



Coastal Restoration Efforts Prompt Legislative Changes in Oyster Leasing

by Melissa Watson

The effects of coastal erosion have been devastating to Louisiana's landscape. One of those effects was the change in salinity of water bodies due to saltwater intrusion. Levying the Mississippi and other rivers prevented the flow of freshwater and sediment into the surrounding marshes. As a result, saltwater from the Gulf of Mexico moved steadily northward allowing marine and estuarine species to become predominant. Those previously freshwater areas became suitable for oyster farming and the state leased those areas to private individuals for oyster production.

In recent years there has been a strong effort to reverse the effects of coastal erosion. Many restoration strategies have been implemented to combat coastal erosion and its effects. One technique is to reintroduce fresh water and sediment from the Mississippi and other rivers into the marshes, imitating the natural overflow of the rivers. Diversion projects have been successful in reducing coastal erosion, however, some areas that had been leased for oyster farming are once again too fresh to support oyster production. The Caernarvon Freshwater Diversion Project was implemented in 1991 in the Breton Sound area near the St. Bernard and Plaquemines Parish line. While one of the project goals was to increase oyster production on the southern and eastern shores of the sound, a class action lawsuit brought by area oyster farmers in 1994 alleged that a total

of 35,000 acres of oyster beds in Breton Sound were destroyed by Caernarvon. In December 2001, a Plaquemines Parish jury awarded the five representative plaintiffs \$21, 345 per acre (\$48 million total) in damages, which could mean a total award of around \$700 million for the 130 plaintiffs.

Caernarvon was a learning experience for Department of Natural Resources. Thus, when the Davis Pond Freshwater Diversion Project near Luling, Louisiana in St. Charles Parish was developed, oyster relocation was a primary focus. In light of the Caernarvon experience and to facilitate future coastal restoration projects, the legislature has made adjustments to existing laws governing leasing of state lands for oyster farming, in addition to enacting new ones. This article highlights the major legislation concerning oyster leasing from 1997 through the 2001 Second Extraordinary Legislative Session.

In the 1997 Regular Legislative Session the legislature mandated that the Department of Natural Resources develop the Oyster Lease Relocation Program to mitigate the adverse consequences of coastal restoration efforts on oyster leaseholders.¹ This is the most significant change in oyster leasing due to coastal restoration. The new law set forth the Oyster Lease Relocation Program and the four options

that it provided leaseholders in the impact area of a coastal restoration project: exchange, relocation, retention, or purchase. It required an oyster leaseholder that felt his lease had been damaged by a coastal restoration project to seek relief through the oyster lease relocation relief program. The Act prohibited such a leaseholder from filing a claim or lawsuit for relief against the state unless all remedies under the program had been exhausted. The oyster lease relocation law directed the Department of Natural Resources and the Oyster Task Force to promulgate detailed regulations under the state Administrative Procedure Act to govern the Oyster Lease Relocation Program. It provided that with projects using federal funding, the oyster lease relocation statute would serve as the basis for a detailed set of rules, developed by the Department of Natural Resources and the Oyster Task Force, for the implementation of federal projects and relief for oyster producers adversely affected by those federal projects. The oyster lease relocation law also provided that for projects funded by the state or any other public or private entity other than the federal government, funding for the relocation would be contingent on the availability of funds appropriated by the legislature specifically for oyster relocation. In addition, it specified that no funds from the Louisiana Wildlife Conservation Fund could be used for the Oyster Lease Relocation Program.



The Department of Natural Resources promulgated a detailed set of regulations to govern the Oyster Lease Relocation Program in the December 1998 Louisiana Register.² In July 2000, the Department of Natural Resources developed a new set of regulations governing the Oyster Lease Relocation Program specifically for the Davis Pond Freshwater Diversion Program.³ The new set of regulations only governs leases located within the projected impact area of Davis Pond; however, where there is no conflict between the 1998 regulations and the 2000 regulations, the 1998 regulations are still applicable.

