Repairing Damages to Coral Reefs Caused by Vessel Groundings and Discharges of Pollutants under the Laws of the United States Virgin Islands

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Issues[1]

1. What statutory and/or regulatory authorities exist in the United States Virgin Islands (the USVI or the Territory) to remedy injuries to coral reefs (lying within waters under the jurisdiction of the USVI) caused by vessels (colliding with reefs or discharging oil or other pollutants)? What common law remedies exist?

2. How could the legislature or administrative agencies of the USVI amend existing laws or regulations to enhance the USVI's ability to recover damages for the destruction of coral reefs caused by vessels and recover costs for long term coral restoration? What are the best options immediately available to the Territory to remedy damages to coral reefs caused by vessels?

Short Answers

1. The USVI does not have a comprehensive coral conservation statute that furnishes a neat set of remedies for injuries to coral reefs. Instead, a patchwork of statutory, common law, and regulatory authorities is available to remedy injuries caused by vessels. Some of these tools are very powerful.

2. There are a number of ways that the legislature of the USVI or administrative agencies of the USVI government could amend existing laws or regulations to enhance the USVI's ability to recover damages for destruction of coral reefs. Where appropriate, this report offers suggestions – i.e. amendments to statutory or regulatory provisions – as to how this could be accomplished. However, piecemeal regulatory and/or statutory change may not offer the most efficient long-term strategy. Thus, this report also offers suggestions as to how to the government of the USVI might maximize coral protection and restoration under existing laws and regulations. Among the most promising of these approaches are:
    a. Engaging private litigators under contingent fee arrangements to sue under any of the civil theories explored below. This cross-cutting suggestion will free up capacity within the Attorney General's office (or the general counsel's office in the DPNR).
    b. Assessing heavy fines for violating the coral protection provisions of the Endangered Species Act. Fines may be as high as $10,000 per specimen killed.
    c. Requesting monies from the Fish and Game fund to conduct coral remediation activities, removing the $250,000 limit on the fund's value, and more rigorously enforcing conservation laws and regulations to grow the fund.

[1] This report is intended for the exclusive use of TNC and its project partners for general information purposes only. It is not legal advice. Those seeking legal advice should contact an attorney.

d. Pursuing a strategy of securing maritime liens against vessels involved in groundings.
e. Filing suits under a public trust and public nuisance theories to recover damages to natural resources.
f. Suing for damages to proprietary interests.
g. In the event of oil spills, assessing penalties for violations of the Oil Protection Act.

Statement of Purpose & Structure

Ship groundings, oil spills, and discharges of other forms of pollution from vessels are among the most destructive – and avoidable – anthropogenic factors causing substantial and cumulative damage to coral reefs.[2] To address these threats, The Nature Conservancy (TNC) and the National Oceanic and Atmospheric Administration (NOAA) have partnered to assess the legal and institutional frameworks in the USVI for coral reef protection and conservation. This assessment will offer suggestions as to how regulatory authorities and/or the USVI legislature might amend existing laws, policies, and regulations to enhance the Territory's ability to protect corals, assess penalties, and recover costs for long term restoration.

To accomplish this, this report surveys the USVI's wildlife and coral protection statutes (such as they exist), other environmental statutes, and various common law causes of action that may supply remedies for damages to coral reefs caused by vessels operating in USVI waters. With the exception of its treatment of admiralty remedies, this report confines its analysis to the laws, regulations, and policies of the USVI, leaving to others the analysis of complementary federal and international laws.

The analyses contained in this paper are informed by two generic factual scenarios, 1) that of a hypothetical vessel running aground on a coral reef in USVI waters, causing significant damage to corals; and 2) that of a hypothetical vessel releasing oil or other pollutants into the waters of the USVI and so causing harm to corals.

Part I of the report supplies background about the USVI's legal system and jurisdiction of the territorial government of the USVI. Part II explores theories of liability under existing USVI authorities, both common law and statutory. Part III explores remedies available in admiralty. Part IV offers a short conclusion and list of recommended next steps.

Part I. Orientation of the USVI

The authorities of the government of the USVI to legislate and regulate, as well as the jurisdiction of its courts to hear certain matters, affect directly its ability to redress effectively the harms to natural resources lying in its territorial waters. This section briefly describes the

[2] Ward, Amber *Reefs in Crisis: A Look at the Chronic Destruction Caused by Ships*, 5 Ocean and Coastal L.J. 75, 76 (2000).

legal orientation of the USVI, including its relationship to the U.S. government; the structure of its government; and its authority to legislate over or otherwise regulate the use, management, and conservation of marine resources.

A. Legal Status of USVI, Scope of Authority in General

The US Virgin Islands (USVI) is an organized,[3] unincorporated[4] territory of the United States purchased in 1917 under the terms of a Treaty with the Kingdom of Denmark.[5]

Unlike the sovereign states, territories are subject to the ultimate control of Congress pursuant to Article 4, §3 of the US Constitution.[6,7] Congress may legislate over territories directly, or delegate legislative powers as it sees fit.[8] In fact, Congress may annul at any time legislation passed by a territorial legislature,[9] although "there is no presumption of an intention on the part of Congress to supersede a local territorial action in the absence of a clear expression to that effect."[10] Thus, the federal Congress is empowered to make all necessary rules and regulations concerning the territory of the USVI.[11]

In exercise of its authority, the US Congress passed the Revised Organic Act of 1954,[12] the territory's analogue to a state constitution,[13] which was intended to grant a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands (vis-à-vis the Organic Act of 1936).[14] The government of the USVI derives its powers from this act.[15] Through it, the USVI enjoys attributes of autonomy similar to sovereign governments, even though the Virgin Islands are not a sovereign.[16]

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[3] A territory is organized if it has a government constituted by an Organic Act passed by the US Congress, or a territorial constitution and functioning legislature.
[4] Unincorporated territories are portions of the United States not within the limits of any state. The term refers generally to the United States Insular Areas (which include Puerto Rico, Guam, the US Virgin Islands, and some others).
[5] 48 USC §1541(a)
[6] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."
[7] U.S. v. Government of Virgin Islands, 363 F.3d 276 (3d Cir. 2004).
[8] Bluebeard's Castle, Inc. v. Government of Virgin Islands, 321 F.3d 394 (3d Cir. 2003).
[9] Inter-Island Steam Nav. Co. v. Territory of Hawaii, by Public Utilities Commission of Hawaii, 305 U.S. 306 (1938)
[10] Inter-Island Steam Nav. Co. v. Territory of Hawaii, by Public Utilities Commission of Hawaii, 305 U.S. 306 (1938)
[11] *See also Territorial Court of the VI v. Richards, DCVI 1987, 63 F. Supp 152, aff'd, CA3d 1988, 847 F.2d 108* (holding that the Inspector General's office had the authority, by means of the Insular Areas Act, to audit Territorial Court of the VI; that there was no violation of the separation of powers doctrine, since the relationship between them is vertical and not one between coequal branches of the same government).
[12] Revised Organic Act of the United States Virgin Islands of 1954, July 22, 1954, ch. 558, sec. 1, 68 Stat. 497.
[13] *Brown v. Hansen*, C.A. 3d. (1992), 27 V.I. 440.
[14] Virgo Corp. v. Paiewonsky, 384 F.2d 569 (3d Cir. 1967).
[15] *Government of the Virgin Islands v. Rivera Solis* (C.A. 3d 1964)
[16] In re Hooper's Estate, 359 F.2d 569 (3d Cir. 1966); Government of the Virgin Islands v. May, 384 F. Supp. 1035 (DVI 1974)

The Revised Organic Act of 1954 extends to the legislature of the USVI power over all rightful subjects of legislation.[17] There is an implied limitation in this grant to subjects having relevant ties within the territory, to laws growing out of the needs of the Islands and governing relations within them.[18]

Judicial power in the USVI is vested a court of general jurisdiction designated the "District Court of the Virgin Islands," the "Superior Court of the Virgin Islands," and "The Supreme Court of the Virgin Islands," – the court of last resort.[19] The Superior Court and the Supreme Court were both established by statute pursuant to §21(a) Revised Organic Act of 1954. The District Court of the Virgin Islands is a legislative court (formed by the U.S. Congress pursuant to its Article I powers), not a constitutional court (formed pursuant to Article III of the U.S. Constitution).[20] 48 USC §1704 confers on the government of the USVI "concurrent civil and criminal jurisdiction with the United States with regard to property owned, reserved, or controlled by the United States in the Virgin Islands [. . .]."[21] Importantly, courts have found that the government of the USVI has jurisdiction to sue as *parens patriae* and stands as a state for this purpose.[22]

Relations between the government of the USVI and the federal government are administered by the Secretary of the Interior.[23]

B. Federalism and Territorial Waters

The regulation and control of activity within territorial waters, at least in absence of conflicting federal legislation, is viewed as within the rights of territorial legislatures.[24]

48 USC §1705 conveys to the USVI all right, title, and interest in tidelands, submerged lands, or filled lands to a line three miles seaward from the coasts "*to be administered in trust for the benefit of the people*."[25] The US government retains powers over regulation of commerce, navigation, national defense, and international affairs, which are paramount to proprietary rights of ownership, rights of management, administration, leasing, use, and development of lands and natural resources conveyed by the statute.[26,27]

