

LOUISIANA COASTAL LAW

LCL 88, DECEMBER 2006



Bills and Resolutions Passed in the 2006 Regular Legislative Session and 2006 1st Extraordinary Session of the Louisiana Legislature Affecting Coastal Resource Use and Conservation

by Melissa Trosclair Daigle

Environmental Quality

SR 17
Shepherd

Directs the secretary of the Department of Environmental Quality to appear before the Senate Environmental Committee to provide information as to why the Gentilly Landfill should remain open.

Act No. 29
HB 29
Representative Lancaster and Senator Dupre

(Amends and reenacts Section 3 of Act No. 69 of the 2005 First Extraordinary Session of the Legislature). Changes the name of the Wetlands Conservation and Restoration Fund to the Coastal Protection and Restoration Fund.

Act No. 115
SB 209
Fontenot

(Amends and reenacts R.S. 30:2054(B)(9) and enacts R.S. 30:2074(B)(10)). Authorizes the secretary of the Department of Environmental Quality to develop regulatory permits for certain air emissions and water discharges. Provides for limitations on such authority.

Act No. 126
SB 615

Senators Fontenot, Bajoie, Hines, Mount, and Nevers and Representatives Alario, Dewitt, Dorsey, Hammett, Jefferson, Richmond, Ritchie, and Salter

(Enacts Chapter 23 of Subtitle II of Title 30 of the Louisiana Revised Statutes of 1950, consisting of R.S. 30:2571 through 2588). Creates and provides relative to the Mercury Risk Reduction Act. The goal of the act is to achieve significant reductions in environmental mercury by encouraging the establishment of effective state and local waste reduction, recycling, and management programs while encouraging non-mercury alternatives.

Act No. 260
HB 371

Representative Damico and Senators Cheek, Fontenot, Malone, and Ullo

(Amends and reenacts R.S. 49:191(3) and repeals R.S. 49:191(1)(g)). Recreates the Department of Environmental Quality and all statutory entities made a part of the department by law.

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Ports, Harbors, and Water

HCR 32

Hutter, Badon, Lafonta, and Marchand

Memorializes Congress to close the Mississippi Gulf River Outlet.

HCR 137

Dove

Urges and requests the Department of Natural Resources to operate the two Mississippi River freshwater diversions structures at as close to maximum capacity as is possible in order to increase the effectiveness of wetland growth.

Act No. 10

SB 4

Senators B. Gautreaux, Amedee, Cain, Dupre, N. Gautreaux, Heitmeier, Theunissen, and Ullo and Representative Jack Smith

(Enacts R.S. 38:331). Reorganizes the structure of certain coastal levee boards. Creates and provides for the Coastal Louisiana Levee Consortium and provides for its purposes, membership, duties, and functions. Provides that the purposes of the Coastal Louisiana Levee Consortium are to facilitate communication and coordination of efforts of the levee districts and specified parishes; to protect coastal Louisiana, its people, property, and resources; to increase awareness and understanding of conditions, issues, strategies, and policies of coastal levee systems, hurricane protection, and flood control; and to provide one unified voice that is representative of the coastal levee community.

Act No. 34

HB 60

Representative Alario and Senator Lentini

(Amends and reenacts R.S. 47:305.1(B) and (C)(1)). Clarifies the law and intent of the law granting a state and local tax exemption for ships and ships' supplies for barges. This clarification was made necessary because of the decision in *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So. 2d 533, where the court held that barges were not "vessels" within the meaning of exemption for materials and supplies purchased by the owners or operators of ships or vessels operating exclusively in foreign or interstate

coastwise commerce. Provides that the taxes imposed by taxing authorities shall not apply to materials and supplies purchased by the owners or operators of ships, barges, or vessels, including drilling ships, operating exclusively in foreign or interstate coastwise commerce, where such materials and supplies are loaded upon any such ship, barge, or vessel for use or consumption in the maintenance and operation thereof. Defines "foreign or interstate coastwise commerce" as including trade, traffic, transportation, or movement of passengers or property by, in, or on a ship, barge, or vessel, including a drilling ship.

Act No. 140

HB 88

Pitre

(Enacts R.S. 14:99.1). Creates the crime of hit and run damaging of a potable waterline by operation of a watercraft or vessel. Defines hit and run damaging of a potable water line by operation of a watercraft or vessel as the intentional failure of the driver to stop such vehicle at the scene of the accident and give the identity of the watercraft or vessel involved in or causing any accident resulting in damage to a potable waterline. Driver must give his name, address, and license number of the vessel or watercraft to the enforcement authorities at the scene or shall report the accident to the police if there are no enforcement authorities at the scene. The operator shall be fined not more than five thousand dollars or imprisoned with or without hard labor for more than five years, or both.

