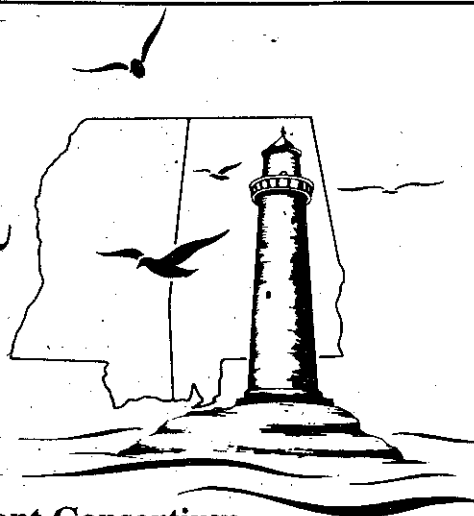


# WATER LOG



A Legal Reporter of the  
Mississippi-Alabama Sea Grant Consortium

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# WATER LOG

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

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# The Administration's New Wetlands Policy

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by John Farrow Matlock

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## INTRODUCTION

On August 9, President Bush and Environmental Protection Agency Administrator William Reilly announced a new regulatory policy towards the nation's wetlands. Under the revised policy, wetlands will be defined more narrowly. In the President's words, "The plan seeks to balance two important objectives—the protection, restoration, and creation of wetlands, and the need for sustained economic growth and development." The subject of wetlands has not raised the kind of interest that air pollution or toxic waste have, perhaps because the word conjures up vague images of swamps or a place where hunters shoot ducks. In fact, while only about five percent of land in the 48 contiguous states is now classified as wetlands by the federal government, as much as half the land in the lower 48 states, and more than half the farmland, meets the current definition of wetlands, meaning that it could be subject to federal regulation, including restrictions on use and development. Some measure of the importance this issue has risen to is indicated by the fact that former Senator Paul Tsongas, the first announced candidate for the Democrats' presidential nomination, has named the protection of wetlands a principal issue in his campaign, along with abortion and global warming.

## WHAT WETLANDS ARE

Broadly stated under the present regulatory definition, a wetland is land covered by water or saturated with water at a depth of no greater than 18 inches beneath its surface for at least seven consecutive days a year, so long as the land consists of certain kinds of soil and supports certain kinds of plants. In addition to swamps, wetlands include coastal marshes, bottomlands, mud flats, and a host of other areas. Wetlands serve a number of functions. Two-thirds of the fish caught in United States waters by commercial fishermen are spawned or reared in wetlands or feed in them. Wetlands also serve as breeding grounds and habitat for birds and animals; as filters to protect groundwater against sediment and polluted surface water; and as places for sport and recreation. Of special importance is the role of wetlands in ameliorating the destructive effects of floods

(hence the Corps of Engineers' concurrent jurisdiction over wetlands). Wetlands that border flooded rivers act as a buffer to protect adjacent uplands from inundation. The absorption and slow release of runoff by wetlands also reduce the likelihood of flooding downstream.

Only in the last 20 or so years has there been wide concern about the preservation of wetlands. According to one estimate, the area of wetlands in the contiguous 48 states has decreased by about half since the 17th century. Most of that area was drained or filled to convert it to productive farmland or to improve public health by eliminating breeding grounds for mosquitoes. In the present century wetlands have continued to be lost to agriculture, as well as to oil and gas drilling, construction of marinas and like waterfront activity, other private development, and highway building. The largest single cause of loss, however, has proven to be the levees along the Mississippi River and its tributaries, built, ironically, by the federal government. Before the levees were built, seasonal floods carried topsoil southward from 32 states and Canada, depositing most of it in Mississippi and Louisiana and keeping the lands in the lower delta above sea level. Now that the river's flow is held within the narrow confines of the levees, wetlands near the river's mouth are no longer replenished by the yearly accumulation of sediment; they are inexorably being eaten away by subsidence, wave action, and the inflowing of salt water. The rate of loss of coastal wetlands in Louisiana is approaching 50 square miles a year, most of which is attributable to flood control projects upriver.

## FEDERAL REGULATION AND THE 1989 MANUAL

The federal government regulates wetlands under the Federal Water Pollution Control Act (relevant parts of which are known as the Clean Water Act), 33 U.S.C.A. §§ 1251 *et seq.* (West 1986 and Supp. 1991). In 1972 the Act was amended to extend the jurisdiction of the agencies charged with enforcing it, principally the Army Corps of Engineers and the Environmental Protection Agency (EPA), from "navigable waters" to "all waters of the United States." The 1977 amendments to the Act mentioned wetlands by name for the first time. By the end of the decade the Act, originally intended to prevent water pollution, was being applied to protect wetlands, in part under the theory that a polluted wetland might drain into some body of water and thence across a state line. Section 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (West 1986 and Supp. 1991)

requires landowners to obtain a permit from the federal government before filling or dredging a wetland. Persons who violate section 404 are subject to injunction and criminal penalties, including fines and imprisonment.

The government had no single standard for determining what was a wetland until 1989, when EPA, the Corps of Engineers, the Department of Agriculture's Soil Conservation Service, and the Department of the Interior's Fish and Wildlife Service jointly promulgated the saturated-for-at-least-one-week definition in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, or wetlands delineation manual. The government's definition has been roundly criticized by an array of interests that range from large businesses to small farmers and landowners, the expressed aim of these groups being "to put the wet back into wetlands." The criticism most often voiced is that the definition is both too inclusive and too vague. Regulations published by EPA and the Corps of Engineers in 1977 and still in use say simply that wetlands are "areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" (33 C.F.R. § 328.3(b)). Thus hydrology (i.e., water content of soil—whether it is flooded or saturated, and for how long), vegetation (the presence of one of 7,000 species of plants as set forth in the regulations), and type of soil are normally reckoned the three "indicators" of wetlands. Lands that meet the definition are termed "jurisdictional wetlands."

