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Louisiana v. Lee and the Battle of Lake Pontchartrain

Oliver A. Houck*

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I. INTRODUCTION

After a while, Nick Yost just held onto the railing. His legs were numb from the pounding, and he worried about his kneecaps. There was no sitting down. At the wheel, Harold Schoeffler was bouncing his sixteen-foot aluminum whaler across three-foot seas so far offshore that

* © 2012 Oliver A. Houck. Professor of Law, Tulane University Law School. The primary research of Casey Scott, Tulane Law School '10, and the careful source work of Andrea Rush '13, is acknowledged with gratitude, as are the information and recollections of several of the actors in this history, cited wherever possible.

the only things visible were flare outs from the oil rigs, searching for his prey—a suite of dredges and barges the size of football fields dredging up the oyster reefs of Vermilion Bay.¹ They may have found them that day; Yost cannot recall. There was no real need to see them, however. There were pictures, and the United States Army Corps of Engineers (Corps) had written an environmental impact statement (EIS) about them saying, in effect, that they posed no problem.²

Yost knew a lot about federal impact assessments. In fact, he had written the rules for them in Washington, D.C. a few years before. Now back practicing in California, he had come down to Louisiana at Schoeffler's request, which he found irresistible. "I mean," he later marveled, "they took me out to eat alligator and then to a dance where the old folks sang in French and danced with their grandchildren."³ As it turned out, Schoeffler not only led the Sierra Club in nearby Lafayette, he ran the Cadillac dealership as well; not many spots in America would you find that combination, Yost mused.⁴ Together with a local attorney who had been tilting at shell dredging for half a decade, they filed a lawsuit.⁵

Even the caption of the lawsuit was unusual, *Louisiana v. Lee*.⁶ Here was the State of Louisiana filing against a Corps permit for an activity supported by major state agencies,⁷ including the Louisiana Department of Wildlife and Fisheries (Department of Wildlife and Fisheries), which happened to receive a cut from each cubic yard of

1. Interview with Nick Yost in New Orleans, La. (June 29, 2009).

2. U.S. ARMY CORPS OF ENGINEERS, OYSTER SHELL DREDGING IN GULF OF MEXICO WATERS, ST. MARY AND TERREBONNE PARISHES, LOUISIANA, at EIS-67, -73, -79 (1994). "Buried reefs are, therefore, without known value unless mined for shell." *Id.* at EIS-79. "The [GSRI] study concluded that there was no difference in the abundance or distribution of aquatic biota in dredged or undredged areas and most differences were seasonal rather than related to dredging." *Id.* at EIS-73.

The effects of released contaminants from bottom sediments [due to turbidity created by dredging] are expected to have only minimal effects on phytoplankton productivity and the growth and survival of larval and adult crustaceans and finfish The impact to populations of phytoplankton is associated with discharge water therefore negligible in the context of the project area.

Id. at EIS-67; see also C.L. JUNEAU, JR., LA. DEP'T OF WILDLIFE & FISHERIES, SHELL DREDGING IN LOUISIANA: 1914-1984 26 (1984) ("[T]he general scientific consensus has been that, provided the [dredging] industry is properly managed and regulated, environmental effects are generally minor and temporary in nature.").

3. Interview with Nick Yost, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Louisiana v. Lee*, 596 F. Supp. 645, 645 (E.D. La. 1984), *vacated*, 758 F.2d 1081 (5th Cir. 1985).

7. *Id.* at 648.

shells taken from the oyster reefs along coastal Louisiana and from Rangia clams that lined the bottoms of Lakes Maurepas and Pontchartrain.⁸ The case would make law a new principle for environmental assessment that would give environmental plaintiffs real legs in court. It would also help lead to the dramatic reversal of a practice deeply embedded in Louisiana politics and to the recovery of a historic resource still lingering in the public mind, ready when the opportunity came to recapture things long-thought destroyed.

Theirs would be a wild ride. It would depend, year in and year out, on the abilities and staying power of two classically southern environmentalists, Schoeffler the car dealer and Michael Osborne, a small-office lawyer working largely *pro bono publico*, both bred so deeply to the outdoor world that this fight seemed to rise from their genes. They found themselves in nearly a dozen venues, some concurrently, with no more resources behind them than it would take to put on a good wedding. These were not easy cases, and they were up against an industry that saw its life on the line. Lloyd's of London would not have backed their chances to prevail. They went forward.

II. THE WATERS

[W]e were in Lake Pontchartrain, so that this stormy view of the gulf was the only one we had. . . . [W]e arrived in sight of the long piers which stretch out from the swamp into the lake, the mudcraft, the canoes with blacks fishing for crabs; the baths, and the large Washington Hotel with its galleries and green blinds, built for coolness, where gentlemen from New Orleans go to eat fish and bathe.

—Harriet Martineau, New Orleans visitor, 1838⁹

Louisiana waters, where the Mississippi River meets the Gulf of Mexico, were the axis of America. While a thousand miles to the east English settlers were still hacking their way into the wilderness tree by tree, the Spanish, having struck gold in Mexico and Peru, were posting forts and sailing their booty along the Louisiana coast en route to Sevilla. The French, meanwhile, were planning a lightning strike from Canada down the Mississippi to secure the heartland of the continent. On the outcome of these bold ventures would hang, among other incidentals, which language would be spoken by the superpower of the twentieth century.

8. Interview by Casey Scott with Dr. Stuart Phillips in New Orleans, La. (Mar. 20, 2009).

9. HARRIET MARTINEAU, RETROSPECT OF WESTERN TRAVEL 122-23 (1838).

The coastal settlement is a legend of its own. The Acadian people, pushed out of Canada in La Grande Tristesse, wound up in the Louisiana marshes and maintained a culture based on fishing, trapping, and small farming for the next two centuries, when the oil rigs arrived. The waters they lived on were incredibly fecund, swarming with seafood, waterfowl, fur bearing animals,¹⁰ and an armada of fishermen whose lives and weekends, to this day, are organized around trips into the lakes and open water of the Gulf.¹¹ Inshore, Lakes Pontchartrain and Maurepas were the prizes, supported by clam deposits that went back millennia in time.¹² Offshore, the prime fishing grounds were the oyster reefs, some of which stuck several feet up out of the water while others lay a foot or so submerged, ideal for wade fishing.¹³ Nearly every big fish in the Gulf and immense schools of smaller ones were centered on these reefs, a several hundred-mile living perimeter of Louisiana, just a few miles out to sea:¹⁴ Point au Fer, East Cote Blanche, Prairie du Chene, they carry French names.

But let us give mention where it is due. None of these people were the first. The Bayougoula, Mougoulascha, Chitimacha, Ouma, Tunica, Tangipahoa, Colapissa, and Quinipissas native tribes lived along these waters under scarcely conceivable conditions,¹⁵ floods and hurricanes, sweltering heat, brackish water, swamp muck to the waist, mosquitoes thick enough to chew, surrounded to the south by sinking mats of grasses, to the north by thick swamps, and on the ridges by canebrake filled with snakes, bear, wolves, and the ever-present roar of alligators which prompted an early French visitor to write in his diary, “May God

10. See *CWPPRA's Frequently Asked Questions*, COASTAL WETLANDS PLANNING, PROTECTION & RESTORATION ACT, <http://lacoast.gov/new/About/FAQs.aspx> (last visited July 25, 2011) (“Approximately 40 percent of the coastal wetlands of the lower forty-eight states are located in Louisiana.”); BETH A. VAIRIN, *CARING FOR COASTAL WETLANDS* 2-3 (1997) (“Furthermore, Louisiana’s coastal wetlands provide wintering habitat for 20% of the nation’s waterfowl and supports the largest fishery in the lower 48 states.”).

11. U.S. ARMY CORPS OF ENGINEERS, *supra* note 2, at EIS-82-83. Tables indicated that commercial fishing in 1989 of four parishes on the Gulf Coast: Cameron, Iberia, Lafourche, and Vermilion brought in a total of 18.5 million pounds of fish totaling \$21.4 million. Commercial shrimping in the four parishes in 1989 totaled 17.8 million pounds of shrimp at a total worth of \$43.1 million. *Id.* In 1986, 40,614 saltwater recreational fishing licenses were issued in Vermilion, Iberia, St. Mary, and Terrebonne parishes, and 3471 shrimping recreational licenses were issued between 1986 and 1987 in those parishes. *Id.* at EIS-114.

12. See JUNEAU, *supra* note 2, at 1-2.

13. For history on fishing on Lake Pontchartrain, see W. ADOLPHE ROBERTS, *LAKE PONCHARTRAIN* 313-19 (Milo M. Quaife ed., 1946).

14. See U.S. ARMY CORPS OF ENGINEERS, *supra* note 2, at EIS-48.

15. See *IBERVILLE'S GULF JOURNALS* 45, 47, 53, 61, 73, 126 (Richebourg Gaillard McWilliams eds. & trans., 1981).

preserve us from the crocodiles!”¹⁶ Befriending the Europeans, these first Americans succumbed to their diseases and, in great numbers, disappeared. What remains of their encampments is marked by huge mounds of the shells of their staple resources: oysters along the Gulf and Rangia clams from Maurepas and Pontchartrain.¹⁷

A few miles inland, less than fifty as the crow flies, the location of New Orleans may or may not have been a mistake, but it was based on strategic access to the coast, an axis of the Mississippi, the Gulf, and the lakes in between.¹⁸ On the heels of Columbus, Spanish explorers found the main river outlet so blocked by towering masses of mud and timber that they named it *Rio de la Palizada*, and gave up the venture.¹⁹ No one else tried for 150 years.²⁰ In 1699, Pierre LeMoyne, Sieur d’Iberville, backed by the French Minister of the Navy, the Comte de Pontchartrain, managed to enter the river from the Gulf, which led to the next question, where to spot a colony.²¹ Trying several sites, he eventually settled next to a pass shown to him by the natives leading to Lake Pontchartrain, which then led to the open Gulf and other French settlements as far east as Mobile.²² The discovery was a godsend. Iberville had learned how difficult it was to navigate up the Mississippi. The clinching argument

16. See LYLE SAXON, *FABULOUS NEW ORLEANS* 78-79 (1947) (“The mouth of the Mississippi was a dangerous place and had never been fully explored. . . . [W]e read of the monsters which were said to dwell near its mouth, and the Indian legends told of other horrors there—of gigantic beasts which waited to spring upon the unwary travelers. And in Father Louis Hennepin’s diary, written thirty six years before [1718], telling of the discovery of the river’s mouth, we find him exclaiming, ‘May God preserve us from the crocodiles!’”).

17. See J.W. FOSTER, *PRE-HISTORIC RACES OF THE UNITED STATES OF AMERICA* 156-63 (1874).

18. See RICHARD CAMPANELLA, *TIME AND PLACE IN NEW ORLEANS* 26 (2002) (“The premier advantage to the French Quarter site was its location on a least-cost/minimum-distance route between the Gulf of Mexico and the Mississippi River. Instead of taking the long and perilous route from the mouth of the river, mariners could slip through the protected waters of the Mississippi Sound and Lake Borgne, and traverse the Rigolets land bridge via the Rigolets or Chef Menteur Pass, to gain access to Lake Pontchartrain and eventually the placid waters of Bayou St. John.”). For greater detail, see *id.* at 18-33; RICHARD CAMPANELLA, *BIENVILLE’S DILEMMA, A HISTORICAL GEOGRAPHY OF NEW ORLEANS* (2008) [hereinafter *CAMPANELLA, BIENVILLE’S DILEMMA*]. All research agrees that it was the combination of the river and the lake that decided the question.

19. *IBERVILLE’S GULF JOURNALS*, *supra* note 15, at 6-7.

20. See *id.* In the 1670s, Robert Cavalier de La Salle sailed south down the Mississippi from Canada and into the Gulf of Mexico, but on a second voyage, this time from the Gulf, his ships missed the outlet, shipwrecked in Texas, and fell to a mutiny that wound up killing him. *Id.* at 3-4.

21. See *id.* at 6-7.

22. See *id.* at 6-7, 11.

for the New Orleans location was the proximity of Pontchartrain, and thence the sea.²³

New Orleans, then, was not just a river town. It was a two-for-one, river and lake town and while the Mississippi brought commerce to the city, the lakes fed it every day. For more than a century, sailboats, and then steamers, scoured the region for fish, vegetables, and timber carried from Pontchartrain into the city on the Carondelet, New Basin, and Harbor canals.²⁴ Meanwhile, however, an even larger trade was building in the wings.

Let us fast-forward. The French and Spanish governors have long left the scene and the Americans, circa 1880, are firmly in charge of the city and accelerating towards the Gilded Age of domestic empire. Let us indulge ourselves in a balloon ride to Lake Pontchartrain. It is a quiet evening; the daily thunderstorm has come and gone, and we are soon gliding east from New Orleans. We are struck at first by the crescent of city lights below, and then the sudden darkness, broken only by the shadows of massive cypress trees and the glint of starlight off the surface of jet-black ponds and bayous. We feel we have left planet Earth. Suddenly, ahead of us in the distance is another rim of lights, and as we approach, we see that they border the lake; from it comes the sounds of laughter, children calling, music, and the smell of crab boil. It seems like a party, there must be a thousand people, but it is not a special event. This is an ordinary summer night along the shores of Lake Pontchartrain.²⁵

Early in the nineteenth century, Lake Pontchartrain began morphing into one of the great pleasuring grounds of North America. Mule-drawn barges and sailboats gave way to steam ferries, the “Smoky Mary”

23. Saxon, *supra* note 16, at 83-84 (“[T]he Company’s project was, it seems, to build the town between the Mississippi and the St. John River which empties into Lake Pontchartrain; the ground there is higher than on the banks of the Mississippi. This river is at a distance of one league from the Lake.” (quoting BERNARD DE LA HARPE, *JOURNAL DE VOYAGE DE LA LOUISIANE ET DES DÉCOUVERTES QU’IL A FAITES* 81 (1716-1722))).

24. See CAMPANELLA, *BIENVILLE’S DILEMMA*, *supra* note 18, at 208-09; see ROBERTS, *supra* note 13, at 313-27.

25. Mark Twain describes his own arrival (by land) at about this time:

And by and by we reached the West End, a collection of hotels of the usual light summer-resort pattern, with broad verandas all around, and the waves of the wide and blue Lake Pontchartrain lapping the thresholds. We had dinner on a ground veranda over the water. . . . Thousands of people come by rail and carriage to West End and to Spanish Fort every evening, and dine, listen to the bands, take strolls in the open air under the electric lights, go sailing on the lake, and entertain themselves in various and sundry other ways.

MARK TWAIN, *LIFE ON THE MISSISSIPPI* 357 (1901).

railroad line, and a trolley extension that wound out from New Orleans past fields and through swamps.²⁶ One enthralled passenger remarked on the ““fleurs-de-lis of every color, palmetto, and a hundred aquatic shrubs new to the eye of the stranger,”” as well as abundant snakes that ““coil about the Negroes who are seen pushing their canoes through the rank vegetation, or towing their rafts laden with wood along the sluggish bayou.””²⁷ The trolley trip took nearly an hour and cost pennies at the time.²⁸ It was affordable.

Once at the lake, no appetite went unserved. New Orleans and neighboring Jefferson Parish were, depending on the politics of the moment, wide open for gambling and “sporting houses.”²⁹ Opulent hotels featured billiard rooms, card parlors, cigar rooms along with live music, formal gardens, theatre performances, target shooting, and, never to be overlooked, fine dining.³⁰ Public parks offered bandstands, ball fields, beer stalls, rain shelters, and outdoor hearths.³¹ The most popular musicians of the day came to entertain each other, vied to outdo each other, as did a hit parade of stars at colored-only Lincoln Beach: Buddy Bolden, Fats Domino, Little Richard, Nat King Cole, Sam Cooke, and the Neville Brothers among them.³² Young Elvis Presley came too.³³ As did Hollywood. Jayne Mansfield, with perhaps the most photographed bosom of her time, was killed in an auto accident on a highway bordering Pontchartrain, traveling from one engagement to the city.³⁴ Out beyond the formal entertainment, the banks of the lake twinkled with family cooking fires and teemed with children baiting nets with chicken necks and bringing in fresh crab. You could hear the music from anywhere. You could park there with a date to “watch the porpoise races” or ride the

26. ROBERTS, *supra* note 13, at 135-36; see MARY LOU WIDMER, *NEW ORLEANS IN THE TWENTIES* 69 (1993).

27. ROBERTS, *supra* note 13, at 185 (quoting HARRIET MARTINEAU, *RETROSPECT OF WESTERN TRAVEL* 135 (1838)).

28. See *id.* at 185, 238. The ride on the Smoky Mary’s steam powered train from Milneburg to the city took thirty minutes each way and cost seventy-five cents round-trip in the 1830s. *Id.* at 238-39; see also WIDMER, *supra* note 26, at 69.

29. See James P. Baughman, *A Southern Spa: Ante-Bellum Lake Pontchartrain*, in 3 *LOUISIANA HISTORY* 8, 7-12 (Edwin Adams Davis ed., 1962).

30. See *id.* at 9-11; see WIDMER, *supra* note 26, at 65-66.

31. See WIDMER, *supra* note 26, at 65-66.

32. See CATHERINE CAMPANELLA, *LAKE PONTCHARTRAIN* 87-94 (2007); see also *You’ve Got a Lot of Nerve*, GENTLEBEAR (Aug. 2, 2008), <http://gentlebear.wordpress.com/2008/08/02/youve-got-a-lot-of-nerve/>.

33. CAMPANELLA, *supra* note 32, at 9.

34. *This Day in History—June 29: Actress Jayne Mansfield Dies in Car Crash*, HISTORY.COM, <http://www.history.com/this-day-in-history/actress-jayne-mansfield-dies-in-car-crash> (last visited June 30, 2011).

legendary Zephyr rollercoaster, which still evoke strong memories,³⁵ and in turn are a part of understanding what happened to shell dredging.

There are more parts still. Lake Pontchartrain is 630 square miles of water, twenty-five miles across at the belly,³⁶ open to the breeze and a world away from summer heat and smells that made New Orleans nearly unbearable for that part of the year. Few people dared swim in the Mississippi River, and several who tried would drown, but the lake was safe, shallow, soft-bottomed, unaffected by currents, uncontaminated by city wastes, and clear except for the stormiest weather. People came and jumped in, sunbathed, brought the relatives out for the weekend, and jumped in again.³⁷ They brought fishing poles, took out small boats, and their catches would fill an ice chest, sometimes two.³⁸ They trawled small nets for shrimp.³⁹ They rented the shacks of commercial fishers in the summer months, one-room cabins on stilts in the shallows surrounded by wide-screened verandas, returning them to their owners in the fall.⁴⁰ Hundreds of these “camps” lined the south shores.⁴¹ They were a peoples’ getaway.⁴²

It all centered on the water, and it all went well until the water changed. To be sure, the jolt of integration played its ugly role, but when the water quality went, the people went too, all of them, white and black. Pontchartrain shut down.⁴³ State agencies stopped even testing the waters. In 1972, the entire lake was posted off-limits. Daunting signs read:

“WARNING
THE LAKE IS UNSUITABLE FOR SWIMMING OR BATHING
HAZARDOUS TO YOUR HEALTH”⁴⁴

By this time, Pontchartrain smelled bad, its shoreline was eroding, its grass beds were dying, its bottoms smothered, its prized trout largely

35. Personal observation of *Along Lake Pontchartrain* (WYES television broadcast Nov. 15, 2007); *1957: Ponchartrain Beach and Lincoln Beach in New Orleans*, TIMES-PICAYUNE (New Orleans) (Nov. 30, 2011), http://www.nola.com/175years/index.ssf/2011/11/1957_ponchartrain_beach_and_L.html.

36. *Lake Pontchartrain*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/469687/Lake-Pontchartrain> (last visited July 23, 2011).

37. WIDMER, *supra* note 26, at 67-69.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See *History of the Pontchartrain Basin*, LAKE PONTCHARTRAIN BASIN FOUND., <http://www.saveourlake.org/basin-history.php> (last visited Sept. 12, 2012).

44. *Id.*

gone, its shellfish battered, and its crabs, in relic numbers, barely hanging on.⁴⁵ A chronic sadness filled conversations about Lake Pontchartrain. They were about what used to be and how nice it was.

At the bottom of it all, forming a substrate for the life in the lake, was a bivalve no larger than a thumbnail, the Rangia clam. It had been under constant assault for half a century and was finally collapsing.⁴⁶ As the Rangia clam went, so would go just about everything else. As the oyster reefs went along the coast, even larger consequences were in store. The clam beds and the oyster reefs faced several challenges unique to each of them, but they held the biggest one in common and it seemed invincible: very large machines.

III. THE SHELLS AND THE MACHINES

They were digging up these fossil shells [that were] hundreds of years old. This wasn't fishing or harvesting, it was mining.

—Dr. Stuart Phillips, Sierra Club, 2010⁴⁷

Louisiana shell dredging began in earnest around 1914 on the coast.⁴⁸ It remained on the coast and primarily focused on oyster reefs for the next twenty years, when extensive layers of Rangia clams were discovered in Maurepas and Pontchartrain.⁴⁹ By the late 1930s, the clam rush was on as well, and by the 1960s, several million cubic yards of shells per year were being taken from the coast and the lakes in almost equal measure.⁵⁰ The shells were cheap, seemingly inexhaustible, and had a ready market. More than eighty percent of them went into public works projects, roads, and levee construction, where the clamshells in particular were crushed to a permeable surface, neither swelling nor cracking with the weather, filtering through the rain.⁵¹ You could ride a bicycle on them and they made a pretty sight, white paths and driveways against green grass. Whatever was happening out in the lakes or down

45. See Interview by Casey Scott with Dr. Stuart Phillips, *supra* note 8.

46. See S.W. Abadie & M.A. Poirrier, *Increased Density of Large Rangia Clams in Lake Pontchartrain After the Cessation of Shell Dredging*, 19 J. SHELLFISH RES. 481 (2000).

