

# WATER LOG

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## The Long Arm of the Law

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Edited by the MASGLP.*

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## • UPCOMING EVENTS •

### **Water Policy Summit: Community Resiliency: Summit to Sea**

Tuscaloosa, AL  
March 27-29, 2018

<http://training.ua.edu/watersummit>

### **Sea Grant Oil Spill Science Outreach: Oil Spill Impacts on Marine Mammals**

Galveston, TX  
March 29, 2018

<http://bit.ly/oilspilloutreach>

### **36th ABA Water Law Conference**

Orlando, FL  
April 16-18, 2018

<http://bit.ly/abawaterlaw>

# Jurisdiction on the Coast and at Sea

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Kristina Alexander

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**Coastal waters have to start somewhere. That line in the sand is the mean high tide line.<sup>1</sup>** From that point, coastal waters are subject to overlays of jurisdiction that dictate, depending on the activity, who is in charge, where it occurs, and whether it impacts waters, the land beneath the waters, or the things in the waters. While coastal waters are not owned in the way that people and entities own land, the resources found in and under coastal waters, such as fish, plants, and oil, are managed by the government for the good of the people as a whole. This authority, often referred to as a type of sovereign ownership, is derived from the Public Trust Doctrine, a centuries-old theory that posits that the government holds title to submerged lands, and the waters above such lands, in trust for public use.

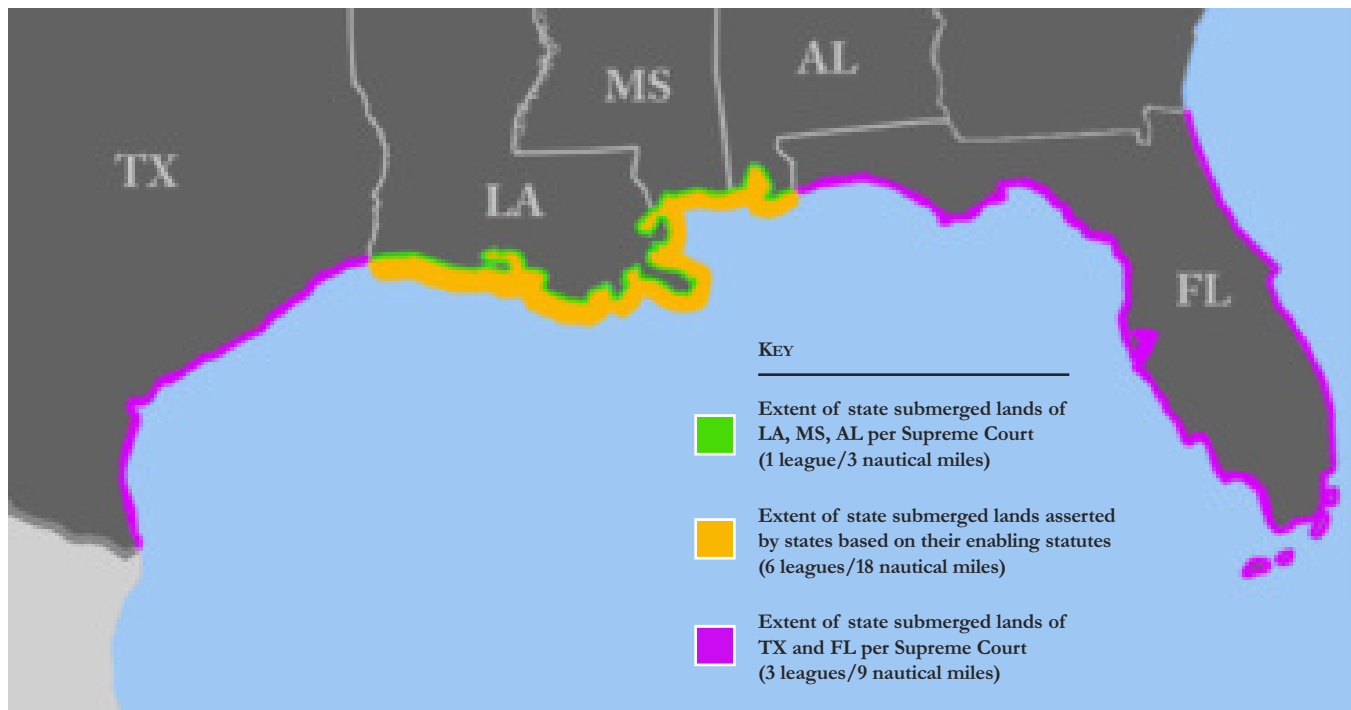
Legal authority also has to start somewhere. In the United States, that starting point is the constitution, although some roots, such as the Public Trust Doctrine, run deeper. The U.S. Constitution establishes that “This constitution, and the laws of the United States ... shall be the supreme law of the land.” This is known as the Supremacy Clause and means that where the United States is directed or chooses to enforce laws pursuant to an underlying constitutional authority, state and local laws are pre-empted, i.e. the federal law must be followed. Thus, even if a state chooses to extend its jurisdiction, such a decision cannot supersede what the federal government has legislated.

As a practical matter, determining jurisdiction over coastal waters is complicated by the fact that the distances from shore are seldom given in uniform units. Nautical miles are commonly used, which equal 1.15 land (or statute) miles. A league equals 3 nautical miles, or 3.45 statute miles.

