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Is Big Oil Too Big? Examining the Implications and Effects of Oil and Gas Companies' Noncompliance with Louisiana Coastal Regulations

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Is Big Oil Too Big? Examining the Implications and Effects of Oil and Gas Companies' Noncompliance with Louisiana Coastal Regulations

Quinn Hamilton*

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INTRODUCTION

In Louisiana, the oil and gas industry has always served as a major source of economic prosperity.¹ For this reason, political actors have

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1. Chris Kardish, *Southern Louisiana Picks a Fight with Big Oil to Save the Wetlands*, GOVERNING (Aug. 24, 2015), <https://www.governing.com/topics/transportation-infrastructure/gov-louisiana-wetlands-lawsuits.html> [https://perma.cc/ZD9Z-LS24].

allowed the industry to evade Louisiana regulations without consequence.² Despite the industry's large contribution to the state's economic landscape, it has also exacerbated environmental damage—specifically coastal erosion—and has not faced any ramifications for its contributions to this problem.³ Louisiana's coast is eroding at an alarming rate and will continue to erode if preventative measures are not taken in the immediate future.⁴ Recently, the state government and several parish governments have taken action to prevent coastal erosion and hold the oil and gas industry accountable for the damage caused.⁵

In 2013 in an endeavor to foster oil and gas company accountability, six Louisiana parishes,⁶ along with the Louisiana Department of Natural Resources (LDNR) and the Louisiana Attorney General as intervenors, filed suit against 98 oil and gas companies that conducted drilling and other excavation activities off the state's coast.⁷ This action resulted in 46 separate lawsuits under the Louisiana State and Local Coastal Resources Management Act of 1978 (“SLCRMA”).⁸ The SLCRMA seeks to “support and encourage multiple use of coastal resources consistent with the maintenance and enhancement of renewable resource management and productivity” and “develop and implement a coastal resources management program which is based on consideration of our resources,

2. Tyler Bridges, *Take a Close Look at This Abandoned Plaquemines Oil Field, Why It's Source of Major Legal Battle*, THE ADVOCATE (July 21, 2018, 7:15 PM), https://www.theadvocate.com/baton_rouge/news/politics/article_2c37c532-8c56-11e8-96cb-6f650d1b6bd9.html.

3. *Id.*

4. See BRADY R. COUVILLION ET AL., U.S. GEOLOGICAL SURV., U.S. DEP'T INTERIOR, LAND AREA CHANGE IN COASTAL LOUISIANA (1932 TO 2016) 1 (2017), https://pubs.usgs.gov/sim/3381/sim3381_pamphlet.pdf [<https://perma.cc/ZHL7-N356>].

5. See *Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502 (5th Cir. 2020), *withdrawn and superseded on reh'g* by 7 F.4d 362 (5th Cir. 2021).

6. The six parishes are Jefferson, St. Bernard, St. John the Baptist, Plaquemines, Vermillion, and Cameron. Tyler Bridges, *'We Ran Out of Time': Bill to Nullify Louisiana Parish Lawsuits Vs. Oil and Gas Companies Is Dead*, THE ADVOCATE (May 29, 2019, 7:34 AM), https://www.theadvocate.com/baton_rouge/news/environment/article_994e1e00-a13a-11ea-b3b3-c7f7bd15897a.html [<https://perma.cc/HCU5-Y6ME>].

7. See Nicholas Bogel-Burroughs, *Louisiana's Coast Is Vanishing. Can a Mining Company's \$100 Million Offer Help Save It?*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/louisiana-freeport-memorandum-deal.html> [<https://perma.cc/9W7P-7PCY>].

8. *Id.*; Bridges, *supra* note 6; see also Bridges, *supra* note 2; *Par. of Plaquemines*, 969 F.3d at 505.

the environment, the needs of the people of the state, the nation, and of state and local government.”⁹ These suits aim to promote the SLCRMA purpose by holding the oil and gas industry responsible for its failure to adhere to these principles and also obtaining damages from it for coastal restoration.¹⁰

Pursuant to the SLCRMA, the complaints alleged that the companies’ drilling and excavation activities significantly contributed to coastal erosion.¹¹ The lawsuits were filed to promote Louisiana’s public policy and the SLCRMA’s purpose “[t]o protect, develop, and, where feasible, restore or enhance the resources of the state’s coastal zone.”¹² The collective goal of the lawsuits was to hold the oil and gas companies responsible for restoring parts of the Louisiana coast damaged by the industry.¹³ According to a study conducted by the U.S. Geological Survey (USGS), 36% of the approximately \$50 billion worth of Louisiana’s coastal damage has been caused by the oil and gas industry.¹⁴

While oil and gas companies cannot be held responsible for all the damage inflicted upon Louisiana’s coast, the lawsuits could aid in paying for a large percentage of the \$50 billion needed for coastal restoration.¹⁵ On average, Louisiana loses about a football field worth of land every 100 minutes due in part to the oil and gas industry’s harmful practices, as well as other human activities which cause the sea level to rise and the coast to erode.¹⁶ Since 2010, Louisiana has lost approximately 58 square miles of wetlands, and since 1932 it has lost approximately 2,000 square miles—or 25%—of its wetlands.¹⁷

9. LA. REV. STAT. § 49:214.22(3), (5) (2021).

10. *See, e.g., Par. of Plaquemines*, 969 F.3d at 505.

11. Bridges, *supra* note 2.

12. LA. REV. STAT. § 49:214.22(1).

13. Kardish, *supra* note 1.

14. *Id.*

15. *Id.*

16. Faimon A. Roberts III, *Is Louisiana Land Loss Slowing? Yes, but . . .*, THE ADVOCATE (July 12, 2017, 3:10 PM), https://www.theadvocate.com/baton_rouge/news/environment/article_28af97a2-673e-11e7-b64d-cf8ec8ce5b83.html; Bob Marshall, *Losing Ground: Southeast Louisiana Is Disappearing, Quickly*, SCI. AM. (Aug. 28, 2014), <https://www.scientificamerican.com/article/losing-ground-southeast-louisiana-is-disappearing-quickly/> [<https://perma.cc/5K WG-XL6C>].

17. Roberts, *supra* note 16; Dante Alessandri, *Recent Developments in Environmental Law: II. Louisiana Coastal Land Loss*, 32 TUL. ENVTL. L.J. 143, 148 (2018).

The main issue presented in this Comment, mirroring the main issue in the referenced lawsuits, is whether defendant oil and gas companies¹⁸ violated the SLCRMA when conducting their coastal operations. Plaintiffs contend that the defendants violated the SLCRMA by conducting operations without first obtaining the necessary permits, and when the companies did obtain permits, they violated those permits' terms and conditions.¹⁹ Further, this Comment analyzes the most effective means for funding the \$50 billion Coastal Master Plan—a comprehensive plan created by the Louisiana government to restore its coastal zone.²⁰

This Comment proposes two potential solutions, which weigh the goals of speedy resolution and the rights of the parties. The first proposal suggests that the state allow the litigation to go to trial. While this may not present the most favorable solution for obtaining funds quickly, the plaintiffs' claims hold considerable weight for reasons discussed later in this Comment. For the second solution, the defendants and the state could reach a settlement. While this may present the best option to receive funding quickly, this may not be the most realistic option, as the oil and gas industry has displayed reluctance to settle. However, the industry claims they are committed to coastal restoration, and a settlement could serve as the best means of collaborating with all parties to reach an efficient and speedy resolution as well as coastal restoration.

