

Louisiana's Open Meetings Law: Implications for Policymaking

By Ryan M. Seidemann

Much of the policymaking that ultimately results in legislation and regulation in Louisiana originates in publicly sanctioned bodies such as committees or task force meetings. Such groups generally fall under the classification of "public bodies" under Louisiana's Open Meetings Law.¹ This law states that "it is essential to the maintenance of a democratic society" for the government to conduct its activities "in an open and public manner."² This law ensures that the public has an opportunity to participate in the lawmaking process for issues that affect their lives. Additionally, the Open Meetings Law allows for public scrutiny of governmental activities to ensure that no special interests are favored over the interests of the general public. For this reason, it is paramount that the provisions of the Open Meetings Law are followed during every meeting of a public body. It is also important for the members of the public to be aware of their right to be informed and to participate in deliberations of public bodies. Much like many other laws, some of the Open Meetings Law's provisions are confusing. I hope that the following discussion will serve as a rudimentary user's guide to Louisiana's Open Meetings Law in an effort to clarify any ambiguity and to assist nonlegal users in navigating this important law.

The meetings of public bodies, defined in the next section, must always be open to the public.³ This general rule applies even if no final action is to be taken in a

meeting.⁴ Additionally, the legislature has mandated that the performance of public business "in an open and public manner" is to be construed liberally.⁵ This means that if there is a doubt as to whether the Open Meetings Law should apply, the public body should abide by that law.

Definitions

Within the Open Meetings Law, the definitions of several key terms are important to understanding it. These terms are: meeting, public body, and quorum. The Open Meetings Law defines meeting as "the convening of a quorum of a public body to deliberate or act on a matter over which the body has supervision, control, jurisdiction, or advisory power."⁶ This definition also includes meetings for information gathering.⁷ "Public body" is defined as "village, town, and city governing authorities; boards of publicly operated utilities; planning, zoning, and airport commissions; and any other state, municipal, or special district boards, commissions, or authorities, and those of any political subdivision thereof, where such body possesses policy making, advisory, or administrative functions, including any committee or subcommittee of these bodies."⁸ A "quorum" is defined as "a simple majority of the total membership of a public body."⁹ Unfortunately, delineating the actual boundaries of some of these terms has been

difficult, especially with respect to what actually constitutes a quorum and what is actually considered a meeting.

One problem that has arisen over the question of what constitutes a quorum is whether or not nonvoting members are counted towards reaching a quorum. Because the definition of a quorum under La.R.S. 42:4.2(A)(3) does not distinguish between voting and nonvoting members, the logical inference to be drawn is that the legislature intended for a quorum to be reached by any combination of voting and nonvoting members and not to restrict a quorum to only a headcount of voting members.¹⁰

What is to be done when less than a quorum is present or the meeting of some of the members of a public body occurs socially or informally? Generally, the provisions of the Open Meetings Law do not apply to "chance meetings or social gatherings of members of a public body at which there is no vote or other action taken."¹¹ This also applies to a formal or informal polling of the members of a public body. However, what constitutes "chance meetings and social gatherings" has been the subject of debate. Generally, as long as a quorum is not present and the members take no final action, the meeting is allowed.¹² However, efforts to ensure that a quorum is not present at a meeting (i.e., keeping it informal by not having a quorum) so as to avoid the Open

Meetings Law is a direct violation of the Open Meetings Law, according to the Attorney General.¹³ Additionally, just because no vote will occur at an “informal” meeting does not allow the public body to meet without following the Open Meetings Law provisions for notice and public attendance.¹⁴ The Attorney General has stated that, “[i]nformal and impromptu meetings... should not be used as a subterfuge of the purposes and mandates of the Open Meetings Law.”¹⁵ However, the Attorney General has not found a violation of the Open Meetings Law when public officials are invited to functions by private individuals when the private individuals discuss matters of personal interest to them that are also relevant to the public body.¹⁶ For such activities, the Attorney General suggests looking to see if such a gathering would be considered a “meeting” under La. R.S. 42:4.2. If this definition is not met by the gathering of one or more members of a public body with private individuals to discuss matters relevant to the public body, then the Open Meetings Law is not violated.¹⁷

Conduct of Meetings

The Open Meetings Law strictly mandates certain restrictions in the conduct of meetings of public bodies.¹⁸ Every meeting of any public body must be open to the public (with exceptions, discussed below). However, a member of the public may be removed from an open meeting if they “willfully disrupt a meeting to the extent that orderly conduct of the meeting is seriously compromised.”¹⁹

La. R.S. 42:5(B) contains a general prohibition against proxy voting, secret balloting, or other secretive means of conducting meetings of public bodies. However, if the enabling legislation of a particular public body provides for the appointment of proxies, this is a clear expression of the intent of the prohibition of proxies under La. R.S. 42:5(B).²⁰ If the public body’s enabling statute does allow for proxies, those proxies do count

towards achieving a quorum at a meeting.²¹ Conversely, if the public body’s enabling statute does not allow for proxies, but the body’s by-laws do allow for proxies, the by-laws violate La. R.S. 42:5(B) and no proxies are allowed.²²

Along with the general prohibition against proxy voting, La. R.S. 42:5(C) requires that all votes be made by the members of a public body viva voce (by voice) and recorded in the minutes of the meeting. Thus, electronic means of conducting meetings (telephone, e-mail, etc.) violate the viva voce requirement of La. R.S. 42:5(C) in addition to violating the general policy that all meetings of public bodies be conducted in an open manner.²³

Finally, La. R.S. 42:5(D) mandates that public bodies allow for public comment at their meetings. There are no hard-and-fast rules for conducting public comment at a meeting. There is no case law, nor are there any Attorney General’s opinions, that clarify how a public body might conduct public comment. It would appear that the adoption of “reasonable rules, regulations, and restrictions”²⁴ by each public body is necessary and should comply with the format for considering all matters under the Open Meetings Law (i.e., in an open and public manner).²⁵

For the rules of order of a public body, one must first look to the enabling statute. Beyond the restrictions in the enabling statute, if any, public bodies have broad discretion in the conduct of their meetings. In the absence of statutory rules, a public body can enact its own by-laws that contain its rules of order. However, in the absence of such action by the public body, the Attorney General suggests using Robert’s Rules of Order.²⁶ Under such a scheme, in cases where Robert’s Rules of Order contradict the Open Meetings Law, the Open Meetings Law is to be followed.²⁷

Voting

Voting by the members of a public body also has proven to be the subject of debate. In addition to the viva voce and proxy voting

discussions above, there are still lingering problems concerning if and when a member must vote on an issue before the body and what to do when a tie vote occurs.

There is no law or persuasive authority on the question of when and if a member must vote and when he or she may abstain or must be recused. The only provisions on recusal by members in the Revised Statutes refer to reasons why such individuals must recuse themselves, not whether they can choose not to vote.²⁸ Such references refer to the Code of Governmental Ethics reasons for recusal in La. R.S. 42:1120 *et seq.* These reasons are limited to situations where the voting member has an economic interest in the subject matter being considered. In such situations, members must recuse themselves. There is no indication of whether or not members must vote when such economic conflicts are absent. So, the only apparent way to avoid excessive abstentions is to write a restriction on abstentions into the by-laws of the public body.

Another problem that arises when members abstain from voting is the question of how those abstentions are to be counted. There is no guidance on how to count vote abstentions in the Revised Statutes. La. Atty. Gen. Op. No. 88-434 does address this problem, though it does not set forth any method for how abstentions should be counted. The opinion suggests that public bodies should adopt rules for themselves on how to deal with abstentions (i.e., whether to count them as a “yes” or “no” vote) and suggests looking to Robert’s Rules of Order for guidance in adopting such procedures.²⁹ Robert’s Rules of Order, however, states that an abstention is counted as neither a “yes” nor a “no”, but rather “the effect is the same as if [the abstainer] voted on the prevailing side.”³⁰

When a tie vote occurs in a public body, generally, the chairperson of the body can cast a vote to break the tie. However, many of the laws and Attorney General’s opinions make it clear

that, if the chairperson already has a vote, he or she cannot vote again to break a tie.³¹ Only where the chairperson does not typically have a vote can he or she vote to break a tie.³²

Exceptions

Despite the overt policy mandate that the meetings of public bodies be conducted in an open manner under the Open Meetings Law, there are some exceptions to what matters can be the subject of open discussion. La. R.S. 42:6 through La. R.S. 42:6.2 contain the limitations to the open nature of public body meetings. Such matters are to be considered by the public body in closed executive sessions. These matters are: discussions of the character, competence, health of a person; strategy sessions or negotiations for collective bargaining for possible litigation; discussions of security personnel, plans, or devices; discussions of investigations regarding allegations of misconduct; discussions of emergencies that are limited to natural disasters, repelling of invasions, or similar matters; State Mineral Board meetings that are entitled to be confidential by statute; and certain school board functions. Aside from these matters, all other issues considered by public bodies must follow the mandates of the Open Meeting Law. Additionally, even when a public body adjourns to an executive session to consider one of the exempted matters listed above, a brief discussion of the subject matter of that session must appear in the meeting agenda.³³ Such closed executive sessions can only occur upon a vote taken at a public meeting of two-thirds (2/3) of the constituent members present.³⁴ Additionally, the vote on whether to hold an executive session and the reasons for the session must be recorded in the minutes of the meeting.³⁵

