

## Chapter 9

# Re-Litigating History: Louisiana Wetland Cases and State-Level Litigation to Re-Regulate Environmental Activities

**Jonathan A. Wolfson**  
**Samuel L. Tarry, Jr.**  
*McGuireWoods LLP*  
 Richmond, Virginia<sup>1</sup>

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<sup>1</sup> Jonathan A. Wolfson is an Associate and Samuel L. Tarry, Jr., is a Partner in the Environmental, Products and Mass Tort Litigation Practice group at McGuireWoods LLP. The opinions expressed in this chapter are the authors' alone and should not be attributed to McGuireWoods LLP. Nothing in this chapter should be construed as legal advice.

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**§ 9.01. Introduction.**

In the age of regulation, companies long ago became accustomed to defending litigation brought by state and local governments. When companies violated regulations, or engaged in behavior that caused direct harm to the state or locality, the offending party could expect to be hauled rather immediately into court by the proper authority to answer for its behavior. But as the 20th century neared an end, states and localities began to eschew forward-looking regulation as a means to control behavior.<sup>2</sup> Instead of using litigation to address recent violations of laws and regulations or even recent damage to state property, these governments began to seek compensation for historic behaviors, often decades past, through backward-looking litigation.

In 1999, Robert Reich, former Secretary of Labor under President Clinton, posited that “the era of big government may be over but the era of regulation through litigation has just begun.” He explained that while, in his opinion, old-fashioned regulation is generally more efficient, litigation-based regulation may be preferable to no regulation.<sup>3</sup>

Secretary Reich’s observations appear prophetic nearly two decades later. In this age of budget shortfalls, budget cuts to regulatory agencies and political calculations, states are looking for politically “safe” revenue generators and regulation by litigation has proven a quite useful tool. And

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<sup>2</sup> See Andrew P. Morriss, Bruce Yandle and Andrew Dorchak, “Choosing How to Regulate,” 29 *Harv. Envtl. L. Rev.* 179, 181 (2005).

<sup>3</sup> Robert Reich, “Regulation is out, litigation is in” *USAToday*, Feb. 11, 1999 (“Regulating U.S. industry through lawsuits isn’t the most efficient way of doing the job. Judges don’t have large expert staffs for research and analyses, which regulatory agencies possess. And when plaintiffs and defendants settle their cases, we can’t always be sure the public interest is being served.”).

despite the potential shortcomings of regulating by litigation, the practice has only grown.

In this chapter, we investigate the rise of the regulation by litigation phenomenon in the environmental context. Section 9.02 explains the concept of regulation by litigation, expounds why states have become attracted to backward-looking litigation over forward-looking regulation, and identifies the legal justifications. Section 9.03 outlines representative environmental cases filed by states following this pattern. Section 9.04 takes a closer look at the state of Louisiana's wetland litigation against oil and gas exploration, production and pipeline companies. Section 9.05 discusses the unique risks defendants face in these cases as well as strategic considerations to defend against environmental regulation by litigation.

### § 9.02. Regulation By Litigation.

The concept of regulation by litigation (sometimes called “regulation through litigation” or “regulatory litigation”)<sup>4</sup> is not new,<sup>5</sup> nor is its discussion novel. Books have been written to describe the phenomenon;<sup>6</sup> attorneys, academics and politicians have debated the merits of regulating through the courts;<sup>7</sup> and state treasuries have been bolstered when settlements are paid.

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<sup>4</sup> “Risk Regulation and Regulatory Litigation,” 64 *Rutgers L. Rev.* 73, 80 (2011) (“the idea of using courts to achieve regulatory ends that have traditionally been the province of regulatory agencies is alternatively called “regulation-through-litigation,” “regulation-by-litigation,” or “litigation-as-regulation.””).

<sup>5</sup> There is some debate about whether the use of litigation to regulate behavior, both forward- and backward-looking, is a relatively new phenomenon in American jurisprudence. This debate is beyond the scope of this chapter, but the interested reader may desire to compare Thomas F. Burke, “Symposium: The Rights Revolution Continues: Why New Rights Are Born (and Old Rights Rarely Die),” 33 *Conn. L. Rev.* 1259, 1259-1260 (2001) with William Pryor, “Government ‘Regulation by Litigation’ Must Be Terminated,” May 18, 2001, available at: <http://www.wlf.org/upload/051801LBPryor.pdf>.

<sup>6</sup> See, e.g., Morris *et al.*, “Regulation Through Litigation,” *Yale U. Press* (2008); W. Kip Viscusi, *Regulation Through Litigation* (W. Kip Viscusi ed., 2002); “Choosing How to Regulate,” 29 *Harv. Envtl. L. Rev.* 179, 183.

<sup>7</sup> See, e.g., Mark Totten, “The Enforcers & the Great Recession,” 36 *Cardozo L. Rev.* 1611, 1663 (2015); William Pryor, “Government ‘Regulation by Litigation’ Must Be Terminated,” May 18, 2001, available at: <http://www.wlf.org/upload/051801LBPryor.pdf>.