18. *In re La. Coastal Zone Land Loss Litig.*, 317 F. Supp. 3d 1346 (J.P.M.L. 2018) (stating that the defendants include, but are not limited to: Rozel Operating Company, Destin Operating Company, Anadarko E&P Onshore, Exchange Oil & Gas Corporation, Riverwood Production Company, June Energy, Chevron USA, Atlantic Richfield Company, Great Southern Oil & Gas Company, Northcoast Oil & Gas Company, ConocoPhillips Company, Linder Oil Company, Devon Energy Production Company, Goodrich Petroleum Company, Apache Oil Corporation, Equitable Petroleum Corporation, Atlantic Richfield Company, Canlan Oil Company, Total Petrochemicals & Refining USA, Exxon Mobil Corporation, Bepco, Palm Energy Offshore, Caskids Operating Company, HHE Energy Company, Campbell Energy Corporation, LLOG Exploration & Production Company, Auster Oil & Gas, Ballard Exploration Company, Brammer Engineering, Burlington Resources Oil & Gas Company, Alpine Exploration Companies, Bay Coquille, BP America, and Gulfport Energy Corporation).

19. *Par. of Plaquemines v. Riverwood Prod. Co.*, No. 18-5217, 2019 WL 2271118, at *16 (E.D. La. May 28, 2019), *aff'd in part, rev'd in part sub nom. Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362 (5th Cir. 2021).

20. *See* COASTAL PROT. & RESTORATION AUTH. OF LA., LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 1 (2017), http://coastal.la.gov/wp-content/uploads/2017/04/2017-Coastal-Master-Plan_Web-Book_CFfinal-with-Effective-Date-06092017.pdf [<https://perma.cc/B2D4-MQCD>].

Part I of this Comment will discuss the background of Louisiana's coastal land loss and the oil and gas industry's contributions to this ongoing problem. Part I will also discuss the factual basis for the SLCRMA lawsuits and the legislation serving as the foundation for the plaintiffs' claims. It will also discuss the political pressures facing the lawsuits and how such pressures will potentially affect the outcome of the lawsuits. Part II will discuss the most recent of these oil and gas cases to appear before the United States Court of Appeals for the Fifth Circuit, detailing the legal theories outlined in the *Rozel* report ("*Rozel Report*"), the specific allegations made by the plaintiffs, and the defendants' response to the allegations. Part II will then analyze the parties' legal theories for their claims. Finally, Part III will discuss a possible solution by providing the most productive outcome for these lawsuits regarding coastal restoration.

I. BACKGROUND

A. Louisiana's Coastal Land Loss

According to a study conducted by USGS, since 1932 Louisiana has lost approximately 1,880 square miles of coastal land—an area about the size of Delaware.²¹ The study also predicted Louisiana will lose another 1,750 square miles of land if measures are not taken in the near future to prevent further coastal erosion.²² In 2012, state officials estimated that a cost of \$50 billion is required to counteract such an enormous loss of land.²³ Due to the continuing land loss and mounting damages, Louisiana Governor John Bel Edwards formally declared a state of emergency over coastal land loss in April 2017.²⁴ Lawsuits against oil and gas companies currently serve as the state's primary solution to sourcing the requisite funding for the \$50 billion coastal recovery project.²⁵

The USGS study also estimates that the oil and gas industry is responsible for at least 36% of the damage contributing to land loss.²⁶ In addition, the total canal dredging area created by the oil and gas industry from 1955 to 1978 is estimated to account for 10% of erosion in

21. Bridges, *supra* note 2.

22. Bogel-Burroughs, *supra* note 7.

23. See Kardish, *supra* note 1.

24. Alessandri, *supra* note 17, at 149.

25. *Id.*

26. See Kardish, *supra* note 1.

Louisiana's coastal region.²⁷ The canals are used for navigation and drainage by the oil and gas industry and create a high degree of hydrological alteration and isolation from other wetland and marsh areas.²⁸ These canals directly account for approximately 6.3% of the total wetland loss.²⁹ Although 6.3% may appear insubstantial, a strong statistical relationship between canal density and total wetlands loss suggests that the indirect impacts of canals account for a much larger percentage of total wetland loss than indicated.³⁰ This is because the high degree of hydrological alteration and isolation caused by the canals reduce sediment input into the wetlands and increase saltwater intrusion, leading to wetland loss.³¹

Parish of Plaquemines v. Rozel Operating Co. illustrates some specific problems created by the oil and gas industry's contributions to the loss of Louisiana's coastal land.³² This case involved four different oil fields that are known collectively as the Bayou Gentilly oil field.³³ Drilling in the Bayou Gentilly oil field took place from 1941 to 2012.³⁴ During this period, 24.4 million barrels of oil were produced by nine companies from the field.³⁵ As this area produced oil, the amount of marsh in the Bayou Gentilly oil field fell from 21,000 acres to only 8,000 acres resulting in a 62% reduction of marshland over the course of the drilling operations.³⁶ The plaintiffs in this case asserted the main cause for the loss of the marshland was the canals dredged in the Bayou Gentilly oil field by the oil and gas companies.³⁷

27. Chris McLindon, *The Louisiana Coastal Lawsuits*, LSU (Apr. 17, 2019), https://www.lsu.edu/lgs/conferences/laoilgas2019/laoilgas2019_mclindon.pdf [<https://perma.cc/YW4U-9WBT>].

28. Jae-Young Ko et al., *Impacts of Oil and Gas Activities on Coastal Wetland Loss in the Mississippi Delta*, HARTE RES. INST., <https://www.harte-researchinstitute.org/sites/default/files/inline-files/33.pdf> [<https://perma.cc/DAG7-L9JA>] (last visited Sept. 27, 2021) (explaining that hydrologic alteration and isolation includes significant changes in the magnitude, duration, timing, frequency, or rate-of-change of natural stream flows).

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* *Plaquemines Par. v. Rozel Operating Co.*, No. 13-6722, 2015 WL 403791 (E.D. La. Jan. 29, 2015).

33. Bridges, *supra* note 2.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

In addition, the plaintiffs in *Parish of Plaquemines v. Chevron USA, Inc.* also claimed the canals constructed by the oil and gas industry are a main contributor to the reduction of marshland in Plaquemines Parish. The plaintiffs alleged that “[s]ince 1978 and before, [d]efendants’ oil and gas activities have resulted in the dredging of numerous canals” that “resulted in the degradation of the Operational Area, including the erosion of marshes.”³⁸ The lawsuit seeks “costs necessary” to “restore the . . . Parish Coastal Zone[s] as near as practicable to [their] original condition” and “actual restoration.”³⁹ As demonstrated by these cases, the oil and gas industry has greatly contributed to Louisiana’s land loss crisis, and many of the industry’s activities have proved harmful to the state’s wetlands and coastal zones.

B. Original Lawsuit

The first lawsuit against the oil and gas industry alleging violations of the SLCRMA was filed in 2013 by Southeast Louisiana Flood Protection Authority-East (SLFPA-E).⁴⁰ The SLFPA-E alleged that the dredging of canals throughout coastal Louisiana caused erosion and coastal land loss.⁴¹ Additionally, the petition claimed that canal dredging increased the risk of storm surge damage, threatening the levee system and coastal area that the SLFPA-E had been charged with protecting.⁴² While this lawsuit was eventually dismissed on the ground that the plaintiff did not state a claim for which relief could be granted, this suit prompted the parishes to file their own actions.⁴³

C. Legislation

In 1972, Congress enacted the Coastal Zone Management Act (CZMA) with the purpose “to preserve, protect, develop, and where

38. See Opening Brief of Defendants-Appellants at 6, *Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502 (5th Cir. 2020) (No. 19-30492), 2019 WL 4238405. For the definition of “Operational Area,” see *Operational Area*, LEXICO, https://www.lexico.com/en/definition/operational_area [<https://perma.cc/39RX-JZK9>] (last visited Oct. 6, 2021) (“An area in which military operations are taking place.”).

