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# CLEANUP OF CONTAMINATED OYSTER BEDS UNDER THE CLEAN WATER ACT AND LOUISIANA'S ENVIRONMENTAL AND WATER QUALITY LAWS<sup>1</sup>

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## I. INTRODUCTION

The State of Louisiana lies entirely in the Gulf Coastal Plain. Surface water covers more than 3,100 square miles in Louisiana, with twelve major river basins, some 66,000 miles of rivers and more than one million acres of lakes and reservoirs within the state's borders.<sup>2</sup> Recreational and commercial fishing contributes over \$1.0 billion to the economy of Louisiana annually.<sup>3</sup> Commercial marine fishing in Louisiana has a yearly average estimated dockside value of \$300 million,<sup>4</sup> with oyster production representing some \$30 million of that total annual value.<sup>5</sup> Based on data compiled in January of 2000, Louisiana is the top producer of oysters in the Gulf of Mexico region, with an annual harvest of more than 13,000,000 pounds,<sup>6</sup> and approximately 415,459 acres leased to commercial oyster farmers.<sup>7</sup> Nearly 60% of the nation's oysters are produced in the Gulf of Mexico region.<sup>8</sup>

The successful propagation of oysters requires stable physical and chemical parameters in the water column and sediments

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<sup>2</sup>Louisiana Department of Environmental, State of Louisiana, Water Quality Management Plan, Water Quality Inventory Section 305(b), Part II, Ch. 1, p.1-3. (2000), available at <http://www.deq.state.la.us/planning/305b/2000/305b-2.htm>.

<sup>3</sup><http://www.dnr.state.la.us>, Louisiana Department of Natural Resources, Louisiana Coastal Facts (last visited 11/2/00).

<sup>4</sup>*Id.* at Louisiana Coastal Facts.

<sup>5</sup>Oyster Strike Force, Louisiana Department of Wildlife and Fisheries, available at <http://www.wlf.state.la.us/apps/netgear/index.asp?cn=lawlf&pid=582> at para. 1, (last visited Nov. 2, 2000).

<sup>6</sup>1999 Oyster Landings, Department of Wildlife and Fisheries, available at <http://oysterweb.dnr.state.la.us/oyster/oysterland.htm>, (last visited Nov. 2, 2000).

<sup>7</sup>LDWF Oyster lease Survey Section, Department of Wildlife and Fisheries, available at <http://oysterweb.dnr.state.la.us/oyster/oystertable.htm>, (last visited Jan. 2, 2001).

<sup>8</sup>Landings, *supra* note 6.

that are home to the oyster beds. Oysters are highly sensitive to the quality of their habitat, affected by everything from water temperature to the slightest change in mineral concentration in the water.<sup>9</sup> Oysters feed by filtering water and collecting nourishment in the process. As a result, oysters and other shellfish collect chemicals and other pollutants from the waters where they live.<sup>10</sup> Each year, the introduction of pollutants into waters nationwide severely limits the quantity and quality of suitable oyster habitat.<sup>11</sup> "Viruses, bacteria and toxins introduced into the waters by illegal waste disposal, flooding, spills and other sources can build to levels in shellfish sufficient to cause illness when eaten by humans."<sup>12</sup> Though freshwater intrusion from diversion projects and general water quality degradation caused by diffuse runoff pollution (commonly referred to as non-point source pollution) often causes or contributes to the harmful changes in oyster habitat conditions, each year point source pollution also results in closure of many otherwise productive and healthy oyster beds.<sup>13</sup> More specifically, it has been reported that while "the Gulf Coast region leads the nation in the total amount of shellfishing waters, it ranks last in the percentage of waters approved for shellfishing."<sup>14</sup> Those in the oyster industry directly feel the impact of degraded and diminished oyster habitat, and it is they who would most directly benefit from cleanup and restoration of polluted oyster beds.

While the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) imposes sweeping cleanup and remediation liability on responsible persons for damage caused by releases of hazardous substances,<sup>15</sup> and the Oil Pollution Act (OPA) is available to force responsible parties to clean up waters affected by the spill or release of oil and other petroleum products not covered under CERCLA,<sup>16</sup> it is the Clean Water Act (CWA)<sup>17</sup> and its Louisiana counterpart, the Louisiana Water Control Law,<sup>18</sup>

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<sup>9</sup>See generally *Oyster Strike Force*, *supra* note 5.

<sup>10</sup>*Id.*

<sup>11</sup>"...the contamination of shellfish growing waters by bacterial pollution is an increasing problem across the United States," Robert E. Watson, Jr., *Evaluation of a Marshland Upwelling System for the Treatment of Raw Domestic Wastewater 1* (2000) (unpublished thesis, L.S.U.) (on file with the L.S.U. Department of Civil Environmental Engineering).

<sup>12</sup>*Oyster Strike Force*, *supra* note 5.

<sup>13</sup>Telephone Interview with Kenneth W. Hemphill, Administrator, LA Dept. of Health and Hospitals, Molluscan Shellfish Program, (Jan. 3, 2001).

<sup>14</sup>Robert E. Watson, *supra* note 11. There has been a 7% increase in harvest limited waters in Louisiana in the last ten years. NOAA Oceanic and Atmospheric Administration (NOAA), 1997. "The 1995 National Shellfish Register of Classified Growing Waters," 398.

<sup>15</sup>Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (2001).

<sup>16</sup>33 U.S.C. § 2701 (2001).

<sup>17</sup>*Id.* § 1251.

<sup>18</sup>LA. REV. STAT. ANN. § 30:2071 (2000).

that generally proscribe the discharge of pollutants into the waters of the U.S. The Louisiana Water Control Law defines "pollutant" broadly enough to include any substance introduced into the waters that adversely affects the usefulness of the resource or the health of humans, animals, or the ecosystem.<sup>19</sup> This definition would include hazardous substances, non-hazardous substances, petroleum products, and a variety of other substances, including conditions that may even be innocuous in isolation but nevertheless negatively impact water quality when introduced into a balanced ecological system in a water body that supports fisheries, vegetation and all the uses attendant thereto. The remainder of this commentary will address methods and mechanisms available to compel cleanup under the CWA and will close with an examination of the relevant Louisiana laws and regulations.

## II. CLEAN-UP UNDER THE CLEAN WATER ACT

The Federal Water Pollution Control Act, now commonly referred to as the Clean Water Act, was originally enacted in 1948 and was substantially amended to its present form in 1972.<sup>20(a)</sup> As amended, the stated objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>20</sup> This objective translates generally into two primary national goals: 1) to eliminate the discharge of pollutants into the nation's waters, and 2) to achieve water quality levels that are safe for fishing and swimming.<sup>21</sup> The CWA's focus on improving the quality of the nation's waters is evident in the comprehensive regulatory framework, which addresses municipal and industrial wastewater discharges, toxic spill incidents, surface water runoff from urban and rural areas, and habitat destruction.<sup>22</sup>

Though the provisions of the CWA address methods to improve and maintain water quality in great detail, it would seem that the restoration and remediation of polluted waters should be of equal importance to achieve the goals of the CWA. While the CWA clearly prohibits the discharge of pollutants into navigable waters not in compliance with a permit, and expressly provides for enforcement through the issuance of non-compliance orders and civil and criminal sanctions, the CWA does little to address the actual cleanup of polluted water bodies. The provisions of the CWA relative to oil and hazardous substance liability in Section 311 provide the clearest

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<sup>19</sup>*Id.* § 30:2073 (definition of "water pollution").