The most frequent target of criticism has been the rule that seven consecutive days of inundation or saturation is sufficient to satisfy the hydrology part of the definition. This rule accounts for the extension of federal regulation to vast amounts of land. Some critics maintain that only those lands that are wet for a period long enough to support the aquatic phase of the life cycles of amphibians and small birds—which lasts about two weeks—should be classified as wetlands; they suggest that the land be wet for at least 21 days before qualifying as a wetland. Others argue that protected wetlands should be limited to those areas capable of sustaining typical wetland plants and suggest a period of at least 30 consecutive days during the growing season when water is on or at the surface of the ground.

Critics likewise question the practice of classifying an area as a wetland when it meets only two of the three criteria (hydrology, vegetation, and soil). The manual provides that an area lacking hydrophytic vegetation will be deemed to have it so long as both hydric soil and the requisite hydrology are present, in effect reducing the number of necessary indicators from three to two. A related

concern is that the standards are far too broad for designating wetlands based on the kind of plants that an area supports. The appearance of any one of 7,000 species of plants as the dominant species is enough to satisfy the vegetation requirement. Many of those species, however, are "facultative," meaning that they grow equally well in wet or dry soil. Critics propose that facultative species of plants no longer be recognized as indicators of wetlands.

Environmentalists respond that the changes in policy currently under consideration are politically motivated and are not supported by the weight of scientific evidence. Relaxing standards for issuing wetland permits is unnecessary, they argue, especially in light of the fact that 95% of the permits applied for in 1990 were granted. They note that several ranking ecologists at EPA refused to endorse the revised manual, and that EPA Administrator William Reilly was himself opposed to raising the minimum period of saturation to 21 days. The inevitable result of the new policy, they say, will be the destruction of habitat for hundreds of species of animals, many of them endangered; more pollution of groundwater; and steady increases in damage from floods and erosion.

## COMPLAINTS ABOUT REGULATORY ACTIONS

The authority under which regulatory agencies, especially EPA and the Corps of Engineers, exercise authority over the protection of wetlands has also been called into question. Those agencies' expansion of jurisdiction under section 404 of the Clean Water Act to include the protection of wetlands is viewed by some as an extension of their prerogative not warranted by the statute; that is, the agencies are using the Clean Water Act not to prevent pollution, but to preserve wetlands. Critics also charge that the effect of allowing EPA and the Corps such wide latitude in designating wetlands is to work unconstitutional "takings" of land. (The Fifth Amendment requires that the government pay just compensation to property owners when it exercises its power of eminent domain or so restricts the use of private land as to render it valueless to the owner.)

Critics have given added weight to their complaints with a parade of horrors involving denials of permits, prosecutions, and huge fines for seemingly innocent activities on private property. Regulators tell farmers not to cultivate their land without first getting a wetlands permit. A householder is warned that he will be sued if he builds a tennis court in his back yard. The case that has received the widest attention in the national press, where it appeared in

*Newsweek*, is that of John Pozsgai, a Hungarian immigrant in Pennsylvania, who cleaned old tires and car parts from his land and then leveled it off with fresh dirt to build a garage. Pozsgai was convicted of felony, sentenced to three years in prison, and fined \$202,000 for failing to obtain a wetlands permit and for filling the land, prompting great public outcry. (What much of the press has failed to report in an ostensibly excellent tale of arbitrary governmental action is that Pozsgai ignored several warnings from the government, including a cease-and-desist order from the Corps of Engineers and an injunction issued by a federal district judge.)

### THE REVISED MANUAL AND CURRENT LEGISLATIVE ACTIVITY

Against this backdrop the President's Council on Competitiveness, chaired by Vice President Dan Quayle, began a review of the 1989 Wetlands Delineation Manual. A new manual was promulgated on August 14 but does not go into force until October 15. The revisions proposed by the Council are far-reaching in effect; an early estimate suggests that if they are implemented, the area of wetlands subject to federal regulation will be reduced by about a quarter. At the heart of the new manual is a change in the criterion for hydrology, which will be limited to lands either covered with water for at least 15 consecutive days during the growing season or saturated with surface or ground water at the surface for at least 21 days a year during the growing season. A growing season is defined as beginning three weeks before the average date of the last killing frost of spring and ending three weeks after the average date of the first killing frost of autumn. The new manual requires that all three indicators—hydrology, hydrophytic plants, and hydric soil—be present in an area for it to be classified a wetland. Recognizing that some wetlands fail to support hydrophytic plants but are nonetheless ecologically valuable, the revised manual by special reference includes playa lakes, pocosins, prairie potholes, and vernal pools.

The broad standard for meeting the vegetation requirement of the definition of wetlands has also been narrowed. No longer will the presence of any one of several thousand species as the dominant species satisfy the requirement. Instead the new manual lays down a formula whereby the "prevalence index" of all species in an area must be less than 3.0 for the area to be classified a wetland. The prevalence index is arrived at by inspecting an area, counting the different kinds of plants, assigning each kind a

number, and then averaging the sum, taking into account the relative frequency of each kind of plant.

The procedure for obtaining a wetlands permit is simplified in the new manual. The new manual would increase the issuance of general permits, for which individual applications are not required. Under the old manual most general permits were granted under a rule that exempted wetlands of less than 10 acres. The new manual also provides that permits will be automatically granted in cases where the review of an individual application takes longer than six months.

