WATER LOG

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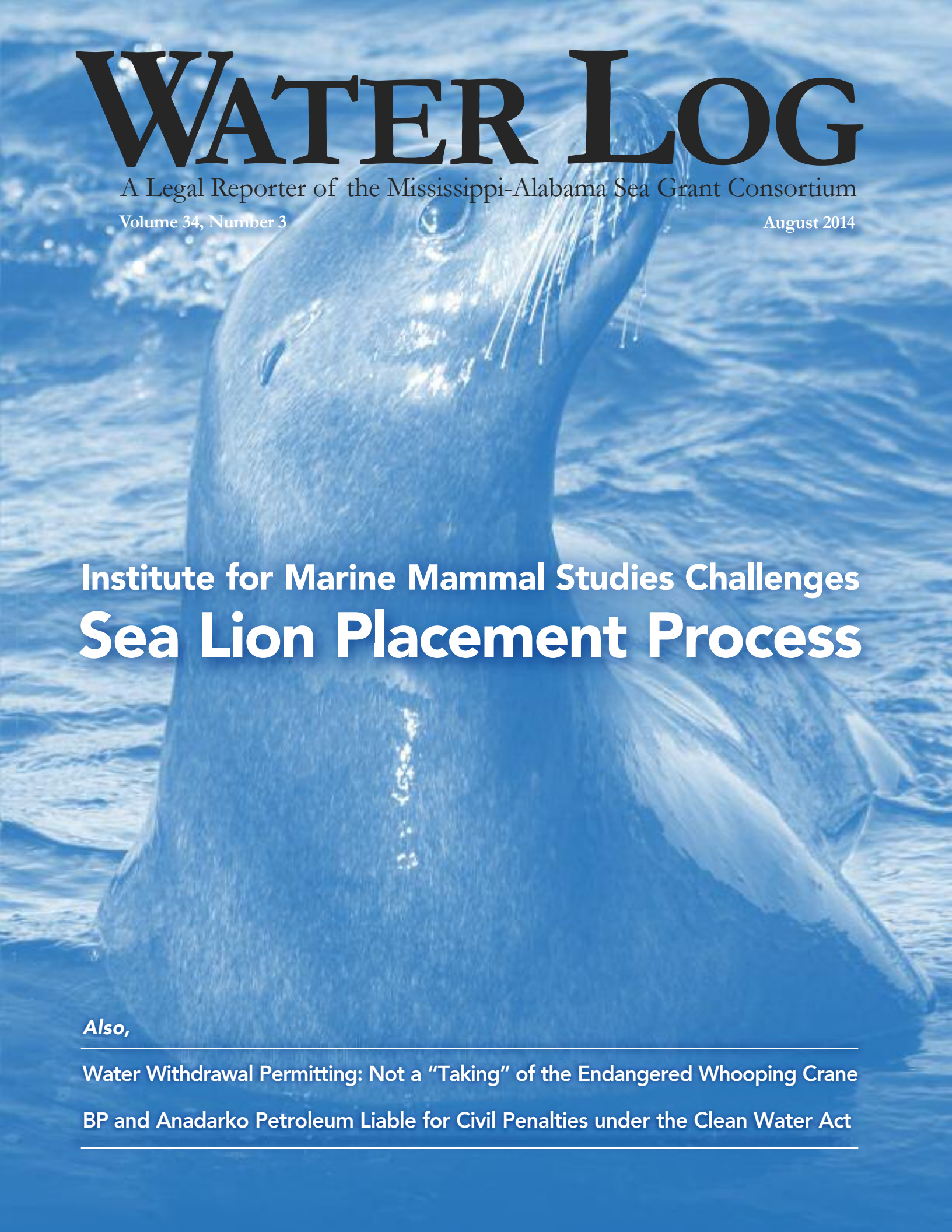

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Cover photograph of a sea lion; courtesy of Nathan Rupert.

Contents photograph of a sunset off Long Beach Marina, Mississippi; courtesy of Barry Goble.

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ABA SEER
22nd Fall Conference

October 8 - 11, 2014
Miami, FL

http://bit.ly/aba22nd

7th National Summit on Coastal and Estuarine Restoration

November 1 - 6, 2014
Washington, D.C.

