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Consider Giving Us a Fracking Chance: An Attempt to Define the Language in Louisiana Revised Statutes Section 33:109.1 to Eradicate Statutory Ambiguity and Impose Accountability

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INTRODUCTION

What happens if a town's water supply becomes contaminated due to a company's environmentally irresponsible actions? The story of *Erin Brockovich* explores this real life scenario.[1] In the movie, residents of the town become very ill from exposure to toxic chemicals that contaminated the local water supply.[2] As a result of the contamination, several residents suffer debilitating effects ranging from minor illnesses to cancer.[3] Although movies are not always an exact replication of such an event, this water supply contamination scenario is not so far-fetched. With the highly controversial topic of hydraulic fracturing constantly being debated amongst environmental and climate change advocates, this devastating environmental catastrophe is a realistic concern in numerous areas across the country.[4]

The Southern Hills Aquifer supplies East Baton Rouge Parish with its drinking water.[5] The aquifer's location overlaps with the Tuscaloosa Marine Shale, a formation that has the capability to transform into what some mineral resource analysts describe as a "'potentially serious' oil play" due to the shale's high oil content.[6] If oil companies decide to drill

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1. ERIN BROCKOVICH (Universal Pictures 2000).
2. *Id.*
3. *Id.*
4. Hilary Boudet et al., *"Fracking" Controversy and Communication: Using National Survey Data to Understand Public Perceptions of Hydraulic Fracturing*, 65 ENERGY POL'Y 57 (2014).
5. *See* U.S. GEOLOGICAL SURVEY, WATER RESOURCES OF THE SOUTHERN HILLS REGIONAL AQUIFER SYSTEM, SOUTHEASTERN LOUISIANA (Mar. 2017), https://pubs.usgs.gov/fs/2017/3010/fs20173010.pdf [https://perma.cc/5BSZ-W2GH] (The Southern Hills regional aquifer system extends across most of southeastern Louisiana. This aquifer system supplies freshwater to many Louisiana parishes, including East Baton Rouge Parish, West Baton Rouge Parish, and West Feliciana Parish.).
6. *Information About the Tuscaloosa Marine Shale*, NAT. GAS INTELLIGENCE, https://www.naturalgasintel.com/information-about-the-tuscaloosa-marine-shale/ [https://perma.cc/ZCV7-W4Y9] (last visited Aug. 16, 2020).

the shale at various sites within close proximity to the aquifer, a drilling accident would likely contaminate the aquifer.[7]

As the law currently stands in Louisiana, local municipalities have the most to lose when a drilling accident occurs, yet these municipalities have the least authority to prevent such accidents. In conjunction with proposing changes to the current statutory language in Louisiana Revised Statutes section 33:109.1, this Comment will address how requiring applicants to submit supplemental information with their drilling permits will allow the Department of Environmental Quality to better evaluate the permit application on its merits. Consequently, this will provide local governments with a better opportunity to explain and express their concerns. Further, this Comment will demonstrate that requiring additional information to receive a drilling permit is not overly burdensome; it would simply align drilling permit applications with requirements similar to those necessary for obtaining coastal engineering permits and wastewater storage permits.[8]

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7. *See generally* Alex Ritchie, *Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation*, 76 LA. L. REV. 809 (2016).

8. *See Administrative Completeness Checklist Hazardous Waste Permit (Initial or Renewal)*, LA. DEP'T OF ENVTL. QUALITY (Jul. 3, 2017), https://deq.louisiana.gov/assets/docs/Land/HazWasteAdComInitialorRenewal.pdf [https://perma.cc/MJF4-NJ2N] (The hazardous waste permit application checklist alone lists ten different steps/requirements that need to be met to apply for and obtain a hazardous waste permit. This list includes a pre-application public meeting, proof of public notice of a pre-application meeting, and most importantly, an environmental impact statement.); *see also Form MD-10-R-1 Application for Permit to Drill for Minerals*, STATE OF LA. OFF. OF CONSERVATION (Aug. 2009) (the application for a permit to drill for minerals is a one-page form requiring: the Parish and field location; the well name; the mineral sought; the type of well; and a proposed zone of completion); *Form DM-4R, Work Permit*, STATE OF LA. OFF. OF CONSERVATION, ENGINEERING DIVISION (Oct. 2011), http://www.dnr.louisiana.gov/assets/OC/eng_div/Forms/DM_4R.pdf [https://perma.cc/W6TQ-XHQB] (the Office of Conservation work permit requires: a description of the work to be done; the operator's name and address; the well name and number; and an engineer's initials/name); *Joint Permit Application for Work Within the Louisiana Coastal Zone*, LA. DEP'T OF NAT. RESOURCES, OFF. OF COASTAL MGMT., http://www.dnr.louisiana.gov/assets/OCM/permits/JPA2010Fillable.pdf [https://perma.cc/SXM5-TSW6] (last visited Aug. 16, 2020) (The Joint Permit Application to apply for a Coastal Use Permit was developed to facilitate the state and federal permit application process administered by the Louisiana Department of Natural Resources Office of Coastal Management (OCM) and the U.S. Army Corps of Engineers (COE) for work within the Louisiana Coastal Zone. This permit application is twelve pages.).

While some scholarly articles concentrate on addressing the issue of preemption, this Comment will focus on the statutory language found in Louisiana Revised Statutes section 33:109.1.[9] This Comment will propose changing the statutory language to ensure that local laws and concerns are adequately considered before a drilling permit is issued. The language in both Louisiana Revised Statutes sections 33:109.1 and 30:28—specifically the word "consider"—needs to be further defined alongside a balancing test of interests. Under the current language found in Louisiana Revised Statutes sections 33:109.1 and 30:28(F), the state will prevail any time there is a clash between a local zoning ordinance and state oil and gas regulations.[10] The balancing test of interests proposed in this Comment encourages weighing environmental concerns against social and economic benefits before making the decision to grant or deny a permit. This Comment will propose a resolution to the state and local preemption issues by clarifying Louisiana Revised Statutes sections 33:109.1 and 30:28(F) and increasing drilling permit application requirements.

Part I of this Comment discusses how local government ordinances conflict with state laws and how hydraulic fracturing issues are a growing concern among certain local municipalities and residents. Part II evaluates both the trial and appellate courts' analysis and application of pertinent law in *St. Tammany Parish Government v. Welsh*, particularly highlighting both courts' interpretation of Louisiana Revised Statutes sections 33:109.1 and 30:28(F).[11] Part II also examines the Louisiana Supreme Court's decision to deny a writ of certiorari in *St. Tammany Parish Government*.[12] Part III deduces the legislature's intent behind choosing the particular language in Louisiana Revised Statutes section 33:109.1 and how the *St. Tammany Parish Government* case demonstrates the problems that arise from the ambiguous language found in the statute. Part IV provides a solution to both the ambiguous language problem in Louisiana Revised Statutes 33:109.1 as well as the currently inadequate drilling permit application process.

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9. *See* Ritchie, *supra* note 7; Madeline Flores, *Fighting Fracking: Unexplored Territory in State and Parish Policy*, 91 TUL. L. REV. 801 (2017).

10. *See* Energy Mgmt. Corp. v. City of Shreveport, 397 F.3d 297, 303 (5th Cir. 2005).

11. LA. REV. STAT. § 33:109.1 (2004); LA. REV. STAT. § 30:28 (2016); St. Tammany Par. Gov't v. Welsh, 199 So. 3d 3, 5 (La. Ct. App. 1st Cir.), *writ denied*, 194 So. 3d 1108 (La. 2016).

12. *St. Tammany Par. Gov't*, 194 So. 3d 1108.