Title 12 §309 of the Virgin Islands Code (VIC) reflects this grant, providing that the beds and bottoms of navigable rivers, streams, lagoons, lakes, sounds, inlets, bays, roadsteads, harbors, oceans, seas or other bodies of water" within the jurisdiction of the territory are the property of

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[17] Revised Organic Act of 1954 §8(a);Creque v. Roebuck, Terr. Ct. St. T. and St. J. 1979, 16 V.I. 197.
[18] Granville-Smith v. Granville-Smith, 1955, 3 V.I. 701.
[19] §21(a) Revised Organic Act of 1954; 4 VIC S. 2.
[20] §21(a) Revised Organic Act of 1954; U.S. v. Lewis, CA 3d 1972, 8 V.I. 500 (1972).
[21] 48 USC 1704
[22] *See* Alfred A. Snapp & Son, Ic. v. Puerto Rico, ex rel., Barez, 458 U.S. 592 (1982)
[23] 48 USC 1541(c).
[24] Alaska v. Arctic Maid, 366 U.S. 199 (1961)
[25] 48 USC 1705
[26] 48 USC 1706; *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982)(holding that the paramountcy doctrine applies within and without the three mile limit)
[27] The paramountcy doctrine states that the federal government has these rights as a function of its national sovereignty. ELI at 87.

the territory.[28] With the limited exception of privately owned ponds under 50 acres, the statute further provides that the Territory *owns* all fish, animals, plants, and all other species comprising the marine, estuarine, and freshwater fauna and flora within the jurisdiction of the territory for public use.[29] Section 310 sets the jurisdiction of the territory at 3 miles from the shoreline or to any international boundary located within such limit, whichever is shorter.[30]

Part II. The Legal and Regulatory Framework for Coral Protection

This section explores theories of liability under existing USVI authorities, both common law and statutory, that might be applied to recover the costs of injuries[31] caused when vessels collide with reefs or discharge oil or other pollutants into USVI waters. It also identifies the agencies and institutions with rulemaking, enforcement, and other relevant responsibilities over natural resources, including corals. Where appropriate, it offers suggestions as to how the legislative and/or administrative framework could be changed to enhance the government's ability to redress harms to corals. A brief introductory section explores a couple of important tools with cross-cutting applicability.

A. Cross Cutting Solutions

To ease the burden on strained government capacity, the government of the USVI could engage private litigators under contingent fee arrangements to sue under any of the theories explored below. In some cases, statutes provide explicitly for this possibility.[32] This approach has several distinct advantages. It also may offer a cheaper alternative, through more regular enforcement of existing laws, to the regulatory process.[33] Also, following this approach, suits could proceed across administrations, despite changes in personnel.[34] In cases in which a great deal of damage has been done – and a large damages award is feasible – this may be an effective strategy. Where there is uncertainty as to the likelihood of recovery, or damages are small, it is less likely that outside counsel would undertake a case.

Also, the Fish and Game fund is available to finance wildlife restoration projects and the administration and enforcement of fish, game and conservation laws.[35] The fish and game fund is capitalized with

> [t]he proceeds from all hunting and firearms licenses, all excise taxes on firearms, parts and ammunition, *all fines imposed by the courts for violation of the fish, game or conservation laws*, and all monies obtained as described in 23 VIC 314

[28] Title 12 309(a).
[29] Title 12 309(b).
[30] 12 VIC 310.
[31] There are many ways to calculate natural resources damages. These methods are subject of many articles in legal journals and fall outside the scope of this paper.
[32] *See e.g.* 12 VIC 306 (treating fisheries)
[33] *Id.*
[34] *Id.*
[35] 12 VIC 81(b).

> ("Moneys [sic] received by the territory for fishing licenses, certificates of number, vessel registrations, fines or other penalties relating to fish or fisheries and such sums as may be credited for other reasons for fish or fisheries activities in the territory, including sums received from the Federal Government,") [. . .].[36]

Upon the request of the commissioner of the DPNR, monies may be disbursed for the purposes noted above.[37] Under the current law, however, once the balance in the Fish and Game Fund reaches $250,000, the overage is diverted to the General Fund.[38] This provision could be amended to expand the monies available for the long term restoration of coral populations and other wildlife.

B. Common Law Authorities

i. Public Nuisance

Because they likely would harm fishery resources and their future ability to provide a livelihood for the citizens of the U.S. Virgin Islands, it is possible that discharges of oil or other pollutants by vessels into waters of the USVI (which also harm coral reefs) may be redressed through an action (sounding in tort) for public nuisance. Historically this action protects the rights of the public to fish, swim, and navigate in waters. To the extent that coral reefs are connected with the productivity of fishing grounds, damages to coral reefs may figure in the calculation of damages for the loss of economic benefits associated with these customary rights.

Note that the Restatement (Second) of Torts has been adopted whole cloth in the USVI in the absence of any contrary territorial law.[39] Whether the Territory's criminal public nuisance statute (discussed *infra*) qualifies as a contrary territorial law is a question that needs attention.

The Restatement (Second) of Torts defines public nuisance as "an unreasonable interference with a right *common to the general public.*"[40] Public nuisance at common law involved interference with interests of the community at large, for example, interference "with the public convenience, as by the obstruction of a public highway or a navigable stream."[41]

In general, courts have found that pollution that "prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish" is likely to be viewed as a public nuisance. In *National Sea Clammers Assn. v. City of New York, 616 F.2d 1222* the court in New York held that that defendant's discharge of sewage, which caused algal growth in a river, was a public nuisance.[42] The analogy to pollution that affects coral reefs is an easy one. It is very likely that a vessel's discharge polluting the waters, beaches, and fishing grounds would be found to interfere with a right common to the public.

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[36] 12 VIC 81a (emphasis added).
[37] *Id.*
[38] *Id.*
[39] 1 V.I.C. §4.
[40] §821B(1).
[41] *Id.* at Comment (b).
[42] Restatement (Second) §821B at Comment (g); *616 F.2d 1222* (holding that defendant's discharge of sewage, which caused algal growth in river, was a public nuisance)

The Department of Natural Resources has prosecuted public nuisance actions. In 2011, anchored in part on a claim of public nuisance, the Government of the USVI alleged in *Commissioner of DPNR v. Century Alumina Co., LLC* , that the defendants damaged the natural resources ("ground water, surface water, land, air, cultural resources, recreational areas, wetlands, habitat, protected and endangered species, biota, fish, and the estuarine and marine environment") of St. Croix by releasing hazardous substances from industrial tracts owned at various times by the defendants.[43]

In determining whether a given interference is unreasonable, a fact finder may consider: (a) whether the conduct involves a significant interference with the public health, safety, peace, comfort, or convenience; or (b) whether the conduct is proscribed by a statute, ordinance, or administrative regulation; or (c) whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[44]

It is likely that an oil spill or release of other pollutants from a vessel would satisfy all of these criteria. An oil spill or release of other pollutants into the navigable waters of the USVI would interfere with the public's right to fish and use beaches in an area. Furthermore, pollution of territorial waters without a permit, and discharges of oil are prohibited by statute. Finally, discharge of oil or other pollutants would have long term effects on the public's customary rights to fish and bathe in navigable waters.

RECOMMENDATION

1. While most public nuisance cases are brought by government entities, private parties may bring claims under this doctrine if the injuries they suffer are different from the kind suffered by the public.[45] To ease the burden on scarce government capacity, the government of the USVI should consider – by statute – permitting actions by citizens to redress invasions of rights common to the public. Such a statute would need to override the traditional condition that requires individual complainants to have suffered some special injury other than that in which the general public share alike.[46]

ii. Public Trust Doctrine[47]

As noted in Part IB above, the government of the USVI, like those of the sovereign states, holds title to submerged lands under its tidal waters in a public trust for its citizens.[48] The basic

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[43] *Slip Copy, 2011 WL 882547 (D. Virgin Islands, 2011)*
[44] Restatement (Second) Torts § 821B, cmt. e (1979)
[45] *See* Strickland Jr., Carter H., *The Scope of Authority of Natural Resource Trustees*, 20 Colum. J. Envtl. L. 301, 317 (1995)
[46] *See* Restatement (Second) of Torts S.821c(1).
[47] *See generally* Turnipseed, Mary, Roady, Stephen, Sagarin, Raphael, and Crowder, Larry *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Dcotrine*, 36 Ecology L.Q. 1, 8 (2009)
[48]48 USC 1705; Turnipseed *et al* at 5; Submerged Lands Act of 1953, 43 U.S.C. § 1301 (2006); *see also Shively v. Bowlby*, 152 U.S. 1,57 (1894); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

premise of the public trust doctrine is that the sovereign states (or "governments," generally[49]) hold in trust for the benefit of their citizens certain resources, including wildlife, as well as rights to fishing, navigation, and commerce over and in these lands and waters. [50]

> "[T]he idea of a public trusteeship rests upon three related principles. First, that certain interests—like the air and the sea—have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit ...."[51]

