

LOUISIANA COASTAL LAW

LCL 91, DECEMBER 2009



Bills Passed in the 2009 Regular Legislative Session of the Louisiana Legislature Affecting Coastal Resource Use and Conservation

By S. Beaux Jones

Ports, Harbors, and Water

Act No. 27

HB 236

Representatives St. Germain and Dove and Senators Dupre and Morrish

(Amends and reenacts R.S. 34:855.3(E) and (F) and 855.4(A)). Provides that no person under the age of sixteen may operate, hire, lease, or rent a personal watercraft on the waters of this state.

Act No. 52

HB 97

Representatives Gisclair and Baldone

(Amends and reenacts R.S. 34:851.2(3) and 851.19). Alters the definition of "motorboat" by removing "commercial fishing vessel" from those types of vessels which are not considered motorboats even if they have a valid marine document issued by the Bureau of Customs of the U.S. Government or any federal agency successor.

Act No. 365

HB 234

Representatives Dove and St. Germain and Senators Dupre and Morrish

(Enacts R.S. 56:1849(D)). Provides that if the Department of

Wildlife and Fisheries denies a permit pursuant to the Scenic Rivers Act, the permit applicant may institute legal proceedings against the Department in the Nineteenth Judicial District Court.

Act No. 370

HB 451

Representative Foil

(Amends and reenacts R.S. 56L1856(B) and enacts R.S. 56:1855(M)). Adds Bayou Manchac, from the Amite River to the Mississippi River, to the list of Historic and Scenic Rivers. Also allows for the construction of flood control projects on Bayou Manchac, including replacing the structures at Alligator Bayou and Frog Bayou; providing a structure for constricting backwater flow on Bayou Manchac; constructing, elevating or protecting the road along the south side of Bayou Manchac; and the realignment of Ward Creek that flows into Bayou Manchac.

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Act No. 474

HB 215

Representatives Hutter and Leger

(Amends and reenacts R.S. 44:4.1(B)(29) and enacts R.S. 47:6035)). Establishes the Ports of Louisiana Tax Credits to encourage private investment in and the use of state port facilities in Louisiana. Establishes an Investor Tax Credit and an Import Export Cargo Credit. Investors will earn the tax credits at the time expenditures are made by an investing company. Only the taxpayers who have received certification from the secretary of the Department of Economic Development are eligible for the Import Export Tax Credits.

Wildlife and Fisheries**Act No. 22**

HB 237

Representatives St. Germain and Dove and Senators Dupre and Morrish

(Amends and reenacts R.S. 56:302.1 (C)(1) and repeals R.S. 56:302.1 (C)(2)(a)). In lieu of purchase of an annual basic recreational fishing license and an annual saltwater license, a non-resident may purchase a temporary saltwater license valid for the number of days specified by the purchaser at a fee of seventeen dollars and fifty cents per day. Such license shall enable the nonresident to fish in the saltwater areas of the state for a period of time indicated on the license.

Act No. 115

HB 299

Representative St. Germain

(Amends and reenacts R.S. 56:497(C)(1)). Increases the fee for a bait shrimp permit from one hundred dollars to one hundred ten dollars, and sets May 1st as the beginning date for when bait shrimp may be taken.

Act No. 131

HB 233

Representative Gallot

(Amends and reenacts R.S. 56:578.2(A)(1)). Moves the Louisiana Seafood Promotion and Marketing Board from the office of the secretary to the office of fisheries of the Department of Wildlife and Fisheries.

Act No. 151

HB 5

Representatives Guinn, Baldone, Barras, Gisclair, Harrison, Henderson, Henry, Johnson, Mills, Montoucet, Perry, Richard, Ritchie, Jane Smith, Patricia Smith, St. Germain, and Wooton, and Senators Guillory and Hebert

(Amends and reenacts R.S. 47:305(A)(5) and enacts R.S. 47:302(T), 321(J), and 331(R)). Abolishes the sales and use tax for the sale and use of bait and feed used in the production or harvesting of crawfish.

Act No. 208

HB 410

Representative Bobby Badon and Senator Guillory

(Amends and reenacts R.S. 56:116.1(C)(2)(a) and enacts R.S. 56:116.1(C)(2)(c)). Opossums, raccoons, nutria, or beaver that are found destroying crawfish in a private pond used for commercially cultivating crawfish may be killed as provided by law with a .22 caliber rim fire rifle by the farmer or landowner from a boat or vehicle with no bag limit, anytime of the year, during day or night.

Act No. 330

HB 551

Representatives Mills, Abramson, Armes, Austin Badon, Bobby Badon, Baldone, Barras, Barrow, Billiot, Burford, Henry Burns, Tim Burns, Burrell, Carmody, Champagne, Chandler, Chaney, Cortez, Cromer, Dixon, Doergee, Dove, Edwards, Fannin, Gisclair, Mickey Guillory, Guinn, Hardy, Harrison, Hazel, Henderson, Hill, Hines, Hoffman, Howard, Hutter, Girod Jackson, Sam Jones, Katz, Labruzzo, LaFonta, Lambert, Landry, Lebas, Ligi, Little, Monica, Montoucet, Morris, Norton, Nowlin, Perry, Pope, Pugh, Richard, Richardson, Robideaux, Simon, Gary Smith, Jane Smith, St. Germain, Stiaes, Thibaut, Waddell, Williams, and Willmott and Senators Cheek, Dorsey, Erdey, Guillory, Heitmier, Mount, Nevers, and Thompson.

