

A Matter of Purpose and Consistency: Coastal Wetlands Planning, Protection, and Restoration Act as a Guide Star for Managing the Mississippi River

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The enactment of the Coastal Wetlands Planning Protection and Restoration Act (CWPPRA) in 1991 was a major milestone in the effort to forestall the collapse of the vast estuarine wetland system created by the Mississippi River and other rivers in southern Louisiana. While the authorizations and funding delivered by CWPPRA are heavily weighted to facilitate ecosystem restoration projects in coastal Louisiana, the act does much more than that. This Article will highlight several aspects of CWPPRA that have been underemphasized but that could be of greater importance in the future, both within and beyond Louisiana.

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I. THE HISTORY BEHIND CWPPRA: THE COLLAPSING COAST OF LOUISIANA AND THE AUTHORITY TO RESPOND

When Europeans began their conquest and colonization of North America, the coastal wetland system in what would become Louisiana was vast, varied, and dynamic. That ecosystem was the product of a continental network of rivers and littoral forces that built and sculpted a system of marshes, swamps, and estuarine waters that, in 1932, totaled more than 7,500 square miles¹ Even then it was known that the human-induced practices of leveeing, draining, canal building, and channelizing had set the coast on a course toward collapse.²

Nowhere was that last point made clearer than in E.L. Corthell's 1897 article in *National Geographic* magazine in which he observed:

The effect of the withholding by the levees from the great areas of the delta of the annual contribution of sedimentary matters, and the steady, though slow, subsidence of these areas, is one which should be taken into account in deciding the important question of how to protect the people from the flood waters of the river. No doubt the great benefit to the present and two or three following generations accruing from a complete system of absolutely protective levees . . . far outweighs the disadvantages to future generations from the subsidence of the gulf delta lands below the level of the sea and their gradual abandonment due to this cause.³

Simply put, coastal Louisiana's wetlands were sacrificed to the nation's navigation, drainage, and development priorities, and it was not a secret. Nor was it a secret that divorcing the Mississippi River from its delta and the "reclamation" (draining) of wetlands was a central cause.⁴ As Percy Viosca observed in 1928:

Reclamation and flood control as practiced in Louisiana have been more or less a failure, destroying valuable natural resources without producing the permanent compensating benefits originally desired.

1. Land Change in Coastal LA 1932-2010 file:///Z:/Mark%20Davis/Reference%20material/Land%20Change%20in%20La%201932%20to%202010%20USGS/Land%20Change%20in%20Coastal%20La%201932%20to%202010%20USGS,%20pamphlet.pdf

2. E.L. Corthell, *The Delta of the Mississippi River*, NAT'L GEOGRAPHIC MAG., at 315 (Dec. 1897); Percy Viosca, Jr., *Louisiana Wet Lands and the Value of Their Wildlife and Fishery Resources*, Vol. 9, ECOLOGY, April, 1928 at 216.

3. Corthell, *supra* note 2, at 354.

4. *Id.* at 348; Viosca, *supra* note 2, at 216.

Reclamation experts and real estate promoters have been “killing the goose that laid the golden egg.”⁵

It was left to future generations to grapple with the consequences of that legacy. The Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA) was Louisiana’s and the nation’s attempt to do that. CWPPRA was enacted to systemically address the collapse of coastal Louisiana through a coordinated ecosystem restoration program, arguably the largest ever attempted. As ambitious as CWPPRA’s coastal wetland restoration appears to be, it is in fact only intended to be a beginning. Beyond its roughly \$40 million-per-year project budget, the soul of CWPPRA is its required development of a comprehensive coastal restoration plan to guide not only the future use of CWPPRA funds, but projects well beyond CWPPRA’s capacity. CWPPRA also makes ecosystem restoration a priority of the U.S. Army Corps of Engineers equal to navigation, flood control, and irrigation and commands the Corps to pursue its work in those areas in a manner consistent with the purposes of the CWPPRA plan. Finally, CWPPRA recognizes that restoring functional sustainability to Louisiana’s coast requires more than restoration projects and traditional regulatory protections. CWPPRA addresses this problem by reducing the state’s cost-sharing commitments on CWPPRA projects if it adopts a coastal wetland conservation plan aimed at achieving no net loss of wetlands from development.

Finally, CWPPRA recognizes that restoring functional sustainability to Louisiana’s coast requires more than restoration projects and traditional regulatory protections. This makes CWPPRA both an important tool to embrace and a possible model for water resource management elsewhere.