I. BACKGROUND

Louisiana jurisprudence recognizes that local government autonomy, or home rule,[13] is not a self-sufficient or absolute virtue granted to all municipalities.[14] Two distinct powers vested in local governments by the Louisiana Constitution—initiation and immunity—are the "yin and yang that combine to produce all of the autonomy that a home rule local government may come to have."[15] Initiation refers to a local government or municipality's capacity to enact legislation and regulations in the absence of express state authorization.[16] Immunity, on the other hand, grants local governments the distinct power to promote certain welfares and agendas without fearing repercussions from state actors.[17] Initiation and immunity combine to create a relationship of powers shared between local governments and the state government.[18] However, prior to the 1974 Louisiana Constitution, this governmental hierarchy did not always operate harmoniously.[19]

A. The Louisiana Constitution Prior to 1974

Prior to the enactment of its most recent Constitution in 1974, Louisiana followed Dillon's Rule.[20] Under Dillon's Rule, municipalities have only those powers that the legislature specifically or expressly grants to them.[21] Additionally, the state legislature has the authority to limit or eliminate a municipality's home rule powers.[22] As a consequence of Dillon's Rule, the Louisiana Legislature established a regime whereby it

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13. R. Gordon Kean, Jr., *Local Government and Home Rule*, 21 LOY. L. REV. 63, 66 (1975).

14. City of New Orleans v. Bd. of Comm'rs of Orleans Levee Dist., 640 So. 2d 237, 242 (La. 1994).

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.*

19. *See* Kean, *supra* note 13.

20. *See* G. Roth Kehoe II, *City of New Orleans v. Board of Commissioners: The Louisiana Supreme Court Frees New Orleans from the Shackles of Dillon's Rule*, 69 TUL. L. REV. 809 (1995) (Dillon's Rule is a restrictive view of municipal power under which local governments possess limited powers to create and enact individualized local laws and ordinances).

21. Davis v. City of Blytheville, 478 S.W. 3d 214, 217 (Ark. 2015).

22. *See* Kehoe, *supra* note 20.

reigned supreme in all matters, regardless of whether the issue concerned the whole state or dealt with a strictly local issue.[23]

The 1974 Louisiana Constitution modified the relationship between state and local governments.[24] More specifically, the 1974 Constitution established and distinguished three separate types of local governments: (1) governments that had home rule charters before the adoption of the 1974 Constitution; (2) governments that adopted home rule charters after the 1974 Constitution; and (3) other local government subdivisions without a home rule charter.[25]

B. Local Governments After the 1974 Constitution

As a result of the Constitutional changes made in 1974, article VI, section 4 is now the governing law for preexisting home rule charters.[26] Under this provision, preexisting home rule charters are not usually subject to general laws adopted by the legislature except "where such laws are enacted pursuant to the State's Police Powers or where such matters are reserved to the State through the Constitution."[27] Section 5 bestows limitations on the local municipalities, providing that "they must yield to general state law that is prohibitory in nature, even if the law is not enacted under the State's police powers."[28] Essentially, local municipalities under article VI, section 5 must not enact any laws that conflict with a state law

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23. City of Baton Rouge v. Blakely, 699 So. 2d 1053 (La. 1997).

24. *See Blakely*, 699 So. 2d 1053 (Advocates of home rule charters sought to increase local autonomy and grant municipalities a certain level of immunity from state and legislative control. Proponents for constitutional change sought to reverse Dillon's Rule to allow local governments the ability to do anything that was not expressly prohibited by the state government.); *see also* LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 94 (1991).

25. Kenneth M. Murchison, *Local Government Law*, 64 LA. L. REV. 275, 279 (2004).

26. LA. CONST. art. VI, § 4 ("Every home rule charter or plan of government existing or adopted when this constitution is adopted shall remain in effect and may be amended, modified, or repealed as provided therein. Except as inconsistent with this constitution, each local government subdivision, which has adopted such a home rule charter or plan of government shall retain the powers, functions, and duties in effect when this constitution is adopted.").

27. LA. LEGISLATIVE AUDITOR, LIMITATIONS OF HOME RULE CHARTER AUTHORITY FOR PARISHES AND MUNICIPALITIES 3 (July 2020), https://app.lla.state.la.us/llala.nsf/CECBB689D15358A5862583EF005AD18F/$FILE/WP-Limitations%20of%20Home%20Rule%20Chtr%20Authority.pdf [https://perma.cc/E28L-BTCC].

28. *Id.*

prohibiting a certain action. The constitutional category for those parishes and municipalities without home rule charter is known as "other local governmental subdivisions."[29] Parishes and municipalities within this category may exercise any power that is not denied by general law or inconsistent with the Louisiana Constitution.[30]

While there are distinctions between the three types of governmental subdivisions, certain limitations apply equally to all.[31] For example, article VI, section 9 of the Louisiana Constitution specifically addresses the police powers of the state.[32] This provision of the Louisiana Constitution establishes the idea that if a certain power falls under the state's police power, no municipality shall enact a law or ordinance that conflicts with that power.[33]

C. How Home Rule Charters Conflict with State Law

A home rule charter provides the structure, organization, powers, and functions of a parish.[34] Furthermore, home rule charters grant

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29. LA. CONST. art. VI, § 7; Murchison, *supra* note 25, at 280.

30. LA. CONST. art. VI, § 7(A).

31. LA. CONST. art. VI, § 9.

32. *See* LA. LEGISLATIVE AUDITOR, *supra* note 27 (Section 9(B) provides that "notwithstanding any provision of this Article, the police power of the state shall never be abridged").

33. *Parish Government Structure*, POLICE JURY ASS'N OF LA., http://www.lpgov.org/page/ParishGovStructure [https://perma.cc/YT47-BDM5] (last visited Aug. 16, 2020).

34. *See* LA. CONST. art. VI, § 44 (A parish is equivalent to a county; these grants of authority include the exercise of any power and performance of any function necessary, requisite, or proper for the management of that parish's affairs so long as the particular function is not denied by general law or inconsistent with the Louisiana Constitution. This constitutional grant of authority vests a home rule charter government with a police power equivalent to that of the state, such that the municipality may pass its own laws and regulations pertaining to autonomous self-government. General law means "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."); *Parish Government Structure*, *supra* note 33; *see also* Geoffrey Hingle Jr., *Fractured State of Affairs:* St. Tammany Parish Government v. Welsh*, Louisiana's Opportunity to Weigh in on Preemption of Municipal Regulation Touching Oil and Gas Exploration*, LSU J. ENERGY L. & RESOURCES: CURRENTS BLOG (March 25, 2015), https://jelr.law.lsu.edu/2015/03/25/fractured-state-of-affairs-st-tammany-parish-government-v-welsh-louisianas-opportunity-to-weigh-in-on-preemption-of-

municipalities the authority to undertake zoning and land use regulation—a power that exists as a function of the vested police power.[35]

It is an established principle of Louisiana law that zoning ordinances are presumptively valid.[36] Article VI, section 17 of the Louisiana Constitution emphasizes that a local government municipality, rather than a state legislature or an agency, may "adopt regulations for land use, zoning, and historic preservation, which authority is declared to be a public purpose."[37] In *City of Baton Rouge v. Myers*, the Louisiana Supreme Court reaffirmed this presumption and stated that the standard for upholding zoning regulations is whether the ordinance "bears a rational relation to the health, safety, and welfare of the public."[38] If a rational relationship exists, the local governing authority has the power to regulate and restrict the location and use of land for industry.[39] Thus, certain local zoning ordinances limiting or prohibiting oil and gas extraction should be presumed valid if such a rational relationship exists.[40]

Although it may appear that any issues involving home rule charter limitations can be easily resolved by reading the Louisiana Constitution, certain areas of the law cloud the analysis.[41] Specifically, confusion arises when two similar areas of the law seemingly overlap with each other.[42] For example, issues emerge when zoning ordinances directly conflict with oil and gas regulations, creating a concern amongst local municipalities who feel that state laws should not always preempt local ordinances.[43]

This concern by local municipalities is largely based on vulnerability against companies seeking to drill within the municipal limits.[44] Particularly, concerned citizens and environmentalists fear that hydraulic

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municipal-regulation-touching-oil-and-gas-exploration/ [https://perma.cc/AT2K-A998].

35. *See* Hingle, *supra* note 34.

36. Palermo Land Co. v. Planning Comm'n of Calcasieu Parish, 561 So. 2d 482, 491 (La. 1990).

37. LA. CONST. art. VI, § 17.

38. City of Baton Rouge v. Myers, 145 So. 3d 320, 327 (La. 2014).

39. *Id.* at 328.

