



Louisiana Sea Grant Legal Program

Louisiana Coastal Law Email Update Service **Issue #25, March 2007**

Cases

O'Reilly v. United States Army Corps of Engineers, 2007 WL 173936 (La. 5th Cir. 1/24/2007)

In 1999, members of the Planche family in St. Tammany Parish applied to the U.S. Army Corps of Engineers (Corps) for a Clean Water Act Section 404 dredge and fill permit. The Planche family needed the permit to begin work on a three-phase project that would result in the filing of 91.94 acres of wetlands. After the Corps received a number of public comments opposing the project, the family withdrew the application for the permit. In September 2000, the family again submitted a permit application, this time only for the first phase of the project, which would require covering 39.54 acres of wetlands. In November 2003, the Corps issued an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) for the activity covered by the permit application and issued the permit.

Plaintiffs in this case alleged that the proposed development would have an adverse impact on the surrounding area and claimed that the Corps did not comply with the requirements of the National Environmental Policy Act (NEPA) when deciding whether to issue the permit. Under NEPA, federal agencies must, except in certain situations, complete an Environmental Impact Statement (EIS) for any major federal action significantly affecting the quality of the human environment. If the proposed action does not seem significant enough to require an EIS, the agency must prepare an EA. If the EA shows that the estimated impact of the project does not require an EIS, then a FONSI must be issued. However, if the EA shows that there will be significant impact, a full EIS must be created. The federal district court granted the plaintiffs' motion for summary judgment, finding that the Corps had acted arbitrarily in issuing the Section 404 permit without preparing a full EIS. The district court stated that the Corps provided no support for their conclusion that the mitigation measures would, in effect, negate the adverse impacts of the project. The court further stated that the project was improperly segmented, building projects piecemeal to avoid consideration of the effects of the overall project.

The Court of Appeals for the 5th Circuit found that the adverse effects on soil and flood capacity, the increased non-point source pollution, the loss of wildlife habitat, the loss of wetland functions, and the adverse effects on traffic and safety were not adequately addressed in the EA prepared by the Corps. More specifically, the appeals court held that the EA failed "to sufficiently demonstrate that mitigation measures adequately address and remediate the adverse impacts so that they will not significantly affect the environment." However, the court found that the project was not improperly segmented, and that the Corps was not required to consider the possible second and third phases of the project when preparing the EA and FONSI for this phase.

The district court held that the Section 404 permit would need to be enjoined until an EIS was completed. However, the appeals court did not agree with this remedy. Instead, the court of

appeals has allowed the Corps to determine if a new EA and FONSI should be prepared, or if and EIS should be created.

In re Katrina Canal Breaches Consolidated Litigation, Pertains to: Robinson v. United States, --- F. Supp. 2d ---, 2007 WL 293163 (E.D.La. February 2, 2007).

Plaintiffs in this case are suing the U.S. Government, alleging that the Mississippi River Gulf Outlet (MRGO) caused catastrophic damage during Hurricane Katrina. They argue that this was a foreseeable consequence of at least two defective conditions known by the Corps of Engineers (Corps). The first alleged defect is the destruction of the marshlands surrounding the MRGO, which intensified an east-west storm surge, resulting in the flooding of much of New Orleans. The second defect stemmed from the MRGO's faulty design, which accelerated the force and strength of that surge.

In this decision on various motions, the Government argued that the case should be dismissed because the federal court lacked subject matter jurisdiction based on the Flood Control Act of 1928 (FCA). The FCA provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."¹ The Government argued that the water that caused the damage was "flood water"; therefore, they are immune from suit. Plaintiffs, however, contended that the MRGO is not a flood control project but rather is an aid to navigation. Additionally, they argued that the water caused the decimation of wetlands, creating a known hazard of flooding. The issue for the court was whether or not the waters that flow through the MRGO are floodwaters. The court found that a complete understanding of the MRGO is needed before any legal determination can be made and did not grant the motion to dismiss.

