

WATER LOG



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Not in My Back Yard:

Restrictions on Wind Farms
in Baldwin County, Alabama

Also,

Flood Insurance Subsidies Begin Phase Out: Mississippi Sues

Louisiana Levee Litigation Brings the Importance of Wetland Loss to Light

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*Cover photograph of a coastal wind farm
courtesy of Lawrence Murray.*

*Contents photograph of an Illinois wind farm at dusk,
courtesy of Shock 264 Photos.*

• UPCOMING EVENTS •

2013 Governor’s Energy Summit

December 5, 2013
Jackson, Mississippi

<http://www.mei.ms>

2014 Gulf of Mexico Oil Spill & Ecosystem Science Conference

January 26 - 29, 2014
Mobile, Alabama

<http://gulfofmexicoconference.org>

ASBPA Coastal Summit

February 26 - 28, 2014
Washington, D.C.

www.asbpa.org/conferences/sum_13.htm

Not in My Back Yard: Restrictions on Wind Farms in Baldwin County, Alabama

Cullen Manning¹

Photograph of the Mendota Hills Wind Farm,
courtesy of Contemplative Imaging

As America continues to look for alternative sources of energy, harnessing the natural power of the wind has gained widespread support. This past year, the federal government leased over 164,000 acres of water off the coast of Rhode Island and Massachusetts to establish large-scale offshore wind farms.² With more confidence building in the potential for wind turbines to produce clean energy, local communities have now begun debating the pros and cons of installing wind turbines.

The Foley Wind Project

This past August, APEX Wind Energy (APEX) gave Baldwin County, Alabama the opportunity to capitalize on new green technology by participating in what they coined “The Foley Project.” As part of the project, the company out of Charlottesville, Virginia hoped to put 40 wind turbines in Baldwin County. These 40 turbines would create a range of benefits for the county. The turbines would produce enough green energy to power 23,000 homes within the county.³ The potential economic incentives are even more impressive. According to APEX

and the National Renewable Energy Lab, the project would generate an annual property tax revenue of \$750,000-\$1,500,000 and pay landowners \$500,000-\$750,000 per year. APEX also claims that the project would create 105-150 construction jobs, 9-12 long-term jobs, and a great amount of spending with local businesses.⁴ APEX supports its claims by pointing to the success they have had with projects in other areas of the country. APEX has onshore wind farms in Oklahoma, Texas, and Indiana. As a basis of comparison, APEX’s wind farms outside of Oklahoma City have employed 300 people and produced over \$100,000,000 in revenue for the state, making them an economically appealing business partner with Alabama residents.⁵

Baldwin County Ban

The Alabama State Legislature gave the power to determine whether the wind turbines would be built to the Baldwin County Commission (the Commission).⁶ The Commission is an extension of the state’s police power and is responsible for the health, safety, and welfare of its

residents. In order to serve its community's best interest, the Commission will not allow large-scale work projects such as the Foley Project unless the project protects the health, safety, and welfare of its residents and serves a public purpose. In February, the Commission decided to place a 180-day moratorium on building wind turbines so that it could learn more about the project before deciding whether to make wind farms a part of the county's economy.⁷ When the Commission reconvened in August, it held a public hearing where citizens voiced their opinions about the turbines.

During the meeting, residents expressed an array of concerns. A former Commissioner expressed his belief that there was no need for the wind turbines and that even though he believes in property rights, he felt that "not in my back yard" (NIMBY) had set in.⁸ NIMBY is a term commonly used to refer to residents' resistance to new developments within their community. Another resident expressed his concern that the wind turbines would be harmful to migratory birds and the ecosystem. The resident claimed that wind farms kill 573,000 birds per year and 88,000 bats. Many citizens believed that the noise coming from turbines and the computers cooling the turbines would be too loud.

