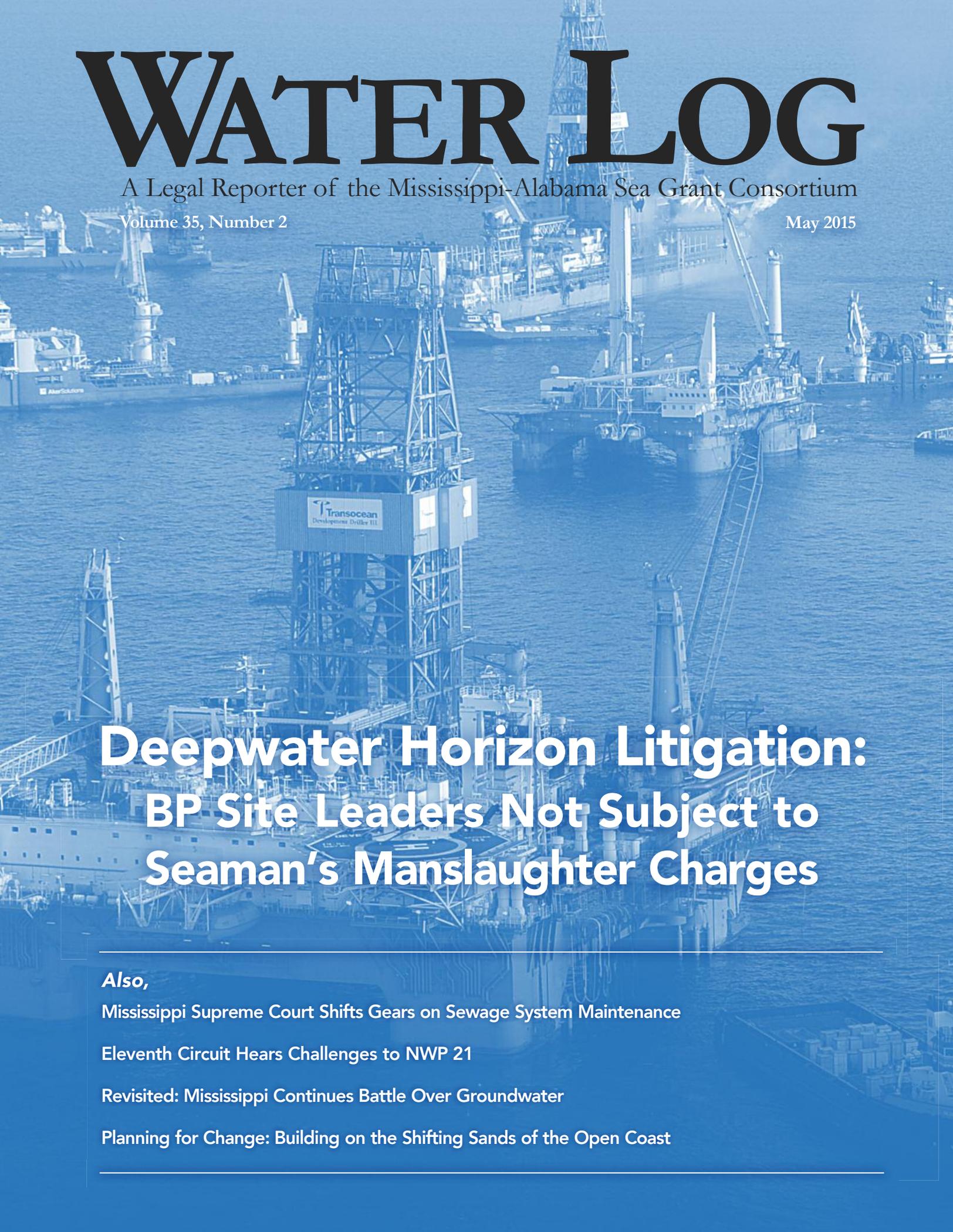


WATER LOG



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Deepwater Horizon Litigation: BP Site Leaders Not Subject to Seaman's Manslaughter Charges

Also,

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*Cover photograph of the Deepwater Horizon oil spill site;
courtesy of the U.S. Department of Defense.*

*Contents photograph of the sunset over the Black
Warrior River; courtesy of David Smith.*

• UPCOMING EVENTS •

Gulf of Mexico Alliance 2015 All Hands Meeting

June 16-18, 2015

Biloxi, MS

<http://bit.ly/goma2015>

24th Annual Southeastern Environmental Law and Regulation Conference

June 19, 2015

Sandestin Beach & Golf Resort

Destin, FL

<http://bit.ly/alstatebar24>

National Working Waterfronts & Waterways Symposium

November 16-19, 2015

Tampa, FL

<http://conference.ifas.ufl.edu/nwwws>

Deepwater Horizon Litigation: BP Site Leaders Not Subject to Seaman's Manslaughter Charges

Marc Fialkoff



Ships and drilling rigs recovering oil from the Deepwater Horizon drill site; courtesy of EPI2oh Media.

In the most recent case brought in the aftermath of the *Deepwater Horizon* disaster, the United States Court of Appeals for the Fifth Circuit affirmed a district court ruling that two BP employees could not be charged with “seaman’s manslaughter.”¹ While most of the *Deepwater Horizon* litigation has focused on the liability of BP as a company and the violations of environmental statutes such as the Clean Water Act, the facts at issue in this case revolve around the duties and responsibilities of individuals at the time of the explosion on April 20, 2010, which resulted in the death of eleven men and severe injuries to several others.² The court reasoned that the law was originally drafted to cover those

professions engaged in marine activity, namely “captain, pilot, engineer, or *other person employed on any steamboat or vessel.*”³ The court was unconvinced by the government’s arguments that the mere presence of the BP site leaders on the rig constituted “marine activity” and affirmed the lower court’s ruling dismissing the counts of seaman’s manslaughter.

Offshore Drilling: A Mix of Land and Sea Duties

The *Deepwater Horizon* was a mobile offshore drilling rig which floated on the water while oil was extracted from the seafloor below. The rig was maintained by two separate crews, a “marine” crew, and a “drill” crew. The

marine crew, provided by Transocean, was comprised of “the master (i.e., the captain), the chief mate, the chief engineer, assistant engineers, dynamic position officers, able bodied seamen, the boatswain, and the offshore installation manager.”⁴ In contrast, the drill crew was provided by BP, Transocean, and other companies and was comprised of well site leaders, drilling managers, drilling engineers, floorhands, and other personnel associated with drill operations.

