

Louisiana Law Review



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F. Hodge O'Neal**

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The Use of the CZMA Consistency Provisions to Preserve and Restore the Coastal Zone in Louisiana

INTRODUCTION

The Louisiana Coastal Zone¹ is an invaluable natural resource for both the state and the nation.² Unfortunately, the coastal wetlands of Louisiana are disappearing at the alarming rate of approximately twenty-five to fifty square miles each year³—lost forever to erosion, saltwater intrusion into freshwater estuaries, development, and ecological mismanagement.

There are three basic causes to which land loss in coastal Louisiana can be attributed. First, there are the natural processes of land subsidence and sea-level rise.⁴ At the present time, the rate of subsidence in coastal Louisiana is 10-11 mm/yr (.40 -.44 in./yr), compared with an historic rate of 1.55 mm/yr (.062 in./yr).⁵ Subsidence attributed to human causes, such as the Mississippi River levee system and oil and gas extraction, has been estimated at 7.25-8.25 mm/yr (.29-.33 in./yr).⁶ While the subsidence rate of coastal Louisiana has increased dramatically in the

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1. The Coastal Zone Management Act of 1972, 16 U.S.C. § 1454(b)(1) (1989), requires the management program for each coastal state to include an identification of the boundaries of the coastal zone subject to the management program. A narrative description of the boundary of the Louisiana Coastal Zone is contained in La. R.S. 49:214.24 (Supp. 1990).

2. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 Tul. L. Rev. 3, 92-100 (1983). See also U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of Coastal Zone Management and Louisiana Department of Natural Resources, Coastal Management Section, *Louisiana Coastal Resources Program Final Environmental Impact Statement*, 22-32 (1980).

3. Houck, *supra* note 2, at 4. There is some dispute as to the exact rate of loss. The latest estimates by the U.S. Wildlife and Fisheries Service put the loss at 25 square miles per year, (see *Miss. River Delta Making a Comeback*, New Orleans Times-Picayune, November 14, 1990, at C-1, col. 1.), while signs at the recently opened Aquarium of the Americas in New Orleans put the loss at 60 square miles per year. In any event, the rate of loss is substantial.

4. Coalition to Restore Coastal Louisiana, *Coastal Louisiana, Here Today and Gone Tomorrow? A Citizen's Program for Saving the Mississippi River Delta Region, To Protect It's Heritage, Economy and Environment*, at 16-17 (1989). See also Houck, *supra* note 2, at 12-15. Presently, the land subsidence rate from all causes (natural and man-made) is 9 mm/yr, and the rate of sea-level rise is 1.2 mm/yr. Combined, the total land-sea subsidence rate is 10-11 mm/yr.

5. See Houck, *supra* note 2, at 15.

6. *Id.*

last 100 years (partly attributable to the loss of sediments which would normally, absent the levee system, be deposited during flood season when the Mississippi River would overflow its banks), and is certainly a factor in coastal erosion, it must also be remembered that until only recently, the same natural processes had produced only a small net land loss.⁷

Compounding the problems of natural subsidence and sea-level rise, the second cause to which land loss can be attributed is the Mississippi River levee system.⁸ In its natural state, the river nourished and replenished the wetlands during floods by depositing a portion of its immense sediment load as the waters entered and passed through the wetlands. Several studies have documented the detrimental effects of the levee system⁹ on the coastal wetlands, but neither this cause alone nor it in conjunction with subsidence can account for the continually accelerating rate of coastal subsidence and erosion in Louisiana.¹⁰ As Professor Houck points out:

There is a danger however in overplaying this role. . . . Continuous levees along the lower Mississippi River have been in place since the late 1800's. Captain Eads' jetties were completed in 1878. The Mississippi River has escaped these confinements on only one occasion since 1913 [during the flood of 1927]. This history notwithstanding, subsidence along the Louisiana coast was only a modest phenomenon until the mid-1950's. Almost two-thirds of the subsidence has occurred in an escalating pattern since that time.¹¹

The same can be said of coastal land loss; it was a modest phenomenon until the mid-1950's. Almost three-fifths of the losses have occurred in an escalating pattern since that time.¹² Why have the rates of both land loss and subsidence escalated so dramatically in the last thirty to forty years? The widely accepted answer may be found in the third major

7. *Id.* at 14-15, 22-24. Until the Mississippi River levee system was in place, the Louisiana coastal zone was expanding, despite natural sea-level rise and natural subsidence. Even after the levee system was put in place, subsidence in the coastal zone was only a modest phenomenon until the mid-1950's. *Id.* at 24.

8. *Id.* at 16-24.

9. Gagliano, *Canals, Dredging, and Land Reclamation in the Louisiana Coastal Zone* (1973) (cited in Houck, *supra* note 2, at 22). See also Gagliano, Meyer-Arendt & Wicker, *Land Loss in the Mississippi Deltaic Plain*, in *Transactions, 31st Annual Meeting, Gulf Coast Association of Geological Societies* 295, at 298 (1981) (cited in Houck, *supra* note 2, at 22-23).

10. Studies of coastal loss have demonstrated that the rate of loss has increased dramatically since the 1950's. Houck, *supra* note 2, at 11-12. See also *infra* note 150.

11. Houck, *supra* note 2, at 23-24 (footnotes omitted).

12. *Id.* at 11-12.

cause of wetlands loss in coastal Louisiana: dredging and development.¹³

The extensive dredging conducted by the U.S. Army Corps of Engineers (Corps) and the oil and gas industry is done to facilitate navigation and mineral exploration and production.¹⁴ The oil industry alone has been estimated to have dredged over 10,000 miles of canals within the state in the last fifty years,¹⁵ and canals have been estimated to be responsible for up to eighty-nine percent of the total land loss.¹⁶ As for the Corps, some of its larger scale projects, such as the Mississippi River Gulf Outlet (MRGO), destroy vast amounts of wetlands both during and after construction. The construction of the MRGO converted 6,653 acres of marsh to open water and buried another 17,344 acres under spoil.¹⁷ The banks have now eroded in some places to three times the original width, and saltwater intrusion up the canal has changed the character of approximately 45,000 adjacent acres from freshwater marsh to open water and brackish marsh.¹⁸

Given the above, one must recognize that there is probably little that can be done about the rate of subsidence, though the Louisiana Department of Wildlife and Fisheries has recently demonstrated that controlled breaches in the Mississippi River levee system *can* create new marsh where the old had been lost¹⁹ by counteracting subsidence through sediment deposition, thereby decreasing the net loss of wetlands in the state. But while the Mississippi River levee system is obviously a culprit in the increased rate of coastal wetlands loss, the fact is that it exists, and will continue to remain in place for the foreseeable future. Controlled

13. *Id.* at 30-55. See also Treen, *Law and Policy: The Continuing Need for CWEL*, 1 *Tul. Envtl. L.J.* 24 (1988); *Batson, Ryan v. Southern Natural Gas Co.: Towards Fashioning An Appropriate Measure of Damages for Land Loss in Coastal Louisiana*, 1 *Tul. Envtl. L.J.* 8 (1988).

14. Houck, *supra* note 2, at 24-55.

15. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 *Md. L. Rev.* 358, 369 (1988).

