

Coastal Restoration Under CWPPRA and Property Rights Issues

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Marc C. Hebert*

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This article reviews coastal restoration under the Coastal Wetlands Planning, Protection, and Restoration Act of 1990 ("CWPPRA"). CWPPRA is peculiar to Louisiana in that it establishes a regulatory and funding mechanism by which state and federal agencies work together to restore coastal wetlands and marsh areas for the benefit of the State and the Nation. This article focuses on CWPPRA, outlining the procedures it creates for undertaking coastal restoration activities. This article also examines property rights issues associated with coastal restoration that can, in many instances, act as a barrier to such restoration activities, causing conflict between private landowners and the state and federal governments.

I. INTRODUCTION

Louisiana has been referred to as a "Sportsman's Paradise" and a "Dream State" because of the many coastal wetlands and marshes in which various wildlife and marine life thrive. This exceptionally prolific ecosystem, however, is in danger of extinction. When Louisiana became a state in the year 1812, it had over 16 million acres of wetlands, of which approximately 4.5 million were coastal wetlands.¹ This ecosystem is presently comprised of approximately 3.3 million acres of coastal wetlands and marshes throughout southern Louisiana. Nearly twenty-six percent of Louisiana's coastal wetlands have been lost since 1812 and more than one million acres of coastal wetlands have been lost within the past sixty years.² Louisiana contains forty percent of the coastal wetlands located within the lower forty-eight states of the United States.³ Current estimates of coastal wetlands loss in Louisiana are between twenty-five and thirty-five square miles each year.⁴ "Louisiana is still experiencing more than eighty percent of the total annual wetlands loss in the United States."⁵

1. Louisiana Coastal Wetlands Restoration Plan, Main Report and Environmental Impact Statement Executive Summary 1 (1993) (The report was prepared by the Louisiana Coastal Wetlands Conservation and Restoration Task Force, led by the United States Army Corps of Engineers, New Orleans District) [hereinafter Louisiana Coastal Wetlands Restoration Plan].

2. *Id.* at 2. It has also been estimated that between 1930 and 1990, Louisiana's coastal zone lost 3,950 square kilometers, or 1,526 square miles, of wetlands. Donald F. Boesch et al., *Scientific Assessment of Coastal Wetlands Loss, Restoration and Management in Louisiana*, J. Coastal Res. 1 (May 1994).

3. Boesch et al., *supra* note 2, at 1. This figure does not include Alaska or Hawaii. Interview with Doug Meffert, Engineer, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995).

4. Louisiana's National Treasure 16 (rev. ed. 1991) (published by the Louisiana Land & Exploration Company (LL&E)) (on file with the *Louisiana Law Review*); Philip Bowman et al., *Louisiana's Vanishing Coast, Part I: Overview*, Louisiana Conservationist, Jan./Feb. 1994, at 6 (published by the Louisiana Department of Wildlife and Fisheries) [hereinafter *Louisiana's Vanishing Coast, Part I*]; Philip Bowman et al., *Louisiana's Vanishing Coast, Part V: Where Do We Go From Here?*, Louisiana Conservationist, Nov./Dec. 1994, at 5 [hereinafter *Louisiana's Vanishing Coast, Part V*].

5. Philip Bowman et al., *Louisiana's Vanishing Coast, Part III: Processes and Problems*, Louisiana Conservationist, May/June 1994, at 4.

Human intervention and influence has been the single most contributing factor in the coastal erosion process and the diminution of wetlands in Louisiana.⁶ In November of 1990, the United States Congress passed a bill to save and restore Louisiana's coastal wetlands. Known as the Coastal Wetlands Planning, Protection, and Restoration Act, or CWPPRA, the bill is directed towards coastal restoration in Louisiana as the coastal state with the largest area of wetlands in the Nation.⁷

II. THE COASTAL EROSION PROCESS IN LOUISIANA

One must first understand the process of coastal erosion before recognizing the problems inherent in proceeding with coastal restoration projects in Louisiana. Coastal wetlands are not limited to wetlands immediately adjacent to Louisiana's coast but include wetlands within the coastal zone of Louisiana.⁸ Louisiana's coastal zone consists of the area between the Mississippi Deltaic Plain to the east and the Chenier Plain in the western portion of the state.⁹ Between the two plains lie nine basins, or watersheds, distinguished by geology and hydrology.¹⁰

Coastal erosion has been an enemy of Louisiana's coastal wetlands and marshes since the early 1940s when a series of flood control levees were constructed along the Lower Mississippi River, confining the river to a single channel.¹¹ This levee system prevents the Mississippi from annually overflowing its banks and flooding large portions of southern Louisiana.¹² Before construction of the levee system, when the Mississippi overflowed its banks or changed course it reintroduced freshwater, sediment, and nutrients into the nine basins, rejuvenating the wetlands and combating the erosion process.¹³ The overflowing of the river's banks allowed a natural accretion process to take place which restored and rebuilt coastal wetlands and marshes lost to tidal erosion and saltwater intrusion, creating a balance between the natural erosion and restoration process. This delicate balance was interrupted by the levee system, resulting in freshwater, sediment, and nutrients

6. *Id.* at 6.

7. Coastal Wetlands Planning, Protection, and Restoration Act; 16 U.S.C. §§ 3951-3956 (1994). As stated in *supra* note 3, Louisiana has the largest area of wetlands of any state within the contiguous United States, excluding Alaska and Hawaii. Interview with Doug Meffert, Engineer, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995).

8. Louisiana's coastal wetlands extend from the coastline inland, and can be found up to 60 or 100 miles inland. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at Executive Summary 11.

9. Boesch, *supra* note 2, at 2.

10. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at 11. The basins are named as follows: Pontchartrain, Breton Sound, Mississippi River Delta, Barataria, Terrebone, Atchafalaya Delta, Teche/Vermillion, Mermentau, and Calcasieu/Sabine.

11. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at Executive Summary 5.

12. Report of the Louisiana Wetland Protection Panel, Convened by Louisiana Geological Survey and the United States EPA, Saving Louisiana's Coastal Wetlands: The Need for a Long-Term Plan of Action I (EPA-230-02-87-026) (April 1987) [hereinafter Report of the Louisiana Protection Panel].

13. *Id.* at 8-9.

bypassing the majority of the basins and emptying into the Gulf of Mexico at the mouth of the River creating what is known as the Bird's Foot Delta.¹⁴ Thus, "natural wetland accretion was terminated by the artificial levees."¹⁵ Today, the River carries 144 million tons of sediment through the State's coastal zone each year.¹⁶

Flood control projects such as the levee system are not the sole factor in wetlands loss. Approximately 200 acres per year are lost due to human activities associated with the oil and gas industry.¹⁷ Inland and coastal dredging and the building of channels for navigation, oil and gas exploration, and land reclamation projects, as well as the construction of ports, all contribute to the loss.¹⁸ Wetlands losses directly attributable to human activity were estimated at 3,000 acres each year in 1980.¹⁹ In areas like Grand Isle and Fouchon, such losses could be credited to the oil and gas industry. Canals dredged and pipeline bulkheads built for the excavation of oil and gas were not kept in good repair.²⁰ Many oil companies abandoned dry holes or unproductive wells without blocking off or filling in the canals dredged to reach the wells, even though such action was required by state law.²¹ These actions contributed to saltwater intrusion and the erosion process, causing direct losses of coastal saltwater marshes by conversion of the marshes to open water and bays.²² Bully Camp Field in the Galliano sulphur mine, which is located within the coastal zone and near Grand Isle, is a prime example. Bully Camp Field was the site of a productive oil well until it went dry nearly ten years ago.²³ When the oil was "pulled" from the well, water was not pumped back into the well to prevent the land from sinking.²⁴ As a result, Bully Camp Field sank approximately twenty to thirty feet below water level and is now a small bay near Grand Isle.²⁵

14. *Id.*; Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at 5. It is necessary to note that the Bird's Foot Delta, while within Louisiana's coastal zone, is located on the edge of the outer-continental shelf in the Gulf of Mexico. Therefore, sediment that flows from the Mississippi River into the Gulf can no longer build or expand the delta because the sediment falls off the shelf into the deep waters of the Gulf. Interview with Doug Meffert, Engineer, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995).

15. Dr. Ivor L. vanHeerdan, Ph.D., A Long-Term, Comprehensive Management Plan for Coastal Louisiana to Ensure Sustainable Biological Productivity, Economic Growth, and the Continued Existence of Its Unique Culture and Heritage 6 (1994).

16. Bowman et al., *supra* note 5, at 1.

17. Boesch et al., *supra* note 2, at 61.

18. *Id.*

19. *Id.*

20. Interview with resident of Terrebone Parish, Louisiana (July 1995).

21. *Id.*

22. *Id.* See also MMS Environmental Studies Available, E&P Environment (November 11, 1994).

23. Interview with resident of Terrebone Parish, Louisiana (July 1995).

24. *Id.* Pumping water back into a producing well while pulling oil out of the well is customary in oil and gas excavation to prevent land from sinking.

25. *Id.* The area is now owned by Louisiana Land & Exploration Company who has since cleaned the area.

Wetlands loss or deterioration in Louisiana is also caused by natural processes such as wave erosion, subsidence, the sinking of land combined with marine tidal invasion, and sea level rise.²⁶ As saltwater intrudes and increases the salinity content of freshwater, vegetation, marine life, and wildlife that depend on freshwater conditions either die off or retreat inland; the wetlands become saltwater marshes, and saltwater marshes become open bays.²⁷ Thus, a new ecosystem is created, further decreasing the "long-term viability" of freshwater wetlands bordering the newly created saltwater marshes.²⁸ In sum, the "activities of man including leveeing, canal dredging, and stream channelization coupled with natural processes have reduced the effectiveness of saltwater barriers and altered hydrological regimes."²⁹ The natural processes of coastal erosion have been accelerated by human intervention and can no longer be offset by nature alone.

III. WHY IS IT IMPORTANT TO RESTORE LOUISIANA'S COASTAL WETLANDS AND MARSHES?

It is of vital importance to restore Louisiana's coastal wetlands and marshes because they provide a variety of benefits to both the environment as well as residential communities in Louisiana's coastal zone.

[H]ealthy wetlands trap and remove excess sediments and nutrients from runoff and improve coastal water quality. Wetlands also have the ability to act as giant sponges to hold and store large amounts of excess water during periods of heavy rainfall or flooding conditions. Healthy wetlands have the crucial ability to absorb and buffer the energy from storm surges created by hurricanes, reducing their inland impact.³⁰

Louisiana's wetlands

support over 30 percent of the Nation's fisheries and shell fisheries harvest and 40 percent of its fur harvest; buffer destructive tidal surges caused by hurricanes and storms and reduce flood damages; trap and hold fresh water for coastal communities and retard salt water intrusion into these coastal freshwater supplies; and provide wintering habitat for two thirds of the 6 million ducks and geese in the Mississippi Flyway.³¹

26. Report of the Louisiana Protection Panel, *supra* note 12, at 8-9; Report for the Governor's Office of Coastal Activities, Science Advisory Panel Workshop, *An Environmental-Economic Blueprint for Restoring the Louisiana Coastal Zone: The State Plan 10* (1994).

27. See Boesch et al., *supra* note 2, at 3.

28. *Id.*

29. Robert H. Chabreck, Ph.D., *Marsh Management in Louisiana for Production of Emergent and Aquatic Plants* 68 (July 1994) (prepared for the Louisiana Landowner's Association, Inc.) (on file with the *Louisiana Law Review*).

30. Bowman et al., *Louisiana's Vanishing Coast, Part V*, *supra* note 4, at 5.

31. S. Rep. No. 375, 101st Cong. 1 (1995).

Coastal wetlands and marshes promote and protect coastal communities and life on the Louisiana coast.³² Not only is Louisiana dependent upon its coastal wetlands for a way of life and for economic reasons, but the entire nation is dependent on Louisiana's coastal wetlands.

Because of Louisiana's vast coastal wetlands, it is one of the Nation's leading states in commercial fisheries production with landings exceeding 1 billion pounds each year.³³ Approximately ninety-five percent of the commercial fish caught in the Gulf of Mexico are heavily dependent upon coastal wetland habitats.³⁴ "Louisiana leads the nation in the production of shrimp, blue crabs, crawfish and wild catfish, menhaden, and generally ranks first or second in oyster production."³⁵ Economic benefits to the state from commercial marine fisheries are about \$1 billion a year, and saltwater recreational fishing is estimated to approach that figure.³⁶ Alligator harvests, both wild and farm-raised, exceeded \$16 million in 1992.³⁷ Hunters of waterfowl within the state generate an income for the state of more than \$50 million.³⁸ Furthermore, "the vast coastal marshes are home to literally hundreds of different species of mammals, birds, fish, reptiles and amphibians, including several threatened or endangered species."³⁹

Coastal wetlands restoration is vital to the continued existence of these species in southern Louisiana as well as to commercial fisheries, oyster production, and the security of residential communities. Current cost estimates to reverse land loss in Louisiana or implement a comprehensive restoration process along the entire Louisiana coastal zone range from \$1.1 billion to \$9 billion.⁴⁰ Regardless of monetary cost, experts agree that if no action is taken, loss of natural resources, public, private, commercial, and residential infrastructure and property, and income-generating capacity to both Louisiana and the

32. *Breaux Works to Protect State's Wetlands and Aquatic Life*, Congressional Press Release, January 24, 1997.

33. Philip Bowman et al., *Louisiana's Vanishing Coast, Part II: Wetlands Functions and Values*, Louisiana Conservationist, March/April 1994, at 4.

34. Bowman et al., *Louisiana's Vanishing Coast, Part I*, *supra* note 4, at 5.

35. Bowman et al., *supra* note 33, at 4.

36. *Id.* at 4-5. See also Memorandum from David W. Fruge, Field Supervisor, United States Department of Interior, Fish & Wildlife Service, *Coordination Act Letter* (Oct. 1, 1993) (on file with author) (discussing the need for coastal restoration in Louisiana as it is not only important to the state's economic base, as the coastal zone supports over \$1 billion annually in commercial fish and shellfish harvests, but is important to the Nation as a whole in terms of national wetlands ecology).

37. Bowman et al., *Louisiana's Vanishing Coast, Part I*, *supra* note 4, at 5.

38. Bowman et al., *supra* note 33, at 5. In 1991 total expenditures for waterfowl hunting exceeded \$430 million. Bowman et al., *Louisiana's Vanishing Coast, Part I*, *supra* note 4, at 5.

39. Bowman et al., *supra* note 33, at 5.

40. Bowman et al., *Louisiana's Vanishing Coast, Part I*, *supra* note 4, at 7; Boesch et al., *supra* note 2, at 64. If \$1 billion to \$3 billion is spent over the next 20 to 50 years on coastal restoration in Louisiana, it is estimated that the cost of such a project would be only 10% of expected production in fisheries alone over the same time period. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at 14.

United States will reach \$100 billion.⁴¹ And once lost, such resources are difficult if not impossible to replace on such a grand scale. Thus, the benefits of restoration heavily outweigh a no-action alternative.

IV. THE COMING-OUT OF LEGISLATION FOR COASTAL RESTORATION IN LOUISIANA

It is necessary to understand the emergence of the Coastal Wetlands Planning, Protection, and Restoration Act (CWPPRA) and appropriate state legislation before discussing any legal issues that compromise its implementation and effectiveness on coastal restoration in Louisiana. The need for coastal restoration projects in Louisiana was formally recognized by the United States Environmental Protection Agency in its 1987 report entitled *Saving Louisiana's Coastal Wetlands: The Need For a Long-Term Plan of Action*.⁴² Since then, numerous public interest groups and the State of Louisiana have become more aware of the need to restore the State's diminishing coastal wetlands.⁴³

In response, the Louisiana Legislature passed the Louisiana Coastal Wetlands Conservation, Restoration, and Management Act in 1989 (the "Act").⁴⁴ The Act, which preceded CWPPRA, is very important to coastal restoration under the federal act for two reasons: 1) under the Act, the State approves and funds its own coastal restoration projects separate from CWPPRA restoration projects, allowing the two acts to work in conjunction to restore Louisiana's coastal zone;⁴⁵ and 2) the funding available under the State's restoration act is used in federal/state cost-share agreements for CWPPRA projects.⁴⁶

The state act set up a Wetlands Conservation and Restoration Task Force, a project development plan, and the Wetlands Conservation and Restoration Fund

41. Bowman et al., *Louisiana's Vanishing Coast, Part I*, *supra* note 4, at 7; Boesch et al., *supra* note 2, at 45.

42. Report of The Louisiana Wetland Protection Panel, *supra* note 12.

43. These public interest groups include the Coalition to Restore Coastal Louisiana, the Lake Ponchartrain Basin Foundation, and Ducks Unlimited. *Corps of Engineers Asked to Consider More Sites in Louisiana Sediment Project*, Daily Executive Reporter (BNA) (Sept. 30, 1996).

