



# Legislatively Capping an Energy Lawsuit: Problems Posed by Stripping a Pending Suit Against Ninety-Seven Oil and Gas Companies

Taylor Boudreaux

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## INTRODUCTION

“Coastal Louisiana *is* vanishing,”<sup>1</sup> and the state’s citizens are becoming aware of that reality.<sup>2</sup> From 1932 to 2010, the state of Louisiana has

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1. DAVID M. BURLEY, *LOSING GROUND: IDENTITY AND LAND LOSS IN COASTAL LOUISIANA* 5 (2010).

2. *Poll Shows that Louisiana Residents Want Oil Companies to Pay for Damage Done to the Coast*, RESTORE LA. NOW (Nov. 22, 2013), [http://restorelouisiananow.org/poll\\_shows](http://restorelouisiananow.org/poll_shows) [perma.cc/H6YA-5EYG] [hereinafter *Poll Results*] (poll showing

diminished by 1,883 square miles.<sup>3</sup> Many Louisianans may not have known much about wetlands in years past, but disasters like Hurricanes Katrina and Rita, concerns over rising sea levels, and the BP oil spill in the Gulf of Mexico have brought the coast's problems to the public's attention. One cannot realistically attach such an extreme loss—spanning over a majority of the past century—to any one cause because the loss is the result of a number of factors.<sup>4</sup> The most prominent suspects are the Mississippi River Delta's "sedimen[t] deprivation,"<sup>5</sup> sea level rise,<sup>6</sup> and commercial development of coastal wetlands.<sup>7</sup>

Crude oil and natural gas production has drastically increased in Louisiana over much of the last century,<sup>8</sup> and the petroleum industry's economic impact on the state has grown accordingly.<sup>9</sup> That development has not been without negative side effects, however; studies connecting the energy industry's coastal operations to the dramatic land loss have put these

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that citizens have substantial concern over protecting the wetlands from coastal erosion and improving flood protection in their parish).

3. BRADY R. COUVILLION ET AL., *LAND AREA CHANGE IN COASTAL LOUISIANA FROM 1932 TO 2010*, at 1 (2011), available at [http://pubs.usgs.gov/sim/3164/downloads/SIM3164\\_Pamphlet.pdf](http://pubs.usgs.gov/sim/3164/downloads/SIM3164_Pamphlet.pdf) [perma.cc/6K7W-F8NW] ("Trend analyses from 1985 to 2010 show a wetland loss rate of 16.57 square miles per year. If this loss were to occur at a constant rate, it would equate to Louisiana losing an area the size of one football field per hour.").

4. See Mark Schleifstein, *Louisiana is Losing a Football Field of Wetlands an Hour*, *New U.S. Geological Survey Study Says*, NOLA.COM (June 2, 2011, 9:37 PM), [http://www.nola.com/environment/index.ssf/2011/06/louisiana\\_is\\_losing\\_a\\_football.html](http://www.nola.com/environment/index.ssf/2011/06/louisiana_is_losing_a_football.html) [perma.cc/R8A4-E65J] (quoting a USGS geographer, David M. Burley, Brady Couvillion, and the director of the USGS National Wetlands Research Center in Lafayette, Phil Turnipseed).

5. *Id.*

6. Saskia De Melker, *Native Lands Wash Away as Sea Levels Rise*, PBS (June 1, 2012, 10:43 AM), [http://www.pbs.org/newshour/updates/climate-change-jan-june12-louisianacoast\\_05-30/](http://www.pbs.org/newshour/updates/climate-change-jan-june12-louisianacoast_05-30/) [perma.cc/263S-YZVS].

7. Bob Marshall, *Science to be Key Factor in Lawsuit Against Oil and Gas Companies for Coastal Loss*, LENS (July 23, 2013, 8:51 PM), <http://thelensnola.org/2013/07/23/science-to-be-key-factor-in-lawsuit-against-oil-and-gas-companies-for-coastal-loss/> [perma.cc/53BY-A2PC].

8. See *Louisiana Energy Facts and Figures*, LA. DEP'T OF NATURAL RES., <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=208> [perma.cc/2S K4-6ADT] (last visited Oct. 22, 2015).

9. Renita D. Young, *Oil and Gas Industry Continues to Strongly Support Louisiana*, *Study Shows*, NOLA.COM (July 11, 2014, 2:33 AM), [http://www.nola.com/business/baton-rouge/index.ssf/2014/07/oil\\_and\\_gas\\_industry\\_continues.html](http://www.nola.com/business/baton-rouge/index.ssf/2014/07/oil_and_gas_industry_continues.html) [perma.cc/THG7-969J].

companies at the center of governmental and public scrutiny.<sup>10</sup> The board of commissioners for the Southeast Louisiana Flood Protection Authority-East (“SLFPA-E”) was well aware of these studies’ findings.<sup>11</sup> Armed with those findings,<sup>12</sup> the board filed suit against almost 100 oil, gas, and pipeline companies<sup>13</sup> that have operated in the southeast portion of the state, specifically in the “Buffer Zone.”<sup>14</sup> The SLFPA-E, tasked with the construction and maintenance of flood prevention systems in the New Orleans and Lake Pontchartrain areas,<sup>15</sup> argued that the defendants’ production operation negatively affected the wetlands that act as a preventative barrier or initial line of flood defense,<sup>16</sup> which made the board’s ability to carry out its duties more burdensome.<sup>17</sup> The lawsuit prayed for injunctive relief and damages, asserting negligence, strict liability, natural servitude of drainage, public nuisance, private nuisance, and breach of contract.<sup>18</sup>

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10. See Alisha A. Renfro, *New Study Examines Oil and Gas Production’s Increased Effects on Louisiana Coastal Land Loss*, RESTORE MISS. RIVER DELTA (Jan. 11, 2012), <http://www.mississippiriverdelta.org/blog/2012/01/11/new-study-examines-oil-and-gas-production%E2%80%99s-increased-effects-on-louisiana-coastal-land-loss/> [perma.cc/YT3S-LPJ3].

11. Marshall, *supra* note 7.

12. Melker, *supra* note 6; Marshall, *supra* note 7.

13. Mark Schleifstein, *Historic Lawsuit Seeks Billions in Damages from Oil, Gas, Pipeline Industries for Wetlands Losses*, NOLA.COM (July 24, 2013, 9:30 AM), [http://www.nola.com/environment/index.ssf/2013/07/historic\\_east\\_bank\\_levee\\_autho.html](http://www.nola.com/environment/index.ssf/2013/07/historic_east_bank_levee_autho.html) [perma.cc/E5KB-UQYT].

14. Petition for Damages and Injunctive Relief at 7, Bd. of Comm’rs of the Se. La. Flood Prot. Auth. v. Tenn. Gas Pipeline Co., No. 13-6911 (La. Dist. Ct. July 24, 2013). The “Buffer Zone” is described as extending “from East of the Mississippi River through the Breton Sound Basin, the Biloxi Marsh, and the coastal wetlands of eastern New Orleans and up to Lake St. Catherine.” *Id.*

15. LA. REV. STAT. ANN. § 38:330.2(2) (Supp. 2015).

16. Petition for Damages and Injunctive Relief, *supra* note 14, at 8–10.

17. *Id.* at 3.

18. *Id.* at 17–23. Months after removal, the federal district court dismissed SLFPA-E’s suit for failure to state a claim. See Mark Schleifstein, *Federal Judge Dismisses Levee Authority’s Wetlands Damage Lawsuit Against Oil, Gas Companies*, NOLA.COM (Feb. 13, 2015, 7:52 PM), [http://www.nola.com/environment/index.ssf/2015/02/federal\\_judge\\_dismisses\\_east\\_b.html](http://www.nola.com/environment/index.ssf/2015/02/federal_judge_dismisses_east_b.html) [perma.cc/KZ4G-KWEL]. This dismissal order did not address Act 544 and its proposed effect on SLFPA-E. See *id.* Additionally, the decision will inevitably be appealed. See Mark Schleifstein, *Appeal of Wetlands Damage Suit Against Energy Companies Will Continue*, NOLA.COM (March 2, 2015, 6:45 PM), [http://www.nola.com/environment/index.ssf/2015/03/continue\\_the\\_appeal\\_of\\_wetland.html](http://www.nola.com/environment/index.ssf/2015/03/continue_the_appeal_of_wetland.html) [perma.cc/H4W3-8V28]. Because the dismissal order did not discuss Act 544’s application or legality, the issue

The oil and gas industry, as well as the Louisiana governor, adamantly opposed the lawsuit.<sup>19</sup> Whether or not the industry's political influence prompted the legislative action, the legislature also expressed its disapproval with the suit and acted accordingly—the 2014 legislative session saw 18 bills that related to the litigation.<sup>20</sup> Ultimately, the legislature passed Senate Bill 469, which the governor eventually signed into law as Act 544 (“the Act”). Among other things, this law provides that “no state or local governmental entity” has a cause of action related to any coastal activity, commercial or otherwise, subject to regulation under particular state and federal law.<sup>21</sup> Interestingly, to achieve the conspicuous aim of the legislators’ efforts, the law provides that its effects shall apply to all “claims existing or actions pending on the Act’s effective date” as well as those filed after that date.<sup>22</sup> Legislators, commentators, and those potentially subject to the new law made clear that the Act’s legality and actual application are far from settled.<sup>23</sup>

The law removed the board of commissioners’ legal standing and stripped a significant slice of authority from that constitutionally established governmental body.<sup>24</sup> With such drastic consequences, constitutional arguments unsurprisingly followed the governor’s signature. Further, with only a cursory view of media headlines, Louisiana citizens are understandably concerned about whether the bill was in their best interest; the law precluded a local-area board from filing suit—an apparent attempt to hold the oil and gas industry accountable—against almost 100 companies in that industry.<sup>25</sup> A more tempered analysis of the situation, however, reveals the inappropriateness of the lawsuit and the true necessity of Act 544.

This Comment suggests that Act 544, though an unusual law, is both legally sound and appropriate. The law has legislative precedent, backed by

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is still unresolved, making the legal and policy analyses relevant not only for this case’s final disposition but also for later analogous industry-wide lawsuits.

19. Mark Ballard, *Louisiana House Votes to Kill Levee Board Lawsuit*, ADVOCATE (May 29, 2014, 6:13 PM), <http://theadvocate.com/home/9309334-125/louisiana-house-votes-to-kill> [perma.cc/4292-3QK4].

20. *Id.*

21. Act No. 544, 2014 La. Acts (Westlaw), *codified at* LA. REV. STAT. ANN. § 49:214.36(O)(1) (Supp. 2015).

22. LA. REV. STAT. ANN. § 49:214.36(O)(2).

23. *See, e.g.*, Ballard, *supra* note 19.

