

LSU Journal of Energy Law and Resources

Volume 6 | Issue 1
Fall 2017

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Repository Citation

Karl L. Morgan, *The Regulatory Environment of Coastal Louisiana*, 6 LSU J. of Energy L. & Resources (2018)
Available at: <https://digitalcommons.law.lsu.edu/jelr/vol6/iss1/9>

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The Regulatory Environment of Coastal Louisiana

*Karl L. Morgan**

INTRODUCTION

Legislation and litigation link the regulatory environment and the legal profession. The regulatory framework built by both litigation and legislation serves to protect the health and wellbeing of the public. This paper describes the Office of Coastal Management (OCM) Program in some detail and how it relates to the U.S. Army Corps of Engineers (USACE) Section 404.10 permitting program and the Louisiana Department of Environmental Quality (LDEQ) water quality program. It highlights tools and programs used to arrive at defensible decisions and discusses the issue of mitigation. This paper concludes with a general discussion of the importance of regulation, what it takes to create a successful program, and how the regulated community responds. Since the regulatory environment is making headlines often, being informed and intrigued about environmental regulations is beneficial to all.

I. ENVIRONMENTAL REGULATION LAW AND POLICY

The legal profession has an immense influence on the regulatory world, yet the general public has no idea how a regulation is put in place. All rules are created under the authority of legislation. However, not all laws provide for regulations.

One example is the statute for the Louisiana Department of Natural Resources' (LA DNR) enforcement program.¹ Under Louisiana Revised Statutes § 49:214.36, the LA DNR is not allowed to independently promulgate rules. Enforcement actions are carried out directly in accordance with the statute, including oversight by an appointed head of the Department and legislative bodies.

Typically, statutes set out the mission, guidelines, and objectives for regulatory and enforcement programs. A key element of these laws is whom they designate to make the final decision whether or not to issue a permit, and what conditions to include in the permit. Under Louisiana Revised Statutes § 49:214.36, the Governor appoints the Secretary of the Department

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1. LA. REV. STAT. § 49:214.36 (2014).

of Natural Resources as the decision maker for the LA DNR. Staff may develop regulations, policies, and procedures under the direction of the Secretary and Assistant Secretary.² Changes to rules are subject to legislative review³ and occasionally arise out of litigation.

Litigation can ensure that rules still accomplish the mission and guidelines of the law. Two landmark cases set out how many types of environmental permits are to be reviewed. *Save Ourselves v. Louisiana Control Commission*,⁴ commonly known as the “I.T. decision,” followed by *Blackett v. Louisiana Dept. of Environmental Quality* set the basis for legal review of permit decisions.⁵ The procedures and threshold for review require justification and need for the “project”; an analysis of alternatives leading to the selection of the least damaging feasible alternative; and finally mitigation of unavoidable impacts.

One important aspect of promulgated rules is that existing rules and policies create a buffering effect that protects the public from sudden and abrupt policy changes. When a new governmental administration is elected and new department heads are appointed, any new policy must go through the administrative procedures for rule change before those changes can be initiated.

II. FEDERAL AUTHORIZING LEGISLATION FOR COASTAL ZONE MANAGEMENT

In 1972, Congress passed the Coastal Zone Management Act (CZMA).⁶ This act, administered by the National Oceanic and Atmospheric Administration (NOAA), provides for the management of the nation’s coastal resources. The goal is to “preserve, protect, develop, and where possible, to restore or enhance the resources of the nation’s coastal zone.”⁷ The CZMA set up a federal coastal program that allows coastal states to create their own programs⁸ and to provide a means of funding to each state

2. See LA. REV. STAT. § 49:214.36 (2014).

3. *Id.*

4. *Save Ourselves, Inc., v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. 1984).

5. *Blackett v. La. Dep't of Env'tl. Quality*, 506 So. 2d 749 (La. Ct. App. 1987).

6. Authorizing legislation was passed in 1972 for the Coastal Zone Management Act (P.L. 92-583), which was amended in 1976 (P.L. 94-370). Relevant statutes can be found at 16 U.S.C. §§1451 *et. seq.* See also *Coastal Zone Management Act*, OFF. FOR COASTAL MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://perma.cc/UKF4-SU4T> (last updated Nov. 21, 2016).

7. 16 U.S.C. § 1452 (2012).

8. See *id.* § 1452(2).

to implement and maintain its respective program.⁹ The federal program outlined what steps the state must accomplish to obtain an approved coastal management program.¹⁰ Currently all coastal states and states bordering the Great Lakes, excluding Alaska, have approved programs.¹¹ All of the state programs are very different in how they are structured and integrated into the state government departments. Many are divided between multiple agencies and incorporated into planning agencies. A few, including Louisiana, maintain a single and distinct agency with its own regulatory permitting program.

III. STATE AND LOCAL COASTAL RESOURCES MANAGEMENT ACT

The State and Local Coastal Resources Management Act created the Louisiana state program in 1978.¹² The federal program provides primary funding, with matching funds generated from fees on permits. The founding of Louisiana's program is detailed within the Final Environmental Impact Statement,¹³ which was very controversial at the time as documented in Section C of the FEIS summary and more fully elaborated in Appendix P of the document.

IV. THE LOUISIANA COASTAL ZONE

The Louisiana Coastal Zone includes all or parts of twenty parishes.¹⁴ The line defining the Louisiana Coastal Zone is established by legislative act, and has been amended several times. There were several amendments in the early years of the program as it was being implemented, including in 1979 and 1983.¹⁵ The staff referred to the original line defining the Louisiana Coastal Zone as a "geo-political" boundary because of the way politics influenced the position of the line.¹⁶ In 2012, the area of the Coastal

9. 16 U.S.C. § 1455 (2012).

10. *Id.*

11. Alaska withdrew from the program in 2011. Alaska Coastal Management Program Withdrawal from the National Coastal Management Program Under the Coastal Zone Management Act (CZMA), 76 Fed. Reg. 39,857 (July 7, 2011).