44. La. R.S. 49:213.1-214.41 (Supp. 1977). Otherwise known as "Act 6." The passage of the Act amended and to a degree changed what was formerly known as the Louisiana Coastal Zone Management Program.

45. The Louisiana Coastal Wetlands Management Act concentrates on freshwater and sediment diversion projects while CWPPRA is broader in scope, creating a variety of restoration projects which work together to attain a comprehensive goal in coastal restoration.

46. The State's coastal wetlands restoration act recognized that "[c]oastal land loss in Louisiana continues in catastrophic proportions. Wetlands loss threatens valuable fish and wildlife production and the viability of residential, agricultural, and industrial development in coastal Louisiana." La. R.S. 49:213.1(A) (Supp. 1997). With this recognition, the Louisiana Legislature intended "that wetlands conservation and restoration be elevated in tandem to a position within state government of high visibility and action and that the conservation, restoration, creation, and nourishment of coastal vegetated wetlands be of high priority within that structure." La. R.S. 49:213.1(D) (1987 and Supp. 1997).

(the "Fund") to provide public monies for state projects.⁴⁷ The most important aspect of the Act is the project development plan that serves as the State's overall strategy for conserving and restoring Louisiana's coastal wetlands.⁴⁸ The State's main goal is to complete freshwater diversion projects to increase the flow of freshwater, sediments, and nutrients into areas that are presently saltwater or brackish marshes but were historically coastal wetlands.⁴⁹ These actions are taken in an attempt to restore the land building process and stabilize Louisiana's coastal zone.

Funding for the State's restoration projects, which includes CWPPRA projects, is dependent upon revenue received from the State's oil and gas severance tax (the "tax").⁵⁰ The Fund receives a minimum of \$5 million every year from the tax.⁵¹ If revenue from the tax exceeds \$600 million for the fiscal year, the Fund receives an extra \$10 million, and if the revenues exceed \$650 million, the Fund receives a second \$10 million.⁵² Thus, the Fund can receive as much as \$25 million per year.⁵³ However, due to a sharp decrease in revenue from the tax, the State has only been able to meet the minimum deposit of \$5 million into the Fund annually.⁵⁴ Even though restoration projects are

47. La. R.S. 49:213.1-213.8 (Supp. 1997). The State's Task Force is comprised of eight members: The Executive Assistant of the governor, Secretary of the Department of Natural Resources, Secretary of the Department of Wildlife and Fisheries, Secretary of the Department of Environmental Quality, Secretary of the Department of Transportation and Development, Assistant Chief of Staff for Health, Welfare, and Environment, Commissioner of Administration, and the Director of the State Soil and Water Conservation Committee. La. R.S. 49:213.5 (Supp. 1997). The fund is also known as the "Wetlands Trust Fund."

48. La. R.S. 49:213.6(A)(1) (Supp. 1997). The plan proposes projects in areas where coastal restoration is needed, and develops and enhances the outcome of the projects through the coastal use permit system.

49. See vanHeerden, *supra* note 15; Governor's Office of Coastal Activities Science Advisory Panel Workshop, *An Environmental-Economic Blueprint for Restoring the Louisiana Coastal Zone: The State Plan* (1994) [hereinafter *An Environmental-Economic Blueprint*]; Governor's Office of Coastal Activities, *A White Paper: The State of Louisiana's Policy for Coastal Restoration Activities* (1995) [hereinafter *A White Paper*]. These plans have been prepared for the state to present to the public and the Task Force the state's restoration plans and goals for both state and CWPPRA projects. The White Paper is the latest state plan on coastal restoration policies. It was recognized but not adopted by the CWPPRA Task Force.

In June, 1996, the Louisiana Governor's Office of Coastal Activities and the Department of Natural Resources released a new document entitled *The United Vision*, discussing the need for restoring coastal Louisiana. The document establishes two goals for saving the State's coastal wetlands and resources: (1) "restoration of critical barrier island functions by the end of this century," and (2) "reestablish Louisiana's coastal wetlands by the year 2040."

50. Interview with Carrol Clark, Engineer Manager, Coastal Restoration Division, Louisiana Dept. of Natural Resources, in Baton Rouge, Louisiana (July 1, 1995).

51. La. R.S. 49:213.7(B)(1) (Supp. 1997).

52. La. R.S. 49:213.7(B)(2)(a), (b) (Supp. 1997).

53. The balance of the fund during a fiscal year cannot exceed \$40 million. La. R.S. 49:213.7(B)(3) (Supp. 1997).

54. Interview with Karen Gautreaux, Technical Assistant, Office of the Governor, Coastal Activities Office, in Baton Rouge, Louisiana (July 11, 1995). During the last regular session of the

considered to be underfunded, the State has completed 200 coastal restoration projects as of October 1994.⁵⁵

In 1990 Louisiana's United States Senators John Breaux and J. Bennett Johnston led the effort that resulted in the Coastal Wetlands Planning, Protection, and Restoration Act of 1990.⁵⁶ This act, known as CWPPRA, set up a Federal-State Task Force (the "Task Force") and a priority project list, and devised a manner of selecting CWPPRA restoration projects for that list, a comprehensive restoration plan, and a funding scheme for the projects.⁵⁷

CWPPRA is a joint effort among five federal agencies and the State of Louisiana.⁵⁸ The Task Force is comprised of the Secretary of the Army, who serves as chairman, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Governor of Louisiana.⁵⁹ The Task Force has final approval authority for all CWPPRA priority projects regardless of lead agency and sponsor, but the State has input as to those projects proposed.⁶⁰

Louisiana Legislature in the Spring of 1995, there were lobbying efforts by citizens groups and the DNR to decrease the threshold requirements of \$600 million and \$650 million to \$300 million and \$350 million in order to increase the amount of contributions the State makes to the Wetlands Fund each year. The result would be revenues of \$20 million annually to match federal funds. These efforts were unsuccessful. A new bill for reduction of the tax's threshold requirements could be considered by the Louisiana Legislature during the 1997 regular session. *Louisiana Searches for CWPPRA Funding, in Water Marks* (Louisiana Coastal Wetlands Planning, Protection, and Restoration Newsletter (Spring 1996)). See also *A White Paper*, *supra* note 49, at 7.

55. Philip Bowman et al., *Louisiana's Vanishing Coast, Part IV: Strategic Measures*, Louisiana Conservationist, Sept./Oct. 1994, at 5. Since approval of the State's first annual plan in 1992, a total of 147 coastal restoration projects or major project elements have been approved; 31 projects have been completed, 19 are under construction, 21 are in the design and permitting stage, and 75 remain to be funded and initiated. Governor's Office of Coastal Activities, Coastal Wetlands Conservation and Restoration Plan 4 (1995). In November 1994, the Louisiana Department of Natural Resources had 53 projects ranked in order of cost effectiveness that are proposed or potential projects. Louisiana Department of Natural Resources, Coastal Restoration Division, State Plan Projects and Ranking Summary (November 11, 1994). The list, however, can change at anytime depending upon CWPPRA project selection and selection of other state projects. Interview with Carrol Clark, Engineer Manager, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995).

56. 16 U.S.C. § 1351-3956 (1994) [hereinafter CWPPRA].

57. *Id.*

58. Interview with Stan Green, Engineer, United States Corps of Engineers, New Orleans District, in New Orleans, Louisiana (July 8, 1995).

59. CWPPRA § 302(9). Each of the agencies placed on the task force has designated a representative of that agency as follows: Dr. Len Bahr, Louisiana Department of Natural Resources; Russell Rhoades, United States Environmental Protection Agency; Dave Fruge, United States Department of Interior—United States Fish & Wildlife Service; Don Gohmert, United States Department of Agriculture—National Resource Conservation Service; Bill Fox and Tom Osborn, United States Department of Commerce—National Marine Fisheries Service; Col. Bill Conner, United States Army Corps of Engineers, New Orleans District.

60. CWPPRA § 303(a). A lead agency for a CWPPRA project is chosen by the type of project, its location, and the specialized work the project entails. Interview with Stan Green, Engineer, United States Corps of Engineers, New Orleans District, in New Orleans, Louisiana (July 8, 1995).

A. CWPPRA Project Categories

Upon identification of a coastal wetlands restoration priority project by the Task Force, site assessments and evaluations are completed, a restoration method is developed, and the proposed project is given adequate public notice and comment.⁶¹ Priority projects are proposed based on the cost-effectiveness of the project "in creating, restoring, protecting, or enhancing the coastal wetlands, taking into account the quality of such coastal wetlands."⁶² At that time, any individual, organization, corporation, or the State may propose additional or alternative projects to those already under consideration by the Task Force.⁶³ However, all CWPPRA projects must come out of the overall restoration plan; that is, a project must be within one of the nine basin areas of southern Louisiana.⁶⁴ The projects are also classified by the agencies as Tier I and Tier II projects.⁶⁵ Tier I projects are small scale and easier to complete with the modest funding available for CWPPRA projects, and are called the "band-aid" approach to coastal restoration efforts.⁶⁶ Tier II projects are large scale and involve a comprehensive or basin-wide plan for coastal wetlands restoration.⁶⁷ A Tier II project may be a single project or a group of smaller projects that work together to produce large-scale results.

61. Interview with Stan Green, Engineer, United States Corps of Engineers, New Orleans District, in New Orleans, Louisiana (July 8, 1995). Essentially, all the requirements of public notice and comment as required under the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321-4370 (1994), are followed when considering restoration plans and projects.

62. CWPPRA § 303(a). The Task Force uses the Wetlands Value Assessment (WVA) method developed primarily by the United States Fish & Wildlife Service in order to measure the costs and benefits of wetlands restoration projects. See also Coastal Wetlands Conservation and Restoration Plan, *supra* note 55, at 7. However, some groups believe that the WVA may be in need of revision because of problems associated with it such as: 1) it favors existing wetlands over restoration projects; 2) it cannot measure the "big-picture" of restoration very well; 3) it does not adequately assess systemic projects; and 4) the Barrier Islands restoration projects and fresh water diversion projects (both of which are absolutely essential to coastal restoration) do not fare well under the WVA. The WVA was developed originally from HEP models that counted wildlife in a designated area (also known as a "critter count"). Interview with Mark Davis, Executive Director of the Coalition to Restore Coastal Louisiana and Chair of the CWPPRA Citizens Participation Group, in Baton Rouge, Louisiana (July 11, 1995).

63. Interview with Stan Green, Engineer, United States Corps of Engineers, New Orleans District, in New Orleans, Louisiana (July 8, 1995).

64. Interview with Mark Davis, Executive Director of the Coalition to Restore Coastal Louisiana and Chair of the CWPPRA Citizens Participation Group, in Baton Rouge, Louisiana (July 11, 1995).

65. *Id.* See also interview with Stan Green, Engineer, United States Corps of Engineers, New Orleans District, in New Orleans, Louisiana (July 8, 1995).

66. *Id.* Some Tier I projects are "demonstration" projects used to determine what actions and methods achieve the best results in coastal restoration. Interview with Doug Meffert, Engineer, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995).

67. *Id.* Large-scale does not necessarily mean large projects, but can be a number of small projects or a combination of large and small projects that are a comprehensive, or big-picture, approach to coastal restoration efforts.

Every fiscal year since CWPPRA's inception in 1990, the Louisiana Coastal Wetlands Conservation and Restoration Task Force has prepared and submitted a Coastal Wetlands Restoration Plan to the United States Congress House and Senate committees on natural resources.⁶⁸ Each plan submitted by this task force contains the plan's objectives, lists of projects and measures recommended for implementation and funding, and project descriptions.⁶⁹ These projects have generally been Tier I projects.

In November of 1993, the Task Force completed the large-scale Louisiana Coastal Wetlands Restoration Plan as required by CWPPRA.⁷⁰ The Restoration Plan significantly changes the existing management techniques of the Lower Mississippi and Atchafalaya Rivers to further increase freshwater and sediment input into coastal wetlands, and to restart the natural processes of building and maintaining these wetlands.⁷¹ The Restoration Plan encompasses Tier II projects. The major concepts included in the plan are:

- a phased abandonment of the existing "bird's foot" delta in favor of a new delta in the shallow waters of an adjacent estuary, possibly Breton Sound
- multiple diversions into the Barataria Basin
- reactivation of old distributary channels
- seasonal increases in flow down the Atchafalaya River⁷²

To reverse the impacts of saltwater intrusion and wave erosion (i.e., hydrologic modifications), large projects are proposed to rebuild barrier island chains and control tidal flows through large navigation channels.⁷³

68. The plans were resubmitted as follows: fiscal year 1990-91 resubmitted in April, 1990; fiscal year 1991-92 submitted in April, 1991; fiscal year 1992-93 submitted in March, 1992; fiscal year 1993-94 submitted in March, 1993; fiscal year 1994-95 submitted in April, 1994; fiscal year 1995-96 submitted in April, 1995. For more information, the United States Army Corps of Engineers, New Orleans District, routinely prepares CWPPRA Project Status Summary Reports for the Task Force, listing the status of all CWPPRA projects to date. The last report was prepared on June 6, 1995.

69. See generally Coastal Wetlands Conservation and Restoration Plan (fiscal year 1995-96), submitted to the House and Senate Committees on Natural Resources (April 1995). As of April 1995, there are 130 currently approved CWPPRA projects within the nine basins. *Id.* at 5-9.

70. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1; CWPPRA § 303(b). The Louisiana Department of Natural Resources has begun to prepare the restoration plan evaluation required to be developed under CWPPRA, and will submit the evaluation to Congress in November of 1996 as required by CWPPRA § 303(b)(7). Interview with Doug Meffert, Engineer, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995).

71. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at 9.

72. *Id.* All of these projects would help to restore the natural land building processes that the Mississippi River historically created within Louisiana's coastal zone, increasing and stabilizing coastal wetlands.

73. *Id.* These large scale projects would greatly contribute to a decrease in wave erosion on the coastal zone and a decrease in tidal (saltwater) invasion into coastal wetlands by protecting Louisiana's coastline.

These projects fit together and make up the "overall plan" to help rebuild Louisiana's disappearing coastal wetlands.⁷⁴ The purpose of the "overall plan," or Restoration Plan, is to

develop a comprehensive approach to restore and prevent the loss of coastal wetlands in Louisiana [and] coordinate and integrate coastal wetlands restoration projects in a manner that will ensure the long-term conservation of the coastal wetlands in Louisiana.⁷⁵

The plan identifies high priority coastal wetlands restoration projects in Louisiana in areas identified as needing coastal wetlands restoration projects.⁷⁶

For coastal restoration to be a success, a comprehensive restoration project plan must be undertaken. While smaller projects may be successful and are necessary for immediate restoration purposes, they generally address localized problems. If such projects remain isolated and uncoordinated, long-term restoration cannot be accomplished.⁷⁷ The consensus of the majority is that "large, complex, innovative long-term projects are essential to ultimate restoration of Louisiana's coastal wetlands."⁷⁸ These projects will provide for the *long-term conservation* of restored wetlands as well as dependent fish and wildlife populations.⁷⁹

Two large-scale projects are currently underway following the Task Force's shift in its emphasis to "big-picture projects." As a result of this decision, two project funding categories were created. Two-thirds of project funding will now be dedicated to large-scale projects having "systematic, process-level benefits" with

Projects were begun and continue at Gravel Terre and Queen Bess Islands. These critical projects have shored up nearly 100 acres of salt marsh damaged by years of storms and tides, enhancing the preservation of Louisiana's coastline. Sandra Barber, *Dredged Silt Helps Build Coastal Islands*, *The Times-Picayune*, Dec. 12, 1996, at A1.

74. The Restoration Plan can be found in the Main Report and Environmental Impact Statement completed by the Task Force in November of 1993, and issued by the United States Army Corps of Engineers in New Orleans. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1.

