

STATUS OF COASTAL LAWSUITS AGAINST THE OIL AND GAS INDUSTRY IN LOUISIANA

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I. INTRODUCTION

Louisiana is in the midst of a land loss crisis. In just 80 years, some 2,000 square miles of its coastal landscape have turned to open water, wiping places off maps, bringing the Gulf of Mexico to the back door of New Orleans and posing a lethal threat to an energy and shipping corridor vital to the nation's economy. Louisiana's coastline continues to disappear at the rate of a football field an hour. In 1989, a study by the Louisiana Mid-continent Oil and Gas Association, the trade association for major oil companies, examined the area of the state with the worst coastal land-loss and concluded that "the overwhelming cause" of that land loss was industry operations. In 2001 the U.S. Geological Survey oversaw a study including oil industry scientists which concluded 36 percent of land loss was caused by the industry. Some scientists believe the industry caused a much higher percentage of the land loss.

II. LOUISIANA'S COASTAL ZONE MANAGEMENT PROGRAM

A. BACKGROUND

Louisiana has administered a federally approved coastal management program since 1978. This program has some of the most robust regulatory and civil enforcement provisions in the country. These enforcement provisions authorize the state coastal management agency, the attorney general, local district attorneys and coastal parish governments to file civil actions for restoration, injunctive and declaratory relief, and damages. Despite the extensive land loss suffered by the state since the inception of the coastal management program, the state and local coastal parish governments have only recently resorted to these civil action provisions in an eleventh hour attempt save what is left of Louisiana's coast.

In 1978, Louisiana's coastal management program was approved by the National Oceanic and Atmospheric Association (NOAA) pursuant to the requirements of the federal Coastal Zone Management Act of 1972 ("CZMA"). In enacting the CZMA, Congress "sought to entice coastal states to use their traditional authority over land use to further the national interest in comprehensive coastal management."¹ "[T]he intent of [the federal CZMA] was] to enhance state authority by encouraging and assisting the states *to assume planning and regulatory powers over their coastal*

¹ Carlson, *Reverse Preemption*, 40 Ecology L.Q. 583, 596 (2013); 16 U.S.C. § 1451, *et seq.*

zones.”² The federal CZMA incentivized states to adopt approved programs by according them a large measure of control over federal land use in the coastal zone by means of a “consistency requirement”³ that is unique in federal law. This requirement has been viewed as a form of “reverse preemption” which provides that any federal activity or private activity that requires a federal permit in the coastal zone “shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State [coastal management programs].”⁴ This consistency requirement is of particular importance in Louisiana, as the authority of the U.S. Army Corp of Engineers to issue Section 401 and Section 404 permits is subject to the veto power of Louisiana’s Office of Coastal Management.

B. THE LOUISIANA COASTAL STATUTE

Louisiana’s State and Local Coastal Resources Management Act of 1978 (La. R.S. 49:214.21-214.42 (“SLCRMA”)) provides that the public policy of the state is “[t]o protect, develop, and where feasible, restore or enhance the resources of the state’s coastal zone.” SLCRMA, and regulations promulgated pursuant to its provisions, establish an elaborate permitting system to control all activities in the coastal zone that have the potential to impact coastal soils and waters. Examples of such activities include dredging, pipeline construction, mineral exploration and production, the siting and construction of buildings and other structures, and the use of cheniers, salt domes, and other similar land forms.

The permitting and enforcement functions of the Louisiana Coastal Management Program (LRCP) are handled by the Office of Coastal Management (OCM) located within the Louisiana Department of Natural Resources (LDNR). With the exception of the coastal management program, the Louisiana Office of Conservation (OC) regulates practically all oil and gas activities in the state.

While the OC is technically part of the LDNR for budgetary and staffing purposes, it is deemed quasi-independent agency organizationally located within the LDNR, as there exists a legal firewall between LDNR and the OC with respect to the core functions of the OC. Until recently, both the LDNR and OC have been subject to considerable influence by the oil and gas industry.