<sup>20(a)</sup> 33 U.S.C. § 1251(a), CWA § 101(a) (2001).

<sup>20</sup>*Id.*

<sup>21</sup> See 33 U.S.C. § 1251(a)(1)-(2), CWA § 101(a)(1)-(2) (2001).

<sup>22</sup>*Id.*

exception to this shortcoming.<sup>23</sup> However, it is important to note that any remedies available under Section 311 address only discharges of oil and hazardous substances.<sup>24</sup>

Of course, water pollution problems are not limited to damage caused by oil and hazardous substances. In fact, pollution more often results from the introduction of non-hazardous substances into the waters. Further, though federal courts have the authority under the CWA to order parties to come into compliance, to impose civil penalties, and to order injunctive relief, monies collected under this authority are deposited into the United States Treasury.<sup>25</sup> While the assessment of penalties achieves the goal of deterring noncompliance, the more basic goals expressed in the opening phrases of the CWA go unfulfilled where monetary payments collected will not provide site-specific redress for the areas affected by violations. Therefore, solutions to the water pollution problem are turning increasingly on interpretive regulation, policies of the United States Environmental Protection Agency (EPA), as well as private citizen actions that seek alternatives to the imposition of civil penalties.

### III. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The use of supplemental environmental projects (SEPs) has emerged as the enforcement alternative that best achieves the water quality restoration goals of the CWA. SEP's are environmentally beneficial projects which a defendant/ respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.<sup>26</sup> The EPA's Supplemental Environmental Projects Policy recognizes that while penalties play an important role in environmental protection, SEPs go further to secure significant, tangible environmental improvement. The SEP policy encourages the use of environmentally beneficial projects as part of the settlement of environmental enforcement cases, providing specifically for the types of projects that are permissible, the terms and conditions under which and SEP may become part of a settlement, and the extent to

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<sup>23</sup>33 U.S.C. § 1321, CWA § 311 (2001).

<sup>24</sup>See 33 U.S.C. § 1321(b)(1), CWA § 311(b)(1), ("The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shoreline, or into or upon the waters of the contiguous zone...").

<sup>25</sup>*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987), (interpreting 33 U.S.C. § 1319, CWA § 309).

<sup>26</sup>EPA, Office of Enforcement and Compliance Assurance, EPA Supplemental Environmental Projects Policy, May 1, 1998, available at <http://es.epa.gov/oeca/sep/sepfinal.html> (last visited Nov. 3, 2000) at 2.

which mitigation of conventional penalties through use of SEP is acceptable.<sup>27</sup> The SEP policy provides a comprehensive framework for the EPA to use in exercising its considerable enforcement discretion to settle enforcement cases, setting out the three key components of a SEP, defining each as follows:

1) "Environmentally beneficial" means the project must improve, protect, or reduce risks to public health, or the environment at large, and while it may provide the alleged violator with certain benefits, the project clearly must primarily benefit public health or the environment;<sup>28</sup>

2) "In settlement of an enforcement action" means that the agreement results from a process in which EPA has had the opportunity to help shape the scope of the project before implementation and the project is not commenced until after EPA has identified a violation;<sup>29</sup> and

3) "Not otherwise legally required to perform" means that the project or activity is not required by any federal, state or local law or regulation and does not include actions or activities which the violator is likely to be obligated under the law to perform at some point.<sup>30</sup>

The SEP policy sets out seven specific categories of supplemental environmental projects which may be part of an approved settlement: public health projects, pollution prevention projects, pollution reduction projects, environmental restoration and protection projects, environmental assessment and audit projects, environmental compliance promotion projects, emergency planning and preparedness projects, and other projects approved on a case-by-case basis.<sup>31</sup> The SEP policy goes on to provide, in significant detail, legal guidelines to assist the EPA's evaluation of whether a proposed SEP is within the EPA's settlement discretion and to ensure consistency with all statutory and constitutional requirements.<sup>32</sup>

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<sup>27</sup> See generally, *Id.*

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Policy, *supra* note 28, at 6-11.

<sup>32</sup> *Id.* at 5-6.

Currently, the EPA has included SEPs in the settlement of some 580 environmental enforcement cases, including more than seventy CWA enforcement cases settled since 1995.<sup>33</sup> This number is not an insignificant portion of the total environmental enforcement cases initiated by the EPA and clearly indicates the willingness of both the EPA and the alleged violators to enter enforceable agreements to redress the particular harm or damage to the environment caused by the specific violations. The EPA's willingness to include SEPs as part of the settlement of enforcement cases is understandable, as these agreements directly further the stated goals of the CWA (such as the restoration of water quality) that would otherwise go unmet. However, to fully realize the potential benefits of SEPs, an understanding of the incentive or impetus of alleged violators to enter a settlement agreement that includes one or more SEPs is critical. Implicit in the very definition of the SEP is the indication that an agreement to conduct a SEP will mitigate the civil penalty assessed. SEPs are commonly defined as voluntary acts performed by alleged polluters in exchange for a reduction in monetary penalties that would probably be assessed if the complaint were to be adjudicated.<sup>34</sup> Like any other settlement negotiations where litigation is pending, the likely outcome at trial faces the greatest pressure on the parties to come to an agreement less onerous than may be otherwise imposed. In addition to weighing probable penalty upon adjudication against monetary obligation under settlement, it follows from simple human nature that one expending funds would like to "get something" for his money or see where his money is going; therefore, the violator would prefer the penalty assessed against him to go toward rectifying environmental interests specifically affected by violations rather than toward replenishing the United States Treasury. Lastly, the violator's agreement to undertake environmentally beneficial projects, even where required as part of a penalty for violation, can provide positive public relations to either protect a good corporate reputation or improve a poor one.

Though the ultimate terms and conditions of a settlement agreement in an environmental enforcement case, whether it includes a SEP or not, lies within the discretion of the EPA or its state counterpart, there is certainly room for participation by private citizens. The SEP policy provides specifically for "Community Input" in developing and approving SEPs, entreating the EPA to

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<sup>33</sup>Office of Enforcement and Compliance Assurance, Office of Regulatory Enforcement, SEP National Database, E.P.A., available at <http://es.epa.gov/occa/sep/search/sep.html> (last visited Nov. 3, 2000), (The SEP Database is not warranted as representative of U.S. approved or recommended SEPs.).

