south, over IWCLC land to the low-water bridge at Paw Paw Chute. That second portion of the road measures 0.47 miles. It was the latter portion of the road that was the subject of dispute.

Public v. Private

In 1968, the gate east of the levee was moved west of the levee, to a point where the current gate is located, in order to allow public access to the levee.[14] In 1988, the Board officially inventoried roads and their respective mileage to be maintained by the county. This inventory indicated that the portion of road beyond the gate west of the levee was not maintained by the county, although it did not specify the road length to which this non-maintenance applied. In June 2000, the Board issued an official map designating and delineating all public roads on the county road system. This map showed the road as public for only the first 0.13 miles, beginning at the highway. Further, a county road sign near the gate reads the words "End of County Maintenance."[15]

Therefore, because the road was gated, had been gated for decades and because there had been no public maintenance inside the gate for at least thirty years—and only sporadically before that—the court concluded that Paw Paw Road is public for 0.13 miles and private for the remainder, which is located west of the gate. Additionally, the court found that the county never had title to the road.

Photograph of Eagle Lake courtesy of Natalie Maynor.

Prescriptive Easement

A prescriptive easement must be proven by clear and convincing evidence. To establish a prescriptive easement, the use must be

1) open, notorious, and visible;
2) hostile;
3) under claim of ownership;
4) exclusive;
5) peaceful; and
6) continuous and uninterrupted for ten years.[16]

Use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription since adverse use is lacking. Here, the court found that Paw Paw Island Land Company had failed to prove three elements: hostile, under claim of ownership, and exclusive.

Because the evidence was insufficient to prove that Paw Paw Island Land Company or any of its predecessors had used Paw Paw Road without the implied permission of ATCO, the court found that Paw Paw Island Land Company had failed to prove by clear and convincing evidence that the predecessors' use was hostile. Likewise, the court found insufficient evidence that any of the early owners, loggers or hunters made a claim of ownership over the road, nor did they claim ownership of a right to use the road. Rather, Paw Paw Island Land Company's predecessors in title used the road following timber industry standards of neighborly courtesy. The court further clarified that Paw Paw Island Land Company could not tack its claim to a hunting lease; even if any right existed via a lease, that right expired with the termination of the hunting and fishing lease in 1994.

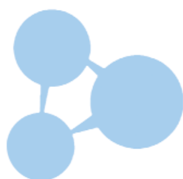
The Mississippi Supreme Court did, however, find that the lower court had erred with regard to the exclusivity element. The lower court had required Paw Paw Island Land Company to prove sole dominion over the road when in fact Paw Paw Island Land Company merely needed to show a claim to the right to use the road over and above that of a member of the indiscriminate public. Nevertheless, the Court found this error to be of no consequence; Paw Paw Island Land Company had failed to prove other necessary elements of prescriptive easement by clear and convincing evidence. This error, then, was insignificant.[17]

Conclusion

As a result of the court's ruling, IWCLC will be able to finish its home site plans, which include the relocation of the boat ramp, parking area and a small segment of the old Paw Paw Road; the new road segment is approximately 420 feet from the old road at its farthest point and is located closer to the bridge than the previous road. Accordingly, Paw Paw Island Land Company will have to abide by these changes. From a public view, however, little to nothing will change as the 0.47 miles segment of Paw Paw Road remains private, as it was before.

Endnotes

1. 2011 J.D. Candidate, University of Mississippi School of Law.
2. Paw Paw Island Land Co, Inc. v. Issaquena and Warren Counties Land Co., LLC, 2010 WL 4484563, at *1 (Miss. 2010).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at *3.
8. *Id.* at *4.
9. *Id.*
10. *Id.* at *2.
11. *Id.* at *5.
12. *Id.* at *6.
13. *Id.* at *5.
14. The current maintenance contract between the levee board and IWCLC prohibits any gates obstructing public access to the levee and the road atop the levee. *Id.* at *2.
15. *Id.* at *4.
16. *Id.* at *5.
17. *Id.* at *9.



