

41 S.U. L. Rev. 237

Southern University Law Review

Spring 2014

Article

THE FIGHT FOR THE COAST: IS SUIT AGAINST THE OIL INDUSTRY PART OF THE “MASTER PLAN”?

Kelley R. Dick, Jr. ^{a1}

Copyright (c) 2014 Southern University Law Review; Kelley R. Dick, Jr.

“The coast is critical to our nation's economy and woven into the identity of our communities. Indeed, the coast is such a part of our daily lives that its bounty can be hard to appreciate. But when we step back, we recognize how vital this region is--not just for what it does, but for what it is. Saving it must be a national priority.” ¹

--Coastal Protection and Restoration Authority

I. INTRODUCTION

In recent months, a political firestorm has engulfed the coastal lands of Louisiana fueled by decades of oil company exploration, drilling, and extraction activities in Louisiana's wetlands. This article addresses the pending action by the Southeast Louisiana Flood Protection Authority-East (“the Levee Board” or “SLFPAE”) ² for damages resulting from the loss of Louisiana's coastal wetlands, allegedly caused by the almost one hundred oil *238 companies named as defendants. ³ This action by the Levee Board demands the question: To what extent must Louisiana's long history and deeply rooted notions of autonomous local rule yield to a comprehensive and coordinated statewide plan to repair and to protect Louisiana's coastland?

This article reviews the constitutional and statutory authority of the Levee Board to institute the action in light of post-Hurricanes Katrina and Rita establishment of the Coastal Protection and Restoration Authority (“CPRA”), ⁴ development and legislative approval of the “Master Plan,” ⁵ amendment of the Louisiana Constitution, ⁶ and the constitutional reorganization and regionalization of Louisiana's levee boards. ⁷ The statutory authority of the Levee Board to sue and be sued ⁸ is weighed against the action's potential effect on the state's police power. ⁹

Quantifying the magnitude of the coastal land loss crisis, Part II of this article examines the historical rates, the leading causes of land loss in coastal Louisiana, and the estimated impacts to state and federal economies resulting from disruptions of maritime trade activities, oil and gas industry activities, and commercial seafood activities.

Part III of this article examines state and federal responses to Louisiana's wetlands loss by generally exploring statutory schemes at the federal and state levels. Part III further reviews the legislative response to Louisiana's coastal crisis in the wake of Hurricanes Katrina and Rita by examining the legislative reorganization and redistricting efforts of Louisiana's levee districts, the legislative purpose, and intent behind the creation of the CPRA, and the CPRA's proposed and adopted solution appropriately dubbed the “Master Plan.”

Part IV reviews, generally, the Levee Board's lawsuit by examining the causes of action it alleges. Part IV further discusses *239 the political response and public reception to the lawsuit, including responses by Louisiana Governor Bobby Jindal and various organizations, such as Restore Louisiana Now and the Louisiana Oil and Gas Association.

Part V discusses the Levee Board's authority to bring suit for the restoration of Louisiana's coastal wetlands by examining constitutional guarantees of local government autonomy and its limitations. Demonstrating the battle between local government autonomy and the supremacy of the state to act pursuant to its police power, Part V illustrates when action by a political subdivision may effectively abridge the state's police power in contravention of Louisiana's constitution.

Finally, Part VI identifies potential constitutional challenges facing the maintenance of the Levee Board's action by discussing the broad legislative scheme that encompasses the reorganization of Louisiana's levee districts, the enactment of the CPRA, the approval of the Master Plan, and the concern over Louisiana's wetlands to the state as a whole, which is the subject of the Levee Board's lawsuit.

II. LOUISIANA'S COASTAL CRISIS

A. Coastal Wetland Loss

Since 1932, the United States Geological Survey ("USGS") estimates that Louisiana has lost more than 1,800 square miles of vital coastal wetlands,¹⁰ an area roughly the size of Delaware.¹¹ According to the USGS, Louisiana's wetlands continue to deteriorate at a rate of approximately 75 square kilometers, or 18,500 acres, per year.¹² The disappearance of Louisiana's largest and, arguably, most vital natural resource threatens hundreds of thousands of Louisiana residents' safety, culture, and everyday ways of life.

*240 Research has shown that the two primary processes responsible for the loss Louisiana's coastal lands are subsidence and erosion.¹³ Land subsidence in Louisiana occurs when the elevation of land moves downward relative to the mean sea level.¹⁴ Subsidence among the coastal wetlands can be attributed to rising sea levels, natural geological and environmental processes, as well as a host of human activities.¹⁵ Gradual subsidence in freshwater coastal areas exposes more lands to tidal waters, increasing the effects of hydrological erosion.¹⁶ As subsidence continues and more coastal lands become exposed to the coastal tides and its erosive effects, salt-water intrusion inland causes freshwater organic life, vital to the stability of the coastal wetlands, to die off.