40. *See generally id.*

41. *See generally id.*

42. *See generally id.*

43. Steven Boutwell, *Louisiana Appeals Court Acknowledges Preemption of State Law Over Parish Zoning Ordinances in Fracking Fight*, KEAN MILLER LLP: LA. L. BLOG (Mar. 11, 2016), https://www.louisianalawblog.com/uncategorized/louisiana-appeals-court-acknowledges-preemption-state-law-parish-zoning-ordinances-fracking-fight/ [https://perma.cc/64CS-AHED].

44. *Id.*

fracturing[45] (fracking) will have adverse effects on local interests, such as groundwater contamination.[46] The fracking concern is not isolated to Louisiana; states including Vermont, New York, and Maryland have passed statutes either banning or limiting fracking.[47] In 2019, Colorado passed Senate Bill 19-181, essentially bringing oil and gas permitting in the state of Colorado to a complete halt due to the broad and sweeping powers the bill affords to local governments opposing oil and gas production.[48] On the other hand, in 2015, Texas Governor Greg Abbott enacted a law that expressly prohibits local governments from banning fracking and controlling the location of oil and gas wells.[49] Consequently, Texas sits on the opposite end of the spectrum from Colorado regarding its stance on fracking.

Resistance against drilling—and particularly against fracking—highlights an ongoing problem that requires a solution beneficial to both state agencies and municipal governments. This developing issue is especially true in Louisiana, where citizens have gone so far as to conduct public protests and erect interstate billboards to voice their local resentment toward fracking in St. Tammany Parish, Louisiana.[50]

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45. *See The Process of Unconventional Natural Gas Production*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/uog/process-unconventional-natural-gas-production [https://perma.cc/4R3K-QB3D] (last visited Aug. 16, 2020) (Hydraulic Fracturing is a technique used in "unconventional" gas production. Hydraulic Fracturing produces fractures in the rock formation that stimulate the flow of natural gas or oil, increasing the volumes that can be recovered. Fractures are created by pumping large quantities of fluids at high pressure down a wellbore and into the target rock formation. These fractures can extend several hundred feet away from the wellbore. Extracting unconventional gas is relatively new. Coal bed methane production began in the 1980s; shale gas extraction is even more recent.).

46. Boutwell, *supra* note 43.

47. *Id.*

48. COLO. OIL & GAS ASS'N, SUMMARY OF SB 181, https://cochamber.com/wp-content/uploads/SB19-181-3-4-19.pdf [https://perma.cc/U5B7-LH47] (last visited Aug. 16, 2020).

49. Russell Gold, *Texas Prohibits Local Fracking Bans*, WALL STREET J. (May 18, 2015), https://www.wsj.com/articles/texas-moves-to-prohibit-local-fracking-bans-1431967882 [https://perma.cc/ED8C-PC95].

50. Boutwell, *supra* note 43.

II. THE INFAMOUS ST. TAMMANY PARISH GOVERNMENT V. WELSH DECISION

St. Tammany Parish Government v. Welsh exemplifies the issue of home rule charter ordinances clashing with state law.[51] In this case, St. Tammany Parish (the Parish) fought to enforce a zoning ordinance that came in direct conflict with a state permit granted to drill a well.[52] James Welsh, the former Commissioner of the Office of Conservation of the State of Louisiana, granted Helis Oil & Gas Company, LLC (Helis) the permit at issue.[53] The Parish brought suit contending that its 1998 home rule charter and subsequent zoning ordinances conflicted with the drilling permit granted to Helis.[54] Specifically, the Parish sought declaratory relief to establish that the Parish's zoning ordinances should be given primary consideration and supersede any authority accompanying the permit granted by Commissioner Welsh.[55]

District Court Judge William Morvant granted summary judgment in favor of Helis, holding that Louisiana Revised Statutes section 30:28(F) expressly preempted the Parish's zoning ordinances.[56] Preemption is the standard whereby "a higher authority of law will displace the law of a lower authority of law when the two authorities come into conflict."[57] Specifically, the court noted that Louisiana Revised Statutes section 30:28(F) provides that "[n]o other agency or political subdivision of the state shall have the authority, and [is] hereby expressly forbidden, to prohibit or interfere with the drilling of a well . . . by the holder of such a permit."[58] Additionally, Judge Morvant found the zoning ordinances to be unconstitutional, but only in regard to the ordinance's interference with the drilling permit granted to Helis.[59]

On appeal, the Louisiana First Circuit affirmed the trial court's holding that state law preempted the Parish's zoning ordinances and that the Commissioner adequately considered the Parish's unified

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51. St. Tammany Par. Gov't v. Welsh, 199 So. 3d 3, 5 (La. Ct. App. 1st Cir.); *writ denied*, 194 So. 3d 1108 (La. 2016).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Preemption*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/preemption [https://perma.cc/33K8-RA3B] (last visited Jan. 9, 2021).

58. LA. REV. STAT. § 30:28(F) (2019).

59. *St. Tammany Par. Gov't*, 199 So. 3d at 5.

development code before granting the permit to Helis.[60] The First Circuit also recognized the state's desire to protect and control environmental regulations pursuant to federal programs.[61] Additionally, the court identified the Office of Conservation as the state entity responsible for the regulation of the oil and gas resources of the state.[62] Agreeing with the trial court, the First Circuit denied the Parish's assertion that the constitutional police powers afforded to the state do not include zoning powers.[63] The First Circuit reasoned that "[a]lthough the constitutional grant of zoning authority set forth in La. Const. Art. VI, section 17 bestows land use and zoning power in local governmental subdivisions, that grant of power is necessarily and expressly limited by the provisions of Article VI, Section 9(B)[.]"[64] Furthermore, "[b]ecause § 17 is contained within 'this Article,' i.e. Article VI, the land use and zoning power granted to local governmental subdivisions cannot abridge the State's police power, a power that includes the Commissioner's regulation of oil and gas activity under La. Const. Art. IX, § 1."[65]

Louisiana Revised Statutes section 30:28 is a general law enacted by the legislature and therefore is applicable to all parishes and municipalities across the state.[66] The First Circuit applied this reasoning and stated "to the extent that St. Tammany Parish's zoning ordinances can be considered the local government's exercise of a power and performance of a necessary . . . function for the management of its affairs, under . . . Article VI, § 5 and the legislature's enactment of [Louisiana Revised Statutes] 30:28 F, [the Parish's zoning ordinance] has been denied by general law."[67] Consequently, because the Parish's ordinance conflicted with a general law, the court reasoned that general law trumps this particular local ordinance.[68]

Finally, the court rejected the Parish's argument that the Office of Conservation failed to comply with Louisiana Revised Statutes section 33:109.1.[69] The court found that "in rendering his decisions [to grant the

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 9. The First Circuit justified their analysis by noting that § 9(B) expressly denotes that the police power of the State shall never be abridged "[n]otwithstanding *any provision of this Article*." (emphasis in original). *See id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 5.

permit] . . . the Commissioner did, indeed, consider the provisions of St. Tammany's master plan, as set forth in the Parish's [Unified Development Code]."[70] The court declined to use the Parish's definition of consider—"give heed to"—and consequently applied the ordinary meaning of consider.[71] Because the trial court limited the scope of summary judgment to the issue of whether the Office of Conservation had so complied, the First Circuit did not answer the question of whether the Office of Conservation has to comply with Louisiana Revised Statutes section 33:109.1.[72]

The Louisiana Supreme Court ultimately denied writs, precluding any further analysis of these issues.[73] However, the Court split four to three on this decision.[74] Of the three justices in favor of granting the writ, both Justice Jeannette Knoll and Justice Greg Guidry assigned reasons.[75] Justice Knoll reasoned that the issue was not about preemption because the ordinances enacted by St. Tammany govern a wholly distinct subject matter: zoning and land use planning.[76] Justice Knoll elaborated, stating that "unlike local oilfield regulatory ordinances which overlap and directly conflict with state oil and gas law, land use ordinances such as zoning codes are not duplicative of state law and thus are not subject to preemption by state oil and gas laws."[77]

Although Justice Knoll correctly reasoned that preemption was not the issue directly presented in *St. Tammany Parish Government*, she chose not to address the underlying issue: the problems stemming from the ambiguous language contained in Louisiana Revised Statutes section 33:109.1. Even if zoning and land use planning laws do not fall victim to state law preemption, a strict interpretation of Louisiana Revised Statutes section 33:109.1 simply requires that any zoning and land use planning

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70. *Id.* at 12.