24. *Id.*

25. These statistics illustrate the public’s perception that this lawsuit stood for “a symbol of Louisiana’s future.” Peter Moskowitz, *In Louisiana, an Environmental Lawsuit Brings Hope for a New Chapter*, ALJAZEERA AM. (Mar. 11, 2014, 7:00 AM), <http://america.aljazeera.com/articles/2014/3/11/environmental-activistshopealawsuitopensanewchapterinlahistory.html> [perma.cc/FT57-GV24].

jurisprudential support, which leads to the conclusion that Act 544 is constitutional. The legislature did not overstep its authority simply because a pending suit was affected, nor did the law improperly violate the flood protection authority's constitutional protections. The SLFPA-E's particular constitutional and statutory origins make the authority susceptible to this type of legislative action. Further, the entity's actual purpose within the state's regulatory scheme supports the conclusion that the legislature acted appropriately despite counterbalancing policy concerns.

Part I of this Comment sets out facts surrounding the board's lawsuit and the legislature's response, and provides context by comparing Act 544 to similar laws. Part II describes and analyzes the legality of retroactive laws that apply to a particular target involved in pending litigation, ultimately concluding that Act 544 does not violate any constitutional prohibitions. Lastly, Part III argues that, in light of the alternatives to this legislative response, both Act 544's means and its end are legitimate. A survey of this lawsuit's role within the established regulatory framework surrounding the oil and gas industry reveals that Act 544 was the preferred solution when considering the destructive alternatives.

## I. HISTORY OF ACTION AND REACTION

The Louisiana Legislature responded to the SLFPA-E's expansive lawsuit by retroactively taking away its cause of action. The history and purpose of the SLFPA-E, the agency's grounds for filing the lawsuit, and the legislature's choice of responses provide essential context for analyzing the necessity of the legislative response in Act 544.

### *A. Legislative Inducement: The Causes of Act 544*

Congress enacted the federal Coastal Zone Management Act in 1972 due to a "national interest in the effective management, beneficial use, protection, and development of the coastal zone."<sup>26</sup> The comprehensive

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26. 16 U.S.C. § 1451(a) (2012). Congress explicitly noted the oil and gas industry's adverse effects on the environment. *Id.* § 1451(c) ("The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.").

scheme provided federal grants to states that submitted their own coastal management program for approval.<sup>27</sup> Louisiana's submission was approved in 1980, and the state's Department of Natural Resources administers the scheme.<sup>28</sup> The legislature enacted the approved scheme under the State and Local Coastal Resources Management Act of 1978.<sup>29</sup> The main features of the federal and state regulations concerned permitting and oversight of coastal land use.<sup>30</sup>

In addition to coastal land use, it is necessary for Louisiana to monitor and control the flooding tendencies along the Mississippi River and the Gulf Coast, given the state's position in relation to these two bodies of water. Thus, over many years, Louisiana established multiple levee districts whose governing boards were charged with constructing and maintaining protective barriers, which operate as a last line of defense for the people and property behind their banks.<sup>31</sup> After Hurricanes Katrina and Rita devastated the levee system surrounding the New Orleans area in 2005, raising concerns over the districts' efficiency and political influence,<sup>32</sup> the legislature amended the state constitution to integrate several of these districts under regional flood protection authorities.<sup>33</sup> SLFPA-E is one of the two existing authorities.<sup>34</sup>

Before 2006, the East Jefferson, Lake Borgne, Orleans, and Tangipahoa Levee Districts dealt with various flood protection projects in their jurisdictions.<sup>35</sup> The state constitution established the SLFPA-E's oversight

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27. *Id.* § 1455(b)–(d).

28. *Coastal Management Programs*, OFF. FOR COASTAL MGMT. NOAA, <http://coast.noaa.gov/czm/mystate/#louisiana> [perma.cc/UG5D-MWSA] (last visited Oct. 22, 2015).

29. LA. REV. STAT. ANN. §§ 49:214.21 to :214.42 (2012 & Supp. 2015).

30. *See id.*; 16 U.S.C. § 1451–66.

31. *See, e.g.*, LA. REV. STAT. ANN. § 38:307(A)(1) (2005) (The Orleans Levee District is instructed “to locate, relocate, construct, maintain, extend, and improve levees, embankments, seawalls, jetties, breakwaters, water-basins, and other works . . .”).

32. Mark Schleifstein, *East Bank Levee Authority Meets for First Time with New Bobby Jindal Appointments*, NOLA.COM (Oct. 17, 2013, 7:19 PM), [http://www.nola.com/environment/index.ssf/2013/10/east\\_bank\\_levee\\_authority\\_meet.html](http://www.nola.com/environment/index.ssf/2013/10/east_bank_levee_authority_meet.html) [perma.cc/4KZ2-DC92].

33. LA. CONST. art. VI, § 38.1.

34. LA. REV. STAT. ANN. § 38:330.1B(1)(a) (Supp. 2015). The legislature established this authority that includes the East Jefferson, Lake Borgne, Orleans, and Tangipahoa Levee Districts. *Id.*

35. *See, e.g., id.* § 38:307(A)(1) (“The [Orleans Levee District] shall have full and exclusive right, jurisdiction, power, and authority to locate, relocate, construct, maintain, extend, and improve levees, embankments, seawalls, jetties, breakwaters, water basins, and other works in relation to such projects and to conduct all

of the districts with “the purposes of constructing and maintaining levees, levee drainage, flood protection, and hurricane flood protection within the territorial jurisdiction of the authority. . . .”<sup>36</sup> Under the Louisiana Constitution, the SLFPA-E has the power to levy taxes, employ and provide for its employees, and to own, construct, and maintain property.<sup>37</sup> The SLFPA-E oversees the flood protection systems in its statutorily defined jurisdiction and shares responsibility with the federal government for operating and maintaining the Hurricane and Storm Damage Risk Reduction System.<sup>38</sup> The board of commissioners of the SLFPA-E may enter into contracts for the purpose of carrying out its powers, including “construction, operation, and maintenance of any facilities and improvements” of projects under their governing laws.<sup>39</sup> Although the flood authority governs and is comprised of these individual levee districts, the law treats the flood authority in every respect as a distinct levee district.<sup>40</sup> Notably, the flood protection authority has the power to sue and be sued, just as the individual levee districts.<sup>41</sup>

Perhaps influenced by public perception along the coast,<sup>42</sup> the SLFPA-E filed a lawsuit for damages and injunctive relief, naming 97 oil, gas, and pipeline companies as defendants and asserting 6 separate grounds for liability,<sup>43</sup> centering on the defendants’ contribution to and exacerbation of Louisiana’s coastal land loss.<sup>44</sup> The SLFPA-E alleged that the citizens and property within its jurisdiction were at a greater risk of flooding because of the defendants’ underground drilling operations, the overexpansion and

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dredging operations necessary in connection therewith or incidental thereto along, over, and on the shores, bottom, and bed of Lake Pontchartrain in the parish of Orleans . . . .”); *Mission Statement*, ORLEANS LEVEE DIST., <http://www.oreanslevee.com/Mission%20Statement.htm> [perma.cc/7WMS-8PET] (last visited Oct. 22, 2015) (“The District is primarily responsible for the operation and maintenance of levees, embankments, seawalls, jetties, breakwaters, water basins, and other hurricane and flood protection improvements surrounding the City of New Orleans, including the southern shores of Lake Pontchartrain and along the Mississippi River. The District is responsible for the maintenance of 104.8 miles of levees and floodwalls, 200 floodgates, 103 flood valves, and 2 flood control structures.”).

36. LA. CONST. art. VI, § 38.1.

37. *Id.*

38. Petition for Damages and Injunctive Relief, *supra* note 14, at 12–14.

39. LA. REV. STAT. ANN. § 38:330.2(C).

40. *Id.* § 330.1(A)(1).

41. LA. REV. STAT. ANN. § 38:309(B) (2012).

42. *Poll Results*, *supra* note 2.

43. Petition for Damages and Injunctive Relief, *supra* note 14, at 17–23.

44. *Id.* at 8–11.



failed maintenance of dredged canals, and other violations of state and federal permitting standards.<sup>45</sup> These actions led the board to request damages arising from the “exponentially” increasing costs to carry out its duties.<sup>46</sup> In effect, the entity asserted that private actors were liable for putting increased strain on its ability to cover its rising operating costs. The SLFPA-E went beyond asking for compensatory relief and requested that defendants take proactive measures that the board believed would protect the coast from future land loss.<sup>47</sup>

Attempts to kill the lawsuit began with an attack on SLFPA-E’s ability to contract with its legal representation<sup>48</sup> because the entity hired attorneys on what appeared to be a contingency fee basis.<sup>49</sup> Those opposed to the lawsuit—including legislators and parties inside the industry—argued that the political body did not have the authority to contract with special counsel in this way and, further, that the contract was not properly presented to the attorney general for approval.<sup>50</sup> The SLFPA-E’s opposition cited apparent

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45. *Id.*

46. *Id.* at 2–8.

47. *Id.* at 12–15. Among these forward-looking requests were for the defendants to carry out “restoration of the coastal land loss,” including the following: “the backfilling and revegetating of each and every canal dredged by [Defendants];” “abatement and restoration activities determined to be appropriate, including but not limited to, wetlands creation, reef creation, land bridge construction, hydrologic restoration, shoreline protection, structural protection, bank stabilization, and ridge restoration;” and “[s]uch other and further relief which the Court deems necessary and proper.” *Id.* at 23–24.

48. The Louisiana Oil and Gas Association filed a separate suit against the state attorney general to stop the Authority’s attorney contract. *See* Petition for Declaratory Judgment and Injunctive Relief, La. Oil & Gas Ass’n, Inc. v. Caldwell, No. 626798 (La. Dist. Ct. Aug. 8, 2014); Mark Schleifstein, *Private Attorneys Working for Louisiana Attorney General Can Do So with Contingency Fee Contracts, Judge Rules*, NOLA.COM (March 10, 2014, 1:38 PM), [http://www.nola.com/environment/index.ssf/2014/03/private\\_attorneys\\_working\\_for.html](http://www.nola.com/environment/index.ssf/2014/03/private_attorneys_working_for.html) [perma.cc/X5QZ-5K79].

49. Schleifstein, *supra* note 13. The contract provided that the firms would receive 32.5% of the first \$100 million of the monetary award should the board prove to be successful, with a smaller percentage paid for any amount above \$100 million. *Id.*

50. *See* Mark Schleifstein, *Judge Upholds AG Buddy Caldwell’s Approval of Levee Authority’s Vote in Wetlands Damage Suit*, NOLA.COM (Mar. 10, 2014, 4:49 PM), [http://www.nola.com/environment/index.ssf/2014/03/judge\\_upholds\\_atorney\\_general.html](http://www.nola.com/environment/index.ssf/2014/03/judge_upholds_atorney_general.html) [perma.cc/5L72-P4LY]; Mark Schleifstein, *Jindal Demands East Bank Levee Authority Drop Lawsuit Against Oil, Gas, Pipelines* (July 24, 2013, 6:41 PM), [http://www.nola.com/environment/index.ssf/2013/07/jindal\\_demands\\_east\\_bank\\_levee.html](http://www.nola.com/environment/index.ssf/2013/07/jindal_demands_east_bank_levee.html) [perma.cc/7AL2-GYNV].

violations of law regarding the state entity's hiring of legal counsel,<sup>51</sup> but the court rejected those arguments.<sup>52</sup> After the defendants removed the suit to federal court,<sup>53</sup> and the SLFPA-E established the validity of its attorney compensation, the levee board's suit appeared to have overcome all remaining hurdles, except one—the political arena.

