

The Mouse That Roared: Can Louisiana’s Coastal Zone Management Consistency Authority Play a Role in Coastal Restoration and Protection?*

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I. INTRODUCTION

The Coastal Zone Management Act (CZMA) was passed in 1972 in order to conserve our nation's coastal areas, foster wise use, and to facilitate cooperation between state and federal authorities whose actions affect coastal resources.¹ The federal consistency provisions of the CZMA give states the power to ensure that federally conducted or approved activities, including Outer Continental Shelf (OCS) activities, comply with the states' federally approved coastal management program (CMP).²

Louisiana attempted to use this power in 1991 with respect to a United States Department of Minerals Management Service (MMS) OCS lease sale.³ After failing to obtain a preliminary injunction against MMS for the issuance of a permit, the state has not tried to exercise the power again.

Louisiana has incurred, and continues to incur, many of the nation's adverse effects from offshore oil and gas activities.⁴ The federal government is aware of Louisiana's plight and the continuing price that the state is paying to meet the nation's energy needs.⁵ The United States Commission on Ocean Policy (Commission) states that despite advancements in safety and environmental protection "there remain numerous environmental issues associated with the development and production of oil and gas from the OCS. *Foremost among these are physical damage to coastal wetlands and other fragile areas by OCS-related onshore infrastructure and pipelines.*"⁶ Seven other categories of impacts are listed, all of which affect Louisiana.⁷ The Commission also acknowledged the lack of equity in the federal-state partnership for

1. See 16 U.S.C. § 1452 (2000).

2. See *id.* § 1456(c)(1)(C).

3. *Infra* Part VII.

4. PETER SMITH & WALDEMAR S. NELSON, LOUISIANA COASTAL AREA RESTORATION FEASIBILITY STUDY E-1 (2002).

5. See generally U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY (2004) [hereinafter OCEAN BLUEPRINT].

6. *Id.* at 361 (emphasis added).

7. *Id.* The other seven categories are:

physical disruption of and damage to bottom-dwelling marine communities; discharge of contaminants and toxic pollutants present in drilling muds and cuttings and in produced waters; emissions of pollutants from fixed facilities, vessels, and helicopters; seismic exploration and production noise impacts on marine mammals, fish, and other wildlife; immediate and long-term ecological effects of large oil spills; chronic, low-level impacts on natural and human environments; and cumulative impacts on the marine, coastal, and human environments.

Id.

energy production between the coastal and noncoastal states, especially those coastal states adjacent to OCS oil and gas production.⁸ The Commission recommends that

Congress should use a portion of the revenues the federal government receives from the leasing and extraction of Outer Continental Shelf (OCS) oil and gas to provide grants to all coastal states that can be invested in the conservation and sustainable development of renewable ocean and coastal resources. States off whose coasts OCS oil and gas is produced should receive a larger share of such revenue to compensate them for the costs of addressing the environmental and socioeconomic impacts of energy activity in adjacent federal waters. None of the programs that currently

8. *Id.* at 359-60. This discrepancy is somewhat overstated and often misunderstood. There is definitely an inequity among coastal states as to the sharing of offshore royalties and there is also a difference between terrestrial and offshore royalty shares. However these two categories cannot be confused. Despite the claims of some critics, Louisiana has not been treated any differently than most of the other coastal states in terms of OCS royalty distributions. Such claims are misleading and are based on the erroneous belief that terrestrial and OCS royalties are treated the same under the law. When comparing Louisiana's OCS royalty share to landlocked states' terrestrial royalty share it does appear that Louisiana is not currently getting its "fair share" of royalties. However, comparing terrestrial royalties to OCS royalties is like comparing apples to oranges. Under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356a (2000), the sole beneficiary of oil and gas royalties from such resources derived outside of state waters is the federal government. *Id.* § 1338. Therefore, as a general premise, the State of Louisiana (and all other states for that matter) does not have any claim to OCS mineral revenues under current federal law, regardless of the effect of the recovery of those minerals on the adjacent states' coastal environment or economy. Despite the reservation of OCS royalties to the federal government, in an effort to offset the impacts of OCS mineral recovery activities to adjacent states, Congress incorporated coastal impact assistance provisions into the OCSLA. *See generally id.* § 1356a(d). Each fiscal year, the Secretary of Commerce shall allocate money to be distributed among the approved states. *See id.* Sixty percent of this amount is shared equally among the approved states. *Id.* § 1356a(d)(1)(A). The remaining forty percent of the allocated funds is to be divided among the approved states according to the amount of OCS production within 200 miles of that state's coast (subject to a few exceptions). *See id.* § 1356a(d)(1)(B), (d)(2). It is important to note that the allocation of monies to the political subdivisions of the approved coastal states *may* create an unfair distribution based on population size because the state still receives the same amount of money regardless of its coastal population size. Another place inequities may arise is within the states themselves, where certain areas may sustain more damage from OCS activities, but, due to lower population numbers, may not receive as much funding. Still further, inequities may arise from the differences in the amount of offshore land claimed by various states as part of their state waters. *See generally* Mindy Heidel, *Louisiana's Seaward Boundaries*, 82 LA. COASTAL L. 15 (2003). For example, along the Gulf of Mexico Coast, Texas and Florida have successfully secured state waters that extend to nine miles from shore, whereas Louisiana, Mississippi, and Alabama are limited to state waters that extend to three miles from shore. The practical significance of this difference is that Florida and Texas have six more miles of state waters than do the other Gulf states. This allows them to recover the fifty percent share of federal royalties granted to states from minerals extracted from state lands over a much wider geographical area than Louisiana, whose share of the royalties drops from fifty percent to its much smaller share of royalties from federal lands at three miles from shore.

receive revenues from OCS oil and gas activities should be adversely affected by this new allocation.⁹

Despite the Commission's recognition of the longstanding and well known problems that OCS mineral development has caused to coastal states like Louisiana, pleas for assistance have, for the most part, gone unnoticed.

In the early 1980s, the Reagan Administration attempted to terminate the CZMA (which, in turn, would have ended state coastal management programs) and did terminate the Coastal Energy Impact Assistance Program which had been instituted to assist states in addressing the adverse environmental effects of OCS oil and gas production.¹⁰ Congress then placed moratoria on OCS oil and gas leasing off some west and east coast states and parts of Florida, putting even more pressure on the Northwestern Gulf to meet the nation's domestic energy production needs.¹¹

While the Northwestern Gulf is the nation's OCS energy workhorse, currently providing ninety-five percent of U.S. offshore production, with the attendant adverse impacts, the coastal states are specifically prohibited from levying severance taxes on minerals produced in the OCS and transported through their territory.¹² However, minerals removed from federal lands within state borders are subject to state severance taxes.¹³ From 1998 to 2001, the Conservation and Reinvestment Act (CARA) was considered and rejected by Congress.¹⁴ CARA would have provided a share of federal OCS revenues to protect coastal resources and repair damage from OCS activities.¹⁵ Congress was unwilling to assist Louisiana despite a direct plea from Governor

9. OCEAN BLUEPRINT, *supra* note 5, at 360.

10. MINERALS MGMT. SERV., COASTAL IMPACT ASSISTANCE REPORT TO THE OCS POLICY COMMITTEE FROM THE COASTAL IMPACT ASSISTANCE WORKING GROUP (1997).

11. Tim Eichenberg, *State Jurisdiction Under the Coastal Zone Management Act After Extension of the U.S. Territorial Sea*, 2 TERRITORIAL SEA J. 119, 128 (1992).

12. *See* 43 U.S.C. § 1333(a).

13. "The state shares in the revenues from oil and gas production on both public land and private land within its taxing jurisdiction by assessing a severance tax." James A. Richardson & Loren C. Scott, *Mineral Taxes and Revenues and Budgetary Stability*, in LOUISIANA'S FISCAL ALTERNATIVES: FINDING PERMANENT SOLUTIONS TO RECURRING BUDGET CRISES 118 (James A. Richardson ed., 1988).

14. H.R. 4717, 105th Cong. (1998); H.R. 3245, 106th Cong. (1999); S. 2123, 106th Cong. (2000); S. 25, 106th Cong. (1999); S. 1318, 107th Cong. (2001); S. 1328, 107th Cong. (2001); H.R. 701, 107th Cong. (2001). All of these bills died before leaving their respective houses.

15. H.R. 4717, 105th Cong. (1998).

Kathleen Blanco.¹⁶ The Bush Administration is also reluctant to make a significant commitment to the state's coastal restoration needs.¹⁷ The failure of these efforts, especially in the wake of the recent environmental disasters wrought upon the region by Hurricanes Katrina and Rita, should make it obvious that Louisiana must employ a new tactic in its efforts to protect its coast from the impacts of OCS oil and gas activities.