When trust resources suffer harm, a state or federal trustee may sue to recover damages.[52] The scope of recovery may include not only damages to lands beneath waters and beaches, but also to damages sustained by living resources.[53] Ordinarily state attorneys general serve as trustees.[54] In the USVI the Commissioner of the DPNR has this responsibility.[55] Per 48 USC §1705[56], the government has the "obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage such property."[57] Recovery is possible when the public trust has been violated by an unreasonable interference with the use and enjoyment of trust rights.[58] Case law in the USVI on point is relatively scarce, suggesting that it is a relatively unexplored area for recovery. The classic test for violations of the public trust derives from the case of *Illinois Cent. R.R. Co. v. Illinois*[59]. The elements of a public trust action are[60]:

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[49] *See Commissioner of DPNR v. Century Alumina*, Slip Copy 2008 WL 4809897 (D. Virgin islands, 2008)(quoting *West Indian Co., Ltd v. Government of Virgin Islands*, 643 F. Supp. 869, 875 (D. Virgin Islands, 1986).
[50] Kanner at 61.
[51] Joseph L. Sax, *Defending the Environment: A Strategy for Citizen* Action 165 (1971)
[52] 5 Ocean & Coastal L. J. at 81
[53] Ward at 81.
[54] Kanner, Allen *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural* Resources 16 Duke Envtl. L. & Pol'y F. 57, 59 (2005-2006); *see also* Wood, Mary Christina *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 Envtl. L. 44, 85-87 (2009) (discussing sovereign cotenancy – federal and state – over natural resources, particularly those that move across boundaries, and the advantages of the public trust doctrine as an alternative to regulatory action to improve natural resources management.)
[55] *Commissioner of DPNR v. Century Alumina*, Slip Copy 2008 WL 4809897 (D. Virgin islands, 2008)
[56] 48 USC 1705 (conveying to the USVI all right, title, and interest in tidelands, submerged lands, or filled lands to a line three miles seaward from the coasts "*to be administered in trust for the benefit of the people*")
[57] *Ohio v. City of Bowling Green, 313 NED2d 40, 411 (Ohio 1974); see also MD Department of Natural Resources v. Amerada Hess,* 350 F. Supp. 1060, 1067 (D.Md. 1972).
[58] Kanner at 59.
[59] 146 U.S. 387, 452 (1892); Kanner at 89.
[60] *Id.*

(1) Trust rights are implicated. Whether trust rights are implicated depends on analysis of a) whether the resource is public, and b) to which public use it is committed. Another factor is the right of the trust in protecting and perpetuating the resource.

(2) There's an unreasonable interference with the use and enjoyment of the resource.

There can be little doubt that the resources in question – corals – are public. The VIC provides explicitly that the Territory *owns* all fish, [. . .] animals, plants, and all other species comprising the marine, estuarine, and freshwater fauna and flora within the jurisdiction of the territory *for public use*.[61]

Furthermore, since the 19th century American courts have recognized the doctrine and used it to prevent conversion of coastal resources to private use.[62] More recently, courts have recognized use of the doctrine in areas beyond the traditional uses of navigation, fishing, and commerce, to include protection of wild birds.[63]

Finally, federal statute explicitly vests in the government of the U.S. Virgin Islands "all right, title, and interest in tidelands, submerged lands, or filled lands to a line three miles seaward from the coasts" and bestows on it the obligation to administer those lands *in trust for the benefit of the people*.[64]

Whether an interference is unreasonable will depend on a review of the unique facts of a given situation. For example, a fact finder may determine that a vessel thrown onto a reef by a storm has acted less unreasonably than a vessel that has run aground while traversing a designated marine protected area in violation of a law or regulation. Likewise, violations of standard navigational rules may suggest unreasonableness.

Of note, in several states, courts have held that state ownership in the strictest sense is not required to vindicate damage caused to them.[65] On the other hand, some states allow for recovery of damages to only those resources that they own.[66] This is a restrictive interpretation of the doctrine. Under the more expansive view, the reasoning is that every state holds a "property" interest in wildlife on behalf of its citizens and that the state is obligated to "recoup the public's loss occasioned by the negligent acts of those who damage such property." [67] In the USVI, the VIC provides explicitly that the Territory "*owns* all fish, [. . .] animals, plants, and all other species comprising the marine, estuarine, and freshwater fauna and flora within the

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[61] Title 12 309(b).
[62] Babcock, Hope *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. Rev. 393, 396 (2009-2010).
[63] *Id. See also Cal. Trout, Inc. v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 211-12 (Cal. Ct. App. 1989)(applying public trust doctrine to fish); *Wade v. Kramer*, 459 N.E. 2d 1025 (Ill. App. Ct. 1984)(applying public trust doctrine to wildlife); *City of Berkeley v. Super. Ct.*, 606 P.2d 362, 365 (Cal. 1980) (extending the public trust extended to ecological preservation).
[64] 48 USC 1705 (emphasis added).
[65] *See e.g. In re Steurt Trnsp. Co.,* 495 F. Supp. 38, 39 (E.D. Va. 1980)(denying the defendant polluter's motion for summary judgment on its submission that government did not *own* birds damaged by an oil spill).
[66] Kanner at 59 note 7 (referring to cases in which states claims for losses of fish failed because of the state's lack of property interest in the fish).
[67] Kanner at 90 (quoting *State v. City of Bowling Green* 313 N.E. 2d 409 (Ohio 1974)).

jurisdiction of the territory *for public use,*" which obviates the need to explore further this line of argument.[68]

Finally, the Supreme Court has held that states have the right to determine the extent of their public trusts.[69] Compelling arguments have been made for filling regulatory gaps – as for protection for resources lying within a state's Exclusive Economic Zone (EEZ) – by using the public trust doctrine as an interim management regime (complete with protective normative standards and other management tools).[70]

iii. The *Parens Patriae* Doctrine

The *parens patriae* doctrine evolved from the common law principle that king, as father of the country, could act as guardian for those who lacked capacity to act for themselves into the idea that a state has *standing*[71] to protect its quasi- sovereign interest in the well being of its people.[72] It is closely related to the public trust and public nuisance causes of action, providing standing to governments to sue on these theories to protect their interests. Quasi-sovereign interests are not sovereign interests, i.e. the enforcement of laws or recognition of borders.[73] Nor are quasi-sovereign interests proprietary interests in the land or businesses that the state owns, which interests resemble those of "other similarly situated proprietors."[74] Instead, quasi-sovereign interests encompass the interest of the state in the health and well-being – physical and economic – of its residents.[75] Quasi-sovereign interests may also encompass the environment and natural resources[76], including the coastal waters and the biological and natural resources associated with them.[77]

The government of the USVI likely has jurisdiction to sue as *parens patriae* and stands as a state for this purpose.[78] In *Alfred L. Snapp & Son, Inc v. Puerto Rico, ex rel., Barez*, the

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[68] Title 12 309(b).
[69] *Philips Petroleum Co. v. Mississippi*, 484 U.S. 475 (1988).
[70] Babcock, Hope *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. Rev. 393, 395 (2009-2010).
[71] "It is not clear whether this doctrine adds substantive rights beyond those already enjoyed under the public trust or public nuisance doctrines, or whether this is just a procedural device to assert rights created by those doctrines." Strickland at 318.
[72] *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for* States, Mank, Bradford, 49 Wm. & Mary L. Rev. 1701, 1757 (2007 – 2008).
[73] *Id.*
[74] *Id.* quoting *Alfred A. Snapp & Son, Ic. V. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601-02 (1982).
[75] 49 Wm. & Mary L. Rev. at 1758.
[76] Kanner, Allen *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural* Resources 16 Duke Envtl. L. & Pol'y F. 57, 59 (2005-2006); 49 Wm. & Mary L. Rev. 1701, 1761; *Tennessee Copper ; see also* Strickland Jr., Carter H., *The Scope of Authority of Natural Resource Trustees*, 20 Colum. J. Envtl. L. 301, 318 (1995).
[77] *See Maine v. M/V Tamano*, 357 F. Supp. 1097, 1100 (D. Me. 1973) (holding that a state has a quasi-sovereign interest in coastal resources); *Maryland v. Amerada Hess Corp.,* 350 F. Supp. 1060, 1065-67 (D. Md. 1972) (allowing a state to file a *parens patriae* suit to recover damages to coastal waters from an oil spill). S*ee also,* Ieyoub & Eisenberg, *State Attorney General Actions, the Tobacco Litigation and the Doctrine of* Parens Patriae, 74 Tulane Law Review 1859, 1869-70 (2000); Allan Kanner, *The Public Trust Doctrine,* Parens Patriae, *and the Attorney General as the Guardian of the State's Natural Resources*, 16 Duke Envtl. L. & Pol'y F. 57, 107 (2005).
[78] *Alfred A. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592 (1982).