Starting on shore heading seaward, activities are subject to multiple laws enforced by multiple authorities. Land above the mean high tide line is likely private property, and state and local authorities have jurisdiction. Generally

speaking, a property owner may do as she pleases on her property, but not to the extent that those activities harm another. If the activity on private property adversely affects the tidal wetlands, for example, such as excavating soil or building a hard structure, the U.S. Army Corps of Engineers (“Corps”) will dictate what is lawful pursuant to its authority under the Clean Water Act. Certain activities may also need permission from the state to ensure the activity is consistent with the state’s Coastal Zone Management Act plan.

At the point where the water covers the shore at high tide, private rights fade and government rights begins. The state government owns the tidal lands – that is, the land between the high and low water marks. These are lands that are covered by the tides at some point during the day. Coastal property owners abutting these tidelands, known as upland owners, are described as having littoral rights, which sometimes, but not precisely, are called riparian rights (which more correctly refer to rights of property owners abutting freshwater). While both Alabama and Mississippi<sup>2</sup> allow littoral owners the rights to access the water, build docks, piers, and structures, and to harvest oysters, the exercise of these so-called “rights” still require permission from the state and likely the federal government, depending on the activity. For example, Alabama Code Ann. § 33-7-53 authorizes littoral landowners to fill, reclaim, and gain title to tidal lands. However, the law requires the landowner to obtain permission from the state and the “United States engineer officers or other federal authority having jurisdiction.” In Alabama, the responsible agency is the Department of Conservation and Natural Resources; in Mississippi, the Secretary of State is responsible for issuing leases for submerged state lands. Activities in the near-shore area such as oyster aquaculture require the permission of the upland owner.



The mean high tide line changes over time, and with it, those property rights. When the high tide line extends farther seaward, as dirt and sand gradually add to the shoreline, it is known as accretion. For the most part, the owner of the upland owns that extra land, just as when the coastline has eroded and the property owner experiences avulsion, losing that land. Different rules apply when an artificial force, such as a dock, pier, or bulkhead, causes the accretion or avulsion, as to opposed the gradual changes by tides.

Alabama and Mississippi differ significantly on how they treat artificial accretion. In Mississippi, an upland owner has the right to title only over artificial accretions that occurred prior to the state established coastal boundaries as of July 1, 1973.<sup>3</sup> However, in Alabama, a Great Depression-era law gives littoral landowners the right to acquire tidelands not devoted to public use and fill, reclaim, and get title to those lands.<sup>4</sup> In other words, any accretion, natural, sudden, or artificial, may give the littoral owner title in Alabama, if they get the right permit.

As with the tidal lands, the state owns the submerged lands extending from its coasts. Submerged lands refers to those lands that are never exposed by the tide. The extent of that jurisdiction is disputed by the states, although the Supreme Court had the last word. According to its 1960 decision, the federal government limits the Alabama and Mississippi state-owned submerged lands to three nautical

miles from the low tide mark based on a 1953 law called the Submerged Lands Act.<sup>5</sup> The federal laws establishing the states, commonly referred to as enabling acts, suggest a rather different boundary. According to Mississippi's 1817 enabling act, state lands extend to "the Gulf of Mexico ... including all the islands within six leagues of the shore." According to the Alabama Enabling Act, the state boundaries continued "south, to the Gulf of Mexico ... including all islands within six leagues of the shore." In other words, the state enabling acts set forth submerged land boundaries of 18 nautical miles or just over 20 statute miles. The Supreme Court held that the 1953 law, and not the earlier laws, dictated the boundaries, based on the reasoning that the earlier laws would have extended the boundaries only if there had been islands at that distance (which there are not).

The States of Alabama and Mississippi, therefore, have rights to minerals, such as oil and gas, found under state submerged lands out to three miles. That three-mile line also dictates the extent of state law over the use of the water column above those submerged state lands, which affects activities such as setting fishing quotas and seasons. After years of disputes over the brevity of federal red snapper seasons, the U.S. Congress extended state boundaries for the regulation of reef fish from three to nine nautical miles starting in 2016.<sup>6</sup>



Coastal states do not have exclusive authority over state submerged lands. The federal government also has an interest. The Corps enforces laws for activities affecting the waters of the United States to ensure that navigation is not obstructed or the federal constitutional authority over commerce impaired. A 750-yard long dock, for example, could not be built by a Mississippi littoral owner (who, by state law has the “right” to build), even if permitted by the state, without permission by the Corps.

While the Corps has authority to exercise its jurisdiction in state waters, so does the U.S. Coast Guard. The Coast Guard provides rescue, defense, and law enforcement on the seas. A primary duty of the Coast Guard is described as “the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States.”<sup>7</sup> The Environmental Protection Agency (“EPA”) also has jurisdiction in those waters, enforcing pollution laws, such as the Clean Water Act.<sup>8</sup>

The United States has a long arm when it comes to law enforcement off its shores. The responsibilities tend to fall into two types of roles: defending the homeland, or authorizing use and extraction of its natural resources, including oil and gas. The justification for the exercise of power comes from two Presidential Proclamations. Under a 1988 Presidential Proclamation defining “territorial seas,” the United States asserted “sovereignty and jurisdiction that extend to airspace ... as well as to its bed and subsoil” to a distance of “12 nautical miles from the baselines of the United States” (meaning the low tide line). This synchronizes with the international definition of territorial sea found in the United Nations Convention on the Law of the Sea (“UNCLOS”), to which the United States is not a party. Similarly, the United States asserted jurisdiction in 1983 to an “Exclusive Economic Zone”<sup>10</sup> (“EEZ”) extending 200 nautical miles to “sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone.”

