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Message in a Bottle: Illusive Remedies in the Parish Coastal Zone Lawsuits

“The coastal zone is affected by the coastal waters and the Seven Seas. Like love, the coastal zone is a many splendored thing. Its ecosystem is a splendid relationship between ocean and beach, between marshlands—and uplands, and between man and his environment.”¹ – Senator Hollings, 1974

INTRODUCTION

The crystal blue waters of Malibu are transparent and magical. The boggy wetlands of Louisiana are murky and disappearing. Both California and Louisiana regulate activity along their coasts through a coastal zone management program, evidence of the confluence among all coastal states.² At the outset, a federal initiative to incentivize state and local protection of the nation’s valuable coasts drove the creation of statewide coastal management programs. The marked differences between the implementation of respective programs resulted in a more accountable structure in California. In November 1991, the California Coastal Commission sued Amir Tahmassebi, a California landowner, alleging that he violated the California Coastal Act by failing to obtain a coastal development permit required for certain activities on his Malibu property.³ The court held that the California Commission had the statutory authority to bring the suit, and Mr. Tahmassebi was estopped from re-litigating his claim that the Commission did not have jurisdiction over his property.⁴ In its ruling, the trial court required the Commission to comply with certain notice provisions prior to imposing penalties.⁵ The process in California was straightforward: the local commission demanded that the property

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1. JOSH EAGLE & MEG CALDWELL, *COASTAL LAW* 362 (2011).

2. The California Coastal Commission has focused its restorative efforts on the Malibu coastline for several years, and legislation in the state is ubiquitous. *See Adam Nagourney, Battle over Lagoon Cleanup Divides a Surfing Haven*, N. Y. TIMES, May 25, 2011, <http://www.nytimes.com/2011/05/26/us/26malibu.html?mc ubz=3>.

3. *Cal. Coastal Comm’n v. Tahmassebi*, 69 Cal. App. 4th 255, 257 (Cal. Ct. App. 1998). The California Commission brought suit under the Public Resources Code, which gave the Commission the right to bring the action for injunctive and declaratory relief as well as impose civil fines for violations of the permit requirements of the Coastal Act. The appellate court did not question the authority of the commission to bring the action.

4. *Id.* at 259.

5. *Id.* at 260.

owner take action, and when the landowner failed to comply, the Commission brought the dispute to the courts.⁶

Since 1980, Louisiana's local parishes and designated state agencies have issued coastal use permits ("CUP") to persons conducting activities throughout the coastal zone.⁷ There are many differences between Louisiana and California's methods of regulating and implementing permit guidelines and imposing penalties for violations. Louisiana's methods are exemplified in the Parish Coastal Zone Lawsuits. Substitute Mr. Tahmassebi's land pursuits for Chevron Oil Company's drilling and dredging within the Jefferson Parish Operational Area and exchange the California Coastal Commission for the Jefferson Parish local permitting authority. The Louisiana Coastal Zone Management Act, also known as the State and Local Coastal Resources Management Act ("SLCRMA"), similar to the California law, authorizes state and local authorities to seek injunctive and declaratory relief against violators of CUPs.⁸ In contrast to the *Tahmassebi* case, Louisiana, its local parishes, and the Department of Natural Resources have historically chosen not to bring suit against violators of the CUP process under SLCRMA.⁹ Without regulation to enforce violations, which may be followed by lawsuits, there is a gap in enforcement in Louisiana.¹⁰ The paradoxical reality is that Louisiana is likely the most in need of coastal zone enforcement.¹¹

6. *Id.*

7. William H. Forman, Jr., *The Louisiana Coastal Resources Management Act of 1978*, 28 LA. B.J. 91 (1980).

8. LA. REV. STAT. § 49:214.36(D), (E) (2014).

9. Local municipalities' suits against oil companies are not limited to the area of environmental protection. Local municipalities have commonly brought suit over gun control issues. Several states have passed laws explicitly eliminating a cause of action for the local governments to bring suit against the gun industry. See Elizabeth T. Crouse, *Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability*, 88 MINN. L. REV. 1346, 1357 (2004). See also Andrew S. Jessen, *Louisiana and the Coastal Zone Management Act in the Wake of Hurricane Katrina: A Renewed Advocacy for a More Aggressive Use of the Consistency Provision to Protect and Restore Coastal Wetlands*, 12 OCEAN & COASTAL L.J. 133, 151 (2006).

10. See *infra*, Part II.B.1.

11. Southern Louisiana's coastal zone is most prone to subsidence, which causes reduced sediment and sea level rise. See Michael D. Blum & Harry H. Roberts, *The Mississippi Delta Region: Past, Present, and Future*, 40 ANN. REV. OF EARTH & PLANETARY SCIENCES 655, 668 (2012). Considering the contiguous United States, Louisiana comprises approximately 40% of the nation's coastal marshlands. See William Lindsey, *Louisiana's Coastal Zone, It's All Special, But Some Areas Deserve Legal Classification: Using Section 214.29 of Louisiana's SLCRMA to Designate Special Areas and Protect the Coastal Zone*, 27 TUL. ENVTL. L.J. 351, 352 (2014). A study concerning coastal wetlands loss in Louisiana may be found at <https://perma.cc/5GHP-VTJM>.

In 2013, Jefferson Parish filed suit against nine oil companies.¹² The Parish alleged that the oil companies had violated the conditions of their CUPs and that the companies had failed to obtain additional CUPs when required.¹³ Five other parishes also sued,¹⁴ but Jefferson Parish's suit was the first to be decided. In August 2016, the 24th Judicial District Court dismissed *Parish of Jefferson v. Atlantic-Richfield Co., et al.* based on a failure to exhaust administrative remedies, but in November, the same judge reversed his decision, allowing the suit to proceed.¹⁵ Although SLCRMA explicitly grants the right for state and local governments to enforce violations of the CUP program, the statute's language is unclear as to what point in the regulatory process such action should occur.¹⁶ Inevitably, the question still arises whether the state or local government must turn to other administrative remedies listed in SLCRMA prior to seeking a judicial remedy.¹⁷ Following Judge Enrisht's reversal, the Louisiana Fifth Circuit Court of Appeals denied defendants' application for supervisory review.¹⁸ The supervisory writ defendants sought is currently pending in the Louisiana Supreme Court.¹⁹ The lack of guidance in the statute, exacerbated by the lack of litigation on the issue, dooms courts to continually dismiss suits that result in real harm to Louisiana's coast.²⁰ The goal of the Parish Coastal Zone ("Coastal Zone") lawsuits is to hold the defendant oil companies responsible for violations of the state and local

12. See Dawn Geske, *Jefferson Parish Suits Against Gulf Oil, Gas Industries Dismiss after Parish Fails to Correctly Review Permits*, LOUISIANA RECORD, Aug. 14, 2016, <https://perma.cc/C998-CMBL>.

13. Reasons for Judgment, *Parish of Jefferson v. Atlantic Richfield Co. et al.*, No. 732-768 (La. Dist. Ct. 2016) [hereinafter *Atlantic Richfield*].

14. The parishes are Vermillion, Plaquemines, Cameron, St. Bernard, and Lafourche. See also Update: *Vermillion Parish Police Jury Vote Not to Support Oil and Gas Lawsuit*, KATC (Aug. 4, 2016), <https://perma.cc/8CUP-XB2P>.

15. Laura Springer Brown & Kelly Becker, *First Parish Coastal Zone Lawsuit to Proceed to Decision Falls for Failure to Exhaust Administrative Remedies*, THE ENERGY LAW BLOG (Aug. 9, 2016), <https://perma.cc/5R9Y-AHQ9>; Mark Schleifstein, *Jefferson Lawsuit against 9 Oil Firms to go to Trial*, NOLA, Nov. 10, 2016, <https://perma.cc/CP5A-VM8R> [hereinafter Schleifstein, *Jefferson Lawsuit*].

16. LA. REV. STAT. § 49:214.36 (2014).

17. See Schleifstein, *Jefferson Lawsuit*, *supra* note 15.

18. LAURA S. BROWN & JENNIFER FERRATT, COASTAL EROSION LITIGATION IN LOUISIANA 12 (2017), <https://perma.cc/9CTD-CAZE>.

19. *Id.*

20. In *Jefferson Parish v. Atlantic Richfield et al.*, the Jefferson Parish district court dismissed the case, granting the defendant's exception for prematurity for failure to exhaust administrative remedies. The court listed some of the administrative remedies that were available to the plaintiff but did not specify, other than by referring to the exhaustion of administrative remedies as a jurisprudential doctrine, why the remedies must come first. See Reasons for Judgment, *Atlantic Richfield*, No. 732-768.

coastal zone management (“CZM”) laws.²¹ In light of that purpose, the plaintiffs in the Coastal Zone lawsuit requested damages from the defendants, without taking those administrative steps that align with the structure of SLCRMA and its goal of protecting the coast.²² The statute and the administrative regulations should be strengthened in order to reflect a more concise order: first identifying the harm, taking steps to stop it, and then seeking a judicial remedy either through injunctions or penalties.²³

This comment focuses in on the issues with SLCRMA and the administrative regulations and the holes that they leave open—whether the state and local parishes are required to take administrative steps prior to filing suit and whether the parishes’ claims constitute actual harm based on the definition of continuing and non-continuing uses. Part I will delve into the federal and state Coastal Zone Management Act (“CZMA”) and describe the grounds upon which the current Coastal Zone lawsuits stand. Part II examines the definitions of continuing and non-conforming uses under the statute and whether those non-conforming uses constitute enforceable harm. Part III will analyze whether, based on that harm, the state and local parish governments were required to exhaust their administrative remedies prior to filing suit. Part IV will provide revisions of SLCRMA (La. R.S. 49:214.36) to mirror the nuances of zoning law and other successful state coastal programs, which will lead to efficient and streamlined enforcement of violations of CUPs. In the midst of Louisiana’s murky waters, the overarching purpose of this comment is to determine whether the Jefferson Parish and the other local governments’ cases are worthy of judicial determination and will survive appeal.

I. STATE LAW AND ITS IMPLEMENTATION

SLCRMA is grounded in both Louisiana’s legislative history and a strong federal initiative. Unique in the national realm, the federal Coastal Zone Management Act (“CZMA”) allowed for a significant amount of state control over individual programs. The first step in passing the Louisiana law was federal approval.²⁴ Once passed, implementation could

21. See Plaintiff’s Petition for Damages, *Parish of Jefferson v. Canlan Oil Co.* et. al, No. 732-771, at 14 (La. Dist. Ct. 2013) [hereinafter *Canlan Oil*].

22. *Id.* Further, the parish, in its petition, references the stated policy of the coastal resource program which is to prevent adverse impacts to the coastal zone. Plaintiff’s Petition for Damages, *Canlan Oil*, No. 732-771, at 12.

23. In *Terrebonne Parish School Bd. v. Castex Energy, Inc.*, the Supreme Court of Louisiana noted that the case presented a balancing between the need for coastal restoration and the importance of adherence to the law as well as respect for the contracting parties. 893 So. 2d 789, 791-92 (La. 2005).