The new policy endorses the controversial system of "mitigation banking" that would allow persons (usually developers and other large landowners) to restore wetlands as compensation for other wetlands they damage or destroy by accumulating "mitigation credits" for wetlands they restore. As part of the new policy, President Bush proposes that the federal government purchase 450,000 acres of wetlands and that funding for wetlands protection and research be increased in the 1992 budget. These measures taken together, says the Administration, make good President Bush's campaign pledge of "no net loss of wetlands." The Administration's actions have won it praise from opponents of the old regulatory regime. Many environmentalists consider the new policy a step backward, calling the revised hydrology standard arbitrary and unscientific and contending that the Administration has surrendered to business interests.

Despite the relaxation of standards in the new manual, there are moves in Congress to pass legislation that would further restrict federal jurisdiction over wetlands. S.1463, introduced by Senator John Breaux (D-La.) with 20 co-sponsors, and H.R.1330, introduced by Representative James Hayes (D-La.) with 160 co-sponsors, would remove wetlands from the reach of the Clean Water Act and give the Corps of Engineers sole regulatory authority over wetlands. Those bills would extend protection only to wetlands declared to be "high-value." S.50, introduced by Sen. Steve Symms (R-Idaho), and H.R. 905, introduced by Representative Bob McEwen (R-Ohio), would treat many denials of permits as regulatory "takings" of property and require the payment of compensation to owners.

### CONCLUSION

The direction that the federal government will take in its wetlands policy has become the most talked-about environmental issue of 1991. Whatever the validity of certain criticisms of the former wetlands policy, it cannot be

denied that monied private interests have supplied much of the impetus behind the Administration's easing of standards for defining wetlands. The scene for further changes in the nation's wetlands policy, at least for the foreseeable future, has shifted to Congress, which could enact changes that would make the Administration's seem mild by comparison. □

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## Private Remedies for Water Pollution

by Philip T. Merideth

*"It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks, or to be protected against everything which threatens their purity." — Oliver Wendell Holmes.*

### INTRODUCTION

American courts have long recognized the common law right of an aggrieved party to maintain a cause of action against a polluter of water. The Mississippi Supreme Court has declared, "One of the cardinal rights of a riparian proprietor is to have the water of the stream come to him in its natural purity . . . and any wrongful pollution . . . constitutes an actionable infringement of such right." *Southland Co. v. Aaron*, 221 Miss. 59, 72 So. 2d 161, 165 (1954). This article will treat theories of liability, remedies, and defenses to private actions for water pollution in American courts, with particular attention to the Mississippi cases.

### THEORIES OF LIABILITY

American courts have entertained private claims under common law theories of riparian rights, nuisance, negligence, trespass, and strict liability.

Riparian lands are lands lying along the natural watershed of a body of running water, and riparian rights are vested in owners of land adjacent to a watercourse. Riparian rights have been defined and applied by the courts under one of two inconsistent theories: the "natural flow" theory

and the "reasonable use" theory. Under the natural-flow theory, which is followed in a minority of jurisdictions, every riparian owner is entitled to have the flow of water along or over his property unchanged in quality or amount by the action of another. The riparian owner has a cause of action if anyone brings about a material diminution in the amount or quality of water flowing through the watercourse. However, most jurisdictions which recognize riparian rights as grounds for a private water pollution action have adopted the reasonable use theory, behind which lies the premise that watercourses exist for the benefit of all and need not be kept in their natural state. Every riparian owner may make reasonable use of the water, even if his use causes some reduction of amount or quality, and thus some water pollution may be considered a "reasonable use." In ascertaining what is a reasonable use, most courts employ a balancing test: a use is not unreasonable until the harm to one riparian owner outweighs the utility of the use to the other owner.

The riparian rights doctrine was clearly announced in the United States as early as 1827. However, the doctrine was not of great usefulness as a basis for liability during the Industrial Revolution, as courts considered the damage in water pollution cases to be *damnum absque injuria* (loss without legal injury). Courts often held riparian rights to be restricted to domestic uses such as water for drinking and bathing, and many plaintiffs who sued to enforce their rights were denied recovery on the grounds that personal inconvenience must yield to the greater public interest. As a result, the riparian rights doctrine was never widely used, although many courts subsequently limited the holdings in the early pro-industry cases to their specific facts.

The tort of nuisance, the oldest and most frequently relied upon theory of liability for pollution, involves a non-trespassory interference with the rights of another; the material element of the offense is not some specific conduct of the defendant, but the invasion of the plaintiff's interests. There are two kinds of nuisance claims. Private nuisance is an unreasonable interference with the plaintiff's enjoyment of his property. (Riparian rights protect the water in a watercourse, whereas nuisance is a remedy for interference with land.) A riparian owner may have a cause of action for private nuisance arising from water pollution if his property interests are adversely affected (e.g., defendant spoils water for drinking, bathing, recreation, or irrigation). By way of contrast, public nuisance is an interference in the exercise of rights common to all members of the public. Because of its quasi-criminal nature, an action for private nuisance may be brought only by the state.

However, the two are not mutually exclusive, and an act of nuisance may interfere with both private and public interests. For a riparian owner to maintain a private nuisance action for a nuisance that also impairs the interests of the public, he must show that he has suffered special damage differing in kind and degree from that of the general public. In addition, the plaintiff must put on proof of the two essential elements of any private nuisance suit: that the defendant intentionally interfered with the plaintiff's use and enjoyment of his property, and that a substantial and unreasonable invasion of the plaintiff's interests did in fact occur. The defendant need not be a riparian owner, and may in fact be any polluter, even a lessee, licensee, or trespasser.

