

Water Log

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Cover photograph and index page photograph of New Horizon oil rig explosion courtesy of the U.S. Coast Guard.

Who Will Clean Up the Gulf Oil Spill?

Niki L. Pace, J.D., LL.M.

On April 20, 2010, Gulf of Mexico residents awoke to news of an explosion on the *Deepwater Horizon* oil rig. The rig was on fire. Two days later, the rig sank to the floor of the seabed. Eleven crew members are missing and presumed dead.¹ Along with the tragic loss of life, untold environmental harms await as the oil begins to wash ashore. Government agencies are working together with rig owner, BP, to prevent and minimize harm to the Gulf of Mexico coastlines and fisheries. However, some exposure appears inevitable. This article examines the current regulatory framework for addressing U.S. oil spills. A second article, *Natural Resource Damage Claims under the Oil Pollution Act: A Background*, analyzes the recovery of natural resource damages resulting from the Gulf oil spill.

Background

Before sinking on April 22, the *Deepwater Horizon* oil rig was located approximately 40 miles off the coast of Louisiana in federal waters and was drilling at a depth of roughly 5,000 feet. Following the explosion, efforts to engage the emergency shutoff system (designed to minimize the amount of oil spilled) failed, allowing oil to continuously spill into Gulf waters. Initial reports estimated the leak at 1,000 barrels a day (42,000 gallons) but those estimates quickly rose to 5,000 barrels a day (210,000 gallons).²

On April 29, NOAA designated the oil spill a Spill of National Significance (SONS). A SONS is defined as “a spill that, due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and clean up the discharge.”³ The designation allows assets from other areas of the country, including other coastal areas, to be used to fight the spill.⁴

The *Deepwater Horizon* is owned by British Petroleum (BP) but operated by Transocean Ltd. At the time of the explosion, Halliburton was providing

cementing services on the rig as well. The specific cause of the explosion is currently unknown but both the U.S. Coast Guard and the Minerals Management Service are conducting separate federal investigations into the matter.⁵ BP, along with federal agencies, has been actively pursuing alternative measures to stop the flow of oil into the Gulf of Mexico.

As this article goes to press, the most recent estimates of the leak remain at 5,000 barrels a day with the potential of 60,000 barrels a day.⁶ Impacts to wildlife and shorelines from both the oil and the estimated 100,000 gallons of dispersant chemicals remain unclear. Federal fisheries adjacent to the oil slick areas are closed, causing a rush for local seafood across the northern Gulf of Mexico.⁷ And on May 6, the Coast Guard confirmed that oil had hit the Chandeleur Islands, just miles off the Louisiana coast.⁸

Clean Up Liability

Following the disastrous 1989 *Exxon Valdez* oil spill, Congress passed the Oil Pollution Act of 1990 (OPA) to protect public health and welfare and the environment. Along with Section 311 of the Clean Water Act (CWA), the OPA provides the primary basis for domestic oil spill regulation. The OPA provides the framework for recovering clean-up costs and also imposes liability for damage to natural resources.⁹ The CWA provides the framework for civil and criminal enforcement actions by the federal government.¹⁰ For hazardous substances other than petroleum products, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) applies.¹¹

U.S. policy prohibits the discharge of oil or hazardous substances into navigable waters and adjoining shorelines.¹² Under both the CWA and the OPA, navigable waters is broadly defined and includes waters subject to the ebb and flow of the tide, as well as wetlands adjacent to navigable waters.¹³ To fall within the scope of regulation, the discharge must be “harmful to the public health or welfare or the environment.”¹⁴ Environmental harms include damage to fish, shellfish, wildlife, public and private property, shorelines, and

beaches.¹⁵ The OPA defines oil as any kind of oil “including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.”¹⁶

Under the OPA, responsible parties are strictly liable for cleanup costs and damages resulting from oil discharges. Responsible parties include the lessee or permittee of the area in which an offshore facility is located as well as owners and operators of vessels and pipelines.¹⁷ The OPA limits liability to the total of all removal costs plus \$75,000,000 per incident, an increase over the CWA § 311 levels.¹⁸

In certain circumstances, the liability limits will be lifted. For instance, limits do not apply where the incident was caused by gross negligence, willful misconduct, or violation of a federal safety, construction, or operating regulation.¹⁹ Limits will also be removed where responsible parties fail to report the incident or refuse to cooperate in removal activities.²⁰ In such situations, the government bears the burden of proof that the liability limits do not apply.

The OPA also provides affirmative defenses to liability. These defenses include an act of God, an act of war, an act or omission of a third party (other than an employee or agent of the responsible party), or any combination of the three. To assert the third party defense, the responsible party must establish that he exercised due care with respect to the oil spill and took precautions against foreseeable acts or omissions of the third party.²¹

Private Party Damages

The OPA allows private party recovery of three types of damages. First, individuals may recover damages for “injury to, or economic losses resulting from destruction of, real or personal property.”²² The second category of damages addresses losses resulting from use of natural resources.²³ The third area of private party recovery deals with damages resulting from “the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources.”²⁴ In addition, private parties may pursue other claims for damages under maritime law and state law.

Oil Spill Liability Trust Fund

Another aspect of the OPA was the creation of the Oil Spill Liability Trust Fund (Fund) and the National Pollution Funds Center (NPFC). The NPFC, an administrative agency of the U.S. Coast Guard, administers the Fund. The primary purpose of the NPFC is to “(1) ensure a rapid and effective federal response to a discharge; 2)

implement and oversee a compensation mechanism, or claims process, to reimburse those damaged by discharges when the liable or responsible party cannot or does not pay; 3) establish a liability and compensation regime that serves as a deterrent to potential responsible parties; and 4) establish a mechanism through Certificates of Financial Responsibility (COFRs) to ensure that owners and operators of certain vessels have insurance in place or the funds to pay for oil spill response costs and damages up to certain limits.”²⁵

Along with funding spill response, the NPFC may adjudicate third-party claims for unreimbursed response costs and damages.²⁶ Before submitting claims to the NPFC, claims must first be submitted to, and denied by, the responsible party. Consideration by the NPFC requires the claimant produce a statement of the claim, evidence supporting how the loss occurred, and invoices documenting costs incurred by the claimant.²⁷ If NPFC denies both the claim and reconsideration of the claim, the individual may seek judicial review in an applicable federal district court under the Administrative Procedures Act.²⁸ More information on claim submission related to the *Deepwater Horizon* spill can be found on page 13.

