

WATER LOG

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Clean Water Act Violations Lead to Massive Fish Kill

**Oil Spill MDL: Punitive
Damage Claims Allowed**

WATER LOG

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23rd Annual Nonpoint Source Conference

January 24, 2012

Montgomery, AL

[http://www.adem.state.al.us/misc/ -
2012NPSConference.cnt](http://www.adem.state.al.us/misc/-2012NPSConference.cnt)

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*Cover photograph of fish kill courtesy of P. J. Hahn of
Plaquemines Parish Coastal Zone Management.*

CLEAN WATER ACT VIOLATIONS LEAD TO FISH KILL

April Hendricks Killcreas¹

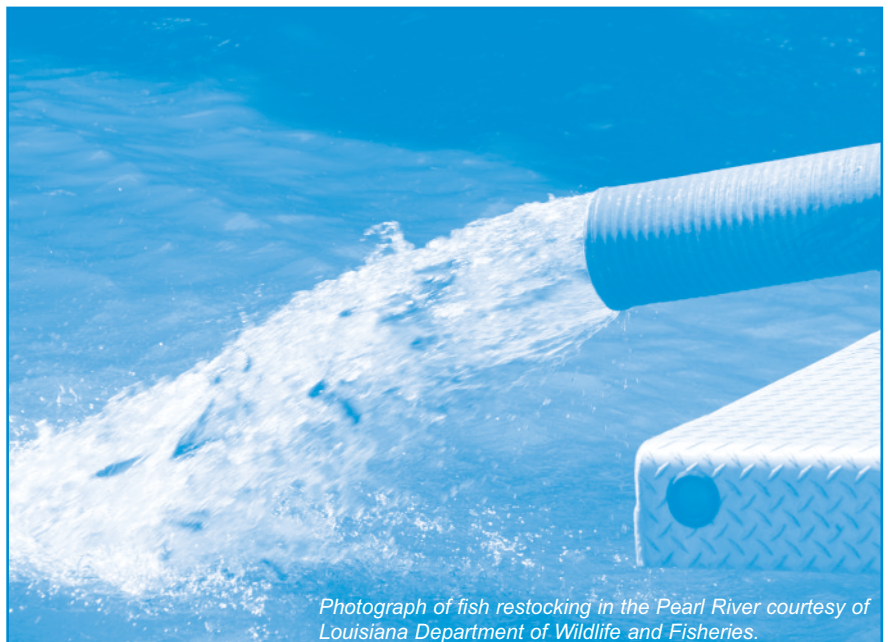
In August, a paper mill owned by Temple-Inland in Bogalusa, Louisiana released a high concentration of waste material into the Pearl River, resulting in the deaths of hundreds of thousands of fish and other aquatic life, including two species listed under the Endangered Species Act. As the result of the adverse impact to the area's water quality and the deaths of a significant number of protected fish, environmental protection organizations have indicated their intent to file suit against Temple-Inland under the Clean Water Act and Endangered Species Act.

Background

On August 9, 2011, as a result of a malfunction at the Temple-Inland Bogalusa Paperboard Mill's wastewater treatment system, the plant discharged a liquid waste material, "black liquor," into the Pearl River, which forms the southeastern border between Louisiana and Mississippi, in St. Tammany Parish, Louisiana.² The paper mill failed to notify the Louisiana Department of Environmental Quality that the spill had occurred until August 13th; however, state environmental officials had, by that time, already learned of the spill as the result of media investigations into reports about a number of dead fish present in the Pearl River. The presence of the black liquor reduced the amount of available oxygen in the river, effectively killing hundreds of thousands of fish, including the endangered gulf sturgeon and the inflated heelsplitter mussel.

After noticing that Temple-Inland's wastewater treatment system was no longer functioning, company officials indicated that they immediately took action to mitigate the harm caused by the discharge. Temple-Inland reportedly shut down the plant upon realizing that the levels of black liquor released into the river had exceeded the allowable amount under their discharge permit; however, this action failed to prevent the contamination of the river, which ultimately resulted in the fish kill. The discharge's impact on the river's aquatic population was compounded by the fact that the Pearl River has recently experienced low water levels due to drought conditions.³

Following Temple-Inland's black liquor discharge and the consequential fish kill, the Louisiana Environmental Action Network (LEAN) notified the company of its intent to file a citizen suit against



Photograph of fish restocking in the Pearl River courtesy of Louisiana Department of Wildlife and Fisheries.

Temple-Inland for violations of the Clean Water Act and the Endangered Species Act. Additionally, the state of Louisiana and the Louisiana Department of Wildlife and Fisheries have filed suit against the paper mill, alleging that Temple-Inland killed or injured aquatic life in violation of state law.⁴

Clean Water Act

The Clean Water Act establishes a framework for the federal regulation of the discharge of pollutants into waters of the United States. Under the CWA, the discharge of pollutants from a point source into navigable waters is unlawful, unless the discharging party holds a National Pollutant Discharge Elimination System (NPDES) permit.⁵ In Louisiana, the Louisiana Department of Environmental Quality (LDEQ) issues this type of permit and oversees the state implementation of the CWA. Industrial dischargers are required to obtain NPDES permits if they anticipate discharging pollutants into navigable waters.⁶ The EPA or LDEQ may impose civil penalties on any party who fails to comply with the provisions of the CWA and violators must return any economic benefit received as the result of the noncompliance. The regulatory agency may impose monetary penalties for each day the violation continues. Therefore, if held liable for the CWA violation, Temple Inland will be subject to fines levied for each day that the black liquor remained in the Pearl River.