24. *EAGLE & CALDWELL*, *supra* note 1.

begin on a statewide level. The nuances of the permitting process, as well as the enforcement provisions, are important features of the legislation that play a significant role in the Coastal Zone Lawsuits.²⁵ SLCRMA's history, its hallmark features, and its overarching role in the lawsuits bring forth questions of the necessity of administrative involvement prior to bringing suit over a CUP violation. Part A of Section I explores the steps Louisiana took to get federal approval of its coastal management program, Part B examines implementation of the program at the state and federal levels, and Part C explains the recent developments with the parish coastal zone lawsuits.

A. Seeking Federal Approval

Louisiana's coastal management program began with the federal initiative to regulate activities that occur within the coastal zones of all states. The purpose of the federal CZMA was to increase protection of the Nation's coasts.²⁶ CZMA established several programs that award grants, which a coastal state would be able to utilize if they participated and submitted program proposals.²⁷ Prior to CZMA, several states were already heading in the direction of organized CZM programs.²⁸ From the federal perspective, there are few requirements that all states must meet, and the federal law gives the state significant discretion in forming and implementing the program once it is approved.²⁹ Specific language in CZMA directs that there must be a continued consideration of the national interest during the program's implementation.³⁰ Although states must consider what is in their best interest, the focus must remain on the national perspective.

25. See *Petition for Damages to the Jefferson Parish Coastal Zone, Canlan Oil*, No. 732-771.

26. At the time, Congress considered the decline in the nation's coastal resources and diminishing water quality a serious problem. Jessen, *supra* note 9, at 133.

27. U.S. DEP'T OF COM. & LA. DEP'T OF NAT. RESOURCES, FINAL ENVIRONMENTAL STATEMENT (1980) [hereinafter FINAL ENVIRONMENTAL STATEMENT] (Letter from David Treen to Secretary Philip Klutznick).

28. See EAGLE & CALDWELL, *supra* note 1, at 369. As of today, thirty-four states have created their own statewide coastal programs. Lindsey, *supra* note 11, at 359.

29. See EAGLE & CALDWELL, *supra* note 1, at 361.

30. See FINAL ENVIRONMENTAL STATEMENT, *supra* note 27, at 118. The national interest consists of virtually everything that the local and state coastal management programs are supposed to protect, including facilities primarily used for energy production and transmission as well as wetlands and endangered species. *Supra* p. 120.

CZMA requires states to submit a plan for development of a CZM program, in order for the states to participate.³¹ The Secretaries of Commerce and National Oceanic & Atmospheric Administration must jointly approve the program.³² Once approved, funds become available to the state.³³ Upon implementation of a state's plan, the state may use the consistency provision, which gives it some veto authority over federal activities in the coastal zone.³⁴ Due to the variation among state programs, some CZM laws are more effective and active than others. All state CZM programs must establish a sufficient mechanism for communication and coordination between the management agency and local governments, as well as other state agencies.³⁵ The consistency provision requires that coastal activities carried out or approved by the federal government affecting the state's coastal zone must comply with the state's coastal laws and policies.³⁶ The requirements of intrastate efficiency, as well as consistency between federal and state governments, should have resulted in a nationwide map of coastal programs, which holds coastal users from South Carolina to Hawaii accountable.

Like other states, Louisiana understood the importance of its coastal zone prior to passage of the federal law. Even before the implementation of Louisiana's CZM program, the legislature had recognized the importance of agencies in conservation and development of the coastal zone.³⁷ Louisiana enacted SLCRMA primarily in pursuit of federal grant awards, and SLCRMA mirrored the federal law.³⁸

31. See Jessen, *supra* note 9, at 135.

32. *Id.*

33. *Id.*

34. *Id.*

35. See EAGLE & CALDWELL, *supra* note 1, at 367.

36. Linda Krop, *Defending State's Rights Under the Coastal Zone Management Act—State of California v. Norton*, 8 SUSTAINABLE DEV. L. & POL'Y 54, 55 (2007).

37. As early as 1971, the Louisiana legislature included in its Acts legislative support for the Louisiana Advisory Commission on Coastal and Marine Resources. One of the purposes of the commission was to assist the governor in the development of the Louisiana Coastal Zone Management Plan and to do so, the commission was authorized to work directly with state agencies and other state departments. See H.B. 118, 1971 Leg., Reg. Sess. (La. 1971).

38. "Primary source of federal wetlands regulations is Section 404 of the Federal Clean Water Act ("CWA"), 42 USC sect. 1344. Under CWA sec. 404 (a), 42 USC sec. 1344(a), the U.S. Army Corps of Engineers has primary authority for issuance of fill and dredge permits." See SCOTT A. BICKFORD & WILLIAM F. RIDLON II, *Key Issues in Wetlands Regulation in Louisiana*, in OVERVIEW OF WETLANDS REGULATION 7 (1994). Act 361's definition of the coastal zone paralleled the definition in the federal CZMA guidelines. The Act defines the coastal zone as "all islands, beaches, salt marshes, wetlands and areas necessary to control uses which have a direct and significant impact on coastal waters." See FINAL ENVIRONMENTAL STATEMENT, *supra* note 27.

Independent of state regulation, the Army Corps of Engineers also has the power to issue 404 permits, which are different than CUP permits, for those activities that affect wetlands and navigable waters.³⁹ The Clean Water Act (“CWA”) delegates authority to issue 404 permits to the Corps, but ultimately, the Environmental Protection Agency (“EPA”) retains final authority.⁴⁰ Statutory law and the Administrative Code provisions provide that certain activities do not require permits under the 404 scheme.⁴¹ Prior to its implementation, the coastal use permitting process in Louisiana relied heavily on the existing 404 permitting process, creating overlap between the state and federal programs.

The path to approval for SLCRMA was rough. Initially, federal authorities completely rejected Act 705, the Louisiana legislature’s first proposal for the statewide program.⁴² Early legislative debate surrounding the final version of the Act focused on defining the Louisiana coastal zone and determining the relative roles of the state and local governments in implementing the program—an issue that continues to plague the wetlands today.⁴³ After amendments and federal approval, on July 10, 1978, Governor Edwin Edwards signed Act 361, and SLCRMA became law.⁴⁴ The statute established the Coastal Commission, which is composed of twenty-three members, eleven of which represent the parishes in the coastal zone. The governor appoints the remaining members of the Commission from interest groups and the Department of Natural Wildlife and Fisheries.⁴⁵ The Coastal Commission’s purpose is to serve as an appeals body for issues

39. See Julie D. Livaudais, *Conflicting Interests in Southern Louisiana’s Wetlands: Private Developers Versus Conservationists, and the State and Federal Regulatory Roles*, 56 TUL. L. REV. 1006, 1012-13 (1982). In contrast to OCM management, the Corps of Engineers is continuously monitored, particularly by citizen groups, for abidance to the 404 permitting. A citizen suit provision exists within the act where individuals and environmental groups may participate in permit decisions and challenge permit decisions. See *supra* pp. 1014-15.

40. Margaret Strand & Lowell M. Rothschild, *What Wetlands are Regulated? Jurisdiction of the §404 Program*, 40 ENVTL. L. REP. 10372, 10373 (2010).

41. For example, LA. ADMIN. CODE tit. 43, pt. I, § 723(B)(7)(a) (2017), which governs agricultural, forestry, and aquacultural activities, exempts activities that do not require a permit from the U.S. Army Corps of Engineer and meet the federal requirements for such activities.

42. *The State and Local Coastal Resources Management Act of 1978*, LOUISIANA COASTAL LAW 1978, at 1, <https://perma.cc/YY4Z-PW5L> [hereinafter LA. COASTAL LAW]. Part of the reason for the rejection was the definition of the boundary that was included in the coastal zone.

43. U.S. DEP’T OF COM. & LA. DEP’T OF NAT. RESOURCES, LOUISIANA COASTAL RESOURCES PROGRAM—FINAL ENVIRONMENTAL IMPACT STATEMENT 2-3 (1980) [hereinafter LA. ENVIRONMENTAL STATEMENT].

44. See LA. COASTAL LAW, *supra* note 42.

45. *Id.* at 2.

concerning CUPs.⁴⁶ However, the Coastal Commission has not been widely utilized as an appellate body within coastal zone regulation.⁴⁷ SLCRMA created a new administrative body for Louisiana, rooted in the Coastal Commission, but the Commission does not play as significant a role as anticipated by the original Act.

B. Implementation of the State and Local Coastal Resources Management Act

In creating the CZM authority, Louisiana had to determine which agency and governing body would head the task of issuing permits and regulating those users that received permits. The result was a mutual state and local initiative through which local parishes can issue permits for activities that occur within their designated operational area. In the Parish Coastal Zone lawsuits, both the state and local parishes have asserted their interests, illustrating the tension in the statute. In focusing on implementation, SLCRMA narrows in on uses of state and local concern.

1. Regulating Uses of State Concern

SLCRMA's objectives are illustrated through broad statements of public policy.⁴⁸ SLCRMA lists twelve goals to be achieved through the Coastal Use Guidelines,⁴⁹ one of which is to create a separate management authority at the state level for regulating coastal uses.⁵⁰ Originally, primary administration of the Act was under the authority of the Department of Transportation and Development, but SLCRMA specified that the governor could order that administrative functions be transferred to the Department of Natural Resources ("DNR") or the Department of Natural Wildlife and Fisheries.⁵¹ This transfer of authority created the Office of Coastal Management ("OCM"), which is currently the administrative body at the state level responsible for issuing CUPs.⁵²

46. *Id.*

47. See WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 13:14 (2013). See also LA. ADMIN. CODE. tit. 43, pt. I § 723 (2017).

48. See LA. COASTAL LAW, *supra* note 42, at 2.

49. Act 361 lays these goals out in Section 213.8. LA. ENVIRONMENTAL STATEMENT, *supra* note 43, at 44-45.

50. See FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 3.

51. See LA. COASTAL LAW, *supra* note 42, at 2.

52. *Id.* See also *Applying for a Coastal Use Permit*, LA. DEP'T OF NAT. RESOURCES, <https://perma.cc/5FCQ-6WRK> (last visited Aug. 28, 2017) [hereinafter *Applying for a CUP*].

SLCRMA regulates activities as uses in the coastal zone and determines whether those uses are of state or local concern.⁵³ The determination of whether an activity is of state or local concern remains with the local governments but must be in accordance with certain criteria.⁵⁴ The definition of “use” under SLCRMA is any activity that has a direct and significant impact on coastal waters.⁵⁵ In determining which uses are prohibited, the legislature intended to target the most common alterations of wetlands.⁵⁶ Any person is able to submit a request to DNR for a formal determination as to whether a proposed activity will require a permit.⁵⁷ Further, OCM, during its review of coastal use permits, works with the permit applicant to minimize the impact to coastal habitats or to ensure that they are avoided.⁵⁸ In order to receive a permit, a prospective permittee first submits an application to either OCM or a local government with an approved program.⁵⁹ Once received, OCM must give public notice of the permit application and distribute copies to the local government in whose jurisdiction the use is going to occur.⁶⁰ Within thirty days of the issuance of public notice or within fifteen days after a public hearing, the permitting body must decide whether to approve or deny the permit. Once decided, the applicant, or any other aggrieved party, such as the local government or an affected local, state, or federal agency, has thirty days to appeal the decision to the Coastal Commission.⁶¹ The procedure for application and issuance of coastal use permits at the state and local level is clear, eliminating the possibility that the oil companies are not aware of the guidelines and pointing to a gap in enforcement.