Civil and Criminal Penalties

The federal government may assess civil penalties for unlawful discharges, failure to remove discharges, or failure to comply with an order or regulation relating to the discharge.²⁹ Penalties may go up to \$25,000 per day of violation or up to \$1,000 per barrel discharged.³⁰ For those spills caused by gross negligence or willful misconduct, the penalty shall not be less than \$100,000.³¹ In assessing penalties, the following factors are considered: 1) seriousness of the violation; 2) economic benefit to the violator, if any; 3) the degree of culpability; 4) other penalties from the incident; 5) any history of prior violations; 6) the nature, extent, and degree of success of efforts by the violator to mitigate or minimize the spill; 7) the economic impacts of the penalty on the violator; and 8) other matters required by justice.³² Civil penalties are in addition to removal costs and may be imposed regardless of fault.

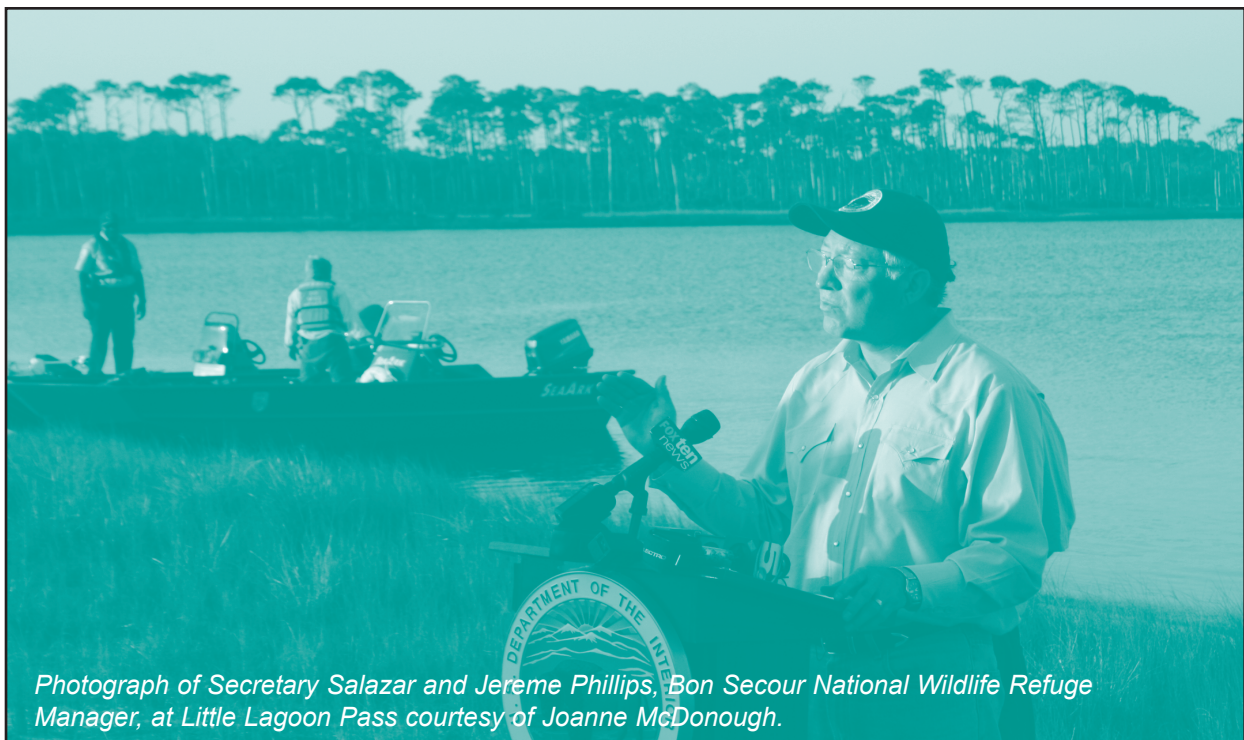
In passing the OPA, Congress amended the Clean Water Act’s list of criminal violations to include negligent discharge of oil.³³ The decision to bring criminal charges by the federal government is discretionary, not mandatory. In deciding whether to pursue criminal prosecution, the government may consider factors such as prior history of the violator, the preventative measures taken, the need for deterrence, and the extent of cooperation.

Conclusion

Litigation is already underway in the Gulf of Mexico states. A variety of lawsuits have been filed since the spill with claimants ranging from commercial fisherman in Louisiana and Mississippi to condo and hotel owners in Alabama and Florida. Most lawsuits seek monetary compensation from BP for alleged losses of property or economic harms connected to the spill. While the spill has yet to make landfall, natural resource damages are also accruing. While the full ramifications of the spill cannot possibly be known at this early stage, these initial lawsuits foretell of potentially lengthy legal battles ahead.☞