75. CWPPRA § 303(b)(2).

76. Interview with Carol Clark, Engineer Manager, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995). Even though the plan has been completed, it has awaited approval since December of 1993 by the Corps of Engineers' New Orleans District Office.

77. Interview with Mark Davis, Executive Director of the Coalition to Restore Coastal Louisiana and Chair of the CWPPRA Citizens Participation Group, in Baton Rouge, Louisiana (July 11, 1995). For example, if an area requires two projects for restoration efforts to be successful, and one project is completed two years prior to beginning the second project, the restoration activities that have taken place as a result of the first project may lapse or deteriorate before the second project has begun. See also *Funding Shifts to Large-Scale Projects*, in *Water Marks* (Louisiana Coastal Wetlands Planning, Protection, and Restoration Newsletter (Spring 1996)).

78. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at 145. See also *Coastal Louisiana: Here Today Gone Tomorrow?*, Coalition to Restore Coastal Louisiana (April 1989) (publication information on file with *Louisiana Law Review*); *An Environmental-Economic Blueprint*, *supra* note 49; Report of the Louisiana Wetland Protection Panel, *supra* note 12; Boesch et al., *supra* note 2; *A White Paper*, *supra* note 49.

79. CWPPRA § 303(b)(4)(C) (emphasis added).

fully-funded costs exceeding \$10 million.⁸⁰ The second project category includes small-scale projects with fully-funded costs of less than \$10 million.⁸¹ This long awaited move toward large-scale projects should ultimately have the effect of a coordinated regional effort, vastly improving the impact and longevity such projects are expected to have on coastal restoration.⁸²

One project is the Myrtle Grove Diversion Project in Plaquemines and Jefferson Parishes. The project cost is estimated at \$15 million and will protect, enhance, and create over 10,250 acres of wetlands and coastal marshes.⁸³ The second project, the Bayou LaFourche Wetlands Restoration Project, has an anticipated cost of \$24.5 million and would result in siphoning water from the Mississippi River into Bayou LaFourche.⁸⁴

Many of CWPPRA's projects are dependent upon the success of each other, creating an interdependency in certain project areas. It is very important that all of CWPPRA's projects fit into an overall scheme for long-term restoration. CWPPRA projects are twenty year projects and upon completion must be monitored and maintained for that period of time.⁸⁵

B. Funding Under CWPPRA

Funding for CWPPRA projects is complicated but can be summarized as follows. Cost-sharing between the federal government and the State for each independent project is seventy-five percent and twenty-five percent, respectively.⁸⁶ The federal government can contribute as much as \$35 to \$40 million each year to CWPPRA projects, but annually contributes \$30 million to the State for such projects.⁸⁷ The federal funding for CWPPRA filters down from the Federal

80. *Id.*

81. *Id.*

82. *Funding Shifts to Large-Scale Projects, supra note 77.*

83. *Breaux Works to Protect State Wetlands and Aquatic Life*, Congressional Press Release (February 24, 1997).

84. *Funding Shifts to Large-Scale Projects, supra note 77.*

85. Interview with Karen Gautreaux, Office of the Governor, Technical Assistant, Coastal Activities Office, in Baton Rouge, Louisiana (July 11, 1995).

86. CWPPRA § 303(f). When the state develops a Coastal Wetlands Conservation Plan as required under CWPPRA § 304, the cost-share changes to 85% Federal and 15% State, per project. This plan has not yet been completed by the State. Interview with Carrol Clark, Engineer Manager, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995).

87. Interview with Carrol Clark, Engineer Manager, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995). Historically, the federal government did contribute as much as \$40 million each year to CWPPRA for restoration projects. However, due to the State's inability to adequately contribute to CWPPRA projects at present, the total amount of federal funding each year has decreased from the original figure of \$40 million. Interview with Doug Meffert, Engineer, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995). However, Governor Foster has taken action by recommending in his plan for fiscal year 1996-97 that \$7.8 million in general fund dollars be used as a federal match, thus "recovering \$23.4 million left on the table over the last two years." 1996 La. Acts No. 17. *See also*

Highway Trust Fund.⁸⁸ Included in the Federal Highway Trust Fund is a Small Engine Gas Tax on fuel sold for small engines such as "weed whackers," lawnmowers, inboard and outboard marine engines, and other small engines.⁸⁹ The revenue from the Small Engine Gas Tax is directed to the United States Fish & Wildlife Service's Sport Fishing Restoration Fund, where it is held until disbursement by the United States Corps of Engineers (COE) for approved CWPPRA projects.⁹⁰ Federal funding for CWPPRA is expected to be available through fiscal year 1999.⁹¹

As discussed previously, state funding for CWPPRA comes from Louisiana's Wetlands Conservation and Restoration Fund. Even with state funding, CWPPRA's total funds are limited to approximately \$45 million each year. One problem is that the State's contribution to its fund has decreased annually from \$25 million to \$5 million due to a vast loss of tax revenue from the oil and gas industry. The decrease in state funding means a higher probability that cost-sharing on all approved CWPPRA projects cannot be attained, causing some projects to not be undertaken.⁹² Presently, there are a total of 66 projects in the nine basins with a baseline cost of approximately \$169.2 million.⁹³ The current estimated cost of those projects is approximately \$180 million.⁹⁴ The available funding for the projects is as follows: federal—\$116 million; state—\$34 million; total—\$150 million.⁹⁵ Even with the federal and state funding available, only fifteen CWPPRA projects have been completed in the past five years.⁹⁶ What is absolutely necessary is that the State have a predictable source and amount of funds annually available for its trust fund.

Other ways of increasing state funds for CWPPRA projects are available. First and foremost, the State should complete its CWPPRA Conservation Plan which would reduce the State's cost share from twenty-five to fifteen percent on

Louisiana Searches for CWPPRA Funding, in Water Marks (Louisiana Coastal Wetlands Planning, Protection, and Restoration Newsletter (Spring 1996)).

88. Interviews with Stan Green, Engineer, United States Corps of Engineers, New Orleans District, in New Orleans, Louisiana (July 8, 1995); Mark Davis, Executive Director of the Coalition to Restore Coastal Louisiana and Chair of the CWPPRA Citizens Participation Group, in Baton Rouge, Louisiana (July 11, 1995); and Johnny Broussard, Sen. John Breaux's Office, in Washington, D.C. (June 1995).

89. *Id.*

90. *Id.* The Department of the Interior and United States Fish & Wildlife Service act as the bank, and the United States Corps of Engineers as the banker for disbursement of federal funds for CWPPRA projects.

91. *Id.* See CWPPRA § 308 and 16 U.S.C. § 777(c) (1994).

92. Refer to CWPPRA Project Status Summary Report, United States Corps of Engineers (June 6, 1995), for those projects that are inactive at the request of the State due to a lack of state funds to cost-share on the project.

93. *Id.* The numbers are approximate numbers taken from the report and rounded off to the nearest figure. Please refer to the report for exact specifications.

94. *Id.*

95. *Id.*

96. *Big Plans For Coastal Restoration, The Times-Picayune, Aug. 11, 1996, at B8.*

CWPPRA and other projects.⁹⁷ The Louisiana Department of Natural Resources (DNR) could ask for additional funding from the State's general fund.⁹⁸ The legislature must consider increasing the amount of revenue available to the Wetlands Fund from the oil and gas severance tax in the fiscal session held in the beginning of 1996.⁹⁹ Other options that should be discussed are: mandatory cost-share agreements with local parishes where the restoration projects are implemented; increasing the fees assessed for wetlands mitigation efforts on dredging permits, etc., for actions that disrupt wetlands; exclusive docking fees for gaming vessels in the coastal zone that would go directly to the Wetlands Fund; an increase in lease fees for the oil and gas industry pipelines; and an increase in fees for oyster leases (current fees are only \$2.00 per acre each year).

Because coastal wetlands loss in Louisiana is a national concern, additional federal funding through the use of taxes or surcharges should be considered to increase monies for CWPPRA projects. Examples of taxes that should be considered are: taxes on the sale of boats/vessels and parts, and on the sale of engines and engine parts for commercial, recreational, and sportfishing uses; taxes on navigational and fishing equipment for boats/vessels and parts for commercial, recreational, and sportfishing; additional taxes on the use of docking areas and marinas, both public and private; a penny or half-penny per gallon tax increase on fuel sold directly to commercial, recreational, and sportfishing boats and vessels at public and private marinas; and fee increases in federal migratory bird hunting licenses that would go directly to the fund. These taxes may also be considered by the State as another source of revenue for the Fund.

Present spending of funds for CWPPRA projects takes place in accordance with the priority list and requires a determination of cost-effectiveness in relation to the Wetlands Value Assessment despite actual wetlands needs.¹⁰⁰ In the State's issue of its latest policy for wetlands restoration, entitled *A White Paper: The State of Louisiana's Policy for Coastal Restoration Activities*, the Governor proposed two plans of action: 1) funding for large-scale projects will require rolling over of CWPPRA monies from year to year; and 2) the spending scheme of funds could be altered to follow a three phase approach: one-third of the annual

97. *A White Paper*, *supra* note 49, at 7; CWPPRA § 303(f), 304. The plan should have been submitted to Congress by publication of this article. The plan is expected to rely heavily on "Louisiana's mitigation regulations already in place," including elements such as incentives to landowners for wetlands preservation, technological innovations in restoration and greater public participation and education. *Funding Shifts to Large-Scale Projects*, *supra* note 77.

98. *Id.*

99. *Id.* The legislature should consider either increasing the severance tax or lowering the threshold amount for receipt of money by the Louisiana Wetlands Restoration Fund. *See also* Coastal Summit '95: Working Group Reports, Draft (Jan. 19, 1995).

100. Cost-effectiveness is a required component and considered a part of the secondary criteria factored into the ultimate selection of CWPPRA projects. Interview with Doug Meffert, Engineer, Coastal Restoration Division, Dept. of Natural Resources, in Baton Rouge, Louisiana (July 11, 1995). *See supra* note 62 for a description of the Wetlands Value Assessment used by the United States Fish and Wildlife Service to determine cost/benefit ratios for wetlands development.

funds used for barrier island restoration, one-third for small-scale defensive projects in critical areas, and one-third for river (freshwater) diversions.¹⁰¹ By spending CWPPRA funds in this fashion, the State believes that existing land would be better protected and that the State can "ultimately achieve a natural balance between wetland loss and wetland gain."¹⁰²

The new state policy would allow for better planning through a comprehensive approach to the restoration process by attacking coastal wetlands loss with a variety of interdependent large and small scale projects. However, such activities would require more funding than is presently available for CWPPRA from either the state or federal governments. Even though the State's new policy may fall in line with the goals of CWPPRA's long-term comprehensive restoration plan, the policy was not accepted by the Task Force and therefore will not be implemented as a part of CWPPRA's plan.

C. An Overview of the Problems in Implementing CWPPRA Projects

The funds presently available for CWPPRA projects may not be adequate to implement a comprehensive long-term method of restoration. The main problem in implementing CWPPRA projects is not lack of funding, nor is it the fact that the Task Force has yet to implement a long-term comprehensive restoration plan. Rather, it is legal problems that pose the greatest threat to CWPPRA's restoration plan and projects. These problems concern property rights and civil damages under Louisiana law.

One dilemma is the effect CWPPRA projects will have on oyster production and the leases themselves. Oyster leases have delayed freshwater diversion projects considerably since coastal restoration began in the late 1980s in Louisiana. Many CWPPRA and state projects will eventually have the effect of redistributing the salinity levels in many areas in the coastal zone because of the introduction of fresh water and sediment into coastal areas in order to curb coastal erosion. Thus, problems are created because oyster production requires a certain degree of salinity in the water. Therefore, as projects are proposed, legal problems in the areas of takings law and compensation rights will arise as a result of oyster leases that may be affected by the projects. As one of the Nation's top oyster producers, Louisiana's average harvest from 1988 to 1992 was 10 million pounds of oyster

101. *A White Paper*, *supra* note 49, at 7. Projects are presently chosen by cost-effectiveness regardless of where they are located and the need for each project. By implementing the State's 1/3—1/3—1/3 approach, the projects in each plan can be chosen on a cost effective basis, while allowing restoration to begin in the three areas that projects are most desperately needed to ensure a comprehensive restoration goal. Each plan, including the barrier island restoration, small scale defensive projects, and large diversions, can then work together more efficiently and effectively to properly coordinate and phase in a long-term restoration plan.

102. *Id.* CWPPRA's goal is to achieve a "no-net loss" of wetlands. Whether that goal can be accomplished without greater effort by the state legislature and Congress to increase funding and provide increased litigation and legal support for CWPPRA projects is debatable.

meats each year.¹⁰³ Oyster production in Louisiana is a livelihood for many and thus a significant industry in southern Louisiana. The majority of oyster production in Louisiana takes place on state owned water bottoms, yet some production occurs on leased private water bottoms.¹⁰⁴ Many oyster farmers claim that coastal restoration projects will have a detrimental effect on oyster production in coastal areas, and they are probably correct. However, such detrimental effects will be short-term. Through coastal restoration projects, areas that are now saltwater or brackish water will eventually return to their historic salinity levels, and oyster production will increase and stabilize over time. Conflicts between diversion projects and oyster beds are an example of economic displacement that must be anticipated and factored into long range planning.¹⁰⁵

The United States Congress recently appropriated \$7.5 million for the relocation of oyster leases that are stalling the Davis Pond Freshwater Diversion Project.¹⁰⁶ Thus, the oyster leases will be moved to a new location where the short-term adverse effects of coastal restoration on oyster leases will not be felt. As more projects of this type are funded, we can ensure that oyster leases do not present an obstacle to CWPPRA and other coastal restoration projects.

Another more persistent obstacle to the implementation of CWPPRA projects is that approximately eighty percent of the State's coastal wetlands are privately owned.¹⁰⁷ Over time, many of these privately owned wetlands have subsided and eroded, the ownership of the newly created water bottoms belonging to the State. Thus, reclamation of restored wetlands by the State brings with it potential conflicts with riparian owners regarding mineral rights to restored lands. Servitude agreements needed to conduct work operations on privately owned wetlands also pose a threat to wetlands management by state and federal agencies. Finally, once projects are completed, the government must prevent the disturbance and disruption of the restored lands over a twenty year period, while taking into consideration the possible need of access to and through those lands to private property.

V. RIGHTS OF RIPARIAN LANDOWNERS AS AFFECTED BY CWPPRA RESTORATION PROJECTS

The rights afforded riparian landowners and other owners of private property interests in Louisiana are longstanding and distinguished. While the State is

103. *Id.* at EIS-86. Ten million pounds is the approximate equivalent of 2 million sacks of raw oysters, with an average value of \$30 million.

104. *Id.* Current oyster leases include approximately 357,000 acres of coastal water bottoms. Oyster leases obtained from the State cost \$2 per acre each year and lease terms are for fifteen year periods.

105. Bowman et al., *supra* note 55, at 7.

106. *Congress Funds Oyster Program*, in *Water Marks* (Louisiana Coastal Wetlands Planning, Protection, and Restoration Newsletter) (Fall 1996).

107. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at 59. Those wetlands in Louisiana not privately owned are under ownership and management by either federal or state agencies.

considered to have an interest in land use and ownership of lands for the public interest, under Louisiana law the courts have been generous towards the rights of the riparian landowner. However, with the coming out of environmental legislation and regulation in recent years, the direction of the courts has changed. Courts are now more concerned with the implementation of environmental legislation in the public interest and for the benefit of the public trust. The courts have also recognized and followed legislative mandates that the State preserve and protect the environment.¹⁰⁸

This change in direction came about before the enactment of CWPPRA and the State's coastal restoration efforts. It began with challenges to the denial and issuance of permits by the Louisiana Department of Environmental Quality (DEQ), the Louisiana Department of Natural Resources (DNR), and the United States Corps of Engineers (COE).¹⁰⁹ Such permits are usually requested for dredge and fill activities in wetlands, coastal use permits, modification of permits, and solid waste disposal permits.¹¹⁰ The courts have come to recognize with regularity environmental issues within the context of rights between landowners and the State.¹¹¹

108. La. Const. art. IX, § 3; La. R.S. 41:1702 (1990); La. R.S. 49:214-214.41 (1987).

109. See generally *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Plantation Landing Resort, Inc. v. United States*, 30 Fed. Cl. 63 (1993); *In re Dravo Basic Materials Co., Inc.*, 604 So. 2d 630 (La. App. 1st Cir. 1992); *Pardue v. Gomez*, 597 So. 2d 567 (La. App. 1st Cir. 1992); *Pardue v. Stephens*, 558 So. 2d 1149 (La. App. 1st Cir. 1989); *Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n*, 452 So. 2d 1152 (La. App. 1st Cir. 1984).

