THE
LOUISIANA ENVIRONMENTAL LAWYER
Volume 6, Number 3 - Fall 2000

LSBA Environmental Law Section Annual Student Essay Contest Winner

A New Green Government Weapon: Shooting Down Regulatory Takings With Estoppel

by Laura Pfefferle, Tulane Law School

I. Introduction

> *One who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a "taking" would confer a windfall.*[1]

The widespread destruction of wetlands in the United States and the gradual realization of the folly of that course of conduct has led to increasing efforts to preserve the nation's remaining wetlands. Regulations to protect wetlands, however, conflict with landowners' expectations for using and developing their property. The result has been the proliferation of takings claims against government when regulation stymies development. Landowners seek reimbursement from the government for the value lost to them when land contains wetland areas that cannot be developed the way the owner wishes and regulations reduce or eliminate the value of the property for non-wetland uses.

Purchasers can avoid such problems by buying land that does not contain wetland areas, but a few states, such as Louisiana, have millions of acres of wetlands whose location is not always known.[2] The broad definition of wetlands includes areas that are not necessarily wet at all times, so their elusive nature compounds the identification problem. Louisiana has not mapped all of its wetlands, and has no requirement that sellers disclose the existence or the extent of wetlands on their property to potential buyers. Are there valid reasons to add yet another regulation to wetlands law requiring sellers to provide actual notice of the possibility that their property may contain wetlands? Will such a requirement provide benefits not attained through private solutions to the problem, or reduce negative consequences resulting from the lack of actual notice to buyers?

Although the many permutations of wetlands law, regulatory takings, and disclosure requirements are beyond the scope of this work, Part II provides a broad outline of these areas of the law and a foundation for interrelating aspects of them through my proposal. Part III will demonstrate that an actual notice requirement is timely given changes in wetland regulations. It will show that actual notice will prevent disputes, provide certainty to landowners at minimal cost, and eliminate wetland-related regulatory takings by using estoppel while protecting our national wetlands resource. Finally, I will assert that actual notice will benefit both the state and federal governments by reducing regulatory takings litigation and its concomitant expense to landowners, government, and taxpayers. Part IV will conclude that applying both the traditional and modern concepts of property law to the problem of wetlands loss in Louisiana militates for a new requirement that sellers of land in Louisiana provide actual notice to buyers of the possible existence of wetlands on properties offered for sale.

II. Takings, Wetlands, and Notice

Annual Section Seminar Notice on Page 17

Published by the Section on Environmental Law, Louisiana State Bar Association, as a service to its members.

Features

Newsletter Editor: **James G. Wilkins**--*Associate Editor*: **Anne J. Crochet**--*Design/Layout*: **Dustin Westphal**

Law

A. Concepts of Property Law

Historically, the common law has favored three social policies underlying the rules of property ownership.[3] First, certainty of ownership gives people confidence and security because they know what they own and what rights they have without having to seek determinations in court.[4] Second, social peace results from clear rules that prevent disputes.[5] Finally, property law favors putting resources to productive use.[6]

In the United States, concern with ownership and control of property manifested itself in the Constitution's Fifth Amendment clause, "nor shall private property be taken for public use, without just compensation."[7] The mandate historically applied only to government eminent domain "takings" of property for public purposes such as roads.[8] A landmark 1922 Supreme Court case introduced a new application of the clause by declaring that if *regulation* of a person's property "goes too far" it too becomes a taking for which government must pay compensation.[9]

Modern property law has evolved to emphasize free alienability while reinforcing certainty and social peace through land use controls such as zoning.[10] Society has recognized that protection of agricultural and ecologically sensitive land may preserve land's most "productive" use.[11] Mechanisms such as development controls, urban growth boundaries, and retirement of sensitive land for conservation purposes attest to these new views.[12]

Economic theory has affected the way in which courts resolve property disputes. In 1960 Professor Ronald Coase proposed that regardless of which party held a particular property right, in the absence of transaction costs, parties to a transaction would achieve the same efficient solution to a dispute.[13] Implicit in Coase's theory is that the parties bear the full costs and receive all the benefits of the transaction; thus, the transaction places no positive or negative externalities upon society.[14] As applied by law and economics scholars, the Coase theorem would have a court's judgment reflect the agreement the informed parties would have reached were they bargaining with low transaction costs.[15] Other areas of law follow this idea of economic efficiency by assigning the risk of loss to the party best prepared to prevent it.[16]

B. Takings Law

In the United States, takings of property under government's eminent domain power and regulation under the police power were areas of law that existed in separate realms until Justice Holmes formally wed them in *Pennsylvania Coal v. Mahon*.[17] Fifty-six years later, in *Penn Central Transportation Co. v. New York City*, the Supreme Court announced two factors by which it would evaluate takings claims: the character of the government action and its economic impact.[18] As part of the economic impact analysis, the Court would consider the frustration of the owner's investment-backed expectations for the property.[19]

A basic idea behind takings law is that individuals should not bear the burden of providing private property for public use. Instead, the public should compensate the individual for the property taken.[20] While the Supreme Court in *Mahon* had decided to focus on reasonable expectations, it was not willing to extend takings law to cover property interests that the owner had believed were available, but which the government had thwarted.[21]

Over the years of takings jurisprudence, the Court has distilled a three-factor takings test.[22] First, courts must examine the character of the government action; for example, whether the action involved a physical occupation or was intended to prevent a nuisance.[23] Second, courts must consider the economic impact of the action, such as a reduction in the value of the property.[24] Third, courts must determine the extent to which the action interferes with the property owner's reasonable investment-backed expectations.[25] The foundation for assessing investment-backed expectations at the time of purchase is the amount of information buyers have about the property, which in turn affects the price paid.[26] Evidence that the landowner should have or could have reasonably expected a regulation to affect the property makes it unlikely that a court will find a taking.[27] For example, some courts have considered the buyer's having paid a reduced price for property as an indicator of awareness of existing or potential regulation.[28] Taking a snapshot of the buyer's investment-backed expectations at the time of purchase has been an equitable way to analyze later takings claims arising from the effects of regulation.[29]

A crucial development in modern takings jurisprudence occurred in *Lucas v. South Carolina Coastal Council*.[30] In *Lucas*, the Supreme Court held that a state statute prohibiting development on beachfront property deprived the owner of all economically beneficial use of his land and was therefore a total taking.[31] The Court declared that the government must pay compensation for such takings unless the regulation was designed to prevent nuisances or was part of the state's real property law, and thus a part of the deed, when the buyer acquired the property.[32] In other words, the Court would not compensate a total taking if the owner had constructive notice of existing property law principles and therefore his expectations for the property were unreasonable.[33] The South Carolina statute rendering Lucas' property a total taking was passed *after* Lucas purchased the property.[34] The Court allowed that, once in possession of property, the owner could naturally expect that

the government might pass new regulations curtailing certain uses of land, but that those would not warrant compensation unless they constituted taking of all economic use and did not fall within the exceptions noted above.[35]

Just as Lucas had constructive notice of state property law principles when he purchased his lots, the federal prohibition against dredging and filling wetlands under section 404 of the Clean Water Act (CWA)[36] puts all U.S. property owners on constructive notice that development of wetlands may not be permitted and that they must adjust their reasonable investment-backed expectations accordingly.[37] Likewise, compensation for regulatory takings will not result from frustrated efforts to develop wetlands unless regulation displaces all economic use *and* the use was not already prohibited under state law.[38] This is an unlikely scenario. Still, the *Lucas* Court signaled that landowners' investment-backed expectations at the time of purchase will be one of the most important factors for assessing takings claims in the future.[39]

Jurisdiction for takings claims against the federal government lies in the Court of Federal Claims when the remedy sought is a judgment exceeding ten thousand dollars.[40] Claims for less than that amount, or in which the suitor seeks an injunction, also may be heard in a district court.[41] Louisiana's constitution contains a takings clause and Louisiana law provides for a process to assess takings and to provide compensation to property owners when government action diminishes the value of their property.[42] Exceptions include eminent domain actions; legislative amendments, enactment of statutes, or adoption of resolutions; and actions taken to comply with federal laws and regulations.[43]

C. Wetlands Law

Wetlands[44] first received federal protection in 1972 under section 404 of the Clean Water Act (CWA).[45] The section 404 program applies to the "waters of the United States," which encompass most water bodies in the country.[46] These waters include not only navigable waters, but also streams, tributaries, wetlands adjacent to other water bodies, interstate wetlands, and isolated wetlands that are not adjacent to other bodies of water — if their degradation could affect interstate commerce.[47] Wetlands may be separated from nearby water bodies by substantial barriers yet still be classified as adjacent.[48] Even artificially created wetlands and seasonal wetlands that are dry during parts of the year are subject to CWA jurisdiction.[49] The Supreme Court has confirmed the broad scope of regulatory power over many types of wetlands, even those not hydrologically connected to neighboring bodies of water.[50] Landowners, then, may safely assume that property containing any type of wetland may be subject to regulation.