During the 1997 Regular Legislative Session, legislation was also passed which allows the Secretary of Wildlife and Fisheries to renew oyster leases that both expire on or after December 31, 1996, and have been officially designated as being located in the impact area of a coastal restoration project.⁴ The leases may be renewed for a period of at least one year up to a maximum of fourteen years. This is significant because prior to this change the lease terms were set at fifteen years with no options to grant shorter lease periods. In areas where the coastal restoration project is already in operation, the leaseholder may request a renewal only if the lease has the capacity to produce oysters. If the coastal restoration project is cancelled, the leases may be renewed for fifteen year terms. If the coastal restoration project is merely delayed, the leases may be extended without application or survey fees.

The legislature also passed amendments to provide that renewal leases will now be designated with the same number as the prior lease and will also indicate the year the lease was renewed.⁵

The law governing lease terms was further amended in the 2000 First Extraordinary Session. The 2000 amendment expanded the area in which leases could be renewed for terms ranging from one to fourteen years. The expanded area now includes the "projected impact area" in addition to the "impact area" of a coastal restoration project.⁶ The 2000 amendment also

states that leases will be renewed for fifteen year terms if the coastal restoration project is cancelled and the lease is not located in the projected impact area of any other coastal restoration projects. If the project is only delayed and the lease is not in any other projected impact area, the Department of Wildlife and Fisheries shall extend the lease, and the leaseholder will have the right to renew the lease for successive terms.

Application and survey fees only apply to renewals and not to extensions, however, rent is due on both extensions and renewals. The 2000 amendment further provides the following: 1) the lease must contain a clause stipulating that the leaseholder accepts all risks of operating a lease located within a projected impact area; 2) declares any leases not renewed or extended will revert back to the state. The state may then re-lease those areas, but the new lessee will not be able to participate in the Oyster Lease Relocation Program should funding become available and a relocation program is established for that restoration project; 3) if a lease has been extended or renewed and the leaseholder received no compensation from the State, and later Oyster Lease Relocation Program funding becomes available, the leaseholder may choose to participate in the program if he is eligible.

The 2000 amendment also addresses the situation where an oyster leaseholder wants to renew leases located in an "operational coastal restoration project zone."⁷ The Secretary of Wildlife and Fisheries may renew the leases expiring on or after December 31, 1996, or after for a period of one year. Those leases may then be renewed annually for a total of fifteen years, including the first term. In order to obtain the renewal, the leaseholder must stipulate that the lease has remained capable of producing oysters after the coastal restoration project has been in operation. The leaseholder must agree that the lease is subordinate to any coastal restoration project and that the leaseholder agrees to assume any risks of maintaining the

lease due to the fact it is in a coastal restoration impact area. The leaseholder must also agree to hold the federal government and its subparts harmless. Any lease that is not renewed or extended will revert back to the state and may be re-leased under the same conditions as with a lease located in the "projected impact area" of a coastal restoration project. The statute declares that if the original leaseholder renews or extends a lease within a coastal restoration impact area without compensation and later funds are available for the Oyster Lease Relocation Program, that leaseholder may participate in the program.

During the First Extraordinary Legislative Session of 2000, the legislature amended the oyster leasing statutes by requiring a "hold harmless" clause to be included in all oyster leases, extensions and renewals issued after July 1, 1995.⁸ This clause provides that the State of Louisiana, its political subdivisions, and its agents and employees were not to be held responsible for any losses or damages to rights arising under any oyster lease, renewal or extension as a result of authorized coastal restoration activities. This "hold harmless" clause specifically for oyster leases is a reiteration of and in addition to the more general "hold harmless" clause established by the legislature in 1995 which is included in all leases, permits or licenses issued to persons for any purpose on state lands or water bottoms, and applies to all damages caused by all coastal restoration efforts.⁹

The final 2000 amendment provides that if a leaseholder chooses to retain his lease as part of the Oyster Lease Relocation Program, he may retain it for the duration of the lease term.¹⁰ If so retained, the lease shall stipulate that it is subordinate to any coastal restoration project, contain the "hold harmless" clause, and declare that the leaseholder accepts all risks of operation. At the end of the lease term, the leaseholder may apply for renewal following the



applicable laws for the type of area in which the lease is located (either a projected impact area or in an operational coastal zone).