Supreme Court of the United States held that Puerto Rico has standing to sue as *parens patriae*.[79] While the USVI and Puerto Rico do not share the same relationship to the US government, the United States Court of Appeals for the Third Circuit has held that the Revised Organic Act of 1954[80] – the territory's analogue to a state constitution, which was intended to grant a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands – has given the USVI attributes of autonomy similar to those of a sovereign government or state.[81] Because of these attributes of autonomy and because the Supreme Court has held that Puerto Rico may bring actions as *parens patriae*, the District Court of the Virgin Islands has held that the USVI may bring suits as *parens patriae*.[82]

iv. Negligence

[Requires research in the Restatement 2nd, USVI case law]

v. Negligence Per Se

[Requires research in the Restatement 2nd, USVI case law]

C. Statutory Authorities[83]

i. Navigation; Liability for Negligent Operation of Vessels[84]

25 VIC §297 prohibits the negligent or reckless operation of any motorboat or vessel so as to endanger the life or property of any person.[85] The same chapter also provides for the liability of vessel owners for "any injury or damage" caused by the negligent operation of their vessels, noting that negligence can be demonstrated by a violation of the provisions of the statutes of the territory, or by "neglecting to observe such ordinary care and such operation as the rules of the common law require."[86]

Because the statute provides for the recovery of "injury or damage" to the property of any person, and because the property of the USVI very likely falls within the coverage of the statute, [87] this section may likely serve to make the USVI government whole for its losses in the event that a negligently operated vessel causes harm to coral reefs. This provision also has the advantage of exposing owners of vessels to liability. When negligent operators lack sufficient resources to repair the harms they have caused, this would be particularly important.

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[79] 458 US 592, 608 n. 15 (1982)
[80] Revised Organic Act of the United States Virgin Islands of 1954, July 22, 1954, ch. 558, sec. 1, 68 Stat. 497.
[81] *Government of the Virgin Islands v. Bryan*, 818 F.2d 1069, 1072 (3rd Cir. 1987)(quoting *In re Estate of Hooper*, 359 F2d 569, 578 (3rd Cir. 1966))
[82] *Commissioner of DPNR v. Century Alumina*, Slip Copy 2008 WL 4809897 (D. Virgin islands, 2008)
[83] Unless otherwise noted, numbered provisions refer to the Virgin Islands Code.
[84] This could also be addressed by a proceeding in admiralty. Admiralty is treated below.
[85] 25 VIC §297.
[86] Title 25 §302.
[87] *See* 12 VIC 309(b).

ii. The USVI's Wildlife Protection Laws

The USVI has a robust framework of wildlife protection laws that, among other things, provides for the protection of cays and offshore islands and the designation of marine and wildlife sanctuaries. These laws may provide a base on which to build more focused set of regulations to ensure coral reef protection. Through the administrative rulemaking process, the DPNR (which enjoys authority under most wildlife protection laws) could make several improvements to existing laws to protect coral populations and facilitate the recovery of penalties for damages caused by vessels.

(a) Cays and Offshore Islands

The Commissioner of Conservation and Cultural Affairs[88] is empowered to issue regulations pertaining to the management, use or control of the offshore islands and cays owned by the Government of the USVI, including but not limited to, the designation of game preserves and wildlife sanctuaries, and the designation of inviolate sanctuaries where human activities are prohibited.[89] Those that violate regulations are subject to fines not less than $200 nor more than $1,000 or imprisoned not more than 60 days or both.[90]

It is likely that this section applies strictly to offshore islands and cays and not to the waters surrounding them or nearby coral populations (this review found no regulations in the administrative code issued under this statue relating to corals). If, however, it is determined that waters and the corals contained therein are within the statute's coverage then the DPNR might well issue regulations to ensure their proper management or protection under this subchapter. In that case, the penalty provisions should be improved, as fines are low and their deterrent value limited compared to potentially catastrophic damages that the regulations are designed to prevent.

(b) Wildlife and Marine Sanctuaries

The network of laws and regulations falling under this subheading provide stiff penalties for violations in some instances; they also contain some very important and robust remediation provisions which could be useful for coral protection, particularly if they were to apply more widely.

The Commissioner of the DPNR may declare wildlife or marine sanctuaries for, *inter alia*, the protection of wildlife and special management zones.[91] Section 96 sets out the general prohibitions.[92] Within wildlife and marine sanctuaries, the law explicitly prohibits taking or possession of any fish or wildlife or part thereof without a permit, as well as the throwing,

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[88] All references to the Commissioner of Conservation and Cultural Affairs refer and apply to the Commissioner of Planning and Natural Resources pursuant to §301 of No. 5265 of the Government Reorganization and Consolidation Act (June 24, 1987).
[89] Title 12 §94.
[90] 12 VIC 94.
[91] Title 12 §97. Also, the Virgin Islands Coastal Zone Management Commission, established in Title 12, chapter 21, §904(a) Virgin Islands Code, may establish other marine parks throughout the United States Virgin Islands as part of a territorial system of marine parks. *See* Title 12 §98(b).
[92] 12 VIC 96.

placing, or depositing of any waste within in any marine sanctuary.[93] Regulations expand the set of prohibited activities. Violators are subject to civil fines not exceeding $10,000.[94]

The Commissioner of the DPNR may make rules prohibiting additional acts which may adversely impact upon wildlife or marine sanctuaries or game preserves.[95] This provision gives broad authority to the Commissioner of the DPNR to protect corals. Many strong regulations have already been issued (Table 1), but are limited to the confines of individual marine reserves and wildlife sanctuaries.

The destruction of corals by vessels running aground would likely be found to constitute a taking under section 96. Because takings in designated marine sanctuaries are unlawful, by designating sanctuaries liberally the USVI could make prohibitions applicable across a wide area. While the penalty provisions in this subchapter are strong enough to pinch violators and so have some deterrent effect, a stricter penalty provision – providing grounds for a cause of action for recovery of natural resources damages, for example – would help to ensure that damage awards hew closely to damages caused by violators.

Table 1. Coral Protection Regulations Issued under the Marine Sanctuaries Law.

Provision	Coverage
CVIR 12-001-000 § 96-1 (2009)	**Compass Point Pond.** Prohibits the disturbing or taking any plant or animal within the Compass Point Pond Marine Reserve and Wildlife Sanctuary except under a permit or specific authorization of the Commissioner.
CVIR 12-001-000 § 96-2 (2009)	**Cas Cay/Mangrove Lagoon.** Prohibits the taking or possession of any bird, fish, or other wildlife (including any living organism) or part thereof within the Cas Cay/Mangrove Lagoon Marine Reserve and Wildlife Sanctuary, except under a permit or specific authorization of the Commissioner.
CVIR 12-001-000 § 96-3 (2009)	**St. James Marine Reserve.** In the St. James Marine Reserve and Wildlife Sanctuary, it is unlawful to remove any marine or other wildlife without a permit or specific authorization of the Commissioner.
CVIR 12-001-000 § 96-4 (2009)	**Frank Bay Pond.** Within the Frank Bay Pond, Wildlife and Marine Sanctuary, unless a permit is granted or there is other specific authorization from the Commissioner. It is unlawful to: (1) collect, take or possess any bird, fish, coral or other wildlife, or part thereof; . . . (3) throw, place or deposit any waste into the sanctuary;. . . (6) destroy, injure or harmfully disturb any sanctuary animal; . . . (11) use any motorized vehicle or vessel, except on existing roads, within the sanctuary; (12) discharge, release or deposit any materials or substances of any kind into the sanctuary waters; . . . (14) discharge, release or deposit, from beyond the boundary of the sanctuary, any material or other matter that subsequently enters the sanctuary and degrades the natural resources or other values of the sanctuary; [. . .].
CVIR 12-001-000 § 96-12 (2009)	**Salt River Bay Marine Reserve.** In the Salt River Bay Marine Reserve and Wildlife Sanctuary, without a permit or the specific authorization of the Commissioner, it is unlawful to: (1) collect, take or possess any fish, coral, bird or other wildlife, or part thereof; (3) throw, place or deposit any waste into the sanctuary; (5) collect, take, possess or harmfully disturb any plant, soil, rock or other material, either marine or terrestrial; (6) destroy, injure or harmfully disturb any sanctuary animal, either marine or terrestrial; ... (8) store, maintain,

[93] 12 VIC 96 (a)(1), 96(a)(3).
[94] CVIR 12-001-000 S.96-8 (2009)(referring to 12 VIC 913(c)(1) (the USVI Coastal Zone Management law)). In the absence of other provisions, violations under this chapter are subject to the criminal penalties prescribed in Title 12 §99 which prescribe a $5,000 civil fine, imprisonment for not more than 30 days, or both. This creates a floor. Regulations and other provisions raise this floor.
[95] 12 VIC S. 96(b).

	repair, construct, use or abandon any vehicle or vessel in the sanctuary; ... (10) dredge, fill, excavate or otherwise alter the seabed or shoreline of the sanctuary, or construct, place or abandon any structure, material or other matter on the seabed of the sanctuary; ... (12) use any motorized vessel except as specified for restricted areas in V.I. Code tit. 25, § 297-3 within the sanctuary; ... (14) discharge, release or deposit any material or substance of any kind into the sanctuary waters; ... (16) discharge, release or deposit, from beyond the boundary of the sanctuary, any material, substance or other matter that subsequently enters the sanctuary and degrades the natural resources or other values of the sanctuary; ... (18) short term anchor (14 days or less) outside a designated anchoring area; (19) long term anchor or moor any vessel or surface platform without obtaining a mooring permit issued by the DPNR; (20) anchor or moor any surface or underwater vessel or platform outside designated anchoring or mooring areas [. . .].