The Army Corps of Engineers (Corps) administers the CWA section 404 permitting program and makes most jurisdictional determinations.[51] The Environmental Protection Agency (EPA) retains ultimate authority for CWA jurisdiction decisions[52] and may veto Corps permits.[53] The section 404 program puts responsibility on the wetlands owner for the initial determination as to whether particular wetlands fall under CWA jurisdiction.[54] The applicant for an individual permit bears the burden of delineating the extent of the wetlands on the property the applicant seeks to develop.[55] The applicant must collect and provide information supporting the delineation to enable the Corps to make the official decision.[56] Determinations must be made based on a site-by-site evaluation and can present considerable difficulty even for experts.[57] The Corps and the EPA are authorized but not *required* to make wetlands delineations.[58] Therefore, property owners often seek the services of private consultants to conduct the delineations, thus avoiding the likely delay and uncertainties of obtaining them from the district Corps engineer.[59]

A wetland owner faces strict liability under section 404 for dredging and filling wetlands without a permit.[60] The CWA lists several kinds of exemptions, primarily for farming, forestry, and ranching.[61] General or nationwide permits cover other activities in wetlands and do not require individual applications, but in some cases require the landowner to notify the Corps before beginning activities.[62] Distinguishing between activities requiring individual, general, or nationwide permits can be difficult. For example, landowners can clear wetland trees and vegetation without individual permits, but the CWA regulates the activity if the landowner redeposits the removed material.[63]

The Corps approves most section 404 permit applications, requiring at most, minor changes or added conditions on some permits.[64] Individual permits are more difficult to obtain, and a significant number of applicants do not follow through to receive them.[65] Rather, they simply drop out of the process.[66] Collected data does not reveal the details of each case, such as how many proceed without a permit, or how many adjust their projects to avoid having to apply for permits.[67] The Corps does not issue permits to fill wetlands if there are practicable alternative sites that would have fewer negative impacts on wetlands.[68] For example, in *Bersani v. EPA*, a developer sought to build a shopping mall on a site containing nearly fifty acres of wetlands.[69] The EPA vetoed the permit because a non-wetland site was available at the time the buyer purchased the property.[70]

Takings claims for wetlands stem from government protections and programs that limit activities in wetlands and thus force property owners to provide the "public goods" wetlands offer—

such as improved water quality, drainage, flood storage, recreation, and wildlife values—at private expense.[71] The number of takings claims for wetlands exceeds that of any other type of federal taking claim.[72] From 1992 to 1997, federal takings suits netted almost $350 million for claimants.[73] Wetland takings claims most often arise when the Corps denies a landowner's application for a permit and frustrates his or her development expectations.[74] State regulations, sometimes enacted pursuant to a federal requirement, may result in takings claims as well.[75] The government has created no uniform national system to compensate people suffering declines in property value due to wetland regulations.[76]

In the conterminous United States, Louisiana is second only to Florida in wetland acreage, with 8.8 million acres.[77] Louisiana law contains various provisions mandating protection of its wetlands, and requires coastal use permits under the state coastal management program.[78] Both state and federal wetlands programs abound: no less than thirty-six federal agencies have functions related to protecting the nation's remaining 103 million acres of wetlands.[79] These programs have not yet stopped the decline in national wetland acreage.[80] In response, the EPA recently terminated a popular nationwide permit that was widely criticized for allowing too much wetland destruction.[81] The Corps has restructured the nationwide permit program to restrict the sizes and types of wetlands that people may disturb.[82] The nationwide permits are due for renewal in 2001, and even further restrictions are expected.[83] Consequences will include more required mitigation and increased permit denials.[84] Some percentage of those permit denials will likely trigger takings claims.

For purposes of this article, "developing wetlands" means filling areas of wetlands to the extent that the developer must seek an individual, rather than a nationwide permit. Therefore, "development" is synonymous with the Corps-permitted discharge of a pollutant (fill material) from a point source into waters of the United States, and destruction or conversion to dry land of wetlands falling under CWA jurisdiction.[85]

D. Notice Law

The notice element in takings law appeared in 1984. In *Ruckelshaus v. Monsanto Co.*, the Supreme Court considered whether a taking occurred when a federal statute permitted the EPA to disclose trade-secret information about a Monsanto product.[86] The takings clause, the Court held, protected the company's property right to the information.[87] The federal statute, however, put Monsanto on notice that the government would reveal trade-secret information.[88] Therefore, the Court held that the company could not have reasonable investment-backed expectations when it was aware that the government would disclose the information.[89]

Although *Monsanto* is not a land use case, its holding is important to takings law because it signaled that notice of a government regulation can frustrate takings claims by minimizing the weight of investment-backed expectations, which are arguably the most important takings factor in landowner claims.[90] The *Lucas* court followed in the *Monsanto* tradition when Justice Scalia applied the "negative" notice rule to real property: in the absence of government regulation prohibiting development, a property owner's reasonable expectations for developing property are "taken" by later-enacted laws for which the landowner had no constructive or actual notice.[91]

State courts, too, have applied the notice rule to reject landowner takings claims.[92] For example, in a New York case the court denied compensation when a developer had notice, prior to a land purchase, of government plans to reduce the maximum building density allowed on a parcel.[93] The court deemed his investment-backed expectations unreasonable.[94]

All property buyers have had constructive notice of the federal statute protecting wetlands since its enactment in 1972.[95] They have constructive notice of state statutes regulating wetlands as well. Louisiana has what could be termed a *de facto* inquiry notice requirement for purchasers of property containing wetlands.[96] That is, buyers bear the burden to investigate the existence and extent of wetlands on property under consideration for purchase because Louisiana has no requirement that sellers notify potential buyers.

In Louisiana, the remedy of redhibition (rescission) of the purchase is available for fraudulent concealment of the existence of wetlands on property.[97] A successful claim for redhibition requires the buyer to prove three elements: a sale, a defect, and the nature of the defect as one that would have caused the buyer to avoid the sale had the buyer known of the defect.[98] Louisiana law holds buyers only to a reasonably prudent buyer standard, yet the average person may have difficulty recognizing certain conditions as wetlands.[99]

The dearth of past redhibition case law for Louisiana property containing wetlands is probably attributable to several factors. Most wetlands in Louisiana are not likely to be of types that are difficult to recognize.[100] In addition, not all wetlands create problems for those who may wish to convert them to other uses.[101] Reasonably prudent land buyers in Louisiana are likely to be aware of the potential difficulties associated with buying wetlands and choose not to buy property containing wetlands if they intend to develop the property.[102] Many potential takings suits need not be filed because landowners modify their plans in order to secure permits or to avoid the need for a

permit.[103] Finally, no precedent exists for considering wetlands to be a *defect* warranting redhibition.[104]

E. The Actual Notice Mechanism

Ideally, actual notice will be as simple as an insertion in the deed or a form setting forth the Louisiana statutory obligation requiring sellers of real property to inform buyers that: (1) the property may contain wetlands; (2) if wetlands are present, they may be subject to state or federal regulation; (3) the federal and state definitions of wetlands include areas that may or may not be inundated at all times; (4) a Corps or private professional delineation is the best way to determine the location and extent of wetlands; (5) sellers need not provide delineations; (6) notice estops regulatory takings claims for decreases in property value if the property contains wetlands, under law or regulations in effect at the time of purchase *or* those enacted later, and (7) credits, compensation, or other incentives to preserve wetlands may be available to wetland owners from state or federal programs.[105] Exemptions from the notice requirement would track those wetlands that are jurisdictionally exempt from CWA and state regulation under existing law.