53. In a recent compilation of wetlands litigation on the Coastal Zone Management Act in Louisiana, the reporter lists some cases that concern SLCRMA. *See also* WANT, *supra* note 47.

54. LA. ADMIN. CODE. tit. 43, pt. I, § 723(F)(1)(a) (2017).

55. LA. REV. STAT. § 49:214.23(13) (2000) defines use as “any use or activity within the coastal zone which has a direct and significant impact on coastal waters.”

56. These listed activities include draining, dredging, and filling of wetlands, modification of the hydrologic regime, highway construction, mining and mineral extraction, as well as water pollution. *See* BICKFORD & RIDLON II, *supra* note 38, at 5.

57. *See* WANT, *supra* note 47.

58. DEP’T OF NAT. RESOURCES, A COASTAL USER’S GUIDE TO THE LOUISIANA COASTAL RESOURCES PROGRAM II-3 (2015).

59. *See* LA. COASTAL LAW, *supra* note 42, at 4.

60. *Id.*

61. *Id.* at 5.

2. Regulating Uses of Local Concern

Local governments may adopt their own coastal management programs, which are responsible for issuing permits. Today, Louisiana's coastal zone encompasses twenty parishes.⁶² Ten Louisiana parishes have implemented approved coastal management programs.⁶³ If the activity is within the parish's sphere of authority, then the parish program's approval is sufficient, and the state does not have to approve the permit.⁶⁴

A local government with an approved program may issue a CUP for uses of local concern conducted within its coastal zone.⁶⁵ In general, areas of local concern are more isolated than those of state concern.⁶⁶ A prospective permittee may submit an application for uses that are of local concern within an area with an approved local program, and the local permitting body has the right to make the initial determination of whether or not the permit should be granted.⁶⁷ Uses of local concern include dredge and fill projects that do not intersect more than one body of water, thus, remaining local in scope.⁶⁸ The Administrative Code lays out guidelines for determining when a use is either one of state or local concern.⁶⁹ Further, the Code gives deference to local uses. When there is an overlapping use, raising proportionate state and local concerns, then the use should be

62. In 2012, the Louisiana legislature passed House Bill 656 (Act 588) which modified the boundaries of the coastal zone. The zone still includes twenty coastal zone parishes. See *Coastal Zone Boundary*, DEP'T OF NAT. RESOURCES, <https://perma.cc/M5RC-XL7M> (last visited Aug. 28, 2017).

63. Those parishes include: Cameron, Calcasieu, Jefferson, Orleans, Lafourche, Plaquemines, St. Bernard, St. James, St. Tammy, and Terrebonne. See WANT, *supra* note 47.

64. *Local Government Participation in the Coastal Zone Management Program*, LA. DEP'T OF NAT. RESOURCES, <https://perma.cc/9DAP-LBDL> (last visited Aug. 28, 2017).

65. LA. REV. STAT. ANN. § 49:214.30(A)(1) (2010); see also *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc. et al*, 64 F. Supp. 3d 872, 878 (E.D. La. 2014).

66. See Jessen, *supra* note 9, at 141.

67. LA. REV. STAT. § 49:214.30(C)(1) (2010).

68. See Livaudais, *supra* note 39, at 1033.

69. LA. ADMIN. CODE tit. 43, pt. I, § 723 (2017). Besides those uses that are classified as state or local in SLCRMA, the permitting agency must consider the following factors in determining the classification of a use: the relationship of the proposed use to a particular use classified in the Act, and if there is an overlap between that of state and local concern, then there should be a deference to a local concern unless the act is carried out with state funds, involves the use of or has significant impacts on state or federal lands, is mineral or energy development, affects Louisiana's offshore jurisdiction, will have major effects on water flow, or has significant interparish or interstate impacts. LA. ADMIN. CODE tit. 43, pt. I, § 723(F)(3) (2017).

classified as a use of local concern.⁷⁰ DNR may review and reverse a decision of a local coastal program.⁷¹

C. A Trilogy Continued: Third Lawsuit by a Public Entity Against Oil Companies

The series of suits filed by the coastal parishes against the oil companies follows suits non-private individuals have brought in recent years against oil companies for activities conducted in the coastal zone.⁷² These suits have not reached resolution, and Louisiana citizens are still looking for guidance on how, and if, oil companies will be held responsible for damage to the coastal zone.⁷³ The Parish Coastal Zone Lawsuits are unique because the plaintiffs cited SLCRMA as the cause of action for the oil companies' violations.⁷⁴ Due to the multiplicity of filings in the Parish Coastal Zone Lawsuits, this comment will focus on Jefferson Parish's petitions, in order to highlight the parish's claims and to focus on the inquiry of whether Jefferson Parish's suit is worthy of judicial determination.

In Jefferson Parish's complaint for the Barataria region, the Parish alleged that the oil companies had violated SLCRMA and, thereby, caused damage to land and water bodies located in the Coastal Zone.⁷⁵ Specifically, the petition alleged that the oil companies had drilled for oil in violation of CZM laws and that they had carried out activities without the required CUP.⁷⁶ Those activities included use of waste pits, discharge or disposal

70. LA. ADMIN. CODE. tit. 43, pt. I, § 723 (2017).

71. *Id.*

72. In recent years, the board of commissioners for the Southeast Louisiana Flood Protection Authority-East filed suit against one hundred oil, gas, and pipeline companies. See Taylor Boudreaux, *Legislatively Capping an Energy Lawsuit: Problems Posed by Stripping a Pending Suit Against Ninety-Seven Oil and Gas Companies*, 76 LA. L. REV. 959, 961 (2016); see also Bob Marshall, *Levee Board Argues in Federal Court for Revival of Landmark Lawsuit*, THE LENS (Feb. 29, 2016), <https://perma.cc/Z6CT-X4DY>. Terrebonne Parish School Board filed suit against oil companies for activities conducted in the wetlands pursuant to a mineral lease. See Ryan M. Seidemann, *Louisiana Wetlands and Water Law: Recent Jurisprudence and Post Katrina and Rita Imperatives*, 51 LOY. L. REV. 861, 866 (2005); see also *Terrebonne Parish School Bd.*, 893 So. 2d 789.

73. See Mark Schleifstein, *Jefferson, Plaquemines Parishes File Wetland Damage Lawsuits against Dozens of Oil, Gas and Pipeline Companies*, NOLA, Apr. 27, 2017, <https://perma.cc/D7WH-Z38V>. Bobby Jindal, as well as the Louisiana legislature, fought vehemently against that suit, eventually instituting Act 544 into law. The thrust behind Act 544 was that the levee board was the improper body to file the lawsuit. See Boudreaux, *supra* note 72, at 962.

74. Petition for Damages to the Jefferson Parish Coastal Zone, *Canlan Oil*, No. 732-771, at 2-3.

75. *Id.*

76. *Id.*

of oil field waste, and exceeding the permitted uses of the issued coastal use permits.⁷⁷ In answering one of Jefferson Parish's petitions, the defendant oil companies raised three dilatory exceptions: vagueness and/or ambiguity, improper cumulation and improper joinder, and prematurity for the failure to exhaust administrative remedies.⁷⁸ On August 1, 2016, the 24th Judicial District Court issued judgment on the defendants' third exception for failure to exhaust administrative remedies, finding that the lawsuit was premature, and proceeded to dismiss the case without prejudice.⁷⁹ Since then, the state, under the guidance of Governor John Bel Edwards, has declared that it will intervene in the lawsuit.⁸⁰ The future timeline of the Parish Coastal Zone Lawsuits depends on the Louisiana Supreme Court's decision on whether to grant a writ of certiorari to the oil companies. A determination by the Supreme Court should clarify the meaning of continuing and non-continuing uses and whether exhaustion of administrative remedies is a necessary step.

II. CONTINUING AND NON-CONTINUING USES AS HARMS

For those uses that are permitted in the coastal zone, there is a difference between continuing and non-continuing uses. Especially for coastal management, those uses that began lawfully prior to the implementation of the CUP process may be exempt from abiding by regulations within SLCRMA. This is the concept of "grandfathered" uses that are not treated uniformly throughout the coastal management law.⁸¹ If the oil companies' violations occurred one-time, prior to the implementation of the CUP process, then they may not be held accountable. Further, issues of prescription arise where activities are no longer ongoing and are no longer contributing to harm. This issue weaves into the broader problem of a lack of guidance in the statute for whether uses that are non-conforming must be regulated according to certain administrative steps.

77. *Id.* at 8-12.

78. State of Louisiana's Memorandum in Opposition to Defendant's Exceptions to the State of Louisiana's Petition for Intervention, *Atlantic Richfield*, No. 732-768.

79. *Id.*

80. Jeff Adelson, *Governor Edwards Instructs Administration to Intervene in Parish Coastal Suits Against Oil and Gas Companies*, *THE ADVOCATE*, Apr. 11, 2016, <https://perma.cc/RL66-ZNH6>.

81. LA. REV. STAT. § 49:214.36(D) (2014).

A. Conforming Through Acquiescence: Substituting a Non-Conforming Use

Although CZM laws provide strict guidelines for what may or may not occur within the coastal zone, there is a possibility that a use that is not in accordance with the guidelines may become accepted either through a statutory exception or governmental acquiescence. For those users that have obtained a coastal use permit, the user must abide by the terms and conditions of that permit.⁸² As an exception, the Administrative Code, in its general provisions, defines in-lieu permits, meaning activities which usually require a CUP do not require one.⁸³ The second exception is a grandfathered use: a user lawfully commenced the activities *prior* to the implementation of the CUP process and does not require a CUP.⁸⁴ This provision creates a category of uses, which may have been prohibited after the CUP process was in effect and yet did not require CUPs. Based on these exceptions, a coastal user must seek review through administrative processes prior to commencing any coastal activity to either determine whether that activity is lawful under the provisions or whether the use would be subject to regulation by another division. Because of the overarching national interest, the federal government must certify that the proposed activity will be conducted in a manner that is consistent with SLCRMA.⁸⁵ Either of these designations would require administrative action to ensure that the uses are conforming within the exceptions. By implicitly requiring an administrative step, the law as it applies to conforming and non-conforming uses hints that certain steps must be taken prior to seeking judicial remedy.