The obvious and readily available mechanism for change is the federal consistency authority under the CZMA. Despite the history of neglect and frustration associated with the federal consistency authority, we argue that it can be an effective tool to protect our coastal resources and in this Article we intend to show how and why it should be used.

Part II of the Article is devoted to how federally approved projects off the coast of Louisiana have contributed to the state's eroding coastline, a state and national crisis. This Part also shows that there is ample documentation of the adverse effects of OCS development on Louisiana's coastal wetlands and other natural resources to justify immediate action. Part III is a review of the history of OCS mineral development and the interaction of this industry with coastal states through the CZMA and the Outer Continental Shelf Lands Act (OCSLA) that culminate in a clear congressional grant of authority to states to require that OCS development be consistent with their approved CMPs. Part IV contains an examination of how some other states are addressing OCS development and what lessons may be gleaned from those examples. Part V is an analysis that demonstrates that Louisiana's federally approved CMP establishes guidelines for coastal resource protection on use as well as how federal OCS activities are inconsistent with those guidelines. Part VI is an overall review of the CZMA consistency provision process. Part VII is a review of the consistency review process and the history of Louisiana's attempts to seek redress for OCS-related coastal impacts. Part VIII proposes means by which Louisiana can begin to make better use of its federal consistency authority granted by the CZMA to help the state mitigate the loss of a nationally essential resource: The Louisiana coast. The Article

16. *La. Governor Urges Coastal States To Join Coalition Seeking Oil and Gas Royalty Relief*, NEW ORLEANS CITY BUS., Dec. 6, 2004, at 1. Although this source notes that Governor Blanco's efforts to obtain more of a share of OCS royalties for Louisiana than currently provided for, it continues to rehash the misconception that terrestrial and offshore royalties are treated the same under federal law as noted *supra* note 8. In this article, coastal states are contrasted with Wyoming when considering oil and gas royalties inuring to the states. Certainly this comparison is misplaced, as Wyoming does not have any OCS interests.

17. Gerard Shields, *Bush Opposes Sharing Revenue*, THE ADVOCATE (Baton Rouge, La.), June 16, 2005, at 1-A.

concludes in Part IX with charges to responsible state entities to use the CZMA consistency provisions to protect the state's coastal zone.

II. PROBLEMS WITH OCS ACTIVITIES IN LOUISIANA

Louisiana's coastal zone offers valuable resources for the entire nation, but this precious coast is disappearing at a disturbing rate.¹⁸ According to the National Oceanic and Atmospheric Administration (NOAA) Louisiana currently has 7721 square miles of coast (5.3 million acres) with a coastal population of 2,044,910.¹⁹ The Louisiana coastal zone encompasses eighteen parishes.²⁰ Wetlands in Louisiana's coastal zone represent approximately forty percent of the coastal wetlands in the continental United States.²¹ "Coastal wetland habitats in Louisiana serve as the foundation for a \$1 billion seafood industry, a \$200 million sport hunting industry, a \$14 million alligator industry, valuable fur resources, wild crawfish resources, hardwood timber and commercial livestock rangelands that equate to thousands of jobs crucial to the economies of many coastal communities."²² Activities such as oil and gas exploration, gas production, and leveeing along the Mississippi and Atchafalaya Rivers have caused staggering losses of these fragile wetlands as well as land in the coastal zone.²³ Although sources differ on the exact amount, reasonable estimates show that erosion and anthropogenic destruction have resulted in the loss of approximately 600,000 acres of Louisiana's coast in the past 75-80 years, at an average rate of 20,000 to 25,000 acres per year, or 25 to 35 square miles per year.²⁴ From the 1780s to the

18. SMITH & NELSON, *supra* note 4, at E-1.

19. Office of Ocean & Coastal Res. Mgmt., NOAA, Ocean and Coastal Management in Louisiana, <http://coastalmanagement.noaa.gov/mystate/la.html> (last visited Dec. 6, 2006). These numbers may now overstate the population size of coastal Louisiana in the wake of the mass exodus from the region by the Hurricane Katrina evacuees, but it is apparent that the data on this page have not been updated in some time.

20. These parishes include: Ascension, Assumption, Calcasieu, Cameron, Iberia, Jefferson, Lafourche, Livingston, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Martin, St. Mary, Tammany, Tangipahoa, Terrebonne, and Vermillion. See La. Dep't of Natural Res., Office of Coastal Res. Mgmt., Louisiana Coastal Facts (2006), <http://dnr.louisiana.gov/crm/coastalfacts.asp>.

21. Justification for Action, <http://lacoast.gov/education/overview/justification.htm> (last visited Dec. 6, 2006). This number seems to fluctuate depending on the source that is consulted. Seidemann & Susman stated, in 2002, that Louisiana contained 3.5 million of the 10 million acres of coastal wetlands in the United States, or thirty-five percent. Ryan M. Seidemann & Catherine D. Susman, *Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives*, 17 J. ENVTL. L. & LITIG. 441, 445 (2002).

22. Justification for Action, *supra* note 21.

23. *Id.*

24. *Id.*; see also Christopher J. Martin, *The Use of the CZMA Consistency Provisions To Preserve and Restore the Coastal Zone in Louisiana*, 51 LA. L. REV. 1087 (1991).

1980s, Louisiana lost forty-six percent of its wetlands, more land loss than any other state in the region.²⁵

MMS itself has documented the routine and unavoidable effects of OCS activities.²⁶ Over time these effects will have a major impact on Louisiana's coastal zone. This reality was brought into bold relief when Hurricane Katrina slammed ashore in coastal Louisiana, wreaking destruction not witnessed in the region within the past century. Some amount of this destruction is no doubt attributable to the loss of coastal wetlands and their storm-buffering effect.²⁷ These unavoidable harmful effects on the physical, biological, and socioeconomic environments due to proposed actions in the leasing programs, as described by MMS, include: Routine operations such as discharges of drilling muds, hydrocarbons, and nitrous oxide; dredging; oil spills; pipeline and structure emplacement, all of which cause inescapable adverse impacts.²⁸ These operations increase emissions of air pollutants; create noise and disturbances from seismic surveys, aircraft, and vessels, which lower water quality, and adversely affect marine, coastal and terrestrial mammals and birds, seafloor habitats, wetland and estuarine habitats, and the coastal wetlands themselves.²⁹ Offshore oil and gas exploration and production require extensive development of onshore infrastructure support facilities including ports, refineries, pipelines, navigation canals, transportation facilities, living accommodations for the offshore workforce and a myriad of other activities that directly and indirectly adversely affect Louisiana's coastal ecosystems.³⁰ Without mitigation of wetland losses, OCS activities are a threat to the United States' energy independence (a goal of the CZMA) because damage caused by the activities threatens the infrastructure that will carry the very oil being discovered and produced to the refiners and, ultimately, the consumers.³¹ One example of the increased expense of coastal degradation on industry

25. United States Environmental Protection Agency (EPA), Office of Research & Dev., *The Ecological Condition of Estuaries in the Gulf of Mexico* (2006), http://www.npwr.usgs.gov/resource/wetlands/wetloss/table_1.htm.

26. MINERALS MGMT. SERV., PROPOSED OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROGRAM FOR 2002-2007, FINAL ENVIRONMENTAL IMPACT STATEMENT (2002) [hereinafter FINAL EIS]; *see also* OCEAN BLUEPRINT, *supra* note 5, at 361.

27. Indeed, at least one case alleging this exact fact has already been filed against numerous oil and gas production and pipeline companies for damage sustained as a result of Hurricane Katrina. *See generally* Class Action Petition for Damage, *Barasich v. Columbia Gulf Transmission Co.*, No. 05-4161 (E.D. La. Sept. 13, 2005), 2005 WL 3161966.

28. FINAL EIS, *supra* note 26, at 4.9.

29. *Id.* at 322-23.

