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Ryan M. Seidemann
Catherine D. Susman

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The wetland regions of Louisiana, arguably the most productive natural resource in the state, are endangered at the federal and private level. At the federal level, recent cases such as *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*¹ are chipping away at the broad protection of wetlands that was once exercised by the United States Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) under Section 404 of the Clean Water Act (CWA).² Additionally, several attempts at undermining Section 404 have been introduced legislatively in recent years³ despite bipartisan support from the executive branch for

* Ryan M. Seidemann is a law clerk for the Louisiana Sea Grant Legal Program. He is also a JD and BCL candidate at Louisiana State University's Paul M. Hebert Law Center, class of 2003. Ryan holds a BA in anthropology from Florida State University and an MA in anthropology from Louisiana State University. He continues to conduct research in human skeletal biology, pre-Columbian voyaging, and cemetery studies as well as in environmental and anthropological law.

** Catherine D. Susman is a member of the Oregon State Bar and currently an associate at Arnold Gallagher Saydack Percell Roberts & Potter, P.C. in Eugene, Oregon. She practices law in the areas of real property, business, and corporate law, land use, commercial transactions, and contract law. Prior to joining Arnold Gallagher et al., Susman was an Assistant Attorney General for the Oregon Department of Justice and the Louisiana Department of Justice.

¹ 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001).

² 33 U.S.C. § 1344 (2002).

³ Louisiana Congressman Billy Tauzin introduced the Property Owners Bill of Rights, H.R. 790, 104th Cong. (1995), which directly targets the authority of the federal government to protect private lands from development under Section 404 of the CWA. Although this bill did not pass, it appears to indicate an increasing trend of opposition to governmental takings of land for the purposes of environmental conservation. Also introduced in the 104th Congress, H.R. 961, 104th Cong. § 803 (1995), attempting to diminish the protection of wetland areas. Although this bill provided an inclusion of wetlands into the CWA (something not yet explicitly done), it redefines the term so as to limit the effectiveness of the protection provided.

President George H.W. Bush's (Bush I) "no net loss" of wetlands platform.⁴

From the perspective of private landowners, who control the vast majority of wetlands in Louisiana and throughout the nation,⁵ there are few incentives to preserve these areas. As the demand for waterfront property increases⁶ and the oil market makes a rebound in Louisiana,⁷ the money of private developers has become more attractive to private landowners than the satisfaction of preserving the natural resources provided by intact wetlands.⁸ Indeed, federal wetlands protection is often seen by private landowners as a substantial encroachment on their property rights.⁹

As federal protection programs continue to encounter problems, more regional and economy-specific solutions, promulgated by individual states, seem to be the most plausible means for wetlands protection in the future.¹⁰ Although only two states have successfully assumed Section 404 protection

⁴ This approach has been supported by the Bush I, Clinton, and George W. Bush (hereafter Bush II) administrations. William K. Stevens, *Efforts to Halt Wetland Loss Turn Their Attention Inland*, N.Y. TIMES, March 13, 1990, at C1 (Bush I); see also Jennifer L. Anderson, James G. Wilkins, & Michael W. Wascom, *Legal Analysis of Section 404 Assumption, State of Louisiana* (Sea Grant Legal Program, Louisiana State University 1994) (Clinton); Ralph E. Heimlich, Keith D. Wiebe, Roger Claassen & Robert M. House, *Recent Evolution of Environmental Policy: Lessons from Wetlands*, 52 J. SOIL AND WATER CONSERV. 157 (1997) (Clinton); Myriam Marquez, *It's Not What Bush Has Done, It's What He's Undone*, ORLANDO SENTINEL, May 2, 2001, at K5 O87 (Bush II); see also Michael Grunwald and Mike Allen, *Conservation Program Reduction Draws Fire*, THE WASHINGTON POST, June 21, 2001, at A1 (Bush II).

⁵ RONALD K. GADDIE & JAMES L. REGENS, *REGULATING WETLANDS PROTECTION: ENVIRONMENTAL FEDERALISM AND THE STATES* (State University of New York Press 2000); see also Frank Clifford, *Raising the Price of Protecting Nature*, LOS ANGELES TIMES, May 25, 1995, at A1.

⁶ Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242 at 1251-52 (1995).

⁷ Mary Judice, *Gulf of Mexico's Oil Revival Could Point to Recovery*, THE TIMES PICAYUNE, Nov. 16, 1997, at A14.

⁸ Clifford, *supra* note 5 at A1.

⁹ Tim Cansler, *NLAP Alert: National Legislative Action Program* (Kentucky Farm Bureau 1997), at <http://www.kyfb.com/nlwetlan.htm> (last visited Sept. 25, 2002).

¹⁰ GADDIE & REGENS, *supra* note 5, at 6; see also WORLD WILDLIFE FUND, *STATEWIDE WETLANDS STRATEGIES: A GUIDE TO PROTECTING AND MANAGING THE RESOURCE* (Island Press 1992).

(Michigan¹¹ and New Jersey¹²), other state-level legislation can provide increased protection in the absence of federal clean water protection authority. Such protections include the voluntary tax incentives discussed here and new concepts such as wetlands mitigation banking,¹³ which have been relatively well received by the public as alternatives to governmental "taking" of land for conservation purposes.¹⁴

Some of the suggestions for possible changes or additions to the conservation and preservation schemes for wetlands in Louisiana discussed in this paper have been implemented in other jurisdictions around the country. In various portions of the paper, we look at a few examples of these programs in an attempt to determine whether or not other jurisdictions can be used as analogs for the development of a comprehensive voluntary conservation program for Louisiana's wetlands.

I

ENVIRONMENTAL, SCIENTIFIC, AND ECONOMIC IMPORTANCE OF WETLANDS CONSERVATION

Wetlands, as defined by the EPA, are:

[T]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.¹⁵

¹¹ Michigan assumed Section 404 authority from the Corps and the EPA in 1984 under a memorandum of agreement that outlines guidelines that the state must follow in order to retain their authority over the traditionally federal regulatory area. This agreement basically requires the state to take timely action against violators of Section 404 and reserves review privileges for permitting under Section 404 to the relevant federal agencies. GADDIE & REGENS, *supra* note 5, at 3.

¹² New Jersey assumed Section 404 authority from the Corps and the EPA in 1994, largely based on a regulatory model created by statute in 1987, the New Jersey Freshwater Protection Act. N.J. Stat. 13:9B-1 (2001), GADDIE & REGENS, *supra* note 5, at 58-66.

¹³ Kathrin E. Yates, *Wetlands Mitigation and Mitigation Banking in Louisiana*, 59 LA. L. REV. 591 (1999); H. Jane Lehman, *Banking on Wetlands*, BUILDER, Mar. 1994, at 56.

¹⁴ See Flint B. Ogle, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573 (1993).

¹⁵ 33 C.F.R. § 328.3(b) (2002).

The "similar areas" are further defined as: "[b]eyond the usual swamps, marshes, and bogs that come to mind when one mentions wetlands, areas which are governed by wetlands regulation also include woody areas which sustain wetlands vegetation, dry desert furrows, formerly marshy meadowlands, occasionally saturated lands, and arctic tundra."¹⁶

These areas, which have historically been perceived as useless wastelands,¹⁷ have been identified in recent years as being the source of seafood production,¹⁸ wildlife habitats,¹⁹ clean water,²⁰ storm protection,²¹ and even tourist revenue.²² Employing the broad definition of wetlands that several scholars contend is the

¹⁶ GADDIE & REGENS, *supra* note 5, at 18.

¹⁷ GADDIE & REGENS, *supra* note 5, at 17.

¹⁸ Greater than seventy percent of the nation's seafood species spend at least some part of their life cycle in wetland areas. The revenue generated by this type of food production is more than thirty-eight billion dollars annually. The coastal wetlands in Louisiana serve as a nursery for several species of shrimp, crab, and oysters, while freshwater wetlands are home to crawfish and catfish. PAUL D. COREIL, *WETLANDS FUNCTIONS AND VALUES IN LOUISIANA* 6 (La. State Univ. Agric. Ctr., La. Sea Grant, No. 2519, 1998).

¹⁹ Wetlands are home to numerous fur-bearing mammals (of which forty percent of the fur trade is supplied from Louisiana wetland species), alligators, and migratory waterfowl. COREIL, *supra* note 18; GADDIE & REGENS, *supra* note 5, at 18-21.

²⁰ Wetland areas act as cleansing agents for surface and ground waters, filtering out "sediments, toxins, and nutrients . . . which would otherwise enter primary waters, resulting in over-production of algae and other microbiological organisms which can deplete fish supplies and taint the fresh water supply." GADDIE & REGENS, *supra* note 5, at 23-24.

²¹ Storm protection is one of the most important functions of wetland areas, as was demonstrated by the severe flooding of the Mississippi River in 1973 (known as a 'man made flood'). Houck & Rolland, *supra* note 6, at 1249. Buffering from storm surges is also an important function for Gulf Coast areas that have seen 33.6% of landfalling tropical cyclone activity in the North Atlantic Basin over a period from 1871 to 1997. This is a significantly larger amount than any other area in the North Atlantic Cyclone Basin (tests of proportions show significant differences between the Gulf Coast and all other areas at the following confidence levels: Caribbean, $z=3.06$, $p=0.00$; Atlantic Coast, $z=3.93$, $p=0.00$; Canada, $z=4.42$, $p=0.00$; Greater Antilles, $z=3.67$, $p=0.00$; Lesser Antilles, $z=3.93$, $p=0.00$; Bahamas, $z=4.32$, $p=0.00$; Newfoundland, $z=4.60$, $p=0.00$). These data were calculated from National Oceanic and Atmospheric Administration raw data as detailed in Ryan M. Seidemann, Presentation to Society for American Archaeology Annual Meeting, New Orleans (April 23, 2001) (*Oceanographic Archaeology: Implications of the Florida Current on Prehistoric Contacts Between the Inhabitants of Florida and the Bahamas*).

²² PAUL COREIL, *COASTAL WETLANDS CONSERVATION: WHY IS IT IMPORTANT TO LOUISIANA?* (La. State Univ. Agric. Ctr., Pub. No. 2644, 1997); MICHAEL D. GRIMES & THOMAS K. PINHEY, *RECREATION POTENTIAL OF PRIVATE LANDS IN LOUISIANA'S COASTAL ZONE* (Ctr. For Wetland Res., La. State Univ., Pub. No. LSU-T-76-010, 1976); WORLD WILDLIFE FUND, *supra* note 10.

federal government's current construction of the term,²³ "there are approximately 100 million acres of wetlands in the lower 48 states, 90 percent of which are inland wetlands."²⁴ Of the remaining 10 million acres of coastal wetlands, 3.5 million are encompassed within Louisiana's borders,²⁵ 75 percent of which are privately owned.²⁶

In addition to the threats from federal actions, erosion of Louisiana's coastal wetlands is occurring at an alarming rate. An average of forty acres of coastal wetlands are lost each year due to human intervention in the natural marsh building process (e.g., the Corps' levee building activities restricting natural alluvial processes).²⁷ Despite ongoing restoration projects in Louisiana's coastal wetlands, if the current rate of loss continues unabated, more than 630,000 acres of land will disappear into the Gulf of Mexico within the next fifty years, representing public use value losses in excess of 37 billion dollars.²⁸ Inland wetlands in Louisiana are also facing widespread destruction at the hands of public and private developers.²⁹ What little protection has been afforded inland wetlands in recent years through farm bills that promote wetlands conservation³⁰ and broad jurisprudential interpretations of the Section 404 protection to the "waters of the

²³ GADDIE & REGENS, *supra* note 5, at 23; see Richard Minter, *Muddy Waters: The Quagmire of Wetlands Regulation*, 56 POL'Y REV. 70 (1991).

²⁴ GADDIE & REGENS, *supra* note 5, at 20.

²⁵ Kenneth J. Roberts, Paul A. Coriel & Albert J. Ortego, Jr., *Marshland Use Valuation Study*, La. Tax Comm'n, Sept. 3, 1996.

²⁶ Kenneth J. Roberts, Paul A. Coriel & Albert J. Ortego, Jr., *Taxation of Private Marshland: The Use Value Method Applied to Louisiana's Coast in Recent Research in Coastal Louisiana: Natural System Function and Response to Human Influence* (Lawrence P. Rozas et al., eds., La. Sea Grant Program 1999).

²⁷ Louisiana Coastal Wetlands Conservation and Restoration Task Force (LCWTF) & the Wetlands Conservation and Restoration Authority (WCRA), *Coast 2050: Toward a Sustainable Coastal Louisiana* (Louisiana Dep't of Natural Res. 1998); Brian Fortner, *Mississippi Diversion* 70 CIVIL ENGINEERING 46 (2000); Marilyn Barrett, *Coast 2050: Coastal Strategic Planning with Business and Environmental Interests*, 7(2) COAST & SEA 20 (1999). However, anthropogenic changes to wetlands processes are not the only causes of land loss in these areas. Tropical cyclones, such as Hurricane Andrew in 1992, cause rapid, widespread destruction of coastal wetlands. See generally, GLENN R. GUNTENSPERGEN & BETH A. VAIRIN, *WILLFUL WINDS: HURRICANE ANDREW AND LOUISIANA'S COAST* (La. Sea Grant Program & U.S. Dep't of the Interior 1996).

²⁸ LCWTF & WCRA, *supra* note 27 at 1.

²⁹ Elizabeth Coleman, *Wetlands in the Marketplace*, 7(2) COAST & SEA 2, 3 (1999).

³⁰ E.g., the Conservation Reserve Program and others discussed later in this paper.

United States"³¹ has seen substantial undercutting recently by the judiciary in *SWANCC*.

A. *SWANCC and Its Implications*

During the October 2000 Term, the United States Supreme Court implemented new limitations on federal authority over certain wetland areas under the CWA. In an opinion delivered by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas, the Court substantially reduced the jurisdiction of the EPA and the Corps with respect to their regulation of wetlands under the "waters of the United States" construction of the CWA.

The plaintiffs in *SWANCC* were interested in using an abandoned sand and gravel excavation area outside of Chicago as a solid waste disposal site. The site contained a number of excavated pits which filled with water following the abandonment of the site, thereby creating permanent and seasonal ponds. The Corps, relying on its authority under the CWA, which authorized it to issue permits allowing the discharge of dredged or fill material into "navigable waters,"³² refused to grant the plaintiff a permit to fill the man-made ponds. The term "navigable waters" is broadly defined by the CWA as "the waters of the United States." Previously, the Supreme Court determined that "navigable waters," as envisioned by the drafters of the CWA, extends to waters that, if degraded or destroyed, would affect interstate or foreign commerce. The Court had previously held that under the CWA the term "navigable waters" only extended to non-navigable (in the traditional sense of the word), non-commercial water bodies that are adjacent to bodies of open water of the United States.³³ Because the ponds in *SWANCC* were not located near any open waters and were non-navigable in the traditional sense of the word, the Court refused to uphold the Corps' jurisdiction over the ponds.

³¹ *E.g.*, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which upheld the Corps' jurisdiction over wetland areas under its authority in Section 404 of the CWA.

³² See *SWANCC v. U.S. Army Corp. of Eng'rs*, 121 S.Ct. at 677 (2001).

³³ *Riverside Bayview Homes*, *supra* note 31 at 123. In *Riverside*, the Court upheld the Corps' construction of such a broad interpretation of the CWA's definition of "waters of the United States."