Citizens' biggest concern at the meeting was the effect building large turbines would have on the natural beauty of Baldwin County. The turbines that APEX wants to build measure 520-590 feet tall. Many of those who testified to the Commission could not imagine waking up to look out their front door and seeing the large wind turbines pervading their beautiful views. After listening to the public's concerns, the Commission voted to ban the building of large wind turbines, but allowed for the building of smaller micro-turbines similar to the one found at LuLu's in Gulf Shores.⁹

Baldwin County is not alone in its reluctance to participate in such green energy projects. Cherokee County, Texas expressed similar concerns when another wind energy provider, Pioneer Green, approached them about the possibility of building wind farms. Wind turbine opponents spoke against the incoming project because many could not envision their self-started farms littered with wind turbines. Their concern was so great that they established a Facebook group, Save Cherokee Rock Village, to garner support against the wind turbines.¹⁰

Conclusion

Wind farms are not the only potential energy source that has met resistance across the country. Disputes about the harms of fracking have led to an outright ban in states such as Vermont.¹¹ Nuclear power continues to be a heavily protested form of energy across the globe. As new methods of obtaining energy multiply and grow, it is likely that local communities will continue to be hesitant to allow them to be located in their back yard.

The Baldwin County Commission's decision represents a compromise between its residents' concerns and the potential benefits wind farms bring. Landowners will still be able to build micro turbines and make a small profit in addition to their annual income. The project, however, will not have the same economic impact on Baldwin County or produce as much green energy, which is the primary reason to have wind farms. Despite these concerns, hopefully the ban will leave Baldwin's scenic areas free from obstruction. Currently, the county is trying to determine if the ban includes the building of a 328-foot meteorological tower that APEX needs to gather more precise information about wind turbine performance in the area. 🐦

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Flood Insurance Subsidies Begin Phase Out: Mississippi Sues

Niki Pace



Photograph of Long Beach, MS, courtesy of Morgan Harrison.

Gulf coast residents are no strangers to the on-going controversy surrounding reforms to the National Flood Insurance Program (NFIP). These changes, brought about by the passage of the Biggert-Waters Flood Insurance Reform Act of 2012, have been an on-going source of public outcry and numerous congressional proposals to limit the impacts. The reforms were meant to improve the financial solvency of the struggling flood insurance program by adjusting rates to better reflect the actual risk of flood. But on the ground, the changes have had some unexpected consequences.

