

Louisiana



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Dr. Jack Van Lopik Retires

In January 2005, Dr. Jack Van Lopik retired from his position as the long-time Director of the Louisiana Sea Grant College Program. Dr. Van Lopik came to LSU in 1968 to develop the Louisiana Sea Grant Program, became its first and only director for the next 36 years, and at the time of his retirement was the longest serving Sea Grant Director. Dr. Van Lopik also served as the Dean of the Center for Wetland Resources from 1968 to 1991. Prior to coming to Baton Rouge in 1968, he was Technical Director of Geosciences Operations at Texas Instruments, Incorporated in Dallas, Texas. Before joining TI in 1961, he spent seven years at the U.S. Army Corps of Engineers Waterways Experiment Station, Vicksburg, Mississippi, where he served as Assistant Chief and Chief of the Geology Branch.

Over his career, Dr. Van Lopik served on the National Committee on Oceans and Atmosphere by presidential appointment, on the U.S. Army Corps of Engineers Chief of Engineers Environmental Advisory Board, and on the Advisory Council of the National Coastal Resources Research and Development Institute (NCRI). He is a past president of the Sea Grant Association and has served on the Executive Committee of the National Conference on the Advancement of Research, as well as numerous other national and state committees concerned with resource management and research policy. In 1985, he was awarded the Public Service Commendation by the U.S. Department of Transportation, U.S. Coast Guard, and, in 1992, the Certificate of Appreciation for Patriotic Civilian Service by the Department of the Army. He is on the Board of Directors and a Founding Member of the Louisiana Partnership for Technology and Innovation.

During Dr. Van Lopik's tenure as Director of Louisiana Sea Grant, he was instrumental in establishing it as a valuable service to those involved in the use, conservation and preservation of Louisiana's rich coastal resources and heritage. He was also a driving force behind the establishment of the Louisiana Coastal Zone Management Program. His continued support for the Sea Grant Legal Program has allowed important research in ocean and coastal law issues to flourish, providing Louisiana, regional, and national audiences with information that would not otherwise have been available. Legal research on ocean and coastal issues has become increasingly vital over the years as Louisiana and other coastal areas struggle with the tensions between sustainable economic progress and conservation of irreplaceable natural resources. We would like to thank Dr. Jack Van Lopik for his foresight and wisdom in recognizing the value of the Sea Grant Legal Program's research efforts and supporting the program all these years. Dr. Chuck Wilson, LSU Vice Provost, is the new Sea Grant Director and has expressed his intention to maintain support of the efforts of the Sea Grant Legal Program.

Jim Wilkins – Director
Mike Wascom – past Director
Lisa Schiavinato – Legal Coordinator

Contents

Dr. Jack Van Lopik Retires	1
Managing 21 st C. Frontiers	2
Avenal v. Louisiana	6
Offshore LNG Facilities	11
Announcements	16



Managing Our Twenty-First Century Frontiers: Toward an Integrated Ocean and Coastal Policy

By Michael Wascom

Introduction

The United Nations designated 1998 as the "International Year of the Ocean." As part of the United States' participation, federal agencies prepared *Year of the Ocean Discussion Papers*,¹ and President Clinton selected Monterey, California as the site for the U.S. Department of Commerce- and U.S. Navy-sponsored first National Ocean Conference that same year as an opportunity to focus national attention on ocean issues. During this conference, President Clinton called on Congress to create a national ocean commission to develop a national policy for the resources of our oceans and seas.² In 1999, the U.S. Department of Commerce published *Turning to the Sea: America's Ocean Future*,³ and two leading academic advocates for a new ocean policy co-authored *The Future of US Ocean Policy: Choices for the New Century*.⁴

The involvement of President Clinton and the influence of these publications from 1998-2000 led to the culmination of a legislative effort that had begun in earnest in 1994.⁵ The Oceans Act of 2000,⁶ introduced by Senator Ernest Hollings of South Carolina,⁷ a long-time advocate of developing a U.S. national ocean policy, was passed by Congress and signed by President Clinton in 2000.

The U.S. Commission on Ocean Policy

The Oceans Act established the U.S. Commission on Ocean Policy (Commission),⁸ which was charged with submitting a report to Congress and the President that would include its findings and recommendations regarding United States ocean policy for issues such as "...stewardship of fishery resources and other ocean and coastal resources, enhancement of marine-related commerce and

transportation, resolution of conflicts among competing ocean users, the expansion of human knowledge of ocean resources, investment in ocean technologies for use in ocean and coastal activities, and coordination among all government agencies and departments and the private sector and the role of the U.S. as a leader in ocean and coastal activities."⁹ In conducting its study, the Commission held 16 public meetings, 8 regional site visits, and heard from 447 witnesses which resulted in nearly 1,900 pages of testimony. An April 2004 *Governor's Draft* of the report elicited comments from 38 of the nation's governors.¹⁰

The U.S. Ocean Commission Report

The Commission's final report, *An Ocean Blueprint for the 21st Century (An Ocean Blueprint)*¹¹ charts a 21st century ocean and coastal policy course for the nation. Among other points, the report demonstrates that Louisiana is overdue to develop a state ocean policy/study calling for a coordinated approach to activities off its shores, an action which several other coastal states have recently taken. Although the Commission benefited from the May 2003 independent Pew Oceans Commission report, *America's Living Oceans: Charting a Sea Change*, this article does not have space to adequately discuss this report.¹²

The Commission's report is the first comprehensive federal look at ocean policy at the national level since the 1969 report *Our Nation and the Sea* from the Presidential Commission on Marine Science, Engineering and Resources (Stratton Commission) Report¹³ appointed by President Johnson, and the first since the United Nations Convention on the Law of the Sea (UNCLOS) went into effect on November 18, 1994. Since the Stratton Commission report, which led to the formation of the National Oceanic and

Atmospheric Administration (NOAA) by Presidential Executive Order in 1970¹⁴ and the adoption of the Coastal Zone Management Act of 1972 (CZMA),¹⁵ there have been many changes in international ocean policy. Since that time, Congress has authored, in piecemeal fashion, numerous pieces of ocean legislation.¹⁶

An Ocean Blueprint considers the dramatic increase in coastal state jurisdiction brought about by the adoption and entry into force of the 1982 UNCLOS III.¹⁷ The U.S. has not ratified this treaty, although the Clinton and Bush administrations have favored its adoption. However, the U.S. has adopted the extension of three ocean jurisdictional zones that are provided for by UNCLOS.¹⁸

In 1983, President Reagan claimed for the U.S. a 200-nautical mile Exclusive Economic Zone,¹⁹ and in 1988 he extended the U.S. territorial sea to 12 nautical miles.²⁰ In 1999, President Clinton recognized a 12 mile-24 mile Special Contiguous Zone,²¹ allowed by UNCLOS.²² As a result, the offshore ocean area under U.S. jurisdiction is larger than its total land mass. Our oceans now "... span nearly 4.5 million square miles, an area 23 percent larger than the land area of the nation."²³

These U.S. jurisdictional expansions have inspired 13 coastal states since 1990 to develop, often through coastal management enhancement grants for ocean resources pursuant to CZMA Section 1456 (b),²⁴ ocean policy or ocean policy study documents, the most recent being Massachusetts in 2004.²⁵ Louisiana, through the actions of its coastal zone managers, should be the next to do so funded in part by means of a CZMA enhancement grant for ocean resource management.

The Ocean Commission's Findings

An Ocean Blueprint is composed of 9 overarching themes, containing 31 chapters and 14 appendices:

- Our Oceans: A National Asset;
- Blueprint for Change: A New National Ocean Policy Framework;
- Ocean Stewardship: The Importance of Education and Public Awareness;
- Living on the Edge: Economic Growth and Conservation Along the Coast;
- Clear Waters Ahead: Coastal and Ocean Water Quality;
- Ocean Value and Vitality: Enhancing the Use and Protection of Ocean Resources;
- Science-Based Decisions: Advancing Our Understanding of the Oceans;
- The Global Ocean: U.S. Participation in International Policy; and
- Moving Ahead: Implementing a New National Ocean Policy.