71. See *Consider*, BLACK'S LAW DICTIONARY (6th ed. 1990), defining consider as "to examine, to deliberate about, ponder over, inspect."

72. *St. Tammany Par. Gov't*, 199 So. 3d at 5.

73. St. Tammany Par. Gov't v. Welsh, 194 So. 3d 1108 (La. 2016) (denying writ of certiorari).

74. *Id.*

75. Justice Guidry argued that writ should be granted because the case is not about the Parish attempting to regulate the oil and gas industry; rather, it is about the Parish "striving to protect its desired quality of life through a constitutionally-authorized process." *See id.* at 1109 (Guidry, J., would grant writ, assigning reasons).

76. *Id.* at 1108 (Knoll, J., would grant writ, assigning reasons).

77. *Id.* (citing Palermo Land Co. v. Planning Comm'n of Calcasieu Par., 561 So. 2d 482, 498 (La. 1990)).

laws be considered.[78] Read in full, Louisiana Revised Statutes section 33:109.1 provides that "[w]henever a parish or municipal planning commission has adopted a master plan, state agencies and departments *shall consider* such adopted master plan before undertaking any activity or action which would affect the adopted elements of the master plan."[79] Therefore, even if Justice Knoll's analysis proves correct and applicable, the zoning and land use planning laws still fall under the umbrella of St. Tammany's master plan[80] and thus need only be "considered." However, "consider" is an ambiguous term and does not specify how much weight the consideration is actually given when making the final decision. Thus, it is unclear as to what level of deference the Commissioner affords to zoning and planning laws.

III. HOW THE FRACK DO WE INTERPRET THESE STATUTES?

Justice Knoll's limited reading of Louisiana Revised Statutes section 33:109.1 in *St. Tammany Parish Government* demonstrates exactly why the statute's usage of the word "consider" creates a problem.[81] "Consider" is a broad term that is not easily defined, especially in situations similar to the one in *St. Tammany Parish Government*.[82] As stated in the Louisiana Civil Code, "[w]hen the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole."[83] Because "consider" is an ambiguous term susceptible to different meanings, the Civil Code further provides that the term "must be interpreted as having the meaning that best conforms to the purpose of the law."[84]

78. *See* LA. REV. STAT. § 33:109.1 (2019).

79. *Id.* (emphasis added).

80. LA. REV. STAT. § 33:101(1) defines a master plan as a statement of public policy for the physical development of a parish or municipality adopted by a parish or municipal planning commission.

81. *St. Tammany Par. Gov't*, 194 So. 3d at 1108 (Knoll, J., would grant writ, assigning reasons).

82. The definition of consider is "to think about carefully, such as to take into account." *See Consider*, THE MERRIAM-WEBSTER DICTIONARY (12th ed. 2016).

83. LA. CIV. CODE art. 12 (2018).

84. LA. CIV. CODE art. 10.

A. Legislative Intent Behind Louisiana Revised Statutes Sections 33:109.1 and 30:28(F)

As the language in Louisiana Revised Statutes sections 33:109.1 and 30:28(F) currently reads, the state will prevail any time there is an issue involving a local zoning ordinance clashing with state oil and gas regulations.[85] The 2004 bill which originally enacted Louisiana Revised Statutes section 33:109.1 was amended in committee to change the language from "take into account and seriously consider" to the current language, "shall consider."[86] Comparing this language, it does not appear that the legislature intended to provide the state with the ability to triumph over a local zoning ordinance in this particular manner. Rather, the decision to change the language leans closer toward making the statute more concise.[87] Ultimately, the legislature decided to use a word that may appear practical on paper yet creates ambiguity and vagueness in its application.

Although the legislative intent behind Louisiana Revised Statutes section 30:28(F) is to promote and protect the state's oil and gas interests, this statute grants a permit holder immunity from local government interference once the applicant receives the permit.[88] To trigger Louisiana Revised Statutes section 30:28(F), all that is required of an oil and gas company—or any company seeking a drilling permit—is to claim that the permit grants them the right to drill for natural resources.[89]

Once in play, the statutory language in Louisiana Revised Statutes section 30:28(F) leaves a local municipality with little to no ammunition for its ordinances to stand ground against a permit holder, creating an unfair advantage whereby state law very easily preempts local ordinances.[90] This inequitable situation arises when a local zoning ordinance conflicts with an approved drilling permit, which is then bolstered by this immunity-granting statute.[91] The fact that Louisiana Revised Statutes section 30:28(F) grants a permit holder absolute autonomy from municipal law means that the statutory language, as well

85. *See* LA. REV. STAT. §§ 30:28(F), 33:109.1 (2019).

86. *Compare* H.B. 1082, 2004 Leg., Reg. Sess. (La. 2004) (as originally proposed), *with* Act No. 859, 2004 La. Acts 2675, 2677 (codified at LA. REV. STAT. § 33:109.1 (2019)).

87. *See generally* H.B. 1082, 2004 Leg., Reg. Sess. (La. 2004).

88. *See* LA. REV. STAT. § 30:28(F).

89. *See id.*

90. *See id.*

91. *See* Energy Mgmt. Corp. v. City of Shreveport, 467 F.3d 471 (5th Cir. 2006).

as the permit application process, should both require a higher level of scrutiny.

B. How the Louisiana Supreme Court Interprets Similar Statutes

In *Save Ourselves, Inc.*, the Louisiana Supreme Court concluded that the legislative aim behind statutory standards of protection is "to implement and perpetuate the constitutional rule of reasonableness."[92] This constitutional scheme of reasonableness implies that laws pertaining to the environment and the enforcing agencies must function with diligence and fairness.[93] After all, the constitutional standard requires environmental protection "insofar as possible and consistent with the health, safety, and welfare of the people."[94] Therefore, whether it is the Department of Environmental Quality (DEQ) or the Louisiana Department of Environmental Quality (LDEQ), the Commissioner must act with the interest of the greater good in mind.[95] This is because, as the Louisiana Supreme Court stated, "the commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it[.] [T]he rights of the public must receive active and affirmative protection at the hands of the commission."[96]

C. Similar Statutes and Regulations in Other States

Colorado, another state dealing with fracking dissension, promulgated Senate Bill 19-181 (S.B. 181) on April 3, 2019.[97] The Colorado Oil and Gas Conservation Commission's new directive makes it clear that any regulation of oil and gas development must affirmatively "prioritize[] the protection of public safety, health, welfare, and the environment in the regulation of the oil and gas industry" by providing clarification to certain

92. Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984).

93. *See Save Ourselves, Inc.*, 452 So. 2d 1152.

94. LA. CONST. art. IX, § 1.

95. *See Save Ourselves, Inc.*, 452 So. 2d at 1157 (LDEQ was formerly known as the Environmental Control Commission ("ECC")).

96. *Id.*

97. Act of Apr. 16, 2019, ch. 120, 2019 Colo. Sess. Laws 502; S.B. 19-181, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

oil and gas statutes.[98] Section 4 of the bill grants certain powers to local governments by providing that local governments have regulatory authority over oil and gas site locations to minimize adverse impacts to public safety, health, and the environment.[99] S.B. 181 also amends the Oil and Gas Conservation Act to impose a balancing test between fostering oil and gas development and the protection of public and environmental values.[100] Overall, these new regulations could restrict long-term oil and gas development in Colorado.[101]

Similar to Colorado's S.B. 181, Illinois enacted the Illinois Hydraulic Fracturing Regulatory Act (the Act) in 2013.[102] The Act, described as "the nation's strictest oil and gas regulation," includes numerous provisions aimed at creating transparency for the public about how fracking impacts environmental and public health.[103] For example, the Act requires oil and gas companies to submit a detailed water management plan and disclose specific chemicals to be used both before and after the drilling occurs.[104] Additionally, the Act allows any citizen with standing to object to fracking permits, with or without a nexus to the state.[105] Since the Act's passage in 2013, the amount of fracking permit applications submitted has decreased substantially.[106]

In contrast to Illinois and Colorado's restrictive oil and gas regulations, Texas passed House Bill 40 (H.B. 40) in 2015 to allocate more

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98. *SB19-181, Protect Public Welfare Oil and Gas Operations*, COLO. GEN. ASSEMBLY, http://leg.colorado.gov/bills/sb19-181 [https://perma.cc/NWY7-8F74] (last visited Aug. 16, 2020).