Some modern courts have adopted the theory of aesthetic nuisance, holding that an actionable interference with the use of property need not produce physical injury. Recovery for aesthetic nuisance is based on a standard of "comfortable enjoyment," which includes the mental as well as physical comfort of the plaintiff. An offensive situation (like odor from a polluted watercourse) can be held a private nuisance if the interference with the plaintiff's enjoyment of his property rendered his life uncomfortable, even absent a showing of endangerment to health or property.

A plaintiff alleging damage from water pollution may bring an action sounding in negligence, in which he must show that the defendant breached a duty owed to him which was the proximate cause of the plaintiff's damage. One difficulty with water pollution actions grounded in negligence is that there is no widely accepted standard of care against which an alleged polluter's conduct can be measured. Another obstacle for the plaintiff is proving that the defendant's actions were the actual and proximate cause of damage to him; where a watercourse is polluted by discharges from several sources, it may be impossible to find that a particular actor is at fault.

It is also possible to bring an action for trespass. A trespass involves an invasion of a landowner's interest in the exclusive possession of his land. Many jurisdictions no longer strictly apply the traditional requirement of proof of actual physical invasion. Thus some courts have held that the release into water of pollutants which find their way onto the plaintiff's land is an invasion of a protected interest and an actionable trespass.

In many cases trespass and nuisance theories may overlap. However, the trespass theory may be preferable to nuisance in cases where actual injury is slight or difficult to prove, since in trespass damages are presumed and no

actual injury need be proven. The plaintiff in trespass can recover nominal damages, but he must prove actual injury for any substantial recovery. He may also be entitled to injunctive relief for a repeated or continuing trespass, even where the damage is minimal.

While the trespass theory has been used successfully in the past, the trend is towards requiring that the invasion be negligent, intentional, or the result of an ultra-hazardous activity. The *Restatement (Second) of Torts* § 166 has adopted the view that an entry on land that is not negligent, unintentional, and not part of an abnormally dangerous activity is not an actionable trespass. In *Vodopija v. Gulf Refining Co.*, 198 F.2d 344 (5th Cir. 1952), the Fifth Circuit followed the trend in affirming dismissal of a trespass action for water pollution on grounds that the plaintiff failed to allege or prove the defendant's negligence.

Polluters may be held strictly liable for damages caused by the release of noxious matter into the environment. The English rule of *Rylands v. Fletcher* says: "The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." The advantage of the strict liability theory is that it allows recovery without a showing of fault. The plaintiff must prove only the fact and cause of the injury, and it is immaterial that the defendant acted with the utmost care. While the trespass and nuisance theories are also not fault-based, individuals sometimes suffer damages under circumstances that do not clearly constitute either nuisance or trespass. An examination of the cases suggests that a plaintiff may have little chance of recovery unless he can assert another theory of liability in addition to strict liability.

Whatever theory of liability the plaintiff employs, he must establish causation—a direct causal link between his injury and the defendant's wrongful act. A plaintiff alleging water pollution may face several problems in proving causation. He may have to prove that the injury complained of did not exist prior to exposure to the pollutant; or that he has not been exposed to the pollutant from any source other than the defendant; or that an injury to his health was caused by a pollutant (to establish which he must put on expert testimony). All of these causation problems are not likely to crop up in every case, and practicing lawyers report that the plaintiff will almost always prevail so long as he establishes causation.

## REMEDIES

The most common remedy granted to plaintiffs injured by water pollution is monetary damages. The amount of monetary damages varies according to the character and extent of the injury. Where the injury is recurrent or permanent, the measure of damages is the depreciation in the market value of the property. If the injury is temporary, damages are measured by the difference in the rental value of the property before and after the pollution occurs. Courts generally award no damages where the only injury is a loss of property value. It is usually held that an owner who buys land damaged by pollution may recover only for the harm that occurs after his purchase. In addition, courts have routinely awarded a wide variety of special damages—e.g., illness, discomfort, inconvenience, annoyance, spoiling of drinking water, sickness or death of livestock, death of trees or fish—upon the plaintiff's proof that a particular injury resulted from the defendant's pollution.

A significant problem faced by victims of water pollution is recovery of damages for business losses. The non-riparian innkeeper or restaurateur in particular has a difficult burden of proving that his business losses were proximately caused by pollution. Many courts have held that non-riparian business owners cannot recover lost profits from travelers' cancellations because there can be no liability for a merely negligent interference with contractual rights. Courts have also denied recovery for business losses because proof of lost profits is speculative.

Plaintiffs in "fish kill" cases have attempted to recover business losses under a nuisance theory. A plaintiff asserting private nuisance must prove that his damage is different in kind and degree from that of the general public, which has led some courts to deny recovery on the grounds that anyone can fish in public waters. The modern view allows professional fishermen recovery on the grounds that plaintiffs who must be licensed by the state to do business have an interest in water quality sufficient to confer standing to sue under a nuisance theory.

The Mississippi Supreme Court has held that the owner of a fishing resort could recover lost profits resulting from a fish kill caused by the defendant's pollution if the plaintiff could prove that he would have made a greater profit but for the killing of the fish. *Masonite Corp. v. Steele*, 198 Miss. 530, 21 So. 2d 463 (1945), *modified*, 198 Miss. 530, 23 So. 2d 756 (1945).