Endnotes

1. Leslie Kaufman, *Search Ends for Missing Oil Rig Workers, but Spill Seems Contained for Now*, N.Y. TIMES, April 24, 2010, at A8.
2. Campbell Robertson, *U.S. Intensifies Bid to Control Oil Spill in Gulf*, N.Y. TIMES, April 30, 2010, at A1.
3. 40 C.F.R. 300.5.
4. Robertson, *supra* note 2.
5. John M. Broder et al., *Amount of Spill Could Escalate, Company Admits*, N.Y. TIMES, May 5, 2010, at A1.
6. *Id.*
7. Kim Severson, *Fish Sells Out as Threat Creeps Closer*, N.Y. TIMES, May 7, 2010, at A18.
8. Susan Saulny, *First Katrina, Now Deepwater Horizon, a City Plays the Waiting Game Again*, N.Y. TIMES, May 7, 2010, (New Orleans Journal) at A19.
9. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2762.
10. Clean Water Act, 33 U.S.C. § 1321.
11. 42 U.S.C. § 9601-9675.
12. 33 U.S.C. § 1321(b)(1).
13. *Id.* § 2701(21); 40 C.F.R. § 110.1; 33 C.F.R. Part 2.
14. 33 U.S.C. § 1321(b)(3)-(4).
15. *Id.* § 1321(b)(4).
16. *Id.* § 2701(23).
17. *Id.* § 2701(32).
18. *Id.* § 2704(a).
19. *Id.* § 2704(c)(1).
20. *Id.* § 2704(c)(2).
21. *Id.* § 2703(a).
22. *Id.* § 2702(b)(2)(B).
23. *Id.* § 2702(b)(2)(C).
24. *Id.* § 2702(b)(2)(E).
25. John M. Woods, *Going on Twenty Years – The Oil Pollution Act of 1990 and Claims Against the Oil Spill Liability Trust Fund*, 83 TUL. L. REV. 1323, 1324 (2009).
26. 33 U.S.C. § 2712(a).
27. 33 C.F.R. § 136.105.
28. 5 U.S.C. §§701-706; *see also* Woods, *supra* note 25, at 1325.
29. 33 U.S.C. § 1321(b)(7).
30. *Id.* § 1321(b)(7)(A).
31. *Id.* § 1321(b)(7)(D).
32. *Id.* § 1321(b)(8).
33. *Id.* § 1319(c).



Photograph of Secretary Salazar and Jereme Phillips, Bon Secour National Wildlife Refuge Manager, at Little Lagoon Pass courtesy of Joanne McDonough.

Natural Resource Damages Under the OPA: A Background

Stephanie Showalter, J.D., M.S.E.L.

As mentioned in the previous article, *Who Will Clean Up the Oil Spill?*, under the Oil Pollution Act of 1990, responsible parties are liable for both the removal costs associated with the clean up of the oil spill and certain damages that result from the incident. Covered damages include injury to property, economic losses due to injury to property, loss of profits and revenues, loss of use, and damage to natural resources.¹ Because natural resource damage claims may only be pursued by designated natural resource “trustees,” they are a bit of a different animal from the other types of damage claims which may be pursued by individuals and businesses.

After an oil spill, the responsibility for assessing damages to natural resources and developing and implementing a restoration plan falls to the natural resource trustees.² Trustee agencies, which are appointed by either the president or the governor, are often different from the agencies tasked with initially responding to the spill. The National Oceanographic and Atmospheric Administration (NOAA) is the designated natural resource trustee for marine resources. In Mississippi and Alabama, the natural resource trustees are the Mississippi Department of Environmental Quality and the Alabama State Lands Division.

If response actions are not adequate to address injuries to natural resources, trustees are authorized to seek “damages for injury to, destruction of, loss of, or loss or use of, natural resources, including the reasonable costs of assessing the damage.”³ Injury “means an observable or measurable adverse change in natural resources or impairment of a natural resource service.”⁴ NOAA’s Damage Assessment, Remediation, and Restoration Program (DARRP) “uses a variety of economic and non-economic science-based methodologies to assess these natural resource injuries,”⁵

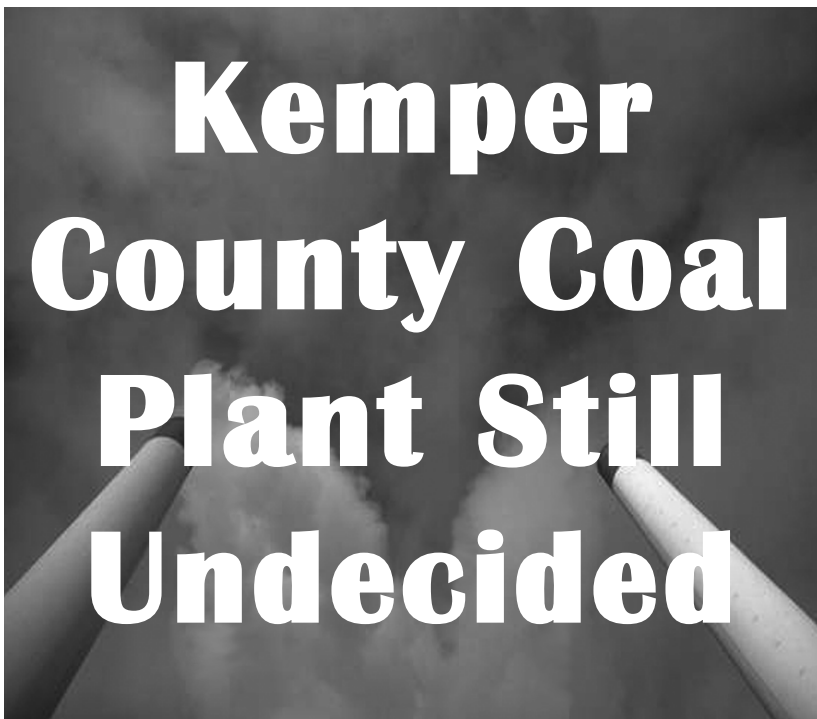
including an analytical framework known as “Habitat Equivalency Analysis.” When trustees follow NOAA’s guidelines, the damage assessment is entitled to a “rebuttable presumption” in subsequent administrative and judicial proceedings.⁶ Essentially this means that the responsible party bears the burden of disproving the trustees’ assessment.