Act No. 282

HB 836

Representatives Jack Smith, Lambert, and St. Germain and Senators Malone and McPherson

(Amends and reenacts R.S. 34:851.10(A) and (B)).

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Revises reporting requirements for collisions, crashes, and casualties on waterways. Changes the word “accident” to “crash.” Requires that any operator of a vessel involved in a collision, crash, or other casualty render assistance to others affected if practicable. Also requires that the operator give his name, address, and identification of his vessel in writing to any person injured and to the owner of any property damaged. Requires that the operator of any vessel involved in a collision, crash, or other casualty involving a recreational vessel and resulting in death or injury to a person or property damage in excess of five hundred dollars give notice of the incident immediately to the department, the nearest law enforcement agency, or the state police.

Act No. 297

HB 1086

Representatives Dove and Baldone and Senator Dupre

(Amends and reenacts R.S. 49:214.7(A) and enacts R.S. 49:214.7(E)). Requires that all barrier island stabilization and preservation projects mandate a minimum dune height of eight feet with vegetation where appropriate. Requires the Department of Natural Resources to annually submit a barrier island status report to the legislature. The report must include the condition of all barrier islands, provide the status of all stabilization and preservation projects under construction, and outline future plans for restoration and maintenance of the barrier islands and coastal passes.

Wildlife and Fisheries

HCR 33

Representatives Jack Smith and St. Germain and Senator B. Gautreaux

Amends HCR 85 from the 2005 Regular Session of the Louisiana Legislature, relative to the Wild-Caught Crawfish Task Force, to provide relative to its membership, whereas, there are concerns and issues involving certain appointing authorities which have caused the Wild-Caught Crawfish Task Force to be operating at diminished capacity without all of its members.

HCR 42

Frith

Urges and requests the Wildlife and Fisheries Commission not to reduce the current creel limit of 25 fish for spotted sea trout.

HCR 191

Pitre

Suspends the coordinates given in Act No. 57 of the 2005 Regular Session relating to the area to be used by the Grand Isle Port Commission for off-bottom oyster culture. The suspension extends through the sixtieth day after final adjournment of the 2007 Regular Session of the Legislature of Louisiana.

Act No. 21

HB 1035

Representatives Frith and St. Germain and Senator N. Gautreaux

(Amends and reenacts R.S. 3:556.12(C)). Removes certain restrictions on use of funds by the Louisiana Crawfish Promotion and Research Board. Provides that the board shall retain such amounts as are necessary for the administrative expenses of the board and shall disburse the remaining funds to fund the following: all costs related to advertising, promotion, and marketing of Louisiana crawfish; research which will aid in carrying out the purposes of this Part; efforts to increase consumption of Louisiana crawfish; providing producers, distributors, retailers, and consumers with educational information as to the nutritional and health value of Louisiana crawfish; and fulfilling any other purposes authorized by this Part.

Act No. 111

SB 162

Ellington

Repeals the provision in R.S. 56:320(A)(5) which states that a wire net shall only be used for the taking of legal size catfish.

Act No. 143

HB 101

Martiny

(Amends and enacts various Revised Statutes dealing with the crime of theft). Both the theft of crawfish and

the theft of an alligator statutes (R.S.14:67.5 and 67.13, respectively) have been revised, raising the low value amount from one hundred dollars to three hundred dollars. For misappropriations or takings of crawfish or alligator valued from three hundred dollars to five hundred dollars, the offender shall be imprisoned, with or without hard labor, for not more than two years or may be fined not more than two thousand dollars, or both. For misappropriations or takings of crawfish or alligator valued at less than three hundred dollars, the offender shall be imprisoned for not more than six months or may be fined not more than five hundred dollars, or both.

Act No. 221

HB 1060

Representative John Smith and Senator Cain

(Amends and reenacts R.S. 56:643(B)). Allows spouses and dependents of active military personnel to purchase recreational hunting and fishing licenses at a reduced rate of \$5.

Act No. 247

HB 85

T. Powell

(Amends and reenacts R.S. 56:331(B) and enacts R.S. 56:331(F)). Provides that the Crab Task force shall be composed of twenty members appointed by the secretary of the Department of Wildlife and Fisheries. Provides that the members should represent, as much as possible, the diverse geographic areas according to statistical crab fishing license data and that these members shall be subject to confirmation by the Senate.