12 VIC §98 and regulations issued thereunder deserve particular attention as they offer strong remediation provisions that could be more widely applied in the USVI.[96] 12 VIC §98 creates the St. Croix East End Marine Park to protect

> territorially significant marine resources, promote sustainability of marine ecosystems, including coral reefs [. . .], wildlife habitats and other resources and to conserve and preserve significant natural areas of the use and benefit of future generations [. . .].[97]

It also grants to the Commissioner of the DPNR the power to issue regulations.[98] Regulations prohibit – *park wide* – intentional or *unintentional* removal of, injury to or possession of coral or live rock; moving removing, taking, harvesting, damaging, disturbing, breaking, cutting, or otherwise injuring, or possessing any living or dead coral, or coral formation or attempting any of these activities.[99] By explicitly forbidding even unintentional actions that result in the destruction of corals (or any of the enumerated offenses) this provision provides a high level of protection. It remains limited by the geographic confines of the St. Croix East End Marine Park, but offers a starting point.

Penalty provisions under this subchapter are fairly robust (allowing for $10,000 in fines and exemplary damages in the event of knowing action) but may not capture the total value of damage corals in the event of destructive groundings. Among the most powerful provisions, however, is the remediation rule appearing in CVIR 12-001-000 §98-9(g) (2009) which allows the Commissioner of the DPNR, after an administrative hearing, to issue a cease and desist order to violators.[100] This provision may have special relevance (and is more easily enforceable from a practical standpoint) when a polluter is conducting continuous action in a restricted area, in violation of a permit or without a permit, to the extent that it is easier to bring that class of offender under the jurisdiction of enforcement officials (compared to the case of a one-time coral strike by a vessel which then sails out of USVI waters). A cease and desist order may require that violations be remedied or restored, or an order that appropriate remedial action be

[96] 12 VIC 98.
[97] 12 VIC 98(a).
[98] 12 VIC 98(d)(3).
[99] CVIR 12-001-000 S. 98-4 (2009).
[100] CVIR 12-001-000 S. 98-9(g) (2009)

taken at the site of the violation.[101] While it does entail the administrative costs associated with hearings, the remediation provision could do a great deal to make the Territory whole when vessels or other actors damage coral populations.

RECOMMENDATIONS

1. Expand/clarify penalty provisions by statute or remove penalty caps in regulations. For example, it is unclear whether remediation activities contemplated by CVIR 12-001-000 §98-9(g)(1), (g)(2) may exceed the stated cap on fines of $10,000 prescribed in 12-001-000 §98-12.

2. Create a cause of action for recovery of natural resources damages so that damage awards hew closely to damages caused by violators. It is likely that this would need to proceed through the legislative, rather than regulatory, process.

3. Declare more sanctuaries so as to apply strict coral conservation rules and remedies (particularly the remediation remedy) across a wider area.

4. Remove intent requirements (as under CVIR 12-001-000 §98-4) across the board, or explicitly prescribe (by issuing a regulation) that intent is not required for fines or other penalties to attach under any of the §96 regulations.

iii. Protections for Endangered Species

The USVI Endangered Species Act provides calls for stiff fines for offenses and has the advantage of being applicable across the entire range of territorial waters.

The USVI Endangered Species Act creates an "Endangered Species Preservation Commission" responsible for identifying and preserving threatened and endangered species in the USVI; for overseeing implementation of the federal Endangered Species Act; and for conserving and protecting endangered or threatened species.[102] Lists of endangered and threatened species are developed by regulation.[103]

Importantly, the statute prohibits expressly the taking, catching, and killing of any *indigenous* species, including live rock.[104] The statute is silent as to the state of mind required to convict violators, which suggests that liability strict liability (i.e. intent may not be required) may attach for damages caused by violations.[105] Violators are subject to a statutorily capped fine of $10,000 or a jail term of 60 days or less.[106] Penalties may accrue for *each specimen* of an indigenous species harmed.[107] Because it is foreseeable that large numbers of specimens of corals would be harmed in the event of a vessel grounding or discharge of pollutants, this provision is very

[101] CVIR 12-001-000 §98-9(g)(1), (g)(2).
[102] 12 VIC §104(a), 104(b).
[103] S. 104(c), 104(e).
[104] 12 VIC §105(a).
[105] 12 VIC 105(a).
[106] 12 VIC 107.
[107] *Id.*

powerful, perhaps affording a remedy that approximates the real losses that violations occasion. Adding a blanket *civil* penalty for natural resources damages in lieu of a fine would enhance the Territory's ability to redress damages to coral reefs.

According to case law on point, there is no private cause of action under the USVI's Endangered Species Act.[108] Adding a citizen suit provision may help to improve enforcement by empowering non-government organizations (NGOs) and interested individuals to enforce a new civil cause of action, and relieving government of sole enforcement responsibility.

RECOMMENDATIONS

1. Add a provision for civil actions to recover natural resource damages.

2. Add a citizen suit provision to the law.

iv. Commercial Fishing Laws

The territory's commercial fishing laws vest broad regulatory power in the DPNR to preserve, manage, and protect fishery resources in all waters to a line three miles seaward of the coast.[109] Violators of regulations issued under this authority are subject to $500 (maximum) fine or imprisonment of less than six months.[110]

Given the relationship between the health of coral reefs and the productivity of fisheries, it is reasonable to assume that the DPNR could appropriately issue coral-specific protective regulations under this chapter. Regulatory improvements might include provisions forbidding the killing or taking of corals in territorial waters, and improved penalty provisions that provide for recovery of natural resource damages. These would be largely redundant of the Endangered Species Act, but for the very strong enforcement provisions in the fisheries act allowing for warrantless seizures of vessels when conservation officers have probable cause to believe that a law or regulation under this chapter has been violated.[111] When violations are committed from boats, the statute allows for liens to be placed against them until fines are paid.[112]

A new regulation forbidding the killing of corals (intentional or otherwise) paired with the seizure power conferred in 12 VIC §305(a) might permit warrantless seizures of vessels when there is probable cause to believe that corals have been damaged. Thereafter a lien could be placed on an offending vessel until fines are paid. The threat of a lien may be a powerful deterrent to would-be offenders. To be relevant, however, the section must prohibit the destruction of corals.

RECOMMENDATIONS

1. Add a regulation explicitly prohibiting the killing of corals.

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[108] *Virgin Islands Tree Boa v.* Witt, 34 V.I.
[109] 12 VIC s. 301; 12 VIC s. 301(a)(1), (a)(2); 12 VIC§302(6); 48 USC 1705.
[110] 12 VIC 304(d).
[111] 12 VIC 305(a).
[112] 12 VIC 305(e).

2. Strengthen penalty provisions.

v. Water Conservation Laws

The water resources conservation law contains a statement of policy providing that "all waters within the Virgin Islands are . . . declared to be public waters belonging to the people of the Virgin Islands, subject to appropriations for beneficial use. . . " Because it establishes that waters are publicly owned, this provision may serve as an anchor for a public nuisance action (described *supra*) in the event of an oil spill or release of other hazardous material that makes water resources unusable by the public (recalling that public nuisance actions redress damages to *public* rights).

Otherwise this law mainly concerns freshwater conservation; permitting for appropriation of water; and well drilling.

vi. Water Pollution Laws

This chapter of the VIC is not applicable to destruction of corals caused by vessel groundings, as the application of the statute is to "changes" in the water as defined in 12 VIC §182.[113] However, if the cause of harm is a discharge form a vessel then the statute applies and offers remedies.

The act prohibits pollution or discharges of pollutants into waters that cause

> changes [to the] physical, chemical or biological properties of any waters of the USVI, including changes in temperature, taste, color, turbidity, or odor, or such discharge of any liquid, gaseous, solid, radioactive, or other substance . . . as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.[114]

Waters includes all waters within the jurisdiction of the USVI.[115]

Like the federal Clean Water Act, this statute prohibits *unpermitted* discharges into waters, and strict civil and criminal penalties attend violations (up to $50,000 per day).[116] The DPNR is responsible for assessing fines administratively after providing a hearing to consider the nature, circumstances, extent, and gravity of violations.[117]

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[113] 12 VIC 182
[114] 12 VIC 182(a).
[115] 12 VIC 182(f).
[116] 12 VIC 190(b)(1).
[117] 12 VIC 190(b).

vii. Oil Pollution Laws

The Oil Spill Prevention and Pollution Control law prohibits discharges of oil, petroleum products or their by-products, or other pollutants into or upon any coastal waters and authorizes the DPNR to adopt regulations relating to spills and discharges.[118]

In the event of a discharge, the law requires the persons responsible to immediately undertake operations to remove the discharge to the satisfaction of the DPNR or else arrange for someone else to conduct the removal.[119] The government may also contract with third parties to this end.[120] Discharges in navigable waterways must be remediated in accordance with the national contingency plan as prescribed in the Federal Water Pollution Control Act 33 USC 1251 et. seq.[121]

Responsible parties are subject to civil penalties of up to $50,000 a day for violations.[122] These penalties are the only penalties the territory will assess for discharges falling within the statute's coverage (in other words, a separate penalty for violations of the territorial water pollution control act will not be assessed).[123]

The statute also extends liability for cleanup costs or other damages to licensed terminal facilities and their agents or servants – e.g. vessels destined for or leaving a licensee's terminal facility – that permit or suffer a prohibited discharge.[124] To facilitate enforcement, the law provides for an absolute maritime lien over any vessel and its freight for all clean up and other damages incurred as a result of the discharge.[125] This is a very strong provision, particularly if natural resource damages are captured by the term "other damages." Moreover, the maritime lien (discussed *infra*) offers an expedited remedy that ensures at least partial recovery.