According to the USGS, many human activities have significantly contributed to the total degradation of the wetlands over the past century.¹⁷ The construction of nearly 1,250 miles of levees prevents seasonal flooding and has caused sediments that are vital to the natural revitalization of the wetlands to be deposited far from the Louisiana coastline in the Gulf of Mexico.¹⁸ The development of a system of dredged canals and flood-control structures, constructed to facilitate commercial activities, has facilitated salt-water intrusion into freshwater wetland areas.¹⁹ Finally, the forced drainage of the wetlands to accommodate residential, commercial, and agricultural development has significantly expedited subsidence rates in coastal areas.²⁰

While decades of such human activity is often cited as a leading cause of coastal land loss in Louisiana, identifying each specific cause and its corresponding contribution to the loss of *241 vital wetlands has proven difficult.²¹ Most recently, however, a USGS study supports the hypothesis that oil and gas industry exploration, drilling, and extraction activity is among the primary cause of subsidence among Louisiana's coastal wetlands.²² This study reveals that the period of greatest wetland loss and subsidence coincides with the period of greatest oil and gas production rates in Louisiana's coastal areas.²³

B. Impact on State and Federal Economies

Perhaps the greatest concern over the impact coastal land loss on Louisiana, and the nation as a whole, is the injurious effects that crippled Louisiana industries may have on the vitality of state and national economies.²⁴ With the Port of South Louisiana ranked first and the Port of New Orleans ranked fifth in total trade among United States ports in 2011,²⁵ and the New Orleans Waterborne Customs District ranked first by volume of international cargo in 2012,²⁶ Louisiana's coastal waterways are vital arteries for facilitating domestic and international trade. Heavily dependent on these coastal lands and waterways is the oil and gas industry, whose exploration and refining activities are enabled by a network of some 125,000 miles of pipeline transporting crude oil and natural gas throughout the state and its offshore *242 areas in the Gulf of Mexico.²⁷ Evidencing the significance of Louisiana's oil and gas industry, Louisiana ranked third among states in total energy production in 2011,²⁸ and the oil and gas extracting, refining, and pipelining industry was estimated to support \$77.3 billion in sales for Louisiana firms, generate over \$16 billion in household earnings for Louisiana residents, and support over 310,000 jobs in the State of Louisiana in 2009 alone.²⁹ Louisiana's coastal wetlands provide critical protection of oil and gas infrastructure that are is responsible for supplying 90% of the nation's outer continental oil and gas.³⁰ Finally, in 2011, Louisiana's seafood industry accounted for \$1.8 billion of state revenue and supported over 32,000 jobs for Louisiana residents.³¹ With such a significant portion of Louisiana's industry and the state and national economies so closely connected to, and dependent on, our coastal waterways and estuaries, the extent to which wetland loss might impair maritime trade, oil and gas activities, and commercial fishing in South Louisiana warrants substantial consideration.³²

Potential economic loss is caused by repeated short-term disruptions to oil and gas pipeline activities, transportation activities, and commercial and recreational fishing activities.³³ Each disruption, lasting three to five weeks, to those Louisiana industries results in an estimated \$941.4 million in lost sales, \$291.3 million in lost earnings, and 14,377 in lost jobs.³⁴ National economic loss resulting from one short-term disruption to Louisiana industry reaches a projected \$8.48 billion in lost sales, \$2.42 billion in lost earnings, and 74,921 in lost jobs.³⁵ National economic *243 loss resulting from repeated disruptions occurring once every four years until the year 2050 is projected to reach \$74 billion in lost sales, \$20.4 billion in lost earnings, and an immeasurable loss to employment opportunities.³⁶

III. THE RESPONSE TO THE CRISIS

A. Legislative Action and Reorganization of the Levee Districts

In the first legislative session following Hurricanes Katrina and Rita, the Louisiana legislature passed, and citizens approved, an amendment to Article VI of the Louisiana Constitution by adding Section 38.1.³⁷ This section provides for the redistricting and reorganization of those levee districts recognized as local governmental subdivisions, and states that, "The legislature by law may establish regional flood protection authorities . . . and provide for their territorial jurisdiction, governing authority, powers, duties, and functions."³⁸ Thereafter, the legislature established the Southeast Louisiana Flood Protection Authority-East, and provided its capacity to sue and be sued.³⁹ In doing so, the legislature enacted the following provision: "The authority shall be subject to Part II of Chapter 2 of Title 49 of the Louisiana Revised Statutes of 1950."⁴⁰ This chapter establishes the Coastal Protection and Restoration Authority as the leading authority on matters concerning the development and implementation of comprehensive state policies and programs regarding coastal protection and restoration.⁴¹

C. The Coastal Protection and Restoration Authority

Article 9, Section 1 of the Louisiana Constitution of 1974 provides, “The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement *244 this policy.” Likely acting pursuant to this express grant of power, the legislature created the Coastal Protection and Restoration Authority to ensure the restoration and conservation of Louisiana’s wetlands.

In establishing the CPRA, the legislature expressly intended to strike a balance between the threatened harm to the public and social safety of Louisiana residents against the state’s interest in preserving industry efforts vital to the economic wellbeing of the state.⁴² The legislature identified historical and continuing uncoordinated efforts of various state agencies as a significant threat to the safety of Louisiana residents, the viability of state and local economies, and the long-term disaster recovery efforts.⁴³ To ensure coordinated statewide efforts, the legislature recognized the need for a single agency with authority to articulate the state’s priorities and to focus development and implementation efforts to achieve comprehensive coastal protection.⁴⁴ Consistent with these recognized dangers to public safety, economic wellbeing, and future recovery efforts, as well as the declared public policy of the state in balancing conservation and development and encourage the use of coastal resources,⁴⁵ the legislature established the CPRA. The CPRA was created within the office of the governor to “provide aggressive state leadership, direction, and consonance in the development and implementation of policies, plans, and programs to achieve comprehensive integrated coastal protection.”⁴⁶ Placing the CPRA within the office of the governor, thereby elevating its administration to a position of high political visibility and importance,⁴⁷ the legislature presumably intended to ensure the development of the comprehensive coastal protection plan to satisfy Louisiana voters by rendering its implementation amenable to political pressures.