Act No. 293

HB 1034

Representative Frith and Senator Cheek

(Enacts R.S. 3:556.14). Provides for an assessment of 1¢ per pound on all crawfish tail meat sold in Louisiana if the assessment is approved in a referendum vote by a majority of crawfish tail meat producers. Also provides that each crawfish tail meat producer shall be exempt from the assessment if he produces crawfish tail meat from crawfish obtained from crawfish farmers and harvesters who have paid the assessment for bait and live crawfish tags.

Act No. 393

HB 702

Representative Odinet and Senator Dupre

(Amends and reenacts R.S. 56:433(B)(1) and (C)). Provides for season opening and closing dates for harvest from the public seed grounds. Authorizes the commission to extend the harvest season beyond April 1 without a limit on when the closing date must be set. Also provides for the commission to designate areas and reefs that may be fished and what portions of the reefs should be closed to harvest. Requires the commission to consider recommendations by the Oyster Task Force in determining season dates and harvest locations.

Act No. 398

HB 802

Representative Frith and Senator N. Gautreaux

(Amends and reenacts R.S. 56:425.1(A), (F), and (G) and 435.1.1(A), (C), and (D); enacts R.S. 56:435.1(H); and repeals R.S. 56:435.1). Provides that oysters may be harvested in Sabine Lake using tongs, a hand dredge, a single dredge with mechanical assist that has a tooth bar no more than thirty-six inches long, or a single scraper with a mechanical assist with a flat bar length of no more than thirty-six inches. Increases the number of oysters per boat per day that may be harvested from ten one and one-half bushel sacks to no more than twenty-five sacks. Provides that the season closing date for calendar years 2007 through 2010 will be set by the commission after consideration of recommendations by the Oyster Task Force. After 2010, the closing date is set on April 30. Increases the harvest limit from fifteen sacks to twenty-five sacks per day per licensed vessel.

Act No. 399

HB 825

Representatives St. Germain, Daniel, Lambert, Pierre and Jack Smith and Senator McPherson

(Amends and reenacts R.S. 56:6.1 and repeals R.S. 56:317). Authorizes the secretary of the Department of Wildlife and Fisheries, in an emergency declared by the governor, to close an area affected by the declaration to hunting or declare a closed season on any species of fish. Provides that any such closure shall be made through issuance of an emergency rule under the Administrative Procedure Act, which must include a description of the

area closed and the restrictions applied, and may alter opening and closing dates. Limits the closure period to not more than 14 days.

Act No. 400

HB 838

Representatives St. Germain, Pierre, Lambert, and Jack Smith and Senator Malone and McPherson

(Amends and reenacts R.S. 56:328(B), (C), and (D) and enacts R.S. 56:328(E)). Gives the Department of Wildlife and Fisheries the authority to promulgate rules to prevent the introduction of invasive, noxious aquatic plants and to control, eradicate, and prevent the spread or dissemination within the state of all invasive, noxious aquatic plants that pose a threat to the wildlife or fisheries resources of the state. Adds new species to the list of invasive, noxious aquatic plants prohibited from importation into the state.

Act No. 401

HB 839

Representatives St. Germain, Lambert, and Jack Smith and Senator N. Gautreaux

(Amends and reenacts R.S.56:306(A)(2)(a), 306.2(A)(3), 306.6(A), and 332(K) and repeals R.S. 56:309 through 309.4). Adds the owner or operator of a soft shell crab shedding facility to the definition of seafood dealer, thereby requiring operators of such facilities to purchase the dealer's license. Eliminates the soft shell crab shedders license. Imposes an additional requirement on dealers who shed soft shell crabs or operate soft shell crab shedding facilities to submit to the department information regarding the amount of soft shell crabs produced. Deletes the exemption relating to a minimum amount of escape rings as it pertains to soft shell crab shedders, thereby making the exemption apply to all crab traps in Lake Pontchartrain.

Act No. 419

HB 1161

St. Germain

(Enacts R.S. 56:332.2(I)). Provides that in Lake Palourde in St. Mary and St. Martin parishes and in Lake Verret in Assumption parish from Nov. 1, 2006, until March 31, 2007, any person licensed for the commercial harvest of shad using a gill net who was also licensed during 2005 is authorized to leave up to two gill nets

unattended after sunset and before sunrise so long as the nets are placed more than 100 yards from the tree line.