Another important feature of the oil pollution law is the Coastal Protection Fund it establishes to cover costs associated with the law's enforcement.[126] The $1,000,000 Virgin Islands Coastal Protection Fund (capped by statute) is available to the DPNR for carrying out the purposes of the law.[127] All license fees, penalties and other fees and charges related to this law, including administrative expenses, and costs of removal of discharges of pollution will be credited to the corpus of the fund.[128] Disbursements from the fund are permitted to cover:

> (a) Administrative expenses, personnel expenses and equipment costs of the Department related to the enforcement of this chapter;
>
> (b) All costs involved in the abatement of pollution related to the discharge of oil or petroleum products or their by-products and other pollutants covered by this

[118] 12 VIC 707.
[119] 12 VIC 709(1).
[120] *Id.*
[121] *Id.*
[122] 12 VIC 716.
[123] 12 VIC716(2).
[124] 12 VIC 712.
[125] *Id.*
[126] V.I. Code Ann. tit. 12, § 711 (2006 & Supp. 2009).
[127] *Id.*
[128] *See* 12 VIC 711(1).

> chapter and the abatement of other potential pollution hazards as authorized herein; and
>
> (c) *all costs and expenses of the cleanup and rehabilitation of waterfowl and other wildlife, whether performed by the Department or other agency.* (emphasis added).[129]

Those responsible for discharges are jointly and severally liable for restoring to the fund the monies drawn by the government, including overdrafts.[130] If a party fails to respond within thirty days to a demand for reimbursement, the matter will be referred to the Department of Law.[131]

viii. Public Nuisance, Statutory

In addition to the common law cause of action for public nuisance, there is in the USVI a statute criminalizing public nuisances.

Under the statute, anything which

> (1) is injurious to health, indecent, offensive to the senses or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by a considerable number of persons; or
>
> (2) unlawfully obstructs the customary free passage or use of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street or highway is a public nuisance.[132]

The statute caps penalties for violations at $200 or one year in prison or both.[133]

Because navigation and fishing rights are considered customary uses (described in greater detail, *supra*) it is likely that discharges of oil or other pollutants from vessels are punishable under this provision. By its terms, however, the law only applies in navigable lakes, rivers, bays, streams, canals or basins. This inhibits the law's usefulness in redressing harms to coral reefs, particularly if these are areas in which corals do not grow. It is possible that the exclusion of "coastal waters" or other navigable waterways was a legislative oversight.

It is also unclear whether the statute precludes common law public nuisance causes of action. In *Government of V.I. v. Latalladi*, the court declared that the criminal statute is "declaratory of the common law; and that "[A] nuisance is public if it affects the entire community or neighborhood, or any considerable number of persons."[134] Resolution of this question will likely require further research, though it is foreseeable that the government could pursue both actions – an action sounding in tort and a criminal charge – independently.

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[129] 12 VIC 711(5).
[130] 12 VIC 711(6).
[131] 12 VIC 711(6)(a).
[132] Virgin Islands Code Title 14 S. 1461.
[133] 14 USVI Code 1462
[134] 8 V.I. 137, 1970 V.I. LEXIS 7 (Mun. Ct. St. T. and St. J. 1970).

ix. USVI Coastal Zone Management

The purposes of the Coastal Zone Management law are, *inter alia*:

> (1) to protect, maintain, preserve and, where feasible, enhance and restore, the overall quality of the environment in the coastal zone, the natural and man-made resources therein, and the scenic and historic resources of the coastal zone for the benefit of residents of and visitors of the USVI;
>
> [. . .]
>
> (4) to assure the orderly, balanced utilization and conservation of the resources of the coastal zone, taking into account the social and economic needs of the residents of the USVI;
>
> (5) to preserve, protect and maintain the trust lands and other submerged and filled lands of the USVI so as to promote the general welfare of the people of the USVI; [and]
>
> [. . .]
>
> (8) to conserve ecologically significant resource areas for their contribution to marine productivity and value as wildlife habitats, and preserve the function and integrity of reefs, marine meadows, salt ponds, mangroves and other significant natural areas.[135]

While the purposes of the act are drawn broadly enough to permit the Coastal Zone Commission (created by 12 VIC §904) to issue rules and regulations to protect corals, it is structured as a zoning statute. The law establishes a Natural Resources Reclamation Fund which can be used to meet expenses incurred in the administration and enforcement of the law and in the discharge of the Coastal Zone Management Commission's duties.[136]

Part III. Remedies in Admiralty, an Overview[137]

This section explores a few basic principles of admiralty law that might supply remedies for damages to coral reefs caused by vessels, particularly in the special circumstance of foreign flagged vessels causing damages and then leaving, or attempting to leave the jurisdiction. A powerful remedy afforded by admiralty jurisdiction is the maritime lien.

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[135] 12 VIC 903.
[136] V.I. Code Ann. tit. 12, § 911(f)(4) (2006 & Supp. 2009)
[137] This review is neither exhaustive nor authoritative.

A. In General, the Significance of Admiralty Jurisdiction

In the vast majority of contract and tort cases sounding in admiralty, a maritime lien – a special security interest that may attach to vessels, cargo, and other maritime property, enforceable by a special *in rem* process[138] – arises, permitting seizure *without a hearing* and before judgment by *ex parte* order of the court.[139] Because of the potential for vessels to immediately leave the jurisdiction after striking and harming coral reefs, *in rem* admiralty remedies may prove very useful to the government of the USVI.[140]

However admiralty cases need not proceed exclusively *in rem*. Because they were not known at common law, *in rem* proceedings are a distinctive admiralty remedy, and fall within exclusive federal admiralty jurisdiction.[141] However, a suit in admiralty may be filed *in personam* or *in rem* (or both, if applicable prerequisites are present).[142] Where non-admiralty remedies are sought (i.e. when not seeking a maritime lien) cases may be heard *in personam* in *state* courts under the saving to suitors provisions of 28 USC §1333(1)(granting federal district courts the exclusive jurisdiction to hear admiralty cases, "saving to suitors" all remedies available in state courts.).[143] Under this clause, *state* courts have concurrent jurisdiction with federal district courts to adjudicate admiralty claims to the extent that distinctive admiralty remedies are not involved and as long as it is not prohibited by statute.[144] To proceed in state court, personal jurisdiction over defendants must be established according to ordinary procedural rules.[145]

Thus, under maritime law, suitors have three possible (and not mutually exclusive) remedies: 1) against the vessel; 2) against the owner; and 3) against the master.[146] On the one hand, a vessel may be seized under a maritime lien theory and held until the lien is released (after judgment or after the issuance of an undertaking) *before leaving territorial waters*. Alternatively, once the vessel has left the jurisdiction, a judgment *in personam* – against the owner or master – can be secured through the ordinary judicial process. A default judgment can be entered (in the event that the named party does not appear) and enforced in a foreign court. The latter is likely the more costly and complicated approach. It may be the only option available, however, when vessels run aground and then leave the jurisdiction.

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[138] Liens attach simultaneously with the cause of action and adhere to maritime property wherever it goes and even through changes of ownership until it is either executed through the *in rem* legal process available in admiralty. CJS Martime Liens §8; Schoenbaum at 421.
[139] *Id.* at 8 (emphasis added).
[140] One of the purposes of the maritime lien is to ensure that ships do not escape their debts by sailing away. C.J.S. Vol. 55, Maritime Liens §2
[141] Schoenbaum at 7, 80 (See also Madruga v. Superior Court, 346 US 556 (1954)
[142] (Schoenbaum at 7).
[143] 28 USC 1333(1); Schoenbaum at 7.
[144] *Id.*
[145] *Id.*
[146] CJS Maritime Liens §85.

B. The Power of the District Court of the Virgin Islands to Hear Admiralty Cases

Whether the District Court of the Virgin Islands is empowered to hear cases *in rem* and to utilize the powerful tools exclusive to admiralty (i.e. the maritime liens) is a complex and important question. Because, among other things, the federal Congress in the Revised Organic Act of 1954 grants to the District Court of the Virgin Islands "the jurisdiction of a District Court of the United States," and the District Court of the Virgin Islands is included within the definition of "district court" in the Federal Maritime Liens Act, on balance it seems that the District Court of the Virgin Islands is competent to issue admiralty remedies. These may be useful for arresting foreign-flagged that have damaged coral reefs before they are able to leave territorial waters.

Judicial power in the USVI is vested in a court of general jurisdiction designated the "District Court of the Virgin Islands," in the "Superior Court of the Virgin Islands," and in "the Supreme Court of the Virgin Islands," – the court of last resort.[147] The Superior Court and the Supreme Court were both established by statute pursuant to §21(a) Revised Organic Act of 1954.