http://www.estuaries.org/summit

Bays & Bayous Symposium 2014

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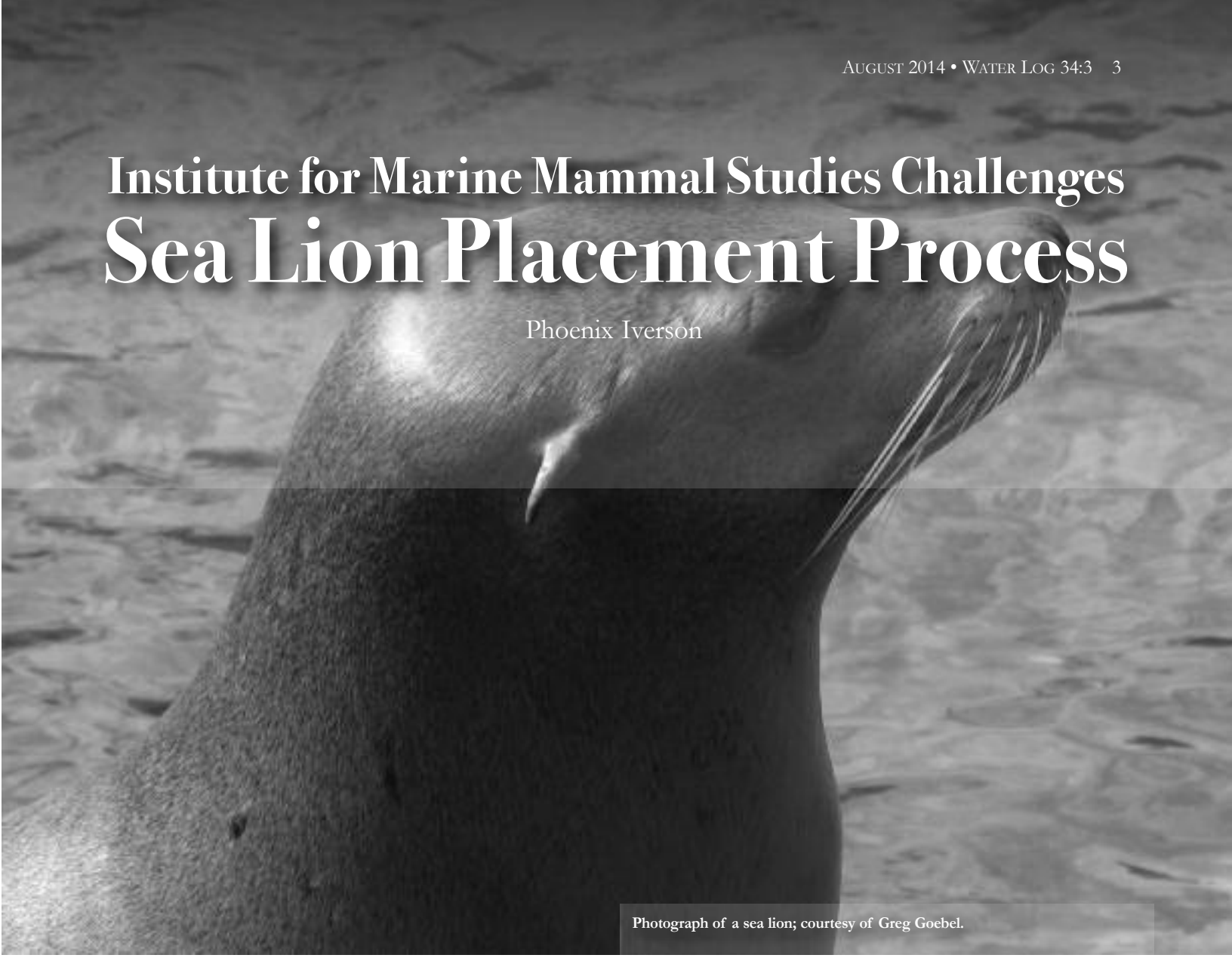
Mobile, AL

http://ambbs.mobilebaynep.com

Institute for Marine Mammal Studies Challenges Sea Lion Placement Process

Phoenix Iverson



Photograph of a sea lion; courtesy of Greg Goebel.

In a recent decision, the U.S. District Court for the Southern District of Mississippi considered a legal challenge raising questions as to whether the National Marine Fisheries Service (NMFS) adequately implemented the Marine Mammal Protection Act (MMPA) with respect to the release of stranded animals.[1] The Institute for Marine Mammal Studies (IMMS) brought the lawsuit. IMMS is a non-profit organization located in Gulfport, Mississippi that operates as an education and conservation institution. IMMS challenged NMFS's selection process for placing stranded sea lions with public facilities like IMMS.

Background

Over the past few decades there has been an increased awareness of marine mammal and sea turtle stranding events and methods of rescue and prevention.[2] This increased awareness had its beginning during the 1970s. In 1972, Congress passed the Marine Mammal Protection Act (MMPA) in response to this increased public awareness. The MMPA put the protection of all marine mammals under the jurisdiction of the federal government.

Under authorization from the MMPA, NMFS operates a network of organizations that rescues, rehabilitates, releases, and studies stranded marine mammals, including sea lions. There are three players involved in this network: NMFS, who administers the program; the stranding organizations, who rescue and rehabilitate the stranded sea lions; and the public display facilities, who house non-rehabilitated sea lions for conservation, education, and research.

When a stranding event occurs the stranding organizations respond to the scene and rescue the animals. Once the animals are rescued they are rehabilitated to the greatest extent possible. Those animals that are deemed

successfully rehabilitated are reintroduced into the wild. Animals suffering injuries or behavioral issues that make a successful return to the wild unlikely are not reintroduced.[3] NMFS disposes of the un-releasable stranded animals at its discretion, which includes release to public display facilities. There are currently about thirty public display facilities seeking non-releasable sea lions, including the IMMS. The IMMS is approved by NMFS as a public display facility established for public education as well as conservation and research of marine mammals.

IMMS is approved by NMFS to receive both releasable and non-releasable sea lions. IMMS can be considered for placement of non-releasable sea lions through NMFS's national placement list. On October 5, 2011, IMMS received a "Public Display Permit to Take Marine Mammals" from NMFS authorizing it as a public display facility to receive and house non-releasable sea lions from stranding organizations. Under the permit, IMMS can receive up to eight sea lions from the stranding network.

In 2011, IMMS sued NMFS alleging violations of the MMPA related to the national placement list and IMMS's Public Display Take Permit. Specifically, IMMS argued that NMFS violated the MMPA by preventing IMMS from obtaining sea lions from stranding organizations. According to IMMS, NMFS's actions forced IMMS to instead take sea lions from the wild. NMFS, without disputing the facts of the case, asked the court to award judgment in its favor based on the legal issues raised.

Non-Releasable Sea Lions

The claim brought by the IMMS concerning non-releasable sea lions involves the national placement list that NMFS uses to place such animals with public display facilities. NMFS does not issue Public Display Take Permits for the placement of non-releasable sea lions because non-releasable animals can never be returned to the wild, making their retention in captivity distinguishable from taking an animal from the wild. In place of a Take Permit, NMFS uses a national placement list to determine which public display facilities receive non-releasable sea lions.

IMMS objected to this process. IMMS argued that the placement list was "an illegal placement scheme" which lacked transparency and was administered arbitrarily.[4] IMMS further maintained that NMFS routinely changed

Photograph of sea lions on a pier; courtesy of Ilja Klutman.

the way it decided where these animals are placed. NMFS disagreed with IMMS noting that demand exceeds supply, making the national placement list a necessary mechanism for the fair distribution of non-releasable sea lions.