In a tangential attempt to restrict the plaintiffs' activities, the Corps relied on the Migratory Bird Rule³⁴ of the CWA. The Migratory Bird Rule allows the Corps to extend its authority from "navigable waters" to waters that provide [a] habitat for migratory birds.³⁵ Because the ponds on the land that the plaintiffs wanted to use were employed as a habitat by migrating birds, the Corps exerted its authority and denied their request. However, the Court refused to extend the Corps' authority to such waters under the Migratory Bird Rule. "Permitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."³⁶

The Court's decision in *SWANCC* may result in the removal of as much as thirty to sixty percent of the wetlands in the United States from federal protection under the CWA.³⁷ However, it is likely too early to tell the extent of the protection which was repealed by the Court in *SWANCC*. Subsequent agency interpretations of the ruling and court decisions on those interpretations will decide the fate of a large portion of the wetlands of the United States (nearly all of which were afforded some measure of protection under the CWA prior to *SWANCC*).³⁸

In an early interpretation of the *SWANCC* decision, the EPA states that potentially affected areas of federal jurisdiction include: "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . ."³⁹

³⁴ 33 C.F.R. § 404(a) (2001).

³⁵ *SWANCC*, 121 S. Ct. at 678.

³⁶ *Id.* at 684.

³⁷ Jon Kusler, Memorandum: The *SWANCC* Decision and State Regulation of Wetlands (Assoc. of State Wetland Managers, Inc., 2001).

³⁸ *Id.* The few cases that have been decided in the lower courts since *SWANCC* illustrate the confusion created by that ruling. In *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001), the *SWANCC* ruling was narrowly construed to allow jurisdiction of the Corps and the EPA to continue to extend to attenuated wetland areas in Montana. However, in *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001), the *SWANCC* ruling was followed in the majority's refusal to extend CWA protection to "ponds that are not adjacent to open water."

³⁹ 33 C.F.R. § 328.3(a)(3) (2001), cited by Memorandum from Gary S. Guzy, General Counsel, EPA & Robert M. Anderson, Chief Counsel, U.S. Army Corps of

The *SWANCC* holding illustrates the necessity of private landowner/government cooperation in the preservation of wetland areas. Under this ruling, the majority of affected areas⁴⁰ are inland wetlands,⁴¹ regions which have traditionally been subject to less attention and protection than their coastal counterparts.

B. Takings Issues

For nearly the past decade, since the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*,⁴² wetlands and other environmental protection programs have come under attack by private landowners under the takings clause of the Fifth and Fourteenth Amendments to the United States Constitution. In *Lucas*, the State of South Carolina was required to pay a private landowner one million dollars because of restrictions placed on the use of his land by the Beachfront Management Act (BMA),⁴³ which deprived the land of all economically viable uses. In an opinion that appeared somewhat callous to the underlying environmental policy concerns, Justice Scalia found that the BMA rendered *Lucas*' property valueless and thus constituted a taking under the United States Constitution.⁴⁴ This decision established a per se category of takings for any regulation which "denies all economically beneficial or productive use of land."⁴⁵ Although no such awards have been granted to Louisiana landowners in situations resembling *Lucas*,⁴⁶ there have been later United States Supreme Court pronouncements on the issue of takings and wetlands regulation.

Announced in the October 2000 term, the Supreme Court's decision in *Palazzolo v. Rhode Island*⁴⁷ represents a potential broadening of takings "liability" to various governmental entities. In *Palazzolo*, the landowner was allowed to assert a takings claim on property which was already subject to CWA regulatory

Eng'rs, Memorandum: Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 5 (2001) (on file with the EPA).

⁴⁰ *E.g.*, areas no longer falling under federal protection.

⁴¹ Guzy & Anderson, *supra* note 39.

⁴² *Lucas v. S.C. Coastal Council (SCCC)*, 505 U.S. 1003 (1992).

⁴³ S.C. CODE ANN. § 48-39-250 (1990).

⁴⁴ *Lucas*, 505 U.S. at 1007.

⁴⁵ *Lucas*, 505 U.S. at 1015.

⁴⁶ This has not been for want of trying. *See, e.g.*, *Jefferson Levee Dist. v. Coast Quality Constr. Corp.*, 640 So. 2d 1258 (La. App. 4th Cir.) (1994).

⁴⁷ 533 U.S. 606 (2001).

protection when the landowner acquired ownership in 1978.⁴⁸ The Court suggested that even in such situations where the individual knew or should have known of such restrictions placed on the development of wetland properties at the time they acquire ownership, such restrictions may still constitute a taking under the United States Constitution.⁴⁹ The Court, however, stopped short of ruling on the damages issue and remanded the case for consideration under the multifactor balancing test for determining takings established in *Penn Central Transp. Co. v. New York City*.⁵⁰ The Court also suggested in this ruling that the property in question need not be deprived of all economic viability to constitute a taking.⁵¹ Thus, this expansion of the landmark *Lucas* decision potentially opens up a larger class of property to takings litigation than had previously existed.

Where regulation for the protection of wetlands on private property are becoming more clearly scrutinized by the courts for takings claims, tax incentives for preservation represent an alternative means to provide protection for environmentally sensitive areas. Although the cited cases in this subsection are national in scope, it is likely that similar results will occur in suits for the taking of property for conservation purposes in Louisiana. One major reason for this expectation is the fact that Louisiana courts are deferring to federal law decisions regarding many takings issues.⁵² This is because the Louisiana Constitution provides less protection than the United States Constitution against public takings of private property.⁵³

C. Voluntary Conservation—Public Reactions

Farmland is a major contributor to inland wetlands loss in the United States.⁵⁴ This loss occurs when farmers drain the wetlands on their property and convert them into cropland. In fostering wetlands preservation, Congress has been reluctant to

⁴⁸ *Id.* at 614.

⁴⁹ *Id.* at 630.

⁵⁰ See 438 U.S. 104 (1978).

⁵¹ *Palazzolo*, 533 U.S. at 630.

⁵² *Avenal v. State*, 757 So. 2d 1 (La. App. 4th Cir.) (1999), *cert. denied*, 531 U.S. 1012 (2000).

⁵³ The United States Constitution protects against takings by federal and state governments, while the Louisiana Constitution only protects against takings by state government. *Id.* at 6. See Joe F. Stevenson, *Louisiana's Oyster Lease Relocation Program: A Step Toward Common Ground*; 28 S.U. L. REV. 19 (2000).

⁵⁴ GADDIE & REGENS, *supra* note 5, at 17.

create regulations that directly impinge on farmers' land use rights.⁵⁵ Additionally, direct regulation of agricultural land may constitute a taking under the Fifth Amendment.⁵⁶ Generally, however, private landowners are reluctant to set aside portions of their property for conservation purposes that, while benefiting society as a whole, detrimentally affect their property interests.

Psychological and land-use planning research over the past twenty-five years has illustrated private landowners' reluctance to comply with governmental (especially federal)⁵⁷ intervention in their property interests for the purposes of environmental conservation.⁵⁸ Several sources credit landowners' general apathy regarding conservation concerns to a lack of education on the environmental issues that affect their communities.⁵⁹

On the other hand, when incentives are introduced to promote voluntary conservation of private lands, many landowners' attitudes change.⁶⁰ When landowners are given tax break incentives⁶¹ or subsidies⁶² to keep their property out of agricultural production, they are often more willing to cooperate with the

⁵⁵ Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. RES. L. REV. 401 (1993).

⁵⁶ See *id.* The takings issue is discussed at length in the previous section of this paper.

⁵⁷ JOEL L. LINDSEY, KAREN W. PATERSON & ALVIN L. BERTRAND, *CITIZEN PERCEPTION OF COASTAL AREA PLANNING AND DEVELOPMENT* (Sea Grant Pub. No. LSU-T-76-001, Center for Wetland Resources, Louisiana State University 1976).

⁵⁸ Cansler, *supra* note 9; J. Dixon Esseks & Steven E. Kraft, *Landowner Views of Obstacles to Wider Participation in the Conservation Reserve Program*, 41 J. SOIL AND WATER CONSERV. 410 (1986); Erik Lichtenberg & Rae Zimmerman, *Information and Farmers' Attitudes About Pesticides, Water Quality, and Related Environmental Effects*, 73 AGRIC., ECOSYSTEMS AND ENV'T 227 (1999).

⁵⁹ Lichtenberg & Zimmerman, *supra* note 58; Gary D. Lynne, J.S. Shonkwiler & Leandro R. Rola, *Attitudes and Farmer Conservation Behavior*, 70 AM. J. AGRIC. ECON. 12 (1988).

⁶⁰ *Farmers Surveyed on Land Use Issues*, STAR TRIBUNE, June 21, 1998, at 5B; Brian Williams, *Wetlands Restoration Promising*, THE COLUMBUS DISPATCH, October 31, 1996, at 2G; Clifford, *supra* note 5.

⁶¹ Examples of such tax breaks are provided in Michigan's now-defunct FOSPA program. MICH. COMP. LAWS § 554.706 (1990) (repealed 1994). These programs have proven highly successful and have been well received by landowners. Thomas Grier, *Conservation Easements: Michigan's Land Preservation Tool of the 1990s*, 68 U. DET. L. REV. 193 (1990). The program allowed the state legislature of Michigan to designate private lands as exempt from local property taxes when the lands fell under certain environmentally endangered criteria as defined by the statute. *Id.* at 198, 219.

⁶² An example of such subsidies is outlined in the Conservation Reserve Program, 7 C.F.R. § 1410 (2001), which protects thirty-six million acres of environmentally

goals of environmental regulators. The preservation possibilities for Louisiana outlined in this paper attempt to balance governmental interests in preserving the environment with private interests based on common-law ideas that private property is outside of government regulatory control.

II

SUMMARY OF WETLANDS CONSERVATION AT THE FEDERAL LEVEL AND IN LOUISIANA

Wetlands conservation and regulation have been actively pursued at both state and federal levels since the 1970s.⁶³ The federal and Louisiana governments have addressed the abatement of wetlands degradation. Below we discuss the efforts by these bureaucracies to foster a "net gain" wetlands strategy and offer suggestions for accomplishing this conservation goal. A brief review of past regulatory attempts is necessary to frame the current argument.

Although considerable legislative and regulatory activity has occurred in the area of wetlands regulation, little action toward stopping wholesale wetlands destruction⁶⁴ occurred during the early years of wetlands conservation.⁶⁵ In the late 1980s and early 1990s, both governmental and private groups began to take action to promote a "net gains" policy of the nation's wetlands.⁶⁶

Despite the lack of action in the early years, the federal government's interest in wetlands protection extends back at least to the mid-1970s. With Executive Order 11,990,⁶⁷ President Carter initiated an era of national concern for the integrity of wetland areas that has included legislation as well as programs aimed at protecting wetlands. These efforts on the part of executive agencies of the federal government and Congress include the CWA and the Food Security Act's⁶⁸ "Swampbuster" provisions, the

important and fragile farmland by paying subsidies to keep the land idle. Jerry Hagstrom, *Common Ground*, 28 *Gov. EXECUTIVE* 34 (1996).

⁶³ GADDIE & REGENS, *supra* note 5 at 107; LCWTF & WCRA, *supra* note 27 at 116.

⁶⁴ No efforts were even made toward reversing the degradation process to yield net gains of United States wetlands.

⁶⁵ Circa 1970 to the mid 1980s.

⁶⁶ WORLD WILDLIFE FUND, *supra* note 10.

⁶⁷ 42 *Fed. Reg.* 26,961 (May 25, 1977).

⁶⁸ 16 U.S.C. §§ 3821-23 (2001). The "Swampbuster" program denies (with exceptions) support to farmers under the Agriculture Act of 1949, 7 U.S.C. § 1421 (2001),

Water Bank Act,⁶⁹ the Small Wetland Acquisition Program,⁷⁰ the Conservation Reserve Program,⁷¹ the Wetland Reserve Program,⁷² and the Emergency Wetlands Resources Act.⁷³ The concerted effort exemplifies the goal to "avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever it is a practicable alternative."⁷⁴ Nevertheless, the primary source of wetlands protection enforcement at the federal level remains the Corps' permit program under Section 404 of the CWA,⁷⁵ the same mechanism which was substantially eroded by the Supreme Court's decision in *SWANCC*.

Despite the substantial federal legislation and enforcement in the stemming of wetlands disappearance, these areas continue to deteriorate and disappear at a higher rate than that at which they are saved. This diminution is partially attributable to the fact that many areas are outside of federal control due to federalism complications.⁷⁶ Although Louisiana has chosen not to assume the federal government's authority under Section 404 of the

or the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714 (2001), if crops are produced on a wetland.

⁶⁹ 16 U.S.C. § 1301 (2001). The Water Bank Act authorizes the Secretary of Agriculture to enter into agreements with landowners for the purposes of promoting the conservation of natural resources on private property, whereby the landowners can receive payment to foster such conservation through idling land. 16 U.S.C. § 1302 (2001).

⁷⁰ The Small Wetland Acquisition Program (SWAP) is located within the Migratory Bird Hunting and Conservation Stamp Act and allows the Secretary of the Interior to purchase lands designated as "Waterfowl Production Areas" which typically amounts to the purchase of wetland areas. 16 U.S.C. § 718(d) (2001).

⁷¹ This is within the Food Security Act of 1985, 7 C.F.R. § 1410.1-64 (2001). The Conservation Reserve Program offers rental or incentive payments on a voluntary basis to farmers who plant crops that promote long-term resource conservation. U.S. Dep't of Agric., *Conservation Reserve Program Fact Sheet 1* (USDA 1999).

⁷² This is within the Food, Agriculture, Conservation, and Trade Act of 1990, 7 C.F.R. § 1467.1-18 (2001). Under the Wetland Reserve Program (WRP), the federal government is authorized to assist, up to 100%, in the restoration of eligible lands to wetland status. These payments come in the form of conservation easements and are issued on a voluntary basis. Nat'l Res. Conservation Serv. (NRCS), *Wetlands Reserve Program Brochure* (NCRS, 1997).

⁷³ 16 U.S.C. §§ 3901-3932 (2001). The Emergency Wetlands Resources Act (EWRA) authorizes the Secretary of the Interior to collect entrance fees from visitors to certain National Wildlife Refuge System areas, seventy percent of which are to be redistributed to migratory bird conservation efforts. *Id.* § 3911.

⁷⁴ Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 25, 1977).

⁷⁵ Anderson et al., *supra* note 4.

⁷⁶ GADDIE & REGENS, *supra* note 5, at 45.

CWA, the State can and does implement its own protections for wetlands within its borders that exceed the federal standards in many areas. Indeed, in the area of wetlands conservation, most scientists and scholars believe that state initiatives have the greatest potential for success.⁷⁷

Louisiana, like the federal government, began statewide wetlands conservation efforts in the mid-1970s.⁷⁸ Most of the Louisiana conservation activities have operated under the Federal Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA).⁷⁹ In Louisiana, the Corps' authority under the Section 404 Permit Program is paralleled by the Coastal Use Permit Program (CUP), which is administered by the Louisiana Department of Natural Resources (LDNR)⁸⁰ in the Coastal Zone.⁸¹ Additionally, the LDNR has sponsored and implemented several efforts to rebuild Louisiana's coastal wetlands since the late 1980s.⁸² However, very little attention has been given to the stemming and reversal of inland wetlands loss. None of the currently implemented regulatory efforts to reduce wetlands losses mention the conservation of inland wetlands.⁸³ This lack of effort is threatening areas which traditionally serve as habitats for numerous wildlife species as well as areas which represent water cleansing and flood control mechanisms. Voluntary incentives, such as those discussed here, for the conservation of inland wetlands are essential to the preservation of these areas in the absence of government legislation and in the current jurisprudentially constricted environment of federal protection

⁷⁷ See EVAN J. RINGQUIST, ENVIRONMENTAL PROTECTION AT THE STATE LEVEL: POLITICS AND PROGRESS IN CONTROLLING POLLUTION (Kenneth J. Meier ed., M.E. Sharpe, Inc., 1993).