47. Interview by Casey Scott with Dr. Stuart Phillips, *supra* note 8.

48. See JUNEAU, *supra* note 2, at 1, 5.

49. See *id.* at 5.

50. See *id.* at 22 (“Since 1979 production along the Louisiana coast has varied between slightly over 6 million cubic yards in 1982 to over 8.6 million cubic yards in 1980.”). The figures for annual shell production in 1925 were 1.5 million cubic yards, increasing to 5.2 million cubic yards in the mid-1960s. U.S. ARMY CORPS OF ENGINEERS, *supra* note 2, at EIS-83.

51. See U.S. ARMY CORPS OF ENGINEERS, CLAM SHELL DREDGING IN LAKES PONTCHARTRAIN AND MAUREPAS, LOUISIANA, at EIS-1 (1987); U.S. ARMY CORPS OF ENGINEERS, *supra* note 2, at EIS-84.

on the coast to get them was miles away from public view and the public mind.

It was a de facto monopoly. A few dredging companies were licensed to operate, and their profits were locked in place.⁵² The state owned the water bottoms and could set a price that, given the close relationship between the dredging companies and state legislators, would never be insulting. The principal buyers were guaranteed as well: state construction agencies and their road and levee contractors.⁵³ The arrangement was highly profitable for the industry, which until the 1980s was buying the shells for a few cents on the cubic yard and selling them back to the state and its contractors for major dollars.⁵⁴ Time did not balance the equation. By the late 1980s, after considerable public exposure, royalty payments rose from \$.20 to \$.90 per cubic yard, but sale prices rose as well to \$11 per cubic yard and more.⁵⁵ Multiplied by 7 million cubic yards per year,⁵⁶ one arrived quickly at an attractive business plan. All that was needed was some dredges in between.

From a distance they looked like aircraft carriers fueled by tankers on the outskirts of a war. The barges were over 100 yards long and some 40 yards wide, topped with pyramids of cargo, more showering down on them for eighteen hours a day, every day of the week, every week of the year.⁵⁷ Coming closer, one saw the dredge boat with its pilothouse and rig machinery perched on deck like a steel praying mantis, long shafts with cutter heads below. The cutters dug out the bottom, which was

52. See Interview with Susan Clade in New Orleans, La. (Jan. 15, 2009).

53. See U.S. ARMY CORPS OF ENGINEERS, *supra* note 51, at EIS-95-97,-100.

54. See JUNEAU, *supra* note 2, at 22. In 1979, average royalties were 18.6 cents per cubic yard. *Id.* In 1983, indicative of royalties in the early to mid-1980s, royalties averaged 28.8 cents per cubic yard in the aggregate. *Id.* Based on a document from Dravo Materials in the civil district file of *Sierra Club v. Louisiana Department of Wildlife & Fisheries*, in the late 1980s, Dravo sold oyster shells for \$7 per cubic yard and clam shells for \$11 per cubic yard. Memorandum from Andrea Rush to author (2012) (citing documents related to Docket No. 83-2669, Judge Robert Katz, at the Civil Dist. Ct., Orleans Parish) (on file with author). Similarly, in 1985 the estimated gross value of shells harvested, from Lake Pontchartrain alone, totaled \$33 million based on a selling price of \$11.30 per cubic yard. U.S. ARMY CORPS OF ENGINEERS, *supra* note 51, at EIS-15, -105. In sum, the markup from purchase to sale was, in some years, over 300%.

55. JUNEAU, *supra* note 2, at 23; see *Sierra Club v. La. Dep't of Wildlife & Fisheries*, 560 So. 2d 976, 978 (La. Ct. App. 4th Cir. 1990) (Plotkin, J., dissenting). The rise in royalties was prompted by environmental litigation. *Id.*; see also discussion *infra* notes 325-333.

56. See JUNEAU, *supra* note 2, at 23-24; see also U.S. ARMY CORPS OF ENGINEERS, *supra* note 51, at EIS-99.

57. U.S. ARMY CORPS OF ENGINEERS, *supra* note 51, at EIS-3,-15; OLIVER A. HOUCK ET AL., TO RESTORE LAKE PONTCHARTRAIN: A REPORT TO THE GREATER NEW ORLEANS EXPRESSWAY COMMISSION ON THE SOURCES, REMEDIES, AND ECONOMIC IMPACTS OF POLLUTION IN THE LAKE PONTCHARTRAIN BASIN 151 (1989).

sucked into a vacuum head called, with no apparent irony, a “fishmouth” and piped up to the rig.⁵⁸ There the shells were screened out, taken by conveyor belt to the barge next-door, and added to the pile.⁵⁹ The rest of the bottom, grasses, plankton, muds, crustaceans, worms, larval fish, shrimp, baby turtles, small crabs—whatever had been down there—was sluiced out with water and dropped back into the lakes and bays, dead or dying.⁶⁰ It was a remarkably simple operation. You could make a working model in the backyard in an afternoon.

It was also a voracious operation. In Pontchartrain and Maurepas, where the shells lay in strata below the water column, the cutter heads were six feet wide and cut trenches three feet down.⁶¹ The mountains of mud brought up to the rig screens would go back overboard in long plumes that spread as much as forty yards to the side, coating the bottom in an “inorganic gel.”⁶² The dredges moved in circular patterns at about two miles per hour, thirty-six miles a day,⁶³ 365 days a year, and there were up to eight dredges working the lakes at a time. In less than two years, they covered all of Pontchartrain,⁶⁴ one of the largest bodies of water in North America, and then began again for shells they had missed.⁶⁵ At least two dredges worked the oyster reefs the length of the Louisiana coast.⁶⁶ Only, these dredges would cut harder and go deeper.⁶⁷ Oysters cement themselves together and build reef walls that may extend over twenty feet below the sea.⁶⁸ Once an oyster dredge struck pay dirt it was something like a vein of gold, it would go all the way down.⁶⁹

If you were an adult fish or a crab, unless directly hit, you would be able to swim away from the vacuum head, although you would lose your nesting and feeding grounds and now find silt, heavy metals, and other

58. U.S. ARMY CORP OF ENGINEERS, *supra* note 51, at EIS-3; HOUCK ET AL., *supra* note 57, at 151.

59. U.S. ARMY CORP OF ENGINEERS, *supra* note 51, at EIS-3; HOUCK ET AL., *supra* note 57, at 151.

60. U.S. ARMY CORP OF ENGINEERS, *supra* note 51, at EIS-3.

61. *See Louisiana ex rel. Guste v. Lee*, 635 F. Supp. 1107, 1114 (E.D. La. 1986) (stating that the dredges in the lakes cut “a shallow trench about two feet deep and four to five feet wide”); *see also Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985).

62. *Louisiana v. Lee*, 758 F.2d at 1085.

63. *See JUNEAU*, *supra* note 2, at 32.

64. *See HOUCK ET AL.*, *supra* note 57, at 151.

65. *See id.*

66. *See U.S. ARMY CORPS OF ENGINEERS*, *supra* note 2, at S-3, A-2.

67. *See id.* at S-3.

68. *Id.* at EIS-6; *see JUNEAU*, *supra* note 2, at 2.

69. *See U.S. ARMY CORPS OF ENGINEERS*, *supra* note 2, at EIS-6 (“The depth of the cut is the depth of the resource, usually 17 to 22 feet.”).

elements turned up from the sediments stuck to your gills.⁷⁰ If you were a small fish, a turtle, or a less-mobile bottom dweller, you were doomed, even if you made it back overboard with the floc.⁷¹ If you were seabed grasses, even if you dodged the first cut of the blades you would be smothered by the gel or, if farther away, die more slowly as the turbidity dimmed the light for photosynthesis.⁷² As with ecosystems everywhere, when it comes to the health of lakes, the lowly things mean the most of all. The living base of *Rangia* clams had the potential to filter and cleanse all of Lake Pontchartrain, the second largest inland body of water in America, within a short four days.⁷³ With this piece missing, the lakes were dying of kidney failure.

The offshore effects were both similar and unique. The dredges left the same floc bottoms and turbid plumes but these bays were vast expanses, constantly swept by winds and tides. The oyster reefs out here, however, performed much more visible biological functions, harboring a spectacular abundance of sea creatures from commercial fish to bait fish, starfish, and crab. They were favored fishing grounds for a reason.

They provided two additional services of high value to Louisiana—or one would have thought. The first was to mark the outer reach of state lands for purposes of measuring its three-nautical-mile extension into the sea. Within this boundary lay a treasury in oil and gas royalties. Were the reefs to disappear, the state's claim to these monies was at risk as well, a point that would grab the attention of the state Attorney General.⁷⁴

Most obviously, one would have thought, the oyster reefs also provided a natural barrier against storm surges from the Gulf, ever threatening to the marshes, barrier beaches, and interior lands. In the late 1800s, a single reef extending more than thirty miles protected coastal towns from Morgan City halfway to Texas; by the end of the 1950s it had been largely removed.⁷⁵ A 60,000-square-foot opening for storm surges

70. See *id.* at EIS-72.

71. See *id.*

72. See JUNEAU, *supra* note 2, at 29.

73. *Environmental Atlas of the Lake Pontchartrain Basin*, U.S. GEOLOGICAL SURVEY (May 14, 2002, 10:30 AM), <http://pubs.usgs.gov/of/2002/of02-206/env-issues/clam-abundance.html>.

74. See discussion *infra* note 86 and accompanying text.

75. See Interview by Casey Scott with Harold Schoeffler in New Orleans, La. (June 30, 2009); Telephone Interview with Harold Schoeffler (June 9, 2011); Interview with William Fontenot in New Orleans, La. (June 17, 2011). Mr. Fontenot was a member of the Louisiana Attorney General's staff and served as its ombudsman for environmental affairs for twenty-seven years. *Free Willie: An Environmental Studies Class Fights for Fontenot*, E-THE ENVTL. MAG. (June 30, 2005), <http://www.emagazine.com/archive/2662>.

was now four million square feet wide.⁷⁶ Dr. Brent Christensen, a hydrologist from the University of Florida, visiting the Louisiana coast in the early 1980s, told the director of the Port of New Iberia that, come the next serious hurricane, his office now so exposed, would be five feet under water.⁷⁷ In 2005, Hurricane Rita proved Christensen in error. The office went six feet under instead.⁷⁸

Whatever these impacts, however, the shell dredging industry both in the lakes and on open coastal waters had one enormous advantage: few people saw them. The big cutter heads and suction tubes plying the bottoms were under water; the barges were simply dots on an enormous horizon. The remoteness of the process fed several industry defenses that would soon be put to the test: that the mud discharged from the barges returned neatly to the very trenches from which they came, that benthic life would simply swim out of the way, and that the plumes of turbidity that hung in the water column actually protected the fishery.⁷⁹ At bottom, though, the industry defense was elegantly simple: you claim harm, you prove it.⁸⁰

The difficulty in seeing thus became a difficulty in proving, placing a heavy burden on those concerned about dredging. No aquatic environment yields easy data, which enabled the state and federal agencies involved to write, rather summarily, that impacts were minimal⁸¹ and, even if not, they could not be accurately portrayed.⁸² Certainly no scientific basis for closing the door.

The most vocal defense of dredging came from the Department of Wildlife and Fisheries, which might, at first blush, seem odd. Sixty years

76. Interview by Casey Scott with Harold Schoeffler, *supra* note 75.

77. *Id.*

78. *Id.*

79. See sources cited *infra* notes 135-137.

80. See CATHERINE COUMANS, MINING'S PROBLEM WITH WASTE, SUBMARINE TAILINGS DISPOSAL 1-2 (2002). Around the globe, mining companies would soon begin to pipe their wastes to the sea floor for this same reason, and with the same assurances: where's the harm? *Id.*

81. See U.S. ARMY CORPS OF ENGINEERS, *supra* note 2 at EIS-67, -73, -79; U.S. ARMY CORPS OF ENGINEERS, *supra* note 51, at S-3-6, EIS-37-41.

82. See U.S. ARMY CORPS OF ENGINEERS, *supra* note 51, at S-3-6, EIS-77.

It is possible that shell dredging has contributed to the apparent long-term increase in turbidity in Lake Pontchartrain. . . . However, since turbidity levels in the lake prior to the advent of shell dredging are unknown, and since many other factors have also contributed to increased turbidity, it is not possible to quantify the impact of shell dredging on long-term turbidity increases.

Id. at S-3. "Natural and man-made perturbations have and are affecting the lake and exert impacts on the benthic community. It is difficult, however, to determine the magnitude and significance of these impacts and whether or not the impacts are detrimental to the overall health of the ecosystem." *Id.* at EIS-77.

of mutual profit and back-scratching between the dredging companies and the political branches of government, however, had formed their own calcinate shell. The Department of Wildlife and Fisheries' relationship began, innocently enough, in 1910 with a law setting royalties on sand, gravel, and shells,⁸³ and a few years later directing its predecessor agency to manage their collection.⁸⁴ The legislature did not fund the mission directly, rather, it diverted the royalties to the Department of Wildlife and Fisheries' coffers.⁸⁵ The die was cast. The more the agency leased, the more personnel it could hire, equipment it could buy, and salaries it could raise—the more successful it became. With royalties measured by the cubic yard and some 7.4 million cubic yards taken each year from Louisiana waters, these monies constituted, rainy day or fair, a secure budget line.⁸⁶

Upton Sinclair once wrote, "It is difficult to get a man to understand something, when his salary depends upon his not understanding it!"⁸⁷ It is human nature. At which point, one is committed to the arrangement. So it was with the Department of Wildlife and Fisheries, and, as adverse information came in, the agency would dig in more deeply to defend.⁸⁸ To the end it would characterize the growing conflict as a squabble among user groups,⁸⁹ showing little awareness that its primary obligation was to the fish and wildlife themselves.⁹⁰ Questioned about a possible

83. JUNEAU, *supra* note 2, at 4.

84. *Id.*

85. *See id.*

86. U.S. ARMY CORPS OF ENGINEERS, *supra* note 2, at EIS-99. Between 1980 and 1984, royalties from coastal and lake dredging ranged between \$1.6 and 2 million. *Id.* at EIS-103.

87. UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 109 (1935).

88. *See* Mark Ballard, *Study Says Shell Dredging Harms Lake Pontchartrain Marine Life*, ST. TIMES (Baton Rouge), Jan. 14, 1982, at A1. From time to time, the gap between what the Department knew and what it said peeked through. At the coastal hearings to come, an environmentalist from Hammond testified: "Wildlife and Fisheries told me off the record that they knew they were destroying the lake. . . . They don't want anything to do with the operation because there's too much money involved." *Id.* Dr. Walter Sikora, a primary witness at these hearings, relates a similar experience:

During one of the breaks in the hearings, I got up and went to the washroom, and as I was leaving, a uniformed Wildlife and Fisheries guy congratulated me on my testimony and for telling the truth. I was quite surprised after the rather hostile testimony of [name omitted by author] defending the shell dredging. I didn't know who the uniformed guy was, and I don't recall ever seeing him again.

E-mail from Walter Sikora to author (June 22, 2011) (on file with author).

89. JUNEAU, *supra* note 2, at 42 ("[S]hell dredging has been a controversial issue backed by a vocal minority in Louisiana for many years and most likely will continue as such due mainly to conflicts between user groups.").

90. LA. REV. STAT. ANN. § 36:602(B) (2006) provides:

The Department of Wildlife and Fisheries through its offices and officers, shall control and supervise all wildlife of the state, including fish and all other aquatic life, and shall

conflict of interest, a Department spokesman replied, “Everything we do brings in money for us.” He continued: “We’re charged with protecting the environment. If we do that, and we have enough real good professional people to do that, then it’s really no concern to me.”⁹¹ This is, of course, the age-old response to all conflicts of interest; sure they pay me, but it does not affect my good judgment.

All of these issues would be put on public display in the first hearings to come.

IV. OPENING SKIRMISH: THE COASTAL COMMISSION HEARINGS

I asked Harold, “Why doesn’t the Fish and Wildlife do something about this?,” and he said “If they told the boss about this, the boss would say ‘you see too good for this job.’ Harold explained that if you have a dredge in Louisiana, in several months “you’ll have a biologist with two Cadillacs in his garage.” I was getting a feel for what Louisiana was like.

—Nick Yost, 2009⁹²

The Louisiana Coastal Commission (Coastal Commission) hearings should have been a slam dunk for the shell industry. A group of local politicians and industry representatives would review permits to continue a practice that had gone on for half a century. To be sure, a few self-appointed environmentalists had been raising a ruckus in the press, but they were few in number and shorter still in influence. The slam dunk did not happen, however. Instead, the first serious shots of the campaign were fired, and while they caused no fatalities (except, unfortunately, to witnesses who naively overlooked the consequences of testifying against the state),⁹³ they revealed weaknesses that would later, in other forums, prove crucial to the outcome.

The State of Louisiana was not keen on having a Coastal Commission.⁹⁴ Indeed, it was not keen on having a coastal anything, having rocked along rather well with its major coastal industries—oil, navigation, dredging, and trawling—doing pretty much whatever they

execute the laws enacted for the control and supervision of programs relating to the management, protection, conservation, and replenishment of wildlife, fish, and aquatic life in the state, and the regulation of the shipping of wildlife, fish, furs, and skins.

Department supporters often saw the arrangement as trading a dead lake for the money to manage more valuable resources. Telephone Interview with Randy Lanctot, Former Exec. Dir., La. Wildlife Fed’n (Mar. 7, 2012) (noting the position of Leslie Glasgow, LSU Professor).

91. Ballard, *supra* note 88.

92. Interview with Nick Yost, *supra* note 1.

93. See sources *infra* notes 109-146.

94. See E-mail from Paul Templet (June 9, 2011, 3:48 PM CDT) (on file with author).

wanted wherever they wanted.⁹⁵ Then in 1976, capping a surge of environmental legislation, the U.S. Congress enacted a program that allowed states to develop coastal plans and run them, with federal monies, even throwing in as *lagniappe* the power to veto federal activities they did not like.⁹⁶ The bait was irresistible, and Louisiana signed on.⁹⁷ The state had no intention, however, of allowing its coastal program to upset the status quo.⁹⁸ The Louisiana Department of Transportation and Development (Department of Transportation)—of all choices—was directed to develop the plan.⁹⁹

At the time, the Department of Transportation had few coastal personnel, but they happened to be green, none more so than Dr. Paul Templet who, years later, would go on to direct the Louisiana Department of Environmental Quality (DEQ). Templet drafted a strong plan and, not trusting the ability of state personnel to resist the inevitable political pressures, created within it a twenty-three-person oversight commission, half of whose members came from coastal parishes, which encouraged at least the possibility of independent points of view.¹⁰⁰ Coastal industries, and the oil and gas industry in particular, felt threatened by the plan and persuaded the Department of Transportation to allow industry lobbyists to revise it.¹⁰¹ They did, thoroughly, with weakening amendments.¹⁰² Templet resigned.¹⁰³ He would be among the first of the casualties in Louisiana's long war over coastal and environmental protection. The shell dredging cases would bring more. Meanwhile, though, his Coastal Commission remained on the books.

By the early 1980s, the Coastal Commission was still feeling its way. Coastal management at this point had been transferred to the Louisiana Department of Natural Resources (DNR),¹⁰⁴ traditionally led by the resource industries.¹⁰⁵ The Coastal Commission, on the other hand, had

95. *See id.*

96. *See* The Coastal Zone Management Act, 16 U.S.C. §§ 1451-1465 (2006). For an overview of the Act, see Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1260 (1995).

97. U.S. DEP'T OF COMMERCE ET AL., LOUISIANA COASTAL RESOURCE PROGRAM 17-19 (1980).

98. *See* E-mail from Paul Templet, *supra* note 94.

99. U.S. DEP'T OF COMMERCE ET AL., *supra* note 97, at 18-19.

100. *See* U.S. DEP'T OF COMMERCE ET AL., *supra* note 97, at 76-77.

101. *See* E-mail from Paul Templet, *supra* note 94.

102. *See id.*

103. *Id.*

104. U.S. DEP'T OF COMMERCE ET AL., *supra* note 97, at 74.

105. E-mail from Paul Templet, *supra* note 94. Secretaries from 1976, when the Department was created, to 1990 include William Huls (1977-1980 and Mar.-Nov. 1984),

the authority not only to review development permits but also to hold hearings on them if anyone challenged a particular grant or denial.¹⁰⁶ For the first two years, all of the permits were granted, none were appealed.¹⁰⁷ In the spring of 1983, however, DNR renewed permits for the four dredging companies working in Lakes Maurepas and Pontchartrain and the reaches of Vermilion and Atchafalaya Bays, providing Schoeffler and the environmentalists with a target.¹⁰⁸ They asked Osborne to appeal.

The hearings were quasi-judicial, with witnesses subpoenaed and subject to examination by Coastal Commission members and lawyers for participating parties.¹⁰⁹ It was a strange affair, pitting experts whose work had been funded largely by federal agencies against the state Department of Wildlife and Fisheries.¹¹⁰ DNR more or less sat at ringside, confident that its permits would in the end be upheld. Several expert witnesses appeared, however, who would set a new tone for the game. They were for the most part Louisiana State University (LSU) researchers with hands-on experience with shell dredging and the Louisiana coastal zone. In good faith, they came forward.

The first was Dr. Len Bahr, who at that time managed research programs for LSU's Center for Wetland Resources (Wetland Center).¹¹¹ He would go on, as Templet did, to high state office in later years, serving as the coastal advisor to four Louisiana governors before retiring. Bahr had come to Louisiana from Georgia in 1979 specifically to work on the impacts of dredging on oyster reefs, which were not a player along Georgia's coastline. He had begun teaching at LSU and raising grants for coastal researchers, including Ivor Van Heerden and Jean and Walter

founder and principal owner of the oil company Exploration Company of Louisiana (XCL); Frank Ashby (1980-1982), New Orleans oil and gas broker; Frank Simoneaux (1982-1984), former Chairman of the Board of Commercial National Bank and corporate attorney; Jim Porter (1984-1988), President of Louisiana Mid-Continent Oil and Gas Association for seventeen years after his DNR tenure; and Dr. Raymond Stephens, Jr. (1988-1990), who worked in the oil and gas industry prior to his DNR tenure.

