

**Louisiana Sea Grant Legal Program**  
**Louisiana Coastal Law Email Update Service**  
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**By Kellyn Elmer**

**Cases**

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***Lonatro v. Orleans Levee District*, No. 11-357, 2011 WL 3513726 (E.D. La. August 11, 2011)); see also Mark Schleifstein, *Bellaire Drive Property Owners Win Round in Lawsuit Over 17<sup>th</sup> Street Canal Work*, The Times-Picayune (August 11, 2011), (both on file with LSGLPP).**

The United States District Court for the Eastern District of Louisiana denied the Army Corps of Engineers (Corps) and Orleans Levee District's (OLD) request to have the lawsuit over the 17th Street Canal levee construction and maintenance thrown out. Landowners are suing over the taking of their backyards for levee construction and maintenance without just compensation.

The plaintiffs' backyards on Bellaire Drive in Orleans Parish abut the levee that runs alongside the 17th Street Canal. Two state lawsuits were consolidated and removed from state court giving rise to this suit.

The first suit arose when following Hurricane Katrina OLD revealed its intention to remove trees and various structures for flood control work from plaintiffs' land. An initial request for injunctive relief was denied, and the work was performed by the Corps pursuant to a grant of right-of-entry by OLD. The state district court granted a motion for summary judgment in favor of the plaintiffs. The defendants appealed the decision, and the Louisiana Fourth Circuit Court of Appeal granted the writ, reversed, and remanded. The trial court found OLD had a "*St. Julien*" servitude over the levees. The *St. Julien* doctrine provides that when a landowner silently acquiesces or expressly consents to his land being appropriated for a public purpose through eminent domain, the landowner cannot reclaim his property and is limited to claims for compensation and severance damages. Unopposed appropriation is considered to create a servitude.

The second suit arose when OLD announced in January 2011 that it would perform extensive strengthening and remediation flood control work, including building structures and "deep soil mixing" on and around plaintiffs' property. The plaintiffs sought preliminary and injunctive relief, which was denied by the trial court.

After removal and consolidation, the issues were (1) whether the case was *res judicata* or under the "law of the case" doctrine and (2) whether the defendants had a *St. Julien* servitude which prevented plaintiffs from stating a claim upon which relief may be granted. The court found the case was not *res judicata*, as *res judicata* fundamentally requires two separate lawsuits and a final judgment upon which the defense is raised. Although the case was moved to a different

court system, the case at issue was the same case just removed from state court and placed in federal court; therefore, the case was not *res judicata*. The court then found the law of the case doctrine not applicable as the Louisiana appellate decision did not limit the court's inquiry, since the facts of the deep soil mixing lawsuit were not before the appellate court.

Finally, the court found there was insufficient evidence of a *St. Julien* servitude as it requires (1) the appropriator be a public or quasi-public body with expropriation power, (2) the appropriator constructs a facility in the public interest, and (3) the landowner consented or acquiesced to the taking. The first and second elements were not at issue as the levee was a structure and OLD was a public or quasi-public entity. Regarding the third element, consent or acquiescence to the levee fell on the previous landowners' consent as the levee was built prior to the current landowners. The court found the mere existence of the levee without any evidence introduced showing consent or acquiescence by the previous landowners was not sufficient to show acquiescence or consent to 17th Street Canal levee.

**In the Matter of: General Permit for Discharges from Oil & Gas Exploration, Development, & Production Facilities, Permit Number: LAG260000, No. 2010-CA-1640, 2011 WL 2297790 (La. App. 1 Cir. June, 10 2011) (on file with LSGP).**

The Louisiana Environmental Action Network (LEAN) appealed the district court's decision to allow the Louisiana Department of Environmental Quality (LDEQ) to reissue a National Pollutant Discharge Elimination System (NPDES) permit for the oil and gas production pollution discharge into Louisiana's territorial seas as a Louisiana Pollutant Discharge Elimination System (LPDES).