The plaintiffs also argued that the Corps did not exercise due care during the project's investigation, planning, design, construction, maintenance, and operation. The Government argued that the "due care" exception and the "discretionary function" exception, both found in 28 U.S.C 2680(a), applied because the flaws the plaintiffs alleged were inherent in the MRGO and, therefore, barred.² The issue the court faced was whether the Government's invocation of the "due care" exception and the "discretionary function" exception create a challenge to the existence of a federal cause of action. The court held that there were substantial questions of fact that made dismissal of the case unavailable. The court allowed the Government time to supplement the record with the latest reports generated, withholding a ruling on this argument until the record can be supplemented.

News

Louisiana to Receive Portion of Offshore Oil and Gas Royalties

On Saturday, December 9, 2006, at 1:49 a.m., the U.S. Senate passed H.R. 6111 that would give Louisiana a share in royalty payments from oil and gas production in the Gulf of Mexico.³ President Bush has said he would sign the bill into law. The bill allows for Louisiana, Mississippi, Alabama, and Texas to share in 37.5 percent of federal royalties from production at the new 8.3-million-acre site located in the Gulf of Mexico. Louisiana will receive 50 percent of this amount,

¹ 33 U.S.C. 702(c)

² 28 U.S.C. 2680(a) – "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved abuse."

³ H.B. 6111, 109th Cong. (2006). Full text of applicable section is available at <http://thomas.loc.gov/cgi-bin/query/F?c109:3:./temp/~c109VSxUkz:e256889>.

resulting in approximately \$20 million annually over the next ten years. In 2017, Louisiana will receive a portion of all new Gulf leases, which will amount to approximately \$650 million a year. Louisiana has amended its constitution to require that these revenues be used to begin repairing damaged coastal wetlands – repairs that are estimated to cost up to \$14 billion.

Source: Gerard Shields, *Coast Funds OK'd*, The Advocate (December 10, 2006) (on file with the LSGLP).

New Version of Master Plan Available for Public Comment

State officials released the most recent version of the master plan for coastal restoration and hurricane protection on February 6, 2007. This draft of the plan addresses concerns voiced by the public and scientists and places much more emphasis on coastal restoration. Cost estimates, which some say will be upwards of \$50 billion, will be released later this month. There are still many uncertainties about the plan, such as how to build heavy levees across soft marshes and how to maximize the effect of freshwater diversion projects. However, the plan still says that it is critical to close the Mississippi River Gulf Outlet. The public is encouraged to submit comments on the plan, which can be done online at <http://www.louisianacoastalplanning.org> or by calling (225) 342-5175. Comments will be accepted until April 1, 2007. The final draft will be presented to the Coastal Restoration Authority on April 12, 2007.

Source: Amy Wold, *New Master Plan Released: La. Coastal Restoration Emphasized*, The Advocate (February 7, 2007) (on file with the LSGLP).

Class Action Lawsuit for Levee Failure

Six residents of the Lakeview area of New Orleans brought a class action lawsuit for themselves and everyone else harmed by the failure of the 17th Street Canal levee during Hurricane Katrina. They argue that the Corps of Engineers (Corps) cannot escape liability for the failure. The plaintiffs allege that the Corps knew of the potential for failure as far back as 1974. In 1984, the Corps allowed the canal to be dredged, but they did not implement advice given by consultants that the sheet pilings needed to be driven deeper. Because of this, the plaintiffs argue, water was able to seep beneath the pilings and into the yards of homes on the side of the levee. Additionally, the Corps made a number of changes to the levee plans without first gaining Congressional approval. The case will be added to the docket of U.S. District Judge Stanwood Duval, Jr., who is handling all federal court levee breach cases.

Source: Susan Finch, *Corps Sued in Canal Breach*, The Times-Picayune (February 9, 2007) (on file with the LSGLP).

Fish Do Not Show Contamination From Oil Spill

According to test results released February 14, 2007, fish in the Calcasieu Ship Channel show no contamination related to the June 2006 Citgo Refinery oil spill. The study tested tissue samples from fish, shrimp, and crab for toxic compounds associated with petroleum. Although the area has long had a fish consumption advisory, the contamination level in the tissue was no higher than normal for that waterway. Additional tests will focus on less toxic but longer-lasting contaminants.

