

LOUISIANA COASTAL LAW

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Legal Implications of the Deepwater Horizon Disaster

By Melissa Daigle

On April 20, 2010, the drilling rig Deepwater Horizon exploded while finishing an oil well located on the Mississippi Canyon Block 252, often referred to as the Macondo Prospect. Two days later the rig sank, damaging the riser pipe. With the riser pipe broken and other safety equipment not functioning, so began what has become the largest oil spill in U.S. history. At the time of publication, British Petroleum (BP) has still been unable to stop the flow of oil from the well. States and individuals have begun and will continue to see untold amounts of damages to property and natural resources, and currently over 200 lawsuits have been filed. This article takes a brief look at the Oil Pollution Act and its state counterpart, the Louisiana Oil Spill Prevention and Response Act. It also discusses the process for the Natural Resource Damage Assessment. Finally, it discusses attorney solicitation of new clients.

Oil Pollution Act (OPA)

The spill response to the 1989 Exxon Valdez oil spill was initially an uncoordinated effort between the tanker owner, federal, state, and local officials, and private citizens. There was no organized federal response. This allowed the spill to spread further than it would have had there been an organized spill response effort. There was also no federal provision for payment of damages to public natural resources, lost income to fishermen, increased local government costs and lost tax revenue, except by suing under common law actions. The Oil Pollution Act (OPA), passed by Congress in 1990, corrected some of these deficiencies in federal law.

Under OPA, the party responsible for a spill from a vessel or offshore or onshore facility must respond immediately to contain the oil spill and contact the United States Coast

Guard. The Coast Guard activates the spill response and damage prevention and assessment capabilities of federal, state, and local agencies pursuant to the National Oil Spill and Hazardous Substance Contingency Plan (NCP).

Damages and Costs Covered under OPA

OPA provides for categories of damages and costs that can be recovered against the responsible party by individuals, businesses and governmental bodies.

The damages/costs recoverable by governmental bodies include:

- Removal costs incurred by the United States, a State, or an Indian tribe.
- Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage. This is recoverable by trustees of the United States, the State, an Indian tribe, or a foreign government.
- Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources. This is recoverable by the United States, a State, or a political subdivision.
- Damages for net costs of providing increased or

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additional public services during or after the removal activities, including protection from fire, safety, or health hazards, caused by the discharge of oil. This is recoverable by a State or political subdivision.

The damages/costs recoverable by any claimant, including individuals, businesses, and governmental bodies include:

- Removal costs incurred by a person for acts taken that are consistent with the National Contingency Plan.
- Damages for injury to, or economic losses resulting from destruction of, real or personal property. These damages are recoverable by any claimant who owns or leases that property.
- Damages for loss of subsistence use of natural resources. These are recoverable by any claimant who uses natural resources that have been injured, destroyed, or lost, without regard to ownership or management of the resources.
- Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources.

Limits to Liability

OPA limits the liability of the responsible party.¹ For an offshore facility, the responsible party's liability will be limited to the total of all removal costs plus \$75 million in other damages. Therefore, the damage claims listed above against the responsible party are capped at \$75 million total for all claimants, over and above the removal costs.

The limitation on liability will not apply if the incident that resulted in the spill was proximately caused by either: 1) gross negligence or willful misconduct of the responsible party or 2) the violation of an applicable federal safety, construction, or operating regulation by the responsible party. This extends to agents or employees of the responsible party and people acting pursuant to a contractual relationship with the responsible party.

The Oil Spill Liability Trust Fund & Claims for Damages

OPA created the Oil Spill Liability Trust Fund (Fund), which provides money for federal and state governments to respond quickly to spills, generally with the assistance of the party responsible for the spill.² OPA describes expenses for which the Fund can be used: removal costs, costs related to the assessment of natural resource damages, and costs for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of equivalent damaged natural resources. It also allows for the recovery of uncompensated damages.³ This includes damages that can be claimed by an individual under OPA.

Under the procedure for filing a claim against the Fund, the claimant usually must first present his/her claim to the

responsible party.⁴ However, there are limited circumstances under which the claimant can present the claim directly to the Fund, including:

- If the President has advertised or otherwise notified claimants to present claims to the Fund because the responsible party and the guarantor both deny liability, the source of the discharge was a public vessel, or it is impossible to determine the source of the discharge,
- If the claim is being presented by the responsible party where the responsible party is entitled to a defense to liability or the responsible party is entitled to a limitation of liability,
- If the claim is being presented by the Governor of a state for removal costs incurred by that state, or
- If the claim is being presented against a foreign offshore unit.

It is important to remember that if these limited circumstances do not exist, claimants must file their claim with the responsible party first, and the responsible party then has 90 days to pay the claim. The responsible party or its guarantor is liable to the claimant for interest on removal and damages claims.⁵ Interest will begin to accumulate on the 30th day after the date on which the claim is presented to the responsible party or guarantor and will end on the date the claim is paid, with three exceptions. First, if the responsible party offers the claimant an amount equal to or greater than that finally paid in satisfaction of the claim, interest will not accumulate from the day the offer is made until the day the offer is accepted. Second, if the offer is made within 60 days after the claim is presented, interest will not start to accrue until after the offer is accepted. Third, if a claimant is not paid due to reasons beyond the control of the responsible party or because it would not serve the interest of justice, interest will not accrue. Most importantly, interest is in addition to damages and removal costs and must be paid regardless of any limitation of liability that may apply. Therefore, in the case of offshore facilities where liability is limited to \$75 million, any interest on removal costs or damages does not count toward the \$75 million cap.

If the claimant files a claim with the responsible party, and the responsible party either denies liability or does not settle the claim by payment within 90 days after the claim

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was presented, the claimant may either commence an action in court against the responsible party or present the claim to the Fund. However, a claim against the Fund will not be approved or certified for payment if there is litigation pending in court to recover the same costs from the responsible party.⁶ In this circumstance, it may be better to file the claim directly with the Fund rather than taking the responsible party to court; a claimant may want to discuss his options with an attorney.

The claims procedure for the Fund was enacted by the United States Coast Guard in 1992.⁷ Each claim must be in writing and contain, along with other information:

- A general description of the nature and extent of the impact of the incident,
- The costs associated with removal actions and damages claimed,
- An explanation of how and when the removal costs or damages were caused by, or resulted from, an incident,
- Evidence to support the claim, including photographs, reports from witnesses, and invoices and receipts,
- A description of the actions taken by the claimant, or a person on the claimant's behalf, to avoid or minimize removal costs or damages,
- The name and address of any witnesses, and a brief description of the claim, and
- A copy of written communications and a description of verbal communications, if any, between the claimant and the responsible party.⁸

If the responsible party has not paid damages up to the \$75 million cap, or if the cap does not apply because of factors discussed above, and another person, including the Fund, pays compensation, the person who paid compensation is subrogated to all rights, claims, and causes of action that the claimant has under any law.⁹ In other words, the Fund can sue the responsible party for reimbursement for payments made up to the cap on damages, or if the cap is removed, for payments made for all damages paid. The U.S. Attorney General has the authority to commence action on behalf of the Fund to recover any compensation from the responsible party paid by the Fund¹⁰

Claims can be filed with BP by calling 1-800-440-0858 or filing a claim online at www.bp.com/claims. A claimant may also visit one of the claim centers; however BP recommends that claimants first get their claim number by filing online or by telephone. If the claimant is not satisfied with BP's resolution, he can contact the National Pollution Fund Center to file a claim against the Fund at 1-800-280-7118. It is not necessary that a claimant hire a lawyer to file a claim. According to BP's website, BP will treat claimants represented by an attorney the same as claimants without one. Once a claimant has an attorney, BP will only deal with the attorney. If a claimant and his attorney prefer that the claimant

deal with BP or its adjusters directly, the attorney must consent in writing.

