



## Louisiana Sea Grant Legal Program

### *Louisiana Coastal Law Email Update Service* Issue #26, July 2007

#### **Cases**

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##### **Coastal Conservation Association v. Gutierrez, 2007 WL 784340 (S.D. Tex. 3/12/2007)**

In this case, the plaintiff challenged Amendment 22 to the Gulf of Mexico Reef Fishery Management Plan. Sources show that red snapper are severely overfished, with the three main causes for red snapper mortality being the commercial red snapper fishery, the recreational red snapper fishery, and the Gulf of Mexico shrimp fishery. However, among these three, there is uncertainty about which is responsible for the largest percentage of red snapper mortality. The most controversial feature of Amendment 22 is the conclusion that no further regulatory action is needed to end overfishing and to rebuild red snapper stocks by the 2032 deadline. The plaintiff challenged the amendment as a violation to the Administrative Procedure Act.

The court found that the stock rebuilding plan in Amendment 22 is both inconsistent with the scientific data and has less than a fifty percent chance of success. This is a violation of the Gulf of Mexico Fishery Management Council's duty to adopt a plan that will rebuild overfished stocks by the deadline. While the Council supported the argument by saying that the plan was based on a conservative economic analysis, the court did not find this argument compelling. The court remanded Amendment 22 for promulgation of a new rule within nine months that has at least a fifty percent chance of succeeding. The court additionally found that Amendment 22 violated U.S. law by not minimizing bycatch from shrimp fisheries.<sup>1</sup> The amendment was remanded in order to allow the National Marine Fisheries Service to consider and adopt measures to minimize the bycatch.

#### **News**

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##### **City Submits Claim Against Corps**

The City of New Orleans has submitted a claim against the Army Corps of Engineers for \$77 billion in damages resulting from the levee breaches after Hurricane Katrina. The city did not release the basis for the figure, but City Councilwoman Shelley Midura said that attorneys at a closed door meeting encouraged the city to aim high in its quest to sue for damages. The Corps' headquarters were swamped as thousands of would-be plaintiffs gave notice to the Corps that they may sue for losses. In addition to the city, the two other large claimants were Entergy New Orleans, seeking \$655 million, and the New Orleans Water and Sewer Board, seeking \$460 million.

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<sup>1</sup> Title 16 United States Code Section 1853(a)(11).

**Source:** Michelle Krupa, *N.O. Asks for Whopping \$77 Billion in Claim to Corps*, The Times-Picayune (March 2, 2007) (on file with the LSGLP).

### **Shell Cancels LNG Terminal**

Shell cancelled the liquefied natural gas terminal set to be built off the coast of Cameron Parish. The project director cites the current market as the reason for the decision. Environmental groups are happy with the decision, due to the uncertain impact a LNG terminal would have had on fish populations.

**Source:** Pam Radtke Russell, *Shell Drops its Plans for LNG Terminal*, The Times-Picayune (March 29, 2007) (on file with the LSGLP).

### **Local Non-profit Group Offers Grants**

Marketumbrella.org, a non-profit group affiliated with Loyola University, has set aside \$110,000 to use to award grants to about a dozen fishers or fishing-related businesses. While the group realizes that the grants will not solve any of the major problems facing Louisiana's fishing industry, they want to identify people who are being innovative in their field. The grants can be used for local fishers to market their product at local farmers markets, to set up biodiesel systems, or to design products that will differentiate Louisiana seafood.

**Source:** Chris Kirkham, *Wanted: Louisiana Fishers with New Ideas*, The Times-Picayune (May 30, 2007) (on file with the LSGLP).

### **Cypress Plan Turned In, But Not Complete**

The governor-appointed advisory panel on the coastal cypress forests turned in its recommendations for coastal cypress management, but not a full report. The recommendations were broad, such as mapping both healthy and unhealthy coastal cypress. The panel did not recommend imposing a moratorium on logging vulnerable forestlands, including state lands. It is not clear if the panel will continue meeting to finish the full report.

**Source:** Amy Wold, *Panel Finishes Cypress Plan*, The Advocate (March 6, 2007) (on file with the LSGLP).

### **New Use for Green Debris Tested**

The Department of Natural Resources began testing a new project that would use downed trees and other vegetation from hurricanes to help coastal restoration efforts. The test project, located in Cameron Parish, will put clean, chipped hurricane vegetation debris in a former canal. The debris will be covered with dirt. Within the canal, there will be three areas, each with a different percentage of chipped material. The project will be monitored for three years to determine which ratio of dirt to vegetation works best in creating a marsh-like landscape.