In addition, the CWA allows citizens to file civil actions against parties alleged to have violated the discharge provisions and effluent standards provided under the Act.⁷ Before filing a suit, citizens who have been adversely affected by a violation of the CWA must provide sixty days notice of the violation to the alleged violator, the state in which the violation occurred, and the Administrator of the EPA.⁸ LEAN has provided Temple-Inland with the requisite sixty-day notice of its intent to file a citizen suit. The notice period offers the parties an opportunity to resolve the matter without resorting to litigation; however, should the parties fail to reach a mutually desirable solution, LEAN will likely pursue its suit against Temple-Inland under the CWA.

Endangered Species Act

The Endangered Species Act (ESA) creates a federal regulatory framework for the protection of endangered and threatened species and their habitats. The ESA specifically makes it unlawful for any person to “take”

an endangered species.⁹ The ESA broadly defines the taking of an endangered species as “to harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect, or to attempt to engage in such conduct.”¹⁰ Additionally, a taking may occur when an action causes harm to a listed endangered species by resulting in “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering.”¹¹

Permits may be issued under the ESA to allow for the incidental taking of endangered species during the course of lawful activity, provided that the permittee submits and the U.S. Fish and Wildlife Service (or NOAA Fisheries, depending on the species) approves a habitat conservation plan for the taken species.¹² Should a taking of an endangered species occur without a permit, the violator may be subject to monetary fines by the FWS. For instances, the penalties for killing an endangered species may range from \$3,500 for the first offense up to the statutory maximum of \$13,000, and the penalties for the taking of an endangered species via habitat modification and degradation will be imposed on a case-by-case basis, up to the statutory maximum amount.

Temple-Inland's Violations


Temple-Inland does not dispute the fact that its paper mill discharged black liquor into the Pearl River, and the discharge permit issued by the Louisiana Department of Environmental Quality does not authorize the discharge of this substance into state waters. Accordingly, LEAN contends that the discharge which occurred on August 9th was an unlawful discharge in violation of the CWA. LEAN also claims that the massive fish kill resulting from the discharge indicates that the black liquor contained various oxygen-demanding substances; thus, such a discharge also violates the limits that the permit placed on biochemical and chemical oxygen demand.¹³ The fish kill is further evidence that the discharge contained a significant pollutant, which supports LEAN's argument that the company violated the CWA.

Temple-Inland's discharge of black liquor into the Pearl River killed a wide variety of fish and other aquatic wildlife. Of the fish killed by the unpermitted discharge, twenty-five were gulf sturgeon, which was listed as endangered under the ESA in 1991.¹⁴ The Pearl River has been designated as a critical habitat for the gulf sturgeon, and Temple-Inland's discharge resulted in both

the pollution of this habitat as well as the deaths of a significant number of these fish. The inflated heelsplitter was also listed as a threatened species under the ESA, meaning that the species is at risk of becoming endangered within the foreseeable future.¹⁵ An unknown number of inflated heelsplitter were killed as the result of the black liquor discharge, and without a permit for the incidental takings of both of these listed species, Temple-Inland has violated various provisions of the ESA.

Conclusion

Temple-Inland's unexpected discharge of black liquor into the Pearl River resulted in devastating environmental harm to the local aquatic ecosystem. Though the Louisiana Department of Environmental Quality has reported that the river has not experienced increased levels of toxic materials as the result of the discharge, the presence of black liquor has negatively impacted the water quality of the river and resulted in the deaths of a significant percentage of the remaining gulf sturgeon in the region.¹⁶ To date, Temple-Inland has proven cooperative with efforts to mitigate the harm from the release, agreeing to pay for water quality testing in areas surrounding the river. Pending laboratory results of this testing, the effects of the damage that has already occurred in the Pearl River remain uncertain. Temple-Inland faces additional legal woes from a class-action lawsuit filed by area residents seek-

ing monetary damages arising from the fish kill.¹⁷ That lawsuit remains in the preliminary stages as all claims are consolidated into one action. 

Endnotes

1. 2012 J.D. Candidate, Univ. of Miss. School of Law.
2. Kathy Finn, *Louisiana paper mill spill causes massive fish kill*, REUTERS, Aug. 22, 2011, available at <http://www.reuters.com/article/2011/08/22/us-louisiana-fishkill-idUSTRE77L6BL20110822>.
3. *Id.*
4. Petition at 1, Louisiana v. TIN, Inc., No. 103,031 (La. 22nd Jud. Dist. Aug. 17, 2011).
5. 33 U.S.C. § 1342.
6. 33 U.S.C. § 1311(b).
7. 33 U.S.C. § 1365(a)(1)(A).
8. 33 U.S.C. § 1365(b)(1)(A); *See also* 40 C.F.R. Part 135, Subpart A.
9. 16 U.S.C. §1538(a)(1)(B).
10. 16 U.S.C. § 1538.
11. 50 C.F.R. § 17.3.
12. 16 U.S.C. § 1539(a)(1)(B).
13. LEAN's Notice of Intent to File Citizen Suit, Aug. 26, 2011, available at <http://www.leanweb.org/our-work/water/pearl-river-fish-kill-update-lean-files-notice-of-intent>.
14. *Id.*
15. *Id.*
16. Finn, *supra* note 2.
17. Order, Evans v. TIN, Inc., No. 11-2067 (E.D.La. Nov. 22, 2011).

