

Coastal Use Permits: Their Increasing Necessity in Legacy Lawsuits and Things to Know When Applying for Them

Presented by:

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Purpose of Presentation

- Awareness
- Insight into the application process

Legacy Lawsuits

- General background
- Act 312 of 2006 enacted La. RS 30:29
- Act 779 of 2012 revised La. RS 30:29

Environmental Management Orders

La. Code of Civil Procedure art. 1552

Upon the request of any party in any civil action alleging environmental damage pursuant to R.S. 30:29, or the Department of Natural Resources, office of conservation, the court shall direct the attorneys for the parties to appear before the court to develop an environmental management order. The environmental management order shall authorize all parties to access the property allegedly impacted to perform inspections and environmental testing. The order shall require that all test results be submitted to all parties and the Department of Natural Resources, office of conservation, within thirty days of receipt thereof. Failure by a party to provide the results of testing to the other parties shall preclude that party from admitting those results into evidence in the civil action. The environmental management order shall include reasonable terms for all of the following:

1. Access to the property.
2. Investigation and environmental testing.
3. Sampling and testing protocols.
4. Specific time frames within which to conduct such testing and sampling.

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Environmental Management Orders: Negotiations

- Differing perspective
 - Testing protocol

Environmental Management Orders: Negotiations

XTH JUDICIAL DISTRICT COURT FOR THE PARISH OF XXX

STATE OF LOUISIANA

NO. 9999

SECTION "X"

PLAINTFFS

VERSUS

DEFENDANTS

FILED: _____
DEPUTY CLERK

ENVIRONMENTAL MANAGEMENT ORDER GOVERNING ENVIRONMENTAL SAMPLING

Upon consent of the parties, and as otherwise provided by Article 1552 of the Louisiana Code of Civil Procedure,

IT IS ORDERED that the parties are to perform inspections and environmental testing in accordance with the following requirements of the property described in Paragraph X of the Petition for Damages, identified specifically as XX acres of various sections in XXX Oil and Gas Field, XXX Parish, Louisiana (the "Property").

I. SITE ACCESS

Pursuant to Article 1552 of the Louisiana Code of Civil Procedure, any party to these proceedings (hereinafter, "Party" or "Parties") shall have the right to access the Property to perform inspections and environmental testing without further need of orders from this Court or discovery requests. The right to conduct inspections and environmental testing shall be subject to the provisions of the above-captioned Environmental Management Order (the "Order").

II. PROTOCOL FOR NOTICE AND FIELD ACTIVITIES

Should any Party to these proceedings wish to conduct sampling and/or testing of air, water, groundwater, aquifer, soils, sediments, wells, and/or equipment with respect to, from, on, in or under the Property (hereinafter, "Sampling Event"), then the following protocol shall be followed with respect to any such Sampling Event. The Party seeking to conduct a Sampling Event, or on whose behalf such Sampling Event will be conducted, is hereby referred to as the "Sampling Party."

A. The Sampling Party shall provide written notice to the other Parties of the scope and media to be sampled and the time, date, and location where such Sampling Event will take place. The Sampling Party shall provide such notice no less than five (5) calendar days prior to the date on which the Sampling Event will be conducted. In describing the location, the notice must provide sufficient information to allow the other Parties to locate and attend the Sampling Event.

B. The other Parties who desire to witness the Sampling Event must be allowed to do so, at each Party's own cost and expense. The Sampling Party shall allow and/or provide the other Parties reasonable access to the Sampling Event. Upon receipt of notice of a Sampling Event as provided, if a Party is unable to be present for the Sampling Event as scheduled, then that absent Party may notice its own Sampling Event on another date at its cost.

C. At the request of any other Party, the Sampling Party shall allow split or duplicate samples to be taken, if volume allows, by the other Party, and/or the other Party's authorized representative(s), but the Party requesting split or duplicate samples will be responsible for the costs of testing the samples and the costs of containers and other routine field supplies necessary to collect the split samples. If the volume is insufficient to allow each Party to obtain its own split sample, then the non-sampling Parties may agree on sharing split media, or apply to the Court for an order to control split samples.