30. *Id.*

31. 16 U.S.C. § 1451(j) (2000).

interests is the fact that the oil and gas industry recently reported that “it spent more money [in 2002] in pipeline maintenance than in the previous decade due to erosion.”³² Unavoidable socioeconomic impacts include adverse effects on commercial and recreational fishing and decreased scenic and aesthetic quality of coastal areas.³³ MMS also acknowledges that there may be damage to archaeological resources such as the steamship NEW YORK and German U-boats from World War II due to offshore oil and gas activities, and even more damage could occur to coastal archaeological sites that are washed away by land loss.³⁴

Besides routine direct and indirect adverse effects, MMS identifies particular areas of environmental concern in the Gulf of Mexico region should an oil spill occur, such as: impacts on the endangered sperm whale, the West Indian manatee, various types of turtles, marine and coastal birds, and wetlands.³⁵ With regard to effects on wetlands, MMS states that the impact would be mild to moderate because the viability of the wetland resource would not be threatened. However, the agency contradicts itself by admitting that if “a large oil spill were to occur in shallow water and reaches of the coastal wetlands in any of the Gulf of Mexico planning areas, there is a reasonable possibility these resources may not fully recover even if remedial action is taken.”³⁶

32. John Hill, *Coastal Erosion Proposed as Official La. Crisis*, DAILY TOWN TALK, Apr. 3, 2003, at 8A.

33. FINAL EIS, *supra* note 26.

34. Minerals Mgmt. Serv., Historic Shipwrecks in the Gulf of Mexico, <http://www.gomr.mms.gov/homepg/regulate/environ/archaeological/shipwrecks.html> (last visited Dec. 6, 2006). The destructive effects of natural wave and storm action on archaeological sites have been well documented. See, e.g., Christopher M. Stojanowski, *Hydrodynamic Sorting in a Coastal Marine Skeletal Assemblage*, 12 INT'L J. OSTEOARCHAEOLOGY 259, 264-67 (2002). In this article, Dr. Stojanowski reports the deterioration of near-shore archaeological deposits at a site called Bird Island, in Florida. Despite the fact that the site is located in a “low to zero energy zone with minimal wave or tidal action,” sea level changes, high and neap tides, and some wave action was responsible for significant undercutting of the shell midden site. *Id.* at 264. Tropical cyclones and other weather conditions resulted in the near-complete destruction of this site over a period from 1964 to 1995. *Id.* at 265-66. Because oil- and gas-related activities are known to accelerate the natural erosion processes in many coastal areas, it is not a quantum leap to expect that the naturally occurring destructive activity that eroded the Bird Island site in Florida over a roughly thirty year period would only be accelerated at other coastal archaeological sites near oil and gas facilities. Additionally, one only need glance at ROBERT W. NEWMAN, AN INTRODUCTION TO LOUISIANA ARCHAEOLOGY (1984) to realize that significant numbers of archaeological sites in Louisiana lie within the coastal zone and that these sites stand to be damaged by oil and gas activities occurring nearby.

35. FINAL EIS, *supra* note 26.

36. *Id.* at iv. The inability of these areas to fully recover from oil spill activity is evident even in routine reports by NOAA. Regarding a BP/Chevron pipeline leak off the coast of Louisiana in 1998, NOAA's National Ocean Service Office of Response and Restoration (ORR) noted that “since coastal wetlands are sensitive to physical intrusion, cleanup operations are highly limited.” ORR, OIL AND HAZARDOUS MATERIALS SPILL REPORTS 37 (2001). From this

In light of all of these threats and the importance of these areas to Louisiana's economy and environmental and public safety, the time has come for Louisiana to use all the tools available to it to protect its precious coastal resources. One of the avenues Louisiana might use to accomplish its coastal restoration and preservation goals is to embrace both the spirit and the letter of the federal consistency provision of the CZMA.³⁷ The problems facing Louisiana, caused in part by OCS activities, are exactly the type of problems that the federal consistency requirements were meant to rectify. A brief history of the CZMA will be helpful to understanding how Louisiana can use its federal consistency authority.

III. THE COASTAL ZONE MANAGEMENT ACT: A BRIEF SUMMARY

A. *Oil and Gas Activities Before Passage of the CZMA*

Offshore drilling became a possibility when Texaco developed the first drilling barge in 1933.³⁸ Offshore oil drilling in the Gulf of Mexico began in 1939 in the Creole Field, off the coast of Creole, Louisiana.³⁹ Despite success with submersible and overwater drilling structures and platforms in nearshore areas such as Creole and in coastal wetland areas, it would be 1947 before offshore drilling began in earnest.⁴⁰ In 1945, President Truman issued a proclamation unilaterally extending U.S.

casual statement in a spill report, it is clear that the sensitivity of coastal wetlands means that, even if cleanup were to occur to mitigate the spill, the actual act of cleanup would detrimentally affect the wetlands. This is an incredibly disturbing reality when one considers that the size of this leak was small, an estimated 3,700 barrels (or 155,400 gallons) compared to some of the more recent spills in coastal Louisiana as a result of Hurricane Katrina. *See, e.g.*, Class Action Petition for Damages at 3, *Barasich v. Shell Pipeline Co.*, No. 05-4180 (E.D. La. Sept. 19, 2005) (alleging that the defendants' facilities spilled an estimated 5,900,440 gallons—or approximately 140,487 barrels—of oil during the storm).

37. Theoretically, Louisiana could carry out its own coastal restoration projects, but the scale and cost of such an undertaking, not to mention the need for federal approval to alter the navigable waters of the United States, require a partnership with the federal government. Entreaties to Washington, D.C., for significant assistance in combating coastal land loss have so far produced disappointing results as discussed *infra* Part VII.

38. DNR, Information Supplement on Lease Sale 135, July 29, 1991, at 2 (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana) [hereinafter Supplement on Lease Sale 135]; *see also* DIANNE M. LINDSTEDT ET AL., HISTORY OF OIL AND GAS DEVELOPMENT IN COASTAL LOUISIANA 11 (La. Geological Survey, Resource Information Series No. 7, 1991).

39. LINDSTEDT ET AL., *supra* note 38, at 11.

40. *See id.* at 11, 14. The delay between drilling in the Creole Field and the later boom of activity offshore was partially due to an interruption in industry activities due to World War II and to the invention, in 1946 of the first offshore platform to have steel rather than wood pilings. *Id.*

federal jurisdiction to include all natural resources on the nation's OCS.⁴¹ Through a long series of United States Supreme Court cases in the 1940s and 1950s, it was eventually decided that the federal government had ownership of offshore lands beyond state waters.⁴² With the passage of the Submerged Lands Act (SLA) and the OCSLA in 1952, development of the OCS for oil drilling greatly expanded.⁴³ Indeed, it is the stated purpose of the OCSLA to "promote the orderly development of the outer continental shelf."⁴⁴ What all of this eventually meant was that the states, which bore the environmental and economic burden of OCS activities, had been stripped of their ability to control these activities and subsequently the ability to act in their own best interests to protect their coastlines from the damaging effects of these activities.

The Secretary of the Interior was authorized to lease the area for oil and gas drilling through competitive bidding. From 1933 to 1969, offshore drilling in the Gulf of Mexico, Atlantic Ocean, and Pacific Ocean increased steadily.⁴⁵ This increase in drilling and production continued until January 29, 1969, when a large oil spill in the Santa Barbara Channel, off the coast of Southern California, changed the dynamics of OCS mineral activities.⁴⁶ The spill was a result of inadequate information about the sea floor and the geologic conditions in the area.⁴⁷ Lease sales in the Pacific were postponed for five years, as were those in the Atlantic and Alaska.⁴⁸ At that point, the Gulf of Mexico became the only active offshore drilling area.⁴⁹ In 1969 the Commission on Marine Science, Engineering and Resources, known as the Stratton Commission, issued its report, *Our Nation and the Sea*, in which it recommended the establishment of a coastal zone management

41. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 27, 1945). For a brief history of the effects of this proclamation on OCS exploration and production, the reader is directed to April E. Hand, *The Role of State Law in the Outer Continental Shelf Lands Act*, 72 TUL. L. REV. 2139, 2140-42 (1998).

42. See, e.g., *United States v. California*, 332 U.S. 19, 38-39 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

43. See Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (2000); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356a.

44. Robin Kundis Craig, *Regulation of U.S. Marine Resources: An Overview of the Current Complexity*, 19 NATURAL RES. & ENV'T, Summer 2004, at 3, 7.

45. DNR, *supra* note 38, at 2-4.

46. *Id.*

47. Adrienne Smith, *Standing and the National Environmental Policy Act: Where Substance, Procedure, and Information Collide*, 85 B.U. L. REV. 633, 633-34 (2005).

48. DNR, *supra* note 38, at 4.

49. *Id.*

program.⁵⁰ The Santa Barbara spill, along with the recommendations of the Stratton Commission led to the subsequent passage of the CZMA in 1972.⁵¹

B. *The Purpose of the CZMA*

The primary objective of the CZMA is to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.”⁵² Over seventy-five percent of the nation’s population is projected to live within one hundred miles of the coast by the year 2010.⁵³ Congress recognized that there was a “national interest in the effective management, beneficial use, protection, and development of the coastal zone” due to the great demands on our coasts for food, energy, defense, recreation, transportation, and other industrial activities.⁵⁴ The legislature also found that the ecological and cultural benefits of the sea are essential to the

50. See COMM’N ON MARINE SCI. ENG’G & RES., OUR NATION AND THE SEA 62 (1969) (also known as the Stratton Commission Report) [hereinafter STRATTON COMMISSION REPORT], available at www.lib.noaa.gov/edocs/stratton.