99. *Id.*; *see also* Zachary Grey, *What Should I Know About Colorado Senate Bill 181 and Its Impact on Oil and Gas Development in the State? Part I*, FRASCONA JOINER GOODMAN & GREENSTEIN PC (Sept. 9, 2019), https://frascona.com/senate-bill-181-and-its-impact-on-oil-and-gas-development-in-colorado-part-i/#_ftn5 [https://perma.cc/6X5G-DCRV].

100. *SB19-181, Protect Public Welfare Oil and Gas Operations*, *supra* note 98.

101. Grey, *supra* note 99.

102. 225 ILL. COMP. STAT. 732 (Westlaw 2020).

103. Matt Kasper, *Illinois Adopts Nation's Strictest Fracking Regulations*, THINKPROGRESS (Jun. 19, 2013), https://thinkprogress.org/illinois-adopts-nations-strictest-fracking-regulations-c5e8ff8a04d8/ [https://perma.cc/2XVG-6MZ9].

104. *See* 225 ILL. COMP. STAT. 732 / 1-35(b)(10); Kasper, *supra* note 103.

105. 225 Ill. Comp. Stat. 732 / 1-102 (nexus means a connection, tie, or link).

106. PAUL YALE & BROOKE SIZER, A BRIEF LOOK AT THE LAW OF HYDRAULIC FRACTURING IN TEXAS AND BEYOND (2018), https://www.grayreed.com/portalresource/lookup/wosid/cp-base-4-110802/media.name=/Law%20of%20Fracking%20in%20Texas%20and%20Beyond%2031st%20Annual%20Institute%20FINAL%208%2029%2018.pdf [https://perma.cc/25EV-H65W].

power to oil and gas companies.[107] H.B. 40 expressly prohibits a municipality from enacting or enforcing any ordinance or measure that "bans, limits, or otherwise regulates an oil and gas operation" within the jurisdictional limits of the municipality.[108] H.B. 40, enacted as a direct response to the City of Denton's fracking ban ordinance, aims to ensure a consistent and fair application of the laws and regulations pertaining to the oil and gas industry across the state of Texas.[109] Although H.B. 40 heavily favors state actors and fracking companies, the bill does carve out an exception allowing local governments to regulate above ground oil and gas activity so long as the regulations are commercially reasonable.[110]

IV. A FRACKING SOLUTION

The solution in this Comment comprises two parts. The first part involves increasing the drilling permit application requirements in Louisiana. Improving the currently inadequate requirements will promote environmental conservation without overly restricting drilling permit applicants. The second part imposes a balancing test of interests thereby clarifying Louisiana Revised Statutes sections 33:109.1 and 30:28(F). By resolving the current ambiguities in the statutes, the second part of the solution will provide specific guidelines for a permit-granting authority to follow and will promote judicial efficiency. Having this balancing test operate alongside the increased permit requirements will ensure that any preemptive effects on local government ordinances are justified.

A. The Current Drilling Permit Application Process is Insufficient

For this Comment's proposed balancing test to be truly effective and fair to all sides, changes must be made to the drilling permit application process as well. The current drilling permit application process in

107. Exclusive Jurisdiction of this State to Regulate Oil and Gas Operations in this State and the Express Preemption of Local Regulation of Those Operations, ch. 30, 2015 Tex. Gen. Laws 971; H.B. 40, 84th Leg., Reg. Sess. (Tex. 2015).

108. TEX. NAT. RES. CODE ANN. § 81.0523(b) (Westlaw 2020).

109. H.R. ENERGY RES. COMM., BILL ANALYSIS, C.S.H.B. 40, H. 84-40, Reg. Sess., at 1 (Tex. 2015), https://capitol.texas.gov/tlodocs/84R/analysis/pdf/HB00040H.pdf [https://perma.cc/WRA2-BFKX].

110. H.B. 40 § 2(c) defines *commercially reasonable* as "a condition that would allow a reasonably prudent operatory to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an operator's capacity to act." TEX. NAT. RES. CODE ANN. § 81.0523(a)(1).

Louisiana requires very little information from the permit applicant. Pursuant to section 503 of the Natural Gas Policy Act,[111] an applicant shall file a written application comprising two different forms.[112] The original application and two copies shall be filed with the Commissioner at the district office for the district in which the proposed drill site is located.[113] Once the district office is finished reviewing the written application, a "permit to drill" application must be submitted.[114]

All applicants for permits to drill wells for oil or gas shall be made on Form MD-10-R and mailed or delivered to the district office.[115] An additional form—Form MD-10-R-1—requires certain information, such as: (1) the date the form is completed; (2) the parish and code number of the well's surface location; (3) the field name and code number; (4) the company name and address number; (5) a unique well name and number; (6) the well's location description; (7) the proposed total depth of the well and proposed zone of completion; and (8) any applicable conservation orders.[116] Three copies of the location plat[117] shall accompany the application, with each plat constructed by a registered civil engineer or surveyor.[118] Additionally, the plats must have well location certifications signed by either a registered civil engineer, a qualified surveyor, or a qualified engineer regularly employed by the applicant.[119]

Statewide Order No. 29-B section 403 addresses the permit requirements for Class II injection or disposal wells.[120] Statewide Order

111. Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350.

112. LA. ADMIN. CODE tit. 43, pt. 9, § 105 (2020) (one application is required by the Office of Conservation while the other is required by the Department of Natural Resources).

113. *Id.* (subject refers to the area to be drilled).

114. *Permit to Drill Applications*, ST. OF LA. DEP'T OF NAT. RESOURCES, http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=166 [https://perma.cc/55XB-AD25] (last visited Aug. 16, 2020).

115. LA. ADMIN. CODE tit. 43, pt. 9, § 103.

116. *Permit to Drill Applications*, *supra* note 114.

117. *See Plat,* BLACK'S LAW DICTIONARY (5th ed. 1979) ("a map of a town, section, or subdivision showing the location and boundaries of individual parcels of land subdivided into lots, with streets, alleys, easements, etc., usually drawn to scale").

118. LA. ADMIN. CODE tit. 43, pt. 9, § 103 (2020).

119. *Id.*

120. *See generally* LA. ADMIN. CODE tit. 43, pt. 19, ch. 4. Class II injection wells are used only to inject fluids associated with oil and natural gas production. *See Class II Oil and Gas Related Injection Wells*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells [https://perma.cc/QEE6-2ECA] (last visited Aug. 16, 2020).

No. 29-B section 403(B) provides that "sub-surface injection or disposal by use of a well as described in section 403(A)(1) above is prohibited unless authorized by permit or rule."[121] This authorization is conditional upon the permit applicant taking all necessary measures to protect underground sources of drinking water as specified by the Commissioner.[122] Such requirements are very broad when compared to other permit applications within the state.[123]

1. Other Permit Application Processes in Louisiana

Two industries faced with permit application processes within the state are the hazardous wastewater storage and coastal engineering fields.[124] Both industries must apply for permits with the state through the Department of Natural Resources (DNR) and follow detailed application procedures.[125] Much like oil and gas companies, both wastewater storage companies and coastal engineering firms provide the state with a large revenue stream and deal directly with the DNR and the LDEQ. Accordingly, the oil and gas permitting process in Louisiana should be modeled after the processes used in these similar industries.

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121. LA. ADMIN. CODE tit. 43, pt. 19, § 403.

122. Underground sources of drinking water means "an aquifer or its portion which: (1) supplies any public water system; or (2) contains a sufficient quantity of groundwater to supply a public water system [and] currently supplies drinking water for human consumption . . . ; and (3) which is not an exempted aquifer. LA. ADMIN. CODE tit. 43, pt. 19, § 403(B).

