

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Volume 42, Number 2

June 2022



Natural Resources Law Enforcement





Inside This Issue . . .

MDMR Office of Marine Patrol:
Keeping Mississippi's Marine
Resources Safe 3

Keeping Construction Runoff Out of
Alabama Waters 7

State Laws Versus Invasive Species ... 10

Creating and Maintaining a Robust
Comprehensive Plan 13

Cover photograph

Credit: MA Office of Energy and Environmental Affairs

Table of Contents photograph

Credit: Amanda Nalley

• UPCOMING EVENTS •

World Environmental and Water Resources Congress

June 5-8, 2022
Atlanta, GA

<https://www.ewricongress.org>

Mid-South Agricultural and Environmental Law Conference

June 9-10, 2022
Memphis, TN

<https://nationalaglawcenter.org/midsouth2022>

Southeastern Environmental Law and Regulation Conference

June 10, 2022
Sandestin, FL

<https://bit.ly/29seelrc>

MDMR Office of Marine Patrol: Keeping Mississippi's Marine Resources Safe

Will Freeman

GUEST EXPERT

Background

The Mississippi Department of Marine Resources (MDMR) Office of Marine Patrol is Mississippi's leading maritime law enforcement authority. In 1994, the Mississippi Legislature officially established the MDMR and the Office of Marine Patrol to enhance, protect, and conserve Mississippi's delicate marine resources. The MDMR is the state's primary coastal enforcement agency, with the officers of the MDMR, better known as Marine Patrol officers, statutorily charged with enforcing conservation, boating safety, and all other criminal laws. Marine Patrol officers work for the citizens of Mississippi. The men and women of Marine Patrol put unparalleled effort into protecting maritime flora and fauna and providing the safest boating environment.

Organization

The Office of Marine Patrol consists of three divisions: Uniformed Patrol, Criminal Investigations, and Administrative. The Uniformed Patrol Division provides the overt daily presence and uniformed inspections and emergency response on Mississippi marine waters. This division consists of four separate shifts, providing 24 hours of law enforcement on and off the water.

The Criminal Investigations Division (CID) is responsible for investigating complex commercial fisheries violations, and boat accident investigations and reconstruction, requiring subject matter experts, and digital and cellular forensics analysis. CID officials serve as agency liaisons with local, state, and federal partners.

The MDMR maintains a cooperative enforcement agreement with the National Office of Oceanic and Atmospheric Administration's Office of Law Enforcement

(NOAA OLE). As part of the agreement, Marine Patrol officers are granted federal inspection authority to stop, board, and inspect recreational and commercial fishing vessels outside Mississippi territorial waters.

The Office of Marine Patrol's uniformed patrol division is supported by the agency's Reserve Officer Program staffed by volunteers from the coastal community with special skills, including part-time law enforcement certification. They provide additional presence during special events, major boating weekends, and when other agencies call upon the MDMR for other support. The Marine Patrol Reserve Division also assists with public outreach projects and special events.

Boating Safety

Providing the safest boating environment for the public is one of the MDMR's most important mission areas. Boating enforcement takes place in local river systems, bays, the Mississippi Sound, and the Gulf of Mexico. With nearly 1,000 square miles of public waterways used by over 55,000 vessels (state- and federally- numbered), the Office of Marine Patrol employs a variety of patrol boats to meet the various mission needs. Marine Patrol officers routinely stop and inspect vessels for compliance with state and federal boating safety regulations. Some examples of safety equipment that an officer will inspect are life jackets, signaling devices, fire extinguishers, and sound producing devices. Marine Patrol officers also enforce the state statute prohibiting boating while under the influence of alcohol and/or drugs. The officers are trained in the most current field sobriety testing methods and legal updates, and undergo an initial wet lab training followed by annual refresher training.



Credit: MDMR Office of Marine Patrol

Marine Patrol officers participate in annual **Boating Under the Influence** refresher training.

Protection of Marine Resources

The Office of Marine Patrol uses its legal authority under 49 Miss. Code ch. 15 to inspect recreational and commercial harvesters, processing facilities, seafood retailers and wholesalers, and other entities selling marine resources products. Marine Patrol officers enforce state statutes and administrative regulations to safeguard the state's marine resources.

Joint Enforcement Agreement

In July 2001, the MDMR entered into a cooperative enforcement agreement with NOAA OLE to provide enforcement of federal regulations in state and federal waters. Through the agreement, Marine Patrol officers carry out regulatory inspections of recreational and commercial

fishing vessels in the economic exclusion zone, which extends from three miles seaward of the Mississippi barrier islands to 200 miles into the Gulf of Mexico. A normal patrol may include boarding and inspecting recreational reef fishing vessels, commercial longline vessels, and commercial shrimp trawlers – all in one day.

Saltwater Finfish

Aside from recreational boating, saltwater fishing is one of the most popular hobbies on the Mississippi Gulf Coast. Recreational and commercial fishing make up a large portion of a Marine Patrol officer's resource enforcement efforts. Officers conduct both land and sea patrols to ensure compliance with state and federal regulations.

For example, Marine Patrol officers enforce the provisions of the 'Tails N' Scales program, a self-check harvest report program for the recreational catch of red snapper. Officers conduct regulatory inspections of trip declarations and harvest efforts as part of the Fishery Management Plan for Reef Fish Resources in the Gulf of Mexico.

