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Environmental Management Orders: Don't Forget About Coastal Use Permits!

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JUNE 11, 2014

In an earlier post, I explained the growing frequency of environmental management orders ("EMOs") in legacy litigation. As a refresher, in 2012, La. Code of Civil Procedure art. 1552 was added to the code of procedure to allow any party to the litigation, along with the Louisiana Department of Natural Resources, to move the court to order the development of an EMO to govern the testing protocol in a legacy lawsuit. Last time I went over the reasonable terms that must be included in an EMO as a matter of law. Now, I want to address one thing to consider that has begun to play an increasing role in adhering to those terms: a coastal use permit.

In 2012 not only did an EMO become available as a matter of right, but also the coastal zone boundaries were increased by 12.6% — totaling 1887 square miles. This increase has affected legacy litigation by increasing the need for coastal use permits when conducting even non-invasive environmental testing. And the application process for obtaining a coastal use permit must be accounted for when drafting an EMO.

In areas identified as the "Coastal Zone," parties on both sides of the litigation must apply for coastal use permits to conduct environmental sampling and, in some circumstances, to simply visit the anticipated testing sites. As a result, the application process to obtain a coastal use permit must be considered.

EMOs generally either have specific deadlines to complete testing and submit expert reports or have points that trigger various deadlines, such as requiring that expert reports be due 90 days after a party receives its coastal use permit. You must be sensitive to the coastal use permit application process – and the expert retained to submit the application – under both of these circumstances. We have seen an application require repeated revisions and take over eight months to be approved. We have also seen applications fly through Coastal Management Office and be issued in 45 days. Therefore, depending on how deadlines are established, the process of getting a coastal use permit can dictate the pace of the litigation.

One last aspect to keep in mind when drafting an EMO that requires a coastal use permit is the timing that is best for the environment to conduct testing. By the very nature of an area being deemed the “Coastal Zone,” there are likely seasons of high and low water levels. As part of the application process, an applicant must identify the time of year when testing will affect the environment the least. Unfortunately, this time of year may not be known by the attorneys when drafting the EMO. In such a circumstance, it’s best to ask for the opposing party’s consent to amend the EMO or move for court intervention. The bottom line is that all steps should be taken to ensure that testing is done during the time period that causes the least harm to the environment. After all, the whole reason for a legacy suit is due to alleged environmental damage – no party wants to be on the record advocating testing with disregard for the optimum environmental conditions.

In short, when drafting an EMO, know in advance if the property at issue is located in the Coastal Zone, take all necessary steps to ensure a coastal use permit is obtained, and ensure that testing is done in a manner and time that is best for the environment.