Once damages have been assessed by the trustees and a restoration plan selected, trustees are required to submit a written demand to the responsible parties to either (1) implement the plan subject to trustee oversight and reimburse the trustees for assessment and oversight costs or (2) advance the trustees funds to cover the direct and indirect costs of assessment and restoration.⁷ For offshore facilities, the responsible party is the lessee of the area where the spill occurred. BP is the responsible party for the *Deepwater Horizon* spill. Responsible parties have ninety days to respond to the trustee’s demand. If a responsible party fails to respond, trustees may file suit against the party or seek compensation from the Oil Spill Liability Trust Fund.

Efforts are already underway to assess the impact of the *Deepwater Horizon* spill on natural resources in the Gulf of Mexico. While it is too early to tell the extent of the damages, the price tag is expected to be quite high. The NRD settlement reached in the *Exxon Valdez* spill, for instance, was \$900 million.☛

Endnotes

1. 33 U.S.C. § 2702(b)(2).
2. *Id.* § 2706(c).
3. *Id.* § 2702(b)(2)(A).
4. 15 C.F.R. § 990.30.
5. DARRP, Environmental Economics – Introduction, <http://www.darrp.noaa.gov/economics/index.html>.
6. 15 C.F.R. § 990.13.
7. *Id.* § 990.62(b)(1).



Kemper County Coal Plant Still Undecided

Niki L. Pace, J.D., LL.M.

Last month, the Mississippi Public Service Commission (PSC) approved the petition of Mississippi Power Company (MPC) to build an experimental coal-fired power plant in Kemper County, Mississippi. The approval, however, came with several conditions which MPC claims effectively prevent construction of the new facility by impairing financing. MPC initially announced its withdrawal of the project; however, the following week, MPC petitioned the Commission for rehearing. The rehearing was held May 14, 2010 at which time the Commission voted to extend the decision deadline.¹

The proposed facility would be located in Kemper County to take advantage of a nearby fuel source. Lignite obtained from a local mine operator would power the electricity generating facility. Lignite is a form of soft coal. The plant would also incorporate IGCC technology. IGCC refers to “integrated-gasification combined cycle.” The plant would convert the lignite into a gas, called syngas, which would turn turbines that generate electricity.² Compared to traditional technology, IGCC improves efficiency and allows for greater capability to remove certain pollutants from the syngas prior to its end use. The facility also promises to reduce carbon dioxide emissions over those of a traditional coal-fired power plant through the use of carbon sequestration.³ Opponents, however, argue that this technology is expensive and unproven.

Public utilities like MPC operate as monopolies but are subject to state regulation by public utility commis-

sions. Before constructing a new facility, utilities need a certificate of convenience and necessity from the Public Service Commission. Commission oversight also extends to rate regulation. Utilities are entitled to earn a fair and reasonable return on their investment but oversight is designed to prevent the monopoly from overcharging the customers.

In late April, the Commission found that the proposal did not sufficiently satisfy the “public convenience and necessity” requirement needed to justify passing the cost of construction on to the ratepayers. Instead, the PSC capped the amount that can be passed on to ratepayers at \$2.4 billion. Other conditions required that all environmental permits be in order and that all incentives, such as federal loans, grants and tax credits, be verified.⁴ These conditions were designed to protect ratepayers from the uncertainties associated with this new technology.

The rehearing held May 14th was conducted as a closed door session. In the end, the PSC decided to extend MPC’s deadline to decide if MPC would build the plant. The PSC will conduct an additional meeting on May 26th, giving the Commission more time to evaluate MPC’s request.⁵

Endnotes

1. Maria Burham, *PSC to Meet On Coal Facility*, THE ASSOCIATED PRESS, May 13, 2010, available at <http://www.clarionledger.com/apps/pbcs.dll/article?AID=20105130331>.
2. Maria Burnham, *Mississippi Power Will Not Build Coal-Fired Plant in Kemper County*, THE ASSOCIATED PRESS, April 29, 2010, available at <http://www.sunherald.com/2010/04/29/2142296/mississippi-power-will-not-build.html>.
3. Mississippi Power Project Website, available at <http://www.mississippipower.com/kemper/EnvironmentalBenefits.asp>.
4. Adam Lynch, *Power Company to Challenge Commission Ruling*, JACKSON FREE PRESS, May 5, 2010, available at http://www.jacksonfreepress.com/-index.php/site/comments/psc_approves_coal_plant_mississippi_power_rejects_it_042910/.
5. Maria Burham, *PSC Coal Plant Talk Goes On*, THE ASSOCIATED PRESS, May 15, 2010, available at <http://www.clarionledger.com/apps/pbcs.dll/-article?AID=20105150319>.

Abandonment of Marina Project Moots NEPA Claims

Lichterman v. Pickwick Pines Marina, Inc., 2010 U.S. Dist. LEXIS 15102 (N.D. Miss. Feb. 22, 2010).

Mary McKenna, 2011 J.D. Candidate, University of Mississippi School of Law

A Mississippi district court recently found local landowners' legal challenges to a marina project moot. The proposed project, located in northeast Mississippi, included the construction and operation of a convention center hotel, a marina, cabin sites, and covered boat slips on 31 acres of land. Subsequent to the filing of the lawsuit in 2007, the project developer abandoned the project which resulted in the termination of the developers' easement, lease and building permits. The district court ruled that these terminations rendered the landowners' claims moot. Further, the court held that the landowners had no private cause of action under the National Environmental Policy Act (NEPA) and that the clear language of the easement did not make the landowners third-party beneficiaries.