123. *See Joint Permit Application for Work Within the Louisiana Coastal Zone*, LA. DEP'T OF NAT. RESOURCES, OFF. OF COASTAL MGMT., http://www.dnr.louisiana.gov/assets/OCM/permits/JPA2010Fillable.pdf [https://perma.cc/SXM5-TSW6] (last visited Aug. 16, 2020); *Administrative Completeness Checklist Hazardous Waste Permit (Initial or Renewal)*, LA. DEP'T OF ENVTL. QUALITY (Jul. 3, 2017), https://deq.louisiana.gov/assets/docs/Land/HazWasteAdComInitialorRenewal.pdf [https://perma.cc/MJF4-NJ2N].

124. *See generally* Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984); ST. OF LA. DEP'T OF NAT. RESOURCES, http://www.dnr.louisiana.gov [https://perma.cc/VQ8Q-LW79] (last visited Aug. 16, 2020).

125. *See* LA. DEP'T OF NAT. RES., OFFICE OF COASTAL MGMT, A COASTAL USER'S GUIDE TO THE LOUISIANA COASTAL RESOURCES PROGRAM (Jan. 2015), http://data.dnr.la.gov/LCP/LCPHANDBOOK/FinalUsersGuide.pdf [https://perma.cc/9WKF-VP6G].

a. The Hazardous Wastewater Storage Permit Application Process

The permit application process for procuring a hazardous wastewater storage permit requires an evaluation by the DNR.[126] When deciding whether to grant a permit, the DNR considers: (1) the purpose and use of facilities; (2) the operation and monitoring plan; (3) capacity; (4) closure; (5) site suitability; (6) financial responsibility; (7) legal considerations; (8) special considerations on a site-specific basis; and (9) local zoning ordinances.[127]

The DEQ is required to use a "systematic, interdisciplinary approach to evaluation of each hazardous waste project or facility."[128] In order to determine whether a proposed project has adequately attempted to minimize injurious environmental effects, "the [DEQ] necessarily must consider whether alternate projects, alternate sites, or mitigative measures would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits."[129] In *Blackett v. Louisiana Department of Environmental Quality*, the Louisiana First Circuit summarized these considerations into five categories:

> *First*, have the potential and real adverse environmental effects of the proposed facility been avoided to the maximum extent possible? *Second*, does a cost-benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrate that the latter outweighs the former? *Third*, are there alternate projects which would offer more protection to the environment than the proposed facility without unduly curtailing non-environmental benefits? *Fourth*, are there alternative sites which would offer more protection to the environment than the proposed facility site without unduly curtailing non-environmental benefits? *Fifth*, are there mitigating measures which would offer more protection to the environment than the facility as proposed without unduly curtailing non-environmental benefits?[130]

These five factors, known as the "IT Factors," provide concrete guidelines that a wastewater storage permit applicant must adequately address before

126. *Save Ourselves, Inc.*, 452 So. 2d at 1156.
127. LA. ADMIN. CODE tit. 33, pt. 5, § 703 (2020).
128. *Save Ourselves, Inc.*, 452 So. 2d at 1157.
129. *Id.*
130. Blackett v. La. Dep't of Envtl. Quality, 506 So. 2d 749, 754 (La. Ct. App. 1st Cir. 1987) (emphasis added).

having a permit granted.[131] The "IT Factors" seek to protect the environment while also considering economic implications.[132] Furthermore, these factors require applicants to explore all options and conduct the appropriate research to ensure there are no safer alternative methods or storage and disposal sites.[133]

b. The Coastal Engineering Permit Application Process

Applying for a coastal use permit requires attention to detail and thorough preparation.[134] The 12 page joint permit application requires: (1) geotechnical investigation drawings, (2) proposed project locations and purposes, (3) adjacent landowner information, (4) proposed project impacts, and (5) detailed maps of the project area.[135] For projects along the Louisiana coastline, the Coastal Protection and Restoration Authority (CPRA) requires additional information to identify alternative locations and methods, to address wetland impact concerns, and to determine the project's potential impact on endangered species.[136]

The purpose of this meticulous application process is to "preserve, restore, and enhance Louisiana's valuable coastal resources."[137] Further, these stringent guidelines are designed so that coastal development is accomplished while maximizing benefits and minimizing damages to the areas surrounding the project area.[138] Lastly, CPRA requires permit applicants to perform the intended work in accordance with the guidelines established in the Louisiana Coastal Resources Program.[139]

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131. *See id.*
132. *See id.*
133. *See id.*
134. *See generally* COASTAL USER'S GUIDE, *supra* note 125.
135. The joint permit application serves as a portal or mechanism to streamline the application process by allowing the applicant to submit one application that reaches all the necessary reviewing agencies. *See Joint Permit Application for Work Within the Louisiana Coastal Zone*, LA. DEP'T OF NAT. RESOURCES, OFF. OF COASTAL MGMT., http://www.dnr.louisiana.gov/assets/OCM/permits/JPA 2010Fillable.pdf [https://perma.cc/SXM5-TSW6] (last visited Aug. 16, 2020).
136. *Joint Permit Application Additional Information*, COASTAL PROTECTION AND RESTORATION AUTHORITY, https://cims.coastal.louisiana.gov/RecordDetail .aspx?Root=0&sid=12290# [https://perma.cc/MK9N-MYGL] (last visited Aug. 16, 2020).
137. *See* COASTAL USER'S GUIDE, *supra* note 125.
138. *See generally id.*
139. *See id.*

Additionally, the Office of Coastal Management (OCM) encourages applicants to apply for a pre-application consultation with the OCM.[140] The purpose of this pre-application consultation is so the reviewing agency can provide the applicant with "a summary of the information OCM *must consider* during the application review process."[141]

2. Comparing Louisiana's Permit Application Process to Colorado's Process

Since 2003, Colorado has nearly tripled its average oil production per year and ranks in the top five in the United States in oil production per state.[142] In contrast to Louisiana's drilling permit application process, Colorado's drilling permit process requires an applicant to submit an in-depth application detailing the proposed activity.[143] One notable difference is that Colorado permit applicants are required to conduct extensive pre-application research.[144] Although a Louisiana applicant is required to provide project site details, Colorado requires a much more thorough analysis.[145] For example, one page of Colorado's Permit to Drill requires an applicant to explain the expected drilling program, to calculate the spacing and unit information, and to provide designated setback location information.[146] Additionally, the applicant must account for environmental and social impacts by providing groundwater testing data and cultural distance information.[147] These additional obligations contribute to the pursuit of preserving and protecting the environment.

Because Louisiana's application process currently lacks the level of detail required by other related industries in Louisiana as well as the oil and gas industry in other states, it is ill-suited for preserving and protecting the environment. Further, because both Louisiana and Colorado's state

140. *Applying for a Coastal Use Permit (CUP)*, ST. OF LA. DEP'T OF NAT. RESOURCES, http://www.dnr.louisiana.gov/index.cfm/page/93 [https://perma.cc/9CZJ-BJ4M] (last visited Aug. 16, 2020).

141. *Id.* (emphasis added).

142. *See Oil Production by State 2020*, WORLD POPULATION REV., https://worldpopulationreview.com/states/oil-production-by-state/ [https://perma.cc/8VZP-4M4N] (last visited Aug. 16, 2020).

143. STATE OF COLO. OIL & GAS CONSERVATION COMM'N, APPLICATION FOR PERMIT TO DRILL, https://cogcc.state.co.us/eForm/WebReportPDF.aspx?doc_num=402132227&report=Form02-3.rdlc&TokenID=8f57eadc-28ba-4bb2-8428-773ae5437f88 [https://perma.cc/8C9K-R638] (last visited Aug. 16, 2020).

144. *Id.*

145. *See generally id.*

146. *Id.*

147. *Id.*

revenues rely heavily on profits generated from oil and gas production, Louisiana should closely observe Colorado's well-thought out application process.[148] Accordingly, specific requirements need to be added to the Louisiana permit application process.