The court, however, never reached the substantive components of these arguments. IMMS brought these claims under the Administrative Procedures Act, which only authorizes a court to review final agency action. Final agency action is defined as one "that imposes an obligation, denies a right, or fixes a legal relationship."[5] The court determined that IMMS's claims involved broad programmatic challenges to the system rather than a reviewable final agency action. Furthermore, even if the claims were reviewable, the process for disposing of the non-releasable sea lions was subject to NFMS's discretion under the MMPA. The MMPA gave NFMS unfettered discretion to administer the program. For both reasons, the court determined it could not review the challenges to the national placement list.

Releasable Sea Lions

The IMMS's next challenge involved the placement of releasable sea lions through the issuance of Public Display Take Permits. Standard procedure under NMFS's program dictates that animals deemed healthy are returned to the wild. If NMFS approves however, the

animal does not have to be returned to the wild, and can be placed with a public display facility.[6] In IMMS's case, NMFS deviated from its standard procedures. NMFS has only issued three permits that authorize public display facilities to receive such animals from stranding organizations; and while two other facilities have permits similar to IMMS's, there is a significant difference between them. IMMS's permit, unlike the permits of other organizations, allows the stranding organizations to decide if it will release the sea lions to IMMS. IMMS argued that NMFS had unlawfully delegated its authority to determine the placement of release animals to the stranding organizations. This decision meant that NMFS would not be able to review any placement decision made by the standing organization regarding releasing a sea lion to IMMS.

In response, NMFS argued that it faced a unique situation because no other facilities made requests like those made by IMMS. Specifically, IMMS wanted permit language that would force stranding organizations to place healthy, releasable animals with the Institute instead of returning the sea lions to the wild.[7] This placed NMFS in a difficult situation because including such a term in IMMS's permit would have threatened the continued viability of these volunteer stranding organizations. These facilities usually operate on a volunteer basis and volunteer support might diminish if these facilities were forced to release an animal to a public display facility instead of returning the animal to its natural environment.

On this claim, the court agreed with IMMS, finding that NMFS had illegally delegated its authority to make placement decisions to the stranding organizations. This delegation is illegal because "an agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest."[8] In this case, NMFS had impermissibly delegated that authority to the stranding organizations. As a result, this permit condition was inconsistent with the law and must be reconsidered by NMFS.

Fifth Amendment Claims

IMMS also claimed that the administration of the national placement list resulted in a violation of their Fifth Amendment rights under the U.S. Constitution. Specifically, IMMS argued that the language in their permit constituted a denial of their right to be treated fairly and equally. NMFS responded by arguing that the unique permit language was justified. In order to satisfy this argument, NMFS had to show that IMMS's situation was so different from the other facilities applying for permits that treating IMMS in the same manner was not possible. In support of this claim, NMFS pointed to IMMS's unique request regarding the placement of releasable sea lions.

Unfortunately for NMFS, the court did not view this difference as enough to justify treating IMMS differently. According to the court, there is no discernable difference between IMMS and the other facilities.[9] Based on this determination, the court ruled that NMFS violated IMMS's Fifth Amendment rights by including unique language in its Public Display Take Permit. Accordingly, the court returned IMMS's permit to NMFS and ordered that they correct the permit language.

Conclusion

Though the court did not review IMMS's challenges to the national placement program, the court did order NFMS to reconsider IMMS's Public Display Take Permit. While this result will help ensure that the language of IMMS's permits are the same as other public display facilities, it may not alter its ability to receive sea lions. Stranding organizations and NMFS prefer for releasable sea lions to be returned to the wild, not sent to a public display facility. Public display facilities will continue to compete for non-releasable sea lions through the national placement list process.

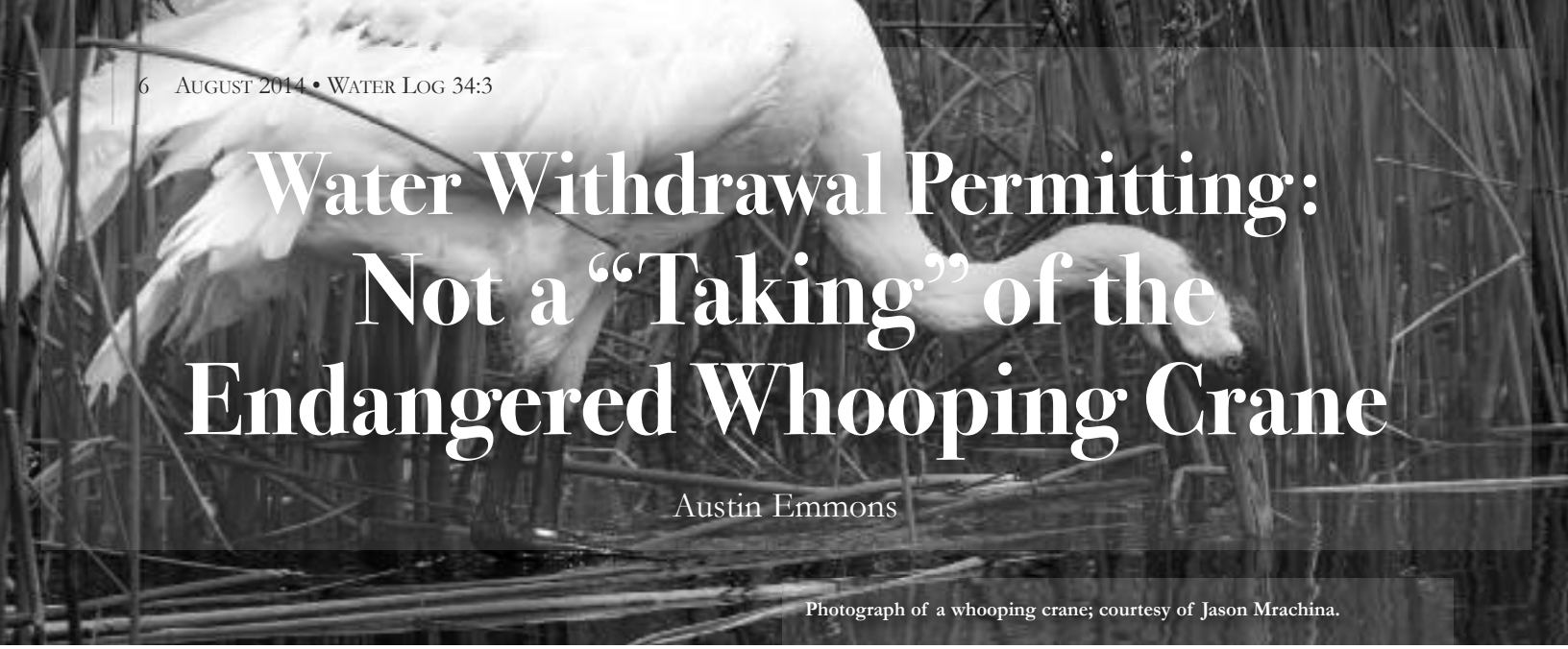
Phoenix Iverson is a 2015 J.D. candidate at Cumberland School of Law and a research associate for the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. Inst. of Marine Mammal Studies v. Nat'l Marine Fisheries Serv., No. 1:11CV318-LG-JMR, 2014 U.S. Dist. Lexis 70454 (S.D. Miss. May 22, 2014).
2. *History of the Northeast Region Stranding and Disentanglement Network*, http:www.nero.noaa.gov/prot_res/stranding/NERStrandingHistory.pdf (last visited July 17th, 2014).
3. *Inst. of Marine Mammal Studies*, 2014 U.S. Dist. Lexis 70454, at 1.
4. *Id.* at 7.
5. *Id.* at 8.
6. *Id.* at 10.
7. *Id.* at 9.
8. *Id.* at 10.
9. *Id.* at 12.

