Louisiana's Coastal Zone, It's All Special, but Some Areas Deserve Legal Classification: Using Section 214.29 of Louisiana's SLCRMA To Designate Special Areas and Protect the Coastal Zone

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I. INTRODUCTION

Mere mention of Louisiana's Gulf Coast conjures up images of environmental hardship. Concerns about coastal land loss, water pollution, increased susceptibility to storm surge, and rising seas due to climate change abound. As litigation continues around the Deepwater Horizon oil spill, which occurred nearly four years ago, new litigation involving the channelization of coastal marshes is now in the pipeline.[1]

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1. *Southeast Louisiana Flood Protection Authority—East Case*, JONES, SWANSON, HUDDELL & GARRISON, LLC, http://jonesswanson.com/slfpaecase/ (last visited Mar. 22, 2014) ("[T]he lawsuit alleges that approximately 100 defendants [oil and gas companies] compromised the integrity of Louisiana's coastal lands with activities tied to hundreds of wells and pipelines, heightening risks of hurricanes, storm surge and flooding in the region. The [Southeast Louisiana

As one zooms in on a map of coastal Louisiana, fingernailesque barrier islands that are constantly being reformed, and often disappearing as the waters of the Gulf of Mexico beat against them, can be seen. As one continues to zoom in, more and more tiny islands, at first invisible, become apparent. These islands serve as key habitat for numerous species, at least one of which is endangered.[2] In addition to serving as key habitat for many species, barrier islands also serve as buffers against storm surge. Such natural protection will become increasingly important as sea levels continue to rise as a result of climate change.[3]

Coastal wetlands are another key piece of coastal Louisiana's ecology. The United States Department of the Interior (DOI) reports that Louisiana's coast contains approximately 40% of the coastal marshland in the contiguous United States.[4] The wetlands located on the state's southeastern coast were created over time as the Mississippi River and Atchafalaya River deposited sediments from the Midwest along the coast.[5] For decades now, the Gulf Coast has been experiencing a net loss of coastal wetlands. Louisiana's Coastal Protection and Restoration Authority reports that the state's coast suffered "a net decrease of 1,883 square miles of land between 1932 and 2010."[6]

The loss of coastal wetlands has been attributed to numerous causes. One of the major causes is the system of levees that has for decades protected populated areas, such as New Orleans, from flooding and also allowed vessels to travel down the Mississippi River to the Gulf of Mexico.[7] As Professor Oliver Houck put it, "Leveed rivers floated ships."[8] The levees have the effect of shuttling valuable, land-building sediments out into the Gulf of Mexico, instead of allowing those sediments to be deposited in the coastal wetlands as they would naturally.[9] Another major factor in the loss of coastal wetlands is the

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Flood Protection Authority—East] asserts in the lawsuit that the defendants are obligated by law to restore the coastal land areas.").

2. *See All About Piping Plovers*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/plover/facts.html (last visited Feb. 6, 2014).

3. *See Future Climate Change*, EPA, http://www.epa.gov/climatechange/science/future.html (last updated Mar. 4, 2014).

4. *See Chapter 8: Coastal Louisiana*, DEP'T OF INTERIOR, http://www.doi.gov/pmb/oepc/wetlands2/v2ch8.cfm (last visited Feb. 6, 2014).

5. *See id.*

6. Coastal Prot. & Restoration Auth., La., *Louisiana Coastal Facts*, LA. DEP'T OF NATURAL RES. (July 27, 2011), http://dnr.louisiana.gov/assets/OCM/OCM/webfactsheet_20110727.pdf.

7. Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3, 19 (1983).

8. *Id.*

9. *Id.* at 17, 23.

canals built by oil and gas companies to access deposits and for use in other day-to-day operations.[10] These canals lead to direct land loss and also increase erosion rates.[11] In addition, Louisiana's coastal zone is constantly faced with potential oil spills and increasingly the impending doom of rising sea levels.

This Comment will argue that section 214.29 of Louisiana's State and Local Coastal Resources Management Act (SLCRMA), which allows for the designation of "special areas" with specific guidelines for their management, has been painfully underutilized and that it should be used to its fullest extent in order to protect Louisiana's coastal zone. Because this provision allows for areas to be nominated, and ideally designated, this Comment will argue that Louisiana should use this provision specifically to protect its natural habitats and resources that fall within the zone.

As seen, the introduction of this Comment discusses the trend of coastal land loss that has been the norm in coastal Louisiana for decades. It also discusses some of the other assaults that have plagued the Gulf Coast in recent history. Part II of this Comment explores the importance of Louisiana's coastal zone from a human and economic standpoint as well as from an ecological standpoint, thus making the case for why relevant legal tools should be used to minimize coastal land loss and other hazards that affront the Gulf Coast. Part III first provides the background of the federal Coastal Zone Management Act (CZMA), which provides for the approval of state coastal management programs that are then eligible for federal funding pending the fulfillment of other requirements by the state. Part III then discusses Louisiana's SLCRMA, which adopts Louisiana's Coastal Management Program (LCMP), an approved state plan under the CZMA. Part III also discusses section 214.29 of SLCRMA, which provides the Secretary of the Department of Natural Resources (DNR) with the power to designate "special areas, projects, and programs" within the coastal zone. This section provides some examples of how this provision could be used and also examines how its nonuse is at odds with certain state agencies' statutory duties. Finally, Part IV concludes by arguing that this provision should be used within the state to its fullest extent in order to take advantage of the benefits offered by the CZMA and ultimately protect Louisiana's coastal zone by setting guidelines for areas that are susceptible to decline.