*B. Legislative Adjustment: The Legislature's Response*

Several bills introduced in the 2014 legislative session set out to either directly or indirectly hamper the levee board's lawsuit.<sup>54</sup> Proposed legislation attacked nearly every aspect of the litigation, including the structure and nomination process of board members, the board's ability to contract with attorneys, and restrictions on how potential award money would be handled.<sup>55</sup> Though legislators proposed many bills, the legislature successfully passed what was perhaps the most effective bill. Act 544 purports to strip the ability of "certain 'state or local governmental entit[ies]'" to sue for violations of certain permitting schemes and other coastal activity.<sup>56</sup> Some legislators labeled SLFPA-E's litigation as "clear

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51. LA. REV. STAT. ANN. § 38:330.6 (Supp. 2015) (making the state Attorney General the Authority's counsel); LA. REV. STAT. ANN. §§ 42:261 to :263 (2006) (requiring approval of entities' "special counsel"). The Louisiana Oil and Gas Association advanced these arguments in a responsive lawsuit against Attorney General Caldwell. Petition for Declaratory Judgment and Injunctive Relief at 4–8, *La. Oil & Gas Ass'n, Inc. v. Caldwell*, No. 626798 (La. Dist. Ct. Aug. 8, 2014).

52. Mark Schleifstein, *Judge Rules New State Law Doesn't Stop Levee Authority from Suing Oil Companies*, NOLA.COM (Oct. 6, 2014, 9:51 PM), [http://www.nola.com/environment/index.ssf/2014/10/state\\_judge\\_rules\\_law\\_prohibit.html](http://www.nola.com/environment/index.ssf/2014/10/state_judge_rules_law_prohibit.html) [perma.cc/XD2A-XFG4].

53. Mark Schleifstein, *Environmental Lawsuit Against 92 Energy Companies Belongs in Federal Court*, *Judge Rules*, NOLA.COM (June 28, 2014, 10:12 PM), [http://www.nola.com/environment/index.ssf/2014/06/federal\\_judge\\_rules\\_east\\_bank.html](http://www.nola.com/environment/index.ssf/2014/06/federal_judge_rules_east_bank.html) [perma.cc/KL2K-YFK4].

54. Ballard, *supra* note 19 (noting that about 18 bills were introduced that legislative session "to clip the wings of this litigation and similar lawsuits").

55. *Id.*

56. Act No. 544, 2014 La. Acts (Westlaw).

violations of law” by a state agency<sup>57</sup> under the terms of existing law.<sup>58</sup> The legislature explicitly stated and expanded its understanding of existing law—only certain governmental entities have a cause of action for activity that certain state and federal regulations of the coast govern.<sup>59</sup> The governor signed the law on June 6, 2014, ten months after SLFPA-E filed suit, and the law became effective that same day.<sup>60</sup>

A majority of Act 544’s substance was originally contained in another bill, Senate Bill 531.<sup>61</sup> Although both versions of the law were related to the general topic of enforcement remedies by entities that the Coastal Zone Management Program governed, Act 544’s final enacted language does not mirror the provisions within its original proposed form.<sup>62</sup> Procedurally, this irregular presentation in the legislature made the law ripe for legal attacks, namely those based on the state constitutional provisions regarding a “title

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57. Mark Schleifstein, *Louisiana Senate Approves Legislation that Would Kill East Bank Levee Authority Wetland Lawsuit Against Energy Companies*, NOLA.COM (May 12, 2014, 6:28 PM), [http://www.nola.com/politics/index.ssf/2014/05/senate\\_approves\\_legislation\\_th.html](http://www.nola.com/politics/index.ssf/2014/05/senate_approves_legislation_th.html) [perma.cc/JJ6Q-VMZC].

58. Presumably, those legislators referred to Louisiana Revised Statutes section 49:214.36(D), which provides a cause of action for claims similar to SLFPA-E’s to enumerated parties. LA. REV. STAT. ANN. § 49:214.36(D) (2012).

59. Louisiana Revised Statutes section 49:214.36(D) now provides the narrow exception to Act 544, meaning that the listed persons or entities in section (D) shall have a right of action specifically related to permitting violations under the Coastal Zone Management Act. *See id.*

60. Act 544 became effective upon the governor’s signature on June 6, 2014. Act No. 544, § 1, 2014 La. Acts (Westlaw); Schleifstein, *supra* note 13.

61. S.B. 531, 2014 Reg. Sess. (La. 2014), available at <http://www.legis.la.gov/legis/BillInfo.aspx?i=225159> [perma.cc/4AXF-TF4Y]. *Compare id.* (“No state or local governmental entity, except the Department of Natural Resources, the attorney general, or the Coastal Protection and Restoration Authority, shall have, nor may pursue, any right or cause of action arising from or related to a state or federal permit issued pursuant to R.S. 49:214.21 et seq., 33 U.S.C. 1344 or 33 U.S.C. 408 in the coastal area as defined by R.S. 49:214.2(4), violation thereof, or enforcement thereof, or for damages or other relief arising from or related to any of the foregoing. Notwithstanding the foregoing, any contractual claims that any state or local governmental entity may possess against the permittee are preserved.”), with Act No. 544, § 1, 2014 La. Acts (Westlaw).

62. S.B. 469, as originally introduced, provided for amendments to Louisiana Revised Statutes section 214.36, relative to administrative and other enforcement procedures. S.B. 469, 2014 Reg. Sess. (La. 2014), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=880653> [perma.cc/S857-FRYF]. The final version of S.B. 469, enacted as Act 544, although related in subject and purpose, differed substantially from the original provisions. Act No. 544, 2014 La. Acts (Westlaw).

indicative,” “germane amendments,” three readings, and local or special law advertisement.<sup>63</sup>

The SLFPA-E further argued that the lawmakers’ rushed attempts to kill the lawsuit affected not only the bills’ procedural formalities but also its textual precision.<sup>64</sup> Accordingly, in two separate lawsuits, SLFPA-E claimed that it was neither a “state nor a local governmental entity,” thus the law did not apply to its lawsuit.<sup>65</sup> One state court has already determined that the Act missed its mark.<sup>66</sup> Lastly, the need for the legislature’s swift response to the pending suit necessarily raised substantive concerns regarding the legal ability to reach back and take away a party’s cause of action.

## II. THE CONSTITUTIONALITY OF ACT 544

Aside from the political and ideological fire that this situation has stoked, Act 544 implicates several state and federal constitutional provisions. The legislature has made a conscious decision to reach back and directly intervene in a pending lawsuit that a constitutionally established entity filed.<sup>67</sup> This raises concerns related to the federal and state contracts

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63. Considering the extent of the procedural issues surrounding Act 544 is beyond the scope of this Comment. The constitutional section concerning the passage of bills requires that “[e]very bill shall contain a brief title indicative of its object,” that “[n]o bill shall be amended in either house to make a change not germane to the bill as introduced,” and that every “bill shall be read at least by title on three separate days in each house.” LA. CONST. art. III, § 15(A), (C), (D). Contingent upon the determinations regarding whether Act 544 is a local or special law, and whether the Act improperly deals with an enumerated, prohibited list of subjects, the law’s passage might have violated the constitutional requirements that local or special laws be published in affected areas for a set amount of time and in a particular manner. *Id.* § 13; *see also infra* Part II.2.

64. Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment Regarding Louisiana Act 544 at 10, Bd. of Comm’rs of the Se. La. Flood Prot. Auth. v. Tenn. Gas Pipeline Co., No. 2:13-cv-05410 (E.D. La. June 5, 2014) (“Act 544’s convoluted path through the Louisiana legislature imbued it with both textual and constitutional defects that cause it to be inapplicable as a viable defense to the plaintiffs’ claims.”).

65. Act No. 544, § 1, 2014 La. Acts (Westlaw); Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment Regarding Louisiana Act 544, *supra* note 64, at 10.

66. *See* Judgment, La. Oil & Gas Ass’n, Inc. v. Caldwell, No. C626798 (La. Dist. Ct. Dec. 3, 2014); Schleifstein, *supra* note 52.

67. *See* Jeff Adelson & Mark Ballard, *Jindal Signs Bill that Could Kill Wetlands Suit*, ADVOCATE (June 6, 2014, 9:00 PM), <http://www.theneworleansadvocate.com/news/9383128-171/jindal-signs-bill-that-would> [perma.cc/SS3H-

and due process clauses.<sup>68</sup> Additionally, Act 544 includes a savings clause for certain claims of all governmental entities, except those of a “local or regional flood protection authority,”<sup>69</sup> which raises the concern that the legislature improperly aimed a local or special law at the SLFPA-E.<sup>70</sup> Further, the legislature’s choice to retroactively amend an existing body of law, which the court was likely to consider during the pending litigation, may have violated the constitutional mandate of separation of powers.<sup>71</sup>

The legal issues raised by this legislation are not novel and have presented themselves in the context of analogous situations throughout other states’ and Louisiana’s legal history. In years past, Congress and state legislatures have responded to unwanted, politicized lawsuits against entire industries by stripping a plaintiff’s cause of action relating to the matter.<sup>72</sup> These legislative responses often share common traits. For example, many of these laws only affect a cause of action by government bodies<sup>73</sup> and, similar to Act 544, usually contain exceptions based on breaches of warranty and contract.<sup>74</sup> Most importantly, several of these statutes provide for retroactive application to pending suits.<sup>75</sup> These past analogues provide legitimate legal and policy precedents to the Louisiana Legislature’s unusual action. Additionally, Louisiana’s constitution and interpretive jurisprudence make clear that Act 544’s application to the SLFPA-E does not violate the Louisiana Constitution.<sup>76</sup>

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HNCR]; Bd. of Comm’rs of the Se. Flood Prot. Auth. v. Tenn. Gas Pipeline Co., 88 F. Supp. 3d 615 (E.D. La. 2015). The SLFPA-E is constitutionally established in article VI, section 38.1 of the Louisiana Constitution. LA. CONST. art. VI, §38.1.

68. U.S. CONST. art. I, § 10, cl. 1; *id.* amend. XIV, § 1; LA. CONST. art. I, § 23; *id.* art. I, § 2.

69. Act No. 544, § 5, 2014 La. Acts (Westlaw).

70. LA. CONST. art. III, § 12(A).

71. *Id.* art. II §§ 1, 2.

72. See generally Bryce A. Jensen, Comment, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334 (2001) (discussing litigation against the lead paint, tobacco, and firearm manufacturer industries).

73. See, e.g., LA. REV. STAT. ANN. § 40:1799 (2008); TENN. CODE ANN. § 39-17-1314 (West Supp. 2008); OKLA. STAT. ANN. tit. 21, § 1289.24a (West Supp. 2009); see also Elizabeth T. Crouse, Note, *Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability*, 88 MINN. L. REV. 1346, 1390 n.70 (2004).