⁷⁸ LCWTF & WCRA, *supra* note 27.

⁷⁹ 16 U.S.C. § 3951-56 (2001). The CWPPRA is actually federal legislation aimed solely at the conservation of Louisiana's coastline.

⁸⁰ Yates, *supra* note 13 at 592-93.

⁸¹ The Coastal Zone is defined by 49 LA. REV. STAT. ANN. § 214.24 (West 2001).

⁸² LDNR has implemented river diversion projects to bring new sediments into shrinking wetlands. Shoreline protectors have also been installed to buffer the coastal wetlands from the erosional lapping waves of the Gulf of Mexico (including the Christmas tree project, where old Christmas trees are used to shore up coastal regions by slowing wave action and trapping sediments). Elizabeth Coleman, *Coastal Restoration Now . . . What's Working? What Do We Need?*, 9 COAST & SEA 4 (2001).

⁸³ See, e.g., LCWTF & WCRA, *supra* note 27; LCWTF, *Louisiana Coastal Wetlands Restoration Plan* (LDNR 1993).

over wetland areas.⁸⁴ Although the efforts of the State of Louisiana have been admirable in the area of promoting coastal wetlands restoration and conservation, their efforts in promoting the same activities for inland wetlands have left something to be desired. The possible methods for promoting inland wetlands conservation (as well as coastal conservation) in this paper represent means which require minimal state involvement from an enforcement perspective, while potentially yielding significant preservation results which satisfy both state entities and private landowners.

A. Louisiana Tax System

Although some of the most successful programs for wetlands conservation at the federal level have been subsidy-driven programs,⁸⁵ no such system has been implemented on a state basis in Louisiana. Tax based incentive programs have been considered a viable alternative to other modes of voluntary conservation. Indeed, some states have designated wetlands areas as untaxable in order to promote conservation goals.⁸⁶

Established primarily by the Louisiana Constitution, Article VII,⁸⁷ the Louisiana tax system provides several areas which may be exploited to promote wetlands conservation. Property taxes may be used to reduce the burden of maintaining low-production land, and severance, processing, and mineral taxes may be able to compensate for revenue lost due to other tax reductions. These possibilities are examined in the next two sections. Any changes to the tax system, such as those proposed in this article, would likely have to be accomplished by proposing a constitutional amendment.⁸⁸ Alternatively, in recent years, minor altera-

⁸⁴ *E.g.*, SWANCC and its progeny.

⁸⁵ *E.g.*, the CRP and the WRP programs.

⁸⁶ *E.g.*, N.D. CENT. CODE § 57-02-08.4 (2001); MINN. STAT. § 272.02 subd. 11 (2001); *see* OR. REV. STAT. § 307.115(4)(c)(C) (2001) (The Oregon statute gives the granting authority discretion if the exemption will promote the conservation of wetlands).

⁸⁷ Specific taxes are found elsewhere in the Louisiana Constitution. The taxing constraints of local governments are located in Article VI, §§ 26-32 (1996); certain natural resource taxes are located in Article IX, § 9 (1996).

⁸⁸ Changes to the tax system are typically accomplished through constitutional amendment. LA. CONST. art. XIII § 1 (1996). This task, although facially daunting, has been accomplished numerous times in the history of Louisiana. Indeed, one scholar reports 536 approved amendments to the 1921 Louisiana Constitution and an additional 41 amendments were approved (62% of those proposed) for the 1974 Louisiana Constitution between 1974 and 1991. Additionally, "[n]early half of the

tions to the Louisiana Tax Commission (LTC) standards for tax collection on wetland areas have been adopted via notice and comment rulemaking by the LTC itself.⁸⁹

B. Louisiana Property Tax System

The majority of landowner complaints about the preservation of wetlands on their property center around the requirement that considerable taxes be paid on land which produces little or no revenue.⁹⁰ Under the current legislation, property is taxed according to its assessed valuation. This ad valorem tax is a percentage of the property's fair market value.⁹¹ Most unimproved land is assessed an ad valorem tax that is ten percent of its fair market value.⁹² There are exceptions to this scheme, however, and wetland areas may fall under one of the exceptions.⁹³

Instead of assessing ad valorem taxes for marshlands⁹⁴ according to the fair market value of the land, the Louisiana Constitution⁹⁵ mandates using the use value approach to determining taxation. This system assesses a ten percent tax on the estimated financial return on the land rather than on the fair market value of the land. The purpose of this reduction is that in some areas,

approved amendments, eighteen of forty-one, were to article VII, and most related to taxes and constitutional dedications." Melissa Lawrence, Comment: *Constitutional Revision by Amendment—A Louisiana Tradition*, 51 LA. L. REV. 849, 851 (1991). Some changes to the tax system have been accomplished statutorily, such as changes to the methods of property valuation for ad valorem taxes. Roberts et al., *supra* note 25.

⁸⁹ E-mail from Ed Leffel, Property Tax Specialist, LTC, to Ryan Seidemann (Nov. 2, 2001) (on file with author).

⁹⁰ Roberts et al., *supra* note 26.

⁹¹ LA. CONST. art. VII, § 18. "Fair market value" is defined as "the price for property which would be agreed upon between a fully informed buyer and seller, under normal circumstances." LTC, *Real/Personal Property Rules and Regulations*, DE-1 (Heritage Press 2000) [hereinafter LTC manual].

⁹² LA. CONST. art. VII, § 18(B).

⁹³ We say that wetlands "may" fall under an exception to the ad valorem taxation scheme because it is unclear at the present time what is exactly exempted under the current scheme. This problem arises as a result of some obscure terminology used in the Louisiana Constitution and the LTC manual regarding the assessment of "marsh" areas. This problem is examined in more detail in the following subsection.

⁹⁴ This scheme is also used for timberlands and agricultural and horticultural lands. Additionally, it is apparent that some assessors have been applying various categories of the timberland use-value scheme to wetland areas as well as the marshland scheme. Interview with Paul Coriel, Vice Chancellor, Extension Service, Louisiana State University AgCenter, in Baton Rouge, Louisiana (Sept. 18, 2001). This may result in over taxation of such land.

⁹⁵ LA. CONST. art. VII, § 18(D).

fair market value taxes would be so high that the land would likely become developed property in accordance with its tax classification in order to offset higher assessed rates.

Despite the reduced taxing for some wetlands under the use value tax system, these areas have generally continued to be overtaxed. The Louisiana Constitution states that the “[f]air market value and use value of property shall be determined in accordance with criteria which shall be established by law and which shall apply uniformly throughout the state,”⁹⁶ thus leaving taxation methods largely up to agency rulemaking. Rather than base assessments on the actual production value of particular parcels of land, an efficiency standard for assessing taxes on marshlands was adopted following public hearings by the LTC.⁹⁷ Several changes to the LTC taxation scheme have occurred over the past decade. Due to the complexity of these changes, the evolution of the LTC standards for marshland valuation warrants review.

In 1995, suit was filed against the LTC by landowners in Terrebone and Lafourche parishes,⁹⁸ claiming that the method for taxing marshlands was overly burdensome.⁹⁹ These suits prompted legislative action. Pursuant to Act 230 of the 1996 Regular Session, the Louisiana Legislature directed the LTC to formulate a new set of standards to apply to the taxation of marshlands across the State. The LTC contracted with the Cooperative Extension Service at Louisiana State University (LSU) for assistance in drafting the new standards. This collaboration initially resulted in recommendations by the LSU advisors to the LTC to tax marshland areas at less than one dollar per acre. However, the LTC rejected this proposal as “simply not feasible” due to ambiguities in the application of the proposed standards.¹⁰⁰

Ultimately, the LTC settled on a later proposal by LSU.¹⁰¹ A tripartite scheme was developed which divided the State’s marsh-

⁹⁶ *Id.*

⁹⁷ LTC manual, *supra* note 91, adopted pursuant to 49 LA. REV. STAT. ANN. §§ 951-968 (2001).

⁹⁸ *E.g.*, *Edgerton v. LTC*, No. 413705 (19th JDC filed Feb. 3, 1995) (settled out of court).

⁹⁹ At the time, marshlands in Louisiana were taxed in two categories: saltwater (\$7 per acre) and freshwater (\$8 per acre). LTC manual, *supra* note 91.

¹⁰⁰ E-mail from Ed Leffel to Ryan Seidemann (Nov. 2, 2002) (on file with author).

¹⁰¹ This proposal is incorporated into *Roberts et al.*, *supra* note 25.

lands into freshwater, brackish, and saltwater. Averages of production returns from those areas taken over a four-year period were then applied as an across-the-board assessment of any land falling into these categories.¹⁰² While statistically sound as mean values of such properties, these average assessments had already been demonstrated to place extreme financial burdens on the owners of some marshlands.¹⁰³ Although these new standards dropped the overall per acre tax rate for marshlands, the decrease was not substantial (between one and two dollars per acre) and does not appear to have solved the problem of burdensome taxation pointed out in such cases as *Edgerton v. LTC*.¹⁰⁴ When landowners are forced to pay steep taxes on low-productivity property, the logical response is to find a more productive use for the land, thereby endangering the integrity of intact wetlands. Under the Louisiana use value tax scheme, this is an especially serious concern because landowners could convert wetland areas that are being over-taxed into productive agricultural lands and still receive a use valuation of their land for *ad valorem* taxation purposes.¹⁰⁵ Landowners could thereby circumvent the high tax rate on low-production property while still retaining tax assessments lower than the fair market value. The LTC standards should be revised to reduce the burdens on landowners and to avoid the possibility of such scenarios.

The current method of assessment employed by the LTC appears to be a use value hybrid. Unlike the purely use value assessment approach to agricultural and timber lands, where the taxed amounts are calculated from the actual production value of the property, the use value approach to marshlands is based on a projected set of standards irrespective of the actual use of these

¹⁰² Roberts et al., *supra* note 25. The marshland assessment values are as follows: fresh water=\$7 per acre; brackish=\$6 per acre, saltwater=\$5 per acre.

¹⁰³ As with any statistically derived mean, there are going to be variables that fall near the outer tails of the standard distribution. On paper this situation may not appear too extreme; affecting a few landowners who are over- or under-taxed. However, in reality the situation is rather more ominous for the continued protection of wetland areas from development. For example, in *Edgerton*, *supra* note 98, there was a \$215,000 difference between the LTC hybrid assessed value and the actual use value of the land. Although the standards are now somewhat different as a result of litigation, there is no indication that the changes have solved the problem of over-taxation.

¹⁰⁴ *Edgerton*, *supra* note 98.

¹⁰⁵ Although falling under the same taxation scheme (i.e., use value), one must not forget that nationally, agriculture is one of the most substantial destroyers of intact wetlands.

lands. This set of standards remains the same, regardless of the economic returns the property actually produces for its owner.¹⁰⁶

Several caveats regarding the current standards are important to point out. Although the Louisiana Constitution of 1974 mandates uniformity for the assessment of marshland taxes across the State, the scheme currently employed by the LTC does not seem to satisfy the mandate. There is a uniform method applied throughout the State, however, the uniform method leads to significantly different assessment rates in different regions. At least since changes in 1998,¹⁰⁷ the LTC has only allowed the marshland classification to be applied to certain enumerated parishes in south Louisiana.¹⁰⁸ This method apparently stems from an LSU recommendation to only value land as marshland south of Interstate 10 (I-10).¹⁰⁹ The inference is that the LTC has limited marshland classifications to areas within the Coastal Zone, a classification which does not comport with the reality that substantial marshlands exist north of I-10.¹¹⁰ The land falling north of I-10 is lumped into an "All Other Acreage" category for taxation purposes.¹¹¹ Under this approach, some wetland acreage is classified under the Timberland Class Four category¹¹² at \$8.64 per acre, while the remaining marshlands not assessed as timberlands are assessed at fair market value.¹¹³ Such a method effectively places wetland areas in North Louisiana in a higher per acre tax category than all other agricultural and timberlands in the state.

¹⁰⁶ While any assessment of agricultural and timber lands is necessarily subject to problems of over- or under-production, such specific standards, often tailored to the types of uses occurring on the property (e.g., growing carrots, growing legumes, etc.), should help to minimize losses due to over-taxation. See generally, J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 363 (2000).

¹⁰⁷ 24 La. Reg. 477, 491 (1998).

¹⁰⁸ 24 La. Reg. 491 (the enumerated parishes are Acadia, Ascension, Assumption, Calcasieu, Cameron, East Baton Rouge, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John, St. Landry, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermilion, and West Baton Rouge).

¹⁰⁹ E-mail from Ed Leffel to Ryan Seidemann (Nov. 2, 2001) (on file with author).

¹¹⁰ See, e.g., U.S. FISH AND WILDLIFE SERV., NATCHEZ—MISSISSIPPI-LOUISIANA MAP, 1:250,000-SCALE MAP OF LOWER MISSISSIPPI VALLEY ECOLOGICAL INVENTORY (1983).

¹¹¹ LTC manual, *supra* note 91.

¹¹² This category requires production of timber to be less than 34.1 cubic feet of growth per acre per year. LTC manual, *supra* note 91.

¹¹³ E-mail from Ed Leffel to to Ryan Seidemann (Nov. 2, 2001) (on file with author); interview with Paul Coriel (Sept. 18, 2001).

Such an approach poses a significant threat when landowners can save tax money by putting their wetlands into agricultural production.

Following the 1996 revisions, the LTC standards underwent a second substantial facelift in 1998.¹¹⁴ The enumerated parishes previously classified as marshlands were divided into East/West zones, roughly following the Atchafalaya River.¹¹⁵ The West Zone retained the 1996 seven/six/five dollar division, while the East Zone has undergone a significant reduction in suggested assessed values.¹¹⁶ Although no reasons for the change were published in the *Louisiana Register*, an LTC official indicated that it was based on feedback from parish assessors as to the use of the lands in the two areas:

For several years after the [1996 valuation tables] were adopted by the Tax Commission, we annually heard from coastal parish assessors that there was [a] large disparity in the amount of 'traditional' use of marshland[s] and income received from hunting/trapping leases, as well as such land being held more for its oil and gas royalty income than such traditional uses.¹¹⁷

While there does appear to be sound reasoning in assigning a higher taxation rate to more profitable lands, this approach still seems to unfairly burden those individuals who own marshland in the West Zone but do not derive substantial amounts of income from oil and gas. As a solution to this problem, below, we discuss replacing the suggested use value tables with a more land-owner-specific valuation method.

The use of arbitrary, geo-political boundaries such as I-10 and the Atchafalaya River without substantial consideration of the geology and geography of individual tracts of land will continue to lead to an unbalanced treatment of wetland and marshland areas in Louisiana. Even if individual assessments of property

¹¹⁴ 24 La. Reg. 477, 491 (1998).

¹¹⁵ E-mail from Ed Leffel to Ryan Seideman (Nov. 2, 2001) (on file with author); West Zone: Acadia, Calcasieu, Cameron, Iberia, Jefferson Davis, Lafayette, St. Landry, St. Martin, St. Mary, and Vermilion; East Zone: Ascension, Assumption, East Baton Rouge, Iberville, Jefferson, Lafourche, Livingston, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John, St. Tammany, Tangipahoa, Terrebonne, and West Baton Rouge. LTC manual, *supra* note 91.

¹¹⁶ In the East Zone, fresh water marsh is now \$5 per acre, brackish marsh is \$4 per acre, and salt water marsh is \$3 per acre. LTC manual, *supra* note 91.