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10. *Id.* at 33.
11. *Id.* at 33-35.

II. THE IMPORTANCE OF LOUISIANA'S COASTAL ZONE

Increasing interest has been placed on coastal zones within the United States, and Louisiana's coastal zone is front and center. This is evident in Louisiana's Comprehensive Master Plan for a Sustainable Coast released by the state's Coastal Protection & Restoration Authority (CPRA).[12] The fifty billion dollar plan to restore Louisiana's coast is laid out over fifty years in three phases and includes projects such as river diversions for delivering sediment to the disappearing coastal marshes, barrier island restoration projects, marsh creation projects, and ridge restoration projects, among others.[13] While the cost of the plan speaks to the volume of work that is needed along the coast, the introduction of the plan makes clear the value of Louisiana's coastal zone:

> It's easy to list impressive statistics about what Louisiana's working coast provides: protection for infrastructure that supplies 90% of the nation's outer continental oil and gas, 20% of the nation's annual waterborne commerce, 26% (by weight) of the continental U.S. commercial fisheries landings, winter habitat for five million migratory waterfowl. Nowhere in the nation is there a region that simultaneously offers globally important habitat and the breadth of economic assets found in coastal Louisiana.[14]

Subpart A of this Part briefly examines the human and economic value of the coast while Subpart B discusses the ecological value, thus making the case for why protection and restoration are necessary endeavors.

A. A Human and Economic Perspective

Louisiana's coastal zone is immensely important to not only those living within the zone, but also to the United States and even the world as a whole. To start locally, the CPRA reports that in 2009 47% of the state's population resided in the coastal parishes.[15] These residents are directly tied to the stability of the coastal zone and thus rely on coastal wetlands and barrier islands as buffers against rising seas and storm surge. In addition, coastal Louisiana is vastly important for the United States' energy production. Estimates from 2009 indicate that Louisiana ranks number one in both oil and gas production among the fifty states if

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12. *See generally* COASTAL PROT. & RESTORATION AUTH., LA., LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST (2012), *available at* http://www.lacpra.org/assets/docs/2012%20Master%20Plan/Final%20Plan/2012%20Coastal%20Master%20Plan.pdf.

13. *See generally id.*

14. *Id.* at 20.

15. Coastal Prot. & Restoration Auth., *supra* note 6.

production from the Outer Continental Shelf is included.[16] If Outer Continental Shelf production is not included then Louisiana ranks fifth and fourth respectively in U.S. oil and gas production.[17] In addition, commercial and recreational hunting, fishing, and wildlife watching along the coast all add significant revenue to Louisiana's economy.[18] For example, a study done by Datu Research found that wildlife tourism, defined by the study as hunting, fishing, and wildlife watching, contributed nearly two billion dollars to Louisiana's economy in 2011.[19] Finally, waterborne commerce is extremely important in coastal Louisiana, and the ports associated with this commerce rely on coastal wetlands to provide protection from storm surge.[20] The stability of Louisiana's coastal zone is directly tied to international commerce as well. For example, the National Park Service reports, "Sixty percent of all grain exported from the US is shipped on the Mississippi River through the Port of New Orleans and the Port of South Louisiana."[21] It is thus clear that humans derive a significant amount of direct economic value from Louisiana's coastal zone.

B. An Ecological Perspective

Louisiana's Coastal Zone is also of vital ecological importance. The coastal marshes provide habitat for countless animals and plants. The barrier islands provide important nesting and wintering areas for bird populations, including at least one species that is federally listed as endangered, the piping plover.[22] Louisiana's coastal wetlands also provide habitat for the Endangered-Species-Act-threatened Louisiana black bear.[23] The coastal wetlands themselves provide the important ecological function of filtering pollutants from the water that flows through them.[24] Some types of coastal wetlands also sequester carbon,

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16. *Id.*
17. *Id.*
18. *Id.*
19. SHAWN STOKES & MARCY LOWE, WILDLIFE TOURISM AND THE GULF COAST ECONOMY 14 (2013) (prepared on behalf of Environmental Defense Fund), *available at* http://www.daturesearch.com/wp-content/uploads/WildlifeTourismReport_FINAL.pdf.
20. Coastal Prot. & Restoration Auth., *supra* note 6.
21. *Mississippi River Facts*, NAT'L PARK SERV., http://www.nps.gov/miss/riverfacts.htm (last updated Mar. 16, 2014).
22. *See All About Piping Plovers*, *supra* note 2.
23. *Coastal Wetlands*, EPA, http://water.epa.gov/type/wetlands/cwt.cfm#why_imp (last updated Feb. 10, 2014); *Louisiana Black Bear (Ursus americanus luteolus)*, U.S. FISH & WILDLIFE SERV., https://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A08F (last updated Feb. 20, 2014).
24. Houck, *supra* note 7, at 91-92.

keeping it out of the atmosphere.[25] These are extremely valuable ecological services, services that are generally not valued in traditional economic models.