StormSmart Coasts

StormSmart.org is a resource for coastal decision makers looking for the latest and best information on how to protect their communities from weather and climate hazards. Using its cutting edge collaboration tools, members can communicate directly with other members from their town, their state, or from any the part of the country. Come join your peers on StormSmart.org!

Presidential Oil Spill Commission Makes Case for Reform

Nicholas J. Lund[1]

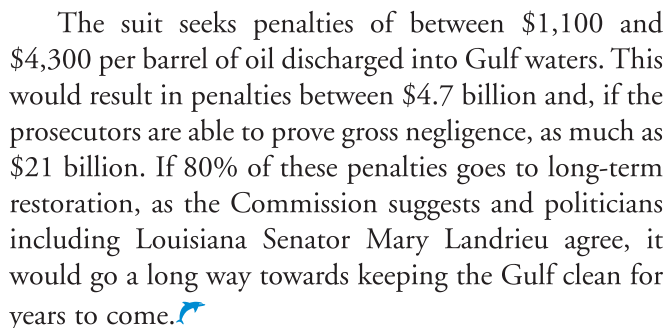
In early January, the White House-established National Commission on the BP Deepwater Horizon Spill and Offshore Drilling released its final report on the causes of the spill and options to prevent further incidents. The blunt, yet vivid report describes in detail the final hours on the Deepwater Horizon rig, as well as the "systemic" industry failures that brought those on board to the brink of a national disaster.

The massive, 380-page report covers the history of offshore drilling in America and the complexity of the current regulatory regime before discussing the Commission's recommendations for addressing the causes and consequences of the spill. While emphasizing that deepwater drilling can be done safely, the Commission advocates raising offshore drilling safety standards to at least the level of other countries, where the burden is on the oil company to prove that their rigs are safe rather than on regulators to find deficiencies.

The Commission also urges a finer distinction between the regulators and the regulated. The report suggests splitting the duties of the famously corrupt and now extant Minerals Management Service into three agencies, one each to handle offshore safety, leasing and environmental science, and revenue collection and auditing. Additionally, the Commission seeks to create a new safety institute to drive innovation in the industry, something it says the industry-cozy American Petroleum Institute does not do.[2]

The response to the report from Washington has been somewhat predictable. The President vowed to work to adopt many of the Commission's recommendations, but noted that Congressional division meant a tough fight. Several Congressional Democrats introduced bills to advance Commission recommendations, while Republicans have blocked any new rules and taken no action on proposals to raise liability under the Oil Pollution Act above the current $75 million cap.

Another of the Commission's noteworthy recommendations was that 80% of penalties assessed under the Clean Water Act be dedicated to long-term restoration of the Gulf. These penalties stem from a civil lawsuit alleging Clean Water Act violations filed by the U.S. Department of Justice against BP and other responsible parties in December.[3] It is important to note that these Clean Water Act penalties are distinct and separate from Oil Pollution Act funds responsible parties are already required to pay to recoup for economic losses to Gulf residents and to restore injured natural resources.



The Clean Water Act lawsuit alleges a violation of the general discharge permit issued to BP to permit it to operate in the Gulf. The permit covers the discharge of many substances, including drilling fluid and bilge water. The Justice Department's suit alleges a violation from the benzene, naphthalene, arsenic, mercury and other chemicals found in crude oil.

The suit seeks penalties of between $1,100 and $4,300 per barrel of oil discharged into Gulf waters. This would result in penalties between $4.7 billion and, if the prosecutors are able to prove gross negligence, as much as $21 billion. If 80% of these penalties goes to long-term restoration, as the Commission suggests and politicians including Louisiana Senator Mary Landrieu agree, it would go a long way towards keeping the Gulf clean for years to come.