<sup>34</sup>*Id.*

make special efforts to seek the input of communities adversely affected by the violations at issue in a given enforcement case.<sup>35</sup> The EPA's SEP policy provides four guidelines for soliciting community input in order to provide meaningful public participation. The guidelines are as follows:

1) Once a party has expressed interest in doing a SEP and a willingness to seek community input, the possible projects, approximate money availability, and consequence of settlement including a SEP, the EPA should provide the communities with information regarding the scope of possible SEPs,<sup>36</sup>

2) Contact the communities by both informal and formal methods, including contacting local community organizations, churches, and elected officials, as well as provide standard public notice in the appropriate newspapers;<sup>37</sup>

3) Provide the communities with general information about SEPs, including the use of SEPs in the context of settling enforcement cases, and the possible penalties for enforcement, in a public hearing forum at which the alleged violator may choose to be present;<sup>38</sup> and

4) Allow for some appropriate community input without allowing actual community participation in settlement negotiations.<sup>39</sup>

#### IV. BRINGING A CITIZEN SUIT: THE CLEAN WATER ACT

Perhaps of even greater importance to persons affected by CWA violations, the EPA's SEP policy refers expressly to the use of the policy to review proposed SEPs in settlement of citizen suits.<sup>40</sup> The plain language of CWA section 505 authorizes citizens to enforce all permit conditions. That section provides; "[A]ny citizen may commence a civil action . . . (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under [the Clean Water Act] . . ."<sup>41</sup> An effluent standard or limitation

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<sup>35</sup>Policy, *supra* note 28, at 18.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 10.

<sup>40</sup>Policy, *supra* note 28, at 3.

<sup>41</sup>33 U.S.C. § 1365(a)(1) (2001).



includes "(2) an effluent limitation or other limitation under section 301 ... or (6) a permit or condition thereof ...."<sup>42</sup> This language clearly contemplates citizen suits to enforce violations of the CWA, but as with civil penalties assessed by agency-initiated administrative or judicial enforcement, any monies collected go to the U.S. Treasury, not to the citizen or to satisfy environmental interests in the area affected by the violation.<sup>43</sup>

The CWA citizen suit provision imposes a sixty day pre-suit notice requirement.<sup>44</sup> The sixty day waiting period is to allow either the EPA or the state regulatory counterpart to proceed with enforcement in its own right and to allow the alleged violator to attempt conciliation of the claims set forth in the notice.<sup>45</sup> While the SEP policy and recent case law, to be discussed hereafter, stand for the proposition that SEPs can be used in the resolution of properly instituted citizen suits under the CWA, a comprehensive analysis of this approach necessarily must include the underlying requisites for bringing an environmental citizen suit.

Whether fashioned as a suit by a named individual or named individuals, or by an organization or association representing the interests of certain individuals, all threshold statutory and constitutional requirements must be met. First, as required by 33 U.S.C. section 1365(b) and 40 C.F.R. section 135.3, the citizen plaintiff must provide the sixty day pre-suit notice (Notice of Intent to Sue) to the alleged violator, the EPA, and the state in which the alleged violation occurs, with sufficient information in such notice to enable recipients to identify the dates and the locations of the alleged discharge or other violation.<sup>46</sup> Absent sufficient Notice of Intent to Sue, the district court in which the citizen plaintiffs bring the suit lacks subject matter jurisdiction to hear the case.<sup>47</sup>

The information alleged in the pre-suit notice and subsequently in the pleadings raises other constitutional requirements necessary to the maintenance of a citizen suit under the CWA, namely standing and the jurisprudential considerations attendant thereto. Taking up the latter first, perhaps the most significant and also most limiting requirement imposed on citizen plaintiffs is commonly referred to as the *Gwaltney* requirement.<sup>48</sup> The Supreme Court has recognized that citizen suits under 33 U.S.C. section 1365(a) cannot be based on wholly past violations, as such suits

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<sup>42</sup>*Id.* at §§ 1365(f)(2), (f)(6).

<sup>43</sup>*See id.*

<sup>44</sup>*Id.* § 1365(b); 40 C.F.R. § 135.3 (2001).

<sup>45</sup>*Id.*

<sup>46</sup>*See* 33 U.S.C. § 1365(b); 40 C.F.R. § 135.3 (2001).

<sup>47</sup>40 C.F.R. §§ 135.1-5 (2000).

<sup>48</sup>*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), *remanded to* 844 F.2d 170 (4th Cir. 1988), *rev'd in part*, 890 F.2d 690 (4th Cir. 1989).

offended the mootness doctrine.<sup>49</sup> “The mootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanctions by predictable ‘protestations of repentance and reform.’”<sup>50</sup> Under this requirement, the citizen plaintiff could not institute a citizen suit under the CWA for a violation that occurred last year, last month, or even last week, where there is no allegation that the violation is ongoing on the date the suit is instituted.<sup>51</sup> Recognizing that CWA violations may be ongoing but not continuous, the Court in *Gwaltney* went on to hold that jurisdiction could be predicated on continuous or intermittent violations saying of an intermittent polluter, “one who violates permit limitations one month out of every three—is just as much ‘in violation’ of the Act as a continuous violator.”<sup>52</sup> On remand to the Fourth Circuit in *Gwaltney*, the court held that it was sufficient to make a good faith allegation of continuing or intermittent violations in order to give the court initial jurisdiction, but at trial, the citizen plaintiff would have to prove that the intermittent violations amount to ongoing violations.<sup>53</sup> The court went on to hold that the citizen plaintiff may prove an ongoing violation by either: (1) proving violations that continue on or after the date the complaint is filed, or (2) adducing evidence from which a reasonable trier of fact could find a continuing *likelihood* of a recurrence in intermittent or sporadic violations.<sup>54</sup> Under the latter approach, intermittent or sporadic violations would cease to be ongoing only when there is no real likelihood of repetition.<sup>55</sup> The greatest limitation resulting from this “ongoing violation” requirement is that it effectively precludes citizen suit under the CWA to address a single spill or release incident, though in fact, these incidents may cause a lion’s share of the impact on water quality. It remains unclear what frequency or character of violation gives rise to a “likelihood of recurrence” but a good faith allegation of such violations should be sufficient to survive objections raised under *Gwaltney*.

The constitutional requirement of a “case or controversy” requires that a party have standing to pursue or continue the

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<sup>49</sup>*Gwaltney*, 484 U.S. at 49, 64.

<sup>50</sup>*Id.* at 66-67 (quoting *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952)).

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 63. (emphasis added).

<sup>53</sup>*Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-172 (4th Cir. 1988).

<sup>54</sup>*Id.* at 171-172 (emphasis added).