III. THE LAW

As the importance of the coastal zone became apparent, laws were enacted in order to protect sensitive areas. The CZMA is the primary law that contemplates the protection of coastal zones. This Act provides for a large amount of federally approved, state participation in the management of states' individual coastal zones.

A. The Coastal Zone Management Act

In 1972, Congress passed the CZMA in recognition of the importance of coastal zones as major locations for human development as well as their importance ecologically.[26] The policy behind the Act states, in part, that by passing the Act Congress was seeking "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."[27] The CZMA is administered by the National Oceanic and Atmospheric Administration's (NOAA) Office of Ocean and Coastal Resource Management (OCRM). It is relatively distinctive in that it provides for a voluntary system in which the federal government provides assistance to coastal states who choose to participate.[28] Importantly, the term "coastal state" is defined by the Act as "a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes."[29] "[T]he term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa."[30] Coastal states are enabled by the Act to develop coastal management programs and submit them for federal approval, which further allows the state to receive federal grant money for the implementation of the program.[31] There are currently thirty-four

25. *Coastal Wetlands*, *supra* note 23.
26. 16 U.S.C § 1452 (2012).
27. *Id.* § 1452(1).
28. Martin J. LaLonde, Note, *Allocating the Burden of Proof To Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act*, 92 MICH. L. REV. 438, 438 (1993).
29. 16 U.S.C § 1453(4).
30. *Id.*
31. *Id.* §§ 1454-1455.

states and territories that have approved coastal management programs.[32] This represents nearly full participation by eligible territories and states, with Alaska being the only exception, having withdrawn from the program in 2011.[33]

An even stronger incentive than federal grant money that may be available to a participating state is the power of section 307(c)(1).[34] This provision states:

> Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency . . . at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.[35]

The activity referred to in paragraph one is defined as "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone."[36] Notably, the federal agency carrying out such an activity "shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved state management programs."[37] While views differ jurisdictionally as to whether the state or the federal government should have the burden of proving such consistency between a federal project and a state program,[38] this consistency requirement nonetheless provides a potentially powerful tool to block federal projects that would negatively impact state waters or natural resources within the coastal zone. The relevant regulations require that states include in their management programs a description of how they will go about consistency determinations.[39]

As a practical matter, and as a federalism issue generally, the CZMA's approach of adopting state programs that have the ability to trump federal projects has raised both praise and criticism. At least one commenter has argued that the CZMA is set up in a way that allows

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32. *Coastal Programs: Partnering with States To Manage Our Coastline*, OCEAN & COASTAL RES. MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/programs/czm.html (last updated Mar. 25, 2013).

33. *Ocean and Coastal Management in Alaska*, OCEAN & COASTAL RES. MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/mystate/ak.html (last updated Sept. 4, 2012).

34. *See* LaLonde, *supra* note 28, at 439.

35. 16 U.S.C. § 1456(c)(1)(C) (2012).

36. *Id.* § 1456(c)(1)(A).

37. *Id.* § 1456(c)(1)(C)(2).

38. LaLonde, *supra* note 28, at 440.

39. 15 C.F.R. § 923.53 (2013).

states to undermine national interests, such as national security.[40] In so arguing, Lieutenant Patrick J. Gibbons states:

> The consistency provisions of the Coastal Zone Management Act . . . leave[s] the states free, should they structure their plans accordingly, to put their own objectives above those of the nation as a whole, and to require the national government to spend more money, to delay or cease important activities, and potentially to fall short of its obligations in order to further state and local concerns.[41]

Another commenter appropriately recognized that the CZMA ultimately adopts a wide range of different state programs, and thus the Act's "'success' in one geographic area would not necessarily indicate success in another."[42] Despite this potential disadvantage of the CZMA scheme, the author goes on to state, "Nevertheless, it is probably fair to say that CZMA has slowed the rate of environmental damage that was being done to coastal areas."[43] Additionally, environmental problems simply do not remain within the geographic borders in which these programs are implemented, and it has been argued that a centralized approach is more suitable for tackling coastal management.[44]

Part of the rationale behind the CZMA's adoption of state programs versus a more centralized, federal approach to coastal management is that the "states possess[] the greatest amount of knowledge about their respective coastlines."[45] Also recognized in the creation of the CZMA and its "cooperative federalist regime"[46] was the difficulty that would likely plague any attempt at a national approach to the management of widely varying coastal zones.[47] Given the mere fact that "[b]eaches vary widely in physical type and characteristics,"[48] there is a strong argument

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40. *See* Patrick J. Gibbons, *Too Much of a Good Thing? Federal Supremacy & the Devolution of Regulatory Power: The Case of the Coastal Zone Management Act*, 48 NAVAL L. REV. 84, 121 (2001).