Decisions of LDEQ will be sustained if (1) the proposed project's potential and real adverse environmental effects have been avoided to the maximum extent possible, (2) the project's social and economic benefits outweigh the environmental impact costs, and (3) there are no alternative projects, alternative sites, or mitigating measures offering more protection to the environment than the proposed project without unduly curtailing non-environmental benefits. The LDEQ, as a public trustee, has a duty to show proper permitting discretion by making basic supported evidentiary findings that are rationally connected to the facts found and the permit issued.

The issue in the matter was the fact that the permit did not show any testing of the Louisiana territorial seas' direct sediment and marine life verifying no major environmental impacts being caused by water production discharges. At the time the original permit was issued, there was no regulation of such discharge to the territorial seas area; however, at the time of review by LDEQ of the NPDES permit for re-issuance as an LPDES permit, the regulated discharge to the territorial seas had been allowed for several years under the existing NPDES permit.

LDEQ believed effluent emission limitation implementation, monitoring requirements, and toxicity testing adequately addressed bioaccumulation concerns. In reasoning for the permit decision, the LDEQ relied on general offshore studies showing produced water discharge had no significant environmental impact. LDEQ never mentioned the Louisiana territorial seas are actually substantially less in depth than offshore waters and react differently to pollution.

The court found that although the permit contained requirements and restrictions mitigating unreasonable degradation of the environment, LDEQ issued the “LPDES permit procedurally without individualized consideration or a fair balancing of environmental factors.” The court stated the evidence LDEQ relied on failed to show minimization or avoidance of potential and real adverse environmental impacts to the maximum extent possible for the Louisiana territorial seas. Rather, LDEQ abused its discretion by failing to address potential environmental impacts shown by EPA in the initial NPDES permit. The evidence submitted failed to support a finding that the discharge would cause no bioaccumulative impacts to the Louisiana territorial seas.

***J.R.A. Inc. v. Essex Insurance Co.*, No. 2010-CA-0797, 2011 WL 2137335 (La. App. 4 Cir. May 27, 2011) (on file with LSGLPP).**

In this case, two properties on West End Park in Orleans Parish were completely destroyed by Hurricane Katrina. The properties had windstorm insurance protection from Essex Insurance Company (Essex), but the policies excluded losses or damages from flood. Essex refused to pay out the full policies for the properties. Essex alleged evidence that the properties’ owner received a massive flood insurance claim and evidence of an expert showing storm surge damage proved wind damage was not the sole cause of the property losses by plaintiffs Allen Jaeger and Jaeger’s Seafood (J.R.A.).

The trial court concluded Essex had not fulfilled its burden of proving the property losses were proximately caused by flooding. The trial court awarded plaintiffs the remainder of the policy limits plus legal fees and interest. Although evidence showed Essex sought multiple expert damage assessment opinions, possibly placing Essex in bad faith and allowing recovery of attorney’s fees, the court found the conduct alleged occurred prior to the amendments of La. R.S. 22:658 or La. R.S. 22:1220 and awarded none. If the act had occurred after the amendments were enacted and the plaintiffs proved the act showed Essex acted arbitrarily and capriciously in failing to pay out the policy within thirty days of plaintiffs’ claim, then plaintiffs would have been awarded an additional fifty percent of the damages awarded for attorney’s fees.

Following the trial court’s decision, J.R.A. moved for a new trial solely with regards to the rejection of the bad faith claim, but the motion was denied.

On appeal, the court determined upon record review that the trial court’s decision awarding the policy limits to appellees was not clearly erroneous and should not be disturbed. And although Essex sought multiple expert opinions assessing the damage to the properties, record review showed Essex was not in bad faith pursuant to La. R.S. 22:658 or 22:1220.