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Dispersant Manufacturers May Face Personal Injury Liability



April Hendricks Killcreas¹

Due to alleged personal injuries suffered in the wake of the *Deepwater Horizon* explosion, numerous plaintiffs filed a class-action lawsuit over the use of Corexit 9500 and 9527, the primary dispersants used in cleanup activities in the Gulf. The defendants in this case, manufacturers of Corexit and those responsible for applying it during the *Deepwater Horizon* response, filed a motion to dismiss the plaintiffs' lawsuit, alleging that they were immune from suit due to their status as government contractors. The district court denied the motion to dismiss, however, noting that, at this stage of the lawsuit, immunity did not apply to the defendants in this case.

Background

Following the explosion of the *Deepwater Horizon* on April 20, 2010, both residents of the Gulf Coast and individuals involved with the oil spill cleanup activities brought personal injury claims against BP, Transocean, various companies responsible for conducting cleanup efforts in the Gulf, and Nalco Company, the manufacturer of Corexit 9500 and 9527, the primary dispersants used in cleanup activities.² The plaintiffs include vessel captains and crew members exposed to these dispersants while engaging in cleanup activities, individuals responsible for cleaning oiled vessels, workers engaging in on-shore cleanup activities, and residents living in close proximity to shorelines where oil and dispersants washed ashore. These plaintiffs claim that, following their exposure to various chemicals found in these dispersants, they have experienced headaches, respiratory problems, eye and skin irritation, and other physical ailments.³ Furthermore, as a result of the health problem they alleged occurred after being exposed to the chemicals in the dispersants, the plaintiffs contend that they are now at a greater risk of significant health problems in the future. As a remedy for these injuries, the plaintiffs exposed to Corexit sought damages for past medical expenses and future medical monitoring costs.

In response to the plaintiff's personal injury claims, the Cleanup Defendants and Nalco attempted to dismiss the plaintiffs' lawsuit, arguing that, as government contractors, they were immune from suit under the derivative immunity doctrine. In the alternative, the Defendants also maintained that these claims against them were preempted by the Clean Water Act and the National Contingency Plan.⁴

Dispersant Related Claims

In this lawsuit, the plaintiffs raised negligence, negligence per se, and products liability claims against the Cleanup Defendants and Nalco. In order to recover under their negligence and products liability claims, the plaintiffs must demonstrate that an actual injury occurred. The plaintiffs maintain that, because they were exposed to toxic levels of Corexit, they are entitled to reimbursement for the future costs of medical monitoring, should any serious illnesses later arise as a result of their exposure. In general, plaintiffs may recover medical monitoring costs where they can demonstrate that an injury has actually occurred.⁵ In this instance, many of the plaintiffs have indicated that, following exposure to Corexit, they experienced headaches, vision and skin problems, and breathing difficulty; therefore, these plaintiffs have properly alleged that an injury occurred and may be entitled to recover medical monitoring costs.

Immunity

In response to the plaintiffs' claims, the Cleanup Defendants and Nalco asserted that they were entitled to immunity from the lawsuit. In general, the federal government is entitled to immunity from lawsuits relating to governmental actions and decisions, including those relating to the *Deepwater Horizon* incident. A government contractor is entitled to derivative immunity if it carries out actions in accordance with Congressional authorization and, when performing those actions, it does not act in excess of the authority granted by Congress.⁶ At the

most basic level, the government contractor defense asserts that a contractor is entitled to immunity because the government ordered the contractor to act.

As a defense against the plaintiffs' claims, the Cleanup Defendants and Nalco argued that, because the federal government approved the use of Corexit in the Gulf, they are entitled to the same immunity that would be extended to the federal government. Since the Cleanup Defendants were responsible for applying Corexit in the Gulf and Nalco manufactured and sold the dispersant to the government for this purpose, they maintained that they could not be sued for these actions since they were carrying out actions ordered by the federal government.

The Cleanup Defendants argued that the Clean Water Act (CWA) and the Federal Tort Claims Act (FTCA) formed the basis of their derivative liability and that, as contractors for the government, they are also entitled to immunity since they applied and manufactured the Corexit used only in response to governmental orders. Under the CWA, the federal government cannot be liable for "damages arising from its actions or omissions relating to any response plan required by this section[,]”⁷ including the response plan mandating the use of Corexit in the Gulf. The regulations implementing the CWA mandate that the government specifically authorize the use of dispersants in response to an oil spill;⁸ therefore, if the federal government authorized the use of Corexit to clean up the oil slick caused by the *Deepwater Horizon* explosion, the Cleanup Defendants did not act in excess of the authority granted under the CWA and would be entitled to derivative immunity from the plaintiffs' suit.

Similarly, the discretionary function exception to the FTCA shields the federal government from lawsuits arising from "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government.”⁹ In *Boyle v. United Tech. Corp.*, the U.S. Supreme Court outlined a three-part test to determine when government contractors would be responsible for defective equipment. A government contractor will be entitled to use the discretionary function exception to the FTCA if the government approved precise specifications, the equipment adhered to those specifications, and the supplier of the equipment warned the government regarding dangers relating to the use of the equipment.¹⁰ Using this test, only decisions made by the government, as opposed to decisions made solely by the contractor, would be afforded liability from suit.

The plaintiffs allege that, to prevent oil from spreading from the blown out well, BP chose to implement disaster

response plans involving the use of Nalco's Corexit to minimize the oil slick. As part of this response, BP coordinated both vessels and aircraft to locate oil migrating from the explosion site and spray dispersants into the oil. When the EPA ordered BP to use a less toxic dispersant, BP refused and proceeded with its use of Corexit throughout the Gulf.¹¹ Therefore, BP, rather than the government, was the party authorizing the use of Corexit. Accordingly, neither the Cleanup Defendants nor Nalco can claim derivative immunity because, under the government contractor test, they were not responding directly to government authorization to use the Corexit and, under the discretionary function exception, the government was not the party approving the use of Corexit. Additionally, even if BP had been authorized by the government to use Corexit, it exceeded the scope of that authority by continuing to use the dispersant when the EPA ordered BP to use a less toxic product. Therefore, the defendant's argument that they are entitled to derivative liability fails under both the government contractor theory and the discretionary function exception.