Courts frequently allow punitive damages as well as compensatory damages in water pollution cases. The general requirements for an award of punitive damages in a water pollution case are: (1) an independent theory of liability (riparian rights, nuisance, negligence, trespass, or

strict liability); (2) proof of actual damage caused by the pollution; and (3) proof that the defendant's actions were willful, wanton, malicious, oppressive, or reckless. In determining whether the defendant's conduct can be so characterized, courts often consider whether the defendant had notice and an opportunity to correct the situation. If he has notice and willfully continues to pollute, punitive damages may be proper to compel the defendant to stop polluting. *See, e.g., Southland Co. v. Aaron*, 224 Miss. 780, 80 So. 2d 823 (1955). In a case where punitive damages are sought, the trial judge must determine whether the facts warrant submitting the issue of punitives to the jury. If so, the issue of assessing punitive damages is solely for the jury to decide under proper instructions.

The plaintiff's recovery in an action for water pollution is limited to the amount of damages he sustains up to the time of the suit. Plaintiffs who suffer continuing injury from water pollution may bring successive suits. Attorneys' fees are ordinarily not recoverable by the prevailing party in federal court unless expressly provided for by statute.

Since many cases of water pollution involve continuing injury, money damages alone may not be an adequate remedy and therefore injunctive relief may be appropriate. In such cases, the court must "balance the equities" by considering factors such as the good faith or misconduct of each party, the economic hardships the parties will suffer, and the best interests of the public. If the severity of the harm caused by the pollution outweighs the utility of the defendant's conduct, the court may issue an injunction. Even if an injunction is denied, money damages may still be awarded. In *Gulf Park Water v. First Ocean Springs Dev.*, 530 So. 2d 1325 (Miss. 1988), the Mississippi Supreme Court stated that an injunction should be granted with extreme caution, but went on to cite prior holdings that an injunction will ordinarily be refused only when there is estoppel, laches, or a refusal by the plaintiff to cooperate with the defendant's attempts to abate. In Mississippi, an injunction may be granted to abate a nuisance or prevent a trespass, even in the absence of demonstrable harm. Furthermore, an injunction must be amenable to compliance without undue hardship and must be reasonably tailored to achieve the desired end.

In addition to seeking money damages and injunctive relief, a person injured by water pollution may avail himself of the common law remedy of abatement by self-help. It has generally been held that one who has been injured or threatened by a nuisance may, at his own peril and within a reasonable time, use reasonable force to terminate the nuisance. Some courts hold that the privilege of self-help



fails without notice to the wrongdoer and a demand for removal of the nuisance, or if circumstances allow sufficient time to resort to the legal process. In *Cook Industries v. Carlson*, 334 F. Supp. 809 (N.D. Miss. 1971), an action for damages and an injunction to require the opening of a drainage ditch, a federal district court applying Mississippi law recognized that landowners in Mississippi have the right to abate a nuisance if it is done without provoking a breach of the peace. The abater acts, however, at his own risk and assumes all liability for exceeding the right. According to the court, abatement in Mississippi is appropriate only in cases of extreme urgency or necessity, and the scope of the remedy is limited to doing what is necessary to abate the nuisance while avoiding unnecessary damage to the property causing the nuisance. The abater will be held to a greater standard of care in abating a nuisance which is not an emergency.

## DEFENSES

One of the most common defenses in water pollution cases is prescription. To defend under a theory of prescription, the defendant must prove that his pollution has been open, notorious, uninterrupted, and adverse for the entire period prescribed by the statute of limitations. (Mississippi's general statute of limitations allows three years to bring an action.) The pollution must not have changed in character or amount during the prescriptive period; otherwise the defense will fail. There can be no prescriptive right to create a public nuisance, and the defense will not be allowed in such cases.

Another frequently raised defense is the running of the statute of limitations. While the statutory period may vary according to the plaintiff's theory of liability, it is usually held that the statute of limitations begins to run when the cause of action accrues, that is, when the plaintiff knew or should have known of the pollution. Successive causes of action accrue for so long as the pollution continues. In cases of continuing pollution, the statute of limitations bars only those damages for which the statutory period has run, but recovery for damages occurring within the period of limitations will not be barred. In Mississippi, plaintiffs in water pollution cases brought under a negligence theory have the advantage of a rule of discovery where the injury or disease is latent. Under Miss. Code Ann. § 15-1-49(2), which was adopted in 1990, a cause of action for latent disease or injury does not accrue until a plaintiff has discovered, or by reasonable diligence should have discovered, the injury. Similar to the statute of limitations defense

is the doctrine of laches, which may be raised where the plaintiff has unreasonably delayed filing suit to the prejudice of the defendant.

A minority of states allow a water pollution defendant to plead either the mere existence of a state pollution control agency (which would have exclusive jurisdiction over pollution cases) or compliance with a state pollution abatement order as sufficient to deprive the courts of jurisdiction to hear cases brought under common law theories. However, most states, including Mississippi, have adopted a contrary rule, either by statute or judicial decision. See *Ginther v. Long*, 227 Miss. 885, 87 So. 2d 286 (1956).

Another defense allowed in some states is agreement between the parties to allow pollution beyond reasonable use. Such agreements are in effect easements to pollute; but if the pollution rises to the level of a public nuisance, the defense will fail as a violation of public policy. The agreement defense is not effective against other riparian owners who have not given their consent to be bound by the agreement. Other defenses sometimes raised are assumption of the risk or "coming to the nuisance" where the pollution precedes the plaintiff's occupancy of the land, and contributory negligence where the plaintiff sues in negligence.

## OTHER MISSISSIPPI CASES

In *Masonite Corp. v. Dennis*, 175 Miss. 855, 168 So. 613 (1936), the court declared that the plaintiff has the burden of proving liability by a preponderance of the evidence (the usual burden of proof in civil cases), and held plaintiff's evidence of pollution 50 miles upstream insufficient to establish causation.