Time Limitations

Under OPA, an action for damages against the responsible party must be brought in a court of proper jurisdiction within 3 years after either: 1) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable or 2) in the case of natural resource damages, the date of completion of the natural resources damage assessment. An action for removal costs must be brought within 3 years after the completion of the removal action.¹¹

If the claimant is filing a claim against the Fund, a claim for damages must be presented within three years of either: 1) the date on which the injury and its connection with the incident in question were reasonably discoverable or 2) in the case of natural resource damages, within three years of the completion of the natural resource damage assessment. For removal costs, the claim must be presented within six years after the date of completion of all removal actions for the incident.¹² Please note, however, that if you choose to file a lawsuit under Louisiana tort law, you have only one year from the day the injury or damage occurs.¹³ In the case of a continuous tort, prescription does not begin until the conduct causing the damage is stopped. This will likely play an important role in this case, as the well in question has been leaking for over two months, with no end in sight. Please remember, however, that participating in any lawsuit against BP will likely prevent the claimant from receiving immediate or short-term compensation from BP.

Financial Limitations of Fund

There are some limits to access to the Fund. The President may make up to \$250,000 from the Fund available to states for the immediate removal of a discharge of oil or the mitigation or prevention of a substantial threat of an oil discharge.¹⁴ Federal law limits the maximum that may be paid out of the Fund per incident to \$1 billion. Claims are processed in the order in which they are received. Natural resource damage assessment and related claims from a single incident are limited to \$500 million. Another significant limitation is that the Fund must maintain a balance of \$30 million. Therefore, a payment cannot be made from the Fund if the balance in the Fund after payment would be less than \$30 million unless the payment is for removal costs.¹⁵

If a person files a claim with the Fund, he cannot file a lawsuit later against any party to recover costs or damages for which he was already compensated. If he does receive payment from another source, such as insurance, he must reimburse the Fund.

Louisiana Oil Spill Prevention and Response Act (LOSPRA)

OPA directly addresses how it impacts other laws.¹⁶ There is nothing in OPA that affects the authority of a state to establish or maintain an additional fund to pay for costs or damages arising out of, or directly resulting from, oil pollution or the threat of oil pollution, and nothing in OPA prevents a state from requiring any person to contribute to such a fund. Additionally, there is nothing in OPA that affects the authority of the United States, a state, or a political subdivision from imposing additional liability or additional requirements or imposing any fine or penalty for any violation of law.

LOSPRA establishes the Louisiana Oil Spill Coordinator's Office (LOSCO) in the Department of Public Safety, under the State Police. LOSPRA names LOSCO, the State Police and Louisiana Department of Environmental Quality (DEQ) as the primary state responders for oil spills. The State can recover oil spill prevention and response costs, and, as provided in OPA, recover loss of state public natural resources damages and loss of ecological services from the responsible party, through various state trustees. LOSPRA does not, however, authorize private causes of action or increase the \$75 million dollar cap on the responsible party's liability.

Recovery of Public Natural Resources by the Federal and State Governments

Both OPA and LOSPRA provide for recovery of federal and state natural resources damages and loss of ecological services through the use of the Natural Resource Damage Assessment (NRDA) process. Federal and state agencies will work as a team on the Deepwater Horizon spill NRDA with the responsible party.

The goal of the NRDA and subsequent restoration is to make whole the public trust resources and the public's loss of the use of those resources that are damaged or impaired following a discharge of oil. According to LOSPRA, "natural resources" include all land, fish, shellfish, fowl, wildlife, biota, vegetation, air, water, groundwater supplies, and other similar resources owned, managed, held in trust, regulated, or otherwise controlled by the state.¹⁷ NRDA's goal is achieved by returning injured natural resources to their pre-spill condition and providing compensation to the public for the loss of use from the time of the spill through the recovery period. Recovery can be achieved by restoration, rehabilitation, or replacement of the damaged resources or acquisition of equivalent resources and /or services. The measure of the natural resource damages includes the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resource; the diminution in value of those natural resources pending restoration; plus the reasonable costs of assessing those damages.¹⁸ Under LOSPRA, the responsible party must make

full payment or initiate its own restoration, rehabilitation, replacement, or mitigation of damages to natural resources.¹⁹ The money received by the trustees under OPA are held in revolving trust accounts and can be used only to reimburse or pay costs incurred by the trustee for restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resource. Any monies remaining after all costs are paid are to be deposited into the Fund.²⁰

The main federal natural resource agencies involved are the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service, which is part of the U.S. Department of Interior. The state natural resource agencies involved are the Louisiana Department of Wildlife and Fisheries, the Department of Natural Resources, and the Department of Environmental Quality. LOSCO coordinates and participates with these agencies' NRDA activities and serves as the lead administrative trustee for the joint federal-state NRDA. LOSPRA provides that the Louisiana oil spill coordinator in conjunction with the trustees shall develop an inventory that identifies and catalogs the physical locations, the seasonal variations in location, and the current condition of natural resources; provides for data collection related to coastal processes, abandoned pits, facilities, sumps, reservoirs, and oil spills; and identifies the recreational and commercial use areas that are most likely to suffer from an unauthorized discharge of oil.²¹

The NRDA process will normally be conducted in three phases: pre-assessment, restoration planning, and restoration implementation.

Pre-assessment

Pre-assessment of damages resulting from a discharge of oil will provide information necessary for trustees to determine whether or not to pursue damage assessment and restoration. The first step in the pre-assessment process is to ensure that jurisdiction exists to pursue restoration under OPA. In order to proceed, the trustees have to verify that:

- An incident occurred,
- The incident is not permitted under a permit issued under federal, state, or local law; or from a public vessel; or from an onshore facility subject to the Trans-Alaska Pipeline Authority Act, and
- Natural resources that the trustee has authority over may have been, or may be, injured as a result of the incident.²²

All three conditions listed above must be met to proceed with the assessment.²³ If all three are met, the trustees must next determine if injuries have or are likely to result from the incident, if response actions have not adequately addressed or are not expected to address the injuries resulting from the incident, and if feasible primary and/or compensatory restoration actions exist to address the potential injuries.²⁴

Pre-assessment may include an initial evaluation of the extent of injury, including preliminary data collection and analysis, and the development of a damage assessment plan. If the decision is made to move to Phase 2, a Notice of Intent to conduct restoration planning will be published in the Louisiana Register as public notice. If all conditions are met except for the last one, the trustees may recover all reasonable costs incurred up to this point in the process.²⁵

Restoration Planning

Restoration planning is done in order to determine the injuries or losses, the extent and timeframe of losses, what should be restored, available methods for restoration, and the appropriate extent of restoration. The first step in making a determination of the injury is to determine if an injury has occurred.²⁶ Evidence of injury includes, but is not limited to, adverse changes in: survival, growth, and reproduction; health, physiology, and biological condition; behavior; community composition; ecological processes and function; physical and chemical habitat quality or structure; and public services. The second step is to determine 1) that an injured natural resource has been exposed to oil, and a pathway can be established from the discharge to the exposed natural resource or 2) that an injured natural resource or impairment of a natural resource service has occurred as a result of response actions to a substantial threat of a discharge of oil.²⁷ Evidence of a pathway includes, but is not limited to, the sequence of events by which the discharged oil was transported from the incident and either came into direct physical contact with a natural resource, or caused an indirect injury. Oil can be identified as coming from a specific well by examining its chemical signature.