Conclusion

Because the plaintiffs in this lawsuit alleged sufficient facts in their complaint to allow the court to infer that the Cleanup Defendants and Nalco were responsible for their injuries and not immune from suit, the court denied the defendants' motion to dismiss. At the dismissal stage of a lawsuit, the court is only concerned with the quality of the facts plead by the plaintiffs and is not making a substantive decision as to the merits of the defendants' arguments; accordingly, the court will rule on the merits of these defenses and the plaintiffs' personal injury allegations during later stages of the lawsuit.✈

Endnotes

1. 2012 J.D. Candidate, Univ. of Miss. School of Law.
2. Order (As to Motions to Dismiss the B3 Master Complaint) at *1, In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, MDL No. 2179, 2011 WL 4575696 (E.D. La. Oct. 4, 2011).
3. *Id.*
4. *Id.* at *2.
5. See *Hagerty v. L & L Marine Servs, Inc.* 788 F.2d 315, 319 (5th Cir. 1986).
6. *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 60 (1940).
7. 33 U.S.C. § 1321(j)(8).
8. 33 U.S.C. § 1321 (d)(G)(I); 40 C.F.R. § 300.910(a).
9. 28 U.S.C. § 2680(a).
10. 487 U.S. 500, 507 (1988).
11. Order and Reasons, *supra* note 2, at *5.

Oil Spill MDL: Punitive Damage Claims Allowed

Christopher Motta-Wurst¹

Following the *Deepwater Horizon* oil spill, more than 100,000 individual claims for damages have been filed in court.² Claims have been brought under a variety of state and federal laws including general maritime law and the Oil Pollution Act of 1990 (OPA). Due to the volume of claims, the cases have been consolidated in a multi-district litigation panel (MDL) in a federal district court in Louisiana. The court organized the cases into bundles to efficiently manage the claims. This case concerns the B1 bundle, which is the bundle that includes all claims for private or non-governmental economic loss and property damages. After resolving issues of jurisdiction, the court went on to rule that claims for punitive damages could be brought in this litigation.

OPA vs. Maritime Law

The Oil Pollution Act was created following the *Exxon Valdez* oil spill in Alaska. The OPA's purpose is to prevent future oil spills and address responsibility and liability for clean up costs, civil penalties, and economic damages incurred for any future oil spills.³ But the OPA also contains two "savings" clauses addressing general maritime law and state law claims. The defendants argued that any claim based upon general maritime law should be dismissed because the OPA displaces such federal common law claims.⁴

Accordingly, the court had to resolve whether the OPA displaced claims under general maritime law (which included claims for punitive damages). The court considered a three-part test to determine if the OPA preempted federal common law: (1) whether there is a clear indication that Congress intended to occupy the entire field governing a particular area, (2) whether the statute speaks directly to the question that is addressed by the common law, and (3) whether application of the common law will have a frustrating effect on the statutory remedial scheme.⁵

After reviewing prior judicial rulings on this issue, the court delineated three types of claims: (1) claims for purely economic losses, (2) claims brought under general maritime law against non-Responsible Parties, and (3) claims brought against Responsible Parties as defined by the OPA. As to the first set of claims, the court found that individuals bringing economic loss claims (as opposed to physical property damage claims) could not have brought those claims prior to the enactment of the OPA, which created this recovery scheme. Consequently, those individuals could not bring claims under general maritime law because their claims only existed under the OPA. Collectively, the court considered claims brought by individuals with physical prop-

*Punitive damages are
designed to punish
and deter unwanted
behavior . . .*

erty damage against non-Responsible Parties and Responsible Parties under the OPA. After considering the three-part test to determine preemption, the court found that general maritime law claims brought against non-Responsible Parties were not affected by the enactment of the OPA. The OPA only addresses the liability of Responsible Parties and therefore does not preempt maritime law claims against other groups. However, maritime law claims brought against the Responsible Parties are displaced by the OPA, to the extent the OPA covers those types of claims. Therefore, the court had to

next consider whether claims for punitive damages against Responsible Parties were claims preempted by the OPA.

Punitive Damages

Punitive damages are designed to punish and deter unwanted behavior by awarding additional damages to the injured party in addition to the actual damages suffered. Here, the court considered whether parties could make claims for punitive damages or if the OPA restricted claims for punitive damages. Relying on the same three-part analysis used above, the court weighed whether or not the OPA eliminated the possibility of punitive damage claims.

The OPA does not mention punitive damages. The court believed that if Congress wanted to eliminate the availability of punitive damages under general maritime law Congress would have done so by making the elimination of punitive damages explicit. The court found that allowing punitive damages would not frustrate the OPA liability scheme, which puts a limit on the amount a Responsible Party can be liable for, because a Responsible Party must abide by the OPA procedures even if there is a claim against them under general maritime law. Also, punitive damages are available under general maritime law when gross negligence occurs and proof of gross negligence eliminates the OPA's limits on liability.⁶ Therefore, the court concluded that the OPA does not displace general maritime law for those making claims who would have

been able to bring the same claims before the enactment of the OPA.⁷ In other words, punitive damages are available under general maritime law when gross negligence occurs.