The rationale for the notice requirement has two prongs. First, actual notice places the burden on the buyer to determine whether wetlands exist on the property, or to take the risk of surprise after purchase, when recovery via a taking claim would be estopped. Clearly, the wary buyer will investigate before buying, and indeed, has great incentive to become informed.[106] If a potential buyer locates wetlands on the property and chooses to walk away, he or she obviously loses no property value by having made no purchase, and therefore has no basis for a takings claim. Actual notice provides the impetus for even the unwary buyer to seek information, and assigns the risk of loss to the buyer if he or she chooses to waive the opportunity to do so. The second prong of the notice requirement estops takings claims from buyers who receive actual notice that property may contain wetlands. Actual notice affirmatively places the burden on buyers to investigate the wetland status of property and to adjust investment-backed expectations accordingly. Under *Lucas*, the existence of wetland regulations in state law, and by analogy under federal law, removes the foundation for takings claims based on unreasonable expectations.[107] Buyers on notice bear the disparity between unreasonable expectations and the market value of property containing regulated wetlands, and actual notice estops a takings claim.[108]

Under the second prong, any pre-existing takings claim the seller might have had would be based on the market value of the property containing regulated wetlands.[109] If the seller obtains a high price as a result of unreasonable investment-backed expectations on the part of the buyer, then the amount of the seller's takings claim will decline or the claim will disappear because his losses will be reduced.[110] Under the first prong of the notice requirement, the seller's position remains unchanged.[111] A lost sale represents no loss exceeding any pre-existing regulatory takings claim he or she might have had, because no further decline in property value occurs.[112] If regulations to protect the wetland have lowered the market value of the property, then that lower value should be reflected in the selling price and will form the basis of the seller's pre-existing takings claim.[113] On the other hand, if the seller conceals the nature of the property's value and obtains a higher price, he or she opens the door to suit by the buyer in redhibition or for fraud.[114] The seller would then bear any disparity between the market value and the selling price because the buyer could recover that difference at minimum, up to the full price paid upon a judgment in redhibition.[115] Again, any pre-existing taking claim the seller might have will be based on the market value.[116]

F. The Law Converges: Notice to Landowners in Wetland Takings Cases

Courts consider far more than the link between constructive or actual notice and investment-backed expectations when deciding takings cases, but notice has elevated the role of expectations in both state and federal cases in determining whether regulatory takings occur.[117] For example, in 1964 Deltona Corp. purchased ten thousand oceanfront acres in Florida to build a residential development.[118] Navigable waters restrictions were in place at the time and the developer had to obtain Corps permits to proceed.[119] Environmental regulations, however, had become more restrictive, and the CWA was enacted before Deltona had obtained all necessary permits to complete the development.[120] The court held that the developer purchased the land with full awareness that permit conditions might become more restrictive.[121] The wetland area that Deltona could not develop constituted twenty percent of its total acreage, but the court found that Deltona's investment-backed expectations were not seriously damaged and found no taking for the diminution in value.[122]

Subsequent to *Deltona*, the *Monsanto* case cemented the notice rule in takings jurisprudence.[123] The next major wetlands case to apply the notice rule was *Ciampitti v. United States*.[124] Ciampitti, a developer, was aware of state and federal wetland restrictions on fourteen of forty-five acres when he purchased them for development.[125] The court found that he could have had no reasonable development expectations and, without difficulty, denied the takings claim.[126]

A landowner in *Formanek v. United States* bought property containing ninety-nine acres of wetlands and twelve acres of uplands in 1966, with the intent to use the property for industrial develop-

ment.[127] Over twenty years later the Corps denied a permit to develop some of the wetlands, and the court awarded the pre-regulation fair market value of the land.[128] Restrictions on the land had come into effect long after purchase so the court was sympathetic to the owner's disappointed expectations and the takings claim.[129]

As these cases demonstrate, government action cannot take value from property for which landowners, through actual or constructive notice, paid prices reflecting existing or expected regulations. Conversely, the courts may be sympathetic to property owners who suffer losses resulting from regulations whose enactment is unforeseeable. Lack of actual notice was pivotal in *Bowles v. United States*, a Court of Federal Claims case in which a property owner had no notice of Corps jurisdiction over a subdivision lot for which the only economic use was as a residence site.[130] The Corps denied a section 404 permit for the owner to install a septic tank.[131] The subdivision, however, required the tank in order for the owner to construct a residence, and the court found a total taking.[132] The court decided that the existence of Corps jurisdiction over the purchaser's property was not foreseeable by a reasonable person.[133] Had the landowner received actual rather than constructive notice, the court signaled that it would have ruled differently.[134]

Actual notice would estop takings claims even when regulations enacted after purchase reduce land values. For example, a developer in *Loveladies Harbor, Inc. v. United States* purchased a 250-acre parcel and had sold most of it before the CWA came into effect.[135] The Corps denied a section 404 permit for only twelve acres, but the court held that the developer's investment-backed expectations had been thwarted.[136] The developer had no notice of the regulations yet to be enacted, and the court affirmed the $2.5 million award for the taking.[137]

In *Loveladies*, the state had granted a building permit and the Corps denied the section 404 permit, placing responsibility for the taking on the Corps.[138] Had the state denied the initial permit, takings liability might well have rested with the state. Louisiana courts have not yet reached this issue of liability in a wetlands context. It is important to note that the state enacted the regulation in *Lucas* pursuant to federal coastal management legislation, yet the state, not the federal government, was responsible for the judgment.[139]

State and federal case law amply supports the conclusion that most courts have not hesitated to use the weapon of estoppel to shoot down takings claims. The Court of Federal Claims has used federal section 404 law as constructive notice to estop such claims, despite Justice Scalia's specific statements in *Lucas* that background principles of *state* law inhering in the title could function to estop total takings claims.[140] Justice Scalia discussed and did not rule out *federal* restrictions that might inhere in the title when land is sold.[141] The Federal Circuit in a recent non-wetland takings case, however, citing *Lucas,* invoked a federal statute in effect long before the company acquired its mineral interest to estop a takings claim.[142] In *M & J Coal Co. v. United States*, the government forced a mining company to leave coal pillars in the ground to prevent subsidence.[143] The Federal Circuit decided that the company had no reasonable expectation to exploit its mineral interest at the cost of public safety because the company was aware of federal statutory restrictions at the time it acquired its mineral interest.[144]

Two years later, the Court of Federal Claims in *Forest Properties, Inc. v. United States* disagreed.[145] The court stated that a section 404 permit denial was irrelevant to the takings analysis because state law allowed dredging and filling a lake bottom.[146] The federal permit could be granted or denied, so the existence of the section 404 program itself did not defeat the developer's property interest.[147] Instead, the court focused on the owner's unreasonable investment-backed expectations, given knowledge of the CWA regulation, to deny the taking.[148]

During the same year, the court in *Florida Rock Industries, Inc. v. United States* found a taking when the Corps denied the landowner a section 404 permit to extract limestone from 98 of 1,560 acres of wetlands.[149] As in *Loveladies*, the owner purchased the property prior to enactment of the CWA.[150] The court held that when Florida Rock purchased the land it had the right to develop or mine the property and fully expected to do so under existing law, so its investment-backed expectations had been frustrated.[151]

The nearly unbroken pattern that has emerged reveals courts favoring takings claims from landowners surprised by regulations enacted after they purchased property. Likewise, when federal or state regulations are in place at time of purchase courts tend to deny takings claims because development expectations are unreasonable. Recently, the Court of Federal Claims decided a significant wetland takings case that exemplifies the role of actual notice and estoppel in protecting the environment.[152] In *Good v. United States*, a developer in 1973 purchased a forty-acre parcel in the Florida Keys that contained thirty-two acres of wetlands.[153] The contract for the sale provided actual notice that development might be problematic: "The Buyers recognize that certain of the lands covered by this contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations."[154]

Environmental regulations tightened over the years after the purchase.[155] Good first applied for a Corps permit in 1981 and sought

approval from county and state authorities to obtain additional necessary permits.[156] Years of ever more complex restrictions, revised plans, and attempts to comply with multiple regulations followed, culminating in a fourth Corps permit denial in 1990.[157] Good then filed a takings suit in the Court of Federal Claims.[158] He lost on summary judgment because the property retained value and because Good lacked reasonable development expectations due to the regulations in place, and his actual notice, at the time of purchase.[159]

The Federal Circuit decided Good's appeal in 1999, and he again lost on summary judgment.[160] The court focused its analysis exclusively on Good's unreasonable investment-backed expectations, including his actual and constructive notice of the regulatory climate at the time he purchased the property.[161] The actual notice in the contract of sale gave the court a ready peg on which to hang estoppel of the claim.[162] Had Good not received actual notice, the court could have based its decision on the claimant's constructive notice of regulations in effect when he purchased the property. However, the *Good* case clearly demonstrates how takings claims approach mootness when claimants have actual notice of restrictions at the time of purchase.