Additionally, the trustees must determine the degree and spatial and temporal extent of the injuries relative to a baseline established prior to the injury.²⁸ The trustees may quantify the injuries in terms of: 1) the degree and spatial and temporal extent of the injury to a natural resource; 2) the degree and spatial and temporal extent of injury to a natural resource, with subsequent translation of that adverse change to a reduction in services provided by the natural resource; or 3) the amount of services lost as a result of the incident. Trustees must also estimate the time for natural recovery without restoration, but including any response actions.²⁹

Trustees must consider a reasonable range of restoration alternatives before selecting the preferred alternative.³⁰ Each alternative must contain primary and/or compensatory restoration components that, as a package, make the environment and the public whole. Alternatives must be considered technically feasible and in accordance with applicable laws, regulations, or permits.³¹ Evaluation of the alternatives include examining issues such as the costs, the extent to which each is to meet the goals and objectives in restoration and/or compensation, the likelihood of success, and the effect of each on public health and safety.³²

Two documents will be published for public comment during this phase: the Draft Restoration Plan and the Final Damage Assessment and Restoration Plan (DARP), which will specify the value given to the natural resource damages incurred and specify the project or projects the responsible party will perform to make the public whole. The Draft Restoration Plan should include, along with other factors, a summary of injury assessment procedures used; a description of the nature, degree, and spatial and temporal extent of injuries resulting from the incident; the goals and objectives of restoration; the range of restoration alternatives considered; and an identification of the trustees' tentative preferred alternative.³³ The Final Restoration Plan will include all the information from the Draft Restoration Plan and response to public comments and an indication of changes made, if applicable.³⁴

Restoration Implementation

The goal of restoration is to make the environment and the public whole following an injury or loss of natural resources and associated services as a result of a discharge of oil. In order to accomplish this, the trustees will implement restoration activities designed to restore injured resources to their pre-spill or baseline, condition, and seek compensation for the loss of injured resources or services. Litigation or negotiation with the responsible party may be pursued to fund these activities and compensate for lost use.

If the parties reach agreement, the final DARP and the Restoration Implantation Plan (RIP) will be included in a Consent Agreement that will be filed with the Federal District Court in New Orleans. After a 30-day public comment period, the court will issue a Consent Decree and the DARP and RIP will be implemented. The court retains jurisdiction over implementation of the Consent Decree.

Attorney Solicitation

In the wake of the Deepwater Horizon explosion and the ongoing release of oil into the Gulf of Mexico, some law firms have begun aggressive advertising campaigns. There are rules that govern how lawyers may solicit business.³⁵ Lawyers may send unsolicited written communication, via mail or email, as long as the communications contains their names and are marked as "Advertisement." For emails, the subject line must state "Legal Advertisement."

A lawyer may also advertise through public media, including ads in newspapers or other periodicals, billboards, and radio or television communications. All advertisements and unsolicited written communications must include the name of at least one lawyer responsible for the content and the location of at least one office of the lawyer(s) who will actually perform the services advertised. Lawyers are not allowed to make or permit to be made false, misleading, or deceptive communication about the lawyer, the lawyer's services, or

the law firm's services. This includes promising results. The Louisiana Bar offers lawyer referral and information, as well as an online directory. More information can be found at www.lsba.org.

Claims from Exxon Valdez

Finally, it is important to remember what happened in the case of the Exxon Valdez spill. While the jury awarded \$2.5 billion in punitive damages to injured parties, the U.S. Supreme Court reduced the verdict to \$507.5 million. Exxon did not begin writing checks until November 2009, 20 years after the spill, and when the funds were divided between the plaintiffs, some received as little as \$100 in damages. OPA was intended to provide a more certain method of compensation to injured parties, but it did not change the litigation process or remove uncertainties under that process. This is important to keep in mind when deciding whether or not to file suit or make a claim against the Fund for damages covered by OPA.

(Endnotes)

- 1 33 USC 2704.
- 2 The Fund is created in the Internal Revenue Code, which can be found at 26 USC 9509.
- 3 33 USC 2712.
- 4 33 USC 2713.
- 5 33 USC 2705
- 6 33 CFR 136.103.
- 7 33 CFR 136.
- 8 33 CFR 136.105.
- 9 33 USC 2715.
- 10 *Id.*
- 11 33 USC 2717.
- 12 33 CFR 136.101.
- 13 La. C.C. 3492.
- 14 33 USC 2712.
- 15 26 USC 9509.
- 16 33 USC 2718.
- 17 La. R.S. 30:2454.
- 18 33 USC 2706(d).
- 19 La. R.S. 30:2480.
- 20 33 USC 2706(f).

- 21 La. R.S. 30:2480.
- 22 15 CFR 990.41.
- 23 *Id.*
- 24 15 CFR 990.42.
- 25 15 CFR 990.41.
- 26 15 CFR 990.51, 15 CFR 990.30.
- 27 15 CFR 990.51.
- 28 15 CFR 990.52.
- 29 *Id.*
- 30 15 CFR 990.53.
- 31 *Id.*
- 32 15 CFR 990.54.
- 33 15 CFR 990.55.
- 34 *Id.*
- 35 Louisiana Rules of Professional Conduct



Resolution 60: The Coastal Zone Conundrum

By Seth Bagwell

Where exactly is the coast? With so much attention given to the coast today, it is a legitimate question - one Louisiana's Senate has specifically assigned to the Coastal Protection and Restoration Authority (CPRA). Senate Concurrent Resolution 60 of the 2009 regular session of the Louisiana Legislature requested CPRA to conduct a

“science based study of the adequacy of the current inland boundary of the coastal zone of Louisiana to meet the state's current and future needs to manage, protect and restore its coastal resources.”¹

The resolution recognized what an important role coastal zone management plays in protecting Louisiana's wetlands and the significant cost savings achieved by protecting wetlands as opposed to restoring them once they are lost.² However, important changes - including deterioration of Louisiana's coast, numerous hurricanes, more accurate data concerning climate change and sea level rise, improved understanding of storm patterns, and increased funding for coastal restoration projects - spurred the Senate to investigate whether or not the coastal zone boundary fulfills the State's coastal zone management needs.³ Coastal zone management is a program that allows the State to regulate the manner in which activities are conducted in Louisiana's fragile coastal ecosystem.⁴ The coastal zone boundary determines the geographic extent of this regulatory area.⁵ Furthermore, the placement of the boundary has significant funding implications for parishes near the coast. These considerations add to the importance of conducting the Resolution 60 study.

The coastal zone boundary is best understood within the context of Louisiana's coastal zone management program. As part of this study, CPRA was to consider the legal framework of the coastal zone management program, important economic activities, and scientific information, such as salinity, storm surge, and types of wetlands.⁶ Furthermore, the Senate requested that CPRA suggest changes to the location of the boundary and the laws, rules, and policies of the coastal zone management program, as necessary.⁷

Louisiana's Coastal Zone Management Program

With the Coastal Zone Management Act of 1972 (CZMA), Congress gave coastal states the incentive and framework to establish coastal zone management programs.⁸ Congress stated that it is national policy to protect and restore

the Nation's coastal zone, to protect flood-prone areas from loss of life and property damage, and to manage coastal development.⁹ Rather than attempt to achieve these goals through a federal program, Congress passed the CZMA to encourage individual states to create their own programs that would achieve the enumerated goals.¹⁰

In response to the CZMA, Louisiana passed the State and Local Coastal Resources Management Act (SLCRMA) of 1978.¹¹ This act established the Louisiana coastal zone management program in accordance with the requirements of the CZMA. Its goal is to “protect, develop, and where feasible, restore or enhance the resources of the state's coastal zone.”¹² Louisiana's coastal zone program is run by the Department of Natural Resources (DNR) Office of Coastal Management (OCM).¹³ The program is designed to regulate “any use or activity within the coastal zone which has a direct and significant impact on coastal waters.”¹⁴ The two main tools used for regulation are coastal use permitting and consistency determinations.