¹¹⁷ E-mail from Ed Leffel to to Ryan Seidemann (Nov. 2, 2001) (on file with author).

proved to be too burdensome for assessors, there may be other ways to adopt more scientifically sound and landowner-friendly valuation schemes. One such possibility is the use of the Soil Conservation Service (SCS) surveys of Louisiana to determine the nature of assessed property. Certain types of land could be classified as representing wetland areas based on SCS designations that could then be applied to the state, without regard to arbitrary boundaries. Such an approach could minimize the burden on individual assessors by reducing the time needed to physically visit each tract. To assess valuation based on use, landowners could report the activities for which their property was used.

Another alternative use value approach to the LTC's assessment of marshlands for taxation purposes would be to bifurcate the scheme into two discrete categories: high use and low use. In the real world, there are landowners who exploit the wetlands to their fullest extent for monetary gains and those who use them minimally for recreation purposes. Within the high use category, a standardized version of the taxation scheme in the LTC manual¹¹⁸ could remain in force. However, in the low use category, a set of minimum rates could be established for those individuals not averaging fifty percent of the expected maximum revenue intake for their tract of marshland property. Such a classification scheme is not wholly without support in the LTC's policies. Both the agricultural and timberland taxation rates are set according to a similar standard.¹¹⁹

Alternatively, a taxation scheme which incorporated multiple use value categories for any one tract of wetland might help to alleviate excessive taxing of landowners. Such a scheme, demonstrated by the means of data collection used to create the extant LTC standards, would take into account how much of a landowner's tract is employed for particular tasks¹²⁰ and then tax accordingly.¹²¹ Again, this suggestion is not without support in the

¹¹⁸ LTC manual, *supra* note 91.

¹¹⁹ LTC manual, *supra* note 91 at UV-8-UV-13.

¹²⁰ This figure would be a calculation of the percentage of land employed for particular uses (e.g., alligator egg sales, alligator hunting, aquaculture, fur trapping, hunting, recreational fishing, and cattle grazing, as suggested by Roberts et al., *supra* note 25).

¹²¹ *E.g.*, where 25 percent of the land is used for agriculture and 75 percent used for recreational purposes, the tax should be adjusted to account for this discrepancy in revenue-producing land use.

current use value scheme. Agricultural lands are assessed based on the specific crops being grown on particular tracts.¹²²

Louisiana could also follow the lead of such states as New York and Oregon, who have incorporated wetland based tax breaks into their property tax systems.¹²³ Such tax schemes exempt wetland areas from any taxation by the State. However, the landowner has the difficult burden of proving that the land in question is a wetland.¹²⁴ Additionally, the New York statute provides for assistance to local governments for the costs of allowing tax exemptions to large parcels of land.¹²⁵ It is likely that such an approach would be necessary if substantial tax breaks were given to the owners of wetland property in Louisiana since most local governments rely heavily on the income generated by property taxes.¹²⁶

C. Wetland, Marshland, Swamp Land—What Does the Louisiana Tax Structure Protect?

As evidenced by the foregoing discussion of the ad valorem and use value tax structures in Louisiana, there are discrepancies in terminology within these schemes. The LTC manual and the Louisiana Constitution both refer to “marsh lands.” The term is not defined in the Constitution, and conflicting definitions in various Louisiana statutory materials lead to a very difficult delineation of an important term. However, before an examination of the permutations of the definition of marshland in Louisiana is undertaken, one caveat should be borne in mind: whatever the definition of marshland ultimately turns out to be, it will be significantly narrower than the currently accepted definition of wetlands.¹²⁷

¹²² LTC manual, *supra* note 91, at UV-13.

¹²³ N.Y. ENVTL. CONSERV. LAW §§ 24-0901 (2001); OR. REV. STAT. § 307.115 (1999).

¹²⁴ Christopher J. Stracco, *Valuation of Wetlands for Property Taxation Purposes*, PROB. & PROP. Mar.-Apr. 1999, at 8, 10. See also *Katz v. Assessor and Bd. of Assessment of the Vill. Town of Mount Kisco*, 442 N.Y.S. 2d 795, 797 (App. Div. 1981).

¹²⁵ N.Y. ENVTL. CONSERV. LAW § 24-0901 (2001).

¹²⁶ Robert S. Angelico, *Valuing Business Assets: Is the Louisiana Property Tax System at the Threshold of Change?*, 42 LA. B.J. 448 (1995). See also CAROL COHEN, *THE LOUISIANA STATE-LOCAL TAX STRUCTURE: IN FINDING PERMANENT SOLUTIONS TO LOUISIANA'S RECURRING FISCAL CRISIS* (James A. Richardson ed.) (1987).

¹²⁷ See 33 C.F.R. § 328.3(b) (1989); GADDIE & REGENS, *supra* note 5, at 18.

The Louisiana Constitution, Article VII, defers to a statutory definition of marshlands. Louisiana Revised Statutes Title 47 Section 2302 says, “[b]ona fide marshland is wetland other than bona fide agricultural, horticultural, or timber land.” This vague definition seems to suggest that any undeveloped, non-agricultural land that squishes when one steps on it is marshland. This definition, vague as it may be, appears verbatim in the LTC manual for tax assessors.

In 1990, Attorney General William Guste stated that:

there is no hard and fast legal rule defining marsh or swamp land. Each situation must be taken on a case by case basis and, even then, there is a large area of discretion.

[N]on-coastal freshwater marshes usually contain vegetation such as maiden cane, water hyacinth, pickerelweed, alligator weed and bulltongue. In addition, certain trees such as tupelo and pepperidge are known to grow only in freshwater swamps. Physically, the land generally is wet, soggy, and actually or partly inundated. Such land exists usually, if not predominantly, in low or depressed areas unfit for cultivation.¹²⁸

Attorney General Guste additionally suggests factors for determining if a particular tract of land to be assessed falls under the “marsh land” category: “1) physical characteristics of the land show its swamp characters; 2) the inundation of the land, though it need not be permanent; 3) the unfitness of the land for cultivation.”¹²⁹

The Attorney General’s interpretation of marshland as defined in the Revised Statutes and the LTC manual is helpful and considerably expands what otherwise appeared to be a narrow definition. Indeed, the Attorney General even tacitly acknowledges that marshlands may not always be wet in nature when he states that marshland “*generally* is wet, soggy, and actually or partially inundated” (emphasis added). This seems to bring the current conception of a marshland in Louisiana into line with the wetlands definition offered at the beginning of this paper. However, later in the same opinion, Attorney General Guste backs away from the progressive definition of marshlands when he outlines his test for whether or not a particular tract qualifies as marshland by saying that the “[p]hysical characteristics of the land show its swamp characters.” Where does this “swamp” term come from? There is no definition of a swamp in the Louisiana

¹²⁸ Op. La. Att’y Gen. 90-26 (1990).

¹²⁹ *Id.*

Statutes, the Civil Code, or the Constitution. The Oxford English Dictionary defines a swamp as "a tract of low-lying ground in which water collects; a piece of wet spongy ground; a marsh or bog."¹³⁰ Now the definition is cyclical: Marsh is used to define swamp and swamp is used to define marsh.

Other definitions of "marsh" in the Revised Statutes further hinder interpretation. A marsh is defined in the Louisiana Administrative Code as "*wetlands* subject to frequent inundation in which the dominant vegetation consists of reeds, sedges, grasses, cattails, and other growth."¹³¹ However, Section 214.3 of Louisiana Revised Statutes, Title 49, reports that "[w]etlands generally include *swamps, marshes, bogs, and similar areas.*"¹³² In the face of such confusing contradictions, it seems only safe to say that some soggy land may fall under the use-value tax scheme and some may not, all subject to the subjective opinion of the particular assessor. What is abundantly obvious is that there is a desperate need for a clear, uniform set of guidelines for determining if land is marshland in Louisiana. Additionally, as previously suggested, the definition of marsh is likely too narrow to encompass all of the areas that need to be protected which fall under the definition of wetlands. The state legislature should consider not only clarifying the definition of marsh but also expanding it to bring it into line with the current scientific and legal definition of wetlands, a move which alone would probably assist in the protection of wetlands in Louisiana. Federal definitions such as the EPA definition discussed above, as well as definitions of wetlands from other state jurisdictions may be of some guidance in this area. Borrowing partially from the EPA definition,¹³³ the Tennessee definition,¹³⁴ and the current scientific definition,¹³⁵ we suggest that the Louisiana Legislature adopt a definition of wetlands similar to the following:

Wetlands are defined as areas inundated or saturated by ground or surface water (hydric soils) with such frequency as to support a prevalence of vegetation generally adapted for life in saturated soils. These areas include, but are not limited to: swamps, marshes, bogs, fresh water meadows, formerly marshy

¹³⁰ OXFORD ENGLISH DICTIONARY 345 (2d ed. 1989).

¹³¹ LA. ADMIN. CODE tit. 43, § 700 (2001) (emphasis added).

¹³² 49 LA. REV. STAT. ANN. § 214.3 (West 2002) (emphasis added).

¹³³ 33 C.F.R. § 328.3(b) (1989).

¹³⁴ TENN. CODE ANN. § 11-14-401 (2001).

¹³⁵ GADDIE & REGENS, *supra* note 5, at 18-21.

meadows, wooded swamps or forested wetlands, open fresh water ponds (except farm ponds), some rice cultivation areas (to be defined by statute), and occasionally saturated lands.

D. *Servitude Possibilities*

Another means of providing tax incentives to the promotion of wetland conservation in Louisiana could be to couple the purchases of conservation servitudes by the government with a reduction in ad valorem taxes on the property subject to the servitude.¹³⁶ Conservation servitude projects basically seek "to preserve the environmental status quo of the burdened land by shifting some ownership rights from the owner of the servient tract to the servitude holder,"¹³⁷ usually a government entity or non-profit organization. This is a rather veteran approach to promoting wetlands conservation which has been successfully implemented in several other states.¹³⁸ Such a tax reduction scheme could adjust the ad valorem taxes on the property burdened by a conservation servitude by accounting for the reduced gross property value resulting from the existence of the servitude. This scheme has been implemented successfully in Oregon.¹³⁹ Such alternatives, while promoting the general conservation of environmentally sensitive areas, are not free from problems. The most significant problem on a political level is the loss of property tax revenues by the dependant local governments.¹⁴⁰

Although there is current legislation in Louisiana for the creation and acquisition of conservation servitudes,¹⁴¹ none of the legislation allows for tax incentives for the creation of such servitudes. Perhaps one way to mitigate the potential revenue losses from the creation of reduced tax conservation servitudes is to

¹³⁶ Such a tax reduction does not currently exist in Louisiana. See Op. La. Att'y Gen. 97-336 (1997).

¹³⁷ Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 436 (1984).

¹³⁸ See, e.g., N.Y. ENVTL. CONSERV. § 24-0901 (2001); Philip A. LaRocque, *Where Will Our Children and Parents Live? Sustainable Development: A Builder's Perspective on Preserving Open Space to Promote Communities*, 4 ALB. L. ENVTL. OUTLOOK 22 (1999).

¹³⁹ OR. REV. STAT. § 307.115 (1999); John Casey Mills, Note, *Conservation Easements in Oregon: Abuses and Solutions*, 14 ENVTL. L. 555, 569-71 (1984).

¹⁴⁰ Mills, *supra* note 139, at 569-71.

¹⁴¹ 9 LA. REV. STAT. ANN. § 1271 (West 2001).

limit the scope of the types of land eligible for tax reductions. According to the current statute,¹⁴² the scope of land eligible for conservation servitudes is quite broad. Priorities "include retaining or protecting natural, scenic, or open-space values of immovable property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, archaeological, or cultural aspects of unimproved immovable property."¹⁴³

If tax reductions were to be allowed on such a broad spectrum of immovable property by the creation of a conservation servitude, local governments would have to bear a considerable financial burden if even a small fraction of such landowners decided to take advantage of the program. As a possible solution to such a problem, we propose an alternative to the conservation servitude system now in force in Louisiana. The establishment of a specific wetlands servitude could abate the loss of such endangered lands in many areas of the State. Under such a plan, ad valorem tax reductions could be obtained by landowners entering into a servitude agreement to preserve wetland areas of their property in their pristine state. Whereas the current conservation servitude method also provides for the protection of agricultural lands and cultural resources,¹⁴⁴ a specific wetlands servitude would reduce the overall financial burden of such a program on local governments because only wetlands preserved in their pristine state would be eligible.¹⁴⁵

¹⁴² *Id.*

¹⁴³ 9 LA. REV. STAT. ANN. § 1272(1) (West 2001).

¹⁴⁴ Although the preservation of such things as cultural resources (e.g., archaeological sites) is important, these areas are typically restricted to discrete, small areas which could be preserved through the use of separate servitudes. Ideally, the preservation of archaeological remains would be accomplished in perpetuity for the possibility of investigation to remain available to all future generations, a reality not typical of general conservation servitudes or subsidies. See, e.g., Constance M. Callahan, Comment, *Warp and Weft: Weaving a Blanket of Protection for Cultural Resources on Private Property*, 23 ENVTL. L. 1323 (1993). Such a perpetual servitude would seem to further restrict wetland preservation where the option to remove one's property from its protected status within reasonably short intervals is attractive for some landowners.

¹⁴⁵ Additionally, at least some of the rest of the lands (e.g., agricultural lands) have tax break potential under the use value tax scheme already in force in Louisiana. So, such a servitude approach would not be depriving the owners of agricultural lands of all tax break possibilities, but would just be limiting the scope of the program to a practical level.

E. Tax Assistance for the Government

As discussed above, one of the major barriers to the establishment of ad valorem tax exemptions is the burden placed on local governments from the loss of this substantial revenue base. There are, however, several alternatives within the Louisiana tax scheme which could be exploited to make up for these losses. Severance and processing taxes have historically been employed for the purpose of defraying environmental costs within the State.¹⁴⁶ As Professor Richard J. Pierce, Jr. points out, “[c]onceptually, a tax is a perfect societal response to an environmental problem . . . because it bans nothing and permits nothing”¹⁴⁷ while providing necessary financial support to mitigate the damages to the environment caused by human expansion and development. Unfortunately, taxation is often seen by state legislatures as an evil to be avoided.¹⁴⁸ However, increases in taxation on such destructive industries as oil and gas can be applied to offset the effects of lost tax revenue used to promote wetlands conservation at the local level. However, such attempts to increase severance and processing taxes have been met with opposition, both legislatively and jurisprudentially in Louisiana, as will be discussed at length below.

III

SEVERANCE TAX SYSTEM

A. General Structure

Severance taxes in Louisiana are those taxes “levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance.”¹⁴⁹ Those taxes fall under Louisiana’s general power to protect and conserve its natural resources,¹⁵⁰ which has been recognized for at least the better part of the past century.¹⁵¹ The authority to levy these natural resource severance taxes has been vested solely in

¹⁴⁶ See generally Richard J. Pierce, Jr., *Symposium on Land Loss in the Louisiana Coastal Zone: The Constitutionality of State Environmental Taxes*, 58 TUL. L. REV. 169 (1983).

¹⁴⁷ *Id.* at 171-172.

¹⁴⁸ *Id.* at 172.

¹⁴⁹ La. Const. art. VII § 4(B) (1996).

¹⁵⁰ 47 LA. REV. STAT. ANN. § 631 (West 2001).