### **Terrebonne and Lafourche parish residents unaware of coastal threats**

Hosted by the America's Wetland Foundation, the first of a series of meetings aimed at saving Terrebonne and Lafourche parishes from environmental and manmade threats presented a new study. The study factored in infrastructure data, along with a survey of parish residents on risk awareness, coastal restoration and protection, disaster recovery, and the economy. On a scale of 1 to 5—1 being the lowest and 5 the highest—the parishes scored the lowest, a 1.9, on hurricane protection and coastal restoration. Among the top of residents' concerns were the federal government and the U.S. Army Corps of Engineers' roadblocks from decades of red tape and bureaucratic delays leaving the parishes using local money to build minimum flood protection systems.

Residents also rated a low (2.9) for storm risk and flood awareness. Levees give parish residents a false sense of security. Residents do not believe they are at risk from scientifically predicted climate changes, which could cause more frequent hurricanes. Most residents do not realize that portions of the parishes could eventually be under water as Louisiana is suspected to subside a foot by 2050. The organizers of the project hope that the meetings result in a plan for the communities to deal with rising insurance rates and reduced federal assistance.

Source: Nikki Buskey, *Study: Locals Unaware of Coastal Threat* (September 29, 2011), (on file with LSGLPP).

### **Louisiana's water institute is gearing up**

Within the month, a board member list for a new Louisiana water institute could be available. The water institute will be a nonprofit, independent organization focusing on Louisiana coastal research and restoration.

Source: Amy Wold, *Plans Firming up for Water Institute*, *The Advocate*, (September 28, 2011), (on file with LSGLPP).

### **LSU oil spill study shows biological problems in fish**

A new Louisiana State University study conducted by Fernando Galvez and Andrew Whitehead focused on killifish, a fish that lives in the Louisiana marsh. The study found that although levels of oil in the fish were low, the fish were still experiencing biological effects potentially impacting health, performance, and reproduction. In the coming months, the researchers will begin comparing prior shrimping season data with this year's data.

Source: *New Oil Spill Study Shows Biological Problems in Fish: Shrimp Season Could Reveal*

*True Impact* (September 27, 2011), (on file with LSGGLPP).

### **Seafood company blames BP for shrimping problems**

The largest employer in Independence, Louisiana, is being forced to lay off employees as BP has yet to pay its multimillion-dollar claim. This, combined with the low white shrimp catch, is causing the company to struggle. The company's owner attributes the oil spill to reproductive problems of the shrimp, and thus, the low catch this season.

Source: *Shrimp Company Lays Off Employees, Blames BP: Doran seafood also blames oil spill for slim shrimp catch* (September 27, 2011), (on file with LSGGLPP).

### **Nation stands to lose billions if Port Fourchon shuts down due to a damaged LA 1**

A new federal Homeland Security study revealed that a hurricane could damage Louisiana's highway LA 1 so badly that it would take three months to repair. This would result in Port Fourchon shutting down for ninety days and would cause the nation 7.8 billion dollars in lost gross domestic product—120 million barrels of oil and 250 billion cubic feet of natural gas. The LA 1 Coalition hopes this study is the critical factor in securing federal funding for completing the raising of LA 1, a 320 million dollar project.

Source: Bill Capo, *Nation Could Lose Billions if Port Fouchon Shuts Down Due to Damaged Highway* (September 26, 2011) (misspelling of Fourchon original), (on file with LSGGLPP).

### **Restore the Gulf Act passes Senate approval**

The Restore the Gulf Act, which directs eighty percent of last year's oil spill fines to states with actual damage from the spill, passed approval by the Senate Environmental and Public Works Committee on September 21, 2011. The approval is a major victory for the Gulf Coast and especially for Louisiana. The bill's formula for dividing the fines gives Louisiana about half of the possible twenty billion in fines as Louisiana bore the brunt of the damage.