<sup>55</sup>*Id.* at 172.

litigation.<sup>56</sup> Under the CWA citizen suit provision, a "citizen" entitled to bring suit is defined as "a person or persons having an interest which is or may be adversely affected."<sup>57</sup> In order to have individual standing, "Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,'...and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'"<sup>58</sup> Where an organization or association sues on behalf of its members, the organization or association must meet the requirements of "representational standing." "'Representational standing' is appropriate where: 1) the organization's members would have standing to sue on their own, 2) the interests the organization seeks to protect are germane to its purpose, and 3) neither the claim asserted nor the relief requested requires individual participation by its members."<sup>59</sup> Whether suit is brought by an individual or an organization, the three constitutional *de minima* requirements must be met for the citizen suit to go forward.<sup>60</sup>

A recent opinion out of the Eastern District of Washington considers the standing issues in the context of a CWA citizen suit, discussing not only the settled constitutional and jurisprudential requirements but also the considerations specific to CWA violations and suits brought to redress those violations.<sup>61</sup> In *Community Association for Restoration of the Environment (CARE) v. Henry Bosma Dairy*,<sup>62</sup> an environmental organization brought an action against several dairies under the CWA and corresponding Washington Clean Water Act citizen suit provisions, alleging discharge of animal manure waste into a joint drain, canal, and river in violation of both the CWA and state water quality provisions.<sup>63</sup> In discussing its opinion, the court took up each of the three core requirements of Article III standing, finding in each instance that the citizen plaintiffs had satisfied the constitutional requirements.<sup>64</sup> Taking up the "injury in fact" requirement first, the court in *CARE* cited *United States v. Students Challenging Regulatory Agency*

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<sup>56</sup>See U.S. CONST. art. III, § 2, cl. 1.

<sup>57</sup>33 U.S.C. § 1365(g) (1994).

<sup>58</sup>*Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, (1982) (quoting *Simon v. E.K. Welfare Rights Org.*, 426 U.S. 26, 38, 41, (1976)).

<sup>59</sup>*Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 70 (3rd Cir. 1990).

<sup>60</sup>*Id.*

<sup>61</sup>*Cnty. Ass'n for the Restoration of the Env't (CARE) v. Henry Bosma Dairy*, 65 F. Supp2d. 1129 (E.D. Wash. 1999).

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 1132.

<sup>64</sup>*See id.*

*Procedures (SCRAP)*,<sup>65</sup> as support for the proposition that the size of the injury is not germane to the standing analysis and that injury in the constitutional sense “need not be large, [no more than] an ‘identifiable trifle’ will suffice.”<sup>66</sup> In *CARE*, the citizen plaintiffs alleged injury to their interest in recreating on waters affected by pollution, and the court found injury to this aesthetic or recreational interest sufficient to confer standing,<sup>67</sup> citing a similar finding by the Supreme Court decision in *Sierra Club v. Morton*.<sup>68</sup>

The injury to oyster farmers where oyster habitat is affected and diminished, often resulting in the closing of oyster beds as a direct casualty from pollution of the waters in which the oysters live, is surely no less than the recreational interest recognized in *Sierra Club v. Morton*, and more recently, in *CARE v. Bosma*.<sup>69</sup> The most likely argument raised to the injury facet of standing is that the oyster farmers have no protectable property interest in the state waters and water bottoms in which the oysters are found. While it is clear that ownership of the water bottoms is vested in the State of Louisiana,<sup>70</sup> many commercial oystermen in Louisiana hold state oyster leases, providing rights to harvest oysters from a designated area.<sup>71</sup> In *Avenal v. United States*,<sup>72</sup> owners of state leases for water bottom lands used for oyster propagation brought takings claims against the United States for damages to their oyster beds caused by freshwater diversion projects.<sup>73</sup> The court ultimately found no taking, but not before recognizing that the leaseholders had a recognizable property interest, a state-created property interest, in the water bottoms on which their leases were located.<sup>74</sup> The court in *Avenal* described the scope of the oystermen's rights in the water bottom as including the right to harvest and the correlative “right to damages when the acts of another harm the oyster beds.”<sup>75</sup> The decision in *Avenal* stands as authority for the existence of a constitutionally protectable property interest in state-granted oyster bed leases, and injury to any such protectable interest clearly would satisfy the injury-in-fact requirement of Article III standing.

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<sup>65</sup>412 U.S. 669 (1973).

<sup>66</sup>*CARE*, 65 F. Supp. 2d at 1139. (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689, n.14.).

<sup>67</sup>*Id.* at 1140.

<sup>68</sup>405 U.S. 727, at 753 (1972).

<sup>69</sup>See generally, Cmty. Ass'n for the Restoration of the Env't (*CARE*) v. Henry Bosma Dairy, 65 F. Supp2d. 1129 (E.D. Wash. 1999).

<sup>70</sup>LA. CIV. CODE ANN. art. 450 (2000).

<sup>71</sup>See generally, LA. REV. STAT. ANN. § 56:435 (2001).

<sup>72</sup>100 F.3d 933 (Fed. Cir. 1996).

<sup>73</sup>See generally, *id.*

<sup>74</sup>*Id.* at 936.

<sup>75</sup>*Id.* at 937.

As with the injury-in-fact requirement for standing, the court in *CARE v. Bosma* devoted considerable attention to the remaining standing elements of traceability and redressability.<sup>76</sup> The "fairly traceable" requirement for standing "is not equivalent to a requirement of tort causation," but only relates to whether the defendant's conduct contributed to the injury alleged.<sup>77</sup> In the context of CWA violations, "the requirement that plaintiff's injury be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent alone, caused the precise harm suffered by the plaintiffs."<sup>78</sup> In *Natural Resources Defense Council, Inc. v. Watkins*,<sup>79</sup> the court held that even though it seems highly probable that polluters other than the named defendant substantially contributed to the river pollution complained of, it does not follow that a plaintiff is deprived of standing to sue where the named defendant has also contributed to the pollution that interferes with the plaintiff's interest.<sup>80</sup> The citizen plaintiff in the CWA citizen suit "does not have to prove that [the defendant] was the only polluter, nor does the plaintiff have to prove the exact amount of pollution" contributed by the defendant.<sup>81</sup>

Similarly, with the element of constitutional redressability, the citizen plaintiffs need not show that success in the citizen suit will completely restore the injured party to his pre-injury condition.<sup>82</sup> In the context of the CWA, though the plaintiffs' interests may continue to be limited by the existence of other polluters, even after issuance of compliance orders and assessment of civil penalties, redress in the broader, constitutional sense is nevertheless provided. Even moderate success resulting from citizen enforcement further expresses the goals of the CWA, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>83</sup> Plaintiffs do not have to show that the waterway will be returned to pristine condition in order to satisfy the minimal Article III requirements of redressability.<sup>84</sup> To argue otherwise ignores the deterrent effect on a polluter amenable to assessment of civil penalties in a citizen's suit brought for violation of the CWA. Redress is also achieved where other

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<sup>76</sup>*Comty. Ass'n for the Restoration of the Env't (CARE) v. Henry Bosma Dairy*, 65 F. Supp2d 1129, 1140-43 (E.D. Wash., 1999).

<sup>77</sup>*Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3<sup>rd</sup> Cir. 1990); (citations and footnote omitted).