The Coastal Protection and Restoration Authority Board (the “CPRA Board”) discharges the powers and duties of the CPRA.⁴⁸ The CPRA Board consists of twenty members including, *245 among other commissioners, politically elected officials, and other appointees, the secretaries, or their designees, of the Department of Natural Resources, the Department of Wildlife and Fisheries, the Department of Environmental Quality, and the Department of Economic Development.⁴⁹ Notably, seven of the twenty board members are appointed by the governor from nominations submitted by levee districts located within the coastal region, legislators of coastal parishes, and governing authorities of coastal parishes.⁵⁰ Louisiana Revised Statute section 49:214.5.2 provides, “The board shall represent the state’s position in policy relative to the protection, conservation, enhancement, and restoration of the coastal area of the state through oversight of integrated coastal protection projects and programs . . . all consistent with the legislative intent”⁵¹ The stated legislative intent is to balance conservation with economic development.⁵² The CRPA Board is charged with developing, coordinating, and providing oversight for a comprehensive coastal protection master plan while working with state agencies and political subdivisions including levee districts and coastal parishes.⁵³ In order to ensure effective implementation of the master plan, the CPRA Board is empowered to take actions against any entity, including political subdivisions, to enforce compliance with the comprehensive master coastal protection plan through civil action, including the seeking of injunctive relief.⁵⁴

C. The “Master Plan”

In an effort to address mounting catastrophic loss of Louisiana’s coastal wetlands, the Louisiana legislature directed the CPRA to develop a plan for a safe and sustainable coastline.⁵⁵ The legislature specified that the Master Plan” must include a comprehensive strategy addressing the protection, conservation, enhancement, and restoration of the coastal area through construction *246 and management of coastal protection programs and projects consistent with the legislative intent,⁵⁶ which includes achieving a proper balance between development and conservation.⁵⁷ To this end, the CPRA identifies, evaluates, and targets large-scale projects throughout the coastal region for development and implementation.⁵⁸ Consistent with the legislative intent in balancing conservation and development, when evaluating potential restoration projects, the CPRA takes into account various decision criteria including, among others, distribution of flood risk reduction across socioeconomic groups,

flood protection of strategic assets, support of navigation, and support of oil and gas.⁵⁹ The Master Plan recognizes the many coastal Louisiana communities whose citizens' work predominantly in the oil and gas industry,⁶⁰ and supports economic growth of Louisiana by providing additional flood risk reduction to those communities, as well as building and sustaining land that serves to protect valuable oil and gas infrastructure.⁶¹

Since 2007, the CPRA has built or improved 159 miles of levees, secured approximately \$17 billion in state and federal funding for protection and restoration projects, mobilized over 150 projects into design and construction, and constructed 32 miles of barrier islands and berms.⁶² This massive, statewide effort includes, among others, structural protection, bank stabilization, shoreline protection, infrastructure, barrier island restoration, marsh creation, and sediment diversion projects.⁶³

Through implementation of the Master Plan, the CPRA estimates net annual coastal land loss will cease by year twenty.⁶⁴ Over the planned term of fifty years, the CPRA's goal is to build or sustain up to 800 square miles of coastal wetlands.⁶⁵ At the end of the fifty-year plan term, the Master Plan aims to improve flood protection for every community in coastal Louisiana, reduce *247 expected flood damage throughout Louisiana's coast by up to \$18 billion annually, significantly reduce or eliminate risk of flooding from a 500 year storm for the Lake Charles and Greater New Orleans areas, and reduce overall risk to coastal areas by reducing storm surge.⁶⁶ Long-term benefits of the Master Plan include supporting coastal industries and infrastructure, sustaining coastal ecosystems thereby supporting commercial and recreational fisheries, and increasing competitiveness of Louisiana ports thereby continuing the international superiority of Louisiana's maritime transportation industry.⁶⁷

Because the Master Plan carries a \$50 billion price tag, the CPRA relies heavily on federal programs to implement restoration projects throughout the state. Various federal acts and grants provide the CPRA with critical funding for the implementation of the Master Plan, including: 1) the Coastal Wetlands Planning, Protection, and Restoration Act;⁶⁸ 2) the Coastal Impact Assistance Program;⁶⁹ 3) the Water Resources Development Act;⁷⁰ and most recently 4) the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act.⁷¹ Along with a variety of federal contributions derived from oil industry activity, state contributions derived almost exclusively from offshore oil and gas activities, including state revenues, severance taxes, and royalty payments associated with the leasing of state lands for oil and gas production, help fund the CPRA's coastal restoration efforts.⁷²

*248 IV. THE LEVEE BOARD'S LAWSUIT

On July 24, 2013, the Southeast Louisiana Flood Protection Authority-East filed suit in the Civil District Court of Orleans Parish in the State of Louisiana.⁷³ The Levee Board demanded nearly 100 oil and gas companies ("oil company defendants") repair damages to Louisiana's coastline caused by dredging, drilling, and extraction activities--the effects of which have substantially contributed to the loss of thousands of acres of coastal lands that are essential to protect South Louisiana from the threat of coastal flooding.⁷⁴ According to the Levee Board, the loss of these coastal lands increases the threat of catastrophic storm surges, and requires costly construction, maintenance, and coastal restoration efforts to mitigate the risk of catastrophic flooding.⁷⁵ The Levee Board is allegedly responsible for a portion of those costly efforts.⁷⁶