**Source:** Amy Wold, *DNR Tests Green Debris in Restoration*, The Advocate (May 7, 2007) (on file with the LSGLP).

### **West Bank Levee Board Seeks Amendment to Law**

The West Bank levee board has compiled a list of amendments it would like to see made to the law that created the board. Amendments include giving the board a way to collect the property tax that funds the board and allowing the two Algiers members a voice in critical decisions.

**Source:** Meghan Gordon, *Levee Board Wants Law Tweaked*, The Times-Picayune (March 29, 2007) (on file with the LSGLP).

### **Levee Board Hopes to Reduce Tasks**

The 11-member East Bank consolidated levee directors turned in a resolution stating that it intends to relinquish management of non-flood assets such as Lakeshore Drive, public green space, and Lakefront Airport. While these assets were historically under the authority of the levee boards, the new consolidated levee board wants to focus more on flood control.

**Source:** Sheila Grissett, *Levee Panel May Shed Tasks*, The Times-Picayune (March 16, 2007) (on file with the LSGLP).

### **Red Snapper Quota Reduced**

Federal regulators reduced fishing quotas for red snapper from 9.1 million pounds to 6.5 million pounds in hopes of preventing a population collapse caused by overfishing. This means that for recreational fishers, the limit is two snapper per day. Additionally, shrimpers will have to install new devices on their nets that reduce or prevent bycatch of red snapper.

**Source:** Chris Kirkham, *Fishing Quota Cut for Red Snapper*, The Times-Picayune (March 30, 2007) (on file with the LSGLP).

### **GPS on Shrimp Boats may help Red Snapper**

It is difficult to establish how many fish are taken from the Gulf of Mexico every year by shrimpers, as fish such as red snapper are often caught in the trawl nets. In order to better determine the impact of shrimping on the red snapper population, the National Marine Fisheries Service will install 250 electronic logbooks onto randomly selected boats across the Gulf; about eighty of the boats will be from Louisiana. The logbooks will use the Global Positioning System to mark the location of the boat every ten minutes. This will allow researchers to determine how often shrimp boats trawl in areas where red snappers breed, allowing for certain areas of the Gulf to be closed to shrimpers rather than the entire Gulf.

**Source:** Chris Kirkham, *Shrimpers Caught up in Snapper Dispute*, The Times-Picayune (May 7, 2007) (on file with the LSGLP).

### **Louisiana Sees Drop in Commercial Seafood Catch**

A statistical analysis released by the National Oceanic and Atmospheric shows that Louisiana's portion of commercial fishing catch has dropped by almost twenty percent since Hurricanes Katrina and Rita. While Louisiana still brings in the majority of seafood caught in the Gulf, the share has dropped from three-quarters in 2004 to two-thirds in 2006. Experts believe that in addition to the impact of the hurricanes, the reduction needs to be thought of in context with years of falling production and prices.

**Source:** Chris Kirkham, *Storms Muddy Waters for La. Fishers*, The Times-Picayune (May 20, 2007) (on file with the LSGLP).

### **Healthy Wetlands May be able to Adapt**

A Duke University study showed that tidal marshlands, like those located between New Orleans and the Gulf of Mexico, should be able to adjust to rising sea levels. However, this cannot occur if the vegetation is damaged or the supplies of upstream sediment are reduced. The team used a computer model with mathematical equations to evaluate the marsh ecosystem. In areas where the vegetation remains intact, more sediment was trapped and erosion was minimized.

**Source:** *Healthy Coastal Wetlands Would Adapt to Rising Oceans*, Science Daily (April 2, 2007) (on file with the LSGLP).

### **Congressional Leaders Concerned about Relief Distribution**

The state's congressional leaders are worried that the state's fishing industry may not be getting a fair portion of money recently approved for hurricane relief. Last year, Louisiana got 41 percent of the recovery money, the same amount proposed this year by the Gulf State Marine Fisheries Commission. However, if the amount was based on the amount of seafood historically brought to shore, Louisiana's share would be about 75 percent. The state's congressional delegation sent a letter to the National Oceanic and Atmospheric Administration to voice their concerns.

**Source:** Chris Kirkham, *Officials Lobby for State's Fishing Industry*, The Times-Picayune (June 18, 2007) (on file with the LSGLP).

### **Proposal for Cleanup of Bayou in St. Charles Parish**

A proposal has been made to clean up Bayou Trepagnier in St. Charles Parish. The bayou has been polluted by runoff from the Shell Norco oil refinery for more than 60 years, so a main component of the proposal is putting a layer of soil over a mile-long segment of the bayou. The soil will help contain the lead and other heavy metals buried in the banks and bottom. The proposal also calls for Norco storm water to be pumped through an 800-foot-long "clean zone" where contaminants would be removed, preventing additional pollution.