Source: Richard Burgess, *Fish Near Oil Spill Show no Ill Effects*, The Advocate (February 15, 2007) (on file with the LSGLP).

Coastal Impact Assistance Plan Unveiled

The State unveiled the Coastal Impact Assistance Plan at the Coastal Protection and Restoration Authority meeting on Tuesday, February 6, 2007. The plan, required as part of the Energy Policy Act of 2005, discusses how the state intends to spend the \$523 million it expects to receive over the next four years for coastal-restoration projects. The state received 337 proposals (approximately \$3.8 billion in requests), creating intense competition for funding. The projects, divided into seven main groups, will focus on areas such as freshwater diversion, rebuilding land bridges, and shoreline protection.

Source: Amy Wold, *State Pitches Coast Plan*, *The Advocate* (February 7, 2007) (on file with the LSGLP).

Breaux Task Force Funds New Projects

The Breaux Act Task Force agreed to fund construction of two wetland restoration projects on February 15, 2007. The first project, costing \$15.2 million, will use soil dredged from Bayous Perot and Rigolettes to create and restore 504 acres of marsh in the adjacent Barataria Basin Land Bridge. The area will be seeded with marsh grasses. The second project will use material dredged from the bottom of Lake Pontchartrain to re-create 566 acres of marsh in open water on the lake's north shore. This project will cost \$19 million. Additionally, the task force agreed to spend approximately \$9 million to add protection to an additional section of the Grand Lake under the Grand Lake Shoreline Protection project.

Source: Mark Schleifstein, *Two Wetlands Projects Receive \$34.2 Million Cash Infusion*, *The Times-Picayune* (February 16, 2007) (on file with the LSGLP).

New Oyster Lease Legislation to Benefit Industry

New state legislation passed in 2006, H.B. 1249, will allow construction to begin on five new coastal restoration projects.⁴ The projects – two in Terrebonne Parish, two in Plaquemines Parish, and one in St. Bernard Parish – had been delayed due to fear of suit by oyster leaseholders. The new law is a compromise between the legislators and oyster industry. While the law holds the state harmless for changes in water salinity due to divergence projects, it also sets up a system to compensate the oyster leaseholders for the leases if dredging or soil placement occurs on them. Additionally, the law may make it possible to lift the moratorium on new oyster leases.

Source: Amy Wold, *La. Oystermen, Industry to Benefit*, *The Advocate* (January 31, 2007) (on file with the LSGLP).

Calcasieu Lake Cleanup Almost Complete

Cleanup crews estimate that Calcasieu Lake will be free of debris tossed in by Hurricane Rita by the end of February 2007. The Coastal Conservation Association organized volunteers to help map the debris. Approximately sixty-two major obstructions were identified, and since work began in January, almost half have been removed. The Department of Natural Resources provided \$250,000 to fund the project. Thus far, tanks, trees, and offshore equipment have been pulled from the bottom of the lake.

Source: Richard Burgess, *Lake Debris Removal Almost Done*, *The Advocate* (February 8, 2007) (on file with the LSGLP).

⁴ H.B. 1249, 2006 Leg., Reg. Sess. (La. 2006). Full text of act is available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=403052>.

Key House Democrats Give Support to Legislation

House Speaker Nancy Pelosi and other key House Democrats promised Governor Blanco that legislation designed to help Louisiana's recovery from Hurricanes Katrina and Rita will be enacted by early April. The legislation would address many aspects of coastal restoration, such as clearly stating the desire of Congress to close the Mississippi River-Gulf Outlet and authorizing hundreds of millions of dollars for flood control and hurricane protection projects. However, some analysts believe that such quick and easy passage of the legislation will not occur.

Source: Bruce Alpert, *Demos Pledge Fast Action on Storm Bills*, The Times-Picayune (February 9, 2007) (on file with the LSGLP).