The Levee Board relies on federal and state laws and regulations, as well as state permits issued by the Louisiana Office of State Lands.⁷⁷ Many of those regulations require maintaining and restoring dredged canals, confining those canals to the constraints of the right-of-way permits, and making reasonable efforts to minimize effects of the defendants' activities.⁷⁸

The Levee Board argues that the various state and federal regulations establish a standard of care required of the defendants, which they have failed to uphold.⁷⁹ The defendants' conduct falling below this standard of care serves as the basis for many of

the Levee Board's tort claims, including negligence, private nuisance, and public nuisance.⁸⁰ The Levee Board further alleges that 1) the defendants knew or should have known that their standard of conduct did, and continues to pose a threat of flooding to residents, and 2) the defendants could have prevented that threat through the exercise of reasonable efforts.⁸¹ The Levee Board also argues that the defendants breached their contracts *249 with the state by failing to confine the dredged canals to the areas permitted by their right-of-way permits.⁸² Finally, the Levee Board argues that as third party beneficiaries to the right-of-way agreements, the Levee Board has the right to bring suit for enforcement of those agreements.⁸³

In the wake of the lawsuit, political response has come swiftly and harshly to some Louisiana leaders. Just one day after the suit was filed, Louisiana Governor Bobby Jindal released a statement saying:

We're not going to allow a single levee board that has been hijacked by a group of trial lawyers to determine flood protection, coastal restoration and economic repercussions for the entire State of Louisiana The lawsuit oversteps the authority of the [CPRA] board by attempting to act on behalf of the state to determine coastal policy.⁸⁴

In the press release, the governor's office contended that the Louisiana legislature established the CPRA as the single entity responsible for the state's policy for coastal issues, and the independent actions of other agencies jeopardizes and undermines the CPRA's ability to implement the Master Plan.⁸⁵ The Levee Board's commissioner, John Barry, effectively lost his seat when he was not selected for reappointment just months after the lawsuit was approved by the Levee Board.⁸⁶ The ousted commissioner then founded a non-profit organization, Restore Louisiana Now, to support the Levee Board's action and assist in lobbying against lawmaker efforts to kill the lawsuit.⁸⁷ Further, the Louisiana *250 Oil and Gas Association has filed suit against Attorney General Buddy Caldwell demanding that he rescind his approval for the contract between the Levee Board and the lawyers retained to represent it.⁸⁸

V. HOME RULE AUTONOMY AND THE STATE'S POLICE POWER

A. Local Government Autonomy

"Home rule authority" is deeply rooted in Louisiana's history and firmly established in the state's constitution. Local governments of Louisiana rely on home rule authority and are not likely to take kindly to legislative intrusion into matters of local concern.⁸⁹ Article VI of the Louisiana Constitution of 1974 gives local government the "freedom and flexibility to manage its own local affairs without undue legislative influence."⁹⁰ Article VI identifies three categories of local governments: 1) those with home rule charters pre-dating the 1974 constitution,⁹¹ 2) those with home rule charters adopted after the 1974 constitution,⁹² and 3) local governmental subdivisions which have no home rule charters.⁹³ Outlining the general powers of constitutionally enabled local governments and political subdivisions without home rule charters, Article VI provides, "The governing authority of a local governmental subdivision . . . may exercise any powers and perform any function necessary, requisite, or proper for the management of its affairs."⁹⁴ Regardless of the home rule status of a local governmental subdivision, Article VI, section 9 expressly limits the authority of local governments⁹⁵ by providing that "the *251 police power of the state shall never be abridged."⁹⁶ Still, if the words of the constitution are to be given any meaning, it stands to reason that the local governments of Louisiana, levee boards, parishes, and municipalities alike, retain authority to manage matters of local concern without intrusion by the state.

B. State's Police Powers: When Abridged?

Reviewing state efforts to regionalize coastal restoration efforts and recognizing the massive and comprehensive efforts needed to restore Louisiana's damaged coastline, Chancellor Emeritus and Professor of Law John J. Costonis observes, "Local voices must be heard. But the scope and costs of the coastal restoration and protection mission that lies ahead precludes a process in which they, rather than the CPRA, ultimately determine the restoration, protection, and land use parameters that shape Louisiana's coast of the future."⁹⁷ Consequently, the difficulty lies with defining the not-so-fine line where political, historical, and constitutional considerations dictate the boundary between matters subject to local control, and those where significant state concern justifies legislative interference into seemingly local matters.

Recognizing the constitutional principle that the state's police power cannot be surrendered, the Louisiana Supreme Court explained that [Article VI, section 9 of the Louisiana Constitution](#) "was adopted as a principle of harmonizing the replete home rule powers granted to local governments with a basic residuum of the state's power to initiate legislation and regulation necessary to protect and promote the vital interests of its people as a whole."⁹⁸ In *City of New Orleans v. Board of Commissioners*, defendant levee district argued that a statute enabling the levee district's land development was an exercise of the state's police power, thereby superseding the city's authority to regulate defendant's development.⁹⁹ There, Justice Dennis, following the rationale of his majority opinion in *Francis v. Morial*,¹⁰⁰ articulated a three-part test *252 to determine whether an action by a home rule entity abridges the police power of the state: 1) the claimant must show that the local action conflicts with "an act of the state legislature that is necessary to protect the vital interest of the state as a whole;" 2) the claimant must show that the state statute and the local ordinance are "incompatible and cannot be effectuated in harmony;" and 3) to prove the state's action is "necessary" to protect a vital interest of the state, it must be shown that protection of that interest cannot be achieved through "alternate means significantly less detrimental to home rule powers and rights."¹⁰¹ More simply stated, the challenger must show that the state has acted pursuant to its police power and that the state and local actions are incompatible.

