



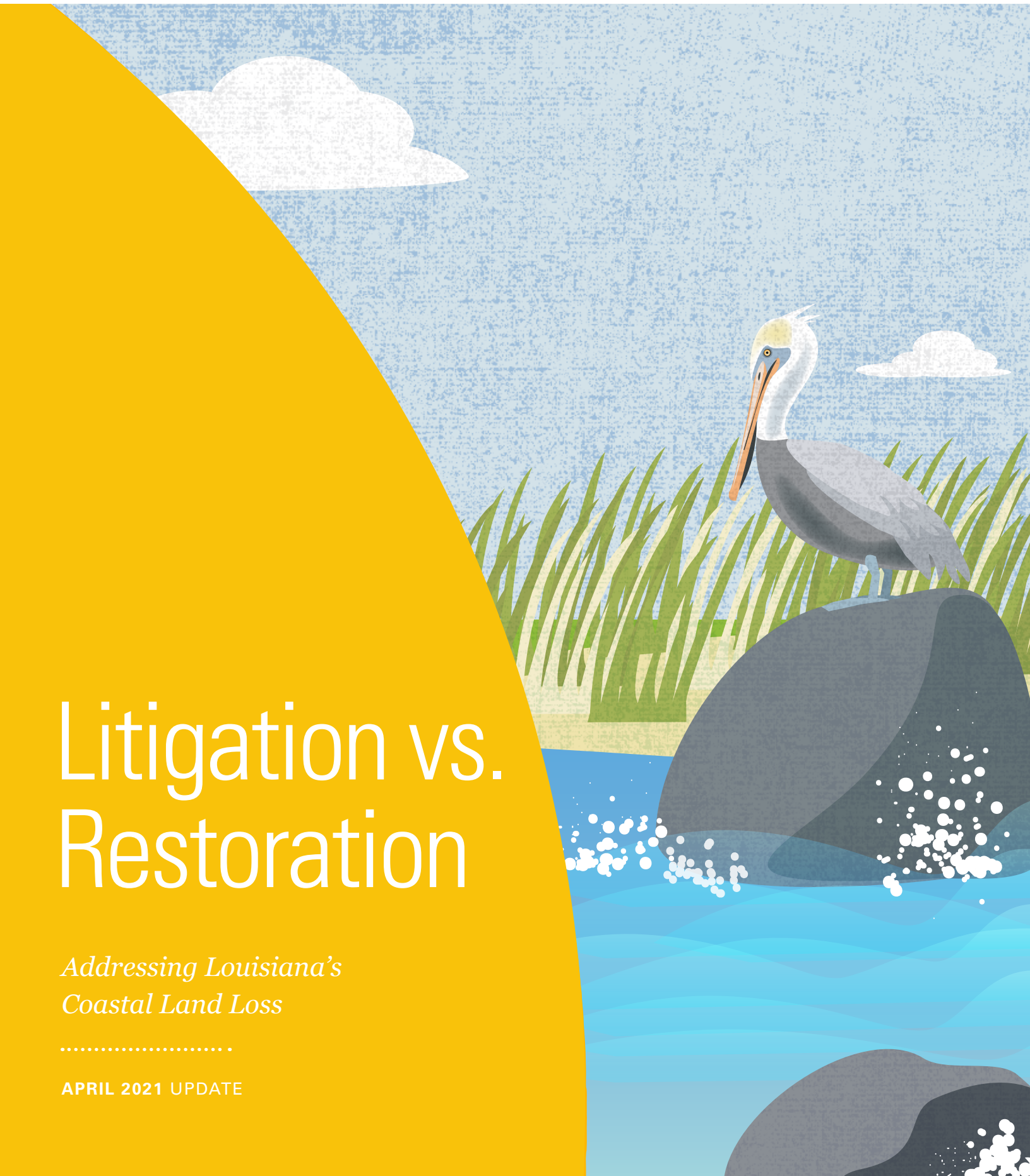
U.S. CHAMBER

Institute for Legal Reform

Litigation vs. Restoration

*Addressing Louisiana's
Coastal Land Loss*

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APRIL 2021 UPDATE





U.S. CHAMBER
Institute for Legal Reform

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Executive Summary

The oil and gas industry is not only a major economic driver for Louisiana and its citizens, but also one of the leading contributors to coastal restoration in the state. Despite these contributions, in recent years the industry has been subjected to an onslaught of litigation driven by private attorneys representing a number of the state's coastal parishes.

While the Louisiana attorney general (AG) later intervened in these suits, along with the governor, he explicitly recognized the disservice these suits do to coastal restoration and protection efforts.