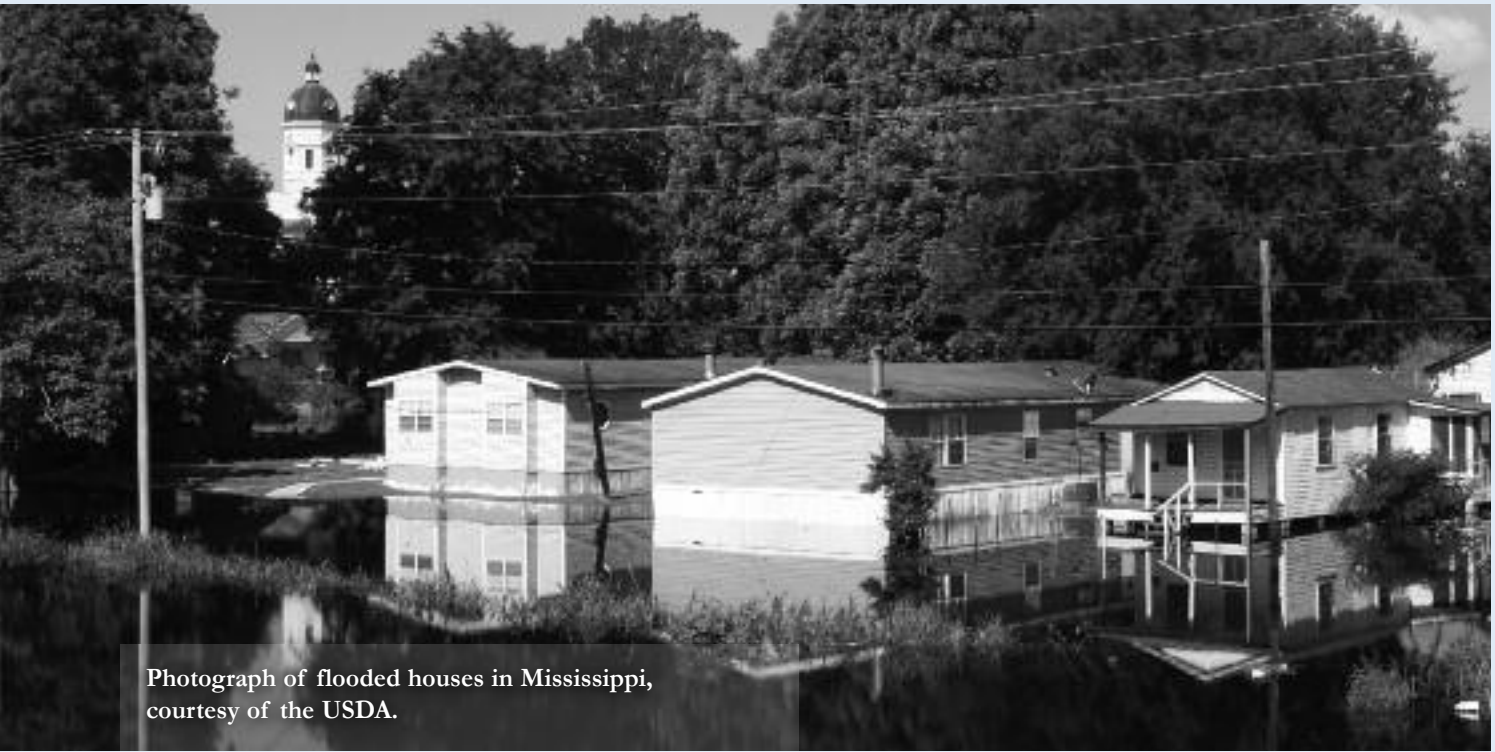
Phase Out of Subsidized Rates

The Biggert-Waters Act made three substantial changes to the flood insurance program: (1) new policies will be issued at full-risk rates, (2) subsidies will be phased out, and (3) grandfathered rates will be phased out. Changes

to new policies began last year, and FEMA started phasing out subsidized flood insurance for vacation homes in January 2013.

On October 1, 2013, FEMA began phasing out subsidized flood insurance rates for business properties and severe repetitive loss properties that are Pre-FIRM. A property is considered Pre-FIRM if it was built before December 31, 1974 or before the area adopted its first Flood Insurance Rate Map (FIRM). These properties have, until now, received a subsidized rate. Rates will now increase by 25% per year until the full risk rate is realized.

Pre-FIRM primary residences receiving subsidized rates will continue to qualify for the subsidies until: (1) the property is sold, (2) the policy lapses, (3) the property suffers severe, repetitive flood loss, or (4) a new policy is purchased. A property qualifies as a primary residence if the insured or their spouse resides there for 80% of the year.



Photograph of flooded houses in Mississippi, courtesy of the USDA.

However, once a Pre-FIRM primary residence loses its subsidized rate, the rate will immediately increase to the full risk rate. Nationwide, approximately 20% of flood insurance policies are subsidized.

Mississippi Insurance Commission Sues FEMA

In late September, the Mississippi Insurance Commissioner Mike Chaney filed a lawsuit against FEMA to stop the rate increases from taking effect. The Commissioner's argument is that the Biggert-Waters Act required FEMA to conduct studies, including an affordability study, before it implemented any of the changes found in the Biggert-Waters Act. The studies, due to Congress in April 2013, have yet to be completed. Therefore, the Commissioner is asking the court to stop FEMA from implementing these new measures, including the phasing out of subsidies.

No one disputes that FEMA was ordered to conduct the studies and that the deadline has been missed. In testimony before the Senate Committee on Banking, Housing, and Urban Affairs, FEMA Administrator Craig Fugate estimated the report would not be finished before 2015. However, Mr. Fugate does not agree that the implementation of the reforms mandated by the Biggert-Waters Act is tied to the completion of the study.

The affordability study provision requires that FEMA study ways to develop an affordability framework for NFIP, including methods of targeted individual need-based assistance such as a voucher system. FEMA has acknowledged that additional information is needed for it to fully process the studies requested by Congress and that phasing out subsidies will have unintended consequences for some property owners. However, the Act also requires the changes to the program.

In short, the Act has left FEMA in the tricky position of trying to implement unpopular congressionally ordered changes aimed at improving the solvency of the NFIP that will have significant unintended impacts on certain property owners. Repeated legislative proposals to amend the rate changes, though popular with coastal residents, have seen little traction in Congress. Now, with the filing of a lawsuit, our federal judicial system may be asked to interpret the requirements of the Biggert-Waters Act to resolve whether the studies must be completed before other provisions of the Act take effect. In the meantime, FEMA has moved forward with the phase out of subsidies. Additional phasing out of grandfathering provisions is expected in late 2014. 🐟

Louisiana Levee Litigation Brings the Importance of Wetland Loss to Light

Casey Pickell¹



Photograph of the Sabine Wetlands in Louisiana, courtesy of Louisiana Travel Photos.