Notice and Agendas

All public bodies must give written public notice of all scheduled regular meetings at the beginning of each year.³⁶ This

notice must include dates, times, and places of the year's meetings.³⁷ In addition to the notice of the yearly schedule for regular meetings, all public bodies must also give written public notice of any regular, special, or rescheduled meetings at least 24 hours prior to the meeting.³⁸ This notice must include date, time, place, and an agenda of the meeting. The notice that is required for each individual meeting places a double notice requirement on regularly scheduled meetings. In other words, even though there has been notice of a regular meeting in the yearly notice, a second, specific notice of regular meetings must also issue. Additionally, news media that have requested notice must be notified in such a manner as to receive the notice no later than 24 hours prior to a meeting.³⁹

There is no law that considers whether or not an e-mail notice would satisfy the "writing" requirements of notice under La. R.S. 42:7. However, the Revised Statutes do have one provision relating to electronic notice.⁴⁰ Under this section of the Revised Statutes, which deals with suits against the state and state officials, e-mail notice is sufficient if it is timely followed by a mailed, written notice. It is, as yet, impossible to tell if similar provisions might apply to notice under the Open Meetings Law. In the interest of prudence, despite the allowance for e-mail notice under La. R.S. 13:5108.1, Open Meetings Law notice should continue to be sent by mail until a more relevant consideration of the e-mail notice issue exists.

As was previously stated, the notice that must go out prior to each individual meeting must be accompanied by an agenda. There is nothing in the Revised Statutes that outlines what must be present in an agenda in order to satisfy the notice requirements of La. R.S. 42:7. However, in two opinions, the Attorney General states that, "we are of the opinion that an agenda must be reasonably clear so as to advise the public in general terms [of] each subject to be discussed."⁴¹ In addition, to these requirements, an agenda must clearly state that

the public has an opportunity to be heard at the meeting of the public body. Simply stating that the meeting is "public" is not sufficient.⁴²

Changes to the agenda during a meeting must be made upon the approval of two-thirds of the members present at the meeting.⁴³ Matters not so added to the agenda cannot be taken up at public meetings.⁴⁴ The practice of adding items to an agenda during a meeting should be used sparingly, as this provision is not intended to allow for an undermining of the public notice requirements.⁴⁵

Records

All public bodies must keep written minutes of their open meetings.⁴⁶ These minutes must include: date, time, and place of the meeting; a list showing which members are present and which members are absent; the substance of decided matters; a record of who voted which way (if requested by a member); and any other information that the public body requests to be included in the record.⁴⁷ The Open Meetings Law does not require the publication of the minutes of meetings in an official journal.⁴⁸ Such a requirement may be imposed by the legislation that created a particular public body or by the public body's own by-laws. However, even though publication in an official journal is not generally required for the minutes of a public body's open meetings, these minutes are public records "and shall be available within a reasonable time after the meeting."⁴⁹

Audio or video recording of public bodies is permissible under La. R.S. 42:8. Each public body can set its own standards that dictate how such recordings can be done so as not to interfere with ongoing meetings.⁵⁰ Although there is no law on point, it appears that such a recording would not constitute a recordation that would satisfy the keeping of written minutes under La. R.S. 42:7.1. In other words, simply recording a meeting is not the same as creating a written record, as the law requires.

Procedural Matters

The remainder of the Open Meetings Law (La. R.S. 42:9 through La. R.S. 42:13) covers procedural matters for the enforcement of the provisions of the statute. La. R.S. 42:9 allows any activity in violation of the previous sections to be sued upon in a court of competent jurisdiction. Such a suit must be brought within sixty days of the complained of action. La. R.S. 42:10 deals with how the Open Meetings Law is to be enforced. The Attorney General must enforce the Open Meetings Law. The Attorney General can sue of his or her own volition or pursuant to a complaint. Each district attorney must also enforce the Open Meetings Law. District attorneys can also sue of his or her own volition or pursuant to a complaint. Any private person who has been denied a right or has reason to believe that the Open Meetings Law has been violated also can sue. La. R.S. 42:11 covers the remedies that are available for a suit under the Open Meetings Law. Relief can include: compliance orders to force a public body to adhere to or to stop violating the Open Meetings Law, judgment rendering the action void, or judgment awarding civil penalties. The court can issue any necessary compliance orders. Failure to comply with such orders is considered contempt of court. Success in an enforcement suit by a private party allows that individual to collect reasonable attorney fees and other litigation expenses. Frivolous suits can result in attorney fees and other costs for the defendant. The proper venue for Open Meetings Law claims is in the district court in the parish where the meeting took place or will take place.⁵¹ Civil penalties of not more than one hundred dollars per violation are assessed against violators of the Open Meetings Law.⁵²

Conclusion

“As the authority for democratic government rests on the participation of the governed, the public must be able to observe and evaluate public officials, public

conduct, and public institutions.”⁵³ Laws such as Louisiana’s Open Meetings Law were created for exactly that reason.⁵⁴ This law is essential to ensuring the ethical conduct of governmental functions. For this reason, the state Attorney General and the various district attorneys around the state very seriously take their duty to enforce and uphold the Open Meetings Law.⁵⁵ It is necessary, therefore, to follow every mandate of the Open Meetings Law in the creation of policy and law by the public bodies of the State of Louisiana. However, as is often the case, concerned public citizens may help public bodies to adhere to the Open Meetings Law. It is hoped that this review of the Open Meetings Law can serve as a useful guide to conducting governmental business in a public manner, in compliance with the law.

¹ The Open Meetings Law is located in the Revised Statutes (La. R.S. 42:4.1 through 42:13). The law covers the meetings of public bodies as well as the Louisiana legislature. A discussion of the provisions that specifically apply to the legislature (La. R.S. 42:6.2 and La. R.S. 42:7.2) are not particularly relevant to the topic of this article and have thus been left out. Louisiana is not the only government with open meetings-like laws. Several other states have such laws (e.g., Mississippi’s Open Meetings Law is located at Miss. Code Ann. 25-41-1 et. seq.). The federal government has incorporated the Government in Sunshine Act (P.L. 94-409) into the Administrative Procedure Act at 5 U.S.C. 552. This applies similar provisions to Louisiana’s Open Meetings Law to federal government functions. See Lisa A. Reilly, *The Government in Sunshine Act and the Privacy Act*, 55 Geo. Wash. L. Rev. 955, 956-957 (May/August, 1987), for a discussion of the history of the Government in Sunshine Act.

² La. R.S. 42:4.1.

³ See La. R.S. 42:4.1 and 42:5.

⁴ See La. Atty. Gen. Op. No. 76-1399.

⁵ La. R.S. 42:4.1.

⁶ La. R.S. 42:4.2.

⁷ *Id.*

⁸ *Id.* (emphasis added to illustrate where most policymaking groups will fall under the Open Meetings Law).

⁹ *Id.*

¹⁰ This is implicit in the use of the phrase, “total membership” in La. R.S. 42:4.2(A)(3).

¹¹ La. R.S. 42:4.1 (B). *But see*, La. Atty. Gen. Op. No. 77-1508, where a social gathering was used solely to consider a matter before the public body. This social gathering did fall under the Open Meetings Law and was therefore conducted in violation of that law.

¹² *Brown v. East Baton Rouge Parish School Board*, 405 So.2d 1148 (La. App. 1 Cir. 1981).

¹³ See La. Atty. Gen. Op. No. 85-113.

¹⁴ See La. Atty. Gen. Op. No. 96-207.

¹⁵ La. Atty. Gen. Op. No. 93-414.

¹⁶ See La. Atty. Gen. Op. No. 96-400.

¹⁷ *Id.*

¹⁸ La. R.S. 42:5.

¹⁹ La. R.S. 42:6.1(C).

²⁰ See La. Atty. Gen. Op. No. 84-56.

²¹ See La. Atty. Gen. Op. No. 88-340.

²² See La. Atty. Gen. Op. No. 84-56.

²³ See La. R.S. 42:5(A). See also La. Atty. Gen. Op. No. 88-238 (stating that telephone polling of members of a public body in an effort to circumvent the “spirit of the open meetings law” is illegal).

²⁴ La. R.S. 42:5(D).

²⁵ The dearth of guidance on how to conduct public participation in open meetings is likely due to the relatively recent adoption of a provision that allows for public participation. This provision was adopted with the passage of Act 285 of the 2001 Legislature. Brian M. Bégué, *Recent Developments: Administrative Law*, 49 La. B.J. 317 (2002). Thus, it is too early to tell what impact public participation is having on the policymaking/rulemaking process in Louisiana. However, for an overview that compares legal systems in which public participation is allowed to those where it is not allowed. see Andrew J. Green, *Public Participation, Federalism, and Environmental Law*, 6 Buff. Env’tl. L.J. 169 (1999). Green sees the public participation process as a means for the public to better inform and pressure their policymakers. *Id.* at 170.