The MDMR regulates the taking of popular marine finfish, such as the spotted seatrout, flounder, red drum, sheepshead and tripletail. Some of the illegal fishing activities Marine Patrol officers encounter include unlawful possession of undersized fish, possessing over the limit, fishing during a closed season, unlawful possession of filleted fish, and illegal monofilament gillnet fishing. Oftentimes, when Marine Patrol officers seize illegal fish found in good condition, the illegal catch is donated to non-profit groups, such as local food banks and homeless shelters.

Oysters

One of the most important harvestable marine species to monitor is the American oyster. The oyster provides employment opportunities for harvesters and processors and provides tasty table fare. Historically, oysters were harvested from public and private reefs in the western Mississippi Sound. Today, private, off-bottom aquaculture provides a greater opportunity for small businesses to offer oysters year-round. Marine Patrol officers patrol the public reefs and aquaculture leases to monitor harvest and ensure compliance with state and federal regulations. Marine Patrol officers provide a uniformed presence in all weather and sea conditions to ensure the public reefs are protected.



Credit: MDMR Office of Marine Patrol

A Marine Patrol officer located undersized red snapper during a federal patrol.

Only under safe harvest and processing conditions can oysters be offered to the public for raw consumption. Marine Patrol officers routinely inspect certified processors and dealers for compliance with state and federal regulations governing the safe handling of raw oysters. On occasion, the Office of Marine Patrol partners with other state regulators to ensure that raw oysters served at restaurants are purchased from licensed and certified oyster harvesters and dealers.

Crabs

Blue Crabs provide year-round recreational enjoyment and commercial gain. The Mississippi Gulf Coast has one of the healthiest crab stocks found in the northern gulf. As part of their resource enforcement duties, Marine Patrol officers routinely inspect both recreational and commercial crab harvesters for compliance with gear and possession laws and regulations. In Mississippi, the harvest of an egg-bearing crab, also known as a sponge crab, is prohibited.



Credit: MDMR Office of Marine Patrol

A Marine Patrol officer seized 214 egg-bearing female crabs from a non-resident commercial crab fisherman. Due to the egregiousness of the violation, the court chose to charge the violator one count for each crab, totaling \$107,000 in potential fines. All the crabs were returned to the marine waters.

Marine Patrol officers work diligently to identify and apprehend those intentionally taking sponge crabs.

Another problem associated with crab fishing is derelict traps. These are the lost, damaged, or forgotten crab traps. Not only do they create an environmental risk, but they also pose a risk to boats, catching in propellers. Shrimpers sometimes find their nets ripped open by the derelict traps.

Shrimp

Saltwater shrimp are another regulated marine species governed by state and federal regulations. Marine Patrol officers are authorized to inspect shrimp harvesters for licenses, gear, and location of harvest. A regulatory compliance inspection may include measuring the size of the shrimp trawl (net) or its otter doors, and inspecting other species onboard. Under the federal enforcement agreement, Marine Patrol officers also check shrimpers for compliance with federal regulations, such as compliance with the use of turtle excluder devices, better known as TEDs, which allow sea turtles to escape from the nets. Sea turtles are protected under the Endangered Species Act of 1973 (ESA), and ESA regulations require shrimp trawlers to use mitigation gear to reduce incidental catches of sea turtles. An average inspection of a shrimp trawler with four nets will take a Marine Patrol officer over one hour to complete. In some cases, an inspection of a single trawler in violation could consume an entire patrol day.

Marine Patrol officers inspect harvest vessels and bait camps to ensure compliance with regulations pertaining to bait shrimp. Live bait operators are allowed to harvest shrimp year-round to support Mississippi recreational fishermen. Officers patrol the marine waters to ensure shrimp harvesters are avoiding estuarine areas critical to the successful growing of saltwater shrimp. The Mississippi recreational and commercial shrimp season opens in late spring or early summer, depending on the shrimp count. Commercial live bait harvested from Mississippi waters is prohibited from leaving the state.

Coastal Wetlands and Derelict Vessels

The MDMR is statutorily charged with the protection of Mississippi's coastal wetlands. Through an interagency partnership with the MDMR's Office of Coastal Zone Management, Marine Patrol officers inspect for the appropriate permits for all construction within the coastal management zone. In addition to regulatory inspections, officers respond and document reports of damaged wetlands and environmental concerns.

The Office of Marine Patrol assists the Derelict Vessel Removal Program with identifying vessels that could potentially create navigational and/or environmental hazards. Marine Patrol officers provide field reports, affix notices to vessels, and assist in identifying the responsible party for removal.

Credit: MDMR Office of Marine Patrol



A derelict vessel located along the marine waters of Harrison County, Miss.

Specialized Units and Capabilities

Criminal Investigations Division

In 2014, the MDMR established a full-time criminal investigations division (CID) consisting of a supervisor and four field investigators. The primary focus of the CID is to support the Uniformed Patrol Division with investigating complex marine resources crimes, investigate boating accidents involving serious bodily injuries or deaths, assisting the MDMR with employment background checks, and serving as agency internal affairs. CID investigators receive special training in criminal investigations, collision analysis, digital forensics. CID staff also serve as agency liaisons with state and federal task forces.