There is a gap in the requirements for the uses that fall under a statutory exception but continued to occur through the beginning of the implementation of the CUP process. SLCRMA and the Administrative Code do not provide a definition for those activities that existed prior to the implementation of the CUP process and continued to occur.⁸⁶ Read in tandem with SLCRMA, the Administrative Code distinguishes between

82. *Id.*

83. "Coastal use permits shall not be required for the location, drilling, exploration and production of oil, gas, sulphur and other minerals subject to regulation by the Office of Conservation of the Department of Natural Resources as of January 1, 1979." LA. ADMIN. CODE, tit. 43, pt. I, § 723(A)(3) (2017).

84. LA. ADMIN. CODE, tit. 43, pt. I, § 723(B)(8)(a) (2017).

85. In a CUP issued to Florida Exploration Co. in the Jefferson Parish operational area, the permittee also submitted an application to the Army Corps of Engineers, certifying that the proposed activity was within the guidelines of the Louisiana Coastal Management program. *See* LA. DEP'T OF NAT. RESOURCES, Coastal Use Permit 821271 (issued Oct. 15, 1982).

86. These permits are often referenced to as in-lieu or "grandfathered" permits although that specific language does not exist in the statute.

continuing and non-continuing uses for coastal use permit purposes.⁸⁷ Continuing uses are uninterrupted, whereas non-continuing uses are conducted on a one-time basis.⁸⁸ In order for a person's activities to be a prohibited use, as one that required a permit, it must be first identified as such.

Jefferson Parish's original petition included a comprehensive list of all CUPs that had been issued within the parish's Operational Area since the inception of SLCRMA.⁸⁹ Some of the flagged permits originated fifty to sixty years ago.⁹⁰ One of the violating permittees, Chevron Oil Company, applied for a CUP to dredge certain canals in 1983, five years after the implementation of SLCRMA and three years following implementation of the permitting process. By 1984, the follow-up investigation for Chevron's permit indicated that the project had been terminated and that the permittee had met all of the permit conditions.⁹¹ The investigating body was still concerned about some aspects of the application.⁹² The coastal resource analyst assigned to the project requested a field investigation of Chevron's site, prompted by Chevron's potential for disruptive work in the canal system.⁹³ Despite the company's proposed use or activity, local authorities still signed off on the project as terminating successfully.⁹⁴ Chevron's activities are a non-continuing use since the activity was conducted and completed on a one-time basis. However, there must be a rationale for why Chevron's permit was included in Jefferson Parish's petition. The petition

87. LA. ADMIN. CODE tit. 43, pt. I, § 723 (2017). Both continuing and noncontinuing uses are permitted uses under the Administrative Code.

88. "Continuing uses are activities which by nature are carried out on an uninterrupted basis, examples include shell dredging and surface mining activities, projects involving maintenance dredging of existing waterways, and maintenance and repair of existing levees;" "Noncontinuing uses are activities which by nature are done on a one-time basis, examples include dredging access canals for oil and gas well drilling, implementing an approved land use alteration plan, and constructing new port or marina facilities." LA. ADMIN. CODE tit. 43, pt. I, § 723(C)(9)(c)(i)-(ii) (2017).

89. See Petition for Damages to the Jefferson Parish Coastal Zone, *Canlan Oil*, No. 732-771, at 9.

90. Geske, *supra* note 12.

91. See LA. DEP'T OF NAT. RESOURCES, Coastal Use Permit 19831461 (issued Sept. 3, 2009).

92. The investigation cited occurred on August 7, 1984. The investigation report listed Steven Chustz as the Coastal Resource Analyst and Rocky Hinds as the investigator on Chevron's project. See *id.* Most permits issued after 1978 may be found in the Department of Natural Resources database.

93. See Coastal Use Permit 821271, *supra* note 85.

94. See Coastal Use Permit 19831461, *supra* note 91. Most permits issued after 1978 may be found in the Department of Natural Resources database.

does not isolate the specific permits that were allegedly in violation of the coastal management laws.⁹⁵

The categorization of “use” under SLCRMA does not contain a definition of a “new use,” yet Jefferson Parish included this term in its petition.⁹⁶ The petition addresses the existence of a waste pit, alleging that the pit was caused by the actions of the defendant oil companies but conceding that the companies’ actions may have begun prior to the passage of SLCRMA. The petition further claims that the continued existence of the waste pit constituted a “new use” for which the user must get another permit.⁹⁷ Jefferson Parish’s characterization of the continued existence as a “new use” is misleading. Under the coastal management laws, there is no process by which an existing use can transform into a new use. By the Parish alleging the new use in such a way, the permitting body can shy away from any responsibility for monitoring the activities of coastal users.

B. Potential for Prescription of Claims

Regardless of the determination of whether a “harm” has occurred, a person who is claiming harm must bring that claim within a certain period of time. Under SLCRMA, claims of CUP violations do not have a clear prescriptive period.⁹⁸ If the plaintiffs in the Parish Coastal Zone Lawsuits are seeking damages, instead of restorative efforts or injunctions, then the rule of prescription should be even more narrowly construed. Due to the lack of case law on SLCRMA, there is no guidance on the issue of when prescription and the duty to abide by governmental regulations collide. The prescriptive period for violations of the duty to restore may also provide a blueprint for longstanding CUP claims.

1. Nonconforming Grandfathered Claims

Nonconforming uses that were grandfathered in, as if they were permitted, may still cause harm to the coastal zone and would be a potential source of damages for a plaintiff. In its petition, Jefferson Parish contends

95. See generally *Petition for Damages to the Jefferson Parish Coastal Zone, Canlan Oil*, No. 732-771, at 9.

96. *Id.*

97. *Id.*

98. Prescription is a civil law term that designates a period of time after which a substantive right is extinguished. The common law equivalent is statute of limitations. See Wm. Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice-Of-Law Regimes Approach Statute of Limitations*, 65 SYRACUSE L. REV. 491, 526 n.189 (2015). Because this comment primarily focuses on Louisiana law, prescription will be used instead of the common law term. However, the terms are practically synonymous.

that, even if the defendants' activities occurred prior to the implementation of the CUP process, the company's activities were unlawful under different statewide orders.⁹⁹ These statewide orders govern permits for drilling of oil wells and the existence of pits.¹⁰⁰ However, when a party is conducting uses in the coastal zone in an unlawful manner, the issue of prescription of those claims arises.

Prescription is interrupted when the cause of action is not known nor reasonably knowable by the plaintiff.¹⁰¹ In considering the granting of a *contra non valentem* exception, the court will deem the plaintiff to know the information he could find out through reasonable diligence.¹⁰² In *Marin v. Exxon Mobil Corp.*, a case concerning dredging of canals which was based in a breach of contract for a mineral lease, the Louisiana Supreme Court found that the claims for damage caused to a landowner's property were subject to a one-year prescriptive period.¹⁰³ Although Jefferson Parish's claims, along with the other parishes in the Coastal Zone Lawsuits, are based in a statutory violation, the parishes are alleging that the defendants have caused damage to the coastal zone by failing to adhere to the coastal use guidelines and the conditions within their coastal use permit.¹⁰⁴ Jefferson Parish's specific request for relief in damages supports an underlying tort theory. For example, the plaintiff alleges that the defendants violated SLCRMA through the construction and use of unlined earthen waste pits.¹⁰⁵ This is a prohibited use under the statute, but the plaintiff's petition does not allege when the waste pit came into existence, merely stating that no matter the date, its existence would be considered illegal.¹⁰⁶ Without an applicable prescriptive period of claims for violation of CUPS, the harm must be ongoing, and it is unclear that the plaintiffs have alleged the continuing harm sufficiently in their complaint.

99. See Petition for Damages to the Jefferson Parish Coastal Zone, *Canlan Oil*, No. 732-771, at 14. The petition states that the activities were illegal under Statewide Orders 29, 29-A, and 29-B, as well as various field wide orders and orders of the Louisiana Stream Commission.

100. See *id.* (Statewide Order 29-B).

101. *Id.* This is known as the doctrine of *contra non valentem*, a discovery rule, which should only be applied in extreme circumstances.

102. See *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 246 (La. 2010). The *contra non valentem* doctrine is unique to Louisiana. The doctrine is juridically created and prevents the running of prescription against those who are not able to bring suit. See HON. MAX TOBIAS ET AL., LOUISIANA CIVIL PRETRIAL PROCEDURE § 6:98 (2016-2017 ed.).

103. See *Marin*, 48 So. 3d at 244.

104. Petition for Damages to the Jefferson Parish Coastal Zone, *Canlan Oil*, No. 732-771, at 2-3.

105. *Id.* at 9.

106. Petition for Damages to the Jefferson Parish Coastal Zone, *Canlan Oil*, No. 732-771, at 2-3.

2. Prescription of Legal Non-Conforming Uses

In the cases involving legal non-conforming uses, the harm for which a plaintiff is suing is non-abidance by coastal use permitting laws. The only guidance in the statute is that once a coastal use permit has been issued, the user has two years to initiate a CUP.¹⁰⁷ Further, the user has five years from that issuance to complete the use.¹⁰⁸ In general, interpretation of prescriptive statutes should be construed in favor of maintaining the party's claim.¹⁰⁹

In the Parish Coastal Zone Lawsuits, the plaintiffs' allegations in their petitions are that the defendants failed to comply with state regulations, but the defendants' failure to comply is inevitably intertwined with harm caused to the coastal zone.¹¹⁰ Damages are not a requirement for a valid cause of action, yet all the parishes that are plaintiffs alleged them.¹¹¹ For those permits that were granted by OCM or a local permitting body, when the user did not abide by the conditions of the permit, La. R.S. 49:214.36 does not specify a prescriptive period for a permitting body to bring an action against a violator of that CUP.¹¹² The prescriptive period for tort claims may be relevant for violations of CUPs. For tort claims, the prescriptive period commences on the day that the tortfeasor causes the harm and runs for one year.¹¹³ In Chevron's CUP file, under special permit conditions, the application provides that the permit expires within two years of the Secretary's signature.¹¹⁴ At some point, the government's claim is stale, unless they are able to prove that the activity has continued to cause harm each day since the expiration of the permit.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES: A NECESSARY STEP?

The 24th Judicial District Court in the Jefferson Parish case, in its original adjudication, did not confront the question of whether the plaintiff was required to exhaust their administrative remedies prior to bringing suit

107. LA. ADMIN. CODE, tit. 43, pt I, § 723(C)(9)(d) (2017).

108. *Id.*

109. *See Marin*, 48 So. 3d at 245.

110. *See* Petition for Damages to the Jefferson Parish Coastal Zone, *Canlan Oil*, No. 732-771, at 14. "Defendants have failed to comply with numerous provisions of the state coastal zone management program, as previously alleged, and thus they are liable under the CZM Laws for any damages resulting from these violations."

111. *See* Petition for Damages to the Jefferson Parish Coastal Zone, *Canlan Oil*, No. 732-771, at 14.