The bill splits the money first by giving thirty-five percent of the money in equal shares to the Gulf Coast states. Thirty percent would establish a federal-state Gulf Coast Ecosystem Restoration Council. Another thirty percent would be allocated by the Gulf Coast Ecosystem Restoration Council to the Gulf Coast states based on an impact formula accounting for the extent of shoreline that was oiled, proximity to the well, and average coastal population. The states would have to submit a plan to the Council for approval in order for the money to be allocated. No more than twenty-five percent of the impact formula funding available to a state could be used for infrastructure projects unless the state verified that all ecosystem restoration needs had been met and additional infrastructure funds were necessary to mitigate impacts of the oil spill. Finally, five percent is allocated for research on coastal restoration and long term

sustainability of commercial and recreational fishing. House members need to quickly come to a consensus on how the Gulf Coast states will split the money, so the bill can be introduced and passed in the House.

Sources: *Progress on BP fines: An editorial*, The Times-Picayune (September 23, 2011), (on file with LSGGLPP). *RESTORE Act (for introduction): Section-by-Section*, (on file with LSGGLPP).

### **Rigs to Reefs Habitat Protection Act**

Senator David Vitter introduced the “Rigs to Reef Habitat Protection Act” on September 14, 2011, which allows certain offshore oil and gas rigs to be used as artificial reefs. The act requires the Secretary of Interior to assess platforms and determine if coral populations, protected species, or commercially or recreationally valued species live in the vicinity. Platforms hosting a substantial reef ecosystem would be permitted to remain in the Gulf as an artificial reef. Further, companies would be exempt from removing platforms, so long as the owner is committed to converting them into artificial reefs. To view the entire bill, please go to <http://www.gpo.gov/fdsys/pkg/BILLS-112s1555is/pdf/BILLS-112s1555is.pdf>.

Sources: CSO Weekly Report Issue 11.28 (September 23, 2011), (on file with LSGGLPP). Ted Venker, *Vitter Takes Important Step in Protecting Vital Gulf Habitat* (September 16, 2011), (on file with LSGGLPP).

### **Levee authority law that triples buffer zone near levees**

The Southeast Louisiana Flood Protection Authority-East is working on a new law which adds an additional six to nine feet of buffer zone behind levees and prevents any construction obstructing or interfering with inspection, construction or maintenance of levee berms or creating a safety hazard within fifteen feet of levees. The law provides civil remedies for the overseeing agency and allows criminal imposition of penalties up to 10,000 dollars or six months in jail. The law raises concerns regarding taking’s compensation and effect on existing structures.

Source: Jeff Adelson, *Levee Authority Seeks Guidance on Law Expanding Safety Buffer*, The Times-Picayune (September 15, 2011), (on file with LSGGLPP).

### **United Houma Nation feels they will be a trade-off community**

As Louisiana updates its coastal restoration and hurricane protection master plan, the United Houma Nation village—which was excluded from the Morganza to the Gulf levee system—feels they will be sacrificed as a trade-off for the plan. Maryal Mewherter, parliamentarian for the Houma Nation tribal council, says the trade-off is an environmental and cultural injustice, and she proposes the master plan be revised to include rebuilding of barrier islands south of the communities. Although concerns are real, the plan will require hard choices in face of the near

500 million to 1 billion per year that will have to be spent to rebuild the wetlands and improve levee systems. The master plan drafting process is available at [coastalmasterplan.la.gov](http://coastalmasterplan.la.gov).

Source: Mark Schleifstein, *Native Americans Demand a Say in Coastal Restoration Plans*, The Times-Picayune (September 14, 2011), (on file with LSGGLPP).

### **Coastal restoration creates jobs**

In a new report from Restore America's Estuaries, data revealed coastal habitat restoration is producing jobs at higher rates than many sectors of the overarching job market. Coastal restoration has the potential for thirty jobs per every 1 million invested—nearly twice as many as the oil and gas and road construction industries combined. The study found U.S. coastal regions supply essential habitat for over seventy-five percent of the nation's commercial fishing industry and eighty to ninety percent of recreational fish catch, provide forty percent of U.S. employment, support sixty-nine million jobs, generate half the nation's Gross Domestic Product, protect nearly 2 trillion in trade each year, and provide 214 billion annually in leisure and hospitality jobs.