Homeland Security, Including Search and Rescue Team and Dive Team

In 2018, the MDMR was awarded its first FEMA Port Security Program Grant to bolster maritime security of

Mississippi's ports, waterside attractions, passenger ferries, and other critical infrastructure. The MDMR has received nearly \$2 million in federal funding to increase maritime domain awareness and response capabilities to each of Mississippi ports: Port Bienville, Port of Gulfport, and Port of Pascagoula. Recently, the Port of Gulfport was designated as a strategic military port, allowing the U.S. Department of Defense to use it for military outloads. The Office of Marine Patrol is an active member of the Area Maritime Security Subcommittees for each port area and participates in state and federal training exercises to increase response to critical maritime incidences.

Credit: MDMR Office of Marine Patrol



In 2022, Marine Patrol officers and the Mississippi Office of Homeland Security conducted an underwater improvised explosive device training exercise in the Port of Gulfport.

Credit: MDMR Office of Marine Patrol



The Office of Marine Patrol partnered with the U.S. Navy and U.S. Coast Guard to provide 24/7 protection of the USS Cincinnati (LCS-20) during her commissioning at the Port of Gulfport in 2019.

The MDMR also assists through the deployment of its search and rescue team and dive team. The search and rescue team is trained for inland and overland search and rescue. The team is also capable of deploying into flooded zones for small boat rescue missions. Marine Patrol divers are called upon by local partnering agencies in cases of drownings to recover evidence and victims, executing these missions with precision and excellence. Additionally, Marine Patrol divers train regularly in the detection of underwater and parasitic devices that threaten our homeland security. 🦋

Captain Will Freeman is at the Office of Marine Patrol, Mississippi Department of Marine Resource.

Keeping Construction Runoff Out of Alabama Waters

Davis C. Delich

Introduction

Alabama is, in the words of one ecologist, “the Fort Knox of the nation’s biodiversity” on account of its vast and heterogenous river systems.¹ The state has over 132,000 miles of river and stream channels. They run from the Appalachian Mountains to the Gulf of Mexico and are native waters to some 38 percent of all North American fish species.² Of course, these waters and their inhabitants are vulnerable to high-profile disasters, such as oil or chemical spills. But even less conspicuous pollutants like sand and sediment mixtures – byproducts from construction sites – threaten the health of Alabama rivers and streams. This article summarizes Alabama’s mechanisms for monitoring, regulating, and enforcing the activities that produce these pollutants.

The Permit Program

The Clean Water Act (the Act) is the backbone of American water law. Although it is a federal law, most states are authorized by the U.S. Environmental Protection Agency to administer the National Pollutant Discharge Elimination System (NPDES) created under Section 402 of the Act (33 U.S.C. § 1342). NPDES requires current and prospective polluters to obtain permits for discharges from their projects, and compliance with the permit amounts to compliance with the Act.

Alabama, through the Alabama Department of Environmental Management (ADEM), is among the 46 states authorized to administer NPDES permits at the state level.³ ADEM approves or denies NPDES permit applications, monitors the compliance efforts of active permittees, and enforces any violations.

Construction and Stormwater Runoff

“Pollutant” is defined broadly in the Act and its regulations. It includes rock, sand, and dredged spoil – inevitable byproducts of construction activities. After a rain event,

these materials may wash away with stormwater runoff and discharge into public waters. But how do these naturally occurring materials “pollute” water? While it is difficult to measure – in part *because* they exist naturally – experts agree that excess sediment erosion can substantially interfere with aquatic ecosystems. A few of the adverse consequences from suspended and bedded sediment (SABS) include: filling up storm drains, causing flood risks; impeding aquatic animals’ ability to see and eat; stunting the growth of aquatic plants; and clogging fish gills.⁴

Construction sites can emit stormwater runoff highly concentrated with SABS. Hence, in Alabama, as with other states, construction and development activities that disturb one or more acres must receive a state-issued NPDES permit.⁵

A Project Gone Awry

The Wynlake subdivision in Alabaster, Alabama, first received a NPDES permit in 2005.⁶ Wynlake was subdivided into 96 lots across roughly 90 acres, and construction there entailed discharges of sediment that were likely to run into a tributary of Spring Creek, an impaired “water of the state.” Over the next few years, 28 of the 96 lots were developed with homes. But when the housing market collapsed in 2008, all construction activities were permanently halted. That did not relieve Wynlake of its NPDES permit obligations, however, as the regulations require a permittee to maintain a permit “until disturbance activity is complete and all disturbed areas have been reclaimed.”⁷ Indeed, as ADEM soon discovered, runoff from the subdivision was polluting nearby waters even though the work had stopped.

The Permit

Prospective builders have an affirmative obligation to determine whether they need a permit. If so, they start by

submitting a Notice of Intent to ADEM.⁸ The Notice of Intent includes at least the following:

- The name and contact information of the permittee
- A description of the proposed activity
- A topographical map of the affected area
- Signed certification by a Qualified Credentialed Professional (such as a licensed engineer) indicating they have prepared a “comprehensive” Construction Best Management Practices Plan (CBMPP) to mitigate stormwater runoff pollution.

CBMPP refers to those practices specific to that construction permit. The key part, known by contractors and developers, lies in the middle of the extended acronym: Best Management Practices (BMPs). Once the permit is approved, those practices become binding legal obligations on the permittee and must be “continually maintained.”⁹ But what is a BMP? Some BMPs are easily spotted at construction sites. For instance, that ribbon of black plastic surrounding a job site perimeter – known as a “silt fence” – is a common BMP. Silt fences help to collect SABS before they can enter a storm drain or a nearby stream.