112. LA. REV. STAT. § 49:214.36 (2014).

113. LA. CIV. CODE art. 3492 (2017).

114. *See* Coastal Use Permit 19831461, *supra* note 91.

against the oil companies.¹¹⁵ Because the defendants filed an exception for prematurity, the court did not have to decide whether there was a requirement of exhaustion based on the merits of the suit.¹¹⁶ The district court initially granted the exception.¹¹⁷ Exhaustion of administrative remedies is a standing doctrine of administrative law, and a defendant may plead in an exception for prematurity that the suit is not ready for judicial determination because the plaintiff has failed to exhaust his or her administrative remedies.¹¹⁸ In order for the defendant to be successful, under Louisiana law, he or she must first show the availability of the administrative remedy, and then the burden shifts to the plaintiff to show that the proper steps have been taken or that the remedy is inadequate.¹¹⁹

A. Space Occupied by the Doctrine

In *Jefferson Parish v. Atlantic Richfield et. al.*, the defendants plead a dilatory exception of prematurity for failure to exhaust administrative remedies. The effect of La. R.S. 49:214.36 is two-prong. The statute creates a right and a cause of action for state and local governments to seek judicial enforcement of violations of Louisiana CZM laws and sets out enforcement steps for an administrative agency to take against violators of the act.¹²⁰ The exception of prematurity for failure to exhaust administrative remedies claims that a judicial cause of action has not come into existence because the plaintiff has not met a prerequisite condition before asserting the claim.¹²¹ In its original disposition of the Jefferson Parish suit, the 24th

115. In its original reasons for judgment, the court in the 24th JDC found that the local parish had not exhausted its administrative remedies against the oil companies. See Reasons for Judgment, *Atlantic Richfield*, No. 732-768. The reversal of the original opinion also does not answer the question of whether exhaustion of administrative remedies was necessary prior to filing suit.

116. See Defendant's Exceptions for Prematurity, *Atlantic Richfield*, No. 732-768.

117. See Reasons for Judgment, *Atlantic Richfield*, No. 732-768. In November, the 24th JDC reversed its original decision. See Schleifstein, *Jefferson Lawsuit*, *supra* note 15.

118. See FRANK L. MARAIST, LOUISIANA CIVIL LAW TREATISE, CIVIL PROCEDURE § 6:6, n.27 (2d ed. 2008).

119. *Id.*

120. *Parish of Plaquemines*, 64 F. Supp. 3d at 890-91; See Boudreaux, *supra* note 72, at 985-86.

121. *Floyd v. East Bank Consol. Fire Protection Dist. for Parish of Jefferson*, 40 So. 3d 160, 163 (La. Ct. App. 2010) (citing LA. CODE CIV. PROC. art. 926(A)(1) (2010); *Steeg v. Lawyers Tit. Ins. Corp.*, 329 So. 2d 719, 720 (La. 1976)). The dilatory exception differs from a peremptory exception. The purpose of a peremptory exception is to declare that the plaintiff's action is legally nonexistent or effectively barred by law. The peremptory exception tends to dismiss or defeat the action. See *Oakville Community v. Plaquemines Parish*, 942 So. 2d 1152, 1155 (La. Ct. App. 2006) (citing LA. CODE CIV. PROC. art. 923 (2006)).

Judicial District Court found that the Parish had not satisfied its burden of proving that it was entitled to judicial relief under La. R.S. 49:21.36, because it failed to show that “any administrative remedy [was] irreparably inadequate,” and thus, required judicial enforcement.¹²² Although the district court later reversed that decision, the court’s adjudication was not based on availability of administrative remedies.¹²³ If the court were to face the merits of that issue, its central focus would be, first, if it is proper to address the exhaustion of administrative remedies doctrine and, second, whether there is a prioritization of remedies under the statute so that the plaintiffs must seek some remedies before others.

1. The Dilatory Exception for Prematurity

In the Parish Coastal Zone Lawsuits, the defendant’s pleading of the dilatory exception for prematurity is relevant to an inquiry of whether the parishes’ suits are properly before the court. The judge must determine whether the case is ready for adjudication. The exception is a tool for parties to highlight the inadequacy of the suit for failure to take certain administrative steps.¹²⁴

The analysis begins with determining whether the doctrine of exhaustion of administrative remedies can and should be applied to the coastal use permitting process. In general, when courts are faced with an issue involving an administrative agency, the court considers whether the agency’s action was final and whether the person bringing suit has exhausted his or her administrative remedies.¹²⁵ In Louisiana, a defendant pleading the dilatory exception of prematurity may do so in cases where the pertinent law provides a procedure for the claimant to seek administrative relief before seeking judicial review.¹²⁶ In *Steeg v. Lawyers Title Insurance Corporation*, competing insurance companies fought over the issue of

122. Reasons for Judgment, *Atlantic Richfield*, No. 732-768. In its opinion, the district court cited the requirement of consistency between state and local divisions, the requirement for a field surveillance program, and the authority of the permitting body to issue cease and desist orders as well as suspend, revoke, or modify, coastal use permits.

123. Instead, the court reversed and granted the plaintiffs’ motion for a new trial. See BROWN & FERATT, *supra* note 18.

124. See Defendant’s Memorandum in Support of Dilatory Exception of Prematurity for Non-Compliance with La. Rev. Stat. § 42:263, *Atlantic Richfield*, No. 732-768. In their memorandum, the defendants argued that the lawsuit should be dismissed because the parish failed to obtain the Attorney General’s approval as required by LA. REV. STAT. § 42:263.

125. See WILLIAM F. FUNK & RICHARD H. SEAMON, *EXAMPLES AND EXPLANATIONS: ADMINISTRATIVE LAW* 261 (3d ed. 2009).

126. See CATHERINE PALO, *LOUISIANA SUMMARY JUDGMENT AND RELATED TERMINATION MOTIONS* § 2:97 (2016 ed.).

prematurity for failure to exhaust administrative remedies.¹²⁷ Similar to the initial Jefferson Parish decision, the trial court found that the plaintiffs failed to exhaust their administrative remedies prior to filing suit.¹²⁸

The Supreme Court in *Steeg* found that the burden shifts to the plaintiff to show that all administrative remedies are irreparably inadequate. This circumstance is exceptional.¹²⁹ An administrative remedy is irreparably inadequate when the harmful activity causes irreparable injury.¹³⁰ The Supreme Court in *Steeg* declined to adopt this argument and reserved the right to determine administrative disputes for the administrative bodies with original jurisdiction over such disputes.¹³¹ Yet, the *Steeg* case came before the Supreme Court prior to the statewide implementation of the CUP process. According to the *Steeg* Court's reasoning, it was clear that the legislature intended for administrative remedies to be exhausted in the area of insurance law.¹³² Regulation through permitting is similar in that there is a clear sense of public policy that supports the need for legislation.¹³³ This notion of public policy translates to a strong administrative presence for both OCM and the local permitting bodies.¹³⁴ SLCRMA emphasizes that the regulatory and administrative procedure should be the guiding light, not judicial enforcement.¹³⁵

2. Finding a Right of Action

By granting a right of action through La. R.S. 49:214.36 to certain persons aggrieved by violations, the legislature made those who conduct activity in the coastal zone susceptible to suit. Simply because the statutory language grants the right does not necessarily mean that the cause of action

127. *Steeg*, 329 So.2d at 720.

128. *Id.*

129. *Id.* (citing *O'Meara v. Union Oil Co.*, 33 So. 2d 506, 510 (La. 1947)). In the 24th Judicial District Court's opinion, the court found that the plaintiff's assertion that the administrative remedy was inadequate because it did not provide for an award of civil damages and not persuasive. The concern of whether issue of damages may be addressed prior to administrative remedies is discussed *infra*.

130. *Id.* at 721 (“[J]udicial proceedings may sometimes be used when irreparable injury might otherwise result.”).

131. *Id.* at 722.

132. *Id.*

133. LA. REV. STAT. § 49:214.22(2)(b) (2006). “The legislature declares that it is the public policy of the state: . . . To express certain regulatory and non-regulatory policies for the coastal zone management program. Regulatory policies are to form a basis for administrative decisions to approve or disapprove activities only to the extent that such policies are contained in the statutes of this state or regulations duly adopted and promulgated pursuant thereto.”

134. *See Applying for a CUP*, *supra* note 52.

135. *Id.*

is always in existence. Determining at what point that right of action comes into existence, triggering a cause of action, is vital in understanding whether the suits will achieve any success.

A reading of the plain language of La. R.S. 49:214.36(D) leads to the conclusion that state and local governments in Louisiana have a right of action against persons who do not abide by CUP regulations.¹³⁶ The statute states:

The secretary, the attorney general, an appropriate district attorney, or a local government with an approved program *may* bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the coastal zone for which a coastal use permit has not been issued when required or which are not in accordance with the terms and conditions of a coastal use permit.¹³⁷

The Secretary of the Department of Natural Resources and the Attorney General are authorized to bring injunctive relief for both violations of a coastal use permit and failure to obtain a coastal use permit when needed.¹³⁸ In addition, the Secretary of DNR and each parish with an approved local program have the authority to conduct field surveillance, issue cease and desist orders, and suspend, revoke, or modify permits.¹³⁹ In La. R.S. 49:214.36, the provision authorizing suspension, revocation, or modification of CUPs precedes the provision authorizing judicial enforcement.¹⁴⁰ The statute limits the judicial enforcement remedy to state officers and local governments while excluding other entities or private individuals. However, La. R.S. 49:214.36 expands the availability of an action through breach of contract or in pursuit of other administrative remedies.¹⁴¹ The court in the Jefferson Parish case concluded that it is the

136. In a decision over whether the federal district court had diversity jurisdiction in *Plaquemines Parish v. Total Petrochemical* case, Judge Zainey remanded to the state district court but, in dicta, suggested that the statute could be reasonably interpreted as authorizing the Parish to file suit to enforce the Coastal Zone Management laws in Louisiana. 64 F. Supp. 3d at 890. *See also* Boudreaux, *supra* note 72, at 991.

137. LA. REV. STAT. § 49:214.36(D) (2014) (emphasis added).

138. *Id.*

139. *See also* Boudreaux, *supra* note 72, at 985.

140. *See* LA. REV. STAT. § 49:214.36 (C), (D) (2014), respectively.