With respect to the submerged lands under the territorial seas and EEZ, the United States had asserted its authority much earlier. For example, in 1953 the Outer Continental Shelf Lands Act asserted the United States’ right to develop minerals from the area: “the subsoil and

seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided [in this law].”<sup>11</sup>

Farther out beyond the EEZ are the so-called high seas, or international waters or, more boringly, areas beyond national jurisdiction. Even there the United States has asserted jurisdiction in certain instances. For example, there are two areas of the Gulf of Mexico where the EEZs of Cuba, Mexico, and the United States do not reach. Those areas are known as the Western Gap and the Eastern Gap. Mexico and the United States entered a treaty in 2000 to divvy-up the Western Gap for the purpose of seabed and subsoil exploration and development, and the United States is in the process of addressing oil development in the Eastern Gap.

The notion of the high seas gives an impression that no laws apply. To a large extent that is true. High sea areas are open to fishing, possibly leading to exploitation of fisheries because there are no limits on harvest numbers or methods. But some U.S. laws apply where U.S. interests are at stake. For example, the Maritime Drug Law Enforcement Act authorizes U.S. interdiction of drugs and their transporters, as is explored more fully in the article by Morgan Springer in this edition.<sup>12</sup> The pollution treaty, MARPOL, authorizes member states to enforce laws over ships at their ports for events that occurred on the high seas.

U.S. wildlife laws, such as the Endangered Species Act (“ESA”) and the Marine Mammal Protection Act (“MMPA”) can also apply to the high seas, as those laws are concerned more with the species or the person harming the species than where the harm occurs. The ESA, for example, applies to any person “subject to the jurisdiction of the United States.” Therefore, a U.S. citizen is prohibited from harming (or buying or selling) listed species even on the high seas. Similarly, the bans within the MMPA apply to any person or *any vessel* subject to U.S. jurisdiction.<sup>13</sup> The MMPA also prohibits importing fish captured with technology that injures or kills an excessive number of marine mammals, regardless of where caught.<sup>14</sup>

Thus, the question of who can do what along the coasts of Alabama and Mississippi (and the whole United States) is complex. The area is regulated by states, more closely to shore, and by the federal government, farther out, to allow individual activities without allowing those activities to harm the interests of the public as a whole. 🐟

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## Endnotes

1. 43 U.S.C. § 1301(a)(2).
2. Mississippi limits littoral rights to 750 yards to sea – almost a half-mile (Miss. Code Ann. § 49-15-9).
3. Coastal Wetlands Protection Act, Miss. Code Ann. § 29-15-7. The accreted land must also not be for a public purpose in order for the upland owner to claim title. *See also*, Bayview Land, Ltd. v. Mississippi, 950 So. 2d 966 (S. Ct. Miss. 2007).
4. Ala. Code Ann. § 33-7-53.
5. United States v. Louisiana, 363 U.S. 1 (1960) (based on the Submerged Lands Act, 43 U.S.C. § 1301).
6. Consolidated Appropriations Act 2016, P.L. 114-113, div. B., tit. I, § 110(b); 9 Stat. 2242 (Dec. 18, 2015).
7. 14 U.S.C. § 2.
8. *See, e.g.*, United States v. Trident Seafood Corp., No. 2:18-CV-00210 (W.D. Wash. *Consent Decree* Feb. 9, 2018) (enforcing CWA violations against a seafood company for dumping seafood waste covering over three acres in waters off the coast of Alaska).
9. Pres. Proc. No. 5928 (Dec. 27, 1988), 54 Fed. Reg. 777.
10. Pres. Procl. No. 5030 (March 10, 1983), 48 Fed. Reg. 10605.
11. 43 U.S.C. § 1332(1).
12. 46 U.S.C. § 70503.
13. 16 U.S.C. § 1372(a).
14. 16 U.S.C. § 1371(a)(2).



# IN SUM.

## A Summation of the Facts and Figures of Interest in this Edition

★ Number of charges for involuntary manslaughter against Well Site Leaders on Deepwater Horizon oil well for 2010 explosion:	22
★ Number of convictions:	0
★ Average number of days before alleged drug-runners caught in international waters are brought to U.S. court:	18
★ Length in miles that a riparian/littoral landowner in Mississippi can build a dock out to sea (if permits are granted):	0.5
★ Distance in nautical miles that Alabama and Mississippi have jurisdiction over oil and gas in submerged lands:	3
★ Distance in nautical miles that Gulf states have management authority over reef fish:	9
★ Distance in nautical miles that Alabama, Louisiana, and Mississippi have management authority over other fish:	3
★ Distance in nautical miles that Florida, Texas have management authority over all fish:	9

# The U.S. Coast Guard Is Arresting Drug Traffickers in Ecuadorian Waters. How Does That Work

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Morgan Stringer

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Photograph courtesy of Mark Barney.