51. Codified at 16 U.S.C. §§ 1451-1456 (2000); see Kim Harb, *The Legal and Policy Dilemma of Offshore Oil and Gas Development*, 19 NATURAL RES. & ENV’T, Summer 2004, at 23, 24-25. The United Nations has also addressed the issue of each nation’s ownership of its offshore waters, first in the 1958 Convention on the Continental Shelf, 499 U.N.T.S. 311, articles 2 and 3, and ultimately in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3. Although UNCLOS does not directly interfere with resources within national jurisdictions, the Convention does expect signatory nations to protect and preserve the marine environment within and without their borders. U.N., OCEANS: THE SOURCE OF LIFE: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 20TH ANNIVERSARY (1982-2002) 4 (2002). Under this Convention, though, the United Nations has established a permitting process for mineral resources beyond national jurisdictions. *Id.* at 3.

The Convention on the Law of the Sea designated marine minerals on the seabed beyond national jurisdiction as the common heritage of mankind, to be explored and exploited for the benefit of humanity as a whole. These mineral resources are administered by the International Seabed Authority, an international organization established on the basis of the Convention, which allows both public and private enterprises, as well as collective mining consortiums, to apply for permission to mine the seabed.

Id. at 6. The Convention establishes, for signatory nations, international boundaries for offshore development; however, the United States has not become a party to the convention. See Ryan M. Seidemann, *What Does It Mean for Us? The United Nations Convention on the Law of the Sea*, 5(1) THE SAA ARCHAEOLOGICAL RECORD, Jan. 2005, at 36, 36 (commenting that the United States has not yet become a party to this international treaty).

52. 16 U.S.C. § 1452(1).

53. Martin M. Randall, *Coastal Development Run Amuck: A Policy of Retreat May Be the Only Hope*, 18 J. ENVTL. L. & LITIG. 145, 166 (2003).

54. 16 U.S.C. § 1451(a).

well-being of the citizens of the United States.⁵⁵ Further, Congress recognized that ill-planned development had seriously damaged the scenic beauty and ecological integrity of the nation's coast.⁵⁶ Part of the problem was determined to be disjointed management of federal activities affecting the coastal zone.⁵⁷ In an effort to reverse this trend, Congress concluded that the most effective management of the coastal zone could be achieved by cooperation between federal, state, and local authorities.⁵⁸ Therefore, one of the main objectives of the CZMA is to coordinate the efforts of individual states and local communities with those of the federal government.

Any state bordering on the Atlantic, Pacific, or Arctic Oceans, as well as the Gulf of Mexico, Long Island Sound, and the Great Lakes is characterized as a coastal state.⁵⁹ Any coastal state is eligible to submit a CMP for federal approval. To be federally approved the CMP must be a comprehensive statement that lays out the objectives, policies, and standards for the use of private and public lands in the coastal zone and complies with all CZMA requirements.⁶⁰ Once the CMP is approved, the state may receive federal assistance and assume the authorities granted to the states under the CZMA.⁶¹ For example, states are eligible for federal grants and matching funds and the authority to control certain activities affecting the state's coastal zone.⁶² All coastal states except for one have a federally approved CMP.⁶³

One mechanism for cooperation between state and federal governments is the federal consistency provision of the CZMA.⁶⁴ The CZMA allows states with federally approved CMPs to require that federal agency activities be consistent to the maximum extent practicable

55. *Id.* §§ 1451(e), 1456.

56. *Id.* § 1451(g).

57. *See generally* STRATTON COMMISSION REPORT, *supra* note 50, at 56 (making recommendations for improving federal ocean policy); OCEAN BLUEPRINT, *supra* note 5, at 92.

58. *See* 16 U.S.C. § 1451(i)-(m).

59. *Id.* § 1453(4). These states and territories are: Alabama, Alaska, American Samoa, California, Commonwealth of the Northern Mariana Islands, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Trust Territories of the Pacific Islands, United States Virgin Islands, Virginia, Washington, and Wisconsin.

60. *See id.* § 1455.

61. *Id.* §§ 1455(b), 1456.

62. *See id.* §§ 1455-1456.

63. NOAA, OCRM-Governmental partnerships on Coastal and Marine Management Issues, <http://coastalmanagement.noaa.gov/about/media/OCRMfactsheet.pdf> (last visited Dec. 6, 2006). Illinois is the only state with a coastal zone that does not have a CMP. *See id.*

64. 16 U.S.C. § 1456.

with the state CMP.⁶⁵ Federal regulations define “maximum extent practicable” as “fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.”⁶⁶ In the event of an emergency or unforeseen circumstance that creates a “substantial obstacle” and prevents the federal agency from complete adherence to the CMP, the agency may deviate from full consistency with the CMP, to the minimum extent necessary to address the emergency circumstance.⁶⁷ Thus, while the CZMA consistency provisions do not constitute an absolute state veto authority they remain a powerful tool with which a state may protect its coastal ecosystems from detrimental federal activities.⁶⁸ An important point to remember regarding consistency authority is that federal agencies who may be affected by a state’s CMP are given the opportunity to comment on the state’s CMP and the federal agency’s views must be “adequately considered” before the CMP is approved by the Secretary of Commerce.⁶⁹

There are five categories of federal activities that require federal consistency reviews: (1) federal agency activities affecting the coastal zone,⁷⁰ (2) federal development projects in the coastal zone,⁷¹ (3) federally permitted or licensed activities affecting the coastal zone,⁷² (4) federally

65. *Id.* § 1456(c)(1)(A), (c)(3).

66. 15 C.F.R. § 930.32(a)(1) (2006).

67. *Id.* § 930.32(b).

68. *See* 16 U.S.C. § 1456.

69. *Id.* § 1456(b).

70. This is a residual category for activities that do not fit the other categories. *Id.* § 1456(c); 15 C.F.R. § 930.31(a); *see* H.R. REP. NO. 101-964, pt. A, at 324 (1990).

Examples of such federal activities include: outer continental shelf oil and gas leasing, exploration and development; designation of dredge material disposal sites in the ocean; military projects at coastal locations; U.S. Army Corps of Engineers fill permits; certain U.S. Fish and Wildlife Service permits; national park projects; highway improvement projects assisted with federal funds; and commercial space launch projects on federal lands.

Cal. Coastal Comm’n, Program Overview, <http://www.coastal.ca.gov/whoware.html> (last visited Feb. 21, 2006).

71. This category is a subset of federal agency activities involving planning and construction of public works, facilities, and structures and the use or acquisition of coastal resources. 16 U.S.C. § 1456(c); 15 C.F.R. § 930.31(b). “A federal development project is an activity that involves the planning or construction of buildings and structures or the purchase or use of land or water resources. Dredging a new navigation channel or purchasing land for a recreation area are examples of federal development projects.” Wash. Dep’t of Ecology, The SMA and Federal/Tribal Activities, http://www.ecy.wa.gov/programs/sea/sma/st_guide/jurisdiction/federal.html (last visited Feb. 21, 2006).

72. 16 U.S.C. § 1456(c); 15 C.F.R. § 930.31(d). An example of this is a permit issued by the U.S. Army Corps of Engineers for the dredging and filling of wetlands in the coastal zone. Wash. Dep’t of Ecology, *supra* note 71.

permitted or licensed activities described in detail in OCS plans,⁷³ and (5) federal assistance to state and local governments affecting the coastal zone.⁷⁴

For the purposes of this Article we will concentrate on one type of federal agency activity, namely MMS Outer Continental Shelf lease sales (category 1 above) but we will also discuss secretarial appeals by federal licensees or permittees (category 4 above) to demonstrate evidence standards.

Before an OCS lease sale can occur, a state's certification of MMS's consistency determination is necessary.⁷⁵ Under the original CZMA, the federal agency had to submit a consistency determination for state approval for any activity "that directly affect[ed]" any land use or water use in the coastal zone.⁷⁶ In 1983, California, whose CMP was federally approved, tried to use the consistency provision to enjoin the Secretary of the Interior from selling oil and gas leases on certain tracts of the state's OCS. The federal government argued that California had no authority over OCS issues, and the state filed a lawsuit challenging the federal government's position.⁷⁷ The state contended that the leasing would certainly lead to oil and gas development off the coast which "directly affect[ed]" the coastal zone within the meaning of the statute.⁷⁸ In *Secretary of the Interior v. California*, the federal district and appeals courts both held that a consistency determination was required, but the Supreme Court reversed.⁷⁹ One fact that influenced the Court's decision was that NOAA had failed to take a definite position on whether or not lease sales required consistency determinations.⁸⁰ The Court began its analysis by quoting from the Department of Interior's brief, which stated

73. 16 U.S.C. § 1456(c)(3)(B); 15 C.F.R. § 930.71. This is not necessarily direct leasing of OCS lands, but issuing various permits (e.g., discharge permits) for activity occurring on the OCS. See generally Wash. Dep't of Ecology, *supra* note 71 (describing the need for the local agency to grant consistency before federal agency approval).