To understand CWPPRA, it is best to start with how it came to be. It would be fair to call it a triumph of governance over government. Though the socially and physically engineered collapse of the coast was documented prior to the 1930s, it was not really anybody’s job to do much with that knowledge. State governments, specifically Louisiana, had limited jurisdiction and resources to contend with the challenges of managing the ever-changing Mississippi, and the federal government only had jurisdiction over activities impacting the navigability of the river. The Flood Control Act of 1928 changed that by transferring responsibility for the levee system south of Cape Girardeau, Missouri, from the states to the U.S. Army Corps of Engineers and the Mississippi River Commission under the Mississippi River and Tributaries Project’s (MR&T)

5. Viosca, *supra* note 2, at 229.

authorization,⁶ albeit with the caveat that the responsibility would come with zero legal liability.⁷ State and local governments still had a role in the new system, specifically: retaining the responsibility to provide the land rights necessary to build and maintain the levees and flood walls, something that could be done at little to no cost under state law, at least in Louisiana, due to the levee servitude (a legal estate similar to an easement elsewhere) that encumbers land adjacent to navigable streams.⁸

The federalization of the flood risk reduction system brought unprecedented levels of expertise, funding, and coordination to the Lower Mississippi River valley. It is a testament to the effectiveness of that commitment that since the authorization of the MR&T, though tested, the system has not failed, yielding an estimated \$2.45 trillion of avoided losses according to the Army Corps of Engineers⁹—at least on the main stem of the river. By locking the river in place and removing the authority of states, especially Louisiana, to flexibly manage the river, it became harder to address the ongoing collapse of the wetlands and estuaries of coastal Louisiana. To add to this problem, the Army Corps and federal government never identified this collapse as a flood, and certainly not one associated with the management of the Mississippi River. Of course, over time federal and state governments eventually viewed wetlands and waterways as more than avenues of commerce worthy of protection. Starting with the federal Rivers and Harbors Act of 1899¹⁰ and running through the Clean Water Act¹¹ and the Coastal Zone Management Act,¹² the nation developed a matrix of laws that relied on a blend of federal and state roles to manage and protect waters and wetlands. But even the most perfect and effective regulatory program (which these decidedly were not) cannot change what has already happened or control actions beyond their jurisdictional reach.¹³ And in the case of coastal Louisiana land loss and

6. Flood Control Act of 1928, ch. 569 (1928), https://www.mvd.usace.army.mil/portals/52/docs/mrc/appendix_e_1928_flood_control_act.pdf.

7. *Id.* at Section 3.

8. La. Civ. Code art. 665 (2024).

9. U.S. Army Corps of Eng'rs, Miss. Valley Div., Press Release (Apr. 2, 2025), <https://www.mvd.usace.army.mil/Media/News-Releases/Article/4144014/high-water-with-major-flooding-in-the-mississippi-valley/>.

10. 33 U.S.C. § 401 *et seq.* <https://darrp.noaa.gov/sites/default/files/Rivers%20and%20Harbors%20Act%20%20USCODE-2010-title33-chap9-subchapI.pdf>.

11. 33 U.S.C. § 1251 *et seq.*

12. 16 U.S.C. chapter 33 § 1451.

13. While there is a natural aspect to the changes occurring to the lands and waters of coastal Louisiana, the overwhelming drivers of the coastal change and wetland loss are, as noted earlier, human-induced. The leveeing of the river, land draining, fluid withdrawals (including water, oil, and gas), navigation projects and canals dredged to facilitate trapping and sulfur, oil and

estuary collapse, that meant the arc of destruction would continue unless steps were taken to actually reengineer the coast and the rivers that built it in order to rehabilitate and create ecosystems.

That is what CWPPRA was created to do, and it did so by taking a three-pronged approach: First, it created a planning and project implementation program that targeted coastal restoration actions in Louisiana. Second, it created incentives to marry the restoration program's aims with wetland conservation efforts to achieve "no net loss of coastal wetlands from development." And third, it requires the Corps of Engineers to harmonize its broader suite of authorized activities (e.g. flood control and navigation) in order to be consistent with the purposes of the coastal restoration plans developed under CWPPRA.

For most of CWPPRA's existence, the conservation of wetlands and harmonization with the restoration plan were handled by compliance with the Coastal Zone Management Act and the Corp's responsibilities under Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act of 1899, and the National Environmental Policy Act (NEPA). That is no longer the case. Owing to the SCOTUS-led retrenchment of the reach of those three laws, which will be discussed in more detail below, it is increasingly clear that meeting the goals and mandates of CWPPRA will require a much more individualized application. Understanding what that might mean is the aim of this paper.