Although BP did not own the rig, the BP employees on the rig were in charge of directing the drill teams, making important decisions related to drill operations, and the site leaders (Kaluza and Vidrine) were considered “the top BP employees.” According to company policy, the site leaders were accountable for decisions and ensuring compliance with all health, safety, and environmental requirements. Both Kaluza and Vidrine were experienced oil technicians. Kaluza had a degree in petroleum engineering and 35 years of experience. Vidrine was a site leader with more than 30 years experience.

In the aftermath of the disaster, a grand jury in the Eastern District of Louisiana returned a twenty-three count indictment charging the defendants (Kaluza and Vidrine) with eleven counts of involuntary manslaughter (Counts 1-11); 11 counts of seaman’s manslaughter (Counts 12-22); and one count of negligent discharge under the Clean Water Act (Count 23).⁵

Seaman’s Manslaughter

Seaman’s manslaughter, also known as “ship officer manslaughter,” codified in 18 U.S.C. § 1115, states in relevant part:

every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, other public officer through whose fraud, neglect, connivance, misconduct, or violation of law the life any person destroyed shall be fined this title or imprisoned not more than ten years, or both.

Unlike the common law definition of manslaughter, seaman’s manslaughter only requires the proof of any degree of negligence to meet the threshold of culpability. In

addition, § 1115 only covers three classes of individuals: (1) individuals associated with the navigation of the vessel, (2) owners, charters of the vessel, or (3) the corporate officers of the corporation who are deemed in control of the vessel.

The provision for seaman’s manslaughter was originally adopted during the 1800’s in an effort to better protect the lives of passengers on board vessels propelled by steam. While steamboats phased out over time, the provision remained and was modified under subsequent revisions of the statute.

The District Court Ruling

Following the indictment, the defendant’s filed a motion to all counts, arguing that the underlying statutes were “unconstitutionally vague as applied.”⁶ Specific to the counts of seaman’s manslaughter, the defendants argued that the U.S. government lacked jurisdiction since the *Deepwater Horizon* was outside the territorial jurisdiction of the United States. In addition, the defendants claimed that § 1115 did not apply to them. The district court denied the motion to dismiss based on the jurisdiction and unconstitutional vagueness grounds, but agreed with the defendants regarding the seaman’s manslaughter charges.

The Court of Appeals Decision

On appeal, the primary issue the court resolved was whether the lower court erred in determining that the statute was ambiguous as it pertained to Kaluza and Vidrine. The government argued that the district court misinterpreted the statute under principles of judicial statutory interpretation.⁷ The defendants claimed that the site leaders were not associated with marine activity and were not a captain, pilot, or engineer of a vessel and therefore do not fall within the ambit of the statute. The government argued that the wording in the statute is not ambiguous and the defendants fall within the statutory definition of *every other person* and therefore can be charged under the statute. The court reasoned that applying the government’s logic, this would make the terms captain, pilot, and engineer superfluous and render these words meaningless. Rather, the court concluded that Kaluza and Vidrine were not involved in the navigation or operation of the vessel and therefore were outside the scope of the statute and could not be charged with seaman’s manslaughter.

The court also rejected the argument by the government that § 1115 was already deemed unambiguous given prior judicial precedent. While the government cited *United States v. O'Keefe*⁸ as a case clarifying § 1115 for terms such as misconduct, negligence, or inattention, the court held that such clarification was for those words and not the phrase “[e]very...other person employed on any ...vessel.”

The court read the statutory language as covering those employees involved with the navigation or maintenance of the vessel. Through examination of the prior cases interpreting the terms of captain, pilot, and engineer, the court concluded that the disjunctive phrase, “every other person on the vessel” was meant for those engaged in marine activities (maintenance and navigation). With Kaluza and Vidrine, neither site leader was part of the marine team on the rig. Citing the district court, the appeals court concluded that the statutory provision has never been applied to employees on a drilling rig. Although the government claimed drilling had a “marine” function, the court was unconvinced and said that just because the activity, such as drilling, occurred on water, does not make it marine. Marine as defined by the court for this case was limited to those functions pertaining to the transportation of people and things, not drilling.

Conclusion

Having accepted the district court’s interpretation of the relevant sections of the statute, the appeals court affirmed the lower court’s dismissal of Counts 12-22 pertaining to seaman’s manslaughter. Although the statutory provision has a rich history in trying to protect the lives of passengers on vessels, the Fifth Circuit found it inapplicable to the events which occurred on the *Deepwater Horizon*. The court noted that given the ambiguity of the statute and its purpose as a remedy of last resort, the rule of lenity should be applied to Kaluza and Vidrine.¹⁰ Although the seaman’s manslaughter charges have been dismissed, Kaluza and Vidrine will still be tried for the eleven charges of involuntary manslaughter, with a trial date set for February 2016.¹¹ 🐦

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Deepwater Horizon fire; courtesy of SkyTruth Media.

Endnotes

1. *United States v. Kaluza*, No. 14-30122, 2015 WL 1056619, at *1 (5th Cir. Mar. 11, 2015).
2. For a full account of the events leading up to and during the *Deepwater Horizon* explosion and subsequent events, see *id.* at *1-3.
3. *Id.* at *10 (*emphasis added*).
4. *Id.* at *2.
5. *Id.* at *3.
6. *Id.*
7. *Ejusdem generis* is a canon of statutory construction which states that “where general words follow specific words in an enumeration describing a statute’s legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated in the preceding words.” *Id.* at *14 n.29.
8. *United States v. O’Keefe (O’Keefe II)*, 426 F.3d 274, 278-79 (5th Cir. 2005).
9. *Id.* at *8.
10. Ambiguous criminal laws are to be interpreted in the favor of defendants subjected to them. *Id.* at *14.
11. Erik De La Garza, *No ‘Seaman’s Manslaughter’ in BP Spill*, WORKERSCOMPENSATION.COM (March 16, 2015, 7:30 AM), <http://www.workerscompensation.com/compnewsnetwork/news/20931-no-seaman-s-manslaughter-in-bp-spill.html>; Associated Press, *Gulf oil spill: Feb. trial date in manslaughter case from 2010 BP disaster*, Naples Daily News (April 10, 2015 6:46 AM), <http://www.naplesnews.com/news/crime/gulf-oil-spill-feb-trial-date-in-manslaughter-case-from-2010-bp-disaster>.

Mississippi Supreme Court Shifts Gears on Sewage System Maintenance

Amy Mitchell

In February, the Mississippi Supreme Court considered whether the City of Starkville (Starkville) could be liable for damages when it negligently failed to maintain its sewer system.¹ Through the Mississippi Tort Claims Act (MTCA), local governments are generally immune from a lawsuit when the city or its employees are undertaking a “discretionary” action. In this case, a homeowner slipped and fell on raw sewage that had flooded his property. Thereafter, he sued Starkville for the negligent maintenance of its sewer system. The court considered both the statute and subsequent case history before concluding that Starkville could indeed be liable to the homeowner in this situation.