Endnotes

1. National Sea Grant Law Center Fellow.
2. The National Commission's Final Report is available here: http://www.oilspillcommission.gov/final-report.
3. John Schwartz, *U.S. Sues Companies for Spill Damage,* N.Y. Times, Dec. 15, 2010, http://www.nytimes.com/2010/12/-16/us/16suit.html?_r=1&scp=5&sq=BP%20Justice%20De-partment&st=cse

Photograph courtesy of the U.S. Coast Guard.

Mississippi Legislative Update

Barton Norfleet[1]

The following is a summary of legislation enacted by the Mississippi Legislature during the 2010 session.

2010 Mississippi Laws Ch. 304 (H.B. 606) (Approved February 17, 2010)
Reenacts section 69-7-601 of the Mississippi Code of 1972 which declares that the article will be known as the Mississippi Catfish Marketing Law of 1975. Section 69-7-602 requires retailers to inform their customers of the origin and species of the fish they are selling. This act is a result of the increasing concerns revolving around food-misrepresentation, in the form of passing off less expensive aquaculture food as more expensive food, and due to the chemicals and other processing techniques allowed in other countries that are not allowed in the United States which could have a detrimental effect on the health of U.S. citizens.

2010 Mississippi Laws Ch. 336 (H.B. 204) (Approved March 15, 2010)
Deletes the repeal on penalties for unlawful possession of paddlefish and allows the Commission on Wildlife, Fisheries and Parks to promulgate rules and regulations, establish and issue permits, and establish and collect fees for permits for the harvest and sale of both paddlefish and paddlefish parts.

2010 Mississippi Laws Ch. 334 (H.B. 231) (Approved March 15, 2010)
Requires the public notification requirement for public water to be provided to the State Department of Health for publication on its website and requires notice to be published in certain newspapers that the drinking water quality reports will be available on the above mentioned website.

2010 Mississippi Laws Ch. 343 (H.B. 1039) (Approved March 15, 2010)
Allows for the Commission on Marine Resources to authorize the transfer of an oyster vessel captain license to a different vessel.

2010 Mississippi Laws Ch. 332 (H.B. 1138) (Approved March 15, 2010)
Changes free fishing day to free fishing weekend and moves it to coincide with national fishing and boating week.

2010 Mississippi Laws Ch. 411 (H.B. 432) (Approved March 17, 2010)
Amends requirements of well developers to obtain a water well contractor's license; prohibits the assignment of such licenses, requires a certification of completion of continuing education units as required by the Mississippi Commission of Environmental Quality; clarifies the authority of the Mississippi Commission of Environmental Quality; and provides an exemption for persons drilling an irrigation well on their own land.

2010 Mississippi Laws Ch. 410 (H.B. 1040) (Approved March 17, 2010)
Authorizes the Commission on Marine Resources to revoke a license of a person and vessel indefinitely for multiple offenses committed within a certain time period.

2010 Mississippi Law Ch. 412 (H.B. 1440) (Approved March 17, 2010)
Revises the requirements for participation in the beneficial use of dredging materials program related to wetlands. Waives charges on any project by a governmental agency or any project where expenses are made as a result of a government grant or from government bond proceeds. Requires a party conducting dredging of over 2,500 cubic yards to participate in the beneficial use of dredge material program, as long as the material is suitable and a beneficial site is available.,

2010 Mississippi Law Ch. 370 (S.B. 2383) (Approved March 17, 2010)
Conforms the standard for intoxication under the Alcohol Boating and Safety Act to the standard for driving under the influence under traffic laws including the need for prima facie evidence at the time of the alleged violation that the alcohol in the blood stream equals eight one-hundredths percent or more by weight of the alcohol in a person's blood, and to also expand potential enforcement of this act to the Department of Marine Resources.

2010 Mississippi Law Ch. 380 (S.B. 2917) (Approved March 17, 2010)
Allows persons 65 or older fishing in marine waters of the state to obtain a lifetime saltwater sports fishing license for a limited one-time fee of $5.00.