II. CWPPRA: WHAT IT IS AND WHAT IT DOES

CWPPRA's path to enactment in 1990 was the product of a powerful bipartisan effort led by Louisiana's two Democratic senators, John Breaux and Bennett Johnston, and the Rhode Island Republican senator John Chaffee. Their efforts did not arise from nowhere, but rather built upon efforts in Louisiana, led by the Coalition to Restore Coastal Louisiana, to make the conservation and restoration of the Pelican State's coastal wetlands a funded state priority.¹⁴ In 1989, those efforts resulted

gas, and timber extraction have transformed a dynamic but largely stable landscape and ecosystem into a disappearing one. Many of these activities, and the destruction they wrought, were done or at least initiated before the advent of regulatory protections. That said, if one ever wants to see evidence of the cumulative and secondary effects of human development, there are few better places to look than coastal Louisiana. This was Percy Viosca's point. Viosca, *supra* note 2.

14. The Coalition to Restore Coastal Louisiana's role in shaping coastal restoration thinking and action is essential to understanding the evolution of CWPPRA. Its foundational work was its "Here Today, Gone Tomorrow?" report released in 1989, which presaged much of what has since happened in Louisiana and in federal legislation and policy. Coalition to Restore Coastal Louisiana, *Coastal Louisiana Here Today, Gone Tomorrow?* (1989) <https://www.crcl.org/wp-content/uploads/2022/07/here-today-gone-tomorrow.pdf>. A useful summary of the Coalition's

in the enactment of a state law creating an office of Coastal Restoration in the governor's office as well as a multi-agency State Wetlands Restoration Task Force which leads the planning and implementation of restoration projects¹⁵ The state's efforts were funded by a constitutionally protected dedication of state oil and gas revenues¹⁶ CWPPRA was enacted in no small part to be an essential federal counterpart to the state's efforts. CWPPRA is much more than an enlightened public works program. Though it is a public works program at its heart, CWPPRA reimagines the federal government's relationship with coastal wetlands, the Mississippi River, and the suite of responsibilities assigned by Congress to the Army Corps of Engineers. While CWPPRA is not focused entirely on Louisiana's wetlands, it is its main focus.

With respect to coastal Louisiana, CWPPRA does four important things:

1. It creates a five-agency federal task force to work with the state of Louisiana to develop a comprehensive coastal restoration plan¹⁷ and to create annual coastal restoration projects lists that are funded by dedicated federal funds and matching state dollars¹⁸ As of 2017, CWPPRA had authorized and funded a total of 214 projects at a cost of \$40 million to \$80 million per year¹⁹. This part of CWPPRA has also served to leverage larger and more expensive projects under other federal authorities such as the Louisiana Coastal Area authorization.²⁰
2. It changes the service mission of the Army Corps of Engineers as a whole, not just in Louisiana, by making wetland enhancement and restoration an authorized activity on par with navigation, flood control, and irrigation—albeit not funded at the same levels.²¹

formation and role in shaping law and policy can be found in David Hanny's dissertation, submitted to the Graduate College at the University of Oklahoma in 1995. file:///Z:/Mark%20Davis/CRCL/Hanny%20Thesis.pdf.

15. Louisiana Revised Statutes 49:213 and 49:214

16. L.A. CONST. art. VII, § 10.2.

17. 16 USC Section 3952(b)(3).

18. Public Law 101-646, Title 11, 16 U.S.C. Chapter 59A

19. U.S Fish and Wildlife Service, <https://www.fws.gov/project/louisiana-ecological-services-coastal-restoration>.

20. U, S, Army Corps of Engineers, Louisiana Coastal Area Ecosystem Restoration Study, Nov. 2004, file:///C:/Users/msdavis/Downloads/aLCA%20Ecosystem%20Restoration%20Study_2004%20Volume%201.pdf

21. 16 U.S.C. § 3956.

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3. It encourages wetland conservation in coastal Louisiana.²²

4. It requires that the Army Corps conduct its non-CWPPRA activities in a manner consistent with the purposes of the CWPPRA plan.²³

Each of those four features of CWPPRA is worthy of a deeper discussion, but because the fate of coastal Louisiana hangs on the management of the national network of rivers and inland waterways under the Army Corps's control, this Article will concentrate only on the consistency provision.