²⁶ See La. Atty. Gen. Op. No. 93-457.

²⁷ See La. Atty. Gen. Op. No. 88-434.

²⁸ E.g., La. R.S. 37:572; La. R.S. 39:1233.1; La. R.S. 40:1299.88. It should be borne in mind, however, that these provisions on recusal are not contained in the Open Meetings Law. Indeed, the Open Meetings Law does not provide any guidance on this issue at all.

²⁹ Henry M. Robert, *Robert's Rules of Order Revised* (William Morrow and Company, Inc. 1971). Despite the fact that there have been subsequent editions, even recent Attorney General Opinions have referenced this 1971 edition (e.g., La. Atty. Gen. Op. No. 93-457).

³⁰ *Id.* at 193.

³¹ See La. R.S. 15:144, see also La. R.S. 18:602, La. R.S. 33:385, La. R.S. 33:2476.1, La. R.S. 2536, La. R.S. 34:335.2, La. R.S. 40:1053(K), La. R.S. 40:1054, La. R.S. 40:1662.1 La. R.S. 48:1805, and La. Atty. Gen. Op. No. 91-518.

³² *Id.*

³³ See La. Atty. Gen. Op. No. 96-357.

³⁴ La. R.S. 42:6.

³⁵ *Id.*

³⁶ La. R.S. 42:7(A)(1)(a).

³⁷ *Id.*

³⁸ La. R.S. 42:7(A)(1)(b).

³⁹ See La. Atty. Gen. Op. No. 79-884.

⁴⁰ La. R.S. 13:5108.1. Although this provision is not included in the Open Meetings Law, it may be of some guidance as to what the legislature considers a writing for notice purposes.

⁴¹ La. Atty. Gen. Op. No. 93-230. See also La. Atty. Gen. Op. No. 96-357.

⁴² See La. Atty. Gen. Op. No. 80-1111.

⁴³ La. R.S. 42:7(A)(1)(b)(ii). See also La. Atty. Gen. Op. No. 89-111.

⁴⁴ *Id.*

⁴⁵ See La. Atty. Gen. Op. No. 87-649.

⁴⁶ La. R.S. 42:7.1.

⁴⁷ *Id.*

⁴⁸ See La. Atty. Gen. Op. No. 96-263.

⁴⁹ This requirement is subject to the

exceptions under La. R.S. 42:6 and La. R.S. 42:6.2 that limits the openness of meetings in executive sessions. La. R.S. 42:7.1(B).

⁵⁰ La. R.S. 42:8(B). See also La. Atty. Gen. Op. No. 95-277.

⁵¹ La. R.S. 42:12.

⁵² La. R.S. 42:13.

⁵³ Bruce V. Schewe, *Entering the Door Opened: An Evolution of Rights of Public Access to Governmental Deliberations in Louisiana and a Plea for Realistic Remedies*, 41 La. L. Rev. 192, 194 (1980).

⁵⁴ *Id.* at 215.

⁵⁵ See, e.g., La. Atty. Gen. Op. No. 85-113; *Connick v. Brechtel*, 713 So.2d 583 (La. App. 4 Cir. 4/22/98).

Beneficial Use of Dredged Material: Do States Have a Voice?

By Lisa C. Schiavinato

Beneficial Use Generally

Many coastal states are experiencing problems from shoreline erosion and other forms of environmental degradation in their coastal zones. One technique that has been used successfully in some situations to combat coastal environmental problems is beneficial use of dredged material. However, financial considerations and seemingly conflicting laws often prevent such use. Can states use their federal consistency requirements under the Coastal Zone Management Act (CZMA) to bring attention to beneficial use issues and generate more consideration of beneficial use in initial project planning?

Dredged material is sediment excavated from inland or ocean waters that is often deposited on uplands or in ocean waters. Waterways, ports, and harbors must be dredged periodically to maintain the nation's navigation channels for commercial, security, and recreational purposes. Removing

that sediment can be used to benefit the environment. Beneficial use of dredged material for such purposes as habitat development, beach nourishment, shoreline protection, and fisheries improvement, is a constructive alternative to disposing of it as waste.

The federal government works in conjunction with state and local governments, private entities, and semi-private entities (e.g., port authorities) to manage and conduct disposal of dredged material.¹ The U.S. Army Corps of Engineers (Corps), the federal agency responsible for maintaining the nation's navigable waterways, issues permits for disposal of dredged material,² while the U.S. Environmental Protection Agency (EPA) establishes permitting guidelines³ and has veto power over Corps decisions if the Clean Water Act's (CWA) Section 404(b)(1) guidelines are not followed.⁴ One of the first steps in the Corp's decision-making process is to evaluate the contaminant status

of sediment to determine whether or not it is suitable for beneficial use.⁵ After a site has been selected, engineers establish whether or not beneficial use is feasible from a technical standpoint, and an environmental analysis is performed.⁶ Then another critical step, the cost-benefit analysis, takes place.⁷ The Corps is required to dispose of dredged material according to the Federal Standard.⁸ The Federal Standard requires dredged material to be disposed in the least costly manner consistent with sound engineering practices and environmental standards and criteria set forth by Section 404(b)(1) of the CWA⁹ and by the Marine Protection, Research, and Sanctuaries Act (a.k.a. the Ocean Dumping Act).¹⁰

Funding Beneficial Use Projects

Funding is perhaps the largest obstacle to beneficial use projects. Since beneficial use projects are considered separately

in the planning and funding phases of a Corps dredging project, the budgets for dredging projects do not usually include the funds to finance beneficial use. Therefore, the Corps encourages the use of separate funding authorities for beneficial use projects, particularly if they do not fall under the Federal Standard.¹¹ Funding generally comes from three main sources: (1) the Corps' general financing authority, (2) other federal financing authorities, and (3) public/private financing.¹² Other federal statutes that provide funding for beneficial use projects include the Water Resources Development Act (WRDA)¹³ and the Coastal Wetlands Planning, Protection, and Restoration Act (CWPPRA).¹⁴

The Federal Standard is known as the Base Plan for deciding how to dispose of dredged material. The Base Plan is the least costly manner by which dredged material is disposed by the Corps and is part of the agency's Congressional mandate, which is maintenance of the nation's navigable waterways.¹⁵ Beneficial use projects may be funded by base plans if they have been determined to be the least costly alternative that complies with environmental standards.¹⁶ When a beneficial use project is more costly than the Base Plan, the Base Plan becomes a reference point for measuring the cost above the Base Plan that must be funded from other sources.¹⁷ For most projects, Corps authorities include provisions for sharing the cost of a beneficial use project.¹⁸ The state or a private entity is responsible for the portion of the cost that exceeds the Base Plan.¹⁹ However, responsibility may be shared between federal and non-federal partners, depending on the type of use.²⁰ However, it is important to note that federal funding of CWPPRA and WRDA projects is low, and all Divisions of the Corps compete for this funding. In many cases then, it is left to the states or private entities to completely or partially fund beneficial use projects.

The Coastal Zone Management Act

The CZMA created a national coastal zone management program for "the effective management, protection, and development of the nation's coastal zone."²¹ The purpose of the CZMA is to preserve, protect, develop, and where possible, to restore or enhance the nation's coastal zone resources.²² The CZMA is implemented by the states through their own federally approved coastal management programs (CMPs) in partnership with the federal government.²³ To maintain this partnership, the CZMA encourages consultation, cooperation, and coordination among, federal, state, and local authorities.²⁴

For purposes of this article, the most relevant provision of the CZMA is the consistency provision.²⁵ The consistency provision allows states with federally-approved CMPs to require that federal activities affecting a state's coastal zone be consistent, with the maximum extent practicable, with the state's federally-approved CMP.²⁶ There seems to be a conflict between the consistency provision and the CZMA Corps' Federal Standard. The Corps maintains that the Federal Standard prevents it from using dredged material beneficially if the use is not part of the Base Plan and no state or other funding is available.²⁷

The Corps argues that there is no contradiction between the CZMA consistency provision and the Federal Standard because Section 106(d) of the Ocean Dumping Act (ODA) preempts the consistency provision and, therefore, the Corps is not required to follow it.²⁸ Section 106(d) of the ODA states, in pertinent part:

"In the case of a federal project, a state may not adopt or enforce a requirement that is more stringent than a requirement under this subchapter if the Administrator [of EPA] finds that such a requirement:

(A) is not supported by relevant scientific evidence showing the requirement to be protective

of human health, aquatic resources, or the environment;

(B) is arbitrary or capricious; or

(C) is not applicable or is not being applied to all projects without regard to Federal, State, or private participation, and the Secretary of the Army concurs in such finding."²⁹

However, the Corps has and continues to voluntarily comply with Consistency reviews of the Corps' activities.³⁰

Not only do the National Oceanic and Atmospheric Administration (NOAA), which administers the CZMA, and some states disagree with the Corps' interpretation of the Federal Standard's intersection with the CZMA consistency provision,³¹ but it also disagrees with the Corp's interpretation of ODA Section 106(d).³² NOAA has stated that while ODA Section 106(d) may leave some doubt about the extent to which the CZMA's consistency provision may apply, its use by the states is implementation of a federal statute and not a state regulation.³³ Therefore, according to NOAA, the Corps cannot effectively argue that it is not required to comply with the consistency provision of the CZMA when the agency is faced with a beneficial use request.³⁴ The funding of beneficial use projects is a separate issue. If the Corps does not have the funds for beneficial use projects, what recourse do the states have, other than funding the projects themselves?