Conclusion

While the litigation is far from over, the court's ruling shapes the future outcome of claims brought in the oil spill MDL. The success of the claims remains to be seen but punitive damages will be allowed. Both federal common law claims under general maritime law and statutory claims under the OPA may also be considered depending on the facts of the claim. More recently, the same court found that both Louisiana and Alabama could also seek punitive damage claims in this litigation.⁸

Endnotes

1. 2012 J.D. Candidate, Univ. of Miss. School of Law.
2. Order (As to Motions to Dismiss B1 Master Complaint) at *1, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, MDL No. 2179, 2011 WL 3805746 (E.D. La. Aug. 26, 2011).
3. *Id.* at *11.
4. *Id.* at *10.
5. *Exxon Shipping Co. v. Baker*, 544 U.S. 471, 489 (2008).
6. 33 U.S.C. § 2704(a).
7. Order, *supra* note 2, at *15.
8. Order (As to Motions to Dismiss Complaints of Alabama and Louisiana), *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, MDL No. 2179, 2011 WL 5520295 (E.D. La. Nov. 14, 2011).

Photograph of Coast Guard laying oil containment booms in Louisiana courtesy of the USCG.





WATERFRONT PROPERTY OWNERS LOSE TAKINGS CLAIM

Photograph of the St. Lucie Canal courtesy of the USCG.

Evan Parrott¹

In June, a federal court considered a property rights lawsuit filed by twenty-three Florida property owners against the U.S. Army Corps of Engineers. The property owners claimed that the Corps took their riparian and upland property rights along the St. Lucie River without just compensation as required by the Fifth Amendment of the U.S. Constitution. According to the property owners, the Corps' actions of discharging pollutants from Lake Okeechobee into the river entitled the property owners to compensation because the pollution diminished their rights to fish, swim, boat, and partake in other recreational activities along the waterway.

Background

The St. Lucie River began as a freshwater stream in Florida, unconnected to the ocean. In the late 19th century, a passage was constructed to connect the river to the Atlantic Ocean; later, Florida and the Corps constructed a system of waterways to control the water levels of Lake Okeechobee. This construction included the St. Lucie Canal, which connected the lake to the St. Lucie River.² To control flooding, the Corps releases water from the lake into the canal system. The released lake water carries with it various pollutants including sediments and nutrients that damage the St. Lucie ecosystem.³

The associated pollution has been documented for many years. As early as the 1950s, a report by the Corps acknowledged the negative impacts of the discharge from Lake Okeechobee on the St. Lucie ecosystem.⁴ The pollution continued over time and in 2005, the Martin County Department of Health banned all contact with the river due to problems associated with the discharge.

In 2006, twenty-three property owners along the St. Lucie River and Canal filed a lawsuit against the

Corps seeking \$50 million in damages for the loss of riparian rights resulting from the pollution.⁵ This summer, the court considered arguments to dismiss the lawsuit on two grounds: (1) the suit was not filed within the six-year statute of limitations and (2) there was no applicable Florida law recognizing riparian rights of fishing, swimming, boating, or recreation.⁶ After considering the arguments, the court ruled in favor of the Corps and dismissed the lawsuit.

Taking of Riparian Rights

The Fifth Amendment of the U.S. Constitution prohibits the federal government from taking private property without paying just compensation. A taking usually occurs when the government physically invades or intrudes onto a person's private property. However, a taking may also be caused by regulations that are overly burdensome to private property rights. For the government to be liable for a taking, the property owner must establish that a legally recognized property interest protected by the Fifth Amendment has been taken by government action.

Here, the property owners claimed that the Corps' discharge of water and the resulting pollution took the property owners' riparian rights to use the St. Lucie River, including their rights to "swim, boat, fish, and use the water for recreation."⁷ The complaint alleged the government's release of fresh water into the brackish water of the estuary "destroy[ed] the delicate balance between salt and fresh water so critical to a tidal estuary" and degraded "fish life and other marine organisms and critically needed vegetation."⁸

Property interests are a matter of state law and therefore the property owners' assertions depend on whether their alleged riparian rights are recognized under Florida law. Riparian rights refer to unique rights held by waterfront property owners and are different

from general public rights to use a waterway. For instance, the right to build a pier off the shoreline of waterfront property is generally considered a riparian right unique to the property owner while the right to use a public waterway for boating or fishing is often considered a public trust right.

Florida law recognizes certain riparian rights: “(1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water.”⁹ In this case, the property owners’ alleged riparian rights of boating, fishing, swimming and viewing wildlife in the St. Lucie River are not recognized under Florida law because those rights are considered public rights. In other words, the property owners do not have a private property right to use the St. Lucie River for fishing, boating, and viewing wildlife, and therefore, are not entitled to compensation for the loss of those rights. As the court further explained, the right of a property owner to have physical access to a body of water does not entitle the property owner to use the body of water for everything he can imagine, such as the activities of “swimming and viewing wildlife.”¹⁰ Because the property owners did not establish a compensable property interest under Florida law, the court did not address whether the government’s actions of polluting a navigable waterway could constitute taking of property under the Fifth Amendment.

Tucker Act Statute of Limitations


The Tucker Act is a federal law that provides a limited waiver of sovereign immunity for certain types of lawsuits against the U.S. government including Fifth Amendment takings claims. Lawsuits brought under the Tucker Act must comply with a six-year statute of limitations.¹¹ To comply, parties must file their suit within six years of when the taking occurred or within six years of when the parties should be reasonably aware of the harm. In this case, the property owners filed their lawsuit on November 13, 2006 so they were required to show that they could not have reasonably known about the taking before November 13, 2000.