NOAA Announces Northern Gulf Institute

NOAA announced the creation of the Northern Gulf Institute, a collaboration of NOAA scientists, universities, and institutions. The Institute will study regional issues related to coastal hazards, climate change, water quality, ecosystem management, coastal wetlands, and pollution. Other areas of research include coastal protection and hurricane forecasting. Louisiana State University is one of the universities across the southern states involved in the program.

Source: *NOAA Announces New Cooperative Institute Serving Northern Gulf of Mexico*, NOAA News Online (November 13, 2006) (on file with the LSGLP).

Study Shows Southward Movement of Louisiana Coastline

A report published by the American Geophysical Union claims that the Louisiana coastline is not only sinking, but also sliding laterally into the Gulf of Mexico. According to the study, a large egg-shaped area approximately 250 miles long is moving southward, triggered by the slippage of underground faults. The slippage is occurring very slowly – about the width of two credit cards a year. While vertical sinking has been incorporated into future levee designs, lateral slippage will not be included until it is better understood.

Source: Cain Burdeau, *Study: La. Slowly Slipping into Gulf*, The Advocate (January 2, 2007) (on file with the LSGLP).

Corps Requests to Move Funds for Levee Improvement

The U.S. Army Corps of Engineers requested to move \$1.3 billion from one list of levee improvements to another. The Corps justified this move by saying that the projects earmarked for the \$1.3 billion are nowhere near construction, while other projects are ready to be bid this year. The \$1.3 billion, if reallocated, would go toward repair and construction of the West Bank and vicinity levee protection system and the Lake Pontchartrain and vicinity levee system.

Source: Amy Wold, *Corps: Shifting Levee Funds Helps N.O.*, The Advocate (February 6, 2007) (on file with the LSGLP).

Publication Examines Post-Hurricane Recovery

A special edition of the Estuarine Research Federation, focusing on the impact of hurricanes, was published in its December 2006 issue. The issue compiles research from long-term monitoring of the coastal environments following the 2004 hurricane season. The research focuses primarily on how different species of plant and animal life and coastal environments recover after hurricanes. While some elements of the environment recover within months, such as water quality and

phytoplankton, others take much longer to recover. Damage to land, such as dunes and wetlands, varied greatly. The variation in the impact of hurricanes depends in part on the characteristics of the hurricane itself. The researchers plan to consider other aspects of storm damage in future studies, such as the impact of human alteration on the ability of the coast to withstand storms.

Source: *Environments Resilient in the Face of Hurricanes, But Questions Remain*, Science Daily (January 14, 2007) (on file with the LSGLP).

Levees Across Country in Need of Maintenance

In a study released February 1, 2007, the Corps of Engineers reported that 122 levee segments across the nation have been poorly maintained, which threatens the public's safety. The study, which does not include levees in the New Orleans area, found that California is the state most in need of urgent levee maintenance after Louisiana. The visual inspection in California uncovered thirty-seven levee sections in need of repair, at an estimated cost of \$12 billion to \$14 billion. The inspections did not include consideration of design and surrounding landscape, which could raise the cost even more. Another study, beginning in 2008 and set to last five years, will assess more thoroughly the risk of all Corps-designed levees.

Source: March Schleitstein, *Levee Maintenance Worries across the Country Listed*, The Times-Picayune (February 2, 2007) (on file with the LSGLP).

New Elevation Program Proposed

The National Research Council (NRC) proposed an "Elevation for the Nation" program on February 1, 2007. The program would focus on the need for more up-to-date land level maps, since many of the current maps date back to the 1970s. The NRC recommended the use of LIDAR (Light Detection and Ranging) to develop the new maps. LIDAR works by sending out short light pulses from an aircraft, which is used to calculate the elevation based off the time it takes for the light to bounce back to the plane. Although the most pressing need of the new elevations would be for FEMA in the development new flood maps, the NRC points out that the information, while costly, would be beneficial to many other organizations, including the Army Corps of Engineers, the U.S. Department of Agricultural, and the Bureau of Land Management.

Source: Randolph E. Schmid, *Flood Maps May Have Out-of-Date Data*, The Advocate (February 2, 2007) (on file with the LSGLP).