The industry has aggressively defended against the lawsuits. However, in September 2019, one of the nearly 200 defendants, Freeport-McMoRan Inc., reached a settlement with the private attorneys representing the parishes. The agreement was reached without any consultation with the AG or the governor. Few details were released about the terms of the agreement, but one aspect was made clear: the settlement would be contingent on the Louisiana legislature creating a "Coastal Zone Recovery Fund" to receive the money.


For over a year, further details of the settlement were not disclosed to the public. Even though the settlement was contingent upon legislative action, during

the 2020 legislative session lawmakers had no knowledge of the details. This may be part of the reason why the legislation proposed during the 2020 session failed. The silence was finally broken on March 4, 2021, when the AG announced he would support the settlement agreement, despite his prior denouncement of private attorneys steering the litigation.

Upon the announcement, a Memorandum of Understanding regarding the settlement was finally released. It not only provided a clearer picture of the settlement but also further revealed the private parish attorneys' influence on the current Louisiana state legislative session. Two new bills that seek to establish the enabling fund required to implement the terms of the settlement have been filed and referred to the Committee on Natural Resources. At the time of this writing, one of these bills has moved to the Senate floor for consideration, while the second bill remains alive in committee.

This paper discusses the history of coastal land loss in Louisiana, the ensuing litigation by some of the coastal parishes against the oil and gas industry, and why the private attorney-driven Freeport-McMoRan settlement and proposed legislation are not

the solutions to protect and restore the coastline. Instead, the solution is already in place through the Coastal Protection and Restoration Authority (CPRA) and its collaboration with industry partners on coastal protection and restoration.



“ [T]he private attorney-driven Freeport-McMoRan settlement and proposed legislation are not the solutions to protect and restore the coastline.”

Land Loss in Coastal Louisiana

The erosion of Louisiana's coastline is a serious concern, not only for the state and its citizens but also for the oil and gas industry that has operated in Louisiana for over a century.

Coastal erosion is caused by many factors, including sea-level rise, subsidence, and storm-driven erosion.¹ Hundreds of years of developing dams, levees, and flood control structures stopped the Mississippi River from depositing sediment on its banks.² Leveeing the Mississippi River disrupted the natural cycle of sediment deposit. The sediment that once built Louisiana's coastline is now lost into the deep water of the Gulf of Mexico.³

Coastal erosion has slowed since 2010, but "[a] major hurricane impact could quickly change the trajectory of the erosion rates. Sea-level rise is projected to increase at an exponential rate, and that would also expedite the rate of wetland loss."⁴

Consider this dynamic in the context of oil and gas operations, which support one out of every nine jobs in Louisiana and pay \$14.5 billion in wages to in-state workers.⁵

In 2019, the oil and gas industry contributed an estimated \$73 billion to the state's gross domestic product, providing 26 percent of the state's total income.⁶ There are 17 operating refineries located in Louisiana, making the state the second most prominent in the U.S. in terms of refining capacity.⁷

The oil and gas industry is also a major contributor to coastal restoration in the state. Since 2015, Louisiana oil and gas companies have generated more than \$230 million for coastal restoration and hurricane protection.⁸ As a result, there are more CPRA projects underway today than ever before in the state's history. In addition to restorative and protective projects, Louisiana's energy industry is committed to broader efforts to reduce emissions and improve air quality in the state, with over \$339 billion invested in these efforts.⁹

“ In 2019, the oil and gas industry contributed an estimated \$73 billion to the state's gross domestic product, providing 26 percent of the state's total income. ”

Coastal Land Loss Litigation

Despite Louisiana's and its coastal parishes' dependence on the oil and gas industry and the industry's efforts to work with the state to protect and restore the coast, coastal land loss litigation erupted against the industry in 2013.

The majority of the lawsuits were brought by coastal parishes, and eventually the AG and the state intervened. The parties have fought over jurisdiction, the scope of the claims, and federal preemption. Nearly eight years later, these cases are still pending, with little to no clear result.

Local Government Lawsuits and a New Wave of Landowner Suits

Litigation against the oil and gas industry is not new, nor is its impact on Louisiana citizens. Between 2004 and 2012, legacy lawsuits brought by private attorneys for

a handful of Louisiana landowners led to a loss of approximately 1,200 wells, resulting in about \$6.8 billion in lost Louisiana drilling investments.¹⁰ While the lawyers profited from the suits, the damage awards were rarely used for remediation and restoration of the land.

In 2013, the private attorneys widened their focus and filed the first local government suit for the Board of Commissioners of Southeast Louisiana Flood Protection Authority-East (the Levee Board) against the oil and gas industry. The Levee Board suit alleged that the industry caused coastal land loss and increased hurricane vulnerability.¹¹ After years of litigation, the courts dismissed the Levee Board litigation for failure to state a claim for which relief can be granted.¹²

“ While the lawyers profited from the suits, the damage awards were rarely used for remediation and restoration of the land.”