C. What Constitutes an Exercise of the State's Police Power?

The question of whether the state is acting pursuant to its police power is resolved on a case-by-case basis.¹⁰² The police power has been described as "the inherent power of the state to govern persons and things, within constitutional limits, for promotion of general security, health, morals, and welfare."¹⁰³ Still, the police power extends only to such measures as are reasonable under all the surrounding circumstances.¹⁰⁴ Thus, for a state's action to be considered a valid exercise of the police power, "[T]he courts must be able to see that its operation tends in some degree to prevent an offense or evil or otherwise preserve public health, morals, safety, or welfare."¹⁰⁵

In *New Orleans Campaign for a Living Wage v. City of New Orleans*, the Louisiana Supreme Court held that a state statute prohibiting a local government from establishing a minimum wage was a valid exercise of the state's police power, thereby finding a city ordinance seeking to establish a minimum wage an *253 unconstitutional abridgment of the state's police power.¹⁰⁶ Looking to the legislative intent, the court found that the statute itself purported to be an exercise of the state's police power.¹⁰⁷ Justice Kimball, writing for the majority, recognized the role of the legislature to make policy decisions for the state, and determined that it was the policy of the state to leave minimum wage decisions to the state in order to preserve consistency in the wage.¹⁰⁸ Finally, Justice Kimball noted that, because minimum wage is generally intended to ensure employment at fair and reasonable wages and simulate the economy as a whole, state regulation of minimum wage rates is of vital interest to the state and tends to preserve the public welfare.¹⁰⁹ Thus, even if the legislature had not instructed that the statute was enacted pursuant to the state's police power, it would, nevertheless, be considered a valid exercise of the state's police power.¹¹⁰

A state statute restricting the ability of a local government to "sue and defend . . . in all courts and places in all matters and proceedings," is a valid exercise of the state's police power if the local government's authority to sue might be used as a means to regulate a major industry.¹¹¹ In *Morial v. Smith & Wesson Corp.*, the city of New Orleans filed suit against numerous firearm

manufacturers pursuant to the Louisiana Products Liability Act.¹¹² Shortly after the city instituted the action, the legislature enacted a law precluding suits from being filed by any political subdivision or local government against firearms manufacturers, and reserved the power to institute such an action to the state.¹¹³ The court found that the state statute was a valid exercise of the state's police power, because allowing several municipalities to file suits effectively attempting to regulate the firearm industry in different ways and degrees might threaten the public safety and welfare by resulting in “haphazard and inconsistent rules *254 governing firearms in Louisiana.”¹¹⁴ Because “the City may freely exercise its power to sue in all matters and proceedings unless [that] power conflicts with a valid exercise of the state's police power,” and the statute was held a valid exercise of the state's police power, the city's action against the firearm manufacturers was held unconstitutional.¹¹⁵

VI. DISCUSSION

Proponents of the Levee Board's lawsuit face seemingly insurmountable constitutional and statutory challenges in the coming months. Relying on the Levee Board's constitutional authority as a local government, regardless of their home rule status, proponents must withstand a possible police power challenge by the state. One potential challenge is that by enacting the CPRA, the legislature has acted pursuant to its police power, and the action by the Levee Board inconsistent with the legislatively approved Master Plan abridges that power. Challengers may further argue that the Levee Board's lawsuit, while involving matters of Levee Board concern by the nature of the action, is tantamount to a matter of utmost state importance because the wetlands are directly tied to the economic wellbeing of the state, and therefore outside of the scope of the Levee Board's authority to govern matters of local concern. Challengers will likely point to the potential preemptive effects of the acts establishing the CPRA and the legislative approval of the Master Plan by arguing by express terms the legislature intended to preempt any Levee Board action not consistent with the CPRA or the Master Plan.

A. CPRA Enactment and “Master Plan” as Exercise of State's Police Power

Article 9, section 1 of the Louisiana Constitution of 1974 provides, “The natural resources of the state, including air and water . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.” By its own terms, the constitution elevates the wellbeing of the natural resources and the environment of the state to a *255 level of utmost importance, such that its preservation is mandated consistent with the health, safety, and welfare of all citizens of the State of Louisiana. Thus, “[T]he constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.”¹¹⁶ In enacting the CPRA, the legislature expressly recognized the harm a deteriorating coastline presents to Louisiana's residential, agricultural, energy, and industrial development.¹¹⁷ In tandem with the constitutional mandate that environmental protections be considered along with economic, social, and other factors, the legislature directed the CPRA to develop and implement a comprehensive and integrated coastal restoration Master Plan that balances wetlands conservation against the needs of the state at large for continued economic growth and development.¹¹⁸ Having such a monumental impact on the state's economic wellbeing,¹¹⁹ and with the general wellbeing of all Louisiana citizens, a direct product of the economic health of the state,¹²⁰ the conservation of Louisiana's wetlands is undoubtedly a goal within the scope of the state's police powers. Accordingly, the legislature adopted means by which conservation efforts of arguably the most vital natural resources of the state are carefully balanced against continued development.¹²¹