We have all seen movies or TV shows, such as *Miami Vice*, where a notorious drug lord races to international waters to evade arrest. By getting to international waters, he escapes the police and the Coast Guard... After all no one has jurisdiction in international waters, right?

As is often the case with law, the truth is much more complicated. In 1986, Congress passed the Maritime Drug Law Enforcement Act, or MDLEA.<sup>1</sup> This law was passed due to the Justice Department's lacking clear authority to detain and prosecute suspected drug smugglers in international waters.<sup>2</sup> MDLEA solved this issue by making drug smuggling on the high seas a crime against the United States and giving the Coast Guard the authority to search

for, detain, and bring suspected drug traffickers back to the United States for prosecution. But how does MDLEA enable the United States to arrest people in international waters and bring them back to the United States? A recent case, *United States v. Portocarrero-Angulo*, illustrates how the law is put into practice.

On October 4, 2016, 150 miles north of the Galapagos Islands, a military patrol aircraft spotted a Go Fast Boat ("GFB"), a sleek, high-powered speedboat designed to evade radar. As the aircraft flew closer, the patrol saw packages being thrown overboard. The Coast Guard Cutter *Waesche* seized those packages — which turned out to be 21 bales of cocaine, totaling 1,370 pounds.<sup>3</sup> A helicopter,

dispatched by the *Waesche*, chased the GFB, the *Pez Sierra*. The *Pez Sierra* did not slow down, so the helicopter fired three warning shots. The boat refused to stop. The helicopter fired two more shots, disabling the engine and ending the chase. The Coast Guard boarded the *Pez Sierra*, collected evidence, discovered that all three men on board were Ecuadorian citizens, and arrested them.<sup>4</sup> The boat was not “flagged,” meaning that it was unclear in what country the boat was registered. International law requires merchant vessels to be “flagged.” The GFB captain, Jesus Portocarrero-Angulo, claimed that the vessel was Ecuadorian. The Coast Guard contacted Ecuadorian officials, but they could neither confirm nor deny the boat’s nationality.

The ship’s pilot argued in federal court that the United States lacked jurisdiction over him because he was not on the high seas when the Coast Guard detained him. In fact, he was within Ecuador’s Economic Exclusive Zone, or the EEZ. Under the United Nations Convention on the Law of the Sea, or UNCLOS, international waters begin 200 nautical miles seaward from a coastal nation.<sup>5</sup> (A nautical mile is 1.15 “land” miles.) However, the District Court for Southern California disagreed with the defendant’s interpretation. In fact, according to current case law, the “high seas” begin seaward of the territorial sea,<sup>6</sup> which extends to 12 nautical miles seaward of a coastal state. Therefore, anything seaward of 12 nautical miles is “high seas” as far as American courts are concerned.

The court’s reasoning for finding another nation’s EEZ as high seas, stemmed from UNCLOS itself. Nearly all UNCLOS provisions applicable to the high seas also apply to the EEZ. For example, the court pointed to UNCLOS art. 58(2) which states that the “rights and freedoms of other states in the [EEZ]...are the same on the high seas.” Article 56 provides that the EEZ gives the coastal state the right to exploit and manage resources in that zone, engage in scientific research, and protect the marine environment. None of this explicitly prohibits a nation from enforcing drug trafficking laws in another country’s EEZ. The defendant argued that Ecuador claimed jurisdiction and sovereignty extending 200 miles seaward. However, the court held that it was unclear if Ecuador intended this to modify the UNCLOS boundaries. Even if that were Ecuador’s intent, the court noted that the United States does not recognize that claim.<sup>7</sup>

Flagged ships of another country raise issues of MDLEA jurisdiction because if MDLEA is enforced beyond United States waters, then both statutory and constitutional jurisdiction must be found to authorize the United States’ claim over the vessel. To find constitutional jurisdiction, a significant nexus between the conduct condemned and the United States must be found to a degree that would not be arbitrary or fundamentally unfair to the defendant.<sup>8</sup> Statutory jurisdiction requires the United States to have jurisdiction over the vessel or defendants. However, the United States can gain jurisdiction over foreign flagged vessels and ships in another nation’s territorial waters. This occurs when the nation at issue consents or fails to object to the United States enforcing its own laws against that foreign-flagged vessel or within foreign waters.<sup>9</sup> However, MDLEA establishes an exception to the requirement of both constitutional and statutory jurisdiction. When a vessel is “stateless,” or has no flagged nationality, then the United States has statutory jurisdiction over that vessel.<sup>10</sup>

The prosecution in the case involving the *Pez Sierra* argued that the boat was “stateless,” since Ecuadorian officials did not confirm or deny that the GFB was Ecuadorian. However, the defendant argued that it was Ecuadorian. Since this is a dispute over the facts of the case, the question of whether the boat is Ecuadorian or stateless must be answered by a jury.<sup>11</sup> If the vessel is “stateless,” then no constitutional jurisdiction needs to be found. The fact that the vessel is “stateless” is enough on its own to establish necessary jurisdiction. However, if the GFB is Ecuadorian, then the court must address the question of constitutional jurisdiction. Interestingly, MDLEA seems to answer that question. Congress found that drug trafficking “presents a specific threat to the security societal well-being and of the United States.”<sup>12</sup> However, in the Ninth Circuit, if a ship is flagged in a foreign country, the prosecution must prove that the trafficked drugs were bound for the United States in order to establish jurisdiction.