Background

In February 2009, Ted Boroujerdi’s home and yard flooded with sewage backup after a heavy rain. Boroujerdi called the City of Starkville Water and Sewage Department to alert them of the problem; Water Department employees arrived soon after. While attempting to show the damage to the Starkville workers, Boroujerdi slipped and fell in the raw sewage on his driveway.

Following his accident, Boroujerdi sued Starkville, alleging that Starkville’s failure to maintain the sewage system caused both serious physical injuries to himself and significant damage to his property. According to Boroujerdi, similar problems had occurred in the past at which time he had notified city officials; but Starkville had failed to provide the necessary repairs. In his lawsuit, Boroujerdi sought damages totaling \$500,000 for medical bills and pain and suffering.

At trial, Starkville requested the court grant summary judgment in its favor, meaning the court would rule on the matter without a full trial. Starkville maintained that it had not violated any laws or permits with respect to its sewage system.² The trial court agreed with Starkville and granted a summary judgment effectively dismissing the case. Boroujerdi appealed the trial court’s decision to the Mississippi Supreme Court.

MTCA & the Discretionary Function

The key issue in this case is whether a city that controls and operates its own sewage system has a ministerial or discretionary duty to repair and maintain the system. Under the MTCA, local governments are given immunity when they perform actions that fall within the course and scope of their discretionary duties. On the other hand, a city can be sued for performing ministerial duties. So at issue in this case was whether Starkville’s maintenance of the sewage system was discretionary or ministerial.³

The trial court relied on a 2011 Mississippi Supreme Court case interpreting the MTCA – *Fortenberry v. City of Jackson* – and found that Starkville’s responsibility to maintain its sewer was discretionary.⁴ In *Fortenberry*, the court used a two-part “Public Policy” test to determine “if governmental conduct is discretionary.”⁵ Under the test, the court considered (1) whether the activity involved an element of choice or judgment, and (2) whether that choice involved social, economic, or political policy considerations. Courts will grant immunity if the duty was not imposed by law and merely depended on the judgment or choice of the government entity or its employees.

In *Fortenberry*, the court found that a local regulation regarding sewer pipe size was not applicable in the disputed situation, there was no ministerial duty imposed by law, and therefore sewage maintenance was considered a discretionary element of choice or judgment. Applying that case to the Boroujerdi situation, the trial court granted summary judgment in favor of Starkville, reasoning that the responsibility was discretionary. Thus, Starkville was protected from liability under the MTCA.

Discretionary Function Post-*Fortenberry*

However, beginning in October 2013, the Mississippi Supreme Court began altering its reasoning. In *Little v. Mississippi Department of Transportation*, the court confronted whether MDOT could be held liable for negligent maintenance of a road on which a pine tree had

fallen, causing an accident.⁶ There, the court held that while performance of the *function* of maintaining a right of way is ministerial, the *acts* performed in order to achieve that function are discretionary. Thus, if the function is “positively imposed by law,” it is ministerial, and not immune from liability.⁷ Right of way maintenance was ruled a ministerial function because the state had enacted a law that imposed a statutory duty on MDOT to maintain all state highways. Furthermore, the court noted that the law at issue had made certain acts by MDOT discretionary, but not the function of maintenance.

The Public Policy test used in *Fortenberry* was officially abandoned in 2014 by the Mississippi Supreme Court’s decision in *Brantley v. City of Horn Lake*.⁸ There, the court ruled that, instead of using the Public Policy test, courts should “examine any narrower duty associated with the activity at issue to determine whether a statute, regulation or other binding directive renders that particular duty a ministerial one, notwithstanding that it may have been performed within the scope of a broader discretionary function.”⁹ In *Brantley*, a person was injured when EMTs negligently dropped him while unloading him from a city-owned ambulance. The court held that even when an entity acts to further a general discretionary function, such as operating an ambulance service, its actions may not be immune if the action also furthered a more narrow function or duty which is made ministerial by another specific statute, ordinance, or regulation. Therefore, because a city-run ambulance service is subject to regulations imposed by the State Board of Health, as well as Mississippi law, once a city decides to maintain its own ambulance service (a broad, discretionary function), it is subject to statutes which remove discretion from the duties required, and therefore such duties are ministerial.¹⁰

Starkville’s Sewage Maintenance: Discretionary?

In reviewing Boroujerdi’s appeal, the Mississippi Supreme Court applied the *Brantley* test. The court noted that the Mississippi Metropolitan Area Waste Disposal Statute gives municipalities discretion to determine whether and how to maintain their sewage systems, much like how Mississippi law renders a city ambulance service a discretionary function.¹¹ The court then considered if there were any narrower functions concomitant to the general discretionary function commanded by statute.¹²

The court explicitly stated that there are statutes, ordinances and regulations that render sewage maintenance ministerial under federal law and Mississippi Department of Environmental Quality (MDEQ) regulations. First, the court noted the Clean Water Act (CWA) prohibits the unlawful discharge of raw sewage into the environment. Second, the court noted that MDEQ regulations implementing the CWA require the governing entity to obtain and keep a permit—a permit that imposes a duty to properly operate and *maintain* sewage systems.¹³

The court remanded the case back to the trial court because Boroujerdi had not proven that any statute, regulation, or ordinance made Starkville’s alleged negligent inaction subject to a ministerial function. Now that the court has specifically defined those statutes for Boroujerdi and redefined the test to determine discretion, Boroujerdi may fare better before the trial court.