Because the evidence suggested that the pollution had been occurring for many years, the property owners argued that the stabilization doctrine modified the statute of limitations in this case. The stabilization doctrine is a means by which the accrual period for the statute of limitations can be delayed. The doctrine was created to provide guidance in situations where property damage occurs gradually, making it difficult for a

property owner to assess the damage and determine when to bring suit. The doctrine states that the statute of limitations begins when “the environmental damage has made such substantial inroads into the property that the permanent nature of the taking is evident and the extent of the damage is foreseeable.”¹² In this case, the pollution of the St. Lucie River had been taking place for over 80 years and the environmental damage resulting from the discharge from Lake Okeechobee had been well documented since the 1950s. Therefore, regardless of whether the stabilization doctrine applies, the property damage was evident and foreseeable, and the residents should have been aware of the risks a significant time prior to November 13, 2000.

Property owners also asserted that the statute of limitations accrual period was modified by government promises to mitigate the damages to the St. Lucie River. This theory of law represents the notion that government promises to repair or mitigate damages to property prevent the landowner from knowing that a taking has occurred at the earlier date. However, the court found that there were no government assurances of mitigation noting that the Corps never attempted to decrease regulatory discharges. Consequently, the court upheld the dismissal of this lawsuit for failure to comply with the six-year statute of limitations.

Conclusion

This decision clarified that under Florida law the rights to boat, swim, fish and view wildlife are commonly held rights of the public rather than private riparian rights held only by waterfront property owners. Because these rights are publicly held, riparian property owners are not entitled to compensation for the loss of those rights under the Fifth Amendment of the U.S. Constitution. 

Endnotes

1. 2013 J.D. Candidate, Univ. of Miss. School of Law.
2. *Mildenberger v. United States*, 643 F.3d 938, 941 (Fed. Cir. 2011).
3. *Id.* at 942.
4. *Id.*
5. *Id.*
6. *Id.* at 944.
7. *Id.* at 943.
8. *Id.*
9. *Id.* at 948.
10. *Id.*
11. 28 U.S.C. § 1491 (2006).
12. *Mildenberger*, 643 F.3d at 946.



CITIZEN SUIT LEADS TO WETLANDS RESTORATION

Travis M. Clements¹

On August 23, 2011, the U.S. District Court for the Southern District of Mississippi approved a settlement between the Gulf Restoration Network and Hancock County Development, LLC. The negotiated agreement compels Hancock County Development to dedicate a wetlands parcel, create a wetlands restoration plan, and pay fines and legal fees for its Clean Water Act violations in Hancock County, Mississippi.²

Background

Hancock County Development, LLC (HCD) is a privately owned Alabama limited liability corporation that develops real estate in the Gulf States. HCD owns over 700 acres of land north and south of Interstate 10 in unincorporated Hancock County, Mississippi. This land is adjacent to the Stennis International Airport and borders the western edge of Bay St. Louis, Mississippi. The parcel lying south of Interstate 10 (the “development parcel”) contains large areas of designated freshwater/forested shrub wetlands and freshwater emergent wetlands.³ A small tributary of Bayou Maron borders the development parcel to the west and south, and Interstate 10 borders the parcel to the north. The tributary flows into Bayou Maron, which empties into Bayou La Croix and the Jourdan River, and ultimately drains into Bay St. Louis and the Gulf of Mexico.

In early 2007, HCD designed a large planned community for the development parcel that included building on the designated wetlands. Later that spring, HCD constructed canals, ditches, berms, and dams, and filled and dredged wetlands on the property. HCD failed to obtain the necessary permits to construct the ditches, berms, and dams, and it did not obtain a wetlands dredge and fill permit under Clean Water Act § 404 from the U.S. Army Corps of Engineers (Corps). After HCD began construction and dredge and fill operations, storm water runoff stopped draining into the wetland areas. HCD also discharged storm water and construction sediment into the nearby Bayou Maron tributary.

After HCD altered the wetlands, two local property owners, the Schuengels and Langs, began to experience flooding during mild rains. The Schuengel and Lang properties are located approximately 200 yards south of HCD’s development parcel. The accumulated construction sediment in the Bayou Maron tributary exacerbated this flooding, which destroyed lawns and gardens, prevented animal grazing, and increased pest levels. In November 2007, the Corps issued a Notice of Violation, citing HCD for unauthorized dredging and filling of wetlands, and ordered the company to halt its construction activities.⁴

In May 2008, the Gulf Restoration Network, an environmental organization, filed a citizen suit under the Clean Water Act against Hancock County Development for violations of the act. Both the Schuengels and Langs are members of Gulf Restoration Network. Aided by legal assistance from the Tulane University Environmental Law Clinic, the Gulf Restoration Network sought correction of the Clean Water Act violations to preserve the Gulf of Mexico coastal ecosystem.

Clean Water Act Citizen Suits

Known as the citizen suit provision, Clean Water Act (CWA) § 505 allows a private citizen or group to file a lawsuit against another citizen or corporation for violation of an environmental statute.⁵ Gulf Restoration’s citizen suit focuses on CWA prohibitions on storm water discharge and unauthorized dredge and fill operations on designated wetlands.⁶ This citizen suit survived multiple litigation tactics by HCD to delay proceedings for over three years, including two motions to dismiss in 2009.