¹⁵¹ See generally, *State v. Standard Oil Co. of La.*, 178 So. 601 (La. 1937).

the state government, excluding all political subdivisions of the State.¹⁵²

Allocations of the revenues collected by the State through severance taxes are outlined in Article VII § 4 (D-E) of the Louisiana Constitution. Effective July 1, 1999, local parishes from which natural resources other than sulfur, lignite, and timber received one-fifth of the severance tax from resources severed within the parish, "but not to exceed seven hundred fifty thousand dollars."¹⁵³ The parishes receive their allocated portions of the severance tax quarterly.¹⁵⁴ In addition to the allocated proceeds from severance taxes, the individual parishes where the severance or production occurs receive one-tenth of the royalties from mineral leases on state-owned or public lands and water bottoms.¹⁵⁵

Severance taxes are not a type of property tax. They do not tax the mere ownership or mere possession of natural resources.¹⁵⁶ They are, in essence, an excise tax levied on the privilege to sever natural resources from the land.¹⁵⁷

Severance taxes do not tax the land itself or the natural resources while they are part of the land. Only after a natural resource has been extracted from the land does the severance tax become due.¹⁵⁸ Since a severance tax is not a property tax, it does not affect the payment of any other state, parish, or local taxes on property.¹⁵⁹ Additionally, unlike property taxes, there

¹⁵² LA. CONST. art. VII § 4(C); *see also* Op. La. Att'y Gen. 81-97 (1981) (explaining the Louisiana Constitution prohibits parishes from levying any severance taxes).

¹⁵³ LA. CONST. art. VII § 4(D). This figure was increased in 1999 from a \$500,000 maximum to the present \$750,000 maximum.

¹⁵⁴ 47 LA. REV. STAT. ANN. § 646 (West 2001).

¹⁵⁵ LA. CONST. art. VII § 4(E).

¹⁵⁶ *Miss. River Fuel Corp. v. Cocreham*, 247 F. Supp. 819 (E.D. La. 1965), *rev'd on other grounds*, 382 F.2d 929 (5th Cir. 1967). *See also* *Bel Oil Corp. v. Roland*, 137 So. 2d 308 (La. 1962), *appeal dismissed sub. nom.* *Bel Oil Corp. v. Cocreham*, 371 U.S. 2 (1962); *State v. Standard Oil Co. of La.*, 178 So. 601 (La. 1937); *Wright v. Imperial Oil & Gas Products Co.*, 148 So. 685 (La. 1933).

¹⁵⁷ *United Gas Pipe Line Co. v. Whitman*, 390 So. 2d 913 (La. Ct. App. 1980). *See also* *Edwards v. Parker*, 332 So. 2d 175 (La. 1976); *Wright v. Imperial Oil & Gas Products Co.*, 148 So. 685, 686 (La. 1933).

¹⁵⁸ *Miss. River Fuel Corp. v. Fontenot*, 234 F.2d 898 (5th Cir. 1956) (Under Louisiana law, natural resources are insusceptible of ownership independent of the land while they are still in place).

¹⁵⁹ 47 LA. REV. STAT. ANN. § 643 (West 2002).

is no constitutional requirement that severance taxes must be equal and uniform throughout the state.¹⁶⁰

The owner of the natural resource owes severance taxes at the time the resource is severed.¹⁶¹ The term "owner" refers to the owner of the natural resource at the time of severance.¹⁶² The term "severed" refers to the time at which the natural resource is separated from the ground or water.¹⁶³ Severance taxes apply equally to all owners, regardless of whether they are private or public landowners, except with regard to the State of Louisiana.¹⁶⁴ There is, however, a severance tax exemption for political subdivisions of the state. The exemption only applies if the natural resource was severed from the land owned by the political subdivision and it was severed for the subdivision's own use.¹⁶⁵

The amount of the severance tax owed is based either on the quantity of the natural resource severed or on the value of the natural resource at the place and the time of severance.¹⁶⁶ The Louisiana Administrative Code and the Louisiana Revised Statutes list the exact tax rate for each different type of natural resource.¹⁶⁷

B. Restructuring Suggestions

At first glance, it may seem that parishes receive adequate compensation from the state under the current severance tax system. However, as is also the case with the use value taxes previously discussed, parishes are often inadequately funded. A reduction in the use value or ad valorem taxes to promote con-

¹⁶⁰ See *Ohio Oil Co. v. McFarland*, 28 F.2d 441, 447 (E.D. La. 1928), *sub. nom.* *Ohio Oil Co. Conway*, 279 U.S. 813 (1929).

¹⁶¹ LA. CONST. art. VII § 4(B). See also *United Gas Pipe Line Co. v. Whitman*, 390 So. 2d 913 (La. Ct. App. 1980); *Texas Co. v. Fontenot*, 8 So. 2d 689 (La. 1942) (holding that severance taxes are immediately due at the time of severance of the natural resources, and these taxes must be paid by the owners of the natural resource in proportion to their respective ownership interests).

¹⁶² 47 LA. REV. STAT. ANN. § 634(1) (West 2002).

¹⁶³ See *id.* § 634(2).

¹⁶⁴ Op. La. Att'y Gen. 1824 (1942) (stating that there is no distinction between severance taxes collected on public or private lands and that all severance taxes are handled the same regardless of the source); Op. La. Att'y Gen. 527 (1944) (stating that municipalities, levee districts, and school boards are liable for the payment of severance taxes for any natural resources severed from their land).

¹⁶⁵ 47 LA. REV. STAT. ANN. § 632(B) (West 2002).

¹⁶⁶ LA. CONST. art. VII, § 4(B).

¹⁶⁷ See 47 LA. REV. STAT. ANN. § 633 (West 2002); see also LA. ADMIN. CODE tit. 61, § 2901 (1999).

servation could upset the fragile balance upon which many parishes rely to conduct daily business. As a potential means for offsetting the property tax reductions discussed previously, severance taxes are generally levied on corporate operations for the extraction of natural resources for production purposes.¹⁶⁸ They may represent a variable which could help replenish parish coffers depleted due to the reduced ad valorem taxes for wetlands conservation.

Indeed, such an approach seems logical when one considers that the environmental effects of natural resource severance are felt at the local level. Corporate entities benefiting from such environmental degradation should be expected to assist in footing the bill for restoration and conservation. Both long and short term detrimental effects of oil and gas severance and production on local environments have been documented.¹⁶⁹ By increasing the amount of severance taxes levied on these resource procurement operations, the state may be able to increase the percentage of tax revenue that goes to individual parishes while still retaining a relatively stable influx of revenue for appropriation to other state functions.¹⁷⁰

The current situation in Louisiana provides several tax incentives to facilitate the drilling for and extraction of oil and gas.¹⁷¹ These tax exemptions for both royalty and severance tax programs were enacted for the purpose of stimulating and promoting drilling in Louisiana during the mid-1980s oil market crash.¹⁷² These exemptions are not unique to Louisiana; they appear in various states throughout the nation as well as at the federal level.¹⁷³ However, Louisiana does have more tax incentives than Mississippi, Texas, and Oklahoma, the nation's other oil and gas

¹⁶⁸ See Frederick R. Parker, Jr., *Costs Deductible by the Lessee in Accounting to Royalty Owners for Production of Oil or Gas*, 46 LA. L. REV. 895, 900-01 (1986).

¹⁶⁹ E.g., Frank T. Csongos, *Interior Suggests Congress Consider Limiting Gas Exploration Off Louisiana*, 44 OIL DAILY 1 (1994); Frank Gibney, Jr., *Louisiana's Bayou Blues*, NEWSWEEK, June 22, 1987, at 55.

¹⁷⁰ Examples of state uses of severance tax funds are the Wetlands Conservation and Restoration Fund found in article 7, § 10.2 of the Louisiana Constitution and the Budget Stabilization Fund, found in article 7, § 10.3 in the Louisiana Constitution.

¹⁷¹ See 47 LA. REV. STAT. ANN § 633 (West 2002).

¹⁷² Alan A. Troy, *A Comparison of Drilling Incentives in Louisiana, Mississippi, Oklahoma, and Texas* (LDNR 1992).

¹⁷³ *Id.*

producing states.¹⁷⁴ Reductions in the size or number of these incentives could free up funds to be reallocated to conservation related programs in Louisiana.

Although there are typically fears of employment drops in the oil and gas industries when tax changes are suggested,¹⁷⁵ the increase in well production in Louisiana in recent years¹⁷⁶ is testament to a different reality: The industries are here to stay.¹⁷⁷ Perhaps it is time to consider a restructuring of the tax incentive system that would shift accountability for environmental damage from the state and local governments to the companies that produce and extract oil and gas. Indeed, such a restructuring, in which overall severance tax income to the state increased, could presumably result in a loosening of local governments' purse strings for wetlands and other environmental conservation programs. The increased revenue would directly benefit such severance tax dependant programs as CWPPRA.¹⁷⁸

IV

LOUISIANA ENVIRONMENTAL TAXES

A. History

Since the 1970s, there has been an increasing awareness within the legal community of the need to supplement governmental-based environmental regulations for the purpose of providing additional protection to natural resources.¹⁷⁹ State environmental

¹⁷⁴ *Id.* at 18.

¹⁷⁵ See, e.g., John M. Biers, *N.O. Bears Brunt of Oil Job Reductions*, THE TIMES-PICAYUNE, Sept. 3, 2000, at O8.

¹⁷⁶ See, e.g., Laura Maggi and Ed Anderson, *State In the Money, Thanks to Oil Prices: Surplus Earmarked for Several Debts*, THE TIMES-PICAYUNE, Aug. 10, 2001, at O8. See also, Anne Feltus, *Demand for Deep Water Blocks Remains High (Off-shore Oil Drilling in the Gulf of Mexico)*, PETROLEUM ECONOMIST, Nov. 1, 1998, available at 1998 WL 11230754 (1998); U.S. Dep't of Energy, *Drilling in Deep Water*, 26 ENERGY 37 (2001).

¹⁷⁷ Marlon Manuel, *Bush In Own Gulf War: Louisiana Staunch Ally In Bid for More Drilling*, THE ATLANTA CONSTITUTION, Jun. 28, 2001, at A1. This reality is based on Louisiana's political willingness to allow drilling when other Gulf Coast states are saying "no."

¹⁷⁸ CWPPRA has experienced minimum contributions from its severance tax base since its inception in 1989. See Marc C. Hebert, *Coastal Restoration Under CWP-PRA and Property Rights Issues*, 57 LA. L. REV. 1165, 1172 (1997). See also Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S.U. L. REV. 149, 159 (2000).

¹⁷⁹ Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 824 (1990).

taxes are one such supplement.¹⁸⁰ Louisiana's first attempt at such a supplement was in 1978 with the implementation of an environmental tax on natural gas, known as the "First-Use Tax."¹⁸¹ The First-Use Tax's stated purpose was to compensate the State of Louisiana for the environmental harm that the State suffered as a result of transportation of natural gas through its coastal wetlands.¹⁸²

Unfortunately, the First-Use Tax could not live up to its stated purpose. Only twenty-five percent of the proceeds from the tax were statutorily dedicated to conservation efforts.¹⁸³ In addition, the First-Use Tax was designed to reach only natural gas that was produced on federally owned lands on the outer continental shelf and then transported through Louisiana.¹⁸⁴ Therefore, there was no tax imposed on oil or other types of pipelines running through the state.¹⁸⁵ The tax also included many exemptions that were designed to ensure that the First-Use Tax affected only non-state producers.¹⁸⁶ These shortcomings in the First-Use Tax and its subsequent interference with interstate commerce led to the United States Supreme Court holding that the tax was unconstitutional.¹⁸⁷

¹⁸⁰ Pierce, *supra* note 146.

¹⁸¹ 47 LA. REV. STAT. ANN. §§ 1301-1307 (2002) (enacted a tax of seven cents per thousand cubic feet of natural gas upon the "first use" of any gas imported into Louisiana when such gas had not previously been subject to tax by any other state or by the United States) (repealed 1998). See also *Maryland v. Louisiana*, 451 U.S. 725 (1981) (holding that First-Use Tax violates the Commerce Clause of the U.S. Constitution).

¹⁸² 47 LA. REV. STAT. ANN. § 1301 (2002). See also Ernest L. Edwards, Deborah F. Zehner, and B. Richard Moore, Jr., *Constitutional and Policy Implications of Louisiana's Proposed Environmental Energy Tax: Political Expediency or Effective Regulation?*, 58 TUL. L. REV. 215, 216 (1983).

¹⁸³ 47 LA. REV. STAT. ANN. § 1351 (A)(3) (1981).

¹⁸⁴ 47 LA. REV. STAT. ANN. §§ 1301, 1303 (1981).

¹⁸⁵ Edwards, *supra* note 182 at 217. See also 47 LA. REV. STAT. ANN. §§ 1301, 1303 (1981).

¹⁸⁶ 47 LA. REV. STAT. ANN. §§ 1301, 1303 (1981) (statutes were designed to help equalize the tax burden between Louisiana producers and out-of-state producers who are not liable for Louisiana severance taxes by imposing a tax on the out-of-state producers using Louisiana's pipelines).

¹⁸⁷ See *Maryland v. Louisiana*, *supra* note 181. The court stated that the tax is not a compensatory tax since Louisiana does not have a compensatory interest in the natural resources that are severed from federal lands. The court held that the tax imposed unfair discrimination on out-of-state producers and, therefore, violated the Commerce Clause of the United States Constitution.

Governor David Treen initiated the next attempt by Louisiana in imposing environmental taxes in 1982.¹⁸⁸ The stated purpose of the Coastal Wetlands Environmental Levy (CWEL) was "to ameliorate and mitigate the impact of the environmental harm to the Louisiana coastal area caused by activities associated with the transportation and development of oil and natural gas."¹⁸⁹ CWEL was designed to levy a tax on the owners of oil and natural gas for the use of facilities that transported their oil and natural gas through Louisiana's coastal wetlands.¹⁹⁰ The tax was also specifically designed to avoid the problems and defects that eventually led to the First-Use Tax being declared unconstitutional.¹⁹¹ For instance, CWEL covered more than just natural gas and was no longer aimed only at out-of-state producers.¹⁹² Unfortunately, CWEL was never adopted into law by the Louisiana legislature.

The latest bill for environmental taxes grew, in part, out of the recent oil boom in the Gulf of Mexico, off the coast of Louisiana.¹⁹³ In 1996, approximately 120 miles south of New Orleans, Shell Offshore, Inc. started production of the largest field of oil found in the United States in the previous twenty-five years,¹⁹⁴ containing an estimated seven hundred million barrels.¹⁹⁵ In addition, deep water oil reserves in the Gulf of Mexico are estimated at 3.5 billion barrels.¹⁹⁶ New technology in the construction of offshore drilling platforms now enables oil companies to reach these previously untapped reserves. This new technology, known as a floating drilling platform,¹⁹⁷ is securely anchored to the ocean floor with twelve steel tendons instead of requiring that the entire platform be anchored to the ocean floor as did the previous technology. The result is that the platform

¹⁸⁸ H.R. 1660, 8th Leg., Reg. Sess. (La. 1982) (Coastal Wetlands Environmental Levy).

¹⁸⁹ *Id.* § 661. See also Pierce, *supra* note 146, at 174.

¹⁹⁰ *Id.* § 663. See also Pierce, *supra* note 146, at 174.

¹⁹¹ Edwards, *supra* note 182 at 219-220.

¹⁹² *Id.* at 220.

¹⁹³ Mary Judice, 'The Key Frontier' Author Predicts Dawn of Oil Boom, THE TIMES-PICAYUNE, Apr. 30, 1996, at A1. See also Anne Reifenberg, Top Oil Concerns Report Robust 1st-Quarter Results, WALL ST. J., Apr. 23, 1996, at B4.

¹⁹⁴ Judice, *supra* note 193. See also Mary Judice, Project an Exercise in Perseverance: Bust Turns to Boom for Shell, THE TIMES-PICAYUNE, Apr. 30, 1996, at A1.