LOUISIANA COASTAL LAW

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(Amends and reenacts R.S. 40:4(A)(1)(b) and enacts R.S. 40:5.5.2 and 5.5.3). Creates a seafood safety campaign regarding the risk of consumption of Chinese seafood and the Seafood Safety Task Force. The campaign shall include a warning label program, which alerts consumers of the serious risks to public health from radiation, antibiotics and other chemicals found in Chinese Seafood. The state health officer has control over the program.

Act No. 360

HB 98

Representative Danahay

(Amends and reenacts R.S. 56:499.1(A)). Prohibits persons from using a skimmer net in Calcasieu Lake from one half hour after sunset until one half hour before sunrise; however, skimmer nets may be used during open season to take shrimp during the day and at night in all areas of Cameron Parish west of the western shore of Calcasieu Lake.

Act No. 363

HB 191

Representative Dove

(Amends and reenacts R.S. 56:700.13(C)). Requires that the secretary and the board of the Department of Wildlife and Fisheries adopt rules providing for the selection of a qualified oyster biologist. If a qualified biologist was previously engaged to conduct a biological survey of an oyster lease for mineral activity damage subject to request arbitration, the same biologist may be used for the biological surveys unless either party files a written objection with the board.

Act No. 374

HB 542

Representative Labruzzo and Baldone

(Enacts R.S. 56:642(C)). Requires that the Department of Wildlife and Fisheries adopt rules and regulations allowing for the use of credit cards, debit cards, or business checks when purchasing commercial licenses, permits, or oyster tags.

Act No. 376

HB 587

Representatives Harrison and Baldone

(Amends and reenacts R.S. 56:424.1(A) and 433.1(A) and (B)). Clarifies the law of oyster seed grounds by adding that only oysters taken for commercial purposes are subject to regulation. Requires that, in order to obtain a vessel permit, each vessel must meet the qualifications for a permit. The time

period to show that a vessel landed oysters in order to gain a oyster seed ground permit has been extended to between January 1, 2004 and May 1, 2009. If a person who owned a vessel that was licensed at anytime during that period can demonstrate through trip ticket submissions that the vessel had oyster landings, then it may obtain a permit.

Act No. 417

HB 390

Representatives Henderson and Baldone

(Enacts R.S. 40:5.3.1). Authorizes the Department of Health and Hospitals, in consultation with the Department of Wildlife and Fisheries, to annually grant an exemption from the National Shellfish Sanitation Program's *Vibrio parahaemolyticus* and *Vibrio vulnificus* management plans to licensed oyster harvesters and certified oyster dealers if the licensed oyster harvester or the certified oyster dealer has not been epidemiologically linked to a *Vibrio parahaemolyticus* or *Vibrio vulnificus* oyster related illness.

Act No. 446

SB 239

Senators Dupre and Morrish and Representatives Dove, Honey, Richard and St. Germain

(Amends and reenacts R.S. 47:305.20(A), the introductory paragraph of (C),(1) and (2) and R.S. 56:303(E)(1) and 304(A)). Allows for vessels to be licensed and receive tax exemptions when they are engaged in commercial fishing or whenever possessing fish for sale in the freshwater and salt-water areas of the state. Clarifies that a fishing license alone is not the sole determining factor of whether a vessel is used primarily for commercial purposes.

Act No. 506

HB 439

Representative Ellington and Senators Long, Mcpherson, Nevers, Riser, Smith, Thompson, and Walsworth.

(Enacts Subpart H of Part II of Chapter 30 of Title 3 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 3:4711 through 4718). "Louisiana Catfish Marketing Law." Requires retail and food service establishments to notify customers of the country of origin of catfish, catfish products, siluriformes (including fish such as basa and tra), or siliuriforme products. The label must also distinguish between farm raised and wild caught fish. Furthermore, no owner or manager of a restaurant that sells imported catfish shall misrepresent to the public, either verbally, on a menu, or on signs displayed on the premises that the catfish is domestic.

Natural Resources and Public Lands

Act No. 361

HB 162

Representatives Sam Jones and Champagne

(Enacts R.S. 56L796 and R.S. 36:610(F) and 917). Creates the Lake Fausse Point and Grand Avoille Cove Advisory Board. The board will be comprised of the members of the House of Representatives representing districts 49 and 50, the members of the Louisiana Senate representing districts 21 and 22, two members of the Chitimacha Tribe, one member appointed by the mayor of Baldwin, one member appointed by the mayor of Jeanerette, the member of St. Mary Parish governing authority representing Council District 1, the member of Iberia Parish governing authority representing Council District 11, two Eagle Point Park members, one licensed commercial fisherman, one member of the local chapter of Ducks Unlimited, one member of the St. Mary Parish Consolidated Water and Sewer District of Charenton, and one non-voting member designated by each of the following: the lieutenant governor, the secretary of Wildlife and Fisheries, and the secretary of the Department of Natural Resources. Meetings will be held at the Chitimacha Tribal Center. The Members will serve without compensation and their terms will run concurrent with the term of the respective appointing authority. The Lake Fausse Point and Grand Avoille Cove Advisory board will operate under the Department of Wildlife and Fisheries.

