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Louisiana Senate Bill 1, Regular Session Groundwater Stewardship and Conservation Act

Senator Cain and Representative Damico are sponsoring new legislation, which would create new statewide policy "...to protect, conserve, and allow for replenishment of fresh water aquifers in the state..." (SRS 01-122 p.2, lines10-11). Senate Bill 1 (SB1) addresses ground water issues, which in Louisiana, were never before considered relevant in the overall management of our states natural resources. However, recent concerns over water use in Louisiana have become a hotly debated topic and Governor Foster has created a Water Policy Advisory Task Force to look at water policies within the state. At the recent Louisiana Water Summit, Water Policy Chairperson Karen Gautreaux announced that the long term recommendation of the Task Force is to develop a comprehensive state water policy and management plan.

The main focus of SB1 is to create a clear public policy for groundwater conservation of Louisiana's fresh water aquifers. The bill establishes priorities for water use around which the larger groundwater plan is developed. Personal consumption, drinking water is listed as the state's top priority and this is followed by water used for agricultural and food production. Listed as the third priority is water consumption for industrial purposes.

The Louisiana Groundwater Stewardship and Conservation Board (Board) is the central groundwater conservation mechanism created in this bill. The Board will be within the Governor's Office and consist of nine board members, all of which are appointed by specified government, educational, industry and conservation agencies and organizations. The purpose is to maintain a diverse representation of state's water users on the Board. Appointments will be approved by the senate and will serve no more than two consecutive four-year terms.

The Board is given broad powers to develop rules and regulations to guide groundwater conservation and stewardship, well spacing and permitting. All groundwater wells considered by the Board will be classified as domestic, agriculture or industrial use. The bill excludes a number of wells from the Board's review: all currently registered wells, all household wells, all wells operated as part of a public water system, and wells without the potential to withdrawal more than 1,000,000 gallons of water annually or wells with a yearly average withdrawal of less than 1,000,000 gallons of water. Permitting of new wells will be one of the main focuses of the Board. SB 1 states that only beneficial uses of groundwater will be permitted. Groundwater permits are identified as a "real right which attaches to and runs with the property on which the well is drilled." (SRS 01-122, p.14, lines12-13) All permit applications are filed with the Board and a public hearing is to be scheduled within 60 days of application. SB1 identifies spacing and location in reference to existing wells, as well as impacts on aquifer depletion as permitting considerations for the Board. The Board will be responsible for writing a fact summary report of each application, which will be available to the public, before any permit decision is made. Permits will either be granted, denied or granted with conditions. A permit will transfer to a new landowner, however, a permit may not be sold separately from the land on which a well is drilled. The Louisiana Geological Survey will be responsible for monitoring and collecting data from the permitting wells.

When provisions in the ground water

Also Inside:

permits are not followed civil penalties,as well as permit cancellations are possible options. SB1 states that permits may be cancelled if well water is being used for purposes other than those identified in the permit, extraction is greater than that listed in the permit, usage amounts are not reported for 2 consecutive years or the well is not used for beneficial purposes within a reasonable time period.

Tranfers or sales of ground water are also under the purview of the Board. SB1 prohibits permitted wells, and permit exempt wells from selling or transferring ground water to others. Tranfers of water outside the parish will only be allowed if approved by the Board. These prohibitions do not apply to bottled water businesses or public water systems.

While the majority of SB1 addresses management of ground water and establishes a groundwater well permitting system the bill does include provisions for conservation. Incentives, such as tax credits or rebates to industrial and agricultural users are suggested as possible mechanisms to drive water conservation. In order to take advantage of such incentive entities would need to show a 20% reduction in water use from the previous year's use through the utilization of an alternative energy or water source(s).

Current Groundwater Laws

Louisiana's current groundwater laws do not offer a comprehensive approach to managing our states water resources. Our neighboring states have developed more sophisticated state planning mechanisms in response to their own waters needs. In the long term "not managing" Louisiana's water could be more difficult on the state's current users than the management and conservation ideas that are emerging. In Louisiana, groundwater ownership is determined by who owns the land above the water AND has reduced it to possession. Civil code article 490 states that: "Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it. The owner may make works on, above, or below the land as he pleases, and draw all advantages that accure from them, unless he is restrained by law or by rights or others." Louisiana's Second Circuit Court of Appeal in Adams v. Grisby, 152 So.2d 619 (La. App. 2d Cir., 1963), *writ denied*, 153 So.2d 880, compares groundwater to fugitive substances such as oil and gas and by analogy uses concepts familiar to established mineral law rather than to surface water laws to solve a usage dispute between neighbors. The plaintiff in this case was suing for damages to their well's production capabilities due to the defendants deeper drilling on neighboring lands. The court refused to use the civil code articles 660 and 661 dealing with surface waters stating that "subterranean waters, by analogy, must be classified with oil and gas as fugitive substances." (152 So.2d 619,620) By following this legal analysis Louisiana's ground water policy has developed a theory similar the English "Absolute Ownership Rule," which grants a landowner unlimited rights to exploit waters found under their land. The court determined that the plaintiff would only have a right of action in situations involving intentional or negligent infliction of damages by the defendant and that pumping could not be stopped absent of these findings.