In 2001, the legislature enacted a statute requiring each oysterleaseholder to submit a form to the Department of Wildlife and Fisheries before March 31 of each year which contains the leaseholder name, harvest grid numbers, amount of marketable oysters removed, amount of seed oysters removed, amount of cultch material placed, and the amount of seed oysters placed and whether the seed oysters were from a private lease or state seed grounds.¹¹ The 2001 act also repealed a requirement that each leaseholder shall place one-tenth of the leased barren water bottoms under cultivation after the commencement of the lease, unless the water bottoms are closed because of health concerns.¹²

Another 2001 amendment requires that projected impact areas and proposed recommendations relative to oyster leases located in a projected impact area of a coastal restoration project must

be presented to the Oyster Task Force by the Department of Natural Resources by August 15 of each year.¹³ Final recommendations will be given to the Department of Wildlife and Fisheries and the Oyster Task Force by September 30 of each year. The Oyster Task Force may request a review of the Department of Natural Resources' recommendations by the House and Senate Committees and Natural Resources, if the request is made prior to October 5 and a copy is forwarded to the Department of Natural Resources. If a timely review request is made, the Committees must meet before October 30 to make a decision. If the Department of Natural Resources is required by the Committees to revise any recommendations, the revised final recommendations must be presented to the Department of Wildlife and Fisheries and the Oyster Task Force before November 5.

Endnotes

¹ Act No. 1314 of the 1997 Reg. Legis. Sess. enacted R.S. 56:432.1.

² See Louisiana Administrative Code (LAC) at 43:I. 850-859.

³ See LAC at 43; I. 875-895.

⁴ Act No. 305 of the 1997 Reg. Legis. Sess. enacted R.S. 56:428.1.

⁵ Act No. 434 of the 1997 Reg. Legis. Sess. amended R.S. 56:428(B).

⁶ Act No. 107 of the 2000 First Extra. Legis. Sess. amended R.S.56:428.1.

⁷ Act No. 107 of the 2000 First Extra. Legis. Sess. enacted R.S. 56:428.2.

⁸ Act No. 107 of the 2000 First Extra. Legis. Sess. enacted R.S. 56:427.1.

⁹ R.S. 49:214.5.

¹⁰ Act No. 107 of the 2000 First Extra. Legis. Sess. amended R.S. 56:L432.1(B)(3).

¹¹ Act No. 438 of the 2001 Reg. Legis. Sess. enacted R.S. 56:430.1.

¹² Act No. 438 of the 2001 Reg. Legis. Sess. repealed R.S. 56:430(A).

¹³ Act No. 439 of the 2001 Reg. Legis. Sess. amended R.S. 56:428.1.

What's In A Name?: The Legal Definition of "Marshlands" and the Implications for Wetlands in Louisiana

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Louisiana, generally, has had considerable success over the past few years with programs aimed at the protection and restoration of the Coastal Zone. However, it is apparent that a considerable portion of Louisiana's endangered environment is unprotected under the current law. The Louisiana wetlands have enjoyed much attention in recent years and the attitudes of governmental agencies and the public at large have changed from general apathy to a regard for these areas as state treasures. Unfortunately, there is no clear definition of wetlands in Louisiana law. This has led to substantial confusion in the delineation of wetland areas for conservation and taxing purposes.¹

Before an examination of the permutations of the definition of marshland in Louisiana is undertaken, one caveat should be borne

in mind: Whatever the definition of marshland ultimately turns out to be, it is significantly narrower than the currently accepted Environmental Protection Agency (EPA) and scientific definitions of wetlands that follow.