12. LA. REV. STAT. § 49:214.21 (1979).

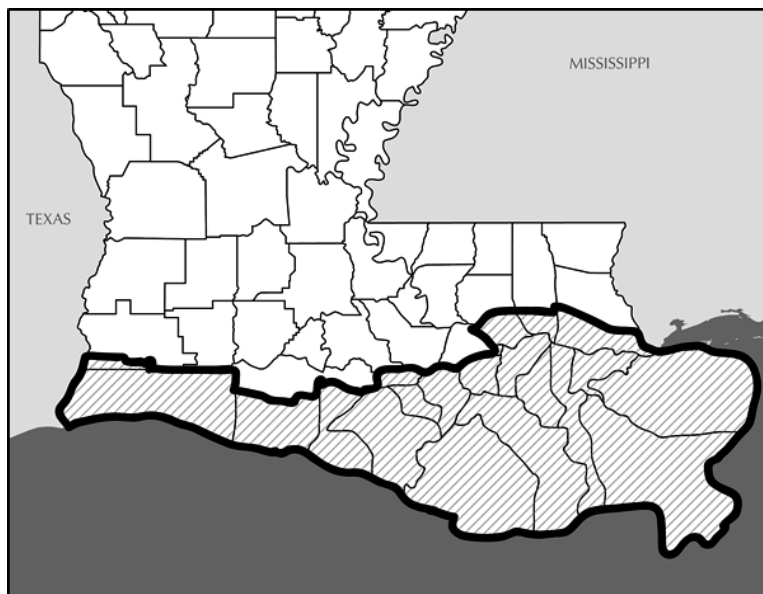
13. LA. ADMIN. CODE tit. 43, §§ 700-729 (2017).

14. LA. REV. STAT. § 49:214.24 (2012).

15. *Id.*

16. LA. DEP'T OF NAT. RES., STATE OF LOUISIANA COASTAL AND ESTUARINE LAND CONSERVATION PROGRAM PLAN 3 (2011), <https://perma.cc/3XEW-2UVS>.

Zone was expanded by Act of the Louisiana Legislature based upon a scientific analysis of coastal functions and processes.¹⁷



0 10 20
mi

The Louisiana Coastal Zone

Disclaimer: This data is not to be used for legal purposes



Absolute Scale: 1:2,320,772

Relative Scale: 1 inch = 193,398 feet

Date: 11/20/2017

V. MISSION OF THE LOUISIANA COASTAL RESOURCES PROGRAM

The mission of OCM, based on the founding legislation,¹⁸ is to balance competing uses of both renewable and nonrenewable natural resources in the coastal zone. The office ensures the use of those resources for the maximum public benefit. The OCM is a balancing agency.¹⁹

The OCM's Declaration of Public Policy includes four main goals.²⁰ The first goal is to "protect, develop, and where feasible, restore or enhance the resources of the state's coastal zone."²¹ The second goal is to "support and encourage multiple uses of coastal resources consistent with maintenance and enhancement of renewable resource management and productivity, the need

17. H.B. 588, 2012 Leg., Reg. Sess. (La. 2012).

18. LA. REV. STAT. § 49:214.21 (1979).

19. LA. REV. STAT. § 49:214.22 (2006).

20. *Id.*

21. LA. REV. STAT. § 49:214.22(1) (2006).

to provide for adequate economic growth and development and the minimization of adverse effects of one resource use upon another, and without imposing any undue restriction on any user.”²² The third goal is to “employ procedures and practices that resolve conflicts among competing uses within the coastal zone . . . and simplify administrative procedures.”²³ The fourth and final goal is “to enhance opportunities for the use and enjoyment of the recreational values of the coastal zone.”²⁴

The OCM program is not limited to any particular resource, unlike almost all other regulatory programs.²⁵ For example, LDEQ is specific to water, air, and other such permits, while the USACE regulates wetlands only.²⁶ The OCM program, however, regulates all coastal resources.²⁷ These resources include beaches and dunes, reefs and shell beds, cheniers, salt domes, and other environmentally sensitive features.

VI. LOUISIANA STATE AND LOCAL COASTAL RESOURCES REGULATORY PROGRAMS

Federal consistency, Coastal Use Permits, and Local Coastal Programs are all important aspects of the Louisiana regulatory system.

A. Federal Consistency

Consistency involves any activity by a federal agency or any activity on federal lands. Since the federal coastal program sets out the rules for the state programs, it provides that the states do not have the authority to require a “permit” for such activities, but do have the ability to review the project to determine if the activities are consistent with the state program.²⁸ Therefore a “Consistency Determination” is a type of permit authorization from the State to a federal agency. Projects such as the USACE dredging in the Mississippi River or an oil well on Sabine National Wildlife Refuge would be authorized under a Consistency Determination.²⁹ This procedure is the most powerful

22. *Id.* § 49:214.22(3).

23. *Id.* § 49:214.22(4).

24. *Id.* § 49:214.22(6).

25. *Id.*

26. See *Louisiana Pollutant Discharge Elimination System (LPDES)*, LA. DEP’T OF ENVTL. QUALITY, <https://perma.cc/BS9F-KA5M> (last visited Oct. 3, 2017). See also *Waste Permits*, LA. DEP’T OF ENVTL. QUALITY, <https://perma.cc/LR86-LZX4> (last visited Oct. 3, 2017).

27. LA. REV. STAT. § 49:214.22 (2006).

28. 16 U.S.C. § 1455(d)(11)(C) (2012).

29. *Id.*

tool the state possesses for working with the Federal Government, but it is not used very often. In the past, Outer Continental Shelf (OCS) lease sales have been delayed by denial of consistency.

Currently, the most pressing issue the LA DNR and the USACE face is the lack of beneficial use of the sediments dredged from the Mississippi and Atchafalaya Rivers. Far too many of those irreplaceable sediments are dumped offshore rather than used to build up the adjacent marshes.³⁰ The New Orleans District USACE tends to ignore the CZMA, prioritizing navigation above all else.

B. Local Coastal Programs

Louisiana statutes allow a parish to establish its own coastal program.³¹ The Louisiana Administrative Code describes the process in detail.³² A parish must develop its program document, which is then reviewed and approved by the State Program and by NOAA.³³ The approved Local Parish Program can then issue permits for activities of local concern. Currently, eleven parishes have approved local programs. Local projects can be large, such as subdivisions and industrial plants. Energy related activities, activities on state owned lands and waters, activities that cross into multiple parishes, and dredge or fill activities that intersect more than one water body are projects not considered to be local.³⁴ Projects other than those described above are sent to the local program for review and permitting.