Oil, Gas, and Minerals

Act No. 126

HB 159

Representatives Henry Burns, Bobby Badon, Billiot, Burford, Carmody, Champagne, Chaney, Downs, Gislclair, Guinn, Henderson, Howard, Lambert, Little, Mills, Monica, Montoucet, Pugh, and Simon and Senator Dupre.

(Amends and reenacts R.S. 30:28(B)). Provides that, in addition to a six-month drilling permit, a one-year permit may be purchased which extends the period of validity for a drilling permit and costs twice that of the six-month permit.

Act No. 409

SB 320

Senators Alario, Thompson, and Walsworth

(Amends and reenacts R.S. 36:401(C)(1)(b)(i) and 405 (A)(1)(b)). The office of the Louisiana oil spill coordinator will now

be under the supervision of the deputy secretary for public safety services.

Hurricane and Flood Protection

Act No. 225

HB 787

Representatives Baldone, Aubert Billiot, Henry Burns, Dixon, Dove, Guinn, Howard, and Wooten and Senators Dupre and Morrish.

(Amends and reenacts R.S. 38:301.1). Gives power to every levee district in the coastal area to establish, on its own behalf, adequate drainage, flood control, water resources development, and integrated coastal protection, and to enter into contracts or other agreements with another entity to do the same. Also, if specifically provided by the Coastal Protection and Restoration Authority, levee districts located in the coastal area may expend funds for projects and programs outside of their normal jurisdiction.

Renames the Office of Public Works, Hurricane Flood Protection, and Intermodal Transportation in the Department of Transportation and Development as the Office of Coastal Protection and Restoration.

Act No. 320

SB 225

Senators Morrish and Dupre and Representatives Baldone, Dove, Bobby Badon, Billiot, Champagne, Gislclair, Guinn, Harrison, Henderson, Sam Jones, and Montoucet.

(Enacts R.S. 49:213.4(A)(9)). Gives the Louisiana Coastal Protection and Restoration authority the power to enter into any agreement with a parish governing authority located wholly or partially within the coastal area but which is not part of a levee district for the construction, operation, maintenance, repair, rehabilitation, or replacement of any coastal protection, conservation and restoration, hurricane protection, infrastructure, storm damage reduction, or flood control project. The authority shall also have the power to provide in the agreement for the use and exercise by the parish governing authority of any and all powers of levee districts or levee and drainage districts.

Act No. 346

SB 208

Senator Amedee

(Amends and reenacts R.S. 38L291(F)(2)(introductory paragraph) and (f) and 334(A)). Changes the number of persons

that the governor shall appoint per parish to serve as levee commissioners from nine to eleven. Changes from three to five the number of those persons to be appointed from the district at large.

Act No. 390

SB 66

Senator Dupre

(Enacts R.S. 38:329.4). Charters the North Lafourche Conservation, Levee and Drainage District as a political subdivision of the state of Louisiana and gives it the power to issue bonds and levy taxes. The district may levy a district-wide sales and use tax, and they may borrow money and issue bonds in the manner provided by law for levee districts.

Act No. 509

HB 500

Representative Baldone

(Amends and reenacts R.S. 38:291(U)(1) and repeals R.S. 38:329(H) and (J)). Transfers the land and mineral rights in the possession of the Atchafalaya Basin Levee District in Terrebonne Parish, for the purposes of ownership, maintenance, and operation of the Atchafalaya Basin Levee District, to the Terrebonne Levee and Conservation District.

Act No. 523

HB 833

Representatives Dove, Bobby Badon, Billiot, Henry Burns, Champagne, Foil, Henderson, Lambert, Landry, Leger, Little, Montoucet, and Morris and Senators Alario, Amedee, Appel, Broome, Chaisson, Cheek, Crowe, Donahue, Dorsey, Duplessis, Dupre, B. Gautreaux, N. Gautreaux, Gray Evans, Guillory, Hebert, Heitmeier, Kostelka, Lafleur, Long, Martiny, Michot, Morrell, Morrish, Mount, Murray, Nevers, Quinn, Riser, Shaw, Thompson, and Walsworth.

(Amends and reenacts R.S. 36:4(Z), 351(C)(1), 358(B), 501(B) and (C)(1), 502(A) and (B), and 508.3(A), (B), (C), (F), and (G), R.S. 38:81, 100, 101(A) and (B), 102, 103(A) and (B), 106(A)(1) and (2) and (B), 107(A), 108, and 109, R.S. 49:214.1 and 214.2, R.S. 56:421(B) and (1), (C), and (E)(4), 424(H), 425(E), 427.1(C), 432.1(A),(B) and (1)(a), (2), (3), and (4), (C) and (1), (D)(1), and 432.2, enacts R.S. 35:410, R.S. 49:214.3.1, 214.4.1 and 214.4.2, 214.5.1 through 214.5.8, and 214.6.1 through 214.6.10, and R.S. 56:421(B)(13), and repeals R.S. 36:4(J), Chapter 3-A of Title 38 of the Louisiana Revised Statutes of 1950, comprised of R.S. 38:241 through 251, Subpart A of Part II of Chapter 2 of Title 49 of the Louisiana Revised Statutes of 1950, comprised of R.S. 49:213.1 through

213.12, and 49:214.3 through 214.16). Creates the Office of Coastal Protection and Restoration in the Office of the Governor. Consolidates functions relative to hurricane protection, flood control, and coastal restoration under that office.