ADEM monitors its permittees through mandatory reporting and inspection requirements. By law, NPDES permittees must keep detailed and up-to-date records that track their compliance with the CBMPP.¹⁰ Moreover, at any “reasonable time,” ADEM can go to a construction site and inspect the property for compliance.¹¹

Inspection and Notice of Violation

In early 2011, ADEM paid a visit to Wynlake. Its inspection revealed that the developers had not met the requirements set forth in their NPDES permit. ADEM found Wynlake had failed to implement the BMPs specified in its CBMPP, and ADEM noted that sediment discharges had occurred or were likely to occur into the nearby Spring Creek.

This was not the first time that ADEM discovered issues at Wynlake; it had already issued a Notice of Violation (NOV) for that property. NOV's are the first step in an enforcement action. Here, as is a common ADEM practice, the first NOV was only a warning shot. Following the 2011 ADEM visit, however, Wynlake was ordered to cease its construction activities except for implementing the BMPs. As noted above, however, Wynlake was not going to build more homes anyway. It turns out they also were not going to implement any BMPs.

Credit: K. Alexander



Silt fence used at a construction site in Oxford, MS.

Civil Penalty Assessment and Internal Agency Review

ADEM allowed the Wynlake developers more than six years to correct course. When ADEM returned in 2017, it found four additional violations at the Wynlake property. To make matters worse, the property's NPDES permit had expired. ADEM issued another NOV in September 2017. Wynlake ignored that one, too.

Therefore, in May 2018, ADEM demanded that Wynlake Development, LLC pay a \$50,300 civil penalty for the NPDES violations, setting forth facts showing that violations had occurred and ADEM's analysis for reaching that penalty amount.¹²

But permittees have due process rights giving them the opportunity to appeal their fines. The process begins internally with ADEM. Once the assessment order is issued, permittees have 30 days to request a hearing with an ADEM officer, which Wynlake did. The ADEM hearing officer agreed with the Department's factual findings but disagreed with the penalty amount. The hearing officer found that the penalty was “excessive,” and suggested that it be lowered to \$30,000. ADEM appealed the hearing officer's decision to the Alabama Environmental Management Commission (the Commission).

The Commission

Like ADEM, the Commission was established in 1982 by the Alabama Environmental Management Act to have oversight of ADEM. Per Ala. Code § 22-22A-6, Commission is chaired by seven members, each appointed by the governor. One of its major functions is to review permitting decisions and administrative orders issued by ADEM. The Commission's conclusion in the Wynlake case proved to be less favorable to the Wynlake developer than that of the ADEM hearing officer. The Commission reinstated the \$50,300 penalty.

Circuit Court

After going through the ADEM officer hearing and then the Commission's review, Wynlake had "exhausted" its administrative appeals. Thus, under the Alabama Administrative Procedure Act, Wynlake could take this matter to court. Wynlake appealed ADEM's and the Commission's decisions to the Jefferson County Circuit Court. Wynlake's essential complaint was that the \$50,300 figure was arbitrary. The penalty assessment, Wynlake argued, was not grounded by any precise standard or algorithm.

Under Sec. 41-22-20 in the Alabama Administrative Procedure Act, courts may overturn an agency decision that is "unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." For NPDES permit decisions, state law allows ADEM discretion in assessing the penalty amounts based on factors such as: the seriousness of the violation, the "irreparable harm" done to environment, the violator's efforts (or lack thereof) to comply, the violator's history, and the violator's ability to pay.¹³

The Circuit Court reversed the entire penalty assessment, writing that "ADEM fail[ed] to state any specific reason for the fines imposed." ADEM appealed that decision to the *next* reviewing authority: the Alabama Court of Civil Appeals.

Court of Civil Appeals

The essential question in *Alabama Department of Environmental Management v. Wynlake Development, LLC* was whether in setting penalties for permit violations does ADEM have to "show its math"? To paraphrase the Alabama Court of Civil Appeals, the answer was not really. No requirement that ADEM document its decisions with

"mathematical calculations" exists. The relevant law only forces ADEM to consider factors like the "seriousness" of a violation in reaching penalty amounts.

The court acknowledged the difficulty of placing a figure on environmental law violations – especially for a judge. That, the court reasoned, is why the Alabama legislature wrote ADEM's penalty assessment standards so broadly: it deferred to the experts who have expertise in this field. It reversed the circuit court, reinstating ADEM's original \$50,300 assessment on Wynlake. 🐦

Davis C. Delich was a Legal Intern at the Mississippi-Alabama Sea Grant Legal Program and is a 2022 graduate of the University of Alabama School of Law.