2010 Mississippi Law Ch. 378 (S.B. 2925) (Approved March 17, 2010)
Prohibits the discharge of human waste in the marine waters of the state from a vessel while the vessel is used to harvest or transport oysters, requires the vessels to have approved marine sanitation devices, provides for standards for these devices, and sets up penalties for violations.

2010 Mississippi Law Ch. 384 (S.B. 3010) (Approved March 17, 2010)
Allows the Commission of Wildlife, Fisheries and Parks to issue an annual group pier fishing license, and clarifies that people fishing from that pier are not required to have individual fishing licenses.

2010 Mississippi Law Ch. 911 (H.B. 1731) (Approved April 5, 2010)
Authorizes the city of Bay St. Louis, MS to waive the required annual state audit for the municipal fiscal years of 2004-2005 due to the effects of Hurricane Katrina.

2010 Mississippi Law Ch. 553 (H.B. 1351) (Approved April 28, 2010)
Authorizes the Pat Harrison Waterway District to receive and expend funds given to them under the provisions of the Federal American Recover and Reinvestment Act of 2009 or from other sources to construct a lake and related structures and facilities in George County, MS, and to obtain any information needed in the construction of the lake and its facilities.

2010 Mississippi Law Ch. 937 (S.B. 3204) (Approved May 13, 2010)
Allows governing authorities in Biloxi, MS to take necessary action to clean private properties affected by Hurricane Katrina which are in a state of disrepair unfit for use or occupancy and which have remnants of structures that are a menace to public safety, provides for a hearing and notice to property owners and lien holders, and allows the city to take action it may recover costs and impose penalties.

Endnote

1. 2012 J.D. Candidate, University of Mississippi School of Law.

Alabama Legislative Update

Barton Norfleet[1]

The following is a summary of legislation enacted by the Alabama Legislature during the 2010 session.

2010 Ala. Laws 257 (S.B. 97) (Approved March 11, 2010)
Provides for the time period of audits relating to certain agricultural programs including catfish farming and the shrimp and seafood industry and requires financial statements to be forwarded to the State Board of Agriculture and Industries.

2010 Ala. Laws 585 (H.B. 376) (Approved April 8, 2010)
Establishes the Alabama Trails Commission within the Department of Economic and Community Affairs and defines trails to include freshwater and saltwater paddling trials.

2010 Ala. Laws 458 (H.J.R. 840) (Approved April 14, 2010)
Extends the Alabama Waterfront Access Study Committee to the tenth legislative day of the 2011 regular session.

2010 Ala. Laws 511 (H.B. 369) (Approved April 14, 2010)
Provides a specific form of exemption for commercial fishing vessels from taxation on the purchase of certain equipment for particular fishing vessels.

2010 Ala. Laws 513 (H.B. 386) (Approved April 14, 2010)
Amends section 9-11-56.3 of the Code of Alabama, which pertains to public pier fishing licenses and residential saltwater pier fishing licenses authorizing nonresidents to purchase a saltwater pier fishing license; and to change the expiration date of public pier fishing and saltwater pier fishing licenses.

2010 Ala. Laws 514 (H.B. 448) (Approved April 14, 2010)
Amends sections 40-23-4 and 40-23-62 of the Code of Alabama and clarifies the exemption for watercraft relating to sales and use tax exemptions.

2010 Ala. Laws 699 (H.B. 315) (Approved April 22, 2010)
Amends sections of the Code of Alabama applying to the Department of Conservation and Natural Resources, Division of Marine Resources, and the regulation of the harvesting of oysters and other seafood; the amendments deal with increased expenditure of local funds and further provides for penalties.

Endnote

1. 2012 J.D. Candidate, University of Mississippi School of Law.

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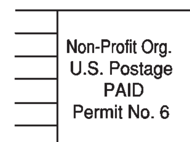

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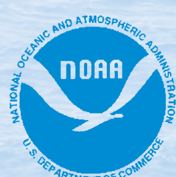

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