Water Withdrawal Permitting: Not a "Taking" of the Endangered Whooping Crane

Austin Emmons



Photograph of a whooping crane; courtesy of Jason Mrachina.

Standing five feet tall with a wingspan over eight feet, the whooping crane is a majestic bird. However, even the majestic whooping crane is not immune to dramatic population decreases caused by habitat destruction. In 1941, the whooping crane was on the verge of extinction with only fifteen whooping cranes in the Aransas-Wood Buffalo (AWB) flock.[1] Fortunately, the population rebounded, and the flock now consists of about 300 whooping cranes.[2] Even with continued population growth, the whooping crane is still classified as an endangered species under the Endangered Species Act (ESA). As a result, the whooping crane is protected by the ESA, making it illegal to "take" whooping cranes.[3] In *Aransas Project v. Shaw*, the U.S. Fifth Circuit Court of Appeals considered whether the water permitting and regulatory practices of the Texas Commission on Environmental Quality (TCEQ) constitute a "taking" under the ESA.[4]

Background

During the winter of 2008-2009, the Aransas National Wildlife Refuge (the Refuge) in Texas suffered from a severe drought. During this time, four whooping crane carcasses were found in the Refuge; autopsies were performed on two of the carcasses and both listed emaciation as one of the causes of death. After performing aerial surveys, biologists concluded that an additional nineteen cranes had also perished. In wake of the deaths, The Aransas Project (TAP) was formed with the goal of protecting whooping crane habitat.

The San Antonio Bay is critical habitat for whooping cranes. It receives most of its freshwater from the San Antonio and Guadalupe Rivers. TCEQ issued permits that authorized the withdrawal of water from the San Antonio and Guadalupe Rivers. TAP asserted that the withdrawal of water from these rivers reduced the flow of freshwater into the San Antonio Bay causing a shortage of drinkable water and food for whooping cranes.

As a result, TAP sued the TCEQ alleging that TCEQ's water permitting and regulatory practices had started a chain reaction that ultimately led to the death of the twenty-three whooping cranes. After an eight-day trial, the lower court found that TCEQ's water permitting and regulatory practices violated the ESA. The lower court granted an injunction that prevented TCEQ from approving or granting new water permits in the vicinity of the Refuge and also required TCEQ to get an Incidental Take Permit from the U.S. Fish and Wildlife Service (FWS) that would allow TCEQ to conditionally take whooping cranes. TCEQ appealed the decision to the Fifth Circuit.

The Endangered Species Act

The ESA prohibits "any person" from "taking" any endangered species, which includes the whooping crane.[5] A "person" encompasses but is not limited to individuals, private entities, and government agencies.[6] A "taking" occurs when you actually or attempt to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" wildlife.[7] Furthermore, "harassment" is any act or omission that will likely injure "wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[8] At the same time, "harm" is the actual killing or injuring of wildlife, which may be accomplished by "significant habitat modification or degradation where it

actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[9] In other words, a person can "take" a protected species by causing habitat destruction if those actions lead to the death or injury of the protected animal.

TCEQ Did Not "Take" Whooping Cranes

The Fifth Circuit's opinion focused on whether TCEQ water withdrawal permits directly caused the deaths of the 23 whooping cranes and whether those deaths were foreseeable at the permitting stage. To be liable for taking an animal under the ESA, two elements must be satisfied: (1) a person's actions must be the proximate cause of the harm; and (2) the harm must be foreseeable. The Fifth Circuit found that the lower court misapplied these standards when it held TCEQ liable "for remote, attenuated, and fortuitous events" related to the issuance of water permits.[10]

To satisfy proximate cause, there must be a causal link between the conduct complained of (TCEQ's issuance of water permits) and the resulting harm (crane mortality); the causal link cannot be "so attenuated that the consequence is more aptly described as mere fortuity."[11] The Fifth Circuit found that the lower court did not explain why the remote connection between TCEQ's actions and the deaths of the whooping cranes resulted in ESA liability. The remote connection being that TCEQ permitting practices led to the withdrawal of freshwater from the Guadalupe and San Antonio rivers, which in turn led to reduced freshwater flow into the San Antonio Bay, which then led to increased salinity, which ultimately reduced the food and drinkable water supplies of the whooping cranes; the reduced food and water supplies then caused the cranes to become emaciated and stressed. Ultimately, the emaciation and stress caused the deaths of the twenty-three whooping cranes. The Fifth Circuit found this "long chain of causation" between TCEQ's issuance of permits and the cranes' mortality legally insufficient to establish proximate cause.