Coastal use permits are used to ensure that activities affecting the coastal zone are performed in such a way as to minimize their impact on natural resources within the coastal zone.¹⁵ Proponents of such activities are required to fill out a permit application in which detailed information about the project must be given; examples of such information include the type of activities to be conducted, the exact location of the project site, the materials and equipment to be used, and the efforts that will be made to minimize impacts on wetlands.¹⁶ The application is then reviewed by OCM to determine the potential effects the project will have and whether it will be conducted in accordance with coastal use guidelines.¹⁷ This process enables OCM to prevent activities *within* the coastal zone from destroying Louisiana's coast.

However, some actions *outside* the coastal zone are also subject to regulation via the State's *consistency* powers. Under federal and state law, governmental actions occurring anywhere in the state that will directly affect the coastal zone must be consistent with Louisiana's coastal zone management program.¹⁸ This includes direct undertakings and supportive actions by federal, state or local governments, both inside and outside of Louisiana's coastal zone.¹⁹ Thus, a *private* entity seeking a Clean Waters Act section 404 permit from the Army Corps of Engineers (Corps) to dredge waters outside the coastal zone would be subject to consistency review if the dredging would directly affect the coastal zone.²⁰ Should DNR find the project is inconsistent with Louisiana's coastal zone management program, the Corps would have to coordinate with, and adopt the recommendations of, DNR before issuing the 404 permit.²¹

Funding Issues

The coastal zone boundary not only brings with it the regulatory measures discussed above but also access to additional funding sources for coastal restoration and protection projects. Because of this, some people are concerned that an expansion of the coastal zone boundary area may stretch those funds too thinly.

For instance, Louisiana's coastal zone management program is funded in large part by an annual federal grant from the National Oceanic and Atmospheric Administration (NOAA).²² This money must be matched by the State dollar for dollar; fees related to permitting and consistency determinations, as well as money from a Coastal Resources Trust Fund, are used to match the NOAA grant.²³ Approximately seventy-five percent of the grant money goes towards administering coastal use permitting and consistency determinations.²⁴ An expanded coastal zone boundary could mean an increase in coastal use permitting costs as more area would be subject to permitting regulation. The other twenty-five percent of the grant money goes towards funding *local* coastal management programs;²⁵ these local programs handle some of the coastal zone permitting duties at the parish level and are funded on a "matching fund basis" between DNR and the parish.²⁶ If parishes are added to the coastal zone through expansion of the boundary, they could seek to establish their own local coastal management programs, but DNR may be unable to help fund those new programs with the limited grant money it receives from NOAA.²⁷

However, there are a few possible solutions. For instance, the amount of NOAA grant money a state receives to run its coastal zone management program is determined based on a formula that considers population and length of coastline, capped at two million dollars.²⁸ Louisiana already receives the maximum amount of grant money allowed.²⁹ Therefore, one solution to the funding problem is having Congress increase or remove the cap on funds; if it were removed, Louisiana would receive an increase in NOAA grant money based on the application of the formula.³⁰ Another solution is to statutorily provide that parishes included in the coastal zone as a result of an amendment to the boundary are not allowed to establish a local management program for a certain number of years. This would perhaps allow SLCRMA time to locate other sources of funding or cut costs in other areas in order to meet its share of establishing new local programs.

Grant money to run the coastal zone management program is not the only funding issue. There are programs that allocate money to parishes, or to projects in parishes, on the basis of being located within the coastal zone boundary. One of the most significant of these is the Gulf of Mexico Energy Security Act (GOMESA). GOMESA allocates a percentage of Outer Continental Shelf (OCS) offshore oil lease revenues to eligible states³¹ based on the proportion of OCS

revenues generated off the shores of the individual state.³² Some of this money goes not to the state itself but directly to "coastal political subdivision[s]" (parishes in Louisiana) that were included in the state's coastal zone as of December 20, 2006.³³ If Louisiana expands its coastal zone boundary to include more parishes, these additional parishes cannot receive GOMESA money *directly*, because they will not have been included in the coastal zone before the effective date. However, newly added parishes could receive GOMESA money *indirectly* from the State. The portion of the GOMESA funds that goes to the state can be applied to a number of limited uses, including "implementation of a federally-approved ... coastal ... management plan."³⁴ Therefore, the State could use GOMESA money in newly added parishes for establishing local coastal programs and implementing coastal use permitting even though those parishes were not eligible for GOMESA funds directly from the Act.

Different Coastal Zone Boundary Designations

The CZMA and other federal regulations establish minimum requirements for a state's coastal zone boundary but states retain considerable freedom in structuring their coastal zones. The CZMA requires that a state's coastal zone boundary extend "inland to the extent necessary to control the land and water uses that have a significant impact on coastal waters of the State;"³⁵ likewise, areas that are vulnerable to sea level rise should also be included.³⁶ Beyond these CZMA requirements, the Department of Commerce established slightly more detailed guidelines for coastal zone boundaries. It divides up the coastal zone boundary into four elements: the inland boundary, the seaward boundary, areas excluded from the boundary, and interstate boundaries.³⁷ Important for the purposes of this article are the regulations concerning the inland boundary. The inland boundary must include "special management areas," waters under saline influence, salt marshes, wetlands, beaches, intertidal areas, and islands.³⁸ As far as designation of the inland boundary is concerned, the regulations only require that the boundary be presented clearly enough to determine whether property or an activity is located within the coastal zone.³⁹ Other than these minimal requirements, a state is free to set up its coastal zone boundary any way it sees fit. From the thirty-four states that have established coastal zone management programs, several different methods of designating the coastal zone boundary have arisen.⁴⁰ The following examines some of these methods, including the one currently used by Louisiana. OCM can look at how other states have defined their coastal zone boundaries as a guide in reevaluating Louisiana's boundary.

Louisiana

Louisiana's coastal zone covers some 8.5 million acres and includes 19 parishes.⁴¹ The seaward boundary of the zone extends to the point where State waters meet Federal waters,

while the east and west (interstate) boundaries extend to the lines separating Mississippi and Texas from Louisiana.⁴² The inland boundary of the zone is described in great detail in La. R.S. 49:214.24. In the early stages of developing Louisiana's inland coastal zone boundary, a multi-agency research group used biophysical parameters (elevation, vegetation, salinity, animal ranges etc.) and legal/governmental considerations⁴³ to create a "best-fit delineation line" to designate the boundary.⁴⁴ Starting at Texas the inland boundary generally follows the Intracoastal Waterway then cuts through Vermillion, Iberia, and St. Mary parishes; it then dips further southward to include most of Terrebonne and Lafourche parishes, before turning upward to wrap around Lake Pontchartrain, ending at the Louisiana-Mississippi border.⁴⁵ Looking at a map of Louisiana's coastal zone reveals a peculiar path for the inland boundary near Morgan City as well as the "three fingers" area near Theriot, Dulac, and Chauvin.⁴⁶ These oddities emphasize the need for the scientific based reevaluation of the coastal zone boundary that the Senate asked for.⁴⁷