Act No. 425

HB 1249

Representatives Odinet and Baldone and Senator Dupre

(Amends and reenacts R.S. 56:423(A) and (B)(1), 424(H), 425(A) and (C), 427.1, 428(A) and (B), 429, and 432.1; enacts R.S. 56:424(I), 425(E), and 432.2; repeals R.S. 56:428.1, 428.2, 428.3, and 430.1). Provides that an oyster lessee shall enjoy the exclusive use of the water bottoms leased, subject to the rights and responsibilities of the state to take any action in furtherance of coastal protection, conservation, or restoration. Provides that no lessee shall have any right to maintain any action against the state arising from any project, plan, act, or activity in relation to coastal protection, conservation, or restoration except as provided in R.S. 56:427.1. Authorizes the secretary of the Department of Wildlife and Fisheries to lease water bottoms of the state to any resident and include such stipulations as he deems necessary to develop the industry. Repeals the Oyster Lease Relocation Program and institutes an Oyster Acquisition and Compensation Program.

Act No. 561

SB 30

Senators McPherson, Barham, Boasso, Cheek, Dupre, Malone, Michot, and Murray and Representatives Baldone, Baudoin, Durand, Farrar, Frith, M. Guillory, Hebert, Hill, Gary Smith, Jack Smith, John Smith, St. Germain, Thompson, Townsend, Walker, and Scalise

(Enacts R.S. 41:16 and R.S. 56:109.2). Provides that hunting and fishing opportunities be a primary consideration in state land management decisions. Requires that an annual report be issued concerning public lands, public hunting grounds, and recreation areas that are available for public hunting, fishing, and recreation. Authorizes the commissioner to manage public lands in a manner to support, promote, and enhance public hunting, fishing, and recreational opportunities to the extent provided by law. Authorizes the commission to manage wildlife management areas, wildlife refuges, public hunting grounds, and recreational areas in a manner to support, promote, and enhance public hunting, fishing, and recreational opportunities to the extent authorized by law.

Natural Resources/Public Lands

HCR 205

Representatives Richmond, Badon, Barrow, Baylor, Burrell, K. Carter, Cravins, Curtis, Dorsey, Gallot, Glover, Gray, E. Guillory, Harris, Honey, Hunter, Jackson, Jefferson, Lafonta, Marchand, Morrell, Pierre, and Quezairé and Senators Bajoie, Broome, Cravins, Duplessis, Fields, Jackson, Jones, Murray, and Shepherd Memorializes Congress to take such actions necessary to extend Louisiana's seaward boundary in the Gulf of Mexico to twelve geographical miles.

Act No. 17

HB 1

Alario and Triche

Department of Natural Resources, Office of Coastal Restoration and Management

Ensures that the loss of wetlands resulting from activities regulated by the Office of Coastal Restoration and Management will be offset by actions that fully compensate for their loss (as stipulated by permit conditions) on an annual basis. Develops and constructs projects to protect, restore, enhance, or create vegetated wetlands annually from fiscal year 2005-2006 through fiscal year 2009-2010; and maximizes the percentage of projects adequately operated and maintained by the end of fiscal year 2009-2010.

Louisiana Department of Wildlife and Fisheries, Office of Fisheries

Ensures that living aquatic resources are sustainable for present and future generations of Louisiana citizens by providing access and scientific management.

Louisiana Universities Marine Consortium

The Louisiana Universities Marine Consortium (LUMCON) will conduct research and education programs directly relevant to Louisiana's needs in marine science and coastal resources and will serve as a facility for all Louisiana schools with interests in marine research and education in order to increase awareness at all levels of society of the environmental, economic, and cultural value of Louisiana's coastal and marine environments.

Act No. 39

HB 631

Damico

(Amends and reenacts R.S. 40:2822(7)). Provides definitions and authority to conduct environmental review of certain public water systems. Defines "environmental review" as a process conducted by the Department of Health and Hospitals of any public water system that has applied for or has received a loan or other assistance from the program.

Act No. 66

SB 26

Dupre

(Enacts R.S. 49:213.1(E) and 213.4(A)(7) and repeals R.S. 49:213.1(E) and 213.4(A)(7)). Provides the Coastal Protection and Restoration Authority with its powers, duties, and functions and authorizes it to serve as the single entity responsible to act as local sponsor for certain projects relative to hurricane protection and flood control. Establishes, authorizes, and empowers the Coastal Protection and Restoration Authority to carry out any and all functions necessary to serve as the single entity responsible to act as the local sponsor for construction, operation, and maintenance of all of the hurricane, storm damage reduction, and flood control projects in areas under its jurisdiction. Authorizes the Coastal Protection and Restoration Authority to enter into contract with the federal government, any federal agency, any political subdivision of the state, or private individual for the construction, operation, or maintenance of any coastal restoration, hurricane, storm damage reduction, or flood control project.