74. All of these activities are outlined in 16 U.S.C. § 1456 and 15 C.F.R. § 930.91. This category includes grants, loans, contracts, subsidies, guarantees, insurance, or other financial aid. Examples of federally funded state or local projects that might implicate the coastal zone include: community development block grants, USDA rural development loans and grants, U.S. Fish and Wildlife Service wildlife management plans, NPS parks and recreation development plans, and waterfront development activities. Va. Dep't of Env'tl. Quality, Federal Consistency Reviews, <http://www.deq.virginia.gov/eir/federal.html> (last visited Feb. 21, 2006).

75. 16 U.S.C. § 1456(c)(3)(A).

76. Pub. L. No. 92-583 (codified at 16 U.S.C. § 1456).

77. See *Sec'y of the Interior v. California*, 464 U.S. 312 (1984).

78. *Id.* at 317.

79. *Id.* at 319-20. For the lower courts' rulings, see generally *California v. Watt*, 520 F. Supp. 1359 (C.D. Cal. 1981); *State of California by and Through Brown v. Watt*, 683 F.2d 1253 (9th Cir. 1982).

80. 464 U.S. at 321.

that “directly affecting” meant “having a direct, identifiable impact on the coastal zone.”⁸¹ In accordance with the government’s position, the Court found that a series of events, which would most certainly lead to these effects, did not fall within the definition of “directly affecting.”⁸² The Court then looked at the legislative history and concluded that the term “directly affecting” should be read very narrowly, in line with the rest of the Act, which did not require consistency for activities outside of the state’s three-mile coastal zone.⁸³ Therefore, the Court held that oil and gas leasing in federal waters was not subject to consistency review.⁸⁴ The California decision severely limited the states’ ability to have some measure of control over oil and gas activities off of their coasts.

Because the CZMA consistency provision was not available for states to use in federal offshore oil and gas leasing decisions, many turned to the OCSLA. Under OCSLA, the Secretary of the Interior is required to consider suggestions from the governor and local officials of states affected by the leasing program.⁸⁵ If the governor comments within a specified time period, the Secretary is required to respond in writing, explaining his reasons for granting or denying the governor’s suggestions.⁸⁶ This served as a way for states to at least comment on OCS lease sales while *Secretary of the Interior v. California* was controlling jurisprudence. However, the ability to comment on leasing issues was much more limited than the authority states would have had under the CZMA’s federal consistency provision. The Secretary only has to respond to suggestions under OCSLA, but is under no obligation to follow any of them.⁸⁷

In 1990, Congress realized the eviscerating effect that *Secretary of the Interior v. California* had on the coastal states’ ability to execute their CMPs. Congress changed the language from “directly affecting” any land use or water use or natural resource to “affects” any land use or water use or natural resource.⁸⁸ The legislative history shows that this was done in order to expand the activities covered by the federal

81. *See id.*

82. *See id.*

83. *See id.* at 321-30. It should be noted that the three-mile state seaward boundary does not exist in all cases.

84. *Id.* at 343.

85. 43 U.S.C. § 1344(c) (2000).

86. *Id.*

87. *Id.*

88. *See* 16 U.S.C. § 1456(c)(1)(A) (2000); *see also* Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1230 (1972).

consistency provisions.⁸⁹ The amendment was specifically drafted to overrule *Secretary of the Interior v. California* so that the CZMA's federal consistency provisions now cover leases of federal continental shelf tracts and superjacent waters.⁹⁰ Although this change appears to have been a major victory for states by greatly increasing the states' ability to influence, and in some cases block, federal projects that do not comply with state CMPs, the minimal case law under this statute has not been favorable to the states.⁹¹

IV. NATIONAL OCS ISSUES

A. *Moratorium on Drilling for Oil and Gas*

No state has felt the effects of coastal oil and gas drilling more than Louisiana.⁹² This is mainly because of the long history of oil and gas development in Louisiana's coastal area, the fragility of its wetlands, and because other states have managed to avoid adverse effects by lobbying for moratoria on drilling off their coastal zones.⁹³ In 1990, President George H.W. Bush issued a moratorium on all drilling on the OCS off of the West Coast, East Coast, Alaska, and the Eastern Gulf of Mexico.⁹⁴ This left Louisiana and Texas to bear the burden of the nation's energy needs. California and Alaska still have drilling that was already being conducted at the time of the moratorium, but no new leases may be opened.⁹⁵ In 1998, President Clinton extended the moratorium until 2008.⁹⁶ When asked at a press conference why Louisiana and Texas were not included in the moratorium, the Clinton Administration responded that the moratorium was granted based on which areas were ecologically sensitive.⁹⁷ The Administration stated that they balanced the technology

89. See generally Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6201-17 (1990); H.R. REP. NO. 101-964, pt. A, at 970 (1990) (Conf. Rep.).

90. H.R. REP. NO. 101-964, pt. 1, at 970.

91. *New York v. U.S. Gen. Servs. Admin.*, 823 F. Supp. 82 (N.D.N.Y. 1993); *Louisiana v. Lujan*, 777 F. Supp. 486 (E.D. La. 1991); *New York v. DeLyser*, 759 F. Supp. 982 (W.D.N.Y. 1991).

92. See generally DNR, *supra* note 38 (listing the effects on Louisiana).

93. See, e.g., Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY NAT. RES. & ENVTL. L. 75, 81-86 (1992) (noting that the images of oil-soaked birds and other problems related to the Santa Barbara oil spill in California led to a public lobbying campaign to garner a moratorium on OCS drilling).

94. See Jennifer Auther & Reuters, *Clinton Extends Moratorium on Offshore Drilling*, www.cnn.com/TECH/science/9806/12/offshore.drilling.pm (last visited Dec. 6, 2006).

95. See *id.*

96. *Id.*

97. Press Briefing by Katie McGinty, 1998 WL 321809 (June 12, 1998).

available for drilling in certain areas with the possible environmental impacts.⁹⁸ Also, the Administration claimed that the Gulf of Mexico was less environmentally sensitive than other areas and that technology such as horizontal drilling made drilling safe.⁹⁹ It was also stated that exploration and extraction were being done in a responsible way in these areas.¹⁰⁰ However, it is obvious from the substantial petroleum industry-related losses of coastal wetlands and other adverse environmental effects that these statements are inaccurate.¹⁰¹

In August 1997, the Chevron Corporation asked for a consistency determination on their plan to drill natural gas wells on the OCS off the coast of Pensacola, Florida.¹⁰² Florida denied the consistency determination. The state's main arguments centered around inadequate information regarding possible environmental damage and the overall uniqueness of the area with regard to fish and mammal species. Following a secretarial override by the Department of Commerce and an appeal by the State of Florida, Florida reaffirmed the contention that extremely detailed information needs to be presented regarding the effects of the proposed activity.¹⁰³ This case could have been an important battleground for the federal consistency provision. However, after four years of briefs being filed by both sides, a unique political situation resolved the case. In an agreement between President George W. Bush and Florida Governor Jeb Bush, Chevron's lease, along with lands in the Everglades, were bought back by the federal government making Chevron and Florida's arguments moot and the dispute over the consistency denial was never resolved.¹⁰⁴

98. *Id.*

99. *Id.*

100. *See id.*

101. *See generally* PAUL TEMPLET, *THE FULL ECONOMIC COSTS OF LOUISIANA'S OIL/GAS AND PETROCHEMICAL INDUSTRIES* (1997).

102. U.S. Dep't of Commerce, *Before the Secretary in the Matter of the Appeal of Chevron U.S.A., Inc., to the Consistency Objection of the State of Florida to the Development and Production Plan for the Destin Dome 56 Unit*, Briefs for the State of Florida and Chevron (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

103. *Id.*

104. Kathleen Koch, *Feds To Buy Back Florida Energy Rights*, <http://archives.cnn.com/2002/ALLPOLITICS/05/29/white.house.conservaion/index.html> (last visited Feb. 14, 2006). It should be noted, however, that this case revolved around a dispute over federal licenses or permits described in detail in OCS plans and *not* for a lease sale itself. The procedures involved in the consistency review process for these two are somewhat different.