39. *Id.*

40. Alessandri, *supra* note 17, at 149.

41. *Id.*

42. *Id.*

43. *Id.*; see *Bd. of Comm’rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.*, 850 F.3d 714 (5th Cir. 2017).

possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."⁴⁴ The CZMA was also designed to encourage states to manage their coasts through federally approved programs.⁴⁵ The CZMA established a national framework for states to manage their coastal resources and also provided funding to states through federal grants.⁴⁶ Additionally, the CZMA performs reviews of federal agency actions in coastal areas and offers several grants for states that set up their own coastal zone management program.⁴⁷ In response to the CZMA, Louisiana enacted the SLCRMA in 1978.⁴⁸

The SLCRMA was designed to promote the policy goals of the Louisiana Office of Coastal Management; specifically, its main goal was to "protect, develop, and, where feasible, restore or enhance the resources of the state's coastal zone."⁴⁹ To pursue this goal, the SLCRMA established a permitting program to regulate any new "use" in the Louisiana Coastal Zone.⁵⁰

"Use" is defined as an activity with "a direct and significant impact on coastal waters."⁵¹ The SLCRMA includes "uses which directly and significantly affect coastal waters and which are in need of coastal management."⁵² Additionally, uses covered include those "which have impacts of greater than local significance or which significantly affect interests of regional, state, or national concern."⁵³ Examples of uses include dredging of canals, pipeline construction, and mineral exploration and production.⁵⁴ Other examples of uses include the construction of

44. See William Lindsey, *Louisiana Coastal Zone, It's All Special, but Some Areas Deserve Legal Classification: Using Section 214.29 of Louisiana's SLCRMA to Designate Special Areas and Protect the Coastal Zone*, 27 TUL. ENVTL. L.J. 351, 356 (2014).

45. See *Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502, 505 (5th Cir. 2020), *withdrawn and superseded on rehearing by* 7 F.4d 362 (5th Cir. 2021); see also 16 U.S.C. §§ 1455–1456.

46. EVA LIPIEC, CONG. RSCH. SERV., R45460, COASTAL ZONE MANAGEMENT ACT (CZMA): OVERVIEW AND ISSUES FOR CONGRESS 2 (2019), <https://fas.org/sgp/crs/misc/R45460.pdf> [<https://perma.cc/4WM2-WMNX>].

47. *Id.*

48. *Par. of Plaquemines*, 969 F.3d at 505.

49. LA. REV. STAT. § 49:214.22 (2021).

50. *Id.* § 49:214.30(A)(1).

51. *Id.* § 49:214.23(13).

52. *Id.* § 49:214.25.

53. *Id.*

54. See Victor L. Marcello, *Status of Coastal Lawsuits Against the Oil and Gas Industry in Louisiana*, UNIV. OR., <https://pages.uoregon.edu/whitelaw/>

buildings and other structures, the use of cheniers,⁵⁵ salt domes, and other similar landforms.⁵⁶

Under the SLCRMA, Louisiana courts can impose civil liability on anyone who starts a “use” without a Coastal Use Permit or fails to comply with the terms and conditions of their permit.⁵⁷ Further, the SLCRMA provides that Louisiana courts can order environmental restoration measures as sanctions for violations.⁵⁸ Examples of a violation would include: disposing oil field wastes without a permit, dredging more canals than permitted, not obtaining a permit for a use, and failing to restore production sites upon completion of operations.⁵⁹ However, the SLCRMA contains a historical use exemption that allows “uses legally commenced or established prior to the effective date of the [C]oastal [U]se [P]ermit program” exemption from obtaining a Coastal Use Permit, which the defendants rely on to defend some of their claims.⁶⁰

D. Political Pressures

These lawsuits face substantial opposition from the oil and gas industry and Louisiana state legislators. In respect to the oil and gas industry, the defendants have exhibited great resistance to the allegations of their alleged liability, evidenced by the defendants’ reluctance to settle. Of the 98 companies sued, Freeport-McMoRan is the only company to reach a settlement, agreeing to pay \$100 million toward restoring the coast in 12 Louisiana parishes.⁶¹ To make these payments, Freeport-McMoRan will deposit \$15 million into an escrow account and then make additional payments of \$4.25 million annually over the next two decades.⁶² The

PIELC_2017/OR_Logging_&_LA_Oil/7_Marcello_handout.pdf [https://perma.cc/X68E-3U4A] (last visited Sept. 25, 2021).

55. A chenier is a beach ridge usually composed of sand-sized material and rests on clay or mud; this is a French-Louisiana term for the ridges in the Mississippi Delta Region. *Chenier*, BRITANNICA, <https://www.britannica.com/science/chenier> [https://perma.cc/HP9C-UE47] (last visited Sept. 25, 2021).

56. Marcello, *supra* note 55.

57. LA. REV. STAT. § 49:214.36(E).

58. *Id.*

59. See *Par. of Plaquemines v. Riverwood Prod. Co.*, No. 18-5217, 2019 WL 2271118 (E.D. La. May 28, 2019), *aff'd in part, rev'd in part sub nom. Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362 (5th Cir. 2021).

60. LA. REV. STAT. § 49:214.34(C)(2).

61. Bogel-Burroughs, *supra* note 7.

62. Melinda Deslatte & Kevin McGill, *Louisiana AG Backs \$100M Deal in Freeport McMoRan Coastal Damage Suit*, INS. J. (Mar. 5, 2021), <https://www>

settlement proceeds will be used for the state's Coastal Master Plan, including coastal restoration and hurricane protection projects, with 60% allocated to state projects and 40% to local projects.⁶³

None of the lawsuits have reached the trial stage thus far.⁶⁴ While the plaintiffs are optimistic that Freeport-McMoRan's settlement will encourage the other companies to settle as well, the rest of the defendant-companies are reluctant to follow suit.⁶⁵ Gifford Briggs, president of the Louisiana Oil and Gas Association, is particularly averse to the idea of a settlement.⁶⁶ Briggs has denounced the settlement, purporting that the suits are baseless and "hold Louisiana oil and gas companies hostage and punish them for legally conducting production activities."⁶⁷ Briggs claims, "Trial lawyer-driven lawsuits and behind the scenes settlement schemes are not the answer."⁶⁸ Additionally, he states that coastal restoration "requires collaboration amongst industry, policymakers, and world-class coastal researchers to develop real serious, science-based solutions."⁶⁹

Lawmakers have also contributed to the defendants' unwillingness to settle.⁷⁰ In the past, regulators and elected officials have been reluctant to enforce regulations, allowing the oil and gas industry's damages to the coast to mount.⁷¹ An example of this reluctance is the backfilling of canals, an activity within the LDNR's enforcement powers, but a survey by a Louisiana State University scientist Gene Turner found only ten miles of backfilled canals of at least 10,000 canals dredged.⁷² This lack of enforcement is due to the large amount of revenue and economic prosperity brought to Louisiana by the industry.⁷³ The oil and gas industry provides approximately 13% of the jobs in the state and approximately

.insurancejournal.com/news/southcentral/2021/03/05/604118.htm [https://perma.cc/E5UK-N3YK].