74. See Crouse, *supra* note 73, at 1358, 1390 n.70.

75. See *id.* at 1390 n.70.

76. A state court has ruled to the contrary, holding that Act 544 is not only inapplicable to the SLFPA-E but that the law is also unconstitutional. Judgment, *supra* note 66, at 2. The trial court found the law’s language did not encompass the unique status of the SLFPA-E, the law violated the Public Trust Doctrine in the

*A. The Supreme Court's Precedent in Morial Supports Act 544's Constitutionality*

In *Morial v. Smith & Wesson Corp.*,<sup>77</sup> the mayor of New Orleans sued a number of firearms manufacturers, retailers, distributors, and trade associations on the grounds that they were making and distributing unreasonably dangerous products to the city's citizens.<sup>78</sup> Similar to the flood authority's approach, the city argued that the industry defendants' actions strained its financial obligations by causing an increased need for the public services the city provided.<sup>79</sup> The legislature, just as it did in response to the SLFPA-E suit, stripped certain parties of their ability to file suit on the matter.<sup>80</sup> The law went into effect several months after the city filed suit and contained a separate section providing for retroactive effect to "all claims existing or actions pending on its effective date and all claims arising or actions on and after its effective date."<sup>81</sup> Mayor Morial argued, and the trial court found, that the responsive legislation was unconstitutional because the law violated plaintiffs' due process and equal protection rights, improperly targeted plaintiffs with a special law, and affected the city's constitutional right to file suit.<sup>82</sup> The Louisiana Supreme Court reversed, holding that the city did not possess ordinary constitutional protections afforded to individuals.<sup>83</sup>

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Louisiana Constitution, the law violated the restrictions and notice requirements on special and local laws, and the law violated the principle of separation of powers. *See id.* at 1–2; Mark Schleifstein, *Gov. Bobby Jindal Asks State Supreme Court to Uphold Law Banning Wetlands Damage Suit Against Oil Companies*, NOLA.COM (Jan. 10, 2015, 9:00 PM), [http://www.nola.com/environment/index.ssf/2015/01/gov\\_jindal\\_asks\\_state\\_supreme.html](http://www.nola.com/environment/index.ssf/2015/01/gov_jindal_asks_state_supreme.html) [perma.cc/6Z2S-UDCZ].

77. 785 So. 2d 1 (La. 2001).

78. *Id.* at 6.

79. *Id.* ("Specifically, the City's petition alleges that '[a]ctions by defendants have caused the city to pay out large sums of money to provide services including but not limited to necessary police, medical, and emergency services, health care, police pension benefits and related expenditures, as well as to have lost substantial tax revenues due to lost productivity.'").

80. LA. REV. STAT. ANN. § 40:1799(A) (2008) (providing that causes of action were abolished for any "governing authority of any political subdivision or local or other governmental authority of the state," reserving that right to the state alone).

81. *Morial*, 785 So. 2d at 6–7 (quoting LA. REV. STAT. ANN. § 40:1799).

82. *Id.* at 8–9. Importantly, the defendant companies did not dispute the trial court's decision as the holding related to a private citizen who joined the city's suit. *Id.* at 9 ("Therefore, the issues relating to Mr. Ignatik's rights are not before us and nothing in this opinion should be interpreted to affect his rights.").

83. *Id.* at 11–13, 19.

The Supreme Court's analysis of these arguments controls the individual constitutional issues surrounding Act 544.

*1. Act 544 May be Applied Retroactively*

Section 2 of Act 544 explains that the law's provisions shall apply to all claims or causes of action pending and filed in the future,<sup>84</sup> and that Section 1 strips the causes of action that any "state or local governmental entity" had relating to permitting schemes and various activities under state and federal law.<sup>85</sup> Thus, read in conjunction, the two sections purportedly operate to take away a party's ability to sue, notwithstanding the fact that a suit might already have been filed and litigation commenced. As a general rule, the Louisiana Supreme Court declared that the legislature is free to provide for a law's retroactivity as long as that temporal application does not violate constitutional rules—specifically, those regarding disturbance of vested rights, impairment of contractual obligations,<sup>86</sup> and violation of "the principles of separation of powers and independence of the judiciary."<sup>87</sup>

*a. Contracts and Due Process Protections are Not Pertinent to Act 544's Intended Subject*

The legislature explicitly provided that Act 544 would apply retroactively,<sup>88</sup> thus obviating the need for further inquiry into its temporal application.<sup>89</sup> The true test for Act 544 will be accounting for potential constitutional violations.<sup>90</sup> The retroactive nature of the law implicates the

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84. Act No. 544, § 2, 2014 La. Acts (Westlaw).

85. *Id.* at § 1.

86. *Morial*, 785 So. 2d at 10 n.8 (citing *Bourgeois v. A.P. Green Indus., Inc.*, 783 So. 2d 1251 (La. 2001)).

87. *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392, 404 (La. 2005).

88. Act No. 544, § 2, 2014 La. Acts (Westlaw).

89. *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1063 (La. 1992) ("[Louisiana Civil Code article] 6 requires that we engage in a two-fold inquiry. First, we must ascertain whether in the enactment the legislature expressed its intent regarding retrospective or prospective application. If the legislature did so, our inquiry is at an end. If the legislature did not, we must classify the enactment as substantive, procedural or interpretive.").

90. *See Bourgeois*, 783 So. 2d at 1257 ("The principle contained in [Louisiana Civil Code article] 6, however, has constitutional implications under the Due Process and Contract Clauses of both the United States and Louisiana Constitutions, such that even where the legislature has expressed its intent to give

due process and contracts clause provisions of both the Louisiana and United States constitutions.

The contracts clauses of the Louisiana<sup>91</sup> and United States Constitutions<sup>92</sup> are “virtually identical” and “substantially equivalent” in their protection of contractual obligations from retroactive laws.<sup>93</sup> Additionally, both constitutions similarly prohibit affecting vested rights without due process of law.<sup>94</sup> These clauses prevent a retroactive law’s application *as applied to a private citizen*, but Act 544 does not attempt to reach a citizen’s cause of action; thus, the intended subject of the law—a governmental body—may not have the same defense.<sup>95</sup>

Similar to SLFPA-E, New Orleans had the “broad right” to pursue and defend the claims in *Morial*.<sup>96</sup> The Louisiana Supreme Court ultimately concluded that the city was unable to invoke either of the above protections because the Declaration of Rights in Article I of the Louisiana Constitution only contemplates the protection of a private person’s rights.<sup>97</sup> Under settled

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a law retroactive effect, that law may not be applied retroactively if it would impair contractual obligations or disturb vested rights.”).

91. LA. CONST. art. I, § 23 (“No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.”).

92. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .”).

93. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 6 (La. 2001) (quoting *Segura v. Frank*, 630 So. 2d 714, 728 (La. 1994)).

94. *Carter v. State*, 897 So. 2d 149, 151 (La. Ct. App. 2004) (“Similar to the Fourteenth Amendment to the U.S. Constitution, the Louisiana Constitution, Article I, § 2, provides that ‘[n]o person shall be deprived of life, liberty, or property, except by due process of law.’”). Likewise, the Fourteenth Amendment to the United States Constitution provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV.

95. For application of these state and federal clauses to a private individual’s suit filed before the retroactive law, see example, *Burmester v. Plaquemines Parish*, 982 So. 2d 795, 812 (La. 2008) (holding that the law there was “unconstitutional if made applicable to the pending, accrued, vested causes of action asserted by plaintiff and the class he represents”); *Bourgeois*, 783 So. 2d at 1259 (holding that the retrospective law, as applied to private plaintiffs, “would contravene due process guarantees by divesting them of their vested rights in their causes of action which accrued prior to the prior to the [sic] effective date of the Act”).

96. *Morial*, 785 So. 2d at 23 (Lemmon, J., concurring).

97. See, e.g., LA. CONST. art. I, § 24 (“The enumeration in this constitution of certain rights shall not deny or disparage other rights *retained by the individual citizens of the state*.” (emphasis added)); see also *Bd. of Comm’rs of Orleans Levee Dist. v. Dept. of Natural Res.*, 496 So. 2d 281, 287 (La. 1986) (“The organization of the 1974 Constitution indicates that Article I, the Declaration of



jurisprudence, political or governmental entities have no due process or contractual obligation rights with regards to their creator's actions.<sup>98</sup> Further, the state may waive or impair its subdivisions' rights because those entities only exercise power that the legislature grants to them.<sup>99</sup> This analysis holds true for both the due process and contractual obligation clauses under Louisiana's constitution<sup>100</sup> and the analogous provisions under the federal constitution.<sup>101</sup>

Under the analysis in *Morial*, and the cases cited therein, Act 544 does not violate any constitutional protections given to SLFPA-E under these two clauses. Ordinarily, when a party files suit "prior to a change in the law, that

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Rights Article, protects the rights of individuals against unwarrantable government action and does not shield state agencies from law passed by the people's duly elected representatives.").

98. *Morial*, 785 So. 2d at 11 (quoting State *ex rel.* Kemp v. City of Baton Rouge, 40 So. 2d 477, 482 (La. 1949)).

99. *Rousselle v. Plaquemines Parish Sch. Bd.*, 633 So. 2d 1235, 1247 (La. 1994) ("This state may constitutionally pass retrospective laws waiving or impairing its own rights or those of its subdivisions, or imposing upon itself or its subdivisions new liabilities with respect to transactions already passed, as long as private rights are not infringed.").

100. The state constitutional protections only apply to private persons. For an application of the state contracts clause protection, found in Article I, Section 23, of the Louisiana Constitution, see example, *Rousselle, id.* See also *Olivedell Planting Co. v. Town of Lake Providence*, 47 So. 2d 23, 27 (La. 1950) ("The provisions of our Constitution relating to the impairment of the obligations of contracts only apply to contracts or vested rights of individuals or private corporations."). For an application of the due process clause in article I, section 2, of the Louisiana Constitution, see example, *Morial*, 785 So. 2d at 13 (citing *Bd. of Comm'rs of Orleans Levee Dist.*, 496 So. 2d at 287-88).

101. The federal provisions likewise do not protect public entities. For an application of the federal Due Process Clause, found in the Fourteenth Amendment, see example, *Warren County, Mississippi v. Hester*, 54 So. 2d 12, 18 (La. 1951) ("[I]t is plain that the Fourteenth Amendment of the Federal Constitution, declaring that no state shall deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws, is utterly without application to the political subdivisions of a state, which cannot be viewed as a person within the purview of the constitutional provision."). For an application of the Contracts Clause in Article I, section 10, clause 1, see example, *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976) ("Ever since the Supreme Court's landmark decision in *Dartmouth College v. Woodward*, it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights, such as the right to be free from state impairment of contractual obligations, in the same sense as private corporations or individuals." (citation omitted)).

right is a vested property right which is protected by the guarantee of due process.<sup>102</sup> When a levee district<sup>103</sup> obtains such a property right, however, that right belongs to the state and is subject to abridgment regardless of whether the right has vested.<sup>104</sup> To be sure, no matter how SLFPA-E is classified, neither the federal nor state constitutions save its lawsuit because its status as either a state agency or some other political subdivision disqualifies the board from that vested-right protection.<sup>105</sup> Likewise, the board's apparent dual identity as agency or political subdivision does not protect any possible contractual obligations the board may have.<sup>106</sup> Ultimately, although this law may seem to be an unfair surprise from what SLFPA-E expected upon filing its claim, that party's status deprives it of the usual defenses against a retroactive law.<sup>107</sup> The second constitutional

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102. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 33 (La. 2008), *amended on reh'g* (Sept. 19, 2008) (citing *Walls v. Am. Optical Corp.*, 740 So. 2d 1262, 1268 (La. 1999)).