41. *Id.*

42. Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DEPAUL L. REV. 981, 991 (1991).

43. *Id.*

44. *See* Gibbons, *supra* note 40, at 98-99.

45. Andrew S. Jessen, Comment, *Louisiana and the Coastal Zone Management Act in the Wake of Hurricane Katrina: A Renewed Advocacy for a More Aggressive Use of the Consistency Provision To Protect and Restore Coastal Wetlands*, 12 OCEANS & COASTAL L.J. 133, 134-35 (2006).

46. Gibbons, *supra* note 40, at 85.

47. Joseph Romero, *Uncharted Waters: The Expansion of State Regulatory Authority over Federal Activities and Migratory Resources Under the Coastal Zone Management Act*, 56 NAVAL L. REV. 137, 141 (2008).

48. *Coastal Watershed Factsheets—The Beach and Your Coastal Watershed*, EPA, http://water.epa.gov/type/oceb/fact2.cfm (last updated Oct. 2, 2012).

that local knowledge makes the CZMA scheme a reasonable one. Thus, in an imperfect world, the CZMA is not a perfect environmental statute. However, it does give the states true potential to protect their coastal zones.

B. The Louisiana State and Local Coastal Resources Management Act

Louisiana is one of the thirty-four states and territories that have an approved coastal management program under the CZMA.[49] The LCMP was created in 1978 with the enactment of SLCRMA.[50] The program was then approved under the CZMA in 1980.[51] NOAA's OCRM reports that, in total, Louisiana possesses 7721 miles of coast.[52] Part III.B.1 will look at Louisiana's program as it is defined by SLCRMA and will also look at the guidelines that were promulgated to carry out the program. Part III.B.2 will then look more closely at section 214.29 of SLCRMA which allows for the designation of "special areas, projects, and programs."[53] That Subpart will additionally explore the unused environmental potential of section 214.29.

1. Louisiana Coastal Resources Program

Louisiana's Office of Coastal Management (OCM) under the DNR is the state agency responsible for administering the LCMP.[54] The public policy behind SLCRMA is fairly similar to that of the CZMA, but is likely a bit more amenable to development interests.[55] It states in part "that it is the public policy of the state: (1) To protect, develop, and, where feasible, restore or enhance the resources of the state's coastal zone."[56] In developing the LCMP, SLCRMA requires that guidelines be promulgated to define criteria for issuing, or not issuing, coastal use permits.[57]

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49. *States and Territories Working on Ocean and Coastal Management*, OCEAN & COASTAL RES. MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/mystate/welcome.html (last updated Mar. 4, 2014).

50. *Ocean and Coastal Management in Louisiana*, OCEAN & COASTAL RES. MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/mystate/la.html (last updated Nov. 14, 2012).

51. *Id.*

52. *Id.*

53. *See* LA. REV. STAT. tit. 49, § 214.29 (2006).

54. *Office of Coastal Management: About OCM*, LA. DEP'T OF NATURAL RES., http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=89 (last visited Mar. 26, 2014).

55. *See* Houck, *supra* note 7, at 152-53.

56. LA REV. STAT. tit. 49, § 214.22.

57. *Id.* tit. 49, § 214.27(B).

There are several goals enumerated for the guidelines.[58] While many of these goals promote economic activities such as "development," "transportation," "industrialization," and "full use of coastal resources," there are several goals that have an environmental focus.[59] Some of these provisions include consideration of "fishery nursery grounds," regulation of pollutants, and a "balance between development and conservation."[60] One of the most environmentally focused goals in the guidelines makes it a priority to "[m]inimize, whenever feasible and practical, detrimental impacts on natural areas and wildlife habitat and fisheries by such means as encouraging minimum change of natural systems and by multiple use of existing canals, directional drilling, and other practical techniques."[61] While this goal includes terms like "feasible and practical," which leave room for legal debate, it nonetheless makes it clear that the state intended to consider the ecological impacts of projects when it adopted the LCMP. The guidelines divide types of coastal projects into separate sections and provide criteria for carrying out each project type.[62] These include projects such as levees, linear facilities, shoreline modification, and disposal of waste.[63] As an example, the guidelines for levees recognize the importance of not disturbing or segmenting wetlands.[64] In addition, the levee guidelines call for the use of "best practical techniques to minimize disruptions of existing hydrologic patterns."[65] Notably, each of the guidelines for the different coastal projects contemplate, at least on some level, a minimization of environmental disturbance when carrying out such projects.[66]

In addition to requiring the promulgation of guidelines, SLCRMA also sets up a scheme allowing local parish governments to create coastal management programs which in turn must be consistent with the state guidelines.[67] Smaller, isolated projects will often require local permits while larger projects will require a state permit.[68] Section 214.30 of SLCRMA lays out the process generally for approving an applicant's