Conclusion

Following this decision, individuals may have an easier time suing their local governments for damages when they do not properly maintain local sewage facilities. Surprisingly, before Boroujerdi, this was effectively impossible, because sewage maintenance was considered a discretionary duty following the *Fortenberry* decision. Though it is unclear how this new test will affect other governmental actions, the door has been opened for citizens to sue local governments for improper maintenance of city-run sewage systems. 🐦

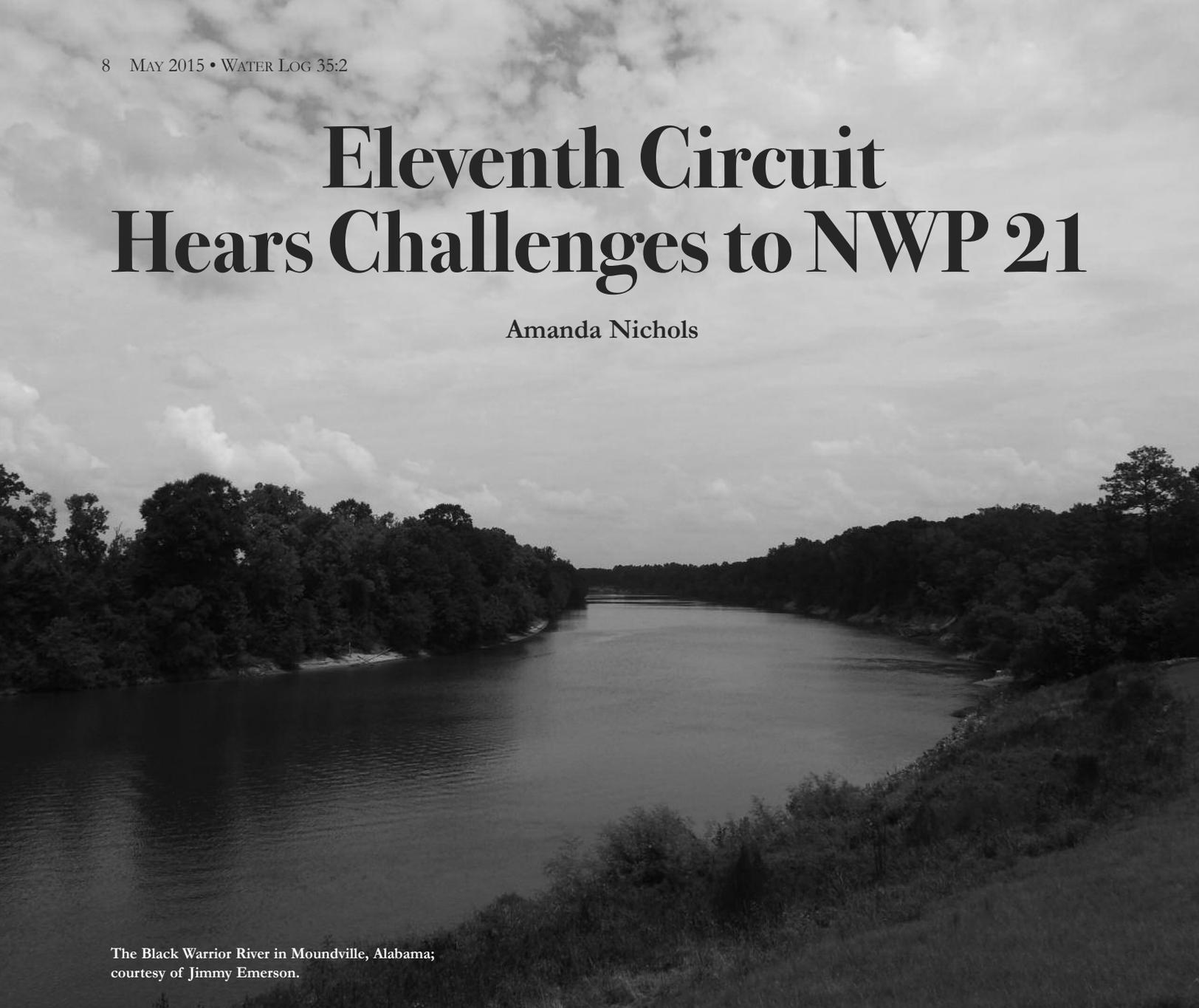
Amy Mitchell is a 2016 J.D. Candidate at The University of Mississippi School of Law.

Endnotes

1. *Boroujerdi v. City of Starkville*, No.2012-CA-01458-SCT, 2015 WL 574802 (Miss. Feb 12, 2015).
2. *Id.* at *1.
3. *Id.* at *2.
4. *Fortenberry v. City of Jackson*, 71 So. 3d 1196 (Miss. 2011).
5. *Id.* at 1202.
6. *Little v. Mississippi Department of Transportation*, 129 So.3d 132 (Miss. 2013).
7. *Id.* at 136.
8. *Brantley v. City of Horn Lake*, 152 So.3d 1106 (Miss. 2014).
9. *Id.* at 1115.
10. *Id.* at 1117.
11. MISS. CODE ANN. § 21-27-189 (2013).
12. *Boroujerdi*, 2015 WL 574802 at *5.
13. 33 U.S.C § 1311 (2009), MISS ADMIN CODE 11-6:1.1.1 (2013).

Eleventh Circuit Hears Challenges to NWP 21

Amanda Nichols



The Black Warrior River in Moundville, Alabama; courtesy of Jimmy Emerson.

In a recent decision from the U.S. Court of Appeals for the Eleventh Circuit, Black Warrior Riverkeeper and Defenders of Wildlife (collectively Riverkeeper) raised challenges to the U.S. Army Corps of Engineers' (Corps) use of Nationwide Permit 21 (NWP 21) under the Clean Water Act (CWA). NWP 21 is used to permit certain discharges into navigable waters during surface coal mining operations. The case arises from an appeal of a district court decision to grant summary judgment in favor of the Corps and industry intervenors, essentially holding that Riverkeeper did not have a viable legal argument.¹ On appeal, Riverkeeper raised arguments against the Corps under the CWA and the National Environmental Policy Act.²

Nationwide Permit 21

Under § 404 of the CWA, the Corps can issue permits for the discharge of dredged or fill material into navigable waters.³ In addition to individual case specific permits, the Corps can develop and utilize nationwide permits for activities that it finds will have minimal adverse environmental impacts. NWP 21 was first issued by the Corps in 1982 to enable surface coal mining operations to discharge dredged or filled materials into nearby navigable waters. In 2007, NWP 21 was revised, but no limit was placed on the length of streams that could be filled by these mining operations.

After the suspension of mining activities in six states due to fear of negative environmental impacts arising from

the 2007 permit, the Corps amended NWP 21 again in 2012. Two new provisions were added. Paragraph (a) of the 2012 NWP 21 included a grandfathering provision that allowed for the reauthorization of operations that had already been authorized under the 2007 version as long as a district engineer verified that they would continue to cause only minimal adverse effects to the environment. This provision served to reauthorize forty-one projects from May 2012 to approximately April 2013. Paragraph (b) of the revision stated that, in new operations, discharges “must not cause the loss of greater than half-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed.”⁴

Trial Court Decision

In response to these revisions in 2012, Riverkeeper filed suit against the Corps in the Northern District Court of Alabama on November 25, 2013. Among other allegations, Riverkeeper argued that the Corps’ cumulative effects analysis under the CWA and finding of no significant impact under NEPA was arbitrary and capricious. Riverkeeper sought a preliminary order that would suspend all reauthorizations in the Black Warrior River watershed in Alabama under NWP 21(a). In response, the Alabama Coal Association and several other mining companies (collectively Alabama Coal) interceded in Riverkeeper’s suit and alleged that such an order would significantly harm their operations. Both the Corps and Alabama Coal filed for summary judgment on the merits of the case, with Alabama Coal additionally filing a motion to dismiss the case on standing grounds and the doctrine of laches. On May 21, 2014, the district court ruled in favor of the Corps and Alabama Coal. Riverkeeper appealed the decision to the Eleventh Circuit.