D. Any and all field notes, photographs, video, and/or coordinate data received by the Sampling Party and/or the Party requesting split or duplicative samples shall be provided to all other parties within thirty (30) days of the receipt or generation of that information or data. Electronic data or media such as that which is generated by terrain or other conductivity surveys, aquifer testing, NORM surveys, or similar electronically rendered processes, or other electronic means shall be shared at the time data is generated or collected if possible, or otherwise promptly thereafter, and no later than thirty (30) days following the collection or generation of such data.

E. Any and all analytical test results from samples taken from the Property shall be submitted to all Parties and the Louisiana Department of Natural Resources (hereinafter, "LDNR") within thirty (30) days of the receipt of certified laboratory results. If, after submitting analytical test results to all Parties and LDNR, there is a correction or change in the test results, then the revised data shall be provided to all parties and LDNR within thirty (30) days of the receipt of the corrected data from a laboratory. Compliance with this provision shall constitute full compliance with the requirements of Code of Civil Procedure article 1552.

F. LDNR requests that Sampling Parties provide sampling location maps and a summary table of analytical data. Sampling Parties will provide sampling location maps and a summary table of analytical data to LDNR when they exchange expert reports with opposing Parties in compliance with the Case Management Order.

G. The Sampling Event shall be conducted during daylight hours on any day of the ordinary work week. No Sampling Event shall be conducted on Saturday, Sunday, or any other legal holiday, except with the consent of all Parties or by order of the Court.

H. Pursuant to Code of Civil Procedure article 1552, any Party may access the Property for viewing, photographing, or otherwise entering upon the Property solely for purposes other than a Sampling Event, upon four (4) business days notice to all Parties.

I. Nothing contained herein shall prohibit any party from obtaining relief from, or modification of, specific provisions of this Order for good cause shown, after notice and a contradictory hearing.

III. ISSUANCE OF NOTICE AND EXCHANGE OF DATA

A. The notice required in this Order at Paragraphs II.A and II.D, and the exchange of laboratory results, data and information required at Paragraphs II.B and II.E shall be provided by facsimile or email to representative(s) of each Party as follows:

1. Counsel for Plaintiffs
Fax: (XXX) XXX-XXXX
Email:

2. Counsel for Defendants.
Fax: (XXX) XXX-XXXX
Email:

3. Contact for Louisiana Department of Natural Resources

Stephen Pennington
Environmental Impact Specialist
Fax: (225) 242-3777
Email: Stephen.pennington@la.gov

B. If notice is not provided as required by Paragraph II.A., and a Party is deprived of its ability to attend the Sampling Event due to the failure to provide such notice, then the failure to provide notice shall preclude the admissibility of those results in this matter, absent good cause demonstrating why the results should otherwise be admissible.

C. The time delays for notice provided for in the Order may be waived by consent of all Parties and may be modified by further order of this Court.

IV. TIME LIMITS

Any plaintiff who desires to conduct testing and sampling of the Property shall complete said testing and sampling in accordance with the Case Management Order.

THUS DONE AND SIGNED on this ____ day of _____, 2014, at _____, Louisiana.

DISTRICT JUDGE

**GORDON
ARATA** MCCOLLAM DUPLANTIS
& EAGAN LLC

Environmental Management Orders: Negotiations

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Environmental Management Orders: Negotiations

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Environmental Management Orders: Negotiations

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Environmental Management Orders: Negotiations