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There is disagreement between the federal government and the states over the Federal Standard, particularly when states have specific beneficial use policies in their own CMPs.³⁵ Should states have more of a voice in the ultimate decision of whether to use dredged material beneficially or disposed of as waste?

Do states have an avenue for strengthening the application of beneficial use via the CZMA's consistency provision, especially

when their own CMPs provide specific beneficial use requirements or guidelines? These two issues are at the forefront of the beneficial use debate.

Louisiana's CMP requires much of what the federal consistency provision requires: any governmental body "undertaking, conducting or supporting activities directly affecting the coastal zone shall be consistent, to the maximum extent practicable, with the state program and any affected approved local program having jurisdiction over the action."³⁶ Specifically regarding Louisiana's beneficial use requirement, "whenever a proposed use requires the dredging or disposal of 500 cubic yards or more of any waterbottom or wetland in the coastal zone, the dredged material shall be used for the beneficial purposes of wetland protection, creation, enhancement, or combinations thereof..."³⁷

Louisiana's Coastal Use Guidelines 4.1 - 4.7 outline the manner in which dredged spoil is deposited.³⁸ Guideline 4.2 expands on La.R.S. 49:214.32(F)(1):

"Spoil shall be used beneficially to the maximum extent practicable to improve productivity or create new habitat, reduce or compensate for environmental damage done by dredge activities, or prevent environmental damage. Otherwise, existing spoil disposal areas or upland disposal shall be utilized to the maximum extent practicable rather than creating new ones."³⁹

If Louisiana finds itself in a situation in which it would request that the Corps beneficially use material that it plans to dredge from a navigation channel, and the Corps is unable to grant the state's request, Louisiana can take the position that the project is not consistent with the CMP. Thus, Louisiana would be vetoing a federal project, a bold move in a state which requires much dredging to maintain navigation. The goal, however, is not to impede navigation but to make sure navigation projects are as environmentally friendly as possible, consistent with the state's CMP. However, consistency denials by a state can be overturned if the

Secretary of Commerce makes a determination that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.⁴⁰

A state can then challenge a secretarial override in court.⁴¹ If Louisiana were to determine that a federal project was inconsistent with its federally-approved CMP and the determination was overturned by the Secretary of Commerce, then Louisiana would have to decide whether to pursue the matter further through the court system.⁴²

What are the Rights of States to Require Beneficial Use?

In order to ascertain the rights of states to require more beneficial use of dredged material, an open question is whether the Corps' Federal Standard is legally defensible. One argument is that the Federal Standard violates the CZMA because the Corps' policy of discharging dredged material in the least costly manner conflicts with the CZMA's requirement that federal activities affecting a state's coastal zone be consistent with state CMPs. While states can apply for funding through the Continuing Authorities Program (CWPPRA, WRDA, etc.), they still need the Corps to promote beneficial use projects.

On the other hand, Congress has charged the Corps with maintaining the nation's navigable waterways, and the agency must do so on limited budget. Also, there are emergency and safety issues that may render beneficial use projects infeasible in some circumstances (e.g., a hurricane and the resultant storm damage). It is important to note that the Federal Standard issue has not been litigated. Resolution of this issue could begin with a judicial interpretation of the legality of the Federal Standard. However, whether or not the Federal Standard is legally defensible would not settle the issue. Since funding is a critical factor in deciding whether to beneficially use dredged material, securing additional funding at both the federal and state levels is necessary. Educating legislators and the public of the environmental and economic importance of beneficial use and of the conflicting

requirements of the CZMA and the Federal Standard is perhaps the real first stepping-stone to including beneficial use projects as standard components of most federal dredging projects. More education could persuade Congress to amend the CWA to require that the Corps include beneficial use funding as a part every Base Plan when dredged material is available and needed for such use.

¹ U.S. Environmental Protection Agency Office of Water, Beneficial Use Manual: Identifying, Planning, and Financing Beneficial Use Projects Using Dredged Material, EPA/842-B-98-001 (December 1999).

² See 33 C.F.R. 335.2.

³ See 33 U.S.C. 1344(b)(1).

⁴ See 33 U.S.C. 1344(c).

⁵ See U.S. Army Corps of Engineers, "Decision Process for Beneficial Uses," <http://www.wes.army.mil/el/dots/budm/decision.html> (accessed May 9, 2003).

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See 33 C.F.R. 335.7. See also 33 U.S.C. 1344.

¹⁰ See *id.* See also 33 U.S.C. 1401-1455.

¹¹ See Beneficial Use Manual, Chapter 5.

¹² See *id.*

¹³ See *id.* See also 33 U.S.C. 467-467j.

¹⁴ See *id.* See also 16 U.S.C. 3951-3956.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ 16 U.S.C. 1452.

²² See *id.*

²³ See *id.*

²⁴ See 16 U.S.C. 1456.

²⁵ See 16 U.S.C. 1456.

²⁶ See *id.*

²⁷ See Beneficial Use Manual, Chapter 5.

²⁸ See Timothy R.E. Keeney, Memorandum: Louisiana's Consistency Objection to the US Army Corps of Engineer's Proposed Maintenance Dredging of Miles 56.1 to 49.9 of the Mississippi River Gulf Outlet (National Oceanic and Atmospheric

Administration, 1990) (on file with the Louisiana Sea Grant Legal Program).

²⁹ 33 U.S.C. 1416(d)(2).

³⁰ See Memorandum from the National Oceanic and Atmospheric Administration.

³¹ See Memorandum from the National Oceanic and Atmospheric Administration to Brigadier General Patrick J. Kelley, U.S. Army Corps of

Engineers (December 15, 1989) (on file with the Louisiana Sea Grant Legal Program).

³² See Timothy R.E. Keeney Memorandum.

³² See *id.*

³³ See *id.*

³⁴ See Memorandum from the National Oceanic and Atmospheric Administration.

³⁵ La. R.S. 49:214.32(B).

³⁶ La. R.S. 49:214.32(F)(1).

³⁷ See La. Admin. Code Tit. 43, 7:707.

³⁸ La. Admin. Code Tit. 43, 7:707(B).

³⁹ See 16 U.S.C. 1456(c)(3)(A).

⁴⁰ See 16 U.S.C. 1456.

⁴¹ See *id.*

Protection of Crocodilians: Current Labeling Requirements and Suggested Modifications

By M. Blake Kramer and
Lisa C. Schiavinato

Federal regulations restrict trade in American alligator (*Alligator mississippiensis*) and certain other crocodilian products.¹ Due to confusion based on species similarity and blatant violations of the law, the current labeling system needs revision. The federal government, as well as numerous state governments, has implemented laws and regulations that are intended to ensure that alligator and crocodile products entering the country or any particular U.S. state comply with national and international protections for endangered species. Despite these governmental efforts, a lingering problem has been detected with the procedures for the labeling of alligator and other crocodilian products. The labeling requirements discussed below have not been entirely successful in preventing the killing and processing of certain endangered species for commercial purposes, such as Caiman.