Doctrine of Laches

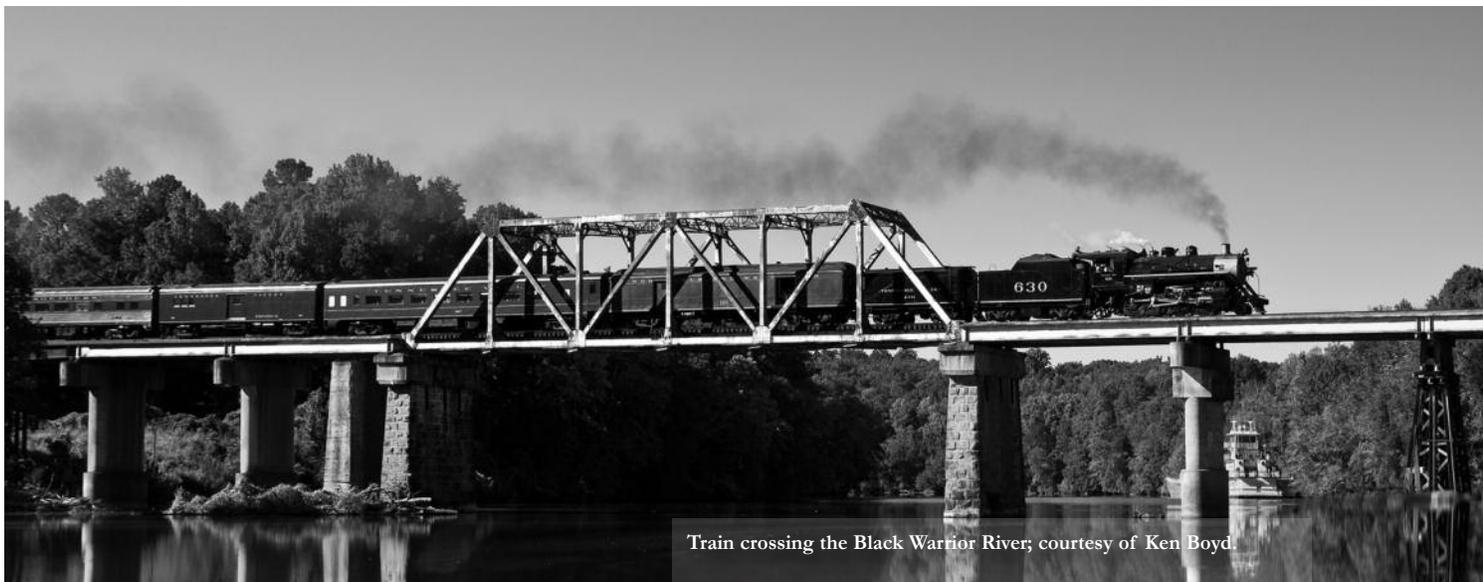
In resolving this case, the Eleventh Circuit considered whether the suit was barred by the doctrine of laches. The doctrine of laches is a principle that serves to bar a plaintiff “whose unexcused delay, if the suit was allowed, would be prejudicial to the defendant.”⁵ To succeed under the doctrine of laches, Alabama Coal needed to establish that (1) Riverkeeper delayed in asserting its claim, (2) the delay was inexcusable, and (3) the delay caused undue prejudice to Alabama Coal.

Although the district court ruled in favor of Alabama Coal, the Eleventh Circuit held that Riverkeeper’s case was not barred. Examining a timeline of Riverkeeper’s actions, the Eleventh Circuit concluded that Riverkeeper lacked standing to file suit until the NWP 21 reauthorizations were first issued in May 2012. No lawsuit, therefore, could have been filed prior to May 2012. According to the court, Riverkeeper then understandably delayed initiating the case until February 2013, when the deadline for seeking reauthorizations had passed, in order to discover the full effects of NWP 21. The court’s analysis shortens the delay to a mere 9-10 months (from February 2013 to November 2013, when the case was first filed). In the court’s opinion, this was not an unreasonable delay as Riverkeeper needed this time to build a case and review Freedom of Information Act requests made by Riverkeeper to aid in determining the scope of the reauthorizations granted under NWP 21(a).

CWA & NEPA Challenges

Lastly, the court considered the case’s merits, that is the claims brought by Riverkeeper under the CWA and NEPA. Riverkeeper argued that the Corps was arbitrary and capricious in its CWA and NEPA determinations in relation to NWP 21. Before the Corps can issue a NWP permit, the CWA requires the Corps make a determination that, taking into account cumulative impacts, the permitted activity will have only minimal impacts on the environment. In addition, NEPA requires the Corps conduct an Environmental Assessment (EA) of the proposed activity, during which the Corps takes a “hard look” at the proposed project to determine if the activity would cause any significant impacts on the area. If the EA determines that there is no significant impact, then the Corps may issue a Finding of No Significant Impact (FONSI), as was done in this case.

The Eleventh Circuit noted that the Corps admitted it had underestimated the number of acres of water that may be impacted by NWP 21. Conceivably, the activities at issue could impact an area greater than a half-acre of U.S. waters.⁶ Notwithstanding this admission, the court, considering the matter as a whole, concluded that it had insufficient evidence in the record to determine whether the Corps’ actions constituted arbitrary and capricious behavior. In other words, the court was confident that the



Train crossing the Black Warrior River; courtesy of Ken Boyd.

Corps committed an error, but uncertain if the error was truly significant.⁷ The court therefore remanded the matter back to the lower court for a thorough reevaluation of the Corps' CWA and NEPA determinations in light of all relevant data, including the Corps' recalculated figure for areas impacted by NWP 21. The court stated that this reevaluation should take no longer than a year.