Miscellaneous

Act No. 36

HB 437

Representatives Kleckley, Labruzzo, Lafonta, Lambert, Lebas, Leger, Ligi, Monica, Morris, Perry, Pope, Pugh, Richard, Richardson, Richmond, Roy, Gary Smith, Jane Smith, St. Germain, Thibaut, Tucker, White, Williams, and Willmott.

(Amends and reenacts R.S. 22:1319 and 1332(B) and (2) and enacts R.S. 22:1332(B)(6) and (C)). Requires disclosure of separate hurricane, wind, or named-storm deductibles on homeowner's and fire insurance policies, and one standardized example of how such separate deductibles will be applied under the policy. Such disclosures shall be for informational purposes only.

Act No. 134

HB 333

Representatives Kleckley, Anders, Armes, Aubert, Austin Badon, Bobby Badon, Baldone, Barras, Barrow, Billiot, Carmody, Carter, Champagne, Chandler, Connick, Cortez, Cromer, Edwards, Foil, Gisclair, Mickey Guillory, Hardy, Harrison, Hazel, Henderson, Hill, Hoffman, Hutter, Michael Jackson, Rosalind Jones, Sam Jones, Katz, Landry, Ligi, Lopinto, Mcvea, Mills, Monica, Pearson, Perry, Pope, Richard, Richardson, Richmond, Ritchie, Roy, Simon, Smiley, Gary Smith, Jane Smith, St. Germain, Talbot, White, Williams, and Willmott and Senators Broome, Dupre, Hebert, Morrish, Quinn, and Thompson.

(Enacts R.S. 12:1337). A separate deductible is a deductible that applies to damage incurred during a specified weather event. For all homeowners' insurance policies or other policies insuring a one or two-family owner occupied home, any separate deductible that applies in place of any other deductible to loss or damage from a named-storm or hurricane shall be applied on an annual basis to all such losses that are subject to a separate deductible during the calendar year. If an insured incurs damage from more than one named-storm or hurricane during a calendar year that are subject to a separate deductible, the insured may apply the deductible to the succeeding storm equal to the remaining amount of the separate deductible or the amount of the deductible that applies to all perils, whichever is greater.

Act No. 488

SB 214

Senator Morrish

(Amends and reenacts R.S. 22:1892(A)(3)). Authorizes the commissioner of insurance to extend the time period for responding to insurance claims after a governmentally declared emergency or disaster by thirty days.



After Nearly a Decade, Elmer's Island Reopens to the Public

By S. Beaux Jones

The State of Louisiana has recently reopened the popular Elmer's Island to land traffic after nearly a decade of being accessible only by boat.¹ Elmer's Island is a barrier spit (commonly referred to as an "island") comprising about 1700 acres (pre- 2005 hurricane season) on the west side of Caminada Pass from Grand Isle in Jefferson Parish.² It is made up of mud and sand flats, marsh, a lagoon, and a tidal channel, and it is one of only three beaches on the Louisiana coast that is accessible by road.³ For years, Elmer's Island was a favorite spot for Louisiana fishermen and women, bird watchers, campers, and shell-searchers.⁴

Elmer's Island is only accessible by one road. For decades, Jim Elmer owned that road and allowed the public to use it and the adjoining property for a small fee. However, in 2001 after the death of Mr. Elmer, his successors closed the road. Hurricanes Katrina, Rita, Gustav, and Ike then rendered the road unusable.⁵ Under long standing Louisiana law contained in the Civil Code, Revised Statutes, and case law, the State holds title to the bed and shore of the sea, arms of the sea, the bed and banks of navigable lakes, and the beds of navigable rivers and streams. This concept is known as the Public Trust Doctrine.⁶ Access to the publically owned seashore has been a concern in Louisiana for some time.⁷ The only practical access to Elmer's Island seashore after the road closure was by boat, leaving many without access. The State, through the Department of Wildlife and Fisheries, has been in negotiations with the landowners for years, attempting to purchase the Elmer's property and to discern ownership of the various areas of the island.⁸

The State contends that through extensive research they have recently determined that 250 acres of Elmer's Island belongs to them.⁹ There are two possible legal classifications of land that would give the State ownership of portions of Elmer's Island without a chain of title to the land. The first is if the land was classified as seashore and the second is if the land in question was formed by accretion of the seashore.

The seashore is a public thing that belongs to the State in its public capacity and includes land over which the waters of the sea spread in the highest tide of the winter season.¹⁰ Therefore, the beachfront portion of Elmer's Island would be owned by the State. Such property is subject to the public use, which means that everyone has the right to land on the shore, to fish, to shelter himself, to moor ships, to dry nets, and the like, provided that he does not cause injury to the property of adjoining owners.¹¹

The State has explicitly claimed that due to accretion, it owns 250 acres of Elmer's Island.¹² Accretion (also called alluvion) is land formed successively and imperceptibly on the bank of a body of water by deposition of sediments. If the body of water is a river or stream, the accretion belongs to the owner of the bank. However, the law is not the same for accretion on the seashore.¹³ There is no right to alluvion on the shore of the sea or of lakes.¹⁴ However, if new land is created it must belong to someone. "Alluvion which forms along the shore of a body of water that is not a river or a stream belongs to the State."¹⁵ Whether the land is accretion or seashore, if it belongs to the State, it is subject to the public use.¹⁶

Therefore, both of these classifications would give the public the right to use the land; just because the public has the right to use the land, they do not have the right to trespass over the land of another to gain access. Boaters have always been free to access the State's land on Elmer's Island; however, one of the most valuable aspects of Elmer's Island is that there is a road connecting it to La. Highway 1. That road was owned by the Elmer family and was in need of major renovations before it could be opened to the public. Recently the State Department of Transportation and Development (DOTD) repaired the road and used what is called a "quick take" to obtain ownership.¹⁷ A "quick take" gives the State DOTD the power to acquire property needed for highway purposes by expropriation when it cannot amicably acquire such property.¹⁸ It also allows the DOTD to take property *prior* to a trial court's judgment. Generally, when a "quick take" is exercised a lawsuit to

determine the proper amount of compensation will follow to be paid to the landowner.