B. California Litigation

California is the only other state besides Louisiana that has been involved in litigation regarding issues arising from a state objection to OCS leases. *Secretary of the Interior v. California*,¹⁰⁵ and *California ex. rel. California Coastal Commission v. Norton*,¹⁰⁶ which upheld California's authority to require consistency determinations for extensions of OCS leases rendered unusable by the moratorium, are the only two cases related to OCS activities aside from the Louisiana case discussed in Part VII.C below. The main question in *California Coastal Commission* was whether MMS must make a consistency determination for the extension of oil and gas leases on the OCS off the California coast. MMS contended that it did not have to submit a consistency determination to the California Coastal Commission (CCC), because the extension of the leases did not affect the coastal zone.¹⁰⁷ The CCC laid out the specific issues it was concerned about, namely the age of the leases, poor quality of the oil, proximity of the leases to marine sanctuaries, and expansion of the territory of the threatened southern sea otter in the area.¹⁰⁸ The court subsequently found that MMS must submit a consistency determination to the CCC.¹⁰⁹ At the district court, Judge Wilken determined that in line with the legislative history and the amendments to the CZMA in 1990, the phrase, "any activity that affects the resources of the coastal zone," should be construed broadly.¹¹⁰ Therefore, the extension of the leases was found to affect the coastal zone. The judge also stated that the amendments should "leave no doubt that *all* federal agency activities and *all* federal permits are subject to the CZMA's consistency requirements."¹¹¹ In June 2002, Judge Nelson of the United States Court of Appeals for the Ninth Circuit affirmed the lower court's ruling, reinforcing the state's power and authority under the CZMA.¹¹² The ruling in this case leaves no doubt that federal consistency is a powerful tool for the states and one that can be used effectively to influence the prosecution of OCS mineral activities if supported by a state's law and political will.

105. 464 U.S. 312 (1984).

106. 150 F. Supp. 2d 1046 (N.D. Cal. 2001); *see also* *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002).

107. 150 F. Supp. at 1050-51.

108. *Id.* at 1050.

109. *Id.* at 1057.

110. *Id.* at 1052.

111. *Id.* (emphasis added).

112. *See* *California v. Norton*, 311 F.3d 1162, 1178 (9th Cir. 2002).

V. LOUISIANA'S COASTAL MANAGEMENT PROGRAM AND ITS APPLICATION TO OCS MINERAL ACTIVITIES

A. *State and Local Coastal Resources Management Act*

In 1978, in an effort to “protect, develop, and, where feasible, restore or enhance the resources of the state’s coastal zone,” the Louisiana Legislature passed the State and Local Coastal Resources Management Act (SLCRMA), which authorizes the state CMP.¹¹³ In 1980, Louisiana’s CMP, called the Louisiana Coastal Resources Program (LCRP), was federally approved.¹¹⁴ The Coastal Management Division (CMD), of the Louisiana Department of Natural Resources (DNR) implements the CZMA-approved LCRP in Louisiana, which includes the authority to conduct consistency determinations for any federal agency activity that directly affect the coastal zone.¹¹⁵

Louisiana has incorporated this federal grant of consistency authority over federal actions into its CMP by stating: “Any governmental body undertaking, conducting, or supporting activities directly affecting the coastal zone shall ensure that such activities shall be consistent to the maximum extent practicable with the state program and any affected approved local program having geographical jurisdiction over the action,” and “[g]overnmental bodies shall fully coordinate their activities directly affecting the coastal zone with the state program and affected approved local programs.”¹¹⁶

SLCRMA still uses the “directly affecting” language of the pre-1990 CZMA pertaining to its consistency authority.¹¹⁷ However, as discussed earlier, in the 1990 CZMA amendments Congress granted to coastal states the authority to require federal activities, whether in or out of the coastal zone, that *affect* the coastal zone to be consistent with their federally approved CMP.¹¹⁸ This change substantially alters the burden on coastal states to show that OCS activity is affecting their coastal zones by dropping the “directly” qualifier. All that must now be shown under the federal law is that the OCS activity affects the coastal zone, whether directly or indirectly. While minor changes to SLCRMA, such as tracking the 1990 CZMA amendments by removing the word “directly,”

113. See LA. REV. STAT. ANN. § 49:214.21-39 (1990).

114. Office of Ocean & Coastal Res. Mgmt., Nat’l Ocean Serv., Louisiana Coastal Resources Program, <http://coastalmanagement.noaa.gov/mystate/la.html> (last visited Feb. 14, 2006).

115. See LA. REV. STAT. ANN. § 49:214.32(C)(7).

116. *Id.* § 49:214.32(B), (D).

117. See *id.* § 49:214.32(B); see also *id.* §§ 49:214.25(A)(1)-(2), 214.28(C)(3)(a), 214.32(D).

118. See 16 U.S.C. § 1456(c)(1)(A) (2000) (emphasis added).

may help state officials understand Louisiana's consistency authority, case law and congressional actions make it clear the state has the statutory authority to ensure most federal activities that affect the coastal zone are subject to Louisiana's consistency review.¹¹⁹ Nevertheless, it would be prudent to amend Louisiana Revised Statute 49:214.32(B) to conform to the 1990 CZMA revision. Such an amendment could read as follows:

Any governmental body undertaking, conducting, or supporting activities within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall ensure that such activities shall be consistent to the maximum extent practicable with the state program and any affected approved local program having geographical jurisdiction over the action.¹²⁰

The other statutes noted in footnote 118 should also be changed to reflect the 1990 amendments. This could be accomplished by substituting "directly or significantly affects" with "affects" in each statute.

B. Coastal Use Guidelines

SLCRMA is implemented by CMD's enforcement of the Coastal Use Guidelines.¹²¹ The goals of the Guidelines include encouraging "full use of coastal resources while recognizing it is in the public interest of the people of Louisiana to establish a proper balance between development and conservation," as well as "minimiz[ing] detrimental effects of foreseeable cumulative impacts on coastal resources from proposed or authorized uses."¹²² The Guidelines include a general list of information that must be submitted by any applicant to help determine if the state should concur in the applicant's consistency determination, such as: techniques and materials used in construction and operation;¹²³ existing water quality and impacts of the activity on water quality;¹²⁴ economic impacts of the activity on the region;¹²⁵ proximity to and extent of impacts on important natural features such as beaches, barrier islands, wildlife and aquatic habitats, and forest lands, and historic, cultural, or

119. See H.R. REP. NO. 101-964, pt. A, at 970 (1990); 16 U.S.C. § 1456; 15 C.F.R. § 930.33 (2006). See generally *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002) (holding that the federal government's approval of lease suspensions was subject to consistency review by California).

120. Cf. LA. REV. STAT. ANN. § 49:214.32(B).

121. *Id.* § 49:214.27(B)(2); LA. ADMIN. CODE tit. 43, § 701-25 (1990).

122. LA. REV. STAT. ANN. § 49:214.27(C)(1)(a), (C)(9).

123. LA. ADMIN. CODE tit. 43, § 701(F)(3).

124. *Id.* § 701(F)(4).

125. *Id.* § 701(F)(7).

recreational resources;¹²⁶ extent to which national, state, and regional interests are served by operating in the coastal zone;¹²⁷ compatibility of the proposal with the natural setting;¹²⁸ and “extent of long term benefits or adverse impacts.”¹²⁹ The Guidelines also list significant detrimental and adverse impacts that should be avoided to the maximum extent practicable for every activity governed by the CMP.¹³⁰ Specific guidelines for levees, linear facilities (such as pipelines), dredged spoil deposition, shoreline modification, surface alterations, hydrologic and sediment transport modifications, disposal of wastes, uses that result in the alteration of waters draining into coastal waters, and guidelines for oil, gas, and other mineral activities are also included in the list of detrimental and adverse impacts in the Guidelines.¹³¹

Many of the Guidelines state that an activity is in compliance with Louisiana’s CMP if it adheres to the guidelines “to the maximum extent practicable.”¹³² The “maximum extent practicable” modifier means that a proposed activity that is not in compliance with the guidelines can be allowed under certain circumstances.¹³³ For guidelines that contain the “maximum extent practicable” modifier, the CMD will consider all of the information submitted to determine if the benefits of the activity will outweigh the adverse impacts resulting from noncompliance, and whether there are alternatives to avoid those negative impacts.¹³⁴ The consistency determination must include procedures that ensure the mitigation of any wetland losses due to the activity.¹³⁵ Also, it must be demonstrated that the public will benefit significantly from the activity; or the use would serve an important regional, state, or national interest; or the use is totally dependent on coastal water.¹³⁶ If such conditions are met, CMD can sanction the proposed activity even though it is not fully compliant with the state CMP. Long-term management strategies must be included in the consistency determination which is in keeping with Louisiana’s desire to maintain sustainable development in its coastal zone.¹³⁷

126. *Id.* § 701(F)(12), (16).