B. The Proposed Balancing Test of Interests

The Louisiana Legislature should amend Louisiana Revised Statutes section 33:109.1 to provide a balancing test of interests to replace the ambiguous "considered" standard that presently exists. This proposed balancing test should not be viewed as a handcuff on oil and gas companies seeking to obtain drilling permits; rather, it would be comparable to successful balancing tests already being used in related fields.[149] Specifically, this balancing test should calculate the probability and severity of the potential harm as well as compare environmental and societal costs against economic and social benefits. By evaluating environmental impacts in contrast to social and economic benefits, this rigid balancing test will establish clear and well-defined guidelines for what a permit-approving agency must consider.

1. Calculating the Probability of Potential Harm Actually Occurring

To adequately determine the probability of potential harm, a drilling permit applicant should be required to identify all the types and concentration of chemicals to be used, the volume of fluids to be pumped, and the estimated fracturing pressure. Louisiana currently requires operators to disclose all additives used in hydraulic fracturing fluids as well as those chemicals subject to Occupational Safety and Health Administration Hazard Communication requirements.[150] However, this

148. *See* Anna Staver, *Oil and Gas Generates $1 Billion in State and Local Taxes for Colorado, Report Finds*, DENVER POST (Mar. 22, 2019), https://www.denverpost.com/2019/03/22/oil-gas-taxes-colorado/ [https://perma.cc/AE7C-4QST].

149. *See Administrative Completeness Checklist Hazardous Waste Permit (Initial or Renewal)*, LA. DEP'T OF ENVTL. QUALITY (Jul. 3, 2017), https://deq.louisiana.gov/assets/docs/Land/HazWasteAdComInitialorRenewal.pdf [https://perma.cc/MJF4-NJ2N]; *Form MD-10-R-1 Application for Permit to Drill for Minerals*, STATE OF LA. OFF. OF CONSERVATION (Aug. 2009).

150. *Comparison of State Hydraulic Fracturing Chemical Disclosure Regulations*, ST. OF LA. DEP'T OF NAT. RESOURCES (Dec. 30, 2011) http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=888 [https://perma.cc/4HJR-5N6B]. Louisiana does not have a federally approved workplace safety and health regulatory program. Therefore, private sector

information should be required prior to the approval of a drilling permit rather than post-approval. Having sufficient knowledge of these chemicals and fluids will provide the basis for determining the probability of potential harm.[151] Once this information is collected, compiling further research will help identify the frequency in which these chemicals and fluids cause harm when pumping under the estimated pressure.

By implementing this duty to provide vital information, a calculation of the probability of potential harm prior to drilling becomes attainable. As a result, the drilling permit application process will be more transparent in Louisiana.[152] Additionally, because there is controversy surrounding hydraulic fracturing techniques, making the permit application process more transparent will likely address some of these concerns as well. This transparency will provide Louisiana citizens with a better knowledge and understanding of both the benefits and downsides of hydraulic fracturing.

2. Determining the Scope and Severity of Potential Harms

Akin to how coastal engineering permit applicants must conduct geotechnical testing to determine a proposed project's impact on the wetlands, a drilling permit applicant should likewise be required to conduct and submit a projected impact study.[153] This projected impact study should identify the various types of harm that could possibly occur, as well as identifying those residents and businesses who might fall within the scope of the harm. The severity of the harm(s) should be identified and categorized ranging from catastrophic, to major, and to minor.[154] Two examples of potentially catastrophic harms include groundwater

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employers are governed by the requirements of the federal hazard communication law. However, there are no state or federal hazard communication rules that govern public sector workplaces in Louisiana. *See Louisiana Hazard Communication: What You Need to Know*, BLR, https://www.blr.com/Environmental/Health-and-Safety/Hazard-Communication-in-Louisiana [https://perma.cc/G4VM-CG88] (last visited Aug. 16, 2020).

151. *See* Euan Mearns, *The Arguments For and Against Shale Oil and Gas Developments*, OILPRICE.COM (Sept. 8, 2014), https://oilprice.com/Energy/Natural-Gas/The-Arguments-for-and-Against-Shale-Oil-and-Gas-Developments.html [https://perma.cc/MVY8-XFUA].

152. *See generally Government Transparency*, U.S. DEP'T OF JUST., https://www.justice.gov/oip/government-transparency [https://perma.cc/DS3R-F45C] (last visited Aug. 16, 2020).

153. *See Joint Permit Application Additional Information*, *supra* note 136.

154. *See* Mearns, *supra* note 151.

contamination and seismic activity.[155] One example of a major harm is the release of methane gases from the fracturing process.[156] An example of a minor harm is noise disruption resulting from drilling activities.[157] Identifying these potential harms on the front end could potentially save entire communities and environments from subsequent negative effects.

After detailing the severity of potential harms, the permit applicant must identify what falls within the scope of the potential harm. This process will require permit applicants to submit detailed maps and drawings of the drilling site as well as the surrounding areas. Residential areas, schools, aquifers, and recreational facilities are a few examples of what should be identified when addressing the scope of a potential harm. Once identified, the permit applicant should provide proof of notice and a chance for those who face the potentially harmful effects to voice their concerns. Allowing potentially affected citizens to voice their concerns will result in a more cordial relationship between the local municipality and the hydraulic fracturing company or applicant.

3. Directly Balancing the Environmental and Social Impact Costs Against the Economic and Social Benefits

The final step in this proposed balancing test requires an assessment of the environmental and social costs against the economic and social benefits of the proposed activity. In addition to the environmental costs addressed in steps one and two, social impacts should be sufficiently considered as well. Social impacts encompass a community's ability to accommodate the rampant activity associated with an oil and gas development boom.[158] These impacts also include strains on infrastructure

155. *See* James Conca, *Thanks to Fracking, Earthquake Hazards in Parts of Oklahoma Now Comparable to California*, FORBES (Sep. 7, 2016), https://www.forbes.com/sites/jamesconca/2016/09/07/the-connection-between-earthquakes-and-fracking/#46a505766d68 [https://perma.cc/T74E-UJ7Y]; *see also* Mearns, *supra* note 151.

156. *See* Robert B. Jackson et al., *Increased Stray Gas Abundance in a Subset of Drinking Water Wells Near Marcellus Shale Gas Extraction*, 110 PROC. OF NAT'L ACAD. OF SCI. 11,250 (2013), https://www.pnas.org/content/110/28/11250 [https://perma.cc/3U8N-YUGS].

157. *See* Mearns, *supra* note 151.

158. Hilary Boudet et al., *"Fracking" controversy and communication: Using national survey data to understand public perceptions of hydraulic fracturing*, Science Direct (Jun. 21, 2013), https://www.sciencedirect.com/science/article/pii/S0301421513010392.

and public services due to increased demands resulting from the influx of new and migrant workers.[159]

Although opponents of oil and gas operations quickly point to the negative side effects, a number of social and economic benefits actually result from oil and gas operations.[160] From a local standpoint, these benefits include an increase in the number of job opportunities, revenue generated from lease agreements, an expansion of local business opportunities, and rising tax revenues for both the state and local governments.[161] After identifying the fundamental variables for both impact costs and development benefits, a balance of these interests will afford weight to each factor to reach a reasonable conclusion.

C. How This Balancing Test Functions Symbiotically With the Increased Permit Application Requirements

Requiring oil and gas companies, or any drilling permit applicant, to provide a moderately detailed analysis addressing environmental concerns is neither absurd nor unduly burdensome. The Louisiana Supreme Court has already acknowledged the need for a balancing test in the application process for wastewater storage permits.[162] Specifically, the Louisiana Supreme Court recognizes that "[t]he Constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social, and other factors."[163]

The balancing test proposed in this Comment, which is analogous to a risk-utility or cost-benefit analysis, is tailored specifically to the drilling permit application process.[164] While there may be some necessary overlap between the steps in the proposed test, each step still serves a separate yet equally important function. For example, accurately calculating the

159. *See generally* Boudet et al., *supra* note 4.

160. *See* Mearns, *supra* note 151.

161. Boudet et al., *supra* note 4.

162. *See* Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984).

163. *Id.* at 1157.