<sup>78</sup>*CARE v. Bosma*, 65 F. Supp2d at 1141 (citing *Powell Duffryn*, 913 F.2d at 72).

<sup>79</sup>*NRDC v. Watkins*, 954 F.2d 974 (4th Cir. 1992).

<sup>80</sup>*Id.* at 980.

<sup>81</sup>*CARE v. Bosma*, 65 F. Supp2d at 1141.

<sup>82</sup>*See id.*

<sup>83</sup>33 U.S.C. § 1251(a) (1994).

<sup>84</sup>*Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73 (3<sup>rd</sup> Cir. 1990).

polluters modify their behavior in order to avoid being assessed penalties themselves in CWA citizen suits.<sup>85</sup>

Traceability and redressability, under the standards discussed above, pose no real obstacle to the Louisiana oyster farmer as a CWA citizen suit plaintiff. In terms of point source pollution, violations of permitted effluent standards and limitations are self-reporting.<sup>86</sup> In addition to the inclusion of the location of each point source or outfall, as well as the waters to which discharges are released in each water permit, permittees provide discharge information to the Louisiana Department of Environmental Quality (LDEQ) and the EPA each month.<sup>87</sup> Any violation is evident on the face of those reports. Traceability may require no more than a showing that the types of pollutants released from a given facility are impacting water quality in the affected area and that, in fact, the discharges from a given facility flow to that affected area. However, where the pollution source is outfall from coastal camps, or nonpoint source pollution, this element will be more difficult to show and require a more sophisticated level of evidence.

The use of SEPs in the citizen suit context is an essentially unexplored approach to compelling clean up of polluted waters. Though, as pointed out earlier, the EPA's SEP policy refers expressly to review proposed SEPs in settlement of citizen suits.<sup>88</sup> In a recent unreported opinion out of the Eastern District of Louisiana in *United States Public Interest Research Group v. Bayou Steel Corporation*,<sup>89</sup> involving a citizen suit brought under the Clean Air Act (CAA), the court entered a consent decree and order finalizing settlement of all claims brought by citizen plaintiffs.<sup>90</sup> In *Bayou Steel*, the citizen plaintiffs and industry defendant entered into a binding and enforceable agreement under which the claims of the plaintiffs are settled, the defendant denies any liability, and consents to pay monetary damages and to perform specified Supplemental Environmental Projects providing pollution reduction and pollution prevention over a specified period of time.<sup>91</sup> Though the consent decree provides expressly that neither EPA nor LDEQ pursue enforcement against Bayou Steel after receiving the required pre-suit notice from the citizen plaintiffs, it does not indicate that either the EPA or the LDEQ participated in the development of the settlement or SEPs nor that either agency approved the agreement

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<sup>85</sup>*Id.*

<sup>86</sup>40 C.F.R. § 122.41 (l)(6) (2000).

<sup>87</sup>See 40 C.F.R. § 122.41 (l)(4) (2000).

<sup>88</sup>Policy, *supra* note 28, at 2.

<sup>89</sup>No. Civ.A.96-0432, 1999 WL 675203, at \*7 (E.D. La. 1999).

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at \*8.

reached.<sup>92</sup> The CWA citizen suit provision contains a clause that addresses the issue of consent judgments entered in CWA actions to which the government is not a party. Under 33 U.S.C. section 1365(c)(3), no consent judgment shall be entered in an action in which the United States is not a party prior to forty-five days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator. Assuming the parties and the court in *Bayou Steel* complied with this provision, it would follow that the absence of objection to the entry of the consent decree and order amounts to acquiescence on the part of the government to the resolution of liability of the defendant as specified in the judgment.

As a matter of litigation strategy, if the desired result or redress obtained by bringing the citizen suit under the CWA is to compel the responsible parties to clean up the pollution they caused, the citizen plaintiff will pursue settlement, where SEPs may be included, rather than litigation to judgment, where there is no jurisprudential precedent for fashioning such relief. Referring back to the incentives of the alleged violator to settle with the EPA and to agree to perform environmentally beneficial projects, the same incentives exist in the citizen suit context. In the Fifth Circuit in particular, the fear of the potential penalty resulting from full adjudication may be the single greatest motivating factor for the alleged violator to settle the claims of citizen plaintiffs. As more fully discussed in *United States v. Gulf Park Water Co.*,<sup>93</sup> a case involving a civil penalty assessment for violations of the CWA in connection with discharge of pollutants into waters of United States without the required National Pollutant Discharge Elimination System (NPDES) permit, the approach to penalty assessment in the Fifth Circuit may result in penalty assessments considerably higher than in other jurisdictions.<sup>94</sup> Courts around the country have taken one of two common approaches to environmental penalty assessment, either "top down" or "bottom up."<sup>95</sup> Section 1319(d) of the CWA mandates civil penalties for each violation of the Act.<sup>96</sup> Currently, the violator is subject to a civil penalty not to exceed \$27,500 per day for each violation.<sup>97</sup> The Fifth Circuit, in *United States v. Marine Shale Processors*,<sup>98</sup> noted that "when imposing

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<sup>92</sup>*Id.*

<sup>93</sup>14 F. Supp2d 854 (S.D. Miss. 1998).

<sup>94</sup>*See generally, id.*

<sup>95</sup>*Id.* at 858.

<sup>96</sup>33 U.S.C. § 1319(d) (1994).

<sup>97</sup>*Id.*; Act of Apr. 26, 1996, Pub. L. No. 104-134. The statutory maximum penalty for violations of the Clean Water Act was increased to \$27,500 per day, per violations occurring after January 30, 1997. *Id.*

<sup>98</sup>81 F.3d 1329, 1337 (5th Cir. 1996).

penalties under the environmental laws, courts often begin by calculating the maximum penalty."<sup>99</sup> The courts are split, however, on which methodology to use in assessing an appropriate civil penalty. Some courts use the "top-down" method of penalty calculation, in which the court begins calculating the penalty at the statutory maximum and adjusts downward considering the factors provided in Section 309(d) of the CWA. Other courts use the "bottom-up" method of penalty calculation, in which the court begins calculating the penalty using the defendants' economic benefit of noncompliance and adjusts upward or downward considering the Section 1319(d) factors.<sup>100</sup> Inasmuch as the statute does not require either method,<sup>101</sup> the courts are free to elect which method to use.<sup>102</sup> While the Fifth Circuit has not clearly indicated a preference, *Marine Shale* would tend to weigh in favor of the "top-down" method. Further, the district courts in the Fifth Circuit have taken the appellate court's lead, and this may be impetus enough to bring alleged violators to the negotiating table, where all settlement options, including SEPs, can be fully explored.<sup>103</sup>

#### V. LOUISIANA'S ENVIRONMENTAL QUALITY ACT AND WATER CONTROL LAW

The remainder of the paper will focus on solutions based on Louisiana's law and regulations in particular. While some aspects of the discussion will be narrowed by this focus, many of the concepts will carry over and have relevance on a general state level. The topics covered will look to Louisiana's water quality and environmental laws, rather than tort law theories for remedies, in an attempt to provide a window to some of the unique and/or less utilized legal provisions.