Since the *Penn Central* decision, then, federal courts generally have held land buyers responsible for their unreasonable expectations when they were on notice of government regulations when purchasing property.[163] Many courts impliedly hold developers to a higher standard of awareness of restrictions than they do individuals buying property to construct single residences.[164] Not all courts have been sympathetic to such buyers.[165] For example, in *Rowe v. Town of North Hampton* the property owners acquired a two-acre parcel in 1968.[166] The town passed wetland regulations in 1979 that prevented the owner from building on the lot.[167] The owner was unable to obtain a variance and sued for a taking, but the court was unsympathetic, declaring that the owner knew of zoning restrictions in place at the time of purchase.[168] She was generally aware of increasing concerns about wetlands and knew the law could become even more restrictive, so the court found her expectation to build on the lot was unreasonable.[169]

On the other hand, in *Vatalaro v. Department of Environmental Regulation*, the elderly buyer purchased wetland property without awareness of a state restriction despite her son's diligent inquiry into county regulations.[170] The buyer's constructive notice of the state regulation did not prevent the court from finding a total taking.[171] The state interest in preserving the wetland site precluded virtually any use, and the frustration of the buyer's intent to construct a residence rather than a commercial development appeared to influence the decision.[172]

The equities in another case favored the buyer less than in *Vatalaro*, but the court ruled for the buyer and found a taking.[173] In *Gil v. Inland Wetlands and Watercourses Agency* the owner purchased a lot consisting of nearly all wetlands but which was zoned residential and located in the midst of single family residences.[174] The Connecticut Supreme Court found the buyer's expectations for development reasonable and upheld the taking claim following building permit denial by the wetland agency.[175] The buyer had paid a discounted price for the parcel, but the court focused on his expectations even in the face of the speculative nature of the purchase.[176]

A Pennsylvania environmental board denied a couple a permit to fill wetland property to construct a business in *Mock v. Department of Environmental Resources*.[177] The landowners did not present evidence of what their expectations were at the time of purchase in 1963, and the court noted that the property was not only wetlands, but also riparian and located in the one hundred year floodplain.[178] Therefore, the land had been subject to regulation under the common law for "centuries."[179]

The council in *Grant v. South Carolina Coastal Council* held that restrictions on tidelands forming part of the background principles of state law at the time of purchase yielded no taking when the owner filled the property without a permit.[180] In three recent New York wetland cases, the state's high court decided there were no takings.[181] In all three cases, the court concluded that restrictions inhering in the title to property when purchased served as constructive notice and estopped the takings claims.[182] In *Gazza*, the court also noted that the reduced purchase price reflected the buyer's awareness of wetland regulations.[183]

III. Analysis

Given that all citizens have been on constructive notice about wetland regulations since enactment of the CWA decades ago, the number of takings claims should theoretically be small. The losses represented by claims that reach the courts as well as those uncounted silent losses that will never be known testify to the failure of constructive notice. It is fair to give actual notice to a land buyer of potentially restrictive government regulations on wetlands before the purchase takes place.

The ultimate objective of the actual notice requirement is to protect wetlands. Many other benefits will result from the requirement, however, and those benefits will indirectly work to preserve wetlands as well. Complicated and fact-dependent wetlands problems have few solutions that result in no adverse impacts, but the notice requirement produces remarkably few negative consequences.

The actual notice requirement will be effective prospectively. Courts using traditional takings

analysis for prior claims can apply estoppel and dismiss claims that some buyers will undoubtedly attempt to pursue despite having had actual or constructive notice.

A. Actual Notice Will Protect Wetlands

The actual notice requirement will promote the national goal of preserving wetlands.[184] An actual notice requirement is timely given changes in federal regulations to protect wetlands.[185] If enacted now, the requirement would proactively estop the imminent fallout of increased takings claims resulting from new restrictions in the nationwide permit program.[186] Under the revised permit program, more land—and smaller parcels—will be subject to more demanding section 404 regulation. Consequently, tightened permit conditions will trigger more permit denials. Those denials represent wetlands that will not be filled.

The actual notice requirement will protect wetlands in other ways as well. Informed buyers who have actual notice to investigate the wetland status of properties they buy will tend to have reasonable expectations regarding development of those wetlands. Those who understand that the Corps will scrutinize the availability of alternative sites at the time of purchase before approving permits will be more selective.[187] Arguments from potential wetland developers who have had actual notice are unlikely to convince the Corps decisionmaker that the developer had no alternative when he or she could have purchased property without wetlands.[188] Under this programmatic scheme, potential buyers are likely to be more careful when purchasing property with wetlands, and will have more reasonable expectations about what they can do with the property. Fewer permits would be sought so fewer will be issued, and more wetlands will remain undisturbed.

The actual notice requirement would increase demand for means other than takings suits to compensate wetland owners for declines in property value. The federal government may step in to create a compensation system, but state, local, or private action might be more effective. Such action could operate in tandem with or as a supplement to national efforts to provide compensation. Until an adequate system materializes, however, more wetland owners will be motivated to try alternatives already tested, such as selling conservation easements or participating in mitigation banks. Programs issuing and trading transferable development rights or conservation credits are likely to become more popular among wetlands owners.[189]

B. Actual Notice Will Prevent Disputes and Provide Certainty to Landowners

An actual notice requirement would not only protect purchasers from surprise, but would also protect sellers from claims of fraud based on nondisclosure. The notice requirement would avert costly litigation by affirmatively shifting to buyers the burdens of informing themselves about wetland regulations and obtaining determinations and delineations.[190] Actual notice would likely prevent disappointment and frustrated expectations by catalyzing the process of self-information on the part of buyers. Sellers would remain vulnerable to suit in redhibition for fraud for actively concealing the presence of wetlands, but that would be the case absent a notice requirement.

C. Actual Notice Will Promote Economic Efficiency

An actual notice requirement would eliminate externalities currently borne by society. Under the Coase theorem, knowledgeable sellers and buyers perform transactions in which all burdens and benefits accrue to the parties.[191] Thus, when uninformed buyers purchase property containing wetlands and buyers' expectations become frustrated, society bears costs even when takings claims do not result. The price in excess of the true market value of property represents losses to buyers and windfalls to sellers. The losses to buyers are not available for investment in buyers' development projects. The social and economic benefits of that development decrease or disappear. The benefits to society of existing wetlands may decline as well when landowners attempt to recoup losses by draining or otherwise damaging wetlands in ways that are not within Corps jurisdiction.[192]

The market for land generally places burdens on buyers under the maxim *caveat emptor*. Actual notice adjusts the burden on buyers from one of potentially huge losses after uninformed transactions to smaller information costs expended *before* purchase that result in wiser purchases. Courts may attempt to reach equitable and efficient decisions in takings suits, but such suits themselves represent vast inefficiencies. Buyers' plans must wait as the suits progress through the courts, and may never come to fruition. Lawsuits demand limited judicial resources. Funds allocated to development shift to pay for legal representation.[193] If, as Coase suggested, judges should reach decisions that represent the agreement the parties would have reached, then judges can never make such decisions because in an efficient market takings suits would not exist.

D. Actual Notice Will Benefit State and Federal Government and the Taxpayers

The *Lucas* decision allows for successful takings claims when the government passes regulations that prohibit economic use of land.[194] Regulation rarely results in the loss of the total value of land, but partial losses are likely when state and federal regulations preempt certain land uses.[195] As *Lucas* demonstrates, even state regulations in the public interest may not ward off substantial awards to successful claimants, presenting poten-

tially large state financial burdens.

State wetland takings claims may be few in number now, but increased regulation and other factors should trigger a greater number of such suits in the future. Takings claims directed against the state have been largely unsuccessful to date. The number of cases brought to conclusion in the courts is not an accurate reflection of the real number of disputes, nor does it represent actual losses.[196] Increasing pressures brought on by growing population, sprawl, and heightened federal efforts to protect wetlands promise more conflicts between the state and wetlands owners.[197] Takings claims against states that are brought in federal courts are usually unsuccessful, but may become more common and more likely to succeed.[198]

Federal restrictions such as those in the National Flood Insurance Program will operate to decrease the supply of land available for development.[199] Developers will divide land into smaller parcels and convert more land while the supply of raw land continues to shrink. State efforts to protect wetlands, including regulation pursuant to federal laws and assumption of the section 404 permitting program, may not preclude state takings liability.[200] Tightened federal regulations and federal pressure on states to protect wetlands, as well as state efforts to attract and keep federally funded coastal restoration projects, promise ever-increasing takings claims.[201]

An actual notice requirement will estop state takings claims in two ways. First, actual notice would prevent more buyers from unknowingly purchasing land containing wetlands. Therefore, they would not be entitled to the "innocent purchaser" defense. Without this defense, buyers will be estopped from collecting for takings when denied permission to develop their land as they wish. If buyers choose to ignore the notice and fail to investigate before buying, estoppel will prevent them from recovering their losses from the government. Second, by giving actual notice that state regulations exist and that further regulation is possible, wetlands owners will be estopped from recovering for reductions in land value resulting from regulations enacted after purchase of land. Lucas' takings recovery resulted from just such an enactment of coastal building restrictions after he had purchased his lots.[202]

The importance of actual notice in saving land buyers from unanticipated losses could be dramatic. The notice requirement is likely to make the most difference to the group least protected under the status quo: individuals buying land on which to build single family homes. These are buyers who in many cases are unable or unwilling to initiate legal action. Many potential takings claims are never made because the landowners lack the resources to pursue them.[203] With actual notice, these silent losses can be avoided. Therefore, the effect of a notice requirement may be modest within the legal system but substantial outside of it.