Endnotes

- Whit Gibbons, *Alabama's Biodiversity Is Remarkable*, Univ. of Georgia Savannah River Ecology Laboratory (June 29, 2014).
- Alabama Rivers Alliance, *About Alabama's Watersheds*.
- U.S. Environmental Protection Agency, *NPDES State Program Authority*.
- U.S. Environmental Protection Agency, *Framework for Developing Suspended and Bedded Sediment (SABS) Water Quality Criteria* (EPA/822-R-06-001), pp. 4-6 (May 2006).
- Ala. Admin. Code r. § 335-6-12-.02.
- See Alabama Department of Environmental Management v. Wynlake Development, LLC*, No. CV-19-901762, 2021 WL 1324013 (Ala. Civ. App. Apr. 9, 2021).
- Ala. Admin. Code r. 335-6-12-.05(1).
- See* Alabama Department of Environmental Management, *Construction General Permit*, adem.alabama.gov; *see also* Ala. Admin. Code r. 335-6-12-.11 (identifying the initial step as a "Notice of Registration").
- Ala. Admin. Code r. 335-6-12-.21.
- Ala. Admin. Code r. 335-6-12-.15.
- Ala. Admin. Code r. 335-6-12-.18.
- The penalty assessment was based on A. Seriousness of the violation(s) (\$28,500); B. Difficulty in complying and quality of water body(s) that were polluted (\$9,500); C. Economic benefit by not complying (\$2,800); D. History of previous violations (\$9,500); E. Any reduction due to the inability to pay (\$0). *ADEM v. Wynlake LLC*, fn.4. *See, gen.*, Ala. Code § 22-22A-5(18)c (setting forth ADEM's penalty assessment authority with a maximum daily penalty of \$250,000).
- Ala. Code § 22-22A-5(18)a.

State Laws Versus Invasive Species

Randolph Mikell

Like the American court system, a well-functioning environment is an adversarial system. Invasive plants and animals disrupt this system. Invasive animals often have no natural predators and outcompete native species for food and resources. Recognizing this rising threat, the U.S. Congress enacted the first anti-invasive species law, the Lacey Act of 1900. Since then, states have followed suit.

Like the federal government, states have enacted their own invasive species laws and take enforcement action against civil and criminal violations of those laws. The laws, explored in more detail as found in state administrative codes, give state conservation officers the power to cite, detain, and even arrest violators. The direct enemy of these state laws are invasive species themselves. Just because invasive species can escape the courtroom, however, does not mean that the humans who possess or transport them can. While many states have laws that make introducing, selling, and/or transporting invasive species illegal, enforcement history is hard to find. Yet, convictions aren't unheard of. For example, in May 2022, an Ohio woman admitted to violating the Lacey Act by selling marbled crayfish in violation of state law. She faces a \$100,000 fine.¹

State Enforcement and Passive Acts

Many of the more publicized convictions related to invasive species involve either zebra or quagga mussels, small invasive mollusks which can rapidly reproduce and wipe out food sources for native species and also adhere to fixtures in water, causing extensive damage such as by clogging water intake structures. Minnesota is one of the states known to hold people accountable for transporting zebra mussels. In 2011, Minnesota conservation officers arrested a man from Fargo, North Dakota for transporting zebra mussels that were on a boat lift.² Notably, the officers had proof that the Fargo man knew that the mussels were present on the lift – after a witness said he told the man there were zebra mussels

on his boat lift – and chose to remove it from a lake and transport it anyway. After officers caught the man, he was charged with a misdemeanor and faced up to 90 days in jail. He pleaded guilty and was fined \$500 and paid \$500 in restitution.³ Fortunately, the man's unlawful act alerted the Minnesota Department of Natural Resources that the lake from which the lift was removed had zebra mussels. The DNR treated the lake to kill the mussels, at a reported \$18,000 price tag.

Another state with a history of mussel-related enforcement is California. There, as with more and more U.S. states, quagga mussels are a threatening invasive species. Some violations of invasive species rules in California are easier to detect. For example, Lake County, in Central California, requires boats to display quagga mussel inspection stickers while on any waterbody in the county. In 2011, a Lake County Deputy Sheriff apprehended a man operating a boat on Clear Lake, arresting the boater for failing to have a mussel inspection sticker on his boat.⁴ In February 2022, the county reported its lakes were still quagga mussel-free, and that it had issued 21,000 inspection stickers in 2021.⁵

State Enforcement of Commercial Violations

Some invasive species crimes result not from the carelessness of the violator but are motivated by the chance to gain a profit. An example of this for-profit phenomenon can be found in a 1986 U.S. Supreme Court case from Maine.⁶ In *Maine v. Taylor*, a bait dealer was indicted under the Lacey Act of 1900 which bans the transportation of fish in interstate commerce when that transportation violates state law. The bait dealer arranged the transportation of over 150,000 golden shiners, nonnative species that can host parasites dangerous to native fish, into Maine in violation of state law. After he was convicted, the dealer appealed, arguing that Maine's statewide ban on importing live baitfish



Credit: Tom Britt

violated the Commerce Clause of the U.S. Constitution, which prohibits the government from discriminating or posing an undue burden on interstate commerce.

Eventually, the U.S. Supreme Court reviewed his claims and rejected his argument, holding that Maine's statute did not violate the Commerce Clause because it served a legitimate local purpose that could not be accomplished in a less discriminatory manner. This case laid a foundation for state enforcement of commercial invasive species crimes by demonstrating that states can constitutionally prohibit the interstate trafficking of invasives.

A more recent instance of transportation and sale of an invasive species occurred in Wisconsin in 2016. Like invasive species laws in many states, Wisconsin law bans the live transport of invasive carp. These fish can quickly overtake waterways, grow up to 80 pounds, and jump 10 feet out of the water, giving the state law strong justification to protect its boaters and natural resources. Reportedly, after a citizen filed a complaint accusing a market of selling

invasive carp, the Wisconsin Department of Natural Resources traced the fish back to a fish dealer.⁷ The dealer was convicted of numerous violations, including the illegal possession and sale of over 9,000 pounds of these fish. This was the state's first conviction related to illegal possession and sale of invasive carp. Yet, had the dealer cut the gills or gutted the fish – thus removing the threat of their invading a waterway – the possession and sale would not have broken Wisconsin law.