Wetlands, as defined by the EPA, are: "Those areas that are inundated or saturated by surface or groundwater at a frequency to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."²

The scientific definition of wetlands

typically incorporates the EPA definition and further expands the covered areas (which is likely the referred to in the EPA definition) as follows: "Beyond the usual swamps, marshes and bogs that come to mind when one mentions wetlands, areas which are governed by wetlands regulation also include woody areas which sustain wetlands vegetation, dry desert furrows, formerly marshy meadowlands, occasionally saturated lands, and arctic tundra."³

The current definitions in Louisiana do not approach the previous two definitions in scope. The Louisiana Constitution, Article VII, defers to a statutory definition of marshlands. This definition is found in La. R.S. 47:2302 (2001), and states, "[b]ona fide marsh



land is wet land other than bona fide agricultural, horticultural, or timber land.” This vague definition seems to suggest that any undeveloped, non-agricultural land that squashes when one steps on it is marshland. This definition, vague as it may be, appears, verbatim, in other important areas (e.g., the Louisiana Tax Commission (LTC) manual for tax assessors⁴).

In an attempt to clarify the definition in the Revised Statutes, Attorney General William Guste⁵ stated that there is no hard and fast legal rule defining marsh or swamp land. Each situation must be taken on a case by case basis and, even then, there is a large area of discretion. “[N]on-coastal freshwater marshes usually contain vegetation such as maiden cane, water hyacinth, pickerelweed, alligator weed and bulltongue. In addition, certain trees such as tupelo and pepperidge are known to grow only in fresh water swamps. Physically, the land generally is wet, soggy, and actually or partially inundated. Such land exists usually, if not predominantly, in low or depressed areas unfit for cultivation.”⁶

Attorney General Guste additionally suggests a method for determining if a particular tract of land to be assessed falls under the “marsh land” category: “1) Physical characteristics of the land show its swamp characters; 2) The inundation of the land, though it need not be permanent; 3) The unfitness of the land for cultivation.”⁷

The Attorney General’s interpretation of marshland as defined in the Revised Statutes is helpful and considerably expands what otherwise appears to be a narrow definition. Indeed, the Attorney General even tacitly acknowledges that marshlands may not always be wet in nature when he states that marshland “generally is wet, soggy, and actually or partially inundated” (italics mine). This seems to bring the current conception of a marshland in Louisiana into line with the wetlands definitions of the EPA and the scientific community stated above.

However, further on in his opinion, Attorney General Guste backs away from the progressive definition of marshlands when he outlines his test for whether or not a particular tract qualifies as marshland by saying that the “[p]hysical characteristics of the land show its swamp characters.”⁸

Where does this “swamp” term come from? There is no definition of a swamp in the Louisiana Statutes, the Civil Code, or the Constitution. The dictionary definition (a common place to find undefined words in the law) of a swamp is “a tract of low-lying ground in which water collects; a piece of wet spongy ground; a marsh or bog.”⁹ Now the definition is cyclical: Marsh is used to define swamp and swamp is used to define marsh. To further complicate the situation, other definitions of “marsh” in the Revised Statutes muddy the water even more. A marsh is defined in the Louisiana Administrative Code as “wetlands subject to frequent inundation in which the dominant vegetation consists of reeds, sedges, grasses, cattails, and other growth.”¹⁰ However, La. R.S. 49:214.3 (2001) reports that “[w]etlands generally include swamps, marshes, bogs, and similar areas.”¹¹ From this lexicographical quagmire, it seems only safe to conclude that, in Louisiana, some soggy land may fall under the marshland definition and some may not, all subject to the subjective opinion of the reader. What is abundantly obvious from all of this is that there is a desperate need for a clear, uniform set of guidelines for determining if land is marshland in Louisiana. Additionally, as previously suggested, the definition of marsh is likely too narrow to encompass all of the areas that need to be protected which fall under the definition of wetlands. The legislature of this State should consider not only clarifying the definition of marsh but also expanding it to bring it into line with the current scientific and legal definition of wetlands, a move which alone could probably assist in the protection of wetlands in Louisiana. Federal definitions, such as the EPA definition discussed above as well as definitions of wetlands from other state