III. THE CWPPRA PLAN: ITS PURPOSE AND WHY IT MATTERS

Coastal Louisiana is a creature of rivers, specifically the Sabine, the Atchafalaya, the Pearl, and, of course, the Mississippi. But that still understates things because it is just as dependent on the Red, the Tennessee, the Missouri, the Ohio, the Allegheny, and dozens more. Over thousands of years, those rivers built and sculpted the immense water and wetland complex that makes up coastal Louisiana. The decline of that complex is very much tied to how those rivers have been managed, and the restoration of whatever semblance of sustainable function is possible for it will also depend on the management of rivers. In the United States, particularly the Eastern and Central parts, any discussion of river management must include the Army Corps of Engineers. The framers of CWPPRA understood that, which is why they tied the development of coastal restoration in Louisiana to the conduct of the Army Corps's broader missions both inside and beyond Louisiana.

At the heart of CWPPRA is the creation of a federal-state task force that is charged with the development and implementation of a comprehensive plan to "restore and prevent the loss of coastal wetlands in Louisiana."²⁴ The task force is chaired by the secretary of the army and includes the administrator of the Environmental Protection Agency, the secretary of interior, the secretary of commerce, the secretary of agriculture, and the governor of Louisiana.²⁵ In practice, each of those named officials has designated a representative to serve on the task force. The secretary of the army has designated the commander/district engineer of the Army Corps's New Orleans District to represent him/her and to chair the task force.

22. 16 U.S.C. § 3953.

23. Pub. L. 101-646, § 303(d)(1).

24. 16 U.S.C. § 3952(b)(3).

25. 16 U.S.C. § 3951(9).

The CWPPRA comprehensive plan was completed and submitted to Congress in 1993. As envisioned by the statute, the plan has evolved since then but always in ways that reinforced and expanded its scope and capacity,²⁶ and always in ways that more fully embraced CWPPRA's purpose of restoring and preventing the loss of Louisiana's coastal wetlands. The details of each of those iterations are not important for our purposes beyond how they signify the growing importance of saving coastal Louisiana and how, throughout it all, they affirm and reaffirm the purposes of CWPPRA and the restoration planning process it launched. That was true in 1990, and it remains true today. What is also true is that the success of those restoration plans and projects depends on harmony between them and the Army Corps's management of the system of American waterways that coastal Louisiana is both dependent on and a part of.

IV. THE CONSISTENCY CLAUSE: WHAT IT SAYS AND WHY IT MATTERS

Just as the connection between rivers and the coast is elemental to the creation and continued existence of coastal Louisiana, so is the connection between all of the Army Corps of Engineers' projects and programs throughout the thirty-one-state Mississippi River basin. It is a simple fact that when one is talking about flood control, navigation, irrigation, aquatic ecosystem management, and the regulation of water pollution, one is also talking about the Army Corps of Engineers. Whether by careful design or historical default, the U.S. Army plays a dominant role in water management in the United States.

The Corps's pervasive role in water management does not mean that those roles are harmonized or readily harmonizable, a fact the Corps has acknowledged. Faced with sharp criticism of the Corps's inability to develop a timely and suitably comprehensive plan for management of the Missouri River (obviously, a major tributary of the Mississippi River), Brigadier General David Fastabend testified that as much as the Corps tried to carry out the will of the American people as expressed by Congress, "the reality is that over time the American people have given us multiple instructions."²⁷ The general reminded the Subcommittee on

26. Most notably, these evolutions can be seen in the Coast 2050 Plan in 1998; the Louisiana Comprehensive Area Program, authorized in the Water Resources Development of 2007; and Louisiana's Coastal Restoration and Protection Master Plans, created following Hurricanes Katrina and Rita and substantially financed with federally directed funds through the RESTORE Act of 2012 following the Deepwater Horizon blowout and explosion in 2010.

27. Testimony of Brigadier General David Fastabend, Commander, Northwestern Division, U.S. Army Corps of Engineers to U.S. Senate Committee on Energy and Natural

Water and Power on Water Resource Management Issues on the Missouri River that:

In the 1930's and 1940's they told us to build, operate, and maintain these projects [navigation, flood control, and hydropower] for multiple purposes. In the 1970's, they had additional instructions that included the Endangered Species Act and the National Environmental Policy Act. In the eighties we had the National Historic Preservation Act, and the Native American [Graves] Protection and Repatriation Act. I respectfully suggest to you that no one ever really stopped to think if any of these instructions might perhaps at times be contradictory.²⁸

Though General Fastabend did not mention CWPPRA, he easily could have, because CWPPRA authorized the Corps to “carry out projects for the protection, restoration, or enhancement of aquatic and associated ecosystems, including projects for the protection, restoration, or creation of wetlands and coastal ecosystems” and to give those projects “equal consideration with projects relating to irrigation, navigation, or flood control.”²⁹ In some ways, CWPPRA was just another ask from the American people, but it was different in one very important way. CWPPRA did not just authorize a new mission area for the Corps; it also provides a reconciling principle: maintaining consistency with the purposes of the CWPPRA plan.