This brings up another issue within MDLEA. When someone is arrested in international waters, which court has jurisdiction? When someone commits a crime in the United States, they are charged where the crime occurred. However, under U.S. maritime law, drug traffickers must be tried either in Washington, D.C., or where they land at port. It appears to be simple to determine which court has jurisdiction over the defendant. However, once again, the truth is more complicated.




The Drug Enforcement Agency (“DEA”) and federal prosecutors decide where the Coast Guard takes the detainees. In the 1980s and 1990s, drug smuggling was more rampant in the Caribbean, so most suspects were brought to a port in Florida and charged there. Currently, despite trafficking becoming more active in the Pacific, many prosecutors and the DEA still prefer the detainees be brought to Florida. One reason for this is the Ninth Circuit (which covers the West Coast) requires the government to show that the drugs were bound for the United States. The same rule of proof does not apply in the Eleventh Circuit, however, where Florida is located, arguably making it easier for the government to prove its case.<sup>13</sup> Thus, detainments at sea may lead to forum shopping by the U.S. government, such as when the Coast Guard catches smugglers in the Pacific but comes ashore in Florida. The efforts to forum shop also lead to longer confinement and delay of the suspect’s right to be brought before a judge “without unnecessary delay,” in potential violation of the Federal Rules of Criminal Procedure, as suspects arrested in the Pacific Ocean are sailed to the Atlantic Ocean.

In the case at hand, the defendant was arrested in the Pacific Ocean and brought to San Diego, so this case does not represent trans-oceanic forum shopping. However, he was still detained three weeks, but the court upheld his 21-day detainment as reasonable. Shortly after the court’s ruling on the detainment, Portocarrero-Angulo pled guilty to possession of narcotics with the intent to distribute and was sentenced to over eight and a half years in prison. This plea bargain cut short the court’s opportunity to determine the flag status of the vessel. The court also lost the opportunity to explore possible limitations on MDLEA, such as the number of days a defendant can be detained at sea or where a defendant could be brought to port.

In the United States, protections against lengthy pre-arraignment periods of detainment are in place. However, these protections do not seem to extend at sea. *The New York Times* reports that courts have extended the period of detainment days allowed from five days in the Caribbean in 1985 to an average detainment now of 18 days at sea. One official not named by the report claims that detainment periods have even reached as high as 90 days. Human rights and maritime law experts claim that these lengthy detainments violate human rights norms. Not only is the length of detainment a cause for concern among scholars, but the conditions on board are as well. *The New York Times*

also reported that detainees were chained to decks, slept on thin rubber mats, were cut off from any communication, including with their consulate or family, and not given adequate food. However, motions to dismiss indictments due to inhumane conditions have been largely unsuccessful, according to the article.

Not only are the detainment periods increasing, but the number of detainees is increasing as well. In the 1990s to the 2000s, the number of detainees held at sea averaged around 200 annually, according to *The New York Times*. However, Operation Martillo, under General John Kelly, in his former capacity as commander of the Southern Command, increased those numbers. In 2016, the Coast Guard detained 585 suspected drug traffickers, mostly in international waters, according to *The New York Times*. From September 2016 to 2017, nearly 700 suspects were detained and brought to the United States.<sup>14</sup> As arrests, transport to the United States, and detainment periods increase, so will the courts’ involvement with these cases, perhaps forcing the courts to draw a line in the sand over jurisdictional issues, detainment issues, and MDLEA. Until then, these issues will continue. 

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## Endnotes

1. 46 U.S.C. § 70503.
2. Seth Freed Wessler, *The Coast Guard’s ‘Floating Guantánamos’*, New York Times (Nov. 20, 2017).
3. *United States v. Portocarrero-Angulo*, 3:16-cr-02555-BEN-01, 2017 WL 3283856, \*1 (S.D. Cal. Aug. 1, 2017), *Ecuador Boat Captain Gets Prison for 1,300-lb Cocaine Load*, San Diego Union-Tribune (Nov. 16, 2017).
4. *Portocarrero*, 2017 WL 3283856 at \*1.
5. *Id.* at \*2; *United Nations Convention on the Law of the Sea (UNCLOS)*, art. 3.
6. *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1667 (2013)).
7. *Id.* at \*4 (citing Office of the Judge Advocate Gen., U.S. Navy, *Maritime Claims Reference Manual: Ecuador* (April 2017)).
8. *Id.* at \*5 (internal citations omitted).
9. 46 U.S.C. § 70502(c)(1).
10. 46 U.S.C. § 70502(d).
11. *Portocarrero*, 2017 WL 3283856 at \*4.
12. 46 U.S.C. § 70501.
13. Wessler, *supra* note 2.
14. Wessler, *supra* note 2.

# Fatal Explosions on Oil Platforms in Gulf Lead to Criminal Charges

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Kristina Alexander

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Photograph courtesy of Ideum Media.

**The long arm of the law reaches out to sea. When crimes** happen on oil rigs, way out on the outer continental shelf (“OCS”), the federal government is in charge. In addition to typical offenses such as assaults against co-workers or theft, crimes can include manslaughter following rig disasters.