On July 24, 2013, the state board that oversees flood protections for southeast Louisiana filed a monumental lawsuit against nearly 100 oil and gas companies, seeking to force them to pay for decades of damage to the coastal wetlands that serve to buffer the effects of hurricanes in the region. The lawsuit, filed by the Southeast Louisiana Flood Protection Authority-East (SLFPA-E), alleges that the named companies failed to live up to stipulations in their coastal use permits requiring them to “maintain and restore” wetlands damaged as a result of their activities over the past few decades.

SLFPA-E Claims

Specifically, the SLFPA-E argues that the dredging of thousands of miles of oil and gas pipeline canals violated the federal River and Harbors Act of 1899 by reducing the effectiveness of federal levees.² The crux

of the case is based on a centuries-old legal principle called “servitude of drainage” which stipulates that someone is liable for damages if he does something to increase the flow of water onto another’s property, in this case, the levees run by the SLFPA-E. Servitude of drainage is an established principle of civil law going back to Roman times.³ Courts in Louisiana, a civil law state tracing its legal history back to Rome rather than England like most states, have regularly recognized this principle since people first started clearing wetland areas for development.⁴

In attempting to demonstrate oil companies’ liability, the suit claims that “oil and gas activities have transformed and continue to transform what was once a stable ecosystem of natural bayous, small canals and ditches into an extensive – and expanding – network of large and deep canals that continues to widen due to the Defendant’s ongoing failure to

maintain this network or restore the ecosystem to its natural state.”⁵ Further, the SLFPA-E claims that the oil and gas activities cause saltwater intrusion, which weakens the root systems of the vegetation that hold the wetlands together, resulting in the loss of wetlands during even minor storms.⁶ The suit seeks two alternative avenues of redress. First, it asks the companies to repair the damage by bringing the landscape back to its original condition if possible. Second, if restoration is not feasible, the companies are asked to offset the SLFPA-E’s rising costs associated with providing flood protection in the parishes under the levee board’s jurisdiction. Gladstone N. Jones III, a lawyer for the SLFPA-E, said it is seeking damages equal to “many, many billions of dollars.”⁷

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Proving the Case

To win its case, attorneys for the SLFPA-E plan to use years of scientific research to prove that the oil industry impacted drainage in the wetlands. For decades, researchers in the area have been documenting the relationship between canal dredging and Louisiana’s loss of almost 2,000 square miles of coastal wetlands. The Louisiana Coastal Protection and Restoration Authority, using research from the U.S. Geological Survey, claims almost 10,000 miles of canals have been dredged to facilitate oil and gas extraction and development. Many researchers believe the figure is considerably higher since the agency’s numbers rely mostly on permits, and there was not a reliable

permitting system until passage of the federal Clean Water Act in 1972. Scientists estimate that anywhere from 35 to 50% in most areas and as high as 90% in some areas of the state’s catastrophic land loss can be traced to oil and gas canals.⁸ Regardless of the percentage, scientists agree that there is an undeniable relationship between the number of canals in an area and the amount of land loss.

Another important scientific factor in the case deals with the relationship between rising storm surges and increased subsidence of the Louisiana coastal zone. Simply described, “subsidence” is the sinking of land. Research published by the Louisiana Universities Marine Consortium shows that the rate of subsidence in an area increased as the rate of oil and gas extraction rose, and fell when extraction stopped. Alex Kolker, a professor and researcher involved in the study, described the increased rate of subsidence as “a pretty straight correlation” based on the fact that when companies remove gas and oil contained in rocks under pressure deep below the earth’s surface, a vacuum is created that is eventually filled by surrounding materials, causing the ground above to sink.⁹

Conflicting Research

However, there has been some scientific research that points to other activities as the main source of increased subsidence rates.¹⁰ Some scientists argue that subsidence in the area is more likely caused by pumping groundwater out of sandy aquifers for surface use, as opposed to the defendants pumping out oil and gas.¹¹ Additionally, they argue that the clear-cutting of cypress forests in the early 1900s that were once abundant in the area south of New Orleans started the process of weakening Louisiana’s coast, not the oil companies. Other objections to the suit allege that the levees themselves are the biggest cause of wetland loss because they prevent the flooding that used to dump sediment across thousands of square miles of southeast Louisiana.¹² At trial, the court will have to take all possible causes closely into account, especially since the suit only asks for the oil companies to pay for the damage that it is determined they specifically caused. Thus, the believability of scientists will be the key for the victor in this case, if the case does in fact make it to trial.



