

Louisiana Sea Grant Law & Policy Program
Louisiana Coastal Law Email Update Service
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By Lauren Weiss

LCL Article Update – *Changes in Coast Guard Regulation of Commercial Fishing Industry Vessels* (Update by Eden Davis)

Louisiana Sea Grant received some questions about an article on the changes being made to Coast Guard regulations regarding commercial fishing vessels published in the last edition of the *Louisiana Coastal Law Newsletter*, and this update is to address those questions. The Coast Guard Authorization Act of 2010 has become law as an interim final rule. Notice and comment procedure has been deferred, though the statute is currently enforceable. This was done using the good cause exception, which allows an agency to promulgate rules without providing the public with notice and an opportunity to comment before publication of the final rule. The good cause exception does allow modification of the rule through a post-promulgation comment period. Interim final rules are considered final rules that carry the force and effect of law. A final rule will be published after a public meeting and comment period to provide discretionary and interpretive language to the regulations.

The construction standards for vessels under fifty feet became applicable January 1, 2010. All vessels built after July 1, 2012, must have load lines if the vessels are 79 feet or greater. Also, if the vessel is built after July 1, 2012, and it is 50 feet or greater, it must have survey and classification equipment on board. The American Bureau of Shipping or other similarly qualified organization approved by the Coast Guard prescribes the survey and classification equipment requirements. The vessel must have on board a certificate issued by the American Bureau of Shipping or other similarly qualified organization to evidence compliance with the requirement. After January 1, 2015, buoyant apparatuses and life floats are no longer allowable; instead, all vessels must carry lifesaving equipment that ensures that no part of an individual is immersed in the water. Any vessel that operates beyond 3 nautical miles from the baseline from which the territorial sea of the U.S. is measured or operates with more than 16 individuals on board and is over 50 feet in length built before July 1, 2012, and over 25 years of age by January 1, 2017, must have developed an alternative safety compliance program by January 1, 2020. Owners of more than thirty vessels subject to the alternate safety compliance program must meet program requirements by January 1, 2030.

News:

**Note – all sources are on file with the Louisiana Sea Grant Law & Policy Program*

Louisiana's 2012 Coastal Master Plan

Louisiana is in the midst of a land loss crisis that has claimed 1,883 square miles of land since the 1930's. Given the importance of south Louisiana's natural

resources, the land loss could have a drastic effect on the lives of Louisiana residents. After three months of community input, the Coastal Protection and Restoration Authority (CPRA) unanimously approved a five-year update of the state's master plan for coastal restoration and hurricane storm surge protection. The 2012 Coastal Master Plan provides for a 50-year, \$50 billion comprehensive plan to address Louisiana's staggering land loss crisis. The Plan includes projects ranging from rebuilding existing barrier islands to creating a long-term, well-financed program for raising buildings out of potential flood areas or buying them outright. The Plan also attempts to diminish the fears of local fisherman who worry that freshwater diversions will destroy their livelihoods. The 2012 Coastal Master Plan has been sent to the State Legislature for approval.

Source: *The 2012 Master Plan is the Way Forward*. Available at, <http://www.coastalmasterplan.louisiana.gov/>; Mark Schleifstein, *Coastal Authority approves 50-year, \$50 billion master plan*, The Times-Picayune, (March 21, 2012). Available at: http://www.nola.com/environment/index.ssf/2012/03/coastal_authority_approves_50-.html

Louisiana Panel OKs \$81.6 million for Projects to Restore Wetlands

The Coastal Wetlands Planning, Protection and Restoration Act Task Force approved spending \$81.6 million to build two medium-size projects that will restore key wetlands and ridges on the east and west banks of Plaquemines Parish. These projects are aimed at restoring eroding wetlands in southern Jefferson Parish along the Harvey Cut-Off Canal and along the lakefront of Lake Pontchartrain in St. Charles Parish. The task force also created an emergency fund to plant wetland grasses, shrubs, and trees in rapidly eroding locations along Louisiana's coast.

Source: Mark Schleifstein, *Louisiana panel Oks \$81.6 million for projects to restore wetlands*, The Times-Picayune, (Jan. 20, 2012). Available at: http://www.nola.com/environment/index.ssf/2012/01/louisiana_panel_oks_816_millio.html

Task Force Releases Final Strategy for Reversing Deterioration of the Gulf

In October 2010, President Obama established a Task Force charged with addressing the immediate devastation and the long-term deterioration of the Gulf ecosystem. The Task Force is comprised of representatives from the five Gulf States and eleven federal agencies. The group's Final Strategy aims to stop the loss of critical wetlands and beaches, reduce the flow of excess nutrients into the Gulf, and enhance the resiliency of coastal communities. The Task Force has begun reviewing existing policies and regulatory issues that are slowing down the restoration process.