103. LA. REV. STAT. ANN. § 38:330.1(A)(1) (Supp. 2015) ("The Southeast Louisiana Flood Protection Authority-East and Southeast Louisiana Flood Protection Authority-West Bank, referred to herein as 'flood protection authority' or 'authority,' are established as levee districts pursuant to Article VI, Sections 38 and 38.1 of the Constitution of Louisiana.").

104. *Bd. of Comm'rs of Orleans Levee Dist.*, 496 So. 2d at 288–89.

105. If the levee authority is an agency, it is a "creature of the state," and does not enjoy due process rights against state action. *State ex rel. Kemp v. City of Baton Rouge*, 40 So. 2d 477, 482 (La. 1949) ("It is the settled jurisprudence that counties and municipalities are *creatures of the State*, established for the purpose of providing effective government with functions, powers, duties and obligations delegated or imposed by the State and that there is *nothing in the Fourteenth Amendment of the Federal Constitution or any other provision of the Constitution of the United States which would prohibit the State from making any change of such functions, powers and obligations.*" (emphasis added)). The same result is obtained if the authority should be classified as a "political subdivision." *Morial*, 785 So. 2d at 13 (citing *Hester*, 54 So. 2d at 18).

106. *See generally Bd. of Comm'rs of Orleans Levee Dist.*, 496 So. 2d 281 (interchangeably referring the Orleans Levee District as an agency and political subdivision and concluding that it was not immune from statute allegedly affecting district's obligations); *Rousselle v. Plaquemines Parish Sch. Bd.*, 633 So. 2d 1235, 1247 (La. 1994) ("This state may constitutionally pass retrospective laws waiving or impairing its own rights or those of its subdivisions, or imposing upon itself or its subdivisions new liabilities with respect to transactions already passed, as long as private rights are not infringed.").

107. In addition to this analysis, substantial support exists for the state's exercise of police power in regulating the oil and gas industry, especially when the law only applies to state bodies. *See Allain v. Martco P'ship*, 851 So. 2d 974, 980 (La. 2003) ("The United States Constitution Fourteenth Amendment and the

argument against the retroactive law does not focus on the law's effect on the plaintiff individually—it instead focuses on Act 544's attempt to remove an action from the grips of the judiciary.

*b. Act 544 Does Not Infringe Upon the Judiciary's Independence*

In *Morial*, the city of New Orleans also opposed the retroactive law on the grounds that the law was the product of the legislature exercising “power properly belonging to [the] judicial branch of government,” presumably because the city had already filed its claim when the legislature enacted the law.<sup>108</sup> Similarly, SLFPA-E contended that because its “claims were already within the jurisdiction of the courts,” the legislature improperly infringed on the judiciary's independence.<sup>109</sup> Although violations of the separation of powers doctrine operate as a constitutional bar to retroactive application,<sup>110</sup> both SLFPA-E and the city of New Orleans misinterpreted the law.

The Louisiana Supreme Court in *Morial* held that the retroactive statute did not violate separation of powers principles, supporting its conclusion by citing only cases regarding divestiture of rights without citing any direct authority on separation of powers.<sup>111</sup> Although a more thorough explanation would have avoided misinterpretation, this analysis was proper. Importantly, the statute at issue in *Morial* was a *substantive* change in the law.<sup>112</sup> The

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Louisiana Constitution Article I, Section 2 and 4 serve as a reasonable restriction on the exercise of the State's police power. In *City of Shreveport v. Curry*, 357 So. 2d 1078 (La.1978), this Court defined ‘police power’ as the power of a governmental body that reasonably regulate [sic] the citizens’ actions in order to protect or promote public health, safety, morals, peace or general welfare.” (citation omitted).

108. *Morial*, 785 So. 2d at 19.

109. Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment Regarding Louisiana Act 544, *supra* note 64, at 23.

110. *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392, 404 (La. 2005) (“Notwithstanding, even when the Legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights. In a like vein, interpretative legislation may also not be applied retroactively if the legislative change violates the principles of separation of powers and independence of the judiciary.” (citation omitted)).

111. *Morial*, 785 So. 2d at 19.

112. The Louisiana Supreme Court does not label Louisiana Revised Statutes section 40:1799 as “substantive” in the separation of powers discussion, but it does explain that “[t]he legislature has always enjoyed the power to create new rights and abolish old ones as long as it does not interfere with vested rights.” *Id.* at 19.

Louisiana Supreme Court's analysis in *Morial* was made in light of prior decisions where the Court held that when a law is not "interpretive," and affects substantive change in legal rights, a separation of powers discussion is unnecessary and the only remaining question is whether the law improperly affects vested rights or contractual obligations.<sup>113</sup> Thus, retroactive laws have the potential to violate the separation of powers principle only if the law is "interpretive," not substantive.

"Interpretive laws" are those that "do not create new rules, but merely establish the meaning that the interpretive statute had from the time of its enactment."<sup>114</sup> Even though the legislature explicitly provides that a law is both interpretive and retroactive, the law may not retroactively overrule a court's previous interpretation of a long-standing law.<sup>115</sup> The leading cases on retroactive violations of separation of powers are confined to their facts—the cases dealt exclusively with interpretive laws that expressly overruled judicial decisions.<sup>116</sup> Thus, even if Act 544 is interpretive, the law does not violate the separation of powers principle because Act 544 does not purport to overrule or alter a previous court's decision regarding the law's interpretation or

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113. This concept is not novel. The Louisiana Supreme Court has previously recognized that a discussion of separation of powers was unnecessary because of its ultimate determination that the retroactive law was substantive. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 819 (La. 1992) ("It is this interplay between the legislative and judicial branches that raises the separation of powers issue which we note, *but do not resolve, as we find the amendment to [Louisiana Revised Statutes section] 23:1103(B) is not interpretive.*" (emphasis added)).

114. *Id.* at 817.

115. *Unwired Telecom*, 903 So. 2d at 406 ("By passing 2002 La. Acts 85 in order to abrogate the appellate court's interpretation and application of a long-standing revised statute, the Legislature clearly assumed a function more properly entrusted to the judicial branch of government." (citing *INS v. Chadha*, 462 U.S. 919 (1983) (Powell, J., concurring))).

116. *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So. 2d 533, 543–44 (La. 2005) ("In *Unwired*, this court recently addressed the issue of whether legislation designated as interpretive and intended to be applied retroactively violates the principles of separation of powers and independence of the judiciary. In that case, as in this one, the legislature passed an Act seeking to legislatively 'overrule' a prior judicial decision. This court concluded that by passing the Act to abrogate a court's interpretation and application of a long-standing revised statute, the legislature 'clearly assumed a function more properly entrusted to the judicial branch of government.'" (quoting *Unwired Telecom*, 903 So. 2d at 406)).

application;<sup>117</sup> merely changing the law before a court reviews that law does not encroach on judicial independence.<sup>118</sup>

Act 544, however, is truly substantive and, thus, poses no problems related to separation of powers. A “substantive law” will “either establish new rules, rights, and duties or change existing ones.”<sup>119</sup> These laws focus on an actual change in a party’s rights.<sup>120</sup> Although some legislators sold Act 544 as a “clarification” of existing law—presumably section 49:214.36(D), which grants causes of action to certain parties—rather than a creation of new law,<sup>121</sup> one should classify the law by examining its effects, without giving regard to labels. Although the causes of action granted to specific parties in section (D) remained, Act 544 abolished claims not only “arising from or related to any use as defined by R.S. 49:214.23(13)” and “activity subject to permitting under R.S. 49:214.21 et seq.,”<sup>122</sup> but also those causes of action relating to any activity subject to federal law and permitting.<sup>123</sup> Act 544, then, contemplates a much broader range of claims than the previous law did, constituting a considerable alteration of rules and affected parties’ rights. Under Louisiana Supreme Court jurisprudence, Act 544 does not violate separation of powers principles, because that law substantively

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117. The only decision even citing Louisiana Revised Statutes section 49:214.36(D), which appears to control which parties may sue over matters included in SLFPA-E’s petition, discussed federal preemption of the state law, not what parties are properly asserting claims for federal and state permitting violations. *BP Am. Inc. v. Chustz*, 33 F. Supp. 3d 676 (M.D. La. 2014).

118. See, e.g., *Pierce v. Hobart Corp.*, 939 F.2d 1305, 1309–10 (5th Cir. 1991) (“The amendment did not alter a court-created doctrine for at that time there was no ‘authoritative judicial interpretation of Louisiana statutory law pertinent to a physician’s duty toward his patient.’” (quoting *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1339 (La. 1978))).

119. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 817 (La. 1992).

120. See Rebecca Barrett Hall, Comment, *A Wolf in Sheep’s Clothing: Dressing-Up Substantive Legislation to Trigger the Interpretive Exception to Retroactivity Violates Constitutional Principles*, 67 LA. L. REV. 599, 614 (2007) (“Thus, laws can be sorted by examining a single characteristic: interpretive classification should rely on clarification of original legislative intent, and substantive classification should depend on creation or alteration of existing rights.”).

121. See Ballard, *supra* note 19.

122. LA. REV. STAT. ANN. § 49:214.36(O)(1) (Supp. 2015).

123. Specifically, Act 544 contemplates the laws in 33 U.S.C. § 408 (taking possession of, use of, or injury to harbor or river improvements) and 33 U.S.C. § 1344 (permits for dredged or fill material).

amends existing law,<sup>124</sup> which only leaves questions related to parties' rights.<sup>125</sup>

## 2. Act 544 Does Not Qualify as a Prohibited Local or Special Law

The principle that only general matters should be the focus of lawmakers' resources and attention is well established.<sup>126</sup> The Louisiana Constitution provides that "the legislature shall not pass a local or special law" concerning certain enumerated topics.<sup>127</sup> The right-stripping provisions in laws like Act 544 apply prospectively to a range of potential claimants, but the law's context suggests that the legislature aimed the law at a particular target—the pending suit. Just like the SLFPA-E, the city of New Orleans in *Morial* was the only party with a pending suit that the new law would affect.<sup>128</sup> The city argued that the law's retroactive application impermissibly targeted its suit, violating the constitutional prohibition against local and special laws.<sup>129</sup>

In addition to violations of individual rights and separation of powers principles, one must also recognize this constitutional provision as an exception to the validity of a retroactive law. Before determining whether a law impermissibly deals with those enumerated topics, the court in *Morial* explained that first classifying the law as "local" or "special" is necessary; only then can one analyze the law under this rule.<sup>130</sup> Specifically in the context of the Local Government Article, the constitution defines a valid "general law" as "a law of statewide concern enacted by the legislature which is uniformly applicable to all persons or to all political subdivisions in the state or which is uniformly applicable to all persons or to all political subdivisions within the same class."<sup>131</sup>

The *Morial* court relied heavily on its previous decision in *Kimball v. Allstate Insurance Co.* to conclude that the law at issue was valid and general in nature.<sup>132</sup> *Kimball* elaborated that a "local law" is one concerned with geographical application; a local law "operates only in a particular locality

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124. See *St. Paul*, 609 So. 2d at 819.