This theory leaves important questions unanswered: who owns or has rights to water before it is captured?, does the state have a right to regulate the use or initial capture of groundwater? Looking to the Louisiana Constitution Art. 9, §1 it is stated that " the natural resources of the state, including air and water and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy." This broad statement of the state's responsibility for the natural resources of the state provides a basis for the development of state regulation of water consumption for the welfare of the people. Furthermore, current state law does regulate ground water use in specific areas. For example, the Capital Area Groundwater Conservation Commission regulates the spacing of wells and the volume of extraction in a five-parish area including East and West Baton Rouge.

Louisiana's current water management leaves the state's natural resources open to misuse and overconsumption. SB1 will be the first attempt to fashion a statewide conservation and stewardship program for the state water resources. While it is too early to predict the sucess of this legislation and the changes that will occur along the way it is clear that Louisiana's groundwater policy will Change. SB 1 is a step in the right direction if it raises consciousness about the importance of Louisiana's water resources.

Assessment of Natural Resource Damages in Louisiana Oil Spill Situations

When unauthorized spills of oil occur, assessment of natural resource damages requires the cooperation of a number of state and federal agencies, as well as the responsible party. As directed by statutory law, Louisiana has established a natural resource damage assessment process to guide state response activities, ensure thorough damage assessment and protect natural resources. The regulations are published in the Louisiana Administrative Code, Title 43, Part XXIX, Sections 101-135.

Intent and Applicability of NRDA Regulations:
Louisiana's natural resource damage assessment regulations establish the procedures and methods for conducting assessments of unauthorized discharges of oil and their affects on natural resources. The regulations define natural resources as "all land, fish, shellfish, fowl, wildlife, biota, vegetation, air, water, groundwater supplies, and other similar resources owned, managed, held in trust, regulated, or otherwise controlled by the State of Louisiana." (LAC43:XXIX.109) Louisiana's regulations are to guide the state's claims for natural resource damage and will not limit in any way the claims that may be made by the federal government. The state may proceed under the state regulation or may choose to proceed under the federal natural resource damage assessment regulations (15 CFR 990.10 *et seq*.) or may proceed under a combination of both. The administrative record should reflect the process chosen by the Coordinator.

Coordination of Response Efforts:
Louisiana's Oil Spill Prevention and Response Act (LOSPRA) establishes the Oil Spill Coordinator's Office within the Governor's Office and creates the position of Oil Spill Coordinator as the state's lead administrator on oil spill matters. (La. R.S. 30:2451 *et seq*.) LOSPRA also designates the state natural resource trustees as the Department of Environmental Quality, Department of Natural Resources and Department of Wildlife and Fisheries. During an oil spill event a unified incident command system will direct the response efforts of the state trustees. Coordination with the federal trustees is also mandated. All responses will be carried out in accordance with the National Contingency Plan, Area Contingency Plans, Regional Contingency Plans and the State Oil Spill Contingency Plan. The lead administrative agency will be responsible for directing group communication, documentation and recording activities and scheduling.

Participation of the responsible party:
Responsible parties will be invited, in writing, to participate in the assessment process. If the responsible party agrees to the participation then they will enter into a written agreement with the state trustees, which sets any conditions and stipulations to participation. This participation can be terminated if the party's activities are inconsistent with the state's assessment procedures or if any conditions or stipulations are not met. If after attempted dispute resolution no agreement is reached the administrative record will
reflect the reasons for the termination. Participation may continue at a later point if resolution is reached.

Initial Response/Field Investigation:
Field investigation of the spill will begin within 24 hours of granting assess to the state trustees. Established investigation methods and protocols will be followed and the administrative record will note the processes followed. Trustees will evaluate the site and make determinations as to the extent of injury to the resources and any loss of services that had been provided by the resources prior to the spill. Within 60 days of the field assessment the coordinator and trustees will determine if there is a need for a NRDA to be conducted. If a trustee has reason to believe that the true nature of the spill's affects have not yet revealed themselves then the trustee may petition the coordinator for an extended investigation period. The Coordinator will present the responsible party with a written Notice of Intent (NOI) to Conduct Restoration Planning at least 10 days prior to beginning any assessment activities. The NOI will include; a summary of the field investigations, a description of the oil spill event and an evaluation of the effects of the response activities.