South Carolina

South Carolina's coastal zone boundary is substantially more sophisticated than Louisiana's. South Carolina's coastal zone includes all counties that contain "critical areas" such as coastal waters, tidelands, and beaches.⁴⁸ This led to the identification of eight coastal counties, with the inland boundary line following the county borders.⁴⁹ Within the counties is a two-tier system: 1. critical areas and 2. non-critical areas. Critical areas are subject to more direct scrutiny by South Carolina's Office of Coastal Resource Management (OCRM); the OCRM has "direct statutory authority... to deny or issue permits for activities in the critical areas."⁵⁰ In non-critical areas the OCRM has the power to review "permit applications to determine their consistency with the South Carolina Coastal Zone Management Program"; the OCRM also has power to issue for other permits such as storm water and sediment reduction permits.⁵¹

A statewide critical area line designates the critical area tier and is a fixed geographic line that generally follows major highways within the coastal counties.⁵² However, where the critical area meant to be protected is coastal waters or tidelands, the line must be depicted on a survey performed by a professional surveyor and reviewed by OCRM.⁵³ This line is set where the influence of salt water ends and expires after 5 years to take into account the changing nature of tidelands.⁵⁴

One of the very unique features of South Carolina's coastal zone management program is its "forty year retreat policy."⁵⁵ First, a baseline is set at the crest of the ocean front sand dunes. Then a setback line is established by determining the annual erosion rate for that area of beach and multiplying it by forty. The resulting number is the distance from the base line to the setback line. Very little new construction is allowed seaward of the baseline and new construction occurring

between the baseline and setback line is highly regulated.⁵⁶ Destruction of vegetation in the set-back area is prohibited unless "there is no feasible alternative," and any unavoidable destruction must be mitigated by planting new vegetation.⁵⁷ The base and setback lines are reset every eight to ten years to accommodate changes to the coast.⁵⁸ While an emphasis on beaches and sand dunes would probably not be proper for Louisiana, South Carolina's tiered structure and frequent updating of boundaries could prove useful to Louisiana.

Illinois

In January 2009, Illinois submitted a draft of its planned coastal zone management program to the Office of Coastal Resource Management (OCRM).⁵⁹ As proposed, Illinois' inland coastal zone boundary has two components. First, the "Lakeshore Boundary" generally applies a watershed approach in determining the extent of its coastal zone. That is, the coastal zone includes all "land area having surface water drainage to Lake Michigan"; this boundary generally parallels the shore of the lake.⁶⁰ The second component is the "Inland Waterway Boundary," which covers river systems that once flowed into Lake Michigan but that have since been redirected to flow away from the lake. The extent of this component of the boundary includes the waterway itself and designated land areas to either side of the river.⁶¹ It is said these river systems meet the federal requirements for inclusion in the coastal zone, as they have a direct and significant impact on coastal waters. However, it is not clearly explained how rivers that no longer flow to the Illinois coast have such an impact.⁶² Most of the coastal zone boundary is delineated by roads and highways, but where necessary other methods of designation, such as bridges, railroad right of ways, and municipal lines, are employed.⁶³ A watershed approach similar to that employed by Illinois could be effective in Louisiana, especially in the southeastern part of the state where the Mississippi River, Bayou Lafourche, and Atchafalaya River dominate the landscape and in the southwestern part of the state near the Sabine and Calcasieu rivers.

Alaska

Alaska's coastal zone boundary is by far the most detailed and scientifically based of all the states covered in this article.⁶⁴ To establish the coastal zone boundary, the State focused on the relationships between the marine and terrestrial environments. This included geophysical relationships such as water flow, saltwater intrusion, tidal action, erosion, storm surge and glacial activity. The biophysical relationships of fish, mammals, birds and plants to Alaska's coastal waters were also a major factor. Alaska determined that an impact on any of these relationships might be considered a "direct and significant impact on coastal waters" for the purposes of the federal requirements governing coastal zone management programs.⁶⁵ With this focus in mind, the State set about mapping these relationships, producing 65 maps with commentary.

This production, titled *Biophysical Boundaries of Alaska's Coastal Zone*, divided the coastal zone into two sub-zones.⁶⁶

First, the “zone of direct interaction” covers all areas where “physical and biological processes are a function of contact between land and sea.” Second, the “zone of direct influence” extends from the zone of direct interaction to all areas that are “closely affected and influenced by the close proximity between land and sea.”⁶⁷ These two sub-zones make up Alaska’s coastal zone. It appears to be completely scientifically based and does not take any political or municipality boundaries into account. Neither does it follow roads, highways, or other easily visible markers. This method probably suits Alaska well since much of the state is rural and undeveloped.⁶⁸

There exists a third zone, the “zone of indirect influence,” which is not considered part of the coastal zone; it extends from the zone of direct influence to “the limit of identifiable land/sea relationships.”⁶⁹ Although mainly used for informational purposes, the zone of indirect influence can be used as a factor in deciding where to conduct large scale operations (like mining) that, while not within the coastal zone, may have an effect on coastal waters.⁷⁰ Louisiana could use some of the factors Alaska considered in setting up its boundaries but may be better off “smoothing” the line so that it follows parish borders, roads, and other more easily identified markers; this could help make it easier to determine what areas are included and what areas are not included in the coastal zone.

Steps Taken

Upon receiving the Senate’s request to reevaluate the coastal zone, CPRA charged OCM with leading the study, since OCM is the agency in charge of administering Louisiana’s coastal zone management program.⁷¹ OCM retained the services of Shaw Environmental and Infrastructure, Inc.; Comite Resources, Inc.; and Louisiana Sea Grant Law and Policy Program to provide technical, scientific, and legal assistance. This cooperation produced a “draft report” that could be used to meet the goals of study.

As the methodology for the study, OCM wanted the coastal zone to encompass all areas subject to coastal processes and all uses which could potentially impact coastal waters.⁷² However, it recognized that different degrees of management would be appropriate depending on the area and use and thus chose a tiered or multi-zone approach for the proposed coastal zone boundary changes.⁷³ To determine where the different tiers might be located, the team examined a host of science-based factors, including geologic information, sea level rise data, elevation data, the ranges of particular animals and vegetation, storm surge data, salinity data and watershed information.⁷⁴ The team also considered socioeconomic

factors such as the size of ports, amount of oil production, and the economic impact of hunting and fishing.⁷⁵

These factors were used to develop certain questions; the State was then divided into 91,648 1-km² “grid cells” and the questions were applied to the cells through a computer program.⁷⁶ Depending on the answer to a particular question a cell would receive a value of either 1 or 0.⁷⁷ For instance, “If all or part of the km² area contained land with an elevation of 5 feet or lower, then the area received a value of 1.”⁷⁸ After all the questions were asked, the program tallied the values/points for each cell. If a cell scored 7-9 it was considered to be an area with a high level of coastal influence.⁷⁹ A score of 3-6 was designated as an area with moderate influence, while a score of 1-2 was considered an area of low influence. If an area scored 0, it was considered not to be subject to coastal influence at all under normal circumstances.⁸⁰ This data was then used to determine where the boundaries for different tiers of the coastal zone could be drawn.⁸¹ Several options were developed and included in the report.

Conclusion

So where is the coast? For now the coastal zone boundary will remain where it has been for almost 30 years, but with the Senate, CPRA, and DNR examining its adequacy, the coastal zone may be redefined in the near future. The location of Louisiana’s coastal zone boundary is critical in that it designates the area of regulation (coastal use permitting and consistency) for the coastal zone management program, an extremely valuable tool for protecting Louisiana’s fragile coastal ecosystem. To some extent, the designation of the coastal zone boundary also controls the amount of money going to areas within the coastal zone. Thankfully, OCM has done well in compiling the report by using a multitude of science-based factors to determine which areas of Louisiana require the most protection. While the report is still under review and legislation has not been proposed to amend the boundary, it seems the steps already taken could help to ensure that Louisiana’s coastal zone boundary is designated on the basis of science and not on the basis of politics if the political will exists to do it. In the fight to protect Louisiana’s coastal ecosystem from destruction, the State can ill afford to misuse a tool as powerful and effective as Louisiana’s coastal zone management program. More information about the study can be found online at <http://dnr.louisiana.gov/CRM/coastmtg/coastalzoneboundary/default.asp>.