After filing the Levee Board suit, private attorneys filed far-reaching lawsuits on behalf of a number of coastal parishes against as many as 200 oil and gas companies alleging that the companies were responsible for land loss in Louisiana. These attorneys also filed similar lawsuits on behalf of private landowners. This group of landowner suits did not follow the same

“The parish suits were filed against virtually every oil and gas company that ever worked within the plaintiff-defined operational area.”

format as the earlier legacy suits in the state. This time, the claims were broadened and filed outside of the regulatory confines of Louisiana’s Act 312.¹³ The State of Louisiana eventually joined the cases, declaring it important for the state to coordinate coastal restoration efforts.

The parish lawsuits sought to place all of the blame for Louisiana’s disappearing coastline at the defendant companies’ feet. The suits, totaling 42, were filed by six of the 17 coastal zone parishes and the City of New Orleans. The parishes include Plaquemines, Jefferson, St. Bernard, Vermilion, Cameron, and St. John the Baptist. The remaining 11 coastal parishes—Calcasieu, Iberia, St. Martin, St. Mary, Terrebonne, Lafourche, Assumption, Tangipahoa, St. Charles, Livingston, and St. James—have not filed suits.

The parish suits were filed against virtually every oil and gas company that ever worked within the plaintiff-defined operational area. The companies sued have conducted oil and gas exploration, production, and transportation in Louisiana since the 1940s. These activities included

dredging and maintaining a network of canals to access wells located on the coast and in the marshland.¹⁴ The lawsuits all allege nearly identical claims that the oil and gas companies violated Louisiana’s coastal management laws, namely the State and Local Coastal Resources Management Act of 1978 (SLCRMA), and associated regulations located in the Louisiana Administrative Code.

SLCRMA was enacted in response to Congress’s passage of the Coastal Zone Management Act of 1972 and approved by the federal government in 1980.¹⁵ Under SLCRMA, certain uses of the coastal zone “which directly and significantly affect coastal waters and which are in need of coastal management” require a coastal use permit (CUP), and the uses must adhere to the terms and conditions of the CUP.¹⁶ However, SLCRMA grandfathered in certain activities, including “uses legally commenced or established prior to the effective date of the coastal use permit program.”¹⁷ Those activities did not require a CUP.

In the 42 lawsuits, the parishes allege that the companies’ operations were in violation of these laws because they either failed to obtain required CUPs or to abide by the terms of their CUPs. The parishes further contended that the companies failed to restore damage and clean up hazardous waste produced during operations, which they claim caused substantial damage to the land and water bodies in the coastal zone.

Despite the parishes’ attempt to plead around federal jurisdiction, the defendants removed the cases to federal court shortly after they were filed. The defendants initially alleged four bases for original

jurisdiction in federal court: (1) diversity jurisdiction, (2) Outer Continental Shelf Lands Act (OCSLA) jurisdiction, (3) admiralty jurisdiction, and (4) federal question (federal enclave) jurisdiction. The district court rejected each of these arguments and declined federal jurisdiction.

First, the court found that diversity jurisdiction was lacking because the parishes sued as agents of the state to enforce the state's substantive rights, making the state a real party in interest, and some defendants were Louisiana citizens.¹⁸ Second, the court found that OCSLA did not provide jurisdiction because the defendants had not established that the activities that caused the alleged injury constituted an operation "conducted on the outer continental shelf."¹⁹ Third, the court found maritime jurisdiction did not exist because the activities alleged were not consistently maritime in nature, and because the defendants could not meet the diversity requirement for such cases.²⁰ Finally, the court rejected the federal enclave grounds of removal due to the parishes' disclaimer of federal law and the defendants' inability to point to any specific federal question. As such, all of the cases were eventually remanded to state court.

State Intervention

Following remand, and nearly three and a half years after the lawsuits were filed, in March 2016, Louisiana AG Jeff Landry moved to intervene in the pending coastal lawsuits on behalf of the state and to assume control of the litigation. At the time, the AG stated: "Continuing to allow these parties to steer the public policy of

Louisiana regarding our coastal restoration and protection is unhelpful ... We cannot allow these differing, and competing, interests to push claims which collectively impact the public policy for our coast and entire state. Louisiana's public policy should be dictated by the rule of law and its elected officials."²¹

A month later, the State of Louisiana, through its newly-elected governor, John Bel Edwards, instructed the Secretary of the Louisiana Department of Natural Resources (LDNR) to intervene in the coastal lawsuits.²² Governor Edwards also encouraged the remaining coastal parishes to file similar lawsuits, suggesting that the state would sue the oil and gas industry if the parishes did not.²³ Following this announcement, St. John the Baptist Parish and the City of New Orleans, the governing body for Orleans Parish, both filed suits.²⁴ The other 11 parishes have not pursued litigation, with Terrebonne and Lafourche Parishes affirmatively rejecting the pursuit of coastal land loss lawsuits.²⁵

Bellwether Cases

After the cases were first sent back to state court in 2015, the parties agreed to use one case filed in Plaquemines Parish and one filed in Jefferson Parish as bellwether cases. During discovery, however, the parishes produced an expert report that made clear that the focus of the lawsuit was the oil and gas activities that occurred decades before the enactment of SLCRMA. This included activities that were compelled by the federal government during World War II under the Petroleum Administration for War (PAW).