C. Regulatory Permitting in the Louisiana Coastal Zone

The Coastal Use permit program is what everyone thinks of as regulatory environmental permits since the general public and industry have to apply to OCM for permits to construct activities in the coastal zone. The public is justifiably uninformed of the roles of the various government agencies in managing and regulating natural resources as it is a broad and complex area of law. The OCM is different from other environmental regulatory permit programs because it is concerned with all coastal resources and not just a particular area. It works with other state and federal groups when appropriate. It also ensures that all coastal use permitted activities are in conformance with

30. See G. PAUL KEMP ET AL., THE CENTRAL ROLE OF THE MISSISSIPPI RIVER AND DELTA IN RESTORATION OF THE NORTHERN GULF OF MEXICO 3 (2011) (Draft dated July 6, 2011).

31. LA. ADMIN. CODE tit. 43, § 725 (2017).

32. *Id.*

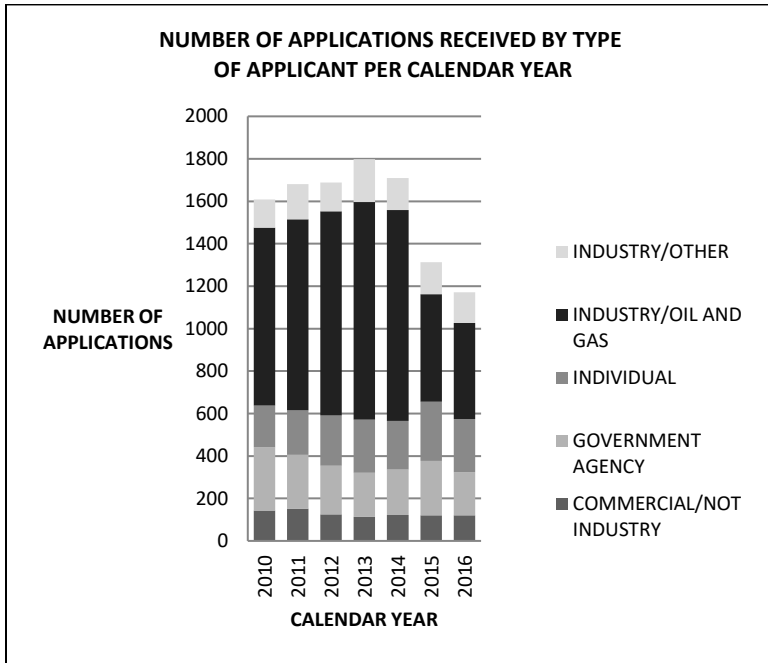
33. LA. REV. STAT. § 49:214.28(G) (2017).

34. LA. REV. STAT. § 49:214.25(A)(1) (1978).

the State's Master Plan for a sustainable coast.³⁵ The Master Plan is the guiding document for the Coastal Protection and Restoration Administration (CPRA) to restore the eroding coastal area of Louisiana. OCM reviews permit applications to ensure those permitted activities do not have an adverse effect on any aspect of the CPRA plan to restore the coast.

VII. COASTAL USE PERMITS & MITIGATION

The OCM receives and reviews 1,500 to 2,000 permit applications annually.³⁶ Typically, about sixty percent of the applications are related to the oil and gas industry. For efficiency, the OCM coordinates with the USACE and LDEQ and employs a Joint Public Notice. The office meets a policy of "No Net Development-Related Loss of Wetlands." This program requires mitigation for adverse impacts to coastal resources.



35. LA. DEP'T OF NAT. RES., *DEFINING LOUISIANA'S COASTAL ZONE: A SCIENCE-BASED EVALUATION OF THE LOUISIANA COASTAL ZONE INLAND BOUNDARY 9* (2010), <https://perma.cc/C5L7-KK9T>.

36. LA. DEP'T OF NAT. RES., *A COASTAL USER'S GUIDE TO THE LOUISIANA COASTAL RESOURCES PROGRAM II-3* (2015), <https://perma.cc/2V4L-Y9WX> [hereinafter *COASTAL USER'S GUIDE*].

VIII. COASTAL USE PERMITTING: MAJOR ISSUES

Currently, the three largest issues involved in coastal regulatory permitting are (1) restructuring of the refining and processing of oil and gas – resulting in more than a few large pipeline projects; (2) liquefied natural gas; and (3) mitigation.³⁷

As the U.S. has produced more and more oil and gas in various parts of the country, there has been a shift in how those products are refined in Louisiana.³⁸ Most of the refining capacity for the U.S. is on the Gulf Coast in order to take advantage of the imported oil.³⁹ Now that companies produce more oil in other areas of the U.S., there is a need for new pipelines to move the oil to the refineries.⁴⁰ Additionally, the federal ban on exporting oil was recently lifted by Congress, allowing crude oil produced in the U.S. to be exported.⁴¹ There are now more permit applications for large pipeline projects to move oil to and around the Gulf Coast.⁴² Natural gas can be exported, but until recently, the U.S. focused on importing natural gas.⁴³ Now, due to the increase in production from the shale plays, the U.S. is preparing to be a major exporter of natural gas.⁴⁴ Consequently, several very large natural gas liquefaction projects are proposed and permits have been submitted for these plants.⁴⁵

IX. THE JOINT PUBLIC NOTICE SYSTEM

There are three primary agencies that issue regulatory permits for activities in the Coastal Zone: the USACE, the LDEQ, and the OCM.⁴⁶ All

37. See OFF. OF COASTAL MGMT., GUIDE TO DEVELOPING ALTERNATIVES AND JUSTIFICATION ANALYSES FOR PROPOSED USES WITHIN THE LOUISIANA COASTAL ZONE (2013), <https://perma.cc/GPF6-QWH7>.

38. COASTAL USER'S GUIDE, *supra* note 36.

39. *Id.*

40. *Id.*

41. Amy Harder & Lynn Cook, *Congressional Leaders Agree to Lift 40-Year Ban on Oil Exports*, WALL STREET JOURNAL, Dec. 16, 2015, <https://www.wsj.com/articles/congressional-leaders-agree-to-lift-40-year-ban-on-oil-exports-1450242995>.

42. *See id.*

43. See Clifford Krauss, *Oil Exports, Illegal for Decades, Now Fuel a Texas Port Boom*, N.Y. TIMES, July 5, 2017, <https://www.nytimes.com/2017/07/05/business/energy-environment/oil-exports-corporus-christi-texas.html>.