141. LA. REV. STAT. § 49:214.36(O)(4) (2014) states,

Nothing in this Section shall prevent or preclude any person or any state or local governmental entity from enforcing contractual rights or from pursuing any administrative remedy otherwise authorized by law arising from or related to a state or federal permit issued in the coastal area pursuant to R.S. 49:214.21 et seq., 33 U.S.C. §1344 or 33 U.S.C. §408.

burden of the plaintiff to show that irreparable injury would result, and thus administrative remedies are not sufficient.¹⁴² It is possible for the law on exhaustion of administrative remedies to be laid out more clearly.¹⁴³

B. Availability of Remedies

If the district courts are confronted with the issue of availability of administrative remedies for state and local governments, the first source to consider is enabling legislation, followed by the Administrative Code. Administrative agencies, such as DNR, may only operate based on the powers they have been delegated through statute.¹⁴⁴

1. Suspending Action

La. R.S. 214.36(C) enables the permitting body to suspend a permit for a permittee.¹⁴⁵ The Administrative Code specifies the procedure for suspending a permit.¹⁴⁶ A permitting body may suspend a permit if one of three requirements is satisfied: the permittee has failed to comply with the terms and conditions or modifications of the permit; the permittee has submitted false or incomplete information with the permit; or the permittee has failed or refused to comply with a lawful order or request on behalf of the permitting body.¹⁴⁷ The Jefferson Parish petition did not specify whether these actions were taken in response to the alleged violating activities. Rather, the plaintiffs' main contention is that, even if remedies exist, all remedies are irreparably inadequate.¹⁴⁸

La. R.S. 49:214.36 does not specify whether the uses for which a state or local entity is allowed to bring suit must be either a state or local use. Under the language of La. R.S. 49:214.36, it is unclear whether the doctrine of exhaustion of administrative remedies applies equally to state and local permitting bodies.¹⁴⁹ If the doctrine does not apply equally, then

142. See Reasons for Judgment, *Atlantic Richfield*, No. 732-768.

143. For example, see *McAlister v. County of Monterey*, 147 Cal. App. 4th 253, 274 (Cal. Ct. App. 2007) ("Under the doctrine of administrative exhaustion, the long-standing general rule is this: 'where an adequate administrative remedy is provided by statute, resort to that forum is a 'jurisdictional' prerequisite to judicial consideration of the claim.'").

144. PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW: CASES AND COMMENTS 33 (11th ed. 2011).

145. See LA. REV. STAT. § 49:214.36(C) (2014).

146. LA. ADMIN. CODE tit. 43, pt. I, § 723(D)(2) (2017).

147. *Id.*

148. See Parish of Jefferson's Memorandum in Opposition to Defendant's Exception of No Right of Action, *Atlantic Richfield*, No. 732-768.

149. LA. REV. STAT. § 49:214.36(D) (2014) states,

the parishes may not have to prove that administrative remedies are required to be exhausted prior to bringing suit.¹⁵⁰ Read in tandem with the rest of the statute, the distinction of state and local uses should not operate to prevent state or local governments from bringing a cause of action.¹⁵¹

2. Considering Prior Violations

In Louisiana, courts have held government agencies responsible for failing to enforce applicable laws and regulations. In *Oakville Community v. Plaquemines Parish*, the Fourth Circuit Court of Appeals reversed the trial court's decision, which granted the defendant's exception of no cause of action.¹⁵² Plaquemines Parish Council, as the local permitting body for CUPs, had granted a permit to Industrial Pipe, Inc.¹⁵³ The Oakville Community Group sued the Council based on allegations that the Council had failed to comply with the regulatory requirements under the Louisiana Administrative Code.¹⁵⁴ Specifically, the group claimed that the Council did not comply with the statutory requirements for the approval of a CUP for the proposed landfill expansion.¹⁵⁵ By holding that the Oakville group had a right of action, the Fourth Circuit affirmed that the action by the group should stay within the court system.¹⁵⁶

The *Oakville* case illustrates the lack of consideration that prior violations are given to new proposed activities. In 1985, the Louisiana Department of Environmental Quality ("DEQ") issued an order assessing a penalty against the sole proprietor of Industrial Pipe, Inc. for operating an illegal solid waste dump.¹⁵⁷ After issuing the order, DEQ managed the

The secretary, the attorney general, an appropriate district attorney, or a local government with an approved program may bring such injunctive, declaratory, or other actions as are necessary to ensure that *no* uses are made of the coastal zone for which a coastal use permit has not been issued when required or which are not in accordance with the terms and conditions of a coastal use permit. (emphasis added).

150. *See Parish of Plaquemines*, 64 F. Supp. 3d at 892.

151. LA. REV. STAT. § 49:214.25(B) (2014) states, "[T]he delineation of uses of state or local concern shall not be construed to prevent the state or local governments from otherwise regulating or issuing permits for either class of use pursuant to another law."

152. *See Oakville Community*, 942 So. 2d at 1157.

153. *Id.* at 1154.

154. *Id.*

155. *Id.*

156. *Id.* at 1158.

157. Corinne Van Dalen, *Oakville—Unprotected: A Study in Environmental Injustice*, 58 LOY. L. REV. 391, n.2 (2012).

proceedings.¹⁵⁸ DEQ was involved because the original use by Industrial Pipe was a land use. Therefore, the company was required to seek a CUP because they sought to expand their activities into the wetlands.¹⁵⁹ In 2003, Industrial Pipe was able to obtain a CUP without significant consideration of the permittee's prior violation of land use laws.¹⁶⁰ If those oil companies who are held liable in the Parish Coastal Zone Lawsuits have committed past violations on land or in water, and the government then approved the permit, then the permitting body should also be held responsible for not properly regulating the permittee's use when there is evidence of not following guidelines.

SLCRMA mandates that "no use" may be conducted without proper permitting.¹⁶¹ Jefferson Parish's claims are largely based on uses of state concern.¹⁶² Judicial interpretation has indicated that the language in the statute is not express in authorizing joint parish and state action in civil litigation. The issue is inconsequential because the parishes are authorized to bring suit on behalf of the state.¹⁶³ However, the parishes do not have jurisdiction over state uses pertaining to administrative remedies and may only issue cease and desist orders as it relates to a local use.¹⁶⁴ If this is the only administrative remedy available to local permitting bodies when regulating state uses, then the local government may have no other option besides bringing suit against the defendant oil company. There are conflicting directions within the statute: the parishes are allowed to bring suit on behalf of the state but are not allowed to take the administrative steps when it comes to the same allegations of harm.

The Administrative Code provides further rules that coastal users must read alongside the Coastal Zone regulations. A permitting body may seek civil and criminal relief if the permittee does not comply with a cease and desist order or a suspension.¹⁶⁵ One reading of this provision suggests that

158. *Id.* LDEQ set up a plan with Industrial Pipe, authorizing it to continue the activities to an extent and subsequently issued compliance orders after finding further violations.

159. *Id.* at 393.

160. *Id.* at 394.

161. LA. REV. STAT. § 49:214.36(D) (2014).

162. *See* Petition for Damages to the Jefferson Parish Coastal Zone, *Canlan Oil*, No. 732-771.

163. *See Parish of Plaquemines*, 64 F. Supp. 3d at 892. "Section 49:214.36(D) does lack the more express 'state' language found in the statutes at issue in *Louisiana v. Union Oil* and *Williams*, *supra*, much less an *explicit* authorization for a parish to join the State of Louisiana as an active party-plaintiff in civil litigation."

164. *Id.* "Section 49:214.36(B) expressly limits a local government's authority to issue cease and desist order to permits pertaining to local uses."

165. LA. ADMIN. CODE tit. 43, pt. I, § 723(D)(4) states, "If the permittee fails to comply with a cease and desist order or the suspension or revocation of a

the permitting body must first issue a cease and desist order or take steps to suspend or revoke a coastal use permit prior to filing suit and seeking a judicial remedy. Judge Zainey, in *Parish of Plaquemines v. Total Petrochemical*, read the provision expansively, applying a broad lens to the Act—the regulatory provision did not limit the local governments to taking certain steps before others.¹⁶⁶ However, this is not the interpretation that was followed by the 24th Judicial District Court in the *Jefferson Parish* case, where the court found that, despite the multitude of administrative remedies available to the permitting body, it was the local government’s burden to prove that judicial action was necessary.¹⁶⁷ Instead, the provision should be read narrowly in connection with La. R.S. 49:214.36(B) to only issue cease and desist orders for local uses.¹⁶⁸ If this is the case, then cease and desist orders were not an available remedy to Jefferson Parish or any of the other parishes. According to La. R.S. 49:214.36, a penalty or cost may not be assessed against a violator without the opportunity for an adjudicatory hearing.¹⁶⁹ In other areas of coastal use permitting law, when a permittee does not abide by the procedural guidelines of a coastal use permit, the permit is vacated.¹⁷⁰ However, this does not cover circumstances where there was no permit issued in the first place.

3. Modifying Priorities

According to the 24th Judicial District Court, one of the available alternatives to the permitting body is to allow modification of coastal use permits.¹⁷¹ Prior to issuing a cease and desist order, or suspending or revoking a permit, the permittee is allowed to modify the permit.¹⁷² However, the process of modification is one that the permittee must initiate, and the permittee must agree to the modifications with the permitting body, which may either be the state’s Department of Natural Resources or the approved

permit, the permitting body shall seek appropriate civil and criminal relief as provided by §214.34 of the SLCRMA.”

166. See *Parish of Plaquemines*, 64 F. Supp. 3d at 892. (“[T]he Parish’s damage claims are not limited to permitted uses to which §723(D)(4) of the Administrative Code pertains.”).

167. Reasons for Judgment, *Atlantic Richfield*, No. 732-768.

168. *Id.*

169. See LA. REV. STAT. § 49:214.36(L) (2014).

170. See *Industrial Pipe, Inc. v. Plaquemines Parish Council*, 139 So. 3d 1168, 1169 (La. Ct. App. 2014).

171. Reasons for Judgment, *Atlantic Richfield*, No. 732-768.

172. LA. ADMIN. CODE. tit. 43, pt. I, § 723(D)(1)(a) (2017).

local permitting program.¹⁷³ Thus, the issuance of a modified permit hinges on the mutual agreement of the two parties: the permitting authority and the permittee. To determine whether a modification of a permit, based on a changing use, or an application for a new permit is required, the DNR must determine whether the proposed activity will significantly increase the impacts of a permitted activity.¹⁷⁴ In *Pardue v. Gomez*, the First Circuit considered whether the plaintiff was required to apply for a new coastal use permit or could modify his existing permit.¹⁷⁵ The First Circuit departed from the plain meaning of the Administrative Code's regulations, finding that if the permitting body determined that the proposed activity would cause significant impacts, the only requirement was sending the permittee's application for a modified permit out for public notice.¹⁷⁶

Interpreting the modification provisions in light of their placement in the regulations, allowing permittees to modify their permits after the fact, is not an available remedy to, nor a remedy readily enforced by, the permitting bodies that observe non-compliant behavior.¹⁷⁷ Further, even if the permitting body was allowed to initiate modifications, a determination is required that the use will "significantly increase" the impacts of a permitted activity.¹⁷⁸ This is the same standard that must be applied to determine if a use should be permitted.¹⁷⁹ The criteria that must be met in order to determine whether the use requires a permit are best addressed by an administrative body familiar with the impact and background of the area, rather than a judicial body designated to rule on matters of law. The Louisiana Supreme Court, in *Pardue v. Gomez*, found that this is a consideration that requires analysis of social and economic, as well as

173. See LA. ADMIN. CODE tit. 43, pt. I, § 723(D)(1)(b) (2017); see also LA. ADMIN. CODE tit. 43, pt. I, § 723(C)(1) (2017), which discusses general requirements for permit applications.

