

# Strategic Considerations in Navigating Opposition During the Permitting Process

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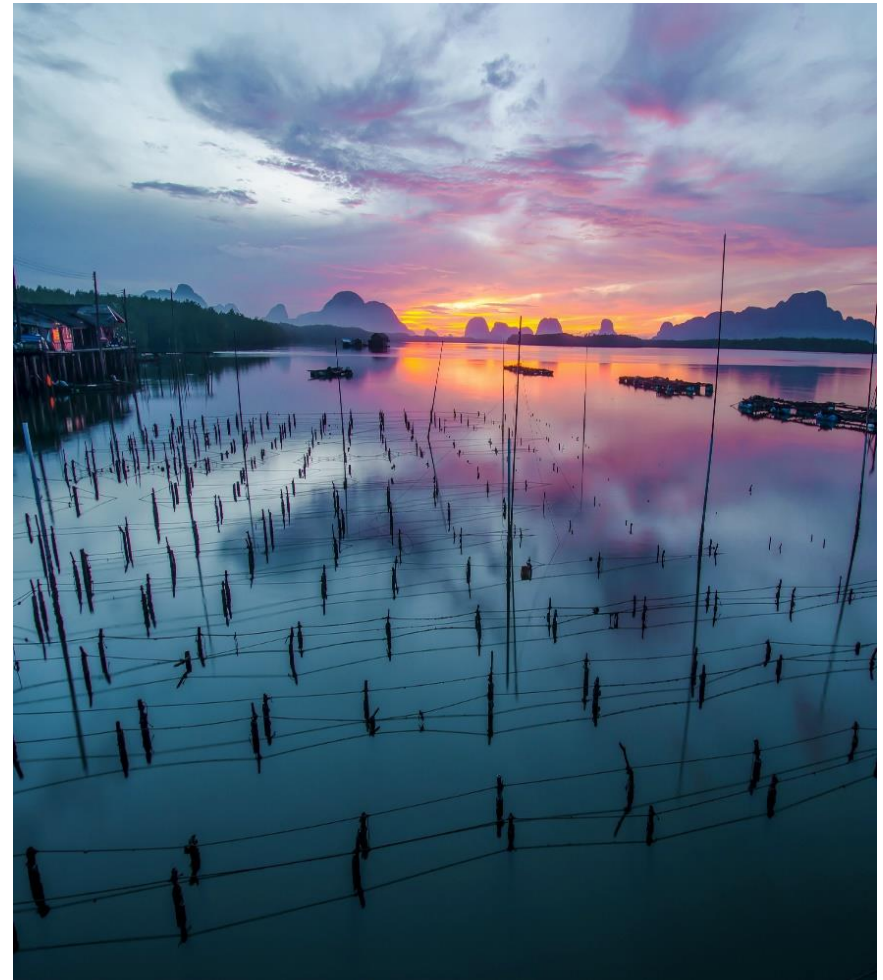
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# Goals of a Successful Project

1. Get the Project Approved
2. With Workable Conditions
3. Within a Workable Timeframe
4. That Avoids Litigation or
5. That Maximizes The Chances of Successful Litigation
6. At Reasonable Cost

# Permitting Success Requires Strategic Thinking at Every Step

- Site Selection
- Outreach/Messaging
- Permitting Process
- Litigation
- Compliance



# Be Careful in Selecting a Site

- Goal: Maximizing productivity and efficiency while minimizing opposition and regulatory hurdles
- Seek Out Favorable Jurisdictions
- Understand State and Local Permitting Process
- Minimize Potential Sources of Opposition
- Environmental Issues
- Tribal Interests
- User Conflicts
- Show Your Work

# Early Outreach is Critical

- Develop Your Allies
- Seek to Reduce or Eliminate Opposition
- Don't Say Anything You Wouldn't Like to See Printed in the Paper (or Facebook)





# Early Outreach is Critical

- Be Proactive
- Listen
- Be Willing to Adjust
- Phasing/  
Mitigation  
Measures
- Site Visits



# Identify Critical Issues

- Understand Areas of Concern
- Develop Strategy Regarding How to Address
- Be Proactive – Include in Application Materials



# Proactive Engagement in Permitting

- Submit a Fully Baked Application
- Do Not Rely Exclusively Upon Regulators Regarding Permitting Process
- Permit Sequencing Matters
- Develop Your Team Early in Permitting Process
- Know Deadlines
  - Deadlines for your responses
  - Deadlines for public comment
  - Agency deadlines (and when/how they can be extended)
- Be Engaged in Consultation with NMFS/USFWS



# Know Your Opposition

- What Are Their Goals?
- What Do They Want?
  - Changes to the Project
  - No Project At All
  - No Project At All (And Willing to Fight)
- Is There Room to Compromise?
- What Is the Litigation Risk?

# Create and Defend Your Administrative Record

- Use Experts Where Needed to Fill Information Gaps
- Engage in Environmental Review, Even if Prepared by Regulatory Agency
- Key Issue: EA/EIS and Level of State Environmental Review
- Provide Responses to Comments - Level of Opposition Drives Level of Response
- Develop Gameplan for Public Hearings

# Understand Litigation Risk Before Litigation

- Do You Have Funding?
- Do You Have Agency Support?
- What is Your Farm Schedule?
- Is There a Risk of a Stay/Injunction?

# 6 Tips for Successful Litigation Strategy

- 1) Define Success – Litigation vs. Settlement
- 2) Administrative Record is Key
- 3) Coordination with Agency – Early and Frequent





# 6 Tips for Successful Litigation Strategy

- 4) Statute of Limitations?
- 5) Specificity Wins
- 6) Speed is Your Friend

Sorry – generally no attorneys fees



# What If Regulators are Opposed?

- Escalate low to high during permitting process
- In litigation, process challenges win more than substantive ones
- Make sure to protect administrative record
- Is it a taking?



# Don't Stop at Permit Approval – Make Sure to Follow Through on Compliance

- Pay Close Attention to Post-Approval Requirements
  - Monitoring
  - Gear Management
  - Reporting
  - NPDES



# Looking Forward

- Litigation Over Nationwide Permit 56
- U.S. Supreme Court Decision in *Looper Bright Enterprises v. Raimondo*
- NOAA Development of Aquaculture Opportunity Areas
- Development of Quantitative Impact/Mitigation Criteria



# Questions?

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