Pending Lawsuit

On August 28, 2009, Charles Elmer filed a lawsuit in the 19th Judicial District Court claiming that the State of Louisiana¹⁹ disturbed his peaceful possession of the 250-acre parcel when they declared it to be state land.²⁰ Mr. Elmer's petition also complains that when Governor Jindal announced the opening of Elmer's Island it encouraged the public to use property possessed by Elmer (the road) in order to use land adversely possessed by the State (250 acres of beachfront).

The action brought by Charles Elmer does not allege ownership of the land; it only alleges Mr. Elmer has possessed the land for more than one year. If someone possesses a piece of land for a year they acquire the right to possess.²¹ They are then considered provisionally as the owner of the land until the right of the true owner is established.²² Charles Elmer would have to show that not only did he intend to possess the land as owner, but also that he took corporeal possession of the land.²³ Corporeal possession is defined as the exercise of physical acts of use, detention or enjoyments over a thing.²⁴

The land at issue in the lawsuit is 250-acre beachfront property that the State previously claimed it owned through the accretion doctrine. If in fact the land belonged to the State, which it appears from the facts that it does, the Elmer's possessory action would be of little use. A person who possesses a piece of immovable property without title for 30 years acquires ownership through acquisitive prescription, so long as the land is susceptible of ownership.²⁵ The problem with the Elmer's claim is that land owned by the state is not susceptible of prescription.²⁶ If the State is correct in their assertion of ownership over the 250-acres of beachfront, then Mr. Elmer's possession is irrelevant.

The petition names the Louisiana Department of Transportation and Development, which seems to raise the issue of the quick take executed on the Elmer's Island entrance road; however the petition does not mention that portion of land in particular. Therefore, the quick take executed on the road is not at issue in this lawsuit.

The State filed its answer to the Elmer's petition on October 7, 2009. The State alleged two exceptions in response to the petition; an exception of vagueness and an exception of no cause of action. The exception of vagueness was due to the fact that Mr. Elmer's petition failed to allege that he possessed the property *as owner*, which is required for the right to possess, and Mr. Elmer conceded that the land in question is "seashore" and "beachfront," which would give him no right of possession or ownership.²⁷ Furthermore, because "seashore" is owned by the State in its public capacity and is thus unable to be possessed by an individual as owner, the State alleges that Mr. Elmer's petition fails to state a cause of action.²⁸

Elmer's Island Wildlife Refuge Stewardship

It is very likely that in the coming months Elmer's Island and the pending lawsuit will create many more headlines, but for now, Elmer's Island is the State's newest wildlife refuge. The Wildlife and Fisheries Commission recently met to determine the regulations of Elmer's Island and beginning October 1, 2009, the following regulations will govern the refuge:

- Use of the refuge will be permitted from 30 minutes before official sunrise to 30 minutes after official sunset. This includes any land access routes to the refuge. No person or vehicle shall remain on the refuge or any land access routes during the period from 30 minutes after official sunset to 30 minutes before sunrise.
- No person shall possess any glass bottles, glass drink containers or other glass products.
- No person shall enter onto or be on the grounds of the refuge during a restricted access period; or alternatively shall do so only in accordance with restrictions set forth by the Secretary.
- No person shall commercially fish, conduct any guiding service, hunt, pursue, kill, molest or intentionally disturb any type of wildlife on the refuge, except for the legal recreational harvest of living aquatic resources.
- No person shall be in areas marked as restricted by signs posted by the department.
- No person shall operate any vehicles in a restricted area. No person shall operate a vehicle in an unsafe or careless manner as to endanger life or property or at any speed in excess of five miles per hour.

There is no permit required for Elmer's Island access by anyone 15 years of age or younger. Those wishing to utilize the island for recreational purposes, ages 16 and above, must possess one of the following: a valid Wild Louisiana Stamp, a valid Louisiana fishing license or a valid Louisiana hunting license.²⁹

The State hopes that those who use the wonderful public resource that is Elmer's Island will be mindful of their responsibility to protect that resource for themselves, others, and future generations. Some landowners who own property adjacent to public beaches and other public areas are rightfully upset when careless and unthinking people do things such as littering that harm the resource and diminish everyone's enjoyment of it. This type of illegal activity has prompted some landowners to try and restrict access to protect their property from damage. We the public can show that Louisianans are committed to protecting our sportsman's paradise and hopefully landowners will be more trusting of the public.

As always beach users should make an effort to be good stewards of the land, but the Department of Wildlife and Fisheries has recommended that the public take particular steps to prevent marine litter.