Photograph of an oil spill's impact on Louisiana's coast, courtesy of Louisiana GOHSEP.

State Opposition

In an effort to stop the case before it gets to the merits, Louisiana Governor Bobby Jindal and administration officials immediately spoke out in opposition of the suit, arguing the SLFPA-E overstepped its authority and that the contingency agreement for the attorneys working on the case is too generous. Governor Jindal additionally raised a claim alleging that the SLFPA-E needed permission from the governor and attorney general before it is allowed to hire special counsel to pursue such lawsuits. The SLFPA-E itself is an “independent political subdivision” (not a state agency, as some news headlines have alluded), set up in a way to shield it from political influence, which was found to be a reason why some of the local levee boards had done such a poor job prior to Hurricane Katrina.¹³ Based on this fact, the SLFPA-E’s board argues it is bound by a different set of requirements that only call for the attorney general to sign off on lawsuits, authorization they already obtained from Attorney General Buddy Caldwell prior to filing.¹⁴

Further, the Jindal administration has argued that the suit actually jeopardizes and undermines the state’s ability to implement its Master Plan for restoring the wetlands. The state’s \$50 billion, 50-year coastal protection and restoration Master Plan outlines how the state and localities will restore wetlands and improve flood protection in the New Orleans area and elsewhere along the state’s coast.¹⁵ Members of the SLFPA-E’s Board said the lawsuit does not conflict with the state Master Plan; in fact, they see the suit as a means of trying to get the money needed to fund the plan.¹⁶

Uncertain Future

On August 13, 2013, one of the defendants in the suit, Chevron U.S.A., filed a motion to remove the suit to federal court in New Orleans arguing that much of the SLFPA-E’s claims require the interpretation of federal law, and the SLFPA-E’s right to relief under one or more causes of action asserted depends upon resolution of a substantial question of federal law, and therefore federal question jurisdiction applies.¹⁷ Representatives from the Levee Authority’s Board said the effort to switch courts was not unexpected. Hearings on the matter are ongoing.¹⁸ 🐦

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Aquifer Regulation in Texas Leads to Takings

Niki Pace and Ryan J.F. Pulkrabek¹

State legislatures must have the ability to regulate aquifers to protect all residents of the state; however, when a legislature passes a regulation that results in a regulatory taking of private property, the state must provide compensation. When the Texas Legislature passed the Edwards Aquifer Act to regulate the consumption of water from the Edwards Aquifer, questions immediately arose as to whether the Act resulted in regulatory takings requiring compensation.

Background

Glenn and Jolynn Bragg own two properties over the Edwards Aquifer in South Texas.² Their sixty-acre Home Place Orchard is used both as their homestead property and as a commercial pecan orchard, while their forty-two-acre D'Hanis Orchard is exclusively a commercial pecan orchard. The Braggs drilled a well in the Edwards Aquifer in 1980 and installed an irrigation system on their Home Place property for their pecan tree operation and for water in their home. In 1995, the Braggs obtained a permit from the Medina County Groundwater Conservation District to drill a well in the Edwards Aquifer on their D'Hanis property and built a well to irrigate this property as well. The Braggs' use of the Edwards Aquifer was in compliance with the regulatory landscape in 1995; however, the regulatory landscape changed in 1996 with the passage of the Edwards Aquifer Act.

Around June 2006, the Braggs applied for a permit for water withdrawals on their two properties. The Authority granted the Braggs a permit on Home Place Orchard of 120.3-acre feet per year based on historical use, but it denied the permit on D'Hanis Orchard due to the Braggs' lack of historical use on that property during the

relevant time period for consideration of permit applications under the Act. The Braggs ultimately filed a lawsuit alleging that the Authority took their property without justly compensating them for it. The state court awarded damages to the Braggs after finding that the Authority's actions constituted a taking. The Authority appealed the ruling and the Braggs appealed the level of compensation to the Court of Appeals of Texas, San Antonio.

The Braggs' use of the Edwards Aquifer was in compliance with the regulatory landscape in 1995, however, the regulatory landscape changed in 1996 with the passage of the Edwards Aquifer Act.