16. Scaife, Turner & Costanza, *Coastal Louisiana: Recent Land Loss and Canal Impacts*, 7 *Envtl. Mgmt.* 433, 440 (1983) (cited in Houck, *supra* note 15, at 370 n.58). While the amount of loss which should be allocated to canals, pipelines, and other oil industry related activities is debatable, even some oil industry supporters will concede that an appreciable amount of damage does occur: "I concede that the level of harm resulting from oil and gas activities, as compared to other causes, is arguable. However, even if the estimate of damage resulting from oil and gas activities is reduced to 10%, or even 5%, the resulting numbers are monumental." Former Louisiana Governor David C. Treen, who was serving on the board of directors of a large oil corporation at the time he wrote this statement. See Treen, *Law and Policy: The Continuing Need for CWEL*, 1 *Tul. Envtl. L.J.* 24, 26 (1988).

17. Houck, *supra* note 2, at 40.

18. *Id.* See also sources cited *infra* at notes 62, 64.

19. See *Miss. River Delta Making a Comeback*, *New Orleans Times-Picayune*, Nov. 14, 1990, at C-1, col. 1.

breaches in the natural levee system near the mouth of the river may be beneficial to that area of the coastal zone,²⁰ but given the importance of the levee system to navigation on the river and to flood control in such heavily populated areas as New Orleans, diversions of any sort further upriver are a much more complicated and controversial matter.²¹

Therefore, in any effort directed toward preservation and restoration of the coastal zone, dredging and development remain as the cause of loss which can be most easily and effectively alleviated—or at least significantly controlled. Implicit in such a statement is the recognition that the primary developers in the coastal zone, the Corps and the oil industry, also will be the parties most affected by any such attempt to preserve and restore the coastal zone.²²

With the above in mind, it should be explained that Louisiana is not alone in its concern for maintaining the health of its coastal zone. Since the passage of the Coastal Zone Management Act (CZMA) in 1972,²³ twenty-eight of the thirty-five U.S. coastal states and territories eligible for participation have voluntarily developed and implemented comprehensive federally-approved coastal zone management programs.²⁴ With the passage of the Coastal Zone Act Reauthorization Amendments of 1990,²⁵ the few remaining non-participating states will probably also choose to participate.

Louisiana passed the State and Local Coastal Resources Management Act (SLCRMA) in 1978,²⁶ and its subsequent approval by the U.S.

20. *Id.*

21. Houck, *supra* note 2, at 19-22. For an interesting discussion of the largest of all possible "levee breaches" or "diversions"—the redistribution of flows of the Mississippi and Atchafalaya Rivers through the river control structures north of Baton Rouge, see Houck, *supra* note 2, at 102.

22. This is not meant to say that the Corps or the oil industry should or should not be penalized for past actions in the coastal zone. Allocation of the costs of repairing damage done to the wetlands in the past is not the subject matter of this comment. Instead, this comment is directed toward gaining a larger measure of state control over all *future* activities undertaken in the coastal zone.

23. 16 U.S.C. §§ 1451-1464 (1989). The CZMA was reauthorized and strengthened by amendment in 1990. See Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, §§ 6201-6216, 104 Stat. 1388 (1990).

24. Cunningham, *Norfolk Southern Corp. v. Oberly: Coastal Protection Wins in Delaware*, 4 *Pace Envtl. L. Rev.* 439 n.4 (1987). Other coastal states face a myriad of problems of a different nature than those encountered in Louisiana, including excessive development, loss of public access to coastal areas, increased coastal zone pollution, and offshore oil exploration.

25. Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, §§ 6201-6216, 104 Stat. 1388 (1990) [hereinafter cited as Reauthorization Amendments of 1990].

26. 1978 La. Acts No. 361, § 1. See also La. R.S. 49:214.21-214.40 (Supp. 1990).

Secretary of Commerce²⁷ allowed Louisiana to create a state administrative agency for state coastal zone management under the authority of the CZMA. This agency, the Coastal Management Division (CMD) of the Department of Natural Resources (DNR), is responsible for state compliance with and the exercise of authority granted by the CZMA.²⁸

As part of the authority granted, the CMD is responsible for making consistency determinations for activities conducted in the coastal zone by federal agencies²⁹ or federal permittees.³⁰ Put somewhat simplistically, a "consistency determination" means that anyone undertaking a regulated activity in the coastal zone must certify to the state that the activity he proposes to conduct in the coastal zone will be consistent with the approved state Coastal Management Program (CMP). Only if the state concurs (with limited exceptions) with the certification will the activity be consistent for CZMA purposes. Along with federal funding offered to assist states in establishing and operating coastal management programs,³¹ the federal consistency requirements³² are at the heart of the CZMA. It is these provisions which allow a state to exert a great deal of control over activities in or affecting the coastal zone by essentially giving states a "veto" power over any federal activity or any activity requiring a federal permit or license. Unfortunately, Louisiana has yet to exercise its authority to the extent allowed by law under the CZMA and SLCRMA.

Through an examination of the applicable statutory law,³³ relevant case law, and the actions of other coastal states, this comment will demonstrate that Louisiana has not used the full extent of its consistency determination powers to control activities in the coastal zone. By not doing so, Louisiana is failing to effectively use a powerful tool in the fight to preserve its wetlands and combat coastal erosion. This comment proposes that Louisiana should, at a minimum, use the consistency provisions as aggressively as they are used in other coastal states. This

27. The SLCRMA and the Louisiana Coastal Resources Program FEIS were submitted for and received the approval of the U.S. Secretary of Commerce in 1980.

28. 16 U.S.C. §§ 1451-1464 (1989), as amended by the Reauthorization Amendments of 1990, §§ 6201-6216. See also 15 C.F.R. Part 930 (1990).

29. 16 U.S.C. § 1456(c)(1)-(2) (1989), as amended by the Reauthorization Amendments of 1990, § 6208(a).

30. 16 U.S.C. § 1456(c)(3)(A)-(B) (1989), as amended by the Reauthorization Amendments of 1990, § 6208(b).

31. 16 U.S.C. §§ 1454-1455a (1989), as amended by the Reauthorization Amendments of 1990, §§ 6205, 6206, 6207, 6209, 6210.

32. 16 U.S.C. § 1456(c) (1989), as amended by the Reauthorization Amendments of 1990, § 6208.

33. 16 U.S.C. §§ 1451-1464 (1989), as amended by the Reauthorization Amendments of 1990, §§ 6201-6216; 15 C.F.R. Part 930 (1990); La. R.S. 49:214.21-214.40 (Supp. 1990); La. Admin. Code 43:I.701-43:I.731 (1990).

comment further proposes that Louisiana should, in certain situations, use the CZMA consistency provisions to force federal agencies and their permittees to conduct their activities in the coastal zone in a manner that has a *positive* effect, not merely a non-detrimental effect, on the coastal zone environment.

With these proposals in mind, the comment first focuses on the CZMA and the consistency provisions contained therein. Second, examples and explanations of the "types" of consistency determinations with which the state is concerned are provided. Third, the comment discusses what Louisiana has been doing and what it should be doing, comparing Louisiana's actions with those of other coastal states. Fourth, the feasibility of the proposals is discussed. Fifth, the comment examines possible obstacles to the course of action proposed herein. Finally, the conclusion will contain a short costs/benefits analysis reemphasizing why Louisiana should attempt to implement the proposals made in this comment.