106. U.S. DEP'T OF COMMERCE ET AL., *supra* note 97, at 77-78.

107. Telephone Interview with Michael Wascom, Former Dir., La. State Univ. Sea Grant Law & Policy Program, Baton Rouge, La. (June 2, 2011).

108. *See Louisiana v. Lee*, 596 F. Supp. 645, 647 (E.D. La. 1984), *vacated*, 754 F.2d 1081 (5th Cir. 1985).

109. Telephone Interview with Michael Wascom, *supra* note 107.

110. *See* Bob Anderson, *Researcher: Dredging Hurt Lake Life*, MORNING ADVOC. (Baton Rouge), May 3, 1983, at B3; Bob Anderson, *Dredging Limitations Urged*, MORNING ADVOC. (Baton Rouge), May 10, 1983, at B1; Bob Anderson, *Shell Dredging Permits Approved*, MORNING ADVOC. (Baton Rouge), May 24, 1983, at A14; Mark Schleifstein, *Dredge Issue Spews Data, Not Answers*, TIMES-PICAYUNE (New Orleans), July 15, 1984, at A1.

111. Interview with Dr. Leonard Bahr (June 7, 2011). Bahr began at the LSU Center for Wetland Resources from 1973-74, then the Marine Science Department (1975-84), and Environmental Studies Institute (1985-86).

Sikora. Although Bahr had not at that point conducted much fieldwork himself, he did render his opinion that the activity was far more harmful than previously believed, which was a start.¹¹² It would be up to his colleagues to back that up, and they did.

Dr. Ivor Van Heerden is today best known to the region for his “all-in” response to Hurricane Katrina, driving to New Orleans, where chaos reigned, with his own boat to perform rooftop rescues and to begin immediately, through LSU’s Hurricane Center, a firsthand assessment of what went wrong and why.¹¹³ He would become a lead member of an independent investigation team whose conclusions, pinning blame squarely on the Corps, were both highly controversial and later confirmed.¹¹⁴ The Corps, however, funded LSU research, heavily. For his outspoken involvement, Van Heerden was first reprimanded by LSU, then effectively dismissed and his Hurricane Center disbanded.¹¹⁵ Coincidentally, LSU almost dismissed him twenty years earlier for his research on oyster dredging in Atchafalaya Bay.

Van Heerden had come to LSU to pursue a master’s thesis on the Atchafalaya delta.¹¹⁶ The subject was timely; this delta was the only expanding piece of the Louisiana coast, while the rest was collapsing at a stunning rate.¹¹⁷ Saving, indeed accelerating, the growth of the

112. Telephone Interview with Harold Schoeffler, *supra* note 75. Schoeffler attended and testified as well. *Id.*

113. IVOR VAN HEERDEN & MIKE BRYAN, *THE STORM: WHAT WENT WRONG DURING HURRICANE KATRINA—THE INSIDE STORY FROM ONE LOUISIANA SCIENTIST* 7-8, 104, 203, 214-28 (2006); JOHN MCQUAID & MARK SCHLEIFSTEIN, *PATH OF DESTRUCTION: THE DEVASTATION OF NEW ORLEANS AND THE COMING AGE OF SUPERSTORMS* 183-84 (2006).

114. See Sheila Grisset & Bob Marshall, *Are We Safe?: Panel Says Corps Engineering Relied on Poor Judgment and Recommends New Analysis of Entire Levee System*, *TIMES-PICAYUNE* (New Orleans), Mar. 25, 2006, at A1; Sheila Grisset & Bob Marshall, *New Report Disputes Corps-Led Levee Probe: Scientists Blast Draft’s Contention That Failures Were Unforeseeable*, *TIMES-PICAYUNE* (New Orleans), Oct. 26, 2006, at A1; Bob Marshall, *Corps Caused Disaster, Report Says: State Inquiry Finds Decades of Blunders*, *TIMES-PICAYUNE* (New Orleans), Mar. 21, 2007, at A1; Bob Marshall, Editorial, *Too True: Ivor Van Heerden Pointed Fingers at the Feds After Katrina, and LSU Decided Its Funding Was at Risk*, *TIMES-PICAYUNE* (New Orleans), Apr. 14, 2009, at A5.

115. See John Schwartz, *A Scientist’s Book on Katrina Draws Fire at L.S.U.*, *N.Y. TIMES*, May 30, 2006, at E1; Mark Schleifstein, *LSU Ousts Professor Critical of Corp Failure*, *TIMES-PICAYUNE* (New Orleans), Apr. 10, 2009, at A1; *Hero Ivor van Heerden Fired from LSU!*, *LEVEES.ORG* (Apr. 11, 2009), <http://levees.org/2009/04/11/hero-ivor-van-heerden-fired-from-lsu/>; *LSU Shoots Messenger, Fires Ivor Van Heerden*, *LACOASTPOST.COM* (Apr. 10, 2009), <http://lacoastpost.com/blog/?p=6432>. Dr. Van Heerden challenged his firing in court. Frank James, *Fired Katrina Whistleblower Van Heerden Sues LSU*, *TWO-WAY: NPR’S NEWS BLOG* (Feb. 10, 2010, 11:46 AM), http://www.npr.org/blogs/thetwo-way/2010/02/fired_katrina_whistleblower_va.html; Mark Schleifstein, *Scientist Sues LSU Over Firing, He Says He’s Targeted for Criticizing Corps*, *TIMES-PICAYUNE* (New Orleans), Feb. 11, 2010, at B1.

116. Interview with Dr. Ivor Van Heerden (June 13, 2011).

117. *Id.*

Atchafalaya system seemed an obvious priority. To Van Heerden's surprise, out there day by day, taking samplings and soundings, he found enormous draglines cutting trenches into the shell reefs ten meters deep.¹¹⁸ He reported back to the Wetland Center and the Corps (which was sponsoring his research at the time) that "we have a real problem here."¹¹⁹ The dredging was far offshore, went very deep, and was destroying entire reef complexes.¹²⁰ This was unwelcome news.

In the months to come, the Corps offered to redirect the delta dredging away from reefs that extended above sea level, but Van Heerden felt that this would simply hide the problem.¹²¹ The bottoms would soon slough into the dredge holes, collapsing the reefs and retarding the growth of the delta.¹²² In straightforward language that became his trademark (a favorite expression: "I just pulled out my data"), this is what he told the Coastal Commission as well.¹²³ LSU was unhappy and told him that if he did not back off, he would lose his master's degree funding.¹²⁴ Reluctantly—and as time would show he would not do this again—Van Heerden curbed his public statements and, instead, began working quietly, on his own time, with Schoeffler and the shell-dredging opponents.¹²⁵

Two other LSU researchers, Drs. Jean and Walter Sikora, went on to conduct the most thorough study of shell dredging impacts ever done.¹²⁶ Bahr had hired them away from Texas to do benthic work on Lake Pontchartrain.¹²⁷ They contributed other seminal research on the coastal zone, including the feasibility of over-marsh vehicles (in lieu of canals) for access to oil and gas sites,¹²⁸ and the potential of backfilling to heal the wounds of existing canals (by that time extending nearly 10,000 miles through coastal wetlands),¹²⁹ from the tenor of which one can glean

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See Letters from Dr. Walter Sikora to author (June 13, 2011, June 16, 2011, June 20, 2011) (on file with author).

127. See *id.*

128. DR. WALTER B. SIKORA ET AL., *Marsh Buggies, Erosion, and the Air-Cushioned Alternatives*, in PROCEEDINGS OF THE WATER QUALITY AND WETLAND MANAGEMENT CONFERENCE, New Orleans, La., Aug. 4-5, 1983 323-36 (R.J. Varnell ed., 1983).

129. See R.E. TURNER ET AL., EVALUATION OF BACKFILLING CANALS AS A MEANS OF MITIGATING THE ENVIRONMENTAL IMPACT OF CANALS (1984). The State of Louisiana to this date, despite the urgency of avoiding and repairing coastal impacts, has not pursued either initiative.

that their conclusions were better received by the scientific community than the industrial/political one. So it would be for their research on shells.

What characterized the Sikora work, done for the LSU Center under Corps contract, was its reliance on field tests and blind-vetted sampling requiring endless patience and near-robotic adherence to replicable protocols. Their research spanned two years and many lake locations, and documented considerable adverse effects, including dramatic drops in *Rangia* clam numbers and overall biomass.¹³⁰ It easily passed scientific peer review but, either disbelieving or cautious, the Corps hired a professional consultant to double check its methods and results, including daily logs, labs sheets, duplicate core samples, and analytical methods.¹³¹ These, too, passed with flying colors.¹³² In fact, Walter Sikora later noted, the consultant's clam counts from core samples "were even lower than what we found."¹³³ The research confirmed "drastic changes in the lake."¹³⁴ None of which would dent the industry or its champion, the Department of Wildlife and Fisheries.

Department witnesses remained adamant that dredging impacts were minor, temporary, and, citing a 1973 report from one of their own, even beneficial.¹³⁵ The nutrients pulled up from the lake floor attracted shrimp and were a net plus for the fishery, they maintained, to which Walter Sikora replied that the shrimp had "a feast for a day" and then famine.¹³⁶ They contended that the discharges would help conceal young fish and crabs from predators, to which Sikora replied that the contents of those discharges, some quite high in toxins, poisoned the youngsters instead and interfered with their ability to grow and breed.¹³⁷ They pointed to evidence that overall fisheries production remained high,¹³⁸ while the Sikora data showed Pontchartrain biota numbers to have

130. Letters from Dr. Walter Sikora to author, *supra* note 126; Interview with Dr. Leonard Bahr, *supra* note 111. The description of the research and its confirmation is taken from these sources.

131. Letters from Dr. Walter Sikora to author, *supra* note 126.

132. *Id.*

133. *Id.*

134. *Id.*; Anderson, *Researcher: Dredging Hurt Lake Life*, *supra* note 110.

135. See JUNEAU, *supra* note 2, at 26-39 (discussing the environmental effects of dredging, the benefits of dredging, and the regulatory safeguards).

136. Letters from Dr. Walter Sikora, *supra* note 126.

137. See Schleifstein, *supra* note 110; see also Ballard, *supra* note 88; *La. Clam Dredgers Beset by Ecologists, Economics*, BATON ROUGE ST. TIMES, Feb. 11, 1982, at A12.

138. Schleifstein, *supra* note 110 ("[A] . . . marine biologist with the Department of Wildlife and Fisheries, said he believes the effects of shell dredging are minor along the coast and in Lake Pontchartrain. 'That's because of the fisheries production figures . . . If you look at the last 10 to 15 years average, it has always been at or above that average.'").

crashed.¹³⁹ What was uncontroverted and uncontrovertible, however, was that continuous dredging had replaced a relatively hard bottom, anchored by *Rangia* clam beds and sea grasses, with an unstable muck, in Sikora's words "the consistency of latex paint."¹⁴⁰

Other LSU academics testified that the offshore oyster dredging was leaving large holes in the reef systems¹⁴¹ and that projections of industry benefits should be weighed against these environmental costs;¹⁴² these were skeptical but less controversial positions and would lead to no professional repercussions. It would be different for the Sikoras. Like Van Heerden and Bahr before them (Bahr left shortly after LSU terminated his contract "largely because of the political implications of my opposition to shell dredging"),¹⁴³ they were told by the Wetland Center that they had a bright future if they would "go easy on shell dredging"¹⁴⁴ (Walter Sikora described this as "a direct quote stuck in my memory"), adding that they could "have all the mud they wanted to play with down at the Grand Terre lab" if they behaved themselves.¹⁴⁵ Two years later, the Wetland Center cut off all Sikora funding, including ongoing projects.¹⁴⁶ They left the state and did not return.

The conflicts of interest were rampant. As it turned out, at the time of the Coastal Commission hearings, the Assistant Dean of LSU's Center for Wetland Resources had been appointed Assistant Secretary of the Department of Wildlife and Fisheries, in charge of shellfish and water bottoms.¹⁴⁷ The Chair of the Wildlife and Fisheries Commission, which oversaw the Department of Wildlife and Fisheries, was active in the dredging industry, including shell dredging.¹⁴⁸ Another Wildlife and

139. Anderson, *Researcher: Dredging Hurt Lake Life*, *supra* note 110 ("Biological production dropped 32 percent in areas of Lake Pontchartrain where shell dredging occurred, LSU researcher Walter Sikora testified Monday before the Louisiana Coastal Commission.").

140. See Ballard, *supra* note 88.

141. Anderson, *Dredging Limitations Urged*, *supra* note 110.

142. Anderson, *Researcher: Dredging Hurt Lake Life*, *supra* note 110.

143. E-mail from Dr. Leonard Bahr to author (Apr. 3, 2012, 5:49 PM) (on file with author) ("In 1984, after my contract with LSU had been canceled unceremoniously, . . . Largely because of the political implications of my opposition to shell dredging while the Louisiana Department of Wildlife and Fisheries was getting a 25 cent severance tax on every bushel of carbonate coastal protection that was removed.").

144. Letters from Dr. Walter Sikora, *supra* note 126.

145. *Id.*

146. *Id.*

147. *Id.*

148. See E-mail from William Fontenot to author (Mar. 16, 2012, 11:49 AM) (on file with author) ("He was a very close friend of Edwin Edwards, served as Chairman of the Wildlife and Fisheries Commission and was one of the biggest dredgers in coastal Louisiana. He dredged thousands of miles of canals for the oil industry and he also dredged up many tons of shells which he then sold to industry and government agencies like the Highway Department and local Police

Fisheries Commission member also chaired a state Senate Subcommittee on Water Bottoms and ran a highway construction agency that, according to Schoeffler, was discovered to have purchased shells without paying for them.¹⁴⁹ There is other evidence that members of the Wildlife and Fisheries Commission paid cash money for the privilege to serve and the benefits thereof.¹⁵⁰ The president of the most prominent shell-dredging company, meanwhile, was jailed for price fixing (the trial court concluding that “the evidence was overwhelming that the defendants had knowingly engaged in conduct clearly violative of the Anti-Trust Laws”); he went on to serve as King of the Rex Organization in New Orleans and President of the Chamber of Commerce.¹⁵¹ As Yost, an outsider, would observe in the quote that appears above, it takes time to appreciate the interwoven texture of decision making in Louisiana.

In the end, and to no one’s surprise, the Coastal Commission denied Sierra Club’s appeal and affirmed the permits.¹⁵² “If it ain’t broke, don’t fix it,” the dredging industry’s attorney told Coastal Commission members,¹⁵³ which assumed of course that nothing was “broke,” but it had been a long three days and people were ready to go home. They left behind, however, a very damaging record. Uncontradicted testimony showed that the number of adult Rangia clams in Lake Pontchartrain had gone from over 100 per square yard to, for most of the lake, absolute zero; overall biomass had dropped by more than fifty percent; the grass beds were largely gone.¹⁵⁴

Juries. As Chairman of the Commission he basically set the fee the Commission charged his dredging company for every cubic yard of water bottoms, wetlands and shell deposits.”). For Mr. Fontenot’s background, see discussion *supra* note 75.

149. Telephone Interview with Harold Schoeffler, *supra* note 75. Per Schoeffler, the senator countered that he had not purchased the shells because he got them for free. Schoeffler filed an ethics complaint which, as might be expected, went nowhere. *Id.*

150. See CLYDE C. VIDRINE, JUST TAKIN’ ORDERS: A SOUTHERN GOVERNOR’S WATERGATE 103 (1977) (“Promises of appointment to the Wild Life and Fisheries Commission brought us [Governor Edwards] between \$150,000 and \$200,000.”). Membership in the Commission, which oversaw the Department, was highly-prized for the opportunities it offered for political and personal favor. *See id.*

151. *Judge Refuses Lennox’s Plea*, TIMES-PICAYUNE (New Orleans), Nov. 22, 1973, at 5-14; see Gordon Gsell, *Firms, Executives Are Indicted Here*, TIMES-PICAYUNE (New Orleans) (Jan. 27, 1973) at A1; *Ex-Rex, C of C Leader Are Given Jail Sentence*, TIMES-PICAYUNE (New Orleans), Nov. 1, 1973, at A1. Mr. Lennox was Louisiana Director of Radcliff Materials and then Public Affairs Vice President for the Dravo Corporation.

152. See Anderson, *Shell Dredging Permits Approved*, *supra* note 110. The approvals included already-imposed conditions that dredges avoid sensitive near-shore areas in Lakes Maurepas and Pontchartrain and whatever above sea level reefs remained in the Gulf. *Id.*

153. *Id.*

154. See Letters from Dr. Walter Sikora to author, *supra* note 126.

As it turned out, the shell-dredging hearings were something of a swan song for the Coastal Commission. An unwieldy structure from the beginning and one ill-suited for trial-like appeals—it was difficult enough simply to gather a quorum¹⁵⁵—the take-home for industry from these hearings was that the Coastal Commission could not be relied on to safeguard the status quo. Coastal parish members in particular had asked hard questions about the dredging and some voted to impose more severe limits.¹⁵⁶ The expert testimony was damaging, and the media was there to record it. DNR, like any self-respecting agency, loathed the idea of having its decisions second-guessed, and even exposed. In one subsequent hearing the Coastal Commission actually reversed a permit for an oil and gas canal, which rattled the cages of another industry light-years more powerful than Dravo and its dredging friends.¹⁵⁷ It was the last straw. And so, the Coastal Commission was abolished and the shell and other coastal permitting vested exclusively within DNR.¹⁵⁸ Future appeals could only be made to the courts.

Which is where Schoeffler, Osborne et al. would next proceed.

V. *LOUISIANA V. LEE I*

We were scared when we were assigned to McNamara in the district court, a Republican state legislator who had been an insurance defense lawyer, and our review was that he had never ruled in favor of environmentalists, which was not a good start, but it soon became evident that he was a very smart person and he was very decisive . . . and moved things along.

—Nick Yost, 2009¹⁵⁹

Coming off the Coastal Commission hearings, it seemed apparent that Osborne and Schoeffler had been barking up the wrong tree. For all of Temple’s good intentions when creating it, the Coastal Commission was essentially wired. Furthermore, given the difficulties of proof posed by aquatic environments and the apparent ease by which the Department of Wildlife and Fisheries and the shell companies could produce people to say that things were just fine, asking any appellate body to flat rule that the dredging was so harmful that it ought to stop was reaching for the sky. A “no” decision from this venue was close to impossible. The problem was that, beyond the Coastal Commission, there was no one else on the horizon with the authority to say “no”—except for the Corps,

155. Telephone Interview with Michael Wascom, *supra* note 107.

156. *Id.*

157. *Id.*

158. *See id.*

159. Interview with Nick Yost, *supra* note 1.

which had already said “yes.” It had decided to reissue federal permits for the dredging to continue.

Challenging this decision also seemed to be an exercise in futility. All government agencies enjoy a presumption of acting correctly, and the Corps’ permit regulations here were written so broadly that anything it found in the public interest passed muster.¹⁶⁰ Nothing mentioned in these regulations was required, not even avoiding sensitive areas, not protecting aquatic sites; instead, every factor in the decision from wildlife to water quality was a “consideration.”¹⁶¹ As long as the Corps “considered” something, there were no grounds for a court to overrule it.

This would have ended the matter but for the entry, in the early 1970s, of another law, the National Environmental Policy Act (NEPA).¹⁶² The Corps had not written an EIS which, at first blush, for an action of this magnitude, would seem to be obligatory. Under NEPA, writing impact statements was not a “consideration;” federal agencies were to do it for all “major” actions.¹⁶³ The Corps denied that the dredging was major, however, and proving the contrary would not only run into the evidentiary problems just seen in the Coastal Commission hearings, but also into the power of the Corps as a defendant, backed by the state Department of Wildlife and Fisheries and the resources of the U.S. Department of Justice (DOJ). Osborne and Schoeffler were looking to be outgunned. At which point, they discovered two gifts from heaven: the Attorney General of Louisiana, and the former chief environmental lawyer for the President of the United States, last seen careening across the choppy waters of Vermilion Bay.

Attorney General Billy Guste was one of the more unusual officials known to Louisiana, a populist with a heightened sense of “public” in the term “public service.” As a state senator, he had sponsored good government initiatives,¹⁶⁴ and his election as the state’s chief legal officer

160. See 33 C.F.R. § 320.4(a)(1) (2011) (“The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.”).

161. See *id.* § 320.1(a)(1) (“As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts.”).

162. 42 U.S.C. § 4321 (2006).

163. *Id.* § 4332(2)(c).

164. See KENT B. GERMANY, *NEW ORLEANS AFTER THE PROMISES: POVERTY, CITIZENSHIP, AND THE SEARCH FOR THE GREAT SOCIETY 197-99* (2007). As a state senator, Guste supported Model Cities, a federal program passed by Congress in 1966 under the direction of HUD to help attack the “interconnected problems of housing, health, education, employment, community organization, and recreation” in poor urban areas of the country. *Id.* at 197. Guste’s support for the program’s implementation in New Orleans included his emphasis on the city’s deprivations and the great need for the (federal) funds that Model Cities would bring to rebuild targeted New

gave him a measure of independence from state government, which he also took seriously, and would ultimately help tip the balance on shell dredging. It did not hurt that his family was old-line New Orleans and, among other things, owned the restaurant Antoine's,¹⁶⁵ higher than which one does not dine.

An early member of Guste's staff recalls organizing a small sailing party with him on Lake Pontchartrain.¹⁶⁶ "The phone was always ringing in his office," he explained, "you couldn't get his attention."¹⁶⁷ The following weekend there they were, out on the water, three young environmentalists (there were not many more than that in the state at the time) and the Attorney General, who proceeded to pop the top from a can of Coca-Cola and throw it overboard—meeting three startled pairs of eyes.¹⁶⁸ "I guess I shouldn't have done that," he said quickly, and fished his hand in the water to retrieve it.¹⁶⁹ "That's all right, Mr. General," one of them said, "there's plenty more down there already."¹⁷⁰ For the duration of the sail, though, they had Guste's full attention.¹⁷¹ From the sailing party, a consumer protection unit resulted within his office to address electricity pricing¹⁷² and an ombudsman to advise citizens on environmental issues.¹⁷³ They also talked about Lake Pontchartrain. It was, that afternoon, all around them.