110. See sources cited in *supra* note 109.

111. The Louisiana Legislature, in the Regular Session of 1995, passed Senate Bill No. 1362 amending and reenacting La. R.S. 49:214.5, and enacting La. R.S. 49:214.6, both relating to coastal restoration projects. La. R.S. 49:214.5-.6 (Supp. 1996). The act contains three sections. Section 1 includes §§ 214.5-.6; Section 2 discusses the act's retroactivity; and Section 3 states that the act is effective as of July 1, 1995. Section 214.5 dramatically affects, in a positive way, the State's ability to move forward with coastal restoration. The section, entitled "State and political subdivisions of the state held harmless in coastal restoration; licensees and permittees," states:

A. Notwithstanding any other law to the contrary, the state of Louisiana, its political subdivisions, and its agents or employees shall be held free and harmless from any claims for loss of damages to rights arising under any lease, permit, or license granted to any individual or other entity for any purpose on state lands or water bottoms from diversions of freshwater or sediment, depositing of dredged or other materials or any other actions, taken for the purpose of management, preservation, enhancement, creation or restoration of coastal wetlands, water bottoms or related renewable resources.

B. All departments, agencies, boards, or commissions of the state of Louisiana and its political subdivisions shall include language which shall hold the state and its political subdivisions harmless for the purposes set out in this Section in all leases, permits, or licenses granted to any individual or other entity after July 1, 1995.

The act is "intended to be remedial in nature" and "shall be retroactive as it applies to any leases, permits, or licenses granted to any individual or other entity on state lands and water bottoms whose rights may be affected by coastal restoration projects." 1995 La. Acts No. 936, § 2. It can be surmised from the language that the act's coverage is both broad and comprehensive. The enactment of this legislation is a great step forward for the State in its ability to implement CWPPRA and state coastal restoration projects.

CWPPRA projects, however, will bring forth a new line of cases regarding the rights of riparian landowners and those individuals or corporations who hold an interest in private property rights within the coastal zone that will be affected by such projects. The issues include the acquisition of property by accretion and alluvion, reclamation rights, mineral rights, servitudes and easements, and possibly takings claims under the Louisiana or United States Constitutions.

A. *Reclamation of Louisiana's Water Bottoms—The Battle Over Severance of Surface Rights and Mineral Rights*

Reclamation and restoration projects are directly at odds with each other. What do the two have in common and why are they causing the Task Force, more specifically the DNR, to set aside much needed CWPPRA projects on the Gulf Coast and the Barrier Islands? While oyster lessees present a barrier to freshwater and sediment diversions, riparian landowners present the same barrier to restoration and fill activities to build wetlands and create marsh. This is a result of the private ownership of approximately 80% of wetlands in Louisiana.

In June of 1993, the EPA subcontracted to the DNR studies to be completed for the restoration of Isle Derniers, part of the chain of Barrier Islands off of Louisiana's coast in the Gulf of Mexico.¹¹² Restoration of these and other barrier islands will help reduce salinity and the effect of high tides that inundate and destroy coastal marshes, reduce tidal erosion to Louisiana's coast, and act as a buffer to coastal communities.¹¹³ The islands are slowly disappearing due to tidal erosion and a lack of sediment from inland waterways building up the backside of the islands. In effect, the islands are "rolling back" and will continue to do so unless the necessary action is taken to restore the islands' natural rebuilding process. Restoration can include construction of breakwater barriers and fill activities by pumping sediment from behind the island and from Ship Shoal to the front of the island.¹¹⁴ While barrier islands restoration generally would not be problematic, private ownership of barrier islands can stall the restoration process. However, Isle Derniers, for example, is currently owned by the Louisiana Land & Exploration Company (LL&E).¹¹⁵ Title disputes have arisen between the State and LL&E with regard to reclamation activities on the islands.¹¹⁶ Although LL&E's interests will be discussed, these issues are not

112. Interview with W. L. "Bill" Berry, Director of Wetlands Management, Louisiana Land & Exploration Company, in New Orleans, Louisiana (July 12, 1995). The islands border the southern portion of Lake Pelto and are located in Terrebone Parish.

113. Bob Anderson, *Restoring Barrier Islands Called Vital for Coast*, Sunday Advocate, Mar. 12, 1995, at B2.

114. Interview with W. L. "Bill" Berry, Director of Wetlands Management, Louisiana Land & Exploration Company, in New Orleans, Louisiana (July 12, 1995).

115. LL&E is the largest private owner of coastal wetlands in the United States and the largest owner of lands in the State of Louisiana. Louisiana's National Treasure 3 (rev. ed. 1991) (on file with the *Louisiana Law Review*).

116. Bob Anderson, *Wetlands Work Hits Ownership Snag*, The Advocate, May 25, 1994, at A10.

limited to LL&E but are applicable to many private property owners in Louisiana's coastal zone.¹¹⁷

LL&E, as owner of Isle Derniers, has an interest in the islands and that portion of the islands lost to erosion that are now state owned water bottoms.¹¹⁸ While this interest includes the land itself, the land beneath the waters is claimed because of the mineral rights attached. LL&E's rationale is that it has a constitutional and legal right to reclaim land it has lost through coastal erosion, which right may be lost if the State reclaims the land as a result of a CWPPRA project.¹¹⁹ From this dispute between LL&E, as a riparian landowner, and the State, three issues can be addressed: 1) whether the term public use includes reclamation of lands for coastal restoration; 2) whether a riparian owner has an absolute right to reclamation; and 3) whether the State can alienate its mineral rights from state owned water bottoms.

B. State Reclamation of Land Lost to Erosion for Coastal Restoration: A Public Use?

It is highly unlikely that many riparian owners of land lost to erosion on the Louisiana Gulf Coast will take steps towards reclamation of their lost land. The main reason being the high cost of reclamation activities and continued maintenance of such emergent lands. Under Louisiana Constitution article IX, section 3, the "legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion."¹²⁰ *The bed of a navigable water body may also be reclaimed by the State for public use.*¹²¹

Although the power of the State to indulge in reclamation activities is far more limited than that of the riparian owner under Article IX, section 3 of the Louisiana Constitution, it is a right that may well preempt a riparian landowner's right of reclamation. The reference made to public use is a concept separate

117. *Id.*

118. Interview with Mark Davis, Executive Director of the Coalition to Restore Coastal Louisiana and Chair of the CWPPRA Citizens Participation Group, in Baton Rouge, Louisiana (July 11, 1995). See *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576 (La. 1974) (water bottoms or beds of navigable waters are owned by the State in its sovereign capacity); *Gaudet v. City of Kenner*, 487 So. 2d 446 (La. App. 5th Cir.), writ denied, 493 So. 2d 638 (1986) (when private property subsides or erodes and becomes the bed of a lake or other navigable water body, it is the property of the State, even upon reappearance).

119. Bob Anderson, *Two Agencies' Dispute Delays Starting Project to Protect La. Coast*, Sunday Advocate, Mar. 12, 1995, at B1. See also LL&E, *Barrier Island Position Paper* (received from Bill Berry on July 12, 1995) (on file with the *Louisiana Law Review*).

120. "Reclamation" or "recovery of land" or "reclamation project" for purposes of La. Const. art. IX, § 3 is "the raising of land through filling or other physical works which elevate the surface of the theretofore submerged land as a minimum above the level of ordinary low water in the case of rivers or streams and above the level of ordinary high water in the case of bodies of water other than rivers and streams." La. R.S. 41:1702(F) (1995).

121. La. Const. art. IX, § 3.

from public purpose, which is traditionally used to define when a taking has occurred.¹²² Public purpose refers to the use of the power of eminent domain for the health, safety, or welfare of the community.¹²³ Public use is a use "which confers some benefit or advantage to the public; it is not confined to actual use by the public. . . . a 'public advantage' or a 'public benefit' accrues sufficient to constitute a public use. . . . The use must be a needful one for the public, which cannot be surrendered without obvious general loss and inconvenience."¹²⁴ A review of Louisiana case law shows that public use is generally referred to as the right of the public to use a parcel of land, whether the property is under private or public ownership.¹²⁵

In *Save Our Wetlands, Inc. v. Orleans Levee Board*, the Louisiana Fourth Circuit Court of Appeal reviewed the ability of the State to reclaim state water bottoms for construction and operation of the New Orleans Lakefront Airport.¹²⁶ The court held that the State reclaimed through a state agency a water bottom it already owns,¹²⁷ stating that reclamation of property for an airport "for the benefit of the public is clearly a public use" that is specifically provided for and within the permissible uses under Article IX, section 3.¹²⁸

Given the fact that restoration of the barrier islands allow them to act as a tidal barrier, a hurricane buffer, and prevent further erosion to Louisiana's coast, a court would probably find that reclamation by the State of the land lost, even if previously privately owned land, would be for a public use. These natural actions would otherwise heavily affect coastal communities and fisheries over long periods of time. Reclamation of submerged lands on the Gulf side of Isle Derniers would confer a substantial benefit to the coastal communities, as well as to the State and the Nation for the reasons previously discussed. Therefore, under Article IX, section 3, the State would probably be able to reclaim those submerged lands for coastal restoration, designating such activities as necessary for a public use.

C. Reclamation—A Riparian Owner's Absolute Right?

The issue that is contested and hotly debated between the State and LL&E is that reclamation of state owned water bottoms, while creating land for the

122. Lee Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 La. L. Rev. 647, 663 (1983).

123. Black's Law Dictionary 1231 (6th ed. 1990).

124. *Id.* at 1232.

125. See generally *Parish of Jefferson v. Bonnabel Properties, Inc.*, 620 So. 2d 1168 (La. 1993) (streets in private subdivision dedicated to public use); *DeSambourg v. Board of Comm'rs for the Grand Prairie Levee Dist.*, 621 So. 2d 602 (La. 1993), *cert. denied*, 114 S. Ct. 925 (1994) (city appropriated bature under levee servitude for public use); *State v. Barras*, 615 So. 2d 285 (La. 1993) (the banks of navigable rivers and streams are private things subject to the public use).

126. 368 So. 2d 1210 (La. App. 4th Cir. 1979).

127. *Id.* at 1213.

128. *Id.*

benefit of CWPPRA and state restoration projects, would deprive the riparian owner of his ability to reclaim land and all rights thereto. LL&E claims that if the State reclaims water bottoms as a part of coastal restoration projects, LL&E will lose its right to reclaim these newly formed lands. And, if LL&E loses its right to reclaim the lands, more importantly it will lose the right to all minerals located below the surface of those lands. Like many landowners in Louisiana, LL&E continues to pay taxes on the land it lost to erosion which has become the property of the State through its sovereign capacity.¹²⁹ Thus, the question presented is twofold: first, whether reclamation is an absolute right of the riparian owner guaranteed by the Louisiana Constitution; and second, whether the riparian owner can reclaim land or certain rights thereto, when such land is recovered by the activities of the State, conducted with state or public monies, without the riparian owner's participation in reclamation activities.

1. *The Reclamation Process*

The statute enabling the landowner to reclaim land lost through erosion is Louisiana Revised Statutes 41:1702. Reclamation is defined within the statute as the raising of submerged land through filling or other physical works.¹³⁰ The statute provides that "owners of land contiguous to and abutting navigable" water bottoms belonging to the state "shall have the right to reclaim or recover land" lost to erosion on or after July 1, 1921, including all mineral rights thereto.¹³¹ The statute continues, stating that the applicants seeking to recover such land shall also comply with the surveying and permitting process.¹³² The riparian owner must apply to the DNR for a permit to perform reclamation activities and furnish a deed of ownership or a survey map prepared by a licensed surveyor evidencing ownership of the lands to be reclaimed.¹³³ However, any plans for reclamation are subject to approval by the Louisiana Departments of Transportation and Development and Wildlife and Fisheries, the Office of Mineral Resources, the governing authority of the parish where the proposed project is located, and other interested agencies.¹³⁴

129. Interview with W. L. "Bill" Berry, Director of Wetlands Management, Louisiana Land & Exploration Company, in New Orleans, Louisiana (July 12, 1995). LL&E pays taxes on approximately 7,200 acres of land lost, which acres are within the July 1921 line. One thousand eight hundred of the 7,200 acres are within the 1951 line. Presently, nearly 1,800 acres are above water and make up the barrier island. Reclamation costs of the submerged land at Isle Derniers is estimated at approximately \$43,000 per acre.

130. La. R.S. 41:1702(F) (1990).

131. La. R.S. 41:1702(B) (1995). La. R.S. 41:1702 was amended by 1996 La. Acts No. 55, § 1 (1st Extraordinary Session) (S.B. 181), allowing for the severance of subsurface mineral rights from state-owned water bottoms, by written agreement, in order that the State have the ability to move forward with coastal restoration.

132. *Id.*

133. La. R.S. 41:1702(C) (1995).

134. La. R.S. 41:1702(D) (1995).

Reclamation will not be permitted if any of the above listed agencies or the attorney general for the State determines that the activity

would . . . impose undue or unreasonable restraints on the state rights which have vested in such areas pursuant to Louisiana law, and to that extent the land area sought to be reclaimed may be limited.¹³⁵

Furthermore, "[a]ny reclamation not in substantial compliance with the permit procedure provided above shall be an absolute nullity and no private rights of ownership shall vest or be acquired by prescription."¹³⁶

2. *Reclamation by the Riparian Owner*

Does the riparian owner have to participate in reclamation activities to obtain rights to reclaimed lands? Does the riparian owner have the right to reclaim land, which is presently water bottoms owned by the State pursuant to Louisiana law, recovered by the State with public monies? This will be a primary concern for riparian owners of submerged lands that are or may be recovered by the State through restoration projects, and will ultimately show the divisive nature of coastal restoration.¹³⁷ To answer the question, it must be determined whether the statute providing for reclamation intended the riparian owner to conduct reclamation activities himself in order to reclaim land lost to erosion.

To interpret a statute, "[t]he act as a whole must be considered in order to ascertain the meaning of any phrase."¹³⁸ In construing a statute, the court "must endeavor to give an interpretation that will give the [statute] effectiveness and purpose rather than one which renders [it] meaningless."¹³⁹ "Likewise, courts will not impute meanings which will lead to absurd results or extend statutes to situations which the legislature never intended should be covered thereby."¹⁴⁰

The Louisiana Constitution provides for either one of two scenarios: 1) reclamation by riparian owners for lands lost through erosion; and 2) reclamation

135. La. R.S. 41:1702(H) (1995).

136. La. R.S. 41:1702(F) (1995).

137. Interview with W. L. "Bill" Berry, Director of Wetlands Management, Louisiana Land & Exploration Company, in New Orleans, Louisiana (July 12, 1995).

138. *In re American Waste and Pollution Control Co.*, 642 So. 2d 1258, 1264 (La. 1994) (citing *Green v. Louisiana Underwriters Ins. Co.*, 571 So. 2d 610 (La. 1990); *Department of Transp. and Dev. v. Walker*, 658 So. 2d 190 (La. 1995)).

139. *State v. All Pro Paint & Body Shop*, 639 So. 2d 707, 716 (La. 1994) and cases cited therein.

140. *Id.* See also *Billiot v. B.P. Oil Co.*, 645 So. 2d 604, 616 (La. 1994) (The court, in construing La. Civ. Code art. 2315.3 as to whether exemplary damages could be awarded under the statute for injuries resulting from the handling of hazardous materials, stated that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and no further interpretation may be made in search of the intent of the legislature.").

by the State of public water bottoms for public use, even if once privately owned prior to subsiding. By reading section 1702 in its entirety and within the context of the constitutional article authorizing the right of reclamation for the riparian owner and the State, for a riparian owner to reclaim lands he must perform the reclamation work. In 1976, the legislature was asked by the State Attorney General to provide a procedure for reclamation of eroded lands by a riparian owner because Article IX, section 3 of the Louisiana Constitution does not spell out a method by which the land owner can make application, substantiate the extent of eroded lands, and be granted authorization to build reclamation works on what would otherwise be regarded as state water bottoms.¹⁴¹ From this statement it can be surmised that Louisiana Revised Statutes 41:1702 applies solely to the riparian owner's ability to pursue reclamation projects himself in order to reclaim lost land.