Source: *Task Force Established by President Obama Releases Final Strategy for Reversing Deterioration of Gulf Ecosystem- USDA \$50 million financial assistance for restoration projects announced as Task Force efforts shift from planning to action* (Release Date: 12/05/2011). Available at: <http://yosemite.epa.gov/opa/admpress.nsf/0/C81EDEAD55F1BB1B8525795D00508A0C>

Louisiana Water Sales to Texas

Over the past year Toledo Bend Partners (a private company backed by a Texas businessman and two Louisiana businessmen) has been negotiating with the Sabine River Authority of Louisiana to purchase the rights to a large portion of the water in the Toledo Bend Reservoir. The lake straddles the Louisiana-Texas border and is one of the last major sources of largely untapped surface water in Texas. The two states are supposed to share the water evenly.

Toledo Bend Partners and the river authority had hammered out a draft contract that would allow the partnership to secure the rights to approximately 196 billion gallons of water per year from Louisiana's portion of the reservoir. The deal could yield nearly \$55 million dollars a year for the Sabine River Authority.

The proposal raised concerns among many residents, farmers, coastal activists, and water districts. In mid-January, the Louisiana Sabine River Authority decided to suspend the sale of water from the Toledo Bend Reservoir to investors. While there will be no out of state water sales in the near future, the issue will likely come up again.

Sources: Forrest Wilder, *Red McCombs Tries His Hand at Water Marketing (and fails)*, Texas Observer, (01/12/2012). Available at: <http://www.texasobserver.org/forrestforthetrees/red-mccombs-tries-his-hand-at-water-marketing>; Theresa Schmidt, *Concerns Raised over Toledo Bend Water Sales to Texas*, KPLC News, (01/03/2012). Available at: <http://www.kplctv.com/story/16435687/concerns-over-proposed-toledo-bend-water-sales-to-texas>; Theresa Schmidt, *Water Sales Issue Likely to Resurface in the Future*, KPLC News, (01/13/2012). Available at: <http://www.kplctv.com/story/16518879/water-sales-issue-likely-to-resurface-down-the-road>

Army Corps of Engineers, Operation Watershed

The Army Corps of Engineers is preparing for the possibility of flooding this spring by planning to make \$802 million in repairs to the levee system. Dropping water levels in the Mississippi and Atchafalaya rivers will end the construction restrictions near the Mississippi River levee, allowing repairs to begin in the Mississippi River and Tributaries (MR&T) project. Phase 1 of the repairs began in December 2011. The money stems from a recently approved Disaster Relief Appropriations Act. Work is underway or completed at Morganza Control Structure, Baton Rouge Front (downtown Baton Rouge), Chalmette and Duncan Point (near

LSU in Baton Rouge), and in the Third District revetment work (downtown New Orleans).

Sources:

Matt Scallan, *Army Corps of Engineers gets Busy on Flood Projects as River Levels Drop*, The Times-Picayune, (01/16/2012). Available at: http://www.nola.com/environment/index.ssf/2012/01/army_corps_of_engineers_gets_b.html; *Mississippi Valley Diversion Prepares for 2012 Flood Season*, (Release Date: 01/09/2012). Available at: <http://www.mvn.usace.army.mil/news/view.asp?ID=541>

Legislation:

Disaster Relief Appropriations Act (Public Law No. 112-77)

This Act was signed into law on December 31, 2011. It makes available funding to FEMA and the Army Corps of Engineers for major disasters declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

The Act dedicates \$802,000,000 to the Army Corps of Engineers for necessary expenses for repair of damages to Federal projects in the “Mississippi River and Tributaries” area resulting from a major disaster. The Act also provides an additional \$534,000,000 (to remain available until expended) for ‘Operation and Maintenance’ for necessary expenses to dredge navigation channels in response to, and repair damage to Corps projects resulting from, a major disaster. An additional \$388,000,000 is provided for ‘Flood Control and Coastal Emergencies’ as authorized by Section 5 of the Act of August 18, 1941, for necessary expenses to prepare for flood, hurricane, and other natural disasters and support emergency operations, repair, and other activities as authorized by law in response to a major disaster.

In order for these funds to be used, a disaster must be declared according to the Stafford Act and Congress must designate specific funds as being for disaster relief. Additionally, the Assistant Secretary of the Army for Civil Works must submit to the Committees on Appropriations a monthly report detailing the allocation and obligation of these funds.

Source: Disaster Relief Appropriations Act, 2012, PL 112-77, December 23, 2011, 125 stat 1277. Available at: <http://www.govtrack.us/congress/billtext.xpd?bill=h112-3672>

RESTORE Provision Excluded from Recently Passed Transportation Bill

Congress approved a version of the transportation bill that did not include a provision that would have guaranteed Gulf States a large percentage of the BP oil spill money. Previous versions of the bill included a provision known as the RESTORE Act which would have guaranteed 80% of the fines collected from the

April 2010 BP oil spill to five Gulf states. Without this provision, the fines collected will go to the U.S. Treasury.