An Ocean Blueprint stated that the nation's coastal zones and oceans are suffering from polluted runoff, extensive coastal development, habitat loss, and overlapping regulatory jurisdictions.²⁶ As a result, the Commission found that coastal watersheds and coastal and ocean water quality were suffering due to conflicting legal and overlapping authorities; increased development and pollution from runoff, pollution from air pollution deposition; and difficulties in achieving sustainable commercial and recreational fisheries.²⁷

An Ocean Blueprint called for establishment of an interagency National Oceans Council responsible for coordinating federal ocean policies across agencies in the Executive Office of the President, chaired by an Assistant to the President, and comprised of Cabinet secretaries and directors of certain independent agencies with ocean responsibilities. It also called for the establishment of two additional bodies in the Office of the President: (1) the President's Council of Advisors on Ocean Policy, consisting of representatives from state, local and

tribal governments as well as from academic, public interest and private organizations, for the purpose of establishing voluntary regional ocean councils; and (2) for the establishment of an Office of Ocean Policy in the President's Office to serve the Council of Advisors and the regional ocean councils.²⁸ Other recommendations found in *An Ocean Blueprint* include:

- Congressional enactment of a NOAA Organic Act (NOAA was created by Presidential Executive Order and not by legislation);
- Strengthening watershed management in the coastal zone and setting measurable goals, particularly from nonpoint sources, for reducing water pollution flowing into ocean waters;
- Coordinating management of current and future federal activities in federal waters (e.g., oil and gas, aquaculture, wind energy, etc.);
- Implementing the National Integrated Ocean Observing System (IOOS), an international satellite network and a national monitoring network);
- Improving ocean-related education through coordinated and effective formal and informal efforts;
- Providing for fisheries management that separates fisheries assessment from allocation decisions and an individual allocation system and improving the Regional Fishery Management Councils; and
- Recommending that the U.S. Senate ratify the U.N. Convention on the Law of the Sea.²⁹

In order to fund these recommendations, the Commission encouraged the establishment of an Ocean Policy Trust Fund with a funding source coming from offshore oil and gas revenues and revenue from the development of new offshore activities (e.g., aquaculture and wind energy).³⁰ The Commission estimated the total additional cost for implementing its recommendations at approximately \$1.5 billion in the first year and \$3.9 billion per year in ongoing costs after full implementation.³¹ The Commission recommended allocation of

a portion of Outer Continental Shelf oil and gas revenues to certain coastal states, such as Louisiana, which have sustained the burden of oil and gas development for the nation.³² This could lead to increased federal funding for Louisiana to fight its severe coastal erosion problem.

An Ocean Blueprint recommended that Congress amend the CZMA to allow coastal states to provide for coastal watershed regulation and a better ability to manage coastal growth.³³ It also calls for consolidation of several area-based management programs (e.g., Coastal Zone Management Programs and National Estuary Programs) to develop more organized management strategies for watershed regulation.³⁴ For example, this recommendation would require closer management cooperation in improving water quality in the Barataria-Terrebonne National Estuary Program and the Louisiana coastal management program in the area three nautical miles seaward of the state.³⁵

In sum, the Commission asserted that this new national ocean policy should provide a balanced use of the ocean, including management for sustainability based on sound science and supported by education and recommended this policy be managed by a system of governance with strong leadership at both the national and regional levels.

The President's Response to An Ocean Blueprint

As required by the Oceans Act, President Bush responded to *An Ocean Blueprint* within 90 days of its issuance by issuing his *U.S. Ocean Action Plan (Action Plan)* on December 17, 2004.³⁶ On that date, and as referenced in the *Action Plan*, the President established the Commission on Ocean Policy in the Executive Office of the President by Executive Order.³⁷ Additionally, the President's *Action Plan* emphasized:

- Enhancing ocean management coordination;
- Advancing our understanding of oceans and coasts;
- Working with Regional Fisheries Councils to support and promote the use, as appropriate, of dedicated access privileges, such as individual fishing quotas (IFQs);
- Supporting a Regional Partnership in the Gulf of Mexico (There are identified key priorities for the Gulf region such as: public health, water quality in coastal waters and watersheds);
- Proposing National Offshore Aquaculture legislation in the 109th Congress establishing clear federal authority to regulate offshore aquaculture;
- Supporting maritime transportation; and
- Advancing International ocean science and policy.

Presidential and Congressional Activity in the 109th Congress

The 109th Congress has seen activity regarding ocean policy. H.R. 50, the National Ocean and Atmospheric Administration Organic Act, is pending in the U.S. House of Representatives.³⁸ H.R. 50 would formally provide for NOAA, the agency responsible for administering many aspects of national ocean and coastal policy, which has been operating under Executive Order since its inception. In June 2005, the Bush administration submitted the National Offshore Aquaculture Policy Act (S. 1195), which would provide a mechanism to establish and implement a regulatory scheme for offshore aquaculture in the U.S. Exclusive Economic Zone.³⁹ As of the writing of this article, the bill is currently in the Senate Committee on Commerce, Science and Transportation.

A Louisiana Ocean Policy?

The U.S. expansion of its jurisdiction, discussed earlier, has inspired 13 coastal states to develop, often through enhancement grants pursuant to CZMA Section 1456 (b), ocean policy

or ocean policy study documents.⁴⁰ Again, Louisiana, through the actions of the Louisiana Department of Natural Resources (LDNR) Coastal Management Division (CMD), should be the next to do so funded, in part, by means of a CZMA enhancement grant for ocean resource management. Louisiana's coastal managers should also serve as the state's representative on any voluntary regional ocean policy councils established pursuant to *An Ocean Blueprint*.

Consistent with the findings of *An Ocean Blueprint*, two of the greatest problems in the coastal and offshore area of Louisiana are water quality and habitat degradation. There are eight major watersheds in coastal Louisiana: Sabine, Calcasieu, Vermilion-Teche, Atchafalaya, Terrebonne-Barataria, Mississippi, Pontchartrain and Pearl. The sources of this water pollution come from several sources: land-based sources such as urban storm runoff; agricultural runoff entering the Gulf of Mexico from rivers and bayous; industrial runoff entering from the rivers, lakes and bayous into the sea; discharges resulting from oil and gas operation in the coastal and ocean areas; and sewage disposal directly into coastal waters.⁴¹ The quality of the coastal and marine waters off Louisiana is vital for the health of its renewable resources, for the recreational enjoyment of its people and for commerce.

Louisiana: An Ocean State

Louisiana is an ocean state deriving much of its culture and development from its location in the Gulf of Mexico. In the state and federal "ocean" off its shores, Louisiana has experienced three centuries of human activity that surpasses that of any other U.S. coastal state. From the American Indians, who early in history made their villages along the coast, to those of European, African, South American, Caribbean and Asian ancestry who have influenced its modern history, Louisiana's ocean has been at the forefront of the state's culture and

development. Today, more than 90% of the 4,000 mineral mining structures in U.S. coastal waters are located off the Louisiana coast.⁴² The nation's first offshore oil port, the Louisiana Offshore Oil Port, was completed in 1981, 18.6 nautical miles off the Louisiana coast, and there are plans to build several offshore liquefied natural gas (LNG) facilities off the Louisiana coast.⁴³

Perhaps the most delectable tie that most Louisianians have to the state's coastal zone and to the Gulf of Mexico is the state's vast bounty of seafood products, both commercial and recreational. Louisiana seafood is known the world over and is entwined in the history and cultural development of our people. The Gulf of Mexico and, specifically, Louisiana's commercial and recreational fishing industries have benefited from the enormous fisheries habitats and resources of the Louisiana coastal zone and offshore waters. Consequently, in 2002, Louisiana's commercial fishery ranked second in the U.S. in number of pounds landed and in value of catch landed, trailing only behind Alaska.⁴⁴ Offshore waters also experience heavy shipping traffic to and from the ports of Louisiana. In 2003, Louisiana had five of the nation's top 20 ports (total tons): Ports of New Orleans, South Louisiana, Baton Rouge, Plaquemines, and Lake Charles with South Louisiana #1, New Orleans #5 and Baton Rouge #10.⁴⁵

Conclusion: Louisiana Needs an Ocean Policy Study

In short, Louisiana has taken an ad hoc "after the fact" approach to ocean policy.⁴⁶ A comprehensive "ocean policy" in Louisiana is long overdue. Because of Louisiana's experience with a wide variety of activities off its shores, it is time for the state to take a hard look at what its policy towards the ocean and resources off its coast should be. Coastal zone management and state ocean policy are two sides of the same coin. The recommendations in *An*

Ocean Blueprint will especially impact Louisiana coastal managers and should spur the development of a comprehensive Louisiana ocean policy as a complement to and extension of the state's coastal management program.

This Louisiana ocean policy would be implemented by the Louisiana coastal management program (due to its vast experience in interagency relationships and conflict resolution with a myriad of interest groups, governmental officials and the public at large) and focus the most on those U.S. Ocean Commission's recommendations for suggested changes that concern Louisiana coastal managers: an organic NOAA Act, establishment of regional ocean councils, managing our coasts and oceans on an ecosystem and watershed basis, controlling nonpoint source pollution and use of local land use authority, as well as other Louisiana-specific issues.

A first step toward development of such a policy in Louisiana is for the state coastal management program to seek funding from the enhancement grant provisions of the CZMA. Louisiana has "reacted" to events in the waters off its coast as they have occurred rather than from the perspective of a coherent, "anticipatory" long-range ocean plan and policy. The logical agency would be LDNR, specifically in the CMD. As part of this ocean policy, an advisory Ocean Policy and Planning Council should be established in the Office of the Governor. Members of this council should reflect backgrounds in science, policy, planning, law, social sciences and economics and also should be from among the state's universities, agencies, industries and citizenry at large and work with CMD to develop a comprehensive Louisiana ocean policy.