44. *Id.*

45. *Id.*

46. *Obtain a Permit*, U.S. ARMY CORPS OF ENGINEERS, <https://perma.cc/7VZW-VUH4> (last visited Sept. 5, 2017); *Permits*, LA. DEP'T OF ENVTL. QUALITY,

three agencies are party to a Joint Public Notice (JPN), a joint agreement that establishes a coordinated process reducing duplication and costs for the applicants as directed by Louisiana Revised Statutes § 49:214.33.⁴⁷ For activities in the Coastal Zone, OCM serves as the point of contact to receive and distribute the applications and all subsequent documents and correspondence.⁴⁸ All three agencies require public notice of pending permit applications, but one joint notice can be published by OCM that serves all three agencies.⁴⁹ Additionally, under the JPN agreement, one public hearing can serve as the hearing for all three agencies.⁵⁰ This service simplifies the process for applicants.

X. INTERAGENCY COORDINATION

During the review process, the three permitting agencies (OCM, USACE, and LDEQ) consider comments from other outside agencies.⁵¹ Under the JPN agreement, the OCM will distribute the application to all other agencies, including local parish governments, and solicit comments.⁵² The electronic system now makes this process much more efficient and saves time for the agencies and applicants. Comments from these agencies are given consideration by OCM staff and administration, and the permits are conditioned to satisfy the agencies' concerns. These agencies include the Louisiana Department of Wildlife and Fisheries; LDEQ; Culture, Recreation and Tourism; Louisiana Department of Health; Department of Transportation and Development; State Land Office; Levee Boards; Parish Governments; NOAA Fisheries; Environmental Protection Agency (EPA); and U.S. Fish and Wildlife Service.

<https://perma.cc/22K4-ZJDC> (last visited Sept. 5, 2017); *Office of Coastal Management*, LA. DEP'T OF NAT. RES., <https://perma.cc/VK3C-M65F> (last visited Sept. 5, 2017).

47. COASTAL USER'S GUIDE, *supra* note 36.

48. See LA. REV. STAT. § 49:214.26 (1984).

49. *Presentation to 2013 Louisiana Transportation Conference*, LA. DEP'T OF NAT. RES., Slide 11 (Feb. 20, 2013), <https://perma.cc/9E3Y-QD6U>; see also LA. REV. STAT. § 49:214.33 (1983).

50. See LA. REV. STAT. § 49:214.33 (1983).

51. *Id.*

52. See *id.* LA. REV. STAT. § 49:214.30 (2010).

XI. CONSIDERATIONS DURING PERMIT REVIEW

When OCM reviews permit applications, it is guided by the rules and regulations.⁵³ There are guidelines for all uses, including specific uses such as linear facilities, surface alteration, levees, and for oil, gas, and other mineral activities.⁵⁴ Many of the guidelines contain the modifier “to the maximum extent practicable,” which is defined in the guidelines under § 701(H). The OCM is tasked with reducing the impacts of coastal activities on the coastal resources and considering social patterns and the human element. It balances the use and preservation of the resources to the maximum extent practicable. As an example, § 701(G) states:

It is the policy of the coastal resources program to avoid the following adverse impacts. To this end, all uses and activities shall be planned, sited, designed, constructed, operated, and maintained to avoid to the maximum extent practicable significant:

1. reductions in the natural supply of sediment and nutrients to the coastal system by alterations of freshwater flow;
2. adverse economic impacts on the locality of the use and affected governmental bodies;
3. detrimental discharges of inorganic nutrient compounds into coastal waters;
4. alterations in the natural concentration of oxygen in coastal waters;
5. destruction or adverse alterations of streams, wetland, tidal passes, inshore waters and waterbottoms, beaches, dunes, barrier islands, and other natural biologically valuable areas or protective coastal features;
6. adverse disruption of existing social patterns;
7. alterations of the natural temperature regime of coastal waters;
8. detrimental changes in existing salinity regimes;
9. detrimental changes in littoral and sediment transport processes;
10. adverse effects of cumulative impacts;
11. detrimental discharges of suspended solids into coastal waters, including turbidity resulting from dredging;
12. reductions or blockage of water flow or natural circulation patterns within or into an estuarine system or a wetland forest;
13. discharges of pathogens or toxic substances into coastal waters;
14. adverse alteration or destruction of archaeological, historical, or other cultural resources;
15. fostering of detrimental secondary impacts in undisturbed or

53. LA. ADMIN. CODE tit. 43, §§ 701-719 (2017).

54. *Id.*

- biologically highly productive wetland areas;
16. adverse alteration or destruction of unique or valuable habitats, critical habitat for endangered species, important wildlife or fishery breeding or nursery areas, designated wildlife management or sanctuary areas, or forestlands;
 17. adverse alteration or destruction of public parks, shoreline access points, public works, designated recreation areas, scenic rivers, or other areas of public use and concern;
 18. adverse disruptions of coastal wildlife and fishery migratory patterns;
 19. land loss, erosion, and subsidence;
 20. increases in the potential for flood, hurricane and other storm damage, or increases in the likelihood that damage will occur from such hazards;
 21. reduction in the long term biological productivity of the coastal ecosystem.⁵⁵

This statute demonstrates the range of environmental and social activities that must be considered and the protection of which balanced against the proposed benefits from the use of these resources.

XII. OFFICE OF COASTAL MANAGEMENT DETERMINATIONS/AUTHORIZATIONS

The OCM can issue different types of permit authorizations.⁵⁶ OCM tries not to burden the public and industry with activities that have no or minor impact. The more potential impact a project has on these resources, the greater the level of review. Some activities are exempt under the law, so a permit is not required.⁵⁷ Others can be deemed minor after a cursory review and are considered to have “No Direct and Significant Impact” (NDSI).⁵⁸ Activities that have impacts, but are routine, can be issued under a general permit.⁵⁹ Everything else must get a full review.⁶⁰

55. LA. ADMIN. CODE tit. 43, § 701(G) (2017).

56. *Id.* § 723.