Edwards Aquifer Act

The Edwards Aquifer Act (the Act) was passed in 1996 to manage the aquifer uses and regulate groundwater withdrawals from the aquifer.³ The Act also created the Edwards Aquifer Authority, which the Legislature authorized to run the permit system protecting both the Edwards Aquifer and threatened or endangered species. The Act created a cap on withdrawals from the Aquifer and authorized the Authority to periodically review and increase this cap. The permit system was designed to give preference to "existing users," those who have withdrawn from the Aquifer on or before

June 1, 1993, by allowing the Authority to grant permits to existing users who can demonstrate beneficial use of water withdrawn from the Aquifer during the “historical period,” between June 1, 1972 and May 31, 1993.

Under the Act, permits granted to existing users allow them to withdraw an amount of water “equal to the user’s maximum beneficial use of water without waste during any one calendar year of the historical period (from 1972 to 1993), unless the aggregate total of such use throughout the Aquifer exceeds the 450,000 acre-foot cap.”⁴ If the aggregate total exceeds the cap, then the Authority must “proportionately adjust the amount of water authorized for withdrawal under the permits to meet the cap[.]” with limitations under two circumstances: “(1) an existing irrigation user must receive a permit of not less than two acre-feet a year for each acre of land the user actually irrigated in any one calendar year during the historical period; and (2) an existing user who operated a well for three or more years during the historical period must receive a permit for at least the average amount of water withdrawn annually during the historical period.”⁵

Regulatory Taking

In this case, the court considered whether the Act, by restricting water withdrawals on the Braggs’ land, amounted to a regulatory taking of the Braggs’ property rights; and if so, what compensation was owed. In Texas, a property owner has absolute ownership of the water beneath his or her land, but that ownership is subject to police power regulation that achieves a legitimate public purpose.⁶ However, when a legitimate public regulation “goes too far” it may cause a regulatory taking of property rights; in those instances, a property owner will be owed compensation for lost property rights. To determine whether the “Act’s impact on the Braggs’ use of the water beneath their land rose to the level of compensable taking[.]” the court looked to the test created in *Penn Central* that requires an ad hoc, factual inquiry.

The *Penn Central* test looks to three different factors in determining whether a regulatory taking has occurred: (1) economic impact of the regulation on property, (2) interference with investment-

backed expectations, and (3) the character of the governmental action. The court first considered the economic impact on the Braggs by considering whether the regulation diminished their property value, even though diminished value alone does not establish a taking.⁷ One of the factors used in assessing the economic impact of the regulation on a property is lost profits. The Braggs asserted that the permitted 120.2 acre-feet of water was insufficient to operate the orchards; 600 acre-feet of water was needed. Although the additional water was available to lease, the Braggs were unable to find a water lease for the amount they wanted to pay. The Braggs reduced the number of trees in the orchard and undertook measures to reduce water consumption. Evidence suggested that leasing sufficient water would have increased the Braggs’ irrigation costs by less than ten percent. However, the court considered this cost more than an incidental diminution in value because prior to the regulation the Braggs had “an unrestricted right to use the water beneath their land.”⁸ For this reason, the court found this factor to weigh heavily in favor of a taking.

The next *Penn Central* factor, investment-backed expectations, is determined by looking at whether the regulation in question prevents a use of the property that the owner reasonably expected to be able to engage in when the property was acquired.⁹ It was undisputed that the Braggs purchased both properties with the intent of using them as orchards and that the regulation at issue was not in effect when the properties were purchased. The Braggs clearly intended to use the Edwards Aquifer to irrigate the orchards. The court considered whether this expectation was reasonable, noting that “the Braggs had no reasonable investment-backed expectation that there would *never* be a regulatory scheme in place that might govern their use of the water beneath their land...”¹⁰ The court concluded that Mr. Braggs’ expectation was reasonable, in part, because he had a bachelor’s and master’s degree in agricultural economics and a background in pecan cultivation at the time of his purchase of both properties. At the time of purchase, the Braggs understood that they owned the water under the land and there was no

regulation of water use. For these reasons, the court determined that the investment-backed expectations held by the Braggs were reasonable and this finding weighed heavily in favor of a finding of a compensable taking of both orchards.