In February 2011, the U.S. District Court for the Southern District of Mississippi granted partial summary judgment to Gulf Restoration Network, ruling that Hancock County Development violated Clean Water Act § 402 by discharging stormwater “associated with

industrial activity” without an EPA permit. Clean Water Act § 402 regulates the discharge of substances into the “waters of the United States,” and it specifically prohibits the discharge of industrial stormwater without an EPA Permit.⁷ The court additionally ruled that HCD conducted unauthorized dredge and fill activities in wetlands without a CWA § 404 permit from the Corps. Under CWA § § 301 and 502, any discharge of dredged or fill materials into “waters of the United States,” including wetlands, is forbidden unless authorized by a § 404 permit issued by the Corps.⁸ Lastly, the court held that HCD’s CWA violations directly caused flooding of the Schuengel and Lang properties.

Consent Agreement

On August 23, 2011, Gulf Restoration Network and Hancock County Development submitted a mutual consent judgment for the district court’s approval. The consent judgment requires that HCD permanently dedicate the development parcel to the Land Trust for the Mississippi Coastal Plain. HCD has six months to transfer full ownership of the parcel to the Land Trust for restoration and conservation.

After transferring ownership of the parcel, HCD will be responsible for funding the detailed wetland restoration plan, developed to restore an ecosystem balance in the area. The Restoration Plan includes: “(i) restoring disturbed areas to natural grade, (ii) collecting and installing native pine savanna herbaceous plant species seeds, and (iii) acquiring, delivering in gallon pots if appropriate, and planting native tree seedlings or saplings as appropriate to restore the Dedication Parcel.”⁹ The consent judgment adds additional measures to the Restoration Plan designed to return the land to its natural wetland state and protect the Schuengel and Lang properties from future flooding.

HCD will place escrow funds sufficient to cover costs of the Restoration Plan into an independent “Restoration Account.” The parties agree that the Restoration Plan will require a § 404 Dredge and Fill Permit from the Corps, and the Land Trust will obtain the necessary permits and oversee restoration. HCD’s environmental consultant will monitor the restoration process and ensure the Land Trust uses Restoration

Account funds only to an extent reasonably necessary to implement the plan.

Conclusion

Under the terms of the consent judgment, Hancock County Development will pay \$95,000.00 in civil penalties to the U.S. government for its Clean Water Act violations and compensate Gulf Restoration \$100,000.00 for its litigation costs.¹⁰ After HCD fulfills the terms of the consent judgment, it can request that the district court permanently dismiss the lawsuit. The consent judgment between Gulf Restoration Network and Hancock County Development continues the process of enforcing Clean Water Act storm water discharge and wetlands regulations.↩

Endnotes

1. 2012 J.D. Candidate, Miss. College School of Law.
2. *Gulf Restoration Network v. Hancock County Dev.*, 772 F.Supp.2d 761 (S.D. Miss. Feb. 22, 2011).
3. *Id.* at 764.
4. *Id.*
5. 33 U.S.C. § 1365.
6. *Gulf Restoration Network v. Hancock County Dev.*, No. 1:08CV186-LG-RHW, 2009 WL 259617, at *1 (S.D. Miss. Feb. 3, 2009).
7. 33 U.S.C. § 1342(p).
8. 33 U.S.C. § 1344.
9. Consent Judgment at 6-7, *Gulf Restoration Network*, 772 F.Supp.2d 761.
10. *Id.* at 11.



Photograph of wetlands courtesy of Waurene Roberson.

COURT UPHOLDS INJUNCTION HALTING BEACHFRONT SIDEWALK

Barton Norfleet¹ and Niki Pace

In Ocean Springs, Mississippi, local controversy has arisen over a beachfront public walkway proposed for an area known as East Beach. This fall, the Mississippi Supreme Court considered one aspect of the ongoing litigation over the project: whether the Hinds County court order permanently preventing the city from proceeding with the project was proper. In this decision, the Mississippi Supreme Court upheld the preliminary injunction, originally issued to protect the property owners' interest until the dispute is resolved. However, the Mississippi Supreme Court found that a permanent injunction was not appropriate at this phase of the litigation.

Background

In 2009, Ocean Springs received federal funding to construct a beachfront public sidewalk adjacent to an existing seawall in the area locally known as East Beach. Prior to construction, Ocean Springs obtained a permit from the Mississippi Department of Marine Resources and a public trust tidelands lease from the Mississippi Secretary of State (State). Ocean Springs's lease from the State begins at the toe of the seawall and extends towards the water's edge. The lease allows Ocean Springs to use the area "for a free public walkway, access area, bicycle racks and other amenities which serve a higher public purpose of promoting the public access to and public use of tidelands and submerged lands."²

Two upland property owners, however, dispute the State's ownership of the beach area and have challenged the validity of the lease. The upland owners hold properties along East Beach. Their properties are currently separated from the water by a roadway, a seawall, and then the beach area at issue here. The property owners contend that they own the beach area in question, or at a minimum, have littoral property rights to the area that limits the State's ability to lease the area without their permission.

Construction of the project was set to begin in March 2010. Before construction of the sidewalk began, the property owners filed this lawsuit in Hinds County, Mississippi challenging the validity of the State's public trust tidelands lease to Ocean Springs. The property owners asked the Hinds County court to declare the lease between the State

and Ocean Springs void and to enter an injunction stopping the sidewalk project. In March 2010, the Hinds County court found that the property owners would suffer irreparable injury if the project commenced as scheduled. Because of that finding, the Hinds County court granted the property owners a preliminary injunction halting construction until the property dispute could be resolved.