Challengers of the Levee Board's lawsuit recognize that, as part of the sweeping statutory scheme that is the center of today's controversy, the legislature reorganized levee districts into regional authorities,¹²² enacted the CPRA as a the single entity responsible for developing and implementing a comprehensive coastal restoration plan,¹²³ placed the newly created regional authorities under the direction of the CPRA,¹²⁴ made the levee districts *256 and various local governments answerable to

the CPRA Board,¹²⁵ and approved the CPRA's comprehensive Master Plan for the restoration of Louisiana's coastline.¹²⁶ By directly taking action against the oil industry for damages to Louisiana's coastline, the Levee Board's lawsuit is likely inconsistent with the Master Plan's goal of restoring the wetlands in a manner considerate of the effects on the oil and gas industry.¹²⁷ It follows that by taking action directly against almost one hundred oil companies for restoration of Louisiana's coastlands, the lawsuit likely flies in the face of the express policy of the state in striking a balance between restoration and development.¹²⁸ Thus, the action by the Levee Board is inconsistent with the CPRA's Master Plan and the expressed policy of the state likely abridges the state's police power in contravention of Louisiana's constitution.¹²⁹

B. Levee Board's Lawsuit on Matters of State Concern

In light of the role that the wetlands play in the overall wellbeing of Louisiana industry,¹³⁰ challengers will further argue that the Levee Board's action is on matters of statewide concern rather than purely local matters.¹³¹ Although historically a state with deep libertarian roots wherein local governments jealously guard their authority to legislate on matters of local concern against intrusion and influence from above,¹³² the post Hurricanes Katrina and Rita regionalism movement, evidenced by constitutional amendments and sweeping reorganization and redistricting legislation,¹³³ will likely support the argument that comprehensive wetlands restoration and conservation is far beyond the purview of one local, or even regional, governing authority. Moreover, the deleterious effects that a damaged Louisiana coastline *257 might have on state and federal economies, and to such an astounding magnitude,¹³⁴ warrants a finding that restoration and conservation of Louisiana's wetlands is well beyond mere local concern of the regional levee authorities. Instead, as evidenced by the many federal contributions to funding restoration projects,¹³⁵ Louisiana's coastal crisis is one of national concern.¹³⁶ Accordingly, action for damages to restore or repair Louisiana's wetlands, even those lands located specifically in a Coastal Zone Management area, will likely be a task for state enforcers, and not an action for one local government of the state.

VII. CONCLUSION

The independent action of the Levee Board finds little place among the broad statutory scheme that regionalizes levee districts, establishes the CPRA, subjects regional levee authorities to the authority of the CPRA, makes local governments answerable to the CPRA Board, and approves comprehensive and integrated plan for the restoration and conservation of Louisiana's coastline at the state level. Although historical considerations weigh in defining the role of local government in an ever-evolving Louisiana political and constitutional landscape, one truth may slowly be realized--to ensure the welfare of all Louisiana citizens so closely dependent on the health of Louisiana industry, and the health of Louisiana industry so closely dependent on the vitality of our coastline, local authority must yield to state efforts in restoring and conserving the Louisiana wetlands.

Footnotes

^{a1} Kelley, R. Dick, Jr., J.D. Candidate 2015, Southern University Law Center. B.S. Engineering, Louisiana State University, 2010 (Minors: Technical Sales & Business Administration). The author would like to thank Professor Winston Riddick, Professor of Law, Southern University Law Center, for his guidance, support, and response throughout the editorial process.

¹ COASTAL PROTECTION & RESTORATION AUTH. OF LA., LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 21 (2012) [hereinafter THE MASTER PLAN], available at <http://www.lacpra.org/assets/docs/2012%20Mater%20Plan/Final%20Plan/2012%20Coastal%20Master%20Plan.pdf>.

² *Se. La. Flood Prot. Auth. v. Tenn. Gas Pipeline Co.*, 2013 WL 3948577 (La. Dist. Ct., Orleans Parish filed July 24, 2013).

- 3 Petition for Damages & Injunction, *Se. La. Flood Prot. Auth. v. Tenn. Gas Pipeline Co.*, No. 13-6911 (La. Dist. Ct., Orleans Parish filed July 24, 2013).
- 4 2005 La. Acts. No. 8.
- 5 THE MASTER PLAN, *supra* note 1, *approved by* S. Con. Res. 46, 2012 Leg., 38th Reg. Sess. (La. 2012).
- 6 LA. CONST. art . VI, § 38.1.
- 7 [LA. REV. STAT. ANN. § 38:330.1](#) (2012).
- 8 *Id.* at 309(B).
- 9 LA. CONST. art . IV, § 9.
- 10 COUVILLION, B.R., U.S. GEOLOGICAL SURVEY, LAND AREA CHANGE IN COASTAL LOUISIANA FROM 1932 TO 2010 (2011), *available at* <http://pubs.usgs.gov/sim/3164> (last visited October 14, 2013).
- 11 *Id.*
- 12 *Louisiana Coastal Wetlands: A Resource At Risk*, U.S. GEOGRAPHICAL SURV., <http://pubs.usgs.gov/fs/la-wetlands/> (last visited October 14, 2013).
- 13 *Subsidence and Wetland Loss Related to Fluid Energy Production, Gulf Coast Basin: Wetland Subsidence and Erosion*, U.S. GEOGRAPHICAL SURV. (May 6, 2013), <http://coastal.er.usgs.gov/gc-subsidence/subsidence.html>.
- 14 VIRGINIA R. BURKETT ET AL., SEA-LEVEL RISE AND SUBSIDENCE: IMPLICATIONS FOR FLOODING IN NEW ORLEANS, LOUISIANA, OSS FOUND. (2003), *available at* <http://ossfoundation.us/projects/environment/global-warming/sea-level-rise/slr-research-summary/Sea-Level-Rise.pdf> (last visited October 14, 2013).
- 15 *Id.*
- 16 *Id.*
- 17 *Louisiana Coastal Wetlands: A Resource At Risk*, *supra* note 12.
- 18 *Id.*
- 19 *Id.*
- 20 *Id.*
- 21 *Subsidence and Wetland Loss Related to Fluid Energy Production*, *supra* note 13.
- 22 *Subsidence and Wetland Loss Related to Fluid Energy Production, Gulf Coast Basin: Induced Subsidence Related to Hydrocarbon Production*, U.S. GEOGRAPHICAL SURV. (May 6, 2013), <http://coastal.er.usgs.gov/gc-subsidence/induced-subsidence.html>.
- 23 *Id.*
- 24 DR. JAMES A. RICHARDSON & DR. LOREN C. SCOTT, THE ECONOMIC IMPACT OF COASTAL EROSION IN LOUISIANA ON STATE, REGIONAL, AND NATIONAL ECONOMIES 12 ((2004), *available at* http://dnr.louisiana.gov/assets/docs/energy/policypapers/AW_EconomicImpactofCoastErosion.pdf (last visited October 15, 2013).
- 25 United States Army Corps of Engineers, *The U.S. Waterway System Facts - Fact Card 2012*, NAVIGATION DATA CENTER, <http://www.navigationdatacenter.us/factcard/factcard.htm> (last visited July 30, 2013).
- 26 *Port Industry Statistics - U.S. Waterborne Trade 2012 by Customs Districts*, AM. ASS'N PORT AUTHORITIES, <http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=900&navItemNumber=551> (last visited August 1, 2013) (Data provided by United States Army Corps of Engineers).