The final *Penn Central* factor is the nature of the regulation. The State has unquestionable power to regulate groundwater production. Because demand often exceeds supply, regulation is an essential conservation tool needed to provide each water owner an equitable share in this shared resource. Here, the Act's express purpose was to manage the resource for the protection of "terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state."¹¹ The Act requires that all reasonable water conservation measures be taken. Due to the importance of the Act's purpose, this factor weighed heavily against the Braggs. However, taking into consideration all three factors, the court determined the Act resulted in a regulatory taking of both the Home Place Orchard and the D'Hanis Orchard.

Here, the Act's express purpose was to manage the resource for the protection of: "terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state."

Determining Compensation

Once a regulatory taking was established, the court then turned to the matter of appropriate compensation. The court held that, in regulatory takings cases, the proper time to value the property is when the regulation is implemented or applied.

In this case, that occurred when the Authority issued its decisions regarding permitting of water withdrawals for Home Place and D'Hanis Orchard. However, defining the property taken presents unique difficulties in matters of groundwater. The court considered a series of cases derived from oil and gas ownership of the subsurface estate and focused on the commodity and business aspects of the property. Here, the Braggs used the water for the business benefit of running commercially viable pecan orchards. Therefore, compensation should be determined based on the value of the properties as commercial pecan orchards immediately before the Act compared with the value immediately after the implementation of the regulation.

Conclusion

The passage of the Edwards Aquifer Act significantly limited the Bragg's previous unlimited ability to withdraw water from the aquifer for operating pecan orchards. Though the State has implicit authority to regulate groundwater and the Act unquestionably aims to conserve water for legitimate public reasons, the regulation's impact must be balanced against the harm to property owners. However, the application of this case outside of Texas will be limited by groundwater ownership laws in other states. Many states do not recognize a property ownership in groundwater that allows surface owners unlimited withdrawal of groundwater. 🐼

Endnotes

1. Niki Pace is Sr. Research Counsel for the Mississippi-Alabama Sea Grant Legal Program. Ryan Pulkrabek is a Dec. 2013 J.D. Candidate at the University of Mississippi School of Law.
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4. *Id.*
5. *Id.*
6. *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 831 (2012).
7. *Edwards Aquifer Authority v. Bragg*, 2013 WL 4535935 at *15.
8. *Id.* at *17.
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10. *Edwards Aquifer Authority v. Bragg*, 2013 WL 4535935 at *19 (emphasis original).
11. *Id.* at *20.

Neighborhood Lake Causes Sinkhole: Homeowners Association Liable for Damages

Niki Pace & Benjamin Sloan¹



Photograph of the Pearl River, courtesy of Chip Smith.

Who is responsible for damage when water drainage from a private neighborhood lake results in a sinkhole on a neighbor's property? That question was before the Mississippi Supreme Court in July when the court considered an appeal by a local homeowners association.² The Carraways, the

property owners with the sinkhole, sued the City of Jackson, Mississippi, the Eastover Lake Association and the owners of the lake that drained by their backyard and created a sinkhole. The trial court sided with the Carraways and the matter was appealed to the Mississippi Supreme Court.

Background

The Carraways own property in Eastover Subdivision, a neighborhood developed between 1949 and 1962 by the Eastover Corporation. The development included construction of Eastover Lake, a private lake with restricted access. In the 1970s, title to the land underlying the lake was deeded to the waterfront property owners whose land abutted the lake by extending each property owner's deed into the middle of the lake. At the same time, the Eastover Lake Association (ELA), the local homeowners association tasked with maintaining the lake, received title to a flowage easement "for the inundation, ownership, control, operation, and maintenance of the lake."³ Since that time, ELA has maintained the lake and retained liability insurance to cover property damage resulting from the flooding of the lake.

The Carraways purchased their home in 1984. The property is not waterfront to Eastover Lake but is near the lake on the southern side. Water from the lake drains out the southern end of the lake through a spillway, under a residential road, and into the Pearl River via an underground culvert system that passes by the Carraways' property.

In the late 1990s, a relative of the Carraways informed them of a severe erosion issue existing where the water exited the culvert. Then in 2002, the City of Jackson removed sections of the drainage pipe to repair a sewer line running six feet below the drainage culvert. The City completed the project and replaced the displaced pipe.