Study Links Phytoplankton Levels to Climate

In a study published in the journal *Nature*, NASA scientists in conjunction with five other institutions found that global warming is reducing phytoplankton levels in the oceans. The nine-year record produced by the study showed that ocean plant levels increased from 1997 to 1999, which corresponded with a period of climate cooling. Since 1999, levels of ocean plants have been diminishing, corresponding to a period of climate warming. The study predicts that as the climate continues to warm, phytoplankton levels will increase even more slowly. The concern is that a reduction in the phytoplankton levels results in a reduction of food available to other ocean life, including fish. Additionally, phytoplankton plays a large role in removing carbon dioxide from the atmosphere. When the climate warms and phytoplankton levels decrease, more carbon dioxide is able to accumulate in the atmosphere, resulting in even more warming.

Source: *Marine Plants Die in Warmer Oceans, Speeding Climate Change*, Environmental News Service (December 7, 2006) (on file with the LSGLP).

Update to Marine Census Highlights New Marine Species

Researchers released the sixth-year update to a ten-year marine census being conducted by a collaboration of over eighty countries, divisions of the United Nations, and private conservation organizations. During 2006, the researchers conducted nineteen oceans expeditions, operated 128 sampling sites, and followed over twenty tagged species. The update also discussed newly discovered species, including shrimp, clams, and mussels living near thermal vents in the Atlantic Ocean; a community of marine life located below more than 1,600 feet of ice; and a shrimp in the coral sea that was thought to have gone extinct millions of years ago. The final publication of the study is scheduled for 2010.

Source: *Census of Seas Reveals Amazing Forms of Life*, CNN.com (December 10, 2006) (on file with the LSGLP).

Louisiana Register

Emergency Rules – Department of Wildlife and Fisheries, Office of Fisheries

Invasive Noxious Aquatic Plants

This emergency rule, which became effective on January 1, 2007, lists 24 invasive noxious plant species that pose a threat to the wildlife and fisheries resources of the state. Any person wishing to import, transport, or possess any of the aquatic plants on the list must first obtain an Invasive, Noxious Aquatic Plant Permit from the Department of Wildlife and Fisheries. Requirements for the permit include filling out an application form and site visits to inspect the facility to ensure that all possible safeguards have been taken to prevent contamination of the natural habitat.

Invasive Noxious Aquatic Plants, 32 La. Reg. 12 (December 20, 2006). See <http://www.doa.louisiana.gov/osr/reg/0612/0612emr.pdf> for more information.

Emergency Rules – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission

2007 Closure of State outside Waters to Shrimping

The Wildlife and Fisheries Commission has closed a portion of the state outside waters to shrimping. The area stretches from the western shore of Freshwater Bayou Canal to the U.S. Coast Guard navigational light off the northwest shore of Caillou Boca. The closure was enacted because recent biological sampling shows that white shrimp in this area do not average the minimum of 100 possession count. By closing the area, the shrimp will have the opportunity to grow to a larger size and become more valuable.

2007 Closure of State outside Waters to Shrimping, 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701emr.pdf> for more information.

Emergency Rules – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission

2007 Commercial King Mackerel Season

The commercial season for king mackerel in state waters will open on July 1, 2007. The season will close once the allotted portion of king mackerel has been harvested.

2007 Commercial King Mackerel Season, 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701emr.pdf> for more information.

Emergency Rules – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission

2007-08 Reef Fish Commercial Seasons and Trip Limits

The commercial trip and possession limit for deep-water and shallow-water grouper combined is set at 6,000 pounds per vessel. This limit includes the following groupers: black, misty, warsaw, red, snowy, yellowedge, yellowfin, and yellowmouth. It also includes red hind, rock hind, speckled hind, gag, and scamp.

2007-08 Reef Fish Commercial Seasons and Trip Limits, 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701emr.pdf> for more information.

Emergency Rules – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission

2007 Reef Fish Harvest

The 2007 season for the recreational harvest of gag and black and red grouper will close on February 15, 2007, and remain closed until March 15, 2007. The recreational limit for groupers (combined), excluding goliath grouper and Nassau grouper, is set at five per person per day, but not to exceed one speckled hind or warsaw per vessel or one red grouper per person.