Think of the biggest oil spill in U.S. history: the 2010 explosion on a BP exploratory oil well more than 40 miles into the Gulf of Mexico, which killed 11 well workers. Two rig

supervisors were indicted in November 2012 for 11 counts of involuntary manslaughter. The two men, known as Well Site Leaders, were employed by a BP subsidiary. The indictment states that the Well Site Leaders had the duty to ensure that negative testing and other safety measures were followed, but instead, according to the indictment, they were grossly negligent by ignoring indications that the drill pipe was not secure and that pressure was building up unexpectedly.<sup>1</sup>

In addition to being charged with involuntary manslaughter under 18 U.S.C. § 1112 for each of the 11 men who died as a result of the explosion, they were charged with 11 counts seaman's manslaughter under 18 U.S.C. § 1115. All 22 manslaughter charges were dismissed in 2015.<sup>2</sup>

Those were not the only manslaughter charges brought as a result of the BP oil spill. In January 2013, BP Exploration and Production, Inc. pleaded guilty to 11 counts of felony manslaughter, as well as to violations of the Clean Water Act ("CWA") and the Migratory Bird Treaty Act. In its allocution to the charges, in which a defendant admits the facts that led to the charge, BP stated that the Well Site Leaders "negligently caused the deaths of the men" and admitted that the two "observed clear indications that the Macondo well was not secure ... but chose not to take obvious and appropriate steps to prevent the blowout."<sup>3</sup> The corporation paid a \$4 billion penalty for the crimes, but nobody went to jail.

Other than a statement that the prosecutors did not believe they could get a conviction of the Well Site Leaders, it is not clear why the involuntary manslaughter charges against the Well Site Leaders were dismissed, especially in light of the statement by BP that the two did the actions as charged. Involuntary manslaughter is a crime in which the defendant did not have malice towards the person who died and the action was either unlawful (but not a felony), or lawful but committed in an unlawful manner or without due caution and consideration. It would seem that a jury could find that the leaders' failure to respond to the non-secured drill pipe and the increasing pressure at the well amounted to a lawful act committed without due caution and circumspection.

The BP oil spill cases illustrate that prosecutors are not limited in what charges are brought by the fact that the place of the crime is on a tiny platform way out to sea. The Outer Continental Shelf Lands Act<sup>4</sup> ("OCSLA") asserts federal control over submerged lands seaward of state-owned lands as well as the structures on those lands. The OCS is treated as federal land with applicable federal laws. Also, OCSLA makes the civil and criminal laws of the adjacent state applicable to the islands and structures on the OCS; those laws are administered by the federal government.<sup>5</sup> Therefore, a platform miles away from shore is still under the watchful eye of the federal government. Crimes on those platforms are prosecuted federally in the district court onshore.

Additionally, OCSLA provides for civil and criminal penalties for violating its rules and regulations. At the time the Justice Department was choosing who to prosecute for the BP oil spill, an explosion occurred eight nautical miles off the coast of Louisiana at an offshore oil drilling operation. Three workers died at the well, which was operated by Black Elk Energy Offshore Operations, LLC ("Black Elk Energy"). The explosion occurred on the platform and did not lead to a massive oil spill. This case is noteworthy when considering crimes at sea because it marks the first time charges were brought under OCSLA against a contractor since the law's enactment in 1953.

Offshore oil production is a collaboration. The company purchasing the lease may not be the one that builds the platform, or assembles the equipment, or runs the drilling rig. In the case of Black Elk Energy, there were multiple contractors involved: a contractor to design plans to alter the piping on the platform and two different contractors to provide workers for the welding project. Welding is known as "hot work," which includes activities that cause sparks, and OCSLA has specific regulations on how it should be conducted, as is appropriate for using fire near petroleum. The work was to modify the contraption that measures petroleum at the same time that it transfers the petroleum from the platform, known as a Lease Automatic Custody Transfer ("LACT") unit. The regulations require a specific protocol for hot work, which was followed on the platform for a while. But then a change was necessary, and work order approvals for activities away from the LACT were copied and signed without inspection for work conducted at the petroleum transfer unit. According to the district court, "neither the piping nor the tanks in the LACT area were rendered inert prior to the start of construction in the area," and when a sump line pipe was cut, spilling liquid, "the crew decided that the liquid was water and continued cutting and welding in the area."<sup>6</sup> Boom.

The explosion occurred November 16, 2012, and the indictment was issued "three years later."<sup>7</sup> Multiple defendants were charged, including Black Elk Energy, Grand Isle Shipyards, Inc. (one of the contractors that provided the workers), the Wood Group (another contractor) and several individuals with supervisory authority. They were charged with involuntary manslaughter, criminal violations of the CWA, and criminal violations of OCSLA specifically regarding performing hot work.




It is not unusual for federal statutes to provide for both civil and criminal enforcement. The Endangered Species Act, the CWA, and the Migratory Bird Treaty Act, for example, all have one set of penalties for a civil violation and another for criminal. Choosing to prosecute civilly or criminally depends on just how bad the violator meant to be, a/k/a intent, although making that determination is largely up to the prosecutor when bringing the charges. Conviction is up to a jury. Yet it is a surprise that the first example of criminal indictments against a contractor under OCSLA came only after sixty years. The indictments for OCSLA violations, however, failed to bring a conviction against the contractors. The prosecution failed not because a jury found the facts of the case did not support a crime, but because a judge found the semantics of the regulation did not support the charges.