A state lawsuit to protect Pontchartrain was another question. State attorneys general did not normally challenge the actions of other state agencies, however egregious those actions may have been. To many, the very notion of the state suing itself was heretical. The federal government did not operate this way—its DOJ did not attack federal decision makers, it defended them—and this was the common policy of

Orleans urban neighborhoods. *Id.* at 197-98. After encouraging New Orleans Mayor Shiro to apply for HUD grants, Guste was eventually appointed as chairman of New Orleans's Ad Hoc Committee on Model Cities in 1968. *Id.* at 199.

165. *See History*, ANTOINES.COM, <http://www.antoines.com/history.html> (last visited Sept. 30, 2011).

166. *See* Interview with William Fontenot, *supra* note 75.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. The consumer protection unit was directed by Assistant Attorney General Richard Troy, who continued to serve for three decades until his retirement. Interview with William Fontenot, *supra* note 75.

173. The ombudsman was William Fontenot. *See* Telephone Interview with Harold Schoeffler, *supra* note 75.

other states as well.¹⁷⁴ The Louisiana Constitution, however, gave the Attorney General broader latitude,¹⁷⁵ and in the case of shell dredging, he just might be persuaded to go to court. The young Turks under his command were ready to assist. Osborne would round up a posse, ride up to Baton Rouge, and make the pitch.

Enter Nick Yost. Whatever instincts and resources the Office of the Attorney General may have had, its experience in federal court was minimal and its familiarity with the key federal law now brought to the fore, NEPA, was equally slim. The Office was fully occupied with providing advice to state agencies on the range of public and private law issues they faced on a daily basis. Moreover, its lawyers were, by and large, not courtroom advocates. Yost was. He had been in private practice both before his appointment as General Counsel to the President's Council on Environmental Quality (CEQ), and following, which took him to the courthouse many times.¹⁷⁶ More compelling, while at the CEQ, he had authored its federal regulations governing NEPA and negotiated them through the rough and tumble of their adoption.¹⁷⁷ No one in the country was more familiar with their purpose and language, word for word, and the outcome of this litigation would hang on the interpretation of two or three small, regulatory words. Yost also brought with him an infectious optimism, and he was deeply green.

And so, on a spring day in 1984, Osborne and Yost drove up to the Capitol to meet with the Attorney General of Louisiana¹⁷⁸—who was himself not unaware of shell-dredging. In fact, Guste's concern over maintaining the state's seaward boundary had established the so-called "Attorney General's Line," off limits to the dredge machines, and he had

174. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2459 (2006) (discussing the few state and federal cases in the latter twentieth and early twenty-first century allowing state Attorney Generals to sue governors or other state executive branch officials because of the Attorney Generals' primary responsibility to protect the interests of the state's people, while, "[n]evertheless, the right of the Attorney General to sue executive branch officers or agencies has not been universally approved.").

175. See LA. CONST. art. IV, § 8 (empowering the Attorney General of Louisiana with broad authority to prosecute actions in the interest of the state.); see also *Louisiana v. Lee*, 596 F. Supp. 645, 650 (E.D. La. 1984) (upholding the Attorney General's independence under the state constitution).

176. *Nicholas C. Yost*, SNR DENTON.COM, http://www.snrdenon.com/people/y/yost_nicholas_c.aspx (last visited July 31, 2011); Interview with Nick Yost, *supra* note 1.

177. *Nicholas C. Yost*, *supra* note 176. The regulations may be found at 40 C.F.R. §§ 1500-1508 (2011). Yost served as the Council's chief lawyer from 1977 to 1981.

178. Interview with Nick Yost, *supra* note 1; Telephone conversation with Nick Yost (Feb. 7, 2012); see also 40 C.F.R. §§ 1500-1508.

imposed subsequent conditions as well.¹⁷⁹ The industry had not welcomed his restrictions, and one tends to remember unfriendly welcomes. Guste's history with the issue gave him the perfect reason to litigate: the proposed lawsuit was not only in the state's environmental interests, but its sovereign boundary interests as well. These concerns in fact gave him reason to *lead* the lawsuit, which became *Louisiana v. [U.S. Army Corps of Engineers Colonel Robert C.] Lee*, a caption that, all by itself, would change the image of shell dredging going forward. Here was an independent state authority saying not only that the dredging was a bad idea, it was a bad enough idea to *sue* over.

Technically, the suit was not about state policies at all. It was instead about a simple extension of federal permits for companies to continue what they had been doing for a very long time. As the Corps saw it, the permits made money for the dredgers and provided shells for state roadways.¹⁸⁰ Whatever damage had been done to the reefs by the 1980s had been long done.¹⁸¹ The state agency in charge of fish and wildlife resources agreed. The approval seemed a no-brainer. The permits were issued accordingly, along with a brief environmental assessment that, perhaps too candidly, admitted that continued dredging could have adverse impacts and postpone, perhaps forever, the recovery of Maurepas and Pontchartrain.¹⁸² The legal question boiled down to whether, given the magnitude of the dredging operations, the Corps was required to go beyond a mere assessment to a full EIS instead.¹⁸³ At first blush, it seemed an arcane inquiry. In practice, however, the question was huge.

The first thing to strike the eye with NEPA is how meager its enforceable requirements are.¹⁸⁴ Enacted in late 1969 in response to an epidemic of environmental injuries then surfacing across America,

179. See JUNEAU, *supra* note 2, at 7, 9.

180. U.S. ARMY CORPS OF ENGINEERS, *supra* note 2, at S-9.

181. See *id.* at EIS-79.

182. See *Louisiana v. Lee*, 596 F. Supp. 645, 654-55 (E.D. La. 1984) (“Due to modifications of sediments caused by the direct-ever passage of a shell dredge, it is unlikely that a total recovery was ever possible. Nonetheless, if shell dredging were discontinued altogether and enough time were allowed to elapse, a self-sustaining benthic community would arise and stable sediment profile could become established. Persuasive evidence exists to show that recurrent shell dredging in Lake Pontchartrain precludes that possibility.” (quoting U.S. ARMY CORPS OF ENGINEERS, ENVIRONMENTAL ASSESSMENT LAKES AREA 20-21 (1984))).

183. CEQ regulations distinguish between an Environmental Assessment (EA) for minor federal actions and a full EIS for major ones. See 40 C.F.R. §§ 1501.3-1501.4, § 1508.9 (defining EA), § 1508.11 (defining EIS).

184. See Oliver A. Houck, “*Is That All?*” *A Review of The National Environmental Policy Act, an Agenda for the Future*, by Lynton Keith Caldwell, 11 DUKE ENVTL. LAW & POL’Y F. 173-74 (2000).

legislators searched for a magic bullet, a new national policy to protect the environment.¹⁸⁵ They came up with this: federal agencies would execute a statement demonstrating that they actually considered the impacts of what they were doing before they went forward.¹⁸⁶ With enlightenment would come better decisions.¹⁸⁷ This concept, today, seems rather naïve. That federal bureaucrats the size and power of the Corps, Atomic Energy Commission, and Federal Highway Administration would suddenly reverse decades of practice and uncouple themselves from their constituencies for “environmental” reasons was wildly optimistic, then or now, but on this environmental disclosure principle, Congress bet its all. The vehicle was the impact statement.¹⁸⁸

It soon became clear, however, that the question of exactly *when* an agency had to write a statement was frustratingly opaque. The statute said only that “major” federal action required it, and CEQ’s regulations, none too helpfully, said that “major” meant “significant.”¹⁸⁹ Federal agencies seized on the looseness of this concept to avoid writing a full statement, inventing instead a short-cut document called an “assessment” for ostensibly minor actions.¹⁹⁰ The assessment option, while more

185. *First Annual Environmental Quality Report: Hearing Before the S. Comm. on Interior & Insular Affairs*, 91st Cong. 5-6, 19-20 (1970); S. COMM. ON INTERIOR & INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. NO. 91-296, at 4-5 (1969):

We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; . . . the loss of valuable open spaces; inconsistent and, often, incoherent rural and urban land-use policies; critical air and water pollution problems; . . . the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species; . . . and many, many other environmental quality problems. . . . As the evidence of environmental decay and degradation mounts, it becomes clearer each day that the Nation cannot continue to pay the price of past abuse. The costs of air and water pollution, poor land-use policies and urban decay can no longer be deferred for payment by future generations.

186. S. REP. NO. 91-296 at 2-3, 10-13 (1969). The process was described as “action-forcing” by the bill’s sponsors. *Id.*; see also 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW 6-7 (1993).

187. See RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 18 (1976). (“Hopefully, agency decision making would be improved; fewer environmentally controversial decisions would be made because ecologically injurious projects would be denied serious consideration in their early stages.”).

188. 42 U.S.C. § 4332(2)(c) (2006).

189. 40 C.F.R. § 1508.18 (2011) (defining “major federal action,” the regulations state that “[m]ajor reinforces but does not have a meaning independent of significantly”).

190. See *Hanly v. Kleindienst*, 471 F.2d 823, 827-28 (describing the evolution of the environmental “assessment” process); 40 C.F.R. §§ 1501.4(b), 1508.9 (“environmental assessments”). The practice has now become routine. See COUNCIL ON ENVTL. QUALITY, THE NINTH REPORT ON THE NATIONAL ENVIRONMENTAL POLICY ACT STATUS AND PROGRESS FOR AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 ACTIVITIES AND PROJECTS 3-4 (2011). In terms of NEPA reviews for projects funded by the American Recovery and Reinvestment Act (ARRA), assessments were written for nearly seven thousand projects while only 830 projects

efficient, allowed the agency to pass off as “insignificant” quite large and controversial endeavors as well.

They had every incentive to do so. The EIS process takes time and money. It also delays funding, invites critics, draws in the media, discovers unseen risks, and, sometimes fatally, surfaces unwanted alternatives.¹⁹¹ If one is in the shells business, for example, the option of using other materials on state construction jobs is anathema.¹⁹² Last but not least, hanging over the whole process like an insult is the notion that something to which you have dedicated your professional life—be it shell-dredging, highway construction or coal-fired power plants—could be a harmful thing to do. That is a big pill to swallow. You will resist it strongly.

Sensing that its cursory assessment was vulnerable—these permits involved, after all, the wholesale mining of one of the biggest and most resource-rich bodies of water in America—the government’s first response to *Lee* was to ask that the matter be sent back to the Corps for further consideration.¹⁹³ The motion was granted, giving Corps lawyers and impact assessors the opportunity to redo their document, which they then brought back to court not as a full statement but as a second, shortcut assessment.¹⁹⁴ That actual “reconsideration” took place at any level other than the use of language, is highly doubtful. Indeed, several cosmetic changes made between assessments numbers one and two would turn out, in a later opinion, to be highly embarrassing. But at this point the Corps was offering no EIS. That the dredging was insignificant was their story and they were sticking to it, which bucked the matter back to the District Court in New Orleans.

Judge McNamara dealt first with motions by the shell-dredging companies, who had intervened en masse, to disqualify the State of Louisiana as a plaintiff.¹⁹⁵ Because state agencies had approved these same shell-dredging activities, they argued, the Attorney General had a

had full statements. *Id.* In addition, 182,300 projects were granted a total pass via “Categorical Exclusion (CE)” to be used for practices with individually or cumulatively insignificant environmental impacts. *Id.*

191. Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 814-17 (1989).

192. Indeed, the feasibility of using crushed limestone rock instead of clam shells would ultimately help win the day for plaintiffs. See John Hall, *Rocky Business: With Lake Pontchartrain Clamshells Off the Market, Suppliers of Construction Materials Vie to Offer South Louisiana a Substitute*, TIMES-PICAYUNE (New Orleans), July 10, 1994, at F1.

193. See *Louisiana v. Lee*, 596 F. Supp. 645, 652 n.9 (E.D. La. 1984).

194. *Id.*

195. See *id.* at 649.

conflict of interest.¹⁹⁶ To the contrary, ruled the court, Louisiana had separate “quasi-sovereign” interests in the proceedings and, besides, state approvals had nothing to do with the federal NEPA claim.¹⁹⁷ The legal question before them was simply whether plaintiffs could show that the Corps’ refusal to write a full statement was unreasonable.

Having come this far, Judge McNamara found that they had not.¹⁹⁸ For one, the Corps permits were conditioned along the coast to avoid state boundary areas and prime fish habitat, and in Lake Pontchartrain to avoid sensitive habitats near shore; they deferred dredging in Lake Maurepas entirely, pending further studies.¹⁹⁹ These conditions seemed convincing evidence that the Corps had done what Congress intended agencies do under NEPA, modify its actions to soften the blow. Looking more closely at Lake Pontchartrain for what impacts might remain, the court accepted its characterization as a body of murky water with an impoverished benthic community, only four kinds of “the hardiest” organisms remaining, none of them plentiful, including the Rangia Clam.²⁰⁰ The prolific biological community of the 1930s, before shell dredging began, was seen as immaterial; the baseline for assessing the harm was 1984, the date of the latest assessment.²⁰¹ The permits were for the future, so then were their environmental effects.

In the end, as the trial court saw it, Yost and Osborne had shown the Corps’ decision to be questionable, but not unreasonable. The Corps had in fact offered reasons, principal among them that the lakes in particular were already so damaged that keeping them in constant upheaval would not seriously affect the status quo.²⁰² These seemed to be conclusions of fact, what trial courts were paid to do and classically off-limits to further review. It would be a difficult opinion to appeal.

VI. *LOUISIANA V. LEE II*: THE APPEAL

The gentleman we were suing was Corps of Engineers Colonel Robert C. Lee, and it opened up with Chief Judge Clark saying “I’m glad they’re not suing Robert E. Lee.”

—Nick Yost, 2009²⁰³

196. *Id.* at 650.

197. *See id.* at 649-50.

198. *Id.* at 657.

199. *See id.* at 655-57.

200. *Id.* at 653-54.

201. *See id.* at 654.

202. *Id.*

203. Interview with Nick Yost, *supra* note 1.

Osborne liked the sound of that. Trial lawyers are always reading the entrails for signs, and he believed, rightly or wrongly, that judges with a sense of humor also had a sense for plaintiffs. In this case, it turned out that way.

While Yost was the NEPA expert for the plaintiff team, it was up to Osborne and Schoeffler to handle the facts. They knew the experts by first name, the bays and lakes by fishing hole, and had already been through one fact-based firefight before the Coastal Commission. They made quite a pair, one whose common bond was forged years earlier, before they even knew each other, by an institution that was an assumption of life in their day, the Boy Scouts of America.

Schoeffler had joined a Scout troop at eight years of age, patently below the official requirement, but he was a hard kid to deny.²⁰⁴ He never did make Eagle Scout, too busy in the out of doors he explains, but he stayed with the program as scout leader and troop master for the next thirty years, almost all of them on the water.²⁰⁵ They canoed the Lower Atchafalaya River several times, a treacherous stretch with a current that could rival the Mississippi.²⁰⁶ They paddled the coastal bays out past Cypremort Point to the oyster reefs, where they pulled out their fishing rods and caught flounder and speckled trout.²⁰⁷ For Schoeffler, scouting, and the way they did scouting, meant freedom.²⁰⁸ It still does.

Osborne started with one of the more unusual troops in Boy Scout history.²⁰⁹ They rolled their own caisson.²¹⁰ Led by a returning World War II veteran with a penchant for carpentry, they outfitted an old gun wagon with equipment boxes at one end and fold-out tables on the side.²¹¹ The wagon had only two wheels and was pulled by a long wooden tongue with handles.²¹² The boys would, literally, trundle this wagon loaded with gear down country roads to nearby creeks, stopping to swim and make camp.²¹³ They might stay a week.²¹⁴ As Osborne grew older he joined a

204. Telephone Interview with Harold Schoeffler, *supra* note 75.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *See* Telephone Interview by Casey Scott with Michael Osborne (Feb. 7, 2012) (recapping several conversations with Osborne over the past twenty years); Interview with Robert McComiskey, Attorney, in New Orleans, La. (Sept. 15, 2011). Mr. McComiskey was Osborne's law partner for many years, and had earlier been a member of the same Scout troop. *Id.*

210. Interview with Robert McComiskey, *supra* note 209.

211. *Id.*

212. *Id.*

213. Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209; Interview with Robert McComiskey, *supra* note 209.

sea scout troop that had two sailboats over thirty feet long, the larger of which traveled to Cuba.²¹⁵ Like Schoeffler, Osborne's scouting revolved around water.²¹⁶ This brotherhood would carry them through the high pressure of the shell litigation for many nail-biting years. For these two men it was not so much a case as a cause. As the litigation was filed Osborne was joined by a particularly cerebral Tulane Law graduate named Chris Gobert. Mike would say, "Chris is my brains"; Gobert would say, "Mike is my lawyer."²¹⁷

For the dredging industry the litigation was also more than a case. Its culture, self-image, and economic life were on the line, to say nothing of a close relationship with the state nurtured since before the lives of anyone now living. Here they were, pillars of the community, instruments of progress, beset by so-called environmentalists who, not content with sniping in the press, would now take them to court. Susan Clade walked right into this mindset, ready to practice law.²¹⁸ A brand new associate in a New Orleans law firm, the shell dredgers were virtually her first assignment and would dominate her next seven years.²¹⁹ She also was a star graduate of Tulane Law School and had won the national moot court competition in her final year. She relished the action.²²⁰

Anomalously even to herself, Clade considered herself an avid environmentalist as well, at a time when the word had alien connotations in the American South.²²¹ A grade school teacher in a previous life, she had her class scrupulously collect each scrap of paper for the monthly recycling run; "we boycotted tuna fishing because they were killing dolphins," she recalled, so it seemed a bit "bizarre" to be "on the opposite side of this case."²²² On the other hand, her senior partner assured her that their industry clients were "good people," else he would not take the case, so she "made peace with [her] alter ego;" then, "of course, the lawyer in you comes out and you start really believing in your case."²²³ A phenomenon familiar to all lawyers everywhere. "I met a lot of really

214. Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209; Interview with Robert McComiskey, *supra* note 209.

215. Interview with Robert McComiskey, *supra* note 209.

216. Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209; Interview with Robert McComiskey, *supra* note 209.

217. Conversations with Michael Osborne and Christopher Gobert throughout the 1980s.

218. Interview with Susan Clade, *supra* note 52.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

cool people,” she reflects, “most of whom were on the other side.”²²⁴ She would be a formidable adversary.

In early 1985, the appeal of the *Lee* decision below was argued before the United States Court of Appeals for the Fifth Circuit, where, in another shock to the Corps and the dredging industry, it was reversed.²²⁵ The decision hung on two little words of enormous importance to environmental law: the difference between “will” and “may.” To prove by a preponderance of the evidence that something “will” happen requires a high degree of certainty, and when it comes to the environmental effects of many things that humans do such certainty is unattainable. Agencies are faced daily with making best guesses about the impact of deep water drilling on endangered whales,²²⁶ of chemicals on human endocrine systems,²²⁷ and, in some quarters at least, whether carbon emissions cause climate change.²²⁸ Opponents of environmental regulation retain stables of lawyers, scientists, economists, former legislators, and public relations firms for the simple purpose of raising doubt.²²⁹ There will always be a reason other than smoking tobacco that people are dying of lung cancer, or that, in this case, Lake Pontchartrain was dying too. In most of these instances, in a court of law, whoever has the burden of proving that something “will” happen will lose.

Which is what happened in the case below. Would shell-dredging significantly harm the lake? According to Judge McNamara, the plaintiffs had to prove that it would, but with the Corps’ mitigating conditions proposed, perhaps it would not; that “perhaps” was all it took to defeat the claim.²³⁰ And so, no environmental statement was called for.

224. *Id.*

225. *Louisiana v. Lee*, 758 F.2d 1081, 1082 (5th Cir. 1985).

226. *N. Slope Borough v. Andrus*, 642 F.2d 589, 592-93 (D.C. Cir. 1980).

227. Endocrine Disruptor Screening Program; Policies and Procedures for Initial Screening, 74 Fed. Reg. 17,560, 17,560-66 (Apr. 15, 2009).

228. The issue entered the 2011 Republican Presidential Primary debates. See Neil King, Jr. & Jonathan Weisman, *Perry, Romney Clash at Debate*, WALL ST. J., Sept. 8, 2011, at A1.

The event ended with a mini-debate on climate change and the causes of global warming. Mr. Huntsman said 98% of scientists saw a human role in climate change, and that the GOP should recognize that role. “All I am saying is that in order for the Republican Party to win, we can’t run from science, we can’t run from mainstream society.” Mr. Perry offered a skeptical view, saying scientists had yet to prove the significance of global warming. “The idea that we would put America’s economy in jeopardy based on a scientific theory that is not settled is nonsense,” Mr. Perry said.

Id.

229. See FRANK LUNTZ, *THE ENVIRONMENT: A CLEANER, SAFER, HEALTHIER AMERICA* 138 (2002), available at http://www.ewg.org/files/LuntzResearch_environment.pdf. (recommending that the party exploit the “window” of scientific doubt).

230. *Lee*, 758 F.2d at 1084-85.

The appellate court did not gainsay this reading of the facts; rather, it gainsaid the test of law. All NEPA required of plaintiffs, it ruled, was to show that an action like this “may” have significant effect on the lake, not that it “would.”²³¹ To hold otherwise, reasoned the court, would be to oblige NEPA plaintiffs to prove the very facts that the NEPA process was designed to investigate and disclose.²³² The trial court got the law backwards.

Worse, the appellate opinion went on, it got the status quo backwards as well. The trial judge accepted the industry position that, since the lake was so badly damaged, the renewed permits could do little additional harm.²³³ After all, they had been dredging in Pontchartrain for the past fifty years. Wrong again, said the appellate court; the new permits would not maintain a status quo but, rather, “continue a course of environmental disruption begun years ago.”²³⁴ To hold otherwise would “ignore the realities that even a badly damaged body of water may restore itself to ecological health if a disruptive activity is halted.”²³⁵ Quite true. Ask any doctor.