Sylvia Carraway claimed she discovered the sinkhole in her backyard in April 2004; at the time it was twelve feet wide and two feet deep. She contacted the City and the ELA seeking repairs but received no relief. The Carraways filed a complaint in October 2006 alleging that ELA and the lake owners did not adequately maintain the lake and its drainage system, which caused damage to the Carraway property.⁴ In October 2007, ELA and the lake owners filed a third party complaint against the City of Jackson alleging that the City had damaged the drainage system when fixing the sewer line in 2002.⁵ By the time of trial, the sinkhole had grown to fifty feet long, twenty-five feet wide, and fifteen to twenty feet deep.

Battle of Experts

At trial, an expert for the Carraways testified that many joints in the culvert had become separated causing water to flow out of the culvert creating the sinkhole. An expert for the City testified that the separation was caused by invasive tree roots.⁶ ELA's expert testified that the joints around the City's project were not properly reconnected causing water to flow along the outside of the drainage pipe.⁷ The trial court concluded that the sinkhole began as a result of ELA's failure to maintain the drainage system and that it was worsened by the City's repair work in 2002. The court found that both ELA and the City were responsible for the repairs and ordered them to immediately repair the drainage system.⁸ ELA and the City appealed the decision to the Mississippi Supreme Court.

The trial court concluded that the sinkhole began as a result of ELA's failure to maintain the drainage system and that it was worsened by the City's repair work in 2002.

Discovery Rule

The Mississippi Supreme Court considered numerous issues on appeal, including whether the lawsuit was barred by the three-year statute of limitations. The critical issue in this analysis is when should the Carraways have reasonably discovered the injury. The lawsuit was filed in 2006; the parties disputed whether the injury was discovered in 2002 or 2004. Trial testimony indicated that the Carraways noticed the sinkhole in the summer of 2002 but had "no true and real knowledge of the origin or causation of the sinkhole."⁹ The trial court found that this was insufficient to establish discovery of the injury: "because water flow and flood currents

require expert knowledge to comprehend fully, a layperson could not have perceived the injury at the time [of the sinkhole discovery].”¹⁰ The Carraways did not discover the cause of the sinkhole until 2004; thus the statute of limitations did not begin running until 2004. The Supreme Court agreed and upheld the trial court’s determination that the case was not barred by the statute of limitations. The Court further determined that even if the Carraways knew of the sinkhole in 2002, their claim was not subject to the statute of limitations because the sinkhole constituted a continuing injury not bound by the statute of limitations because of its ongoing nature.¹¹

Riparian Law

The court also considered whether matters of riparian law were appropriately applied to this case. The riparian law principal at issue here “holds that an upper landowner is liable for water that flows onto lower lands when he has, by artificial means, discharged the water in a manner that unreasonably damages a lower landowner.”¹² ELA argued that it was not bound by this principle of law because ELA did not own the actual lake – the property owners did. However, the Mississippi Supreme Court held that ELA did in fact have a flowage easement related to maintenance of the lake and an easement related to the culvert system used to drain the lake.¹³ Therefore, ELA has a property right to manage and control overflow waters from the lake that may impact downstream properties. For that reason, it was appropriate to apply the riparian principal to ELA and determine that it owed downstream property owners a duty of reasonable care in its management of water overflows.

Conclusion

The Mississippi Supreme Court largely upheld the trial court, holding that ELA, the lakefront property owners, and the City of Jackson all shared responsibility for the sinkhole. The parties will share financial responsibility for repairing the damage to the Carraway’s property. The lakefront property owners and the ELA will continue to be responsible for maintaining the drainage system and preventing future harm to the Carraways. 🐟

Photograph of the Pearl River, courtesy of Shawn Rossi.

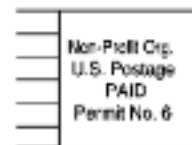


Endnotes

1. Niki Pace is Sr. Research Counsel for the Mississippi-Alabama Sea Grant Legal Program. Ben Sloan is a Dec. 2013 J.D. Candidate at the University of Mississippi School of Law.
2. *Borne v. Estate of Carraway*, 118 So. 3d 571 (Miss. 2013).
3. *Id.* at 577.
4. *Id.*
5. *Id.*
6. *Id.* at 579.
7. *Id.*
8. *Id.* at 580.
9. *Id.* at 582.
10. *Id.*
11. *Id.*
12. *Id.* at 589.
13. *Id.* at 590.



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