¹⁹⁵ Caleb Solomon & Peter Fritsch, Mission to Mars: How Shell Hit Gusher Where No Derrick Had Drilled Before, WALL ST. J., Apr. 4, 1996, at A1.

¹⁹⁶ Judice, *supra* note 193 at A1, A4.

¹⁹⁷ Judice, *supra* note 193, at A4. See also Solomon & Fritsch, *supra* note 195.

weighs about ninety-five percent less than a conventional drilling platform. Additionally, the technology costs significantly less than a conventional platform.¹⁹⁸

This new type of drilling platform has made possible a new era of oil and gas exploration off of the Louisiana coast.¹⁹⁹ However, along with the increased drilling activity, there has been an increase in environmental costs. This situation has led to a proposed amendment to the Louisiana Constitution to allow a tax to be levied on hydrocarbon processing facilities.²⁰⁰ When the bill was introduced, part of its purpose was to help compensate Louisiana for damage to the state's coastal resources caused by the increase in oil and gas exploration, transportation, and processing. However, since its introduction in the Twenty-second Regular Session in 1996, the Hydrocarbon Processing Tax has undergone several facelifts for the purposes of reintroduction.²⁰¹ No version of the bill has had a specific dedication of funds for environmental purposes even though its intended purpose is to make up for the declining income from severance taxes.²⁰²

¹⁹⁸ Judice, *supra* note 193, at A4.

¹⁹⁹ Judice, *supra* note 193, at A4. . See also Solomon & Fritsch, *supra* note 195, at A1, B4 .

²⁰⁰ S.B. 2, 1996 Leg., Reg. Sess. (La. 1996). The bill proposes to amend La. Const. art. VII § 4(B) & 4(C) and to enact art. VII § 4.1. The bill defines the following terms:

"hydrocarbon" means a chemical compound containing atoms of both carbon and hydrogen, including, but not limited to crude oil, condensate, natural gas, natural gas liquids, and any refined petroleum products and primary petrochemicals produced from them . . . ;

"hydrocarbon processing" means any process, procedure, or operation by which a hydrocarbon or mixture of hydrocarbons undergoes any one or more of the following: [see (E)(5)(a)-(dd)] . . . ;

"hydrocarbon processing facility" means any plant, building, construction, structure, or equipment located in Louisiana and used to perform all or a part of the processes, procedures, or operations provided for in subparagraph (E)(5); however, such terms shall not include motor vehicles, railway cars, ships, barges, or vessels.

²⁰¹ One version or another of the proposed amendment has been introduced nine times over a five-year period (as S.B. 2 in the 1996 Regular Session; S.B. 240 in the 1997 Regular Session; S.B. 1, S.B. 2, and S.B. 21 in the 1998 Regular Session; S.B. 24 in the 1999 Regular Session; H.B. 79, H.B. 99, and S.B. 1 in the 2000 Regular Session; and is to be introduced as S.B. 1 in the 2002 Regular Session). Telephone interview with Alan Miller, Staff Attorney, La. State Senate (July 10, 2001).

²⁰² Many of the severance taxes do have such specific environmental dedications. Additionally, the sponsoring senators of the 2000 version, Campbell, Davins, and McPherson, state that two of the four purposes of the tax are environmental. Foster Campbell, Donald Cravins, & Joe McPherson, Brochure: *At Last, A Plan for Louisiana to . . . Improve Our Schools, Repair Our Roads, Restore Our Coastline, Clean*

If the Hydrocarbon Processing Tax were ever to pass, the tax would be owed by the owners of hydrocarbons and due at the time a Louisiana facility was first used to process these hydrocarbons.²⁰³ Like severance taxes, under the proposed bill, only the State could impose the hydrocarbon tax.²⁰⁴ A special State hydrocarbon tax fund would be established, from which the proceeds would be allocated by statute.²⁰⁵ The proposed tax was estimated to generate approximately 1.5 billion dollars in revenue for Louisiana and approximately 20 million dollars annually for coastal preservation.²⁰⁶

However, the Hydrocarbon Processing Tax is likely to be met with substantial opposition if it does pass. Much like the First-Use Tax as it was introduced in 1978, the Hydrocarbon Processing Tax stands on tenuous constitutional grounds. The Hydrocarbon Processing Tax may fall under the ruling in *Maryland v. Louisiana*,²⁰⁷ which held the First-Use Tax "unconstitutional as a violation of the commerce clause of the United States Constitution in that it discriminated 'against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions.'"²⁰⁸ If the Hydrocarbon Processing Tax were able to overcome the opposition, it would likely provide a new source of funds for the assistance of wetlands conservation.

Unfortunately, as the most recent drafts of the Hydrocarbon Processing Tax bill exist, this potentially significant source of environmental protection funds for Louisiana presents several problems, some of which substantially resemble the problems of the First-Use Tax. In cases against taxes similar to the Hydrocarbon Processing Tax, the United States Supreme Court has employed a test from *Complete Auto Transit, Inc. v. Brady* to determine if the particular tax is burdensome to interstate com-

Up Our Environment . . . and Solve Our State's Fiscal Crisis (2000) available at <http://Senate.legis.state.la.us/Senators/Archives/2000/Campbell/topics/oiltaxbrochure/default>. However, no specific dedications appear in the bill.

²⁰³ S.B. 2, 1996 Leg., Reg. Sess. (La. 1996).

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ Summary of Distribution of the Proceeds of the Hydrocarbons Tax, supplied by Louisiana Senate Offices of Senators Campbell, Cox, and Cravins (Feb. 1997), Sen. Campbell, Sen. Cox & Sen. Cravins, Summary of Distribution of the Proceeds of the Hydrocarbons Tax (Feb. 1997) (on file with the Louisiana Senate Offices of Sen. Campbell, Sen. Cox & Sen. Cravins).

²⁰⁷ 451 U.S. at 756 (1981).

²⁰⁸ Edwards et al., *supra* note 182, at 219.

merce.²⁰⁹ There is reason to believe that the same analytical process would be applied in a review of the validity of the Hydrocarbon Processing Tax. There are four parts to the *Complete Auto Transit* test: 1) the tax must have a substantial nexus with the taxing state; 2) the tax must be fairly apportioned; 3) the tax must not unfairly discriminate against interstate commerce; 4) the tax must be fairly related to the services provided by the state.²¹⁰ If a tax fails on the third prong of the test, a showing can be made to justify the burden on interstate commerce by demonstrating strong support for the first and fourth prongs.²¹¹ The First-Use Tax passed constitutional muster on prongs one, two, and four of the *Complete Auto Transit* test, but ultimately failed due to its discrimination against interstate commerce.

Due to the similarity between the Hydrocarbon Processing Tax and the First-Use Tax, the Hydrocarbon Processing Tax would likely also pass on the same prongs (one, two, and four). The "substantial nexus" (1) and the "fairly related" (4) prongs are satisfied due to the substantial environmental hazards of processing hydrocarbons.²¹² Under the fourth prong, the Court does require the "measure of the tax" to be "reasonably related to the extent of the contact."²¹³ There is a considerable amount of contact with the State when the minerals are processed. The Hydrocarbon Processing Tax is only levied on processing facilities, not the transportation of the materials through a pipeline. This levy on facilities avoids the problem of taxing transit criticized by the Court in *Michigan-Wisconsin Pipe Line Co. v. Calvert*,²¹⁴ thus making the Hydrocarbon Processing Tax more likely to pass the fourth prong of the *Complete Auto Transit* test.

Professor Richard J. Pierce suggests that the second prong of the *Complete Auto Transit* test is to ensure that "no state levies a tax on more than its fair share of the activity."²¹⁵ In his analysis of the CWEL tax, Pierce concluded that the tax would likely pass

²⁰⁹ 430 U.S. 274, 277-78 (1997).

²¹⁰ *Id.*

²¹¹ See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

²¹² *Id.* at 625-26. The court stated that the "fairly related" prong does not mean "the amount of the tax of the value of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test," which is satisfied when the tax has a substantial nexus with the taxing state. *Id.*

²¹³ *Id.* at 626.

²¹⁴ 347 U.S. 157 (1954).

²¹⁵ Pierce, *supra* note 144, at 188-189.

the second prong because it is only taxing activity in one state and the nexus for the tax of environmental protection would justify any opposition. Similarity to the CWEL tax reasonably supports application of Pierce's conclusion to the Hydrocarbon Processing Tax.

The most tenuous prong for the proposed Hydrocarbon Processing Tax is the third prong of the *Complete Auto Transit* test: The tax must not unfairly discriminate against interstate commerce. The drafters of the most recent proposal²¹⁶ have clearly attempted to avoid the problems the third prong placed on the First-Use Tax. As opposed to the First-Use Tax, the Hydrocarbon Processing Tax refunds out-of-state taxpayers the amount that they paid the state of origin in severance taxes. Under the First-Use Tax, such "tax credits and exclusions" were only made to Louisiana severers, a practice that the Court found highly offensive to interstate commerce.²¹⁷ It is unclear, and as yet untested, whether a tax refund to out-of-state taxpayers is sufficient to overcome the First-Use Tax problem, especially when there can only be a refund if the state of origin also allows for a similar tax credit to Louisiana taxpayers.

In addition to the suggested refunds to out-of-state producers mentioned above, another method of bolstering constitutional support for the Hydrocarbon Processing Tax would be to demonstrate that the tax, while burdensome to interstate commerce, is compensatory. The Court in *Maryland v. Louisiana* suggested that such a classification of a tax may help justify its burden.²¹⁸ There must first be an "identification of the burden for which the State is attempting to compensate."²¹⁹ The recent proposal fails to make such specific dedications of funds. It seems that the tax will fail to pass constitutional muster for this absence of allocation of funds and identification of the burden. While literature about the Hydrocarbon Processing Tax²²⁰ suggests that the money will be used for the environment, education, and various other state interests, there are no specific dedications in the bill. Although tax money does not always have to be allocated en-

²¹⁶ S.B. 2, 1996 Leg., Reg. Sess. (La. 1996), *supra* note 203.

²¹⁷ 451 U.S. at 756, 760.

²¹⁸ *Id.* at 758. If the tax is compensating for a substantial burden on a state, this may justify the tax burden on interstate commerce. *Id.*

²¹⁹ *Id.* This will probably also satisfy the nexus component of the *Complete Auto Transit* test.

²²⁰ *Miller, supra* note 201.

tirely to the burden for which it is exacted,²²¹ such burdens must be articulated. However, as the Court noted in *Commonwealth Edison*, the 25% dedication to the environmental harms in the First-Use Tax was insufficient to overcome the burden on interstate commerce.²²² If the Hydrocarbon Processing Tax is ever to be considered a viable tax, the drafters will have to link the tax more closely with the environmental harms that such processing causes. Allocations should include specific dedications to environmental problems reasonably related to the oil and gas industry, such as damages to wetland preservation and conservation.

B. Tax Lessons from Other Jurisdictions

Although Louisiana is among the states with the highest percentage of wetlands in the nation, other states have found it prudent to offer tax incentives to private landowners in the hopes of promoting conservation. Nationally, the wetlands taxing schemes can be broken down into three broad categories: exempt, qualified exemption, and not exempt.

Several states have designated all wetland areas as exempt from property taxation.²²³ It is likely that such a move is a reflection of both the growing importance of the protection of wetland areas as well as the fact that not many wetland areas exist in some states, thereby making the tax breaks less painful to the state and local coffers. Louisiana already discounts many areas which fall under the broad wetlands definition. Because the tax revenue does not represent substantial returns to the parishes,²²⁴ an across the board exemption may be a reasonable approach to attaining the goal of no net wetlands loss at the level of the private individual.

The qualified exemption category, into which Louisiana falls, is a broad grouping which encompasses a variety of partial, but by no means complete, tax breaks for landowners with wetlands on their property. Several progressive wetlands protection states

²²¹ Indeed, the Court stated in *Commonwealth Edison Co. v. Montana* that "a mineral-rich State [may] require that those who consume its sources pay a fair share of the general costs of government. . . ." 453 U.S. at 650.

²²² See *id.* at 652 n.18 (White, J., concurring).

²²³ E.g., Tennessee (TENN. CODE ANN. § 11-14-401 (2001)) and North Dakota (N.D. CENT. CODE 57-02-08.4 (2001)).

²²⁴ E-mail from Paul Coriel to Ryan Seidermann (Sept. 18, 2001) (on file with author).

such as New York and New Jersey fall under this category.²²⁵ Under the plans of these states, no landowners receive tax breaks for wetlands until they apply for a permit to develop the wetland property. Only if the permit is denied by the Corps, EPA, or a state agency can the landowner apply for a tax reduction; even then, it is not an absolute elimination of the tax. These approaches simply seem to be a post-*Lucas* takings dodging method for the states that do not foster a conservation-friendly attitude among their land-owning citizens. Louisiana's approach (discussed *supra*) is different from that of New York and New Jersey. The Louisiana practice of reducing taxes based on assessments is an approach shared by several other states.²²⁶ Although this approach is a step in the right direction, it is not nearly as attractive or beneficial as the schemes of such states as Tennessee. The states falling into the "not exempt" category have no statutory exemptions available for landowners who have wetland areas on their property. All of the states' approaches to wetlands taxation are briefly outlined in Appendix 1.

C. *Non-tax Incentives*

Although most of this paper focuses on tax reduction incentives for conservation-minded landowners, there are also incentives for voluntary wetlands conservation that either are or should be available for private landowners in Louisiana. Two alternatives to tax reduction that are available in Louisiana are conservation subsidies and wetland mitigation banking.

1. *Wetlands Conservation Subsidies*

Louisiana currently has no state-level subsidy program to encourage private landowners to conserve wetland areas.²²⁷ This is not to say that there are not conservation subsidies available in Louisiana. Federal programs, including the Wetland Reserve Program (WRP),²²⁸ Conservation Reserve Program (CRP),²²⁹

²²⁵ N.Y. ENVTL. CONSERV. LAW § 24-0905 (McKinney 2001); 54 N.J. STAT. ANN. § 4-23.5 (West 2001).

²²⁶ *E.g.*, Kansas (KAN. STAT. § 79-1476 (2000) (amended 2002)) and Connecticut (CONN. GEN. STAT. § 12-63 (2000) (remanded 2002)).

²²⁷ E-mail from Paul Coriel to Ryan Seidemann (Sept. 18, 2001) (on file with author). There are simply no green space or open space subsidies for any type of conservation at the state level in Louisiana.

²²⁸ 7 C.F.R. § 1467.1 (2001).

²²⁹ 7 C.F.R. § 1410.1 (2001).

Environmental Quality Incentive Program (EQIP),²³⁰ Wildlife Habitat Incentive Program (WHIP),²³¹ Forestry Incentive Program (FIP),²³² and Swampbuster,²³³ have substantially contributed to the preservation of wetlands in Louisiana.²³⁴

Subsidies provide real incentives for small landowners to enter into conservation agreements where the above proposed tax reductions may be less attractive because of considerable development offers. Most of the conservation subsidies available in Louisiana are for individuals with small tracts of wetlands where a tax break of five to seven dollars an acre may be insignificant.²³⁵ The reality of the tax reductions suggested previously is that they will likely only make a difference in aggregate. Large landowners with vast acres of wetlands on their property stand to reap significant benefits from tax reductions due simply to the large amount of land eligible for the tax break. On the other hand, the monetary advantage for small landowners may not be substantial enough for them to keep their land out of development or agricultural production. In these situations, conservation subsidies could level the playing field for small landowners who wish to conserve their wetlands while maintaining the economic viability of their land.