During the 1990's, ongoing takings claims against the U.S. government numbered between 150 and 300 per year, with wetlands cases representing one fourth of the total.[204] Takings claims involve the costs of litigation and judgments paid by the government, and these are costs that all taxpayers, including those in Louisiana, stand to save by reducing takings claims.

E. Actual Notice Will Not Compensate Wetland Owners

The *Bowles* court succinctly summarized the case for actual notice and pointed out the problem it cannot solve:

> When the land owner has actual knowledge of the government regulation prior to purchase, the "notice" defense makes economic sense. A rational buyer who has actual notice of government land-use regulations prior to purchase will consider the risk that use may be restricted when deciding how much to pay. That is, the rational buyer is compensated for this risk up front by purchasing the property at a discount. Though, of course, the seller may have a valid taking claim.[205]

The actual notice requirement is a way to remove takings claims from the courts, but for all that an actual notice requirement can do, it will leave unsolved the question that has plagued wetland regulation since the CWA took effect. Regulations on wetlands lower the value of property by reducing its uses and development potential. Actual notice will estop regulatory takings claims, but eliminating takings claims will remove one of the few ways wetlands owners can obtain compensation for losses in property value. When the environment wins at the expense of property owners who suffer uncompensated losses, the victory is hollow because the environment becomes the enemy. Therefore, the legislative creation of an equitable and efficient system to reimburse those who own wetlands for the very real losses they suffer must take top priority.[206] The takings clause of the Constitution demands no less.[207] Society owes it to both wetland owners and the environment to take up the tool of the law and fashion a remedy.

Compensation is what takings suits are about, but takings suits are a highly inefficient way to compensate landowners. They impose the costs of litigation and the resulting awards on society, but the landowner's recovery bears no relationship to protection of the wetlands over which the suit was initiated. Only those who bring successful takings suits obtain recoveries. Those who do not prevail or who do not bring suit because they lack the necessary resources, or because their losses are too small to justify the costs of suit, go uncompen-

sated.[208] The societal interest in preserving wetlands should place the burden of protecting wetlands on society as a whole, not on the individuals who fortuitously own property containing wetlands.

Compensating wetland owners for declines in property values resulting from regulatory takings does not address the problem of funding wetland preservation. The compensation issue is bound to the problem of shifting the cost of wetland preservation to society as a whole, because the costs of both compensating wetland owners and preserving their wetlands rightfully belong to all members of society. Wetlands are unevenly distributed among the states yet their benefits accrue to all citizens.[209] Consequently, forcing states such as Louisiana to compensate all wetland owners within state boundaries would place an unfair burden on those states with plentiful wetland areas.[210] Federal programs currently in place to fund wetland preservation may be adequate to the task, but they must be properly funded and must encompass all wetlands.

F. How Will the Future Look with an Actual Notice Requirement in Place?

The future with an actual notice requirement in place is a future without regulatory takings suits over wetlands. The adversarial relationship of wetland owners to the government will disappear. Wetland owners will no longer perceive their wetlands as burdens.

The weapon of estoppel will be the instrument of its own demise. Takings suits eventually will become obsolete as land continues to change hands to informed buyers. These buyers will know the wetland status of property and the regulations that apply to it at the time of purchase, and they will have factored into the price they pay the potential for those regulations to change. The discrepancy between market value and price paid for land will approach zero as investment-backed expectations adjust according to the land's wetland status.[211] Government regulatory actions will "take" nothing from buyers who have reasonable expectations.

Closing the courthouse door to wetland takings claims will force state and federal governments to create better legislative solutions to compensate wetland owners.[212] Those solutions will provide compensation not only to those with the resources to complain loudly, but to those who have silently suffered losses in property value with few prospects for relief. Government will spend its resources more efficiently providing fair compensation to many than on expensive litigation with the few.[213] Case law shows that courts already apply estoppel at the end of the long legal road that takings claimants must follow; actual notice will save them the journey.[214]

Compensation may take any of several forms, including transferable development rights or conservation or mitigation credits. Some landowners will sell the rights or credits immediately, and some will let them accrue to the property to enhance its attractiveness to buyers. Subsequent purchasers will be aware, as part of the notice requirement, of the availability of these benefits and they will adjust their expectations and the prices they pay accordingly.

Most important to environmentalists, fewer wetlands will be destroyed. First, as land continues to change hands, more sellers and buyers will request delineations. Sellers will find that obtaining delineations before placing property on the market will catalyze sales. Sellers' efforts to provide this information is entirely consistent with the actual notice model of increasing information for buyers. The increased number of delineations will provide a more complete and precise picture of the location of wetland areas in the state. Ideally, the Corps will incorporate this data into existing maps that identify not only the location of wetlands, but also their value for preservation. Government and private programs to protect wetlands will allocate resources more efficiently by focusing on high quality wetlands for priority protection.[215]

Second, informed buyers will not purchase land containing wetlands if they desire to develop the property. Alternatively, informed buyers who do purchase land containing wetlands will do so with reasonable expectations for the nature of the development that regulations will allow. In both cases, wetlands will be spared. Buyers with incomplete information about wetlands and unreasonable expectations for development will be phenomena of the past.

Positive spillover effects for the environment will result. Informed buyers will tend to pay attention not only to wetland conditions, but will be more aware of conditions such as floodplain location. Sensitive ecosystems will remain intact. Wetland-dependent plants and wildlife will flourish. Water quality will improve.

IV. Conclusion

The national objective of protecting against further loss of our nation's wetlands can be quietly drained of its vitality parcel by parcel, permit by permit. Instilling the power in Louisiana law to preserve the centerpiece of America's wetland wealth should be our economic objective, as it must be our moral duty. Louisiana can both protect itself by estopping takings claims *and* preventing such claims from arising, while fostering the social goals of peace, certainty, and protection of wetland resources.

Two questions have not been addressed satisfactorily and will remain unanswered even assuming passage of an actual notice requirement. First, how can society compensate the landowner whose

property declines in value due to regulations on wetlands? Second, how can society ensure protection of existing wetlands in perpetuity? Society is slowly finding ways to solve these problems, but the solutions must be economically efficient and fair to both wetland owners and society. Uncompensated losses and takings litigation are neither. Actual notice must be viewed as one step in the evolution of an equitable wetland policy under which both people and the environment can win. Louisiana should arm itself with this new weapon to shoot down the *potential* for wetland takings claims to arise. We all have a stake in the equitable green future this new law promises.

To read the footnotes, check the SGLP web-site at http://www.lsu.edu/guests/sglegal/

Inside DEQ

RULE-MAKING UPDATE

Air Quality

AQ201 - Fugitive Emission Controls (LAC 33:III.2121) (*La. Register* vol. 26, #7; 7/20/00).
Removes the word "pipeline" and removes a redundant phrase to provide clarification to the regulations for monitoring requirements and exemptions to monitoring requirements for petroleum refineries, SOCMI, MTBE, and polymer manufacturing industry for fugitive emission control of organic compounds.

AQ203 - Volatile Organic Compounds - Loading (LAC 33:III.2107) (*La. Register* vol. 26, #7; 7/20/00). Test Methods 18, 25A, 25B, and flaring devices will be added as appropriate test methods for determining compliance with the control requirements for loading facilities for volatile organic compounds. This is part of the State Implementation Plan, which is federally enforceable, and EPA has requested these changes.

AQ200 - Repeal of Control of Emissions from Motor Vehicles and Related Fees (LAC 33:III.223, 1901-1935, and Chapter 19.Appendix) (*La. Register* vol. 26, #8; 8/20/00). The existing regulations at LAC 33:III.1901-1935 and the appendix at the end of Chapter 19 are being repealed, and the fees at LAC 33:III.223 are being amended, because the enhanced Motor Vehicle Inspection/Maintenance Program was never implemented and was not reauthorized by the Louisiana Legislature in 1997. Although these regulations were promulgated in 1995, vehicle testing was not to begin until 1999, and only after reauthorization by the Legislature in 1997. As the Legislature did not reauthorize this enhanced program, the program was never implemented, and thus, these regulations are moot and obsolete and need to be repealed. The Legislature, by Act 576 of the 1999 Regular Session, did authorize a less stringent, less costly program for the control and abatement of motor vehicle emissions to include new evaporative system pressure tests. A gas cap pressure test was implemented effective January 1, 2000, and a fuel inlet pressure test is scheduled to be implemented later in the year. The new emissions testing will be performed as part of annual vehicle safety inspections, and thus, enforcement of program provisions and collection of fees for this new vehicle inspection/maintenance program will be handled by the Department of Public Safety and Corrections, Office of State Police, Safety Enforcement Section (DPS), with DEQ providing oversight, data collection support, and liaison activities. In accordance with R.S. 32:1306(C), DPS has promulgated a final rule on December 20, 1999, necessary to implement the new requirements of this recently authorized vehicle emissions I/M program.