63. *Id.*

64. Bogel-Burroughs, *supra* note 7.

65. *Id.*

66. See Gifford Briggs, *Briggs: Louisiana's Coast Needs Solutions, Not Shakedowns*, LA. REC. (Oct. 29, 2019), <https://louisianarecord.com/stories/516060822-briggs-louisiana-s-coast-needs-solutions-not-shakedowns> [https://perma.cc/DVA9-E6M8].

67. *Id.*

68. *Id.*

69. *Id.*

70. Kardish, *supra* note 1.

71. *Id.*

72. *Id.*

73. *Id.*

14% of the state government's revenue.⁷⁴ Louisiana is also responsible for 7% of all oil production in the United States and is capable of producing 3.3 million barrels of crude oil every day.⁷⁵ Due to backlash from the oil and gas industry, combined with the economic prosperity the industry brings to the state and the support received from Louisiana regulators and elected officials because of this economic prosperity, the other companies continue to demonstrate reluctance to settle. Additionally, the industry has support from both past and current lawmakers, adding to its unwillingness to cooperate with the state and parish plaintiffs.

The first lawsuit filed, *Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East*,⁷⁶ was met with a large amount of backlash from the oil and gas industry and then-Governor Bobby Jindal.⁷⁷ Following the filing of this lawsuit, Louisiana state legislators introduced 18 bills in an attempt to get the suit dismissed.⁷⁸ Plaquemine Parish Council, one of the parish plaintiffs, initially voted to dismiss the lawsuits.⁷⁹ However, the Council reversed their decision to dismiss in a 6–1 vote.⁸⁰ Council voters had originally been persuaded to drop the suit by a speech made by former LSU economics professor, Dr. Loren Scott.⁸¹ Dr. Scott claimed that the parishes should have dropped out of the lawsuits.⁸² He explained his rationale: "It's the case of the dog biting the hand that feeds them. The lifeblood of the parish is not fruit trees. It's the oil and gas industry."⁸³ This dismissal is a clear example of elected local officials valuing the industry's economic prosperity over their parish's coastal zone, despite the enormous damage the industry has caused.

Governor John Bel Edwards has consistently served as one of the main proponents of the lawsuits and intervened as a plaintiff in all these cases

74. *Id.*; see also LA. WORKFORCE COMM'N, LOUISIANA WORKFORCE INFORMATION REVIEW 1 (2015), https://www.laworks.net/Downloads/LMI/WorkforceInfoReview_2015.pdf [<https://perma.cc/J9ET-ZC8D>].

75. Bogel-Burroughs, *supra* note 7.

76. Bd. of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., 850 F.3d 714 (5th Cir. 2017).

77. See Alessandri, *supra* note 17, at 149.

78. *Id.*

79. Bridges, *supra* note 2.

80. *Id.*

81. See *id.*

82. *Id.*

83. *Id.*

along with Louisiana Attorney General Jeff Landry and the LDNR.⁸⁴ Edwards formally declared a state of emergency in Louisiana in 2017 and sought funding for the \$50 billion Coastal Master Plan.⁸⁵ For Edwards, these suits are a major source of funding for the coastal recovery project.⁸⁶

Despite support from both Governor Edwards and Attorney General Landry, political opposition to these lawsuits still exists. The most recent opposition came from Louisiana legislation with 2020 Senate Bill 440,⁸⁷ which proposed to eliminate the lawsuits completely.⁸⁸ This bill, written by Senator Mike Fesi, aimed to eliminate the lawsuits because it would have required the money spent by the parishes on the lawsuits to go toward coastal restoration efforts instead.⁸⁹ However, Senate Bill 440 died in the Louisiana House of Representatives after it failed to vote on it during their legislative session.⁹⁰ Despite the setback, Senator Fesi vowed to resuscitate the bill in 2021.⁹¹

II. ANALYSIS

A. Parish of Plaquemines v. Chevron USA, Inc.

The most recent legal battle involving these lawsuits came from the Fifth Circuit in *Parish of Plaquemines v. Chevron USA, Inc.*, which dealt primarily with removal rather than any substantive legal issues.⁹² In this case, the parishes alleged a number of SLCRMA violations including the continued use of wells and canals originally constructed during World War

84. *Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502, 505 (5th Cir. 2020), *withdrawn and superseded on reh'g* by 7 F.4th 362 (5th Cir. 2021).

85. Alessandri, *supra* note 17, at 148.

86. *Id.*

87. S.B. 440, 2020 Leg., Reg. Sess. (La. 2020).

88. *See id.*; *see also* Maria Marsh, *Louisiana House Bill Seeks to Invalidate Parish Lawsuits Against Oil and Gas Companies*, 4WWL (May 27, 2020, 5:20 PM), <https://www.wvltv.com/article/news/local/louisiana-house-bill-seeks-to-invalidate-parish-lawsuits-against-oil-and-gas-companies/289-d67a3c48-c7ff-449d-9f08-ca44f098b77c> [<https://perma.cc/4TG2-E9FY>].

89. *Id.*

90. Bridges, *supra* note 6.

91. *Id.* Senator Fesi attempted to bring a similar bill in 2021, Senate Bill 122. However, after passing the Louisiana Senate, this bill also died in the Louisiana House after representatives failed to vote on it. *See* S.B. 122, 2021 Leg., Reg. Sess. (La. 2021).

92. *See Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502, 505 (5th Cir. 2020), *withdrawn and superseded on reh'g* by 7 F.4th 362 (5th Cir. 2021).

II (WWII).⁹³ Chevron and the other defendants⁹⁴ claimed that their continued use of those earlier built wells and canals is covered by the historical exemption of the SLCRMA.⁹⁵ The historical exemption provides that “uses legally commenced or established prior to the effective date of the [C]oastal [U]se [P]ermit program shall not require a [C]oastal [U]se [P]ermit.”⁹⁶ The defendants also claimed that their uses were commenced under federal directives, meaning they were not required to obtain permits for relevant activities.⁹⁷ This was also their basis for attempting to remove the case to federal court.⁹⁸ The plaintiffs claimed, however, that the defendants’ activities were not “legally commenced” under the SLCRMA because the activities were not conducted in good faith.⁹⁹

Chevron and the other defendants wanted to remove the case to federal court in an attempt to have it heard under federal law rather than the SLCRMA.¹⁰⁰ They argued that the alleged violations took place during WWII while they were acting under federal authority, giving rise to federal question jurisdiction as required for removal to federal court.¹⁰¹ If heard in state court, however, the defendants would be subject to state law, which includes the SLCRMA.¹⁰² The Fifth Circuit ruled that the defendants did not timely file the removal petition; consequently, the suit was remanded back to state court.¹⁰³

However, the Fifth Circuit granted a petition for a rehearing and withdrew their original opinion after new information was provided to the court.¹⁰⁴ On rehearing, the Fifth Circuit reversed the ruling in part and remanded the case back to the district court.¹⁰⁵ The defendants presented a new theory for federal jurisdiction during the rehearing, federal officer

93. *Id.* at 366.

94. *Id.* at 362. Other defendants included the California Company, Exxon Mobil Corporation, Humble Oil and Refining Company, ConocoPhillips Company, General American Oil Company of Texas, BP America Production Company, Kerr-McGee Oil & Gas Onshore, L.P., Shell Oil Company, Swepi, L.P., and Texas Company. *Id.*

95. *Id.* at 366.

96. *Id.*; see LA. REV. STAT. § 49:214.34(C)(2) (2021).

97. *Par. of Plaquemines*, 7 F.4th at 366.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.*

103. *Id.* at 363.