**Source:** Matt Scallan, *Cleanup Could Bring Benefit for Wetlands*, The Times-Picayune (June 6, 2007) (on file with the LSGLP).

### **Following Recommendations Boosts Survival of Caught-and-Released Fish**

The NSW Department of Primary Industries has released some guidelines to improve fish survival when releasing line-caught fish. These recommendations include cutting the line on fish that swallow hooks, removing hooks caught in the mouth of the fish, and minimizing air exposure. The study also recommends using nets without knotted mesh and maintaining water quality in on-boat holding tanks.

**Source:** *Going Fishing? Only Some Catch and Release Methods let the Fish Live*, Science Daily (June 4, 2007) (on file with the LSGLP).

### **Overfishing of Large Sharks Results in Reduced Shellfish Populations**

A team of Canadian and American ecologists released a study that shows that overfishing the largest predatory sharks along the Atlantic Coast of the United States impacts the shellfish population. In areas where large sharks are overfished, the population of their prey, including smaller sharks and rays, explode. These smaller sharks and rays will generally feed on shellfish

such as scallops, and as the number of small sharks and rays increases, the population of shellfish decreases.

**Source:** *Overfishing Large Sharks Impacts Entire Marine Ecosystem, Shrinks Shellfish Supply*, Science Daily (March 29, 2007) (on file with the LSGLP).

## **Louisiana Register**

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### **Emergency Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

#### 2006-2007 Oyster Season Closure

The following Oyster Seed Grounds closed on April 1, 2007: Primary Public Oyster Seed Grounds, Bay Gardene Public Oyster Seed Reservation, Lake Borgne Public Oyster Seed Grounds, Hackberry Bay Public Oyster Seed Reservation, Little Lake Public Oyster Seed Grounds, and the Vermillion/East and West Cote Blanche/Atchafalaya Bay Seed Grounds. Calcasieu Lake Public Oyster Area closed April 30, 2007.

2006-2007 Oyster Season Closure, 33 La. Reg. 4 (April 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0704/0704emr.pdf> for more information.

### **Emergency Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

#### 2007 Red Snapper Recreational Season

From April 21, 2007 to May 2, 2007, the recreational harvest daily take and possession limit was set at four red snapper per person. Beginning May 2, 2007, the daily take and possession limit was reduced to two red snapper per person. Additionally, as of May 2, 2007, the captain or crew of a vessel operating as a charter vessel or headboat may not retain any red snapper. The recreational season for red snapper is set to close on October 31, 2007. However, the secretary may close the season earlier.

2007 Red Snapper Recreational Season, 33 La. Reg. 4 (April 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0704/0704emr.pdf> for more information.

### **Emergency Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

#### Oyster Season – Certain Public Seed Grounds

The oyster season reopened on May 4, 2007, and closed May 18, 2007, for the Little Lake Public Oyster Seed Grounds and a portion of the Vermillion/East and West Cote Blanche/Atchafalaya Bay Seed Grounds. The reason for reopening was due to the fact that substantial oyster resources continued to exist in these public oyster seed grounds, and it was determined that the reefs would benefit from limited harvest.

Oyster Season – Certain Public Seed Grounds, 33 La. Reg. 5 (May 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0705/0705emr.pdf> for more information.

**Emergency Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

**Shrimp Season – Partial Reopening in State Outside Waters**

Shrimp season has been reopened in the state outside waters from the eastern shore of the Atchafalaya River Ship Channel to the U.S. Coast Guard navigational light off the northwest shore of Caillou Boca. Biological samples taken in the area show that small white shrimp have reached marketable sizes and the closure is no longer necessary.

Shrimp Season – Partial Reopening in State Outside Waters, 33 La. Reg. 5 (May 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0705/0705emr.pdf> for more information.

**Emergency Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

**Shrimp Season – Spring Inshore**

The 2007 Spring Shrimp Season in Louisiana state waters opened as follows: Shrimp Management Zone 1 opened at noon on May 28, 2007, Shrimp Management Zone 2 opened at noon on May 14, 2007, and Shrimp Management Zone 3 opened at noon on May 28, 2007.

Shrimp Season – Spring Inshore, 33 La. Reg. 5 (May 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0705/0705emr.pdf> for more information.

**Emergency Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

**Tilefish Season - Commercial**

The 2007 commercial season for the harvest of tilefishes in Louisiana state waters closed at 12:01 a.m., April 18, 2007 and is to remain closed until 12:01 a.m., January 1, 2008.