Both holdings made significant advances in the law of NEPA. The first ruling gave the public the right to full environmental review even when the impacts were only potentially serious, which as a practical matter, is often the time at which things can be changed and the review will do the most good. The second ruling required full review for ecosystems like Pontchartrain, even though badly damaged for a very long time. Wasted watersheds, urban slums, cut-over forests, and grazing lands beaten to dust would have the chance to imagine a future restored.

The appellate ruling did not decide the case, however. Rather, after a brief and unsuccessful industry petition to the United States Supreme Court,²³⁶ the parties went back to Judge McNamara for the same is-it-big-enough? question, this time under the proper legal standard.²³⁷ Neither the Corps nor the dredging companies were giving an inch.

VII. *LOUISIANA V. LEE III*: THE REMAND

[I]f it is decided to go ahead and complete the demise of the ecological system of Lake Pontchartrain by continuation of the practices of dredging,

231. *Id.* at 1085-86.

232. *See id.* at 1084-86.

233. *Id.* at 1085-86.

234. *Id.* at 1086.

235. *Id.*

236. *Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied*, 475 U.S. 1044 (1986).

237. *Id.* at 1082.

pollution and marginal marsh destruction, then that is a human decision we will have to live with.

—Corps of Engineers, Environmental Assessment, 1982²³⁸

—Statement deleted from Corps of Engineers
Environmental Assessment, 1984²³⁹

One of the mysteries of NEPA litigation is the extent to which government agencies and their beneficiaries (often referred to as “constituents”) resist the obvious course of action: just write the blessed statement and move on. Instead, year after year, the amount of fact-twisting, impact-denying, alternatives-ignoring, and general avoidance of the statute’s very simple command—indeed, its *only* command—is stunning. More than half of all NEPA environmental litigation simply seeks, and from the other side strongly resists, a full environmental review.²⁴⁰ It is a fact of life.

This said, one remains impressed by the fact that the Corps in this case stuck with its short-cut environmental assessments when the Fifth Circuit had sent such clear signals of disagreement. One answer may be that this is what government lawyers do, defend the government, and they are already on the payroll; there are few costs to agencies for violating environmental law. A second answer, suggested by the Sierra Club’s expert in the public bids cases to follow,²⁴¹ is that in this instance the Corps benefitted by cheap shells as much as anyone else; it purchased them for levees, secondary roads, and similar projects.²⁴² It was hooked into the same machine.

Whatever the reasons, once again the missing EIS was back before Judge McNamara who was, in Yost’s opinion, straight-up enough to accept the appellate court’s requirements and apply them.²⁴³ When a DOJ attorney suggested (per Yost, “obsequious[ly]”) that the Fifth Circuit had misinterpreted the judge’s excellent reasoning at trial, McNamara interrupted him to say, “the Fifth Circuit knew exactly what I was saying and they said I was wrong.”²⁴⁴

238. Louisiana *ex rel.* Guste v. Lee, 635 F. Supp. 1107, 1118 (E.D. La. 1986) (citing U.S. ARMY CORPS OF ENGINEERS, LAKES AREA ENVIRONMENTAL ASSESSMENT 6 (1982)).

239. *Id.* (citing U.S. ARMY CORPS OF ENGINEERS, LAKES AREA ENVIRONMENTAL ASSESSMENT (1984)).

240. See 24 COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY ANNUAL REPORT 368, 368-71 (1993) (showing “No EIS” to have been the “most common complaint” in NEPA litigation).

241. Interview with Dr. Barry Kohl in New Orleans (June 28, 2011). For Kohl’s roll in the bid cases, see *infra* text accompanying notes 296-308.

242. *Id.*

243. Interview with Nick Yost, *supra* note 1.

244. *Id.*

The remand itself was more than a simple hearing. It was preceded by a series of mini trial-like depositions in which the government examined five of Osborne and Yost's expert witnesses, all of them scientists or economists, while the plaintiffs examined six Corps employees responsible for the assessment and permit decisions.²⁴⁵ Even these proceedings had a Louisiana flair, as Yost later recalls:

Most of our witnesses were from LSU and the Corps had its own witnesses. One of our witnesses [was] an LSU professor, and we all would break and go to the cafeteria for lunch. And I remember following within earshot as the counsel from the other side was going up to our expert and offering him a consulting job. It took a lot of gall to do something like that.²⁴⁶

The two sides could as well have been talking about different planets. As the court would later note, "[I]t appears that the parties agree solely on disagreeing and that this court has become a forum for a battle of the experts."²⁴⁷ This is not an uncommon phenomenon in environmental cases, but it is one in which, on occasion, government witnesses, once before an impartial arbiter, can be badly embarrassed.²⁴⁸

In this case, they were embarrassed not only by the testimony of other experts more credentialed than they were, but by their own previous statements as well. As seen earlier, in 1982 the Corps produced separate assessments for clamshell dredging in the lakes and oyster dredging on the coasts, only to retract them when faced by the lawsuit in order to write new ones, completed in 1984.²⁴⁹ The court was obviously struck by the discrepancies between them, which included the following samples (emphasis added):

245. Louisiana *ex rel.* *Guste v. Lee*, 635 F. Supp. 1107, 1118-20 (E.D. La. 1986).

246. Interview with Nick Yost, *supra* note 1.

247. *Guste*, 635 F. Supp. at 1120.

248. A more recent Corps case involving the Mississippi River Gulf Outlet is *In re Katrina Canal Breaches Consolidated Litigation*, 647 F. Supp. 2d 644, 660-63 (E.D. La. 2009).

Mr. Podany [a Corps expert witness] tried to distance himself from these finding[s] [a 1988 Corps study on MR-GO erosion possibilities] and opined that they were concerned about large, mile wide breaching, not the "small" breach at Lake Borgne that was present at Hurricane Katrina. However, this testimony was less than credible in light of the fact that when those "small" breaches were found to be dangerous, the Corps was able to justify "emergency" funding for corrective action in the early 1990's Implicit in Mr. Podany's testimony is the sense that these decisions were all based on policy considerations. However, when the safety of an entire region is at stake, negligence cannot be masked by policy. Indeed, his testimony rings hollow

Id. at 661-62 n.19.

249. Louisiana *v. Lee*, 596 F. Supp. 645, 652 n.9 (E.D. La. 1984).

1982	1984
(Pontchartrain): “the <i>most significant</i> impact of shell dredging occurs during the dredging process whereby <i>benthic organisms</i> are disrupted by the dredging or smothered by the discharge” ²⁵⁰	“the impact on the <i>benthic organisms is not considered to be significant</i> because the effects are temporary and short term” ²⁵¹
(Pontchartrain): “[T]he rapid depletion of the <i>fossil shell</i> represents an <i>irreversible and irretrievable impact</i> ” ²⁵²	“[r]eduction (depletion) of <i>fossil shell is not a significant biological impact</i> ” ²⁵³
(Pontchartrain): [Dr. Sikora had concluded that] “hydraulic shell dredging had <i>significant effects on the nutrient and heavy metal</i> chemistry of the water and sediments of Lake Pontchartrain” ²⁵⁴	[reference deleted]. ²⁵⁵
(Gulf coast): “[t]he physical removal and/or burial of benthic organisms will be a <i>significant impact</i> to these communities” ²⁵⁶	[t]he physical removal and/or burial of benthic organisms will result in <i>temporary</i> adverse impacts to these communities” ²⁵⁷
(Gulf coast): “[t]here <i>would</i> be significant impacts to sport fishing” ²⁵⁸	“there <i>could</i> be significant impacts to sport fishing” ²⁵⁹

Each term even faintly suggesting adverse impacts had been altered. It seems obvious that someone was trying to clean up the files, which often happens once lawyers get involved. Noting the same on appeal, the Fifth Circuit had cautioned the trial court that “the 1984 assessment is a *post hoc* rationalization and thus must be viewed critically.”²⁶⁰ Which Judge McNamara would do. Corps employees attempted to explain the differences between the two documents as “clarifications” for the “non-scientific reader,”²⁶¹ which was hardly plausible. They also defended the changes as responsive to more restrictive permit conditions considered in the 1984 version,²⁶² facially more plausible, save for the fact that the conditions had been imposed in 1982. As Judge McNamara further

250. *Guste*, 635 F. Supp. at 1117.

251. *Id.* at 1117-18.

252. *Id.* at 1118.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420-21 (1971)).

261. *Guste*, 635 F. Supp. at 1117.

262. *Id.*

noted, detailed affidavits on dredging impacts by two of the plaintiffs' experts had not been cited, discussed, or even listed in the Corps' 1984 document, some evidence that the process was not exactly the desired search for truth.²⁶³ These defects noted, the question remained whether the permit conditions were sufficient to ensure that dredging this massive would have only minor impacts.

To assist the inquiry, the Fifth Circuit had given the trial court a time frame by which to take its measure: the parties were to compare the environmental health of the lake five years from now, with and without shell dredging.²⁶⁴ The Corps and industry responses, predictably, were that the harm had been done, little more harm could be done, and there was no way of determining how or how fast the lake would recover were the dredging permits denied.²⁶⁵ Plaintiffs' witnesses, who enjoyed a clear edge in credibility, described the injury as a continuing one from which recovery could not even be imagined unless the dredging stopped. One witness went on to conclude, however, that, were it to stop, within the five-year time frame, bottom-dwelling creatures could increase by nearly forty percent in numbers and by thirty-three percent in weight.²⁶⁶ This was perhaps the best news of the trial, and something of a jolt of electricity for a public that had resigned itself to the loss of Lake Pontchartrain. Left to its own devices, the lake could recover.

Having walked this far, a last hurdle remained: would Judge McNamara stop the projects? The environmentalists and the Attorney General were seeking a full environmental statement to inform future agency and even legislative decisions; it made little sense to continue in the meantime doing what everyone knew would have to be then curtailed, if not eliminated altogether.²⁶⁷ The industry, on the other hand, wanted to continue to dredge for as long as it could without interruption;²⁶⁸ it had made its investments years ago, recovered on them handsomely, and had about played out the resource. With just a little more time, it could max out its gains. The court saw both sides well enough. Basically, it had to choose between ending the industry or recovering the lake.

In the end, Judge McNamara accepted the argument that he had relied on in the first instance: the lake had been defiled for a very long

263. *See id.* at 1119-21.

264. *Lee*, 758 F.2d at 1086.

265. *Guste*, 635 F. Supp. at 1119-20.

266. *Id.* at 1120. Dr. Darnell, a Professor in the Department of Oceanography at Texas A&M University, was the plaintiffs' witness who made the five-year predictions about the bottom dwelling creatures' likelihoods of rebounding. *Id.*

267. *See id.* at 1123.

268. *See id.*

time; a little more would not hurt it as much as stopping dredging would hurt the industry. Indeed, an industry-sponsored academic had produced the rather fantastic estimate that shell dredging generated “in the neighborhood of \$226,000,000 of economic transactions.”²⁶⁹ Slicing the baby, the judge allowed the existing permits to continue for another eighteen months, the remainder of their term.²⁷⁰ Any new permits would have to pass full environmental review.²⁷¹

As the dust settled on this long legal skirmish under NEPA, the plaintiffs won valuable information and cast a dark shadow over the future of shell dredging, but they did not put an end to it. That would have to happen in other venues yet to come. For the dredgers, however, this part alone was a victory. As Clade said years afterward, reflecting on the litigation, “[O]ur point of view was that we had done a great job and kept them in business for another seven years.”²⁷² And yet by her lights, perhaps by anyone’s lights, she was environment-green. F. Scott Fitzgerald once wrote, “[T]he test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.”²⁷³ Of course, were environmentalists sufficiently “intelligent” to favor both a clean lake and shell dredging, the POSTED: NO SWIMMING signs might well still ring Pontchartrain.

VIII. *LOUISIANA V. LEE IV*: FEES

I was in a deposition with Mike Osborne. They were deposing me at One Shell Square with about twenty dredging attorneys. They started at nine in the morning and went until around ten at night. One of the attorneys said, “we got you outnumbered, we got twenty boys against your one.” And I said, “I’ll readily admit that your side has the best 20 lawyers that money can buy, and our side has the best attorneys that money can’t buy. So we’re about even.”

—Harold Schoeffler, plaintiff, 2010²⁷⁴

This was vintage Schoeffler, but somewhat easy for him to say. He owned a Cadillac dealership. Osborne and Gobert, on the other hand, had been litigating for several years, in multiple forums, often concurrently, and fending off a running battle of motions and sideshows in the legislature, the press, and local parishes. They were up against the

269. *Id.* at 1128-29.

270. *Id.* at 1129.

271. *Id.* at 1129-30.

272. Interview with Susan Clade, *supra* note 52.

273. F. SCOTT FITZGERALD, *THE CRACK-UP* 69 (1945).

274. Interview by Casey Scott with Harold Schoeffler, *supra* note 75.

United States government whose litigation was funded by the general public, and corporations who, the size of their bank accounts aside, could write off legal fees as ordinary business expenses. Fact-based cases like the shells saga are costly in every regard—experts, research, court fees, transcripts, depositions, travel—to say nothing of secretarial support and keeping the lights on at the office. This is all before one factors in the psychological toll. Corporate law firms know this as well as anyone and keep the pot boiling with rolling volleys of pleadings; an opponent they can wear out is as much a win as any other. Apart from a few modest contributions from the environmental groups, Osborne and Gobert were going deeper in the hole every day.²⁷⁵

The close of the *Lee* cases gave them the opportunity to receive compensation for professional services that, on the other side, easily reached a mid-range, six-figure number.²⁷⁶ Having, in their minds anyway, won the lawsuit, they applied to Judge McNamara for attorney's fees under the Equal Access to Justice Act (EAJA).²⁷⁷ No one became wealthy off of the EAJA, for reasons soon apparent, but it would at least be something to pay the bills.

The U.S. system of justice tries to level the playing field for plaintiffs in several ways. Understanding that government and corporate defendants hold the high cards, the most evident of which is money, the so called "American rule" requires each party to pay its own litigation costs, removing the daunting specter of having to reimburse the shell dredging industry, or for that matter, British Petroleum, for the immense tabs run up in court, particularly against close-but-meritorious claims.²⁷⁸

275. Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209. Osborne would later say, "I really didn't have a paying client. I had not-for-profits and you know they would send me \$200 and say 'I hope that goes a long ways and such', but it really didn't." *Id.*

276. While no fee information is available from those representing the shell dredging industry, if one estimates that one attorney alone invested 1000 hours, over five years in trial, appeal and retrial of the *Lee* case—including research, depositions, pleadings hearings, public appearances, private meetings and lobbying—a modest estimate under the circumstances, and a billing rate of \$150 an hour, also modest for corporate practice, one arrives at \$50,000 multiplied now by several attorneys on the case (who may charge higher rates). In short, the estimate is conservative.

277. *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219, 1221 (5th Cir. 1988).

278. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975) ("[T]he court proceeded to consider whether the requested fee award fell within any of the exceptions to the general 'American rule' that the prevailing party may not recover attorneys' fees as costs or otherwise."); *see* David P. Riesenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 DUKE L.J. 977, 989-990 (2011) ("Under the American rule, 'the costs lie where they fall.' That is, both respondent and claimant pay their own legal costs, regardless of which party is successful on the merits. There is no shifting of legal costs, except when one of the two parties is penalized for litigating in bad faith." (quoting Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 10 (1984))).

The each-pays-its-own rule, however, only shields small-scale plaintiffs from risking their financial lives; it does not get their attorneys paid. Congress stepped in to address the payment piece in two ways: providing EAJA attorney's fees against the government in certain cases and more specific "citizen suit" provisions in later environmental laws.²⁷⁹ Explaining his rationale for sponsoring the EAJA, Senator Domenici stated:

The basic problem this bill seeks to overcome is the inability of many Americans to combat the vast resources of the Government in administrative adjudication. In the usual case, a party has to weigh the high cost of litigation or agency proceedings against the value of the rights to be asserted. Individuals and small businesses are in far too many cases forced to knuckle under to regulations even though they have a direct and substantial impact because they cannot afford the adjudication process. In many cases the Government can proceed in expectation of outlasting its adversary.²⁸⁰

The premise behind the EAJA was, and is, that it is desirable for ordinary people to be able to challenge power in court where there are valid claims. In enacting subsequent citizen suit provisions, Congress further recognized that in many instances unless citizens enforced the law nobody would, and clean air and water programs would become a string of empty promises.²⁸¹ The NEPA statute behind the *Lee* cases, however, contains no citizen suit provision, reverting Osborne and Gobert to the EAJA, which has significant limitations. Even if plaintiffs win a case they will still lose on fees if the government shows that its position was

279. See *Guste*, 853 F.2d at 1221 (noting plaintiffs filed a motion for attorney's fees under EAJA); James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 38 (2003) (asserting that while environmental citizen suits usually allow "successful citizens . . . to recover attorney fees," lately a trend, based on lower court decisions, developed that May argues will "encourage defendants to stave off compliance . . . and invites a more sensible 'violator pays' rule" because of a defendant's belief that he can avoid paying citizen suit attorney's fees and costs by complying before judicial enforcement); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10407, 10410 (1984) ("The citizen suit sections reverse the American Rule by authorizing courts to award costs of litigation . . . to any party when appropriate The propriety of fee awards under the environmental statutes has sparked considerable controversy, with more reported decisions on attorneys fees than on any other aspect of the citizen suit sections.").

280. *Guste*, 853 F.2d at 1223 n.22.

281. This is particularly obvious for agency violations of public laws. Because the federal government does not sue its own agencies for violations of the law, if citizens can't sue either the violations run free. For this reason, Congress referred to environmental plaintiffs as "citizen attorneys general." See Melanie A. Anbarci, *The Laidlaw Decision: Shield or Sword?*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 143, 144 (2001); see also Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits To Pick Up the Slack?* 20 DUKE ENVTL. L. & POL'Y F. 1, 2 (2010).

“substantially justified,”²⁸² a loophole as large as Montana; attorneys live by providing justifications. The court may moreover reduce an EAJA award, or deny it entirely, under undefined “special circumstances.”²⁸³ Finally, these hurdles cleared, the awards are capped at \$75 an hour, short of “extraordinary” services, in which case they could rise to all of \$125 an hour.²⁸⁴ Corporate law firms would turn down such rates with a chuckle. Having little alternative, Osborne and Gobert added up their hours and submitted a claim.

An interesting dynamic followed. The government has the opportunity to oppose a claim, and this is the same DOJ, indeed the same lawyers, whom the plaintiffs have just beaten in court. Human sensibility comes into play. Where in a case like *Lee* the trial court too has been overturned on appeal, there are also the sensibilities of that same trial judge, who now decides the award. Not surprisingly, then, winning plaintiffs and their counsel are often forced to litigate their entitlement to fees, and then the proper amount, and perhaps yet another appeal, before getting paid.²⁸⁵ It is not unusual for them to accept whatever discount the DOJ offers in order to get on with their lives.

In this case, Judge McNamara referred the matter to a magistrate, and then made his decision: \$164,100.85, to be divided among the plaintiff environmental organizations represented by Osborne, Gobert, and Yost.²⁸⁶ Spread over the half-decade the case had lasted, five organizations, and three attorneys, the sum was hardly a living wage but would keep the game in motion.²⁸⁷ Both the DOJ and the environmentalists appealed.

282. See 28 U.S.C. § 2412(d)(1)(A) (2006).

283. See *id.* § 2412(d)(2)(A)(ii).

284. These limits on attorney’s fees amounts by the EAJA were as they stood at the time of the case. See 853 F.2d at 1225. The current act reimburses at \$125 per hour as a rule, rather than \$75 per hour in the case, with allowance still for increases due to cost of living or other “special” factors. *Id.* § 2412(d)(2)(A)(ii). These rates, still, are nothing comparable to those on the corporate side of a case.

285. For fee challenges at the time of these cases, see Christopher Gobert, *Citizen Suits in the Populist State*, 2 TUL. ENVTL. L.J. 57, 63-73 (1989). For continuing challenges, see Adam Babich, *The Wages of Sin: The Violator-Pays Rule for Environmental Citizen Suits*, 10 WIDENER L. REV. 219, 259 (2003) (“These awards [under violator-pays provisions of environmental statutes] do not compensate lawyers for the risk of loss, are unlikely to make up fully for delays in payment, often fail to cover all activities that are necessary to completely serve the client, and are often reduced . . .”).

286. *Louisiana ex rel. Guste*, 1986 U.S. Dist. LEXIS 17549, at *3 (E.D. La. 1986); see *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219, 1221 (5th Cir. 1988).

287. The State of Louisiana, as a public entity, was ineligible for an award. See 28 U.S.C. § 2412(d)(2)(B).

This *Lee* appeal, then, the fifth formal proceeding in the case, considered the government's opposition to any fees because the Corps position was substantially justified; it had relied on prior case law; the Fifth Circuit, in its view, had announced a new rule for impact statements when it reversed.²⁸⁸ Not so, said the court, because the agency's obstinacy flew in the face of NEPA's requirements; indeed, the Corps had in fact prepared full impact statements for less extensive dredging in three other coastal states.²⁸⁹ Dropping back, the DOJ then argued that, because the State of Louisiana led the case as plaintiff, the environmental groups were simply along for the ride, a "special circumstance" that precluded recovery.²⁹⁰ As a final fallback, if any recovery were merited, the government added, raising the award to \$125 an hour for Yost was entirely out of order;²⁹¹ despite his special expertise, he was not extraordinary. Nothing in *Lee* came easily.

Not far from mind, however, was the ignominy of what Osborne et al. were fighting for: who in today's world would try a federal lawsuit for \$75 an hour? The Fifth Circuit decided to remand the remaining arguments, as questions of fact, to the trial court. And so the *Lee* case, still a dogfight, headed back to Judge McNamara yet another time. Five years after the opening gun, six years if one counts the Coastal Commission hearings, the plaintiffs' attorneys had yet to be paid.