58. *Id.* tit. 49, § 214.27(C).
59. *Id.*
60. *Id.*
61. *Id.* tit. 49, § 214.27(C)(5).
62. LA. ADMIN. CODE tit. 43, §§ 701-719 (2012).
63. *Id.*
64. *Id.* tit. 49, § 703(A)-(B).
65. *Id.* tit. 49, § 703(F).
66. *See, e.g.*, *id.* tit. 49, § 709(B) ("Shoreline modification structures shall be designed and built using best practical techniques to minimize adverse environmental impacts.").
67. LA. REV. STAT. tit. 49, § 214.28 (2012).
68. Jessen, *supra* note 45, at 141.

permit,[69] and the relevant regulations provide greater detail. While this Comment does not go into a comparison of the environmental protection aspects of individual states' coastal programs or their overall effectiveness in this regard, it should be mentioned that at least one author has argued that the LCMP seems to have a "pro-development slant . . . with emphasis placed on accommodating as much development as possible."[70] Thus the argument could certainly be made that, although environmental issues are mentioned relatively frequently in the statute, the program itself should be strengthened statutorily if it is to have a truly environmentally protectionist result. SLCRMA however does provide a provision, aside from those placing limits on coastal use permits, that truly has the potential to benefit Louisiana's Gulf Coast environmentally. This provision is discussed in the following Subpart.

2. Special Areas, Projects, and Programs: SLCRMA Section 214.29

Amidst the provisions outlining the coastal use permitting process and the provision calling for guidelines, there is another provision in SLCRMA that allows for the nomination of areas of special importance within the coastal zone to ultimately designate them as "special areas."[71] The provision gives numerous examples of the types of areas that can be designated special areas:

> Special areas are areas within the coastal zone which have unique and valuable characteristics requiring special management procedures. Special areas may include important geological formations, such as beaches, barrier islands, shell deposits, salt domes, or formations containing deposits of oil, gas or other minerals; historical or archaeological sites; corridors for transportation, industrialization or urbanization; areas subject to flooding, subsidence, salt water intrusion or the like; unique, scarce, fragile, vulnerable, highly productive or essential habitat for living resources; ports or other developments or facilities dependent upon access to water; recreational areas; freshwater storage areas; and such other areas as may be determined pursuant to this Section.[72]

The examples laid out in this provision obviate the fact that the state intended to designate such areas not just for mineral exploration or development, although these activities are certainly contemplated, but also for the protection of coastal ecosystems. The first types of areas mentioned are beaches and barrier islands, the very areas known to be

69. LA REV. STAT. tit. 49, § 214.30.
70. Jessen, *supra* note 45, at 136.
71. LA. REV. STAT. tit. 49, § 214.29.
72. *Id.* tit. 49, § 214.29(A).

presently eroding away. Important habitats and freshwater storage areas are also considered, both of which are characteristics of coastal wetlands.[73]

After laying forth the types of areas that can be considered special areas, section 214.29 then requires a number of actions by the secretary of DNR in order to develop a system under which these special areas should be established.[74] In so doing, the secretary is required to adopt "rules for the identification, designation, and utilization of special areas and for the establishing of guidelines or priorities of uses in each area."[75] Section 729 of the Louisiana Administrative Code provides the regulations for the nomination and administrative review of special areas.[76] To begin with, "[a]n area may be nominated for designation as a special area by any person, local government, state agency, or the secretary."[77] The term "person" is defined by the regulations as "any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character, other than the secretary."[78] It is important to note that while the definition of person from the regulations excludes the secretary, the listed entities in section 729 includes the secretary along with the phrase "any person." A clear reading of section 729 indicates that the secretary is thus empowered to nominate a special area. Notably, the governor is also enabled by the regulations to actually designate, not simply nominate, special areas and promulgate their guidelines.[79] As will be discussed below, this broad spectrum of entities and individuals that are empowered by the regulations to nominate special areas makes section 214.29 of SLCRMA a potentially powerful tool in continuing to devise ways to protect and enhance the natural resources of Louisiana's Gulf Coast.

The regulations further stipulate that a special area can be nominated for any purpose laid out in the section 214.27 of SLCRMA as long as the areas "are in the coastal zone; have unique and valuable characteristics; require special management procedures different from the normal coastal management process; and are to be managed for a purpose of regional, state, or national importance."[80] Section 214.27 is

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73. *See generally Coastal Wetlands*, *supra* note 23.
74. LA. REV. STAT. tit. 49, § 214.29(B), (D)-(G).
75. *Id.* tit. 49, § 214.29(B).
76. LA. ADMIN. CODE, tit. 43, § 729 (2012).
77. *Id.* tit. 43, § 729(B)(1).
78. *Id.* tit. 43, § 101(A).
79. *Id.* tit. 43, § 729(D).
80. *Id.* tit. 43, § 729(B)(2).

the SLCRMA section that lays out the goals for the LCMP guidelines, mentioned previously in Part III.B.1 of this Comment.