127. *Id.* § 701(F)(13).

128. *Id.* § 701(F)(18).

129. *Id.* § 701(F)(19).

130. *Id.* § 701(G).

131. *Id.* §§ 703, 705, 707, 709, 711, 713, 715, 717, 719.

132. *Id.* § 701(H).

133. *Id.*

134. *Id.*

135. *See* LA. REV. STAT. ANN. § 49:214.32(F) (1990); LA. ADMIN. CODE tit. 43, § 723(C)(8)(a).

136. LA. ADMIN. CODE tit. 43, § 701(H).

137. *Id.*; *see also* LA. REV. STAT. ANN. § 49:214.32(B).

C. Consequences of OCS Activities Which Impede Federal Consistency with Louisiana's CMP

In order for the state to challenge a consistency determination for any activity that affects the coastal zone, the state must be able to show which specific Guidelines in the CMP are violated.¹³⁸ In past consistency determinations, Louisiana has cited several Guidelines that proposed activities have violated, thereby making these proposals inconsistent with the Louisiana CMP.¹³⁹ For example, Guideline 1.7 has served as a stumbling block for permits in the past. This Guideline requires that “all uses and activities shall be planned, sited, designed, constructed, operated, and maintained to avoid to the maximum extent practicable significant”¹⁴⁰ adverse effects including:

- 2) “adverse economic impacts on the locality of the use and affected governmental bodies”;
-
- 6) “adverse disruption of existing social patterns”;
-
- 10) “adverse effects of cumulative impacts”;
-
- 16) “adverse alteration or destruction of unique or valuable habitats”;
-
- 19) “land loss, erosion, and subsidence”;
- 20) “increases in the potential for flood, hurricane and other storm damage, or increases in the likelihood that damage will occur from such hazards”;
- and
- 21) “reduction in the long term biological productivity of the coastal ecosystem.”¹⁴¹

138. See, e.g., Letter from Ron Gomez, Sec’y, La. Dep’t of Natural Res., to Thomas A. Readinger, MMS (May 14, 1991) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

139. See, e.g., Letter from Terry Howey, Adm’r, CMD, to Chris C. Oynes, MMS (Aug. 3, 1994) (citing problems with Guidelines 1.7(b), 1.7(c), 1.7(f), 1.7(k), 1.7(m), and 1.7(s) in the draft EIS for Lease Sales 152 and 155) [hereinafter Letter from Terry Howey to Chris C. Oynes]; Letter from Jack C. Caldwell, Sec’y, La. Dep’t of Natural Res., to Thomas A. Readinger, MMS (Jan. 9, 1996) (citing nonspecific wetlands degradation concerns in Lease Sale 157); Memorandum from Terry W. Howey, Adm’r, CMD, to Jack McClanahan, Sec’y, La. Dep’t of Natural Res. (May 4, 1995) (citing erosion concerns from vessel traffic and the dredging of navigational canals); Letter from Ron Gomez, Sec’y, La. Dep’t of Natural Res., to Thomas A. Readinger, MMS (May 14, 1991) (citing consistency problems with Coastal Use Guidelines 1.7(b), 1.7(f), 1.7(j), 1.7(s), and 1.7(v) in Lease Sale 135); Letter from Terry W. Howey, Dir., CMD, to Thomas Gernhofer, MMS (June 18, 1991) (citing problems of saltwater intrusion and coastal erosion in Lease Sales 139 and 141). Materials on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana.

140. LA. ADMIN. CODE tit. 43, § 701(G).

141. *Id.*

Guideline 1.7(b) provides for the avoidance of “adverse economic impacts on the locality of the use and affected governmental bodies.”¹⁴² Because of the area-wide leasing now in use, there is a displacement from the traditional, sustainable economic structure in South Louisiana, which has pulled the economy into a cyclical and unsustainable oilfield structure.¹⁴³ The ecological destruction caused by the oil and gas industry destroys the resources necessary for a traditional economic structure.¹⁴⁴ Morgan City, Louisiana, which used to house the largest shrimp fleet in the nation, has only recently begun to rebuild its shrimping industry after the fleet disappeared in the 1970s.¹⁴⁵ South Louisiana’s economy has always been tied to the wetlands, with industries such as commercial fishing, hunting, and trapping.¹⁴⁶ Also, in recent years Louisiana has made large strides in the tourism industry, notwithstanding the impacts of the 2005 hurricane season.¹⁴⁷ Louisiana had one of the fastest growing tourism industries in the United States.¹⁴⁸ If Louisiana’s wetlands and offshore areas are allowed to be further damaged by OCS activities, this blossoming industry already crippled by Hurricanes Katrina and Rita, will continue to be threatened as well.

Guideline 1.7(f) requires that activities must avoid, to the maximum extent practicable, “disruption of existing social patterns.”¹⁴⁹ Research indicates that the area-wide leasing of the central and western Gulf causes Louisiana to fall into a boom/bust cycle of economic activity.¹⁵⁰

142. *Id.* § 701(G)(2).

143. DNR Memorandum Dec. 20, 1991: Comments on Lease Sale 139 (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana) [hereinafter DNR Memorandum].

144. *Id.*

145. Bob Gramling, Socioeconomic Impacts of OCS Activities to Date (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

146. DNR Memorandum, *supra* note 143.

147. *See generally* *Tourism Boom in New Orleans*, 53(56) TRAVEL WKLY. 21 (1994) (commenting on the record number of conventions coming to New Orleans); Frederic Dimanche & Alenna Lepetic, *New Orleans Tourism and Crime: A Case Study*, 38 J. TRAVEL RES. 19 (1999) (“In the past 10 years, New Orleans has become a major urban tourism destination in the United States.”); Don Muret, *The State of Louisiana Is Singing the Blues*, 112(24) AMUSEMENT BUS. 5 (2000) (“Louisiana leads the nation in tourism growth at 17.6% annually. The national average is 7.7%.”); Dan Luzadder, *After the Storm: Hope for Tourism Recovery Hard To Come By in Louisiana: As Congress Ponders Relief, Anxious New Orleans Makes a Troubled March Towards Mardi Gras*, 64(50) TRAVEL WKLY. 34 (2005) (noting the substantial blow to Louisiana’s tourism economy as a result of the 2005 storm). If OCS activities are allowed to continue to degrade Louisiana’s coastal areas, the state’s hopes of recovery from the tourism slump to regain its former glory as a tourist Mecca may be dashed. These coastal areas, which contain New Orleans, are a substantial tourist draw for the state and their protection is imminently needed.

148. *See* Muret, *supra* note 147.

149. LA. ADMIN. CODE tit. 43, § 701(G)(6) (1990).

150. DNR Memorandum, *supra* note 143, at 12.

When offshore mineral exploration and production activity begins there may be a large increase in population as support staff moves to terrestrial hubs nearest the offshore activity. The state's infrastructure is not equipped to handle this large influx of people.¹⁵¹ The tax base takes at least two years to catch up with the demand for more services.¹⁵² History has shown that the oil industry, in general, also operates in cycles of boom and bust.¹⁵³ When the oil business takes its next inevitable downturn, there will be a large departure from these areas.¹⁵⁴ These fluctuations of growth and decline result in a large, unsustainable coastal infrastructure.¹⁵⁵ Because of the nature of oilfield work, where employees are usually required to be on the job for at least a week, and then off for that same amount of time, employees can live in other states and work in federal waters off Louisiana's coast.¹⁵⁶ When these people are in Louisiana they are taking advantage of Louisiana's infrastructure and contributing to wear and tear on the local systems, but they are not contributing to the income tax base.¹⁵⁷ One example of this is the long list of coastal roads that cost the Louisiana Department of Transportation and Development (DOTD) millions of dollars to repair because of the traffic from oil and gas activities.¹⁵⁸ Highway 1 (LA 1), Louisiana's main link to its oilfield resources, is sinking due to coastal erosion and subsidence.¹⁵⁹ DOTD is currently undertaking a four-year project to replace a portion of LA 1 with a seventeen-mile-long elevated bridge.¹⁶⁰ With such projects, the state's budget is at a substantial disadvantage for not having access to the income taxes of its out-of-state offshore workers.