104. *See id.* at 365.

105. *Id.*

jurisdiction.¹⁰⁶ Generally, under the holding of *Latiolais v. Huntington Ingalls, Inc.*,¹⁰⁷ an order remanding a case to state court is not generally reviewable.¹⁰⁸ However, “the federal-officer removal statute, is reviewable ‘by appeal or otherwise.’”¹⁰⁹ While affirming that federal question jurisdiction did not exist, the court remanded the case to the district court.¹¹⁰ The district court now must decide whether federal-officer jurisdiction existed under the holding of *Latiolais*, which the court had not previously considered.¹¹¹

B. Plaintiffs’ Position

The plaintiffs use the *Rozel* Report as the foundation for their legal theories against the defendants.¹¹² The *Rozel* Report is an expert report that was first introduced by Plaquemines Parish during a related case, *Parish of Plaquemines v. Rozel Operating Co.*,¹¹³ and it outlines the specific legal theories on which the plaintiffs base their recovery.¹¹⁴ This report is certified to represent the LDNR’s position in all 46 cases.¹¹⁵ One of the LDNR’s most important theories addressed in the *Rozel* Report involves the 1980 Louisiana Coastal Resources Program Final Environmental Impact Statement (“FEIS”) which interprets the SLCRMA.¹¹⁶ The FEIS was allegedly prepared, published, and distributed to the defendant-companies in 1980 by the LDNR. The FEIS interpreted the SLCRMA historical use exemption to define which activities were “legally commenced” under the statute.¹¹⁷ The plaintiffs use the FEIS’s interpretation of the historical exemption to claim that the companies’ activities were not “legally commenced” under the SLCRMA.¹¹⁸ Under

106. *Id.* at 368.

107. *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 290 (5th Cir. 2020).

108. *Par. of Plaquemines*, 7 F.4th at 367.

109. *Id.* (quoting *Latiolais*, 951 F.3d at 290).

110. *Id.*

111. *Id.*

112. *Id.* at 366–67.

113. *See* *Plaquemines Par. v. Rozel Operating Co.*, No. 13-6722, 2015 WL 403791 (E.D. La. Jan. 29, 2015); *see also* *Par. of Plaquemines v. Riverwood Prod. Co.*, No. 18-5217, 2019 WL 2271118, at *2 (E.D. La. May 28, 2019), *aff’d in part, rev’d in part sub nom.* *Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362 (5th Cir. 2021).

114. *See* *Riverwood*, 2019 WL 2271118, at *2.

115. *Id.* at *2 n.8.

116. *Id.* at *6.

117. *Id.*

118. *Id.* at *16.

the FEIS's interpretation, for activities to be "legally commenced," the following elements must be satisfied: (1) actual construction or operation of the use or activity must have been begun in good faith; (2) all permits, licenses, and clearances required by governmental bodies must have been obtained and the use or activity must be in compliance with them; and (3) no significant change in the nature, size, location, or impacts of the use or activity takes place.¹¹⁹

The *Rozel* Report claims that certain uses by the defendant-companies were not "legally commenced" because the pre-SCLRMA operational methods used by the defendant-companies were in bad faith.¹²⁰ If the companies' methods were in bad faith, then they would clearly not be in "good faith" as required by the SLCRMA. This would be contrary to the first requirement of "legally commenced" pursuant to the FEIS's interpretation: to be in good faith.¹²¹

The activities alleged to have been conducted in bad faith in the *Rozel* Report include the use of leaking pits, the overboard discharge of wastes, and the use of long leaking flowlines, all of which are inconsistent with the requirements of the historical use exemption as interpreted by the FEIS.¹²² The *Rozel* Report also claims that there were certain pits and salt discharges before 1980 that were not "legally commenced" or were commenced in bad faith.¹²³ According to the *Rozel* Report, the defendants' construction, use, and failure to close unlined earthen waste pits were pre-1980 activities not commenced in good faith, meaning they were not "legally commenced" under the FEIS's interpretation.¹²⁴ Therefore, the pits and salt discharges would have required a separate Coastal Use Permit to continue operating after 1980.¹²⁵

Additionally, the *Rozel* Report names three different activities that violated the SLCRMA.¹²⁶ The first violations named in the report were certain uses by the defendants "legally commenced" before 1980, but the

119. *Id.* at *2 n.10.

120. See Original Brief of Plaintiff-Appellee and Intervenors-Appellees at 37, *Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502 (5th Cir. 2020) (No. 19-30492), 2019 WL 5458958.

121. *Par. of Cameron v. Auster Oil & Gas Inc.*, 420 F. Supp. 3d 532, 538 (W.D. La. 2019), *aff'd in part, rev'd in part sub nom. Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362 (5th Cir. 2021).

122. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, *supra* note 121, at 37–38.

123. *Riverwood*, 2019 WL 2271118, at *16.

124. *Id.* at *1 n.4.

125. *Id.* at *6.

126. *Id.* at *2.

uses' impacts changed after 1980.¹²⁷ Since the impacts changed after 1980, the defendants were obligated to obtain a permit to continue the uses; however, the defendants never pursued one.¹²⁸ Examples of this violation included the continued operation of canals without seeking a permit for modification and the continued discharge of produced water.¹²⁹ The second violations named in the report were certain uses illegally commenced from the beginning; because these uses were not "legally commenced" at the outset, they could not qualify for the historical exemption.¹³⁰ Examples of the second named violation were the extraction of oil at too high of a production rate by the defendants and the incorrect drilling and spacing of their wells.¹³¹ The last violations alleged in the report were certain uses by the defendants commenced after 1980.¹³² For these uses, the defendant-companies needed a permit under the SLCRMA but never obtained one at all.¹³³ An example of this last-named violation was the defendants' disposal of oil field wastes without a permit.¹³⁴

The experts in the *Rozel* Report also claim that there were certain non-exempt coastal uses that took place after 1980 that required a Coastal Use Permit, such as maintenance dredging and plugging and abandoning wells.¹³⁵ The *Rozel* Report further states that the defendants violated the SLCRMA by failing to fully disclose the cumulative impacts in their applications for Coastal Use Permits seeking to dredge or maintain canals.¹³⁶ Finally, the report asserts that, in some instances, the defendants violated the terms and conditions of their Coastal Use Permits obtained for certain uses after the enactment of the SLCRMA.¹³⁷

The SLCRMA was enacted in 1978, and the Coastal Use Permit Program went into effect in 1980.¹³⁸ The plaintiffs claim they never alleged that the defendant-companies' activities prior to 1980 were actionable under the SLCRMA. Rather, they argue that the defendant-companies' pre-1980 conduct is only relevant to the application of the

127. *Auster Oil*, 420 F. Supp. 3d at 537.

128. *Id.*

129. *Riverwood*, 2019 WL 2271118, at *16.

130. *Auster Oil*, 420 F. Supp. 3d at 537.

131. *Riverwood*, 2019 WL 2271118, at *13.

132. *Auster Oil*, 420 F. Supp. 3d at 537.

133. *Id.* at 535.

134. *Riverwood*, 2019 WL 2271118, at *1 n.4.