It is apparent from the wording of section 1702(C) that the permit process afforded the riparian owner includes the requirement of reclamation, that is the *raising of land by the riparian owner* through "filling or other physical works." Therefore, in order for a riparian owner to recover land lost to erosion, the owner must follow the procedures set forth in section 1702 and perform reclamation activities as set forth under the statute.

The case law on the issue of reclamation under section 1702 is sparse, if not nonexistent. However, one case does make it clear that without the proper permits, reclamation activities by a riparian owner cannot commence. From this ruling it can be concluded that the ability to reclaim land lost to erosion is not a vested right. In *Plantation Landing Resort v. United States*,¹⁴² a developer brought a takings claim against the United States for the denial of a section 404 permit by the United States Corps of Engineers.¹⁴³ The permit was for dredge and fill activities associated with the development of a "tourist destination resort" on the Gulf Coast at Grand Isle, Louisiana.¹⁴⁴ The facts showed that the permit was denied as a result of the expiration of the plaintiff's Louisiana State Coastal Use Permit ("CUP").¹⁴⁵

The court briefly discussed the regulatory process by which a riparian owner can reclaim land lost to erosion, stating that Louisiana Revised Statutes 41:1702 establishes the "administrative procedure to be followed by riparian land owners" seeking to reclaim lands lost through erosion.¹⁴⁶ The court further stated that the riparian owner is required to apply for a coastal use permit from the DNR in order to proceed with reclamation activities.¹⁴⁷ The statements made by the court lead

141. 75 Op. Att'y Gen. No. 1602 (1976).

142. 30 Fed. Cl. 63 (1993), *cert. denied*, 115 S. Ct. 1822 (1995).

143. 33 U.S.C. § 1344 (Clean Water Act § 404) (1994).

144. *Plantation Landing Resort*, 30 Fed. Cl. at 63.

145. *Id.* at 66.

146. *Id.* at 68.

147. *Id.* (citing La. R.S. 41:1702 (1990)). Once a permit is approved and granted for reclamation by a riparian owner, it is effective for a period of two years. *River Dev. Corp. v. Liberty Corp.*, 144 A.2d 180, 189 (N.J. Super Ct. App. Div. 1958), *aff'd*, 148 A.2d 721 (N.J. 1959).

to the inevitable conclusion that reclamation must be carried out by the riparian owner to recover land lost, and that reclamation is undertaken through a discretionary permit process rather than as an absolute right.

In *Save Our Wetlands, Inc v. Orleans Levee Board*, the fourth circuit held that the State, in recovering water bottoms for use by the New Orleans Lakefront Airport, was only "reclaiming through a State agency a waterbottom it already owns."¹⁴⁸ The court concluded that reclamation by the State for a public use is specifically authorized by Article IX, section 3 of the state constitution.¹⁴⁹ The enabling statute for reclamation of the water bottom by the state agency, the Orleans Levee Board, was Louisiana Revised Statutes 38:1325.1.¹⁵⁰ That statute grants the levee board the right to use or acquire public lands for public uses. Thus, it can be reasoned that the State's method of reclamation is by the appropriate statute in each situation arising outside of the section 1702 process.

3. Reclamation—A Riparian Owner's Vested Right?

Is the right of reclamation an irrevocable right vested in the riparian owner by the Louisiana Legislature? Another way of stating the question is whether the riparian owner can bring an action under the Louisiana or United States Constitutions for a taking of his right to reclaim land lost through erosion if the State reclaims the land rather than the riparian owner. The cases cited above, although not explicitly stating so, inevitably lead to the conclusion that the riparian owner's right of reclamation is not vested. The right of reclamation is premised upon authorization by various state agencies through the granting of permits for reclamation activities.¹⁵¹ Because the granting of a permit for reclamation activities is a discretionary function of these state agencies, it can be said that the right of reclamation is not a vested right.¹⁵² Furthermore, the riparian owner is reclaiming land he lost to erosion which, as submerged land and thus water bottoms, is by law truly property of the State.

Under certain circumstances an agency or the Attorney General can deny the issuance of a permit to a riparian owner for reclamation activities. This can be done if the issuance of the permit would impose undue or unreasonable restraints on the State's right to reclaim the land for the express purpose of conferring a

148. *Save Our Wetlands, Inc. v. Werner Bros., Inc.*, 368 So. 2d 1210, 1213 (La. App. 4th Cir. 1979). See also *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576 (La. 1974) (for the proposition that beds of navigable waters are owned by the State).

149. *Save Our Wetlands*, 368 So. 2d at 1213.

150. *Id.* La. R.S. 38:1235.1 has since been repealed and amended as La. R.S. 38:307.

151. La. R.S. 41:1702(D) (1995); *Plantation Landing Resort*, 30 Fed. Cl. at 63; *Save Our Wetlands, Inc. v. Werner Bros., Inc.*, 372 So. 2d 231 (La. App. 4th Cir. 1979) (A public organization sued for injunctive relief alleging a breach of La. Const. art. IX, § 3, to halt the building of a building on state owned water bottoms in Lake Ponchartrain. The court held that the necessary permits had been acquired from the State and the United States Corps of Engineers and plaintiffs had no standing to sue.).

152. See *Save Ourselves, Inc. v. Louisiana Env't. Control Comm'n*, 452 So. 2d 1152 (La. 1984).

benefit on the public.¹⁵³ Granting CUPs for reclamation activities by a riparian owner could impose unreasonable restraints on the State when reclaiming land for the purpose of much needed coastal restoration projects or other projects for the benefit of the public, thus denying the benefits of coastal restoration to the State and the Nation.

These concepts are furthered by *Plantation Landing Resort*. In that case, a Fifth Amendment claim against the United States Corps of Engineers was denied by the United States Court of Federal Claims.¹⁵⁴ The claim was premised on the Corps' denial of a section 404 permit for dredging activities associated with the reclamation project. The court noted that at the time the alleged taking occurred, plaintiff's Coastal Use Permit to reclaim the submerged land had expired.¹⁵⁵ "*By not renewing the permit, plaintiff extinguished its compensable interest in the . . . land below the [mean high water mark], subject to state reclamation regulation. Without such interest, plaintiff cannot proceed with a takings claim as to this land.*"¹⁵⁶ Based upon this holding by the Court of Federal Claims as to reclamation by a riparian owner, it can be stated that the riparian owner's interest in reclamation of lands lost to erosion is not an absolute vested right. The riparian owner has no compensable property interest in state owned water bottoms absent a permit for reclamation.¹⁵⁷ It is a right authorized by the Louisiana Legislature pursuant to Article IX, section 3 of the Louisiana Constitution, and subject to regulation by state agencies involved in reclamation proceedings. Thus, the riparian owner has only an inchoate interest in reclamation of lands lost to erosion, which right becomes vested only upon the granting of a permit under Louisiana Revised Statutes 41:1702 by the State as owner of the water bottoms.¹⁵⁸

153. La. R.S. 41:1702(H) (Supp. 1997).

154. 30 Fed. Cl. at 63.

155. *Id.* at 68.

156. *Id.* (emphasis added).

157. *Id.*

158. *Cf. River Dev. Corp. v. Liberty Corp.*, 144 A.2d 180 (N.J. Super Ct. App. Div. 1958), *aff'd*, 148 A.2d 721 (N.J. 1959). By act of the state legislature, the Camden and Amboy Railroad and Transportation Company was granted the right to reclaim and improve lands under tidewater fronting on uplands owned by them (a portion of the lands were located in Fisher Cove) and to take title to the lands so reclaimed and improved. In 1955, this right of reclamation, still unexercised, was conveyed by the railroad company to plaintiff corporation, which had been organized for the purpose of converting submerged lands into industrial sites. Before plaintiff had begun any improvement in Fisher Cove, Liberty Corporation, by the act of dredging, proceeded to remove underwater sand and gravel in the Cove. Plaintiff instituted an action and obtained a TRO.

The court stated that the right under the local common law to improve the shore, and by reclamation or improvement to obtain title in fee simple, was a mere license revocable at the will of the Legislature. The right became irrevocable only when the license had been executed and the riparian owner had effected the reclamation or improvement. Before that was done, the State might convey its lands to anyone, either for public or private use, without making compensation to the riparian owner in front of whose lands the conveyance was made. The court, quoting previous case law, stated that "[t]he right of the bankowner was dealt with by the legislature not as an incident of

If Section 1702 were interpreted to allow the riparian owner to reclaim land that is recovered by the State or a political subdivision under authority of the State, then the ability to reclaim lands lost to erosion for public use as stated under Louisiana Constitution article IX, section 3 would be nonexistent. Under such an analysis the riparian owner would never have an incentive to expend money and effort in recovering land lost, but instead would wait for the government to reclaim or recover the land. The riparian owner would then reclaim the land as his own, leaving the public burdened with the expenses of the task of reclamation. Thus, it is apparent that the statute is not to be interpreted so as to allow the riparian owner to reclaim land at the expense of the public and deny the State the ability to reclaim lands lost to erosion for public use. Certainly, it was not the intent of the legislature in enacting Louisiana Constitution article IX, section 3, nor was it the intent of the legislature to do so in its passage of section 1702. Such an interpretation is contrary to the constitutional article and would lead to an absurd result if the statute for reclamation was construed to afford the riparian owner surface or other rights to land actually reclaimed by the State.¹⁵⁹

property already vested, but as a privilege which required the element of public acquiescence . . . to be converted into a legal right. Bank-owner has, by the local custom of the state, but an inchoate right before the reclamation of the land below the water . . ." *Id.* at 189, 190.

159. LL&E states in its Barrier Island Position Paper, *supra* note 119, that La. R.S. 49:213.8 "is a clear recognition that the landowner's rights are not to be abridged or curtailed as a consequence of implementing restoration projects under state law." LL&E intends that this statement apply to reclamation activities on the barrier islands. The Louisiana Coastal Wetlands Conservation, Restoration, and Management Act, La. R.S. 49:213.8, states in pertinent part that "it is anticipated that a significant portion of the projects funded through the Wetlands Conservation and Restoration Fund either will occur on or in some manner affect private property. No rights whatsoever shall be created in the public, whether such rights be in the nature of ownership, servitude, or use, with respect to any private lands or waters utilized, enhanced, created, or otherwise affected by activities of any governmental agency, local, state, or federal, or any person contracting with same for the performance of any activities, funded in whole or in part, by expenditures from the Wetlands Conservation and Restoration Fund." Private persons do not receive any rights to emergent lands reclaimed by the State or a state agency, and further, lose any rights they would receive if such lands were reclaimed pursuant to the Louisiana Constitution.

A close reading of the statute leads to the reasonable interpretation that § 213.8 applies to coastal wetlands and other property that is privately owned. The statute states that, "[n]o rights whatsoever shall be created in the public . . . with respect to any private lands or waters, utilized, enhanced, [or] created." What can be concluded from this sentence is that the statute does not apply to reclamation activities by the state on state owned water bottoms in the coastal zone, but applies only to state restoration activities on private lands. For even though such water bottoms may once have been surface land owned by the riparian owner, it is now property of the state as land lost to erosion, subject only to the riparian owner's right of reclamation. Therefore, if the state reclaims land it already owns (i.e., water bottoms), no rights would vest or accrue in the riparian owner. Furthermore, the statute lacks such wording as "contrary to all other laws and regulations this statute applies" which language is usually included in laws to overcome existing rights under other laws that may conflict with the legislation in question. See La. R.S. 49:214.5 (Supp. 1997). The right of reclamation is guaranteed to the state by the Louisiana Constitution, and section 213.8 does not state otherwise. A constitutional amendment would be necessary to change the state's right of reclamation.

If the right of reclamation is not a vested right of the riparian owner, restoration activities undertaken by the State will not provide any private rights to a riparian landowner, absent the State unilaterally granting such rights to the riparian owner.¹⁶⁰

D. The Severance of Surface and Mineral Rights—A Solution to the Problem?

Another problem that stems from reclamation are the rights to mineral exploration that could take place on the surface of the newly created land, and whether the riparian owner would lose his mineral rights to lands reclaimed by the State. Louisiana courts would certainly be forced to entertain the issue of whether the State could deprive a riparian landowner of his right to minerals on the recovered lands.

The DNR and LL&E have discussed a compromise that would allow the State to retain the surface rights to the newly created land. The DNR would own the surface rights to the land and maintain newly formed marshes and wildlife refuges. The compromise would grant to LL&E, as a riparian owner, the mineral rights on the land and servitude agreements to develop and explore for minerals.¹⁶¹

By act of the legislature, the State can divest itself of certain rights.¹⁶² In a valiant attempt to curb the threat of litigation over state reclamation activities, the Louisiana Legislature passed an amendment to the state constitution allowing for the severance of mineral rights from state owned lands in limited instances.¹⁶³ Prior to the amendment, the Louisiana Constitution strictly prohibited the alienation of state mineral rights, even in the sale of public lands by the State.¹⁶⁴ As

160. Neither is the right to recover any royalties if the landowner in fact reclaims land lost to erosion that is subject to any existing state lease. 91 Op. Atty. Gen. No. 299 (1991).

161. Bob Anderson, *Rights to Reclaimed Coast at Stake*, Sunday Advocate, Dec. 18, 1994, at B1. Interview with W. L. "Bill" Berry, Director of Wetlands Management, Louisiana Land & Exploration Company, in New Orleans, Louisiana (July 12, 1995). This was a proposal developed by the Secretary of the Dept. of Natural Resources, Jack McClanahan and LL&E officials. However, the State Attorney General's office stated that such a compromise could not be undertaken because it was against the Louisiana Constitution to alienate state mineral rights from state owned lands.

162. See *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576 (La. 1975).

163. La. Const. art. IX, § 4(A), amended by 1995 La. Acts No. 1332. The amendment passed a vote of the people on Monday October 23, 1995. *Constitutional Amendments*, The Times-Picayune, Oct. 23, 1995, at A4. At that time, the enabling legislation, Senate Bill No. 916, which provides a reclamation-in-law of lands lost through erosion, compaction, subsidence or sea level rise, to provide for agreements between the state and riparian owners for use of lands, rights of access to lands, rights of riparian owners for mineral exploration and development, and for wetlands conservation and restoration projects, by amending La. R.S. 41:1702, was reengrossed but did not pass the legislature. As previously noted, La. R.S. 41:1702 was eventually amended by 1996 La. Acts No. 55.

164. The prohibition has been in effect since the passage of Article IV, section 2 of the Louisiana Constitution, and has continued in the 1974 amendment to the constitution as Article IX, section 4(A). Upon the sale of state lands to a private party, the mineral rights must be reserved by and for the state. This is an implied reservation of rights. See also *Dynamic Exploration, Inc. v. LeBlanc*, 362 So. 2d 734 (La. 1978); *Board of Comm'rs of the Caddo Levee Dist. v. S.D. Hunter Found.*, 354 So. 2d 156 (La. 1977); *Standard Oil Co. of Louisiana v. Allison*, 200 So. 273 (La. 1941).

amended, Article IX, section 4(A) of the Louisiana Constitution states in pertinent part:

The mineral rights on land, contiguous to and abutting navigable water bottoms reclaimed by the state through the implementation and construction of coastal restoration project shall be reserved, except when the state and the landowner having the right to reclaim or recover the land have agreed to the disposition of mineral rights, in accordance with the conditions and procedures provided by law.¹⁶⁵

To a certain degree, the legislation provides a remedy to the conflict between the DNR and LL&E, as well as other riparian owners that may be affected by state reclamation activities.