125. See *supra* Part II.A.1.a.

126. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 17 (La. 2001) (quoting *Kimball v. Allstate Ins. Co.*, 712 So. 2d 46, 50 (La. 1998)).

127. LA. CONST. art. III, § 12(A) ("Except as otherwise provided in this constitution, the legislature shall not pass a local or special law . . . [c]oncerning any civil or criminal actions . . .").

128. *Morial*, 785 So. 2d at 18.

129. *Id.*

130. *Kimball*, 712 So. 2d at 50; *Morial*, 785 So. 2d at 17.

131. LA. CONST. art. VI, § 44.

132. *Morial*, 785 So. 2d at 17–19.

or localities without the possibility of extending its coverage to other areas should the requisite criteria exist or come to exist there.”<sup>133</sup> Act 544’s first section abolishes causes of action for a class of parties without geographic limitation—the phrase “state or local governmental entity” does not connote application to any specific area of the state.<sup>134</sup> Section 5 of Act 544, however, contains a savings clause for all governmental entities with an exception expressly naming “a local or regional flood protection authority.”<sup>135</sup> Currently, only two such entities exist in the state—the Southeast Louisiana Flood Protection Authority-East and -West—both of which are located in the southeast region of the state.<sup>136</sup> Thus, one could consider Act 544 “immediately suspect as a local law,” because the law’s operation “is limited to certain parishes.”<sup>137</sup>

Several reasons exist for specifying why the levee authorities in this manner do not bring Act 544 within the definition of a “local” law. First, Act 544 has the potential to apply to areas outside the southeast region of the state if the lawmakers decide to create additional authorities, something that is well within their power.<sup>138</sup> In addition to the law’s ability for future application, just because the levee authority was the only “state or local governmental entity” with a pending suit when the law took effect does not mean the law was local.<sup>139</sup> Lastly, though the Louisiana Supreme Court has suggested that a law’s application may be tied to naturally occurring, measurable criteria such as “population, size or physical characteristics,” the Louisiana Supreme Court has not restricted the mechanism for determining a law’s expanded application to this type of criteria.<sup>140</sup>

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133. *Kimball*, 712 So. 2d at 51.

134. LA. REV. STAT. ANN. § 49:214.36(O)(1) (Supp. 2015).

135. *Id.* at § 49:214.36(5) (“Nothing in this Section shall alter the rights of any governmental entity, except a local or regional flood protection authority, for claims related to sixteenth section school lands or claims for damage to property owned or leased by such governmental entity.”).

136. LA. REV. STAT. ANN. § 38:330.1 (Supp. 2015).

137. *Kimball*, 712 So. 2d at 51.

138. LA. REV. STAT. ANN. § 38:330.1.

139. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 18 (La. 2001) (“The fact that the City is the only political subdivision that has a lawsuit of this type pending against the firearms industry does not make Section 2 a local law since the conditions upon which Section 2 operates, all governing authorities of a political subdivision that have actions pending on the effective date of the Act, simply do not prevail in other localities.”).

140. *Kimball*, 712 So. 2d at 51 (“[A] law may be a general law even though limited to one locality if it is general in its terms and its coverage can extend to other areas should the requisite criteria exist there as well or if its operation is limited to a locality through the effect of a reasonable classification such as

Further, where a reasonable distinction supports the legislature's geographic limitation, the narrow application of the law may be constitutional.<sup>141</sup> Act 544 likely specified "local or regional flood protection authority" because of the urgency of ending the litigation. Alternatively, those flood protection authorities may be unique "governmental entities" in a disaster-prone area of the state, such that the legislature wishes to deny them access to certain property damage claims. Further, a law is not "local" when "persons throughout the state are affected by it or it operates on a subject in which the people at large are interested."<sup>142</sup> The board's ability to file certain suits may not directly affect citizens elsewhere in the state, but determining how to regulate such a pervasive industry and how the government implements that regulation are certainly statewide interests. Because this exception to the local law prohibition is a type of deference to the state's police power,<sup>143</sup> the state's restriction on its own creation should supersede any concerns relating to a "local" law, especially when that entity is being prevented from involvement in litigation against an industry subject to the state's police power.<sup>144</sup>

Next, the Louisiana Supreme Court has defined a "special law" as "one which operates upon and affects only a fraction of the persons . . .

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population, size or physical characteristics and not solely through the specific designation of a certain parish or parishes." (quoting *City of New Orleans v. Treen*, 431 So. 2d 390, 394 (La. 1983))). Here, Act 544 is general in its language in that the law does not attempt to specify any area of the state and has the potential for future application should other authorities exist later.

141. *Id.* ("For example, we noted in *Slay*, that a law which specified a fishing net must have a certain mesh size in some parishes and a different mesh size in others could have been constitutional, and not a local law, if the state had been able to show a reasonable basis for the classification based on the conditions and characteristics of the various parishes." (citation omitted)).

142. *Id.*; *La. Paddlewheels v. La. Riverboat Gaming Comm'n*, 705 So. 2d 149, 156 (La. 1994); *Polk v. Edwards*, 626 So. 2d 1128, 1134 (La. 1993).

143. *See Kimball*, 712 So. 2d at 51 (explaining that the Louisiana Supreme Court previously held in *Polk* that a law was general because it "pertained to matters of significant interest to the entire state, affected people throughout the state, even though some only indirectly, and was passed to benefit the entire state."). Further expounding upon the exception to a regional limitation, the Louisiana Supreme Court later explained that local and special laws are "not intended to restrict the legislature's exercise of its police power." *Morial*, 785 So. 2d at 19.

144. *Allain v. Martco P'ship*, 851 So. 2d 974, 982 n.8 (La. 2003) ("In *Sun Oil Company v. State Mineral Board*, the Court noted that 'the state's police powers justify measures for the regulation of production with oil and gas for the conservation of these valuable deposits.'" (citation omitted)).



encompassed by a classification, granting privileges to some persons while denying them to others.”<sup>145</sup> Although Act 544 specifically excepted SLFPA-E from the savings clause provision, the law applies equally to all entities that fall into the distinct class of flood authorities—the “general body”—and it does not single out any one in particular.<sup>146</sup> Further, like the jurisprudential rule on “local” laws, “special” laws have a similar exception based on the state’s reasonable basis for the law’s narrow application.<sup>147</sup> The legislature may have considered particular property damage claims unnecessary or improper in light of the levee authorities’ special roles of monitoring flood prevention. Thus, the state may have similar policy reasons for holding the law’s application to this particular set of governmental actors, as the legislature did for removing these causes of action from the special geographically situated entities.

Thus, Act 544 does not fall into the requisite categories of “local” or “special” laws,<sup>148</sup> obviating the need to apply the law to the enumerated list of prohibited subjects.<sup>149</sup> Additionally, the only questionable provision in Act 544 is Section 5, which specifically applies to the flood protection authorities.<sup>150</sup> Even if a court later determines that section is invalid, the law is severable if the remaining provisions of the law can still have effect in that section’s absence.<sup>151</sup> Although Act 544 is a permissible general law as

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145. *Kimball*, 712 So. 2d at 52. More specifically, the Louisiana Supreme Court explained, “[a] special law is one that confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.” *Id.*

146. *Id.*

147. *Id.* (“As with a law which classifies on the basis of geographic conditions or particularly designated localities, classification of certain parties will not render the law special if it is based on a substantial difference between the class created and the subjects excluded, and there is a reasonable basis for the distinction.”).

148. LA. CONST. art. VI, § 12(A)(3).

149. *Polk v. Edwards*, 626 So. 2d 1128, 1133 (La. 1993) (“Thus, if the legislation is general rather than local or special, neither the prohibitions regarding the enumerated subjects nor the requirement for local advertisement apply.” (citing *Teachers’ Ret. Sys. of La. v. Vial*, 317 So. 2d 179 (La. 1975))).

150. LA. REV. STAT. ANN. § 49:214.36(O)(5) (Supp. 2015).

151. LA. REV. STAT. ANN. § 24:175(A) (2007) (“Unless otherwise specifically provided therein, the provisions of each act of the legislature are severable, whether or not a provision to that effect is included in the act. If any provision or item of an act, or the application thereof, is held invalid, such invalidity shall not affect other provisions, items, or applications of the act which can be given effect without the invalid provision, item, or application.”).

applied to the flood authorities, the state constitution provides for those entities, which may limit the law's effect on their established powers.

*B. The Levee Authority's Constitutional Origins Do Not Provide Immunity*

Whereas the United States Constitution grants power to the federal government, Louisiana's constitution is a restriction on the otherwise unabridged power of the state.<sup>152</sup> Thus, the legislature is free to pass any law that does not violate some specific constitutional provision<sup>153</sup> that was impliedly or expressly<sup>154</sup> meant to prevent the legislative action.<sup>155</sup> The same principle applies to laws affecting the powers of constitutionally established entities.<sup>156</sup>

In *Wooley v. State Farm Fire and Casualty Insurance Co.*, the Louisiana Supreme Court considered amendments to the framework of administrative law that affected powers of the commissioner of insurance.<sup>157</sup> The court offered a detailed history of the commissioner's office to explain that no specifically listed duties or powers that were protected from legislative alteration appeared anywhere in the office's establishment.<sup>158</sup> The constitutional delegates, the court noted, clearly contemplated whether to place the specific powers and duties of the commissioner in the constitution or leave those determinations to the legislature.<sup>159</sup> Ultimately, the constitutional delegates wrote the provision so that the office "has no powers, functions or duties allocated to [it] by the constitution."<sup>160</sup>

The Louisiana Constitution provides for the legislature's ability to establish regional flood protection authorities but does not provide the entities with any particular powers that Act 544 affected. The 2006 amendments to the Local Governmental Article of the Constitution lay out only three specific powers

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152. *State v. All Prop. & Cas. Ins. Carriers*, 937 So. 2d 313, 319 (La. 2006) ("Unlike the federal constitution, the Louisiana 'constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature." (quoting *La. Mun. Ass'n v. State*, 893 So. 2d 893, 843 (La. 2005))).

153. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 31 (La. 2008).

154. *Id.* at 31.

155. *Id.*

156. *See, e.g., State ex rel. Porterie v. Walmsley*, 162 So. 826, 829 (La. 1935) (concluding that although the Louisiana Constitution codified the citizen taxpayer petition, the provisions did not specifically prevent the state from rearranging the sewerage and water board's members by statute).

157. *Wooley v. State Farm Fire & Cas. Ins. Co.*, 893 So. 2d 746, 750 (La. 2005).

158. *Id.* at 758–61.

159. *Id.* at 767.