Federal regulations require the species-specific labeling of most alligator and other crocodilian products to display certain information about the animals.² Such labels are required for the products to be legally imported, exported, or re-exported³ from the U.S.⁴

For skins of American alligators that are to be traded internationally, labels must display a tag consistent with the Convention on International Trade in Endangered

Species of Wild Fauna and Flora (CITES).⁵ The tag should include information about the animal's country of origin, species, and year of take plus a unique serial number.⁶ As a condition on initial export from the U.S., alligator meat is subject to the tagging system of the particular U.S. state from which it was taken.⁷ Federal regulations also require that the labels for American alligator meat note, at a minimum, each animal's country of origin, year of take, species, original hide export tag number, weight of meat in the container, and identification of the state-licensed processor or packer.⁸ There are also specific conditions that must be met for meat from Nile crocodile and Australian saltwater crocodile that is imported into the U.S. or exported or re-exported from the U.S.⁹

Federal law also regulates the initial export from the U.S. miscellaneous parts of American alligators such as tails, throats, feet, and backstrips.¹⁰ These "small parts" must be tagged with a label showing their country of origin, species, original hide export tag number, and weight of the parts in the container.¹¹

The one product for initial export from the U.S. that does not require species identification is the alligator skull.¹² The skulls need only be labeled according to state law requirements, with no federal minimum provided, except for a

reference to a valid CITES tag number.¹³

Despite these labeling requirements, as early as 1994, the US Department of the Interior (DOI) was aware of commingling in the trade of products from endangered species, such as Caiman, with products from the threatened American alligator.¹⁴ This commingling during trade resulted in product mislabeling. Primarily concerning itself with trade in skins and leathers and relying on the CITES tagging system, DOI expressed confidence that better tracking of the products as they left their countries of origin would help solve the commingling problem. DOI also proposed a new rule that would apply to products imported into and re-exported from the U.S. requiring "that a system for monitoring skins [of alligators and crocodiles] be implemented by the countries of re-export, so that the transaction history is provided, that inventory controls are maintained by the manufacturer, and that unmarked skins in re-exporting countries will not be allowed in trade after a specific period of time."¹⁵ The monitoring rule was codified in 1996.¹⁶

DOI has attempted to go even further. In 2000, the agency proposed a rule that would extend the current tagging requirements to all crocodilian skins being imported, exported, or re-exported by the U.S. due to continued problems of

commingled products.¹⁷ The proposed rule would ensure that requirements for trade in all crocodylians are consistent with CITES and the international practices of all countries exporting native crocodylians. This standardization of requirements will assist with inspection efforts, reduce risk to wild crocodylian populations, and standardize procedures for importers and exporters.¹⁸ The proposed rule would bring the regulation of trade in all crocodylian products to the same level as the American alligator. The rule has not yet been implemented.

Louisiana and Florida are among the states that export alligator products. Under Florida law, all lawfully acquired alligator carcasses (skinned and unskinned) and untanned hides must have CITES tags legally affixed.¹⁹ Meat from legally acquired alligators that is not discarded and not processed for sale must be packaged and labeled to indicate the CITES tag number.²⁰ Alligator meat that is processed or re-processed for sale must be labeled to indicate the CITES tag number(s) from the alligator(s) from which the meat was taken, among other requirements.²¹ Furthermore, it is against Florida law to sell crocodylian products manufactured from a species declared threatened or endangered by the U.S. Fish and Wildlife Service and the Florida Fish and Wildlife Conservation Commission.²² Under Louisiana law, in order to sell meat or other parts of alligators, an alligator parts dealer's license is required²³ and CITES tags of origin are required to be listed on Alligator Parts Sale or Transaction Forms and Shipping Manifests.²⁴ CITES tags are also required for alligator hides.²⁵

Passage of the new rule to extend tagging requirements to all crocodylian skins imported into or exported or re-exported from the US would be a step in the right direction to remedy the problem of the meat or other parts of endangered or threatened species being purposefully or mistakenly passed off as American alligators. Another possible remedy would be to appeal to states such as Louisiana and to other nations to be more

specific with their own regulation of alligator products. A weakness in Louisiana's regulatory scheme is the tagging of alligator meat and other parts. While CITES tag numbers are required on Alligator Parts Sale or Transaction Forms and Shipping Manifests, tags are merely listed as a range of numbers on a single form when meat or parts from multiple alligators are sold to a single buyer. Therefore, it is difficult to attribute meat or parts to a particular tag number. If regulations required tagging on alligator meats or parts themselves rather than, or in addition to, listing multiple tag numbers on transaction forms and shipping manifests, it may be less likely for a non-endangered species to be mistaken for a protected species.

Education of the crocodylian hunting, farming, and processing parties in U.S. states and in foreign countries also would be critical to any effort to halt species confusion. Anyone involved in the tagging process must be knowledgeable of the unique characteristics of the species that are proper for commercial use and those that are not. Education might also have the collateral benefit of making the parties involved more aware of the infractions of others that violate the labeling and tagging requirements so that they will be able to report those violations to the proper authorities.

Final resolution of the problem of product mislabeling will require the involvement of federal, state, and local governments. Currently, it is a violation of federal regulations to violate any U.S. state law with respect to the taking (including tagging) of alligators²⁶ or to import, export, or re-export saltwater crocodiles and Nile crocodiles without valid permits.²⁷ The ESA listing should be expanded to include additional species listed as threatened or endangered in CITES, such as Caiman, Gavial, and other members of the Order *Crocodylia*.²⁸ States should then be made aware of these other species and the need for their protection so that states can amend their own statutes and regulations to place these other species under state protection. Cooperation from state

and local governments could begin to fill existing legal gaps that currently allow for the misuse of these threatened and endangered species.

¹ See 50 C.F.R. 17.42. See also 50 C.F.R. 23.57.

² See 50 C.F.R. 23.57. See also 50 C.F.R. 17.42(a) and (b).

³ "Re-export" means to export a specimen that previously had been imported. See Convention on International Trade in Endangered Species of Wild Flora and Fauna, March 3, 1973, 27 UST 1087, Article I.

⁴ See 50 C.F.R. 23.57. See also 50 C.F.R. 17.42(a) and (b).

⁵ See <http://www.cites.org> for more information..

⁶ See 50 C.F.R. 23.57(1) (emphasis added). Note: The regulations in 50 C.F.R. 23.57 apply only to American alligator products that are initially exported from the U.S.

⁷ See 50 C.F.R. 23.57(3).

⁸ See *id* (emphasis added).

⁹ See 50 C.F.R. 17.42(c).

¹⁰ See 50 C.F.R. 23.57(4).

¹¹ See *id*.

¹² See 50 C.F.R. 23.57(5).

¹³ See *id* (emphasis added).

¹⁴ 59 Fed. Reg. 18,652-01 (1994) (to be codified at 50 C.F.R. Part 17) (April 19, 1994).

¹⁵ See 59 Fed. Reg. at 18,657.

¹⁶ See 50 C.F.R. 17.42.

¹⁷ 65 Fed. Reg. 26,664, 26,679 (2000) (to be codified at 50 C.F.R. Part 17) (May 8, 2000) (emphasis added).

¹⁸ See *id*.

¹⁹ See F.A.C. 68A-25.002(1).

²⁰ See F.A.C. 68A-25.052(1).

²¹ See F.A.C. 68A-25.052(4)(d).

²² See F.A.C. 68A-25.002(b).

²³ See La. R.S. 56:263(A)(1).

²⁴ See La. Admin. Code Tit. 76, 5:701(3)(o). See also La. Admin. Code Tit. 76, 5:701(4).

²⁵ See La. Admin. Code Tit. 76, 5:701(6)(e). See also La. Admin. Code Tit. 76, 5:701(A)(2), which defines an alligator hide tag as "an official CITES serially numbered tag issued by the [Louisiana] department [of Wildlife and Fisheries]."

²⁶ See 50 C.F.R. 17.42(a).

²⁷ See 50 C.F.R. 17.42(c).

²⁸ See 50 C.F.R. 23.23. See also CITES, 27 UST, Appendices I and II.

U.S. PIRG v. Atlantic Salmon of Maine: Non-Native Fish as “Biological Pollutants” under the Clean Water Act and the Potential Repercussions for Louisiana Aquaculture

By Sayward Byrd

On May 28, 2003, in a rare and unorthodox use of the primary jurisdiction doctrine, a United States District Court in Maine ordered two salmon farms to permanently cease the stocking and raising of non-native salmon species in their coastal net pen facilities. The suit was initiated by the U.S. Public Interest Research Group (U.S. PIRG), a national organization dedicated to environmental protection, against two salmon farms alleged to be in violation of the effluent discharge guidelines of the Clean Water Act (CWA). In *U.S. PIRG v. Atlantic Salmon of Maine*, 215 F. Supp.2d 239, the court held that escaping farm-raised salmon, which are genetically different from the wild Atlantic salmon native to Maine’s coastal waterways, constituted a “biological pollutant” as intended by the CWA. In an opinion written by US District Court Judge Gene Carter, the court found the salmon farms to be in violation of the effluent discharge requirements of the CWA. In holding that the net pens in which the fish were being raised fell under the definition of “point sources” for the purposes of the CWA, the court found that the language of the CWA, which defines “a discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source,”¹ applied to the discharge through escape of non-native salmon from fish farms in coastal waters. The court reasoned that the hybrid farm-bred salmon are “additions” within the meaning of the applicable statute, as they do not naturally occur in the Maine waters.² Moreover, net pens qualified as “point sources” since the Environmental Protection Agency (EPA) defines point sources as “all discrete, identifiable sources from

which pollutants are emitted or conveyed into the U.S. Waters.”³ The *Atlantic Salmon* court cited *National Wildlife Federation v. Consumer Power Co.*, 657 F. Supp. 989, 1010 (W.D. Mich.1987), where the federal district court held that dead fish and fish viscera discharged into Lake Michigan were pollutants within the meaning of the CWA. In finding the salmon farms liable for \$50,000 in statutory damages and granting an immediate and permanent injunction against the raising of the non-native salmon species, the *Atlantic Salmon* court used their power under the primary jurisdiction doctrine as allocated to them by the citizen suit provision of the CWA.⁴ The defendant salmon farms (hereinafter defendants) maintained that they had submitted applications for National Pollutant Discharge Elimination System permits (hereinafter NPDES permits) as required by the CWA for Concentrated Aquatic Animal Production Facilities (hereinafter CAAPF).⁵ The EPA failed to respond and later delegated responsibility for permit regulation and institution to the Maine Department of Environmental Protection.⁶ The defendants argued that the district court should be barred from considering injunctive relief since the state was still in the process of developing an adequate permit program and the EPA had central responsibility for the regulation of CAAPFs.⁷ Pursuant to the doctrine of primary jurisdiction, a court may defer or stay litigation pending a review by the appropriate administrative agency of the issue presented in the suit.⁸ The court rejected this option, noting that such administrative deference was discretionary.⁹