jurisdictions may be of some guidance in this area. Borrowing partially from the EPA definition,¹² the Tennessee definition,¹³ and the current scientific definition,¹⁴ I suggest that the Louisiana Legislature adopt a definition of wetlands similar to the following. “Wetlands are defined as areas inundated or saturated by ground or surface water (hydric soils) with such a frequency as to support a prevalence of vegetation generally adapted for life in saturated soils. These areas include, but are not limited to: swamps, marshes, bogs, freshwater meadows, formerly marshy meadows, wooded swamps or forested wetlands, open fresh water except farm ponds, some rice cultivation areas (to be defined by statute), and occasionally saturated lands.

Endnotes

¹ See e.g., Seidemann, Ryan M. and Susman, Catherine D. (in press) *Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives*. *Journal of Environmental Law and Litigation*.

² 33 CFR 328.3(b) (1989).

³ Gaddie, Ronald K. and Regens, James L. (2000) *Regulating Wetlands Protection: Environmental Federalism and the States*, State University of New York Press, p. 18.

⁴ Louisiana Tax Commission (2000) *Real/Personal Property Rules and Regulations*, Little Rock: Heritage Press.

⁵ Guste, William (1990) Louisiana Attorney General Opinion Number 90-26.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Oxford English Dictionary (1989) Swamp, *Oxford English Dictionary* 22:345.

¹⁰ LAC 43:1.700, 2000 (italics mine).

¹¹ Italics mine.

¹² *Supra*, n.2.

¹³ Tenn. Code §11-14-401 (2001).

¹⁴ *Supra*, n.3.



Nonindigenous Species

The dramatic increase in global trade and travel in recent years has created a serious problem in local ecosystems: The introduction of nonindigenous species. Some of the most notable cases have included the foot-and-mouth disease that American farmers took great pains to keep off of their property and the zebra mussel invasion of power plants in the Great Lakes region (a problem that also affected Louisiana). However, this problem is not limited to the ranches of the Great Plains or the environs of the Great Lakes, nonindigenous species are invading Louisiana and the Gulf Coast region at an alarming rate. One example of this problem is the nutria invasion of South Louisiana which is causing destruction to the coastal wetlands in this state (Dunne, 2002). Another is the appearance of Australian jellyfish in Mobile Bay which poses a threat to indigenous species of shrimp and crab.

The only current legislation that deals specifically with nonindigenous species protection are ballast water regulations (33 CFR 151). The task of combating the influx of these species is becoming overwhelming, as the numerous federal agencies charged with policing the country's ports are only able to inspect about two percent of the incoming cargo vessels for invaders per year (Swanson, 2001). The bulk of the enforcement and education on nonindigenous species falls to state and local agencies.

Until recently, the majority of the efforts in Louisiana at combating indigenous species invasions has been educational in nature. Some of the education efforts to date have been successful. Substantial damage to Louisiana power plants due to zebra mussels, which clog intake sources, was averted due to educational counseling. There have been some efforts to control single species in practice, such as the eradication program by the Jefferson Parish Sheriff's Office of nutria and spraying to control hyacinth, salvinia, and hydrilla in certain parts of the state. All of these efforts have met with low to moderate levels of success (see e.g., Bienvenu 2001). Additionally, the high cost of several of these measures further

complicates the process of controlling the nonindigenous species.