Thirty-two years ago, such an approach was taken in Louisiana with the Louisiana Advisory Commission on Coastal and Marine Resources.⁴⁷ It was a very successful effort leading to

the development of the state's coastal management program, which has revolutionized the way the state looks at its coastal zone, and has provided for a focused and far-reaching look into the future status of the coastal zone. A generation later, it is now past time for the state to conduct a similar study with respect to its offshore "ocean."

¹ U.S. Department of Commerce, National Oceanic & Atmospheric Administration, *Year of the Ocean: Discussion Papers* (1998), at <http://www.yoto98.noaa.gov/papers.htm> (last accessed May 24, 2005).

² See U.S. Department of Commerce, National Oceanic & Atmospheric Administration, *Highlights from the National Ocean Conference* (1998), at <http://www.yoto98.noaa.gov/oceanc2/hilite.htm> (last accessed May 24, 2005).

³ U.S. Department of Commerce, National Oceanic & Atmospheric Administration, *Turning to the Sea: America's Ocean Future* (1999), at NOAA Office of Public & Constituent Affairs, http://www.publicaffairs.noaa.gov/pdf/ocean_rpt/pdf (last accessed May 24, 2005).

⁴ BILIANA CICIN-SAIN & ROBERT W. KNECHT, *THE FUTURE OF U.S. OCEAN POLICY: CHOICES FOR THE NEW CENTURY* (Island Press 2000).

⁵ The U.S. Senate did have an ongoing ocean policy subcommittee, The National Ocean Policy Study, from 1974-1994. However, it was not until 1994 that legislature made its first serious attempt to pass an oceans policy statute. John R. Justus, Jeffery A. Zinn & Eugene H. Buck, *The National Ocean Policy Study: A Model for the Future?*, The Library of Congress Congressional Research Service Order Code RL31705 (2003), available at reports/national_ocean_policy_study.pdf http://lugar.senate.gov/CRSreports/national_ocean_policy_study.pdf (last accessed May 24, 2005).

⁶ Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644.

⁷ S. 2327, 106th Cong. (2000) (enacted).

⁸ Commission Members were: Admiral James D. Watkins, USN (Ret.), Chairman; Dr. Robert Ballard, Ph.D.; Mr. Ted A. Beattie; Ms. Lillian Borrone; Boyd Professor Dr. James M. Coleman, Ph.D. (Louisiana State University); Ms. Ann D'Amato, Esq.; Mr. Lawrence Dickerson; Vice Admiral Paul G. Gaffney II, USN (Ret.); Professor Marc J. Hershman; Mr. Paul L. Kelly; Mr. Christopher Koch; Dr. Frank Muller-Karger, Ph.D., Mr. Edward B. Rasmuson; Dr. Andrew A. Rosenberg, Ph.D.; Mr. William D. Ruckelshaus; Dr. Paul A. Sandifer, Ph.D., and Dr. Thomas R. Kitsos, Ph.D., Executive Director.

⁹ Oceans Act of 2000 § 2.

¹⁰ U.S. Commission on Ocean Policy, *Preliminary Report of the U.S. Commission on Ocean Policy, Governor's Draft* (2004), at http://www.oceancommission.gov/documents/prelimreport/00_complete_prelim_report.pdf (last accessed May 24, 2005).

¹¹ U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century, Final Report*, Washington, D.C. (2004) ISBN# 0-9759462-O-X, available at www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf (last accessed May 24, 2005).

¹² Pew Oceans Commission, *America's Living Oceans: Charting a Course for Sea Change* (2003), at http://www.pewtrusts.org/pdf/env_pew_oceans_final_report.pdf (last accessed May 24, 2005).

¹³ Commission on Marine Science, Engineering and Resources, *Our Nation and the Sea. A Plan for National Action*. (1969), at <http://www.lib.noaa.gov/edocs/stratton/title.html> (last updated Oct. 12, 2001).

¹⁴ Exec. Order No. 11,564, 35 Fed. Reg. 15,801 (Oct. 6, 1970).

¹⁵ Coastal Zone Management Act, 16 U.S.C.A. § 1451-1464 (2004).

¹⁶ Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (2005); Deepwater Port Act of 1974, 33 U.S.C.A. §§ 1501-1524 (1975); Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C.A. §§ 1801-1883 (2005); Oil Pollution Act of 1990, 33 U.S.C.A. §§ 2701-2709, 2731-2738, 2751-2752,

2761, 43 U.S.C.A. 1642, 1656, 46 U.S.C.A. 3703a, 7505 (2005).

¹⁷ United Nations Division for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea* (1982), at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last accessed May 26, 2005).

¹⁸ See *id.* at arts. 3, 33, & 57.

¹⁹ Proclamation No. 5030, 48 Fed. Reg. 10601 (March 10, 1983).

²⁰ Proclamation No. 5928, 54 Fed. Reg. 777 (December 27, 1988).

²¹ Proclamation No. 7219, 64 Fed. Reg. 48701 (Aug. 2, 1999).

²² United Nations, *supra* note 18.

²³ Pew Oceans Commission, *supra* note 12, at 5.

²⁴ 16 U.S.C.A. § 1456(b).

²⁵ Massachusetts Ocean Management Task Force, *Waves of Change* (2004), at <http://www.mass.gov/czm/momi/technicalreport.pdf> (last accessed May 24, 2005).

²⁶ U.S. Commission on Ocean Policy, *supra* note 11, at 1.

²⁷ U.S. Commission on Ocean Policy, *supra* note 11, at Chapters 4-7, 9-11, 14 and 17.

²⁸ U.S. Commission on Ocean Policy, *supra* note 11, at Chapters 5 and 6.

²⁹ U.S. Commission on Ocean Policy, *supra* note 11, at Chapters 5-9, 14, 19, 22, 24 and 26.

³⁰ U.S. Commission on Ocean Policy, *supra* note 11, at 468.

³¹ U.S. Commission on Ocean Policy, *supra* note 11, at 459.

³² U.S. Commission on Ocean Policy, *supra* note 11, at Chapter 30.

³³ U.S. Commission on Ocean Policy, *supra* note 11, at Chapter 9.

³⁴ U.S. Commission on Ocean Policy, *supra* note 11, at Chapter 9.

³⁵ Louisiana's 3-mile seaward boundary has been written into federal

law. 43 U.S.C.A. § 1301(b) (2005). However, see La. R.S. § 49:1: the Gulfward boundary of the State of Louisiana extends a distance into the Gulf of Mexico three marine leagues from the coast.

³⁶ As noted with respect to the Pew Oceans Commission Report, space limitation prohibits a full discussion of the President's response. The full report is available on the internet. President George W. Bush, *U.S. Ocean Action Plan*, (2004), at <http://ocean.ceq.gov/actionplan.pdf> (last accessed May 24, 2005).

³⁷ President George W. Bush, *Executive Order: Committee on Ocean Policy*, (2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041217-5.html> (last accessed May 24, 2005).

³⁸ Information regarding H.R. 50, including the text of the bill itself, may be accessed via search engine at THOMAS - U.S. Congress on the Internet, at <http://thomas.loc.gov/>.

³⁹ For more information, visit NOAA Office of Sustainable Fisheries, NOAA Aquaculture, at <http://www.nmfs.noaa.gov/mediacenter/aquaculture/>.

⁴⁰ See Marc J. Hershman, *Ocean Management Policy Development in Subnational Units of Government: Examples from the United States*, 31 *Ocean & Coastal Mgmt.* 25, 25-40 (1996).

⁴¹ Gulf of Mexico Region, U.S. Minerals Management Service, U.S. Department of the Interior, History of the Offshore Oil and Gas Industry in Southern Louisiana Interim Report-Volume I: Papers on the Evolving Offshore Industry, OCS Study MMS 2004-049, Center for Energy Studies, LSU, July 2004, at p. 1.

⁴² *Id.*

⁴³ The onshore Sabine Pass LNG and Pipeline Project was approved by the U.S. Federal Energy Regulatory Commission on December 15, 2004. The Cheniere LLC LNG and Pipeline Project to be located 38 miles offshore was granted a license by the U.S. Department of Transportation on February 16, 2005.

⁴⁴ U.S. Department of Commerce, *Fisheries of the United States 2002* (2003), at <http://www.st.nmfs.gov/st1/fus/current/2002-fus.pdf> (last accessed May 25, 2005).

⁴⁵ U.S. Army Corps of Engineers, *2003 Waterborne Commerce of the United States (WCUS) Waterways and Harbors on the: Part 5 - National Summaries of Domestic and Foreign Waterborne Commerce*, Section 5 Ports: Selected Ports by Port Name, 2003, Ranked by Total Tons (2003), at <http://www.iwr.usace.mil/ndc/wcsc/wcsc.htm> (last accessed May 25, 2005).