In evaluating foreseeability, the court considered whether TCEQ, when issuing the permit, could reasonably have predicted that the issuance of water permits would cause the whooping cranes to die. The Fifth Circuit found that the connection between TCEQ permitting and whooping crane deaths was affected by a number of contingencies that were outside of TCEQ's control; thus, the connection lacked foreseeability and was not direct. The contingencies noted by the court included water use by permittees, forces of nature, and the availability of whooping crane food sources. The court further found that the contingencies demonstrated "that only a fortuitous confluence of adverse factors" caused the death of the whooping cranes and that this confluence was "the essence of unforeseeability."[12]

Conclusion

In the end, the Fifth Circuit reversed the lower court's judgment and concluded that "finding proximate cause and imposing liability on the [TCEQ] in the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes' estuary environment goes too far."[13] In other words, the ordinary standards of proximate cause and foreseeability had not been satisfied. In reality, TCEQ's water permitting and regulatory practices may have been the cause of the twenty-three whooping crane deaths, but in the legal world, the causation was too remote to justify holding TCEQ liable for ESA violations.

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Endnotes

1. U.S. Fish & Wildlife Service, Report on Whooping Crane Recovery Activities (2012 breeding season-2013 spring migration), 1, 1-2 (September 2013), http://www.fws.gov/refuge/Aransas/what_we_do/science.html (follow "Whopping Crane Recovery Report (2012-2013)" hyperlink).
2. Wade Harrell, *March 17, 2014 Whooping Crane Update*, U.S. Fish & Wildlife Service (last visited July 14, 2014), http://www.fws.gov/nwrs/threecolumn.aspx?id=2147544385.
3. 16 U.S.C. § 1538(a)(1)(B).
4. Aransas Project v. Shaw, No. 13-40317, 2014 WL 2932514 at *1 (5th Cir. June 30, 2014). *See* Cullen Manning, *Preventing the Taking of Endangered Whooping Crane*, 33:2 WATER LOG 3 (2013), for a discussion of the lower court's ruling in *Aransas*.
5. 16 U.S.C. § 1538(a)(1)(B).
6. *Id.* § 1532(13).
7. *Id.* § 1532(19).
8. 50 C.F.R. § 17.3(c).
9. *Id.*
10. *Aransas Project*, No. 13-40317, 2014 WL 2932514 at *12.
11. *Id.* at *13.
12. *Id.* at *16.
13. *Id.* at *17.

BP and Anadarko Petroleum Liable for Civil Penalties under the Clean Water Act

Jesse Hardval

Over four years after the Macondo Well blowout released immense quantities of oil into the Gulf of Mexico, its aftermath continues to be the focus of many federal court rulings. A recent opinion by the U.S. Court of Appeals for the Fifth Circuit continued this trend. The new ruling decided who is liable for the Clean Water Act violations stemming from the 2010 blowout, the Macondo Well's owners or the *Deepwater Horizon*'s owners. The court ruled that the discharge of oil occurred due to cement failure at the well, making the well's owners, BP and Anadarko Petroleum, liable for civil penalties mandated by the Clean Water Act.

Background

Appealing a decision in favor of the government, BP Exploration and Production, Inc. (BP) and Anadarko Petroleum, Corp. (Anadarko) claimed they were not liable for civil penalties for violations of the Clean Water Act.[1] The Clean Water Act (CWA) § 311 imposes mandatory penalties of $25,000 per day or up to $1,000 per barrel against the owners of facilities that "discharge" oil or hazardous pollutants into navigable waters. It is estimated that over the course of 87 days the Macondo well leaked 4.9 million barrels of oil into the Gulf.[2] Those figures would make BP and Anadarko liable for anywhere from $2,175,000 to $4.9 billion in civil penalties.

Several important factual details were undisputed. BP and Anadarko owned the Macondo Well. Transocean owned the *Deepwater Horizon*. A "discharge" of oil into a navigable water occurred. And, the oil flowed from the Macondo Well through the *Deepwater Horizon*'s riser to reach navigable water.

Discharge Location Key to Liability

At issue before the court was whether the discharging facility was the Macondo Well or the *Deepwater Horizon*. BP and Anadarko claimed that the "discharge" did not occur from the well, but from the riser, because it was from a break in the riser that the oil entered navigable waters. Therefore, they claimed, the civil penalties should be enforced against the riser's owner, Transocean.

The Fifth Circuit disagreed with BP and Anadarko. It held the cement failure at the well constituted the "discharge" under the CWA, because it allowed oil to flow from an area of controlled confinement into navigable waters. In order to determine if the "discharge" occurred at the well or at the riser, the court used the examples of "discharges" given within the CWA and a plain language analysis. The court ruled the examples and the plain language indicated a "discharge" occurs at the point where controlled confinement is lost, or where "the fluid 'flow[s] out of where it had been confined.'"[3] Here the place of confinement was within the well. The failure of the cement well casing allowed the oil to flow into the riser and then into the Gulf.

The court backed up this reasoning by citing three cases: In two, the discharges flowed some distance over the surface of the land before entering navigable waters. In the third, *Pepperell Assocs. v. EPA*, hazardous substances flowed down a drain and through a conduit before reaching navigable waters.[4] In all of these cases the "discharge" occurred where controlled confinement of the oil or hazardous material was lost, not where the fluids entered navigable waters.

Based on this reasoning, BP and Anadarko then argued that the *Deepwater Horizon*'s blowout preventer was the discharging facility. They claimed the blowout preventer would have kept the oil confined if it had been properly installed. Therefore, its failure constituted the loss of controlled confinement. The court rejected this argument as well. It concluded the need for a blowout preventer only emphasized that the oil was already unconfined upon leaving the well. Accordingly, as controlled confinement was lost at the well, the well was the discharging facility.