In *D & W Jones v. Collier*, 372 So. 2d 288 (Miss. 1979), the owner of a catfish pond sued five neighboring farmers and crop dusters for negligence in applying agricultural chemicals which contaminated his pond. The plaintiff could not prove that any one defendant sprayed enough chemicals to cause the harm to his property, and there was no evidence of common design among the defendants. Upon plaintiff's appeal from the circuit court's dismissal, the Mississippi Supreme Court reversed and remanded, holding that the defendants' separate, concurrent, and successive negligent acts which together caused a single, indivisible injury rendered the defendants jointly and severally liable.

A 1990 verdict by a Greene County jury may become a landmark water pollution case in the jurisprudence of

Mississippi. Plaintiff, a riparian owner who for years had fished and swum in the Leaf River before discovering the pollution, sued Georgia-Pacific Company for polluting the river with dioxin from its Leaf River pulp mill. On plaintiff's action for loss of property value and mental suffering, the jury awarded him \$40,000 in compensatory damages and \$1,000,000 in punitives, but rejected his claim for mental suffering. Simmons' suit touched off a wave of litigation in south Mississippi, some 10,000 plaintiffs having now filed similar suits against Georgia-Pacific.

## CONCLUSION

Some legal scholars have written that common law theories of liability have been inadequate to control water pollution. This may have been (and continue to be) true in jurisdictions where judges and juries consistently favor businesses over private citizens. In the main, however, the success of common law actions to control water pollution depends upon the vigilance of private plaintiffs in protecting their rights through seeking redress in the courts. □

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## Riparian Rights in Mississippi

*by Paul Krivacka*

### INTRODUCTION

A dispute has developed in Mississippi regarding littoral/riparian rights and the public trust doctrine. Riparian rights are those pertaining to land bordering a water course, or belonging or relating to a bank of river or a stream. Littoral rights are those pertaining to property bordering an ocean, sea, or lake. The two terms are often used interchangeably. The term riparian will be used in this article to refer to both riparian and littoral rights. The public trust doctrine will be discussed below. Specifically, this article will address the nature and alienability of riparian rights to oyster beds in the Gulf of Mexico within the framework of the public trust doctrine.

## THE PUBLIC TRUST DOCTRINE AND RIPARIAN RIGHTS

The public trust doctrine provides that the state holds title to tidelands in trust for the benefit of the public who may use them for navigation, fishing, commerce, or other activities. Mississippi obtained title to tidelands below mean high tide from the United States government under the equal footing doctrine, a legal principle which provides that states entering the Union after its initial creation come in on an "equal footing" with other states. Thus, Mississippi obtained title to its tidelands upon statehood. *Phillips Petroleum Co. v. Mississippi*, \_\_\_ U.S. \_\_\_, 108 S. Ct. (1988). Miss. Code Ann. § 29-15-3(1) (1989) provides that it is the public policy of Mississippi to favor the preservation of the natural state of public trust tidelands, except where an alteration of specific public trust tidelands would serve a higher need. Miss. Code Ann. § 29-15-5 (1989) further provides that tidelands and submerged lands are held by the state in trust for public use.

The question of how riparian rights work within the context of the public trust doctrine is a complicated one. In Mississippi, riparian rights give the owner of property adjacent to tidelands the private common law rights of landing boats, hauling nets, gathering seaweed and shells, and taking sand from the beach between the high and low tide marks. In addition to these rights, the riparian owner has the right to an unobstructed view, access to the water, and use of the water for navigation, boating, swimming, and fishing. Jarman, *Of Time, Tidelands, and Public Trust*, 57 Miss. L.J. 131, 157 (1987). Finally, accretions to upland property are granted to the owner as riparian rights.

Miss. Code Ann. § 49-15-9 (Supp. 1991) expands common law riparian rights to include the sole rights of planting, cultivating in racks or other structures, gathering oysters, and erecting bathhouses extending a distance of no more than 750 yards from the shore. The statute explicitly excludes riparian ownership activities which interfere with navigation and ownership over reefs and natural oyster beds. Miss. Code Ann. § 29-15-5 (1989) further provides that riparian property owners have common law statutory rights under the Coastal Wetlands Protection Law, §§ 49-27-1 *et. seq.* (1990), which extend into the waters and beyond the low tide line, and that the state's responsibility as trustee extends to such owners as well as to the rest of the public.

## THE NATURE OF RIPARIAN RIGHTS

The nature of riparian rights with regard to oyster bedding is stated in Miss. Code Ann. § 49-15-9 (Supp. 1991). The riparian owner is granted the sole right to plant, cultivate, and gather oysters to a distance of 750 yards from the shore. These rights involve public trust tidelands and are to the exclusion of those rights enjoyed by the general public. What is the nature of the riparian owners' property interest as conferred by § 49-15-9? In *Crary v. State Highway Commission*, 219 Miss. 284, 68 So. 2d 468, 471 (1954), the Mississippi Supreme Court held that a predecessor statute (Code Sec. 6066) to § 49-15-9, giving riparian owners bordering on the Gulf of Mexico, Mississippi Sound, and their tributary waters the sole right of planting and gathering oysters, and erecting bathhouses simply grants a revocable license of privilege subject to a superior state right to impose an additional public use upon the property, already set aside for public purposes, without requiring payment in compensation. The court reasoned that the statute, when construed consistently with prior case law, and Section 81 of the Mississippi Constitution, which provides that the legislature shall never authorize the permanent obstruction of any navigable waters of the state, granted to the riparian owners a revocable license of the privilege to plant and gather oysters and to build bathhouses and other structures. Therefore, the nature of the riparian rights conferred to riparian owners by Miss. Code Ann. § 49-15-9 is a license and not a property interest that is unlimited in use and duration. It is more appropriate to refer to the riparian owners as having the sole "privilege" to plant, cultivate, and gather oysters to a distance of 750 yards from the shore. Should a superior state purpose arise for the use of the public trust lands that affect the riparian owners rights, Miss. Code Ann. § 29-15-3 (1989) now provides that the state's interest will prevail over the owner's.