⁴⁶ See the number of single subject, ocean-related statutes passed by the Louisiana Legislature at different times over the past three decades, e.g., Louisiana Offshore Terminal Authority Act, La. R.S. § 41:3401, Fishermen's Gear Compensation Fund, La. R.S. § 56:700.1-.5 (2005).; Oil Spill Prevention and Response Act, La. R.S. § 30:2451-2496 (2005).; and Louisiana Fishing Enhancement Act, La. R.S. § 56:639.1-.10 (2005).

⁴⁷ Louisiana Advisory Commission on Coastal and Marine Reources Final Report: LOUISIANA WETLANDS PROSPECTUS, September 1973, Baton Rouge, LA.

Avenal V. Louisiana

By Mindy Heidel and James Wilkins

History of the Caernarvon Freshwater Diversion Project

The Caernarvon Freshwater Diversion Project (Caernarvon or Caernarvon project), a joint federal/

state endeavor, diverts freshwater from the Mississippi River to the Breton Sound area.¹ The project, instituted after requests from fishermen and oyster farmers and decades of planning, operates as intended by

freshening the water in the impact area.² The freshening has resulted in returning Breton Sound and its surrounds to somewhat historical salinities thereby increasing fisheries (including oyster) productivity in some

areas but making other areas unproductive.³ Oyster farmers had for decades cultivated their crops in areas that were artificially fresh due to the Mississippi River levee system with at least the constructive knowledge that the Caernarvon project would one day attempt to undo the levee's effects on salinity.⁴ The oyster farmers operated under leases from the State of Louisiana, which is responsible for leasing public water bottoms in areas suitable for oyster cultivation.⁵ Louisiana oyster leases create a property right due to the fact that they are transferable, heritable, subject to the right of first refusal, and can only be terminated if they become unsuitable for oyster production.⁶

In 1989, when scientific analysis was able to predict Caernarvon's effects on salinity, the Louisiana Department of Wildlife and Fisheries began inserting clauses in oyster leases that purported to hold the state harmless from damages resulting from coastal restoration projects.⁷ The state also attempted to aid oyster farmers in the affected area with the Caernarvon Oyster Transfer Program that permitted leaseholders to relocate their oysters from December 7 through December 12, 1990.⁸ Some lessees participated in this project, while others did not.⁹

The Caernarvon project was dedicated on April 12, 1991, tested in August in 1991, and became fully operational September 1991.¹⁰ The Caernarvon Interagency Advisory Committee (CIAC), comprised of agency representatives and stakeholders, was formed to determine the flow rate of the Caernarvon Diversion Project.¹¹ In 1993, the CIAC decided to greatly increase the flow of the diversion allowing more freshwater to reach Breton Sound.¹² This greatly improved production on the public oyster seed grounds, but caused damage to many of the leases at issue in this case.¹³

In 1994, the plaintiff oystermen brought a class action lawsuit against the State of Louisiana and the

Louisiana Department of Natural Resources (LDNR) and subsequently against the United States government for damage caused to their oyster leases by coastal restoration projects.¹⁴ The plaintiffs claimed that the Caernarvon project had lowered the salinity of their leases, making them unsuitable for oyster cultivation and was, in effect, a taking of their leases without just compensation.¹⁵ The Louisiana Legislature responded to the Caernarvon lawsuits in 1995 by requiring hold-harmless clauses in all leases granted by the state.¹⁶

This article will summarize the key portions of the *Avenal* decision, including the relevant facts leading up to the suit, the related federal court case, the final determination of the Louisiana Supreme Court, and potential impacts that this case may have on future coastal restoration activities.

The Federal Suit

After the plaintiffs filed a class action lawsuit in state court, they filed suit in federal court against the United States, based on the Corps' involvement in the Caernarvon project, claiming their property rights had been taken by the federal agency's action, and, therefore, they were owed just compensation under the Fifth Amendment of the U.S. Constitution.¹⁷ The Court of Federal Claims found that the plaintiffs "had no compensable expectancy in the artificial condition which spawned oyster communities in the areas of [their] lease."¹⁸ In other words, there was no property interest in the water quality above their oyster beds.

The Federal Court of Appeals for the Federal Circuit affirmed the verdict of the lower court, but on different grounds. The federal appeals court found that the plaintiffs did have a compensable property interest in the water quality over their oyster beds, but they were barred from recovering because they did not have a reasonable investment-backed expectation that

their leases would not be interfered with by the Caernarvon project, which was planned in 1959.¹⁹ Such expectations are a key element in order for a taking to occur under the U.S. Constitution. The oyster farmers did not invest in their leases until the 1970s, and the court reasoned that they knew or should have known the project would significantly change the area.²⁰

The State Suit

In March 1994, a class action was initiated on behalf of all persons holding oyster leases on state-owned water bottoms in Breton Sound.²¹ The plaintiffs claimed that the state's action of lowering salinity levels in Breton Sound "resulted in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in their property rights without just compensation,"²² as required by the Article I Section 4 of the Louisiana Constitution.²³

In December 1998, before the state trial commenced, the plaintiffs successfully argued that evidence concerning the hold harmless clauses in the leases should not be presented to the jury.²⁴ At the same time, the court deferred ruling on a motion for partial summary judgment from the LDNR to decide the validity of the hold harmless clauses until the jury had made its findings.²⁵ The state appealed these rulings, and the Fourth Circuit Court of Appeals upheld the trial court's decision to exclude evidence of the hold harmless clauses from the trial but directed the trial court to rule on the state's motion for summary judgment on the validity of the clauses before the trial.²⁶ Because of time delays, the trial court never ruled on that motion.²⁷

The trial court also granted the plaintiffs' motion to exclude the LDNR's use of biological assessments and side-scan sonar to show the productivity of the plaintiff's leases and refused to compel the plaintiffs to show actual oyster production or actual

income from their leases.²⁸ Some evidence of income produced from the plaintiffs' leases was produced at trial, but this evidence fell short of proving the actual damages incurred by the lessees.²⁹

After an eight-day trial, the jury found in favor of the plaintiffs and awarded \$21,345 per damaged acre to all but one plaintiff.³⁰ They awarded the remaining plaintiff \$1,000 per damaged acre.³¹ The aggregate damage awards exceeded \$1 billion, and the court of appeals affirmed this judgment in 2003.³²

The court of appeals affirmed the verdict of the trial court, even though some leaseholders admitted that their leases had never been productive.³³ The court of appeals held that "so long as plaintiffs proved *generally* that their leases were productive before [Caernarvon] came on line, and that they were not productive after [Caernarvon] came on line, and that [Caernarvon] caused the loss of oyster productivity" the plaintiffs were entitled to recover.³⁴

Louisiana Supreme Court Decision

The Louisiana Supreme Court reversed the findings of the lower courts, determining that the terms of most of the leases prevented the oystermen from suing the state, and that, in the remainder of the cases, the oystermen had waited too long to bring suit.³⁵ The first group of plaintiffs held leases that were granted in 1989 or later and contained one version or another of a hold harmless clause which absolved the state from liability for damages to oyster leases resulting from coastal restoration efforts.³⁶ The second group held leases that were granted before 1989 and did not contain a hold harmless clause.³⁷ The Louisiana Department of Wildlife and Fisheries (LDWF) began inserting a hold harmless clause into its leases in 1989 that stated, "The lessee hereby agrees to hold and save that the State of Louisiana, its agents or employees, free and harmless from any claims for

loss or damages to rights arising under this lease from...creation or restoration of coastal wetlands...."³⁸ In 1995, the LDNR began inserting a more detailed indemnity clause that was mandated by the state legislature.³⁹

The Louisiana Supreme Court found that where either the 1989 or 1995 hold harmless clause was in the lease, the State of Louisiana was not liable for damages.⁴⁰ This part of the decision is based on the interpretation of the legislatively created oyster leasing system, and the authority of the administrative agency, in this case the LDWF, to alter the way the state contracts with oyster lease holders.⁴¹ The Louisiana Supreme Court found that the court of appeals had erroneously relied on the case of *Jurisich v. Jenkins* in determining that the hold harmless clauses at issue in this case were invalid.⁴²

In *Jurisich*, the Louisiana Supreme Court concluded that the LDNR could not unilaterally insert a "navigation and oil field activity clause into oyster leases," but explicitly refrained from extending that ruling to other clauses such as those dealing with coastal restoration.⁴³ The court found that the Fourth Circuit read *Jurisich* too expansively and distinguished that opinion from the facts in *Avenal*.⁴⁴ The court noted that LDWF was only obligated to renew oyster leases that were capable of producing oysters, and when it was recognized that the long anticipated effects of Caernarvon would make the subject leases unproductive, the agency was within its authority to decline renewing the leases.⁴⁵ The hold harmless clauses were the result of a compromise to allow the oyster leases to continue in the Caernarvon impact area and were actually a concession to the oyster lessees.⁴⁶ The court also found that the Caernarvon project and the hold harmless clauses that allowed it to operate without exposing the state to liability were in furtherance of developing the oyster industry as a whole and in line with the state's responsibilities to protect her natural resources under the public trust

doctrine.⁴⁷ Therefore, the court found that the 1989 hold harmless clauses were a valid exercise of LDWF's administrative authority without the need for legislative action.⁴⁸ Those lessees whose leases did not contain a hold harmless clause until 1995 were also barred from recovery because the court said they did not allege and prove specific damages to their leases that occurred between the dates Caernarvon began operating and the renewal of their leases in 1995.⁴⁹ Instead, they chose to base their claims on their post 1995 leases containing the more detailed, legislatively mandated hold harmless clause.⁵⁰