135. *Id.*

136. *Id.*

137. *Id.*

138. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, *supra* note 120, at 35.

historical use exemption.¹³⁹ According to the plaintiffs, the companies' pre-1980 activities did not qualify for the SLCRMA's historical use exemption, and such activities constituted a use under the statutory definition.¹⁴⁰ Therefore, the companies were required to obtain a Coastal Use Permit after the SLCRMA's enactment—which the defendants failed to do.¹⁴¹

The *Rozel* Report contains the FEIS's interpretation of the SLCRMA's historical use exemption to support their claim that the defendant-companies' activities were not "legally commenced" in good faith as required, thus asserting that the companies violated this provision.¹⁴² The parishes provide numerous specific allegations of the companies' bad faith actions.¹⁴³ The allegations include the companies' disposal of their oil field wastes without a permit, failure to build saltwater rejection wells, and incorrectly drilling and spacing their wells.¹⁴⁴ The parishes also claim that the defendants extracted their oil at too high of a production rate and needed to use thicker tubing on their tubular well walls.¹⁴⁵

The plaintiffs assert these activities were conducted in bad faith for several reasons. First, they argue the defendants' failure to build the reinjection wells was in bad faith because the defendants knew the wells would have helped to avoid salinization, pollution, and subsidence.¹⁴⁶ According to the plaintiffs, the improper spacing of the wells was also conducted in bad faith because the defendants should not have spaced the wells as widely apart and also should not have drilled vertically into oil reservoirs.¹⁴⁷ Plaintiffs further assert the defendants should have instead drilled wells directionally from a central location, which would have reduced the need for dredging canals and long flowlines for oil that increased leaks and spills.¹⁴⁸ Plaintiffs project in their report that the amount of canals dredged could have been reduced had directional drilling been utilized.¹⁴⁹ Additionally, the plaintiffs contend the defendants "chose to use excessive canal dredging with high traffic marine equipment operations as the means of transportation" despite having other options

139. *Id.*

140. *Id.*

141. *Id.*

142. *Riverwood*, 2019 WL 2271118, at *16, *21.

143. *Id.* at *5.

144. *Id.* at *1.

145. See Opening Brief of Defendants-Appellants, *supra* note 38, at 31–33.

146. *Id.* at 32.

147. *Id.*

148. *Id.* at 33.

149. *Id.*

available.¹⁵⁰ They allege the high production rate “generated accelerated wave action that erode[d] levees and destroy[ed] marshes,” increasing subsidence and consequently weakening surface lands.¹⁵¹ Lastly, the plaintiffs claim the use of the thinner tubing¹⁵² was in bad faith because the thicker tubing would have prevented the tubular well walls from collapsing or leaking.¹⁵³

In addition to the bad faith allegations, the plaintiffs assert multiple claims regarding the defendants’ conduct after enactment of the SLCRMA. One of the allegations relates to the defendants’ failure to close their unlined earthen waste pits post-SLCRMA enactment.¹⁵⁴ According to the plaintiffs, even if the use of the waste pits had legally commenced before the statute’s enactment, continued post-enactment use of the waste pits amounted to a new use because the failure to close the earthen pits violated existing regulations.¹⁵⁵ Since the defendant-companies did not close the pits before the SLCRMA’s enactment, that new use required a Coastal Use Permit.¹⁵⁶ Other alleged violations included disposal of defendants’ oil field wastes without a permit, the dredging of numerous canals that exceeded the limits of their Coastal Use Permits, and the companies’ failure to restore the canals that eroded adjacent marshland to their original condition.¹⁵⁷

The parishes also allege that some of the defendants’ activities constitute a violation of implementing regulations.¹⁵⁸ If the defendants’ activities were in bad faith prior to the enactment of the SLCRMA, those

150. *Id.* at 32.

151. *Id.*

152. The outer tubes of wells are called casing. Casing lines the well to protect the layers of soil and above all, the groundwater, from being contaminated by the drilling mud and/or frac fluids. Viktoria Steiniger, *Drilling, Casing, Tubing: The Three Phases of a Wellbore*, VOESTALPINE (July 3, 2017), <https://www.voestalpine.com/blog/en/energy/drilling-casing-tubing-the-three-phases-of-a-wellbore/> [<https://perma.cc/C5R5-FNT2>].

153. Opening Brief of Defendants-Appellants, *supra* note 38, at 32.

154. *See* Par. of Plaquemines v. Riverwood Prod. Co., No. 18-5217, 2019 WL 2271118, at *1 n.4 (E.D. La. May 28, 2019), *aff’d in part, rev’d in part sub nom.* Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021).

155. *Id.* at *16.

156. *Id.*

157. *See id.* at *1 n.4.

158. *See id.* Following the enactment of SLCRMA, regulations written and approved interpreting the law and provide the details of its implementation. *See Louisiana Coastal Programs Handbook*, LA. DEP’T NAT. RES. (Sept. 16, 2020), https://data.dnr.la.gov/lcp/lcphandbook/lcp_handbook.pdf [<https://perma.cc/2N36-DJMB>].

activities after the statute's enactment assumedly would be a violation of the SLCRMA's implementing regulations as well and thus not covered by the historical exemption. Examples of activities the plaintiffs alleged to be in violation of implementing regulations include the defendants' failure to restore production sites after finishing their operations and the failure to use techniques to prevent the release of pollutants in their operation and construction of drilling sites.¹⁵⁹ Further, the parishes also allege the companies violated existing regulations by disposing of radioactive waste into the coastal zone.¹⁶⁰

C. Defendants' Positions

The defendants remain firm in their position that the lawsuits are counterproductive because they do not take meaningful action to combat wetland loss, arguing that the parties should instead address the problem by working together with all stakeholders to create a more productive solution.¹⁶¹ They also claim the lawsuits are not an effective means to combat coastal erosion; rather, defendants argue that the more effective means would be a collaborative approach between the oil and gas industry and the state to restore the coast.¹⁶² For these reasons, the defendants are particularly reluctant to settle the claims.

The defendants are not without potential defenses to the plaintiffs' claims, however. A number of possible defenses were articulated in the Defendant-Appellants' opening brief in *Parish of Plaquemines*.¹⁶³ Regarding the plaintiffs' legal theories, the defendants claim that the FEIS interpretation in the *Rozel* Report is flawed because the language of the FEIS only states that "[a]ctual construction or operation of the use or activity must have begun, in good faith."¹⁶⁴ This statement makes no reference to "prudent practice," an expression the plaintiffs often use in the claims they assert against the defendants.¹⁶⁵ For instance, in their report, the plaintiffs claim that "the intense production rates were in bad faith and contravened prudent practices."¹⁶⁶ According to the defendants,

159. *Riverwood*, 2019 WL 2271118, at *1 n.4.

160. *Id.*

161. Bridges, *supra* note 2.

162. *Id.*

163. See Opening Brief of Defendants-Appellants, *supra* note 38, at 27.

164. *Id.* at 9.

165. *Id.* at 27.

166. *Id.* at 37.

the plaintiffs' interpretation of the historical use exemption is erroneous because their interpretation contains no mention of "prudent practices."¹⁶⁷

In response to the allegations made by the plaintiffs, the defendants primarily claim that the activities alleged in bad faith were conducted while acting under the directive of the federal government.¹⁶⁸ For example, the plaintiffs claim that the volume of the production of oil was too high to possibly constitute good faith or meet prudent practices.¹⁶⁹ In response, the defendants assert that the federal government required them to comply with Louisiana's oil production quota to meet military demands.¹⁷⁰ They further argue that the federal government's Petroleum Administration for War ("PAW") controlled production rates, which included rates for Plaquemines Parish fields.¹⁷¹ Therefore, according to the defendant-companies, they could not have slowed production due to the need to satisfy wartime requirements set by the federal government.¹⁷²

In response to claims that the defendants improperly spaced and drilled their wells, the defendants assert that many of the production decisions were a result of government directives regarding scarce material.¹⁷³ In 1941, the government issued Conservation Order M-68, which governed the spacing of oil field wells.¹⁷⁴ According to the defendants, Conservation Order M-68 made materials available for new wells when they "conform to a uniform spacing pattern of not more than one single well to each 40 surface acres."¹⁷⁵ The defendants also state that the well-spacing requirements prevented the wells from being drilled on top of each other, and the closer spacing saved materials elsewhere.¹⁷⁶ They argue they could not have implemented closer well spacing because, if they were to violate Conservation Order M-68, it would have been punishable by denial of materials or criminal prosecution.¹⁷⁷ According to the defendants, PAW required the defendants to drill the wells "with due diligence to maintain a vertical well-bore" instead of drilling multiple wells in the same location, which the parishes argue was the prudent

167. *Id.*

168. *See id.* at 1.