Background

In 2000, the Tennessee Valley Authority (TVA) leased approximately 31 acres of land to Tishomingo County Development Foundation (TCDF) for the proposed project.¹ TVA conducted a NEPA review to determine the environmental impact of TCDF's proposal, and issued a Finding of No Significant Impact (FONSI) and a Final Environmental Assessment (2000 EA)

that contained several restrictive conditions, including a requirement that TCDF maintain a 50-foot undisturbed buffer to be managed as a shoreline management zone. The 2000 EA also required undisturbed forested buffers at least 50-feet wide be maintained and enhanced around the site with 100-foot minimum width along a cove at the north end of the site.²

In 2005, TCDF subsequently leased the area to Pickwick Pines Marina (PPM) for the construction and operation of a marina. PPM applied to TVA for a permit to construct and operate the marina on the property. In 2006, TVA issued a Final Environmental Assessment (2006 EA) that evaluated the envi-

ronmental effects of PPM's proposal. Like the 2000 EA, the 2006 EA resulted in a FONSI but imposed the same restrictive conditions regarding buffers.³ TVA also issued PPM a TVA Section 26a shoreline construction permit⁴ (Section 26a permit) to build and operate the marina.

When PPM submitted their detailed site development plans for approval, TVA proposed modifying the restrictive condition language to require a "managed" rather than an "undisturbed" buffer area to avoid inconsistencies among the conditions. TVA also concluded that it would be impossible to have an "undisturbed" buffer zone around a commercial marina project. In July 2007, John Lichterman, Vince Marascuilo and Marsha Marascuilo (collectively Lichterman), whose real property is situated across the embayment from PPM's property, observed the cutting of trees in the buffer area. After they contacted TVA with their concerns, TVA ceased work and tree removal in the buffer zones, and conducted a NEPA review to determine whether modifying the buffer language would have significant environmental impacts. Following the NEPA review, TVA concluded that permitting a managed buffer rather than an undisturbed buffer would not alter TVA's previous EAs and FONSI, and would have negligible environmental impact.⁵

TVA approved modification of the buffer language, and Lichterman sued petitioning the court to enjoin TVA from violating the restrictive conditions in the 2000 and 2006 EAs. The court denied the preliminary injunction regarding the 50-foot buffer

because TVA's review of the buffer language modification was not arbitrary and capricious as TVA took a "hard look" at the environmental consequences. The court, however, granted the preliminary injunction as to the 100-foot buffer due to TVA's lack of any investigation, review, or analysis regarding the 100-foot buffer or the removal of trees on the northern bank.⁶ The U.S. Court of Appeals for the Fifth Circuit affirmed.⁷

On March 16, 2009, a Mississippi district court granted TCDF's and PPM's separate motions to dismiss with respect to Lichterman's NEPA claim as neither TCDF nor PPM are federal agencies, but denied TCDF's and PPM's motions with respect to Lichterman's breach of contract claims. During the district and appellate proceedings, the easement from TVA to TCDF, the lease from TCDF to PPM, and PPM's 26a permit were all terminated. TVA moved for judgment on the pleadings, or in the alternative, summary judgment.⁸

NEPA

Lichterman alleged that TVA violated NEPA by failing to require TCDF and PPM to adhere to the environmental commitments contained in the 2000 and 2006 EAs, which were incorporated in TCDF's easement and PPM's lease and Section 26a permit. While NEPA demands that federal agencies be environmentally conscious of the potential impacts certain projects may have on ecological surroundings, NEPA does not command the agency to favor an environmentally preferable course of action. NEPA only requires that the agency make its decision to proceed with the action after taking a "hard look at environmental consequences."⁹ Thus, agency decisions are reviewable under the Administrative Procedures Act (APA) only on procedural grounds, not based on a particular substantive result.¹⁰ Because Lichterman's challenge was not procedural (in fact, they conceded that TVA had adhered to NEPA's procedural requirements in compiling the "satisfactory" EAs¹¹) but rather substantive, the court held that Lichterman had no legal right to sue for the enforce-

ment of the specific conditions contained in the 2000 and 2006 EAs.

Mootness

Further, TVA argued that Lichterman's NEPA claims regarding the environmental commitments were moot because the site preparation work for the marina was completed in early 2008, the marina development proposed by TCDF and PPM was no longer being constructed, and TCDF's easement and PPM's Section 26a permit and lease were no longer in force. All actions that might violate the 2000 and 2006 EAs had been simultaneously abandoned with the termination of the easement and lease and the cessation of the project. "A claim under NEPA does not present a live controversy when the complained of action has been completed so that no effective relief is available."¹² Because a case or controversy must exist at all stages of the litigation, the court held that even if further NEPA process were taken, given the circumstances, declaring TVA's actions arbitrary and capricious or writing a new EA assessing a terminated project did not constitute true relief that would maintain Lichterman's claim as a live controversy.¹³

Lichterman further asserted their claims were not moot because the project was merely interrupted rather than completed.¹⁴ The court disagreed. Regardless of whether TVA was waiting for a replacement developer, any future development of the site would be considered a new "major federal action" under NEPA, and TVA would have to conduct a new environmental assessment.



Photograph of Pickwick Landing Lock and Dam courtesy of the U.S. Army Corps of Engineers.

Although a case may technically be moot, an exception to the mootness doctrine is applicable if the challenged problem is likely to recur or is otherwise capable of repetition, yet evading review.¹⁵ The court, however, found that Lichterman failed to prove valid application of the exception; because the easement, the lease and the Section 26a permit had all been terminated, any future development in the area would be a new major federal action requiring new environmental reviews under NEPA.¹⁶ Nor would future injuries evade review because Lichterman would have the opportunity to apply for a preliminary and permanent injunction, which would halt construction.