Dissent

One justice provided a partial dissent to the Eleventh Circuit opinion. While he agreed with the rulings on standing and the doctrine of laches, he felt the majority was in error by failing to suspend NWP 21 due to the Corps' error. Because the lacking information is an integral part of the minimum impacts analysis required to obtain a general permit, the lack of such resulted in a miscalculation of the actual impacts that would occur under NWP 21. Due to the nature of the misinformation, these actual impacts would have been materially underestimated. As a result, the dissent argued that all reauthorizations under NWP 21 (a) should be suspended at least until the reevaluation period is completed and another hearing can take place. At a minimum, he recommended that the district court, on remand, suspend all authorizations for organizations that had not yet initiated their activities in relation to NWP 21.

According to the dissent, the mining industry in the region would not be irreparably harmed, as Alabama Coal claimed. Because NWP 21 is just a permit authorizing certain stream filling activities, those

mining operations could still conduct business as long as they complied with the new restrictions under NWP 21 (b) or an individual permit under § 404 of the CWA.

Conclusion

Until this new hearing, each reauthorization granted by NWP 21 will remain valid and will be allowed to continue its operations. This will give reauthorized projects additional time to produce revenue from their efforts on the Black Warrior River. Conversely, this period will also allow for extra time that the river and its surrounding areas could be negatively affected by said operations. Hopefully within a year, as the appellate court stipulated, the matter will be revisited in light of all new and relevant data, and NWP 21's fate will finally be decided. 🐉

Amanda Nichols is a 2016 J.D. Candidate at The University of Mississippi School of Law.

Endnotes

1. *Black Warrior Riverkeeper v. U.S. Army Corps of Engineers*, 23 F.Supp.3d 1373 (N.D. Ala. 2014).
2. *Black Warrior Riverkeeper v. U.S. Army Corps of Engineers*, 2015 WL 128250 (11th Cir. Mar. 23, 2015).
3. 33 U.S.C. § 1344 (2012).
4. *Black Warrior Riverkeeper*, 2015 WL 128250 at *3.
5. *Id.* at *9.
6. *Id.* at *14.
7. *Id.*

Revisited: Mississippi Continues Battle Over Groundwater

M. Patrick O'Neal

Ten years after the initiation of its original lawsuit, and four years after the U.S. Supreme Court refused to hear its appeal, Mississippi is back before the Court seeking review of its groundwater dispute with Tennessee and the City of Memphis.¹ If the Supreme Court agrees to take Mississippi's case, the states will embark on a lengthy journey toward final resolution of an ongoing saga over water withdrawals from an interstate groundwater aquifer.

Background

Despite its location along the mighty Mississippi River, the City of Memphis draws its drinking water primarily from groundwater wells scattered throughout the city. Several of these wells are located along the Tennessee-Mississippi border. The wells draw from the Memphis Sands Aquifer, a large underground water source lying beneath portions of Mississippi, Tennessee and Arkansas. Mississippi has long claimed that groundwater pumping by the City of Memphis's utility provider, Memphis Light, Gas, and Water Division (MLGW), is depleting the aquifer at a much faster rate than it can be replaced by rainfall. Mississippi argues this excessive pumping has created a "cone of depression" that causes water belonging to Mississippi to uncharacteristically flow into Tennessee.²

Mississippi took its case to court in 2005, arguing that MLGW was unlawfully diverting Mississippi water that resulted in over a \$1 billion in damages. The trial court dismissed Mississippi's case upon ruling that the Memphis Sands Aquifer was an interstate resource subject to equitable apportionment by the Supreme Court. Equitable apportionment refers to the water law doctrine developed by the Supreme Court to resolve disputes between states over the usage of an interstate water resource.³ Through equitable apportionment, the Court seeks to determine how to fairly allocate the water among the affected states. This allocation must be made before a state can sue another party over the misuse of an interstate waterway.⁴ The Supreme Court has never expressly held that equitable apportionment applies to groundwater resources.

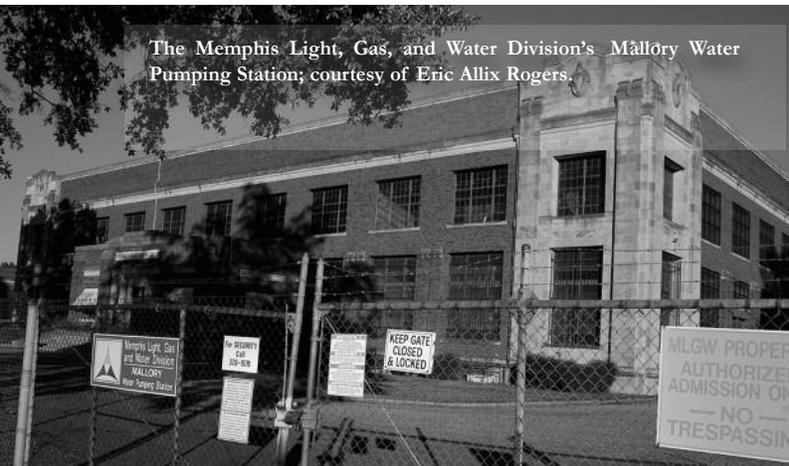
In 2009, the U.S. Court of Appeals for the Fifth Circuit agreed and upheld the dismissal of the case. The Fifth Circuit noted the lack of Supreme Court precedent, but held that relevant rulings supported the treatment of aquifers as "any other part of the interstate water supply."⁵ In addition, because the Fifth Circuit determined that this case was more properly viewed as a dispute between two states, as opposed to a state and a municipal utility, it did not have jurisdiction to review the matter. The U.S. Supreme Court has original and exclusive jurisdiction over controversies between states pursuant to Article III, § 2, clause 2 of the U.S. Constitution and 28 U.S.C. § 1251(a).⁶

In 2010, the U.S. Supreme Court denied Mississippi's appeal of the Fifth Circuit decision and its request to file an original action before the Court. In dismissing the case, the Court referenced two cases involving equitable apportionment of interstate water resources. Although neither case involved groundwater, the citations suggest that the Court may agree that equitable appropriation is the applicable doctrine⁷ and that Mississippi needs to show injury or damage from the taking of groundwater by Tennessee.⁸ The motion for leave was dismissed without prejudice, however, opening the door for Mississippi to re-file at a later date, which it did in June 2014.