169. *Id.* 32-33.

170. *Id.* at 36.

171. *Id.*

172. *Id.*

173. *Id.* at 37.

174. *Id.* at 41.

175. *Id.*

176. *Id.*

177. *Id.*

practice.¹⁷⁸ The defendants argue this decision minimized steel use as directed by the federal government, and PAW's decision to drill vertically was to maximize oil production using the smallest amount of steel.¹⁷⁹ Defendants further emphasized that PAW's main objective at the time did not include minimization of environmental impacts.¹⁸⁰

Regarding the bad faith use of earthen pits, the defendants claim that they used earthen pits to minimize their use of steel because the earthen pits allowed the oil to flow to centralized tank batteries.¹⁸¹ These centralized tank batteries would allow the oil to be stored in one place instead of in separate tanks, further minimizing their use of steel.¹⁸²

Another claim by the plaintiffs is that the defendant-companies acted in bad faith during their WWII-era operations because they did not drill saltwater reinjection wells.¹⁸³ In response, the defendants assert that they did not do so because the Louisiana Department of Conservation did not allow saltwater reinjection wells at the time.¹⁸⁴ Additionally, the wells the plaintiffs claim should have been drilled were not approved by the government's wartime materials priority system because the defendants did not have enough materials to drill the wells the plaintiffs would deem to have been in "good faith."¹⁸⁵

Concerning the use of thinner tubular well walls, the defendants argue that the government required them to use thinner tubular well walls to minimize the casing and save materials.¹⁸⁶ According to the defendants, they were acting under the government's directives when doing so.¹⁸⁷

Much is at stake regarding the outcome of the litigation, and none of the lawsuits have reached the trial stage on their merits thus far.¹⁸⁸ There are many reasons why the litigation may ultimately fail. The litigation could fail on the merits. It could also fail because of the political forces

178. *Id.* at 42.

179. *Id.* at 43.

180. *Id.* at 42–43.

181. Opening Brief of Defendants-Appellants, *supra* note 38, at 43. A tank battery is a group of tanks that are connected to receive crude oil produced from a well or a producing lease. A tank battery is also called a battery. In the tank battery, the oil volume is measured and tested before pumping the oil into the pipeline system. *See Tank Battery*, OILFIELD GLOSSARY, https://www.glossary.oilfield.slb.com/en/Terms/t/tank_battery.aspx.

182. Opening Brief of Defendants-Appellants, *supra* note 38, at 43.

183. *Id.* at 44.

184. *Id.*

185. *Id.*

186. *Id.* at 45.

187. *Id.*

188. Bogel-Burroughs, *supra* note 7.

opposing the lawsuits, including the legislators attempting to pass a bill to abolish the lawsuits.¹⁸⁹ If the litigation were to fail, abolishing the lawsuits would not benefit the restoration project or the Louisiana economy.¹⁹⁰ Instead, the burden of funding coastal restoration would shift to Louisiana taxpayers.¹⁹¹

For far too long, the oil and gas industry in Louisiana has caused damage to the coast without facing any consequences. Political actors have enabled this destructive behavior by allowing oil and gas companies to shirk their legal responsibilities because of the economic benefit the industry brings to the state.¹⁹² The intent of bringing forth the lawsuits was to allow the state and its parishes to restore the damage to the coastal zone by funding the \$50 billion necessary to accomplish that goal.¹⁹³

Based on the *Rozel* Report, plaintiff parishes claim that the defendants did not use “prudent practices” in their coastal impacting operations.¹⁹⁴ Defendants contend that “prudent practices” is not an appropriate legal standard for the present case, and that it is little more than a label concocted in the *Rozel* Report to fill the void in the plaintiffs’ legal position.¹⁹⁵ Furthermore, the defendants assert that their actions were prudent because they were acting under federal directives.¹⁹⁶

The defendants argue that because the historical exemption and the FEIS interpretation make no reference to “prudent practices”—a theory relied on by the plaintiffs, that the plaintiffs’ claims of imprudent practices were flawed.¹⁹⁷ However, the plaintiffs still alleged that the defendant-companies were in bad faith in multiple instances; thus, even if prudent practices were not mentioned in the FEIS, the companies were still acting in bad faith. Also, while the language of the FEIS does not directly refer to prudent practices, it can be assumed that if the defendants were acting contrary to prudent practices, it would provide further evidence to support

189. Marsh, *supra* note 88; Bridges, *supra* note 6.

190. Bridges, *supra* note 2.

191. Mark Davis, *If Legislature Forbids Levee Lawsuits, Louisiana Taxpayers Will Pay the Price of Coastal Repairs*, NOLA.COM (Apr. 6, 2014, 10:40 PM), https://www.nola.com/opinions/article_f5c51c71-ecc6-5ce8-8b8e-0433bda4c4cb.html.

192. Bridges, *supra* note 2.

193. Kardish, *supra* note 1.

194. Parish of Plaquemines v. Riverwood Prod. Co., No. 18-5217, 2019 WL 2271118, at *1, *15 (E.D. La. May 28, 2019), *aff'd in part, rev'd in part sub nom.* Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021).

195. Opening Brief of Defendants-Appellants, *supra* note 38, at 27.

196. *See generally id.*

197. *Id.* at 27.

the notion that the defendants' activities were in bad faith. Therefore, FEIS's interpretation of the good faith requirement was likely not flawed.

Even if the defendant-companies were lawfully acting under federal directives during the war, that defense should no longer apply after the war was over.¹⁹⁸ Once the SLCRMA became effective, it is reasonable to conclude that the companies were required to comply with the statute, which they entirely failed to do.¹⁹⁹

Defendants have contended, at least in part, that their activities were permissible because activities commenced under federal directives.²⁰⁰ However, it is probable that not all their activities were conducted under federal direction. Even if they had been, it may ultimately be shown that at least some actions were undertaken in bad faith. An example of this could be their use of earthen pits. The use of earthen pits was in bad faith because they "leaked and seeped waste, produc[ing] saltwater and hydrocarbons into the marsh."²⁰¹ The defendant-companies claim that they used earthen pits to minimize their use of steel, which was in short supply during WWII.²⁰² However, they do not give any indication that the government required them to use earthen pits or that there were no other viable alternatives to the use of earthen pits. They also do not respond directly to the allegations that they failed to close their earthen pits and did not obtain the required permit for their continued use.