The regulatory word play is due to the regulation's failure to include "contractor" in the definition of "you." (For a while it was thought that writing regulations with "you" rather than "person" made them easier to understand. Some regulations have not been revised since that awkward phase.) OCSLA states that "any person who knowingly or willingly" violates any regulation designed to protect health, safety, or the environment, shall "be punished by a fine of not more than \$100,000, or by imprisonment for not more than ten years, or both."<sup>8</sup> And that law defines "person" as "in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation."<sup>9</sup> But the OCSLA regulations were written using the second person voice. For example, one of the charges is that the defendants intentionally violated the OCSLA regulation which states "You may not begin welding until: (i) The welding supervisor or designated person in charge advises in writing that it is safe to weld."<sup>10</sup> The contractor-defendants argued, and the courts (both district and court of appeals) agreed, that the regulations did not define "you" to include contractors. Instead, 30 C.F.R. § 250.105 defines "you" as "a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s), a pipeline right-of-way holder, or a State lessee granted a right-of-use and easement." Lots of types of people, but not a contractor.

The government argued that because the statute says "person," and the contractors are persons, the law must apply. The Court of Appeals considered how charges were brought

under OCSLA, noting "the government's failure ever before to seek criminal penalties against a contractor or individual employees in the sixty-plus year history of the OCSLA."<sup>11</sup> The court looked at statutory language in 43 U.S.C. § 1348(b) indicating OCSLA regulations were to apply to lessees and permittees – without including contractors – as well as the government's own language in describing the regulations: "BSEE stated that it [the regulation] 'does not regulate contractors; we regulate operators.'"<sup>12</sup> Based on this history and this language, the court dismissed the criminal charges against the contractors for OCSLA regulatory violations in September 2017.

The involuntary manslaughter and CWA crimes were not dismissed. The CWA charges were brought against all the defendants, including the contractors and individuals, but the involuntary manslaughter charges were made only against the corporations Black Elk Energy and Grand Isle Shipyard. Black Elk Energy filed for bankruptcy.<sup>13</sup> 

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# Life on the Edge:

## How Does Community Persist in the Harshest of Conditions

Stephen Deal



Favela de Manguinhos in Rio de Janeiro, Brazil.

**Scarcity and shortage have a way of pushing human** beings to maximize their efficiency and improve their capacity to adapt to sudden change. Cities, in many respects, are a collective response to scarcity and adverse environmental conditions. However, in a sprawl dominated age, communities with easy financing and plentiful road access may lose some of the cultural traits that develop when sustaining life in an adverse environment. A community's capacity to share resources and transmit local knowledge, such as where and how to build or what type of materials one should employ, are valuable cultural traits which make a place more resilient and less prone to suffering a sudden setback. Although local regulations also provide insight into a community's built environment, staff turnover and a lack of comprehensive ownership in the government planning process tend to make regulatory knowledge a fragile commodity, whereas cultural traits are deeply embedded in the everyday life of a place and can be transmitted across decades or even centuries. These types of cultural traits are also important in adverse social situations as well, such as

inadequate housing or poor economic conditions. With that in mind, planners and urban design professionals would be well served to learn from communities, that have grown accustomed to unfavorable environmental and economic circumstances and have changed their living patterns as a result. In other words, when the instruments of modern convenience break down how do people sustain themselves and, equally important, how do they begin to build the basic foundations of community with little aid or assistance from external actors.

### The Dune Shacks of Cape Cod

Nestled in the rolling sand dunes outside of Provincetown, Massachusetts are 19 small shacks without electricity or running water. The presence of these shacks on the landscape is a unique portrait of island living stripped down to its bare essentials. All but one is owned by the National Park Service as part of the Cape Cod National Seashore in the 1,900-acre Peaked Hill Bars Historic District.<sup>1</sup> Today, many of these properties are maintained for the enjoyment of artists and writers as part of a residency program.<sup>2</sup>

The sizes of the shacks range from just over 1,000 square feet to a mere 96 square feet, but despite their small size, these structures display a wealth of innovative techniques by their inhabitants to adapting to barrier island conditions. In 2005, an ethnographic report compiled for the National Parks Service described the dune shacks as, “small, weathered and rustic looking, built on skids or pilings allowing for occasional repositioning on unstable dunes.”<sup>3</sup> In a natural environment such as the barrier islands, where everything can be subject to drastic change over a relatively short period of time, the impermanence of the shacks is a positive attribute rather than a hindrance. Records indicate that of the 18 dune shacks that have been surveyed by Cape Cod National Seashore over the years, five of the shacks have had to be moved at some point in their history.

The continued survival of the shacks can largely be attributed to the watchful eye of the occupants. Shack residents regularly perform basic maintenance such as installing sand fences and putting in dune plants to help stabilize the site. In previous years, some residents even maintained birdhouses adjacent to their properties, which had the beneficial side effect of keeping the insect population in check. Periodic repairs and patch jobs were a consistent feature of shack life as the dune environment could quickly reclaim a neglected property. A quote from the 2005 report emphasizes the importance of maintenance to the continuing survival of the shacks: “The severe conditions of the Backshore would destroy shacks except for the vigilant care of residents. Strong winds, blowing water, and shifting sands quickly overwhelm the vulnerable shacks without intervention.”