The nominations themselves are required to include a number of elements in order that the area be sufficiently defined. This information includes the following:

a. a statement regarding the area nominated, including, for example, its unique and valuable characteristics, its existing uses, the environmental setting, its history, and the surrounding area;
b. a statement of the reasons for the nomination, such as any problems needing correction, anticipated results, need for special management, and need for protection or development;
c. a statement of the social, economic, and environmental impacts of the nomination;
d. a map showing the area nominated;
e. a statement as to why the area nominated was delineated as proposed and not greater or lesser in size or not in another location;
f. proposed guidelines and procedures for management of the area, including priorities of uses;
g. an explanation of how and why the proposed management program would achieve the desired results;
h. a statement as to how and why the designation of the area would be consistent with the state coastal management program and any affected local programs; and
i. a statement as to why and how the designation would be in the best interest of the state.[81]

Next, the regulations stipulate the process for administrative review of a nomination.[82] This process is fairly straightforward. It requires that the secretary decide whether the proposed special area designation is consistent with the LCMP and if such consistency is found, then a "Proposal for a Special Area" may be drafted.[83] This proposal, which will include the delineation of the area as well as the guidelines for its use, will then be run through the administrative process of notice and comment.[84] Finally, after all comments are considered, the secretary will make a decision on the designation and guidelines that will then be used to manage the area.[85] The designation must then be federally approved "as an element or amendment of the state's coastal zone program."[86]

81. *Id.* tit. 43, § 729(B)(3).
82. *Id.* tit. 43, § 729(C).
83. *Id.* tit. 43, § 729(C)(1)-(2).
84. *Id.* tit. 43, § 729(C)(2)-(4).
85. *Id.* tit. 43, § 729(C)(4).
86. *Id.* tit. 43, § 729(E).

The OCM released a manual titled *A Coastal User's Guide to the Louisiana Coastal Resource Program* in an effort to provide the public with information about the state's LCMP, generally, as well as information about the process for applying for a coastal use permit.[87] This manual mentions only two special areas that have been designated and incorporated into the LCMP.[88] The first of these are areas that are governed by the Offshore Terminal Authority, known as Louisiana Offshore Oil Port, or LOOP, essentially based on the need to specially manage deepwater marine terminals. The other special management area recognized in the manual is the Marsh Island Wildlife Refuge and Game Preserve. This area is designated for highly distinctive reasons compared to the Offshore Terminal Authority. The Refuge was designated based on recognition of its value as an important habitat for a number of species.[89] The guidelines for the use of this area are strict, to say the least. They state: "It is a trespass and a criminal offense for any member of the public to go upon the refuge without the State's consent. A one mile buffer zone, designed to prevent trespassing from nearby recreation areas into the wildlife refuge, exists around Marsh Island."[90] These guidelines make clear that the refuge will be managed in an environmentally protective manner, and also set a precedent for environmentally protective guidelines for future special area designations.

Amazingly, while SLCRMA and the LCMP have been in existence for nearly twenty-five years, this author can find evidence of no other areas that have been designated as special areas within the state. This is especially astounding considering the vast range of knowledge about Louisiana's coast and the problems, not the least of which is coastal land loss, that have plagued the zone for several decades. It is almost as if this provision had been hidden in a large library on the wrong shelf and then forgotten about. While this Comment does not propose specific designations of special areas, it will provide examples of how section 214.29 could be used as a potent tool to protect Louisiana's coastal zone. It recommends that groups, municipalities, state agencies, individuals, and even the secretary of DNR begin the process of implementing this provision as an added arrow in the quiver against environmental degradation within Louisiana's coastal zone.

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87. *See generally* Office of Coastal Mgmt., *A Coastal User's Guide to the Louisiana Coastal Resources Program*, LA. DEP'T OF NATURAL RES. (2013), http://data.dnr.louisiana.gov/ABP-GIS/ABPstatusreport/FinalUsersGuide_2013.pdf.

88. *Id.* at IX-1.

89. *Id.*

90. *Id.*

SLCRMA section 214.29 provides "areas subject to flooding, subsidence, salt water intrusion or the like" as examples of types of areas that could classify as special areas.[91] A cynical commenter, albeit an honest one, could argue that these categories alone would make the entire southeastern coast of Louisiana open to a special area designation. However, if such a designation was coupled with strict, environmentally protective management guidelines, then the management of such a large area would inevitably not comply with other goals of the LCMP, such as the goal of "encourag[ing] full use of coastal resources."[92] On a practical level, there are areas within Louisiana's coastal zone that are experiencing particularly extreme levels of coastal land loss as a result of salt water intrusion and erosion, in part due to the channelization of coastal marshes for oil and gas activities, and are thus increasingly susceptible to flooding events. Plaquemines Parish, which juts out of the end of Louisiana into the Gulf of Mexico, serves as a perfect example of an area that could be nominated, at least partially, as a special area. A study done by the University of New Orleans Pontchartrain Institute for Environmental Sciences indicates the vulnerability of Plaquemines Parish and other coastal parishes like it.[93] According to the study, between 1982 and 2000, Plaquemines Parish lost 3.14% of its marsh located within the Pontchartrain basin.[94] It is important to note that historically canals were dug within Plaquemines Parish's marshes for oil and gas activities.[95] Notably, one study released in 1981 predicted that Plaquemines Parish could completely disappear within fifty-two years, by 2033.[96] Plaquemines Parish like many of the other coastal parishes has an approved local coastal program.[97] Plaquemines Parish's 2000 Coastal Zone Management Program manual indicates that although the right is reserved by the Parish to nominate special areas, none were