THE COASTAL ZONE MANAGEMENT ACT

The Coastal Zone Management Act of 1972³⁴ was passed by Congress in order to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone"³⁵ and to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone."³⁶ In the Coastal Zone Act Reauthorization Amendments of 1990,³⁷ Congress has gone even further in its encouragement to the states, stating that "[i]t is the purpose of Congress in this subtitle to enhance the effectiveness of the Coastal Zone Management Act of 1972 by increasing our understanding of the coastal environment and *expanding the ability of State coastal zone management programs to address coastal environmental problems.*"³⁸ To effectuate these policy objectives Congress has encouraged coastal states to participate in the management and development of their coastal zones by providing federal funding to help states set up and operate coastal zone management programs.³⁹ As further incentive, and at the heart of the CZMA, Con-

34. 16 U.S.C. §§ 1451-1464 (1989), as amended by the Reauthorization Amendments of 1990, §§ 6201-6216.

35. 16 U.S.C. § 1452(1) (1989).

36. 16 U.S.C. § 1452(2) (1989).

37. 16 U.S.C. §§ 1451-1464 (1989), as amended by the Reauthorization Amendments of 1990, §§ 6201-6216.

38. Reauthorization Amendments of 1990, § 6202(b) (emphasis added).

39. 16 U.S.C. §§ 1454-1455a (1989), as amended by the Reauthorization Amendments of 1990, §§ 6205, 6206, 6207, 6209, 6210.

gress enacted in the CZMA a system dubbed by legal scholars as "new federalism"⁴⁰ by which a state is able, through its consistency determination authority, to exert control over activities in its coastal zone.

Once a state Coastal Management Program (CMP) has been approved by the U.S. Secretary of Commerce,⁴¹ the CZMA requires that federal activities and projects affecting the coastal zone, as well as activities and projects conducted by private parties which require a federal permit or license, be consistent with the approved state CMP.⁴² Distinct sets of consistency standards and procedures apply to (1) federal agency activities⁴³ and (2) other activities that require a federal permit or license.⁴⁴ In the first instance, federal agency activities "within or outside the coastal zone that affect[s] any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."⁴⁵ The federal agency which conducts or supports the activity makes the consistency determination, and the state may concur or object.⁴⁶ If the state objects, it may pursue mediation by the U.S. Secretary of Commerce or seek judicial intervention to enjoin the activity.⁴⁷

In the second case, federally permitted activities,⁴⁸ including outer-Continental Shelf (OCS) lease sales, exploration, and development and production, must be conducted in a manner consistent with the state CMP.⁴⁹ Applicants for a federal permit must "certify" to the state

40. Eichenberger and Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism,"* 14 *Ecology L.Q.* 9, 11 (1987). In federal-state cooperative environmental programs, federal agencies and state governments jointly manage resources and development once exclusively managed by the federal government.

41. 16 U.S.C. § 1455 (1989), as amended by the Reauthorization Amendments of 1990, § 6206. As to administration of the CZMA, the Secretary of Commerce has delegated his authority under the CZMA to the assistant administrator of the National Oceanic and Atmospheric Administration (NOAA). See 15 C.F.R. §§ 923, 930.1, 930.15-.16 (1990).

42. 16 U.S.C. § 1456(c) (1989), as amended by the Reauthorization Amendments of 1990, § 6208.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* See also 15 C.F.R. Part 930, Subpart C (1990). It should be noted that the regulations concerning the administration of the CZMA contained in 15 C.F.R. Part 930 will soon be changed to reflect the changes made to the CZMA by amendment in the Coastal Zone Act Reauthorization Amendments of 1990.

47. 16 U.S.C. § 1456(h) (1989); 15 C.F.R. § 930.116 (1990).

48. E.g., private activities which require a federal permit or license, such as the dredging of a canal through privately owned wetlands areas.

49. 16 U.S.C. § 1456(c)(3)(A)-(B) (1989), as amended by the Reauthorization Amendments of 1990, § 6208. As for outer-Continental Shelf (OCS) lease sales, see the controversial case *Secretary of the Interior v. California*, 464 U.S. 312, 104 S. Ct. 656 (1984), which

agency that the proposed activity complies with the state's approved program.⁵⁰ If the state agency objects, the federal agency may not issue the necessary permits unless, on appeal or his own initiative, the Secretary of Commerce overrides the state objection.⁵¹ The Secretary may override a state objection upon a finding that the activity is either consistent with the objectives of the CZMA⁵² or is necessary in the interest of national security.⁵³

In Louisiana, the Louisiana State and Local Coastal Resources Management Act (SLCRMA) functions as the state coastal management program for CZMA purposes.⁵⁴ The SLCRMA established the state coastal zone boundary,⁵⁵ implemented a coastal use permitting system to regulate activities occurring in the coastal zone,⁵⁶ and provided for the development of state "coastal use guidelines" to serve as the criteria for granting, conditioning, denying, revoking, or modifying coastal use permits.⁵⁷ The Coastal Use Guidelines are quite extensive⁵⁸ and allow the state to review virtually all significant activities occurring in the coastal zone area.

"TYPES" OF CONSISTENCY DETERMINATIONS MADE BY THE STATE

In addition to the division of activities in the CZMA into those of federal agencies and those of federal permittees, the consistency determination problems that Louisiana encounters can further be divided into four categories: (1) activities initiated prior to the approval of the state CMP; (2) activities for which no consistency determination was required at their initiation but for which the state has subsequently determined

held that the consistency provisions of the CZMA did not apply to the Department of the Interior's sale of oil and gas leases on the OCS. Section 6208(a) of the Reauthorization legislatively overrules the case and provides a major victory for coastal states desiring to interpret the CZMA consistency provisions in an aggressive manner. See Morris, *Review Clause Could Delay MMS's Planned Gulf Lease Sale*, Inside Energy/with Federal Lands, December 17, 1990, at 11; Shuler, *Proposal May Give La. More Oil Money*, Baton Rouge State-Times/Morning Advocate, February 23, 1991, at C-1, col. 2.

50. 16 U.S.C. § 1456(c)(3)(A) (1989), as amended by the Reauthorization Amendments of 1990, §6208(b)(2).

51. *Id.* See also 15 C.F.R. §§ 930.120-930.122 (1990).

52. 16 U.S.C. § 1456 (c)(3)(A) (1989), as amended by the Reauthorization Amendments of 1990, § 6208(b)(2). See also 15 C.F.R. §§ 930.120-930.121 (1990).

53. 16 U.S.C. § 1456(c)(3)(A) (1989), as amended by the Reauthorization Amendments of 1990, § 6208(b)(2). See also 15 C.F.R. §§ 930.120, 930.122 (1990).

54. 1978 La. Acts No. 361, § 1. See also La. R.S. 49:214.21-214.40 (Supp. 1990).

55. La. R.S. 49:214.24 (Supp. 1990).

56. La. R.S. 49:214.30-214.36 (Supp. 1990).

57. La. R.S. 49:214.27 (Supp. 1990).

58. The Coastal Use Guidelines are contained in the La. Admin. Code 43:I.701-43:I.731 (1990). See *infra* note 88.

do require a consistency determination; (3) activities for which a consistency determination has already been made, but which are not being conducted in conformity with the state CMP or the Coastal Use Guidelines; and (4) activities which have not yet come up for a consistency determination.