57. LA. REV. STAT. § 49:214.34 (2012).

58. LA. ADMIN. CODE tit. 43, § 723 (2017).

59. *Id.*

60. *Id.*

A. Exemptions

Some activities are exempt from requiring permits.⁶¹ Each of these exemption criteria contains certain restrictions. For example, activities above 5 feet mean sea level (MSL) may be regulated at the discretion of the Secretary.⁶² Construction of a home or camp is exempt,⁶³ but the exemption does not include fill for a yard. The agriculture and forestry exemption requires that the activity must have started before the inception of the program and precludes changing the agricultural use.⁶⁴

B. No Direct Significant Impact

A determination of NDSI is a type of exemption, however, the determination is contingent on conditions of the project stipulated on the plats.⁶⁵ A recreational pier is determined to be NDSI, provided the plats state that the structure will be marked and lighted according to U.S. Coast Guard regulations. Different activities have certain conditions that are stipulated in order for the activity to be authorized under the NDSI designation.⁶⁶

C. General Permits

Louisiana Revised Statutes § 49:214.30(E) authorizes the LA DNR to establish General Coastal Use Permits. General Permits provide a streamlined review for activities that qualify and are used for routine activities with limited impacts. Activities that qualify under a General Permit are not subject to full public notice, but the OCM will distribute notice to all of the agencies and request comments in support or opposition within a limited time period.

D. Coastal Use Permits

All activities that are not specifically exempt or that do not qualify for NDSI or General Permit must undergo the full Coastal Use Permit review

61. LA. REV. STAT. § 49:214.34 (2012).

62. *Id.* § 49:214.34(A)(1).

63. *Id.* § 49:214.34(A)(7).

64. *Id.* § 49:214.34(A)(3).

65. *Id.* § 49:214.34(1)-(2).

66. *Id.*

process.⁶⁷ This process includes a public notice period.⁶⁸ The activity must be compliant with all applicable coastal use guidelines prior to the decision to issue a permit.⁶⁹ The permit authorization may impose special conditions on the permittee to remain in compliance.

XIII. SEQUENCING

Sequencing is the procedure used by regulatory agencies during permit review. Adverse impacts to coastal resources must be avoided; those that cannot be avoided must be minimized; all of the unavoidable adverse impacts that remain must be mitigated.⁷⁰ The OCM makes its decision based upon the conformance of the project with the Coastal Use Guidelines, but during review of the activity, the OCM uses sequencing to bring the application into compliance.⁷¹ Sequencing is particularly applicable where the guidelines require “to the maximum extent practicable.”⁷² The process is also in compliance with judicial direction and jurisprudence.⁷³ Sequencing requires a demonstration of need or justification for the project and a thorough review of less damaging alternative locations or methods that result in the least damaging feasible project.⁷⁴

XIV. GEOLOGIC REVIEW

Geologic review is one of the tools used by the OCM and USACE to reduce impacts of the oil and gas industry.⁷⁵ Geologic review is one of the most effective and important tools used by the agencies and has greatly reduced the amount of wetlands impacted by access canals.⁷⁶ This tool is required for all new oil and gas wells that impact vegetated wetlands or other environmentally sensitive areas,⁷⁷ such as oyster seed grounds and federal and state wildlife refuges. The regulatory agencies contract with an expert who attends meetings with an applicant to review the geologic

67. LA. REV. STAT. § 49:214.30 (2010).

68. *Id.* § 49:214.30(2)(a).

69. *Id.* § 49:214.30(2).

70. COASTAL USER’S GUIDE, *supra* note 36, at II-2-II-3.

71. *Id.* at II-3.

72. *Id.* at IV-1.

73. *Id.* at 20.

74. *Id.* at IV-1.

75. LA. ADMIN. CODE tit. 43, § 700 (2017).

76. *Id.*

77. *Id.* § 724(3).

and engineering data from the applicant.⁷⁸ Confidentiality is maintained, and the expert advises the regulatory agencies as to technical and economic feasible alternatives.⁷⁹ The OCM and the USACE share the costs of the Geologic Review program.

XV. MITIGATION

Mitigation is replacement of the values or habitats that are lost as a result of development. Environmental mitigation originated during the 1970s environmental movement.⁸⁰ The use and development of mitigation is a part of many federal environmental acts, including the Clean Water Act. During the late 1980s, the concept of “No Net Loss” of wetlands focused the efforts to create regulatory guidance for wetland mitigation.⁸¹ In 1990, the EPA and USACE agreed on establishing compensatory mitigation procedures. Mitigation was always a part of Louisiana’s coastal program, but no formal guidance or procedures existed until the mid-1990s.⁸² The Coastal Wetland Planning, Protection, and Restoration Act (CWPPRA) of 1990 provided funds for coastal restoration in Louisiana.⁸³ Part of CWPPRA provided that if the state could guarantee no net loss of wetland function and value, the state matching monies for CWPPRA funds would be reduced from twenty-five percent to fifteen percent. To qualify under this program, the OCM promulgated rules and regulations for mitigation in 1995 and completed the Coastal Wetlands Conservation Plan in 1997.⁸⁴ Compliance with CWPPRA continues to save the State millions of dollars per year. The Louisiana OCM mitigation regulations were updated on three occasions in 2013-2014. The regulations provide details on how the OCM should calculate mitigation for adverse wetland impacts,⁸⁵ however, the agency can require mitigation for adverse impacts to coastal habitats other than wetlands.

78. *Id.* § 700.

79. *Id.*

80. See Stacy Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497 (2004).

81. See U.S. ENVTL. PROT. AGENCY, NATIONAL WETLANDS MITIGATION ACTION PLAN (2002), <https://perma.cc/5ZZJ-PP6L>.

82. *About CWPPRA*, CWPPRA, <https://perma.cc/2SJB-B7KJ> (last visited Oct. 10, 2017).

83. *Id.*

84. LA. DEP’T OF NAT RES., LOUISIANA COASTAL WETLANDS CONSERVATION PLAN (1997), <https://perma.cc/SB8A-W7HS>.

85. *Id.* at 27.

When a project will have unavoidable impacts to wetlands, mitigation will be required, and permit applicants should plan for the mitigation as early as possible. There are several options for mitigation: purchase credits from a mitigation bank,⁸⁶ an in-lieu fee payment,⁸⁷ or permittee responsible project.⁸⁸ If the applicant chooses to create a permittee-responsible mitigation project, there will be a long-term commitment for maintenance. Often the cost of maintenance can be offset with a purchase of credits from a bank or another option that does not require maintenance of an individual project.