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91. LA. REV. STAT. tit. 49, § 214.29(A) (2012).

92. *Id.* tit. 49, § 214.27(C)(1).

93. *See generally* L. Martinez et al., *Critical Habitat, Coastal Land Loss, and Land Loss/Land Change Analysis of the Lake Pontchartrain Basin, Louisiana*, PONTCHARTRAIN INST. FOR ENVTL. SCIS., UNIV. OF NEW ORLEANS, http://www.pbc.uno.edu/reports/CriticalHabitat_LandChangeAnalysis_82-90-00.pdf (last visited Mar. 19, 2014).

94. *Id.* at 8 tbl.6.

95. *See* Mark Schleifstein, *Historic Lawsuit Seeks Billions in Damages from Oil, Gas, Pipeline Industries for Wetland Loss*, TIMES-PICAYUNE (July 24, 2013, 4:13 PM), http://www.nola.com/environment/index.ssf/2013/07/historic_east_bank_levee_autho.html (displaying small diagram showing where canals were dug through the marshes of Plaquemines Parish).

96. SHERWOOD M. GAGLIANO ET AL., LAND LOSS IN THE MISSISSIPPI RIVER DELTAIC PLAIN, 31 TRANSACTIONS—GULF COAST ASS'N GEOLOGICAL SOC'YS 295, 298 (1981).

97. *Local Coastal Programs*, LA. DEP'T OF NATURAL RES., http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=111&pnid=192&nid=194 (last visited Feb. 6, 2014).

recognized as of that point.[98] In order to prevent even further land loss and vulnerability to flooding events, it seems that it is incumbent upon Plaquemines Parish and other parishes like it to take advantage of section 214.29. Thereby, at the very least, nominating some portions of the parish as special areas in an effort to ward off further channelization and other wetland-harming activities. The special area, once designated and federally approved, would then be taken into consideration when consistency determinations under the CZMA were being made. If such marsh channelization was not in line with the approved guidelines of the special area, then a permit to dig such channels would likely not pass the consistency determination threshold. Local environmental groups or the municipal government could also step in and make the nomination, thus forcing a decision to be made about the proposed designation.

Another example of the type of nomination that could be made is special areas that serve as "essential habitat for living resources."[99] While the case could likely be made that numerous locations within Louisiana's coastal zone qualify as essential habitat for different living resources, an easy case is made with the example of the piping plover. This bird is federally listed under the Endangered Species Act as endangered in certain population segments within the United States and threatened in others.[100] The piping plover inhabits many of the barrier islands off the coast of Louisiana, and many of these islands have been designated under the Endangered Species Act as critical habitat.[101] These islands serve as wintering habitat for the plover.[102] Notably, a critical habitat designation, which is done by the United States Fish and Wildlife Service, "only affects activities with federal involvement."[103] State agencies, or any other enabled entity, could nominate islands such as the Chandeleur Islands, which are part of the piping plover critical habitat designation, as special areas and propose guidelines that would protect this "essential habitat." This would add an additional layer of protection to the federal critical habitat designation. The guidelines could potentially include actions that would disallow these islands from eroding

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98. Coastal Environments, Inc., et al., *Plaquemines Parish Coastal Zone Management Program*, LA. DEP'T NATURAL RES. 7-9 (Aug. 2000), http://dnr.louisiana.gov/assets/docs/coastal/interagencyaff/localcoastalprograms/plaquemines.pdf.

99. LA. REV. STAT. tit. 49, § 214.29(A) (2012).

100. *Piping Plover Critical Habitat: Questions and Answers*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/plover/q&a.html (last visited Mar. 26, 2014).

101. Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for Wintering Piping Plovers, 66 Fed. Reg. 36,038, 36,127 (July 10, 2001).

102. *Id.* at 36,128-31.