Third Party Beneficiaries

Lichterman alleged they were third-party beneficiaries of the easement because the easement language provided for a 100-foot buffer at the end of the site, which is across the embayment from Lichterman's real property, while specifying a mere 50-foot buffer around the perimeter of the rest of the site. To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the parties' express or implied intention to benefit the third party.¹⁷ "When a contract is with a government agency, parties that benefit are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary."¹⁸ Although Lichterman argued that the 100-foot buffer condition was particularly intended to protect and preserve the value of their land, the court determined that even if the 100-foot buffer was included in the easement with Lichterman in mind, the easement language was not specific enough to demonstrate that TVA and TCDF intended to benefit Lichterman; the mere inclusion of the 100-foot buffer on the north end without clear intent did not make Lichterman third-party beneficiaries with enforceable rights.¹⁹

Conclusion

Even though Lichterman's claims in the present case were mooted, in the event of future development of these 31 acres, Lichterman will have the opportunity, if they deem necessary, to seek injunctive relief to ensure compliance

with NEPA procedural mandates.²⁰ In addition, because any future development in the area will constitute a new major federal action, pursuant to NEPA, TVA will be required to assess anew the environmental impact of any future proposal. Nevertheless, the decision reinforces the notion that a violation of NEPA does not create an implied private right of action on behalf of injured citizens.☛

... any future development in the area would be a new major federal action requiring new environmental reviews under NEPA.

Endnotes

1. Lichterman v. PPM Pines Marina, Inc., 2010 U.S. Dist. LEXIS 15102 at *2 (N.D. Miss. Feb. 22, 2010).
2. *Id.* at *2-3.
3. *Id.* at *3-4.
4. Section 26a of the TVA Act requires TVA approval before any construction may commence that affects navigation, flood control, or public lands along the shoreline of the TVA reservoirs, in the Tennessee River or in its tributaries. *See* Tennessee Valley Authority, <http://www.tva.gov/river/26apermits/index.htm> (last visited Apr. 30, 2010).
5. *Id.* at *5-6.
6. *Id.* at *5-7.
7. *Id.*
8. *Id.* at *8.
9. *Id.* at *10 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)).
10. *Lichterman*, 2010 U.S. District LEXIS 15102, at *10.
11. *Id.* at *11.
12. *Id.* at *13. *See* *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 398 (5th Cir. 2000) (holding that a substantial completion of construction project mooted NEPA claim).
13. *Lichterman*, 2010 U.S. District LEXIS 15102 at *11.
14. *Id.* at *14.
15. *Id.* at *15 (citing *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991)).
16. *Id.* at *17.
17. *Id.* at *18.
18. *Id.* (quoting *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003)).
19. *Id.* at *19.
20. *Id.* at *17.

Texas Court Upholds “Rolling Easements” on Beachfront Property

Brannan v. State, 2010 Tex. App. LEXIS 799 (Tex. App. Houston 1st Dist. Feb. 4, 2010).

Michael McCauley, 2011 J.D. Candidate, University of Mississippi School of Law

The Texas Court of Appeals recently considered the issue of rolling easements under the Texas Open Beaches Act (OBA). Before the court was a challenge to the removal of three beachfront homes. In Texas, any structure located on a public beach, the area between the low water mark and the vegetation line, is subject to removal if it interferes with the public’s use of the area. Because the boundaries of the public beach move with the vegetation line, the public’s right of access is known as a “rolling easement.” Hurricane Ike shifted the vegetation line in front of the three homes in question such that the homes are currently located between the low water mark and vegetation line in violation of the OBA. After considering the issues, the court concluded that the homes were subject to the rolling easement and that their removal was not a taking because of the historic dedication to public use.

Background

In the 1960s, several houses were constructed on the beachfront in the Village of Surfside, Texas. The homes were built above the vegetation line along a strip of land that was heavily used by the public. Pedestrian Beach, as it is known, has been used by the public for as long as citizens can remember. Coastal erosion resulting from Hurricane Ike in 1998 pushed the vegetation line further inland. As a result, several houses are now located between the low water mark and vegetation line. The storm also damaged sewer connections to several of the houses.

Following the storm events, the Attorney General determined several homes were “an immediate threat to public health and safety” or “significantly blocked public access.”¹ Because the houses obstruct the public’s use of Pedestrian Beach, their presence violated the OBA. The State subsequently denied permits to repair the homes’ septic systems and shut off access to water. The Property Owners filed suit seeking declaratory judgment to affirm their right to repair, maintain, and access their homes.² The State responded with a counterclaim seeking

removal of the houses under the OBA. Several Property Owners claimed that removal of their houses constituted a taking for which they should receive compensation. The trial court ultimately ordered the houses to be removed, which led to this appeal.

Implied Dedication of Public Easement

The OBA is unique to Texas and has recently been incorporated into the Texas constitution. In November, Texas voters passed Proposition 9 which amended the Texas constitution to include the public access and use rights found in the OBA. The OBA protects the public’s right to access and use of a beach in instances where the public has acquired an easement by prescription, dedication or custom.³ The Act also mandates that an official shall file suit to enforce this right. A public beach is defined as any area extending inland from the line of mean low tide to the line of vegetation.⁴

The Property Owners first argue the State never proved the existence of an easement on Pedestrian Beach. The court notes the issue was not raised in the first five years of the litigation and that property owner Brannan’s own testimony states people had long used the beach for recreational purposes. The court also rejected the Property Owners’ argument that the houses should be allowed to remain because the purpose of the easement can be met even if the houses remain at their location.⁵ However, evidence showed that at high tide there was virtually no access to the beach because of the homes. This access was held to be “unlike and inferior” to the public’s access before the hurricane.



Photograph courtesy of Wikimedia Commons.

Rolling Easements

A rolling easement is a special type of easement placed along the shoreline. As the sea advances, the easement automatically moves or “rolls” landward. So as the vegetation line or waterline moves, the easement rolls with it. This type of easement enables limits to development along the shoreline and preserves the natural ecological processes of tidal areas.