- Differing perspective
 - Testing protocol
 - Trigger for limited admissions

Environmental Management Orders: Negotiations

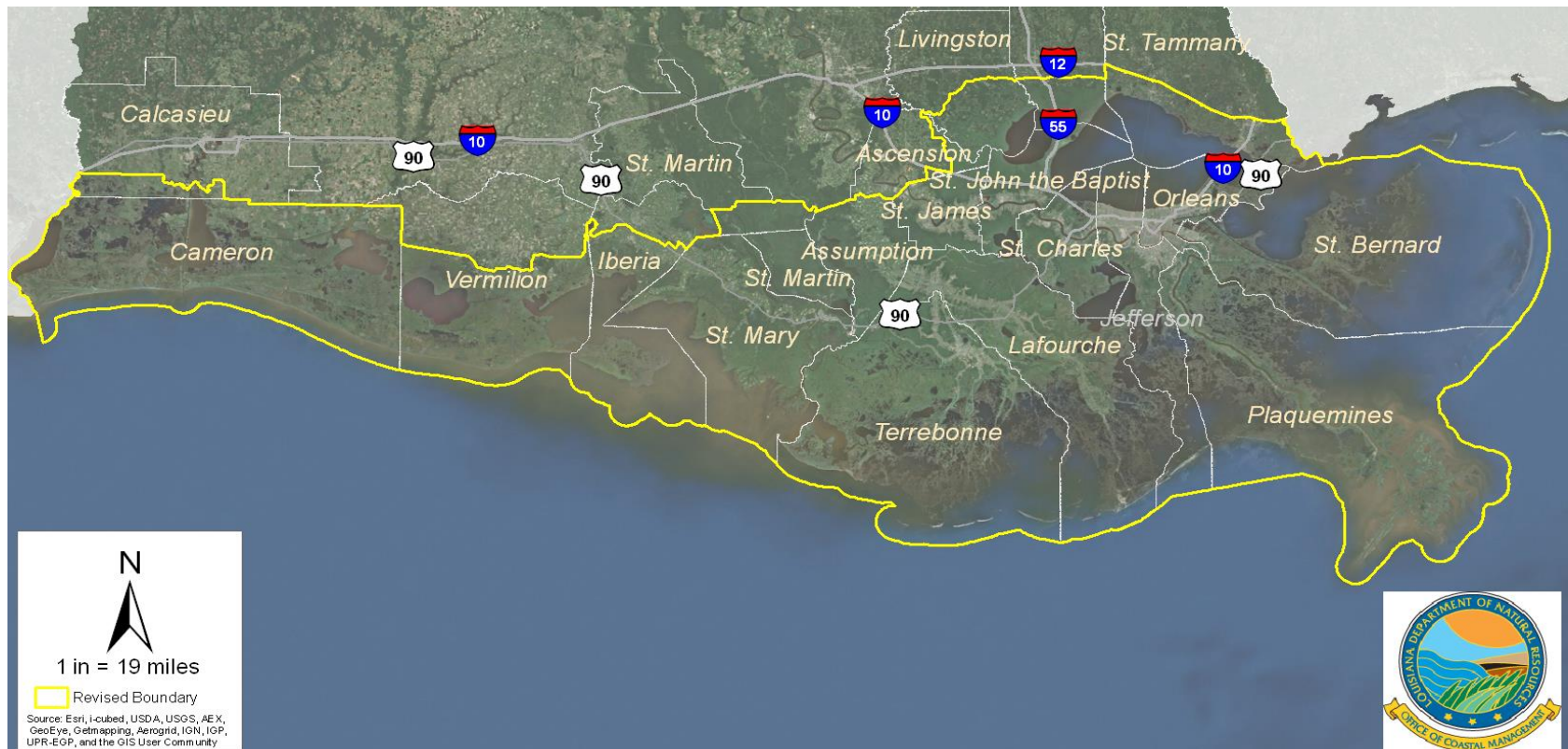
Limited Admissions

- Admit liability for a part of the environmental damage
- The LDNR's remediation plan can be admitted into evidence
- Costs
 - Must deposit \$100,000 with the LDNR contemporaneously with or before the admission;
 - Admitting party responsible for all of plaintiffs' expert fees and attorneys' fees
- Must be filed in the lawsuit record anytime between the institution of the lawsuit and **90 days after the completion of environmental testing**

Coastal Use Permit

The Louisiana Coastal Zone

Parishes (all or parts of): Ascension, Assumption, Calcasieu, Cameron, Iberia, Jefferson, Lafourche, Livingston, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermilion



Coastal Use Permit: Authority

- Authority

LDNR Office of Coastal Management (OCM) is charged with implementing the Louisiana Coastal Resources Program (LCRP) per the La. State and Local Coastal Resources Management Act of 1978, as amended (Act 361, La. R.S. 49:214.21 et seq.).