Louisiana divides coastal zone permitting responsibility between local governments and the State. The State issues permits relating to “uses of state concern” in the coastal zone, and local governments with approved programs issue permits for “uses of local concern.” Oil and gas activities involve “uses of state concern” that are conducted pursuant to “state concern permits.” Coastal parishes in Louisiana are allowed to establish local coastal management programs that are

² S. Rep. No. 92-753, at 1 (1972), 1972 U.S.C.C.A.N. 4776. (emphasis added). States with CZMA-approved coastal plans are entitled to federal dollars for coastal management. 16 U.S.C. § 1456 (c).

³16 U.S.C. § 1456 (c).

⁴16 U.S.C. § 1456(c)(1)(A). The CZMA regulations define “maximum extent practicable” as “fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency’s operations.” 15 C.F.R. § 930.32 (2013); Carlson, *Reverse Preemption*, 40 Ecology L.Q. 583 at 595.

empowered to issue “local concern permits” that apply to “uses of local concern.” In coastal parishes without approved programs, the state issues both state and local concern permits.

The authority of parish governments with approved local coastal management programs to pursue their coastal lawsuits is set forth in Subsection D of La. R.S. 49:214.36 (hereinafter “Subsection D”). Under Subsection D, the authority of parishes with approved local coastal management programs is equal to that of the LDNR Secretary, the attorney general, and local district attorneys. Subsection D provides:

D. The secretary, the attorney general, an appropriate district attorney, or a local government with an approved program may bring such injunctive, declaratory, or other actions as are necessary to **ensure that no uses** are made of the coastal zone for which a **coastal use permit** has not been issued when required or which are not in accordance with the terms and conditions of a coastal use permit.

Subsection E of La. R.S. 49:214.36 contains the damage provision that applies to the coastal litigation:

E. **A court may impose civil liability and assess damages; order, where feasible and practical, the payment of the restoration costs;** require, where feasible and practical, actual restoration of areas disturbed; or otherwise impose reasonable and proper sanctions for uses conducted within the coastal zone without a coastal use permit where a coastal use permit is required or which are not in accordance with the terms and conditions of a coastal use permit. The court in its discretion may award costs and reasonable attorney's fees to the prevailing party.

Nothing contained in the legislative history or the Environmental Impact Statement issued pursuant to the National Environmental Policy Act specifically explains the meaning of the word “damages” in Subsection E.

C. THE LITIGATION

Despite the fact that the SLCRMA was enacted in 1978, no civil action for restoration and damages was filed under Subsection D until 2013. In 2013, the parishes of Plaquemines and Jefferson, both of which have approved local coastal programs, filed 28 separate lawsuits (21 in Plaquemines, 7 in Jefferson) against over one hundred oil companies alleging claims for restoration and damages arising from the violation of coastal use permits, or arising from the failure to obtain a permit when required. Most of the claimed damages arise from the failure to obtain permits when required. All twenty eight suits were removed to the Eastern District of Louisiana. The removal notices alleged the following grounds of jurisdiction where appropriate: Outer Continental Shelf Lands Act jurisdiction; maritime jurisdiction; diversity jurisdiction; federal enclave jurisdiction; substantial federal question jurisdiction; and federal question jurisdiction based on the Natural Gas Act. The twenty eight cases were assigned to ten different federal judges, and all were eventually

remanded over the course of two years.

While the remand issues were extremely complex, the only issue of continuing importance to the progress of the litigation in state court was the diversity determination. The defendants argued diversity jurisdiction based on a jurisdictional theory endorsed by the Eleventh Circuit in *Tapscott v. MS Dealer Serv. Corp.*⁵ known as “fraudulent misjoinder” or “egregious misjoinder.” *Tapscott* seeks to distinguish the concepts of fraudulent joinder and fraudulent misjoinder. The former requires proof that there is no possibility that the plaintiff can recover against the non-diverse defendants. The latter requires only that the removing defendants prove that one or more non-diverse defendants who may possibly be liable to the plaintiffs were misjoined in the action with diverse defendants for the purpose of defeating diversity. If the federal court agrees that such a misjoinder has occurred, it retains jurisdiction over claims against the diverse defendants who are properly joined and remands the remainder of the case. Thus, based on *Tapscott*, the defendants in the Plaquemines and Jefferson coastal cases alleged that the federal court should at least retain jurisdiction over those claims unrelated to claims involving non-diverse defendants. In making such a determination, the federal court applies state joinder rules. The rule in Louisiana is straightforward: claims and parties are properly joined if it is “commonsensical to do so.” The parishes’ coastal suits were prepared with the expectation that they would be removed under the egregious misjoinder theory even though the Fifth Circuit has not explicitly endorsed the theory. Therefore, the claims of Plaquemines and Jefferson parishes were divided into distinct “Operational Areas” that would support an argument for “commonsensical” joinder.