160. *Id.*

of the regional districts: “(a) to levy taxes in such areas [and] prohibit the levy of taxes provided for in this Section in such areas, (b) to employ and provide for its employees, or (c) to own, construct, and maintain its property.”<sup>161</sup> Although the originating provision details several purposes of the levee authority, even some unlisted and “incidental” to those listed, these purposes do not constitute specific grants of power. Instead, “[t]he legislature *by law* may establish regional flood protection authorities . . . and provide for their territorial jurisdiction, governing authority, powers, duties, and functions. . . .”<sup>162</sup>

Following the constitutional amendments establishing the flood protection authorities, the legislature provided “by law” for their powers, duties, restrictions, jurisdiction, and guidelines for the boards of commissioners.<sup>163</sup> The SLFPA-E is also considered a levee district, so its board has the legislatively granted ability to sue and be sued.<sup>164</sup> That ability is now a general rule to which Act 544’s restriction on particular causes of action operates as an exception.<sup>165</sup> Just as in *Wooley*, Act 544 does not affect the SLFPA-E’s constitutionally listed powers—its ability to levy taxes, employ and pay its employees, or own, construct and maintain its property. Rather, Act 544 is a valid exercise of the state’s authority unrestrained by the constitution. The legislature’s ability to alter the powers granted to an agency goes to the heart of administrative law and the system of checks and balances. Through the state’s democratic pronouncement, the legislature chose to regulate coastal activity through a permitting framework and only allow particular entities to sue on related matters.

### III. ACT 544 IS A NECESSARY SOLUTION TO A COMPLEX PROBLEM

Though serious questions persist regarding when and how the state should hold industry players responsible for violations and potential damage to the coast, the SLFPA-E’s attempted method is not the appropriate means. The state’s existing coastal regulatory framework, as well as several policy concerns, demonstrate that Act 544 was the preferred solution.

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161. LA. CONST. art. VI, § 38.1(A)(2).

162. *Id.* § 38.1(A)(1) (emphasis added).

163. LA. REV. STAT. ANN. §§ 38:330.1 to 330.13 (Supp. 2015).

164. LA. REV. STAT. ANN. § 38:309(B) (2012).

165. See Act No. 544, § 2, 2014 La. Acts (Westlaw), *codified at* LA. REV. STAT. ANN. § 214.36(O)(1) (Supp. 2015).

*A. How Does the Lawsuit Fit into the Framework of Coastal Regulation?*

The legislature has set up an entire body of law to regulate the coastal zone and those persons who use the zone.<sup>166</sup> The secretary of the Department of Natural Resources is in charge of administering the state's coastal management program,<sup>167</sup> which federal law approved and which governs Louisiana's coast.<sup>168</sup> A part of Louisiana's plan delegates to coastal parishes the ability to issue coastal use permits after developing an approved program.<sup>169</sup> The secretary constantly scrutinizes both the permitting decisions<sup>170</sup> and programs developed at the local level "to ensure continued consistency with the state program, guidelines, and with the policies and purpose" of the state's coastal management.<sup>171</sup> The secretary and each parish with an approved local coastal program have the ability to conduct "field surveillance,"<sup>172</sup> "issue cease and desist orders,"<sup>173</sup> "suspend, revoke, or modify" permits,<sup>174</sup> and "bring such injunctive, declaratory, or other actions as are necessary to ensure" compliance with the permitting framework along the coast.<sup>175</sup> Notably, however, the legislature has not entitled the flood protection authorities to these actions.

The state did not create the SLFPA-E to file suits to enforce regulations on the state's wetlands or permitted uses thereof, nor does that flood protection authority have the power to do so. Under the statutory provisions governing which entities have the ability to enforce coastal-use standards, the SLFPA-E is not a local government with an approved permitting program.<sup>176</sup> That fact alone, however, does not deprive the SLFPA-E of potential enforcement action. The enforcement section of the Louisiana

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166. LA. REV. STAT. ANN. §§ 49:214.21 to :214.42 (2012 & Supp. 2015).

167. LA. REV. STAT. ANN. § 49:214.26A(1) (2012). The secretary is in charge of developing the "coastal management program consisting of all applicable constitutional provisions, laws and regulations of this state which affect the coastal zone." *Id.* § 214.27(A).

168. Congress approved Louisiana's program under the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451–66, in 1980. *See Coastal Management Programs, supra* note 28.

169. *Local Coastal Programs*, LA. DEP'T NAT. RESOURCES, <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=111&pnid=192&nid=194> [perma.cc/R63M-AQWY] (last visited Oct. 22, 2015).

170. LA. REV. STAT. ANN. § 49:214.30(C)(1) (2012).

171. *Id.* § 214.28(H)(3).

172. *Id.* § 214.36(A).

173. *Id.* § 214.36(B).

174. *Id.* § 214.36(C).

175. *Id.* § 214.36(D).

176. *See id.*

Coastal Zone Management Program provides that “local political subdivision[s]” without such a program may still enforce “any ordinance or regulation relating to wetlands protection or restoration.”<sup>177</sup> The terms “wetlands” and “permit,” however, do not appear in any of the regional flood authorities’ constitutional or statutory establishments.<sup>178</sup>

The legislature specifically created these authorities to construct and maintain flood prevention systems in their jurisdictions.<sup>179</sup> Their inferior role in regulating use of the coastal zone in general is apparent in several provisions in the Coastal Zone Management Act.<sup>180</sup> By attempting to address regulatory matters itself, the Board of Commissioners for SLFPA-E hastily upset a plan of administration the state has tailored over several decades.<sup>181</sup> The legislature did not intend for local bodies to handle this regulatory framework for the coast alone, especially by means of unpredictable, high-stakes litigation.

Several factors of the lawsuit make its resolution potentially problematic for the industry’s oversight. A government subdivision—a piece of the larger regulatory machine—can significantly affect the regulated industry with a suit like SLFPA-E’s. As opposed to “traditional suits,”<sup>182</sup> litigation that focuses on future change and which asks the court to

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177. *Id.* § 214.36(M).

178. LA. CONST. art. VI, §§ 38–42; LA. REV. STAT. ANN. §§ 38:330.1 to :330.13 (Supp. 2015).

179. LA. REV. STAT. ANN. §§ 38:330.1 to :330.13.

180. *See, e.g.*, LA. REV. STAT. ANN. § 49:214.27D(1) (2012) (“In the development and implementation of the overall coastal management program, the secretary shall conduct a public education program to inform the people of the state of the provisions of this Subpart and the rules and regulations adopted pursuant hereto, and *participation and comments* by . . . state, and local governmental bodies, including port authorities, *levee boards*, regional organizations, planning bodies . . . shall be *invited and encouraged*.” (emphasis added)).

181. For the policy goals that the secretary takes into consideration when adopting guidelines and the management programs, see Louisiana Revised Statutes section §214.27(C)(1)–(12).

182. Patrick Luff, *Risk Regulation and Regulatory Litigation*, 64 RUTGERS L. REV. 73, 102 (2011). To distinguish these suits from litigation with the aim of regulation, one scholar has canvassed certain characteristics of the classic lawsuit: the lawsuit is a contest of two “diametrically opposed interests;” the suit concerns “retrospective” review of facts in the past; “scope of the relief is derived more or less logically from the substantive violation;” after its disposition, the court’s role is through; and “responsibility for fact . . . development” is exclusively among the parties, not the court. *Id.* at 102–03, 111.

assess normative values<sup>183</sup> can function as a substitution for democratically approved law. As an area of statewide concern, the oil and gas industry's regulation falls under the state's police power.<sup>184</sup> In this instance, SLFPA-E has prayed for a judgment that forces the defendant companies to take actions beyond remedying past harms based on quasi-legislative determinations regarding who should bear responsibility for the entity's financial woes.<sup>185</sup> This type of "regulation through litigation," although suspect as an inappropriate means of handling an entire industry's operations in the state, has expansive implications both for the individual levee boards and the state's industry management as a whole.<sup>186</sup> The courts should replace the legislature's role, especially at the unapproved request of one of the state's inferior bodies.<sup>187</sup> Ultimately, SLFPA-E's decision to file the suit does not

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183. Abram Chayes, *The Role of The Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976). This new form of regulation by litigation will naturally differ from the traditional suits in certain respects: the scope of the suit's issues are "shaped primarily by the court and parties"; the parties' structure is not "bilateral but sprawling and amorphous"; the factual determinations are predictive and legislative; relief is not confined to past wrongs with finite limits among the parties but is more "forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees"; the remedy is not involuntarily imposed but is instead the result of a compromise; disposition of the lawsuit does not end the court's involvement; the judge is also responsible for "organizing and shaping the litigation to ensure a just and viable outcome"; the litigation does not concern "a dispute between private individuals about private rights, but a grievance about the operation of public policy." *Id.*

184. *Allain v. Martco P'ship*, 851 So. 2d 974, 982 n.8 (La. 2003).

185. *Petition for Damages and Injunctive Relief*, *supra* note 14, at 7.

186. Edward Winter Trapolin, *Sued into Submission: Judicial Creation of Standards in the Manufacture and Distribution of Lawful Products—The New Orleans Lawsuit Against Gun Manufacturers*, 46 LOY. L. REV. 1275, 1284–85 (2000) ("The judiciary is being used by special interest litigants as a tool for judicial legislation in the absence of actual legislative enactments."); *see also* Crouse, *supra* note 73 (discussing that supporters of a federal bill, which provided to "prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition," believed lawsuits of that sort were "an attempt by the judiciary to craft gun control laws outside of the legislative process." (quoting 15 U.S.C. §§ 7901–7903 (2009))).

187. *See id.* at 1294 ("Ultimately, what the lawsuits against the tobacco companies, and now the lawsuits against the handgun industry, are attempting to do is create standards for the manufacture and distribution of any given product through the force of overwhelming litigation costs. The net effect is to accomplish

coincide with the regulation's effectiveness, because the flood protection authority attempted to circumvent the uniform democratic voice by seeking to impose its own view of the industry's responsibility.

Further, the lawsuit's outcome has the potential for unforeseen consequences. The nature of SLFPA-E's claims has drawn attention to whether the potential judgment might affect the similarly situated agencies in an indirect way. For example, the only other flood protection authority in the state, Southeast Louisiana Flood Protection Authority-West, expressed its disapproval of the unusual suit, citing concerns that the suit's implications would reach far beyond the board's territorial jurisdiction.<sup>188</sup> Additionally, SLFPA-E's requested remedy may involve processes beyond its power to compel. For instance, the board requested that, at the court's discretion, the court force the defendant companies to backfill dredged canals, which is an activity under the supervision of the secretary and the Army Corps of Engineers.<sup>189</sup> Although the levee authority has perhaps stepped into a regulatory role for which the legislature did not create the authority, the SLFPA-E's intended responsibilities remain and its ability to fulfill these responsibilities should not suffer as a result of the board of commissioners' hasty decision. Act 544 effectively resolves both issues.

#### *B. Act 544 is the Preferred Solution*

The legislature corrected the inappropriate lawsuit by means of an after-the-fact denial of access to the courts. Without considering the specific circumstances, this action might appear as an attempt to shield political and financial interests. Although the situation might at first appear to involve poor gamesmanship and political puppetry, in context, Act 544's effect was actually corrective in nature—a hard and fast solution to a potentially destructive situation.