XVI. STATE AND FEDERAL RULES FOR COMPENSATORY MITIGATION

The difference in mitigation requirements between the state and federal programs may be problematic. Under the state program, the hierarchy for mitigation is: (1) individual mitigation measures on the affected landowner's property; (2) purchase of mitigation bank credits; and (3) purchase from the in-lieu-fee mitigation trust fund.⁸⁹ The initial rules and regulations, established in 1995, gave landowners the right to have mitigation performed on their properties as first priority, if practical and feasible.⁹⁰ However, under the federal wetland regulations promulgated in 2008, formally called the Compensatory Mitigation for Losses to Aquatic Resources, the mitigation options in priority order are: (1) purchase of mitigation bank credits; (2) purchase from an approved in-lieu-fee program; (3) establishment of a permittee responsible mitigation project; and (4) preservation.⁹¹

86. A wetlands mitigation bank is a wetland area that has been restored, established, enhanced or preserved, which is then set aside to compensate for future conversions of wetlands for development activities. Permittees, upon approval of regulatory agencies, can purchase credits from a mitigation bank to meet their requirements for compensatory mitigation. The value of these "credits" is determined by quantifying the wetland functions or acres restored or created.

U.S. ENVTL. PROT. AGENCY, WETLANDS COMPENSATORY MITIGATION 2, <https://perma.cc/2QTL-BEN3> (last visited Oct. 10, 2017).

87. *Id.* In-lieu fee mitigation "occurs when a permittee provides funds to an in-lieu-fee sponsor (a public agency or non-profit organization). Usually, the sponsor collects funds from multiple permittees in order to pool the financial resources necessary to build and maintain the mitigation site."

88. *Id.*

89. LA. ADMIN. CODE tit. 43, § 724 (2017).

90. LA. ADMIN. CODE tit. 43, § 724 (1995).

91. 40 C.F.R. § 230.93 (2008).

Since state and federal mitigation regulation priorities are different, mitigation coordination must occur during the permitting process. Staff from both agencies coordinate to ensure the applicant is provided an option for mitigation that satisfies the requirements of both agencies. On rare occasion, an applicant must perform separate mitigation for each agency. OCM staff work diligently to avoid that situation.

In the last five years, mitigation banking in Louisiana has matured into a viable and profitable industry.⁹² Mitigation banking in this state, however, lacks the aspect of marsh mitigation. Much of the current effort to create marsh bank credits consists of reestablishing wetland hydrology on existing grazing lands.⁹³ There are few efforts to create marsh credits by reestablishing marsh in areas that have eroded to open water. Risk and cost play a crucial role in the lack of recreated marsh mitigation bank.⁹⁴ Creation and maintenance of marsh is more risky and expensive than restoration of marsh from a pasture or creation of forested habitats.⁹⁵ This sentiment is reflected in the price of marsh mitigation from the few banks that offer it. The coastal environment is dynamic, and there is a great risk to maintenance of marsh from hurricanes and other natural phenomena. The OCM is promoting a solution by encouraging USACE to give more credit to projects that will recreate marsh and promote the creation of marsh in areas that protect or enhance coastal restoration projects and protection levees.

XVII. MONITORING AND COMPLIANCE

A. OCM Field Offices

OCM maintains field offices in New Orleans, Houma, Lafayette, and Lake Charles, and it employs a field biologist in the Baton Rouge office. There are currently six field biologist positions, each assigned an area of the Coastal Zone. The field staff monitor their areas for unauthorized activities; provide field data in support of permit application review;

92. See Tegan Wendland, *Restoration Work Profitable for 'Mitigation Banks,'* WWNO (Nov. 23, 2015), <https://perma.cc/DQ5R-FQL2>.

93. See NAT'L OCEANIC & ATMOSPHERIC ADMIN. ET AL., AN INTRODUCTION AND USER'S GUIDE TO WETLAND RESTORATION, CREATION, AND ENHANCEMENT 13, <https://perma.cc/E44S-HY9H>.

94. See generally PATRICK W. HOOK & SPENSER T. SHADLE, NAVIGATING WETLAND MITIGATION MARKETS: A STUDY OF RISKS FACING ENTREPRENEURS AND REGULATORS (Dec. 2013), <https://perma.cc/W5MQ-CEKQ>.

95. *Id.*

perform follow-up investigations; provide information for mitigation requirements; and assist the general public at their respective offices.⁹⁶

B. Monitoring and Enforcement

Any activity that is not consistent with the Coastal Program can be considered a violation of the program.⁹⁷ Pursuant to statute, the OCM is required to monitor and enforce compliance of permits.⁹⁸ Enforcement cases are usually brought against someone initiating a project without a permit or exceeding the scope of his or her permit.⁹⁹ If someone fails to comply with the conditions of his or her permit, the compliance process goes from a monitoring function to an enforcement case. Monitoring is not a simple operation; it requires a diligent and determined effort from multiple staff. OCM has set up a monitoring database to track permits which contain conditions and post-project obligations for which the permittee is responsible.¹⁰⁰ These conditions include as-built plats for pipelines, pre- and post-project photographs, monitoring reports, and restoration upon abandonment.¹⁰¹ At the designated time, the system generates a report listing those permits requiring follow-up attention.¹⁰² Through the database system, OCM tracks all permits that require or authorize mitigation projects to ensure the mitigation is meeting its required amount of created habitat value. All projects that allow a full growing season for habitats to recover are listed and sent to the field staff for inspection. Randomly selected projects are also designated for follow-up field inspections.

Monitoring further requires the field biologists to physically monitor their respective areas. They routinely contract flights to get an aerial view, which helps them stay apprised of the projects in their area and discover violations. Should enforcement be needed to bring cases into compliance or address an unpermitted activity, OCM is statutorily authorized to: (1) issue administrative fines up to \$12,000, (2) assess mitigation or the costs of mitigation, (3) suspend, modify, or revoke an existing permit, (4) require restoration of the site, or (5) seek relief through the civil court system.¹⁰³

96. See *Field Services Section*, LA. DEP'T OF NAT. RES., <https://perma.cc/2U5C-GZUD> (last visited Oct. 18, 2017).

97. LA. DEP'T OF NAT. RES., LOCAL COASTAL PROGRAMS HANDBOOK 43 (2015), <https://perma.cc/W7DT-MLDN> [hereinafter HANDBOOK].