NRDA Assessment:
The regulations establish three types of assessments available for evaluation of natural resources damage; comprehensive, expedited and negotiated. A comprehensive assessment will require a thorough evaluation of the affected sited, including sampling and monitoring. An expedited assessment will be used when limited evidence of mortality is observed and the restoration plan can be implemented within 12 months of the response. Additionally expedited assessment may be used when the discharge is less than 1,000 gallons or the state trustees determine that it is the most cost-effective and technically feasible option. Lastly, a negotiated assessment is defined as any assessment method agreed to by the state trustees and the responsible party. Cost-effectiveness will dictate

the assessment type when more than one type of assessment would be appropriate. Assessments will be completed within 20 months from the initial written notification that field assessment/response is complete. If more time is needed than the trustees may petition the coordinator for additional assessment time.

Restoration Plans:
The outcome of the NRDA will be the development of a restoration plan for the damaged resources. This plan may be any combination of restoration, replacement, rehabilitation, natural recovery and/or acquisition of equivalent natural resources that the state trustees deem acceptable to return the area to pre-spill conditions. The regulations specify a number of elements that should be found in every restoration plan: analysis of alternative actions, cost-effective and technically feasible solutions, allowances for corrective actions, project monitoring requirements and measurable goals to ensure project completion. Plans must be reviewed at a public hearing and if requested public comments may be considered as well. When the spill occurs in an area that has an established regional restoration plan, if appropriate, the state trustees may pursue one of the projects in the regional plan as the natural resource restoration plan for the spill.

Administrative Record
The lead agency will be responsible for initiating and maintaining an administrative record on the NRDA process beginning with the NOI to conduct restoration planning. The purpose of the administrative record is to document the state's decisions throughout the NRDA process. (see the Louisiana Public Records Law La. R.S. 44:1 *et seq*.) The regulations specifically mandate a list of documents to be included in the record, as well as prohibit the inclusion of others. The following documentation must be kept in the record:

1. selection of methods and protocols for assessment;

2. scientific, technical and economic information used in decision-making;

3. NOI to conduct restoration planning;

4. field investigation report and pre-assessment information;

5. assessment and restoration plan;

6. all communication with responsible party and

7. public comments and trustee responses.

Recovery of Damages
The coordinator shall present the responsible party with a written request for damages upon completion of the restoration plan. The coordinator may request that the party pay for assessment, as well as implement the restoration plan under supervision of the trustees or pay for the assessment, as well as forward the trustees the sum for implementation of the plan. The regulations specify what costs state trustee may recover from the responsible party. La R.S. 30:2479 offers some parties limits on their natural resource damage liability and therefore recovery will be adjusted accordingly. If the state trustees are unable to collect reimbursement from the responsible party then the Oil Spill Contingency Fund can be tapped for costs incurred in response and assessment of an unauthorized discharge of oil. The state agencies must submit requests of the fund directly to the coordinator accompanied with proof of costs. If the state agencies are reimbursed through the state fund the coordinator will pursue the responsible party, federal fund or any other entities that may be responsible in order to replace the expenditure of funds.

Settlements/Mediation
A negotiated settlement between the coordinator and the responsible party will release the party from any further **state** liability in conjunction with the unauthorized discharge of oil. These types of settlements are only allowed after restoration payment or certification that the restoration plan is complete. Public review of all draft agreements shall be required.

All disputed natural resources damage assessments are subject to mediation before access to any court may be granted. The coordinator has 10 days from notice of the disagreement to refer the parties to mediation. The regulations establish mediator requirements, as each party is entitled to their own mediator. Mediators must be neutral, third parties and are required to submit disclosure statements to all parties involved. The parties involved are to agree to a mediation period not to exceed 135 days from the NRDA claim nor to be less than one full business day.

Public Participation
The regulations direct the coordinator to give public notice in a number of state and local publication upon issuance of a NOI to conduct restoration planning. Once a NRDA and restoration plan have been issued the coordinator will provide opportunity for a public hearing and comment period. The state shall not enter into a settlement until the public has been given opportunity to comment. Lastly, if a regional restoration project is utilized as a restoration plan the public may request and receive a public hearing on the proposed plan.