While the defendants do have some legislators on their side, the Governor and Attorney General fervently oppose their positions. This is a huge disadvantage to them as Governor John Bel Edwards continues to apply pressure, and Louisiana legislators have not yet defeated these lawsuits. John Carmouche, an attorney for the plaintiffs, continues to fight these suits and asserts that the oil and gas companies have not taken responsibility for their destruction to the coast for too long and selfishly expect state legislators and other state politicians to fix their messes for them.²⁰³ He has also stated that "in my opinion, they are playing politics. They've beat the system for years through politics. They hire lobbyists to change the laws. They ask politicians to not enforce the law, to not clean it up."²⁰⁴

While many of the plaintiffs' arguments are favorable towards holding the oil and gas companies liable, it remains unclear how long these suits

198. *Id.* at 33.

199. *See id.*

200. *See id.*

201. *Id.* at 30.

202. Bogel-Burroughs, *supra* note 7.

203. Bridges, *supra* note 2.

204. *Id.*

will continue without resolution. However, if these suits do continue and liability is proven, the state should eventually recover substantial sums of money from the oil and gas industry. Since the corporations likely have significant funds available, they may continue to fight these claims for many years in the future. Without the requisite funding, it is impossible for “the industry, policymakers, and world-class coastal researchers to develop serious, science-based solutions,” as claimed to be the best solution by Gifford Briggs.²⁰⁵

IV. SOLUTION

While there is not one clear solution to this litigation, multiple options are available to the state to use these lawsuits to fund the Coastal Master Plan. First, the state could let the litigation transpire. While the companies have not defended these specific allegations in court due to their attempts to remove the cases to federal court, it does not appear that the defendants’ legal theories will prevail. The defendants’ legal theories are solely an attempt to escape liability for damages they inflicted on Louisiana’s coast. Removing the cases to federal court was another attempt to delay the litigation and further avoid responsibility under Louisiana law. If these lawsuits ultimately fail, the burden of paying for coastal cleanup will fall on Louisiana’s taxpayers and thus disadvantage the state’s citizens as well as its coastal zone.²⁰⁶ While this is not the best solution currently, the plaintiffs’ claims hold significant weight for reasons discussed earlier in this comment. For that reason, it may be advantageous to the plaintiffs to allow these suits to go to court. However, court action may not occur for many years, which would further delay a means of funding for coastal restoration while the coast continues to erode. Lawmakers have also consistently put pressure on the state to put an end to these suits, and if a bill is introduced and passed dismissing these lawsuits, the state is left without many options to fund their coastal restoration project. Further, due to political pressures and Senate opposition, these lawsuits may not ever reach the trial stage.

Second, the defendants and the plaintiffs could reach a settlement. While this likely presents the best option to seek the quickest funding, this may not be the most realistic option, as the industry has displayed a particular reluctance to settle. However, if the industry was as committed to coastal restoration as it claims, this could be the most efficient means of collaborating with all parties to reach a productive outcome. With only one

205. Briggs, *supra* note 67.

206. Davis, *supra* note 191.

of the 98 companies involved having settled, substantial efforts to restore the coast cannot begin until the state obtains proper funding.²⁰⁷ Further, this settlement strongly suggests that the suits do hold valid claims with provable damages—something that the companies have denied up until this point.²⁰⁸ John Carmouche has stated, “We have been fighting for five years, and an oil company has finally validated the claims and is willing to be involved in a business solution to solve the real and provable damages caused by the oil companies.”²⁰⁹ The Freeport McMoRan settlement could also create a framework encouraging the rest of the defendants to settle as well, as more settlements would continue to bring more of the much-needed funds to the state for coastal restoration. Governor John Bel Edwards has even noted that he is “hopeful that this settlement can act as a framework for how other similar actions might be handled.”²¹⁰ Carmouche is also optimistic other companies will settle in the future stating, “I hope, since they see now that the attorney general and the governor have united and will endorse companies that come to the table and they will get a better deal, I’m optimistic we will see some very soon.”²¹¹ Moreover, the more quickly other defendants settle, the faster the money can be brought in, which is vital considering the coast’s alarming depletion rate.

Of these potential solutions, the most favorable to the plaintiffs, and in turn for quickly obtaining coastal restoration funding for the Coastal Master Plan, would be settlement. Additionally, Governor John Bel Edwards has expressed a commitment to ensuring the money from the settlements goes to coastal restoration stating, “Ensuring these funds stay in the communities that are impacted for dedicated coastal restoration is why the state of Louisiana intervened in these lawsuits.”²¹² Linda Hayes,

207. Bogel-Burroughs, *supra* note 7.

208. *Freeport McMoRan to Pay \$100M in First Settlement in Louisiana Coastal Damage Suits*, INS. J. (Sept. 30, 2019), <https://www.insurancejournal.com/news/southcentral/2019/09/30/541575.htm> [<https://perma.cc/V9MA-SZ35>].

209. Tyler Bridges, *In First for Energy Industry, Freeport-McMoRan to Settle Louisiana Lawsuits Aimed at Restoring Coast*, NOLA.COM (Sept. 26, 2019, 3:57 PM), https://www.nola.com/news/environment/article_bb453b96-e070-11e9-be4c-d7a9572b4e20.html.

210. Melinda Deslatte & Kevin McGill, *Louisiana Attorney General Signs onto Coastal Lawsuit Deal*, AP NEWS (Mar. 4, 2021), <https://apnews.com/article/wetlands-john-bel-edwards-new-orleans-lawsuits-jeff-landry-1ebd6c685cfd478f739af8ab780986cd> [<https://perma.cc/GVD2-K89F>].

211. *Id.*

212. Carolyn Davis, *Freeport McMoRan Agrees to \$100M Deal in Louisiana Coastal Erosion Cases*, NAT. GAS INTEL. (Sept. 30, 2019),

Vice President of Communications for Freeport McMoRan, has even noted that settlements are a collaborative solution for both parties. In a statement released on behalf of Freeport McMoRan, she provided that “we recognize the importance of coastal restoration” and that “we decided to make an early investment in a creative solution rather than continue to engage in years of litigation.”²¹³ For these reasons, it would be in the best interests of the state’s coastal zone for the parties to reach a settlement. As time goes by with no verdict or settlement, the coast will continue to erode and disappear. By settling, the state would receive much-needed funding, and the coast could finally begin adequate restoration.

CONCLUSION

There is no easy solution to solving the restoration of Louisiana’s coast. However, the oil and gas industry has caused damage to the coastline without facing consequences for far too long. Despite the companies’ arguments that their activities during WWII were under the directives of the federal government, this does not excuse their post-war violations as well as the continued violations of their permits. Additionally, the defendants have employed numerous legal theories that have not proven successful to continue to delay liability.²¹⁴

One company has already settled, which could imply that the plaintiffs’ claims do have merit and that there are actual damages to the Louisiana coast caused by the oil and gas industry.²¹⁵ This settlement could create a solid framework for other defendants to settle. Additionally, both the Governor and attorneys for the plaintiffs are optimistic this first settlement will encourage other companies to settle as well.²¹⁶ For these reasons, the ideal solution for the health of the coast would be extrajudicial settlement, provided the plaintiffs receive money damages from the oil and gas industry. Such a monumental settlement would give Louisiana the proper funding for the continued and necessary restoration of its coastal zone.

<https://www.naturalgasintel.com/freeport-mcmoran-agrees-to-100m-deal-in-louisiana-coastal-erosion-cases/> [<https://perma.cc/97YV-CQCE>].

213. Marshall, *supra* note 16.

214. See Par. of *Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502 (5th Cir. 2020), *withdrawn and superseded on reh'g by* 7 F.4th 362 (5th Cir. 2021); see also discussion *supra* Part II.

215. *Freeport McMoRan to Pay \$100M in First Settlement in Louisiana Coastal Damage Suits*, *supra* note 208.

216. Deslatte & McGill, *supra* note 210.