Tilefish Season - Commercial, 33 La. Reg. 5 (May 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0705/0705emr.pdf> for more information.

**Rule – Department of Environmental Quality, Office of the Secretary, Legal Affairs Division**  
**Wetlands Assimilation**

This rule is to provide notice that the secretary has amended the Water Quality regulations to protect wetland areas that may receive treated wastewater effluent. The description of “biological and aquatic community integrity” was amended to include plants as indicative of the aquatic community in the case of wetlands.

Wetlands Assimilation, 33 La. Reg. 3 (March 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0703/0703rul.pdf> for more information.

**Rule – Department of Wildlife and Fisheries, Office of Fisheries**

**Invasive Noxious Aquatic Plants (LAC 76:VII.1101)**

This rule was enacted in order to control, eradicate, and prevent the spread or dissemination of invasive noxious aquatic plants within the state. These plants are considered noxious as they pose a threat to the wildlife or fisheries resources of the state. In order to bring any of the twenty-four listed plants into the state, a person conducting a scientific study must obtain a permit from

the Department of Wildlife and Fisheries. Part of the requirements for the permit include that the plants will be handled only in a deliberate and cautious manner and only in controlled settings. The plants must remain inside the confines of a controlled facility.

Invasive Noxious Aquatic Plants (LAC 76:VII.1101), 33 La. Reg. 3 (March 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0703/0703rul.pdf> for more information.

**Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

Farm Raised Alligators – Return Rate and Release Length (LAC 76:V.701)

Minimum return rates for alligators are based upon the state average of hatching success, which is 78 percent. Each alligator must be returned to the original egg collection area within two years from the date of hatching. Each alligator released shall be between 36 inches and 54 inches, with at least 50 percent of the alligators being female. Releases can occur between March 15 and August 25 as long as environmental conditions are favorable for survival.

Farm Raised Alligators – Return Rate and Release Length (LAC 76:V.701), 33 La. Reg. 4 (April 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0704/0704rul.pdf> for more information.

**Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

Wild Alligator Harvesting (LAC 76:V.701)

The possession of shotguns is prohibited while hunting or taking wild alligators, except as authorized by the department for taking nuisance alligators by specified nuisance alligator hunters. A hide tag must be properly attached and locked in the alligator's tail immediately upon possession by an alligator hunter.

The state is divided into two alligator hunting zones. The East Zone season for taking alligators opens on the last Wednesday of August, and the West Zone season opens on the first Wednesday in September. The season will remain open for 30 days following opening.

Wild Alligator Harvesting (LAC 76:V.701), 33 La. Reg. 4 (April 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0704/0704rul.pdf> for more information.

**Rule – Department of Wildlife and Fisheries, Wildlife and Fisheries Commission**

Bait – Special Dealer's Permit (LAC 76:VII.329)

The Wildlife and Fisheries Commission has amended the special bait dealer's permit program. Applications for the special bait dealer's permit will be accepted from January 1 through April 30 of each year and will only be accepted from the owner of an existing business which sells or plans to sell live bait to recreational fishermen. Beginning in 2008, the applicant must post a \$1000 cash bond and the facilities must be inspected before the permit is issued.

Bait – Special Dealer's Permit (LAC 76:VII.329), 33 La. Reg. 5 (May 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0705/0705rul.pdf> for more information.

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

Oyster Lease Moratorium

A moratorium on the issuance of oyster leases for waterbottoms not presently under lease has been established. Applications pending as of March 7, 2007, may still be processed. No reason for the moratorium is given in the Notice of Intent.

Oyster Lease Moratorium, 33 La. Reg. 3 (March 20, 2007). See <http://www.doa.louisiana.gov/osr/reg/0703/0703noi.pdf> for more information.

## **Federal Register**

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### **Rules and Regulations – Department of Commerce, National Oceanic and Atmospheric Administration**

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fishery of the Gulf of Mexico; Gulf Red Snapper Management Measures

This interim rule is intended to reduce the overfishing of red snapper in the Gulf of Mexico and is effective May 2, 2007, through September 29, 2007. The rule reduces the commercial and recreational quotas for red snapper and prohibits the retention of red snapper under the bag limit for captain and crew of vessels operating as charter vessels or headboats. The commercial size limits for red snapper and recreational bag limit for red snapper were reduced. Additionally, the rule establishes a target level of reduction of shrimp trawl bycatch mortality of red snapper.

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fishery of the Gulf of Mexico; Gulf Red Snapper Management Measures, 72 Fed. Reg. 62, 15617 (April 2, 2007).