98. LA. REV. STAT. § 49:214.36 (2014).

99. HANDBOOK, *supra* note 97.

100. *Id.* at 14.

101. *Id.*

102. *Id.*

103. LA. REV. STAT. § 49:214.36 (2014).

C. Additional Enforcement Means

The small fines OCM is statutorily authorized to issue are not an effective deterrent; therefore, other methods and means must be utilized. OCM enforcement staff raise awareness of what can happen if an entity is not in compliance with its permit. The potential violator is advised that one can be named at fault in a lawsuit by private or nonprofit organizations. In addition to a suit by LA DNR, there can be additional federal enforcement actions and fines. Enforcement actions will cost money and time. If a company is in violation of its permit, it will not win in court.

XVIII. WHY THE REGULATORY SYSTEM WORKS

The Regulatory System is based upon a “level playing field.” The collective list of agencies that issue permits must treat all applicants the same and hold all permittees to the same standards. All companies play by the same rules; everyone is treated equally; the rules are published; and everyone knows expectations before starting a project. There is public participation in decision making. The rules can be changed, but only with public comment and the oversight of the state legislature. There are consequences for not following the rules.

XIX. REGULATORY COMMENTS AND ADVICE

Regulations to protect the health of people and the environment are absolutely essential. Industry and businesses welcome regulations when properly promulgated and followed. These sophisticated parties know that regulations do not “close them down.” Industry does require a level playing field for all competitors to operate. Close to ninety percent of companies meet the legal requirements and are compliant, but there are approximately ten percent that look to cut corners, cheat, and disregard permits to skim a little more profit. Effective enforcement must exist to make cheating unprofitable. Allowing competitors to succeed in disregarding environmental laws is unfair to the ninety percent of good corporate stewards and the public. In these cases, the question becomes: “Is it the law that was lacking or the will to enforce it?” The answer is the law. The ninety percent of businesses and industries that desire fair and effective regulation deserve effective enforcement.

In further rebuke to the idea that regulations drive away business, in areas like natural resources, oil and gas, marinas, energy production, and most industries, the businesses have to operate locally because that is where the resource is located. Industry must follow the natural resource.

Industry depends on rivers for transportation, water, pipelines, and particular geology. More complications arise in manufacturing since sites can often be situated anywhere and are not as dependent on location, but countries like China, with few environmental protection laws, now have to deal with pollution much as the United States did forty to fifty years ago. The pollution gets so bad that it can no longer be tolerated and must be reduced.

The Clean Water Act of 1972 was passed in response to public pressure after Ohio's Cuyahoga River, which flows into Lake Erie, caught fire.¹⁰⁴ The river was so polluted that it actually burned. It was long devoid of fish or other aquatic life. This was not the first time the river burned; it caught fire several times between 1952 and 1969.¹⁰⁵ *Time* magazine reported on the fire, and public outrage fueled the environmental movement of the 1960s and 1970s. Lifeless and poisoned rivers are examples of why it is so important to have effective regulation and enforcement. If it is profitable to dump in the river, every company will be forced to dump whether they want to or not. Consider the following hypothetical: Company A dumps its waste in the river, and therefore, it can sell product at ten dollars a barrel. Company B treats its waste and has to sell the same product for twelve dollars a barrel. Company B will be forced to dump, or it will not be able to compete. The public inevitably suffers. Violation of standards affects everyone because all people need clean air and water.

My personal observations show we have come a long way in cleaning up our waters and air, but we cannot get complacent. As a teenager growing up in St. Francisville in the late 1960s and 1970s, I loved to fish, and I ran trot lines, hoop nets, and gill nets. The old commercial fisherman who helped me would say the fish in the Mississippi River were "oily." And indeed, they had a very strong taste. So, all of the fish I caught in the river, I would give away or sell. The fish we caught at the edge of the backwater where the local creeks flowed in were good, so we kept those to eat. In the mid 1980s, I caught catfish in the Mississippi River at St. Francisville, and they were much better. I have come to find out that the taste we called "oily" was actually a result of the presence of the chemical Phenol. Today, the Mississippi River, at a point just above Baton Rouge, is cleaner than it has been in over fifty years. Also, air pollution has been greatly improved. In the 1970s and early 80s, the air in Baton Rouge was so bad that people driving to work could not see the old Mississippi River

104. Julie Grant, *How A Burning River Helped Create The Clean Water Act*, THE ALLEGHENY FRONT (Apr. 21, 2017), <https://perma.cc/8TWG-ZN6Q>.

105. *Id.*

Bridge (US 190) while driving on the new I-10 bridge (an unobstructed view about 4.5 miles distant). Cleaner air is a result of regulations at work.

Complacency will unwind all progress. In 2011, a papermill in Bogaloussa spilled twenty million gallons of black liquor into the Pearl River.¹⁰⁶ The spill went unreported for four days. It killed everything in the river below the discharge point, including all fish, mussels, clams, insects, and all breeding stock of several endangered species.

While some legislatures call for rolling back environmental laws, a chemical spill polluted the drinking water for 300,000 people. The EPA and U.S. Department of Justice fined Alpha Natural Resources, Inc., one of the nation's largest coal companies and subsidiaries, twenty-seven million dollars for thousands of permit violations.¹⁰⁷ Coal ash piles and ponds are a huge national problem, but often the federal laws defer to the states, which require only minimal regulations. Three coal ash spills have polluted miles of nearby rivers.¹⁰⁸

The government agencies need to have better laws to ensure companies are responsible. Effective enforcement is based upon good legislation and followed by effective rules and proper funding.

When an oil field becomes less productive, it will often be sold to a smaller operator who reworks it. After a while, this operator sells it to someone else who skims what they can, declares bankruptcy, and leaves the taxpayers to clean up the mess. Similarly, after a spill or accident, the company at fault goes bankrupt and the taxpayers are obligated to pay for cleanup and remediation. Agencies need to ensure there are funds for cleanup. A means to force companies to clean up a field is needed. Under DNR, there are approximately 2,800 orphan wells, which are wells abandoned in Louisiana, while DNR waits on funding for the agency to plug them and clean up the sites.¹⁰⁹ An industry fee provides sufficient funds to plug approximately 150 each year, but approximately 100 additional wells are abandoned every year.¹¹⁰ Companies should provide

106. Katie Urbaszewski, *Bogaloussa Paper Mill Admits Fault as Dead Fish Flow to Lake Pontchartrain*, NOLA (Sept. 25, 2011), <https://perma.cc/XW98-955H>.