The Property Owners cite a “Swiss cheese” argument attempting to convince the court that a rolling easement must accommodate a preexisting house when the vegetation line moves landward.⁶ However, a public easement on a beach cannot be established with reference to a set of static lines. The nature of coastal areas is that the shoreline changes over time and this must be reflected in any easement designed to protect it. Otherwise, the Property Owners’ approach to easements would cease to preserve the public right to use and enjoy the beach once an area becomes submerged. Additionally, the Act contains an explicit provision mentioning that homes that “become seaward of the vegetation lines as a result of natural processes may be removed.”⁷

The court also rejected the Property Owners’ interpretation of the statute’s use of “encroachment.” They argued that it was meant to apply only to the introduction of a new obstruction. The OBA states that “any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach” is subject to removal.⁸ Looking to the plain language of the statute, the court concluded that the use of the word “any” would necessarily include a home previously built on land that a rolling easement encompasses.

Walking through the considerations of statutory construction, the court likewise found no justification for the Property Owners’ interpretation. The objective of the legislature, circumstances under which the act was enacted, legislative history, and consequences of a particular construction all supported the finding that a rolling easement would include a home once the vegetation line moved landward. The construction of the statute must also “ascertain and give effect to the Legislature’s intent” which was to protect the public’s rights of access to and use the public beaches. Finally, the court notes that the Property Owners’ interpretation would in effect defeat the expressed purpose of the Act.

Takings Claim

The court also rejected the Property Owners’ argument that their homes did not substantially interfere with the public’s use of the beach. Evidence showed there was no

dry beach seaward of the homes at high tide. Additionally, the homes substantially obstructed pedestrian and emergency vehicles along the beach, therefore blocking the access to Pedestrian Beach. This access was held to be “unlike and inferior” to previous access given to the public and authorized the State to order the removal of the homes. The Owners then appeal to the court arguing that this constituted a regulatory taking, for which they should be compensated.

The Texas Constitution mirrors the Fifth Amendment, which states that no person’s property shall be taken for public use without adequate compensation.⁹ Additionally, courts have held that only where a regulation denies all economical benefit of land does it constitute a regulatory taking.¹⁰ The government did not create the easement; the land was historically dedicated for the public’s use. Removal of a structure from a public easement under the OBA is not a taking because the Act does not create an easement, but rather provides a method of enforcing an easement acquired by other means.¹¹

Conclusion

Brannan v. State serves an important victory for both the public and the Open Beaches Act. The holding dictates that beachfront homes which become located on the public beach following the natural migration of the vegetation line can be removed without compensation. The removal of these homes is not deemed a taking because the easement was not created, but rather historically dedicated. The ruling also serves as notice to homeowners who purchase or own beachfront homes that if vegetation lines shift the house may be removed under the Act without compensation. 🏖️

Endnotes

1. *Brannan v. State*, 2010 Tex. App. LEXIS 799, 804 (Tex. App. Houston 1st Dist. Feb. 4, 2010).
2. *Id.* at 816.
3. TEX. NAT. RES. CODE. ANN. § 61.0018(a).
4. *Id.*
5. *Brannan*, 2010 Tex. App. LEXIS 799, at 817.
6. *Id.* at 835.
7. TEX. NAT. RES. CODE. ANN. § 61.25.
8. *Id.* § 61.018(a).
9. TEX. CONST. ART. I, § 17.
10. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
11. *Brannan*, 2010 Tex. App. LEXIS 799, at 861.

OIL SPILL Claims Information

(Adapted from NOAA Press Release, NOAA Closes Commercial and Recreational Fishing in Oil-Affected Portions of Gulf of Mexico, May 2, 2010).

BP is now accepting claims for the Gulf Coast oil spill. Please call BP's helpline at 1-800-440-0858 to begin the process of filing a claim.

If you are not satisfied with BP's resolution, there is an additional avenue for assistance available through the Coast Guard once BP has finalized your claim. Those who have already pursued the BP claims process can call the Coast Guard at 1-800-280-7118.

Claim Type	Description	Who Can Submit
Natural Resource Damages (NRD)	Costs for: <ul style="list-style-type: none"> • Assessing an area's natural resource damages, • Restoring the natural resources, and • Compensating the public for the lost use of the affected resources. 	Only specially designated natural resource trustees
Removal Costs	Costs to prevent, minimize, mitigate, or clean up an oil spill. (The costs of cleaning up your own property fall under the category of property damage, not removal costs.)	Clean-up contractors, called Oil Spill Recovery Organizations (OSROs) Federal, State, and local government entities The responsible party Anyone who helped clean up the spill
Property Damage	Injury to or economic loss resulting from destruction of real property (land or buildings) or other personal property. Does not include personal injury!	People or entities who own or lease the damaged property
Boat Damage	Injury to or economic loss resulting from damage to a boat (a subset of property damage).	People or entities who own or lease the damaged boat
Loss of profits & Earnings Capacity	Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of property or natural resources.	Anyone with loss of profits or income (You do not have to own the damaged property or resources to submit a claim under this category.)
Loss of Subsistence Use of Natural Resources	Loss of subsistence use claim if natural resources you depend on for subsistence use purposes have been injured, destroyed, or lost by an oil spill incident.	Anyone who, for subsistence use, depends on natural resources that have been injured, destroyed, or lost (You do not have to own or manage the natural resource to submit a claim under this category.)
Loss of Government Revenue	Net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resource	Federal agencies States Local governments
Increased Public Services	Net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil or directly attributable to response to the oil spill incident	States Local governments

More information about what types of damages are eligible for compensation under the Oil Pollution Act as well as guidance on procedures to seek that compensation can be found at www.uscg.mil/npfc.

For more information about the response and recovery efforts and to sign up for updates from the Joint Information Center, go to <http://www.deepwaterhorizonresponse.com>

Claim Format

There is no required format for claims. You must, however, support your claim with documentation, put the claim in writing, and sign it.