The Prescription Statutes

Of the approximately 204 leases that were damaged by the Caernarvon project, 12 did not contain a hold harmless clause, having been granted prior to 1989 and expiring between 2000 and 2005.⁵¹ After a detailed analysis of Louisiana's constitutional categories of property "taken" versus "damaged" for a public purpose the court found that these plaintiffs had filed their suit too late for relief.⁵² The plaintiffs argued that their claim was not for damages, but for a taking. The court found that since the oyster farmer's exclusive right to use the bottom for oyster culture was not terminated and the leases were apparently still producing some oysters, and the state, being owner of the water, water bottoms and oysters, could not take its own property, the Caernarvon project had damaged the leases, but had not taken them.⁵³ The distinction is important because Louisiana law provides a three-year prescriptive period for taking of property,⁵⁴ but only a two-year prescription for damaging of property for a public purpose.⁵⁵ The court found that since the property was damaged and not taken, the action had prescribed by early November 1993, two years after freshwater began flowing through the Caernarvon structure.⁵⁶ The suit was not filed until March of 1994 and thus invalid.

The Louisiana Supreme Court's holding in *Avenal* was based on the terms of the contract between the state and the oyster lessees and on failure to bring suit in a timely manner. However the court's dicta indicates a much stronger support for the state's ability to avoid liability for damaging property in its coastal restoration efforts.⁵⁷ Courts are generally reluctant to decide legal issues that are not absolutely necessary to the resolution of the particular dispute before them, and if the case can be decided on very narrow grounds, a court's holding will usually be limited to those grounds.⁵⁸

The court in *Avenal*, while basing its holding on the narrow grounds of the terms of the lease contract and prescription discussed above, seemed to go out of its way to expound on general principles of takings law and police power. The court discussed the plaintiffs' takings claim under the Fifth Amendment of the U.S. Constitution and determined that a taking had not occurred, agreeing with the federal appeals court that the oystermen could not "have had reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal governments."⁵⁹ The Court went further and postulated that even "... if Caernarvon did entirely deprive them of all economically beneficial and productive use of their property rights, the plaintiffs are still not entitled to compensation as Caernarvon was a valid exercise of the state's police power under federal law."⁶⁰

The Court cited the U.S. Supreme Court case of *Lucas v. South Carolina Coastal Council* in which it was found that a regulation depriving a property owner of all economic value amounted to a total taking requiring compensation unless the regulation is part of the "background principles of the state's law of property and nuisance already place upon land ownership" when the property is acquired or "by [the] state under its complementary power to abate nuisances that affect the public

generally, or otherwise."⁶¹ Such power to act in the "actual necessity" to prevent "grave threats to the lives and property of others"⁶² is generally termed a state's "police power."⁶³ The court stated that even if Caernarvon eliminated all economically beneficial uses of the plaintiffs' oyster leases no compensation would be owed because the "right of the state to disperse fresh water from the Mississippi River over saltwater marshes in order to prevent coastal erosion is derived from a background principle of Louisiana law...as early as the 1950s and 1960s" and was "certainly a part of the environment in which the raising and harvesting of oysters were conducted."⁶⁴ The court went further to say that "...the freshening of these waters in order to prevent further coastal erosion and save Louisiana's coast is a matter of 'actual necessity' as it will 'forestall [a] grave threat to the lives and property of others.'"⁶⁵

While the court was discussing federal takings law, the same principles can be applied to Louisiana takings law. Article I § 4 of the Louisiana Constitution makes property rights subject to "reasonable statutory restrictions and the reasonable exercise of police power."⁶⁶ The Louisiana Constitution has been interpreted to provide greater protection of property rights than the Fifth Amendment of the U.S. Constitution⁶⁷ but the principle that individual property rights must sometimes bow to the cause of protecting the public from grave and imminent threats is not totally foreign to Louisiana law, although courts have been somewhat schizophrenic in balancing police power against compensable losses.⁶⁸ The boundaries between government actions requiring compensation and those that do not, whether or not those actions are termed "police power," are not clear and may depend on the court's perception of the level of risk to the public good or safety.⁶⁹ The Louisiana Supreme Court in *Avenal* seemed to be convinced of the seriousness of coastal land loss and the absolute necessity of government action to combat it.⁷⁰

Were the facts different, if the public risk is considered less serious, and if the property owners' prior knowledge of their assumed risk is lacking, the court might be less inclined to allow application of police power without compensation.

We must also consider the steps lawmakers have and will continue to take to ease the tension between coastal restoration and property rights. In 1997, the Louisiana Legislature enacted legislation that created the Oyster Lease Relocation Program (OLRP) partially in response to the *Avenal* law suit, and because the state recognizes the importance of the oyster industry and wanted to provide a reasonable measure of relief to oyster lessees who would be affected by the Davis Pond diversion project.⁷¹ The OLRP has no dedicated funding and merely establishes a mechanism based on a "cultch currency matrix" for compensating the oyster lessees for damages from coastal restoration projects if funds are available on a project-by-project basis.⁷² In 2003, the legislature passed a constitutional amendment and supporting legislation to allow the state to limit compensation to owners of property that is taken or damaged for coastal restoration purposes to that allowed under the Fifth Amendment of the U.S. Constitution, which in most cases will amount to the fair market value rather than the "full extent of the loss" as normally required under the Louisiana Constitution. The amendment was ratified by the electorate in November 2003.⁷³ The change in the Louisiana Constitution and law may spell the end of the OLRP and merely require compensation for the fair market value of oyster leases based on "arm's length" transfers gleaned from sales data.⁷⁴ In light of *Avenal*, lawmakers have expressed a desire to assist oyster lessees negatively affected by coastal restoration projects and compensation will probably be based on the fair market valuation now allowed by the Louisiana Constitution.⁷⁵

Appeal to the U.S. Supreme Court

In March 2005, the *Avenal* plaintiffs filed a writ of certiorari to the U.S. Supreme Court, requesting review of the Louisiana Supreme Court's decision in regard to takings under the Fifth Amendment of the U.S. Constitution.⁷⁶ The plaintiffs argued that the petition for certiorari should be granted because the Louisiana Supreme Court incorrectly applied federal constitutional law in two ways: (1) in their classification of Louisiana's action as a regulatory taking rather than a physical taking, which would present a much higher standard for the state to overcome, and (2) that they misinterpreted *Lucas* by holding that if the action is "in accordance with a background principle of the state's property law that already prohibit(s) the landowner from the use he claims was taken, or is undertaken in the exercise of the state's police power" that no compensation is due.⁷⁷ Interestingly, the merits of a federal takings claim had already been decided by the federal courts.⁷⁸ The writ failed to mention the hold harmless clauses that were found valid under Louisiana law and the state's prescription statutes. The case could have been, and arguably was, decided solely on those grounds.

Potential Impacts of *Avenal* on Coastal Restoration in Louisiana

The *Avenal* decision seems to have settled the issue regarding oyster leases with hold harmless clauses, the state will not be liable to lessees for coastal restoration-related damages to their leases if they contain the clauses. Leases contracted before 1989 should have all been renewed by now, but there may remain some claims stemming from other coastal restoration projects' effects on pre-clause leases. Those claims face an uphill challenge in the face of *Avenal* especially if the lessees knew or should have known of the coming projects.⁷⁹ The Louisiana Supreme Court seems inclined to view coastal restoration as a more urgent and imperative species of police power, which will make it

easier for state and federal agencies to complete coastal erosion projects. This case paves the way for hold harmless clauses to be inserted into other types of leases and contracts.

¹ *Avenal v. State*, 757 So.2d 1, 2-3 (La. 4th Cir. Ct. App.).

² *Id.* at 2-4.

³ *Id.* at 3-4.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 4-5.

⁷ *Avenal v. State*, 886 So.2d 1085, 1090 (La. 2004).

⁸ *Id.*

⁹ *Id.* at 1090-1091.

¹⁰ *Id.* at 1109.

¹¹ *Id.* at 1091 n.2.

¹² *Id.* at 1091.

¹³ *Id.*

¹⁴ *Avenal v. State*, 757 So.2d at 2-3.

¹⁵ *Id.* at 2, 4.

¹⁶ *Avenal v. State*, 886 So.2d at 1102 n.21. See LA. REV. STAT. ANN. § 49:214.5 (West 2005).

¹⁷ *Avenal v. U.S.*, 33 Fed.Cl. 778, 779 and 782 (Ct. Cl., 1995).

¹⁸ *Id.* at 791.