Louisiana's Environmental Quality Act<sup>104</sup> was passed to promote the "protection of the public welfare and property of the people of Louisiana that there be maintained at all times...clean air and water resources, preservation of the scenic beauty and ecological regimen of certain free flowing streams . . ."<sup>105</sup> The Act established the agency structure, basic media-based regulatory programs and overall enforcement provisions.<sup>106</sup> Louisiana's Water Control Law<sup>107</sup>

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<sup>99</sup>*Id.* at 1337; (citing *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 87 F.2d 1128, 1142 (11<sup>th</sup> Cir. 1990).

<sup>100</sup>*United States v. Gulf Park Water Co.*, 14 F. Supp2d. 854, 858 (S.D. Miss. 1998).

<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

<sup>103</sup>*See id.* at 854.

<sup>104</sup>LA. REV. STAT. ANN. § 30:2002 (West 2000).

<sup>105</sup>*Id.* § 30:2002.

<sup>106</sup>*Id.* § 30:2001.



governs the discharge of any substance into the waters of the state and establishes the system of permits, variances and licenses required for said discharges.<sup>108</sup> On August 27, 1996, in response to adjustments and additions to the state's water permitting system, the EPA announced that Louisiana's application to administer and enforce the NPDES program for discharges into state waters had been accepted.<sup>109</sup> The new program is referred to as the Louisiana Pollutant Discharge Elimination System (LPDES).<sup>110</sup> Therefore, point source polluters in Louisiana are issued one permit that satisfies both the state and federal discharge requirements.<sup>111</sup>

Two important provisions to examine in this discussion are the ability under Louisiana's law to compel mitigation and remediation of resources affected by pollution discharges and the opportunity for citizens to take actions to enforce state laws. Fortunately, Louisiana law provides the basis needed for both remediation and enforcement through citizen suits.

Within the LPDES program, La. R.S. 30:2077 compels remedial action when unpermitted discharges have negative impacts on resources.<sup>112</sup> The law requires immediate notification to the LDEQ secretary of any release of pollution into state waters that contravenes state law.<sup>113</sup> Once notified, the violator may be requested to perform remedial clean up of the affected location.<sup>114</sup> The statute states that the goal is to ". . . eliminate those releases that may reasonably pose a threat to human health or the environment and to remediate contaminated media, taking into consideration current and expected uses."<sup>115</sup> The language in the statute itself is sparse, with only one paragraph dedicated to remediation of pollution, and unfortunately in practice the LDEQ has not utilized this provision to its full capacity.<sup>116</sup> The accompanying regulations also reiterate the duty to mitigate without detailing any specific requirements.<sup>117</sup> However, the potential use of remediation, specifically in the clean-up of contaminated oyster beds, is an important tool to include in the realm of possible solutions.

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<sup>107</sup>LA. REV. STAT. ANN. § 30:2071 (West 2000).

<sup>108</sup>*Id.* § 30:2077.

<sup>109</sup>"Louisiana Delegated NPDES Program Authority," La. Envtl. Compliance Update, Vol. 4, Issue 9, September 1996.

<sup>110</sup>LA. REV. STAT. ANN. § 30:2073(1) (West 2001).

<sup>111</sup>*Id.*

<sup>112</sup>*Id.* § 30:2077.

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

<sup>115</sup>LA. REV. STAT. ANN. § 30:2077 (West 2001).

<sup>116</sup>Telephone Interview with Christopher Ratcliff, Attorney, LA Dept. of Environmental Quality, Legal Division, (Oct. 5, 1999).

<sup>117</sup>LA. ADMIN. CODE tit. 33, § 2355 (D) (1998).

As mentioned above, the Louisiana Environmental Quality Act provides general enforcement provisions for the state's environmental protection laws. Specifically, the Act establishes a citizen's right to bring suit in response to a violation of the state's environmental laws,<sup>118</sup> as it must do to comply with the general provisions of the CWA as well as with the delegation of permitting authority under the CWA. In a parallel to the paper's previous discussion of federal citizen suits, it is important to highlight the use of these types of suits to enforce state environmental laws. However, due to the extensive statement on the uses and advantages of citizens suits in oyster bed contamination situations previously stated in this paper, this issue will not be examined again here. Because Louisiana has assumed the federal NPDES program, the issues here mirror the ones already reviewed.

## VI. OTHER STATE OPTIONS

### A. Louisiana's Beneficial Environmental Projects

When considering environmental enforcement actions to be taken when a violation(s) occurs, the LDEQ has a number of options available through both the Louisiana Environmental Quality Act<sup>119</sup> and/or its associated regulations. When The Louisiana Environmental Quality Act specifically identifies the possible enforcement options as: civil suits for damages, emergency cease and desist orders, compliance orders, civil penalties and criminal penalties.<sup>120</sup>

Recent legislative and regulatory activity in Louisiana regarding the use of environmentally beneficial projects warrants mentioning as well.<sup>121</sup> On March 10, 2000, the LDEQ promulgated an Emergency Rule regarding its "Beneficial Environmental Projects" (BEP) rule.<sup>122</sup> The Louisiana BEP rule is similar in scope and stated purpose to the EPA SEP policy, intended to facilitate the settlement of environmental actions and promote the use of BEPs. The BEP provisions were finalized and adopted as a LDEQ regulation on August 20, 2000.<sup>123</sup>

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<sup>118</sup>LA. REV. STAT. ANN. § 30:2026 (West 2000).

<sup>119</sup>*Id.* § 30:2025.

<sup>120</sup>*Id.*

<sup>121</sup>"...the secretary may enter into settlements of civil penalty assessments which allow the respondent to perform environmentally beneficial projects and/or provide for the payment to the state which shall be considered a civil penalty for tax purposes." LA. REV. STAT. ANN. §30:2050.7(E) (West 2000).

<sup>122</sup>LA. ADMIN. CODE tit. 33, § 2501 (West 2000).

<sup>123</sup>*Id.*

The newly promulgated BEP regulations will allow the inclusion of BEPs as part of a settlement or penalty assessment of a violation. The regulatory definition of a BEP states that BEPs are "projects that provide for environmental mitigation which the defendant/respondent is not otherwise legally required to perform, but which the defendant/respondent agrees to undertake as a component of a settlement of a violation or penalty assessment."<sup>124</sup> These provisions will afford the LDEQ the opportunity to negotiate with violators in order to create solutions that not only meet the statutory directives but further enhance the natural resources and public welfare within the state. While there is little administrative guidance and no jurisprudence on this most recently added provision regarding BEPs, the similarities to the EPA SEP policy would indicate that the guidance and jurisprudence on the federal policy will be, at the very least, instructive in defining the contours of the provision. The regulations identify eight categories of BEPs that mirror the federal SEP policy; public health, pollution prevention and reduction, environmental restoration and protection, assessment and audits, environmental compliance promotion, emergency planning, preparedness and response and other projects.<sup>125</sup> Other projects are "projects determined by the department to have environmental merit that do not fit within at least one of the seven categories above [which] may be accepted if they are otherwise fully consistent with the intent of these rules."<sup>126</sup> The regulations offer flexibility to the state to design projects when it is deemed appropriate.