In addition, the parishes styled their cases in the following manner: “*State of Louisiana, ex rel Parish of Plaquemines, and Parish of Plaquemines v. Defendants.*” This was based on the belief that Subsection D accords the Secretary of LDNR, the attorney general, local district attorneys and parishes with coastal management programs equal authority to file suit on “state concern” permits or uses, which include all oil and gas uses within the respective parish boundaries. When a political subdivision, such as a parish, is statutorily authorized to bring a claim on behalf of the state and the state is a real party in interest, there is no diversity removal jurisdiction because a state cannot be a citizen of itself for diversity purposes.⁶ Thus, the parishes of Plaquemines and Jefferson alleged that there was no diversity jurisdiction because they were suing on behalf of the state to enforce state coastal use permits or the failure of defendants to obtain such permits when required.

In the first of the twenty eight parish cases removed to the Eastern District of Louisiana, *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*, 64 F.Supp.3d 872, 890 (E.D.La. 2014), Judge Zainey concluded that “§ 49:214.36(D) can reasonably be interpreted as authorizing the Parish to file suit to enforce the CZM Laws as they pertain to uses of State concern, and therefore State-issued permits, within the confines of Plaquemines Parish.” It is likely that the Louisiana state

⁵77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds*, *Cohen v. Office Depot*, 204 F.3d 1069 (11th Cir. 2000).

⁶*Louisiana v. Union Oil Co. of California*, 458 F.3d 364, 366 -367 (5th Cir. 2006); *Moor v. Alameda County*, 93 S.Ct. 1785 (1973); *Postal Telegraph Cable Co. v. Alabama*, 15 S. Ct. 192 (1894).

courts on remand will follow Judge Zainey's well reasoned opinion concerning the rights of parishes to pursue statutory remedies based on state concern permits and uses involving oil and gas activities, as his opinion is squarely supported by the text of Subsection D.

After remand of the Plaquemines and Jefferson Parish cases, the oil companies lobbied the Plaquemines Parish council heavily, eventually resulting in a resolution to dismiss the parish's cases. Before the dismissal was filed, Louisiana elected a Democratic governor, John Bel Edwards, who supported the parish cases. Governor Edwards made it clear that if Plaquemines Parish did not pursue its coastal cases, he would intervene and take over the prosecution of the cases on behalf of the state. The parish council decided to continue its prosecution of the coastal cases.

Since the filing of the Plaquemines and Jefferson Parish cases, three additional parish cases have filed coastal suits, all of which are pending for decision on motions to remand in federal court. Two coastal parishes that have suffered significant land loss—Lafourche and Terrebonne parishes—are heavily populated with businesses related to the oil and gas industry, and have not yet filed suit.

The regulations issued pursuant to Louisiana's coastal statute are quite complex. Arguably, the regulations can be read to require restoration to original condition "where feasible and practical." The regulations also require that "cumulative impacts" be taken into consideration in permitting, as the effects of a particular activity in Louisiana's coastal zone are seldom confined to the specific area where the activity occurs. Since most of the claims alleged in the parish coastal cases involve claims for restoration based on the failure of the defendants "to obtain a coastal use permit when required," it is likely that the courts will require that cumulative impacts also be considered in determining the restoration costs required to repair damage resulting from a defendant's failure to obtain a coastal use permit when required.

Louisiana's coastline is disappearing at an alarming rate. The estimated cost for the implementation of Louisiana's Master Plan for coastal restoration ranges from \$50 billion to \$92 billion dollars. The state is unable to fund the plan, and federal funds are limited. The very survival of Louisiana's coast depends in large part on the success of these coastal cases. Considering the immense power and influence of the oil and gas industry in Louisiana, the members of the parish governing authorities in Plaquemines and Jefferson parishes demonstrated tremendous courage in authorizing the filing of the parish coastal lawsuits. The parish coastal lawsuits offer the last hope for saving Louisiana's coast.