¹⁹ *Avenal v. U.S.*, 100 F.3d 933, 937 (Fed. Cir. 1996).

²⁰ *Id.*

²¹ *Avenal v. State*, 886 So.2d at 1091.

²² *Id.* at 1092.

²³ LA. CONST. art. I, §4 (1975).

²⁴ *Avenal v. State*, 886 So.2d at 1093.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1093.

²⁹ *Id.* at 1093 n.9.

³⁰ *Id.* at 1093-1094.

³¹ *Id.* at 1094.

³² *Avenal v. State Dept. of Natural Resources*, 858 So.2d 697 (La. App. 4 Cir. 2003), *Avenal v. State*, 886 So.2d at 1094.

³³ *Avenal v. State*, 886 So.2d at 1094.

³⁴ *Id.*

³⁵ *Id.* at 1085.

³⁶ *Id.* at 1096.

³⁷ *Id.* at 1096 n.13.

³⁸ *Id.* at 1096-1097.

³⁹ *Id.* at 1097-1098.

⁴⁰ *Id.* at 1102.

⁴¹ *Id.* at 1100, 1101.

⁴² *Id.* at 1101. *Jurisich v. Jenkins*, 749

So.2d 597 (La. 1999).

⁴³ *Jurisich v. Jenkins*, 749 So.2d at 605.

⁴⁴ *Avenal v. State*, 886 So.2d at 1099-1102.

⁴⁵ *Id.* at 1100.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1101.

⁴⁸ *Id.* at 1102.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1106.

⁵² *Id.* at 1108-1110.

⁵³ *Id.* at 1106-1107.

⁵⁴ LA. REV. STAT. ANN. § 13:5111 (West 2005) provides that "Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years from the date of such taking."

⁵⁵ LA. REV. STAT. ANN. § 9:5624 (West 2005) provides that "When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription period of two years, which shall begin to run after the completion and acceptance of the public work."

⁵⁶ *Avenal v. State*, 886 So. 2d at 1109.

⁵⁷ *Avenal v. State*, 886 So.2d 1085 (La. 2004).

⁵⁸ See, e.g., *U.S. v. Allen*, 406 F.3d 940, 946 (8th Cir. 2005) ("When confronted with several possible ground for deciding a case, any of which would lead to the same result, federal court chooses narrowest ground in order to avoid unnecessary adjudication of constitutional issues."). *Newton v. Yates*, 353 N.E.2d 485, 494-495 (Ind. 1st Cir. Ct. App. 1976) ("The principle of 'judicial parsimony' allows a court to delay or suspend discovery on one issue if the outcome of another issue, to be tried first, will be dispositive of the entire case."). *Moses Lasky, Observing Appellate Opinions from Below the Bench*, 49 CAL. L. REV. 831, 837 (1961) ("There is a law of judicial parsimony, which states that a court should decide no more than it must.").

⁵⁹ *Id.* at 1103-1108 n.28.

⁶⁰ *Id.* at 1108 n.28.

⁶¹ *Id.* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004 and 1029 (1992).

⁶² Lucas v. South Carolina Coastal Council, 505 U.S. at 1029 n.16.

⁶³ Avenal v. State, 886 So.2d at 1108 n.28.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ LA CONST. art. I § 4 (2005).

⁶⁷ Avenal v. State, 886 So.2d at 1103-1104.

⁶⁸ Compare Constance v. State Through Dept. of Transportation And Development, 626 So.2d 1151 (La. 1993) with Deltic Farm and Timber Co., Inc. v. Board of Commissioners for the Fifth Louisiana Levee District, 368 So.2d 1109 (La. Ct. App. 2d Cir. 1979).

⁶⁹ *Id.*

⁷⁰ Avenal v. State, 886 So.2d at 1108 n.28.

⁷¹ Joe F. Stevenson, *Louisiana's Oyster Lease Relocation Program: A Step Toward Common Ground*, 28 S.U. L. Rev. 19, 30 (2000).

⁷² *Id.* at 32-33.

⁷³ See H.B. 424, 2003 Reg. Sess. (2003) (enacted Act 1295). LA. CONST. art. I § 4 (2005). H.B. 531, 2003 Reg. Sess. (2003) (enacted LA. REV. STAT. 49:213.9, later redesignated as LA. R.S. 49:213.10).

⁷⁴ Memorandum from G. Blaize, Jr. and Kim Mayhall of Strain, Dennis, Mayhall and Bates, L.L.P. to Louisiana

Department of Natural Resources Secretary Jack Caldwell, 18 (July 29, 2002) (on file with the Louisiana Sea Grant Legal Program).

⁷⁵ Governor's Advisory Commission on Coastal Restoration and Conservation, Transcript, 90-91 (Jan. 7, 2005) (on file with the Louisiana Sea Grant Legal Program).

⁷⁶ Avenal v. State, 125 S.Ct. 2305 (U.S. May 23, 2005), *writ denied*.

⁷⁷ *Id.* See also Lucas v. South Carolina Coastal Council 505 U.S. at 1019, Avenal v. State 886 So.2d at 1107 n.28.

⁷⁸ Avenal v. U.S., 33 Fed.Cl. at 790, Avenal v. U.S., 100 F.3d at 937.

⁷⁹ Avenal, 886 So.2d at 1096-1101.

Offshore Liquefied Gas Facilities: Deconstructing the Permitting Process

By David Mills and Lisa C. Schiavinato

Introduction

Recently, attention has surrounded the proposed offshore liquefied natural gas (LNG) facilities for the Gulf of Mexico and their potential impact on the environment. Twenty-three percent of the energy we use in the United States comes from natural gas.¹ Natural gas liquefies at -259°F ;² and its liquid state is one six-hundredth the volume of its gaseous form.³ The change in form and volume allows the gas to be more easily and economically transported from where it is extracted to where it is needed.⁴ The leading exporters of LNG to the United States are Indonesia, Malaysia and Qatar.⁵

LNG facilities have been proposed off the coasts of several states, including Louisiana, to help meet the growing national demand for natural gas. Most of the proposals affecting Louisiana involve transporting the natural gas through an existing transmission infrastructure in the Gulf of Mexico (GOM) and southern Louisiana. These proposed facilities would help meet the national demand for natural gas by delivering re-gasified LNG through the existing offshore and onshore pipeline structure in the GOM

for passage through the national gas pipeline grid through connections to other interstate and intrastate pipelines. In addition, a significant number of onshore LNG facilities are proposed for Louisiana and the GOM.⁶

This article will discuss the differences between the different types of LNG facilities and their various effects on the sea, the permitting requirements and process to construct and operate such a facility, and the state's role during the review process pursuant to the Coastal Zone Management Act. This article also will discuss federal and state issues concerning coordination and consistency of policies and regulations, and how they fit within the framework of the Louisiana Coastal Resources Program.

Open Loop System vs. Closed Loop System

Generally, offshore LNG facility operators have a choice between two systems to re-gasify the natural gas from its more easily transportable liquid state to its use-ready gaseous state: open loop or closed loop systems.⁷ The open loop system, or

open rack vaporization system (ORV), would use ambient temperature seawater running through a series of racks or panel coils to reheat the LNG to a gaseous state.⁸ Up to 154.3 million gallons of water per day per LNG facility may be used during the transfer process by an open loop system.⁹ When the water used directly in the heating process is returned to the sea, it would be cooler than ambient temperatures.¹⁰ Some people believe the cold water extracted during the re-gasification process will destroy millions of fish eggs and larvae in the area,¹¹ but others believe the effects on fisheries would be minimal.¹² The Final Environmental Impact Statement (EIS) submitted in conjunction with the Gulf Landing, LLC deepwater port license points out that engine cooling systems for diesel ships already use seawater in engine cooling mechanisms, whose impact is cumulatively more substantial than any one LNG port.¹³ The EIS estimates the amount of water required for the Port will be less than one percent of the amount of water used for engine cooling purposes.¹⁴ The Gulf of Mexico Fishery Management Council decided LNG open loop systems would adversely affect the biota of the GOM and the recreational and

commercial fishing industries that depend on this biota,¹⁵ and, therefore, opposes the use of an open loop LNG system in the GOM.¹⁶

The alternative to the open loop system is a closed loop system, which would burn natural gas in a submerged combustion process using diesel engines to heat the LNG rather than using the heat from seawater, thus minimizing the temperature changes due to displaced water.¹⁷ The impact of a closed loop system on marine life in the GOM is supposedly not as detrimental compared to an open loop system, but it is more costly.¹⁸ It is estimated that using a closed loop system could cost a LNG facility operator anywhere from \$20 - \$40 million in annual revenues due to the 1.2 - 1.6 % of LNG burned to warm the LNG.¹⁹ In addition to being more costly, increased air emissions of sodium oxide, nitrogen oxide and volatile organic compounds will result from the submerged combustion.²⁰