Act No. 181

HB 452

Representatives Dove and Baldone and Senator Dupre

(Enacts R.S. 38:301.1). Requires the levee districts in the coastal zone to prepare and submit levee elevation reports. Levee districts located wholly or partially in the coastal zone and every parish governing authority for parishes similarly located but which are not part of a levee district shall once every three years submit a levee elevation report on tidal levees located within the coastal zone. The report is to be submitted to the Coastal Protection and Restoration Authority and to the office of

public works, hurricane flood protection, and intermodal transportation in the Department of Transportation and Development. The report shall be based on a centerline profile survey, which shall be limited to the gathering of elevation information along the top of the levee.

Act No. 548

SB 635

Dupre and Dardenne

(Amends and enacts R.S. 49:214.32(B) and (D) and 214 (A)(6); enacts R.S. 49:214.22(8), 214.32(C)(8) and 214.41(A)(7); and repeals R.S. 49.214.51). Provides relative to coastal resources management and repeals the Louisiana Coastal Restoration Fund. Instructs the governor, through the secretary, to ensure that any activity within or outside the coastal zone that affects any land or water use or natural resources of the coastal zone that is undertaken, conducted, or supported by any governmental body is consistent with the state program. Also instructs the governor, through the secretary, to consider the sustainability of any activity in the coastal zone and account for potential impacts from hurricanes and other natural disasters.

Act No. 854

SB 229

Senators Dardenne, Bajoie, and Dupre and Representative Daniel

(Adds Article VII, Section 10.2(F) and repeals Article VII, Section 10.11 of the Constitution of Louisiana). Provides for the deposit of a portion of the proceeds of any tobacco securitization into the Coastal Protection and Restoration Fund and repealing the Louisiana Coastal Restoration Fund. If the state securitizes any portion of revenues received from the Master Settlement Agreement executed November 23, 1998, and approved by the Consent Decree and Final Judgment entered in the case *Richard P. Ieyoub, Attorney General, ex rel. State of Louisiana v. Philip Morris, Inc.*, the treasurer shall transfer twenty percent to the Barrier Island Stabilization and Preservation Fund. The money is to be used for the purposes of the Louisiana Coastal Wetlands Conservation and Restoration Program.

Miscellaneous

HCR 34

Representatives Faucheux, Quezair, and Gary Smith and Senator Amedee

Urges and requests the Louisiana Department of Transportation and Development to construct a westbank expressway along Louisiana Highway 3127 between Baton Rouge and New Orleans in order to create an alternate escape route during hurricane evacuations.

SCR 27

Murray

Memorializes the Congress of the United States to take immediate action to provide federal financial assistance to aid Louisiana's recovery following the devastation caused by hurricanes Katrina and Rita, to expeditiously complete the needed repair to the levee system in the greater New Orleans area, to provide for the prompt construction of hurricane and tidal water protection for south Louisiana, and to provide assistance with coastal restoration and marsh management.

Act No. 558

SB 7

Nevers

(Amends and reenacts Part XIV-A of Chapter 5 of Title 3 of the Louisiana Revised Statutes of 1950). Requires state agencies to assist the Department of Economic Development in the development, registration, and licensing of any trademark or label for use in promoting Louisiana agricultural and seafood products. Defines "seafood products" as including any type of species caught in either privately owned or public waters, including streams or lakes, or any final derivative resulting from a combination or breakdown of raw seafood products. 🏰

Parm v. Shumate

By Melissa Trosclair Daigle

Facts

In approximately 1880, the Mississippi River shifted westward. When the river moved back eastward, Gassoway Lake remained behind as a shallow water body on property now owned by Walker Cottonwood Farms. The lake is located in East Carroll Parish in the uppermost eastern corner of the state.¹ The lake, which remains landlocked during most of the year, is so shallow that it is practically inaccessible by boat and is completely dry during parts of the year.² The only time the lake receives new water is when the Mississippi River floods.³ When this occurs, water flows through a ditch from the river to the lake and submerges virtually all of the land in this area up to the high water mark of 112 feet.⁴ In *Walker Lands, Inc. v. East Carroll Parish Police Jury*, the 2nd Circuit Court of Appeals for Louisiana was faced with the issue of whether or not the lake and the ditch that connects the lake to the Mississippi River were navigable or non-navigable.⁵ In *Parm v. Shumate*, defendant Sheriff Shumate arrested plaintiffs Roberts, Balch, Watts, Gammill, and Parm on different occasions in the late 1990s for trespass onto the Walker Cottonwood property.⁶ When arrested, the plaintiffs were fishing from boats on the water of the Mississippi River covering the section of the bank owned by Walker Cottonwood Farms. The case was first heard in the Magistrate Court for the Western District of Louisiana. In October 2002, District Court Judge Robert James of the U.S. District Court of the Western District of Louisiana accepted Magistrate Judge Kirk's Report and Recommendation that the *Parm* case be stayed until a final decision was made in *Walker Lands, Inc.*, as it was anticipated that the case could possibly resolve some of the issues at stake in *Parm*.