The Louisiana Legislature followed passage of the constitutional amendment by amending section 1702, allowing for the severance of subsurface mineral rights by the State to the riparian owner of lands reclaimed as a result of coastal reauthorization activities.¹⁶⁶ As amended, the statute grants to the DNR the authority to enter into written agreements with the riparian owner of lands subject to reclamation that would

establish in such owner the perpetual, transferrable ownership of all subsurface mineral rights to the then existing coast or shore line. . . . [and either] limited or perpetual alienation or transfer . . . of subsurface mineral rights owned by the state relating to the emergent lands that emerge from water bottoms that are subject to the owner's right of reclamation in exchange for the owner's compromise of his ownership and reclamation rights within such area and for such time as the secretary deems appropriate and in further exchange for the owner's agreement to allow his existing property to be utilized in connection with the project to the extent deemed necessary by the secretary.¹⁶⁷

165. La. Const. art. IX, § 4(A). Prior to the amendment, section 4(A) stated, "The mineral rights on property sold by the state shall be reserved, except when the owner or person having the right to redeem buys or redeems property sold or adjudicated to the state for taxes." The new language was added to this single paragraph of section 4(A).

166. La. R.S. 41:1702(D)(2)(a) (Supp. 1996).

167. *Id.* at (D)(2)(e). "Emergent land" is defined under the statute as:

land that emerges from a public water bottom to an elevation sufficient to support emergent vegetation, except that in the case of the seaward side of a barrier island the minimum elevation required shall be the lowest elevation sufficient to support emergent vegetation on the landward side of such island. However, no land below the elevation of ordinary low water shall be considered emergent land.

Thus, I point out that even in the definition of emergent land an exemption is provided which could be interpreted by the State in reclaiming land lost to erosion, that an agreement entered into does not apply to any land not meeting the definition of emergent land under the statute. Such an interpretation or even the addition of language to an agreement stating that an exemption applies, and the agreement does not apply to land not meeting the definition could be cause for either rescission of the agreement or simply a loss of rights to the riparian landowner. *Id.* at (D)(2)(e).

Included within an agreement, the DNR receives, in exchange for subsurface mineral rights, any reclamation rights the owner might have and the use of the owner's existing property for implementation and completion of the project.¹⁶⁸ Although the above language is certainly a step in the right direction and might solve most disputes over inchoate rights associated with reclamation that can be addressed by such language, the discretionary factor that remains within the language of the statute leaves much opportunity for conflict. The statute states that the DNR "may"¹⁶⁹ enter into such agreements with riparian owners, thus leaving to the discretion and judgment of the state agency, in its position as public trustee of the State's natural resources, the ability to deny the riparian owner such benefits as are allowed under the statute. The statute, as amended, further emphasizes that reclamation is not a vested right of the landowner and supports any argument posed by the State that, under the Louisiana Constitution, it has the right to reclaim any lands lost to erosion that are presently state owned water bottoms.

A second problem associated with that language is to what degree and when, if an agreement was to be entered into, would the riparian owner have the right to subsurface minerals; *i.e.*, before, during, or after reclamation? When do such rights attach to the riparian owner? Although an agreement might be entered into stipulating when such rights vest, the potential for conflict again arises if the riparian owner deems it necessary to enforce its rights prior to and during reclamation activities. Enforcement of those contractual rights by the riparian owner at an inappropriate time may significantly threaten a coastal restoration project or truly undermine the State's efforts in undertaking a project.

Can the State divest itself of mineral rights before the land reclaimed is raised and no longer submerged? Riparian owners will likely expect that severance of state mineral rights would give them immediate mineral rights to the state owned water bottoms, before any reclamation activities occur, and even if they are never undertaken.¹⁷⁰ And if restoration projects are halted or go unfinished, do such rights revert back to the State?

If the State divests itself of its mineral rights on state owned water bottoms and grants the riparian owner absolute rights to explore and develop minerals on water bottoms without requiring a leasehold interest from the State, a conflict might arise between the riparian owner and the public. The conflict would be the public use of the bed of a navigable water body owned by the State and held by the State in public trust for the enjoyment and use by the people. The State, in essence, would divest itself of a right not only inherent in the State, but a right that is part of the

168. *Id.* at (D)(2)(a).

169. *Id.*

170. Interview with W. L. "Bill" Berry, Director of Wetlands Management, Louisiana Land & Exploration Company, in New Orleans, Louisiana (July 12, 1995). LL&E would like to obtain exclusive mineral rights to the submerged lands surrounding Isle Derniers prior to reclamation taking place. In turn, the corporation would grant to the State exclusive surface rights to all reclaimed lands.

public trust and public interest protected by its designation as a navigable water bottom insusceptible of private ownership.¹⁷¹

The severance of mineral rights from water bottoms prior to the completion of a reclamation project by the State could jeopardize the public interest and, as a result, open the door to many constitutional issues. Conflicts in long-standing public policy may occur, such as the ability of the public to use that navigable body of water free and clear of restrictions by private parties, as was intended by acts of the legislature and the Constitution of Louisiana.¹⁷² The law states that alienation of subsurface mineral rights may occur on land "contiguous to and abutting navigable water bottoms belonging to the state" and on emergent land under certain circumstances.¹⁷³ The definition of reclaim with regard to land is to bring into a "condition for cultivation or other use."¹⁷⁴ Reclamation is the "act or process of reclaiming."¹⁷⁵ When read within the context of the amendment, the word "reclaimed" appears to stipulate that mineral rights can be alienated on those lands or water bottoms that have been elevated above the ordinary high water mark, or to which surface rights would attach; that is, lands no longer submerged or considered water bottoms. Therefore, interpreting the statute on its face and by discerning the intent of the legislature, it is likely that the State cannot sever mineral rights from water bottoms prior to reclamation activities, but only from land actually created by reclamation activities for coastal restoration.¹⁷⁶ The State should maintain full ownership of the water bottoms to adequately regulate them for the use and benefit of the public.

The courts will undoubtedly be called upon to interpret when alienation of mineral rights can occur under the constitutional amendment to section 4(A) and under section 1702(D) of the revised statutes. There is no doubt that the State will contend that mineral rights cannot truly be severed until the land is reclaimed. Otherwise, the State loses the right to grant mineral leases on the water bottoms, losing the right to mineral royalties as sole mineral rights would then be vested in the riparian owner. This results in a loss of revenue generated for Louisiana's Coastal Management Fund. Furthermore, the State would also lose its rights to such water bottoms, held in trust for the public use, in the event reclamation does not take place or reclamation of only a portion of the area to be reclaimed occurs.

Regarding a restoration project involving a barrier island, in addition to the above, the DNR "may also require the owner to transfer title to all or a portion of the island in exchange for any subsurface mineral rights acquired by said

171. *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576 (La. 1975).

172. *Id.* See also *Davis Oil Co. v. Citrus Land Co.*, 576 So. 2d 495 (La. 1991).

173. La. Const. art. IX, § 4(A); La. R.S. 41:1702(D)(2)(a) (Supp. 1997).

174. *The Random House College Dictionary* 1102 (rev. ed. 1988).

175. *Id.*

176. See *Department of Transp. and Dev. v. Walker*, 658 So. 2d 190 (La. 1995); *In re Matter of American Waste and Pollution Control Co.*, 642 So. 2d 1258 (La. 1994); *State v. All Pro Paint & Body Shop, Inc.*, 639 So. 2d 707 (La. 1994).

owner."¹⁷⁷ The establishment of such a right for the DNR appears to give the agency the power to unilaterally obtain ownership of land belonging to the landowner. If that is in fact the legislature's intention, the potential for a takings claim would be present, dependent upon the riparian owner's determination of compensation in terms of subsurface mineral rights as a trade off of current ownership.

Consistent with the transfer of mineral rights in exchange for the right of reclamation, the riparian owner is granted, as a result of an agreement, a "perpetual transferrable servitude to use the surface of any such land for the purpose of locating, accessing, extracting, and transporting those subsurface minerals with the same freedom, and subject to the same restrictions, as an owner of the surface."¹⁷⁸ This provision can be highly detrimental to any coastal restoration project that occurs and for which an agreement is entered into under section 1702. The reason being that granting unlimited rights and access to emergent lands that require continued maintenance and monitoring by the State for what may be an indefinite period of time can have an adverse affect on restoration activities. If the grantee's right to use the land is not properly regulated, depending upon the type of use, the grantee of a servitude could "roll-back" the intended consequences of restoration. What is absolutely necessary is that the DNR, possibly in consultation with any appropriate state and federal agencies, devise a strategy to be followed by both parties entering into an agreement in order that the intended effects of restoration activities take place.

While section 1702 as amended appears to alleviate many of the inconsistencies in current law regarding reclamation, it does have the potential to create more controversial issues because of its discretionary nature and ambiguity in direct application.¹⁷⁹

The State, however, still maintains the right to proceed with reclamation activities and can enforce its right to expropriate the land once reclaimed while providing LL&E, other riparian owners, and the public, perpetual use of the land created and held in the public trust.¹⁸⁰ However, such uses, including mineral

177. La. R.S. 41:1702(D)(2)(b) (Supp. 1997).

178. La. R.S. 41:1702(D)(2)(c) (Supp. 1997).

179. At the time this article was written, the Louisiana Department of Natural Resources has not yet adopted regulations for reclamation of land in compliance with section 1702. La. R.S. 41:1702(G)(1) (Supp. 1997). Furthermore, no case law or opinions of the Louisiana Attorney General has surfaced with regard to the amended statute.

180. Cf. *United States v. Harrison County, Mississippi*, 399 F.2d 485 (5th Cir. 1968). The State of Mississippi created an artificial beach with the assistance of federal funding. Part of the agreement to obtain federal funds included the declaration of the beach to be perpetually open to the public for use, pursuant to a Mississippi constitutional mandate. After completion of the beach an adjacent property owner brought suit claiming fee simple title to that portion of the beach constructed adjacent to her property. The case was ultimately decided in the state's favor by the Supreme Court of Mississippi. *Harrison County v. Guice*, 140 So. 2d 838 (Miss. 1962). The United States brought suit against the county for specific performance of the aforementioned contract of agreement as the county was declining public use of the beach. The United States Fifth Circuit reviewed *Harrison County*

exploration, should be restricted through servitude agreements and coastal use permits (CUPs) consistent with the intent of coastal restoration as defined by law.

VI. HOW CAN THE STATE WORK TO ENSURE THE PROGRESS OF CWPPRA PROJECTS REGARDLESS OF THE OBSTACLE PRESENTED BY PRIVATE PROPERTY INTERESTS?

If the State or Task Force proceeds without the passage of legislation to further CWPPRA's cause, their efforts will continue to be obstructed by private and riparian owners of property in those areas where CWPPRA projects have been proposed or designated. It is certain that in the development of CWPPRA projects in coastal areas that are privately owned where it is necessary to obtain easements or servitudes, there will be conflicts in procuring such contracts and agreements.¹⁸¹

CWPPRA does not provide for the acquisition of easements, servitudes, or land for restoration projects. That responsibility is left to the State through the DNR.¹⁸² In areas where land is not susceptible to regulation by the State or local government but is privately owned, it may be difficult for the DNR to purchase the property outright or acquire servitudes and easements because of liability issues. Those activities requiring easements, servitudes, or right-of-ways are barrier island restoration, creation of marsh with dredged material, erosion control, hydrologic restoration, and hydro-management of impoundments.¹⁸³

Obtaining easements or servitudes presents an obstacle to the State's ability to construct structures and undertake restoration activities on privately owned wetlands and marsh areas. The Corps of Engineers and cooperating federal and state agencies stated in the FEIS that existing private land uses in most cases would

v. Gulce in rendering an opinion. The court stated that the "common law doctrine of artificial accretion must yield to the command of the Mississippi Constitution as to the disposition of state owned lands." 399 F.2d at 491. The court recognized that the land belonged to the state and did not become the property of the adjacent landowner by means of accretion, and was to be kept open for use by the public.

It may be possible for the federal government to expropriate the submerged lands under the Submerged Lands Act, codified at 43 U.S.C. § 1311 (1994), with approval or no dispute from the state in order to proceed with the restoration projects. By divesting the state of its rights to the land, the right of the reclamation by the riparian owner may be denied under state law. The federal government can then grant to the state servitudes on the land for maintenance of the wildlife refuge and marsh created, or cede the land to the state after its creation.

181. In order for the State to implement coastal restoration projects in certain areas, permission must be granted by the private landowner to the State to enter upon the lands and begin construction or restoration activities. The conflict that arises in regard to servitude agreements is what type of language to include in the servitude agreement so as to protect the private landowner from potential liability from negligent activities of the State causing injury to third parties, injury to State employees, or injury to third parties by the State-owned and maintained structures themselves.

182. Interview with Stan Green, Engineer, and Marco Rosamano, Attorney, Real Estate Division, United States Corps of Engineers, New Orleans District (July 11, 1995).

183. Louisiana Coastal Wetlands Restoration Plan, *supra* note 1, at EIS-8-13.

be maintained.¹⁸⁴ However, issues that will arise with regard to servitude agreements are: liability and indemnity for delictual actions and losses; ownership of newly created lands as a result of the project; and compensation for use of the land.

To ensure CWPPRA's progress and continued restoration efforts, the legislature should consider a bill to be included within Louisiana's Coastal Management Program that grants the Task Force, as an agent of the State, or the Coastal Restoration Division of the DNR, the power to *appropriate* and when necessary *expropriate*, immovable private property for coastal restoration projects.¹⁸⁵

For example, the levee districts of the State can appropriate or expropriate private property needed for levee purposes or hurricane protection.¹⁸⁶ The levee district's authority extends to the expropriation of corporeal property and executing servitudes for both riparian and non-riparian property when such property cannot be appropriated or otherwise amicably acquired.¹⁸⁷ Expropriation procedures are exercised by the filing of a petition in the district court of the parish in which the property is situated.¹⁸⁸ The petition must contain "a statement of the purpose for which the property is to be expropriated describing the property necessary therefor and the reasons for the necessity, with a plan of the same, a description of the improvements thereon, if any, and the name of the owner, if known."¹⁸⁹ The petition must further contain an estimate of the full extent of the owner's loss for the damage or expropriation.¹⁹⁰

184. *Id.*

185. This section states that it is the public policy of the State to assure that constitutional and statutory authorities affecting uses of the coastal zone should be included in the Louisiana Coastal Zone Management Program, La. R.S. 49:214.22 (1995), which is part of the Louisiana Coastal Wetlands Conservation, Restoration, and Management Act. It can be inferred from this statement that the legislature has a mandate to enact legislation to assist in the restoration and development of the coastal zone.

Section 213.8 will play a role in the formulation of legislation. Section 213.8 should be amended and specified that the State, through the DNR, has the right to appropriate and use private lands for coastal restoration and management for a period of 10 to 20 years, depending upon the type of project and restoration needs. Further acknowledging that the servitude or appropriated land is for the sole purpose of maintenance and restoration activities, leaving naked title to the owner of the land while granting to the DNR a right of use.

186. Present law allows the levee district to expropriate property when the district cannot appropriate, or amicably acquire, property for servitudes that is needed for levee purposes. La. R.S. 38:301 (1995). See also *West Jefferson Levee Dist. v. Coast Quality Constr. Corp.*, 640 So. 2d 1258, 1271-72 (La. 1994), *cert. denied*, 115 S. Ct. 736 (1995); *Pillow v. Board of Comm'rs for Fifth Louisiana Levee Dist.*, 369 So. 2d 1172 (La. App. 2d Cir.), *writ denied*, 373 So. 2d 525 (1979), *appeal after remand*, 425 So. 2d 1267 (La. App. 2d Cir. 1982), *writ granted*, 427 So. 2d 1200 (1983), *writ recalled and cert. denied*, 445 So. 2d 1225 (1984).

187. La. R.S. 38:351 (1995). The levee district can acquire the property prior to judgment.

188. La. R.S. 38:352(1) (1995).

189. La. R.S. 38:352(2) (1995).

190. La. R.S. 38:352(3)(b) (1995).

The appropriation of riparian property subject to a levee servitude by the levee district is not considered a taking of private property for which compensation is due under either the Fifth Amendment or the Louisiana Constitution.¹⁹¹

The constitutional justification for the power of appropriation rested on the theory that the State and its sovereign predecessors in title have never granted a perfect title in any riparian lands to any private person since the settlement of Louisiana. Consequently, when the State exercises its levee servitude rights with respect to such lands, there is no "taking" within the meaning of the constitutional guarantees concerning eminent domain because the State thereby merely resumes possession of what it always owned.¹⁹²

Compensation is therefore not a legal right because the appropriation of riparian land for levee purposes by the creation of an easement or servitude in favor of the levee district leaves naked title of the property in the owner.¹⁹³ Appropriation of riparian lands for levee servitudes is based on Louisiana Civil Code article 665 which provides that "[s]ervitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works."¹⁹⁴ When the land is no longer needed or the servitude expires, the right to use the land again reverts to the owner of the property. Therefore, any compensation provided by Louisiana constitutional or statutory law is gratuitous.¹⁹⁵ Compensation for a servitude is, however, made by the levee district and determined by the use value of the property actually used for the period of time utilized by the district.¹⁹⁶ If the land appropriated is not

191. *Pillow v. Board of Comm'rs for the Fifth Louisiana Levee Dist.*, 369 So. 2d 1172 (La. App. 2d Cir. 1979).