- 27 Dr. LOREN C. SCOTT, THE ENERGY SECTOR: STILL A GIANT ECONOMIC ENGINE FOR THE LOUISIANA ECONOMY 45 (2011), available at [http:// www.lmoga.com/assets/Economic_Impact_Study_2011.pdf](http://www.lmoga.com/assets/Economic_Impact_Study_2011.pdf) (last visited October 17, 2013).
- 28 *Rankings: Total Energy Production, 2011*, U.S. Energy Infor. Admin., available at <http://www.eia.gov/state/rankings/?sid=US#/series/101>.
- 29 THE ENERGY SECTOR, *supra* note 27, at 46.
- 30 THE MASTER PLAN, *supra* note 1, at 20.
- 31 NAT'L MARINE FISHERIES SERV., U.S. DEPT OF COMMERCE, FISHERIES ECON. OF THE U.S. 2011: ECON. AND SOCIOCULTURAL STATUS AND TRENDS SERIES 128 (2012)), available at [http:// www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2011/FEUS%202011-Revised.pdf](http://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2011/FEUS%202011-Revised.pdf) (last visited October 17, 2013).
- 32 RICHARDSON, *supra* note 24, at 12.
- 33 *Id.* at 5-10.
- 34 *Id.* at 9.
- 35 *Id.*
- 36 *Id.*
- 37 2006 La. Sess. Law Serv. 1st Ex. Sess. Act 43 (S.B. 9) (West).
- 38 LA. CONST. art . VI, § 38.1.
- 39 LA. REV. STAT. ANN. § 38:330.1 (2012).
- 40 *Id.*
- 41 *Id.* § 49:214.1 .
- 42 *See id.* (Legislative purpose and intent for the acts establishing the CPRA).
- 43 *Id.*
- 44 *Id.*
- 45 *Id.* § 49:214.1(D).
- 46 *Id.* § 49:214.1(E).
- 47 *Id.*
- 48 *Id.* § 214.5.1(A).
- 49 *Id.* § 214.5.1(B).
- 50 *Id.* § 214.5.1(B)(10).
- 51 *Id.* § 49:214.5.2; *see also id.* § 49:214.1 (2012) (Legislative intent is to balance conservation and development and encourage the use of Louisiana's coastal resources.).
- 52 *Id.* § 49:214.1.
- 53 *Id.* § 214.5.2(A)(2).
- 54 *Id.* § 214.5.2(A)(6).

- 55 THE MASTER PLAN, *supra* note 1, at 24.
- 56 LA. REV. STAT. ANN. § 49:214.5.2(A)(2) (2012).
- 57 *Id.* § 214.1(B).
- 58 THE MASTER PLAN, *supra* note 1, at 25.
- 59 *Id.* at 56-57.
- 60 *Id.* at 152.
- 61 *Id.*
- 62 *Id.* at 25.
- 63 *Id.* at 30.
- 64 *Id.*
- 65 *Id.* at 29.
- 66 *Id.* at 32.
- 67 *Id.* at 32-33.
- 68 Coastal Wetlands Planning, Protection and Restoration Act of 1990, Pub. L. No. 101-646, 104 Stat. 4761 § 301 (1990) (codified at 16 U.S.C.A. § 3951).
- 69 Coastal Impact Assistance Program, Pub. L. No. 105-58, 119 Stat. 594 § 384 (2005) (codified at 43 U.S.C.A. § 1356a).
- 70 Water Resources Development Act, Pub. L. No. 110-114, 121 Stat. 1041 (2007) (codified at 33 U.S.C.A. § 2201).
- 71 Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012, Pub. L. No. 112-141, 126 Stat. 405 § 1602 (2012) (codified at 33 U.S.C.A. § 1321).
- 72 LA. REV. STAT. ANN. § 49:214.5.4 (2012).
- 73 Petition for Damages & Injunction, *Supra* note 3.
- 74 *Id.* at 8-10.
- 75 *Id.* at 12-15.
- 76 *Id.*
- 77 *Id.* at 16-17.
- 78 *Id.*
- 79 *Id.* at 7-9.
- 80 *Id.* at 17-21.
- 81 *Id.*
- 82 *Id.* at 22-23.
- 83 *Id.*