AQ206 - Standards of Performance for New Stationary Sources (NSPS) (LAC 33:III.3003) (*La. Register* vol. 26, #8; 8/20/00). This rule incorporates by reference 40 CFR Part 60 as revised July 1, 1999, into LAC 33:III.Chapter 30. Louisiana receives delegation authority from the U.S. Environmental Protection Agency (EPA) for 40 CFR Part 60 Standards of Performance for New Stationary Sources (NSPS) by incorporating the federal regulations into the LAC. EPA's 105 Grant Objective requires that incorporation by reference of new and revised NSPS regulations be made annually. This rulemaking meets that requirement.

AQ202 - Zinc Reclassification and other Clarifications (LAC 33:III.5107 and 5112) (*La. Register* vol. 26, #9; 9/20/00). Reclassifies zinc and zinc compounds from a Class II toxic air pollutant (ATAP@) (suspected human carcinogen and known or suspected human reproductive toxin) to Class III TAP (acute and chronic, non-carcinogen toxin). Exposure to zinc and zinc compounds has been shown in EPA toxicological studies to cause acute and chronic health effects corresponding to the Class III TAP classification. The rule also corrects a typographical error and adds a certification statement to the requirements for initial and subsequent annual emission reports and revisions to any emission report to attest that the information contained in the report is true, accurate, and complete.

AQ205 - Update Incorporation by Reference, 40 CFR Part 68 (LAC 33:III.5901) (*La. Register* vol. 26, #10; 10/20/00). Incorporates by reference 40 CFR Part 68 through July 1, 1999, and 65 FR 13243-13250 air quality regulations. The federal regulation revises the list of regulated flammable substances to exclude those substances used as a fuel or held for sale as a fuel at a retail facility. This rule will allow the facilities to comply with equivalent federal regulations.

AQ207 - Update Incorporation by Reference, 40 CFR Part 61 and Part 63 - (LAC 33:III.5116 and 5122) (*La. Register* vol. 26, #10; 10/20/00). Incorporates by reference, into Chapter 51, additional federal regulations in 40 CFR Parts 61 and 63, National Emis-

sion Standards for Hazardous Organic Air Pollutants (NESHAP), as well as removes previous references to Federal Registers. The state of Louisiana has received delegation of authority from EPA to implement NESHAP by "straight" delegation, which requires that DEQ incorporate rules as promulgated by EPA without changes. Louisiana incorporated certain NESHAP regulations by reference on January 20, 1997. In agreement with the revised delegated authority mechanism and with EPA grant objectives, the department is now incorporating additional NESHAP regulations by reference. These changes will expedite both the EPA approval process and the state implementation of delegation of authority for the NESHAP program. The NESHAP and the authority for EPA to delegate authority of that program to the state is established in the Clean Air Act Amendments of 1990, Section 112. This rulemaking is applicable to stationary sources statewide.

Hazardous Waste

HW073 - Remedial Action Plans State Provisions (LAC 33:V.625, 630, 635, 660, and 717) (*La. Register* vol. 26, #7; 7/20/00). In order to maintain delegation to operate the hazardous waste program in Louisiana in lieu of EPA, or to become delegated for previously undelegated activities, the state must adopt regulations equivalent to federal regulations. Federal regulations promulgated in part 40 of the CFR on November 30, 1998, contain certain provisions that cannot be adopted verbatim because of differences in terminology and procedure in state statutes. These provision include the process to approve or deny a remedial action plan (RAP) application; the effective date of a RAP; when to begin physical construction; appeal of the decision to deny a modification or revocation; and reissuance or termination of a RAP. This rule replaces the federal requirements with equivalent state requirements that are consistent with the state statutes. In addition, the rule removes redundant state requirements for public notices for hazardous waste activities.

Nuclear Energy

NE024 - Determination of Fee (LAC 33:XV.2508) (*La. Register* vol. 26, #7; 7/20/00). Amends existing regulations to provide relief to registrants who received registration fee assessments for X-ray units that they no longer possess. The registrant will not be required to pay the fee, if he provides, by the due date on the invoice, written documentation of the name, address, and telephone number of transferee.

NE026 - Amendment of Fluoroscopic X-Ray Systems (LAC 33:XV.605) (*La. Register* vol. 26, #10; 10/20/00). Relaxes requirements that are stricter than the federal requirements for exposure rate limits, and adds restrictions on equipment manufactured after May 19, 1995, when high level control is provided. This action will allow the state rules to become more compatible with the federal regulations.

Office of the Secretary

OS035 - Laboratory Accreditation Amendments (LAC 33:I.Subpart 3) (*La. Register* vol. 26, #7; 7/20/00). The laboratory accreditation rule requires accreditation of commercial environmental laboratories by the department every three years. The accreditation program requires third-party audits, submission of samples for independent analysis, and inspection of regulated laboratories. The rule provides for quality assurance/quality control procedures, laboratory personnel qualifications, and sampling protocol. The rule establishes the requirements to ensure the quality of data generated by commercial environmental laboratories that are accredited by the department, and provides clarification to facilitate a better understanding of the program requirements. The rule also promulgates the changes made in the emergency rule OS035E, which was effective on December 15, 1999. These changes extend the deadline to apply for accreditation to July 1, 2000, and the deadline for accreditation by the department to December 31, 2000.

OS037 - Beneficial Environmental Projects (LAC 33:I.Chapter 25) (*La. Register* vol. 26, #8; 8/20/00). Governs the use of beneficial environmental projects (ABEPs@) in the settlement of civil penalty assessments, as required by R.S. 30:2031 and 2050.7. Defines BEP as Aa project that provides for environmental mitigation which the defendant/respondent is not otherwise legally required to perform, but which the defendant/respondent agrees to undertake as a component of a settlement of a violation(s) or penalty assessment. Requires that a BEP must be either a public health project or a pollution prevention project, as those terms are defined in the rule.

Water Quality

WP035E4 (*La. Register* vol. 26 #10; 10/20/00) Financial Security for Privately-Owned Sewage Treatment Facilities. This rule reissues WP035E, which was issued on an emergency basis on July 1, 1999, as necessitated by Act 399 of the 1999 Legislative Session. That act requires the execution of a surety bond (or other acceptable financial security) for all privately-owned sewage treatment facilities that are regulated by the Public Service Commission, prior to receiving discharge authorization. Such security is to be payable to the DEQ, and conditioned upon compliance with the Water Control Law and any applicable permit. The secretary of DEQ may order forfeiture of the security upon determining that the continued operation, or lack thereof, of the facility represents a threat to public health, welfare or the environment because the permittee is unable or unwilling to adequately operate and maintain the facility, or has abandoned it. The proceeds of any forfeiture shall be used by the secretary to correct deficiencies or to maintain and operate the system. Act 399 applies to any issuance, renewal, modification, or transfer of such permits after July 1, 1999, and mandates that the Department establish by rule the acceptable forms of financial security and the amount of financial security required for the various types and sizes

of facilities. This rule amends LAC 33:IX.2331, 2381, 2383, 2385, and 2769, and adopts LAC 33:IX.2801-2809, to fulfill that mandate. WP035E3, signed and effective on June 26, 2000, includes amendments allowing for waiver and exemptions under certain circumstances, as provided by Act 93 of the 1st Extraordinary Session.

Proposed rule WP035 was published in the Louisiana Register on September 20, 2000. The earliest date it can become a final rule is December 20, 2000.

WP040 - LPDES Incorporation by Reference Update (LAC 33:IX.2301, 2531, and 2533) (*La. Register* vol. 26, #8; 8/20/00). Updates the CFR references in Chapter 23 to the current 1999 CFR. Authorized programs are required to adopt changes made to the federal regulations.

WP039 - Phase II Stormwater Discharges (LAC 33:IX.Chapter 23) (*La. Register* vol. 26, #10; 10/20/00). The Phase II stormwater regulations expand the existing Louisiana Pollutant Discharge Elimination System (LPDES) stormwater program (Phase I) to address stormwater discharges from small municipal separate storm sewer systems (MS4s) (those serving less than 100,000 persons) and construction sites that disturb one to five acres. The regulations allow for the exclusion of certain sources based on a demonstration of the lack of impact on water quality, as well as the inclusion of others based on a higher likelihood of localized adverse impact on water quality. The regulations exclude from the LPDES program stormwater discharges from industrial facilities that have "no exposure" of industrial activities or materials to stormwater. Also, the deadline by which certain industrial facilities owned by small MS4s must obtain coverage under an LPDES permit is extended from August 7, 2001 until March 10, 2003. In order to fulfill the department's responsibility as defined in the existing Memorandum of Agreement between the LDEQ and the US EPA, the department is required to develop and maintain the legal authority (including state regulations) to carry out all aspects of the LPDES program.