In New Orleans, the Central Wetlands Unity (CWU), a 30,000 acre area of degraded marsh near downtown New Orleans, is being revitalized with a 72 million dollar project on track to create 280 direct jobs and 400 indirect and induced jobs. And in Florida, Everglades' restoration is projected to create 440,000 jobs over the next fifty years.

Sources: *Jobs & Dollars: Big Returns from Coastal Habitat Restoration*, Restore America's Estuaries (September 13, 2011), (on file with LSGGLPP). *New Report: Coastal Habitat Restoration Generates American Jobs* (September 13, 2011), (on file with LSGGLPP).

### **The FY12 Agriculture, Rural Development and FDA bill**

Senator Mary Landrieu secured 1.26 billion dollars for Louisiana in the FY12 Agriculture, Rural Development and FDA bill passed by the Senate Appropriations Committee, which will be used to restore flood protection, research alternative energy, and strengthen imported seafood regulations. The bill appropriated 1.1 billion dollars to the Mississippi River and Tributaries Flood Control and Navigation Project; 19.2 million dollars for continued studies of the Bayou Sorrel Lock, the Calcasieu Lock, the Ecosystem Restoration program, and coastal restoration studies under the LA Coastal Area; and 136.8 million for operation and maintenance of existing Corps navigation and flood control projects.

Source: *Landrieu Secures \$1.26B for Louisiana Flood Protection* (September 7, 2011), (on file with LSGGLPP).

### **West Bay produces new land**

Mississippi River record flooding coupled with the Army Corps of Engineers recent placement

of artificial islands along West Bay on the Louisiana coast and a 2003 Mississippi river diversion project has produced four acres of new land along the coast. The recent development has fueled the debate on whether sedimentary deposits created by river diversions can actually rebuild Louisiana's shrinking coastline and whether the diversions actually do more good or more harm to the coastal area.

Source: *New Land in Eroding Louisiana Wetlands Provides Cause for Hope*, The Associated Press (September 1, 2011), (on file with LSGLPP).

### **The EPA refused request for new dead-zone regulations**

The Environmental Protection Agency rejected a request by environmentalist groups to bolster new regulations dealing with pollution in the Mississippi River, which contributes to an area of low oxygen in the Gulf of Mexico and ultimately a dead-zone.

Source: *EPA Rejects Gulf of Mexico Dead-zone Petition from Environmentalists*, The Associated Press (August 4, 2011), (on file with LSGLPP).

### **Gulf coastal region valuation report**

A new report from NOAA, *The Gulf of Mexico at a Glance: A Second Glance*, provides vital statistics for future policy makers and coastal managers regarding the economic and ecological value of the Gulf coastal region. Nineteen topics are included, such as coastal population change, the Gulf coast's national economic impact, the extent of land-based and marine protected areas in the region, and Gulf coast vulnerability to sea level rise. The report is available at <http://stateofthecoast.noaa.gov/gulfreport.html>.

Source: *Report Highlights Economic, Ecological Value of the Gulf Coastal Region* (August 3, 2011), (on file with LSGLPP).

### **Reallocation of unused funds from the Coastal Impact Assistance Program**

Bioengineered oyster reefs tops a 60 million dollar project list Governor Bobby Jindal seeks to implement through unused money from the federal Coastal Impact Assistance Program. The reallocation of the 60 million must be approved by the Department of Interior's Bureau of Ocean Energy Management, Regulation, and Enforcement. If approved, the money would also be used for shoreline protection, reintroduction of Mississippi River water into Bayou Lafourche, creation of a Mississippi River Delta Management Strategic Planning program, acquisition of land rights for the Coastal Forest Conservation Initiative, implementation of water control structures on the Falgout Canal, and construction of a long distance pipeline for sediment dredging to be pumped into marshland.

Source: Mark Schleifstein, *Bioengineered Oyster Reefs Top \$60 Million in Coastal Projects*



*Announced by Gov. Bobby Jindal, The Times-Picayune (July 21, 2011), (on file with LSGLPP).*