164. A risk-utility or cost-benefit analysis is commonly used in products liability cases in which a court balances the danger of a particular product against its benefits to society. This analysis appropriately balances the interests of manufacturers, consumers, and the public. *See* Rebecca Tustin Rutherford, *Changes in the Landscape of Products Liability Law: An Analysis of the Restatement (Third) of Torts*, 63 J. AIR L. & COM. 209, 222–23 (1997).

probability of potential harm directly correlates with determining the frequency in which a catastrophic, major, or minor harm might occur.

In *St. Tammany Parish Government*, the Parish asked the courts to construe the statutes differently than what the language expressly provided.[165] This attempt to have the judiciary create law highlighted the Parish's earnest intentions, despite its use of an improper medium. Rather than having the judiciary read more into the statutes than what is currently provided, the Louisiana Legislature needs to address the issue. If the legislature removes the word "consider" and instead implements a balancing test of interests, then a permit-approving agency such as the DNR will be able to reach more equitable outcomes pursuant to a clear and definite list of reasons rather than a decision arising from ambiguous considerations.

If the balancing test proposed in this Comment were applied to the facts from *St. Tammany Parish Government*, the Parish's interest in preserving its aquifer would weigh heavily against the State's interest in fracking for potential natural resources. The contamination of a major aquifer is a potentially catastrophic harm and thus weighs heavily in favor of the Parish. Assuming extractable oil and gas exists, the economic benefits from fracking weigh heavily in favor of the State. Further, the social costs of oil and gas development close to a residential area would likely outweigh the economic benefits of local job opportunities. After the application of this balancing test, the agency would have a well thought-out and definite list of factors and data, enabling it to reach a sound conclusion.

During this process, interests will be balanced fairly and decisions will be backed by concrete reasons. Much like the test used in *Blackett*, this proposed balancing promotes valid research in permit application processes to ensure that environmental concerns are adequately addressed.[166] In *Blackett*, Browning Ferris, Inc. (BFI) balanced environmental impacts against social and economic benefits before applying for a wastewater storage permit.[167] BFI's submitted analysis specifically noted potential injurious environmental effects caused by the facility, as well as proposed protective measures it would use in the design and operation of the landfill at issue.[168] The report focused on groundwater contamination, odor and dust contamination, methane gas migration, and

165. *See* St. Tammany Par. Gov't v. Welsh, 199 So. 3d 3 (La. Ct. App. 1st Cir.), *writ denied*, 194 So. 3d 1108 (La. 2016).

166. *See* Blackett v. La. Dep't of Envtl. Quality, 506 So. 2d 749 (La. Ct. App. 1st Cir. 1987).

167. *Id.* at 754.

168. *Id.*

surface water contamination.[169] After balancing the environmental burdens against the social and economic gains, BFI ultimately concluded that the social and economic benefits outweighed any environmental impact costs of the proposed facility.[170] Consequently, the Louisiana First Circuit determined that the reports complied with the permit application testing and data requirements and affirmed the LDEQ's decision to grant the permit.[171]

Furthermore, the DEQ is "required to make *basic findings* supported by *evidence* and ultimate findings which flow rationally from the basic findings, and it must articulate a *rational connection* between the facts found and the order issued."[172] These standards are in place to ensure that the DEQ makes fair and impartial decisions based on the information given.[173] Only by providing concrete details and reasoning will the DEQ be able to maintain its status as a "public trustee and justify the discretion with which it is entrusted by constitutional and statutory authority in a contested environmental matter."[174] If a balancing test provides concrete evidence of what the DEQ will consider before granting a permit, when faced with judicial review, such concrete evidence will be extremely beneficial to both the permit applicant and the adjudicating court.

The Louisiana Legislature has already established a standard of judicial review under Louisiana Revised Statutes section 49:964.[175] In *Save Ourselves Inc.,* the Louisiana Supreme Court analyzed the DEQ Secretary's discretion in decision-making alongside the judicial review requirements set forth in Louisiana Revised Statutes section 49:964 to reach its decision.[176] Thus, during judicial review, a court should reverse

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169. *Id.*

170. *Id.*

171. *Id.* at 756.

172. Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984) (emphasis added).

173. *See id.*

174. *In re* Am. Waste & Pollution Control Co., 642 So. 2d 1258, 1266 (La. 1994). For example, the Louisiana First Circuit held that a decision by the DEQ to grant a permit applicant exemption from statutory prohibition against deep well injection of hazardous waste did not undergo proper evaluation. *In re* Rubicon, Inc., 670 So. 2d 475, 483 (La. Ct. App. 1st Cir. 1996).

175. LA. REV. STAT. § 49:964(A) (Judicial Review of Adjudication) provides "a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy and would inflict irreparable injury."

176. *See Save Ourselves, Inc.*, 452 So. 2d at 1158: "Pursuant to § 964, a reviewing court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if substantial rights

a DEQ decision on its merits *only* when the Secretary either acted arbitrarily or blatantly, or gave insufficient weight to environmental protection in the risk-utility balancing test of the costs and benefits of the proposed action.[177] In these two instances, the court *must* reverse if the DEQ reached its decision "without individualized consideration and balancing of environmental factors conducted fairly and in good faith."[178]

If provided with a well-defined list of reasons as to why an agency made a certain decision, adjudicating courts will not have to rely on judicial interpretation of ambiguous statutory language when deciding the validity of an agency decision.[179] As a result, this streamlined decision making process will further the Louisiana Legislature's recent push to require trial court judges to submit well-defined reasons for certain rulings.[180] For example, the 2016 revisions to Louisiana Code of Civil Procedure article 966(c)(4) now require the courts to state on the record or in writing the definite reasons for either granting or denying a motion for summary judgment.[181] Similarly, the 2010 revisions to Louisiana Code of Civil Procedure article 863(G) require that a court describe the specific conduct warranting a sanction and explain the basis for imposing the sanction.[182] Thus, in addition to promoting judicial efficiency throughout the adjudication review process, this proposed balancing test would also further a recent legislative agenda requiring courts to specify with concrete details the reasons why the court has ruled a certain way.

Through these implementations, there is more information for the permit-issuing agency to assess before granting the permit. Additionally, if challenged, there is more information for the reviewing court to evaluate. Consequently, these changes justify the preemptive effects

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of the appellant have been prejudiced because the administrative findings, inferences conclusions, or decisions: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) manifestly erroneous in view of the reliable probative, and substantial evidence on the whole record."

177. *In re Rubicon, Inc.*, 670 So. 2d at 482.

178. *Save Ourselves, Inc.*, 452 So. 2d at 1159.

179. *See id.*

180. *See Guy Holdridge, Skip Phillips, & Donald Price: 6 Things to Know about the New MSJ Article*, LA. L. REV.: THE LEGAL EASE PODCAST (Nov. 15, 2015), https://soundcloud.com/the-legal-ease/ep-3-hon-guy-holdridge-skip-phillips-donald-price-6-things-you-need-to-know-about-the-new-msj-article [https://perma.cc/9MPL-EZZE].

181. LA. CODE CIV. PROC. art. 966 (2018).

182. LA. CODE CIV. PROC. art. 863.

afforded to the permit holders if the permitted action would otherwise violate local ordinances.

CONCLUSION

The underlying issue in *St. Tammany Parish Government* is the ambiguous language contained in Louisiana Revised Statutes section 33:109.1, specifically the use of the word "consider." Because this language is ambiguous, there is no set test or defined requirements that a state agency or department must follow before carrying out a desired plan. As the law currently reads, the threshold for meeting the 'consideration' standard is very low. This low threshold provides drilling permit applicants an easier path to obtain a drilling permit. Once an oil and gas drilling permit is granted, Louisiana Revised Statutes section 30:28(F) affords the permit holder ample protection. Consequently, this protection means that the state-backed permit holder will always be able to use state law to trump any local ordinances that get in the way.

The ongoing feud between local governments and state actors remains prevalent, especially in a state like Louisiana where oil and gas activities generate much needed revenue. To resolve these issues, the language of Louisiana Revised Statutes section 33:109.1 should be refined to create a more equitable balancing test between state and local interests, or one that an agency will adequately consider. In conjunction with the implementation of a balancing test, the legislature should enact more stringent drilling permit application requirements. When combined, these proposals will solve one problem while avoiding the creation of another—having the promotion of one natural resource seemingly at odds with the conservation of others.

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