Because the Macondo Well was the discharging facility, the Fifth Circuit held the owners of the well, BP and Anadarko, were liable for the penalties.[5] The CWA provision states the owners of the facility from which the oil is discharged, not the owners of the facility where the oil enters navigable water, are liable for the civil penalties. It was immaterial that the channels through which the flow reached navigable water were owned by a third party. For support the court again referred to *Pepperell*. As in that case, where CWA § 311 liability could not shift to the municipality who owned the conduit through which the discharged material flowed, here, the court ruled, liability could not shift to the owner of the riser through which the discharged oil flowed.

The court also dismissed the Appellants' claim that the potential fault of the *Deepwater Horizon* operators precluded BP and Anadarko's liability. It held civil penalty liability under the CWA cannot shift from appellants to the drilling vessel's owner or operator. The CWA does not provide a third-party-fault exception for civil penalty liability. So, the fact that negligence by the operators of the *Deepwater Horizon* may have contributed to the discharge reaching navigable water did not alter BP and Anadarko's civil penalty liability.

Conclusion

BP and Anadarko are now subject to civil penalties as calculated by statutory guidelines. In making its determination of the civil penalty amount, the court will consider several factors: the seriousness of the violation, any economic benefit to BP and Anadarko that occurred due to the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, any efforts by BP and Anadarko to minimize or mitigate the discharges effects, the penalty's economic impact on BP and Anadarko, and any other matters as justice may require. In an annual report from 2013, BP estimated its § 311 civil penalties will be $3.51 billion.[6] As of May 4, 2014 Anadarko had not estimated its civil penalties, but did state in a Securities and Exchange Commission 10-Q form that it "believes its exposure to CWA penalties will not materially impact the Company's consolidated financial position, results of operations, or cash flows."[7]

Photograph of spill-response crews burning oil in the Gulf of Mexico near the site of the leaking Macondo well; courtesy of SkyTruth Media.

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Endnotes

1. United States v. B.P. Exploration & Prod. Inc. (*In re Deepwater Horizon*), 2014 U.S. App. LEXIS 10425 (5th Cir. La. June 4, 2014).
2. The Ocean Portal Team, *Gulf Oil Spill*, Smithsonian Institution Ocean Portal, http://ocean.si.edu/gulf-oil-spill (last visited July 10, 2014).
3. *In re Deepwater Horizon*, 2014 U.S. App. LEXIS 10425 at 10.
4. *Id.* (*citing* Pepperell Assocs. v. United States EPA, 246 F.3d 15 (1st Cir. 2001)).
5. *Id.* at 18.
6. BP, *Clean Water Act Provisions*, http://www.bp.com/en/global/corporate/sustainability/environment/managing-our-impact-on-the-environment/complying-with-regulations/clean-water-act-provision.html (last visited June 24, 2014).
7. Anadarko Petroleum, Corp., *Form 10-Q* (May 4, 2014), *available at* http://www.anadarko.com/investor/pages/secfilings.aspx.

Wild Alligators:
When are They a Private Nuisance?

Austin Emmons

Photograph of an alligator crossing the road; courtesy of Matthew Paulson.

A few years after buying property in Mississippi, Tom and Consandra Christmas realized that their neighbor's property was infested with alligators and that the alligators were coming onto the Christmas's property. The Christmases claimed the alligators prevented them from enjoying and using their property and, consequently, brought a nuisance suit against Exxon, the owner of the neighboring alligator-infested property. After rulings by the local court and the Mississippi Court of Appeals, this case made its way to the Mississippi Supreme Court for consideration as a case of first impression: can wild alligators constitute a private nuisance?[1]

Background

Beginning in the 1980s, Rogers Rental & Landfill Company owned and operated a waste disposal site located between the towns of Centerville and Woodville in rural Wilkinson County, but the site stopped accepting waste in 1997. From 1984 to 2001, Exxon was the only customer at the waste disposal site owned by Rogers Rental & Landfill Company. During this time, Exxon was involved in the site's operations, though the extent of their involvement is disputed. During the early 1980s, Cliff Rogers, owner of Rogers Rental & Landfill Company, allegedly introduced alligators from Louisiana to the site. On July 6, 2001, Exxon purchased the site from Rogers, and on December 3, 2003, the Christmases purchased property next door.

Before the Christmases purchased their property, their real estate agent told them that he suspected alligators were on the property. Thus, the Christmases were warned that alligators might be present on their property when they purchased it. This warning was confirmed when the Christmases personally saw a few alligators on their property from 2003 to 2007. The Christmases began living on their property around August 2007 but claim that they did not know the adjacent Exxon site was infested with alligators until later in 2007, when Mr. Christmas went on Exxon's property to retrieve his dog.

On July 2, 2007, the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) surveyed Exxon's property at its request and found eighty-four alligators. In regards to Exxon's site, the MDWFP "noted that this was 'a high density of alligators to exist in the wild.'"[2] In February 2008, the Christmases moved from their property because of the alligators. Following another request by Exxon, the MDWFP removed several alligators from the site in July 2008.

On August 11, 2008, the Christmases sued Exxon alleging the alligator infestation was a nuisance. Instead of asking the court to order Exxon to stop the nuisance (aka alligator infestation), the Christmases sought monetary damages for harm to their property value. Exxon sought dismissal of the lawsuit arguing that, among other things, Exxon was not responsible for the alligators on its property. At trial, the lower court agreed with Exxon and dismissed the case.

The Christmases' appealed the decision to the Mississippi Court of Appeals. The appellate court concluded that it was debatable as to when the Christmases first learned of the alligator infestation and that when they actually learned of the infestation was critical to resolving the statute of limitations and damages issues of the case. Therefore, the Court of Appeals reversed the circuit court's ruling and remanded the case for trial.

Exxon appealed that decision to the Mississippi Supreme Court claiming that: (1) the statute of limitations had expired; (2) the Christmases had no recoverable damages; and (3) Exxon could not be liable for the wild alligators on its property.