In *Walker Lands, Inc.*, the court held that the lake and ditch were non-navigable and, therefore, not subject to public use.⁸ The *Parm* suit was thereafter reopened, in which the plaintiffs sued Sheriff Shumate in his official capacity, claiming they were arrested without probable cause for trespassing when they traveled, hunted, and fished on the waters of the Mississippi River when it flooded and covered the privately-owned Walker Cottonwood farmland, including Gassoway Lake.⁹ The plaintiffs sought a declaratory judgment that regardless of

who owns the irregular bank and shore of the Mississippi River, they have a right to navigate along said bank and shore.¹⁰ They desired to fish and hunt on the water between the ordinary low and high water mark of the Mississippi River.¹¹ Additionally, they sought injunctive relief and damages under federal and state law.¹²

Procedural History

On April 21, 2006, Magistrate Judge Kirk issued his Second Report and Recommendation.¹³ He first considered the plaintiffs' argument that federal law gave them the right to hunt and fish on the water in question. To support this argument, the plaintiffs cited 33 U.S.C. 10, which states, "All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways." The Magistrate Judge pointed out that in the 1870 United States Supreme Court case *The Daniel Ball*, the Court held that public navigable rivers are those that are "navigable in fact."¹⁴ In order to be navigable in fact, they must be capable of being used, "in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."¹⁵ Magistrate Judge Kirk held that this federal statute is not determinative on this issue of whether hunting and fishing is allowed on navigable waters in Louisiana.

Additionally, Magistrate Judge Kirk held that the federal navigational servitude does not grant rights to hunt and fish up to the high water mark. However, he held that, because of the navigability of the Mississippi River, "there is a federal common law right of navigation which includes the right to reasonably use the [Mississippi River's] waters for the purposes, among other things, of navigation including travel and transportation, commerce, boating, sailing, and fishing and hunting from boats."¹⁶ To support this, he cited *Silver Springs Paradise Co. v. Ray*, which held that the public's right of navigation "entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing pleasure, as well as for carrying persons or property for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common."¹⁷

While 33 U.S.C. 10 and the federal navigation servitude did not explicitly give the plaintiffs the right to fish and hunt on the banks of the Mississippi River, Magistrate Judge Kirk held that, under state law, the plaintiffs had a right to fish and hunt on the Mississippi River, up to the high water mark, when the river flooded privately owned land. He began by analyzing the laws governing public and private things. The water and bed of a navigable water body is a public thing subject to public use.¹⁸ In contrast, the bank of a river - the area between the low and high water stage - is a private thing subject to public use.¹⁹ Since the Walker Cottonwood farmland is part of the bank of the Mississippi River, the Magistrate Judge found that the area is subject to public use. He cited *D'Albora v. Garcia*, a 1962 Louisiana 4th Circuit Court of Appeals case, to support the argument that the rights of the public "to the unhampered use of the water above [the privately owned banks] for navigation, commerce or fishing" are superior to those rights of full ownership.²⁰

Magistrate Judge Kirk pointed out that La. C.C. Art. 452 gives the public the right to fish in publicly-owned rivers.²¹ Additionally, the Louisiana Supreme Court has recently held that "the public has a traditional right to fish from boats in the navigable waters of the state."²² Magistrate Judge Kirk held that Louisiana law gives the plaintiffs the right to fish on the water covering the banks of the Mississippi River up to the high water mark. Therefore, Magistrate Judge Kirk held that Sheriff Shumate did not have probable cause to arrest the plaintiffs for trespassing.²³