No single agency in Louisiana has complete responsibility for controlling and monitoring nonindigenous species. One example of the jurisdictional problems inherent in the current methods of dealing with nonindigenous species in Louisiana is the salvinia eradication effort. The Louisiana Department of Wildlife and Fisheries (LDWF) is trying to organize spraying efforts to control salvinia in Cameron Parish. These activities have to comply with the Clean Water Act and the Clean Air Act, as well as State regulations administered by the Environmental Protection Agency (EPA), the Army Corps of Engineers (Corps), and the Louisiana Department of Environmental Quality (LDEQ). While such a project falls within the ambit of LDWF due to their mission to protect the State's wildlife (which sometimes requires killing invasive plants), the federal and state agriculture agencies also have jurisdiction in this matter. To that end, researchers from the LSU Agriculture Center have gotten approval from the United States Department of Agriculture (USDA) to control the same salvinia in Cameron Parish by introducing a nonindigenous weevil species. All of these efforts are undertaken with concern for the surrounding environment, a situation that further complicates the efforts. The LDWF approach is efficient, but the chemicals that can be used to control the salvinia may have some effect on the surrounding wildlife. The biological approach may also have detrimental effects if the weevils cannot be contained.

In an effort to eliminate problems of multiple agency redundancy and conflicts the Louisiana Sea Grant Program and the Louisiana Department of Wildlife and Fisheries have been coordinating to centralize the response to the nonindigenous species problem. Governor Foster has designated LDWF as the lead agency to develop a management plan. Representatives from these two groups have asked Governor Foster to authorize the establishment of a task force to devise management practices for the nonindigenous species problem in Louisiana. The task force, which would incorporate all groups with

an interest in the management of nonindigenous species, would be built on an information-sharing network of government agencies, corporations, and private landowners. Such a project is a monumental task, involving almost every state agency with any interest in natural resources and several federal agencies as well as the water garden, aquarium, aquaculture, chemical, and power industries. As part of the task force, a rapid response group is planned to be able to deal with specific invasions on short notice (personal communication, Marilyn Barrett O'Leary, 2002).

The importance of such centralized regulatory information-sharing management is underscored by the reality of a current invasive species in Louisiana. Current efforts to stem the salvinia problem in Cameron Parish have been slow. The possibility of the formation of such a task force in Louisiana is extremely important to the preservation of the fragile balance of our environment as well as to maintaining the economic integrity of our agriculture. For this reason, the Sea Grant Legal Program will continue to track the legal and environmental ramifications of the Sea Grant's and the Department of Wildlife and Fisheries' efforts in the development of the task force as well as their other efforts to control invasive species.

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The Defense of Lake Tahoe

Over thirty years ago, in an effort to stem the development-related environmental degradation of Lake Tahoe, the California, Nevada, and United States governments began investigating land use alternatives around the rim of the lake. The Tahoe Regional Planning Compact (TRPC) was approved in 1969. The Tahoe Regional Planning Agency (TRPA) immediately began to categorize land according to its level of endangerment and developed a plan that outlined the amount of artificial disturbance sustainable by each category. The TRPC was amended in 1980 amid suspicions that the original plans were not adequately protecting the Lake. This amendment directed the TRPA to review all planned development projects in the region in order to determine their environmental consequences. During these reviews, restrictions were placed on the development. In order to handle the volume of review work, the TRPA issued a temporary moratorium, effective in mid-1981, on development in the most sensitive categories. This moratorium was to expire on the adoption by the TRPA of a set of amendments to the TRPC that would ensure the continued environmental protection of the region. In 1982, the TRPA issued an extension until late 1983 to their original moratorium. The moratorium was again extended until April of 1984, when the TRPA released its new development guidelines. Over the next two days, the State of California and the League to Save Lake Tahoe filed suit against the TRPA in an attempt to stop development permits from being issued. An injunction was issued and remained in force until 1987 when the TRPA issued a revised regulatory plan. After the adoption of the 1984 plan by the TRPA, property owners in Nevada and California filed suit in their respective states on several grounds (seeking declaratory and injunctive relief under the Takings, Due Process, Equal Protection, and Contracts Clauses of the United States Constitution). Various claims were dismissed or settled over the intervening fifteen years. The United States Supreme Court considered the only remaining claim, the §1983 civil

rights claim in January of 2002.