CWPPRA makes clear that, with regard to the Army Corps, this consistency mandate is not perfunctory, but critical to the success of the coastal restoration program authorized by CWPPRA. Section 303 (d)(1) of CWPPRA states:

In implementing, maintaining, modifying, or rehabilitating navigation, flood control or irrigation projects, other than emergency actions, under other authorities, the Secretary [of the Army], in consultation with the Director [of the U.S. Fish and Wildlife Service]) and the Administrator [of the Environmental Protection Agency] shall ensure that such actions are consistent with the purposes of the restoration plan submitted under this section.³⁰

Resources, Subcommittee on Water and Power on Water Resource Management Issues on the Missouri River, 21 (July 10, 2002), <https://www.govinfo.gov/content/pkg/CHRG-107shrg83681/html/CHRG-107shrg83681.htm>.

28. *Id.*

29. Pub. L. 101-646, § 307.

30. Pub. L. 101-646, § 303(d)(1).

This is not the language of wishful thinking. The use of “shall ensure” makes it clear that CWPPRA imposes an affirmative duty on the Corps to comport its actions under other authorities with the purposes of CWPPRA. The requirement that the Army Corps consult with the EPA and the U.S. Fish and Wildlife Service removes any doubt that this duty is left to the Corps’s discretion to interpret and apply.

If the consistency clause is so clear and substantive, why has it not been more frequently discussed or utilized? It actually has been, but rarely by name.³¹ Though the type of coordination and consultation required by CWPPRA is not synonymous with the requirements of NEPA, in most cases NEPA compliance has adequately covered the bases. While CWPPRA’s role outside of Louisiana has been modest at best, its role as an ancillary player may be coming to an end as the impact of recent Supreme Court rules and administrative pronouncements take hold on the general body of environmental law and on management of the Mississippi River in particular. Seeing why that might be and what it could mean will be the subject of the next part of this Article.

V. CWPPRA’S ROLE IN A TIME OF ENVIRONMENTAL LAW RETRENCHMENT

Since the dawn of the modern environmental law era in the 1960s and ’70s, the architecture of environmental regulation has been fairly stable. Congress, often with bipartisan support, has passed laws grounded in the protection of public health and welfare to address pollution and environmental degradation. Underlying much of that legislation was the recognition that state-centric approaches to environmental and public health stewardship were inadequate to the nation’s needs. Those laws have usually empowered a suite of executive branch departments and agencies to develop regulations and policies to identify pollutants and jurisdictional boundaries necessary to achieve the aims of those laws. Those boundaries and definitions ebbed and flowed over time, as constituencies contended in Congress, the courts, and at the ballot box, but the fundamental reach of those laws and the authority of agencies to interpret and enforce them remained largely intact. At least, that was the case in the instance of the Clean Water Act and the Rivers and Harbors Act of 1899. Until it wasn’t.

31. One of the few times it has been directly discussed was in the case of a coal transfer facility downriver from New Orleans. *See*, Devin Lowell, *Ensuring Consistency: Louisiana Coastal Restoration Through the Lens of the RAM Terminal and the Mid-Barataria Sediment Diversion*, 27(2) TUL. ENV’T L.J. (2014).

Before the mid-1990s, Congress was the arena in which efforts to remap the reach of the Clean Water Act played out. In the early to mid-1990s, there were regular, well-coordinated campaigns to enact amendments to the Clean Water Act to scale back the reach and application of Section 404 of the act, which deals with the regulation of dredge and fill activity. Led by groups like the industry-heavy National Wetlands Coalition³² and contested by conservation focused groups like the Clean Water Network,³³ those high profile and often contentious clashes generated a lot of heat and attention, but no meaningful changes to the law itself.