CASE LAW UPDATE

Challenge to Acid Injection is Neutralized.

In the Matter of BASF Corporation's Exemption from Hazardous Waste Land Disposal Restrictions, No. 99-0302 (La. App. 1 Cir. 7/31/00), 765 So. 2d 1171.

The Environmental Quality Act, at La. R.S. 30:2193, prohibits the land disposal of hazardous waste in general, but also provides for exemptions to this prohibition for the underground injection of hazardous waste under certain circumstances. Furthermore, by an amendment of the statute in 1997, La. R.S. 30:2193 and its land disposal restrictions do not apply to the injection of hazardous waste when: (1) such land disposal has been exempted by the U.S. EPA from similar land disposal restrictions contained in the federal Resource Conservation and Recovery Act (RCRA); (2) a permit has been issued for such injection well by the Louisiana office of conservation, pursuant to its authority under the federal Safe Drinking Water Act; and (3) the secretary of DEQ determines that there are no economically reasonable and environmentally sound alternatives to the injection of such hazardous waste.

BASF Corporation produces hydrogen chloride (HCl) as a byproduct of its manufacturing processes at its facility in Geismar, La. BASF has an injection well on site that it has used in the past to dispose of excess HCl, although the company has been able to use and sell all of its HCl since 1991. Nevertheless, BASF applied to DEQ for an exemption from the land disposal restrictions, under La. R.S. 30:2193(E), to ensure that it would be able to use the injection well if it could not use or sell all of its excess HCl.

DEQ issued a decision finding that there are no economically reasonable and environmentally sound alternatives to the injection of BASF's waste HCl (waste being defined as only that HCl that cannot be used or sold, and is to be discarded). Furthermore, BASF had obtained both a RCRA exemption from EPA and a well permit from the Louisiana office of conservation. Therefore, DEQ said, the criteria of La. R.S. 30:2193(E) were met, and BASF did not need an exemption in order to use its injection well.

The Louisiana Environmental Action Network and the Ascension Parish Residents Against Toxic Pollution, both represented by the Tulane Environmental Law Clinic, appealed DEQ's decision to the 19th JDC, which affirmed it. That judgment was then appealed to the 1st Circuit Court of Appeal.

The court of appeal affirmed the district court's judgment upholding the DEQ decision. The court of appeal rejected the appellants' arguments that feasible alternatives to injection were available. The court cited DEQ's determination that use and sale of HCl, while adequate for the time being, may not be so in the near future due to the increasing ratio of supply to demand. The court also accepted DEQ's determination that a neutralization plant constructed by BASF for the purpose of neutralizing HCl with caustic material was not an economically reasonable alternative and was not the most environmentally protective method of disposing of the waste.

Since the criteria of La. R.S. 30:2193(E) were met, and BASF did not need an exemption in order to use its injection well, the court found it unnecessary to address other assignments of error based upon the statutory and regulatory requirements for obtaining an exemption.

Appellants filed a request for rehearing, which the 1st Circuit denied. No application for writ of certiorari was filed with the Supreme Court.

Exxon's Air Permit Withstands Scrutiny

North Baton Rouge Environmental Assoc. and Louisiana Environmental Action Network v. La. Department of Environmental Quality, No. 456, 658 (19th J.D.C. 3/15/00).

DEQ issued a Part 70 (Title V) construction and operating air permit to Exxon Chemical Americas, for a new polypropylene unit to be located near Baton Rouge. The area is classified as

a non-attainment area for the ambient air standard for ozone. Appellants appealed the permit decision to the 19th J.D.C. Judge Robert Downing upheld DEQ's decision to issue the permit, holding that:

1. Louisiana's Air Quality Regulations require, as a condition of issuing the permit, that all existing stationary sources of air pollutants owned or operated by the applicant in Louisiana shall be in compliance with all applicable state and federal emission standards and limitations, the Federal Clean Air Act, and all conditions in a state or federally enforceable permit. LAC 33:III.504.D.1. However, the absence from the record of a specific finding by DEQ that Exxon meets this requirement does not justify remanding or overturning the permit. The record does contain a certification by Exxon that it complies with all applicable rules, and appellants had offered no contrary information during the public comment period or since.

2. Emission reduction credits used to offset the new emissions allowed by the permit, under LAC 33:III, Chapter 6, must be presumed to be valid, and the appellants offered no evidence to the contrary.

3. La. R.S. 30:2054(B)(3), which authorizes the state's emission reduction credit banking system, does not violate the state constitution's mandate to protect the environment. That statute is rationally related to achieve improvement of air quality.

4. Under DEQ's regulations, the permit must require Exxon to achieve the lowest achievable emission rate. Since there are no other facilities comparable to the Exxon facility being permitted, there is no evidence in the record that suggests the existence of any system or technology better than that employed by Exxon.

5. DEQ rationally showed that a preponderance of the evidence sustained its opinion that the benefits of the permitted facility outweigh the costs, as is required under *Save Ourselves, Inc. et al v. Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984). Exxon has significantly reduced emissions, and puts money back into the community. The new facility will emit an additional 34 tons of pollutants in the Baton Rouge ozone non-attainment area, but this amount is small compared to two days of automobile emissions, and does not outweigh the benefits.

Only Individual Notice Starts Appeal Clock for Aggrieved Person

In the Matter of Natural Resources Recovery, Inc., No. 98-2917 (La. App. 1 Cir. 2/18/00), 752 So. 2d 369.

The 1st Circuit Court of Appeal says that DEQ is required by La. R.S. 30:2050.23 to give written notice of a permit action to any person who has submitted a written comment on the permit. Reversing a ruling to the contrary by the 19th J.D.C., the court holds that the 30-day appeal period, under La. R.S. 30:2050.21, for an aggrieved person who has submitted a written comment does not begin to run until DEQ mails to that person a notice of the issuance of the decision. The court rejects the arguments of DEQ and the permittee that DEQ is required only to give notice to the permit applicant, under La. R.S. 30:2024, and that La. R.S. 30:2050.23 merely specifies the method to be used for giving notice when notice is otherwise required by another statute or regulation.

The Supreme Court denied a writ application, and the case has been remanded to the district court for a hearing on the merits of the appeal.

Individual Notice, Round 2

A to Z Paper Company, Inc., et al. v. State of Louisiana, Department of Environmental Quality, No. 99-1710 (La. App. 1 Cir. 9/22/00).

In an appeal of a DEQ decision to issue a minor source air permit, filed by 3d persons, DEQ moved for dismissal on the grounds that the appeal was not timely. The District Court granted the motion, and Appellant appealed to the 1st Circuit, arguing that the 30-day appeal period never commenced because DEQ had not given Appellant written notice of the decision, as is required by *Matter of Natural Resources Recovery, Inc*. DEQ argued that the court's decision in *Matter of Natural Resources Recovery, Inc*. was distinguishable because Appellant never submitted written comments on the permit application. What Appellants claimed as comments on the permit application were actually enforcement complaints submitted before the permit application had been submitted, and DEQ responded accordingly, the agency argued. Furthermore, according to DEQ, Appellant never requested notice of the permit action under La. R.S. 30:2022.A.(1), which requires DEQ to send notice of an action to any person who has requested it.

The court of appeal reversed the district court judgment, and remanded the case for a hearing on the merits of the appeal. In doing so, the court simply held that *Matter of Natural Resources Recovery, Inc*. applied, and did not address DEQ's argument that no comment on the permit application had been submitted. DEQ has requested rehearing.

Legislative Update

Joint Meeting on DEQ Rule on Beneficial Environmental Projects

The House Committee on Environment and the Senate Committee on Environmental Quality held a joint meeting on July 11, 2000, to review rules proposed by the Department of Environmental Quality on Beneficial Environmental Projects (BEPs). R.S. 30:2050.7, (Acts 1999, No. 1184) established BEPs and required the promulgation of rules to implement their use in settlements. This procedure allows DEQ and persons or companies who have been subject to enforcement actions for environmental violations to work out alternative methods of reso-

lution, other than the payment of fines. These projects may include community projects, environmental mitigation, environmental safety and public health.

Issues discussed at the hearing included the differences between the Louisiana and the EPA laws and regulations governing BEPs and the impact of the loss of fines on the Environmental Trust Fund.