District Court Holding

The decision of the United States District Court for the Western District of Louisiana was released on August 29, 2006. District Judge Robert James began by first analyzing the application of federal law to the issue. The court adopted the recommendation of the Magistrate Judge that 33 U.S.C. 10 and the federal navigational servitude do not provide the plaintiffs with the right to fish and hunt on the Mississippi River.²⁴ However, the district court declined to adopt Magistrate Judge Kirk's recommendation that there is a federal common law right to hunt and fish on the Mississippi River up to the high water mark on privately owned land. While the court agreed with Magistrate Judge Kirk that the Fifth Circuit in *Silver Springs*²⁵ allowed for some usage of navigable waters under the idea of public rights, the court refused to extend the enumerated

list to include hunting and fishing. Therefore, the court held that there is no federal common law right that protects hunting and fishing on waters covering the privately owned banks of navigable waterways.²⁶

The court agreed with the Magistrate Judge's decision that the farmland is located between the high and low water marks of the Mississippi River. Therefore, under La. Civ. Code Art. 456, the land is considered to be part of the banks of the Mississippi River and therefore subject to public use.²⁷ The court emphasized that public use "is limited to activities that are incidental to the navigable character of the Mississippi River and its enjoyment as an avenue of commerce."²⁸

The issue then became whether hunting and fishing were included in the rights available to the public for land classified as a bank of a navigable waterway. The district court did not adopt the recommendation of the Magistrate Judge that the public had such a right. First, the district court cited Comment (b) to Article 456, which gives examples of activities that are covered by the phrase "public use" as seen in an older draft of the article; fishing and hunting are not among those activities listed.²⁹ Next, the court looked to decisions of other Louisiana courts, which have found that the phrase "public use" under Article 456 does not include fishing and hunting on private property that has been flooded, because hunting and fishing do not fulfill the requirement that the use be related to commerce.³⁰ Therefore, based on the idea that hunting and fishing are not incidental to the navigability nor the avenue of commerce characteristics of the Mississippi River, the court held that the activities of hunting and fishing by the plaintiffs were not permitted on the water of the Mississippi River covering the farmland.³¹

The court then addressed the issue of whether the sheriff had probable cause of trespass sufficient for an arrest. While the Magistrate Judge recommended that Sheriff Shumate did not have probable cause to arrest, the district court found that the sheriff did have probable cause to arrest for trespassing in violation of La. Rev. Stat. 14:63. The court explained that since fishing and hunting are not allowed on privately owned banks of the navigable waters, the sheriff had probable cause to arrest for criminal trespass.

Motion for Rehearing and Motion for Amendment of Judgment Denied

On October 11, 2006, District Judge Robert James for the Western District of Louisiana issued rulings on a Motion for Rehearing and Reconsideration and a Motion for Amendment of Judgment, both filed by the plaintiffs on September 9, 2006.³²

First, the plaintiffs argued that the original ruling made factual errors concerning word usage. The plaintiffs challenged the use of the word “flooded” to describe the lands at issue, arguing that “flooded” would only apply to those lands above the high water mark, which is not the land they were above. The court, however, pointed out that if any such mischaracterization took place, it would not have any impact on the decision. Additionally, the plaintiffs argued that the court improperly failed to distinguish between the river “bed” under federal law and the river “bed” and “bank” under state law. The court explained that since the same area of land comprised both the federal law “bed” and the state law “bed” and “bank,” such lack of distinction would not change the decision.

The plaintiffs’ second argument was that the court failed to correctly apply federal authority that provides for the plaintiffs’ federal right to fish on the land in question. The court also rejected this argument. Judge James emphasized that the federal common law right of navigation did not extend to activities such as recreational fishing and hunting. To support this argument, Judge James looked to *Blanchard v. Williams*, in which the 5th Circuit Court of Appeals upheld the District Court’s holding that there was no federal right to fish upon the flooded swamplands lying between two navigable bodies of water.³³

The final argument made by the plaintiffs was that the court failed to appropriately apply binding state authority found in the Louisiana Constitution, statutes, and case law. The court rejected all of these arguments. While Article 1, Section 27 of the Louisiana Constitution preserves a right to hunt and fish, this right is subject to state regulation and private property rights. Additionally, the court pointed out that the scope of the bank servitude, found in La. C.C. Art. 456, does not change depending upon whether the bank is dry or covered with water. Finally, the court refused to adopt the argument that the navigable aspect of the water itself was important and instead held that the lands do not become navigable when periodically flooded.