Permitting Process for Offshore LNG Facilities

The Deepwater Port Act of 1974 (DWPA) establishes a licensing process for ownership, construction, and operation of human-made structures beyond the U.S. territorial limits.²¹ The DWPA defines a deepwater port as:

Any fixed or floating manmade structure other than a vessel, or any group of such structures, that are located beyond State seaward boundaries and that are used or intended for use as a port or terminal for the transportation, storage, or further handling of oil or natural gas for transportation to any State... includes all components and equipment, including pipelines, pumping stations, service platforms, buoys, mooring lines, and similar facilities to the extent they are located seaward of the high water mark...²²

The DWPA is the main legal mechanism by which an offshore LNG facility is licensed, though other laws may be triggered by a license application. The U.S. Secretary of Transportation has delegated joint responsibility for processing deepwater port license applications to the U.S. Maritime Administration (MARAD) and the U.S. Coast Guard (USCG).²³ The Secretary has delegated to the Maritime Administrator the authority and responsibility to issue deepwater port licenses, including those required for the construction of offshore LNG facilities.²⁴

In making a decision to approve or not approve an application to own, construct and operate a deepwater port, the Maritime Administrator considers several factors: (1) whether the applicant is financially responsible; (2) whether the applicant will be able to comply with relevant laws, regulations, and license conditions; (3) whether the proposed deepwater port would be in the national interest and consistent with national security, energy sufficiency, and environmental quality policy goals; (4) whether the Governor of the adjacent coastal state(s) approves or has presumed to approve the deepwater port; (5) whether the deepwater port will be constructed and operated to prevent or minimize adverse impacts on the marine environment; and (6) whether the deepwater port will comply with national environmental laws.²⁵ The Maritime Administrator also considers the effects of the proposed port on programs of the Departments of the Army, State, and Defense and consults with their respective Secretaries and ensures that the deepwater port will not unreasonably interfere with international navigation.²⁶ Finally, the adjacent coastal state to which the proposed deepwater port will be directly connected must have in place a federally approved coastal management program pursuant to the Coastal Zone Management Act or must be in the process of developing such a program.²⁷

Pursuant to the National Environmental Policy Act (NEPA), environmental assessments and environmental impact statements (EIS) are required for major federal actions significantly affecting the human environment. The EIS process analyzes the environmental impact of the proposed action, unavoidable adverse environmental effects, and alternatives to the proposed action.²⁸ The DWPA requires compliance with NEPA for all deepwater port license applications.²⁹ Because MARAD and the USCG have authority over the permit process for deepwater ports,³⁰ these agencies take the lead on application review and EIS development and coordinate with other federal agencies having jurisdiction over any aspect of the construction or operation of a deepwater port.³¹ In most, if not all, instances, an EIS would be required for the construction and operation of an LNG terminal off Louisiana's coast given the size, scope and potential impacts of such a project.³²

The DWPA gives coastal states a voice during the applicant review process. When issuing notice of an application, MARAD is required to designate "adjacent coastal states," which means any coastal state that would be either directly connected via pipeline to the deepwater port or would be located within 15 miles of a proposed deepwater port.³³ If MARAD does not designate a state as an "adjacent coastal state," then the agency may designate the state as such via state request. However, the request must be made not later than 14 days after publication of notice of a deepwater port application, and the request is granted if MARAD determines, after receiving recommendations from NOAA, that there is a "risk of damage to the coastal environment of such state equal to or greater than the risk posed to a state directly connected by pipeline to the proposed deepwater port."³⁴ The law does not allow the agency to issue a deepwater port license without the approval of the Governor

of each adjacent coastal state.³⁵ Approval is conclusively presumed if the Governor does not approve or disapprove of the permit application no later than 45 days after the last public hearing on applications for an area.³⁶ Furthermore, if a Governor notifies MARAD that a license application is inconsistent with the state's coastal zone management and environmental protection programs, then MARAD may condition the license so it will be consistent with those programs.³⁷ The DWPA also does not allow MARAD to issue deepwater port licenses unless an adjacent coastal state has developed, or is in the process of developing, at the time the deepwater port license application is submitted, a federally approved coastal management program pursuant to the Coastal Zone Management Act.³⁸ These provisions clearly demonstrate the important role of coastal zone management during the license application review process, and states should take advantage of their CMPs to ensure that offshore LNG facilities will have minimal adverse impacts on their coastal resources.

Any person or company that applies for a deepwater port license is required to submit detailed plans to the Secretary of Transportation.³⁹ Within 21 days after receipt of an application, the Secretary determines whether it contains all of the required information.⁴⁰ NEPA compliance is required for all applications.⁴¹ After the Secretary determines that all required information has been submitted, he publishes notice of the application in the Federal Register no later than five days after making the determination.⁴² The federal and state agency review period is between 240 and 285 days after the public notice has been filed.⁴³ The DWPA requires a final decision (record of decision, or ROD) on a permit application within 330 days of filing of the public notice or issued within 90 days of the last public hearing, which takes place within 240 days after the public notice.⁴⁴ The overall

process, from submittal of application to ROD, must be completed within 356 days.⁴⁵ However, MARAD can "stop the clock" to request further information during the review process.⁴⁶ Once the ROD is issued, the applicant has the authority to make the facility fully operational.⁴⁷ The typical time period for the granting of licenses ranges from two to four years.⁴⁸

While the DWPA and NEPA are the major laws triggered by a proposed offshore LNG facility, other laws also come into play, such as the Coastal Zone Management Act, Clean Water Act, Marine Protection, Research and Sanctuaries Act and Magnuson-Stevens Fishery Conservation and Management Act. In addition to the USCG and MARAD, other federal agencies may be involved in the permitting process.⁴⁹

Louisiana's Role via the Coastal Zone Management Act and Deepwater Port Act

In 1972, Congress passed the Coastal Zone Management Act (CZMA) in order to encourage coastal states to take steps towards managing their coastal and other natural resources.⁵⁰ One of the goals of the CZMA is to protect the habitat areas of the coastal zone, the fish, shellfish, and other living marine resources and wildlife therein.⁵¹ If a state decides to participate in the CZMA, it must develop and implement a coastal management program (CMP) that is in line with federal requirements.⁵² State CMPs are developed with the participation of federal agencies, state and local agencies, industry, other interested groups and the public, and final approval is granted by the National Oceanic and Atmospheric Administration (NOAA).⁵³ One of the major incentives Congress offered coastal states in exchange for adopting their own CMPs was the consistency provision.⁵⁴

Pursuant to the CZMA's consistency provision, an affected coastal state may require federal actions that have reasonably foreseeable effects on any land use, water use or natural resources of the coastal zone be consistent to the maximum extent practicable with the enforceable policies of its federally approved CMP.⁵⁵ There are four basic types of federal actions subject to the CZMA consistency requirements: federal agency activities, federal license or permit activities, outer continental shelf (OCS) plans, and federal financial assistance to state and local governments.⁵⁶ Since an offshore LNG terminal applicant is required to obtain a federal permit for construction and operation, the application is subject to the CZMA consistency provision.⁵⁷

State Coordination and Consistency

In Louisiana, deepwater port commissions and deepwater port, harbor and terminal districts⁵⁸ are not required to obtain Coastal Use Permits, though their activities must be consistent to the maximum extent practicable with the state CMP and any affected approved local programs.⁵⁹ The purpose of a Coastal Use Permit (CUP) is to ensure that any activity affecting the coastal zone is performed in accordance with guidelines established in the Louisiana Coastal Resources Program (LCRP),⁶⁰ Louisiana's federally approved CMP.⁶¹ However, coastal activities that do not require CUPs nevertheless still must be consistent to the maximum extent practicable with the state program and affected approved local coastal programs.⁶² Federal and state governmental bodies must fully coordinate their activities directly affecting the coastal zone with the state program and affected local coastal programs, including the federal licensing of deepwater ports.⁶³ When the Secretary of the Louisiana Department of Natural Resources finds that a governmental action not requiring a CUP may significantly

affect land and water resources within the coastal zone, he is required to notify the Secretary of the Louisiana Department of Wildlife and Fisheries and the governmental body carrying out the action.⁶⁴ That governmental body must coordinate fully with the Secretaries or their representatives at the earliest possible stage of the proposed action.⁶⁵ The secretaries should make comments to other agencies in order to assure that those actions are consistent with the state program and affected local programs.⁶⁶ The comments are required to be incorporated into the proposed activity.⁶⁷

Although the focus of this article is on offshore LNG facilities, it is worth noting that onshore facilities, including pipelines from offshore facilities, are regulated by the Federal Energy Regulatory Commission and are also subject to CUPs if they are within the state's coastal zone or if they are proposed in state waters, i.e., within the three-mile limit. The state reviews offshore LNG facilities under the CZMA consistency provision only when those facilities will be in federal waters.