192. *Delaune v. City of Kenner*, 550 So. 2d 1386, 1389 (La. App. 5th Cir.), *writ denied sub nom. Beckendorf v. City of Kenner*, 553 So. 2d 475 (La. 1989) (from these principles it was determined that land which is not subject to appropriation is a "taking" within the traditional meaning of the Federal Constitution). See also Richard P. Wolfe, *The Appropriation of Property for Levees: A Louisiana Study in Taking Without Just Compensation*, 40 Tul. L. Rev. 233, 267 (1966); *DeSambourg v. Board of Comm'rs for Grand Prairie Levee Dist.*, 621 So. 2d 602 (La. 1993), *cert. denied sub nom. DeSambourg v. Plaquemines Parish*, 510 U.S. 1093, 114 S. Ct. 925 (1994) (Landowners sued for compensation for appropriation of a batture. The court held that the batture was consistent with the definition of batture as the term is used in the context of the batture exemption from compensation for the state's appropriation of riparian land pursuant to La. Const. art. VI, § 42 and La. R.S. 38:301(C)(1)(a) (1989)).

193. *Delaune*, 550 So. 2d at 1389.

194. The legislature should consider amending Article 655 to include shores of lakes, bays, and arms of the sea above the ordinary high water mark. However, the Legislature may be able to bypass such an amendment by expanding the definition of seashore in Articles 450 and 452. Articles 450 and 452 state that the seashore is a public thing, subject to the police power of a municipality and its public use is governed by the laws of the municipality.

195. *Deluane*, 550 So. 2d at 1389.

196. La. R.S. 38:301(C)(1)(e) (1995).

riparian, then it is likely that "inverse appropriation" or expropriation proceedings will be brought under Louisiana Constitution article I, section 4 by the owner of the property in order to receive just compensation.¹⁹⁷

Some areas where CWPPRA projects are proposed or approved may not be available to the levee servitude or other public uses without the passage of legislation favoring the development of these lands for CWPPRA purposes. The resolutions allowing the levee district to appropriate and expropriate property were passed because of the importance of the Lower Mississippi Valley Flood Control Plan.¹⁹⁸ It is apparent that the nature of coastal restoration in Louisiana and the importance of CWPPRA projects requires the acquisition of servitudes over privately owned wetlands and marshes. Furthermore, it is necessary to provide the DNR and the Task Force with the power to carry out restoration projects without undue delay from the court system or private parties. If the DNR is provided with the constitutional or statutory authority to appropriate property necessary for a restoration project, without fear of delay and litigation, the burden of obtaining the use of property for projects would be lifted. Therefore, the legislature should consider a bill modeled after the statute used by the levee districts for public works and improvements, granting the DNR or the Task Force the ability to appropriate private property or obtain servitudes for coastal restoration.

What should be included in the legislation are sections or clauses discussing the following: property rights of the State and the grantor (riparian owner); indemnification and hold harmless clauses with regard to the State, the grantor, and any third parties conducting activities on the property by the direction or approval of the State; acknowledgement that land lost to erosion and recovered or reclaimed by the State as a result of activities pursuant to the project shall constitute state owned land pursuant to Louisiana Constitutional article IX, section 3, and to which the riparian owner will have no vested property rights¹⁹⁹ unless such rights are in fact granted pursuant to existing law; construction and improvements on the property; modifications to the property; and conditions and terms otherwise applicable to restoration projects, including the time period for which the servitude

197. *Pillow v. Board of Comm'rs for the Fifth Louisiana Levee Dist.*, 425 So. 2d 1267, 1271 (La. App. 2d Cir. 1982) (where land appropriated is not riparian in nature, an inverse appropriation or expropriation suit was proper and fair market value of property taken was just compensation). See also *Delaune*, 550 So. 2d at 1386; *Long v. Board of Comm'rs for Fifth Louisiana Levee Dist.*, 466 So. 2d 44, 51 (La. App. 2d Cir. 1985).

198. *Pillow*, 425 So. 2d at 1269-71.

199. Disputes may occur between the riparian or private landowner and the State over property rights created in the public. The Louisiana Coastal Wetlands Conservation, Restoration, and Management Act, La. R.S. 49:213.8 (Supp. 1997), states that "[n]o rights whatsoever shall be created in the public, whether such rights be in the nature of ownership, servitude, or use, with respect to any private lands or waters utilized, enhanced, created, or otherwise affected by activities of any governmental agency, local, state, or federal, or any person contracting with same for the performance of any activities, funded in whole or in part, by expenditures from the Wetlands Conservation and Restoration Fund." The question that will arise is whether the clause applies only to state restoration projects under the Act, or CWPPRA projects as well.

would be in force. From these sections, a standard form to be used for a "Temporary Easement, Servitude and Right-of-Way Agreement" could be drafted which would reflect legislative intent, dispensing with any challenges to the servitude agreements.²⁰⁰

The legislature should also consider a form of compensation to be paid to the owner of the property. For appropriated property, the value could be dependent upon the present use of the property when appropriated and during the period of time the property is under the servitude, rather than potential use of the property.²⁰¹ Compensation for property that is expropriated should be determined by the potential use value after determining whether the owner would be able to acquire the permits necessary to put the property to the future use he declares it susceptible of. If compensation is paid to the owner of the property appropriated or expropriated, it may limit the amount of constitutional challenges under taking claims.

The Public Trust Doctrine of the State mandates that the legislature enact laws to fully implement the State's policy of environmental protection.²⁰² The passage of a law enabling the DNR to move forward with much needed restoration without further delay would greatly assist the agency in protection of the environment. Consequently, a CWPPRA restoration project will not be funded by the Corps unless it is ensured that "wetlands restored, enhanced or managed through that project will be administered for the long-term conservation of such lands and waters and dependent fish and wildlife populations."²⁰³ It is therefore necessary for the DNR to provide servitudes or easements for restoration projects that can be held for long periods of time.²⁰⁴

200. CWPPRA draft "Temporary Easement, Servitude and Right-of-Way Agreement," June 22, 1995 (on file with the *Louisiana Law Review*).

201. Present uses should be considered rather than potential uses because as wetlands and marshes, potential uses would be completely dependent upon the ability of the owner to acquire permits from the United States Corps of Engineers and state agencies to improve the lands for agriculture or other purposes. The likelihood of the State or Corps granting such permits in light of a CWPPRA restoration project being considered in the area is therefore highly unlikely. Furthermore, development of wetlands and marshes for private purposes can be costly, time consuming, and not within the ability of the current landowner, which factors must also be considered.

202. *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152, 1156 (La. 1984) (citing La. Const. art. IX, § 1 (1974)).

203. CWPPRA § 303(e).

204. Takings claims will probably be brought under the Louisiana takings bill for state servitudes on, or appropriation of, "private agricultural property" in which the property's fair market value is diminished by 20% or more as a result of the restoration project. La. R.S. 3:3601 (1987 and Supp. 1997). However, such remedy is available under the statute only for diminution in value resulting from a "governmental action." La. R.S. 3:3610(A) (Supp. 1997). Governmental action does not include the formal exercise of eminent domain, the amendment or enactment of a statute or resolution by the legislature, or actions taken in compliance with federal law or regulation. La. R.S. 3:3602(12)(a)(b)(g) (Supp. 1997) (respectively). The new "takings regulation" may actually be less problematic than expected. The legislature can enact laws designating the use of private lands for restoration activities, providing an appropriate measure of compensation and using the loophole in (12)(b) to refute any potential takings claims under the statute. Furthermore, private land use with

VII. THE RECOVERY OF CERTAIN RIPARIAN LANDS WITHOUT THE NEED FOR ADDITIONAL LEGISLATIVE AUTHORITY

Certain areas along the banks of navigable rivers and streams may be appropriated by the State and are subject to a public right of use guaranteed under the laws of the State.²⁰⁵ These lands are riparian lands subject to the public use as guided by the laws of the State²⁰⁶ and can be easily obtained through appropriation or expropriation by the State as discussed earlier.²⁰⁷ However, the question may appear as to whether lands reclaimed or formed as a result of restoration activities belong to the riparian owner or the State.²⁰⁸ When accretion or alluvion is formed "successively and imperceptibly" on the bank of a stream or river, the land belongs to the owner of the bank subject to the right of public use.²⁰⁹

[I]t has been held that lands reclaimed or suddenly formed by artificial process with public money or under public authority, though in a river, do not qualify as alluvion, and the language of the Code requiring that the accretions be formed 'successively and imperceptibly' to soil on the shore has been strictly construed.²¹⁰

Therefore, any land formed on the bank of a river or stream as a result of a restoration project under the State's authority, or funded by the state, belongs to the state and the riparian owner has no rights to the newly formed property. This applies to lands *reclaimed* or formed suddenly by an act of man. Undoubtedly, there may be disputes as to whether the land was successively and imperceptibly formed rather than suddenly formed.

This principle can also be applied to private lands bordering bays and inlets in the coastal zone. The seashore is a public thing that is subject to public use pursuant to applicable laws and regulations of the State or a municipality.²¹¹ As such, the seashore is insusceptible of private ownership and the riparian owner has no right of alluvion or accretion.²¹² It is first proper to define the term "the sea" as used in the codal articles before defining the seashore. The "sea" as used in the Code has

regard to CWPPRA restoration projects can be considered actions taken in compliance with federal law as stated under (12)(g), thus denying takings claims under the regulation.

205. *State v. Placid Oil Co.*, 300 So. 2d 154, 172-73 (La. 1974), *cert. denied*, 419 U.S. 1110, 95 S. Ct. 784 (1975); La. Civ. Code arts. 455-456.

206. *Id.*

207. *See Save Our Wetlands, Inc. v. Orleans Levee Bd.*, 368 So. 2d 1210 (La. App. 4th Cir. 1979).

208. *See* La. Civ. Code arts. 499-501, which govern rights to alluvion and accretion for riparian owners of land on navigable river, streams, lakes and shores of the sea.

209. *Id.* *See also Placid Oil*, 300 So. 2d at 154; *Davis Oil Co. v. Citrus Land Co.*, 576 So. 2d 495 (La. 1991); *Esso Standard Oil Co. v. Jones*, 98 So. 2d 236 (La. 1957).

210. *Esso*, 98 So. 2d at 246 and cases cited therein.

211. La. Civ. Code arts. 450-452.

212. La. Civ. Code art. 500.

reference to the Gulf Coast, and to the lakes, bays and sounds along the Gulf Coast. Additionally, according to Louisiana jurisprudence the word "sea" applies to "arms of the sea," which are defined as bodies of water in the vicinity of the open Gulf and which are directly overflowed by the waters of the Gulf.²¹³

In the case of *Davis Oil Co. v. Citrus Land Co.*, there was a dispute about oil proceeds from wells located on an alluvion formed along both the shoreline and the bank of a river in the Atchafalaya Bay area.²¹⁴ In making its determination, the court stated that the waters of Little Bay, where a portion of the alluvion was created along the marshline of the Bay, are directly overflowed by the tidal waters of the Gulf of Mexico.²¹⁵ Therefore, the Bay is either a "part of the sea or an arm of the sea" making the shoreline of the Bay "the shore of the sea," or seashore, for purposes of the codal articles on the subject of alluvion.²¹⁶ Alluvion formed along the seashore, or bank of a body of water other than a river or stream, belongs to the State, not the riparian owner.²¹⁷ This is so because the shores of the lakes and seas are public things, as are the beds of navigable bodies of water.

By analogy, it can be determined that land formed by state projects along the shorelines of lakes, bays, sounds, and barrier islands on the Gulf Coast belong to the State, not the riparian owner.²¹⁸ Furthermore, these shorelines are subject to a public right of use, regardless of whether the land adjacent to it is privately owned. These lands include the seashore of the barrier islands and other lands along the coast that are privately owned. As a seashore, it is insusceptible of private ownership and is a public thing subject to public use, which use may be for the restoration of wetlands and marsh areas or other public works and projects. Consequently, the State need not acquire a servitude to perform work or activities on these lands or seashores. It can be stated that any lands reclaimed or created by the State through restoration projects are not susceptible of private ownership by the riparian owner. This follows for two reasons: first, the land created is owned by the State because it is created on state-owned water bottoms, and is merely the build-up of state property;²¹⁹ secondly, riparian owners have no right to alluvion or accretion on the shores of lakes, bays, or arms of the sea, regardless of the manner in which the land is formed.²²⁰

213. *Davis*, 576 So. 2d at 500-01 (quoting *Buras v. Salinovich*, 97 So. 748, 750 (1923)). See also *Dardar v. Lafourche Realty Co.*, 985 F.2d 824 (5th Cir. 1993).

214. *Davis*, 576 So. 2d at 496.

215. *Id.* at 501.

216. *Id.*

217. See *State v. Placid Oil Co.*, 300 So. 2d 154 (La. 1974); *Davis*, 576 So. 2d at 495; *Esso Standard Oil Co. v. Jones*, 98 So. 2d 236 (La. 1957).

218. See sources cited in *supra* note 217.

219. *Save Our Wetlands, Inc. v. Werner Bros.*, 368 So. 2d 1210 (La. App. 4th Cir. 1979).

220. See *Davis*, 576 So. 2d at 500; *Placid Oil*, 300 So. 2d at 154.

The State can apply these principles of law to advance its restoration activities along the coastline and on barrier islands by the process of artificial accretion without the threat of interference by riparian owners. The State could then take title to the land created and hold the land in trust for the public as necessary for coastal restoration, bypassing the need for reclamation under Louisiana Constitution article IX, section 3.

VIII. THE STATE SHOULD ASSERT THE PUBLIC TRUST DOCTRINE IN PROTECTING LOUISIANA'S COASTAL ENVIRONMENT

The public trust doctrine in Louisiana declares that "a state holds title to land under navigable waters within its limits and that the title is held in trust for the people of the state that they may enjoy and use the waters free from obstruction or interference."²²¹ Yet, with the onslaught of environmental problems in our society and the development of more strict environmental laws and regulations, the public trust doctrine has been expanded beyond its original meaning. This expansion includes, within the scope of the public trust doctrine, the "right of the public, as beneficiary of the public trust, to use and enjoy public trust natural resources free from obstruction or interference."²²² By employing the public trust doctrine, the State and its agencies can drastically advance their efforts in coastal restoration.

The public trust doctrine in Louisiana is found in Article IX, section 1 of the 1974 Louisiana Constitution.

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.²²³

The Louisiana Supreme Court, in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,²²⁴ held that the State has a public trust obligation for "the protection, conservation and replenishment of all natural resources of the state," which obligation is recognized by Article IX, section 1 of the Louisiana Constitution of 1974.²²⁵ This article further "imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environ-

221. *Save Ourselves, Inc. v. Louisiana Env'tl Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984) (citing *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892)).

222. Michael Wascom and James G. Wilkins, *The Public Trust Doctrine in Louisiana*, 52 La. L. Rev. 861, 894 (1992).

223. Article IX, section 1 was derived from Article VI, section 1 of the 1921 Louisiana Constitution, which stated "[t]he natural resources of the state shall be protected, conserved and replenished."

224. 452 So. 2d 1152 (La. 1984).