Faced with little legislative success, critics of the Clean Water Act shifted from focusing on elections and lawmakers to focusing on the courts and the judiciary. A very well organized effort was developed to promote a more conservative judiciary and to encourage legal theories like originalism, textualism, and the major questions doctrine which is skeptical of Congressional delegations of statutory interpretation to executive branch agencies. Those efforts are transforming the governance and environmental lawscapes. The origins of legal conservatism and the conservative public interest law organizations that added heft to the shift of legal institutions from “left” to “right” are beyond the scope of this paper but are well discussed elsewhere.³⁴ For our purposes, it is sufficient to accept the fact that the seeds planted over the past generation have yielded a crop of rulings and decisions that have narrowed how two generations of environmental legislation and administration are to be read and employed. The prime example of that—and of why CWPPRA’s consistency clause deserves new attention—are the U.S. Supreme Court’s rulings in *Sackett v. EPA*³⁵, *Seven County Infrastructure Coalition v. Eagle County*³⁶, and *Loper Bright Enterprises v. Raimondo*.³⁷ A brief look at each of those cases will explain why.

32. See the National Wetlands Coalition, https://en.wikipedia.org/wiki/National_Wetlands_Coalition.

33. See Clean Water Network, Wikipedia, https://en.wikipedia.org/wiki/Clean_Water_Network.

34. See STEVEN M. TELES, *THE RISE OF LEGAL CONSERVATISM: THE BATTLE FOR CONTROL OF LAW* (2010); Oliver Houck, *With Charity for All*, 93 YALE L.J. 1419 (1984).

35. *Sackett v. EPA*, 598 U.S. 601, 651 (2023).

36. *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. 168 (2025).

37. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

A. Sackett v. EPA

This case is notable for redefining the term “waters of the United States” (WOTUS) and, consequently, the reach of the Clean Water Act. The Court’s decision, penned by Justice Alito, restricts the application of that Act to navigable waters, their tributaries, and immediately adjacent wetlands.³⁸ Most notably, the Court removed any doubt that only wetlands with a direct surface connection are subject to the Act, at least concerning the regulation of dredge and fill activity under Section 404 of the Act. That doubt was an artifact of an earlier split decision in *Rapanos v. United States* that failed to produce a clear majority.³⁹ It is too early to know exactly which waters and wetlands will be covered by the Act, but the consensus is that it will be extensive, with wetlands separated from a navigable water body by a levee or other barrier—a type of wetland very common in the Mississippi River valley—now beyond the Act’s protections.⁴⁰

This is a very significant development, but not one that redefines the role of the federal government generally. The Clean Water Act (like most environmental, civil rights, and public health-related laws) was enacted under the auspices of the Commerce Clause of the U.S. Constitution. The long jurisprudential history of the Act has really been an exploration of how far Congress meant to go using its Commerce Clause power, an exploration that is likely not finished. It is widely acknowledged that Congress could have written the Clean Water Act to apply to much more than navigable waters but by equating the terms navigable waters and “waters of the United States” it did not.⁴¹

Whatever the fate and reach of the Clean Water Act may be, it does not control other sources of authority for federal action. While the federal government may no longer have the authority to regulate activities in wetlands using the Clean Water Act, it still has a duty to protect the efficacy of other federal projects and property. The massive flood risk

38. See *Sackett*, 598 U.S. at 684.

39. See *Rapanos v. U.S.*, 547 U.S. 715 (2006).

40. See, e.g., Richard Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. CHI. L. REV. (2023), available at <https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa> (arguing that by some estimates, more than fifty percent of the previously regulated wetlands and up to eighty percent of the previously covered streams have lost the protections of the Clean Water Act). Even Justice Kavanaugh observed in a concurring opinion that, by excluding from coverage wetlands that are separated from a navigable water body by only a levee, berm, dune, or such obstruction, the majority was adopting too narrow a view of what an adjacent wetland could be. See *Sackett*, 598 U.S. at 716.

41. 31 U.S.C. § 1362(7).

reduction and navigation projects and infrastructure constructed and maintained by the Army Corps as part of the MR&T are a good example. Authorized in the Flood Control Act of 1928 after the great flood of 1927, the MR&T created a unified system of flood control and navigation projects to be overseen by the Mississippi River Commission and the Army Corps. More than a system of locks, dams, levees, and pumps, the MR&T also supports environmental protection and enhancement.⁴² The retreat of the Clean Water Act does not mean that wetlands that support the function and integrity of MR&T projects can be filled and used for just anything. The Corps has not only the rights implicit in the MR&T authorization, but under the Property Clause of the Constitution,⁴³ the federal navigation servitude,⁴⁴ and even state drainage and nuisance laws, it even has the right to influence—or control—the way private lands and waters are developed and used in order to protect the federal government’s interests. As the Corps assesses and asserts those rights, CWPPRA’s consistency mandate may come into play to require that not only the efficacy of the federal project in question be considered but also the systemic implications for coastal Louisiana’s wetlands.