Among the many efforts to defeat SLFPA-E's suit was an attempt by the governor and the legislature to alter the board's membership. Months before the 2014 legislative session, the governor's opposition to the lawsuit led to his unprecedented rejection of the board's nominations for vacant

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in court what cannot be achieved in the state and federal legislative branches.” (footnote omitted).

188. Benjamin Alexander-Bloch, *New Orleans Levee Authority Will Consider 45-Day Pause to Coastal Erosion Lawsuit*, NOLA.COM (Aug. 15, 2013, 6:13 PM), [http://www.nola.com/environment/index.ssf/2013/08/new\\_orleans\\_levee\\_authority\\_wi.html](http://www.nola.com/environment/index.ssf/2013/08/new_orleans_levee_authority_wi.html) [https://perma.cc/J32S-LXYM].

189. See LA. REV. STAT. ANN. § 49:214.25(D) (2012); 33 U.S.C. § 1344 (2012).

positions.<sup>190</sup> After making clear that he would reject any board member who opposed his viewpoint,<sup>191</sup> the governor followed through by removing and subsequently instating three commissioners based on their stances on the lawsuit.<sup>192</sup> In an attempt to legitimize the governor's politically motivated rejections, the legislature later proposed an amendment to the flood protection authority's governing law that would eradicate some political immunity that the board members enjoyed.<sup>193</sup> Subsequent amendments softened the bill's effects, ultimately proposing that the governor have the power to remove a commissioner in light of state law or policy violations.<sup>194</sup> The legislature has not yet enacted this proposed law and probably never will, assuming the lawmakers remain true to their concerns over effective, consistent regulation. Arguably, such political influences were exactly what the legislature intended to avoid with the authorities' post-Hurricane Katrina creation.<sup>195</sup> If SLFPA-E was indeed incorrect in filing this lawsuit because their original, specific duty is to maintain flood systems, which is a highly technical and specialized task, then the legislature should not alter the board's membership and appointment process. The entity's grave task of overseeing effective flood diversion and prevention naturally calls for objective determinations, which are best handled by parties that are truly qualified and not motivated by political appeasements.

Act 544, specifically the provision that eliminates SLFPA-E's cause of action, halts the lawsuit and preserves the entity's integrity as an expertise-driven body. Thus, the law does not diminish the entity's ability to carry out its intended tasks. Though the board may not now sue on certain claims of regulatory import, the board is still left with all previously held capabilities,

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190. See Mark Schleifstein, *Levee Authority Committee Ignores Bobby Jindal Rejection of One Nominee, Agrees to Send Him Another*, NOLA.COM (Mar. 7, 2014, 3:40 AM), [http://www.nola.com/environment/index.ssf/2014/03/levee\\_authority\\_committee\\_igno.html](http://www.nola.com/environment/index.ssf/2014/03/levee_authority_committee_igno.html) [perma.cc/NB2F-WPNU]; Jeff Adelson & Mark Ballard, *Jindal Signs Bill that Could Kill Wetlands Suit*, ADVOCATE.COM (June 6, 2014, 9:00 PM), <http://www.theneworleansadvocate.com/news/9383128-171/jindal-signs-bill-that-would> [perma.cc/QLW9-V8BS].

191. See Associated Press, *Levee Board Re-nominates Lawsuit Supporter*, DAILYWORLD.COM (Sept. 27, 2014, 12:37 PM), <http://www.dailyworld.com/story/news/state/2014/09/27/levee-board-re-nominates-lawsuit-supporter/16334373/> [perma.cc/MZ86-G6R9].

192. See Adelson & Ballard, *supra* note 190.

193. Act No. 79, 2014 La. Acts (Westlaw); *see also* Schleifstein, *supra* note 190.

194. Act No. 79, 2014 La. Acts.

195. Mark Schleifstein, *East Bank Levee Authority Meets for First Time with New Bobby Jindal Appointments*, NOLA.COM (Oct. 17, 2013, 7:19 PM), [http://www.nola.com/environment/index.ssf/2013/10/east\\_bank\\_levee\\_authority\\_meet.html](http://www.nola.com/environment/index.ssf/2013/10/east_bank_levee_authority_meet.html) [perma.cc/MU3U-9MQJ].



including the ability to maintain unbiased membership and the power to file suit on non-prohibited matters. As for accomplishing the end goal, Act 544 justifiably attempted to prevent litigation from improperly serving as a regulation that a state entity imposed inappropriately.<sup>196</sup> Laws regulating such a complex industry require a consistent, statewide pronouncement. The Louisiana Supreme Court has previously offered its sentiment on this type of action, making Act 544's eventual approval all the more likely.<sup>197</sup>

The lawsuit's potential for affecting the state's ability to uniformly regulate an area subject to its police power might make Act 544 an understandable remedy in this instance, but the larger policy concern of holding the companies responsible still remains. Coastal residents believe that the oil and gas companies are at least partially responsible for the coastal wetland problems, and these companies likely will not voluntarily restore the damage done.<sup>198</sup> A passive view of the facts surrounding SLFPA-E's lawsuit and the corresponding retroactive law may puzzle some—the legislature has taken serious strides to limit lawsuits against parties whom the public feels are responsible. Regardless of Act 544's immediate effects, however, the companies remain susceptible to serious liability for these issues.

This Comment does not intend to suggest that litigation against oil and gas companies is categorically improper. Along with the public's perception

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196. For one commentator's comparable opinion, see Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685, 698 (2000) (“[T]he appropriate legislative response is likely to enact legislation limiting mass tort claims by states and other government entities. Because politics and economics may be influencing the filing of these lawsuits, rather than a purer quest for justice, a political response is needed. Further, the massive size of these claims and their enormous potential impact on society create complex policy issues that are better addressed by legislatures than by courts.”).

197. The Louisiana Supreme Court has recognized the need for consistency in the face of industry regulation. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 16 (La. 2001) (“Equally clear is the fact that consistent, exclusive statewide regulation of the firearms industry tends in a great degree to preserve the public safety and welfare. A scheme allowing several municipalities to file suits effectively attempting to regulate the firearms industry in different ways and in different degrees could conceivably threaten the public safety and welfare by resulting in haphazard and inconsistent rules governing firearms in Louisiana.”).

198. *Poll Results*, *supra* note 2 (showing that 93% of coastal residents believe the companies, not taxpayers, should fix the damage to the coastal wetlands; only 33% of residents along the state's coast and 22% of residents in the New Orleans believe the companies will repair the coast on their own).

of the situation,<sup>199</sup> empirical data suggests that oil and gas production has contributed to coastal land loss.<sup>200</sup> The legislature appears to be responsive to these concerns and has established a framework that allows for sizeable lawsuits against those companies in the industry.<sup>201</sup> Louisiana Revised Statutes section 214.36(D) expressly grants a cause of action for coastal zone violations to many coastal parish governments.<sup>202</sup> More notably, none of the legislature's industry protections have affected private citizens with proper standing. Compared to the way other states have handled instances of reoccurring lawsuits against an industry, Louisiana's restrictions have been mild.<sup>203</sup>

Looking forward, the legislature is capable of preventing this kind of unwanted scenario created by an unauthorized state actor. The more state lawmakers and administrators address the industry's problems—for example, the growing concerns over coastal land loss and the companies' role in taking responsibility—the more likely courts are to defer to the legislature's studied findings.<sup>204</sup> Also, the state should continue to act carefully when creating and providing powers for state entities in the

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199. *Id.*

200. See Renfro, *supra* note 10. Still, some studies suggest that many other factors contribute to coastal erosion, namely groundwater withdrawal, heavily influence "subsidence," and that oil and gas production plays a miniscule role. Roy K. Dokka, *The Role of Deep Processes in Late 20th Century Subsidence of New Orleans and Coastal Areas of Southern Louisiana and Mississippi*, 116 J. GEOPHYSICAL RES 1, 16 (2011).

201. See, e.g., Mark Schleifstein, *Jefferson, Plaquemines Parishes File Wetland Damage Lawsuits Against Dozens of Oil, Gas, Pipeline Companies*, NOLA.COM (Nov. 12, 2013, 6:43 PM), [http://www.nola.com/environment/index.ssf/2013/11/jefferson\\_plaquemines\\_parishes.html](http://www.nola.com/environment/index.ssf/2013/11/jefferson_plaquemines_parishes.html) [perma.cc/6GCM-PVXH].

202. LA. REV. STAT. ANN. § 49:214.36(D) (2012). Specifically, 10 of the 20 coastal parishes have an approved local coastal management program, qualifying them under the statute. *Local Coastal Programs*, *supra* note 169.

203. Statutes in Colorado, Alaska, and Illinois have prevented both private and governmental entities from suing the firearm industry on particular causes of action. See Crouse, *supra* note 73, at 1359.

204. Cupp, *supra* note 196, at 699–700 ("As noted above, the courts' willingness to engage in public policy analysis expands when they perceive that the legislatures cannot or will not address an issue. Thus, legislatures may control state mass tort lawsuits not only through restrictive legislation, but also through affirmatively acting to remedy corporate misconduct where appropriate. Critics often claim that businesses and trade associations prevent legislatures from controlling corporate excesses through lobbying and large campaign contributions. The less a ring of truth is perceived in such allegations, the less open courts will be to intruding on legislators' policy-making role." (footnotes omitted)).

constitution, clearly indicating to a court that the legislature intends to retain the ability to modify the entity, such as in *Wooley*.<sup>205</sup> This indication would keep public entities democratically adjustable. Additionally, explicitly providing for how a particular entity may seek redress of any disputes, financial or otherwise, may be wise. By proactively imposing express limitations on the avenues a governmental body may pursue for alleged violations in its jurisdiction, the legislature can avoid many of these problems.

#### CONCLUSION

A casual survey of the Act and its context supports many state and national concerns of whether the oil and gas industry will ever be held accountable in Louisiana.<sup>206</sup> When viewed in the context of SLFPA-E's intended role, however, Act 544 appears legitimate, especially in light of the Coastal Zone Management Program framework. Not only did the lawmakers act well within their legal capacity, but they also retained the final say on coastal development regulation inside the democratic process.

Louisiana finds itself between a rock—the continuously growing energy development industry—and a hard place—the collective opinions of society and the scientific community. The oil and gas industry's role on the coast is clearly an issue of statewide concern, as the issue permeates everyday conversation many miles from the Gulf. The size of the oil and gas industry brings that industry within the cross hairs of Louisiana's political and economic interests. Importantly, the state has precedent both from Louisiana and elsewhere that can be instructive on how to handle such a publicly criticized, highly regulated industry. Just as in those instances before, state policymakers should remain flexible in handling the scenario, specifically responding to their constituents' concerns not just for obvious political reasons but also to proactively prevent regulatory disruption. The judiciary and the public are more inclined to feel the industry is being properly policed the more state policymakers take clear stances on important issues in the coast's development. But as for resolving already existing

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205. *Wooley v. State Farm Fire & Cas. Ins. Co.*, 893 So. 2d 746, 767 (La. 2005).

206. Steven Mufson, *Oil Spills. Poverty. Corruption. Why Louisiana is America's Petro-State*, WASH. POST (July 18, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071602721.html> [perma.cc/U34S-DAYC].

oversights in industry-wide regulatory frameworks, narrow laws like Act 544 function as a desired remedy.

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