In April 2010, the Hinds County court held another hearing to decide whether a permanent injunction against the sidewalk project should be issued. In considering the issue, the court repeatedly acknowledged that a separate legal action to determine ownership of the beachfront area was underway in a Jackson County court and that the Hinds County court could not properly rule on the issue of property rights. (The property at issue is located in Jackson County, Mississippi.) Consequently, the Hinds County court denied the property owners' request that the lease be declared void but the court did grant the permanent injunction "until there has been a final determination of property ownership."³ Ocean Springs and the State appealed this ruling to the Mississippi Supreme Court.

Public Trust Tidelands

Although this ruling does not decide who owns the property, some general information on shoreline property issues is helpful in considering whether the award of a permanent injunction was proper. Under the public trust doctrine, Mississippi generally holds title to all submerged lands for the benefit of the public and the state recognizes a variety of public trust uses including recreation. Mississippi's public trust ownership extends to all lands subject to the ebb and flow of the tide up to the mean high tide line. Waterfront property boundaries continue to shift with the natural shoreline through erosion and accretion. Lands above the mean high tide line can be privately owned and those owners hold littoral rights to the waterfront area. Littoral rights give the upland property owner unique privileges to use the waterfront such as the ability to build a boathouse or construct a pier.

In 1989, Mississippi enacted the Public Trust Tidelands Act, a law that sought to resolve property boundary disputes

between upland owners and state public trust tidelands.⁴ The Act distinguishes between developed and undeveloped shorelines and established a mechanism for resolving disputes over past artificially (or man-made) accreted lands along developed shorelines. In these cases, the waterfront property line may become fixed at a set point rather than migrating with the water's edge. Essential to the arguments raised in this case is whether the State or the upland property owners own the beachfront area seaward of the seawall. If the State owns the property, then a permanent injunction against the State's lease would be improper.

Permanent Injunction

On appeal, the Mississippi Supreme Court considered whether the Hinds County court properly granted the permanent injunction and in doing so, considered the differences between a permanent and a preliminary injunction. Preliminary injunctions last for a temporary amount of time and are used to prevent irreparable injury from occurring while the court considers the case. Permanent injunctions, on the other hand, are issued after the court decides the case. Permanent injunctions do not necessarily last indefinitely; for instance, courts may use a permanent injunction to prohibit certain activity until specified conditions have been met. In deciding whether an injunction should be issued, the court considers a four-part balancing test: (1) whether there is a substantial likelihood that the plaintiff will win the case; (2) whether the injunction is necessary to prevent irreparable injury; (3) whether the injunction would cause greater harm to the defendant; and (4) whether the injunction is consistent with the public interest.⁵

The Mississippi Supreme Court first considered whether there was sufficient evidence of irreparable injury to justify an injunction. The upland owners, if successful in their property claim, could potentially suffer habitat destruction and property damage if the project moved forward. This evidence was sufficient justification for issuing a preliminary injunction while the issues of property ownership were being resolved. However, the Mississippi Supreme Court found that there was insufficient evidence to issue a permanent injunction because ownership of the beach area was undetermined. A permanent injunction would last indefinitely and would only be proper if the upland property owners did indeed own the area described in the lease. Next, the Mississippi Supreme Court assessed whether a permanent injunction could be issued before the merits of the claims were determined. In this case, the merits of the claim are whether or not the upland owners have a property interest in the leased area. Again, the Mississippi Supreme Court found that a permanent injunction was improper at


this stage of the proceedings because a permanent injunction would indefinitely prohibit the State from leasing the area even if the court later found that the upland property owners did not have any property interest in the leased area.

Ultimately, the Mississippi Supreme Court found that a preliminary but not a permanent injunction was appropriate and that the Hinds County court had mistakenly termed the injunction permanent. In support of this conclusion, the Mississippi Supreme Court placed great emphasis on Hinds County court's finding that an injunction was needed "until there has been a final determination of property ownership."⁶ Although the permanent injunction was improper, the Mississippi Supreme Court found that the preliminary injunction was still in effect and should remain in place until the property dispute is settled.

Dissent

Justice King agreed with the majority's finding that a permanent injunction was improper but did not agree with the continuation of the preliminary injunction.⁷ According to Justice King, the Hinds County court's hearing to determine if the permanent injunction should be granted was a hearing on the merits of the case. At the hearing, the upland owners failed to prove that they more likely than not owned the property and therefore failed to prevail on the merits of the case. Consequently, the upland owners were not entitled to a permanent or a preliminary injunction since preliminary injunctions only last until the claims are resolved.

Conclusion

With this decision, the preliminary injunction will continue to prevent construction of the beachfront sidewalk until the property disputes are resolved. As previously mentioned, that litigation is pending in another court in Jackson County, Mississippi. The Mississippi Supreme Court also suggested that the Hinds County court consider transferring this case to the Jackson County court overseeing the property dispute for a more efficient resolution. Either way, Ocean Springs will be unable to construct its proposed beach pathway until ownership of the property is determined. 

Endnotes

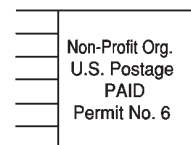
1. 2012 J.D. Candidate, Univ. of Miss. School of Law.
2. *Sec'y of State v. Gunn*, 2010-CA-00719-SCT, 2011 WL 5027136 (Miss. Oct. 13, 2011).
3. *Id.*
4. Miss. Code Ann § 29-15-1 to -23.
5. *Gunn*, 2011 WL 5027136 at *3.
6. *Id.* at *5.
7. *Id.* at *6 (King, J., dissenting).



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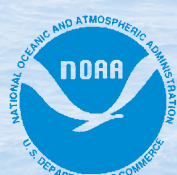
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