B. Loper Bright Enterprises v. Raimondo

The interpretation of almost all laws requires some judgement calls about what the law means and how to apply it. That has been particularly the case with environmental laws that are supposed to protect human health and welfare and the environment. Objectives like these don’t lend themselves to specific legislative direction. Conditions change, new pollutants emerge, and we learn things—things that legislatures can’t keep up with even under the most ideal of conditions. That is why those laws often authorize the executive branch to act and develop rules and regulations to fulfill the purposes of the law. That, of course, is what the field of administrative law is all about.

In many ways, that approach makes perfect sense. Agencies have the ability to build expertise and staff and to serve the public. For that reason, courts traditionally deferred to agencies’ interpretations of their

42. See US Army Corps of Eng’rs, *Mississippi Rivers and Tributaries Project* (U.S. Army Corps: Mississippi Valley Division), <https://www.mvd.usace.army.mil/About/Mississippi-River-Commission-MRC/Mississippi-River-Tributaries-Project-MR-T/>.

43. See U.S. Const. art. IV, § 3, cl. 2.1.1 which provides: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”

44. See, e.g., 43 U.S.C. 1314.

authorizing laws. That rule of legal deference was established by the U.S. Supreme Court in the case of *Chevron USA v. Natural Resources Defense Council*.⁴⁵ And for forty years, that was the way it worked. Until it didn't. As noted earlier, the federal judiciary is experiencing a doctrinal transformation, and one victim of it has been "*Chevron* deference," or the notion that courts must defer to reasonable agency determinations. In *Loper Bright*, the Supreme Court reasserted the independent role of the courts in interpreting legislative intent in cases of substantive law where it is not clear. The Court did not suggest that deference is improper, just not mandatory.⁴⁶ Whether this results in a pattern of de facto deference to agency expertise or to a chaotic patchwork of inconsistent judicial and agency interpretations it is too early to tell, but it is going to matter for the Mississippi River and the Army Corps. The river abuts four federal judicial circuits, so the possibility of multiple divergent interpretations of the laws governing federal agency missions and actions is distinctly possible with the management of the river hanging in the balance.

Facing that very real possibility, it would be helpful to have some specific Congressional direction to guide agencies and the Courts and to serve as a reconciling principle. CWPPRA can be just that. Providing a river that is adequate to serve the purposes of CWPPRA in Louisiana means managing the river holistically. Too often in the past, the fate of the lower reaches of the river was presumed rather than planned for. Dredges and levees would handle the essential navigation and flood control, and everything else would, it was presumed, somehow take care of itself. CWPPRA grew out of the realization that the economic, environmental, and cultural life of that region, as well as, in fact, the nation, demanded more than that. While framed in the context of wetlands, CWPPRA is fundamentally about survival. The wetlands and estuaries of coastal Louisiana support much more than wildlife habitats. They support and protect a web of commerce, industry, energy supply, and food production. The vitality of that entire system comes with the need to understand and manage the waters, nutrients, sediments, and water quality of the rivers that are its foundation—starting with the Mississippi. The consistency clause in CWPPRA is an unequivocal mandate from Congress to do a better job of doing that. With the waters themselves and their uses constantly changing, the wisdom of CWPPRA's drafters will only become clearer.

45. 467 U.S. 837, 843 (1984).

46. See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 398-99 (2024).

C. Seven County Infrastructure Coalition v. Eagle County

This 2025 decision by the Supreme Court is one of the most significant rulings concerning NEPA in many years. It also provided an additional gloss to the rules governing the deference owed to agency decisions that were the subject of the *Loper Bright* case discussed above. The purpose of NEPA is really quite simple: to inform federal agency decision-making about the significant environmental effects of major federal actions projects and to identify feasible alternatives that could mitigate those impacts.⁴⁷ Those impacts and alternatives are to be addressed in a “detailed statement,” commonly known as an environmental impact statement.