Background

The primary source of revenue for the fund is a nine-cents per barrel fee on imported and domestic oil. Collection of this fee ceased on December 31, 1994 due to a "sunset" provision in the law. Other revenue sources for the fund include interest on the fund, cost recovery from the parties responsible for the spills, and any fines or civil penalties collected. The Fund is administered by the U.S. Coast Guard's National Pollution Funds Center (NPFC).

The Fund can provide up to \$1 billion for any one oil pollution incident, including up to \$500 million for the initiation of natural resource damage assessments and claims in connection with any single incident. The main uses of Fund expenditures are:

- State access for removal actions;
- Payments to Federal, state, and Indian tribe trustees to carry out natural resource damage assessments and restorations;
- Payment of claims for uncompensated removal costs and damages; and
- Research and development and other specific appropriations.

Structure of the Fund

The OSLTF has two major components.

1. **The Emergency Fund** is available for Federal On-Scene Coordinators (FOSCs) to respond to discharges and for federal trustees to initiate natural resource damage assessments. The Emergency Fund is a recurring \$50 million available to the President annually.
2. **The remaining Principal Fund** balance is used to pay claims and to fund appropriations by Congress to Federal agencies to administer the provisions of OPA and support research and development.

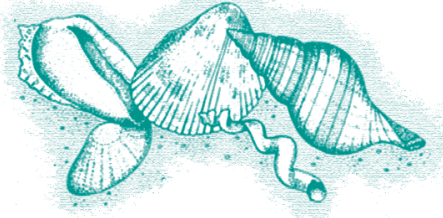
Another source of information on making pollution claims can be found on the U.S. Coast Guard website at http://www.uscg.mil/npfc/Claims/claims_docs.asp.



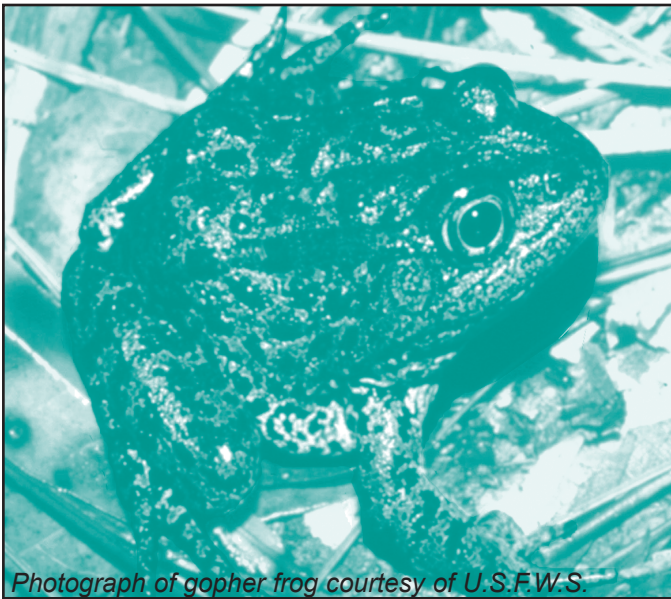
Photograph of emulsified streamer on April 28, 2010, courtesy of USCG.

Interesting Items

Around the Gulf...



The Gulf Restoration Network and the Center for Biological Diversity announced in late April their intent to sue the federal and state governments to protect the habitat of the Mississippi gopher frog. The gopher frog was listed as endangered under the Endangered Species Act (ESA) in 2001 but critical habitat was not designated at that



Photograph of gopher frog courtesy of U.S.F.W.S.

time. Glen's Pond, in the Desoto National Forest, is the last known breeding ground for the gopher frog. The pond is located on U.S. Forest Service land in Harrison County, Mississippi. The two conservation groups issued their intent to sue the U.S. Department of Housing and Urban Development and the state of Mississippi. The intent to sue is a procedural requirement of the Endangered Species Act which allows the parties 60 days to resolve the matter without litigation. The groups are concerned that a proposed sewage treatment plant planned near the Tradition development (north of Biloxi and Gulfport) will jeopardize the breeding grounds. The groups want a larger buffer zone around the pond to ensure greater protection. The Nature Conservancy is currently working to create additional breeding grounds for the frog on land in Jackson County, Mississippi.

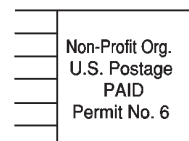
A beachfront sidewalk project in Ocean Springs, Mississippi was halted after local residents challenged the project in Hinds County Chancery Court. The court issued a permanent injunction stopping the sidewalk project until ownership of the beach can be determined. The project was to be located along East Beach and involved the construction of a 3,470 foot long sidewalk along the present seawall. The seawall serves the public interest by protecting East Beach Drive. Two local residents maintain they own the beach in front of their homes where the sidewalk would be constructed. The landowners have filed suit in Jackson County, Mississippi to resolve the ownership dispute. The City maintains that the beach is public lands under the auspices of the Secretary of State. The beach in question has been zoned public since 1972 and has been maintained by Jackson County for decades, according to Ocean Springs Mayor Connie Moran. As a result of the injunction, funding for the project may be lost. This possibility has prompted Ocean Springs to seek permission to utilize the stimulus funding for road repairs, rather than lose the funding to projects outside of Ocean Springs. 🐸

Photograph of East Beach in Ocean Springs courtesy of Mississippi-Alabama Sea Grant Consortium.





The University of Mississippi
WATER LOG
Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 258
P.O. Box 1848
University, MS 38677-1848



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Editor: Niki L. Pace, J.D., LL.M.

Publication Design: Waurene Roberson

Research Associates:

Mary McKenna, 2011 J.D. Candidate, Univ. of
Mississippi School of Law

Michael McCauley, 2011 J.D. Candidate, Univ. of
Mississippi School of Law

Contributors:

Stephanie Showalter, J.D., M.S.E.L.

*For information about the Legal Program's research on ocean and
coastal law, or for past issues of **WATER LOG**, visit our homepage at*

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