Activities Initiated Prior to the Approval of the State CMP

Activities initiated prior to approval of the state CMP are of two types: (a) ongoing federal activities other than development projects⁵⁹ and (b) phased federal development projects.⁶⁰ Other activities which require federal permits do not have any bearing on this category, as all such activities are subject to consistency determinations upon renewal of the federal permit or license.⁶¹

An example of a federal activity which should be held to be subject to consistency review is the dredging of the Mississippi River Gulf Outlet (MRGO) by the U.S. Army Corps of Engineers (Corps) every six years.⁶² The CMD recently notified the Corps that it objected to the planned Corps method of spoil disposal in the dredging of the MRGO scheduled for 1991.⁶³ The Corps plan calls for the dredged material to be deposited on the south bank of the shipping channel; the CMD would like the spoil to be deposited on the north shore to help control erosion of the wetlands north of the canal. The CMD has notified the Corps that the plan submitted by the Corps is not consistent with the Louisiana CMP, and that the state is prepared to pursue an administrative appeal and possibly litigation.⁶⁴ Combined with the CMD determination on the Corps levee project problem explained below,⁶⁵ this may signal a major change in the way CMD views the consistency determination authority granted to it by the CZMA.

Prior to this year, the CMD had not attempted to require a new consistency determination for any federal activity or development project initiated prior to approval of the state coastal management program. If the MRGO dredging dispute is not resolved by mediation and instead

59. 15 C.F.R. § 930.38(a) (1990). An example is maintenance dredging of an existing waterway such as the MRGO or the Intracoastal Canal.

60. 15 C.F.R. § 930.38(b) (1990). An example is the phased construction of hurricane protection levee systems.

61. 15 C.F.R. §§ 930.50-930.51 (1990). Any private activities in the coastal zone would fall under this category.

62. See State Wants Corps to Revise Channel Dredge Plan, New Orleans Times-Picayune, August 29, 1990, at B-1, col. 1.

63. *Id.*

64. See Corps Refuses to Alter Dredging on Gulf Outlet, New Orleans Times-Picayune, October 24, 1990, at B-8, col. 1.

65. See *infra* text accompanying notes 69-75.

proceeds to litigation, the court may hold that it is an activity "other than [a] development project," in which case the Corps will be required by regulation to submit a new consistency determination.⁶⁶ If, however, the court determines that the dredging is a "phased Federal decision which [was] specifically described, considered and approved prior to management program approval (e.g., in a final environmental impact statement [FEIS] issued pursuant to the National Environmental Policy Act [NEPA]),"⁶⁷ the CMD will then have to demonstrate that the Corps is acting in a manner that is substantially different from the FEIS, or that the impact is substantially greater than that contemplated in the FEIS.⁶⁸

An example of a phased development project initiated before approval of the State CMP which should be found to be subject to a consistency determination is the Corps' LaRose-to-Golden Meadow levee project in LaFourche Parish. The levee project was planned and initiated prior to approval of the state Coastal Management Program, and the Corps issued a FEIS purporting to cover the project from beginning to completion.⁶⁹ The Corps now appears to be altering its original project plan in a substantial manner by changing the alignment of the levee, which may have significantly different and substantially greater environmental impact in the wetlands areas adjacent to the project.⁷⁰ As the CMD views it, the Corps should have to submit a new consistency determination which takes into account the effects of the proposed change in the alignment of the levee. The Corps apparently believes that the project is exempt from any further consistency review by the "grandfather clause" of 15 CFR 930.38(b).⁷¹ The only case involving a similar fact situation is *Enos v. Marsh*.⁷² In *Enos*, plaintiffs asserted (in part) a violation of the CZMA where a federal project (a harbor project by

66. 15 C.F.R. § 930.38(a) (1990).

67. 15 C.F.R. § 930.38(b) (1990).

68. A court determination of this nature is highly unlikely in this dispute, as the Corps has already demonstrated by its actions (i.e. the Corps has already submitted a consistency determination) that it does not consider maintenance dredging of the MRGO a phased federal development project. See *supra* notes 62, 64. However, even if the court were to make such a determination, the CMD should not have any problem demonstrating that the maintenance dredging is having an impact substantially greater than that contemplated in the FEIS. See *supra* text accompanying notes 17-18.

69. Memo from M. Wascom, CMD Legal Staff, DNR, to J. DeMond, CMD Federal Consistency Section, DNR, regarding the possible change in levee alignment by the Corps (August 6, 1990) (on file at the Sea Grant Legal Program, Paul M. Hebert Law Center, Louisiana State University).

70. *Id.*

71. *Id.* 15 C.F.R. 930.38(b) states, in pertinent part, that "This provision shall not apply to phased Federal decisions which were specifically described, considered and approved prior to management program approval (e.g., in a final environmental impact statement issued pursuant to the National Environmental Policy Act)."

72. 616 F. Supp. 32 (D. Hawaii 1984), *aff'd*, 769 F.2d 1363 (9th Cir. 1985).

the Corps) was "initiated" prior to approval of the state CMP, though actual construction began after approval of the state CMP. The court held in part: (1) that 15 CFR 930.38(b) (the "grandfather clause") applied and that the original EIS was sufficient; therefore new consistency determinations were *not* required as each phase was undertaken, and (2) that changes made in the actual development work did *not* rise to a level of significance which would require a new consistency determination. This part of *Enos* is relevant in deciding whether a new consistency determination may be required of the Corps in the change of levee alignment in two respects. First, the court in *Enos*, basing its conclusions on 15 CFR 930.38(b) and policy considerations,⁷³ decided that projects initiated prior to approval of the state CMP and supported by a FEIS are entitled to a "presumption" of sufficiency. In other words, absent *significant* changes in the plan and development work, the Corps is covered by the "grandfather clause" of 15 CFR 930.38(b).

Second, the court did *not* "close the door" to future plaintiffs in similar cases. By basing its ruling, in part, on the small magnitude of the change involved, the court implied that should the changes be grossly inconsistent with the original plan put forth and covered by the FEIS, the question of whether a new consistency determination could be required would still be open to litigation.⁷⁴ As the CZMA and 15 CFR Part 930 set up a strong policy favoring agency compliance with state CMP's through consistency determinations,⁷⁵ the Corps should be viewed as operating in its levee alignment project under what should be construed as a narrow exception to the general rule. Therefore, if the changes in the alignment cause additional environmental impact of a significant nature and scope, the CMD should be able to prevail in court and force the Corps to submit a new consistency determination.

Both the levee alignment change and the dredging of the MRGO present an opportunity to the CMD to assert its authority and exercise some measure of control over the fate of large areas of the coastal zone. Should the CMD prevail in these two situations, it would provide the CMD with a greatly enhanced ability to limit coastal zone destruction, as the Corps is involved in many activities initiated prior to the approval of the state CMP.

Activities for Which No Consistency Determination was Required at Initiation But for Which the State has Subsequently Determined Do Require a Consistency Determination

As for activities for which no consistency determination was required at the time of their initiation, but for which the state has subsequently

73. *Enos*, 616 F. Supp. at 63-64.

74. *Enos*, 616 F. Supp. at 64.

75. See the "Findings and Purpose" contained in the Reauthorization Amendments of 1990, §6202.

determined do require a consistency determination, the state may make a request to the agency conducting the activity for remedial action to correct the problem causing the CMD to view the activity as inconsistent.⁷⁶ If no remedial action is taken in a reasonable time, the state may pursue mediation by the Secretary of Commerce or seek relief in court.⁷⁷

Activities for Which a Consistency Determination Has Already Been Made, But Which Are Not Being Conducted in Conformity With the State CMP Or the Coastal Use Guidelines

As a general rule, once a federal activity or an activity of a federal permittee has received a favorable consistency determination by the state, it is not subject to any further consistency determinations.⁷⁸ This rule is based primarily on the principle of estoppel.⁷⁹ However, when an activity is being conducted in a manner not in conformity with the state CMP, the same rule that applies to activities not previously required to have a consistency determination but subsequently determined to be subject to the consistency determination authority applies: the CMD may request remedial action, and if no action is taken in a reasonable time, the CMD may seek Secretarial mediation or take the matter to court.⁸⁰

This means that while the state has the ability to restrict any activities which deviate from a previously granted consistency determination, it must be very careful in its granting of an initial consistency determination. After the state approves the initial consistency determination it is effectively estopped from interfering with the activity as long as the activity does not significantly deviate from that initially approved. Therefore, the critical point in the process is the initial determination.