PAW gave the government the authority to dictate to the oil and gas industry the amount of production required from them, as well as dictate what processes and materials were to be used during the wartime effort.²⁶ Because the discovery process revealed that the federal government directed and reviewed the industry's actions, the defendants again attempted to remove the cases to federal court, this time based on federal officer jurisdiction.

On May 28, 2019, the federal court again remanded the cases to state court. In so doing, the court reasoned that the removal based on the expert report was too late. The district court found that the expert report did not reveal any "new theories," but rather the report "simply put a finer point on what the plaintiffs already placed at issue," namely plaintiffs' theory of how the defendants' conduct in the coastal zone was not lawfully commenced.²⁷ The district court found that other papers, such as the pre-SLCRMA activity referenced in the petition, the amended petition filed in 2017, and the responses to discovery requests, contained enough information to

provide the defendants with notice of the changed circumstances.²⁸

While remand orders are typically not appealable, an exception exists where removal is based on federal officer jurisdiction. The defendants appealed the orders under this exception, and the remand orders were stayed, halting the litigation. On appeal, the Fifth Circuit affirmed the district court's remand order.²⁹ The defendants filed a petition for rehearing and a petition for rehearing *en banc*, arguing both that the court failed to apply the appropriate standard for timely removal and that the court failed to consider federal question jurisdiction.

U.S. Supreme Court Interplay

Meanwhile, in January 2021, the U.S. Supreme Court heard oral argument in a case involving the question of whether an appellate court can review the entire remand order when a case is removed under the federal officer statute.³⁰ The outcome of that case will likely influence whether the Fifth Circuit rules in the Louisiana defendants' favor on the pending petitions for rehearing.

“ Because the discovery process revealed that the federal government directed and reviewed the industry's actions, the defendants again attempted to remove the cases to federal court, this time based on federal officer jurisdiction. ”

Freeport-McMoRan Proposed Settlement

While the appeal of the second remand order was pending, on September 27, 2019, one of nearly 200 defendants in the lawsuits, Freeport-McMoRan Inc., announced that it had reached a settlement.³¹ The settlement was the product of negotiations between the private attorneys representing the parishes and this single defendant.

This defendant and the private plaintiffs' attorneys did not consult the governor or the AG, both of whom had intervened on behalf of the state nearly three years before the announcement was made.³² And, though the settlement was reached with the private attorneys on behalf of several parishes, the details of the settlement had not even been disclosed to the parishes

when the settlement was announced, even though the settlement would require the approval of 12 coastal parish governments, not only the coastal parishes participating in the lawsuits.³³

According to news reports, the proposed settlement would require Freeport-McMoRan to make an initial payment of \$15 million upon execution of the agreement, followed by two subsequent payments of \$4.25 million in 2023 and 2024. The settlement was conditioned on the creation of a special fund by the Louisiana legislature to receive the money. In addition to the cash payments, Freeport-McMoRan would be required to contribute up to \$76.5 million more, "subject to contemporaneous reimbursements from the proceeds of the prior sales of environmental credits."³⁴

By January 2020, further settlement details still had not been disclosed to the 12 parishes identified to participate in the deal, including Plaquemines Parish.

“ This defendant and the private plaintiffs’ attorneys did not consult the governor or the AG, both of whom had intervened on behalf of the state nearly three years before the announcement was made. ”

“ The settlement provides for the creation of a ‘Coastal Zone Recovery Fund,’ and is contingent on the Louisiana legislature creating such a fund that is ‘materially consistent’ with the private attorney-created ‘Conceptual Framework’ for it. ”

And there was still no indication that the AG or governor – intervenors in the suits – had been given additional details of the settlement.³⁵

Little was known until very recently, when on March 4, 2021, AG Landry announced he would support the settlement agreement.³⁶ His approval came as a surprise to many because of his earlier stated position regarding the lawsuits: that private attorneys should not be steering the public policy relating to the restoration of the coast.

Regardless, upon the AG’s announcement, a Memorandum of Understanding (MOU) among the parishes that filed suit (Plaquemines, Cameron, Jefferson, St. John the Baptist, Vermilion, and St. Bernard), the non-plaintiff coastal parishes (Iberia, St. Mary, Terrebonne, Lafourche, St. Charles, and St. Martin), the State of Louisiana through the LDNR and the AG, and various Freeport-McMoRan entities,

was released, finally providing a clear picture of the settlement.