IX. PUBLIC BIDS I: SEARCHING FOR A STOPPER

*The environmentalists have come in the back door, because they have lost on the issue of the shell dredging causing environmental damage. . . . Now they have won on a legal, not environmental, technicality, and they are screaming victory.*²⁹²

—Ann Jordan, spokesperson for dredging industry, 1988

Perhaps it was a technicality. Particularly if you believe that putting twenty-year leases on nearly two million acres of water bottoms out for public bids is a technicality. Apparently the shell companies and the Department of Wildlife and Fisheries thought so. They had done business without bids since day one.

288. *Guste*, 853 F.2d at 1222.

289. *Id.* at 1222-23.

290. *Id.* at 1225.

291. *Id.* at 1226.

292. Bob Anderson, Editorial, *Dredgers Petition To Keep Operating*, MORNING ADVOC. (Baton Rouge), Mar. 23, 1988, at 2B.

The idea came to Osborne and Gobert in the back of their office on Chartres Street, poring over the Louisiana mineral code.²⁹³ It was written there in black and white, in the Louisiana Constitution, no less, which mineral licenses were to be granted through public bidding.²⁹⁴ Instead, for the past fifty years these leases had been negotiated, if negotiations took place at all, somewhere in the Department of Wildlife and Fisheries building, which provided, in effect, the agency's principal defense: We have always done it this way.

Osborne and Gobert considered their prospects. A bids case was attractive because, unlike *Lee*, it would not depend on disputed facts. The bid laws were not about environmental impacts but, instead, about securing the best return for state coffers and a fair playing field for anyone wanting to enter the game. On the other hand, what practical difference would it make were the leases put out for bids? The fix was in, the dredging world was small and finite, the same companies would receive the same leases from the same Department with a new date stamp. Schoeffler, on the telephone line from Lafayette, thought otherwise. "We have to hit them with everything we have," he remembers saying.²⁹⁵ Who knew what would happen then?

One fact question remained, whether *Rangia* clam shells were minerals at all. They would call Dr. Barry Kohl, a petroleum geologist for Chevron at the time who, acting *pro bono*, was one of the best credentialed experts in the Louisiana environmental community.²⁹⁶ It was evening, and they reached him at home.

"Barry, let me ask you a question," Osborne began slowly, and with some trepidation, because if he heard the wrong answer they were sunk.²⁹⁷ "Are clam shells minerals?" Kohl did not hesitate. "Yes they are," he said, adding with a technical flourish, "they are over ninety percent calcium carbonate." "Can you put that in a document?" Osborne asked, politely, holding himself back. "I sure can," said Kohl. That was the right answer. Here was their lawsuit. They called Harold back with the news. They had two clients, the Sierra Club and an ad hoc group in

293. Interview with Christopher Gobert in New Orleans, La. (June 8, 2012). The description of the Osborne-Gobert consideration that follows are taken from this source.

294. "No conveyance, lease, royalty agreement, or unitization agreement involving minerals or mineral rights owned by the state shall be conferred without prior public notice or public bidding as shall be provided by law." LA. CONST. art. IX, § 5.

295. Interview by Casey Scott with Harold Schoeffler, *supra* note 75.

296. Interview with Barry Kohl, *supra* note 241; Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209. The description of the Kohl conversation that follows is taken from these interviews.

297. Interview with Barry Kohl, *supra* note 241.

Cajun country formed around the oyster dredging called Save Our Coast.²⁹⁸ Schoeffler was a force in each one. In March 1987, they launched what would become a second Odyssey of litigation.

Gobert remembers entering the New Orleans courtroom with them on the first day of the public bid trial.²⁹⁹ He took one look at the judge, a poker-faced man with a rigid bearing and thought, “this does not look good for our side.”³⁰⁰ Like many trial lawyers playing similar hunches, he was wrong.

Their case was quite simple. They had the mineral code, the Kohl affidavit that the shells were minerals, and four leases bid behind closed doors, contrary to what the code and constitution required. What was left to try? They raised ancillary claims too, that the clam bottoms were not “reefs” as provided by the original dredging statute, and that the leases covered more acreage than the law allowed.³⁰¹ They won on all three.³⁰² The Department of Wildlife and Fisheries and its industry partners were shocked and filed an appeal.

Meanwhile, the industry tried another approach as well. Now facing what it perceived as a real threat, the largest of the companies, Dravo, called up Schoeffler and asked for a meeting.³⁰³ Its representative seemed a little nonplussed to find him sitting comfortably at a Cadillac dealership, but, after a few pleasantries that included the possibility of taking him out on a turkey hunt, he got down to business. Dravo would like Schoeffler to join its Gulf of Mexico team, he said. They could pay him a five-year advance of say, \$100,000. What would be expected of him?, Schoeffler asked. Just do not do anything that would negatively impact on the company, was the answer. It was more a passive kind of job.

Schoeffler refilled his coffee. He expressed his appreciation for the offer, but he had to decline it and wanted to say why. He had grown up fishing in Vermilion Bay, he explained, on a 2000 acre shell bank that was two feet clear of the surface. One day he went out and found three or four barges instead, with shells piled twenty-five feet high. The reef

298. Interview by Casey Scott with Harold Schoeffler, *supra* note 75. Schoeffler and others had formed Save Our Coast in the early 1970s to oppose oyster shell dredging in the Gulf. *Id.*

299. Interview with Christopher Gobert, *supra* note 293.

300. *Id.*

301. See *Sierra Club v. La. Dep’t of Wildlife & Fisheries (Sierra Club I)*, 519 So. 2d 836, 837-38 (La. Ct. App. 1988).

302. See *id.*

303. Interview by Casey Scott with Harold Schoeffler, *supra* note 75. The description of the meeting that follows is taken from this source.

was gone. “That impressed the hell out of me,” he said. He knew right then that he had to do something about it when he grew up. So, this day, he didn’t mean anything personal but he had a promise to keep which was to get Dravo out of the shell dredging business. In retelling the story, Schoeffler actually says, “to get Dravo the hell out,” but his use of that phrase is doubtful.³⁰⁴ Neither he nor Osborne was the cursing type. Besides, they had the court judgment: they did not have to.

The following January the appeal came down.³⁰⁵ A three-judge panel reversed the trial court’s findings on the leasing restrictions, but found for the Sierra Club and Save Our Coast on the public bid claim, which was not a stopper, but could certainly mix things up for a while.³⁰⁶ Dravo’s rather halfhearted claim that the shells were not minerals was rebutted, in part, by what litigators call a “bad fact”: a report of the Louisiana Shell Producers Association itself claiming that they were “99% calcium carbonate.”³⁰⁷ Picking up on an argument long made by Osborne and Schoeffler in other circumstances, the shells were part of a public trust required by the state Constitution, to be “protected, conserved, and replenished insofar as possible,” a mandate that at the very least reinforced public requirements for bidding.³⁰⁸ Besides, the court noted with no apparent irony, the state would want to “avoid even the slightest appearance of impropriety.”³⁰⁹

The industry put a brave face on the defeat, calling it a “technicality” that in no way impugned shell dredging itself.³¹⁰ Osborne put another face on it, observing that “not a single judge thought any of their arguments had merit,” which of course was not exactly true, but in result, true enough.³¹¹ Once again, the industry would have to appeal but this time to the Louisiana Supreme Court, which did not grant writs of appeal with any frequency, which would have, one would think, ended the matter. It did not; they were just heating up.

304. Lest this story seem apocryphal, see *supra* note 246, describing industry approach to Yost’s expert witness during the *Lee* depositions.

305. *Sierra Club I*, 519 So. 2d at 836.

306. *Id.* at 842. The panel also rejected the argument that, by press releases and meeting agendas, the Department had provided public notice “de facto.” These informal notices were simply not solicitations that, for contracts of this magnitude, could produce higher bids and more favorable conditions for the State of Louisiana and the general public. *Id.* at 841.

307. *Id.* at 840.

308. *Id.* at 842 (citing LA. CONST. art. IX, § 1) (“In light of this Constitutional provision, the Supreme Court has recognized that the State owns land under navigable waters within its limits in ‘public trust’ for the people.”).

309. *Id.*

310. See Anderson, *supra* note 292.

311. Mike Dunne, *Guste Seeks Talks on Dredging*, MORNING ADVOC. (Baton Rouge), Mar. 19, 1988, at 2B.

X. PUBLIC BIDS II: A DEEPENING TANGLE

In the case of public interest litigation, the successful outcome generally benefits the entire population in the area in question. . . . Therefore, in the interest of justice and equity, it is important to reimburse the complainant and its counsel for their work out of the benefits which their work has created, protected, preserved or increased.

—Judge Plotkin, *Sierra Club v. Louisiana Department of Wildlife and Fisheries*, 1990³¹²

Looking back, what happened next seems inexplicably complex. All the dredging companies had to do was to agree to rebid the leases and this issue would be behind them. It is hard to believe that they feared competition from new entrants; by the late 1980s, they were the sole survivors of a decades-long binge. Perhaps they anticipated higher royalty payments, were the question opened to public view. Perhaps they feared that local parishes might turn contrary, or that the state legislature, increasingly bombarded by questions from Lake Pontchartrain aficionados and the media, might turn against them as well. Even Governor Edwards was not a sure thing, and a new governor would be replacing him. From what transpired next, they apparently thought that any halt in the dredging, however brief, could de facto shut them down for good. Better to slug it out with the cards now on the table.

The drama began when, in early March 1988, the Louisiana Supreme Court turned down their writs for appeal.³¹³ No surprise here, but, whatever these rulings did, they did not, in the industry's opinion, keep them from continuing to dredge. Four days later they filed a "Petition for Clarification of the Judgment and Supplemental Relief," saying as much.³¹⁴ They had been acting, after all, according to Department of Wildlife and Fisheries procedures.

From here, a glimpse of the multiparty maneuvers that followed:

March 30, 1988: Sierra Club petitions the trial court to direct the Department of Wildlife and Fisheries to stop the dredging.³¹⁵

April 8, 1988: Louisiana Attorney General joins the Sierra Club's petition.³¹⁶

312. *Sierra Club v. La. Dep't of Wildlife & Fisheries (Sierra Club IV)*, 560 So. 2d 976, 981 (La. Ct. App. 1990) (Plotkin, J., dissenting).

313. *See Sierra Club v. La. Dep't of Wildlife & Fisheries (Sierra Club II)*, 521 So. 2d 1151 (La. Ct. App. 1988).

314. *See Sierra Club v. La. Dep't of Wildlife & Fisheries (Sierra Club III)*, 557 So. 2d 418, 419-20 (La. Ct. App. 1990).

315. *Id.* at 420.

316. *Id.*

April 26, 1988: Trial court hearing on the petitions.³¹⁷

June 13, 1988: Prior to trial court decision, Louisiana legislature authorizes the dredging to continue pending public bid process, effective that date.³¹⁸

September 26, 1988: This authorization notwithstanding, trial court enjoins the dredging pending public bids and stating that the legislature could not supersede its decision.³¹⁹

September 26, 1988 [the same date!]: The trial court notwithstanding, Dravo and the Department of Wildlife and Fisheries sign new leases.³²⁰

November 29, 1988: Trial court contempt hearing against Dravo and the Department of Wildlife and Fisheries for issuing new leases.³²¹

December [no date available] 1988: Sierra Club and Louisiana Attorney General petition trial court to nullify new leases for noncompliance with public bid laws.³²²

January 30, 1990: Appellate court denies industry appeal of trial court injunction, but remands for consideration of Dravo claim that new leases meet public bid requirements.³²³

March 21, 1990: Appellate court denies industry motion for rehearing on injunction; industry writ filed to Louisiana Supreme Court.³²⁴

Following which, one has the right to be confused, but the upshot was quite simple. After one additional year of strenuous lawyering, the bid issues returned to the trial court with their outcome still hanging in the air. The industry had succeeded in keeping its dredges operating despite a string of adverse rulings, a tangible victory, but their future was problematical. Among other things, the environmentalists were arguing that the Department of Wildlife and Fisheries had effectively limited the new lease bidding to holders of the prior leases, hardly an open process.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. The date was obtained from Memorandum from Andrea Rush to author, *supra* note 54 (citing documents related to Docket No. 83-2669, Judge Robert Katz, at the Civil Dist. Ct., Orleans Parish) (on file with author).

322. The petition, but not the date, is referenced in the same documents. *Id.*

323. *Sierra Club III*, 557 So. 2d at 421.

324. *Sierra Club v. La. Dep't of Wildlife & Fisheries*, No. 89-CA-0184, 1990 La. App. LEXIS 716, at *1-2 (La. Ct. App. Mar. 21, 1990).

At the same time, the ability of Osborne and Gobert to continue these proceedings, wherever they led, was in doubt as well.³²⁵ Every step in this imbroglio had driven them deeper in arrears. To stay afloat they would now, as in *Lee*, sue for fees,³²⁶ which presented a problem. No Louisiana statute provided for fee awards in mineral cases. Instead they invoked a doctrine allowing compensation for any plaintiff who protected or increased a “common fund” or “common property” of the state.³²⁷ To the mind of Osborne and Gobert they certainly had; their action had boosted state royalties from the new bidding process.³²⁸

The trial court rejected their argument without opinion, and was upheld by two members of the Louisiana Fourth Circuit Court of Appeal.³²⁹ The majority was persuaded that, because the Sierra Club had not sued with the intention of creating more royalties, but rather to protect the environment, they were in no position to claim common fees.³³⁰ In a vigorous dissent, Judge Plotkin pointed out the obvious: The “common fund” doctrine contained no “intent” test.³³¹ To the contrary, the history of the doctrine supported its application. The plaintiffs had without question raised state revenues significantly; leases under the old system that went for \$0.27 per cubic yard were now receiving up to \$1.27 per cubic yard—400% more.³³² Multiplied by several million cubic yards, an extra dollar led to real money. This seemed a classic “common fund” scenario, with which the Louisiana Supreme Court might well agree. Not missing that chance, Osborne and Gobert applied to the Court for a writ of review.³³³

The great paleontologist and author Loren Eiseley writes of an encounter in a desert canyon with what appeared to be a small whirlwind.³³⁴ Coming closer he saw feathers flying from the vortex and then the shining coils of a snake. The snake was wrapped in a death grip around the wings of a prairie hen, that in turn had its beak buried deep into the snake’s skull. Neither seemed able to extricate itself.³³⁵ So it

325. Interview with Christopher Gobert, *supra* note 293; Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209.

326. *Sierra Club v. La. Dep’t of Wildlife & Fisheries (Sierra Club IV)*, 560 So. 2d 976, 977 (La. Ct. App. 1990).

327. *Id.*

328. *Id.* at 978.

329. *Id.* at 977.

330. *Id.* at 978.

331. *See id.* at 978-79 (Plotkin, J., dissenting).

332. *Id.* at 979.

333. Interview with Christopher Gobert, *supra* note 293.

334. LOREN EISELEY, *THE FIRMAMENT OF TIME* 173-74 (1960).

335. *Id.*

seemed with the public bids cases here in New Orleans, which were now three years and counting. With continued dredging in doubt, attorney's fees in doubt, and more bid issues pending, each side had more lawyering ahead and a lot to lose.

Meanwhile, however, the action on shell dredging was moving to yet another venue, and it would in the end prove dispositive.

XI. THE FOUNDATION AND THE REPORT

- (1) *Shell dredging in the Lake should be discontinued at the earliest practicable time.*
- (2) *State and federal agencies should ensure that their procurement practices do not support the perpetuation of an industry that interferes with the goal of restoration of Lake Pontchartrain, by requiring the use of alternative materials unless these materials are conclusively determined to be impracticable.*

—Recommendations, To Restore Lake Pontchartrain, April 1989³³⁶

After years of struggle, shell dredging had been restricted in several places, exposed to probing critiques and knocked around a bit in the press, but the business was still thriving and on apparently safe political ground. The legislature, for its part, was still enjoying the services of the nearby “Green House,” a free lunch lobby-shop to which the shell industry of course contributed.³³⁷ Governor Edwards, too, had long been a supporter but he came, apparently, with his own price tag. Clade recalls talking with a shell industry lobbyist who, following the public bids cases, met at the governor's mansion with an Edwards aide about reissuing the leases.³³⁸ From time to time the aide would disappear to talk with the Governor, who could be seen padding around adjoining rooms in his bathrobe and pajamas. After one of these conferences, he returned to say that the governor wanted to know what was in it for him. “You mean, personally?,” the lobbyist is said to have replied. The aide

336. HOUCK ET AL., *supra* note 57, at 24.

337. The Green House was the inspiration of a business lobbyist, Jo Wood, located in Spanish Town next to the Capitol. It served lunches, and even dinners, for lobbyists and their legislators; the lobbyists footing the bill. Wood later married Jessie Guidry, whom Governor Treen appointed to head the Louisiana Wildlife and Fisheries Department . . . continuing the insider tradition. Telephone Interview with Randy Lanctot, *supra* note 90. As Executive Director of the Department of Wildlife and Fisheries, Lanctot was involved in lobbying on Wildlife and Fisheries issues during this time. *Id.* The lobbying was also more personal. As Schoeffler later said, “all of those guys were huntin’ and fishin’ with senators, and owners from the companies wined and dined ’em with steaks and quail suppers. How do you fight that?” Interview by Casey Scott with Harold Schoeffler, *supra* note 75.

338. Interview with Susan Clade, *supra* note 52. The account that follows is taken from this interview.

remained quiet. In Louisiana, political support required constant attention.³³⁹

The public, meanwhile, was getting restless. Media reports of the hearings and their disclosures had rekindled a long-dead flame of interest in Lake Pontchartrain; even the coastal parishes, increasingly alarmed by the collapsing barriers between them and the sea, were turning skeptical, if not hostile.³⁴⁰ Clade, who spent much of her time as the “public face” of shell dredging at parish council meetings, attributed the change in attitude to propagandizing by Schoeffler and Osborne, while she countered with her own, but it was certainly more than that.³⁴¹ Things like fishing matter a great deal in South Louisiana, and when scientists started connecting the dots between aquatic life and the big machines it did not take a propaganda campaign to get people’s attention. So far, however, the organized opposition consisted of Sierra Club chapters in New Orleans and Lafayette, and the ad hoc group Save Our Coast. That was about to change, for an unpredictable reason: a very long bridge.

For most of history, residents of Jefferson and New Orleans remained confined to the south shore of Lake Pontchartrain while the north shore went its separate way, tied only by waterborne traffic and a challenging journey by dirt road and ferry around the sides. The early 1900s saw various proposals to bridge the lake, one featuring a string of artificial islands to support smaller spans that would be financed through development around them.³⁴² Bridging the full lake was a tall order, however, and it was not imagined until the close of World War II, nor completed until 1956.³⁴³ Financed by public bonds, the Pontchartrain Causeway ran straight as a die for 24 miles, the longest bridge over water in the world.³⁴⁴ In 1969 a second bond issue financed its twin.³⁴⁵ The stage was now set for a remarkable series of coincidences.

Louisiana has its own approach to many institutions, but one of the most distinct is the creation of commissions to run public facilities such

339. The account rings true. See Vidrine, *supra* note 150, at 100-04, 201-08 (relating, inter alia, with names and dollar amounts, the monies Edward collected from office seekers and government favor seekers, usually through intermediaries like Vidrine himself).

340. See Interview with Susan Clade, *supra* note 218.

341. *Id.*

342. See *Lake Pontchartrain Causeway*, SOUTHEASTROADS.COM, <http://www.southeastroads.com/lpc.html> (last visited Oct. 22, 2012) (citing *Lake Pontchartrain Causeway* (History Channel television broadcast Oct. 15, 2003)).

343. *Id.*

344. Interview with Robert Lambert, former General Manager, Lake Pontchartrain Causeway Commission, in New Orleans, La. (Aug. 2, 2011); *The Causeway*, METAIRIE.COM <http://www.metairie.com/Landmarks/causeway.php> (last visited Sept. 16, 2012).

345. Interview with Robert Lambert, *supra* note 344.

as the bridge spanning the Mississippi River at New Orleans and the spans across Lake Pontchartrain. In the late 1980s, the Pontchartrain Causeway Commission (Causeway Commission) led another large bond issue to fund an elevated highway connecting the bridge traffic to the interstate leading into New Orleans, which made perfect engineering sense.³⁴⁶ It made less sense to local businesses, however, isolating them from potential customers and leaving the neighborhood with a large, noisy thing in the sky. The blowback from merchants along the route was fierce, and stymied the project.³⁴⁷ It left the Causeway Commission with more cash in hand than it knew how to spend, followed by a feeding frenzy for pet projects, followed by, ultimately, an understanding that bond monies would be spent only on those with a direct relation to the lake.³⁴⁸

The Causeway Commission had another challenge. During this same period of time, several of its members fell out with each other and began complaining to legal authorities about the misuse of public funds.³⁴⁹ A sweetheart-looking insurance contract went to a friend of a commissioner. Added to the usual improprieties, private trips on the public tab and gratuities, it was enough to bring in the FBI and bring down the house. When the dust settled, three members had been indicted on criminal charges and resigned.³⁵⁰ Into one of these board slots came an insurance salesman named Bennett Powell. Powell knew little about Lake Pontchartrain except that he, like thousands of others, used to hang around it growing up.

In these years, the go-to person of the Causeway Commission was its general manager, Robert Lambert, who had his own epiphany with the lake when, strangely, the Hollywood star Paul Newman came to film a movie called “The Drowning Pool.”³⁵¹ By chance, Lambert was asked to shepherd the actor around. It was a pleasant duty, during which they stopped by the lake and Newman remarked that it was very pretty, Lambert smiling in agreement. Then the actor added, “But I hear it’s polluted.” The comment left Lambert speechless. Newman was not

346. Personal Meetings with Robert Lambert, General Manager, and Bennett Powell, Commissioner, of the Pontchartrain Causeway Commission (Spring & Fall 1988). Powell and Lambert asked the author to organize a study of the lake.

347. Interview with Robert Lambert, *supra* note 344.

348. *Id.*

349. *Id.* The account of the improprieties that follows and the appointment of Powell is taken from this source.