In addition to the benefits to landowners from conservation subsidies, it appears that, while property owners can gain substantial income from conservation subsidies, their property tax rates on subsidized lands will not change. There is currently no legislation, jurisprudence, or scholarship addressing this point, but the taxation scheme in Louisiana seems to allow for this possibility.²³⁶ This is significant because it means that landowners may be in a win-win situation when they enter into subsidy programs, whereby they pay little property tax and still receive subsidy benefits (compared to letting the land stay idle).

One complication of such conservation schemes is that the subsidy programs have caps limiting the total number of acres which

²³⁰ 16 U.S.C. § 3839aa (2001).

²³¹ 16 U.S.C. § 3836a (2001) (repealed 2002).

²³² 16 U.S.C. § 2103 (2001).

²³³ Water Bank Act, *supra* note 69.

²³⁴ See Appendix 2 for information on amounts of acreage currently enlisted in each program in Louisiana.

²³⁵ See Appendix 2 for information on the minimum acreages necessary for entry into the various federal subsidy programs.

²³⁶ Interview with Paul Coriel, Sept. 21, 2001.

can be enrolled nationally at any one time.²³⁷ For example, the WRP was started in 1985, and reached its acreage cap in 2001.²³⁸ Louisiana, as one of the top ten enrolling states in terms of gross acreage, would be wise to consider funnelling a portion of the current budget surplus into a State level subsidy program to bolster the national programs.

The federal programs can be divided into three broad categories: penalty programs, strict subsidy programs, and cost-sharing subsidy programs. The best example of the penalty programs is the Swampbuster program, which is part of the Food Security Act.²³⁹ The Swampbuster program denies farmers federal subsidies when they plant commodity crops on wetland areas. Although this disincentive to wetland destruction does not apply to all crops,²⁴⁰ it has successfully acted as a deterrent to much wetland destruction since its passage in 1985.

The cost-sharing subsidy programs, represented in Louisiana by such programs as WHIP, EQIP, and FIP, are agreements between farmers and the federal government to cooperate to reach particular conservation goals on individual parcels of land. WHIP is a program in which the federal government, through the National Resources Conservation Service (NRCS) of the United States Department of Agriculture (USDA), provides planning and financial assistance to landowners for the enhancement or creation of fish and wildlife habitats.²⁴¹ Agreements with NRCS are entered into on a five or ten year contract basis. This program is relevant to wetlands conservation because it extends to upland and inland wetland habitats as well as riparian and in-stream habitats. The benefit to wetlands under this program is secondary to the benefit of wildlife, but it is nevertheless important.²⁴² The only land not eligible for WHIP is federal

²³⁷ E-mail from Billy Moore, State Admin. Officer, Natural Res. Conservation Serv. (NRCS), United States Dep't of Agric. (USDA), to Ryan Seidemann (Nov. 19, 2001) (on file with author).

²³⁸ *Id.*

²³⁹ Water Bank Act, *supra* note 69.

²⁴⁰ Margaret N. Strand, *Federal Wetlands Law: Part III*, 23 ENVTL. L. REP. 10354, 10357 (1993).

²⁴¹ The financial assistance provided by the NRCS is up to 75% of the expense of implementing and maintaining the conservation project. See <http://www.nrcs.usda.gov/programs/whip>.

²⁴² USDA, WHIP Fact Sheet, at <http://www.nrcs.usda.gov/Programs/farmbill/2002/pdf/whipfact.pdf> (last visited Sept. 20, 2001).

land, or lands enrolled in the CRP, WRP, or Water Bank Act (WBA) programs.²⁴³

Similarly, EQIP is a cost-sharing federal program which operates on a five to ten year contract basis to manage agricultural or livestock areas in order to minimize the detriment to adjacent environmentally sensitive areas. Additionally, EQIP may involve incentive payments "to encourage a producer to perform land management practices such as nutrient management, manure management, integrated pest management, irrigation water management, and wildlife habitat management."²⁴⁴

Both WHIP and EQIP were reauthorized as part of the 2002 Farm Bill. Another 2002 Farm Bill reauthorization that may offer an attractive cost-sharing alternative that could enhance wetlands conservation is the FIP.²⁴⁵ Because many of the inland wetlands in Louisiana consist of forested lands, the FIP, which provides cost-sharing assistance to landowners interested in producing timber crops, may help restore or maintain wetland areas on a short-term basis.²⁴⁶

Two major strict subsidies from the federal government which are in action in Louisiana are the CRP and the WRP. Under the CRP, landowners enter into ten to fifteen year contracts with the federal government, whereby, through the Commodity Credit Corporation (CCC), the government pays rental payments for the removal of highly erodible land and wetland areas from agricultural production.²⁴⁷ This program works much like a conservation easement; the landowner retains property rights to the land, but has numerous restrictions on its use.

The WRP, much like the CRP, is a strict incentive program through which the federal government makes payments to private landowners in order for them to keep their land agriculturally idle. Under this program, the government purchases thirty-year or perpetual easements from the landowner. Alternatively,

²⁴³ In addition, land deemed unlikely to represent viable habitat is sometimes excluded from eligibility from WHIP and other programs.

²⁴⁴ USDA, EQIP Fact Sheet, at <http://www.nhq.nrcs.gov/OPA/FB96OPA/eqip-fact.html> (last visited Sept. 20, 2001).

²⁴⁵ The FIP was originally authorized in 1978, but the 2002 Farm Bill extended the program through 2002. 16 U.S.C. § 2103.

²⁴⁶ USDA, FIP Fact Sheet, at <http://www.nrcs.usda.gov/programs/fip/FIP/FIPfact.html> (last visited Sept. 28, 2002).

²⁴⁷ Strand, *supra* note 240; USDA, CCC Fact Sheet, available at <http://www.nhq.nrcs.usda.gov/OPA/FB96OPA/ChngFact.html> (last visited Sept. 16, 2002).

the landowner may elect to enter into shorter cost-share restoration agreements with NRCS. The restoration cost allocation varies depending on which agreement the landowner chooses.²⁴⁸

One potential problem with the major federal subsidy programs is that they are largely limited to restoration of land that has been devoted to agricultural purposes. This may become a problem because, while agriculture has historically been one of the major destroyers of wetlands, even agricultural land is now in danger of displacement in many areas due to urban sprawl.²⁴⁹ Consequently, these agricultural incentives/disincentives aimed at wetlands protection may be losing some of their effectiveness. Granted, several of the subsidies discussed above would likely restrict urban development of areas protected under an agreement with the USDA or some other agency. However, these programs are facing increased financial burdens. Considering these limitations to the federal programs, Louisiana should consider implementing conservation subsidies that could either supplement the ailing federal programs or fill gaps missed in them, such as the protection of non-agricultural lands. Whereas, federal programs focus their attention on the reclamation of converted wetlands, a state program could promote preservation of intact wetlands in the face of development generally, both urban and agricultural.

Louisiana is not the only state lacking state-level conservation subsidies. However, some states have provided for conservation by making available state funds either to fill the lacunae left by federal subsidies or to supplement the federal subsidies. Few of these programs are outright grants of funding for wetlands conservation or preservation. Most protection for wetlands from subsidy programs exists in the form of open space, green space, or agricultural subsidy programs. For example, wetlands may be protected tangentially under the Florida Forever program which

²⁴⁸ For perpetual easements, the USDA covers 100% of the restoration costs; for thirty-year easements, the USDA covers 75% of the restoration costs; for typical ten-year restoration cost-share agreements, which do not place easements on the property, the USDA pays 75% of the restoration costs but does not make rental payments. USDA, WRP Fact Sheet, at <http://www.nrcs.usda.gov/programs/farmbill/2002/pdf/WRPFct.pdf> (last visited Sept. 28, 2002).

²⁴⁹ Karen M. White, "Extra" Tax Benefits for Conservation Easements: A Response to Urban Sprawl, 18 VA. ENVTL. L.J. 103 (1999). Indeed, this appears to be at least partial motivation for the LTC's use value taxation scheme as applied to agricultural property.

“authoriz[es] certain municipalities to create a funding mechanism for greenspace management and exotic plant control.”²⁵⁰

Obviously, funding does not, and probably could never, exist for the creation of a wetlands protection subsidy at the state level in Louisiana that would cover all privately owned wetlands. If such a subsidy were to be implemented in Louisiana, it would have to be narrowly tailored to accomplish specific preservation goals. For example, the legislature could create a wetlands subsidy rather than a green space subsidy to limit possible enrollees. Alternatively, it may very well be that such a subsidy, in order to remain viable, would have to be focused on even more specific goals than simply wetlands preservation. With the relative abundance of federal subsidies available for the protection of agriculturally endangered and coastal wetlands, a prudent course of action in the present climate would be to create a non-agricultural, inland wetland subsidy which would target some of the most under-protected wetland areas in the state. Another option would be to use an assessment scheme to implement a broader wetland subsidy program, whereby a case-by-case evaluation of applicants' land could be made to determine the need for preservation on particular tracts on an endangered scale basis.²⁵¹ In the current budget surplus climate in Louisiana, the establishment of a comprehensive wetlands protection strategy should include expenditures for the granting of subsidies.

A Louisiana wetlands subsidy should function as a voluntary program, much like a conservation easement, where private landowners would agree to abstain from farming or developing extant wetlands on their property for a period of five to ten years. In exchange for this agreement, the State would pay landowners sums comparable to those paid by existing federal programs. The Louisiana program would have to operate outside of the federal conservation programs in order to avoid having the same property covered by multiple subsidies. This would ensure the protection of a maximum amount of endangered land in Louisiana. Like its federal counterparts, the Louisiana program could also work with landowners to restore wetlands on their property under a cost-sharing/rental program with the amount of the State

²⁵⁰ FLA. STAT. ch. 259.105 (2002).

²⁵¹ For example, the most important and under-protected areas receive priority funding, and this continues until an acreage cap is met or funding runs out. This is similar to the method used by federal programs such as the CRP and WRP.

contribution to be determined by the length of the contractual agreement with the landowner. The distinguishing element of the State program should be that only inland wetland areas would be eligible. Such an approach would help to balance the substantial bias in favor of Louisiana's coastal wetlands with new attention directed at inland and fresh water wetlands.

2. *Wetland Mitigation Banks*

Over the past decade, wetland mitigation banks have emerged as one of the most promising means of preserving and restoring endangered environments.²⁵² Wetland mitigation banks can be categorized into three varieties: existing wetlands, restored wetlands, and created wetlands. They provide a means by which developers can offset their projects' deleterious effects on existing wetlands through the preservation, restoration, and/or creation of wetlands elsewhere. Some agencies now require developers to provide for the maintenance of wetland banks in order to be granted a permit to build in certain areas. Katherine Yates describes these mitigation banks as "compensatory mitigation . . . achieved through a process where a permittee restores, creates, or protects another wetland in exchange for or, to replace the one destroyed."²⁵³ Essentially, developers invest in "banks" that allow them to buy up "destruction credits" for other wetland areas.

The success of these mitigation banks, however, has not been without controversy. Some concerns have been voiced regarding the effectiveness with which artificially created wetlands will be able to replace the destroyed wetlands, although the current view in the legal arena seems to be that mitigation banks are better than nothing.²⁵⁴ Additionally, it should be kept in mind that not all mitigation banks are "created" wetlands. Rather, many protect existing wetland areas. Indeed, these types of ventures have become very popular among law makers²⁵⁵ and land developers.²⁵⁶ No one doubts the effectiveness of using programs such as these to preserve and maintain intact wetlands in their pristine state. However, some critics argue that the ability of developers

²⁵² Yates, *supra* note 13.

²⁵³ *Id.* at 593.

²⁵⁴ Jocelyn Kaiser, *Wetlands Restoration: Recreated Wetlands No Match for Original*, 293 SCIENCE 25 (July 6, 2001).

²⁵⁵ *Id.*

²⁵⁶ Lehman, *supra* note 13.

to buy the rights to destroy wetlands in one area by preserving them in others undermines overall environmental goals.²⁵⁷ A pragmatic view of these endeavors is that development will continue. Consequently, wetlands will continue to be threatened, encroached upon, fragmented, and destroyed. Creating a substantial economic incentive for private landowners to maintain extant pristine wetlands that will not be fragmented into smaller non-viable tracts is both practical and realistically beneficial.

The Louisiana tax scheme can be used in the context of wetland mitigation banks to promote the preservation of such pristine environments by a means that both generates revenue and minimizes taxes to landowners. Such a scheme should be seen as obtaining environmental goals through a realistic means.²⁵⁸ Indeed, it is the intact, pristine wetland banks (as opposed to the restored or created wetlands) which garner the highest price from developers.²⁵⁹ Such high per acre payments for maintaining the status quo of land far outweigh the minimal taxes currently assessed on these lands. Although valuations vary from assessor to assessor, wetlands mitigation banks are typically taxed under the marshland or timberland use value schemes in Louisiana.²⁶⁰ With such high profit returns at such low tax rates, it seems that tax attorneys and other financial advisors to Louisiana landowners should counsel their clients regarding the potential benefits of wetlands mitigation banking of intact wetlands on their property.²⁶¹ This would help to protect existing wetlands which are considered, both environmentally and economically, to be the most worthwhile category of wetlands for banking purposes.²⁶²

Louisiana is a progressive state when it comes to wetlands mitigation banking. Although many states have no statutory lan-

²⁵⁷ See, e.g., the problems outlined by Coleman, *supra* note 29.

²⁵⁸ E.g., money incentives which make it beneficial, and perhaps profitable, to the landowner to keep wetland property idle.

²⁵⁹ Wetland mitigation banking credits vary considerably across the country. Per acre credits vary from \$1,950 in California to about \$40,000 in Florida. The rates vary by bank, not by state. See generally, MITIGATION BANKING: THEORY AND PRACTICE, 221-56 (Lindell L. Marsh et al. eds., Island Press 1996). The Fina La Terre mitigation bank in Louisiana, which exists for the purposes of facilitating oil and gas extraction and production, charges only \$50 per credit. Yates, *supra* note 13 at 596.

²⁶⁰ Interview with Paul Coriel (Sept. 18, 2001).

²⁶¹ Although there are no statutes, regulations, or jurisprudence on the issue, it is probable that mitigation banks will be assessed in the same manner as non-mitigation marshland or timberland by the LTC. *Id.*

²⁶² See Yates, *supra* note 13.

guage regarding the creation or functioning of mitigation banks, comparing the Louisiana approach²⁶³ to those of some of the other states which have codified banking is worthwhile. There are two broad groups of states having statutory allowances: States authorizing public-run banks (e.g., Arkansas)²⁶⁴ and states authorizing either publicly or privately administered mitigation banks (e.g., Louisiana). Nearly all of the states combining some sort of public/private operation of mitigation banking programs resemble the programs allowed in Louisiana.²⁶⁵ Only the California program introduces a novel approach that is worth noting for possible implementation in Louisiana. The California Fish & Game Code § 1775 authorizes the establishment of wetlands mitigation banks in the Sacramento-San Joaquin Valley in much the same way as does 9 La. Rev. Stat. § 214.41. However, the California statute additionally authorizes the use of rice fields as mitigation banks. This novel combination of agricultural use and conservation goals may present an economic benefit not yet realized in the Louisiana mitigation banking program. Although this could not be implemented in every case, it may attract landowners to create perpetual banks in situations where they otherwise would not do so. Substantial sums of money could be made by landowners, as they could generate revenue from the agriculture, as well as receive income from the purchase of mitigation credits.

There is one major shortcoming to the Louisiana mitigation banking scheme. As with most other wetlands protection programs in Louisiana, lawmakers only appear to be concerned with those areas within the Louisiana Coastal Zone.²⁶⁶ Although very progressive when compared to many other states' mitigation banking programs, the scope of the Louisiana program is much too narrow, ignoring the existence of wetlands north of the

²⁶³ 49 LA. REV. STAT. ANN. § 214.41 (2001).