The MOU also revealed the private parish attorneys’ influence on the current Louisiana state legislative session.³⁷ The settlement provides for the creation of a “Coastal Zone Recovery Fund,” and is contingent on the Louisiana legislature creating such a fund that is “materially consistent” with the private attorney-created “Conceptual Framework” for it. In other words, if the legislature does not create the fund proposed by the private attorneys, the Freeport settlement falls apart. This point is not without consequence, because if the legislation fails to pass in the next three years, the parishes get to keep the initial \$15 million payment without any control by the state over how the money is spent.

The MOU also suggests that the projects to be developed by the proposed legislation will be “designed to generate marketable environmental credits that can be used to reimburse [settlement] payments.”³⁸ Environmental credits are an asset class that encourages companies to invest in a cleaner environment by monetizing their restoration activities in return for their regulatory compliance. These credits can be sold to companies looking to offset the environmental impacts from their projects. The settlement provides an incentive for Freeport-McMoRan to be the first in line on the proceeds from sales of environmental credits created by the proposed legislation.³⁹ However, as the MOU notes, the economic value of environmental credits is market-driven. Therefore, the future value of the credits, and thus, the extent of reimbursement, is uncertain.

The settlement agreement suggests that its intent is to settle parish claims and similar landowner claims, but its ability to do so is unclear, as the landowners are not participants in the settlement. Further, the settlement sets forth an indemnification provision that allows the entire initial contribution of \$15 million to be paid to satisfy any judgments against Freeport-McMoRan for private landowner claims.

Settlement Contingent Upon Legislation

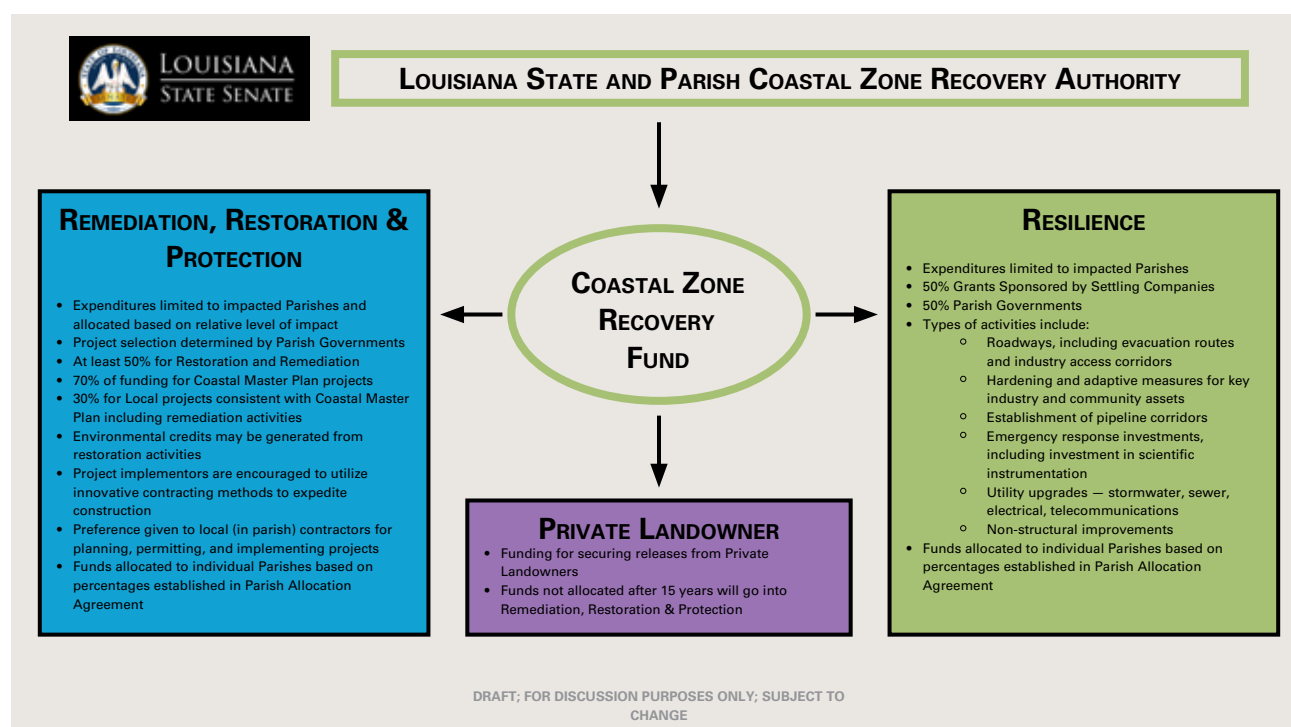
As mentioned above, when word of the Freeport settlement was announced in 2019, it was expressly conditioned on the creation of a special fund by the Louisiana legislature to receive the money.