Depending on one’s point of view, NEPA is either our nation’s environmental Magna Carta, injecting an honest consideration of the environmental impacts of federal actions firmly on the table, or a well-intentioned but out-of-control beast that leads to mostly unnecessary delays in a wide array of public and private projects. The *Seven County* court acknowledges both viewpoints but clearly sees NEPA jurisprudence as having strayed beyond what the statute was intended to do. In its decision, the court aims to reel it in and “bring it back in line with the statutory text and common sense.”⁴⁸ A particular concern of the court was what it perceived to be the expansion of the range of impacts that have to be considered under NEPA, especially those that might flow from collateral developments and lie beyond the agencies’ actual authority, especially with regard to climate change. The big take away from *Seven County* is that NEPA does not cover those sorts of things. The second take away is that it is unclear where the line between those now-excluded items and the indirect environmental impacts of a federal action, which are still covered, will be drawn,⁴⁹ but that the agencies will be shown substantial deference in deciding that. While this may seem contrary to the rule laid down in *Loper Bright*, it is not. *Loper Bright* dealt with the interpretation and application of substantive laws like the Clean Water Act and the Magnuson-Stevens Act (dealing with fisheries), for which the courts are no longer obliged to show deference. In the case of a procedural law, which NEPA is, that is not the case.⁵⁰

47. See *Seven County Infrastructure Coalition v. Eagle County, CO*, 605 U.S. 168, 168 (2025).

48. *Id.* at 184.

49. *Id.* at 187.

50. *Id.* at 183.

When it comes to the Mississippi and other rivers, the Army Corps plays a multitude of roles, including in the planning, design, construction, and operation of projects as well as as a regulator of the actions of others. Some of those will unquestionably involve substantive law, others will likely be procedural, and still others may fall some place in between. Exactly where CWPPRA will fall on that spectrum at this point is an unanswered (and unasked) question. Given its history and purpose, it would fit best as a substantive statute and one whose meaning is not ambiguous. That could turn out to be very important, especially as the gap widens between what a post-*Seven County* NEPA may require and what CWPPRA mandates.

As a substantive law, CWPPRA is supposed to do more than inform Army Corps actions; it is clearly intended to shape them. That is evident from the plain wording of the clause which is distinctly different from NEPA. NEPA is focused on addressing environmental impacts of major federal actions, while CWPPRA requires actual consistency among authorized Corps navigation, flood control, and irrigation. Additionally, compliance with CWPPRA's consistency mandate is not left to the Corps's discretion, but must be done in consultation with EPA and the U.S. Fish and Wildlife Service.

Obviously, the Corps will have to make some judgment calls concerning compliance with CWPPRA, but it should not be entitled to judicial deference (a much less substantial deference than would be the case with NEPA) when it does. The reason for that is twofold. First, the CWPPRA statute's consistency requirement is not ambiguous and does not leave room for the Corps to add its own interpretive gloss. Second, even if that were not the case, as a substantive law, CWPPRA would fall within the boundaries of the *Loper Bright* ruling that eliminated mandatory deference in the case of substantive laws. None of that is to say that the reach of the CWPPRA consistency clause will be easy to determine, only that it will not be left to the judgment of the Corps to set.

D. Consistency and a Changing River; Changing Water Demand, and a Changing Coast

America's rivers, especially those in the Mississippi River basin, are assuming a level of importance that has not been rivalled for nearly one hundred years. The expanding demand for water coupled with changing precipitation patterns and aquifer depletion are already putting more pressure on those water resources. Many of the new contenders for water are from nontraditional quarters that are seeking water for energy

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production, interstate transfers, and tech development, which will only complicate the already complicated work of managing our nation's water resources. Busy days are ahead for the Army Corps and its other federal and state counterparts.

Balancing all of those players and their needs—and rights—is going to strain the framework of laws and authorizations that govern those waters. With the coverage of the Clean Water Act shrinking and the imposition of new limits on the reach of NEPA courtesy of the *Seven County* decision, that architecture is going to be even less robust than before. While state laws will always be important guardrails on the use of waters on the federal side, the primary checks will be as they have been for the past one hundred years or so—the ability to handle the authorized levels of flood protection and navigation. That won't be enough. There will need to be additional reconciling values and objectives. That is where CWPPRA comes into play.

VI. LOOKING AHEAD

By making the survival and restoration of coastal Louisiana's wetlands a national priority, CWPPRA gives the Army Corps an essential counterweight to myriad other upstream proposals and projects. CWPPRA does not elevate the needs of coastal Louisiana above all of those; it just prevents the subordination of those needs. Indeed, though not stated explicitly in CWPPRA, the simple truth is that without a functioning lower river and its associated estuaries to deliver commerce and floodwaters to, the future of many of those upstream uses is problematic. In other words, it is important to keep in mind that it is not a catalog of dreams and projects we are managing, but a river system. A river system that serves an entire nation. CWPPRA offers our best current option for treating it like one.