Citing the ineffectiveness and laxness of the EPA and the absence of any meaningful state regulation, the court found a permanent injunction both appropriate and necessary to ameliorate the extensive damage done to the native salmon population in Maine’s coastal waterways by the introduction of the non-native hybrids.¹⁰ The court held that the injunction, though admittedly costly and somewhat unfair to the defendants who had applied for permits numerous times with no response from either the EPA or the state agency, was justified by the imminent and irreparable harm to the wild Atlantic salmon.¹¹ The defendants, given their thwarted attempts to be in compliance with state and federal regulations, were victims with no recompense of bureaucratic negligence. In a final hearing on the matter, the court flatly stated in its Order and Injunction that the salmon farms “shall not at any time after the date of this Order and Injunction, *irrespective of the provisions of any permit, ruling, rule, or regulation, or any state law, stock in waters adjacent to the Maine coast any salmonid fish of non-North American stock or genetic strain.*”¹²

Potential Repercussions for Louisiana’s Aquaculture Industry

This decision could have significant repercussions for Louisiana’s aquaculture industry. In *Atlantic Salmon*, a federal court essentially usurped control over an issue of commercial fisheries from the administrative regulatory agency who was authorized to control it. In Louisiana, where aquaculture is an important

industry,¹³ the *Atlantic Salmon* decision could be a matter of great interest. Another variable in the calculus of potential aftereffects of *Atlantic Salmon* for Louisiana is the state's tumultuous history with invasive and nuisance species. Louisiana is ranked with Hawaii, Florida, and California as one of the most threatened states in terms of the introduction and establishment of harmful and ecologically disastrous non-native species.¹⁴ Aquaculture facilities in Louisiana are currently regulated pursuant to Title 56 of the Revised Statutes. The statutes provide for a permitting program to be administered by the Secretary of the Department of Wildlife and Fisheries (DWF). DWF has the authority to grant or deny permits based on the kinds of fish harvested, the methods used for raising, harvesting and managing the fish, including but not limited to hatchery breeding, spawning, transportation, implantation, propagation, growout, and harvesting of domesticated fish and other aquatic species.¹⁵ The statutes also state that no permit shall be issued for the "mariculture of any harmful species of fish."¹⁶ Pursuant to this grant of regulatory authority, DWF has prohibited the possession, sale or transportation into the state of various kinds of fish, namely tilapia, without express permission.¹⁷ Tilapia, a fish species native to Africa, is the basis of a rapidly growing aquaculture industry.¹⁸ Tilapia is a prolific species that reproduces easily and is fairly disease resistant. Tilapia is also a very adaptable fish that can be grown in a variety of locations and is even capable of thriving in brackish and salt waters despite the fact that the species is considered fresh water fish.¹⁹ Given tilapia's excessive spawning and general hardiness, it is a threat to less hearty native species.²⁰ According to the requirements set forth in Title 56, applications for aquaculture permits must contain a plan detailing the method of containment of various species of fish and a mode for insuring separation of domestic stock from wild stock.²¹

Currently, Louisiana appears to have an effective scheme under the CWA for the containment of

non-native fish. However, the regulation of and authority over Louisiana aquaculture might change. A bill introduced during the Louisiana legislature's 2003 Regular Session, which passed both Houses but was vetoed by Governor Foster, proposed to transfer regulatory authority over aquaculture from DWF to the Department of Agriculture and Forestry.²² Given the overwhelming support for this bill in the legislature, the likelihood of its reintroduction, albeit at a date whenever there is a governor more amenable to its terms, is great. The bill specifically stated that all species of finfish could be considered aquatic livestock with the exception of fish within the family Pangasidae and certain species of game fish, e.g. largemouth bass, spotted bass, shadow bass, black or white crappie, and species of bream.²³ This would imply that tilapia could be raised and harvested as aquatic livestock in Louisiana. Since *Atlantic Salmon* was decided, the EPA has used its authority to completely prohibit the cultivation of some non-native species (or "biological pollutants") in certain vulnerable areas.²⁴ Several environmental defense groups have proposed that the EPA effluent guidelines should prohibit the culture of all non-native species where there is a potential for escape into native fish populations.²⁵ In Louisiana, this would involve all coastal aquaculture facilities as well as those with access to inland rivers or streams. The question raised by *Atlantic Salmon* is whether Louisiana's aquaculture facilities could be prevented from raising, harvesting and stocking non-native species, especially a harmful yet profitable species like tilapia.

Could *Atlantic Salmon* open the floodgates to citizen suits filed under the applicable section of the CWA alleging ecological harm and substantial environmental impact due to non-native "biological pollutants?" What would be the cost of such permanent injunctions, if granted, to Louisiana's aquaculture industry? Louisiana has one of the most diverse aquaculture industries in the nation. Species such as crawfish, catfish, alligators, oysters,

tilapia, baitfish, hybrid striped bass, redbird, soft-shell crawfish and crabs, ornamental fish, baby turtles, and a variety of freshwater game fish are raised, harvested, and stocked in Louisiana.²⁶ Louisiana is also home to invasive species, such as the Rio Grande cichlid, the black carp and the zebra mussel, that threaten the delicate and unique ecosystem of the state.²⁷ Recent reports suggest that the most common method of introduction of non-native species into Louisiana waterways is through intentional stocking for sportfishing.²⁸ Bait releases and aquarium releases are responsible for about sixteen percent and twenty-five percent of all invasive species introductions, respectively.²⁹ Currently, escapes from aquaculture facilities account for only a small portion of the non-native species discharged into Louisiana's waterways. If tilapia is allowed to be harvested, transported and raised with impunity in Louisiana, will these statistics change? Given the adaptability of the fish and its tendency to reproduce exponentially, the likelihood for the invasion and establishment of tilapia is great though still merely speculative. What effect, if any, these statistics would have on an attempt to prohibit the harvest of non-native species in Louisiana coastal waters is uncertain. What is certain, though, is the fact that this issue is far from being resolved and the repercussions of *Atlantic Salmon* are only just beginning to be felt.

¹ *Atlantic Salmon of Maine*, 215 F. Supp.2d at 246 (emphasis added).

² The court upheld the EPA provision classifying an addition as anything that is introduced from a point source "into navigable water from the outside world"; *Id.* at 249; *See, e.g., Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001).

³ *Supra* n.1 at 255.

⁴ 33 U.S.C. 1365(a) states that the district courts have jurisdiction, regardless of the amount in controversy or the citizenship of the parties, over all civil actions instituted by any citizen against any person alleged to be in violation of

the effluent discharge standard of the CWA.

⁵ See *Atlantic Salmon* supra n.1, at 257; See also 33 U.S.C. 1342.

⁶ See *Atlantic Salmon* supra n. 1, at 260.

⁷ *Id.* at 259.

⁸ See *US PIRG v. Atlantic Salmon of Maine*, No. Civ. 00-151-B-C-, Civ. - 00-149-B-C, slip op. at 16. (emphasis added).

⁹ *Id.*

¹⁰ In fact, the court was quick to reprimand the EPA and the Maine Department of Environmental Protection in saying that, "They have sat overlong on their hands in this respect."⁹ See case cited *infra* note 12, at 17.

¹¹ *Id.* at 24.

¹² *Atlantic Salmon* supra, n.8 at 25 (emphasis added).

¹³ Louisiana leads the nation in total acreage of cultured aquatic species and grossed over \$200 million in aquaculture products in 2001. See generally, Louisiana Summary, Agriculture and Natural Resources 2001. Louisiana Cooperative Extension Service (February 2002).

¹⁴ P.L. Fuller, L.G. Nico and J.D. Williams. 1999. Nonindigenous Fishes Introduced into Inland Waters of the United States. Special

Publication 27 American Fisheries Society, Bethesda, MD.

¹⁵ La. R.S. 56:579(B)

¹⁶ *Id.* See also La. R.S. 3:263 which defines mariculture as "aquaculture which is practiced in brackish or saline water"; But cf. La. R.S. 56:356 which defines aquaculture as "production of fish in a controlled environment in private waters on private lands."

¹⁷ La. R.S. 56:319

¹⁸ The American Tilapia Association has reported that domestic production of tilapia increased by nearly 17 million pounds in 1998; See Tilapia Situation and Outlook Report. The American Tilapia Association (1998).