2020 LEGISLATION

In the 2020 Regular Legislative Session, two competing bills were introduced in the Senate to establish such a fund: SB440,

introduced by Senators Michael Fesi and R.L. Bret Allain,⁴⁰ and SB490, introduced by Senator Eddie Lambert.⁴¹ However, as noted in a Natural Resources Committee hearing on May 15, 2020, six months after the settlement announcement, no settlement draft or agreement had been provided to the legislature for consideration. Nor had all of the parishes joined the settlement at that time.⁴²

SB490, supported by the parishes' private attorneys, proposed the creation of a State and Parish Coastal Zone Recovery Authority (the Authority) and a board of directors within the Office of the Governor. The Authority would be given the ability to collect and spend any settlement funds from the coastal zone lawsuits. The bill purported to create a Coastal Zone Recovery Fund in the state treasury, with three separate bank accounts, or "buckets" for the collection and retention of the money, as follows:⁴³



The first “bucket” included remediation, restoration, and coastal protection. In other words, this bucket purported to cover the one and only alleged purpose of the Parish suits: to protect and restore the coast.⁴⁴

The second “bucket” purported to cover private landowner claims, both current and future, by using the funds to secure settlements with landowners. However, the private landowners with pending cases are not parties to the parish lawsuits, nor are they parties to the Freeport settlement. The inclusion of the landowners without their actual participation makes little sense, except that some of the same private attorneys who represent the parishes represent the landowners.

Finally, the third bucket is the “resilience” bucket, which purported to provide funds for roadways, emergency response investments, utility upgrades, and other similar projects.⁴⁵ The bill initially also included a governing board for the Authority, an administrative bucket, and an economic development bucket. However, at the Natural Resources Committee hearing, Senator Lambert presented an amended version of the bill, which removed these items. The amended version did not provide for any governing board or method for distributing the money collected.

During the Committee hearing, Senator Sharon Hewitt pointed out that the proposed “buckets” appeared to be beyond the authority of CPRA and the scope of what should be included in the definition of restoration and remediation of the coast. She was also concerned that the majority of the “resilience” bucket included projects that were not in the state’s Master Plan.⁴⁶ Senator Allain was concerned with the fact that the landowner claims were being swept into the legislative process without any real participation by the landowners who brought lawsuits. In addition, he pointed out that the proposed legislation incorporated the terms of settlements that had not yet been entered. He further voiced his concern about creating legislation contingent on the unknown terms of a settlement.⁴⁷

SB490 did not make it out of the committee. Both the Louisiana Oil and Gas Association (LOGA) and Louisiana Mid-Continent Oil and Gas Association (LMOGA) responded to the bill’s failure by noting that “[t]his bill would have diverted funds away from Louisiana coastal restoration, incentivized more frivolous litigation targeting the energy industry, and allowed for the wholesale out-sourcing of state coastal policy and regulatory enforcement authority to private attorneys at the expense of Louisiana’s integrated coastal resources program.”⁴⁸

“The inclusion of the landowners without their actual participation makes little sense, except that some of the same private attorneys who represent the parishes represent the landowners.”

“The Authority will still be housed in the Office of the Governor, but unlike the 2020 bill, the Board will not include many industry and coastal restoration experts, including the president of LOGA, the president of the Louisiana Association of Business and Industry, the executive director of LMOGA, or the executive director of the Coalition to Restore Coastal Louisiana.”

SB440 similarly proposed a way to handle funds from any settlements resulting from the parish lawsuits, among other issues. Most importantly, the bill required that any money collected be used in a manner consistent with the present law. A portion of the funds would be deposited in the already-established Coastal Protection and Restoration Fund.⁴⁹ Another portion would be deposited into a restricted fund administered by the parish implicated. This bill passed in the Senate, but did not make it through the House Appropriations Committee.

2021 LEGISLATION

Although the 2020 bills did not pass into law, the Freeport settlement agreement remains contingent on legislative action. As a result, two new bills were pre-filed in connection with the 2021 legislative session, which opened on April 12, 2021. These bills attempt to establish the enabling fund required by the settlement. Senator Rick Ward filed SB233, which is very similar to 2020’s SB490.⁵⁰ At the same time, Representative Tim Kerner pre-filed HB569, which is substantially similar to Senator Ward’s SB233.⁵¹ In addition to these “2021 Settlement Bills,” Senator Allain pre-filed SB122, which is more in keeping with Louisiana’s current coastal protection program.