- 84 Louisiana Office of the Governor, *Governor Jindal Demands Board Pull Lawsuit to Stop Trial Lawyer Windfall*, (July 25, 2013) [http:// gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&catID=2&articleID=4160](http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&catID=2&articleID=4160).
- 85 *Id.*
- 86 Jeff Adelson, *Proponent of Oil, Gas Suit Loses Spot on Levee Board*, ADVOCATE, Oct. 3, 2013, available at <http://theadvocate.com/news/7199951-123/lead-proponent-of-oil-and>.
- 87 Jeff Adelson, *Ousted flood authority member launches nonprofit to support lawsuit*, ADVOCATE, Nov. 24, 2013, available at <http://theadvocate.com/news/7630705-123/ousted-flood-authority-member-launches>.
- 88 Jeff Adelson, *Oil and gas association challenges AG's approval of contract for coastal lawsuit*, ADVOCATE, Dec. 17, 2013, available at <http://theadvocate.com/news/7863346-123/oil-and-gas-association-challenges>.
- 89 John J. Costonis, *Two Years and Counting: Land Use and Louisiana's Post-Katrina Recovery*, 68 LA. L. REV. 349, 355-56 (2008).
- 90 *Morial v. Smith & Wesson Corp.*, 00-1132, p. 16 (La. 4/3/01); 785 So. 2d 1, 14 (quoting *Miller v. Oubre*, 96-2022, p. 9 (La. 10/15/96); 682 So. 2d 231, 236).
- 91 LA. CONST. art . VI, § 4.
- 92 *Id.* § 5.
- 93 *Id.* § 7.
- 94 *Id.*
- 95 *Savage v. Prator*, 04-2904, p. 9 (La. 1/19/06); 921 So. 2d 51, 54.
- 96 LA. CONST. art . VI, § 9.
- 97 Costonis, *supra* note 89, at 363-64.
- 98 *City of New Orleans v. Bd. of Comm'rs*, 93-0690, p. 32 (La. 7/5/94); 640 So. 2d 237, 249.
- 99 *Id.* at 241.
- 100 *Francis v. Morial*, 455 So. 2d 1168 (La. 1984).
- 101 *City of New Orleans*, 640 So. 2d at 252; *See also*, Costonis, *supra* note 89, at 373-74.
- 102 *Morial v. Smith & Wesson Corp.*, 00-1132, p. 16 (La. 4/3/01); 785 So. 2d 1, 15.
- 103 *Francis*, 455 So. 2d at 1172; *See also Morial*, 785 So. 2d at 15.
- 104 *Francis*, 455 So. 2d at 1172; *Schwegmann Bros. v. La. Bd. of Alcoholic Bev. Control*, 43 So. 2d 248 (1949); *Morial*, 785 So. 2d at 15.
- 105 *Francis*, 455 So. 2d at 1172-73; *See also Morial*, 785 So. 2d at 15.
- 106 *New Orleans Campaign for a Living Wage v. City of New Orleans*, 02-0991, p. 1 (La. 9/4/02); 825 So. 2d 1098, 1100.
- 107 *Id.* at 1105.
- 108 *Id.* at 1106.
- 109 *Id.* at 1107.
- 110 *Id.*
- 111 *Morial v. Smith & Wesson Corp.*, 00-1132, p. 16 (La. 4/3/01); 785 So. 2d 1, 1.

- 112 *Id.* at 6.
- 113 *Id.*
- 114 *Id.* at 16.
- 115 *Id.* at 15.
- 116 *Save Ourselves, Inc. v. La. Env'tl. Control Com.*, 83-1480, p. 11 (La. 5/14/84); 452 So. 2d 1152, 1157.
- 117 LA. REV. STAT. ANN. § 49:214.1(A) (2012).
- 118 *See generally, id.* § 49:214.1 (Legislative purpose and intent for the acts establishing the CPRA).
- 119 *See* Part II(b) above.
- 120 *See New Orleans Campaign for a Living Wage v. City of New Orleans*, 02-0991, p. 1 (La. 9/4/02); 825 So. 2d 1098, 1107.
- 121 LA. REV. STAT. ANN. § 49:214.1 (2012).
- 122 *Id.* § 38:330.1.
- 123 *Id.* § 49:214.1.
- 124 *Id.* § 38:330.1.
- 125 *Id.* § 49:214.5.2(A)(6).
- 126 THE MASTER PLAN, *supra* note 1, *approved by* S. Con. Res. 46, 2012 Leg., 38th Reg. Sess. (La. 2012).
- 127 *Id.* at 56-57.
- 128 LA. REV. STAT. ANN. § 49:214.1 (2012).
- 129 *New Orleans Campaign for a Living Wage v. City of New Orleans*, 02-0991, p. 1 (La. 9/4/02); 825 So. 2d 1098, 1107 (City ordinance establishing minimum wages abridged state's police power where state declared it public policy to leave minimum wage rates up to the determination of the legislature.).
- 130 *See supra* Part IIB.
- 131 *See supra* Part IIA-B.
- 132 *See generally, Costonis, supra* note 89.
- 133 *See generally, Costonis, supra* note 89.
- 134 *See supra* Part IIB.
- 135 *See supra* text accompanying notes 63-67.
- 136 THE MASTER PLAN, *supra* note 1.