## THE ALIENABILITY OF RIPARIAN RIGHTS

The alienability of riparian rights (or "privilege") is a source of controversy. Alienability refers to the right of an owner of a real property interest to transfer that property interest to another. Specifically, the question is whether the riparian owner may lease to another his sole right to oyster beds. Mississippi case law seems to shed doubt on the ability of a riparian owner to lease his riparian right to another to the exclusion of the public.

The first case to address the issue was *Barataria Canning Co. v. Ott*, 84 Miss. 737, 37 So. 121 (1904), which resolved the issue in the negative. The case involved the owner of riparian rights leasing oyster beds off waterfront property to Barataria. Subsequent to the leasing arrangement between Barataria and the riparian owner, Harrison County granted Barataria the right to plant and harvest oysters from the water bottoms adjacent to the leased property. The riparian owner later conveyed the lot to Barataria, reserving all riparian rights. The issue before the court was whether this reservation resulted in the riparian owner having a property right in the oysters. The court held that the right to gather oysters was not a common law riparian right, but a legislative riparian right. Therefore, the riparian right to the oysters could not be reserved in the deed.

Following the reasoning of the court in *Barataria Canning* coupled with the reasoning of the court in *Crary*, one can infer that statutory riparian rights are merely a license conferred by the state upon the riparian owner, subject to a superior state purpose. Cases cast doubt upon the ability of the riparian owner to sever his interest from the land. Therefore, it is questionable whether the riparian owner would be able to lease his riparian rights in tidelands. And even if he can, the property interest is subject to revocation by the state.

## CONCLUSION

The issue of whether the owner of riparian rights may lease his statutory riparian rights remains an undecided issue in Mississippi. Mississippi statutes, construed with case law and the Mississippi Constitution, seem to indicate that the nature of the riparian rights is that of a revocable license. That license is merely a privilege which runs with riparian ownership; such a privilege probably cannot be severed from the land. It is also subject to a superior state use. Until the legislature or the Mississippi Supreme Court takes up the issue, it will remain unresolved. □

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# Coker v. Skidmore

941 F.2d 1306 (5th Cir. 1991)

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by John Farrow Matlock

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*Under the National Environmental Policy Act, a supplemental environmental impact statement need not be prepared for a federal project unless significant new circumstances come to light*

## INTRODUCTION

On September 6, 1991, the United States Court of Appeals for the Fifth Circuit vacated an injunction granted by a lower court to prohibit the construction of a levee on the Yazoo River. The plaintiff had sought the injunction to prevent his land being condemned. The Fifth Circuit held that no supplemental environmental impact statement was required under the National Environmental Policy Act.

## FACTS

The Army Corps of Engineers planned to build a levee 5.4 miles long along the Yazoo River as part of the Yazoo River Basin Flood Control Project. The levee was intended to prevent flooding in and around the town of Belzoni, Mississippi. J.C. Coker III, who owned land that would be condemned as part of the project, filed a complaint for an injunction in the United States District Court for the Southern District of Mississippi. In his complaint Coker alleged that the Corps violated the National Environmental Policy Act, 42 U.S.C.A. §§ 4321 et seq. (West 1977 and Supp. 1991), by failing to issue a supplemental environmental impact statement on the proposed levee; the environmental impact statement on the entire project had been prepared in 1975. The Mississippi Wildlife Federation intervened in the action as a plaintiff, and the Board of Mississippi Levee Commissioners and the Board of Commissioners for the Yazoo Mississippi Delta intervened as defendants. While the matter was pending, the Corps of Engineers issued an environmental analysis and a "finding of no significant impact" as to the effects of the proposed levee. The court adopted the finding of no significant impact but found that the environmental impact statement was out of date. The district court therefore issued an order on September 4, 1990, enjoining the Corps from condemning land or building the levee until a supplemental environmental impact statement was prepared. The United States Court of

Appeals for the Fifth Circuit reversed the district court and vacated its order granting the injunction, holding that the National Environmental Policy Act did not require an environmental impact statement to supplement the one prepared in 1975.

## ANALYSIS

The National Environmental Protection Act at 42 U.S.C. § 4332(2)(C) states that federal agencies must prepare an environmental impact statement whenever they propose actions that would significantly affect the environment. Where an agency proposes a series of related actions, the agency may either draw up a single environmental impact statement for the entire project or prepare separate impact statements, environmental analyses, or findings of no significant impact for each part of the planned action. Federal agencies are allowed to "tier" their environmental impact statements: i.e., after an impact statement has been prepared for a program or a large project, its results need only be summarized in impact statements concerning subsequent parts of the project. While an environmental impact statement on the effects of the levee to be built near Belzoni could have incorporated the results of the impact statement drafted in 1975 for the entire Yazoo River Basin Flood Control Project, the district court held that the 1975 statement was out of date and therefore could no longer be relied upon in preparing impact statements.