(Endnotes)

- 1 2009 La. Sess. Law Serv. Sen. Conc. Res. 60 (West).
- 2 *Id.*

3 *Id.*

4 La. Rev. Stat. Ann. § 49:214.22 (2010).

5 *Id.* at § 49:214.23.

6 2009 La. Sess. Law Serv. Sen. Conc. Res. 60 (West).

7 *Id.*

8 Richard J. McLaughlin, Ray Stewart, & Louise Stewart, *The Coastal Zone Management Act and the Procedures it Created*, 4-23A Environmental Law Practice Guide § 23A.01, pg. 1.

9 16 U.S.C.S. § 1452 (LexisNexis 2010).

10 *Id.* at § 1452(2).

11 James G. Wilkins et. al., *Louisiana Coastal Hazard Mitigation Guidebook* 37 (2008).

12 La. Rev. Stat. Ann. § 49:214.22 (2010).

13 *Id.* at § 49:214.26.

14 *Id.* at § 49:214.24.

15 Louisiana Department of Natural Resources, Applying for a Coastal Use Permit, <http://dnr.louisiana.gov/crm/coastmgt/permitsmitigation/permitsmitigation.asp> (last updated Mar. 4, 2010).

16 Louisiana Department of Natural Resources, Permits/Mitigation Support Division, <http://dnr.louisiana.gov/crm/coastmgt/coastmgt.asp> [hereinafter *Permits/Mitigation Support Division*] (follow “Joint Permit Application” hyperlink) (last updated Jan. 27, 2010).

17 *Id.*

18 16 U.S.C.S. § 1456(c)(1)(A) (LexisNexis 2010); La. Rev. Stat. Ann. § 49:214.32(B)&(D) (2010).

19 La. Rev. Stat. Ann. § 49:214.32(B) & (D) (2010).

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22 Telephone Interview with Terry Howey, Coastal Resources Administrator, Office of Coastal Management, Louisiana Department of Natural Resources (Jan. 5, 2010); 16 U.S.C.S. § 1455 (LexisNexis 2010).

23 *Id.*; 16 U.S.C.S. § 1455(a)(1) (LexisNexis 2010).

24 Interview with Terry Howey, *supra* note 22.

25 *Id.*

26 *Id.*; La. Rev. Stat. Ann. § 49:214.28 (2010).

27 Interview with Terry Howey, *supra* note 22.

28 *Id.*; The Library of Congress: Thomas, Senate Report 106-412- Coastal Zone Management Act of 2000, http://www.thomas.gov/cgi-bin/cpquery/?&sid=cp1060mn5v&refer=&r_n=sr412.106&db_id=106&item=&sel=TOC_2696& [hereinafter *Senate Report*] (pg. 1 under *Backgrounds and Needs*) (last visited Mar. 29, 2010).

29 *Id.*; Interview with Terry Howey, *supra* note 22.

30 *Id.*

31 Alabama, Mississippi, Louisiana, and Texas.

32 43 C.F.R. § 219.410 (LexisNexis 2010).

33 *Id.* at § 219.411 & .413.

34 *Id.* at § 219.410.

35 16 U.S.C.S. § 1455(e)(1) (LexisNexis 2010).

36 *Id.* at § 1453(1).

37 15 C.F.R. § 923.30 (LexisNexis 2010).

38 *Id.* at § 923.31 (each of these terms is defined in the statute).

39 *Id.*

40 Office of Ocean and Coastal Resource Management, Coastal Programs: Partnering with States to Manage our Coastline, <http://coastalmanagement.noaa.gov/programs/czm.html> (last update Mar. 11, 2010).

41 Department of Natural Resources, About OCM, <http://dnr.louisiana.gov/crm/about.asp> (last update Mar. 3, 2010).

42 La. Rev. Stat. Ann. § 49:214.24 (2010).

43 i.e.: “navigable waters of the United States,” 100 year flood elevation line pursuant to the National Flood Insurance Act of 1968, federal law requirements under the Coastal Zone Management Act, and State law requirements on the specificity of the boundary.

44 William G. McIntire et. al., *Report No. 1, Coastal Zone Management Series: A Rationale for Determining Louisiana's Coastal Zone 2* (Center for Wetland Resources, Louisiana State University 1975).

45 La. Rev. Stat. Ann. § 49:214.24 (2010).

46 Department of Natural Resources, Coastal Zone Boundary Study (2009), <http://dnr.louisiana.gov/CRM/coast-mgt/coastalzoneboundary/default.asp> (follow "Defining Louisiana Coastal Zone" hyperlink) (last updated Dec. 16, 2009) slides 7-8.

47 *Id.*

48 National Ocean and Atmospheric Administration(NOAA), Ocean and Coastal Management in South Carolina, <http://coastalmanagement.noaa.gov/mystate/sc.html> (last updated Dec. 23, 2009).

49 *Id.*

50 *Id.*

51 *Id.*

52 Telephone Interview with Curtis Joyner, Planning Department, South Carolina Department of Health and Environmental Control (Sep. 22, 2009).

53 *Id.*; S.C. Code Ann. § 48-39-210 (2008).

54 S.C. Code Ann. § 48-39-210 (2008).

55 *Id.* at § 48-39-280.

56 South Carolina Department of Health and Environmental Control, Frequently Asked Questions- Beachfront Property, http://www.scdhec.gov/environment/ocrm/permit/faq_beach.htm#5 (last visited Apr. 1, 2010).

57 S.C. Code Ann. § 48-39-310 (2008).

58 Telephone Interview with Curtis Joyner, *supra* note

59 National Oceanic and Atmospheric Administration, Ocean and Coastal Management in Illinois, <http://coastalmanagement.noaa.gov/mystate/il.html> (last updated Feb. 24, 2009).

60 Department of Natural Resources, Illinois Coastal Management Program Document, <http://dnr.state.il.us/owr/cmp/documentation.htm>, Chapter 3 pg. 3, (2009).

61 *Id.*

62 *Id.*

63 *Id.* at 6.

64 State of Alaska Natural Resources Office of Project Management and Permitting, Handbook of Statutes and Regulations, <http://www.alaskacoast.state.ak.us/Clawhome/handbook/panels/A.htm>, [hereinafter *Handbook*] (follow "Tab A" hyperlink) (last updated Apr. 18, 2006) chap. 1 pg. 5-6.

65 *Id.* at chap. 2 pg. 9.

66 *Id.* at chap. 2 pg. 10.

67 *Id.*

68 Info Please, Alaska, <http://www.infoplease.com/ce6/us/A0803021.html> (last visited Apr. 1, 2010).

69 *Handbook, supra* note 64 at chap. 2 pg. 10.

70 *Id.*

71 Coastal Protection and Restoration Authority, *A Resolution Authorizing a Comprehensive Study and Evaluation of the Louisiana Coastal Zone Boundary*, June 29, 2009, pg. 3.

72 Department of Natural Resources, Coastal Zone Boundary Study (2009), <http://dnr.louisiana.gov/CRM/coast-mgt/coastalzoneboundary/default.asp> (follow "Status Report on the Re-evaluation of the Louisiana Coastal Zone Boundary" hyperlink) (last updated Dec. 16, 2009) slide 5.

73 *Id.*

74 Scientific Based Re-evaluation of the Current Louisiana Inland Coastal Zone Boundary (on file with author) pg. 16 & 28.

75 *Id.* at 32-33.