Consistency Review Process Under the CZMA

A federally licensed or permitted activity is subject to review by the state under the CZMA if it affects any coastal use or natural resource, including reasonably foreseeable effects.⁶⁸ Such activities must be consistent with a state CMP, or the federal agency may not issue the permit unless the activity falls under one of the listed exceptions.⁶⁹ The applicant for a federal license or permit is required to provide in its application to the license or permitting agency a certification that the proposed activity complies with the enforceable policies of the state CMP and will be conducted consistent with that state program.⁷⁰ The applicant is also required to submit to

the state agency responsible for the administration of the state CMP a copy of the consistency certification.⁷¹ The state then has six months after receiving a copy of the applicant's consistency certification to notify the federal agency whether or not it concurs with, or objects to, the applicant's certification.⁷² If the state does not respond within this time frame, then concurrence is conclusively presumed.⁷³ If the state objects to the issuance of the permit or license, the federal agency may not issue the permit, but the applicant may appeal the decision to the Secretary of Commerce who may, because of the appeal or on his own initiative, review the state objection to determine whether or not to allow the issue of the permit or license.⁷⁴

Conclusion

One concern dealing with open loop LNG terminals is the unmeasured impacts of a multitude of LNG terminals in the Gulf of Mexico. As of February 2005, the Federal Energy Regulatory Commission reported that there were a total of four constructed LNG terminals in North America, one of which is located in the Gulf of Mexico.⁷⁵ There are now 51 proposed LNG terminal locations in North America, with 24 of those proposed locations in the Gulf of Mexico.⁷⁶ The cumulative impacts of these offshore facilities on the GOM is an open issue, and the process for permitting these facilities offshore continues to be the subject of debate for both Congress and the public. Further scientific study may result in clearer answers regarding potential impacts of the open loop system. Pending federal energy legislation also may effect how and where offshore LNG facilities are permitted.

While aware of the potential economic benefits of offshore LNG facilities, Louisiana is remaining mindful of the potential adverse impacts. The Governor has also expressed her reservations regarding the open loop system and is concerned about the impacts this system may have on GOM fisheries.⁷⁷ The state has yet to declare any proposed offshore facility inconsistent under the CZMA,⁷⁸ but insists that a CZMA consistency concurrence is not its final word, citing the Governor's veto power under the DWPA.⁷⁹ Whether granting consistency to an offshore LNG facility and then vetoing it under the DWPA could cause a problem if an applicant decides to challenge the state veto in court is yet another open question.

¹ Latent Semantic Analysis at Colorado University, Natural Gas, at <http://lsa.colorado.edu/summarystreet/texts/naturalgas.htm>.

² Cheniere Energy, Inc., LNG Industry Profile at http://www.cheniere.com/LNG/LNG_industry_profile.shtml (last accessed April 14, 2005).

³ *Id.*

⁴ *Id.*

⁵ Federal Energy Regulatory Commission, For Citizens: LNG Overview at <http://www.ferc.gov/for-citizens/lng.asp> (last accessed April 14, 2005).

⁶ See Federal Energy Regulatory Commission, Regulating Natural Gas Projects: Existing and Proposed LNG Terminals at <http://www.ferc.gov/industries/gas/gen-info/horizon-lng.pdf>.

⁷ Other re-vaporization systems include intermediate fluid vaporizer system and a shell and tube vaporizer system. However, these alternative systems are either too costly, aren't deemed safe enough, or the technology has not yet been proven. See Final Environmental Impact Statement for the Gulf Landing LLC Deepwater Port License Application, USCG-2004-16860, 2-6, available at <http://dms.dot.gov>.

⁸ *Id.* at ES-4.

⁹ *Id.* at 4-5.

¹⁰ *Id.* at ES-4

¹¹ Gulf Restoration Network, LNG Facilities Pose a Threat to Gulf Fisheries at <http://www.gulfrestorationnetwork.org/fisheries/issues.htm> (last accessed April 4, 2005).

¹² See, e.g., Final Environmental Impact Statement, *supra* note 7, at 2-8.

¹³ Final Environmental Impact Statement, *supra* note 7, at 5-7.

¹⁴ *Id.*

¹⁵ Gulf of Mexico Fishery Management Council, Gulf Council Motions: May 19 – 20, 2004 at <http://www.gulfcouncil.org/motions/motions2004-05.htm> (last accessed June 28, 2005).

¹⁶ *Id.*

¹⁷ Final Environmental Impact Statement, *supra* note 7, at 2-6 and 2-7.

¹⁸ E-mail from Aaron Viles, Fisheries Campaign Director, Gulf Restoration Network, to David Mills, Law Clerk, Louisiana Sea Grant Legal Program (March 1, 2005, 16:39:20 CST) (on file with the Louisiana Sea Grant Legal Program).

¹⁹ *Id.*

²⁰ Personal Communication with Justin Farrell, Coastal Ports Specialist, Louisiana Sea Grant (April 28, 2005).

²¹ Deepwater Port Act, 33 U.S.C. §§ 1501-1524 (2002).

²² 33 U.S.C. § 1502.

²³ U.S. Maritime Administration, Deepwater Port Licensing at http://www.marad.dot.gov/dwp/about_dpa/about_lic_req.html (last accessed April 28, 2005).

²⁴ *Id.*

²⁵ 33 U.S.C. § 1503.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See 42 U.S.C. § 102(c).

²⁹ See 33 U.S.C. § 1505.

³⁰ The Federal Energy Regulatory

Commission has jurisdiction over onshore LNG facilities. See Natural Gas Act, 15 U.S.C. § 717 et seq.

³¹ See *id.*

³² For example, an EIS was developed for the LNG terminal proposed by Gulf Landing LLC, which would be located approximately 38 miles south of Cameron.

³³ 33 U.S.C. § 1508(a).

³⁴ *Id.*

³⁵ 33 U.S.C. § 1508(b).

³⁶ *Id.*

³⁷ *Id.*

³⁸ 33 U.S.C. § 1508(c).

³⁹ 33 U.S.C. § 1504(c).

⁴⁰ *Id.* For a list of information required for a complete application, see 33 U.S.C. § 1504(c)(2).

⁴¹ See 33 U.S.C. § 1504(f).

⁴² 33 U.S.C. § 1504(c).

⁴³ Final Environmental Impact Statement, *supra* note 7, at ES-1.

⁴⁴ *Id.*

⁴⁵ U.S. Maritime Administration, Deepwater Port Licensing Frequently Asked Questions, at <http://www.marad.dot.gov/dwp/faq.html> (last accessed June 28, 2005).

⁴⁶ *Id.*

⁴⁷ Final Environmental Impact Statement, *supra* note 7, at ES-1.

⁴⁸ *Id.*

⁴⁹ These agencies include the Environmental Protection Agency, Minerals Management Service, Fish and Wildlife Service, National Oceanic and Atmospheric Administration, Federal Energy Regulatory Commission and Department of Defense, as well as state agencies with jurisdiction and nongovernmental organizations.

⁵⁰ 16 U.S.C. § 1451 et seq.

⁵¹ *Id.* at § 1451(e).

⁵² See 15 C.F.R. Part 923. See also National Oceanic and Atmospheric Administration Office of Ocean and Coastal Resource Management, Federal Consistency Requirements, available at [\[www.coastalmanagement.noaa.gov/czm/federal_consistency.html\]\(http://www.coastalmanagement.noaa.gov/czm/federal_consistency.html\) \(last accessed June 23, 2005\).](http://</p></div><div data-bbox=)

⁵³ 16 U.S.C. § 1456.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at (3).

⁵⁷ U.S. Department of Transportation Organization, 62 Fed. Reg. 11382 (March 12, 1997).

⁵⁸ LA. CONST. art 6, § 44.

⁵⁹ La. R.S. § 49:214.32(A).

⁶⁰ Louisiana Department of Natural Resources, Coastal Use Permits, at <http://www.dnr.state.la.us/crm/coastmgt/cup/cup.asp> (last accessed April 28, 2005).

⁶¹ See La. R.S. § 49:214.21 et seq.

⁶² *Id.*

⁶³ La R.S. § 49:214.32(D).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 15 C.F.R. § 930.53(a).

⁶⁹ 16 U.S.C. § 1456(c)(3)(A).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Federal Energy Regulatory Commission, Gas: General Information at <http://www.ferc.gov/industries/gas/gen-info/horizonlng.pdf>.

⁷⁶ *Id.*

⁷⁷ See The Associated Press, DNR Approves Liquefied Natural Gas Port, THE ADVOCATE (Baton Rouge), June 27, 2005, at 5B.

⁷⁸ Note: LDNR recently granted consistency to the proposed Pearl Crossing LNG facility. See *id.*

⁷⁹ See *id.*

Announcements

Over the next year, in order to decrease costs, the Sea Grant Legal Program will phase out the hard copy version of the LCL that we mail out to subscribers and move to a fully electronic version that will be posted on our website. An email notice will be sent to subscribers informing them of the publication of each new edition. We anticipate completing this transition by Spring/Summer 2006 with LCL 88. If you are subscribed to the LCL only and not to the Email Update list also, and you wish to receive email notifications of new LCL editions, please send us your email address. Our contact information is below.

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