2007 Reef Fish Harvest, 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701emr.pdf> for more information.

Emergency Rules – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission

Oyster Season – Little Lake Public Oyster Seed Grounds

The oyster season in the Little Lake Public Oyster Seed Grounds opened one-half hour before sunrise on February 21, 2007.

Oyster Season – Little Lake Public Oyster Seed Grounds, 33 La. Reg. 2 (February 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0702/0702emr.pdf> for more information.

Rule – Department of Agriculture and Forestry, Office of Agro-Consumer Services, Weights and Measures Division

Chloramphenicol in Seafood, Seafood Products, and Honey

This rule sets out the details regarding testing for chloramphenicol in seafood, seafood products, and honey. The Department of Agriculture has the right to inspect, take samples for testing, and test for the chemical in any seafood and honey being held, offered or exposed for sale, or sold, in the state. The amount to be sampled is based on the poundage of the lots.

Chloramphenicol in Seafood, Seafood Products, and Honey, 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701RUL.pdf> for more information.

**Rule – Department of Agriculture and Forestry, Office of Agro-Consumer Services,
Weights and Measures Division**
Fluoroquinolones in Seafood

This rule sets out the details regarding testing for fluoroquinolones in seafood. The commissioner may declare areas that are known to be locations where the chemical is being used on or is found in producing animals or products of such animals. Food from this area must meet the requirements in the law in terms of sampling, identification, sample preparation, testing, and analysis before being held, offered or exposed to sale, or sold in the state.

Fluoroquinolones in Seafood, 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701RUL.pdf> for more information.

Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission
Abandoned Crab Traps Removal

In order to remove abandoned crab traps, the use of crab traps will be prohibited from 6 a.m., March 3, 2007, through 6 a.m., March 12, 2007, within portions of Lafourche Parish, Jefferson Parish, and Plaquemines Parish. Additionally, the use of crab traps will be prohibited from 6 a.m., February 24, 2007, through March 5, 2007, within portions of Jefferson Parish, Orleans Parish, St. Bernard Parish, and St. Tammany Parish. The rule explicitly describes the portions of the above listed parishes. During the closure periods, all crab traps remaining in the areas listed shall be considered abandoned and may be removed only between one-half hour before sunrise and to one-half hour after sunset. Anyone is authorized to remove the abandoned crab traps.

Abandoned Crab Traps Removal, 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701RUL.pdf> for more information.

Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission
Coastwide Nutria Control Program (LAC 76:V.123)

This rule amends the incentive payment portion of the regulations on the Coastwide Nutria Control Program. The incentive payment will be an amount set by the Coastal Wetlands Planning, Protection, and Restoration Act Task Force.

Coastwide Nutria Control Program, 33 La. Reg. 2 (February 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0702/0702rul.pdf> for more information.

Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission
Public Oyster Seed Grounds – Little Lake (LAC 76:VII.521)

This rule designates and describes with particularity certain state-owned water bottoms within Jefferson and Lafourche Parishes as the Little Lake Public Oyster Seed Grounds

Public Oyster Seed Grounds – Little Lake, 33 La. Reg. 2 (February 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0702/0702rul.pdf> for more information.

Notice of Intent – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission
Harvesting Wild Alligators

The Department of Wildlife and Fisheries intends to amend the regulations governing the harvesting of wild alligators. The possession of shotguns is prohibited when hunting or taking wild

alligators, unless there is an authorized taking of a nuisance alligator by nuisance alligator hunters. Land managers and hunters must have a signed document by the landowner verifying their representation of the landowner and the total acreage of the represented land in order to obtain hide tags. The notice of intent also address changes intended to the requirements for proper display of hide tags.

Harvesting Wild Alligators, 32 La. Reg. 12 (December 20, 2006). See <http://www.doa.louisiana.gov/osr/reg/0612/0612noi.pdf> for more information.