Another example of selling live invasive fish occurred in New York in 2011. There, a fish dealer sold a large volume of northern snakehead fish he had imported – nearly 4,000 fish in multiple shipments from China in violation of state law.⁸ Snakeheads are toothy creatures that can devour native fish, reproduce quickly, and even travel short distances on dry land. They have few natural predators in the United States. They are also said to be delicious. Officers arrested the fish dealer for importing the illegal fish. He faced felony charges and up to four years for his crimes.

Difficulty in Enforcement

Ultimately, the list of prosecuted violations of state invasive species laws is short. And surely, violators get away with their crimes. This is due in no small part to the difficulty of enforcing state invasive species laws. There are a variety of factors at play. First, states must have the resources to enforce these laws. Most invasive species crimes, especially in the southeastern United States, likely fall in the wheelhouse of conservation officers, although sheriff departments and municipal police departments also make arrests related to invasive species. For laws to mitigate the spread of invasive species, there must be enough conservation officers to address would-be violators. If law enforcement were the only tool to prevent the spread of invasive species, there would have to be enough officers to check at every boat ramp and fishing hole to see if invasive plants are clinging to a boat or if an invasive species is being used as bait – an impossible task.

However, history shows that a greater number of conservation officers does not mean success in invasive species management. For example, Florida's Fish and Wildlife Conservation Commission employs the largest number of conservation officers of any state in the Union.⁹ Yet, a search of recent news publications and case databases found no reports of Florida prosecutions stemming from its laws and regulations pertaining to invasive species. Perhaps an educated public offers a better way of enforcement.

Mississippi and Alabama Laws

Mississippi and Alabama face gaps in effective invasive species management. For example, both Mississippi and Alabama employ fewer conservation officers than surrounding states.¹⁰ And compared to Maine laws that categorically prohibit importing any live baitfish and smelts, Alabama bans importing only wild caught bait.¹¹ The law allows importing commercially produced baitfish that may carry diseases harmful to native fish. Mississippi bans exporting but not importing wild caught bait,¹² but prohibits releasing non-native species into state waters.

The states have been active in improving their legal battles against invasives. Mississippi and Alabama have issued Aquatic Nuisance Species Management Plans, with Alabama's plan approved in 2021.¹³ The Management Plans focus on aquatic invasives, and they secure the states approximately \$100,000 per year in federal funding to fight invasives.

The Management Plans benefit the states by allowing them to prioritize certain invasives and use federal funds to remove or raise awareness of them, but the actions still depend on effective, up-to-date state laws for enforcement power. Mississippi and Alabama both maintain blacklists of species that are illegal to import. Yet, Mississippi's blacklist remains unchanged since 2011.¹⁴ And while Alabama amended its invasive animal blacklist in 2020,¹⁵ its invasive plant blacklist has been left untouched since 1999.¹⁶ 🦋

Randolph Mikell was a Legal Intern at the Mississippi-Alabama Sea Grant Legal Program and is a rising third-year law student at the University of Mississippi School of Law.

Endnotes

1. The Guardian, *Ohio Woman Pleads Guilty to Selling Invasive Crayfish Species Across 36 States* (May 12, 2022).
2. Dan Gunderson, *Fargo Man Charged with Transporting Zebra Mussels*, MPR News (Dec. 29, 2011).
3. MPR News, *N.D. Man Sentenced in Minn. Zebra Mussel Case* (March 2, 2012).
4. Lake County News, *Boater Arrested for Invasive Mussel Sticker Violation*, (Aug. 18, 2011).
5. Lake County Record-Bee, *Lake Remains Quagga-Mussel Free For Now* (Feb. 15, 2022).
6. *Maine v. Taylor*, 477 U.S. 131 (1986).
7. Bob McNally, *Wisconsin Fish Dealer Convicted of Illegally Selling, Transporting 9,000-Plus Pounds of Invasive Carp*, Outdoor Life (March 22, 2022).
8. Reuters, *New York Man Charged with Importing Banned Fish from China* (April 28, 2011). While the accused admitted committing the crime, no report was found on his sentence.
9. U.S. Bureau of Labor Statistics, *Occupational Employment and Wage Statistics* (May 2021).
10. U.S. Bureau of Labor Statistics, *Occupational Employment and Wage Statistics* (May 2021).
11. Ala. Admin. Code r. 220-2-.162.
12. 40 Miss. Admin. Code Pt. 3, R. 3.1.G.4.
13. David Rainer, *Alabama Aquatic Nuisance Species Management Plan Approved*, Alabama Department of Conservation and Natural Resources (Feb. 17, 2022). For Mississippi and other Southeastern and Gulf states' management plans, see <https://www.gsarp.org/library-state-ans-plans/>.
14. 2 Miss. Admin Code Pt. 1, Subpt 4, Ch. 11, § 104.
15. Ala. Admin. Code r. 220-2-.26.
16. Ala. Admin. Code r. 220-2-.124.