174. LA. ADMIN. CODE tit. 43, pt. I, § 723(D)(1)(a) (2017).

175. *Pardue v. Gomez*, 597 So. 2d 567 (La. Ct. App. 1992). The plaintiff wanted to build a boat launch, which was not covered by his prior permit. In the communications with DNR, Pardue could not "properly proceed by way of an application for a modification of an existing permit." *Supra* p. 569.

176. *Id.*

177. *Id.* at 571. "After careful consideration of the record adduced in the case at bar, this Court hereby finds that the Department did, in fact, act arbitrarily and capriciously in denying the modification requested." *Supra* p. 570.

178. LA. ADMIN. CODE tit. 43, pt. I, § 723(D)(1)(a) (2017).

179. LA. ENVIRONMENTAL STATEMENT, *supra* note 43, at 48. The statement cites three criteria that must be considered. These are that, "significant public benefits will result from the use," "the use would serve important regional, state or national interests, including the national interest in resources and the siting of the facilities in the coastal zone identified in the coastal resources program," or "the use is coastal water dependent."

environmental impacts.¹⁸⁰ If the use will cause such a change, then the permitting body is directed to process the permit as a new application for a permit, rather than a modification.¹⁸¹ Those companies which failed to obtain a permit when one was required will not be able to argue that modification was available to the administrative bodies, since it must be first sought by the permittee.

It is unclear whether the “permitting body” referred to in the Administrative Code includes both state and local permitting bodies, since they are given such authority under La. R.S. 49:214.36,¹⁸² or whether it only refers to state governments. The 24th Judicial District Court found that the “permitting body” language referred to the DNR because the Secretary of the DNR is the only authority authorized under the Code to determine whether a coastal use permit is required.¹⁸³ Depending on which body is responsible for the issuing the permit, either the state or local agency, in a claim brought under La. R.S. 49:214.36(D), the necessary administrative will vary.

The lack of a distinction in La. R.S. 49:214.21-36 between state and local permitting authorities creates confusion over which body has primary authority in enforcement and is an anomaly in other coastal states which have coastal zone management programs.¹⁸⁴ As a comparison, California’s Coastal Act, creates a space for local governments to regulate activities within their jurisdictions through their own proposed local coastal plan or one that the Coastal Commission prepares.¹⁸⁵ Once the local plan is in place, the Coastal Act delegates the authority to the local government to issue coastal development permits.¹⁸⁶ Further, Washington’s Shoreline Management Program mandates that local governments must adopt shoreline master programs (“SMP”) overseen and reviewed by the Department of Ecology.¹⁸⁷ This Program was used by the local counties, particularly in *Weyerhaeuser Co. v. King County*.¹⁸⁸ The County brought suit for declaratory judgment, injunction, damages, and other relief because

180. See 597 So.2d at 572.

181. *Id.*

182. LA. REV. STAT. § 49:214.36(D) (2014).

183. Reasons for Judgment, *Atlantic Richfield*, No. 732-768.

184. See EAGLE & CALDWELL, *supra* note 1, at 369 (“Local governments... are often primary implementers of state coastal policies and programs.”).

185. WANT, *supra* note 47, at § 13:5 (referencing Act. Cal. Pub. Res. Code §30500, “Each local government lying, in whole or in part, within the coastal zone shall prepare a coastal program for that portion of the coastal zone within its jurisdiction. . . . [A]ny local government may request, in writing, the commission to prepare a local coastal program, or a portion thereof, for the local government.”).

186. *Id.*

187. *Id.* at § 13:35.

188. See *Weyerhaeuser Co. v. King County*, 91 Wash. 2d 721 (Wash. 1979).

the developer had not applied for a substantial development permit prior to commencing construction.¹⁸⁹ The Court found that the local county governments in Washington have the authority to enforce the regulations under the Shoreline Management Act (“SMA”).¹⁹⁰ The SMA makes explicit that local county governments may not bring injunctive, declaratory, or other actions for enforcement, unless they attempt to engage the DNR in the process first.¹⁹¹ This requirement that the local parishes first turn to the state’s Department of Natural Resources before seeking judicial enforcement of violations of coastal use permits is not in La. R.S. 49:214.36.

C. Accessibility of Damages

The administrative process plays an important role in the assessment of civil damages.¹⁹² This notion implies that the civil damages are triggered by the administrative process, in that the process is what determines the amount and breadth of damages. Without an adequate assessment of damages by the respective administrative agencies, the penalty may be solely in the court’s discretion.

The language in La. R.S. 49:214.36 is unclear on the appropriate steps for administrative remedies, but the availability of damages within the statute might provide some guidance. The 2014 revision of La. R.S. 49:214.36(O) states that damages received from enforcement of a violation of a CUP must be directed towards coastal protection, restoration, and the overall improvement of the coastal area.¹⁹³ This model is not representative of what

189. *Id.* at 724.

190. *Id.* at 732.

191. See REV. CODE OF WASHINGTON ANN. § 76.09.140(3) (2017):
Injunctions, declaratory actions, or other actions for enforcement under this subsection may not be commenced unless the department fails to take appropriate action after ten days written notice to the department by the county of a violation of the forest practices rule or final orders of the department or appeals board.

192. See Reasons for Judgment, *Atlantic Richfield*, No. 732-768.

193. LA. REV. STAT. § 49:214.36(O) (2014):
Any monies received by a state or local governmental entity arising from or related to a state or federal permit issued pursuant to R.S. 49:214.21 . . . a violation thereof, or enforcement thereof, or for damages or other relief arising from or related to any of the foregoing, or for damages or other relief arising from or related to any use as defined by R.S. 49:214.23(13) shall be used for integrated coastal protection, including coastal restoration, hurricane protection, and improving the resiliency of the coastal area.

is common in “public law litigation,”¹⁹⁴ from the last century into the present, where there has been a disconnect between the right that is asserted by the plaintiff and the remedies that are afforded.¹⁹⁵ By requiring that the damages that are received from a lawsuit under La. R.S. 49:214.36 must flow to areas of coastal protection, SLCRMA unifies the right of action that is being asserted by state governments with the purpose behind the law. Thus, if the available remedy that is given goes towards coastal restoration, then the enforcement mechanisms should be clear so that the remedies can properly be allocated.

The revised version of subsection (O) lists a multitude of sources that could activate the “monies” or the damages provision.¹⁹⁶ The money damages may arise from a violation or enforcement.¹⁹⁷ Damages may also arise for any other damages or relief arising from “the foregoing.”¹⁹⁸ The language in the revision is extremely broad and gives ample room to the courts for interpretation. The 24th Judicial District Court interpreted the provision exclusively, finding that without involvement in the administrative process, the amount of damages cannot be determined.¹⁹⁹ This suggests a judicial reluctance to get involved in determinations of damages by administrative bodies. Considering this judicial reluctance and the multiplicity of administrative remedies, it is clear that permitting bodies should turn to those remedies prior to turning to the courts.

IV. ZONING THE COAST AND STREAMLINING A SOLUTION

For those lawsuits that are currently pending, a change in the language of the statute will not have a retroactive effect. A proposal for an end to the unequal application must occur within the legal framework that already

194. Public law litigation consists of lawsuits which fight for significant social values that affect most of society. See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, n.1 (1989).

195. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1293-94 (1976) provides:

The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc. In the process, moreover, right and remedy have been to some extent transmuted. The liability determination is not simply a pronouncement of the legal consequences of past events, but to some extent a prediction of what is likely to be in the future. And relief is not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved.

196. LA. REV. STAT. § 49:214.46(O) (2014).

197. *Id.*

198. *Id.*

199. Reasons for Judgment, *Atlantic Richfield*, No. 732-768.

exists while addressing the ongoing concerns through the lawsuit. This will include making other remedies more readily available to the permitting bodies and state and local agencies. The purpose of the CZMA was never to induce tort-like lawsuits, but to encourage care and regulation of the coast. Any solution for how the CZMA should be implemented should be guided by that principle.

A. Allowing for Judicial Discretion

The local parishes' claims that the oil companies have violated SLCRMA and the Administrative Code are not currently enforceable due to the availability of other administrative remedies.²⁰⁰ Louisiana's statute is not clear concerning which actions must come first: must parishes first suspend, revoke, or modify a permit, or can they take civil action before instituting any of those actions?²⁰¹ This issue is intensified in most states, not just Louisiana, because courts are unwilling to impute knowledge of a violation or a duty onto the state and local permitting agencies to check for compliance with issued permits.²⁰² However, some states are more effective at dealing with this problem through statutory clarity. For example, North Carolina's coastal law ties administrative remedies and judicial enforcement into one provision and allows for judicial discretion in determining the remedies afforded to the plaintiff.²⁰³ According to North Carolina's statute, both the State agency and local government's rights of action are triggered upon a violation of the provisions of the coastal management law, and the statute clarifies that the government may institute the action before or after a proceeding for the collection of a penalty has been instituted.²⁰⁴ Thus, when a person has failed to comply with the requirements under the North Carolina law, he or she may file an action seeking relief.²⁰⁵

200. *See supra*, Part I.C.

201. *See* discussion *supra*, Part III.B.

202. In *Feduniak v. California Coastal Commission*, the California court found that there was no statutory duty on behalf of the Coastal Commission to review decisions by local permitting agencies nor were they willing to impute knowledge to the Commission of the status of all properties for which permits were issued. 148 Cal. App. 4th 1346, 1365-66 (Cal. Ct. App. 2007). The California courts have found that neither a statutory duty nor an administrative duty exists to check for compliance. *Supra* p. 1363.

203. *See* N.C. GEN. STAT. ANN. § 113A-126(a)-(b).

204. *Id.*

205. In the case of *State ex. rel. Rhodes v. Gaskill*, the State filed a complaint and motion for preliminary injunction in order to restrain the defendant from violating the Coastal Area Management Act of 1974 and the Dredge and Fill Act and to require restoration of the property. Although the court eventually dismissed the case, it was due to the fact that the parties had reached a consent judgment

The available remedies to state and local permitting bodies are suspension, revocation, and modification of a permit.²⁰⁶ By incorporating a duty into the Administrative Code for OCM to supervise the permitting decisions emitted by local permitting bodies, there would be a dual responsibility both on behalf of the state to enforce its permitting regulations, through cease and desist orders, or by filing notice of potential suspension, prior to filing suit. Likewise, permittees would be encouraged to stay updated on their permit conditions, particularly as to whether or not they are meeting the established conditions of their permits. In the *Terrebonne Parish School Board* case, the Louisiana Supreme Court held that there was no implied duty on the behalf of a lessor to restore the land when the agreement did not expressly provide for such a provision.²⁰⁷ However, the CUPs expressly provide for the conditions that a user must abide by in order to be in compliance.²⁰⁸ By enforcing these provisions, OCM and the local permitting bodies will hold the coastal users more accountable prior to turning to judicial remedies.