Periodic maintenance, though, was not the only set of skills shack dwellers developed; many of the residents had to become highly adept at shack relocation as houses regularly had to be moved to keep up with the shifting dune landscape. This skill proved to be invaluable in 2004 in saving the Isaacson-Schecter shack, which had been overtaken by sand in the early 2000s. Initially the owners of the sand infested shack approached the National Park Service about finding a way to relocate the shack to more stable ground. The costs for relocating the structure were initially estimated at \$15,000. However as outside bids started to come in for the project, the cost projections quickly ballooned to between \$80,000 and \$100,000. Faced with these staggering cost projections, the shack’s owners opted for a more traditional

approach using local knowledge and in-kind services. With the aid of human labor, a few beam supports, and some hand-pumped hydraulic jacks, the dune dwellers were able to pull the structure out of the sand. This informal process meant that the park service did not have to employ any funds to relocate the house as the work was done using the local resources and networks the shack dwellers had access to.

The stories and history behind Cape Cod’s dune shacks suggest that while many buildings aren’t built to span the ages, the cultural traditions and vernacular craftsmanship that creates them can be. Whether it is relocating a house or doing basic maintenance such as installing sand fences, the dune dwellers demonstrate a deep understanding of coastal systems, which has been tested by decades of trial and error experimentation in a hostile environment. Through constant maintenance and repair, coupled with a basic respect for the harsh surroundings and natural terrain, the dune shack builders have been able to strike a balance between human needs and those of the environment.

### **The Favela Communities of Brazil**

Not all adversity is environmental though; sometimes adversity comes in the form of lack of economic opportunity or institutional support. In large portions of the developing world, people struggling to scratch out a living often employ a simple solution to share resources and forge stronger social bonds: they build a city. Usually these communities are built with little to no oversight from public officials, and they generally don’t benefit from public services such as sewer and power lines. The high prevalence of these settlements suggests additional study and analysis is warranted.

One nation that has drawn attention from both urban planners and social scientists when it comes to informal communities is Brazil, where the communities are known as favelas. The scale and complexity of some favelas can be quite impressive. In one of Brazil’s largest cities, Rio de Janeiro, it is estimated that 25% of the population lives in favelas.<sup>4</sup> Life in the favelas is far from ideal, but that community represents a blank slate where people can forge a new life and have some degree of freedom to operate and make critical life choices.

Although no formal building codes exist in the favelas there are a number of basic techniques people employ that have gained general acceptance over time. Much like

traditional urban areas in the United States, favela residents who happen to live near an important commercial street will generally choose to reserve the ground floor as commercial space.<sup>5</sup> When it comes to constructing a new home, favela residents employ simple materials such as brick, concrete and corrugated iron. These materials are desirable because of their low cost, light weight, and the ease with which they can be transported through the Favela's narrow streets and alleys. Bartering for new goods or services can also occur in the favelas. For example, one favela resident recounted a situation where they exchanged roof tiles in order to obtain new windows. Some of the favelas have even been able to marshal resources for civic entities such as community centers. The favela community Maré, for example, created art centers to help its younger residents develop new skills. This type of life sustaining activity can generally go unnoticed since it is not formally organized and it generally functions as part of the web of casual public life in the favelas.

In the 1960s many Brazilian communities razed the favelas and relocated families to large housing complexes with infrastructure and services, an approach that paralleled American urban renewal efforts around the same time.<sup>6</sup> This method of eradication and relocation into isolated housing complexes failed, however, because while it was easy to transport people, the support networks developed over time in the favelas could no longer be maintained in the housing complexes. Urban theorist Jane Jacobs, who arguably was the most vocal opponent of this urban planning approach, was one of the first to document the invisible support structures and networks people cultivate in a high functioning slum neighborhood. A key component to the success of these neighborhoods that Ms. Jacobs noticed was that "People are accommodated and not assimilated, not in undigestible floods, but as gradual additions, in neighborhoods capable of accepting and handling strangers in a civilized fashion."<sup>7</sup> In Brazil, many of the favelas do appear to display the characteristic of having an informal process to accommodate gradual change over time. The main lesson favelas provide to American planners is a simple one: to improve economic opportunity it is important to facilitate the creation of mutual support networks in low-income neighborhoods showing improvement and to create new support networks in low-income area devoid of meaningful social relationships.

## Conclusion

Human resourcefulness can be an amazing thing, and it is often easiest to spot inventiveness and adaptability in locations where resourcefulness is a requirement of life. In the two examples cited, thrift and ingenuity are essential components for maintaining local traditions, such as with the Cape Cod dune shacks, or in providing for the basic necessities of life, such as with the Favelas. For the dune shack dwellers, life on the dunes is in a constant state of flux because Cape Cod, itself, is in a constant state of flux. Those who have opted to live there, live with the change rather than fight it, using a built environment that can change as frequently as the natural environment does. In Brazil the ad-hoc solutions and incremental changes are used to build a lasting community. The changes incorporated into life in the favela are attempts to build a stable and resilient lifestyle despite numerous social and economic disadvantages. For those who live on society's edges, whether it is in rustic isolation in a hostile environment or in a low income informal urban area, the ability to cultivate a series of cultural mores that can be mutually reinforcing is key. By having an informal body of knowledge and skills to pass on to succeeding generations, vulnerable communities can ensure their continued survival, even in the face of daunting odds. 🐦

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