Activities For Which a Consistency Determination Has Not Yet Been Made

The point at which the state has the greatest ability to exert influence over an activity in the coastal zone is, ironically, before the activity is ever actually initiated. It is therefore imperative that Louisiana exert its power and authority during the initial consistency determination phase to the fullest extent allowed by law. Ideally, Louisiana should be using its consistency determination powers as a tool to further state coastal zone objectives: slowing erosion and saltwater intrusion, and the re-

76. 15 C.F.R. § 930.44(b) (1990).

77. 15 C.F.R. § 930.44(c) (1990), and 15 C.F.R. Part 930, Subpart G (1990).

78. *Enos*, 616 F. Supp. at 63-64.

79. *Id.*

80. 15 C.F.R. §§ 930.44(b)-(c) (1990), and 15 C.F.R. Part 930, Subpart G (1990).

building of the marshes and wetlands through the use of water diversions, spoil deposition from development projects, and mitigation. Unfortunately, this is not what has been happening in Louisiana during the past 13 years.⁸¹

There are two parts to the proposal made in this comment, and for the sake of clarity and understanding they will be repeated here. First, when compared to other coastal states, Louisiana has not been using the consistency determination powers it has been granted in an efficient manner. Second, in certain situations, Louisiana should be using its consistency determination powers to force a party conducting activities in the coastal zone to act in a manner that will yield positive environmental results instead of merely non-detrimental effects in the coastal zone. As to the first proposition, a simple analysis of empirical information provides some very incriminating evidence. In Louisiana, the state with the highest volume of coastal permit issuance in the nation, the rate of Clean Water Act section 404 dredge and fill permit⁸² denials by the Corps from 1980-1986 averaged 6.3 denials a year, or approximately 0.64% of the applications considered.⁸³ During that period, an average of 899 permits⁸⁴ a year were considered. As each of these Corps permittees was required by the CZMA to obtain a consistency determination from the CMD *before* the Corps would be allowed to issue the permit,⁸⁵ and as the majority of these permits involved oil and gas industry access to facilities in the coastal zone,⁸⁶ it would appear that the CMD has been solicitous to energy industry concerns at the expense of the environment. These undesirable results have not occurred because the law is not strict enough or lacks potency; Louisiana's CMP and Coastal Use Guidelines⁸⁷ provide the state with the ability to affect virtually any activity in the coastal zone, and to effectively halt most activities if it should so choose.⁸⁸

81. See Houck, *supra* note 15, at 369-74. The "13 years" refer to the time which has passed since the passage of the SLCRMA in 1978.

82. Federal Water Pollution Control Act, 33 U.S.C. § 1344 (Clean Water Act §404) (1989). A "dredge and fill" permit is required from the Corps for most dredging operations in the coastal zone.

83. See Houck, *supra* note 15 n.16.

84. *Id.* at 370.

85. 15 C.F.R. §§ 930.53(e), 930.65 (1990).

86. See Houck, *supra* note 2, at 24-44. See also Houck, *supra* note 15, at 369-70.

87. La. Admin. Code 43:1.701-43:1.731 (1990).

88. *Id.* The Coastal Use Guidelines provide stringent requirements which must be met by any actor in the coastal zone. In addition to broad general application guidelines, the Coastal Use Guidelines also contain specific guidelines for levees, linear facilities (pipelines), dredged spoil deposition, shore modification, surface alterations, hydrologic and sediments transports modifications, disposal of wastes, and oil, gas, and other mineral activities.

In comparison, other coastal states and territories have acted in a much more aggressive manner in their use of the consistency determination powers. Delaware has used its powers to completely ban any new bulk transfer facilities in the Delaware coastal zone.⁸⁹ California has acted to protect its coastal fishing industry by forcing the oil industry to conduct its offshore exploration activities only while the fishing season is closed.⁹⁰ California has also used its powers to restrict onshore development⁹¹ and to control the method of removal of structures such as rail lines before they are abandoned.⁹² Puerto Rico has used its powers to enjoin the federal government from transferring Haitian and Cuban refugees to a camp on a U.S. Army Base on the island,⁹³ citing physical plant deficiencies at the base. Other coastal states are acting aggressively to halt or control detrimental activities in their coastal zones; not so in Louisiana. The state has rarely used its consistency determination powers to restrain or halt an activity in the coastal zone, especially if the activity is being conducted by the Corps or is oil industry related.⁹⁴

If the state ever hopes to slow coastal erosion and preserve the coastal zone, it will have to make use of its powers in the way other coastal states have. This means that the CMD must view the CZMA as the environmental protectionist measure it is intended to be⁹⁵ and assert its authority more aggressively.

To this end, the state should also try to extend the parameters of its CZMA authority by using the consistency determination powers to force federal agencies and their permittees to conduct their activities in a manner that will produce positive effects in the coastal zone environment. This means that in some cases, the state should not be satisfied with the plan for an activity and grant the consistency determination

89. See *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225 (D. Del. 1986), *aff'd*, 822 F.2d 388 (3rd Cir. 1987). See also Comment, *Norfolk Southern Corp. v. Oberly: Coastal Protection Wins in Delaware*, 4 *Pace Envtl. L. Rev.* 439 (1987).

90. See *Exxon Corp. v. Fischer*, No. 84-2362 (D. Cal. Oct. 9, 1985), *rev'd on other grounds*, 807 F.2d 842 (9th Cir. 1986). See also Fitzgerald, *Exxon Corp. v. Fischer: Thresher Sharks Protect the Coastal Zone*, 14 *Envtl. Affairs* 561 (1987).

91. See *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 107 S. Ct. 1419 (1987). See also Comment, *State Control of Mining on Federal Land: Environmental Or Land Use Regulation?*, 28 *Nat. Resources J.* 873 (1988).

92. See *Southern Pacific Transportation Co. v. California Coastal Commission*, 520 F. Supp. 800 (N.D. Cal. 1981).

93. See *Commonwealth of Puerto Rico v. Muskie*, 507 F. Supp. 1035 (D.P.R. 1981), vacated due to a consent agreement in *Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981).