- Intent

- Protect, develop, and, where feasible, restore or enhance the resources of the state's coastal zone
- Balance conservation and resources
- Help to resolve user conflicts
- Encourage coastal zone recreational values
- Determine the future course of coastal development and conservation

Coastal Use Permit: Regulations

- LCRP basic tool: Coastal Use Permit (CUP)
- Rules and regulations governing CUPs: Louisiana Administrative Code (LAC), Title 43, Part 1, Chapter 7 §723.
- Requires **persons planning public, private, or commercial projects within the coastal zone** to apply for authorization prior to construction of any project that is not exempt from the regulation.

Coastal Use Permit: Applicability

- Example projects:
 - Dredge and fill work, bulkhead construction, shoreline modification
 - Development projects including marinas, subdivisions, drainage facilities, industrial facilities, and energy infrastructure
- Exempt activities:
 - Agricultural, forestry, aquaculture activities on lands consistently used in the past for such activities; hunting, fishing, trapping, preservation of scenic, historic, and scientific areas for wildlife preserves
 - Normal maintenance or repair of existing structures, including emergency repairs (although after-the-fact permit may be required)
 - Activities that do not have a direct and significant impact on coastal waters (NDSI) – e.g., activities above 5 ft MSL or fastlands (areas protected by levee)
- Typical field activities for legacy litigation cases:
 - Soil boring/sampling
 - Groundwater monitor well installation and sampling
 - Surface water sampling
 - Test pits

Coastal Use Permit: Process

- Apply online using Joint Permit Application (JPA) form
 - Indicate CUP, Solicitation of Views (SOV), or Request for Determination (RFD)
 - CUP application will be forwarded to other agencies for comment/action. Other permits or clearances may be required.
- Real-time electronic notification of application status changes and comments
- Allows for online tracking of applications

Coastal Use Permit: Application Requirements

- Applicant/Agent information
- Landowner/Adjacent Landowner/Oyster Lease Holder names and mailing addresses (attach additional sheet(s) if necessary)
- Lat/Long of Project (attach additional sheet(s) if more than one point)
- Excavation/Fill Volumes and Types of Materials (native material, sand bags, etc.)
- Equipment Used (marsh buggy, shallow draft vessels, pipe lay barge, etc.)
- Alternatives
- Mitigation plan for unavoidable wetland impacts
- Plats (application drawings)

Coastal Use Permit: Application Plats

- Vicinity Map
 - Project location clearly marked on map scale appropriate to identify general location within CZ and exact location
- Plan View
 - Location and dimensions of ALL aspects of the proposed work (include graphic scale)
 - Mean high/low water levels
 - Existing and proposed structures
 - Access routes
- Cross Section
 - Mean high/low water levels
 - Water bottom elevation and/or water depth
 - Depth and width of dredging
 - Height and width of spoil/structure

Coastal Use Permit: Timing

- Acknowledgment of Completeness
 - 5 days to ... (until you get it right)
 - Most common cause of delays: unacceptable plats
- For a Complete Application
 - 7 days: activities that are exempt from permit requirements
 - 4 - 10 days: depending upon location: projects that are determined to have no direct or significant impacts to coastal resources
 - 10 - 15 days: authorizations for activities that qualify for a General Permit
 - Minimum of 45 days: activities that require full public notice

Coastal Use Permit: End Game

- Read and follow CUP conditions (e.g., type/route of access, prior notice to La. Dept. of Wildlife and Fisheries [LDWF])
- Follow up after project by submitting As-Built plats
- OCM will usually conduct a field visit one full growing season (over a year) after project to determine need for mitigation
- You may still need to work with other agencies
 - Corps of Engineers will usually issue a Programmatic General Permit (PGP). If non-CUP authorization, the Corps may choose to permit.
 - Parish may have its own requirements for issuing a Letter of No Objection (which will come after the CUP is issued). May be hearings, fees, bonds required.
 - Levee board will need to permit drilling within 1500 feet of centerline of levee. Work may be prohibited during high water periods.
 - LDWF may require nesting bird survey.