Creating and Maintaining a Robust Comprehensive Plan

Stephen Deal

A comprehensive plan is a planning agency's signature document. Though comprehensive plans are considered advisory in nature, the role they have in justifying city zoning and policy means they can be perceived as having the weight of law. A poorly written comprehensive plan is not just ineffective, it can undermine the ability of a city to effectively enforce zoning regulations. A comprehensive plan is the fulcrum on which planning legitimacy rests, and the success or failure of a planning agency begins and ends with the comprehensive plan.

A Poorly Written Plan Can Be Trouble

A good comprehensive plan should be viewed as a precondition for sound planning. While zoning enforcement does not need a good comprehensive plan to take place, a poor comprehensive plan can be a ticking time bomb that invites legal scrutiny and squanders precious social capital. In the early years of city planning, courts deemed the presence of zoning regulations as a kind of exercise in comprehensive planning in and of itself.¹ Increasingly, courts have placed greater weight on comprehensive planning as a stand-alone process distinct from zoning regulations. Courts will often use a city's comprehensive plan to determine the legal validity of city planning policy.

In the Illinois case *LaSalle Bank National Association v. City of Oakbrook Terrace*, the comprehensive plan was a critical factor.² In this case, the city adopted a 2001 plan that it deemed advisory and not a legal obligation. In 2003, the city amended the comprehensive plan by creating the "Unit 5 Area Plan" that applied to 236 acres of city land, which included part of the plaintiff's property. The new amendment resulted in the city rezoning the plaintiff's property, which resulted in a significant reduction in the number of allowable units that could be built on the property, going from 2,700 units down to 300. The plaintiff

alleged that the city's action was down zoning and constituted a taking. The Illinois Court of Appeals dismissed the plaintiff's claims as they were filed prior to the city's final action dictating how many units could be developed, but noted that the city had applied the comprehensive plan as the law requires to justify its actions.

The comprehensive plan is more than just a justification for government actions, it legitimizes the planning discipline. A comprehensive plan symbolizes the "big picture" of the community and serves as a broad vision that gives shape and form to the collective aspirations of a community. If a comprehensive plan fails to gain traction in a community, it signifies a failure in collective decision-making that casts doubt on a local government's ability to address citizen needs. Since a comprehensive plan is often a multi-year process, a community must invest considerable staff time and resources towards its completion and adoption. If a multi-year comprehensive plan process fails in the final adoption stage it becomes a drain on city resources and local government staff. In one Indiana county, citizens were so dissatisfied with their comprehensive plan they elected new county commissioners who proceeded to unadopt the plan and let the entire planning staff go.³

The Key Is Consistency

A primary consideration of any comprehensive plan is its consistency with relevant state laws and city zoning. Planners need to be mindful that the regulatory weight of comprehensive plans can vary in accordance with state law. According to one source, Alabama and Mississippi have no explicit laws requiring consistency between a city's comprehensive plan and zoning, while many states across the country do.⁴ These laws can apply to specific regions or they can be statewide. In North Carolina, the Coastal Area Management Act (CAMA) requires that the state's coastal

counties prepare comprehensive land use plans and that these plans must be consistent with formal guidelines developed by the Coastal Resource Commission.⁵ The states of Oregon, California, and Hawai'i require consistency of land-use regulations to the comprehensive plan, and cities are required to produce findings that show the plan and zoning are in sync.

In some instances, urban regions have regional authorities that have a direct say in the planning process of a community. In Minnesota, the Metropolitan Council has been directing planning activities in the seven-county Twin Cities region since 1976.⁶ Every 10 years the council creates a long-range development plan for the region. When communities in the region write their own comprehensive plans, those community plans must be consistent with the long-range development plan. Since the enactment of this policy, more than 2,200 local plans and plan amendments have been reviewed, with the council requesting modifications from 24 of them. It should be noted that a city's own land use regulations may also elevate a plan beyond its advisory role. One example of this would be an ordinance requirement stipulating that a conditional use permit can only be approved upon showing that the proposed land use activity is in keeping with the comprehensive plan.

Other aspects of the plan, such as how often it is updated, are also important in making the plan robust and a legitimate tool for city guidance. As a general rule of thumb, a comprehensive plan should be updated on a regular cycle, such as every three to five years.⁷ City planning departments must be mindful of changing conditions in demographics that might invalidate fact finding used to justify the plan.⁸ If a comprehensive plan is over five years old, it's generally a good idea to update the plan to reflect new data as demographic changes may affect recommendations made on land use, the transportation network, and public facilities.

The Importance of Transparency when Developing Plans

A city should strive for robust public involvement in all of its planning activities, but that is especially true when it comes to developing a comprehensive plan. If a plan is to have any weight or sense of legitimacy in the eyes of the public it needs to be promoted among city stakeholders and be reasonably well understood by all parties involved in local governance. One notable example of public involvement in comprehensive plan development comes from Tuscaloosa,

Alabama. When the City of Tuscaloosa created a new comprehensive plan in 2021 there were ample opportunities for public input. During the drafting period for the plan there were 11 steering committee meetings, two 3-hour open house sessions, and numerous public hearings before the City Planning and Zoning Commission.⁹

In addition to meetings, the city also used many unique communication methods to convey the value and significance of the plan to city residents, including a social media campaign, radio interviews, a project website, letters to the editor, and various flyers and posters promoting the plan's framework. The plan was approved by the City Planning and Zoning Commission. It was recognized with an Outstanding Planning Award for a Comprehensive Plan by the Alabama State Chapter of the American Planning Association.¹⁰