As with 2020’s SB490, the 2021 Settlement Bills seek to establish a Louisiana Coastal Zone Recovery Authority and a Louisiana Coastal Zone Recovery Fund to handle settlement proceeds. However, the 2021 Settlement Bills propose a slightly different approach from last year. The enabling language notes that the legislation is being introduced not only to create the Authority and Fund but also to provide for use of that Fund. The Authority will still be housed in the Office of the Governor, but unlike the 2020 bill, the Board will not include many industry and coastal restoration experts, including the president of LOGA, the president of the Louisiana Association of Business and Industry, the executive director of LMOGA, or the executive director of the Coalition to Restore Coastal Louisiana. Instead, the Board would consist of: (1) a member from each settling parish; (2) the chairman of the CPRA; (3) the president of the Senate; and

(4) the speaker of the House. The industry and coastal restoration experts are now included on a "Coastal Zone Recovery Subcommittee," which is charged with advising the Board.

The 2021 Settlement Bills also grant the Board many new powers not included in 2020's SB490, including the obligation to: (1) oversee implementation of the settlement agreement; (2) manage projects submitted by settling parishes; (3) recommend annual appropriations to the legislature; (4) oversee the use of funds in connection with landowner issues; and (5) oversee the banking of environmental credits.

The bills also impose extra obligations on the CPRA, including the obligation to coordinate with the new Authority and a requirement that CPRA's executive director "provide necessary reports, staff, assistance and support" to the Authority and its subcommittee, though what this entails is not spelled out in the proposed legislation. CPRA is also required to promulgate guidelines, rules, and regulations in coordination with the Authority to oversee, manage, and administer an environmental bank program established in accordance with the Freeport settlement. It is also designated to receive and administer money from the Fund.

The 2021 Settlement Bills also create new and additional "buckets" for the Fund. The first bucket is for the Master Plan and dedicates 60 percent of the Fund to be used on projects consistent with the state's Master Plan. The second bucket, the "Restoration, Protection, and Remediation Account," is very similar to the previously-named "remediation, restoration and

coastal protection" bucket. The third "resilience" bucket is also similar to the previous resilience bucket. The landowner bucket has been renamed the "Land Rights Account," which now defines the account to include monies for the acquisition of access rights, rights of use, servitudes, easements, or payment for other rights or interests. What is not clear is whether this account will include the payment for landowner lawsuits/claims or indemnification for those lawsuits/claims that is provided in the MOU.

Senator Allain pre-filed SB122,⁵² which is substantially similar to 2020's SB440 with regard to the handling of settlement funds from the parish lawsuits. As with SB440, SB122 requires that any money collected be used in a manner consistent with the present law. A portion of the funds would be deposited in the already-established Coastal Protection and Restoration Fund.⁵³ Another portion would be deposited into a restricted fund to be administered by the parish implicated.

The 2021 Settlement Bills and SB122 were referred to the Committee on Natural Resources. SB233 and SB122 were heard on April 21, 2021. At the hearing, Senator Ward voluntarily deferred debate of SB233, but SB122 was debated. Senator Allain presented SB122 as a way to make sure any money paid in settlement of the coastal cases would go toward restoration of the coast. During debate, SB122 was amended, increasing the percentage of funds that must go directly to CPRA from 50 percent to 75 percent. John Carmouche, the parishes' private attorney, testified against the bill, arguing that it interfered with the litigation by removing the parishes'

ability to bring future litigation regarding issues of state concern, and that language in the bill might provide industry defendants with an argument that the parishes have no right of action to pursue the current litigation. Senator Allain responded that the competing bill, SB233, was excessively complicated and that it diverted money from the coast. He also suggested that the correct approach would be for the

settlement to fit in with current legislative intent and the state's policy favoring restoration, rather than revise or implement legislation to fit in with the settlement. The committee voted to report SB122 and move it to the floor for consideration by the full Senate.

As of this writing, debate on SB233 and the similar HB569 remains ongoing.



“ [T]he correct approach would be for the settlement to fit in with current legislative intent and the state’s policy favoring restoration, rather than revise or implement legislation to fit in with the settlement. ”

Lawyer-Driven Legislation Fails to Protect the State or its Landowners

The coastal litigation is now entering its eighth year, with no end in sight. Instead of facilitating resolution, it has polarized the litigants and industry and limited opportunities for cooperative restoration projects. The single settlement reached in private was crafted by a company that no longer operates in Louisiana and by the private plaintiffs' attorneys driving the litigation against the industry.

This sweeping settlement comes without input from the state, the parishes involved, or the other hundreds of companies sued in

“ This sweeping settlement comes without input from the state, the parishes involved, or the other hundreds of companies sued in the coastal cases. The settlement does nothing to facilitate global resolution or cooperation ... ”

the coastal cases. The settlement does nothing to facilitate global resolution or cooperation, but it requires legislative action which would apply far beyond this one deal. Should the proposed legislation pass, it will adversely affect the rest of the litigation and the restoration effort as a whole.