Sources: Jordan Blum, *Bill OK'd without RESTORE provision*, The Advocate, (03/31/2012). Available at: <http://theadvocate.com/news/2446790-123/bill-okd-without-restore-provision>

Cases:

BP Spill Settlement

An agreement was reached to settle health and economic damage claims by individuals and businesses who were harmed by the Gulf of Mexico oil spill. The deal is divided into two class actions, one covering economic loss claims and the other covering medical claims. Anyone who fits the class profile, even those who had never filed with the GCCF or the court, will automatically be included. Those who do not wish to participate must opt out.

BP and plaintiff attorneys say the court-supervised claims process will begin immediately. The settlement is uncapped, meaning there is no limit on how much money is available to pay damages. BP estimates that the deal will cost about \$7.8 billion. Plaintiffs claim the new process will be more transparent than the Gulf Coast Claims Facility. Award calculations will be made under formulas approved by the court. Persons who have made applications to the GCCF will not need to reapply, as all data will be transferred to the new administrators. Anyone who has received a final offer from GCCF will receive 60% of the offer immediately, with the remainder of the claim put into the court-supervised settlement program. However, people who have already received full payment from the GCCF are not eligible for the settlement. Attorneys for BP and plaintiffs are basically working from an agreement in principle and need to fill in details and file a proposed settlement agreement with the court within 45 days.

The settlement does not include federal, state, and local governments. Additionally, BP has assigned the rights to its suits against rig owner Transocean and cement contractor Halliburton to the plaintiffs' committee. These disputes may be subject to a new trial or new settlement negotiations.

Source: Rebecca Mowbray, *BP spill settlement promises fast payouts*, The Times-Picayune, (03/04/2012). Available at: http://www.nola.com/news/gulf-oil-spill/index.ssf/2012/03/bp_spill_settlement_promises_f.html

BP is Seeking Recovery of all Gulf Spill Costs from Halliburton

BP is seeking the amount of costs and expenses incurred by BP to clean up and remediate the oil spill, the lost profits from and/or diminution in value of the Macondo prospect, and all other costs and damages incurred by BP related to the Deepwater Horizon incident and resulting oil spill. BP filed their original complaint with the US District Court for the Southern District of Texas, Houston Division in

April of 2011. In response to the suit, Halliburton argues that its cementing-services contract requires BP to indemnify it from all damage claims, even if its employees were found to have shared blame for the disaster.

Sources: Laurel Brubaker Calkins, *BP seeks recovery of all Gulf spill costs from Halliburton*, The Washington Post, (01/01/2012). Available at: http://www.washingtonpost.com/business/bp-seeks-recovery-of-all-gulf-spill-costs-from-halliburton/2012/01/03/gIQALRq9XP_story.html; <http://www.scribd.com/doc/53582431/BP-v-HALLIBURTON-1-PLAINTIFF-S-ORIGINAL-COMPLAINT-535654401>

Gulf Spill Oil Companies Face Liability Apart from Settlement

Under two federal laws, BP and other responsible parties may face liability for approximately \$20 billion for damage and expenses. Under the Clean Water Act, the companies involved in the spill could face fines of \$17.6 billion, with an additional \$5 billion in charges if the companies are found to have been grossly negligent. Parties may also face liability under the Oil Pollution Act of 1990. This law would require responsible companies to pay for projects that would offset damages to natural resources and the public's use of those resources. Responsible parties could face liability of \$5 billion dollars or more.

In addition, the companies involved in developing the Macondo well could be subject to fines under the Migratory Bird Treaty Act, the Endangered Species Act, and the Marine Mammal Protection Act. Those companies found liable also face criminal penalties if charges are filed against BP, its officers, or any other companies associated with the spill. A criminal investigation by the Justice Department began in June 2010.

Sources: Mark Schleifstein, *Gulf oil spill companies face other liability apart from settlement*, The Times-Picayune, (03/05/2012). Available at: http://www.nola.com/news/gulf-oil-spill/index.ssf/2012/03/gulf_oil_spill_companies_face.html

Federal Appeals Court Upholds Ruling that Army Corps of Engineers is Liable for Property Owners' Claims

A federal appeals court on March 2 upheld a judge's ruling that the Army Corps of Engineers is liable for property owners' claims. The court found that shoddy work on a shipping channel caused billions of dollars in damage from Hurricane Katrina's storm surge.

A three-judge panel from the United States Fifth Circuit Court of Appeals ruled that the federal government is not entitled to immunity from lawsuits blaming Katrina's flood damage on the Corps' operation and maintenance of the Mississippi River-Gulf Outlet. The court found that the Corps shoddy work on the shipping channel caused billions of dollars in damage from Hurricane Katrina's storm surge.

Source: Michael Kunzelman, *Appeals court upholds Katrina flood ruling*, The Huffington Post, (03/02/2012). Available at: <http://www.huffingtonpost.com/huffwires/20120302/us-katrina-flood-lawsuit/>; Associated Press, *Appeals court: Corps liable for MRGO flooding during Katrina*, (03/02/2012). Available at: <http://www.houmatoday.com/article/20120302/WIRE/120309888>