Although the plaintiffs were successful at the district court level on their §1983 claim, the United States Court of Appeals for the Ninth Circuit found their claims to lack merit in a decision handed down in June of 2000. The plaintiffs' §1983 claim alleges that the moratoria violated their Fifth Amendment rights by taking their land without compensation. The plaintiffs' claims are based on a theory that the four moratoria and extensions constituted a regulatory taking of their fee interest in the property. The plaintiffs have conceded that there was no permanent taking of their land, as the regulations are now in place and they are able to use the land. What they are actually looking for is reimbursement for the lost value of the use of their land during the time that the moratoria were in effect. Courts have, in the past, recognized a temporary taking. However, in this case, several courts have already ruled that they were not totally restricted from using their land during the period the moratoria were in effect. The plaintiffs are claiming, in the alternative, that they have a severable right in the taking of their fee interests in the property, a contingency that the Ninth Circuit rejects. In essence, the rights of a property owner can be likened to a bundle of sticks. In their argument, the plaintiffs want to dissect the bundle and address the affect of the regulation on individual components of their property interest, an activity that the court will not allow. A long line of Supreme Court cases has rejected attempts to sever property interests in an effort to establish a taking on one aspect and not another. The severance here refers not to a physical severance which is compensatable, but rather to a conceptual (in this case, temporal) severance. Additionally, due to the temporary nature of the moratoria, the court refused to grant the plaintiffs relief for the deprivation of all economic value of the land. Although the case represents numerous claims for takings under the various moratoria and extensions, the Ninth Circuit denied

relief to the plaintiffs on all of the claims, primarily due to the flaws in their takings argument and also due to the expiration of some of their claims.

In defense of their refusal to allow the severing of conceptual components of property, the Ninth Circuit commented, "[i]n reaching this conclusion, we preserve the ability of local governments to do what they have done for many years – to engage in orderly, reasonable land-use planning through a considered and deliberative process. To do otherwise would turn the Takings Clause into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest." 216 F.3d at 782. Additionally, although no decision has been handed down, as yet, by the United States Supreme Court, it is reasonable to presume, considering their prior case law, that they will affirm the Ninth Circuit decision. Indeed, in the seminal regulatory takings case, *Penn Central Transportation Company v. City of New York*, the Supreme Court stated that, "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has affected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole*." 438 U.S. at 117-118 (italics in original). Sea Grant Legal Program will continue to track this case due to its importance for the continued sustainability of environmental protection programs with an update expected in the next few months.



Bush Administration Weakens Wetland Protections

On January 14, 2002, the White House announced that wetland protections promulgated by the Clinton administration would be eased. Although the Corps of Engineers (Corps) stated that the roll back of increased regulation would only streamline the permitting process for development, the reality is that important protections are being done away with. The changes will allow for the filling of certain intermittent streams. One change that has been the subject of much confusion regards the treatment of wetland areas destroyed by developers. Currently, Corps regulations require a one-to-one

replacement of destroyed wetlands. Many environmentalists fear that under the Bush plan, wetland replacement would not be required as long as there is no net loss of wetlands in individual Corps districts. The Corps states that no repeal of earlier one-to-one requirements has happened as a result of the new regulations. Additionally, the new plans reduce restrictions on floodplain development and surface mining operations. The Corps also contends that there is no relaxing of floodplain protection with the new regulations. Several environmental groups, including

the National Wildlife Federation and the Sierra Club, have voiced their concern that these changes will have substantial deleterious effects on wetland areas across the nation. More telling of the possible danger to wetlands is the support of the environmentalists' claims by other governmental agencies, such as the Fish and Wildlife Service and the Environmental Protection Agency. To the credit of the Bush administration, the changes announced on January 14 were substantially less severe than those proposed by the Corps in a draft report in August 2001.