94. See *supra* sources cited in note 86.

95. 16 U.S.C. § 1452 (1989), as amended by the Reauthorization Amendments of 1990, § 6202.

when the plan merely provides that the activity will not do any significant harm to the environment. For example, in the MRGO dredging dispute,⁹⁶ the canal has almost eroded through to an adjoining lake, and if such a breach occurs, it will hasten erosion of the adjoining wetlands and possibly damage the levee system that protects St. Bernard parish from hurricane surges.⁹⁷ The Corps plan calls for the disposal of the dredge spoil to be accomplished in the cheapest manner possible⁹⁸—by depositing it on the south shore of the canal. The CMD contends that the Corps must comply with the state requirement for using dredge spoil whenever possible to create wetlands and prevent environmental damage.⁹⁹ It is in situations such as this that the state should require, where feasible, a “positive” contribution to the coastal zone environment. Merely settling for “minor damage/impact” in the coastal zone will only moderately slow the rate of destruction. Louisiana’s coastal zone has been beyond that point for some time now.¹⁰⁰

HOW AND WHY LOUISIANA SHOULD BE ABLE TO ACCOMPLISH THE PROPOSALS MADE IN THIS COMMENT

Louisiana should be able to accomplish the proposals made in this comment by aggressively using its CZMA powers in a variety of ways. First, the consistency provisions of the CZMA and 15 CFR Part 930 give the state an effective “veto” power. While not absolute,¹⁰¹ the state determination does carry the presumption that it is the correct decision,¹⁰²

96. See *supra* text accompanying notes 62-64.

97. See *supra* note 64.

98. *Id.* See also letter from Col. Richard Gorski, District Engineer, New Orleans District, Corps of Engineers, to D. Soileau, Asst. Secretary, DNR, CMD (October 16, 1990) (on file at Sea Grant Legal Program, Paul M. Hebert Law Center, Louisiana State University). In the letter, Col. Gorski acknowledges that the Corps’ own studies have concluded that the better method of spoil disposal would be that proposed by the CMD, but then goes on to say that the Corps maintenance dredging regulations require the Corps to “place dredged material in the least costly manner consistent with sound engineering practices and meeting required environmental standards.” The CMD contends that spoil disposal on the south shore does not meet “required environmental standards.” See *infra* note 99.

99. Under Louisiana’s federally approved coastal management plan, and specifically under Coastal Use Guideline 4.2, “[s]poil shall be used beneficially to the maximum extent practicable to improve productivity or create new habitat, *reduce or compensate for environmental damage done by dredging activities*, or prevent environmental damage.” See La. Admin. Code 43:I.707(B) (emphasis added).

100. See Houck, *supra* note 15, at 369-70.

101. 16 U.S.C. § 1456(c)(3)(A)-(B) (1989), as amended by the Reauthorization Amendments of 1990, § 6208. See also 15 C.F.R. §§ 930.120-930.122 (1990).

102. 16 U.S.C. §§ 1452, 1456 (1989), as amended by the Reauthorization Amendments of 1990, §§ 6202, 6208. See also Beyle, A Comparison of the Federal Consistency Doctrine Under FLPMA and the CZMA, 9 Va. Env’tl. L.J. 207, 207-16 (1989).

and it is up to the agency or permittee to prove it wrong or inappropriate.¹⁰³ Second, the CZMA and 15 CFR Part 930 provide for mediation by the Secretary of Commerce when disagreements concerning a consistency determination arise.¹⁰⁴ In the case of federal agency activities, either the state or the federal agency may request mediation, though it is not required of either party—litigation is always an option.¹⁰⁵ If both parties agree to mediation, a public hearing is conducted in the area to be affected by the proposed activity, and the Secretary of Commerce uses the hearing record to conduct a mediation conference. The state, through this formal negotiation session, should be able to “encourage” the agency to modify its proposed plan of action. In the case of a federal permittee, there are no provisions in the Code of Federal Regulations which allow for formal mediation by the Secretary, but the certification and appeals processes are designed to encourage negotiation and compromise between all of the parties involved.¹⁰⁶ Once again, the CMD should be able to “encourage” the would-be permittee to modify its plans.

The third method by which the state should be able to accomplish the goals set forth in this comment is by resorting to litigation when the process outlined above does not prove satisfactory. In both types of consistency determinations (federal agency and federal permittee activities), the state has the option of litigation both before and after any Secretarial action on the matter.¹⁰⁷ Given the strong “Findings and Purpose” statement inserted by Congress in the Coastal Zone Act Reauthorization Amendments of 1990,¹⁰⁸ the extensive coverage of activities contained in the Coastal Use Guidelines,¹⁰⁹ and the track record of other coastal states when disputes have gone as far as litigation,¹¹⁰ Louisiana should win more than its share of the cases.

Finally, the state should, over time, be able to use the sheer coercive pressure of the above plan of action to force change, both in the type of proposals submitted for a consistency determination and in the manner in which federal agencies and their permittees attempt to conduct their activities in the coastal zone.¹¹¹ By strictly interpreting the Louisiana

103. 16 U.S.C. §§ 1452, 1456 (1989), as amended by the Reauthorization Amendments of 1990, §§ 6202, 6208. See also Beyle, *supra* note 102.

104. See 16 U.S.C. § 1456(h) (1989) and 15 C.F.R. §§ 930.43-930.44, 930.55, 930.66, 930.110-930.116 (1990).

105. 15 C.F.R. § 930.116 (1990).

106. 15 C.F.R. §§ 930.64, 930.123-930.134 (1990).

107. 15 C.F.R. § 930.116 (1990).

108. Reauthorization Amendments of 1990, § 6202.

109. La. Admin. Code 43:I.701-43:I.731 (1990). See *supra* note 88.

110. See *supra* notes 89-93.

111. For an example of the ability of the state to use its consistency determination powers in a moderately coercive manner, see Proposal May Give La. More Oil Money, *Baton Rouge State-Times/Morning Advocate*, February 23, 1991, at C-1, col. 2.

Coastal Use Guidelines, consistently "vetoing" proposed activities which do not contribute to the environmental health of the coastal zone, aggressively pursuing mediation and appeals to the Secretary of Commerce, and litigation, the state will eventually wear down its opponents.

While neither the Corps, the oil industry, nor developers will succumb to such tactics without a fight, and while the state will undoubtedly lose its share of the battles, it should ultimately prevail because it will turn the whole process into an administrative ordeal. To the oil industry and developers (and to a lesser extent the Corps) time is money. The entire process described above is, most of all, time consuming. Faced with the prospect of seemingly endless submissions of data, hearings, administrative appeals, and court challenges the federal agencies and permittees conducting activities in the coastal zone should soon come to the conclusion that it is more cost effective to coordinate and cooperate with the CMD than to fight a government bureaucracy armed as it is with Congressional backing.¹¹²

POSSIBLE OBSTACLES TO THE COURSE OF ACTION PROPOSED IN THIS COMMENT

Override Provisions

The first obstacle to the course of action proposed in this comment is the "override" provisions of the CZMA and its supporting regulations.¹¹³ In the case of federal permittees the Secretary of Commerce may find, on his own initiative or upon appeal by the applicant, that the proposed activity is either: (1) consistent with the objectives or purpose of the CZMA, or (2) is necessary in the interest of national security.¹¹⁴ In the case of a federal agency activity, after a final judgment in a federal court finding an agency activity not consistent with a state CMP, the President may exempt the agency from compliance if he determines that the activity is in the paramount interest of the United States.¹¹⁵ In the former case, if such a finding or determination is made, the state will be left with only two options: (1) to accept the override and allow the activity to be conducted, or (2) to challenge it in court.

112. See the Findings and Purpose contained in the Reauthorization Amendments of 1990, § 6202.

113. 16 U.S.C. § 1456(c)(3)(A) (1989), as amended by the Reauthorization Amendments of 1990, § 6208. See also 15 C.F.R. §§ 930.120-930.122 (1990).

114. 16 U.S.C. § 1456(c)(3)(A) (1989), as amended by the Reauthorization Amendments of 1990, § 6208. See also 15 C.F.R. §§ 930.120-930.122 (1990).