Private Nuisance

A private nuisance occurs when one person's conduct interferes with another person's use and enjoyment of their land. To be liable for a private nuisance in Mississippi, the person causing the interference must be behaving in a particular way that is either (a) intentional and unreasonable, or (b) unintentional while also being negligent, reckless, or abnormally dangerous.[3]

Alligators: A Protected Species

Alligators, which are protected by Mississippi law, are exclusively managed by the MDWFP. Furthermore in Mississippi, it is illegal "for any person to disturb an alligator nest; to buy, sell, take or possess alligator eggs; to buy, sell, hunt, kill, catch, chase or posses alligators or parts thereof" unless they have a permit from the MDWFP.[4] Even if an alligator is deemed to be a nuisance, its capture and removal is strictly regulated by the MDWFP. When the Christmases complained about the alligators, Exxon reasonably responded by requesting that the MDWFP remove alligators from the site.[5]

Alligators as a Private Nuisance?

In a 5-4 decision, the Court determined that, since Exxon neither introduced the alligators to its property nor restrained the alligators, this case was about wild alligators. While a wild alligator nuisance claim is a case of first impression in Mississippi, the Supreme Court agreed with other jurisdictions that "private persons cannot be held liable for acts of wild animals on their property that are not reduced to possession."[6] Due to the laws protecting alligators, the Supreme Court concluded that "allowing wild alligators to constitute a private nuisance would subject landowners to liability for something over which they have no control."[7]

Accordingly, the Supreme Court held "that the presence of wild alligators 'not reduced to possession, but which exist in a state of nature' cannot constitute a private nuisance for which a land owner can be held liable."[8] Since the Supreme Court found that Exxon had not reduced the wild alligators to possession, the Court granted summary judgment in favor of Exxon and did not award monetary damages to the Christmases.

A Close Decision

The four dissenting justices agreed with the majority's holding that landowners could not be held liable for wild alligators not reduced to possession. However, the dissenting justices disagreed with the majority's conclusion that the alligators were wild. The dissenting justices believed that the evidence, when viewed in favor of the Christmases, created a genuine issue as to whether the alligators were wild or "had been reduced to possession such that Exxon could be liable for maintaining a nuisance."[9] Therefore, the dissent believed that the case should have been returned to the lower court for a trial on the issue of whether or not the alligators were wild or whether the alligators were under Exxon's control.

Conclusion

In a case of first impression, the Mississippi Supreme Court held that a landowner cannot be held liable for a private nuisance based on the actions of wild alligators not under his control. In the *Christmas* case, the Court found that the wild alligators on Exxon's site had not been reduced to possession, and as a result, Exxon could not be held liable for the wild alligators. At this time, it is unclear how the two neighbors will move forward to resolve the matter of the alligator infestation impacting the two properties. As noted above, MDWFP may be called in to remove additional wild alligators.

Austin Emmons is a 2016 J.D. candidate at The University of Mississippi School of Law and a research associate with the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. Christmas v. Exxon Mobil Corp., 138 So.3d 123 (Miss. 2014).
2. *Id.* at 125 (quoting the MDWFP report on the survey of Exxon's site).
3. Leaf River Forest Products, Inc. v. Ferguson, 662 So.2d 648, 662 (Miss.1995).
4. Miss. Admin. Code 40–2:5.1.C.1 (2013).
5. *Christmas*, 138 So.3d at 127.
6. *Id.*
7. *Id.*
8. *Id.* at 127-28.
9. *Id.* at 128 (Chandler, J., dissenting).

New Economic Impact Analysis of Mississippi's Offshore Drilling Program Ordered

Niki L. Pace

In 2012, the Mississippi Development Authority (MDA) released regulations authorizing a program to lease portions of the Mississippi Sound for offshore oil and gas exploration. Mississippi has historically allowed offshore oil and gas development to take place on certain state-owned submerged lands but has not allowed these activities in the Mississippi Sound. The MDA estimated the new leasing program for the Mississippi Sound would bring the state millions of revenue. However, the new program has faced challenges from various groups concerned about the impact to the coastal environment as well as to tourism. Most recently, the Gulf Restoration Network and the Sierra Club (collectively Sierra Club) challenged the economic impact analysis conducted by the MDA.[1]

Photograph of a Mississippi offshore oil rig; courtesy of Shane Lampman.

Background

In the spring of 2012, the MDA released new rules creating a leasing program that allowed for seismic exploration of the Mississippi Sound for minerals and gas. Following a legal challenge filed by the Sierra Club, a public hearing was held on August 8 and 9, 2012 before the Mississippi Major Economic Impact Agency (MMEIA), the state designated mineral lease commission.[2] During the hearing, challenges to the rules were raised. However, at the conclusion of the hearing, the hearing officer recommended adoption of the new rules. The Executive Director of MMEIA accepted the recommendation of the hearing officer and officially issued the regulations on September 21, 2012. Following the issuance of the rules, the Sierra Club appealed MMEIA's decision to adopt the rules to the local court.

Economic Impact Analysis

Under Mississippi law, agencies must prepare an Economic Impact Statement (EIS) before adopting or implementing proposed regulations.[3] Among other requirements, an EIS must include an approximation of the agency cost to implement and enforce the proposal; an estimation of the cost or economic benefit to all persons directly affected; a description of reasonable alternatives; and an analysis of the impact on small businesses in the affected area.[4]

To fulfill this requirement, the MDA prepared a "Benefit/Cost Analysis of Offshore Leasing of State-Owned Minerals Associated with Oil and Gas in Mississippi" on December 15, 2011. The half-page analysis projected a potential income to the state of $18.5 million and determined that the administrative cost of the leasing program to be no more than $20,000.[5] The report further concluded that leasing was a purely administrative process with "little cost to the state and no risk of environmental damage or economic harm."[6] The report acknowledged that the ultimate goal of leasing was to extract oil and gas at a future point and that oil and gas extraction would pose "inherent risk of environmental damage and economic loss."[7] However, the MDA found those concerns could be addressed in a future study.

The report further concluded that leasing was a purely administrative process with "little cost to the state and no risk of environmental damage or economic harm."

The Sierra Club raised two challenges to the EIS: (1) that the EIS is legally insufficient under Mississippi law, and (2) that the EIS incorrectly concluded that the leasing process was a purely administrative process. After reviewing the EIS, the court agreed with the Sierra Club on both counts.