Regulations promulgated by the Council on Environmental Quality, 40 C.F.R. § 1508.27, require an agency to supplement an environmental impact statement only where the agency makes substantial changes in a program or where "significant" new information or circumstances concerning effects on the environment comes to light. Significant information or circumstances include effects on public health; proximity to park lands, wetlands, or other protected areas; and possible harm to endangered species of wildlife.

In reaching its decision, the Fifth Circuit noted that the Corps issued, and the district court adopted, a finding that the planned levee would have no significant impact on the environment. A court reviewing an agency's determination not to supplement an impact statement will overturn the agency's decision only if it is found to have been "arbitrary and capricious." The court will look to whether the agency considered the relevant facts and whether there was a clear error of judgment. The Fifth Circuit stated that environmental impact statements need not be updated whenever any new information comes to be known, and

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that a statement does not become invalid by "mere passage of time." Remarking that the district court had adopted the Corps' finding of no significant impact, the Fifth Circuit found the grant of the injunction improper and vacated the lower court's order.

### **CONCLUSION**

The Court of Appeals held that a 16-year-old environmental impact statement was adequate to allow the Corps of Engineers' to proceed with building a levee. The Corps' Yazoo River Basin Flood Control Project has come under heavy criticism over the last several years for failing sufficiently to take into account concerns about protecting ecologically valuable wetlands and bottomlands. The dispute reflected in this decision is only one of many that have arisen during the course of this controversial project. □

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## LAGNIAPPE

*A Little Something Extra*

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A federal judge on August 16 rejected an attempt by the state of Louisiana to prevent the U.S. Department of the Interior from selling oil and gas leases on 23 million offshore acres in the Gulf of Mexico. Louisiana's governor and attorney general filed the action for an injunction against the sale of the leases on the outer continental shelf after the Department of the Interior refused to share proceeds from the sales with the state. Louisiana argued that it was entitled to a portion of the revenue because of the damage wreaked by offshore drilling on the state's environment, and particularly on its coastal wetlands. Louisiana attacked the proposed sale on three grounds: that the consistency determination under the Coastal Zone Management Act failed to take important information into account, that the sale could result in the loss of as many as 65 square miles of coastal wetlands, and that the environmental impact statement required by the National Environmental Policy Act was inadequate. In denying the relief sought by the state, the district judge acknowledged the harm to the environment that offshore drilling causes, but noted that no such arguments were raised before the Department of the Interior while the sale was being considered and that the state's "extreme delay" in giving voice to its objections weighed against it in his ruling. (A fuller discussion of questions concerning the federal government's role in managing the outer continental shelf will appear in a future issue of *WATER LOG*.)

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The attorney general of Mississippi has recently issued three official opinions regarding gambling on ships that sail from the state's Gulf waters. According to an opinion of March 22, gambling is legal on the two cruise ships presently docked in Harrison County only when the ships are underway, not when they are dockside. A second opinion issued on the same date stated that "gaming schools," which would use gambling machines but where no gambling would actually take place, are under the regulatory jurisdiction of the State Department of Education rather than that of the Mississippi Gaming Commission. The attorney general addressed the question of holding referenda on gambling by judicial district in an opinion of August 7. After a referendum to allow gambling in Harri-

son County was defeated, promoters of gambling expressed interest in holding a referendum in the Second Judicial District of Harrison County, which, if approved, would permit gambling in Biloxi but not in Gulfport. The attorney general responded that the Mississippi Gaming Control Act requires gambling referenda to be held by counties alone.

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Alabama ranks last among the fifty states in the quality of its environment, according to the *1991-1992 Green Index* published by the Institute for Southern Studies. Louisiana, Arkansas, Mississippi, Texas, and Tennessee, in that order from the last place held by Alabama, rounded out the bottom of the list. (Oregon, Maine, and Vermont received the highest ratings.) The report, based on information collected both by the federal government and by private groups, ranks the states in such areas as air and water pollution, toxic waste, forests, and environmental policies. While the Alabama Department of Environmental Management has raised serious questions about the methodology employed in compiling the report, including the use of outdated studies and of amateur research of dubious scientific validity, the Alabama Conservancy, an environmental group in Birmingham, is proposing that Governor Guy Hunt appoint an emergency task force to examine the state's environmental problems.

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EPA's review of its toxicity standards for dioxin continues, and some scientists now say exposure to it in amounts ordinarily encountered is no more hazardous than a week's sunbathing. Meanwhile, several thousand more plaintiffs in southern Mississippi have joined the lawsuit against Georgia Pacific and International Paper, both of which operate paper mills that discharge minute amounts of dioxin, bringing the total number of persons suing the companies to about 10,000.

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The Mississippi-Alabama Sea Grant Legal Program has recently released its *Mississippi Ocean Policy Study*. The document examines a number of pressing ocean issues facing the state—focusing on use and management issues and addressing problems such as marine pollution, mineral

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resources management, oil spill contingency planning, and fisheries management. The study is available at a cost of \$8.00. For further information or to obtain a copy contact Laura Howorth at 601-232-7775.

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The Marine Policy Center, a multidisciplinary social science research group concentrating on economics and international law, seeks applicants for economists and international lawyers at the Assistant and Associate levels to conduct research on problems relating to marine resources, ocean uses and role of scientific information in policy process. With Center resources, these investigators will help develop research programs and raise supporting funds. PhD or equivalent degree and demonstrated ability to devise and complete high quality independent research required. Fields of law, international relations, law and economics, science policy, economics of technological change, natural resources, and/or conservation/environmental management are preferred, but strong applications from other relevant fields are welcome. A statement of interest, vitae and names of 3 references should be forwarded to: Personnel Manager, Box 54PM, Woods Hole Oceanographic Institution, Woods Hole, MA 02543.