115. Reauthorization Amendments of 1990, § 6208(a).

In the latter case, the Presidential determination appears to be final.¹¹⁶

Whatever the substantive basis of the challenge may be, it will be reviewed by the court using administrative law principles. As such, the determination by the Secretary will be accorded great deference, and the state will have to challenge his decision as arbitrary and capricious or as an abuse of discretion.¹¹⁷ Given such a difficult burden of proof, the state will probably only occasionally succeed in overturning an override of either type. However, the standard imposed by statute¹¹⁸ on the federal government is also high in that it requires a formal finding or determination be made in each case before the state decision can be overridden, and the basis for the required finding is limited in scope.¹¹⁹ Finally, there is the reality of the circumstances: the more than two dozen participating coastal state programs, bolstered by the recent Congressional action,¹²⁰ will probably begin to collectively assert more authority in protecting their coastal areas through consistency determinations. Therefore, while the possibility of an override may seem to be a formidable obstacle to the implementation of the proposals made in this comment, in practice an override is unlikely to affect more than a small percentage of the adverse consistency determinations made by the coastal states.

Retaliatory Federal Coercive Powers

The second possible obstacle is that the federal government and the Secretary of Commerce have the ability to exert coercive powers of their own on the state through the withholding of grants and loans related to the CZMA.¹²¹ Should Louisiana exercise its consistency determination powers in the manner proposed, it might, in the process, get too far

116. See 15 C.F.R. § 930.130(d) (1990). In either case (federal agency activity or federal permittee), final action by the Secretary of Commerce on an appeal constitutes final agency action for the purposes of the Administrative Procedure Act. The Presidential exemption for federal agency activities is not applicable until a final judgment in federal court finds an agency activity not consistent with an approved state coastal management plan. See the Reauthorization Amendments of 1990, § 6208(a).

117. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971).

118. 16 U.S.C. § 1456(c)(3) (1989), as amended by the Reauthorization Amendments of 1990, § 6208. See also 15 C.F.R. §§ 930.120-930.122 (1990).

119. 16 U.S.C. § 1456(c)(3) (1989), as amended by the Reauthorization Amendments of 1990, § 6208. See also 15 C.F.R. §§ 930.120-930.122 (1990).

120. Reauthorization Amendments of 1990, §§ 6201-6216.

121. 16 U.S.C. §§ 1454-1455a (1989), as amended by the Reauthorization Amendments of 1990, §§ 6205, 6206, 6207, 6209, 6210.

ahead of the Commerce Department.¹²² Given the fact that both the Bush administration and the oil industry¹²³ adamantly opposed the reauthorization, the Commerce Department will probably not eagerly reward states which use their consistency determination power aggressively with discretionary grants and loans. However, as the recent passage by Congress of a wetlands preservation measure granting Louisiana \$35 million this year and possibly \$50 million per year in the future demonstrates, the state is not without its supporters in Washington in its efforts to protect its coastal zone.¹²⁴

Economic Obstructions

Next, the state will probably incur some economic losses as well as resultant political upheaval if the CMD starts to aggressively assert its authority. Short term losses may occur in oil royalties and oil industry related tax revenues, as well as in income tax and sales tax revenues from especially hard hit areas¹²⁵ where workers suffer job losses attributable to decreased oil and gas exploration and production. However, the oil industry, like any business, is directed by the bottom line. If the price of oil is at a level which offsets the increased costs of compliance with the more stringent coastal protection measures urged herein, this particular obstacle may never be encountered.¹²⁶ The state may also suffer from slowdowns and stoppages of Corps development projects. However, as the state will be the one making the decision on the

122. The Department of Commerce, which includes the NOAA (see *supra* note 41) is, of course, within the executive branch of the U.S. government. It is therefore noteworthy that the Bush administration opposed the reauthorization of the CZMA as amended by Congress. Prior to passage, the President threatened a veto, claiming that certain amendments would "shift the focus of the CZMA from balanced management to coastal protection." See Morris, *White House Tells Congress CZMA Reauthorization Bill May Draw Veto*, *Inside Energy with Federal Lands*, October 1, 1990, OCS Section, at 11. Further, Congress only managed to avoid a Presidential veto by adding an appeals fee to the act, thereby allowing it to be attached to the Omnibus Budget Reconciliation Act of 1990 as a revenue producing measure. See *Reauthorization Amendments of 1990*, § 6208(c).

123. See "National Ocean Industries Association Opposes Legislation Giving States Veto Over OCS Leasing", *PR Newswire*, May 8, 1990.

124. See *La. Wetlands Debut in Bush Budget*, *New Orleans Times-Picayune*, February 5, 1991, at A-1, col. 2. See also *Proposal May Give La. More Oil Money*, *Baton Rouge State-Times/Morning Advocate*, February 23, 1991, at 1C, col. 2.

125. E.g. *Plaquemines, Terrebonne, and Lafourche Parishes*.

126. The same may be said for the potential "taking" problem discussed *infra* at text accompanying notes 127-148. Furthermore, the oil industry can resort to other available technologies to accomplish exploration and production in the coastal zone. This includes directional and/or horizontal drilling and the use of alternative access vehicles such as hovercraft. See Skora, *Air Cushion Vehicles for the Transport of Drilling Rigs, Supplies, and Oil Field Exploration Operations in the Coastal Marshes of Louisiana* (1988).

consistency determination, it is not as though major flood control projects will be halted if the state does not wish them to be. Slowdowns in Corps projects are far more likely, as the state will be using the determination authority to force desired changes in the projects, and the negotiations necessary to produce such changes will probably cause delays in the projects.

Economic setbacks caused by long-range environmental decisions are usually difficult to explain to the voters, so it is almost certain that the course of action proposed in this comment, if implemented, would cause heated debate in the state legislature and possibly some adverse political fallout for the CMD. To limit these possibilities, lessen the impact of the change, and build public support, the CMD will probably have to move at a somewhat restrained pace for the next few years, and fully document the environmental benefits which result from the implementation of the proposals.

Constitutional "Taking"

The fourth possible obstacle is that such a course of action may eventually raise a fifth amendment "taking" question¹²⁷ in court. The question of whether the scope of the land use constraints enacted by the SLCRMA is so onerous as to be a taking that requires compensation has not been decided in Louisiana. However, it is doubtful that such a challenge would prove successful as, with one major exception,¹²⁸ the question has been answered in the negative in both the federal courts and the courts of several other states.¹²⁹ The mere assertion of regulatory

127. U.S. Const. amend. V. "[N]or shall private property be taken for public use, without just compensation."

U.S. Const. amend. XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"

128. See *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). In *Nollan*, a California Court of Appeal had held that the California Coastal Commission could condition issuance of a permit necessary to rebuild a home on the homeowners' transfer to the public of an easement across their beachfront property, and that such a condition did not amount to a taking. The *Nollans* appealed on their takings claim to the Supreme Court. The Court held that a taking of the *Nollans'* property had occurred. However, the Court relied heavily on the character of the governmental action, i.e., that a "permanent physical occupation" of the property by someone other than the owner would occur if the easement was required. This is in marked contrast to the character of governmental action which would occur under the proposals made in this comment, where no physical invasion of private property by the state would occur.