- Take reusable items and less trash or throw-away containers to the beach.
- At the beach, be sure to recycle what you can and throw the rest of your trash away. Do not leave anything on the beach when you leave.
- Pick up debris that others have left.
- When fishing, take all nets, gear and other materials back onshore.
- If you smoke, take your butts with you, disposing of them in the trash.
- When boating, stow and secure all trash on the vessel.
- Participate in local clean-ups.

(Endnotes)

1 Daniel McBride, *Elmer's Island opens for holiday weekend*, The Thibodaux Daily Comet, July 1, 2009.

2 Louisiana Wildlife Federation, *Elmer's Island Primer*, www.lawildlifefed.org/press_detail.cfm?id=19, January 15, 2004.

3 Rex Caffey, *Linking Recreation to Restoration: The Case of Elmer's Island*, Louisiana Wetland News, Spring 2004.

4 Michael DeMocker, *Elmer's Island attracts hundreds on first weekend it's reopened to the public*, The Times-Picayune, July 8, 2009.

5 *Id.*

6 *Avenal v. State*, 886 So.2d 1085 (La. 2004)

7 Sharonne O'Shea, *Access to Louisiana Beaches Following Publicly Funded Restoration Projects: The Reclamation of Fourchon Beach*, Tul. Env'tl. L.J. 95 (1999)

8 Caffey, *supra* note 3.

9 State of Louisiana, Office of the Governor, "Gov. Jindal Declares Portion of Elmer's Island Open for Public Access." Press Release. Dec. 15, 2008. <http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=833>.

10 La. Civ. C. arts. 450 & 451.

11 La. Civ. C. art. 452.

12 DeMocker, *supra* note 4 & 5.

13 La. Civ. C. arts. 499, 500.

14 La. Civ. C. art. 500.

15 *Davis Oil Co. v. Citrus Land Co.*, 576 So. 2d 495, 500.

16 La. Civ. C. art. 452.

17 Telephone interview with Amber Hebert, DOTD Public Information Officer (July 9, 2009)

18 La. R.S. 48:441.

19 The Louisiana Department of Wildlife and Fisheries, The State

of Louisiana, and The Louisiana Department of Transportation and Development.

20 *Elmer v. Louisiana Department of Wildlife and Fisheries and the State of Louisiana*, No. 581979 (19 Dist. Ct. La. filed Aug. 28, 2009).

21 La. Civ. C. art. 3422.

22 La. Civ. C. art. 3423.

23 La. Civ. C. art. 3424.

24 La. Civ. C. art. 3425.

25 La. Civ. C. art. 3486.

26 La. Const. art. 12 § 13.

27 *Supra*, note 23.

28 La. Civ. C. art 450.

29 Louisiana Department of Wildlife and Fisheries (October 1, 2009) "L.W.F.C. Approves Regulations for Elmer's Island Refuge," <http://www.wlf.louisiana.gov/experience/wmas/refuges/elmersisland.cfm> Retrieved October 10, 2009.



Clean Water Restoration Act of 2009

By S. Beaux Jones

In 1972, Congress enacted the Federal Water Pollution Control Act (more commonly known as the Clean Water Act) with the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.¹ The Environmental Protection Agency and the Army Corps of Engineers were the principle agencies charged with carrying out those objectives. Over its 47 year existence, the direction of the CWA has changed many times, from focusing on "point source contamination,"² to polluted runoff.³ However, one of the most controversial issues of the CWA has been which of the nation's waters are subject to the jurisdiction of the act. Until 2001, the EPA and the Army Corps of Engineers broadened the scope of that which was covered by the act, moving from rivers, lakes, and streams to isolated wetlands and other features.⁴ Two recent U.S. Supreme Court decisions, *SWANCC v. US Army Corps of Engineers* (2001)⁵ and *Rapanos v. United States* (2007)⁶, have, at least temporarily, halted the broadening trend. The Clean Water Restoration Act (CWRA) is an attempt to return federal jurisdiction over the country's waters to its status prior to the above-mentioned cases.

What Waters are Protected?

The federal government is a government of limited power and may only exercise those powers delegated to it by the Constitution. The Constitution is silent as to Congress regulating pollution; however, the "Commerce Clause"⁷ of the Constitution has served as a basis for Congress to regulate everything from civil rights⁸ to wheat production on a single farm.⁹ The Commerce Clause states that Congress has the power "to regulate Commerce with foreign Nations, and among the several States..."¹⁰ Therefore, in order to justify their assertion of jurisdiction over that which is not explicitly delegated to them in the Constitution, Congress structured the language in the CWA so that it could be construed as regulating "Commerce among the several States."¹¹ For example, the CWA authorizes the U.S. Army Corps of Engineers (Army Corps) to issue dredge and fill permits for "navigable waters,"¹² or "the waters of the United States, including the territorial seas,"¹³ which are defined by the Army Corps Regulations as interstate waters and intrastate waters, "the use, degradation or destruction of which could affect interstate or foreign commerce."¹⁴ It is a much stronger argument for Congress to claim that damaging waters like the Mississippi River could affect interstate commerce, than to justify the regulation of stagnant drainage ditches. *SWANCC v. US*¹⁵ was an illustration of that.