¹⁹ See generally L.A. Helfrich and D.L. Garling. Planning for Commercial Aquaculture. Virginia Cooperative Extension Service (Publication No. 420-012) (May 1997).

²⁰ *Id.*

²¹ La. R.S. 56:579(D)

²² House Bill 2013 (Regular Session 2003) provides that "the commissioner [of the Department of Agriculture and Forestry] shall determine the finfish species that are aquatic livestock suitable for aquaculture and those species that may be brought into the state for

that purpose as well as any regulations necessary to prevent the species from affecting the natural resources of the state."

²³ *Id.*

²⁴ See, e.g., EPA Permit Number ME0036234 (issued to Acadia Aquaculture Inc., Blue Hill, Maine).

²⁵ See generally Letter from Sea Web, Environmental Defense, Clean Water Network et al., to Marta Jordan, Office of Water, US EPA, *Effluent Limitations Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Point Source Category* (January 27, 2003) (Docket Number W-02-01).

²⁶ See supra n. 13.

²⁷ See supra n. 14.

²⁸ The major pathway of fish introduction for all states in the southern region, except Florida, is intentional stocking for sportfishing. The dominant pathway in Florida is the release or escape of animals associated with the aquarium trade. See supra n. 14.

²⁹ *Id.*

Determining the Impact of SWANCC: Advanced Notice Issued by the Corps and the EPA

By Marcelle C. Shreve

The full impact of the 2001 United States Supreme Court decision of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*¹ (SWANCC) may soon be realized. SWANCC altered the scope of the Army Corps of Engineers' (the Corps) Clean Water Act (CWA) Section 404(a) permitting program by rejecting the agency's jurisdiction over intrastate, isolated waters under the CWA. The Corps had asserted such jurisdiction under the "other waters" category, "the use, degradation, or destruction of which could affect interstate or foreign commerce."² The Corps had asserted that the ponds in question were connected

to interstate commerce under the Migratory Bird Rule.³ However, since the release of the high court's opinion, debate on whether to expand SWANCC to exclude all CWA jurisdiction over intrastate, isolated water bodies has arisen in legislative committees, courtrooms, Corps districts, and by the agencies and the concerned public. The Corps and the EPA have attempted to clarify the SWANCC ruling in a recent Advanced Notice of Proposed Rulemaking (hereinafter Advanced Notice).⁴

As reported in the December 2002 edition of *Louisiana Coastal Law*,⁵ the Clean Water Authority Restoration Act of 2002 (CWAR)

was introduced in House and Senate committees that clarified the interpretation of "waters of the United States." Under CWAR, "waters of the United States" include all intrastate, isolated waters for CWA jurisdiction.⁶ This was a congressional attempt to ensure that the holding of SWANCC was not employed to limit intrastate waters from CWA jurisdiction. CWAR did not move out of the House Subcommittee on Water Resources and Environment or from the Senate Committee on Environment and Public Works.⁷

The federal circuit courts are not in unison in their interpretation of CWA jurisdiction over intrastate,

isolated waters post-SWANCC.⁸ The Supreme Court reiterated the requirement that isolated, intrastate waters be “adjacent” to or have a “significant nexus” to a navigable waterway for CWA Section 404(a) jurisdiction.⁹ A majority of the circuits have broadly construed the meaning of “adjacent” and “significant nexus” and have granted CWA Section 404(a) jurisdiction to the Corps if there is any surface water connection to the isolated water body.¹⁰ Other circuits have expanded SWANCC’s holding to invalidate any Corps jurisdiction over intrastate, isolated waters.¹¹

Although the SWANCC decision is not based on the US Constitution’s Commerce Clause, it is a narrow reading of congressional intent under the Commerce Clause for federalism concerns.¹² This changes the analysis for individual Corps districts in delineating over which waters they will have jurisdiction and over which they will not. Before SWANCC, a basis for jurisdiction could be constructed by the migration of birds across state lines and nesting on a shallow, seasonal pond.¹³ Now the individual Corps districts must look more closely at each jurisdictional determination in light of their own interpretations of SWANCC. Without national guidelines for making these determinations, there is a high probability for disparity among the districts in their interpretations of their own jurisdictions. Such varied interpretations could lead to increased litigation against the Corps for differential treatment of similar properties across the country and also could lead to an increase in wetlands degradation.

In recognizing all of these difficulties created by SWANCC, the Corps and the Environmental Protection Agency (EPA) (hereinafter agencies) issued an Advanced Notice in January 2003, with an extended public comment period through April 2003.¹⁴ The Advanced Notice requested comments from the “general public, scientific community and Federal and State resource agencies” on the regulatory definition of “waters of the United States” subject to CWA jurisdiction in light of SWANCC.¹⁵

Specifically, the agencies requested comments on what factors do or should provide a basis for determining CWA jurisdiction over isolated, intrastate waters. Secondly, the agencies wanted to know “whether the regulations should define ‘isolated waters,’ and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes.”¹⁶

The agencies acknowledge that SWANCC invalidates jurisdiction over intrastate, isolated waters where the sole basis for jurisdiction is the Migratory Bird Rule, but question whether SWANCC also eliminates jurisdiction over intrastate, isolated waters when based on any rationale of 33 C.F.R. 328.3(a)(3)(i)-(iii).¹⁷ “Although the SWANCC case itself specifically involves Section 404 of the CWA, the Court’s decision may also affect the scope of regulatory jurisdiction under other provisions of the CWA,” including the state water quality certification program and the National Pollutant Discharge Elimination System (NPDES) permitting program.¹⁸

The agencies’ stated goal of the Advanced Notice is to “develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and according full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA.”¹⁹ The agencies received thousands of responses, most of which were from individual citizens or through form letters that were against eliminating federal protection of isolated waters and wetlands.²⁰ With the input received in response to the Advanced Notice, the agencies will “determine the issues to be addressed and the substantive approach for a future proposed rulemaking addressing the scope of CWA jurisdiction.”²¹

Locally, the 2003 Regular Session of the Louisiana legislature responded to the Advanced Notice with H.C.R. 115, which urges the EPA and the Corps “to revise their regulatory authority in light of” SWANCC.²² The resolution asserts “the SWANCC decision recognizes

congress’ [sic] true intent that several states retain the traditional authority to manage their land and nonnavigable water resources through the use of planning tools such as zoning authorities and conservation incentives.”²³ It seems that the Louisiana legislature hopes the Corps and EPA will revise their rules and guidelines to reduce the Corps’ CWA jurisdiction over intrastate, isolated waters, thereby expanding the technical holding of SWANCC and expanding state control over Louisiana’s wetlands. This potential greater level of state control over the wetlands does not equal more stringent regulation and protection of the state’s wetlands. The Advanced Notice suggests that the Corps and EPA will release proposed rulemaking on the impact of SWANCC in the near future. Ideally, this agency action will clarify the holding of SWANCC for legislatures, courts, and individual Corps districts in an effort to standardize the application of the CWA’s Section 404 jurisdiction over intrastate, isolated waters.

¹ 531 U.S. 159 (2001). (SWANCC)

² 33 C.F.R. 328.3(a)(3).

³ 51 Fed. Reg. 41217. Adopted in 1986, the Migratory Bird Rule “was an administrative interpretation stating that the presence of migratory bird aquatic habitat was sufficient to make such aquatic habitat jurisdictional under 33 C.F.R. 328.3(a)(3), which provides for CWA jurisdiction over ‘other waters’ based upon the Commerce Clause.” The SWANCC Court held “that Congress did not intend Section 404(a) to regulate such isolated waters based solely upon the use of such waters by migratory birds.” Jon Kusler, *The SWANCC Decision and State Regulation of Wetlands*, Memorandum for the Association of State Wetland Managers, <http://www.aswn.org> (accessed June 4, 2003).

⁴ 68 Fed. Reg. 1991. See also 68 Fed. Reg. 9613.

⁵ 81 *Louisiana Coastal Law* 5

⁶ 107th Congress S.2780 and H.R. 5194.

⁷ See THOMAS - U.S. Congress on the Internet, <http://thomas.loc.gov> (accessed June 4, 2003), for the text and status of the bill.

⁸ See Robin Kundis Craig, *Lower Courts Untangle the Finer Points of the SWANCC Decision*, 24 *National Wetlands Newsletter* 7 (2002).

⁹ *SWANCC* at 167-168.

¹⁰ *Id.* at 8.

¹¹ *Id.*

¹² See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

¹³ *Supra* n. 2.

¹⁴ *Supra* n. 3.

¹⁵ 33 C.F.R. 328. See also 40 CFR 110, 112, 116, 117, 122, 230, 232, 300, and 401.

¹⁶ 68 Fed. Reg. 1991, p.7.

¹⁷ *Id.* at 5. Other commentators have maintained that the decision is broader, invalidating Section 404 jurisdiction over any intrastate wetland. See David M. Ivester, *The Supreme Court Draws a Line*, 23 *National Wetlands Newsletter* 5 (2001).