A good public engagement strategy is essential for community buy-in, but the success of a comprehensive plan rests on its ability to communicate a cohesive vision. To put it simply, public transparency is only possible if the plan itself is clear in its intent. In Memphis, Tennessee, local government officials were tasked with rebuilding the city's long-term planning infrastructure. The city's comprehensive plan, Memphis 3.0, was not simply a new plan, but a course correction for a city that had not updated its plan since 1981.¹¹

The plan's simple vision was "Build Up, Not Out," and the planning effort focused on the downtown core and 13 other neighborhoods with the potential for greater walkability. The plan also identified three degrees of change (nurture, accelerate, and sustain) to be encouraged in target neighborhoods. Nurture actions provide stability to neighborhoods in decline, accelerate actions support change that is already taking place but requires additional support, and sustain actions support existing character. Target neighborhoods were also classified by their community character, such as whether they were an urban center or a neighborhood crossing. The plan has proven to be a big success, as it established a logical framework for local investment. According to the city's planning director, in the first year of its adoption, 71 percent of development investment was in anchors and anchor neighborhoods identified in the comprehensive plan.¹² By employing a broad vision, utilizing simple language, and highlighting neighborhoods for targeted investment, Memphis 3.0 demonstrates how a well-written comprehensive plan can inject transparency into local decision-making.

Conclusion

A comprehensive plan may be advisory, but advisory does not mean optional. Increasingly, the comprehensive plan is viewed as a fundamental component to justify zoning and policy recommendations. In light of this, planning departments should regularly update their comprehensive plans and check to ensure that the plans are consistent with state laws and city zoning. A comprehensive plan should also strive to involve as many stakeholders as possible, so it can represent the community's collective interests. A comprehensive plan can be a stumbling block when done poorly, but if it is done well it can be a bold vision for a community's collective aspirations. 🦋

Stephen Deal is the Extension Specialist in Land Use Planning for the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. Edward J. Sullivan, *Legal Lessons*, Planning Magazine (Feb. 2015).
2. *LaSalle Bank National Association v. City of Oakbrooke Terrace*, 393 Ill. App. 3d 905 (Ill. Ct. App. 2009).
3. Jim Segedy & Lisa Hollingsworth-Segedy, *Unadoptable?*, PlannersWeb (Nov. 12, 2013).
4. Texas A&M AgriLife Extension, *Intro to Legal Framework for Planning: State and Local Land Use*.
5. David W. Owens, *Plan-Consistency Statements*, UNC School of Government Planning and Zoning Law Bulletin No. 27 (Nov. 2018).
6. Metropolitan Council, *History of the Metropolitan Council*.
7. Timothy Beatley, *Ethical Land Use*, Johns Hopkins University Press (1994).
8. Central Mississippi Planning and Development District, *Does Your Community's Comprehensive Plan or Zoning Ordinance Need Updating?* (Nov. 7, 2016).
9. City of Tuscaloosa, *Framework: A Dynamic Guide for Tuscaloosa* (Feb. 17, 2021).
10. American Planning Association Alabama Chapter, 2021 *AL-APA Awards Recipients*.
11. Linda McIntyre, *Memphis Makes the Case for Planning*, Planning Magazine (May 2020).
12. Linda McIntyre, *Memphis Makes the Case for Planning*, Planning Magazine (May 2020).

IN SUM.

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

★	Miles of rivers and streams in Alabama:	132,000
★	Size of public waterways patrolled by Mississippi Marine Patrol (in sq. miles):	1,000
★	Date of first nationwide invasive species law:	1900
★	Year MDMR established full-time Criminal Investigation Division:	2014
★	The year Tuscaloosa won an award for its comprehensive plan:	2021



The University of Mississippi
WATER LOG
Mississippi-Alabama Sea Grant Legal Program
258-E Kinard Hall
University, MS 38677-1848



WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA18OAR4170080, the Mississippi-Alabama Sea Grant Consortium, the State of Mississippi, the Mississippi Law Research Institute, and the University of Mississippi Law Center. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Mississippi-Alabama Sea Grant Legal Program, the Mississippi-Alabama Sea Grant Consortium, or the U.S. Department of Commerce. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon.

Recommended citation: Author's name, *Title of Article*, 42:2 **WATER LOG** [Page Number] (2022).



The University complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, disability, veteran or other status.

MASGP-22-003-02

ISSN 1097-0649

June 2022



WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal issues in and around the Gulf of Mexico.

To subscribe to **WATER LOG** free of charge, go to <http://masglp.olemiss.edu/subscribe>. For all other inquiries, contact us by mail at Mississippi-Alabama Sea Grant Legal Program, 258 Kinard Hall, Wing E, P. O. Box 1848, University, MS, 38677-1848, by phone: (662) 915-7697, or by e-mail at: bdbarne1@olemiss.edu. We welcome suggestions for topics you would like to see covered in **WATER LOG**.

Editor: Kristina Alexander

Publication Design: Barry Barnes

Contributors:

Stephen C. Deal
Davis C. Delich
Will Freeman
Randolph Mikell



Follow us on Twitter!

Become a fan by clicking
"Follow" on our page at
twitter.com/msalseagrantlaw