In 2001, the Solid Waste Agency of Northern Cook County (SWANCC), a consortium of Chicago area waste management groups looking for a disposal site for

non-hazardous solid waste, challenged the Army Corps of Engineer's assertion of jurisdiction over an abandoned sand and gravel pit which provided a habitat for migratory birds.¹⁶ In an opinion delivered by then Chief Justice William Rehnquist, the Court held that the CWA could not exercise jurisdiction over intrastate waters because "[t]he term 'navigable' has... the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."¹⁷ Thus equating the seasonal ponds in the gravel pit with navigable waters went beyond the powers of Congress and could not be governed by the CWA. This was the first successful constitutional challenge to the CWA.

Five years after *SWANCC*, the U.S. Supreme Court heard another case pertaining to the types of waterways falling under the CWA's jurisdiction. In *Rapanos v. United States*,¹⁸ the issue before the Court was whether the CWA had jurisdiction over wetlands that at least occasionally emptied into tributaries of traditionally navigable waterways. Rapanos ignored cease and desist orders by the EPA and discharged fill material into protected wetlands, to which the EPA responded with a civil suit. The Court rendered a split decision, 4-1-4, disagreeing on the legal reasoning, but agreeing to send the case back to the Circuit Court. The decision did little to clarify the reach of the CWA. The plurality, lead by Justice Antonin Scalia, held that the court should establish a two-prong test to determine what water should be covered by the CWA. First, the court would have to find that the waterway in question must be relatively permanent and connected to traditional interstate waters. Secondly, the waterway would have to have a continuous surface connection with "waters of the United States" that is substantial enough to make it unclear where the questionable water ends and the traditional water begins.¹⁹ Justice Kennedy concurred with Scalia in the decision to remand the case, but he did not completely agree with their two-prong test.²⁰ Kennedy's vote was enough to send the case back to the Circuit Court; unfortunately no clear legal reasoning can be pulled from the split majority. The dissenting opinion, written by Justice Stevens, disagreed with the majority and felt that the Army Corps definition of a wetland was a reasonable interpretation of the executive branch and that the two-prong test would only add to confusion.²¹ The *Rapanos* decision did not completely overrule the assertions of jurisdiction by the Army Corps and the CWA, but it was definitely a restrictive decision.

In addition to the two Supreme Court cases, the Bush Administration also did its part in tightening the scope of the CWA. According to the environmentalist publication,

Reckless Abandon, the Bush Administration launched a formal effort to restrict the waters protected by the CWA. In 2003, the administration issued an Advanced Notice of Proposed Rulemaking,²² weakening the power of the CWA, and a new policy directive, ordering federal regulators to “immediately begin withholding protections for certain streams, wetlands, ponds, and other waters.”²³ The policy directive specifically focused on what the administration called “isolated waters,” and how they would be left out of protection, “even if the water was used in interstate commerce or if the pollution or destruction of the water would affect interstate commerce.”²⁴ However, the EPA and the Army Corps received approximately 135,000 comments about the directive and close to 99 percent of them opposed the policy directive, so the directive was abandoned.

In response to the *Rapanos* decision of 2007, the Bush Administration’s EPA issued a memorandum explaining how they and the Army Corps would apply the new decision.²⁵ The memo explained that CWA would not have jurisdiction over non-navigable waterways like erosion features and ditches, and they would apply a fact-specific test (much like the *Rapanos* two part test) to determine jurisdiction. The Clean Water Restoration Act has emerged as an attempt to return the scope of the CWA to its pre-*SWANCC/Rapanos* status.

Clean Water Restoration Act of 2009

On April 2, 2009, Sen. Russ Feingold (D-WI) introduced the Clean Water Restoration Act of 2009, or Senate Bill 787 (hereafter CWRA), into the Environment and Public Works Committee of the Senate. As with most legislative instruments, the interpretation of the CWRA depends on political ideology. Senator Feingold’s office claims that the act will “ensure protections for rivers, streams and wetlands, which were long protected under the CWA, but are now in jeopardy of losing protections as a result of two recent Supreme Court cases.”^{26 27} However, the Pacific Legal Foundation’s Principal Attorney, Reed Hopper, claims that the proposed act is “patently unconstitutional” and would “push the limits of federal power to an extreme not matched by any other law, probably in the history of this country.”²⁸

Politics aside, the CWRA’s purpose is to 1) reaffirm the original intent²⁹ of Congress in enacting the CWA, 2) to clearly define which waters of the United States are subject to the CWA, and 3) to provide protection to the waters of the United States to the maximum extent of the legislative authority of Congress under the Constitution.³⁰ The proposed act finds that “since the 1970s, the definitions of ‘waters of the United States’ in regulations of the Environmental Protection Agency and the Corps of Engineers have properly established the scope of waters that require protection by the Federal Water Pollution Control Act in order to meet the national objective.” In order to remedy any conflict between the CWA and regulations promulgated by the Corps and the

EPA, the Act seeks to strike the words “navigable waters” from the CWA and replace them with “waters of the United States.”³¹ The wording change would change the regulated waters to “all waters subject to the ebb and flow of the tide, the territorial seas, an all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”³² This change would provide legislative authority for the EPA and the Army Corps to regulate classes of waters that have been left out of the CWA’s jurisdiction due to *SWANCC* and *Rapanos*.