Significance in Litigation

1. Determine if your testing will occur in a coastal zone.

Significance in Litigation

Determine if your testing will occur in a coastal zone

- After The permit is required if there's a **potential impact** on the coastal zone
- Even the landowner must acquire a permit to conduct testing on his own property if it potentially impacts the coastal zone
- When you suspect that a permit is not necessary, still submit a **request for determination** to the LDNR
- Must account for logistics beyond the actual testing event
- A permit may be required when simply observing opposing counsel's expert

Significance in Litigation

1. Determine if your testing will occur in a coastal zone.
2. Hire an expert familiar with the application process.
3. Account for the application process in establishing testing deadlines for litigation purposes:

Significance in Litigation

Include deadlines with more than enough time to get permits.

IV. TIME LIMITS

Any plaintiff who desires to conduct testing and sampling of the Property shall complete said testing and sampling by October 15, 2014.

Any defendant who desires to conduct testing and sampling of the Property shall complete said testing and sampling by December 20, 2014.

THUS DONE AND SIGNED on this ____ day of _____,
2014, at _____, Louisiana.

**THE HONORABLE MARILYN CASTLE
FIFTEENTH JUDICIAL DISTRICT COURT**

Significance in Litigation

Don't include specific dates, but link all deadlines to the permit(s).

I. SAMPLING DEADLINES

- A. Plaintiff will apply for the necessary permits to conduct sampling in the areas of its choosing by [DATE], and, upon receipt of same, plaintiff shall supply opposing counsel with copies of plaintiff's permits to conduct sampling.
- B. Plaintiff shall complete sampling and shall exchange final expert reports relating to the scope of contamination and a remediation plan with opposing counsel within one-hundred twenty (120) days of receiving the necessary permits to conduct such sampling. In accordance with Code of Civil Procedure article 1552 and Part II.E. above, all test results shall be submitted to all Parties and the LDNR within thirty (30) days receipt of the complete testing results.
- C. Defendants shall apply for the necessary permits to conduct sampling in the areas of their choosing within thirty (30) days of receiving plaintiff's final expert reports identified in Part IV.B. Defendants further agree to use their best efforts to apply jointly for a Coastal Use Permit.
- D. Defendants shall complete sampling and shall exchange final expert reports relating to the scope of contamination and a remediation plan with opposing counsel within one-hundred twenty (120) days of receiving all defendants' permits necessary to conduct such sampling. In accordance with Code of Civil Procedure article 1552 and Part II.E. above, all test results shall be submitted to all Parties and the LDNR within thirty (30) days receipt of the complete testing results.
- E. Absent good cause shown, the completion of environmental sampling and testing pursuant to La. Code of Civil Procedure article 1552 shall be ninety (90) days after receipt of all defendants' permits necessary to conduct sampling specified in Part IV.C. This deadline shall trigger the ninety (90) day period for limited admissions provided under La. Code of Civil Procedure article 1563(A)(4) and (5).

THUS DONE AND SIGNED on this _____ day of _____ 2014, at _____, Louisiana.

Significance in Litigation

1. Determine if your testing will occur in a coastal zone.
2. Hire an expert familiar with the application process.
3. Account for the application process in establishing testing deadlines for litigation purposes.
4. Be transparent with opposing counsel with regard to your application process.
5. If you believe that opposing counsel's experts aren't adhering to the permit, immediately contact the LDNR.

Coastal Use Permits

QUESTIONS?