²⁶⁴ ARK. CODE ANN. § 15-22-1001 (1999).

²⁶⁵ E.g., Maryland (MD. CODE ANN., ENVIR. § 5-901 (2001)), North Carolina (N.C. GEN. STAT. § 143-214.8 (2001)), Washington (WASH. REV. CODE ANN. § 90.84.005 (2001)), Wisconsin (WIS. STAT. ANN. § 281.37 (2001)), and Oregon (OR. REV. STAT. § 196.600 (1999)).

²⁶⁶ Although this limitation is not explicitly stated in the pertinent legislation, it is implied through the placement of the mitigation banking regulations in the Coastal Zone portion of the Louisiana Administrative Code. This limitation is also implicitly evidenced by discussions in Yates, *supra* note 13 and Michael Rolland, *The Systemic Assumptions of Wetland Mitigation: A Look at Louisiana's Proposed Wetland Mitigation and Mitigation Banking Regulations*, 7 TUL. ENVTL. L.J. 497 (1994).

Coastal Zone.²⁶⁷ Even though the wetland areas outside of the Coastal Zone do not typically serve the seafood production and tourism functions of their southern counterparts, they still perform a wealth of other functions (e.g., flood protection, wildlife habitat, and water filtering). These areas need to be protected with the same fervor as the wetlands located in the Coastal Zone. We suggest a few possibilities for extending the for-profit mitigation banks to areas outside of the Coastal Zone. The most logical of these extensions is to broaden the scope of the existing legislation to allow for the creation of mitigation banks throughout Louisiana. Louisiana should also examine the possibility of allowing certain rice fields to be used as mitigation banks in much the same way as does California.

Some of the more regulation-neglected wetland areas (e.g., northern Louisiana) are the home to numerous acres devoted to rice production.²⁶⁸ Similar to the California scheme, these areas could be used as mitigation banks where their rice cultivation character resembles the habitats of particular wetlands planned for mitigation. These areas would likely function comparably to the seasonal ponds at issue in the *SWANCC* case. This is due to the seasonal flooding and draining of rice fields that is necessary for planting and harvesting.²⁶⁹ Nevertheless, these areas could provide flood protection (especially due to their general proximity to the Mississippi River in Northern Louisiana)²⁷⁰ all year, as well as some habitat support during the months when the fields are flooded (typically March through August).²⁷¹ Since rice fields are less useful than pristine wetlands, or even constructed mitigation banks, it should take many rice field acres to equal one destroyed wetland acre. One major concern with using rice fields as mitigation banks is the pesticides used on the rice. Some pesticides have been demonstrated to have detrimental and even

²⁶⁷ Some measure of mitigation banking under Corps authority does exist outside of the Coastal Zone, but the scope of coverage is currently unclear. E-mail from Jim Holcombe, Mitigation Coordinator, Coastal Mgmt. Div., La. Dep't of Natural Res., to Ryan Seidemann (Jan. 11, 2002) (on file with author).

²⁶⁸ See, e.g., LSU AGRICULTURE CENTER, 2001 LOUISIANA RICE ACREAGE BY VARIETY at <http://www.agctr.lsu.edu/Subjects/rice/Parish/Acreage2001.htm> (last visited Nov. 16, 2001) [hereinafter LSU AGRICULTURE CENTER; E-mail from Jim Holcombe to Ryan Seidemann (on file with author)].

²⁶⁹ James W. Avault, Jr., *Catastrophic Loss of Pond-Raised Crawfish Attributed to Rice Insecticide*, 27 AQUACULTURE MAGAZINE 45 (2001).

²⁷⁰ Yates, *supra* note 13; Rolland, *supra* note 266.

²⁷¹ LSU AGRICULTURE CENTER, *supra* note 268.

deadly impacts on wetland flora and fauna.²⁷² This suggests that all land enrolled in a mitigation bank program would have to couple rice production with crawfish aquaculture in an effort to ensure that minimally destructive pesticides are used on the crops.²⁷³ Non-crawfish fields could be enrolled with the stipulation that only minimally destructive pesticides will be used. Additionally, like the California scheme, rice mitigation banks would have to conform to the minimum requirements of all mitigation banks within the state (which may require a tweaking of the current regulations). Because the cost of rice production is high compared to other Louisiana crops, this extra financial incentive may be mutually beneficial to farmers and developers looking to bank wetland areas comparable to rice production areas.²⁷⁴

CONCLUSION

As protections for wetland areas erode in the current legal environment (e.g., *SWANCC*, *Lucas*, and their progeny) and threats to wetlands increase via increased development in wetland areas, new approaches to the conservation of these sensitive areas are needed. Much of the wetlands regulation to date has been accomplished by the federal government by means that have often amounted to takings under the Fifth and Fourteenth Amendments of the United States Constitution (e.g., *Lucas* and *Palazzolo*). An important approach after *Lucas* is one which minimizes the takings problems and fosters the development of a positive relationship with landowners. Adjustments to existing tax laws may be one way to do this. Using monetary incentives to engender a conservation attitude has proven successful among private landowners in the past.²⁷⁵ Such alterations to the Louisiana tax scheme, as suggested here, minimize governmental encroachment on landowners' property rights. Under current Louisiana legislation, destructive agricultural practices are more economically beneficial to private landowners than conservation. Landowners can simultaneously make a profit from agriculture

²⁷² Interview with Paul Coriel (Sept. 18, 2001).

²⁷³ The multitasking of land has grown in popularity in Louisiana in recent years due to the alternating seasons of rice and crawfish harvesting. See LSU AGRICULTURE CENTER, *supra* note 268.

²⁷⁴ L. Eugene Johnson et al., *Rice Economics in LOUISIANA RICE PRODUCTION HANDBOOK* 100 (1999).

²⁷⁵ See, e.g., Lynne et al., *supra* note 59, at 13.

while benefiting from a preferred tax status, compared to those applied to wetland areas. In light of such a startling reality, it seems prudent at this point to adopt either a more wetlands-friendly taxation scheme or to eliminate taxes on wetland areas altogether (as have Tennessee and North Dakota). If taxes on wetland areas are to remain in place, at a minimum, it is time for the legislature to expand the "marsh land" term as it is now used by the LTC to cover "wetlands" as defined by the EPA and as refined by subsequent jurisprudence and scholarship. Additionally, more effort needs to be expended by the LTC to ensure that assessments are standardized across the state. Currently, wetland areas may not receive preferred tax status, or they may be assessed under any number of categories within the LTC's taxation scheme.²⁷⁶ Such subjectivity creates an inequitable system as applied to landowners.²⁷⁷ According to the LTC manual, marshlands are currently assessed using a three stage efficiency scheme, divided into east and west zones, and limited to South Louisiana. It is apparent that this efficiency method of assessing use value taxes by the LTC is not adequate because the danger of over-taxing areas may lead to conversion of wetland property into something more economically viable. Also apparent in the current LTC scheme is a lack of emphasis on inland wetland areas.²⁷⁸ The inland wetlands appear to be going unnoticed due to the grave threats to Louisiana's coastal wetlands. This focus is unfortunate and harmful, as such inland areas perform vital flood abatement functions and serve as a home to numerous endangered species. It is time for the LTC and the state legislature to take action to protect these threatened inland areas, possibly as a category entirely distinct from the coastal areas that are currently receiving so much attention.

Non-tax incentives may also be able to mitigate losses to wetland areas in Louisiana. Although the federal government's programs have succeeded in protecting vast areas of wetlands in

²⁷⁶ Interview with Paul Coriel (Sept. 18, 2001).

²⁷⁷ It is apparent that this was not the intention of the creators of the current LTC standards, but their model approach has broken down in practice due to a lack of uniformity in the assessments of independent assessors.

²⁷⁸ It is unlikely that brackish or saltwater marshes will be found in the upland portions of the state. This focus is also evident in the legal scholarship on wetlands in Louisiana, where there is a virtual absence of treatment of these areas. Indeed, no state regulation of wetlands exists outside of the coastal zone in Louisiana. E-mail from Jim Holcombe to Ryan Seidemann (Jan. 11, 2002) (on file with author).

Louisiana,²⁷⁹ there is still much to be done. There are gaps in the protections afforded by the federal programs which could be filled by smaller-scale state subsidies directed specifically at wetlands. Conservation servitudes also hold some promise for wetlands protection. However, adding tax-reducing incentives (in some cases just to compensate for the servitude's reduction of property values) to the creation of conservation servitudes may make them more attractive.²⁸⁰ Along these lines, providing tax incentives may also help in the creation of new wetlands mitigation banks in endangered areas. Finally, changes to the severance tax structure could be used to offset the losses felt by the state and local governments as a result of providing tax breaks to private landowners.

The state of Louisiana is losing its wetlands at an alarming rate, both in the coastal and inland areas. Many of these losses are irreversible, as studies have shown that reconstructed wetlands fail to adequately represent their pristine counterparts.²⁸¹ The time to act to create a more conservation-friendly environment in Louisiana is now. State action on any one of the numerous issues addressed herein could significantly stem the tide of wetlands loss and bring Louisiana closer to its goal of "no net loss" of wetlands.

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²⁷⁹ The federal government likely will continue to do so, as the 2002 Farm Bill extends current subsidies to the year 2011. House of Representatives Press Office, Farm Bill Update at <http://www.agriculture.house.gov/press/pr010727.html> (last visited Oct. 15, 2001).

²⁸⁰ Additionally, if this appears too economically burdensome for the state, perhaps it is time to create specific wetlands servitudes to alleviate some of the burden of giving up these taxes.

²⁸¹ See, e.g., Kaiser, *supra* note 254.

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APPENDIX I
TAX TREATMENT OF WETLAND AREAS IN VARIOUS
UNITED STATES JURISDICTIONS

STATE	TAX BREAK?	EXTENT ²⁸²	TYPE OF LAND ²⁸³	STATUTE ²⁸⁴
Alabama	No	—	—	—
Alaska	No	—	—	—
Arizona	Yes	Reduced	Open Space	Ariz. Rev. Stat. §48-5702
Arkansas	Yes	Reduced for Restoration	Wetlands	Ark. Stat. Ann. §26-51-1505
California	Yes	Reduced	Open Space	Ca. Const. Art. XIII §8
Colorado	No	—	—	—
Connecticut	Yes	Exempt	Open Space (non-profits)	Conn. Gen. Stat. Ann. 12-107f
Delaware	Yes	Exempt	Open Space	Del. Code Ann. tit. 9, §8106
District of Columbia	No	—	—	—
Florida	No	—	—	—
Georgia	No	—	—	—
Hawaii	Yes	Exempt	Open Space	Hawaii Rev. Stat. §246-34
Idaho	No	—	—	—
Illinois	Yes	Reduced	Open Space	Ill. Rev. Stat. ch. 35, §200/10-155
Iowa	Yes	Exempt	Native Prairie and Wetlands	Iowa Code Ann. §427.1
Indiana	No	—	—	—

²⁸² This column refers to the extent of the tax exemption for the relevant property provided by each state or territory. Each state either provides no tax exemption, a total tax exemption or a partial exemption for the relevant land. Partial exemptions are reductions in the tax rate compared to other lands and are denoted by "reduced."

²⁸³ This column details exactly what types of exemptions or reductions are available for landowners in each state or territory. Various types of land are listed because it is likely that wetland areas may be protected under a broad range of classifications in various jurisdictions.

²⁸⁴ This column provides the original citation to the statutory material for each state or territory in which the listed tax benefits are located.

STATE	TAX BREAK?	EXTENT ²⁸²	TYPE OF LAND ²⁸³	STATUTE ²⁸⁴
Kansas	No	—	—	—
Kentucky	No	—	—	—
Louisiana	Yes	Reduced	Marshland, Timberland	La. Rev. Stat. §47:2307
Maine	Yes	Reduced	Open Space	Me. Rev. Stat. Ann. tit. 36, §1106-A
Maryland	No	—	—	—
Massachusetts	No	—	—	—
Michigan	Yes	Exempt	Open Space Easement	Mich. Comp. Laws Ann. §324.36105
Minnesota	Yes	Exempt	Wetland	Minn. Stat. Ann. §272.02
Mississippi	No	—	—	—
Missouri	Yes	Reduced	Open Space	Mo. Ann. Stat. §67.895
Montana	Yes	Reduced	Conservation Easement	Mont. Code Ann. §76-6-208
Nebraska	No	—	—	—
Nevada	Yes	Reduced	Open Space	Nev. Rev. Stat. §361A.090
New Hampshire	Yes	Reduced	Open Space	N.H. Rev. Stat. Ann. §79-A:5
New Jersey	Yes	Reduced	Wetlands	N.J. Stat. Ann. §54:4-23.5
New Mexico	No	—	—	—
New York	Yes	Reduced	Wetlands (freshwater)	N.Y. Envir. Conser. §24-0905
North Carolina	No	—	—	—
North Dakota	Yes	Exempt	Wetland	N.D. Cent. Code §57-02-08.4
Ohio	No	—	—	—
Oklahoma	No	—	—	—
Oregon	Yes	Exempt	Wetland (non-profits)	Or. Rev. Stat. §29:307.115
Pennsylvania	Yes	Exempt	Open Space	16 Pa. Cons. State. 11943
Puerto Rico	Yes	Exempt	Mangrove Swamp	PR St 28 § 81

STATE	TAX BREAK?	EXTENT ²⁸²	TYPE OF LAND ²⁸³	STATUTE ²⁸⁴
Rhode Island	Yes	Reduced	Open Space Easements	R.I. Gen. Laws §44-5-12
South Carolina	No	—	—	—
South Dakota	No	—	—	—
Tennessee	Yes	Exempt	Wetlands	Tenn. Code Ann. §11-14-401
Texas	Yes	Reduced	Open Space	Tex. Const. Art. VIII §1-d-1
Utah	No	—	—	—
Vermont	No	—	—	—
Virginia	Yes	Exempt	Waters (non-profits)	Va. Code §58.1-609.8
Virgin Islands	Yes	Exempt	Open Space (non-profits)	33 V.I.C. 2355
Washington	Yes	Reduced	Open Space	Wash. Rev. Code Ann. §84.34.060
West Virginia	No	—	—	—
Wisconsin	Yes	Differential Treatment	Swamp	Wis. Stat. Ann. §70.32
Wyoming	No	—	—	—

APPENDIX 2
ACREAGE INFORMATION FOR LOUISIANA
CONSERVATION SUBSIDY PROGRAMS

PROGRAM	ACREAGE REQUIRED FOR PROGRAM		NUMBER OF CONTRACTS	NUMBER OF ENROLLED ACRES
	MINIMUM	MAXIMUM		
Conservation Reserve Program ²⁸⁵	0.0	No maximum	2,664	206,979.7
Wetlands Reserve Program ²⁸⁶	0.0	1,000.0/year		140,004.0
Wildlife Habitat Incentives Program ²⁸⁷	0.0	No maximum	201	16,493.23
Environmental Quality Incentives Program ²⁸⁸	0.0	No maximum	3,488	358,054.0
Forestry Incentives Program ²⁸⁹	5.0	1,000.0	2,055	75,370.30
Swampbuster ²⁹⁰	0.0	0.0	N/A	110,000.0

²⁸⁵ Data supplied by personal communication with David Carnline of NCRS, Sept. 24, 2001 and Nov. 7, 2001.

²⁸⁶ Data supplied by personal communication with Billy Moore of NCRS, Sept. 19, 2001 and Nov. 13, 2001.

²⁸⁷ Data supplied by personal communication with Ron Marcantel and Tim Landreneau of NCRS, Oct. 30, 2001 and Nov. 7, 2001.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*