For example, the 2021 Settlement Bills require a complete rewrite of the state's coastal policy. Rather than provide funds exclusively for the state's Master Plan, these bills divert funds away from coastal restoration to other projects, such as road work, emergency response investments, and utility upgrades. As currently written, the 2021 Settlement Bills would also allow funds to be used to pay private damage claims brought by landowners without the protection the state built into landowner suits when it enacted Act 312 in 2006 to address landowner legacy lawsuits.

“Legislative affirmation of the Freeport settlement would effectively offer private plaintiffs’ attorneys unfettered discretion to structure settlements in government-sponsored lawsuits, in a manner contrary to Louisiana’s present law.”

The 2021 Settlement Bills would also create a complex web of authority and administrative hoops for the CPRA, which is entirely unnecessary given the fact that Louisiana already has a deeply engrained structure for evaluating liability and directing funds related to coastal land loss.

Legislative affirmation of the Freeport settlement would effectively offer private plaintiffs’ attorneys unfettered discretion to structure settlements in government-sponsored lawsuits, in a manner contrary to Louisiana’s present law. If this comes to pass, private plaintiffs’ attorneys might reasonably expect that their priorities, rather than the state’s interests, will animate this area of economic and environmental policymaking in Louisiana. This incentivizes lawsuits and undermines the more important goal: getting actual restoration effectuated.

Public and Private Solutions Already in Place

The State of Louisiana undoubtedly needs solutions for addressing its diminishing coastline. But those solutions will not be found through divisive litigation, secretive settlements, or complicated legislation that does not guarantee settlement funds will actually go towards restorative efforts.

Rather, the solution lies in partnership and collaboration with stakeholders, including industry, to constructively respond to land loss and related issues. And, as mentioned above, that solution is already in place.

The state currently receives substantial funding from industry activity for coastal restoration projects, which are implemented by the CPRA. The CPRA is the agency that leads coastal restoration and hurricane protection efforts in the state.⁵⁴ It was formed in 2005 after Hurricanes Katrina and Rita highlighted the need to improve Louisiana's hurricane protection systems and restore wetlands.⁵⁵ Every five years, the CPRA upgrades its comprehensive master plan to address land loss, subsidence issues, and storm surge damage. The CPRA also serves as the lead trustee administering Louisiana's

Deepwater Horizon settlements, which it uses to fund several of these projects.⁵⁶

In addition to oil spill funds, the CPRA also receives substantial funding directly from revenue generated by industry activity within the Gulf States and off their coasts.⁵⁷ Indeed, the CPRA's only two recurring funding sources are state mineral revenues that flow into the Coastal Trust Fund and Gulf of Mexico Energy Security Act (GOMESA) revenues generated by oil and gas companies through production in the Gulf.⁵⁸ In this way, industry-generated revenue directly contributes to concerted coastal restoration efforts. The ongoing litigation, however, poses a threat to this funding source by disincentivizing future oil and gas production within the state and off its shores.

“Rather, the solution lies in partnership and collaboration with stakeholders, including industry, to constructively respond to land loss and related issues.”

Rather than promoting lawsuits that halt progress and advance private attorneys' interests, the state needs to focus on encouraging cooperation with industry leaders on projects targeted towards advancing coastal restoration goals. The industry is already engaged in several projects to reverse land loss—projects that are both welcomed and provided for by the CPRA.⁵⁹ For example, Ducks Unlimited joined with ConocoPhillips in 2018 to restore 1,200 acres of marshland,⁶⁰ and it recently partnered with Chevron and Phillips 66 to restore approximately 2,550 acres of coastal marsh.⁶¹ ConocoPhillips

also partnered with Tierra Resources to implement an air-seeding project focused on planting mangroves to protect against wetland erosion and hurricane surge.⁶² Additionally, in an innovative coastal restoration effort, Shell collaborated with the Coastal Conservation Association in 2019 to repurpose plastic bottles from the New Orleans Jazz & Heritage Festival into floating islands to slow coastal erosion.⁶³ These efforts demonstrate the power of partnership to support immediate coastal restoration, without having to wait for litigation to resolve or requiring complicated structures to disburse settlement funds.

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Conclusion

The erosion of Louisiana's coastline is a serious concern, one that everyone in Louisiana agrees must be addressed.

But constant litigation by private attorneys seeking to direct state policy is not the way to ensure that the coastline is restored. While a one-off settlement may provide some money for restoration, it is unclear

if and when that money will ever be used to restore the coast. Instead, the goals of coastal protection and restoration are better served through ongoing collaboration between the state and its industry partners.

Endnotes

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