350. *Id.*

351. *Id.* The account of Lambert’s “epiphany” and the genesis of the Pontchartrain study that follow are taken from this source.

joking. They were aware of this embarrassment all the way out to California.

And so, one afternoon at the Causeway Commission building, Powell and Lambert happened to be in its meeting room with a panoramic view of the lake. Powell remarked that nothing was moving out there, not a fisherman, not a sailboat, no one walking the shore. Pontchartrain seemed entirely dead. “I wonder what we could do about that,” Lambert said, musing aloud. Silence in the room. Then Powell, who enjoyed sailing, took the bait: “Let’s fund a study and see.” They sold the idea to the Causeway Commission. They had the bond money and, after all, it was related to the lake.

The report to the Causeway Commission that followed considered all facets of the lake’s condition, but was drawn by the sheer weight of the facts to shell dredging.³⁵² Written by professionals at Tulane University in New Orleans and several private consulting firms, and relying on public records and their own calculations, it concluded that of all the problems, shell dredging was the king. Except for the once-in-a-decade occasions when a spillway was opened to let Mississippi floodwaters into the lake, shell discharges were the major consumers of oxygen, a basic element for all aquatic life, and a numbers-dwarfing leader in suspended mud and particles that blanketed out the light.³⁵³ An accompanying economic study put the value of the benefits of a clean lake, just those susceptible to dollar values, at \$756 million.³⁵⁴ One of the Report’s principal recommendations was the creation of a public foundation to stimulate the lake’s recovery.³⁵⁵ The first recommendation relative to shell dredging was that it be “discontinued at the earliest practicable time,” adding, without mentioning the Department of Wildlife and Fisheries by name, that state agencies “should not support the perpetuation of an industry that interferes with the goal of restoration of Lake Pontchartrain.”³⁵⁶ There it was: the impacts of dredging, the benefits of eliminating it, and the mechanism to do so. The shell companies hated all three.

352. HOUCK ET AL., *supra* note 57, at 6, 24. Thirty professionals contributed to the report with lead contributions from the University of New Orleans and Tulane University. *Id.* at 48-50.

353. *Id.* at 2, 5 fig. 2A, 6 fig. 2B. In brief, shell dredging contributed nearly 15,000 tons of oxygen demand and 18 million tons of suspended sediments to Lake Pontchartrain; by comparison, the totals for all community sewer systems, individual sewage systems and urban runoff were 3880 tons of oxygen demand and 6000 tons of sediments. *Id.*

354. *Id.* at 42, 48. The economic report was done by Dr. John Elstrott of the Freeman School of Business at Tulane University.

355. *Id.* at 16-17.

356. *Id.* at 24.

Within a few months the state legislature had authorized the Causeway Commission to establish the Lake Pontchartrain Basin Foundation (Basin Foundation), which made the lake its own.³⁵⁷ The Basin Foundation formed. Lambert himself felt considerable heat for supporting its cleanup agenda.³⁵⁸ Overtures from shell dredging interests were not very subtle. At times, he recalls, there would simply be calls in the night, by unidentified callers, telling him to back off. One call, however, came unexpectedly from the president of the largest company, telling him in a hoarse whisper that they needed to meet, soon. “When people speak to me on the phone in whispers about urgent meetings,” Lambert continues, “I can get nervous.” They met the next morning, in private. This was not about shell dredging, Lambert was told in that same, urgent voice, and it was not about him; it was about his *job*. Did he not understand what was at stake? Lambert was all thanks; he really appreciated learning this, he said, and the meeting ended. He remembers wondering later whether it was better to be threatened by an anonymous caller in the middle of the night or over breakfast by a whisperer in a business suit. The Basin Foundation did not back off. The first action it took was on shell dredging.

XII. WATER QUALITY HEARINGS I: THE FINAL BATTLE

It was a surprise every day.

—Christopher Gobert, plaintiff attorney, 2011³⁵⁹

It was always going to come down to this. The other challenges to shell dredging—coastal use permitting, environmental impact statements, public bids—had “scotched the snake,” but the big suction heads remained in motion and no law yet raised had the power to stop them. One remained, the law of clean water, which was a fitting last test for the dredging operations because this is where they were and this is what they impacted.

Around the time the *Lee* cases were in full swing, Schoeffler happened on an engineer in New Iberia who had done design work on

357. *Creating the Foundation*, SAVEOURLAKE.ORG, <http://www.saveourlake.org/about-us.php> (last visited Sept. 16, 2012) (“In the spring of 1989, a report called ‘To Restore Lake Pontchartrain’ . . . called for the establishment of an entity whose sole focus would be a healthy Lake and Basin. That report . . . resulted in the formation of the Lake Pontchartrain Basin Foundation that same year.”).

358. See Interview with Robert Lambert, *supra* note 344. The account of shell industry pressure that follows is taken from this source.

359. Interview with Christopher Gobert, *supra* note 293.

the dredges.³⁶⁰ Asked what the “Achilles heel” of the operations was, the engineer replied, casually, as if it were a commonplace: “it’s the wash water.” Schoeffler remembers thinking first, “Why didn’t I think of that?,” and second, “I’ll bet the dredgers have thought about it,” fearing it might arise. And so it did.

The facts were compelling. The barges were not simply dumping mud back overboard, which was covered by their Corps permits; they were also pumping up volumes of lake water, flushing it through the shells, and then discharging from 15,500 to 35,000 gallons of water, muck, small shells, plants, and aquatic and bottom creatures per *minute* back into Pontchartrain.³⁶¹ Water discharges in any amount required state water quality permits.³⁶² The amounts here ran up to nearly 40 million gallons per barge per eighteen-hour day.³⁶³ The oxygen demand was high, the suite of toxins was impressive, and the turbidity levels were staggering.³⁶⁴ How could all that *not* require a water quality permit? And how could a permit, with an eye to water quality, *ever* be granted?

The politics had also timely turned. In 1988, Governor Edwards, whose DEQ turned on his every word was replaced by a rare breed of reform candidate, Buddy Roemer. Among other things, Roemer had campaigned against shell dredging and brought an interest in environmental protection to Louisiana government not seen before, or since.³⁶⁵ In early 1989, Schoeffler and Osborne petitioned DEQ to hold water quality hearings on permits for shell dredging in Lake Pontchartrain.³⁶⁶ The request was not ignored. The hearings began in the fall.

360. Interview by Casey Scott with Harold Schoeffler, *supra* note 75. The dialogue that follows is taken from this interview.

361. HOUCK ET AL., *supra* note 57, at 151.

362. LA. ADMIN. CODE tit. 33:IX § 301B(2) (2011).

363. HOUCK ET AL., *supra* note 57, at 151.

364. *See id.* at 151-56. Biological oxygen demand of one dredge’s total daily discharge, based on average hours worked per day, would be approximately six tons of BOD5. *Id.* at 152-53. Beyond PCB, which were measured in the early 1980s between 0.28 and 0.36 micrograms per gram (µg/g), heavy metals are found in shell dredging discharges, with notably cadmium, copper, lead, nickel, silver, thallium, and zinc well above EPA Water Quality criteria. *Id.* at 155-56. Average measures of total suspended solids (TSS) per dredge per discharge reached 65,103 milligrams per liter (mg/L); multiplied by the average 17.86 hour work day, one dredge’s total daily discharge of TSS would equal over 7000 tons. *Id.* at 152. Turbidity of the discharge of Pontchartrain discharges averaged as high as 182,000 JTU; six hours after dredging, turbidity remained 130% above ambient near the bottom and 66% above ambient on the surface. *Id.* at 151, 154.

365. Susan Clade complained of Roemer’s bias. Interview with Susan Clade, *supra* note 52. Few complaints were heard, however, about those of his predecessors.

366. *See* Adjudicatory Hearing Findings of Fact & Conclusions of Law, Dravo Basic Materials Co. 1-2 (La. Dep’t of Env’tl. Quality May 10, 1990) (Robinson, ALJ); *see* Bob

What followed was the most grueling exercise yet of the shell proceedings: three full weeks of trial in Baton Rouge before Administrative Law Judge Herman Robinson who, while employed by the DEQ, was independent in fact and law.³⁶⁷ This was the last grand rendezvous of the parties with lawyers from DEQ (who remained rather passive throughout), the Department of Wildlife and Fisheries, the Louisiana Attorney General's Office, the Lake Pontchartrain Basin Foundation who joined Osborne and Gobert, plus the three remaining dredging companies: Dravo, Pontchartrain Materials, and Louisiana Materials.³⁶⁸ Osborne, unsure to the opening day about the Attorney General's position, asked him when he appeared, "Well, Mr. General, are you here to represent your [state agency] client?"³⁶⁹ "No sir," Guste replied, smiling, "when you look at the Constitution of Louisiana you will see that I am the chief water quality enforcer."³⁷⁰ As the days went on, however, Osborne and Gobert, given their long history with the issues, did the heavy lifting for the environmental side, as did Clade for the industry.³⁷¹

One of Osborne's challenges, as it had been throughout the previous proceedings, was that he had no war chest to fund witnesses, not even their parking. Schoeffler later marveled, "University of Pennsylvania Dr. Peter deFur came on his own plane ticket and his own cash, and he was probably the top blue crabologist in the world . . . it was crazy."³⁷² As the hearing started, the chief attorney for Guste's office came up and said, "Harold we're with ya and we're bringing [University of Texas A&M Marine Science Director] Rez Darnell with us."³⁷³ The Basin Foundation was in too with money on the table. Resources had arrived. When all parties had submitted their witness lists, there were more than a dozen names about evenly divided among the environmentalists, the state, and

Anderson, *Testimony Ends in Permit Hearing for Shell Dredging*, MORNING ADVOC. (Baton Rouge), Nov. 14, 1989, at 2B.

367. See Adjudicatory Hearing Findings of Fact & Conclusions of Law, Dravo Basic Materials Co. 2-3 (La. Dep't of Env'tl. Quality May 10, 1990) (Robinson, ALJ).

368. *Id.* at 1-2.

369. Telephone Interview with Harold Schoeffler, *supra* note 75.

370. *Id.*

371. William Goodell, a new staff attorney for the Attorney General at the time, remembers that Osborne "pretty much ran the show" and that Clade was a "presence" for the defense. Telephone Interview with William Goodell (Aug. 10, 2011). Gobert, who assisted Osborne throughout, remembers Clade as the most active from the industry table, although several more senior attorneys also participated throughout. Interview with Christopher Gobert, *supra* note 293.

372. Interview by Casey Scott with Harold Schoeffler, *supra* note 75.

373. *Id.*

the industry.³⁷⁴ Which for Osborne and Gobert meant all day at trial, and all evening debriefing and preparing for the next. For Gobert in particular, those evenings had an Old West quality about them, because Osborne liked nothing better than to light up a cigar as they huddled together over a tiny table in their low-budget motel room, made closer yet by a biology graduate named David Norris who volunteered his time each evening to help go over testimony, and then slept on the couch.³⁷⁵ Gobert would sneak out of the room from time to time for a breath of air. Come lights out, he adds, his colleagues snored like trains.³⁷⁶

The dredgers, per Schoeffler, came in style and rented the better part of a hotel for their team.³⁷⁷ Clade loved every minute of it: “[T]he most fun I’ve had as a lawyer, the press was there like crazy. I got quoted in the newspaper,” she remembers.³⁷⁸ She even made peace with Schoeffler, whom she correctly sensed as the true foe, and the testosterone level went down. She had less use, however, for the Attorney General’s counsel and remembers objecting to his opening statement (“personal reminiscences about his childhood and the lake”) as “irrelevant, immaterial, and uninteresting,” with which the judge then agreed³⁷⁹; Clade calls it her “moment of infamy” in the contest.³⁸⁰

Gobert, with an objective turn of mind, describes the industry witnesses themselves as unimpressive.³⁸¹ Their big gun on impacts was a “scientist they flew in with a north European name” who seemed rather stuck on himself; asked by the court reporter to spell the name he did so impatiently, adding something like “that’s Icelandic for the Great White Warrior,” which did not go over well.³⁸² The turbidity of the discharge was the principal issue for experts on both sides, and, unfortunately for the industry’s cause, recent permit applications by the dredge companies listed astronomical numbers of suspended solids. The measurements had been taken directly from the discharge pipes themselves, apparently, rather than from the receiving water which diluted them. Try as industry

374. Adjudicatory Hearing Findings of Fact & Conclusions of Law, Dravo Basic Materials Co. 1-2 (La. Dep’t of Env’tl. Quality May 10, 1990) (Robinson, ALJ).

375. Interview with Christopher Gobert, *supra* note 293.

376. *Id.*

377. Telephone Interview with Harold Schoeffler, *supra* note 75.

378. Interview with Susan Clade, *supra* note 52. Her recollections that follow are taken from this interview.

379. *Id.*

380. *Id.* Ad-libbing on her feet, Clade was in her element.

381. Interview with Christopher Gobert, *supra* note 293. His impressions of the hearing that follow are taken from this interview.

382. Described as intelligent and hard-working, Judge Robinson was also, *inter alia*, African American.

counsel would to explain these numbers as a “testing error,” Osborne would drag them out like a dead cat at every opportunity. As it would turn out, the degree of their dilution would be a pivotal factor in DEQ’s ultimate decision.

For economic impact, the industry presented an academic from Baton Rouge who testified that when he went to the lake he enjoyed looking at the barges, to which recreation he assigned a dollar amount multiplied by others who, in his mind, doubtless shared his enjoyment. Not all that impressive a witness either. To shore up this line of defense, the industry produced Ed Lennox, President of Dravo, last seen talking in whispers with Robert Lambert of the Causeway Commission.³⁸³ Lennox described the interlocking nature of the Rangia clam shells, making a perfect substrate for local levees and automobiles. Rising to the occasion, he concluded that it was “like God created the Rangia clam in South Louisiana in order to build roads.”³⁸⁴ Even in this God-fearing part of the country, Gobert thought it a bit over the top.

The verbal sparring was continuous. When Osborne put on DeFur to testify to impacts on the lake, Clade started an objection by stating, “He may be the world’s leading expert on crabs, but not on . . . ,” to which Osborne quickly interjected, “Very well, we will tender him then as the world’s leading expert on crabs.”³⁸⁵ Per Gobert, DeFur’s description of the crab’s cleansing mechanisms for water, its delicate filtering system, and the effects of sediments and toxins that stunted its size, weight and reproductive capacity was mesmerizing—“you even felt sorry for them.”³⁸⁶ Crabs were a featured attraction of Lake Pontchartrain and the docks at Bucktown were the most popular lakeside eating spot in the region, lined by fishing boats and stacked with wire crab traps, the wheeling gulls above.³⁸⁷ They were surrogates for something large.

Dr. John Elstrott was also called to critique the economic impact analysis offered by the shell dredgers. He had contributed the economics section for the Pontchartrain Report, which Osborne referred to constantly as “Dr. Houck’s Report,” giving it an elevated air.³⁸⁸ Clade, who had been a student of Houck’s at Tulane Law School, could stand it no longer and stood to object, “Dr. Houck?,” she exclaimed, “why he’s no

383. Interview with Robert Lambert, *supra* note 344.

384. *Id.*

385. Interview with Christopher Gobert, *supra* note 299.

386. *Id.*

387. Personal observation by author, who visited the Bucktown docks many times before they were destroyed by Hurricane Katrina.

388. Interview with Christopher Gobert, *supra* note 293.

more a doctor than I am!”³⁸⁹ Osborne continued to use the honorifics unperturbed. Law trials are games within games.

Osborne’s favorite witness was Dr. John Day of LSU, who arrived so close to his appointed time that there was no opportunity to debrief him.³⁹⁰ Nor, apparently, any need. Trim, tanned, sporting a light beard and professorial spectacles, he looked the part and had the knack of making the arcane terms of the case simple. He did not talk about “benthic organisms” but, rather, of “bottom creatures,” not of “juveniles” but “their babies.” On cross-examination, industry attorneys decided to attack his knowledge of the lake instead, asking him when the last time was that he had been there. “Just last night,” he replied. What was he doing, came next. “I’m a biologist,” he answered, “and I was with my PhD students going over their field work in the area.” Examining an opposing witness can be a guessing game, and sometimes the guesses come out wrong.

At the end of three weeks of testimony Judge Robinson went into seclusion, and would not emerge for half a year.³⁹¹ This hiatus left room for both parties to evaluate their chances and consider one last high-stakes play: a settlement.

XIII. THE GAMBLE

It was the right thing to do, but we had to rely on [DEQ Administrative Law Judge] to stop 'em in Lake Pontchartrain and we had no real idea where he was going to go.

—Harold Schoeffler, 2011³⁹²

Each side had a great deal on the line. The public bids cases had not stopped the dredging, but they had wrapped it in an uncertainty inimical to long-range business decisions.³⁹³ A final injunction from the court was always possible. On the other hand, whatever injunctions the environmentalists won based on the bids process could be soon remedied in a new tender; that issue, so annoying up to now, was only a temporary stopper. Meanwhile, coastal dredging had been left scot-free in the water

389. *Id.*

390. Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209. The description of the Day testimony that follows is taken from this source.

391. See Adjudicatory Hearing Findings of Fact & Conclusions of Law, Dravo Basic Materials Co. (La. Dep’t of Env’tl. Quality May 10, 1990) (Robinson, ALJ).

392. Telephone Interview with Harold Schoeffler, *supra* note 75.

393. Dravo in particular was in a broad-range materials business and had other options available. See *Dravo Corp. 10-K-19960328 Business*, EDGAR ONLINE, http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=471210-5897-15965&SessionID=uSUVHegDKiONDR7 (last visited Oct. 19, 2012).

quality hearings, which for tactical reasons focused on Lake Pontchartrain. And Osborne and Gobert, fee petitions still pending, were nearing nine years without pay.³⁹⁴

In April 1990, the new bids landed again before the trial court, and industry counsel called for a time-out in the proceedings to discuss options with all parties.³⁹⁵ What ensued was a negotiation on steroids, packed into a single, full day. Openly at the table, a Dravo representative asked his counsel what their chances were on winning this round.³⁹⁶ Up to now, came the reply, not good, given the fact that Osborne and Gobert had won the NEPA case and the earlier bid rounds.³⁹⁷ Schoeffler, sitting silent at the table, thought otherwise; they had at best another short-term stopper.³⁹⁸ It emerged from the discussions that, more than anything else, the industry wanted to keep dredging in Lake Pontchartrain.³⁹⁹ If that could happen, it would ramp down heavily on the coast and abandon its opposition to attorney's fees that might, ultimately, be awarded by the Supreme Court anyway, although no one would bet on it.⁴⁰⁰

It was not an easy offer. For Schoeffler and Osborne, stopping shell dredging had become the focus of their lives and Lake Pontchartrain was their poster child, front and center in the media and a magnet for rising public expectations. They knew as well as anyone, however, that the bid cases, however hard and successfully fought to date, were going to run out of steam, as had the NEPA case; their best chance on the merits was in the water quality hearings, still under advisement with Judge Robinson, which they thought had gone well for their side.⁴⁰¹ And, they were financially exhausted. They decided to roll the dice.

Osborne and Schoeffler would take a quick phase out of dredging the coast, and a big gamble on Pontchartrain. Dredging on the coastal bays would be cut about 90%, from some 290,000 acres to 31,000, crammed into one corner of a bay that the industry had already been working over for the past year and a half; Schoeffler estimated it would play out completely in the next two or three years.⁴⁰² In return, the

394. See Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209.

395. Interview with Christopher Gobert, *supra* note 293.

396. *Id.*

397. *Id.*

398. Telephone Interview with Harold Schoeffler, *supra* note 75.

399. See *id.*

400. *Id.*

401. Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209; Interview with Christopher Gobert, *supra* note 293.

402. Interview by Casey Scott with Harold Schoeffler, *supra* note 75.

industry would pay reasonable attorney's fees and the Pontchartrain bid cases would end.⁴⁰³ The fate of the lake would be up to DEQ.

The gamble went both ways. To be sure, the DEQ was under new management, which, along with strong hearing testimony, Osborne and Schoeffler saw as a major plus, but it had a very poor track record on environmental decisions.⁴⁰⁴ This history doubtless encouraged the shell companies towards the deal. They would get rid of the nuisance bid cases, pay money they could easily afford from their dredging revenues, and keep their options open for the lake before an agency that had rarely in its life said "no" to anything.

The settlement was agreed to by all parties, but not all were happy. Save Our Coast, which had been in the fight from the beginning, saw dredging continuing along the very coast it had started out to save, while receiving only a fraction of the fees to cover expenses.⁴⁰⁵ Upset, it tried to remove Schoeffler from its board. It even brought ethics charges, subsequently rejected by the bar association, against Osborne for selling out its interests for fees. Members of the Attorney General's Office, which had sided with the environmental groups in a common cause, even though the office signed onto the settlement, saw their public position eroded and their bid issues disappear.⁴⁰⁶ The Basin Foundation, which had made stopping shell dredging its first and top initiative, faced a similar situation.⁴⁰⁷ How bad could the dredging be if the environmentalists were now willing to cut it loose? And worse, as it appeared, cut it loose for attorney's fees.

It was an excruciating moment for Osborne et al. There is no doubt that fees played a role in the settlement. There is also no doubt that the settlement gained them more leverage over dredging than they could have hoped for on the coast, which had not been at issue before DEQ at all, and retained their shot at a water quality victory. If DEQ denied the

403. *Id.*

404. For a description of Louisiana's track record in pollution-control—air, water, and waste—at the time, see Oliver A. Houck, *This Side of Heresy: Conditioning Louisiana's Ten-Year Industrial Tax Exemption upon Compliance with Environmental Laws*, 61 TUL. L. REV. 289, 310-45 (1986); for a more contemporary look, see Mark Schleifstein, *Report Flunks La. at Enforcing Air, Water Laws*, TIMES-PICAYUNE (New Orleans), Dec. 13, 2011, at A1. Enforcing federal law is a challenge in Louisiana; even after a 2001 EPA audit of DEQ policies, instituting major changes in state enforcement, DEQ is one of the worst performing state environmental agencies at citing violators of federal clean air, water, and hazardous waste laws and carrying out required inspections under those laws. *Id.*

405. Interview by Casey Scott with Harold Schoeffler, *supra* note 75. The contretemps with Save Our Coast that follows is taken from this interview.