107. Associated Press, *Coal Producer Fined \$27.5 Million for Polluting Appalachian Waterways*, N.Y. DAILY NEWS, Mar. 5, 2014, <http://www.nydailynews.com/news/national/epa-fines-coal-producer-27-5-million-appalachian-pollution-article-1.1711885>.

108. *Id.*

109. *Louisiana's Orphaned Well Program*, LA. DEP'T. OF NAT. RES. (June 30, 2010), <https://perma.cc/HNN2-AZW6>.

110. *Id.*

the money to restore the sites before they begin operations, rather than less secure means of financial security or the company's promise.

Environmental regulations are necessary to protect people, not just a hypothetical forest. They protect the air that is breathed and the water that is drunk. Regulations protect the people.

At public hearings, people pour out their hearts; they are passionate about their cause. Many times they identify and object to problems and situations that exist. They ask the DNR to deny permits. But, most of the time, the basis of these requests to deny is behavior the DNR has no legal standing to regulate. The public implores the DNR to punish companies for illegally polluting the water, but in many cases the DNR has no statutory or regulatory basis to bring such action. The regulatory arena has many participants, which dilutes the strength of the regulatory process. The intent and wording of the law upon which the regulations are based govern what the DNR must do.

William D. Ruckelshaus, former head of the EPA under Ronald Reagan, recently wrote an article published by the *New York Times*.¹¹¹ After Reagan took office in 1981, the new cabinet appointees had failed and the agency was in disarray.¹¹² Reagan asked Ruckelshaus, who served as the first administrator from 1970 to 1973, to return in early 1983.¹¹³ The text and cite of the article follows:

“A Lesson Trump and the E.P.A. Should Heed”¹¹⁴

In March 1983, President Ronald Reagan asked me to return to Washington to run the Environmental Protection Agency. I had been the E.P.A.'s first administrator, from 1970 to 1973, and over the agency's first 10 years, it made enormous progress in bringing the country's worst pollution problems under control despite resistance from polluting industries and their lobbyists. A worried and outraged public had demanded action, and the government responded.

Yet the agency and its central mission came under attack during the 1980 presidential campaign. The Clean Air Act was criticized as an obstacle to growth. The agency was seen as bloated, inefficient, exceeding its congressional mandates and costing jobs. The Reagan administration and its new administrator were

111. William D. Ruckelshaus, *A Lesson Trump and the E.P.A. Should Heed*, N.Y. TIMES, March 7, 2017, at A27.

112. *Id.*

113. *Id.*

114. *Id.*

going to fix that. Sound familiar?

The E.P.A. I returned to in the spring of 1983, some 28 months into President Reagan's first term, was dispirited and in turmoil. Its administrator, Anne M. Gorsuch, had been cited for contempt of Congress. Its budget had been reduced by almost 25 percent, with more cuts promised. Staffing had been slashed.

There were internal conflicts, resignations of key officials, complaints of documents being destroyed and reports of secret meetings with officials from companies under investigation by the agency. One political appointee, Rita Lavelle, was facing accusations of lying to Congress, for which she would later be convicted. And voters were taking notice. President Reagan discovered that government backsliding on protecting Americans' health and the environment would not be tolerated by an awakened, angry and energized public.

While I awaited Senate confirmation hearings that April, several chemical industry chief executives asked to meet with me. I expected to hear complaints that over-regulation was stifling economic growth, just as I had heard 10 years earlier.

Instead, I was stunned by their message. The public, they told me, was spooked about the turmoil at E.P.A. Americans didn't believe anything was being done to protect their health and the environment. They didn't believe the E.P.A., and they didn't believe the chemical industry. These executives had concluded that they needed a confident, fair and independent E.P.A. They knew that an environmental agency trusted by the public to do its job gave their businesses a public license to operate.

A strong and credible regulatory regime is essential to the smooth functioning of our economy. Unless people believe their health and the environment are being safeguarded, they will withdraw their permission for companies to do business. The chemical industry executives who came in to see me that day felt this loss of public support and were asking me to reassure Americans that the government would do its job to protect them.

Our collective freedom and well-being depends on a set of restraints that govern society and how it operates. Those restraints need to be clear and effective. They were not in 1983.

The E.P.A.'s new administrator, Scott Pruitt, comes to his job with this historical backdrop. Are there changes that can be made to improve how the agency operates? Certainly. But those changes can never be seen as undercutting or abandoning the E.P.A.'s basic mission. That was the mistake made during the early Reagan years and why I was asked to return.

One of the factors leading to the creation of E.P.A. was the recognition that without a set of federal standards to protect public health from environmental pollution, states would continue to compete for industrial development by taking short cuts on environmental protection. The laws that the E.P.A. administers create a strong federal-state partnership that has worked well for over 40 years. The federal government sets the standards and the states enforce them, with the E.P.A. stepping in only if the states default on their responsibilities.

Budget cuts that hurt programs that states now have in place to meet those duties run the risk of returning us to a time when some states offered industries a free lunch, creating havens for polluters. This could leave states with strong environmental programs supported by the public at a competitive disadvantage compared to states with weak programs. In other words, it could lead to a race to the bottom.

Voters may have supported Donald J. Trump believing his campaign rhetoric about the E.P.A. But they don't want their kids choking on polluted air or drinking tainted water any more than Hillary Clinton voters, and as soon as the agency stops doing its job, they're going to be up in arms.

To me, the E.P.A. represents one of the clearest examples of our political system listening and responding to the American people. The public will tolerate changes that allow the agency to meet its mandated goals more efficiently and effectively. They will not tolerate changes that threaten their health or the precious environment.

These are the lessons President Reagan learned in 1983. We would all do well to heed them.

CONCLUSION

Though there are calls in Congress and state legislatures to reduce environmental regulations, these regulations are vital to protect the health and well-being of the public and the environment. Effective regulations protect the public and create economic growth and opportunity. Careful scientific consideration must be applied to regulations to ensure fair and effective regulations that do not overly burden industry with unnecessary or unattainable measures.