Notice of Intent – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission
Return Rate and Release Length for Farm Raised Alligators

Each alligator returned to the wild must be returned to the original egg collection area within two years from the date of hatching. The alligator must be between 36 and 54 inches, allowing for certain releases of alligators measuring between 55 and 60 inches; no alligator over 60 inches may be released. At least 50 percent of the released alligators should be females.

Return Rate and Release Length for Farm Raised Alligators, 32 La. Reg. 12 (December 20, 2006). See <http://www.doa.louisiana.gov/osr/reg/0612/0612noi.pdf> for more information.

Notice of Intent – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission
Paddlefish

The commercial take and possession of paddlefish is prohibited. Properly licensed recreational fishermen using legal recreational gear may take up to two paddlefish per person per day. However, the taking or possession of paddlefish is closed in all saltwater areas of the state and in border waters shared with Texas. The paddlefish must be dead and must remain intact while possessed on the waters of the state. No person may possess paddlefish eggs unless they are fully attached to the fish. Any paddlefish greater than 30 inches must be returned to the water immediately.

Paddlefish, 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701NOI.pdf> for more information.

Notice of Intent – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission
Special Bait Dealer's Permit (LAC 76:VII.329)

The special bait dealer's permit is intended to allow recreational fishermen to use live shrimp and live croaker during the closed season between the spring and fall shrimp seasons. Application for the permit will be accepted from January 1 through April 30 of each year. The application can be made only from the owner of an existing business and must be notarized and made on forms provided by the department. Beginning in 2008, the applicant will have to post a \$1,000 cash bond before the permit is issued.

Special Bait Dealer's Permit (LAC 76:VII.329), 33 La. Reg. 1 (January 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0701/0701NOI.pdf> for more information.

Notice of Intent – Department of Health and Hospitals, Office of Public Health
Seafood Preparation and Handling

The Department of Health and Hospitals intends to amend and revise Title 51, Part IX, in regards to sanitary control regulations of shellfish produced and sold for human consumption. The owners

of each vessel will be required to provide a suitable receptacle for extract that can hold at least two gallons for each person on the boat.

Seafood Preparation and Handling, 33 La. Reg. 2 (February 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0702/0702noi.pdf> for more information.

**Notice of Intent – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission
Reef Fish (LAC 76:VII.335)**

The Wildlife and Fisheries Commission intends to modify the recreational take and possession limit for red grouper, establish a closed season for the recreational harvest of gag and black and red grouper, prohibit captain and crew of for-hire vehicles from retaining bag-limits of any grouper species while under charter. The rule will also modify the rules for commercial harvest of red snapper and establish permanent trip limits for commercial harvest of groupers.

Reef Fish, 33 La. Reg. 2 (February 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0702/0702noi.pdf> for more information.

Louisiana Attorney General Opinions

06 Op. Att’y Gen. 0263 (December 28, 2006)

During the late 1950’s and early 1960’s, the Army Corps of Engineers cut “straight-aways” in the Amite River, removing many of the sharp turns. One such straightaway was cut through the Sutherlands’ land. Since this time, the State Land Office has maintained that the state does not claim the bed and water bottom of this part of the River. A local ski school had been using that portion of the river, and Mr. Sutherland was concerned about the erosion that has occurred to his property and liability that may result in connection to the skiers. According to Mr. Sutherland, the river has widened from 150 feet to 350 feet due to excessive boating activity.

The Louisiana Attorney General’s office believed it was clear that the Sutherlands own the bottom of the channel, as this remained private property after the Corps cut the current channel. However, the waters in the channel are considered to be “running waters,” which are public things belonging to the State. The Sutherlands, in order to protect their property and other liability interests, want to erect a floating gate on the portion of the river crossing their property. However, the Attorney General found that the law does not support the gating of a river in Louisiana, especially when considering the facts of this case. The channel through the Sutherlands’ land is part of a major river within the state, and to cut of use to all residents and businesses both above and below goes against the idea that waterways are highways of commerce and recreation.