225. *Id.* at 1154; Wascom and Wilkins, *supra* note 222, at 894.

mental protection, and mandates the legislature to enact laws to implement fully this policy."²²⁶

The supreme court has stated that the language of the constitution sets forth a standard to measure the actions taken by an agency or official involved in environmental protection. The standard requires environmental protection "insofar as possible and consistent with the health, safety, and welfare of the people."²²⁷

This is a rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare. Thus, the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.²²⁸

In carrying out the balancing process, an agency must consider "whether alternate projects, alternate sites, or mitigative measures would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits."²²⁹

The application of this standard and rule of reasonableness applies to all state agencies that have the authority to manage natural resources for the public trust.²³⁰ The Louisiana Legislature has designated several agencies as public trustee agencies "to supervise the state's public trust natural resources; to preserve, so far as consistent with the interests of the people of Louisiana, the uses protected by the trust; to protect and maintain trust resources and manage them so that they remain open to public use and enjoyment; and, in general, to act as fiduciaries of the public's interests."²³¹ The public trust agencies include the Department of Environmental Quality, the Department of Wildlife and Fisheries, the Office of Coastal Restoration and Management of the DNR, and the Attorney General for the State of Louisiana.²³²

226. *Save Ourselves, Inc.*, 452 So. 2d at 1156. This statement was reaffirmed by the Louisiana Supreme Court in *In re American Waste and Pollution Control Co.*, 642 So. 2d 1258, 1262 (La. 1994).

227. La. Const. art. IX, § 1.

228. *Save Ourselves, Inc.*, 452 So. 2d at 1157.

229. *Id.* In response to the IT decision, the Louisiana Department of Environmental Quality (DEQ) began requiring permit applicants to provide information in response to the questions used for balancing the environmental costs and benefits of a project or action requiring a DEQ permit. Gerald L. Walter, Jr. and Anne Jordan Crochet, *IT: An Industry Perspective*, The Louisiana Environmental Lawyer, (Louisiana State Bar Association), Spring 1995, at 2. See *Blackett v. Louisiana Dep't of Env'tl. Quality*, 506 So. 2d 749, 753-54 (La. App. 1st Cir. 1987) (this case articulates the five questions to be addressed by the DEQ when reviewing an administrative record for the issuance or denial of a permit).

230. *Save Ourselves, Inc.*, 452 So. 2d at 1157; *Wascom and Wilkins*, *supra* note 222, at 895.

231. *Wascom & Wilkins*, *supra* note 222, at 896 (emphasis added).

232. *Id.* at 897-98 and the Louisiana Revised Statutes cited therein.

The public trust doctrine can play a very important role in coastal restoration under CWPPRA and the Louisiana Coastal Wetlands Conservation, Restoration, and Management Act. State agencies can use the doctrine in the evaluation and granting or denying of permits in Louisiana's coastal zone for the protection of coastal wetlands and marshes that are restored and preserved by CWPPRA projects. In the interests of the public welfare, taking into account social and economic factors, it is within the purview of the various agencies to grant or deny permits on the basis of the consistency of the private action or project with CWPPRA and other state restoration projects.²³³ Under the Louisiana Constitution, these agencies have a duty to protect the environment as well as the public welfare. Private parties must apply for certain permits from state agencies for actions or activities conducted within the coastal zone. Using the variables developed from the public trust doctrine, the issuing agency can deny the permit, or modify an existing permit, to such an extent that it would not have an adverse impact on CWPPRA projects.

The agency should also consider including various mitigation measures necessary to ensure the continued development of comprehensive coastal restoration in Louisiana.²³⁴ The proper use of mitigation measures can also help to administer the long-term conservation of restored and managed coastal wetlands as required by CWPPRA section 303(e). Thus, the public trust agencies can play a significant role in the ability of the CWPPRA Task Force to implement restoration activities in the coastal zone by asserting the public trust doctrine in their daily activities.

For instance, the DWF is authorized to grant leases on state-owned water bottoms for oyster production and cultivation.²³⁵ The DWF should consider not issuing oyster leases in areas where CWPPRA projects are proposed or approved because to do so would create a conflict with restoration activities. The DEQ can deny water discharge permits for dredging operations and other activities in the coastal zone that may adversely impact a restoration project, or result in decreased benefits from a restoration project.²³⁶

Similarly, the DNR's decision to issue or deny a coastal use permit (CUP) must be "consistent with the state program and approved local programs for affected parishes and must represent an appropriate balancing of social, environmental and economic factors."²³⁷ The state program is the Louisiana

233. *Save Ourselves, Inc.*, 452 So. 2d at 1152.

234. La. R.S. 49:214.22 (Supp. 1997). See generally *Pardue v. Stephens*, 558 So. 2d 1149 (La. App. 1st Cir. 1989); *Pardue v. Gomez*, 597 So. 2d 567 (La. App. 1st Cir.), writ denied, 599 So. 2d 305 (1992).

235. La. R.S. 41:1225(A) (Supp. 1997).

236. La. R.S. 30:2011(A)(1) and (D)(2) (Supp. 1997). See also *In re Dravo Basic Materials Co.*, 604 So. 2d 630 (La. App. 1st Cir. 1992) (reviewed the DEQ's denial of a water discharge permit for dredging operations).

237. La. R.S. 49:214.27 (Supp. 1997); La. R.S. 49:214.30(C)(3) (Supp. 1997). Those activities or uses of the coastal zone that are subject to the coastal use permitting program are listed at La. R.S. 49:214.25 (Supp. 1997). These uses include various dredge and fill activities and reclamation projects.

Coastal Wetlands Conservation, Restoration, and Management Act.²³⁸ The act states that the Coastal Management Division of the DNR can deny a coastal use permit if the action taken under the permit would not be consistent with the program.²³⁹ The consistency provision would probably include CWPPRA as a state program because of the State's involvement and activity in CWPPRA projects through the DNR.²⁴⁰

In employing such a balancing process to the application for CUPs that have the potential to, or could, affect CWPPRA and other restoration projects, the DNR (or any other agency in denying or issuing permits) can show the environmental costs and benefits associated with approval or denial of a CUP. By further demonstrating a significant positive impact on the economy and the public welfare resulting from CWPPRA or state projects, the denial of a CUP for activities that may adversely affect a project, or the end result of a project, may not be deemed unreasonable. The DNR can also include in any CUP issued a greater degree of mitigation requirements for wetlands losses in the coastal zone resulting from the proposed activity.²⁴¹ The public trust agencies, in addition to other factors they are required to review before issuing a permit, can and should use the public trust doctrine to help preserve and restore the natural resources of the State by coordinating their efforts under the Louisiana Coastal Wetlands Conservation, Restoration, and Management Act.

The Governor of Louisiana should modify the departmental policies and procedures of the DNR, DWF, and DEQ to make them consistent with CWPPRA and state restoration efforts.²⁴² For example, an agency should be required to

238. La. R.S. 49:213.1-214.22 (Supp. 1997). La. R.S. 49:214.21, previously cited as the State and Local Coastal Resources Management Act (SLCRMA). La. R.S. 49:213.1 was redesignated as La. R.S. 49:214.21 by 1989 La. Acts No. 6, § 7.

239. La. R.S. 49:214.27 (Supp. 1997); La. R.S. 49:214.30(C)(3) (Supp. 1997); La. R.S. 49:213.1 (Supp. 1997). See also J. Christopher Martin, *The Use of the CZMA Consistency Provisions to Preserve and Restore the Coastal Zone in Louisiana*, 51 La. L. Rev. 1087 (1991); Pardue v. Stephens, 558 So. 2d 1149 (La. App. 1st Cir. 1989) (discussing the DNR's methods for issuing a CUP within the coastal zone management procedures and regulation of Louisiana); Pardue v. Gomez, 597 So. 2d 567 (La. App. 1st Cir.), writ denied, 599 So. 2d 305 (1992) (discussing the modification of a CUP by the DNR).

240. Louisiana's restoration act further requires that the State's Wetlands Conservation and Restoration Task Force "[c]oordinate and focus federal involvement in Louisiana with respect to coastal wetlands conservation and restoration." La. R.S. 49:213.4(B)(8) (1995). Thus, it can be implied that CWPPRA is actually a factor or part of the overall state program in coordinating a comprehensive restoration plan for Louisiana's coastal zone. See also CWPPRA § 304.

241. La. R.S. 43:700 (1996). Known as the "Mitigation Papers" for wetlands activities in the issuance of a CUP, these are the proposed regulations for the DNR for wetlands mitigation. In granting a CUP for an activity in the coastal zone, the DNR "shall not consider the use to be consistent with the state program unless the permit includes condition(s) which . . . ensure the mitigation of wetlands ecological values which would be lost due to the use." La. R.S. 43:723 (1996).

242. La. R.S. 49:213.4(C)(1)-(2) (Supp. 1997). Under the Louisiana Coastal Wetlands Conservation, Restoration, and Management Act, the Governor can review and modify state departmental policies that may affect restoration projects.

deny or properly modify a permit, license, or lease of water bottoms or other state lands in areas that state or CWPPRA restoration projects are proposed, approved, or located. This would limit the amount of litigation and challenges to projects that affect private property interests granted by the permit or lease. The Governor also has the authority to review and modify CUPs prior to issuance to the extent that the permits will significantly affect wetlands conservation and restoration projects, or diminish the benefits of such projects.²⁴³ Because most activities in the coastal zone require a CUP, this authority could be used to enforce stricter mitigation measures in areas where the wetland ecosystem is more susceptible to destruction by human influence, or where restoration and management activities need to be protected from adverse impacts. These powers should be considered and employed for the benefit of coastal restoration activities as they can make a substantial impact on the problems now facing many restoration efforts. Finally, citizens of the State, the Attorney General, or another state agency can sue a trustee agency for failing to protect a public trust natural resource.²⁴⁴

The public trust doctrine mandates the legislature enact laws to implement the State's policy of environmental protection. It can be said that the State has done so with the enactment of Act No. 936, holding the State and its agents harmless for activities of restoration that cause damage to oyster leases. The legislature, through the Act, has directed the Secretary of the DWF to include language in oyster leases to allow state and federal agencies to begin restoration projects under CWPPRA or other state laws without delay and expenses caused by potential litigation.²⁴⁵ The alternative is to allow the continued trend of coastal erosion and loss of wetlands and marshes in Louisiana's coastal zone.

Act No. 1332,²⁴⁶ allowing for the alienation of state mineral rights can also be considered to have been enacted by the legislature in an effort to further the environmental protection of Louisiana's coastal zone. The Act may very well increase the likelihood of beginning coastal restoration activities in areas like Isle

243. La. R.S. 49:213.4(C)(8) (Supp. 1997).

244. *Wascom & Wilkins*, *supra* note 222, at 898. See also *Mouton v. Department of Wildlife & Fisheries*, 657 So. 2d 622, 627 (La. App. 1st Cir. 1995) (in which Mouton, a citizen, joined by The Louisiana Association of Coastal Anglers and the Louisiana Environmental Action Network, sought to compel the DWF to enforce the Trout Plan, LAC Title 76, Part VII, Chapter 3, § 341, and weekend ban on commercial speckled trout fishing. Although the court reversed the trial court's issuance of a writ of mandamus based on the finding that Mouton lacked standing, the court did recognize that the DWF is a public trustee of the wildlife and aquatic life of the State.).

245. *Wascom & Wilkins*, *supra* note 222, at 898. In *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152, 1156 (La. 1984), the court recognized that the legislature in passing 1978 La. Acts No. 334 § 1104 (indicating that state regulations be consistent with the federal Resource Conservation and Recovery Act), directed the Department of Natural Resources "to promulgate regulations to prevent the transportation, treatment or disposal of hazardous wastes except by permit issued upon a showing that the particular project or facility to be licensed does not involve a substantial risk to the environment."

246. La. Const. art. IX, § 4(A), amended by 1995 La. Acts No. 1332.

Derniers where title disputes may arise between the State and riparian landowners as a result of reclamation activities.

The legislation enacted will further state restoration efforts—which are not only to ensure the preservation and protection of the State's natural resources, but also the contribution Louisiana's coastal zone makes to the economy of the State and the Nation.

IX. CONCLUSION

It is difficult for one to understand the need and importance of coastal restoration in Louisiana unless one has experienced the bayous and marshes, both inland and along the coast of southern Louisiana. While it can be said that wetlands loss has in some ways benefitted the oyster fisherman or oil and gas industries by creating productive oyster leases and allowing easier access to mineral deposits, the potential and actual harm caused by such losses may not yet be realized.

Human influence created the current trend of coastal wetlands and marsh loss in southern Louisiana. Ironically, human intervention is necessary to prevent further loss of these wetlands and marshes, and to restore what has already been lost. As stated earlier, if we allow coastal wetlands and marshes to disappear at the current rate without taking action, it has been estimated that within fifty years we will have allowed the coastline of Louisiana to advance approximately fifty miles inland from its present location. That translates into another loss—that of billions of dollars in natural resources, public, private, commercial and residential infrastructure and property, and income generating capacity to the Nation as well as the State.

Change if it is not controlled by wise people destroys sometimes more than it brings . . . unless some wise person comes along in the middle of the change and takes charge of it, change can destroy what is irreplaceable. If the reason for the change is based in motive—that is, to clear the wilderness just to make cotton land, to raise cotton on an agrarian economy of peonage, slavery, is base because it's not as good as the wilderness which it replaces. But if in the end it makes more education for more people, more of good things of life—I mean by that to give man leisure to use what's up here instead of just leisure to ride around in automobiles, then . . . it was worth destroying the wilderness. But if all the destruction of the wilderness does is give to more people more automobiles just to ride around in, then the wilderness was better.²⁴⁷

247. Greg Guirard, *Seasons of Light in the Atchafalaya Basin* 17 (1983) (quoting Frederick Gwynn and Joseph Blotner, *Faulkner in the University* (1959)).

Louisiana's coastal wetlands and marshes are not only a natural beauty that should be preserved, but a valuable natural resource upon which the State and the Nation is dependent. Yet, the conflicts between the oyster lessee and the State, and the riparian landowner or oil and gas industry and the State, are well-founded and entrenched in the legislation and laws of the State.

The State can and should make use of the public trust doctrine of the Louisiana Constitution in order to further much needed restoration efforts. However, individual and private property rights must be considered and cannot simply be set aside, even for the restoration of natural resources. These rights are innate in both the Constitution of Louisiana and the United States Constitution.

It was human influence that initiated the destruction of Louisiana's coastal zone, beginning with the much needed Lower Mississippi River Levee System and ending with oil and gas exploration activities affecting the coastal wetlands and marshes of Louisiana.

... the destruction of the wilderness ... is a change that's going on everywhere, and I think that man progresses mechanically and technically much faster than he does spiritually, that there may be something that he can substitute for the ruined wilderness, but he hasn't found that. He spends more time ruining the wilderness than he does finding something to replace it, just like he spends more time producing more people than something good to do with the people or to make better people out to them.²⁴⁸

However, with the enactment and implementation of laws and regulations for coastal restoration, a new enemy has been born. That enemy is the potential dispute over riparian and other property rights within the coastal zone. If these actions are not curtailed through the use of laws and regulations available to the government and its agencies, or the enactment of legislation more favorable to coastal restoration, there will be no property rights or interests over which to debate in the future. The two needs are at odds with one another. Natural resources are a necessity for the continued benefit the coastal zone has on the State and Nation's economy; yet, in protection of these natural resources for future development of social and economic factors, industry and occupations that rely on the coastal zone will probably notice a short-term reduction in their productive and financial capabilities in order to acquire long-term and continued benefits. The State has made great inroads over the past two years not only through the passage of legislation to facilitate coastal restoration efforts, but also to bring about an awareness of the inherent conflicts associated with coastal restoration.

The preservation of the coastal zone and the restoration of coastal areas, while possibly having a detrimental short-term effect on various coastal

248. Guirard, *supra* note 247, at 35 (quoting Gwynn and Blotner, *supra* note 247).

industries, will assure a long-term highly productive ecosystem that can be controlled and stabilized through the use of restoration projects and activities. Not only will restoration stabilize coastal industries and the economy, but protection for coastal communities will be enhanced by a reduction of the impact on Louisiana's coastal environment by hurricanes, tidal erosion, and saltwater intrusion,²⁴⁹ thus ensuring the prolonged and continued availability of natural resources to the people and economy of the State of Louisiana and the United States. The long-awaited medium between nature and industry can then be found.

249. See Charles East, Jr., *Hurricanes: How They Impact Louisiana's Environment*, Louisiana Environmentalist, July-Aug. 1995 (published by the Louisiana Department of Environmental Quality, the article discusses the dramatic effect hurricanes have on Louisiana's coastal environment); Robert H. Chabbeck, Ph.D., *Marsh Management in Louisiana for Production of Emergent and Aquatic Plants* (July 1994) (Prepared for the Louisiana Landowners Association, Inc., the booklet discusses the coastal alterations, among other things, that saltwater intrusion has upon Louisiana's delicate coastal marshes).