In oyster bed pollution situations, the use of BEPs by the LDEQ could result in increased opportunities for oyster leaseholders damaged by point source pollution to see present and future benefits to water quality. Enforcement actions against these violators may now include environmental projects and will correct damage caused by the violation, as well as projects designed to decrease the possibility of future violations that could adversely impact the water quality and oysters depending upon clean water habitats. For example, a compliance order may include a beneficial project requiring a violator to enhance the condition of the local ecosystem or geographic area. This in turn would create enhanced water quality for the damaged oyster leaseholder, which is a step beyond that which the previous remedies would have provided. "DEQ believes the addition of this new BEP regulation in the enforcement 'tool box' will greatly enhance the effectiveness of the overall enforcement

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<sup>124</sup>*Id.* § 2503.

<sup>125</sup>*Id.* § 2505.

<sup>126</sup>*Id.* § 2505(A)(8).

process. BEPs also provide enhancements that exceed reasonable precautions and go above and beyond the regulatory requirements.<sup>127</sup>

To ensure that Louisiana develops an effective program that truly meets the needs of the local citizens affected by violations of the state's laws, a heightened duty to involve the public exists. While the decision to enter into a settlement including a BEP falls squarely within the discretion of the agency involved,<sup>128</sup> there is an opportunity for public involvement in the BEP process, as all settlements or compromises, i.e. BEPs, are to be subject to a period of public review.<sup>129</sup> During this forty-five day period, written comments from the public are invited on the proposed settlement agreement or compromise.<sup>130</sup> In the case of BEPs, more thorough public participation elements could be added to the program through amendments to the current legislation and/or regulation. For example, mandatory public meetings in the area to be affected by the BEP would allow input, questions and suggestions from those with the most at stake in the local environment.

#### B. Clean Water State Revolving Fund

The Clean Water Act provides another possible alternative potentially available to persons affected by the degradation of water quality resulting from point source pollution. The CWA establishes the Clean Water State Revolving Fund (SRF).<sup>131</sup> Under this program, eligible projects receive low interest or no interest loans from the state fund to undertake the qualified water quality project.<sup>132</sup> The source of repayment need not come from the project itself nor the person or persons proposing the project. Repayment sources can include fees paid by developers on other lands, recreational fees (fishing licenses, entrance fees), a dedicated portion of local, county, or state taxes or fees, storm water management fees, wastewater user charges and donations made by private parties, and potentially even the parties responsible for the negative impact on water quality that requires such project to be undertaken.<sup>133</sup> In creating the SRF, Congress provided a

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<sup>127</sup>"Compliance Corner: *Beneficial Environmental Projects*" LA. ENVTL. UPDATE, Fall 2000 at 11.

<sup>128</sup>LA. ADMIN. CODE tit. 33 § 2501 (West 2000).

<sup>129</sup>LA. REV. STAT. ANN. § 30:2026 (West 2000).

<sup>130</sup>*Id.* § 30:2050.7(A)-(B).

<sup>131</sup>33 U.S.C. § 1381 (2001).

<sup>132</sup>See The Clean Water State Revolving fund Program, office of Wastewater Management, available at <http://www.epa.gov/owmitnet/cwsrf.htm>, (last visited Nov. 6, 1999).

<sup>133</sup>Funding Shellfish Restoration and Remediation Projects with the Clean Water State Revolving Fund, EPA: Office of Water, available at

mechanism through which states would be able to fund virtually any type of water quality project. Such projects include nonpoint source, wetlands, estuary, and other types of watershed projects, as well as more traditional municipal wastewater treatment systems.<sup>134</sup> Under the CWA SRF provisions, no category or type of project is given any more preference than the others. The SRF has three major categories of eligible projects: (1) Publicly owned wastewater treatment facilities, (2) Nonpoint source projects (publicly or privately owned), and (3) Estuary management projects (publicly or privately owned).<sup>135</sup> Among the types of shellfish remediation projects that are SRF fundable are: urban runoff, wastewater treatment plants and combined sewer overflows, nonpoint agricultural runoff, malfunctioning septic systems, pump-out stations for marinas and boating facilities and restoration of shellfish habitat including reef structure.<sup>136</sup>

The EPA has recently highlighted the use of the SRF for the purpose of funding shellfish restoration and remediation projects in a document titled *Funding Shellfish Restoration and Remediation Projects with the Clean Water State Revolving Fund*.<sup>137</sup> The document described two examples in which the SRF provided monies for shellfish improvements. In the City of Port Townsend, Washington, the SRF was used to preserve a wetland buffer area, thereby protecting valuable oyster beds.<sup>138</sup> In Des Moines, Washington a sediment trap/pond facility was developed to provide flood protection, and sediment removal for the local oyster production area.<sup>139</sup> In addition, four projects "funded as grants under Section 319, [that] would be potentially eligible for loans from the [SRF]" are detailed in the document.<sup>140</sup> Dr. Kelly Rusch of Louisiana State University, Department of Civil and Environmental Engineering led one of those projects, called the Marshall Upwelling System. The objective of this project was to focus on developing an alternative wastewater treatment system for coastal Louisiana and to study its ability to provide an effluent of suitable

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<http://www.epa.gov/owm/pdfs/sfish.pdf> (last visited Nov. 6, 2000) [hereinafter *Funding Shellfish*].

<sup>134</sup>See generally, 33 U.S.C. § 1381 (2001).

<sup>135</sup>*Funding Shellfish*, *supra* note 133.

<sup>136</sup>*Id.*

<sup>137</sup>*Id.* EPA has also highlighted the potential use of the Clean Water State Revolving Fund as a mechanism to achieve the goals of the Clean Water Action Plan. One of the key points in the Clean Water Action Plan is the clean up of contaminated shellfish beds. See *The Clean Water State Revolving Fund and the Clean Water Action Plan*, E.P.A., Office of Wastewater Management, available at <http://www.epa.gov/OWM/cwpfact.pdf> (last visited Dec. 19, 2000).

<sup>138</sup>See *Funding Shellfish*, *supra* note 133.

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

bacterial quality for oyster harvesting waters.<sup>141</sup> These concrete examples provide the oyster industry with a strong precedent for the type of projects possible from the SRF.