The Attorney General also discussed the use of servitude law in connection to the Sutherlands’ property. A servitude acquired through prescription would further support the conclusion that the Amite River cannot be gated. However, the Attorney General left this issue open for a court to decide and did not make a final decision regarding whether or not a servitude was created in this case.

Finally, the Attorney General made suggestions to the Sutherlands to help with the situation. He suggested that either the Corps or the Ascension Parish government erect bulkheads along the original dredge-line of the channel in order to assist in the reclamation of the land lost. If this cannot be done, the Attorney General suggested that the parish post and enforce “no wake zones” in this portion of the river. The Sutherlands should post no trespassing signs along the property and pursue actions against those who violate trespassing laws. Finally, the Sutherlands

were encouraged to enter into hold harmless agreements with the ski school in order to escape liability for and injuries occurring on the property.

05 Op. Att’y Gen. 0322 (January 25, 2007)

The Terrebonne Parish Council, through the Terrebonne Parish Attorney, requested an opinion concerning issues related to zoning and land use regulations. First, do the general or special powers contained in the home rule charter provide sufficient authority to allow the placement of any issue before the electorate if the council, by majority vote, chooses to do so? Second, assuming a binding election and favorable vote take place, would the implementation of zoning regulations constitute a constitutional delegation of legislative power?

The Attorney General Opinion stated that under the parish home charter, any modification of the zoning plan, maps, or regulations requires an act by ordinance of the council, and the council is authorized to make such modifications.⁵ In order to make changes, the charter requires a favorable vote by at least a majority of the authorized members of the council, but there is no requirement that the changes be placed on the ballot for voting by the electorate.

The opinion then explained that in order for something of this nature to be placed on a ballot, it must be authorized by the Louisiana constitution, a state statute, or a home rule charter.⁶ Since the Terrebonne Parish charter does not directly allow for issues relating to zoning to be placed on the ballot, the item only could be placed on the ballot if it passed the petition process set out in the charter. However, this only would allow electors of the parish to use the petition process, if the council refused action.

Therefore, the Attorney General concluded that the Terrebonne Parish Home Rule Charter does not allow the issue to be presented to voters. However, the council may amend the home rule charter in order to allow the issue to be placed on the ballot.⁷

06 Op. Att’y Gen. 0330 (January 30, 2007)

The issue in this opinion was whether the *ad valorem* tax exemptions⁸ on the drilling and completion costs of oil and gas wells permitted by the Louisiana Tax Commission (LTC) are constitutional. The Attorney General looked to *Meyers v. Flournoy*⁹, in which the Louisiana Supreme Court stated that only the Louisiana Constitution could provide the basis for tax exemptions. The court held, and the Attorney General agreed, that there is no express or implied exemption from *ad valorem* taxes for the equipment and facilities necessary to extract minerals from the ground in the state Constitution. Additionally, the LTC does not list corporeal property used in oil and gas exploration and extraction processes as property that is exempted from *ad valorem* taxation.

The Attorney General made it clear that he cannot comment on who is responsible for paying the tax as not enough information was provided. If the corporeal property in question is leased, then the lessor rather than the lessee is responsible for the taxes.

⁵ La. R.S. 33:4780.50 – “A. The provisions of this Subpart are designed and intended to supplement existing law; accordingly, nothing in this Subpart shall be construed to limit, supersede, or repeal any grant of zoning authority heretofore granted to any parish, or parish governing authority either by statute or home rule charter.”

⁶ La. R.S. 18:1299 – “The provisions of this Chapter provide the procedures to be used in elections, except those provided for in Chapter 6-A of this Code, at which a proposition or question, authorized by the state constitution, by a statute of this state, or by a home rule charter, shall be submitted to the voters.”

⁷ See also 97 Op. Att’y Gen. 95 (March 12, 1997), which covers many of the same issues in this opinion.

⁸ An *ad valorem* tax is one that is imposed proportionally on the value of something, rather than on some other measure. The property must be assessed or appraised before tax is paid on it in order to determine the amount of taxation. Blacks Law Dictionary (8th ed. 2004).

⁹ 25 So.2d 601 (La. 1946).