The Revised Organic Act specifies that the District Court shall have the jurisdiction of a District Court of the United States.[148] However, the District Court of the Virgin Islands is a legislative court (authorized by the U.S. Congress pursuant to its Article I powers), not a constitutional court (formed pursuant to Article III of the U.S. Constitution).[149] As such, it may be a court of the U.S. for some purposes but not for others, and any particular statute, and any definitions contained therein, must be read to determine which is the case, *as statutory powers granted to courts of the U.S. are not automatically applicable to the Virgin Islands District Court*.[150]

Because of the vital importance that international and interstate shipping had to the new nation, the founders drafted Article III, §2 of the United States Constitution to empower the federal judiciary to hear "all Cases of admiralty and maritime Jurisdiction," to promote uniformity in admiralty law. Because the federal Congress in the Revised Organic Act of 1954 grants to the District Court of the Virgin Islands "the jurisdiction of a District Court of the United States," and because federal district courts are empowered to hear admiralty cases, it is likely that the District Court of the Virgin Islands would be considered a federal district court with jurisdiction to issue admiralty remedies.[151]

There are other indications that the District Court of the Virgin Islands has the authority to hear cases sounding in admiralty. First, the District Court has heard admiralty cases in the past.[152]

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[147] §21(a) Revised Organic Act of 1954; 4 VIC S. 2.
[148] §22(a) Revised Organic Act of 1954.
[149] §21(a) Revised Organic Act of 1954; U.S. v. Lewis, CA 3d 1972, 8 V.I. 500 (1972)(Shepardize)
[150] *Id.* (emphasis added).
[151] Revised Organic Act of 1954 S. 22(a); *Ferguson v. Kwik-Check Winn-Dixie Stores, Inc.* 7 U.S.V.I. 639 (DCVI 1970)(noting that Congress demonstrated in the broad grant of power in S. 22(a) of the Revised Organic Act its intention to integrate the District Court of the Virgin Islands into the federal system)
[152] *See e.g. Sosebee v. Rath*, 893 F. 2d 54 (3rd Cir. 1990); *Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp*. 726 F 2d 121 (3rd Cir. 1984).

Second, the Court's local rules require the clerk of the court to maintain an admiralty docket.[153] Finally, the District Court of the Virgin Islands is included within the definition of "district court" in the Federal Maritime Liens Act.[154]

However, alternative interpretations are possible. For example, the Office of the Attorney General of the Virgin Islands has issued a formal opinion that admiralty and maritime laws lie exclusively within the federal jurisdiction.[155] This could be an assertion that the *local* courts of the Virgin Islands are not the appropriate venue for seeking admiralty remedies, despite the "saving to suitors" clause of 28 USC 1333(1) which reserves to suitors the remedies available under state law. It could also be a reflection of the contraposition noted in *U.S. v. Lewis* that *statutory powers granted to courts of the U.S. are not automatically applicable to the Virgin Islands District Court;* that a territorial court may be a court of the U.S. for some purposes but not for others, and any particular statute, and any definitions contained therein, must be read to determine which is the case.[156] As noted above, because the grant of power to federal courts to hear cases in admiralty derives from the U.S. Constitution rather than from a statute, this line of reasoning is likely inapplicable.

C. A Note on the Applicable Substantive Law in Admiralty Cases

The substantive law applicable in admiralty cases is, in general, the federal maritime law, which in many respects is distinct from state law and the common law.[157] However, determining what substantive law applies in admiralty cases has been the subject of some controversy, and "the jurisprudence of the Supreme Court in the area of federalism in admiralty is plagued with inconsistencies."[158] Closer inspection of these issues will be required moving forward; however, the Supreme Court of the United States has set out a couple of important basic principles: (1) state law may fill gaps and supplement federal law; (2) it cannot defeat or narrow a fundamental tenet of admiralty law; and, (3) if there is a strong federal interest, state law will not be allowed to impair the essential uniformity of maritime law.[159] On the other hand, state law may prevail if a state has a strong interest in the subject matter of an action and there is correspondingly little need for uniformity in federal maritime law.[160]

"General maritime law governs maritime occurrences and state law must yield to the required uniformity of the maritime law."[161] This is true whether the suit is brought in the admiralty forum, on the "law side" of the federal court (i.e. not admiralty), or in state court.[162] However, this is not understood to mandate the exclusive use federal rules in admiralty proceedings.[163]

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[153] Rule 79.1(a)(8) *Local Rules of Civil Procedure of the District Court of the Virgin Islands* (amended December 2009).
[154] 46 USC §31301(2)(C).
[155] 1 V.I. Op. A.G. 226.
[156] 8 V.I. 500
[157] Schoenbaum at 85.
[158] Id.
[159] Id. at 92, 93.
[160] Id
[161] *Id.*
[162] Id.; *Southern Pacific Co. v. Jensen* 244 US 205 (1917).
[163] Schoenbaum at 86.

The demand for uniformity is not inflexible. State and federal interests must be balanced.[164] Furthermore, because the federal judiciary very rarely issues new principles of general maritime law, there are numerous gaps in the federal admiralty laws that have been filled by "borrowing" state laws.[165] Through this borrowing process, state laws are incorporated into the general maritime law.[166] State law must neither contravene a clearly established rule of general maritime law nor impair the principle of national uniformity.[167]

The court has also permitted the application of state law when the matter is "maritime but local."[168] Three conditions must be met for this to occur: a) no applicable admiralty rule may exist; b) local and state interests must predominate; and c) the uniformity principle must not be crucial.[169] While it can impair the uniformity principle, this "maritime but local" process is a way to accommodate differing state and federal interests.[170]

Finally, the Supreme Court has allowed the application of state law when "admiralty law is not a pervasive system and state law supplements but does not contradict admiralty rules."[171]

D. Specific Causes of Action in Admiralty

Actions for negligence and for allision (where a vessel collides with a fixed object) may apply in the event of vessel groundings that destroy reefs.

"The negligence cause of action may be invoked by virtually anyone who suffers injury or loss in an admiralty setting."[172] The elements of a negligence action in admiralty are basically the same as a common law action: duty, breach, causation and harm.[173] Generally, a duty of care exists when injuries are foreseeable . Foreseeability is assessed by weighing the probability of an accident arising from a given activity, the potential extent of injury, and the cost of adequate precautions. A duty can also stem from duly enacted laws, regulations, and rules; custom; or the dictates of reasonableness or prudence.[174]

At common law negligence may also be shown by evidence of violation of a statute or regulation under a theory known as "negligence per se". This concept is also applicable in the admiralty context.[175] To establish negligence under this theory, there must be an applicable statute which a defendant has been violated; the plaintiff must be included in the class of persons the statute is

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[164] *Id.* at 87; Kossic v. United Fruit Co., 365 US 731, 739 (1961)
[165] Id. at 86, 87; East River Steamship Corp. v. Transamerica Delaval, 476 US 858, 865, n. 2 (1986).
[166] *Id.* at 88; *Jones and Laughlin Steel Corp. v.* Pfeifer, 462 U.S. 523 (1983); Herbert v. Outboard Marine Corp., 638 F.Supp. 1166 (E.D.La. 1986).
[167] Id. at 88.
[168] Id. at 88.
[169] Id. at 88; Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 US 310 (1955); St. Hilarie Moye v. Henderson, 496 F.2d. 973 (8th Cir. 1974).
[170] Id. at 88, 89.
[171] Id. at 90.
[172] Schoenbaum at 100.
[173] *Id.*
[174] *PA RR Co. v. The Marie Leonhardt, 202 F.Supp. 368, 375 (E.D. Pa. 1962), affirmed 320 F.2d 262 (3d. Cir. 1963).*
[175] *Id.* at 104.

designed to protect; and the harm suffered must be the kind that the statute or rule was designed to prevent.[176]

Res ipsa loquitur is also applicable in admiralty.[177] Under this doctrine, negligence can be shown by circumstantial evidence as long as a fact finder determines that

> (1) the thing causing injury was under the exclusive control of the defendant;
>
> (2) the injury is such as in the ordinary course of things does not occur if one having exclusive control exercises proper care; and
>
> (3) the injury was not due t any negligence on the part of the plaintiff.[178]

When it is determined that fault has caused or contributed to damage, as happens with a collision or allision, a party may be liable.[179] Fault is assessed against "general concepts of prudent seamanship and reasonable care, statutory and regulatory rules governing the movement and management of vessels, and other maritime structures, and recognized customs and usages."[180] The most frequent source of liability for marine casualty is the violation of a statute or regulation.[181] Among the most important are "rules of the road" for navigation which may prescribe, for example, safe speeds and a proper lookouts.[182] Internationally accepted systems also exist, such as the International Regulations for Preventing Collisions at Sea (COLREGS).[183]

E. Process

The Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims 28 U.S.C.A. apply to the procedures in admiralty and maritime claims with respect to maritime attachment and garnishment, and actions *in rem*, among others.[184] The Federal Rules of Civil Procedure also apply unless they are inconsistent.[185]

i. Remedies in *In Personam* Actions (against people)