Mississippi's Argument

Mississippi contends, as it did in 2010, that this case does not implicate the doctrine of equitable apportionment because it does not involve an interstate water resource. Rather, Mississippi asserts that this dispute is grounded in issues of state sovereignty and state ownership of natural resources within its borders.⁹ According to Mississippi, equitable apportionment is inapplicable because the underground water contained in the Memphis Sands Aquifer is not a fast flowing, interstate natural resource but a slow moving body of water that does not naturally leave the geographical borders of the state. Based upon its exclusive rights to natural resources within its state borders, Mississippi argues that Tennessee has no right to this natural resource. As such, equitable apportionment does not apply.¹⁰

With this foundation laid, Mississippi argues that pumping water from Mississippi into Tennessee constitutes an unlawful taking of Mississippi groundwater. Mississippi seeks damages equal to the value of the amount of water taken and injunctive relief to stop the pumping of groundwater that is located in the aquifer underlying Mississippi's borders. Mississippi asks for \$615 million in compensation, which is based on the value of the groundwater taken from 1985-2012.¹¹



Tennessee's Reply

In their reply briefs, Tennessee, the City of Memphis, and MLGW assert two reasons why Mississippi's complaint does not satisfy the standard required to bring a case before the Supreme Court.¹² First, they argue that the case should be dismissed because Mississippi has failed to file a valid complaint for equitable apportionment. Tennessee points to three specific assertions by Mississippi: (1) the Aquifer is not subject to equitable apportionment; (2) geographic borders determine ownership of Mississippi's portion of the Aquifer; and (3) Mississippi holds "ownership" of a portion of the Aquifer. Because Mississippi is not seeking equitable apportionment of the Memphis Sands Aquifer, but rather a determination of groundwater ownership, Tennessee argues the complaint should be dismissed.

In addition, Tennessee argues that Mississippi's complaint should be dismissed on the grounds of issue preclusion. Issue preclusion prevents a party from "re-arguing" an issue of fact that has already been determined by a previous court where no error was found.¹³ The district court and the Fifth Circuit both determined that the Aquifer is a shared interstate waterway subject to equitable

apportionment. Tennessee asserts that these findings are conclusive and Mississippi is precluded from bringing these same issues before the Supreme Court again.

Conclusion

If the U.S. Supreme Court accepts Mississippi's case, the decision handed down in this controversy would be a landmark decision as it relates specifically to aquifers and groundwater.¹⁴ Current case law suggests that equitable apportionment would apply to this type of resource, but no Supreme Court decision has yet to affirmatively resolve the matter. Disputes over water resources are likely to become more common in the future, and a ruling regarding an interstate aquifer could have many implications for the use and control of groundwater stretching beneath multiple states. 🐼

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Endnotes

1. State of Mississippi v. State of Tenn., --S.Ct.--, 2014 WL 5449619 (June 6, 2014).
2. Hood v. City of Memphis, Tenn., 570 F.3d 625 (2009).
3. Colorado v. New Mexico, 459 U.S. 176, 184 (1982).
4. *Id.* at 183 (1982).
5. Hood, 570 F.3d at 630, n. 5.
6. Section 1251(a) of Title 28, U.S. Code, provides: The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.
7. Virginia v. Maryland, 540 U.S. 56 (2003).
8. Colorado, 459 U.S. at 187, n.13.
9. Mississippi's Motion for Leave to File Bill of Complaint in Original Action, Mississippi v. Tennessee, No. 143 Original at 14 and 17 (2014).
10. *Id.* at 17-18.
11. *Is Memphis Stealing Water from Mississippi?*, The Clarion-Ledger (Oct. 6, 2014), <http://www.clarionledger.com/story/news/2014/10/06/mississippi-water-rights-battle/16796725/>
12. See Tennessee's Brief in Opposition to State of Mississippi's Motion for Leave to File Bill of Complaint in Original Action, Mississippi v. Tennessee, No. 143, Original (2014).
13. City of Memphis's Brief in Opposition to State of Mississippi's Motion for Leave to File Bill of Complaint in Original Action at 25.
14. Michael "Aquadoc" Campana, *Déjà Vu All Over Again: Mississippi v. Memphis Over Groundwater Pumping*, AMERICAN WATER RESOURCES ASSOCIATION (Oct. 14, 2014), <http://awramedia.org/mainblog/2014/10/14/deja-vu-all-over-again-mississippi-v-memphis-over-groundwater-pumping/>

Planning for Change: Building on the Shifting Sands of the Open Coast

Stephen Deal



The town center of Seaside, Florida.

A trip to the beach is practically a rite of passage for many American families. The white, sandy shorelines and gentle lapping of the waves attract countless tourists every summer, along with a steady influx of coastal retirees. The popularity of America's shorelines has also brought with it tremendous development pressures, and contentious debate has followed over what kind of course of action to follow. One could discern two schools of thought on coastal development. The early modern approach to beachfront development was to build seawalls or jetties to protect coastal properties. On the other end of the spectrum, there are coastal scientists, such as Orrin Pilkey, who believe only a full-scale retreat will mitigate the environmental pressures imposed by coastal development.¹ The intent of this article is not to argue in favor of one approach over the other, but to explore how a few beach communities have tackled the problem to see if we can discover a local planning approach that works for the coast.

Wrightsville Beach: Early Beach Settlement in America

The town of Wrightsville Beach, North Carolina is emblematic of the evolution of coastal resort towns. From its start as a streetcar suburb of the city of Wilmington, the town has evolved into a toney beach destination, chock full of luxury homes and fine dining options. Prior to World War II though, the town reflected many time-tested principles of coastal development.

Whether its a coastal resort town or a historic fishing village, the importance of accommodating a changing shoreline and weather conditions is key. In Wrightsville, during the early 20th century, the coastal cottages built for vacationing families were not all that different from the permanent residences one might find in small fishing villages.² The houses frequently employed the same wooden shakes, the same elevated profile and the same preference for no frills, low maintenance design. It is also worth noting that the town's evolution into a thriving

coastal resort did not happen overnight. As the streetcar expanded further onto the island and convenient access became available, lots were subdivided. Though this practice was rather common in the United States before World War II, property subdivision over time is a valuable indicator of how changes to the town were gradually phased in as needed, rather than incorporated in a master design all at once.

The town was not all quiet beach cottages; there were a number of structures that were designed for heavy public use and enjoyment. One example of this was Lumina Pavilion. Stretching some 300 feet and rising two stories above the beach, Lumina Pavilion was built in the early 1900s to draw visitors to the area.³ The pavilion was conveniently located next to the streetcar line, 20 feet from it to be exact, and the building itself stretched back to the high water line located along the beach. This structure served as a valuable funnel for casual visitors to the beach. High quality amenities intended for casual public use can help avoid some of the friction that ensues when private property interests clash with the public access needs of casual beach users. In fact, the social interactions and activities taking place in the Pavilion shaped many people's early memories of Wrightsville Beach.⁴ The Lumina Pavilion provides a useful historic precedent on how shared, community amenities can contribute to the quality of a place in a way that a simple beach access point may not.