NRDA MOA
In order to build the type of state

agency coordination needed to effectively implement the NRDA regulations Louisiana's state trustee have signed an MOA that further details the interaction among the agencies after an oil spill event. The provisions of the MOA are reviewed below.

The Memorandum of Agreement among the Louisiana Oil Spill Coordinators office, the Department of Wildlife and Fisheries, the Department of Environmental Quality, and the Department of Natural Resources has as its primary goal to promote their coordination and cooperation in responding to an oil spill, effectively protecting natural resources and services, and planning and implementing a restoration plan.

State Trustees assess damages for injury to, destruction, loss or loss of use of natural resources resulting from an oil spill. The goal of natural resource damage assessment and restoration is no net loss, and State Trustees will consider both primary and compensatory restoration actions to work toward that goal. They may perform preliminary assessments, emergency restoration, field investigations and negotiated administrative or judicial agreements, among other things.

The lead administrative trustee appointed by the Oil Spill Coordinator, is responsible for maintaining the administrative record, monitoring the assessment process and scheduling and preparing agendas for the meetings of the Technical Committee.

The MOA provides for each state trustee and the oil spill coordinator to designate a member to serve on the Technical Committee, which is responsible for implementing the MOA. The activities of the Committee may include the following: conduct and/or oversee scientific or technical studies, seek compensation for damages to natural resources, participate in negotiations with the responsible party (RP), manage any money paid on behalf of the RP, oversee the development, implementation and monitoring of a restoration plan, arrange contacts with professional consultants to assess damages, interact with the RP in a manner that promotes coordinated communication, recommend to the Oil Spill Coordinator that participation of an uncooperative RP be limited or terminated, and require an RP to pay the cost of publishing a Notice of Intent to Conduct Restoration Planning.

The Technical Committee shall strive for unanimous consent for all its actions. In the event this is not attained, the Oil Spill Coordinator has the authority to make final decisions, provided the Coordinator does the following: give written notice to the state trustees of the dispute and solicit comments, receive written responses from each of the trustees and respond to them in writing, explaining the final decision that has been made and outlining the reasons for that decision.

The state trustees agree that all damages, excluding assessment costs, will be used exclusively for restoration activities, with funds deposited in a dedicated amount within the Louisiana Oil Spill Contingency Fund. Trustees also agree to provide public assess to documents, pursuant to the Louisiana Public Records Act, La.R.S. 44:1, *et seq.*, and to disseminate all relevant documents to the other state trustees at the time those documents are created. They also agree not to disclose any internal communications or deliberations to the RP, nor to enter into the administrative record any written or oral communications unless expressly agreed by all the state trustees.

Unanimous consent is required to modify the MOA, but any state trustee may withdraw at any time upon providing 30 days written notice. In this event each trustee must cooperate in preparing an accounting for and status report of any damage assessments in progress.

Research Finds Marine Reserves Instrumental in Tackling Depleted Oceans Worldwide

Two complementary reports dealing with collapsing ocean fisheries were recently released, one by the United Nations Food and Agriculture Organization (FAO) and another by an international team of 150 scientists established in 1997 at the National Centre for Ecological Analysis and Synthesis (NCEAS).

The FAO State of World Fisheries and Aquaculture 2000 report compiles research on a wide variety of fishery-related topics including the impacts of fisheries on marine ecosystems and genetically modified organisms and fisheries, to name just a few. The report also gives the state of fishery stocks by region.

The FAO report describes marine resources in what it calls a "glass is half full and half empty" outlook, noting that, "From the 'state of stocks' angle, it is comforting to see that 72 percent of the world's fishery resources can still produce MSYs [maximum sustainable yields] if required. From the management point of view, however, it should be noted that 75 percent of resources require stringent management of fishing capacity. . . For 28 percent of them, there is no doubt that forceful action is required for rebuilding." One of the management techniques the FAO report mentions is the establishment of marine reserves.

According to the NCEAS report, "Marine Reserves (MRVs) are areas of the sea completely protected from all extractive activities. Within a reserve, all biological resources are protected through prohibitions on fishing and the removal or disturbances of any living or non-living marine resource, except as necessary for monitoring or research to evaluate reserve effectiveness."

Marine Reserves are part of a larger category of Marine Protected Areas (MPAs). The NCEAS report describes MPAs as, "areas designated to enhance conservation of marine resources. The actual level of protection within MPAs varies considerably; most allow some extractive activities such as fishing, while prohibiting others such as drilling for oil or gas." Thus activities in Marine Reserves are far more restrictive, providing for the highest level of protection.