### **Rules and Regulations – Department of Commerce, National Oceanic and Atmospheric Administration**

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the 2007 Gulf of Mexico Commercial Fishery for Tilefishes

The commercial fishery for tilefishes in the exclusive economic zone (EEZ) of the Gulf of Mexico closed April 18, 2007, and will remain closed until January 1, 2008. This closure is necessary to protect tilefishes.

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the 2007 Gulf of Mexico Commercial Fishery for Tilefishes, 72 Fed. Reg. 71, 18593 (April 13, 2007).

### **Rules and Regulations – Department of Commerce, National Oceanic and Atmospheric Administration**

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the 2007 Deep-Water Grouper Commercial Fishery

The commercial fishery for deep-water grouper in the exclusive economic zone (EEZ) of the Gulf of Mexico closed June 2, 2007, and will remain closed until January 1, 2008. This closure is necessary to protect the deep-water grouper resource.

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the 2007 Deep-Water Grouper Commercial Fishery, 72 Fed. Reg. 102, 29444 (May 29, 2007).



### **Notices – Department of the Army, Corps of Engineers**

Intent to Prepare a Legislative Environmental Impact Statement, for the Proposed Mississippi River – Gulf Outlet Deep Draft De-authorization (3-D), LA

This notice of intent addresses the Federally authorized navigation channel located in southeastern Louisiana. A report is to be prepared to aid in identifying a comprehensive plan for de-authorizing deep-draft navigation on the MRGO from the Gulf Intracoastal Waterway to the Gulf of Mexico.

Intent to Prepare a Legislative Environmental Impact Statement, for the Proposed Mississippi River – Gulf Outlet Deep Draft De-authorization (3-D), LA, 72 Fed. Reg. 71, 18641 (April 13, 2007).

### **Proposed Rule – Department of Commerce, National Oceanic and Atmospheric Administration**

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Gulf of Mexico Vermilion Snapper Fishery Management Measures

This proposed rule would reduce the minimum size limit for vermilion snapper to 10 inches total length, eliminate the 10-fish recreational bag limit for vermilion snapper within the existing 20-fish aggregate reef fish bag limit, and eliminate the 40-day commercial closed season for vermilion snapper.

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Gulf of Mexico Vermilion Snapper Fishery Management Measures, 72 Fed. Reg. 81, 20980 (April 27, 2007).

## **Louisiana Attorney General Opinions**

### **07 Op. Att’y Gen. 0037 (April 9, 2007)**

The Secretary of the Louisiana Department of Environmental Quality (DEQ) requested an opinion of the Attorney General on whether the DEQ had authority to remove and dispose of vessels abandoned or destroyed by Hurricanes Katrina and Rita and if so, what was the proper procedure for removal.

The Attorney General found that under Louisiana’s Disaster Act, the Governor is given the power to utilize all available resources once a declaration of state emergency is issued. Additionally, the Governor’s Office of Homeland Security and Emergency Assistance and Preparedness (GOHSEP) has authorization to coordinate the activities of all State agencies and organizations. The GOHSEP tasked the responsibility of removal and disposal of abandoned and wrecked vessels to the DEQ. Further supporting the fact that the DEQ has the authority to removal the abandoned and wrecked vessels is Act 662, passed by the Louisiana Legislature during the 2006 Regular Session, which gave the task of the development and implementation of a comprehensive debris management plan to the DEQ. Therefore, the DEQ does have legal authority to remove and dispose of abandoned, hurricane-damaged vessels.

The procedure for the removal is initially governed by the Federal Wreck Act, which places the United States as being responsible for the removal of abandoned vessels. However, jurisprudence has interpreted the Act to allow the application of State or local laws as long as they do not conflict with the federal law. Under Louisiana Revised Statute 34:843, the federal, state, or local governing authority having jurisdiction may remove and dispose of abandoned vessels. In regards to vessels abandoned or destroyed due to the effects of Hurricanes Katrina and Rita, the DEQ has the necessary jurisdiction.

The first step in the procedure is for the DEQ to provide written notice by certified mail to the title owner of the vessel. If this person cannot be identified, the DEQ must publish the notice in the official journal of the parish where the vessel is located. The owner has thirty days in which to provide a plan for removal of the vessel. Within thirty days of submission of a plan, the DEQ must approve or reject the plan. If the owner does not present a plan, or if the plan is rejected, the DEQ may remove and dispose of the vessel or sell, exchange, or otherwise transfer ownership of the vessel to any person, corporation, or entity for any price or consideration that the DEQ finds reasonable. However, if the vessel poses an immediate threat to life or property, the DEQ may remove and dispose of the vessel without waiting the required thirty days.