406. See Telephone Interview with William Goodell, *supra* note 371.

407. *Id.*

permits on Lake Pontchartrain, they would emerge as heroes. If not, it could be very ugly.

XIV. WATER QUALITY HEARINGS II: THE DECISION

I find that the proposed regulatory control strategy is inadequate and that shell dredging cannot be undertaken in a manner which will adequately protect the environment. Therefore, no permits will be issued for wastewater discharges associated with such activity.

—Maureen O’Neill, Assistant Secretary,
Office of Water Resources, Louisiana DEQ, 1990⁴⁰⁸

In May 1990, the smoke went up. Administrative Law Judge Robinson made 126 findings supported by a small library of testimony, studies, and reports.⁴⁰⁹ They reflected discrepancies among the experts on the duration of the dredge plumes and their contribution to the lake’s demise,⁴¹⁰ but they led with the testimony of Walter and Jean Sikora, and Rez Darnell⁴¹¹—a good sign for the environmental team. At journey’s end there was no avoiding that the discharges were massive, the collapse of the benthos was indisputable, and the industry would require a waiver of state water quality requirements to continue.⁴¹²

Robinson’s findings and recommendations were reviewed by the DEQ Assistant Secretary in the Office of Water Resources, Maureen O’Neill, who had formerly represented the New Orleans Sewerage and Water Board in a titanic fight against the dumping of gypsum wastes into the Mississippi River.⁴¹³ Her boss, DEQ Secretary Dr. Paul Templet, was last seen in this story leaving government over the bowdlerizing of his coastal use guidelines some fifteen years before.⁴¹⁴ These were not the kind of agency decision makers to whom the dredging industry was accustomed. They were also not the kind to waive water quality

408. Dravo Basic Materials Co., 1990 WL 152841, at *9 (La. Dep’t of Env’tl. Quality June 22, 1990) (findings of fact, conclusions of law, decision) (O’Neill, Assistant Secretary, Office of Water Resources).

409. See Adjudicatory Hearing Findings of Fact & Conclusions of Law, Dravo Basic Materials Co. (La. Dep’t of Env’tl. Quality May 10, 1990) (Robinson, ALJ).

410. *Id.* ¶¶ 25-32.

411. *Id.* ¶¶ 55-71.

412. *Id.* ¶¶ 108-09, 113, 126; conclusions of law, ¶¶ 1-4.

413. See Cox News Serv., *Chemical Discharge Plan Worries Water Officials in New Orleans*, SPARTENBURG HERALD-JOURNAL, Mar. 23, 1986, at A10 (citing O’Neill).

414. See *supra* notes 100-103 and accompanying text.

standards; indeed, they had just put in place a new program upgrading them.⁴¹⁵

In June 1990, in a statement of 123 findings of her own, O’Neill determined that shell dredging required permits and none would be forthcoming: by its nature, she held the business could not be undertaken “in a manner which will adequately protect the environment.”⁴¹⁶ Unlike days of yore, the governor’s office was not on call to overrule her.

The industry had but one arrow left, an appeal, which it promptly filed, keeping the matter in abeyance (and its dredges moving) for another two years. The Pliable Edwin Edwards just might be coming back to the Governor’s Mansion (as in fact, he would be); meanwhile, it was buying time. In June 1992, the state appellate court ruled.⁴¹⁷ The industry’s challenge to its need for a permit lay somewhere between weak and perfunctory. Despite its representation statute that it was not “discharging” anything in the lake but, rather, just sort of moving it around, the operative statute explicitly required permits for the “discharge of waters/sediments resulting from the commercial dredging of shell or other natural resources.”⁴¹⁸ The English language does not often get more plain than that. Challenge rejected.

Industry challenges to DEQ’s fact-finding went up an equally steep slope because the record simply contained so much damaging evidence. To be sure, industry witnesses had challenged the extent of the harm, and even that dredging caused it, but the reconciliation of opposing experts was exactly what agencies were supposed to do, and what appellate courts were not supposed to do. The only legal question was whether the DEQ had good reasons to conclude as it did.⁴¹⁹ One would have to be a contortionist to avoid the evidence from Sikora and Darnell et al. and reports going back twenty years, including EISs of the Corps themselves, which were also cited.⁴²⁰ At last, the many evidentiary pigeons released from so many shell dredging proceedings came home to roost.⁴²¹

415. See *Dravo Basic Materials Co.*, 1990 WL 152841, at *10 (La. Dep’t of Env’tl. Quality June 22, 1990) (findings of fact, conclusions of law, decision) (O’Neill, Assistant Secretary, Office of Water Resources).

416. *Id.*

417. *In re Dravo Basic Materials Co.*, 604 So. 2d 630, 632 (La. Ct. App. 1992).

418. LA. ADMIN. CODE tit. 33:IX § 301C(7) (2011).

419. *Dravo*, 604 So. 2d at 636.

420. *Id.* at 637-40.

421. The industry’s last complaint was that the DEQ had not really based its decision on water quality at all, but, rather, some generalized notion of the environment. *Id.* at 634-35. The argument was factually correct, Louisiana water quality legislation was restricted to just that, and Assistant Secretary O’Neill had overtly relied on other environmental impacts, in addition to

The appellate court affirmed.⁴²²

XV. AFTER THE STORM

I was born in 1919 at Old Milneburg—I am now 92 years old—and lived with my family in a house built years ago by my grandfather on the waters of Lake Pontchartrain, fronting on the great wharf that extended beyond the Milneburg lighthouse (the third one on the spot since 1831). When I was young, on weekends crowds of Smoky Mary train passengers came from town, passed our house on the wharf and headed for the piers that extended past the lighthouse, all carrying their fishing gear, poles, nets, etc. At that time the lake was full of all kinds of seafood, many of which could be caught from our house porches and boat platform in the rear.

What wonderful memories I have of living at Milneburg!

—Albert Bellevue, 2011⁴²³

It came back more quickly than anyone imagined. A few months after the dredges stopped plying Lake Pontchartrain, commuters starting out on the long Causeway crossing were asking the toll booth operators “how’s the lake today?,” or simply exclaiming “it’s blue!”⁴²⁴ Strollers along the north and south shores, wading the shallows, could see bottom. For most of them it was the first time in their lives.

Everything started coming back, the grass beds, the crabs, even small pockets of Rangia clams.⁴²⁵ Water transparency soared.⁴²⁶ Brown pelicans appeared in numbers, white pelicans as well, feeding on new schools of menhaden and croaker.⁴²⁷ Fishing guides were reporting “monster specks” (speckled trout) of twelve pounds and more.⁴²⁸ “When

water quality, in making her decision. The argument was wrong on the law, however, because the Louisiana Supreme Court had declared that the state Constitution imposed a fiduciary duty on all agencies, beyond their statutory commands, to protect the environment “to the fullest extent possible consistent with the health, safety and welfare of the people.” *Id.* at 640 (citing LA. CONST. art. IX, § 1; *Save Ourselves, Inc. v. Louisiana Env’tl. Control Comm’n*, 452 So. 2d 1152, 1160 (La. 1984)). You never know where opinions like that land, but the DEQ was one of them.

422. *Id.* at 641.

423. Letter of Albert Bellevue, *TIMES-PICAYUNE* (New Orleans), Aug. 21, 2011, at A8.

424. See Telephone Interview by Casey Scott with Robert Lambert (2009).

425. Interview by Casey Scott with Carlton Dufrechou, former Executive Director, Lake Pontchartrain Basin Foundation (June 25, 2009).

426. Hyun Jung Cho & Michael A. Poirrier, *Response of Submersed Aquatic Vegetation (SAV) in Lake Pontchartrain, Louisiana to the 1997-2002 El Niño Southern Oscillation Shifts*, 28 *ESTUARIES*, no. 2, Apr. 2005, at 216 (noting that three years after “the cessation of shell dredging in 1990, the water transparency of Lake Pontchartrain had increased”).

427. See Telephone Interview by Casey Scott with Robert Lambert, *supra* note 424.

428. *Lake Pontchartrain Possibly Holds the Next Louisiana Record Trout*, JOHN N. FELSHER’S OUTDOORS ADVENTURES, <http://www.johnnfelsher.com/PontchartrainTrout.html> (last visited Aug. 1, 2012) (“I’ve seen days when four people catch 100 trout weighing more than 515 pounds.”).

the Seabrook Bridge area is on,” one told a reporter, “it can be the greatest place to fish in the world. It’s not uncommon to catch 100 fish in 90 minutes with many in the 3- to 5-pound class.”⁴²⁹ It was almost like old times.

To be sure, it was not just about stopping the dredging, although that came first. Soon to follow were curbs on runoff from north shore cattle farms and south shore streets and parking lots.⁴³⁰ A major boost came from an EPA grant to fix the underground sewer pipes in New Orleans, which had collapsed to the point that untreated waste was being directed, not to the treatment plant, but into Pontchartrain instead.⁴³¹ Gulf saltwater continued to pour into the lake from the Mississippi Gulf Outlet, killing off adjacent marshes and cypress stands, but that too would be blocked following Hurricane Katrina.⁴³² The “NO SWIMMING” signs came down. The Basin Foundation took to reporting the water quality around the lake on a weekly basis, picked up

429. *Id.*

430. See *Management Plan*, LAKE PONTCHARTRAIN BASIN FOUND., SAVEOURLAKE.ORG, <http://www.saveourlake.org/management-plan.php> (last visited Sept. 16, 2012). Included in the 1995 recommendations of the Lake Pontchartrain Basin Foundation’s (LPBF) Comprehensive Management Plan were: managing agricultural runoff by constructing and maintaining waste retention lagoons for livestock operations; and for storm water runoff from streets and parking lots, to fund storm water system investigations, repairs, expanding public education to reduce the pollution, and investigating flow balancing method of temporarily holding polluted water for later treatment. The LPBF notes that many of these “have been or are being addressed” with “numerous projects implemented.” *Id.*

431. *Sewage on the South Shore*, LAKE PONTCHARTRAIN BASIN FOUND., SAVEOURLAKE.ORG, http://www.saveourlake.org/basin-issues.php#s_sewer (last visited Sept. 16, 2012) (“[T]he south shore sewerage infrastructure has been greatly improved and renovated to prevent leaks and seepage into the drainage canals that lead to Lake Pontchartrain. . . . The [LPBF water quality-monitoring program] sampling results demonstrate that improvements to the sewerage system have had a tremendous impact on cleaning up Lake Pontchartrain.”); see also *Sewerage System Upgrades*, SEWERAGE & WATER BD. OF NEW ORLEANS, http://www.swbno.org/history_sewerage_upgrades.asp (last visited Sept. 16, 2012) (noting that the forty to 100-year-old sewerage system of New Orleans was in need of “major rehabilitation” and “capacity upgrade,” which began following a 1996 public hearing and 1998 signing of a consent decree between it and the EPA, which provided Congressionally authorized EPA federal grants of \$100 million over ten years, with the Board currently having received \$38.8 million. *Id.*).

432. John A. Lopez, *The Environmental History of Human-Induced Impacts to the Lake Pontchartrain Basin in Southeastern Louisiana Since European Settlement—1718 to 2002*, 54 J. COASTAL RES. (SPECIAL ISSUE) 1, 9 (2009) (“[T]he Mississippi River Gulf Outlet (MRGO) was the largest single dredging impact that has been extensively documented as causing wetland filling, land loss, saltwater intrusion, and hypoxia. . . . The cumulative pre-Katrina wetland loss in the Lake Pontchartrain Basin is 415 mi². Wetland loss in the basin due to Hurricanes Katrina and Rita is estimated to be an additional 79 mi².”). In the wake of Katrina, after rising public pressure, Congress finally ordered the Corps to close the MRGO, which it did with a barrier near the Gulf. See Mark Schleifstein, *Go-Ahead To Close MR-GO Expedited, Vitter Says Corps Has Authority and Financing*, TIMES-PICAYUNE (New Orleans), Dec. 20, 2007, at A1; Bob Warren, Editorial, *MRGO Closure Welcome, But Late*, TIMES-PICAYUNE (New Orleans), Dec. 27, 2008, at B5.

on Saturdays in the New Orleans *Times-Picayune*, unless there had been some heavy rains, the conditions were looking good.⁴³³

Why did this all happen? Throughout the controversy, the dredging companies insisted that the lake's problems were elsewhere, with cows and bad sewers and the like, and this was in part, if misleadingly, true. It ignored the elephant in the room. When the turbulence that had overwhelmed the lake for decades was finally arrested, a swell of momentum rose to tackle the rest. "Save Our Lake" bumper stickers became prominent fixtures on pickup trucks and automobiles across the region.⁴³⁴ North shore communities began requiring holding basins and porous pavement on new parking lots.⁴³⁵ New Orleans began thinking about restoring Bayou St. John, and even reopening part of the old canal system into town.⁴³⁶ These were not Red/Blue issues. Members of Congress who routinely accused environmentalists of extremism championed cleaning up the lake.⁴³⁷ This is where the votes were. This is where people's dreams were.

Perhaps the acid test of the political climate on shell dredging came in 1991, with former governor Edwards in a dead-heat reelection contest with former Klan leader David Duke.⁴³⁸ Edwards had shown little

433. See *Water Quality! Weekly Report*, LAKE PONTCHARTRAIN BASIN FOUND., SAVEOURLAKE.ORG, <http://www.saveourlake.org/weekly-report.php> (last visited Sept. 16, 2012) (noting that the LPBF tests ten sites along the lake every Tuesday (and reports these findings every Friday) for fecal coliform, water temperature, water visibility, dissolved oxygen, and salinity, with notices that rainfall events cause spikes in bacteria and alerting the public if that week rainfall occurred). As of February 22, 2012, testing even following a rain, seven of the ten sites indicated fecal coliform levels at safe levels for swimming (below 200 mpn). *Id.*

434. As of April 2012, LPBF had more than 2000 individual members, in addition to several categories of sponsors. Telephone Conversation with Dr. John Lopez, LPBF (Apr. 10, 2012).

435. See HOUCK ET AL., *supra* note 57, at 81 (stormwater retention basins); see also COVINGTON, LA., COMPREHENSIVE ZONING ORDINANCE § 4.109 4(c) (2010) ("The city engineer may approve permeable paving materials (pavers or porous asphalt and pervious concrete) in lieu of impervious surfaces; however, regular maintenance of the permeable areas that ensure proper function shall be a condition of approval."); *id.* § 4.2045(e)(iv) ("Except for sidewalks and curb and gutter, no paving with concrete, asphalt or other impervious material within the drip line of trees to be retained shall be allowed.")

436. See DUTCH DIALOGUES, <http://www.dutchdialogues.com> (last visited Oct. 20, 2012). A group of workshops between engineers and water experts in the Netherlands and South Louisiana gathered post-Katrina to brainstorm and enact innovative ways for adapting to the "threats inherent to living in a subsiding delta." *Id.*; see also Mark Schleifstein, *Planners Try To Pour Water Back into N.O. Landscape*, TIMES-PICAYUNE (New Orleans), Apr. 7, 2010, at B1.

437. Even Senator David Vitter, who has made a career of belittling environmental concerns as pressing as climate change, lined up four-square for the Lake. See Ron Thibodeaux, *Vitter Moves To Get Federal Money for Lake*, TIMES-PICAYUNE (New Orleans), Jan. 19, 2000, at B2.

438. Telephone Interview by Casey Scott with Robert Lambert, *supra* note 424. The account of the meeting and subsequent statements are taken from this interview.

interest in environmental issues through his initial term, except to trash them. Duke, for his part, was a cipher. The Monday before election day both candidates were on television, however, and in response to a media question, Duke replied that, were he elected, there would be no shell dredging. Edwards, apparently caught off guard, ducked the issue by saying that he needed “more scientific information.” The next day Powell and Lambert from the Pontchartrain Basin Foundation travelled to Baton Rouge to visit Edwards, and asked him whether he knew that, during his absence from office, the shell permits had been denied? And that this was very, very important to the Foundation’s members?⁴³⁹ Edwards replied, “I think there has been a misunderstanding.” The next day on television, the former governor, too, said that there would be no shell dredging during his new term. When the moderator commented, “I’ve never seen you reverse yourself,” Edwards replied, in classic deadpan, “I think it was a divine revelation.”

The victory was not free. The strain of these cases, some years delayed, eventually put Osborne into the hospital.⁴⁴⁰ To this day, there are conservationists in Lafayette, Louisiana, who will not speak with Schoeffler, despite the felicitous outcome.⁴⁴¹ The most direct hit, however, landed on researchers like Bahr, Van Heerden and Sikora who spoke truth to power and paid the price.⁴⁴² The chilling effect of this price is immeasurable. For every scientist sanctioned, many others decide to keep their heads down and “stick to my grants.”⁴⁴³ To be sure, shell dredging was hardly an innovator in the business of gagging its critics—finding an expert to speak honestly on coal in Kentucky, agribusiness in Iowa, or grazing in Nevada is a search for the brave—but the Pontchartrain cases were eventually won because a few people risked a great deal.

In the end, the materials industry moved on without missing a beat. It began selling crushed limestone, instead.⁴⁴⁴ In the meantime, however, it had pulled in seven more years of profits on shells since the opening salvos, staving off the day of reckoning, which is not unusual either. The companies’ litigation costs were smart business decisions. Clade, whose efforts on their behalf shone through the shell dredging proceedings, made firm partner in record time.⁴⁴⁵

439. *Id.*

440. Interview with Christopher Gobert, *supra* note 293.

441. Interview by Casey Scott with Harold Schoeffler, *supra* note 75.

442. *See* discussion *supra* notes 143-146 and accompanying text.

443. *See* Interview with Dr. Ivor Van Heerden, *supra* note 116.

444. *See* Hall, *supra* note 192.

445. Interview with Susan Clade, *supra* note 52.

We should, though, leave the last word for those closest to the action. From the industry's attorneys:

Joseph Leblanc:

Impact? I think the lake is better [noting that there were many sources of pollution]. Hasn't it even reached the point where it's swimmable? Even elimination of short-term turbidity will only make it better.⁴⁴⁶

Susan Clade:

I had to frankly admit when [the dredges] were gone, oh my God. But there were other things done to Jeff Parish and animal manure, but three or four years after dredging was gone and these other measures it was getting better. Oh my God there was a pelican, and fishing improved, and different species of fish appeared, and there were porpoises in the lake.⁴⁴⁷

From their opposing lawyers:

Michael Osborne:

I loved the natural environment. . . . I know it made a difference in shell dredging because they don't do it anymore. It's gone.⁴⁴⁸

Christopher Gobert:

It was a piece of work. I'm not sure I could go through it again, but it was very satisfying.⁴⁴⁹

And their allies:

Stuart Phillips:

Now nobody could get something bad in the lake, they'd all get shot. It went from who cares about that dirty old lake to it's very important. Really did a wonderful job with turning the state around . . . because in 1970 no one thought it was worth anything.⁴⁵⁰

Carlton Dufrechou:

The lake it looked like chocolate milk all the time, like the Mississippi River looks in high season. When shell dredging was going on it was a brown mess forever and a day. . . . [Y]ou had to be a really hardy critter to survive in Pontchartrain the shell dredging years.⁴⁵¹

Robert Lambert:

It's heartbreaking in many ways that generations missed Lake Pontchartrain The bottom line is there was a long tough fight. Now we have a

446. Telephone Interview with Joseph Leblanc, LeBlanc Bland P.L.L.C. (Aug. 2011).

447. Interview with Susan Clade, *supra* note 52.

448. Telephone Interview by Casey Scott with Michael Osborne, *supra* note 209.

449. Interview with Christopher Gobert, *supra* note 293.

450. Interview by Casey Scott with Dr. Stuart Phillips, *supra* note 8.

451. Interview by Casey Scott with Carlton Dufrechou, *supra* note 425.

healthy lake and the United States can look and say we're not lost in that, the metropolitan area of New Orleans reclaimed a lake.⁴⁵²

Harold Schoeffler:

It was an amazing thing . . . the guy who rented us [a fundraising] hall when we went to pay him he didn't take the money, the caterer didn't take the money, the band didn't take the money, and the guy who won the [raffle] money he said all he wanted was his ticket money back. All these people up in arms, we're going to save this damn lake.⁴⁵³

Schoeffler continues:

But all those dredges are down in the bottom of the Gulf. They actually made reefs out of them.⁴⁵⁴

Which is perhaps the ultimate irony.

452. Telephone Interview by Casey Scott with Robert Lambert, *supra* note 424.

453. Interview by Casey Scott with Harold Schoeffler, *supra* note 75.

454. *Id.* The state and the federal governments are now proposing to spend heroic sums of money attempting to restore even small pieces of the coastal barriers Louisiana once enjoyed, for free. *Coastal Protection & Restoration, Projects*, LOUISIANA.GOV, <http://coastal.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&nid=78&pnid=0&pid=97&catid=0&elid=0> (last visited Sept. 16, 2012). The state Office of Coastal Restoration and Protection outlined \$1.4 billion to be used by 2012 for nearly 150 various coastal restoration and protection projects, including those dedicated to wetland and barrier island restoration projects. *Id.* The overall bill will dwarf this sum. See Ross Landry, *State Plans Coastal Restoration, Hurricane Preparation*, NICHOLLS WORTH (Thibodaux) (Jan. 24, 2012), <http://www.thenichollsworth.com/news/state-plans-coastal-restoration-hurricane-preparation-1.2751266#.T01pJyP82cE> ("The 2012 Master Plan is for both coastal restoration as well as hurricane protection. It will use billions of dollars from state and federal funding [totaling \$50 billion] as well as sources such as offshore-drilling income and fines from the BP oil-spill in order to pay for 381 various projects designed to restore and protect Louisiana's coastal wetlands over the next 50 years.").