Discussing the two points in conjunction, the court noted that the MDA failed to support or explain its conclusion that the leasing program was purely administrative. Having acknowledged that "exploration and extraction are intrinsically linked to the leasing process," the MDA erred in failing to account for this aspect of the program in the EIS.[8] Mississippi law requires the EIS account for the costs of implementing and enforcing the proposed action. Because the goal of the leasing program was extraction, the EIS should have considered those costs as well. In addition, the court noted that the EIS lacked: (1) analysis of impacts to small business, (2) costs and benefits of not adopting the rule, (3) determination of less costly or intrusive methods, (4) reasonable alternatives analysis, and (5) statement of methodology and data used to conduct analysis.

As a result, the court concluded that the EIS was in violation of Mississippi law. Without a legally sufficient EIS, the offshore leasing rules were also unsupported by law. The court sent the matter back to the MDA, ordering the MDA to prepare a "meaningful" EIS that addressed the deficiencies laid out by the court. In the interim, the regulations allowing oil and gas leasing in the Mississippi Sound are vacated.

Conclusion

This ruling serves as a temporary delay to the new offshore leasing program for the Mississippi Sound. Although the court's decision vacated the current rules, the MDA may re-issue the rules after preparing a legally sufficient economic impact analysis of the program. At that time, environmental groups may raise additional challenges to the new EIS or other legal challenges to the overall program. The timeline for the new economic impact statement is unknown at this time.

Niki L. Pace is senior research counsel and adjunct professor with the Mississippi-Alabama Sea Grant Legal Program at The University of Mississippi School of Law. Research assistance was provided by Allan Charles, a 2014 graduate of The University of Mississippi School of Law.

Endnotes

1. Sierra Club v. Miss. Dev. Auth., Case No. G-2012-1657, 4 (Miss. Ch. Ct. Hinds Cnty. 1st Dist. June 19, 2014).
2. Miss. Code. Ann § 29-7-1.
3. *Id.* § 25-43-3.105.
4. *Id.*
5. *Sierra Club v. Miss. Dev. Auth.*, Case No. G-2012-1657 at 4.
6. *Id.*
7. *Id.* at 5.
8. *Id.* at 6.

2014 Alabama Legislative Update

Energy

Senate Bill 402 and 403 makes it unlawful to construct, erect, install, operate, or locate a wind energy conversion system in Cherokee and Etowah County, Alabama without first obtaining a permit from a local governing body of Etowah County. In the event a municipality elects to regulate wind energy conversion systems within the corporate limits of the municipality, the regulations shall govern. Approved April 20, 2014.

Senate Joint Resolution 57 urges the Environmental Protection Agency to support the state regulation of carbon dioxide emissions from existing power plants by recognized state-developed standards. Approved March 3, 2014.

Fishing Licenses

House Bill 356 creates several new license options for both residents of the State of Alabama and nonresidents fishing in fresh water. The license options are (1) the resident daily state lake license, (2) the non-resident state lake fishing license, and (3) the non-resident three-day family fishing license. Approved April 8, 2014.

Flood Insurance

Senate Joint Resolution 22 seeks to bring together the Gulf Coast counties in Alabama, Alabama's Department of Insurance, and the Alabama Executive Office to explore and consider the formation of an Interstate Re-Insurance Coastal Band and/or re-insurance entity. Approved April 2, 2014.

Seafood Marketing

Senate Joint Resolution 81 seeks to have moneys generated from federal marine and fishery product import tariffs allocated by the U.S. Congress for the marketing of domestically harvested seafood. Duties and tariffs on imported seafood products generate approximately $280,000,000 annually for the U.S. Treasury. This marketing fund would help promote domestic seafood products that face competition from imported seafood products. The resolution also seeks to have the U.S. Congress create a National Seafood Marketing Fund. This fund would promote and develop the production of seafood in the United States. Approved April 10, 2014.

Water Resources

House Bill 403 seeks to place the State of Alabama on equal footing with other Gulf Coast States with regard to the limits and boundaries of the territorial waters by extending the territorial waters of the State of Alabama seaward to a distance of three marine leagues. Approved April 2, 2014.

House Bill 49 creates the Alabama Drought Planning and Response Act and the Alabama Drought Assessment and Planning Team. Under the Act, the Office of Water Resources shall publish a drought plan for the State of Alabama that is to be updated every 5 years. Approved April 9, 2014.

Senate Bill 355 allows county and municipal governments to discover, control, manage, and eliminate discharges into and from municipal separate storm sewers. They are also granted the enforcement authority needed to satisfy the requirements of storm water laws. The substantive scope of local programs is limited to the rules, regulations, or aspects that are absolutely required to satisfy the Clean Water Act. These local management programs rely upon the Alabama Department of Environmental Management (ADEM), to the fullest extent allowed, for permitting and enforcement of all ADEM discharge sites to avoid double regulation. Approved April 10, 2014.

2014 Mississippi Legislative Update

Marine Resources

Senate Bill 2579 creates the Department of Marine Resources Accountability and Reorganization Act. The Bill creates five new offices within the Department and gives the executive director more authority to take personnel actions for the purposes of reorganizing. It also requires an independent annual audit of the department. Approved April 16, 2014.

Seafood

Senate Bill 2068 allows restaurants to prepare and serve recreationally caught marine finfish to the persons who caught the finfish. Approved by Governor, March 24, 2014.

Wetlands

House Bill 941 increases to ninety days the amount of time for which an applicant can request an extension for a coastal wetlands permit to the Mississippi Commission on Marine Resources. Approved March 21, 2014.

Meet Our New Hire – Stephen Deal

Stephen, our new Extension Specialist in Land Use Planning, is a newcomer to the Gulf Coast, having lived most of his life in North Carolina. With a Masters in City Planning from Clemson and a major in Urban Studies from Furman, Stephen maintains an avid interest in cities and in the built form. As an employee of Mississippi-Alabama Sea Grant, he will work closely with local planning and public policy professionals in the area of coastal resiliency as part of our outreach team. He arrives to the position with two years of prior work experience in southern West Virginia, along with numerous internships with city governments and regional agencies.

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