Officials of the Department of Environmental Quality testified that DEQ currently had discretion to set fine and penalties under current law and the proposed rules would allow DEQ to substitute other types of projects in lieu of the fine. These rules would allow DEQ to require a small environmental violator to improve its facilities, thereby reducing pollution, while a fine could have the effect of shutting down that same business.

At the conclusion of the meeting, the House Committee voted in favor of the rules by a vote of 6 to 3. The Senate Committee took no action on the rules. As a result the rules went into effect as proposed.

Meetings on Status of Louisiana's Aquifers

The Senate Committee on Environmental Quality has held a series of public meetings to determine the effect of proposed power plants on the states aquifers. These meetings have been held in Lafayette, Ruston, Hammond and Baton Rouge.

The water levels of several of the aquifers in the state, including the Chicot Aquifer in Southwest Louisiana, the Sparta Aquifer in North Louisiana and the Southern Hills Aquifer in Southeast Louisiana, have been dropping for many years. This is primarily due to overpumping and has been exacerbated by the current drought. Many applications for construction of power plants have been filed. Power plants use large amounts of water for cooling their equipment. Power plants have been drawn to Louisiana because of its supplies of natural gas and water and its location on the electrical power grid. Unlike many states, Louisiana has lax laws and regulations on the use of underground water. The power plants, commonly called merchant power plants, are generating power primarily for sale out of state. DEQ, claiming to have no choice, issued permits to these facilities without determining the effects of the high usage on that resource. Several groups have filed lawsuits contesting the permits issued by DEQ to the power plants.

The U.S. Geological Survey stated that the power plants are not the only users that may affect the level of the aquifers. The aquifers are affected by municipal and domestic use, farming, and industrial use. These new power plants will affect each aquifer differently.

The Sparta Aquifer, which is currently experiencing problems, will be affected the most by the increased drawdown. Testimony by the Louisiana Geological Survey indicated that major problems may occur within 10 years if some type of regulation is not established. These problems include shallow domestic wells drying up and salt water intrusion. The Louisiana Geological Survey estimated that the Southern Hills Aquifer may experience problems within 15 to 20 years. The Chicot Aquifer, which is heavily utilized by rice farmers in the area, may not experience problems for 20 to 30 years.

At each meeting, public sentiment was generally against the permitting and construction of additional merchant power plants. Representatives of these facilities discussed the benefits of the plants and conclusions the conclusions of their experts that the extraction of groundwater would have minimal affect on the aquifers. Members of the public, as well as several legislators, indicated that some legislation may be necessary to deal with the issue. The committee requested information on alternative methods of cooling, such as surface water, gray water, and air cooling.

A final meeting is scheduled for October 11, 2000 in Baton Rouge to review the information from the public meetings and to determine what, if any, legislation is necessary at this time to regulate the groundwater resources of the state.

Science for Lawyers

EPA Releases Guidance to States for Designing Flexible Title V Air Permits

by M. Michelle Marney

Title V of the 1990 Clean Air Act Amendments required each state to develop a comprehensive operating permit program for major industrial sources of air pollution. A major source of air emissions under Title V has the potential to emit 100 tons annually of any criteria pollutant, or the potential to emit 10 tons annually of any single hazardous air pollutant or 25 tons annually of any combination of hazardous air pollutants. The Title V Air Operating Permit organizes, in a single, comprehensive document, all the air requirements which apply to the permit holder.

The Title V permitting process is as lengthy as it is arduous for both the regulated community and DEQ, requiring substantial effort on the part of the applicant just to compile the technical, regulatory, and administrative information required in the application, and a substantial effort on the part of DEQ to review the information received and incorporate it in permit form. Add to this the expanded public participation provisions built into

the program, and Title V permit issuance can easily take more than a year.

With the Title V Air Operating Permit program now fully implemented in Louisiana, most businesses and industries subject to Title V have traversed the permit process. Now these Title V permitted facilities and, consequently, the attorneys addressing the various issues of regulatory compliance under Title V, are likely looking ahead to the inevitable and unenviable prospect of modifying the Title V permit to incorporate the various facility changes or operational changes necessary to more accurately reflect current business needs.

As with new Title V permits, all renewals and significant permit modifications must go through public notice and comment, potentially including a public hearing, where requested. Neighboring states and EPA are also given the opportunity to comment on permit content. While public participation is a necessary and often useful component of facility permitting, when it is coupled with DEQ's exhaustive review of the technical and regulatory aspects of a proposed permit modification, issuance of the modified Title V permit often takes as long as issuance of the original Title V permit. Even where the state program provides an expedited revision process, modifications made under this ordinary Title V process make it difficult if not impossible for a business to make operational changes to effectively and efficiently respond to the marketplace.

In August 2000, EPA released draft guidance known as "White Paper Number 3," providing state and local permitting authorities information on how to design flexible permits for sources subject to the Title V permits program. In concept, a flexible Title V permit provides specifically for reasonably anticipated modifications to the facility and its operations and further provides for the implementation of those changes as needed throughout the term of the permit without need of modification or revision of the Title V permit. The flexible Title V permit would be most useful to sources that need to make frequent or quick operational changes to meet changes in market demand.

The draft guidance describes several approaches for providing more operational flexibility, but EPA focuses primarily on "advance approval," which is the most versatile and effective flexible permitting approach. Advance approval is the incorporation into a Title V permit of terms which authorize specified future changes to occur such that no further approval or Title V revision is needed before the source can make these changes. With a Title V permit containing advance approval, the permittee need only provide a simple letter notice to DEQ informing of the plan to implement the preapproved change and document the change in an on-site implementation log.

Under the flexible permit approach, operational flexibility is analyzed early in the development of the permit application, giving the permit applicant the opportunity to consider not only present facility operations but to plan for future operational needs and the type and amount of planned growth at a facility. Changes typically suitable for advance approval that would otherwise require permit modification and/or DEQ approval prior to implementation, most notably include:

- addition of new emissions units or new component equipment,
- reconstruction of an emissions unit,
- modification of an emissions unit,
- relocation or reconfiguration of equipment,
- rerouting emissions to another control device,
- adding a new control device; and
- undertaking site activities, such as factory experiments, remediation, test burns, emergency generator operation and pilot operations.

The flexible Title V permit identifies not only the category of changes contemplated, but also all applicable requirements associated with the changes. The flexible permit also "links" the implementation of advance approved changes with each correlative applicable requirements and compliance assurance measure triggered by the change. This flexible permit also bounds the magnitude of the advance approved changes.

While up-front costs to develop a flexible Title V permit will likely be higher than for traditional Title V permits, flexible Title V permits have the potential to benefit everyone without sacrificing environmental protection. The use of plant-wide emission caps in flexible permits, which limit future emissions increases and, in some cases, reduce overall emissions, amounts to increased environmental protection, and the flexible permit approach encourages the increased use of pollution prevention practices, allowing industry to adjust their processes as necessary to remain under an emissions cap. A flexible permit can provide an improved knowledge of a facility's emissions for the entire site and of its compliance status, as well as improved public understanding of a facility's activities over an extended period, since each proposed advance approval must describe the type and magnitude of the potential emissions increases that can occur.

Flexible Title V permits for air pollution sources offer great potential to provide permitted facilities with otherwise unavailable operational flexibility. The draft guidance on flexible air permitting demonstrates, in considerably more detail than provided herein, how this innovative permitting approach promotes equal or better environ-

mental protection while facilitating opportunities for Title V facilities to comply with the mandates of the Clean Air Act and, more specifically, the terms and conditions of their Title V permits, in a smarter, more efficient fashion.

Ms. Marney currently practices with the law firm of Taylor, Porter, Brooks & Phillips, L.L.P., and was formerly an environmental consultant specializing in the air permitting field.

Announcements

Annual Section Seminar in New Orleans

Please remember the annual LSBA Environmental Law Section Annual Seminar will be held on Nov 17, 2000 from 8:30 AM to 12:25PM at the Hotel Intercontinental Hotel, 444 St. Charles Avenue, New Orleans. Speakers include DEQ Sec. Dale Givens, Dr. Margaret Reams LSU, Bruce Hammatt DEQ, Office of Conservation Commissioner Philip Asprodites, Gerald Walter, Robert Coco, April Snellgrove, Kyle Beall and Charley Hutchens.

Please plan to attend and support the Section. Further details on the seminar can be found at: http://its2.ocs.lsu.edu/guests/sglegal/public_html/lel/annual_seminar.pdf or by contacting Ms. Donna Maddie at (225)-381-0259.

LOUISIANA STATE BAR ASSOCIATION
601 St. Charles Avenue
New Orleans, LA 70130

RETURN POSTAGE GUARANTEED
If undeliverable, please return to sender

Non-Profit Org.
U.S. Postage
PAID
New Orleans, LA
Permit No. 201