76 *Id.* at 34, 39-40.

77 *Id.*

78 *Id.* at 37.

79 *Id.* at 39.

80 *Id.*

81 *Id.* at 40.



The Redfish Bowfishing Exemption: What is It and Why Is It There?

By S. Beaux Jones

I. Introduction

Due to their aggressive appetites and the appetites of restaurant goers, Redfish¹ have become one of Louisiana's most prized natural resources. Redfish have an interesting lifecycle, and they can be found in a wide range of marine habitats. Mature Redfish spawn from mid-August through mid-October in high-current areas such as where rivers meet the Gulf of Mexico, after which the fish retreat to the deep waters of the Gulf. The eggs are carried by the tides to the inland marshes where the fish typically spend up to their first five years of life.² This means that fishermen in Louisiana can expect to find Redfish juveniles in the marsh, usually weighing between 1-10 lbs, and mature spawning Redfish weighing up to 50 lbs. in the open waters of the Gulf. Prior to 1977, recreational fishing for Redfish was unregulated, but today the regulations surrounding Redfish are numerous and controversial. This paper will examine the law surrounding the recreational fishing of Redfish, specifically focusing on the species' designation as a "game fish" and the laws concerning methods of taking.

II. Redfish Laws

A. Historical Regulation

The first laws governing the taking of Redfish appeared in Louisiana in 1977 and established a combined recreational fishing daily limit of fifty fish for Redfish and Speckled Trout.³ Additionally, individuals were limited to no more than two Redfish over 36 inches in length. In 1984, the possession limit was reduced to the daily limit,⁴ a new saltwater angling license was instituted, and the minimum recreational length was set at 14 inches. In 1988, the daily bag limit was reduced to five fish, with a minimum length of 16 inches, and only one fish over 27 inches could be kept.⁵

B. Redfish Laws Today

Today the size and bag limits for Redfish are similar to those in 1988. The daily limit is five fish per person, none of which may be less than 16 inches, and only one may be over 27 inches.⁶ Louisiana law sets the legal *take*, daily bag and possession limits for Redfish and defines "take" as the attempt or act of hooking, pursuing, netting, capturing, snaring, trapping, shooting, hunting, wounding, or killing by any means or device.⁷ Once off the water, an angler may be in possession of two times the daily bag limit (ten fish).⁸ The taking of Redfish in federal waters is prohibited. The most significant change in Louisiana law, has been the designation of Redfish as a "game fish."

C. Game Fish Designation

On October 20, 2007, President George W. Bush issued Executive Order 13449 (EO 13449) concerning the protection of Redfish. The stated policy was to conserve Redfish for the recreational, economic, and environmental benefit of present and future generations. EO 13449 encouraged Federal and State agencies to designate Redfish as a game fish and to conduct periodic reviews of the populations.

Following EO 13449, Louisiana passed Act 23 of 2008. Act 23 revised the definition of "game fish" and delineated what restrictions would apply to such fish. Prior to that, the "game fish" title in Louisiana law was merely a means of distinction between fish taken for "recreational purposes" and those taken for "commercial purposes." The definition previously read, "'Game Fish' means all species of freshwater and saltwater fish which are taken for recreational purposes, and which are taken with the aid or use of a line, reel, rod, and artificial or natural bait."⁹ Therefore, a Redfish was technically a game fish if an angler caught it for recreational purposes, even though it was not specifically defined as such.¹⁰ Act 23 of 2008 took the guesswork out of the law and specifically designated sailfish, five species of marlin, and Redfish as saltwater game fish.¹¹ This explicit designation apparently ensured Redfish an added level of protection through sale restrictions,¹² size limits,¹³ and methods of harvest.¹⁴ However, due to the revisions in the methods of harvest section (§320), the level of protection that has been realized is questionable.

D. Bowfishing Exception

Louisiana R.S. 56:320 sets out the regulations for taking both freshwater and saltwater fish in Louisiana waters. The law begins by offering several legal methods of taking fish for recreational purposes, including the use of a bow and arrow. Prior to Act 23 of 2008 there were no added restrictions for saltwater game fish. However, in Act 23, which provided the game fish designation to specific species of saltwater and freshwater fish, the legislature also revised §320 to prohibit the use of nets, traps, buckets, spearing equipment and *bows and arrows* when taking *all but one* species of newly defined game fish. The one species excluded from the regulation was Redfish.

1. Potential Problems with Bowfishing

Under Louisiana law, all citizens of the state have a right to fish and enjoy marine resources as long as they comply with the applicable laws.¹⁵ The law also provides that laws may be passed to ensure that fishing is managed in such a way as to sustain species biologically and produce the maximum yield of social and economic benefits.¹⁶ There are several potential impacts of bowfishing for Redfish in Louisiana's marshes that

could create a conflict between the practice and the right to fish law.

Bowfishing for Redfish is typically done at night from an airboat complete with high-powered lights. Several shooters stand on the front of the airboat waiting for the lights to reveal fish. One of the most obvious potential problems is that, as previously mentioned, Redfish are subject to a very strict slot limit between 16 and 27 inches.¹⁷ If a person shoots an undersized Redfish with a bow and arrow the possibility for a safe release is very low due to the injury inflicted on the fish by the arrow. While no game and fish laws are perfect, they should be logically linked to their purposes. On a rod and reel, Redfish outside of the slot are frequently caught; however, the possibility for a successful release is much higher. If the purpose of a slot limit is to reduce pressure on spawning and young Redfish, it logically follows that all of the legal methods for taking Redfish should provide anglers with the best opportunity for live release of under/oversized fish. If an angler were to be caught with a Redfish outside of the slot limit, he would face up to a three hundred dollar per fish fine, the possibility of losing his fishing license for up to three years, and up to a sixty day imprisonment.¹⁸ Because of these severe penalties, there is an incentive for the angler to “pull the arrow out and hope he swims away” if the fish is not within the slot limit; in fact, this is what is required of him.¹⁹ Louisiana law requires that Redfish caught out of the slot limit be “returned immediately to the waters from which taken without avoidable injury.”²⁰ This mandate creates a significant problem as it pertains to bowfishermen, because the very act of shooting the fish is harmful enough to kill the fish. Therefore, the law is helpless in protecting under/oversized Redfish from bows and arrows, because even releasing the fish without further “avoidable” injury would likely result in the killing of protected fish. This law places the protection of under/oversized fish in the judgment of bowfisherman at night while riding in an airboat. If the shooter’s judgment is poor he can either keep the fish and break the law, or do that which the law requires and return the fish to the water. Unfortunately, the Redfish bowfishing exemption, and not the bowfishermen, has created this situation, and neither of the outcomes serve to further the purpose of protecting Redfish.

Another potential problem with bowfishing for Redfish is that enforcement of the law is extremely difficult. First, the practice is most often done at night. The nighttime activities make any surveillance or covert investigation difficult for enforcement agents, and the cover of darkness may provide an opportunity to break the law that would otherwise not be present during daylight. Second, the killing and discarding of fish outside of the slot is much harder to punish than anglers keeping fish outside of the slot. If illegal bowfishermen were attempting to keep too many fish, then enforcement agents could simply set up checkpoints at the various docks and marinas, but because the problematic practice is the shooting

and dumping of Redfish, a law enforcement agent would have to be on site when the act occurred. Therefore, enforcement requires a large number of agents covering a wide range, which unfortunately is a hard task for the State’s agencies.