Seaside: A Synthesis of Past and Present

Past examples may be fine and good, but where can we look today? One present day example, which combines modern shoreline management practices with prior settlement patterns, is the community of Seaside, Florida. A major reason behind Seaside's success as a resilient coastal community may be that the developers of Seaside recognized that the process of placemaking is an iterative one. Originally the street material used in Seaside was crushed shells, but as the development moved closer to its peak urban condition, those street treatments were phased out and concrete pavers were put in.⁵

Streets are not the only place where the community adapted to change. In fact, a few portions of the community were built with some form of constant change in mind.⁶ Some parts, such as the Perspicacity

Bazaar and the nearby food trucks, serve as interchangeable lego pieces, something to be programmed in early and then moved around if needed. These structures will not withstand the onslaught of a hurricane, but their ease of use and endless adaptability add a much needed resilience component.

One specific design principle demonstrated in Seaside is the importance of site planning. In Seaside, circulation to the beach is accomplished through a series of pavilions, each with its own distinct design.⁷ Though most of the pavilions are private in nature, the town center pavilion offers public beach access. Its close proximity to shops and restaurants also means that casual visitors can still have a quality experience in the community even if they do not own property in town. Much like Lumina Pavilion helped structure people's perceptions of Wrightsville Beach in the early 20th century, Seaside's town center offers visitors a quality sampler of coastal living without having to own property in Seaside.

Managing beach access is not the only positive site planning component the neighborhood has to offer. The town center green, aside from serving as a public gathering space, also serves as a kind of retention pond. The design of the streets help facilitate this function by drawing rainwater to the town green where it can be easily absorbed. Lawns, and other artificially green spaces, are something of a rarity in Seaside, since every other space in the community utilizes the sandy soil and the existing vegetation that was there beforehand. This lack of lawns helps reduce overall maintenance in the community, since one does not need an elaborate irrigation system to maintain it.

Seaside would not be Seaside, however, without its beautiful shoreline. Good shoreline management techniques had to be taken into consideration when designing the overall community. One way this was accomplished was through the preservation and utilization of the natural dune ridges located on-site.⁸ By building behind the dune ridge, rather than on it, the community of Seaside was able to weather its first hurricane event quite well and provide another real-world example of why a careful understanding of site planning and context-sensitive solutions is paramount to building cities and towns that stand the test of time.

Ocracoke: Low Density Approach

In sites with low development suitability, the site planning dynamic changes rapidly. Though some fortification might make sense where density can best be sustained, here the value of living with the change suddenly takes priority. Buildings in these areas should be built simply and density should be kept to a minimum.

One example of a coastal town that has learned to live on a rapidly changing shoreline may be Ocracoke, North Carolina.⁹ In Ocracoke, a large number of the historic homes are hidden behind a lush canopy of scrub pines and live oaks. Since the town was so isolated, the local street system tended to be nothing more than a series of winding, sandy footpaths. One of these streets, Howard Street, is regularly featured in state tourism brochures and symbolizes much of what draws people to the coast.

The informal vernacular of Ocracoke is not simply an aesthetic choice; it is a carefully calibrated cultural response to a constantly changing, and hurricane-prone, shoreline. Here, the traditional suite of planning solutions may be inadequate, or worse counter-productive, because there is no guarantee that the land planned for future development will be there in the years to come. Whether it is hurricanes, or simply the natural erosion and accretion of the island, there are too many mitigating factors, making buttressing a community from all forms of coastal risk infeasible. The alternative is to build simply and build cheaply and when the inevitable hurricane or island topography change happens, repeat the process.

Designing for Change

In all three communities cited, the concept of designing for change is an overriding theme. Individual structures address the need for change in the design and construction phase by choosing materials that are easy to maintain and replace. The overall design of the community is also phased in as demand grows, so community leaders can better assess the changes that needed to be made. The demands of public beach access have also resulted in the creation of high-quality, public amenities, such as pavilions. The presence of these facilities help focus casual beach use at key points and avoid potential conflict between the general public and private homeowners.

In the community of Seaside, these lessons are also combined with up-to-date knowledge on shoreline management, as demonstrated by the placement of the community behind the natural dune system. Incremental design strategies, signified by food trucks and the initial crushed shell street design, also contribute to resilience in Seaside, as they can be plugged in elsewhere as community needs dictate, or moved, if the current site was deemed to be too vulnerable to coastal erosion. These strategies may not fully resolve the issue of development pressures along America's shorelines, but they do show a path forward that coastal cities and towns can take towards a kind of strategic retreat. By approaching the question of land use and development in an incremental manner, with some temporary uses and a little bit of persistent experimentation, a community can begin to plan and design with the change, rather than defensively reacting to it. 🦋

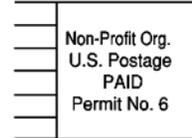
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Endnotes

1. Orrin Pilkey, *We Need to Retreat From the Beach*, THE NEW YORK TIMES, (Nov. 14, 2012), http://www.nytimes.com/2012/11/15/opinion/a-beachfront-retreat.html?_r=0
2. Beth Keane, *National Register of Historic Places Registration Form: Sprunt, James D. and Frances, Cottage*, 2013, <http://www.nps.gov/nr/feature/places/pdfs/13000935.pdf>
3. Norwood, et al., *The 110 People, Places & Events That Shaped WB*, Wrightsville Beach Magazine, Jan. 2009, <http://www.wrightsvillebeachmagazine.com/article.asp?aid=460&iid=62&sud=27>
4. Billy Arthur, *Summer Lights*, Our State Magazine, July 1998, <http://digitall.ncdcr.gov/cdm/compoundobject/collection/p16062coll18/id/70033/rec/1>
5. Steve Mouzon, *Patient Urbanism – Build Neighborhoods Without High Debt*, THE ORIGINAL GREEN (March 4, 2013), <http://www.originalgreen.org/blog/patient-urbanism---build.html>
6. Kaid Benfield, *Urbanism: Reconsidering Seaside, Florida*, Sustainable Cities Collective (Aug. 19, 2013), <http://sustainablecitiescollective.com/kaidbenfield/170706/reconsidering-seaside-florida>
7. First+Main Media, *American Makeover Episode 2: Seaside, The City of Ideas*, Youtube, May 23, 2013. <https://www.youtube.com/watch?v=Z9F4PDPUS24>
8. Steve Mouzon, *The Ecological Dividend*, THE ORIGINAL GREEN (Feb. 25, 2012), <http://www.originalgreen.org/blog/the-ecological-dividend.html>
9. Genevieve and Tim Keller, M. Ruth Little, *National Register of Historic Places Registration Form: Ocracoke Historic District*, 1990. <http://www.hpo.ncdcr.gov/nr/HY0634.pdf>



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