¹⁸ *Id.*

¹⁹ *Id.* at 4-5.

²⁰ See U.S. Environmental Agency Dockets, www.epa.gov/docket (accessed June 4, 2003) (Listed under Docket ID No. OW-2002-0050).

²¹ 68 Fed. Reg. 1991, p.1.

²² Louisiana State Legislature, <http://www.legis.state.la.us/> (accessed June 4, 2003).

²³ *Id.*

Oyster Liability: Gregor v. Argenot Great Central Insurance Company

By Mindy Heidel

On May 20, 2003, the Louisiana Supreme Court issued its decision in *Gregor v. Argenot Great Central Insurance Company*,¹ a case exploring the liability of both the Department of Health and Hospitals (DHH) and restaurant owners for the incorrect placement of signs warning patrons of the dangers of eating raw oysters.

Suit was filed against DHH, the restaurant where the oysters were served, and the restaurant's insurance company after Dan Gregor, who suffered from hepatitis C, became sick and died after eating raw oysters at Pascal's Manale in New Orleans.² The claim was based on the restaurant's failure to comply with and DHH's failure to enforce La. Admin. Code Tit. 51, 23:1109.³ The restaurant subsequently settled with Gregor's family, leaving DHH as the only defendant.

The Louisiana Sanitary Code requires that "[a]ll establishments that sell or serve raw oysters must display signs, menu notices, table tents or other clearly visible messages at the point of sale with the following wording: 'There may be a risk associated with consuming raw shellfish as is the case with other raw protein products. If you suffer from a chronic illness of the liver, stomach or blood, or have other immune disorders, you should eat these products fully cooked.'"⁴

The restaurant in the *Gregor* case had posted a warning above the oyster bar where the restaurant made approximately seventy-five percent of its total raw oyster sales. However, Mr. Gregor ate his oysters in the dining room where there was no such warning posted. The appellate court found DHH seventy-five percent liable for Mr. Gregor's death due to their failure to enforce the Louisiana Sanitary Code and the restaurant twenty-five percent liable for its failure to post the required warnings.⁵

In DHH's appeal, the agency claimed that they were not liable for the enforcement of the Sanitary Code under La. R.S. 9:2798.1 because it was a policymaking or discretionary act. The Supreme Court rejected this argument noting that the directive that the warnings "must" be posted at the "point of sale" was mandatory, not discretionary, language.⁶

DHH also appealed the ruling that they were responsible for seventy-five percent of the damages. DHH argued that the lower court erred in finding it to have a greater responsibility for Mr. Gregor's death than the restaurant, because the restaurant knew better than DHH where customers purchased oysters. The court found that the restaurant was well aware of the requirement of placing the signs at the point of sale and the

dangers of eating raw oysters. The court then determined that the restaurant was at least equally responsible for Mr. Gregor's death.⁷

The court reduced DHH's share of the damages to fifty percent in light of its diminished responsibility for the death and increased the restaurant's portion to fifty percent. In deciding to increase the restaurant's culpability, the Louisiana Supreme Court also found that the sign above the oyster bar was inadequately displayed because of the "visual clutter" surrounding the sign, making the restaurant negligent in warning the patrons of the oyster bar where the sign was posted.⁸

In general, this decision has two major impacts on the liability that DHH and restaurants have for insufficient warnings given to consumers of raw oysters:

1. DHH's liability for failing to enforce the Louisiana Sanitary Code as to oyster-related illness is affirmed; and
2. Restaurants may now incur liability if they fail to clearly and conspicuously post warning signs. A single sign posted among many others behind the oyster bar is not sufficient even as to those individuals who purchase oysters there.

Gregor partially reaffirms the related Fourth Circuit case, *Grayson v. Louisiana Department of Health and Hospitals*.⁹ In this case, DHH was found one hundred percent liable for failing to enforce the same provision of the Louisiana Sanitary Code after a man died from eating oysters in a restaurant devoid of all required warnings. While the *Gregor* case affirms the liability of DHH by again finding the agency liable, it also reduces that liability by placing more responsibility on restaurants. The Louisiana Supreme

Court found the restaurant in *Gregor* fifty percent at fault when it had a warning posted (albeit insufficient), while the *Grayson* court absolved the restaurant of all liability even though not a single sign was posted. This message from the Louisiana Supreme Court that restaurants can be found liable for failing to comply with the Louisiana Sanitary Code may cause the fault assigned to restaurants and DHH to be more equally apportioned in future cases.

¹ 2003 WL 21179846 (La.).

² *Id.*

³ This portion of the Louisiana Sanitary Code regulates food establishments.

⁴ La. Admin. Code Tit. 51, 23:1109.

⁵ See *Gregor*, 2003 WL 21179846.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 837 So.2d 87 (La. App. 4 Cir. 2002).

Louisiana's Seaward Boundaries

By Mindy Heidel

State boundary disputes may seem to be a topic confined to an earlier part of our nation's history, but with the dynamic nature of Louisiana's coastal areas and the continued economic importance of these areas, this topic should not be overlooked. As reported in the most recent edition of *Louisiana Coastal Law*, coastal boundaries are not only important for determining mineral and fishing rights, but also are important for determining the rights of ownership associated with submerged shipwrecks.¹

In the early twentieth century, disputes over oyster harvesting rights between Louisiana and Mississippi led the United States Supreme Court to determine the proper boundary between Mississippi and Louisiana.² The court, after reviewing documents relating to each state's admission to the Union, found in favor of Louisiana.³ The court placed the boundary at the thread of the channel of the Mississippi River extending south until the thirty-first degree north of latitude and then running east along that degree until the Pearl River was reached. From there, the court extended the border south along the channel of the Pearl River to Lake Borgne and then from Lake Borgne to the Mississippi River, with the deep-water sailing channel separating Isle à Pitre from Cat

Island acting as the final boundary.⁴

Louisiana did not fare so well in an action against Texas in an effort to establish the state's western boundary. The United States Supreme Court, appointing a Special Master, determined Louisiana's boundary with Texas in 1976.⁵ Louisiana asked that the court set the boundary at the geographic middle of the west pass of the Sabine River and grant the state ownership to all islands in the river.⁶ However, the court, following the Special Master's recommendations, set the boundary in the middle pass of the Sabine River and granted Louisiana title only to islands located in the eastern half of the river deferring judgment on the ownership of the remaining islands.⁷

Louisiana did not obtain an official grant to the offshore waterbottoms making up the state's southern-most border until 1953.⁸ The Submerged Lands Act (SLA) granted Louisiana control over waterbottoms extending three geographical miles from shore and gave the federal government control of the remainder of the Exclusive Economic Zone.⁹ After this legislation was passed, disputes arose because Louisiana had already granted mineral rights beyond this three-mile perimeter.¹⁰ The United States Supreme Court was again forced to determine the proper

boundary, and after reviewing documents cited by Congress when Louisiana entered the Union in 1812, the court found that the 1953 SLA was the only grant of control over coastal waterbottoms ever given to Louisiana.¹¹

In accordance with the SLA, the court, using the Louisiana Plane Coordinate System,¹² established a boundary approximately three miles from the state's coast.¹³ Originally, this ambulatory boundary line was a fixed point three miles from the coast and changed as the coastline changed. This was a potential threat to Louisiana because as the state's coastline receded the state/federal boundary also receded and Louisiana lost control over important fishing and oil exploration areas. Fortunately for Louisiana, Congress amended the SLA in 1986, making the boundary stationary and unaffected by shoreline changes.¹⁴ The amendment fixed all boundaries between any state and the United States that had been or would be fixed by coordinates under a decree of the Supreme Court.¹⁵

These boundaries are important today as they determine which state and federal laws apply, making the placement of these boundaries crucial to understanding

the law for many ocean-related industries.

¹ 81 *Louisiana Coastal Law* 1.

² *State of Louisiana v. State of Mississippi*, 202 U.S. 1 (1906).

³ *Id.*

⁴ *Id.*

⁵ *State of Texas v. State of Louisiana*, 426 U.S. 465 (1976).

⁶ *Id.*

⁷ *Id.* The court referenced certain maps as delineating the boundary line in more detail,

but because these maps were not published with the opinion, the exact placement of the boundary as determined by this court may never be known.

⁸ Submerged Lands Act, 43 U.S.C. 1301-1305 (2003).

⁹ *Id.*

¹⁰ See *United States v. Louisiana*, 382 U.S. 288 (1965).

¹¹ *Id.*

¹² See also La.R.S. 50:3 (2003). The Louisiana Plane Coordinate System uses a grid system

based on points fixed and documented by the National Ocean Service/National Geodetic Survey. The “x” coordinate describes a position east to west and the “y” coordinate describes a position north to south.

¹³ *United States v. Louisiana*, 422 U.S. 13 (1975) (listing the complete set of coordinates established by the court).

¹⁴ 43 U.S.C. 1301 (b) (as amended April 7, 1986).

¹⁵ *Id.*

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