One final problem that may stem from bowfishing for Redfish occurs when fishermen trespass on hunting leases with airboats, as this disturbs waterfowl populations and property rights. During winter months, it is common for landowners to lease their land to waterfowl hunters. Due to the nature of airboats, they are not confined to the deeper waters of the marsh and can easily venture into privately owned areas. When such an act happens, the operators may be susceptible to arrest for trespass, but because the actions occur at night, it is extremely difficult for land managers or law enforcement officers to catch violators. In Louisiana, hunting for waterfowl must take place between one half hour before sunrise to one half hour after sunset; therefore, the leaseholder has an interest in keeping their lease clear at night to provide habitat for waterfowl. If an airboat trespasses over these leases it is not only breaking property law, but also it is also putting twenty-four hour pressure on waterfowl.

2. Other States’ Regulations

Redfish are not particular to Louisiana; they can be found along much of the Atlantic Coast and the Northern Gulf of Mexico. Thus, it may be helpful to examine the laws surrounding Redfish in other states that support a significant population. In Texas, Florida, Georgia, South Carolina, and North Carolina, Redfish are considered game fish, and in all of those states, bowfishing for Redfish is illegal, except for South Carolina, which allows bowfishing for Redfish only in December, January, and February.²¹ The other two Gulf states, Mississippi and Alabama, have not designated Redfish as game fish. Therefore, it appears that there is a general consensus among those states that have given Redfish the added protection of the game fish designation that bowfishing for Redfish should not be allowed. The question, then, is not what makes Redfish different from other game fish, but rather what makes Redfish in Louisiana different from Redfish in other coastal states? While Act 23 of 2008 does not address the questions posed in this article, recent occurrences in the State Legislature may make them moot.

III. Conclusion

On January 29, 2010, Former Secretary of Louisiana Wildlife and Fisheries Jimmy Jenkins raised his concerns about bowfishing for Redfish in an opinion letter to the Baton Rouge newspaper, *The Advocate*.²² Mr. Jenkins’s letter sparked several heated responses in the paper, but it appears that the Louisiana Legislature heard his concerns. On March 19, 2010, State Senator Dan Claitor (R)- Baton Rouge prefiled Senate Bill 573, which would have removed the exception from La. R.S. 56:320(A)(2) and prohibited the taking of Redfish with a bow and arrow. The proposed law read “...any person using

a bow and arrow...shall not take or possess a game fish as defined by R.S. 56:8.” Redfish are clearly defined as game fish under R.S. 56:8, so under the proposed law, the practice of bowfishing for Redfish would have been illegal. The bill was assigned to the Senate Natural Resources Committee, but was later withdrawn.

If bowfishing for Redfish is to remain legal in Louisiana, then it should at least agree with the laws already in place. Current laws surrounding Redfish are written for rod and reel fishermen and, as shown above, translating these laws for bowfishing can produce absurd consequences. Therefore, if Redfish remain exempted from the bowfishing ban, a balance must be struck between allowing the practice to continue and furthering the protection intended by the game fish designation. The current laws place a large emphasis on the protection of Redfish through closely monitored slot limits, which require catch and release. However, catch and release and bowfishing are mutually exclusive. The legislature needs to address this clear contradiction by assigning an entitlement to one side. If the entitlement rests with the slot limit, then the legislature should repeal the Redfish bowfishing exemption, but if the entitlement is given to bowfishing, then the bowfishing and rod and reel fishing laws should be distinguished and logical regulations promulgated for each. Allowing the practice of bowfishing for Redfish to exist in the shadow of rod and reel laws without specific regulations is impractical, illogical, and potentially harmful to the species.

(Endnotes)

1 Redfish, which are the largest member of the drum family, are also referred to as Red Drum or *Sciaenops ocellatus*.

2 Kevin Savoie, *Redfish Facts*. Chenier Ecology Column. July 2009.

3 Speckled Trout are also known as Spotted Sea Trout or *Cynoscion Nebulosus*.

4 This change allowed anglers to have in their possession, whether on a boat or in transit, no more than one day’s limit of Redfish.

5 Savoie, *supra* note 2.

6 The purpose of the length limits or “slot limits” is to reduce the pressure on spawning aged and young Redfish. A one-year-old Redfish typically ranges between 10 and 17 inches and Redfish begin spawning at around 26 inches.

7 La. R.S. 56.325.1, La. R.S. 56.8(131).

8 La. R.S. 56:325.1.

9 La. R.S. 56:8(66) prior to Act 23 of 2008.

10 However, according to the legal definition of saltwater commercial fish, Redfish could not be taken for commercial purposes. Louisiana R.S. 56:8 (110) previously read, “Saltwater commercial fish means any species of saltwater fish taken for commercial purposes. Saltwater commercial fish does not include sailfish (*Istiopharus platypterus*), blue marlin (*Makaira indica*), white marlin (*Tetrapturus albidus*), black marlin (*Makaira nigricans*), striped marlin (*Tetrapturus audax*), hatchet marlin (*Tetrapturus* spp.), and **red drum** (*Sciaenops ocellatus*).”

11 La. R.S. 56:8 (66)(b).

12 La. R.S. 56:327.

13 La. R.S. 56:326.1.

14 La. R.S. 56:320.

15 La. R.S. 56:640.3.

16 *Id.*

17 La. R.S. 56:325.1(B) “Any red drum...under the prescribed size or over the maximum prescribed size and daily bag limit shall be returned immediately to the waters from which taken without avoidable injury.”

18 La. R.S. 56:325.1; La. R.S. 56:32.

19 Alleged statement of a bowfisherman testifying before a legislative committee. From an opinion letter by James H. Jenkins, Former Secretary of Wildlife and Fisheries in the Jan. 29, 2010 Advocate, Page 8B.

20 La. R.S. 325.2(B)

21 Texas Parks and Wildlife, *Bowfishing in Texas*. http://www.tpwd.state.tx.us/publications/pwdpubs/pwd_if_t3200_1559/ Retrieved March 24, 2010.; Georgia Dept. of Natural Resources, Coastal Resources Division & Wildlife Resources Division, *2010 Georgia Regulation: Sport Fishing*, www.gofishgeorgia.com Retrieved March 24, 2010.; Florida Fish and Wildlife Conservation Commission, *2010 Florida Fishing Regulations: Saltwater edition*, http://myfwc.com/RULESANDREGS/SaltwaterRules_index.htm Retrieved March 24, 2010.; South Carolina Department of Natural Resources, *Fishing Regulations: Saltwater*. www.dnr.sc.gov/saltwater.html Retrieved March 24, 2010.; North Carolina Wildlife Resources Commission, *North Carolina Fishing Regulations*. http://www.ncwildlife.org/Regs/Regs_Fishing.htm Retrieved March 24, 2010.

22 Jenkins, *supra* note 17.





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ANNOUNCEMENTS

Fact Sheets on Oil Spill Related Legal Issues Available Online

The Louisiana Sea Grant Law & Policy Program (SGLPP) has created two fact sheets on oil spill related issues. The first on the Oil Pollution Act, and the second is on the National Resources Damage Assessment procedure. The SGLPP will likely be putting out more fact sheets in the future as the extent of damage caused by the Deepwater Horizon spill becomes more known. Fact sheets can be found on our website at <http://www.lsu.edu/sglegal/pubs/other.htm>.

The Louisiana Coastal Law Newsletter is Available Online! If you would like to switch your paper subscription to an email subscription, send an email to Melissa Daigle at mtrosc2@tigers.lsu.edu.



LCL E-mail Update Service

The Louisiana Sea Grant Legal Program disseminates an e-mail/web-based update to our biannual newsletter four times a year. These updates cover environmental law news relevant to the LSL's audience, summaries of recently introduced environmental legislation and regulations and recent court decisions. To subscribe to the LCL E-mail Update Service, send an e-mail to mtrosc2@lsu.edu.



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