On its face, cleanup of polluted waters using the SRF seems to be a logical alternative that would comport with the stated purpose of the SRF, while furthering the ultimate goal of restoring water quality. However, eligibility for the program will vary by state. In Louisiana, the SRF seems irrevocably committed to wastewater treatment projects. In fact, the LDEQ SRF division is aptly called the Municipal Facilities Revolving Loan Fund Program.<sup>142</sup> Its stated mission, however, is to provide financial assistance for projects to enhance and improve water quality in Louisiana.<sup>143</sup> All of the revolving loans made to date in Louisiana have financed municipal wastewater treatment works projects, although federal law requires consideration of other types of water quality projects if they address significant water quality problems and a willing and capable borrower exists.<sup>144</sup> Accordingly, the SRF must be considered a viable cleanup option available under the CWA. In fact, the EPA states that those interested in using the SRF to clean up pollution affecting shellfish production "should seek out their [SRF] programs, gain an understanding of how their state program works and participate in the annual process that determines which projects are funded."<sup>145</sup>

Louisiana's regulations for the state's Municipal Facilities Revolving Loan Fund Program set out a prioritization system based on a number of factors, such as segment priority ranking, population, needs and uses.<sup>146</sup> All applications go through the state's prioritization system and are ranked before the public is given a chance to comment on the projects.<sup>147</sup> Annually, the public is given a chance to discuss and comment on the state's priority list for the next year.<sup>148</sup> The result of Louisiana's narrow focus on municipal facilities and the limited chance for public involvement is a constricted program that does not meet its potential as outlined in federal law and encouraged by the EPA. In order to remedy this shortcoming and expand Louisiana's program to realize its full potential as a vital water quality improvement tool, new legislation and accompanying regulation are suggested. Legislative changes would be required to

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<sup>141</sup>Robert E. Watson, *supra* note 12, at 2.

<sup>142</sup>LA. REV. STAT. ANN. § 30:2078 (West 2000).

<sup>143</sup>*Id.* § 30:2078(A).

<sup>144</sup>Interview with Catherine Lundergan, LA Department of Environmental Quality, (Nov. 29, 2000).

<sup>145</sup>Funding Shellfish, *supra* note 133.

<sup>146</sup>LA. ADMIN. CODE tit. 33, § 123(B)(5) tbl. A-1 (1998).

<sup>147</sup>*See id.* § 2123(C)(8).

<sup>148</sup>*Id.*

expand the current program to include the types of projects described above, such as wetland buffer projects, innovative septic systems for coastal camps, and alternative sediment/floodwater pond facilities. Amendments to the regulations could ensure that public participation in the project selection process is designed to give the interested parties a real voice in the process and prioritization of the state's projects, beyond the minimum public comment procedures.

### C. State Funds, Task Forces and Boards

There are a number of oyster related programs, funds, and task forces that command recognition as possible remedial opportunities to oyster leaseholders damaged by point source water pollution. These programs all have the potential to provide valuable services to the oyster industry by funding projects to improve oyster production, increasing enforcement of oyster protection and/or revising legislation to better respond to oyster production needs.

The Louisiana legislature created the Oyster Task Force with a mandate "to study and monitor the molluscan industry and to make recommendations for the maximization of benefit from that industry for the state of Louisiana and its citizens."<sup>149</sup> The task force is charged with monitoring the water quality requirements of the state in shellfish production areas and is directed to make recommendations to state agencies to further the oyster industry's success within the state.<sup>150</sup> While the task force does not have the authority to act independently in a regulatory or enforcement role, it has been and will continue to be influential in passage of legislation enacted to protect oyster resources from damages.<sup>151</sup> Specifically, the task force has been instrumental in the passage of legislation to assist oyster farmers in areas targeted for coastal restoration projects. In the future, the task force could continue to assist the oyster industry by supporting the legislative changes suggested in this paper.

The Oyster Strike Force is a unit within the Department of Wildlife and Fisheries' Enforcement Division that concentrates on enforcement of oyster regulations within Louisiana's coastal area.<sup>152</sup> This unit has specialized equipment and training all geared toward enforcement of the current regulatory requirements.<sup>153</sup> This sort of

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<sup>149</sup>LA. REV. STAT. ANN. § 56:421(A) (West 2000).

<sup>150</sup>See *id.* § 56:421(E)(1)-(4).

<sup>151</sup>Ron Dugas, Mollusc Program, Louisiana Department of Wildlife and Fisheries, available at <http://www.wlf.state.la.us/apps/netgear/index.asp?cn=lawlf&pid=550> (last visited Jan. 30, 2001).

<sup>152</sup>Oyster Strike Force, *supra* note 5, at para.8.

<sup>153</sup>*Id.* at para. 8-9.

focused patrolling of Louisiana's oyster production areas offers an additional defense against illegal discharges into these waters.

The legislature also created the Oyster Lease Damage Evaluation Board in order to mediate damage claims that arise between oyster leases and mineral owners. Specifically, the board is "to effect an equitable solution . . . which will result in fair and predictable treatment to the oil and gas industry while assuring the oyster fishermen actual compensation for damages to their oyster beds due to mineral activities."<sup>154</sup> Again, this provides another important avenue for recovery when oyster production is threatened or destroyed by point source discharges.

The Oyster Sanitation Fund was established as a special fund within the state treasury.<sup>155</sup> The monies in the fund consist of grants and donations, as well as monies collected from a surcharge established in La. R.S. 30:2075.1.<sup>156</sup> The surcharge is a "flat rate of twenty five percent of the department imposed [water discharge] permit fee . . . for discharges in the Atchafalaya, Terrebonne, Barataria, Lake Pontchartrain and the Mississippi River water quality management basins . . ."<sup>157</sup> The funds must be used for sanitation purposes, pursuant to appropriation by the legislature.<sup>158</sup> The Secretary of either the Department of Health and Hospitals (LDHH) or the Department of Wildlife and Fisheries (LDWF) may petition the treasurer for monies in order to conduct projects that protect, enhance or restore sanitary conditions directly related to the molluscan shellfish industry.<sup>159</sup> One way to expand this program's effectiveness would be to allow for public suggestions or requests to be made to the LDHH and LDWF about sanitation projects in which local constituents have an interest. Giving the public a voice in the way the monies from this fund are spent would allow oyster farmers an opportunity to present possible solutions to persistent problem areas.

## VII. CONCLUSION

This commentary has addressed the various methods available to private parties to compel clean-up under the Clean Water Act and the Louisiana Water Control Law. Though this discussion has focused on remedies that would provide redress to oyster farmers affected by pollutant-contaminated oyster habitat, the approaches discussed are equally applicable to any person affected by the

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<sup>154</sup>LA. REV. STAT. ANN. § 56:700.10 (West 2000).

<sup>155</sup>*Id.* § 40:5.10(A).

<sup>156</sup>*Id.*

<sup>157</sup>*Id.* § 30:2075.1(B).

<sup>158</sup>*Id.* § 40:5.10(C)-(D).

<sup>159</sup>LA. REV. STAT. ANN. § 40:5.10(C) (West 2000).



pollution of our State's waters. Admittedly, some approaches discussed are more novel than others, but there is real potential for citizen-driven clean-up using no more than the current environmental law, regulations, and applicable jurisprudence.