Federal Legislation Update

American Wetland Restoration Act (H.R. 1474)

This bill proposes to amend Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) to authorize the Secretary of the Army to issue federal wetlands mitigation bank charters. These banks can be either public or private and must meet the following requirements: 1) Must show assurances of success; 2) Must have an adequate water source; 3) Must have legal control (e.g., title, license, etc.) over the land; 4) Must have adequate finances to support the venture; 5) The design must be adequate to assure continued viability; 6) Must have adequate method of selling and withdrawing credits. Periodic reports from the bank operators are also required.

Coastal Community Conservation Act of 2001 (CCCA) (H.R. 897)

This bill is intended to reauthorize the Coastal Zone Management Act. The bill

would, if passed, create a new grant program, the National Coastal Reserve System, to assist in conserving coastal resources and minimizing coastal development. The CCCA also expands the availability of state grant funds for restoring coastal areas, permitting aquaculture, and dealing with nonpoint pollution problems. The bill would also require states to develop outcome indicators for the purposes of monitoring the success of coastal projects.

Coastal Zone Enhancement Reauthorization of 2001 (CZER) (S. 328)

The CZER proposes several amendments to the Coastal Zone Management Act (CZMA) of 1972. One proposed amendment would allow the Secretary of the EPA to issue coastal zone management grants to states without approved coastal zone management plans (through 2005). Additionally, coastal nonpoint pollution control programs

would be added to the list of programs eligible for administrative grants and Coastal Zone Enhancement Grants. Nonpoint pollution control plans would also be covered by the Coastal Resource Improvement Program (16 U.S.C. 1455a). Coastal Zone Management Fund loan repayments would be used by NOAA to offset the costs of the CZMA. This reauthorization would also create the Coastal Community Program. This program would allow the Secretary to provide grants to coastal communities for resource protection and to offset the damages of urban sprawl. This bill also proposes to make the Walter B. Jones Awards discretionary rather than mandatory. The CZER would also alter the scope of the National Estuarine Research Reserve System from a research oriented focus to include public education and resource stewardship issues.



Pew Oceans Conference on Marine Pollution

The Pew Oceans Conference recently released a report as part of a long-term study of the causes of marine pollution in the United States. The report supports the results of past studies by identifying several causes for this pollution, including industrial discharges and agricultural activity in the Midwest. The report is primarily concerned with the hypoxic zone or Dead Zone, located off the Louisiana and Texas coasts, which is caused when certain pollutants, largely nitrogen from agricultural fertilizer, deplete the oxygen supply and lead to toxic algal blooms in sections of the ocean, thereby making it difficult for marine life to survive. The findings of this report underscore the immediate need for legislation aimed at changing agricultural practices in order to minimize runoff that is finding its way to the Gulf of Mexico. The Conference generally suggests

improved watershed management practices that incorporate entire drainage basins are necessary to reduce the volume of agricultural pollutants. In addition to the agricultural degradation, the report also identified nitrogen oxides released from the combustion of fossil fuels as a major source of ocean pollution. Legislation aimed at reducing emissions from automobiles would also substantially improve the ocean pollution situation. Louisiana's need for national and state legislation is more urgent than in other areas due to this State's heavy reliance on the seafood industry for economic support. The Conference report suggests the following methods (which could be legislatively implemented) to reduce the level of nitrogen pollutants reaching the Gulf of Mexico: "(1) improved agronomic practices that reduce nitrogen losses from farm fields and (2) trapping nitrogen lost from fields in restored wetlands, vegetated buffers, reconnected floodplains, and

coastal wetlands" (Boesch et al., 2001:22). The complete results and recommendations of the Pew Oceans Conference on the pollution problem can be found in the full text of the report at:

<http://www.pewoceans.org/reports/022701report.pdf>.

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