Impact of Decision

While the impact of this recently-decided case remains to be seen, it is clear from the opinion that District Judge James is not making it illegal for boaters to enter the area between the high and low water mark. However, he has made it illegal for boaters and others to fish and hunt on the waters covering privately-owned land in between the high and low water mark; a crime for which people may be arrested under the state criminal trespass laws. What is problematic about this is that it limits the rights granted in La. C.C. Art. 452: Public things and common things subject to public use, which states that “everyone has the right to fish in the rivers, ports, roadsteads, and harbors ... provided he does not cause injury to the property of adjoining owners,” so long as he does not violate any licensing and permit regulations. Article 450 clearly sets out that “running waters, the water bottoms of natural navigable water bodies, the territorial sea, and the seashore” are public things that would be subject to public use.³⁴

Additionally, problems may arise due to the difficult nature of distinguishing the low and high water mark by someone who is unfamiliar with the area. Boaters unfamiliar with the area, and even some who have fished the area many times, may not realize that the water level is somewhere between the low and high water mark and could inadvertently commit criminal trespass. As Magistrate Judge Kirk explained in his recommendation: “Were the law to adopt such a rule, an unreasonable, and indeed, impossible burden would be placed on the public to ascertain, at any given point in time, just where on the surface of the water the boundary between the bed and the bank lay at any given point along the river even at normal or usual stages of the river.”³⁵

It is important to remember that the holding by the district court is not final. The case can be brought before the appellate court, should the plaintiffs decide to appeal the decision. Additionally, Louisiana lawmakers have the ability to adjust the Civil Code, should they so choose, to explicitly provide for fishing and hunting on the waters of navigable waterways when the water covers the area between the ordinary high and ordinary low water stage.



¹ Map of East Carroll Parish can be found at http://www.enlou.com/maps/eastcarroll_map.htm. A map of the lake can be found at <http://www.topozone.com/map.asp?lon=-91.2158&lat=32.9858>.

² *Walker Lands, Inc. v. East Carroll Parish Police Jury*, 871 So. 2d 1258, 1261 (La. App. 2nd Cir. April 14, 2004).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1262.

⁶ *Parm v. Shumate*, 2006 WL 2513856 (W.D.La. April 21, 2006).

⁷ *Id.*

⁸ *See supra* note 2.

⁹ *See supra* note 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Parm v. Shumate*, 2006 WL 2513921 (W.D.La.

¹³ *See supra* note 6.

¹⁴ *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557 (1870).

¹⁵ *Id.*

¹⁶ *See supra* note 6.

¹⁷ *Silver Springs Paradise Co. v. Ray*, 50 F.3d 356 (5th Cir. 1931).

¹⁸ La. C.C. Art. 450: “Public things are owned by the state or its political subdivisions in their capacity as public persons. Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore...”

¹⁹ La. C.C. Art. 456: “The banks of navigable rivers or streams are private things that are subject to public use. The bank of a navigable river or stream is the land lying between the ordinary low and the ordinary high stage of the water...”

²⁰ *D’Albora v. Garcia*, 144 So.2d 911 (La.App. 4th Cir. 1962).

²¹ La. C.C. Art. 452: “Public things and common things are subject to public use in accordance with applicable laws and regulations. Everyone has the right to fish in the rivers, ports, roadsteads, and harbors...”

²² *State v. Barras*, 615 So.2d 285 (La. 1993).

²³ *See supra* note 6.

²⁴ *See supra* note 12.

²⁵ *See supra* note 17.

²⁶ *See supra* note 12.

²⁷ *See supra* note 19.

²⁸ *See supra* note 12.

²⁹ Comment (b) states, in pertinent part: “Article 455(1) of the Louisiana Civil Code of 1870 declares that ‘everyone has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.’ According to well-settled Louisiana jurisprudence, which continues to be relevant, the servitude of public use under this provision is not ‘for the use of the public at large for all purposes,’ but merely for purposes that are ‘incidental’ to the navigable character of the stream and its enjoyment as an avenue of commerce.”

³⁰ Cases listed in support of this include: *State v. Barras*, 615 So.2d 285 (La. 1993), *Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970), *Buckskin Hunting Club v. Bayard*, 03-1428 (La. App. 3 Cir. 3/3/04), and *Edmiston v. Wood*, 566 So.2d 673, 675-76 (La. App. 2d Cir. 1990).

³¹ *See supra* note 12.

³² *Parm v. Shumate*, 2006 WL 2925373 (W.D. La. Oct. 11, 2006).

³³ *Blanchard v. Williams*, No. 92-0941 (W.D.La. Sep. 19, 2005), *aff’d*, 98 F.3d 1339 (5th Cir. 1996).

³⁴ *See supra* note 18.

³⁵ *See supra* note 6 at 11.

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