Enforcement remedies in the Administrative Code should be expanded to account for specific steps taken by local permitting bodies in order to provide additional guidance to administrative bodies. The Administrative Code is limited to one enforcement provision.²⁰⁹ By increasing such provisions, there will be a clear procedure for a state or local government to follow. This will lead to greater accountability for the permittee and provide proof to the courts that the permitting body has exhausted all administrative remedies prior to seeking a judicial remedy. Other states have attempted to achieve this transparency and have often succeeded. For example, the California Code of Regulations requires a methodology for identifying issues that must be implemented by the local coastal programs that exist in the state.²¹⁰ The purpose of the methodology required under the California Code is to identify existing or potential conflicts in the Coastal Zone.²¹¹ From the local program's inception, there is a designated purpose and incentive towards achieving the overarching public policy of the state. In analyzing that provision, the Appellate Court in California noted in *Yost v. Thomas* that the role of the state and local governing bodies is to carry out the administrative functions that are meant to achieve the public policy

during the pending period which rendered the issue before the court moot. 383 S.E.2d 923 (N.C. 1989).

206. LA. REV. STAT. § 49:214.36(C) (2014).

207. *Terrebonne Parish School Bd.*, 893 So. 2d at 802.

208. LA. ADMIN. CODE tit. 43, pt. I, § 723(C)(9) (2017).

209. LA. ADMIN. CODE tit. 43, pt. I, § 723(D)(4) (2017).

210. CAL. CODE REGS. tit. 14, § 13503 (2017).

211. CAL. CODE REGS. tit. 14, § 13503(a) (2017).

of the state.²¹² By designating the power to enact enforcement provisions to the respective local permitting bodies, those administrative agencies are able to control their permitting processes while remaining within the framework of the Coastal Management Act's overarching objectives and policies.

B. Streamlining the Cause of Action

To align the stated goals and remedies of SLCRMA, the power to file suit for violations should be reserved to the designated government official, while allowing for the opportunity to funnel the benefits of enforcement down to the local level. The California Code of Regulations exclusively allows the executive director of the Coastal Commission to bring a direct action against a violator under its enforcement provisions for the California Coastal Act.²¹³ Louisiana should streamline its authorization to bring suit, specifically against violators of the coastal use permits, into the office of the secretary of DNR. Public and private persons and the state and local governments should still be able to bring suit based on breach of contract provisions, and other administrative remedies should remain available. The body of law surrounding coastal regulation is complex, and the authority to bring suit for violations of coastal use permits should be delegated to one office. The secretary of DNR is emphatically involved in the permitting process and must ensure consistency between the purpose of the state's coastal management program and implementation.²¹⁴ The Coastal Commission has jurisdiction over appeals of coastal use permit decisions, followed by the Attorney General.²¹⁵ The Coastal Commission should implement this priority of enforcement by becoming the body to first hear all issues concerning violations of coastal use permits.

Similarly, California has put in place a mechanism for appeal from the local governments to the Coastal Commission based on certain provisions.²¹⁶ An appeals court in California faced this issue in *North Pacifica, LLC. v.*

212. See *Yost v. Thomas*, 189 Cal. Rptr. 549, 556 (Cal. Ct. App. 1983).

213. CAL. CODE REGS. tit. 14, § 13173 (2017):

Whenever the executive director of the commission determines that any violation of the provisions of the California Coastal Act of 1976 has occurred or is threatened, the Attorney General may file an action in the name of the commission for equitable relief to enjoin such violation, or for civil penalties, or both, or may take other appropriate action pursuant to Chapter 9 of the California Coastal Act of 1976.

214. See *Boudreaux*, *supra* note 72, at 985.

215. For an example, see Letter from Attorney General William J. Guste to Brenda McClure (Feb. 21, 1980) (on file with author).

216. CAL. PUB. RES. CODE § 30603 (West 2017).

California Coastal Commission, where the local city government refused to seek review, through appeal, by the state's coastal commission, claiming that it was not required under the statute.²¹⁷ Because the appeals court had previously held that the plaintiff needed to exhaust its administrative hearings, it held similarly in this case that the administrative process, through the Coastal Commission, should be prioritized before judicial review.²¹⁸

Fields of zoning regulation and coastal use permitting regulation are subject to parallel frameworks of analysis.²¹⁹ Zoning laws operate under similar mechanisms and rationale as coastal management laws.²²⁰ The Louisiana zoning laws explicitly designate that local authorities may bring an action when a building or structure is in violation of the laws, but those authorities may also turn to other remedies.²²¹ The Supreme Court of Louisiana upheld that local authority to file suit in *City of New Orleans v. Board of Commissioners of the Orleans Levee District*.²²² The purpose of zoning laws is to promote the health, safety, morals, and general welfare of the community.²²³ Similarly, in the case of coastal use law, the doctrine of exhaustion of administrative remedies may be applied in the zoning context.²²⁴ By officially incorporating zoning's application into the coastal use context, these issues may be solved.

In contrast to the coastal permitting regulations, changes, which significantly increase the impacts of a permitted activity, under zoning regulations, are processed as a new application, rather than a modification.²²⁵ Altering the Administrative Code to process all new uses with significant impact on the coastal zone will force the permitting body to objectively

217. See *North Pacifica, LLC v. Cal. Coastal Comm'n*, 2008 WL 741314 (Cal. Ct. App. 2008).

218. *Id.* at 5.

219. See *Van Dalen*, *supra* note 157, at 392-94.

220. The transition between land use regulation and coastal management regulation was demonstrated in the case of *Oakville Community v. Plaquemines Parish*. That case illustrated a breakdown of the system as failure to abide by land use guidelines that did not affect the Council's later decision to issue a coastal use permit by the same user. 942 So. 2d 1152.

221. LA. REV. STAT. § 33:4728 (2017), "In case any building or structure is erected, structurally altered, or maintained, or any building, structure or land is used in violation of R.S. 33:4721 through R.S. 33:4729 . . . the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings"

222. See *City of New Orleans v. Bd. of Commissioners of Orleans Levee Dist*, 640 So. 2d 237, 246 (La. 1994).

223. See *Phillips' Bar & Restaurant, Inc. v. City of New Orleans*, 116 So. 3d 92, 101 (La. Ct. App. 2013).

224. See *State ex. rel. Bert Leasing Corp. v. Donelon*, 173 So. 2d 24, 26 (La. Ct. App. 1965).

225. LA. ADMIN. CODE tit. 43, pt. I, § 723(D)(1)(a) (2017).

analyze the permittee's past record. This will be more efficient than requiring an agreement between the parties.²²⁶ Additionally, this would eliminate the confusion about whether a new use will have such an impact that it would require a new application. Instead, the Office of Coastal Management will process all new activities as a new application. Further, zoning regulation enforcements are subject to a five-year prescription.²²⁷

C. Incorporating the Deference Doctrine

An administrative agency's interpretation of whether a use is permissible and additionally, whether a defendant violated those uses should be the foremost consideration in a decision involving regulatory structures.²²⁸ Louisiana courts have not adopted this deference doctrine explicitly in the limited number of rulings on coastal use permits. Yet, based on the doctrine of exhaustion of administrative remedies, the Supreme Court in *Steeg* found that deference should be given to administrative bodies when looking at regulations.²²⁹ The Supreme Court has also echoed that it is unwilling to submerge itself in the restoration of the coast, primarily through damages from litigation disputes, and prefers to leave that role to the state agencies and experts.²³⁰ This may be applied at the level of the judiciary but also should be incorporated through language into the statute.

SLCRMA and the Administrative Code place the obligation on the person conducting activity within the coastal zone to seek proper permitting. When interpreting these laws based on legislative intent, it appears the legislature allocated the burden of conforming to the coastal use guidelines to those seeking to utilize the coastal zone to their benefit. However, the legislature also purposely created an administrative agency, and subsequently an entire administrative body of law, to implement these rules. The permittee has a duty to apply for a permit and ensure compliance, while the permitting bodies have a duty to enforce and regulate the permits.

It is clear when a permittee violates SLCRMA by either failing to obtain or not abiding by permit conditions. However, the amount of

226. Disagreement over permitting decisions and the consequences were prevalent in *Pardue v. Gomez*. See *Pardue*, 597 So. 2d 567.

227. See 116 So. 3d at 101-102.

228. See *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control*, 411 S.C. 16, 33 (S.C. 2014).

229. See *Steeg*, 329 So. 2d 719.

230. See *Terrebonne Parish School Bd.*, 893 So. 2d at 802. "The court is hesitant to interpose its authority, limited, as it must be, to resolving civil disputes between litigating parties, to order piecemeal restoration of the coast in some fashion, considering the far superior knowledge of relevant environmental concerns that state agencies and experts possess."

damages or penalties that should be assessed is not so clear, which may explain the local permitting bodies' quick turn to damages in the Parish Coastal Zone lawsuits. By solidifying the deference doctrine, whereby the courts make it clear that the determination of damages by the administrative body is the first and foremost consideration, the issue of damages will be resolved. Subsection (O) of SLCRMA should require administrative input prior to an assessment of monies owed. The statutory language requiring that all damages arising from the foregoing should be eliminated, and language that requires an administrative determination of damages, prior to filing suit, should be substituted in its place.²³¹ Finally, following the inclusion of that provision, the statute should read that judicial remedies will only be available upon a certification by the agency that there is a violation and that damages have and may be assessed. It should be the role of the courts to enforce that finding.

CONCLUSION

The tension between development and preservation of the environment is palpable in Louisiana, particularly in the Parish Coastal Zone Lawsuits.²³² SLCRMA is not clear as to the proper steps that a person harmed under the statute should take in order to obtain a sufficient remedy. The variety of administrative remedies that are available under the statute does not specify which should be primarily available, and because the right to bring an action exists for public and private persons, the courts have a wide breadth of interpretation.²³³ The consequence is that courts may dismiss suits with legitimate concerns at stake, and those who wish to seek enforcement are left without guidance. By revising SLCRMA and streamlining the language of the statute, issues of ambiguity will be resolved.

Under a revised CZMA in Louisiana, there should be explicit judicial discretion only when a plaintiff has exhausted its remedies with the administrative body. By deferring to the permitting body for issues of damages and enforcement against the coastal user, the court places primary authority to the body responsible for issuing permits in the first place. Further, the body that has the authority under the act to bring a cause of

231. For example, the statute could read, “. . . or for damages or other relief arising from a determination by the Department of Natural Resources or a local permitting body, on appeal to the Coastal Commission, of such damages.”

232. The stated goal of the Office of Coastal Management is to balance conservation and development. *See Applying for a CUP, supra* note 52.

233. This is evidenced by the 24th JDC's recent reversal of their opinion in the Jefferson Parish case. In November, the court found that the parish was not required to exhaust its administrative remedies. *See Schleifstein, Jefferson Lawsuit, supra* note 15.

action for violations of the CUP process should be DNR. Local coastal zone management programs will continue to exist but should appeal to the Coastal Commission as an aggrieved party under the statute. Thus, the fate of the coast may not lay in political mongering but will be guided by statutory authority.

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