103. *Piping Plover Critical Habitat*, *supra* note 100.

away, such as the proactive use of dredged sediments to rebuild them. Such a nomination, and hopeful designation, would have the added benefit of maintaining these barrier islands that serve as an initial defense against storm surge for the people living along the coast. Markedly, barrier islands themselves are listed as an example of the type of area that can be nominated as a special area.[104]

With regard to state agencies' fulfillment of the duties with which they are statutorily charged, the nonuse of section 214.29 of SLCRMA clearly represents a missed opportunity for a number of relevant agencies. These agencies, working together with other agencies, have the wherewithal and expertise to nominate appropriate areas and propose guidelines as required by the regulations that would serve to protect the area or resource in question. As an example, the Louisiana DNR is "responsible for the conservation, management, and development of water, minerals, and other such natural resources of the state, including coastal restoration and management, except timber and fish and wildlife and their habitats."[105] Clearly, DNR could make nominations for special areas that contained oil and gas deposits, but it is also charged with the conservation of water and other natural resources. Thus, protecting freshwater wetlands along the coast provides an excellent example of how DNR could invoke SCLRMA 214.29 to promulgate guidelines that would help conserve freshwater. These guidelines could, as a practical matter, be as exclusionary as the Marsh Island guidelines mentioned earlier. They could preclude any sort of disruption or channelization in areas especially valuable as "freshwater storage areas."[106] DNR is also charged with coastal management in general. Given this statutorily delegated responsibility as the trustee of the coastal zone, it is unacceptable that DNR has not stepped forward and nominated areas that are especially valuable ecologically or especially susceptible to environmental decline.

Special areas that are "highly productive or essential habitat for living resources" should be nominated by the state's Department of Wildlife and Fisheries.[107]

> The Department of Wildlife and Fisheries through its offices and officers, shall control and supervise all wildlife of the state, including fish and all other aquatic life, and shall execute the laws enacted for the control and supervision of programs relating to the management, protection,

104. LA. REV. STAT. tit. 49, § 214.29(A).
105. *Id.* tit. 36, § 351(B).
106. *Id.* tit. 49, § 214.29(A).
107. *Id.*

> conservation, and replenishment of wildlife, fish, and aquatic life in the state, and the regulation of the shipping of wildlife, fish, furs, and skins.[108]

Thus, it would certainly be within the purview of this department to nominate special areas based on their importance to species. A clear example lies in the previously mentioned case of the piping plover. This department could nominate important barrier island chains in the Gulf of Mexico that have already been federally recognized as important wintering habitat for the plover. Additionally, the department could nominate areas that are especially productive oyster reefs or fisheries to ensure that they are not depleted by overfishing or other destructive processes such as the channelization of marshes. Notably the "shall" language mentioned above mandates that the Department of Wildlife and Fisheries "execute the laws enacted for the control and supervision of programs relating to the management, protection, conservation, and replenishment of wildlife, fish, and aquatic life in the state."[109] Thus, the Department is charged with both conservation and replenishment of these living resources. Given that SLCRMA was designed "[t]o protect, develop, and, where feasible, restore or enhance the resources of the state's coastal zone,"[110] it seems that the Department would be obligated to nominate areas under section 214.29 where it has been shown that significant declines are occurring. In doing so, the Department could also propose guidelines that would lead to the "replenishment" of a given living resource. Again, the piping plover is an excellent example of a living resource that is proven to be in decline. Their wintering, barrier island habitats need to be designated as special areas by the Department of Wildlife and Fisheries. Otherwise, the Department is missing a key statutorily based action that could assist in the protection of a resource that it is charged with conserving.

In nominating areas that are especially ecologically valuable or susceptible, the state could create a mechanism in which permits for channels or even potentially harmful levee projects are harder to push through the system. Of course these designations would ultimately need to be federally approved as mentioned earlier, but it is certainly worth the effort of seeking such approval. Environmental groups and state agencies should identify areas of particular concern and should make the nominations. The provision exists because the Louisiana legislature believed that "special areas" that would "requir[e] special management

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108. *Id.* tit. 36, § 602(B).
109. *Id.*
110. *Id.* tit. 49, § 214.22(A).

procedures" existed, and thus the provision should not be wasted.[111] It is all but inconceivable that given coastal Louisiana's ecological susceptibility that this provision has not been put to greater use to protect the coastal zone.

IV. CONCLUSION

Without a doubt, the LCMP could be strengthened environmentally, however this is a decision for the legislature. As in all areas of environmental law, those pushing to protect and preserve the environment must use what they have to do what they can. In the case of Louisiana's coastal zone, they have section 214.29 of SLCRMA. This section is an existing legal tool that has been all but unutilized and provides the potential to designate sensitive areas within the coastal zone and then adopt guidelines for their management. There are numerous environmental groups[112] and agencies working to protect and restore Louisiana's Gulf Coast, and these groups undoubtedly have the expertise to nominate particularly sensitive areas and then help develop guidelines for their appropriate management. Section 214.29 should not continue to go unused in the state; it is a mechanism designed to manage areas that need a special kind of management, and it should be used to do so.

111. *Id.* tit. 49, § 214.29(A).

112. *See, e.g.*, GULF RESTORATION NETWORK, https://healthygulf.org/ (last visited Mar. 26, 2014); LAKE PONTCHARTRAIN BASIN FOUND., http://www.saveourlake.org/ (last visited Mar. 26, 2014); COAL. TO RESTORE COASTAL LA., http://www.crcl.org/ (last visited Mar. 26, 2014).