129. See Comment, Determining "Takings" Under Coastal Zone Management Programs in New York and Connecticut, 1 Pace Envtl. L. Rev. 91 (1983). See also *Deltona Corp. v. United States*, 657 F.2d 1184 (Cl. Ct. 1981), cert. denied, 455 U.S. 1017, 102 S. Ct. 1712 (1982).

jurisdiction does not constitute a taking.¹³⁰ Instead, a balancing of private and public interests is required.¹³¹ The Supreme Court has identified three factors, besides the government's interest,¹³² of "particular significance" in determining whether a taking has occurred: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'"¹³³

In assessing the economic impact of the regulation on the claimant, the focus is on interference with rights in the parcel as a whole,¹³⁴ using a comparison of the value of the property before and after regulation.¹³⁵ This degree of reduction in value is then used in conjunction with the other factors to determine if a taking has occurred. While no set amount or degree of reduction in value has been seized upon by the Court, a denial of the "highest and best use," i.e., most profitable use, that would be available in the absence of regulation" does not constitute a taking.¹³⁶ Instead, in order to establish a taking claim, the plaintiff must prove "that as a result of the regulation, the property's value has been reduced and the property has no remaining economically viable use."¹³⁷ Obviously, this is not an easy task for a landowner who has been temporarily deprived of the ability to explore for minerals in one particular fashion—the dredging of canals to reach a desired wellsite.

The second factor, the extent to which the regulation has interfered with investment-backed expectations, should not be a major problem in the context of the proposals made in this comment. The CZMA was originally passed in 1972, and Louisiana gave notice of an intent to

130. "[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking [o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land . . . can it be said that a taking has occurred." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127, 106 S. Ct. 455, 459 (1985).

131. *Agins v. City of Tiburon*, 447 U.S. 255, 260-261, 100 S. Ct. 2138, 2141 (1980). The Supreme Court has also stated "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978).

132. See *infra* text accompanying notes 140-145.

133. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225, 106 S. Ct. 1018, 1026 (1986).

134. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31, 98 S. Ct. 2646, 2662 (1978).

135. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 1248 (1987).

136. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 901 (Fed. Cir. 1986).

137. *Formanek v. United States*, 18 Cl. Ct. 785, 797 (1989).

participate in 1978 with the passage of the SLCRMA. Therefore any investment-backed expectations should, at least after 1978, have been tempered by the knowledge that the state would assert its authority through its regulatory powers in ways which might affect the rate of return expected. "A purchaser who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights."¹³⁸ As for land purchases before 1978, it is doubtful that many of the landowners will be able to prove that they purchased the land solely or primarily for the future extraction of oil and gas.

The third factor, the character of the governmental action, means that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."¹³⁹ Once again, in the context of the proposals made in this comment, this factor should have little impact as there will be no physical invasion by the government of a landowner's property.

Finally, a critical factor in determining whether a taking has occurred, and thus whether compensation is required,¹⁴⁰ is the nature of the State's interest. As the Supreme Court stated in *Nollan v. California Coastal Commission*,¹⁴¹ the standard required is "that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved . . . not that 'the State 'could rationally have decided' that the measure adopted might achieve the State's objective."¹⁴² However, the Court went on to emphasize that a number of its cases "have made clear, . . . that a broad range of governmental purposes and regulations satisfies these requirements."¹⁴³ Given the scope of destruction in the wetlands, the emergency nature of the situation, and the relatively well-accepted causal relationship which exists between dredging and land loss in the

138. *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 611 (M.D. Fla. 1989).

139. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978). See also *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987).

140. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 488, 107 S. Ct. 1232, 1243-1244 (1987).

141. 483 U.S. 825, 107 S. Ct. 3141 (1987). See also *supra* note 128. For an excellent discussion of the *Nollan* decision and its impact on coastal zone management, see Comment, *Staring Down the Barrel of Nollan: Can the Coastal Commission Dodge the Bullet?*, 9 *Whittier L. Rev.* 579 (1987).

142. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3, 107 S. Ct. 3141, 3147 n.3 (1987).

143. *Nollan*, 483 U.S. at 834-35, 107 S. Ct. at 3147.

coastal zone,¹⁴⁴ it does not seem likely that Louisiana will have any problem demonstrating to the courts a strong nexus between the more stringent regulation of dredging and other activities that damage the wetlands and the legitimate state interest of literally preserving its physical being.¹⁴⁵

More simply stated, the denial of a permit to conduct an activity on private land must result in a "practical confiscation of property by restraining the use of the property for 'any reasonable purpose.'"¹⁴⁶ Put another way, it must "render the property unsuitable for any reasonable income . . . and thus destroy its economic value, or all but a bare residue of its value."¹⁴⁷ As stated in the conclusion of a law review article on the subject:

Absent an administrative abuse of discretion, the test . . . requires a showing of an almost complete interference in a landowner's property rights before a taking can be proven . . . it appears that the . . . coastal zone legislation will enable each state to effectively regulate land use without being overly burdened by the requirement of just compensation.¹⁴⁸

CONCLUSION

Louisiana is at a crossroads between development and conservation. The state has recently managed to secure federal funding from Congress to aid the state in its wetlands preservation and restoration efforts.¹⁴⁹ While federal funding is certainly welcome and will help the state effort in a major way, it will not alone be enough. To preserve and restore the wetlands, the state will have to dramatically slow the rate and scope of activities taking place in the coastal zone, and further, act to force those still allowed to conduct such activities to do so in a manner which produces beneficial environmental effects.

One of the few methods that the state has available to accomplish these goals is the aggressive use of its CZMA consistency determination powers. While the use of these powers in the manner proposed in this comment may cause some short-term economic dislocations and concomitant political problems, the tangible results that can be achieved will, in the long run, greatly outweigh such negative results. The alter-

144. See *supra* text accompanying notes 13-18.

145. "[F]ederal and state courts have consistently recognized that the protection and maintenance of wetlands is a proper exercise of governmental authority." *Crow-New Jersey 32 Ltd. v. Township of Clinton*, 718 F. Supp. 378, 384 (D.N.J. 1989).

146. See Comment, *supra* note 129, at 93.

147. *Id.* at 95.

148. *Id.* at 96.

149. See *supra* note 124.

native is for the state to continue the practices and policies which have led to the current deplorable situation. As Louisiana is disappearing at an ever accelerating rate,¹⁵⁰ literally being "washed away" into the Gulf of Mexico, there does not seem to be a choice.

Armed with the newly reauthorized CZMA and its findings, policy statements, and grants of authority to the states over OCS leasing and non-point source pollution problems,¹⁵¹ Louisiana has the tools and Congressional support necessary to effectively implement a new policy of wetlands preservation that will truly change the manner in which activities are conducted in the coastal zone. But the CZMA is only effective as an environmental management tool if it is used aggressively. As Louisiana has forty percent of the nation's wetlands and is experiencing eighty percent of the nation's loss,¹⁵² Louisiana is in the best position among the states to lead the way in coastal protection through aggressive assertion of CZMA authority.

Implementation of the proposals made in this comment amounts to nothing more than the exercise by Louisiana of the full extent of its powers under the CZMA and the state's federally approved Coastal Management Plan and Coastal Use Guidelines. As such, the exercise by Louisiana of its consistency determination powers in the manner proposed should survive any court challenge which may arise. The only reasonable explanation for the state's inaction in the past is the lack of political will to implement such an aggressive plan of action.

In sum, Louisiana has little to lose by trying. Meanwhile, much is being lost on a daily basis while the state remains in its present posture. Given such harsh realities, it is hoped that the state will pursue the proposals made in this comment in as rapid a fashion as is possible. Waiting will only allow for increased destruction in the coastal zone.

J. Christopher Martin

150. "While over 800,000 acres of south Louisiana have been lost to the Gulf of Mexico in the last eighty years, almost sixty percent of these losses have occurred since 1956." Houck, *supra* note 2, at 11-12.

151. Reauthorization Amendments of 1990, §§ 6202, 6203(a)(3), 6208(a).

152. See Gulf Environmental Pressures Grow, *Baton Rouge Morning Advocate*, December 5, 1990, at B-1, col. 2.