On June 18, 2009, the CWRA completed its first legislative hurdle when the Senate Environment and Public Works Committee voted to introduce the bill to the Senate floor by a vote of 12-7. However, before the full Senate has the opportunity to vote on the act, thus making it law, Senate Majority Leader Harry Reid (D-NV) must add the bill to the Senate Calendar. According to phone conversations with the offices of Senator Feingold and Senator Mary Landrieu, there is no accurate way of determining if the bill will make it to the calendar; if the bill is not considered before the end of the 111th Congress, it must be reinstated at the committee level.

Arguments for and Against the CWRA

As previously mentioned, many of the arguments surrounding the CWRA are of a political nature, which oftentimes interferes with science. According to Joan Mulhearn of Earthjustice, the CWRA will provide protection for waters that had previously been protected by the CWA. She stated that after *SWANCC* and *Rapanos* called the protections into question, polluters have been seizing on the ambiguity in the law, and the “nation can not afford to wait longer to fix the problem.”³³ On the other side, Senator James Inhofe (R-OK), the ranking Republican on the Senate Environment and Public Works Committee, stated that the bill is “aimed squarely at rural America” and that “allowing EPA and the Corps to exercise unlimited regulatory authority over all inter- and intrastate water, or virtually anything that is wet, goes too far and is certainly beyond anything intended by the Clean Water Act.”³⁴

If the bill is voted on by the entire Senate, it would likely draw support from the Democratic majority and the Executive branch. However, if it passes, the criticism of the act may not be over. As evidenced by Reed Hopper’s comment, the proposed changes in the CWRA may face scrutiny for constitutionality. Those arguing against the constitutionality of the bill could potentially claim that by losing the “navigable waters” language, which served as a connection to interstate commerce, Congress would be acting outside of the enumerated

powers given to it by the Commerce Clause. Those arguing for the act's constitutionality may point to part of the bill that states "protection of intrastate waters is necessary to restore and maintain the chemical, physical, and biological integrity of all waters in the United States." The argument would be that intrastate waters must be regulated because when looking at the entire hydrologic system, such waters eventually have a substantial effect on interstate commerce.³⁵

It is obvious that there is legal confusion and political frustration as to the jurisdiction of the Clean Water Act and something legislative will likely need to be done to "clear the waters." However, it is uncertain whether or not the CWRA will be able to accomplish that.

(Endnotes)

1 33 U.S.C.A. 1251.

2 Contamination or pollution directly from industrial facilities, municipal sewage plants, and some agricultural facilities.

3 Including runoff from streets, construction sites, farms, and other "wet weather" sources.

4 Matt Dempsey, *Background Information of S. 787: the Feingold Clean Water Restoration Act of 2009*, U.S. Senate Committee on Environment & Public Works: The Inhofe EPW Press Blog. <http://epw.senate.gov> (Retrieved September 1, 2009).

5 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

6 *Rapanos v. United States*, 547 U.S. 715 (2007).

7 U.S. Const. art. I, §8, cl. 3.

8 *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

9 *Wickard v. Filburn*, 317 U.S. 111 (1942).

10 *Supra*, note 7.

11 *Id.*

12 33 U.S.C.A. 1344.

13 33 U.S.C.A. 1362 (7).

14 33 C.F.R. 328.3(a) (3) (emphasis added).

15 *Supra*, note 5.

16 *Id.* at 162.

17 *Id.* at 172.

18 The Supreme Court case is a combination of *Rapanos v. United States* and *Carabell v. United States*.

19 *Rampanos* at 2227.

20 *Id.* at 2237.

21 *Id.* at 2252.

22 68 Fed. Reg. 1991, January 15, 2003.

23 Earthjustice, National Wildlife Federation, National Resources Defense Council, and Sierra Club, *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm 4* (2004), available at <http://www.sierraclub.org/cleanwater/recklessabandon/>.

24 *Id.*

25 Originally issued on June 6, 2007.

26 Referring to *SWANCC* and *Rapanos*.

27 *Feingold Reintroduces Effort to Protect the Drinking Water of Over 100 Million Americans*, U.S. Senator Russ Feingold, Apr. 2, 2009, <http://feingold.senate.gov/record.cfm?id=311001>.

28 Pacific Legal Foundation, *Is the Clean Water Restoration Act Constitutional?*, Rapanos Blog, June 1, 2009, http://rapanos.typepad.com/my_weblog/2009/06/plf-calls-clean-water-restoration-act-clearly-unconstitutional.html.

29 "To restore and maintain the chemical, physical, and biological integrity of the waters of the United States."

30 Clean Water Restoration Act of 2009, S. 787, 111th Cong. §2 (2009).

31 Clean Water Restoration Act of 2009, S. 787, 111th Cong. §3 (2009).

32 Clean Water Restoration Act of 2009, S. 787, 111th Cong. §4 (2009).

33 *Senate Committee Approves Clean Water Restoration Act*, SustainableBusiness.com News, June 19, 2009, <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/18413>.

34 *Id.*

35 *Supra*, note 9.



ANNOUNCEMENTS

The Center for Natural Resource Economics & Policy will be holding the **3rd National Forum on Socioeconomic Research in Coastal Systems** May 26-28, 2010, in New Orleans. CNREP is accepting abstracts for paper and poster presentations through February 19, 2010. More information can be found at www.cnrep.lsu.edu.

The State of the Coast: Implementing a Sustainable Coast for Louisiana conference will be held June 8-10, 2010, in Baton Rouge. Abstracts are being accepted through January 15, 2010. More information can be found at www.stateofthecoast.org.



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