On May 26, 2000, President Clinton issued Executive Order 13158 to, "help protect the significant natural and cultural resources within the marine environment for the benefit of present and future generations by strengthening and expanding the Nation's system of marine protected areas (MPAs)." The Order called for coordination between the Federal and state governments to encourage the use of "(1) science-based identification and prioritization of natural and cultural resources for additional protection ; (2) integrated assessments of ecological linkages among MPAs, including ecological reserves in which consumptive uses of resources are prohibited . . .(5) practical, science-based criteria and protocols for monitoring and evaluating the effectiveness of MPAs."

However a recent letter to President Bush by the Chair of Resources Committee, James Hanson expresses his concerns that, "no goals or purposes of the MPA for a system of MPA's have been identified; and no research has been identified to determine whether the goals of MPAs are being achieved . . . MPAs must be done in a scientifically defensible manner."

The international team of NCEAS scientists seems to have addressed this challenge at a meeting of the American Association for the Advancement of Science (AAAS) in San Francisco, CA on February 15-20, 2001. The team issued a Scientific Consensus Statement, "in response to repeated requests by many fishermen, marine resource managers, governmental officials, conservation activists, interested citizens and others for a succinct, non-technical but scientifically accurate summary of the current scientific knowledge about marine reserves." The team found that "marine reserves are a highly effective but under-appreciated and under-utilized tool," that can help ameliorate the exploitation and collapse of many ocean fisheries.

The scientists found five ecological effects occurring within the boundaries of marine reserves. They are as follows, "reserves result in long-lasting and often rapid increases in the abundance, diversity and productivity of marine organisms; these changes are due to decreased mortality, decreased habitat destruction and to indirect ecosystem effects; reserves reduce the probability of extinction of marine species resident within them; increased reserve size results in increased benefits, but even small reserves have positive effects; full protection (which usually requires adequate enforcement and public involvement) is critical to achieve this full range of benefits."

In addition, scientists found that areas outside the reserve boundary benefit as well, adding that, "the size and abundance of exploited species increase in areas adjacent to reserves. . . [and] There is increasing evidence that reserves replenish population regionally via larval export." Further, Networks of MRVs spread over large distances offer the most protection as it "buffers against the vagaries of environmental variability."

The team concludes that "reserves conserve both fisheries and biodiversity. . . reserves must be established and operated in the context of other management tools . . .[and] existing scientific information justifies the immediate application of fully protected marine reserves as a central management tool."

For more information on the Federal MPA program, or to read Clinton's Executive Order visit: www.mpa.gov. To locate the FAO and NCEAS reports visit: http://www.fao.org/fi/default.asp and http://www.nceas.ucsb.edu/, respectively.

Supreme Court Decision on CAA Standards

Supreme Court hands down decision on "sister cases," *EPA v. American Trucking Association* (No.99-1257) and *American Trucking Association v. EPA* (No.99-1426)

The U.S. Supreme Court handed down the much-anticipated decision on these cases in late February 2001. The source of the dispute stemmed from EPA's 1997 promulgation of new CAA standards concerning ozone and particulate matter emissions. The cases presented two distinct issues for the Court to examine: 1) should economic considerations be part of the standards setting process and 2) had EPA exceeded the authority granted to it by Congress when setting the standards. On the delegation issue the Court held that there had not been a violation of the constitution and Congress' direction to set air quality standards that 'protect the public health' was a valid delegation of authority. The Court also confirmed that cost considerations were not to be part of the standard setting process and specifically pointed to Section 109(b) of the CAA for this holding. However, the Court did instruct EPA to revise the implementation of the ozone standards, saying that it was up to EPA to fashion a reasonable interpretation of the standards.

Announcements

CARA

On February 14, 2001, Don Young (R-Alaska) introduced H.R. 701 or the Conservation and Reinvestment Act (CARA). Last year CARA passed the House and the Senate Energy and Natural Resources Committee but did not make it to the Senate floor, instead some of the proposed CARA programs were funded through the Interior and other related agencies' appropriations bills. In current form this bill would direct $3.1 billion from the outer continental shelf oil and gas receipts to a number of conservation programs. The Land and Water Conservation Fund would be fully funded with an allocation of $900 million. This funding would be spilt between federal land conservation purchases and matching funds conservation grants to states. Shoreline restoration in coastal states would also receive $ 1 billion. Monies would be allocated to wildlife conservation and restoration ($350 million), the Urban Park and Recreation Recovery program ($125 million), the Historic Preservation Fund ($150 million) and endangered and threatened species recovery programs ($50 million).

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