If the defendant is not found within the district when a verified complaint praying for attachment (and accompanying affidavit are filed), the plaintiff in the complaint may request process to attach the defendant's tangible or intangible personal property (e.g. vessels) – up to the amount sued for – held by garnishees named in the process.[186] If the plaintiff certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and

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[176] *Id.* at 104.
[177] *Id.* at 104.
[178] *Id.* at 104.
[179] At 714.
[180] at 715.
[181] *Id.*
[182] *Id.* at 715 – 717.
[183] *Id.*
[184] Rule A(1).
[185] Rule A(2).
[186] Rule B(1)(a).

process of attachment and garnishment.[187] The plaintiff then has the burden of showing in a post attachment hearing that exigent circumstances existed.[188] If the property is a vessel, the summons, process, and any supplemental papers must be delivered to the marshall for service.[189]

Note that state laws providing for seizure of person or property to secure satisfaction of ultimate judgment are available to plaintiffs also. These may include, arrest, attachment, and garnishment, among others.[190]

ii. Remedies in *In Rem* Actions (against property)

As explained above, actions *in rem* may be brought to enforce maritime liens. When a plaintiff submits a complaint, the court will review the complaint and, if satisfied that the conditions for an *in rem* action exist, issue an order directing the clerk to issue a warrant for a vessel's arrest.[191] If the plaintiff certifies that exigent circumstances exist that make court review impractical, the clerk must promptly issue a warrant for the arrest of the property.[192] The plaintiff has the burden of showing exigent circumstances existed at a post-arrest hearing.[193] Once a warrant is issued, the marshal serves the warrant.[194]

These rules recognize that in some cases a judge may be unavailable and a vessel may be about to depart the jurisdiction.[195] One of the prerequisites for seizure under this provision is that the vessel be within the territorial jurisdiction of the court.[196] Seizure of a vessel will likely require an armed government official and the cooperation of the U.S. Coast Guard and other governmental authorities.[197]

After a vessel is arrested, Rule E(4)(f) calls for a prompt hearing at which the plaintiff must show why the arrest or attachment should not be vacated.[198]

F. Other Issues in Admiralty Law

Admiralty law may provide a series of potentially powerful tools for redressing injuries that vessels groundings and discharges may cause to coral populations in the USVI. For example, in the event of violations, vessels may be seized under a maritime lien theory and held until the lien is released (after judgment or the issuance of an undertaking, for example) *before they leave territorial waters*. Importantly, it also seems the District Court of the USVI is competent to

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[187] Rule B(1)(c).
[188] Id.
[189] Rule B(1)(d).
[190] FRCP Rule 64.
[191] Rule C(3)(a).
[192] Rule C (3)(a)(ii).
[193] *Id.*
[194] Rule C (3)(b).
[195] Notes of Advisory Committee on Rules – 1985 Amendment, Rule C.
[196] Rule C (1)(a), (b).
[197] Notes of Advisory Committee on Rules – 1991 Amendment, Rule C.
[198] Rule E(4)(f)

provide this sort of remedy. Still, many admiralty and maritime issues require closer scrutiny. Among them:

1. May the government of the USVI bring an action in admiralty in any federal district court?

2. If a vessel leaves the waters of the USVI, bound for Florida, for example, should or can a proceeding *in rem* be filed by the government of the USVI in Florida to arrest the vessel?

3. Can arrests occur outside the three mile limit of the USVI's territorial waters?

4. If one wishes to sue for a violation of USVI law, is it possible to take advantage of the maritime lien, or are maritime liens only applicable under the federal common law of admiralty?

Part IV. Conclusions, Recommendations

While the USVI does not have a comprehensive coral conservation statute that furnishes a neat set of remedies, there are powerful tools available – statutory, common law, and regulatory – to remedy injuries to coral reefs caused by vessel groundings and discharges.

Several useful tools apply across the board. For example, to ease the burden on strained government resources, the government of the USVI could engage private litigators under contingent fee arrangements to sue under most of the statutory, common law, or regulatory provisions that apply to coral protection. While not without limitations, this approach may offer a cheaper alternative to the regulatory process, and ensure that suits against offenders proceed across administrations, despite changes in personnel. Also, the Fish and Game fund is available to finance wildlife restoration projects. Enhanced enforcement of existing conservation laws will grow the fund. By removing the $250,000 cap that exists now, the government could increase the monies available for long term restoration of coral populations.

The most promising strategies for remedying damages and promoting long term recovery in coral populations include the following.

1. Assess heavy fines for violating the strict coral protection provisions of the Endangered Species Act. Fines may be as high as $10,000 per specimen killed. Enforcement of the law might deter prospective violators. Moreover, because proceeds from all fines imposed by the courts for violations of conservation laws accrue to the Fish and Game Fund, penalties assessed and damages collected would make more resources available for long term restoration projects. Lifting the $250,000 statutory cap on the size of the fund is also recommended.

1a. A policy statement from the Governor of the Territory or from the head of the DPNR could prioritize enforcement of these laws.

2. Where appropriate, use maritime liens. These privileged claims upon maritime property (i.e. vessels) arise whenever the maritime property in question causes injuries. Maritime liens adhere immediately, permitting the arrest of offending vessels well before the entry of a judgment against the vessel or its owners. They serve as security for a claim, giving creditors, i.e. the Territory, the right to appropriate a vessel and, in the event of a favorable judgment or resolution of the action, to sell it to satisfy the claim. The maritime lien is a very powerful enforcement tool. Its regular use would likely have a deterrent effect.

> 2a. To facilitate enforcement of maritime liens, the government of the USVI should consider developing an *in rem* complaint template that complies with The Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. This will allow for the quick arrest of offending vessels before they leave the Territory's jurisdiction.
>
> 2b. A new statutory provision might prescribe that damage awards arising out of claims secured by maritime liens accrue to a special fund, i.e. the Fish and Game Fund. This might be particularly useful if the statutory cap on the Fish and Game Fund were lifted.

3. Use public trust and public nuisance cases to recover damages to natural resources. While most conservation statutes prescribe penalties for violations, a public trust case permits the recovery of damages for injuries suffered in the event of an unreasonable interference with the use and enjoyment of trust resources (i.e. fishing, navigation, wildlife in the coastal and marine zone under the jurisdiction of the territorial government). Public nuisance actions similarly protect public uses and may facilitate the recovery of damages. Where government resources are limited, a contingent fee arrangement with outside counsel may permit enforcement, if not a large recovery.

4. Sue for damages to proprietary interests. As the owner of coral resources – "the Territory *owns* all fish, [. . .] animals, plants, and all other species comprising the marine, estuarine, and freshwater fauna and flora within the jurisdiction of the territory for public use,"[199] – the government of the USVI has standing to sue under basic common law principles (conversion, negligence, e.g.) when they are damaged or destroyed to recover their value.

5. In the event of oil spills, assess penalties for violations of the Oil Protection Act. Responsible parties are subject to civil penalties of up to $50,000 a day for violations.[200] Furthermore, to facilitate enforcement, the law provides for an absolute maritime lien over any vessel and its freight for all clean up and other damages incurred as a result of the discharge.[201] This is a very strong provision, particularly if natural resource damages are captured by the term "other damages."

6. Make regulatory changes. Small regulatory changes could be implemented – as noted in various places throughout the analysis – that could have potentially large impacts. The most promising are noted below. It is acknowledged that this may be an inefficient use of resources given that the regulatory process can be time-consuming. To implement all of the small

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[199] Title 12 309(b)
[200] 12 VIC 716.
[201] *Id.*

regulatory changes suggested would likely entail prohibitively high transaction costs. Channeling resources toward the enforcement of existing laws or the enactment of a single comprehensive statute would likely be the more efficient way to achieve the goals desired.

> 5a. Regulatory change 1. Designate more marine protected areas to widen the enforcement area and applicability of regulations. The government could collect more fines and grow the Fish and Game Fund.
>
> 5b. Regulatory change 2. Issue coral specific protective regulations under the Commercial Fishing Act. By including a provision forbidding the killing or taking of corals in territorial waters, the DPNR may then utilize the very strong enforcement provisions in the fisheries act that authorize warrantless seizures of vessels when there is probable cause to believe that a law or regulation has been violated.[202] The law already provides for a maritime lien, which adheres until fines for violations are paid.[203] With enhanced penalty provisions, this could be very useful.

Finally, if it determines that the current patchwork of laws and remedies is ill-equipped to address threats posed by vessel grounding and discharges, the legislature may choose to develop a new civil cause of action for destruction of coral reefs and house it within a new coral conservation law. The new statute could provide explicitly for the recovery of natural resources damages in a civil action. There are good models available in the federal Clean Water Act and the Oil Protection Act for natural resource damages provisions.[204] This would likely be a time and resource intensive process, however the end result would be a robust legal framework for addressing a prominent anthropogenic threat to the health and longevity of coral reef systems in the USVI.

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[202] 12 VIC 305(a).
[203] 12 VIC 305(e).
[204] See also *Exxon Valdez Natural Resources Damage Assessment Plan;* Christine Cartwritght, *Natural Resource Damage Assessment: The Exxon Valdez Oil Spill and its Implications*, 17 Rutger's Computer & Tech. L.J. 451 (1991).