With regard to ecological effects, Guideline 1.7(s) states that activities must avoid "land loss, erosion, and subsidence."¹⁶¹ Beach and wetland loss was estimated at 2347 to 5357 acres per year in the early

151. Gramling, *supra* note 145.

152. *Id.*

153. See generally W.R. Freudenburg & R. Gramling, *Linked to What? Economic Linkages in an Extractive Economy*, 11 SOC'Y & NATURAL RESOURCES 569 (1998); Gregory Curtis, *A Wild Ride*, 21(2) TEX. MONTHLY 100 (1993).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Memorandum from Neil Wagoner, La. Dep't of Transp. & Dev., to Tim Hebert, Esq., Legal Counsel for La. Dep't of Natural Res. (Oct. 7, 1991) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

159. La. Dep't of Transp. & Dev., LA1 Improvements, <http://www.wilbursmith.com/la1> project (last visited Mar. 9, 2005).

160. *Id.*

161. LA. ADMIN. CODE tit. 43, § 701(G)(19) (1990).

1990s.¹⁶² It is estimated that over twenty square miles of wetlands are lost due to activities from one area-wide sale.¹⁶³ This type of wetlands loss is clearly inconsistent with Guideline 1.7(j), which seeks to avoid the cumulative impacts of all past and future activities on the coastal zone.¹⁶⁴

A major portion of the Guidelines regulates adverse impacts relating to navigational channels and pipelines.¹⁶⁵ A major cause of wetland loss is the digging, maintenance, and continued use of navigational channels.¹⁶⁶ A 1990 study on direct impacts resulting from OCS activities examined the adverse results from dredging-related and pipeline activities on coastal areas.¹⁶⁷ That study found that the

[t]ypes of impacts that result include: (1) the direct conversion of wetland to open water and spoil and the indirect loss of wetlands from enhanced saltwater intrusion; (2) canal widening from boat-wake erosion; (3) pipeline breakages and leakages; (4) alteration in the sedimentary and hydraulic regimes by spoil banks and channels; (5) differential loading compaction of sediments that result from the weight of spoil deposits.¹⁶⁸

Navigational canals increase the possibility of destruction from tropical storms so common to the Gulf of Mexico by providing avenues for storm surge and low resistance paths for cyclones to move inland.¹⁶⁹ Direct

162. DNR Memorandum, *supra* note 143, at 25.

163. *Id.*

164. LA. ADMIN. CODE tit. 43, § 701(G)(10).

165. *Id.* § 705.

166. For examples of such claims of environmental problems being made in the courts of this state, see, e.g., *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 04-0968 (La. 1/19/05); 893 So. 2d 789; *Terrebonne Parish Sch. Bd. v. Southdown, Inc.*, 03-0402 (La. App. 1 Cir. 7/14/04), 887 So. 2d 8; *Terrebonne Parish Sch. Bd. v. Bass Enters. Prod. Co.*, 02-2119 (La. App. 1 Cir. 8/8/03), 852 So. 2d 541, *writ denied*, 03-2786 (La. 1/9/04); 862 So. 2d 984; *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303 (5th Cir. 2002); see also Ryan M. Seidemann, *Louisiana Wetlands and Water Law: Recent Jurisprudence and Post-Katrina and Rita Imperatives*, 51 LOY. L. REV. 4 (2005) (discussing damage to wetlands by channels). See generally Robert H. Bauman & Eugene R. Turner, *Direct Impacts of Outer Continental Shelf Activities*, 15 ENVTL. GEOLOGY & WATER SCI. 189 (1990).

167. See generally Bauman & Turner, *supra* note 166.

168. *Id.* at 189.

169. In 2002, Seidemann & Susman noted that

storm protection is one of the most important functions of wetland areas, as was demonstrated by the severe flooding of the Mississippi River in 1973 (known as a 'man made flood'). Buffering from storm surges is also an important function for the Gulf Coast areas that have seen 33.6% of landfalling tropical cyclone activity in the North Atlantic Basin over a period from 1871 to 1997. This is a significantly larger amount than any other area in the North Atlantic Cyclone Basin.

Seidemann & Susman, *supra* note 21, at 444. Of course, this article was written before the devastation wrought on the State by Hurricanes Katrina and Rita. The discussion of the importance of wetlands as barriers from storm surges and tropical cyclones is no longer the

evidence for some of these problems has been identified in Louisiana. According to DNR research, vessel wakes cause canals to widen at a rate of 0.95 to 2.54 meters per year.¹⁷⁰ These navigational canals exist in direct contravention to the prohibition against activities that tend to increase potential damages from storm activities in Guideline 1.7(t).¹⁷¹ The bulk of all pipeline landfalls in the Gulf of Mexico are in Louisiana, leading to significant saltwater intrusion.¹⁷² Additionally, recent cases filed in the wake of Hurricane Katrina highlight the storm protection problems caused by anthropogenic activities in the coastal zone.¹⁷³

Guideline 1.7(u) requires an avoidance of the “reduction in the long term biological productivity of the coastal ecosystem.”¹⁷⁴ Environmental impact statements in the past have consistently neglected to address the profound impact of mineral exploration and production on the flora and fauna in the area.¹⁷⁵ Guideline 1.7(p) requires the avoidance of adverse “alteration or destruction of unique or valuable habitats.”¹⁷⁶ Coastal wetlands are essential habitats for invertebrates, fish, reptiles, birds, and mammals.¹⁷⁷ They serve as important nursery grounds for juvenile forms of commercial fish species and two-thirds of the wintering waterfowl population.¹⁷⁸ These wetlands have high organic productivity, high detritus production, and efficient nutrient recycling which make them essential parts of the world’s ecosystem.¹⁷⁹ There is also a high potential

academic issue that it was when the above quote was written in 2002—Louisiana is now suffering the results of decades of neglect of these areas.

170. Comments on Draft EIS for Lease Sales 152 and 155, attached to Letter from Terry Howey to Chris C. Oynes, *supra* note 139, at iii.

171. LA. ADMIN. CODE tit. 43 § 701(G)(20) (1990).

172. See ROBERT GRAMLING & SHIRLEY LASKA, A SOCIAL SCIENCE RESEARCH AGENDA FOR THE MINERALS MANAGEMENT SERVICE IN THE GULF OF MEXICO 1 (OCS Study/MMS No. 93-0017) (1993). Indeed, Turner notes that the dredging activity in coastal Louisiana associated with oil and gas exploration and production, a considerable amount of which is attributable to pipeline construction and maintenance, is the sole quantifiable cause of wetlands (and by implication coastal land) loss in Louisiana in recent decades. R.E. Turner, *Wetland Loss in the Northern Gulf of Mexico: Multiple Working Hypotheses*, 20 ESTUARIES 1, 6, 8 (1997).

173. See generally Barasich, *supra* note 27.

174. LA. ADMIN. CODE tit. 43, § 701(G)(21).

175. DNR Memorandum, *supra* note 143.

176. LA. ADMIN. CODE tit. 43, § 701(G)(16).

177. See Martin T. O’Connell et al., *Biological Resources of the Louisiana Coast: Part 2. Coastal Animals and Habitat Association*, 44 J. COASTAL RES. 146, 156 (2005); see also BARATARIA-TERREBONNE NATIONAL ESTUARY PROGRAM (BTNEP), STATUS, TRENDS, AND PROBABLE CAUSES OF CHANGE IN LIVING MARINE RESOURCES IN THE BARATARIA-TERREBONNE ESTUARINE SYSTEM (Barataria-Terrebonne Estuarine Sys. Publ’n No. 21, 1995) [hereinafter BTNEP].

178. O’Connell et al., *supra* note 177.

179. DNR Memorandum, *supra* note 143, at 29.

for impact on the Kemp's Ridley sea turtle (an endangered species), and the brown pelican, Louisiana's state bird.¹⁸⁰

Guidelines 1.7(k) and (m)¹⁸¹ limit the discharge of suspended particles and pathogenic or toxic substances. Produced waters from oil rigs, which contain these substances, are released into the Gulf from platforms every day.¹⁸² Polynuclear aromatic hydrocarbons are released from these waters and incorporate themselves into the soil.¹⁸³ The particles in produced water also cloud the waters around platforms preventing sunlight from penetrating to natural levels.¹⁸⁴

The Louisiana CMP has a policy of "no net loss" of wetlands and avoidance of cumulative adverse social, economic, and environmental impacts.¹⁸⁵ It is clear from the foregoing review of the various Guideline provisions that OCS activities cause and continue to cause significant detrimental impacts to the state's coastal zone. We conclude that the effects of OCS activities, especially the cumulative effects, violate the Louisiana CMP, specifically the Guidelines, to the extent that there are ample grounds to deny consistency for failure to comply with Louisiana's CMP without some mechanism to reverse and repair past, ongoing, and future damage to the state's coast. The clear history of the detrimental impacts of past, present, and future lease sales present sufficient statutory and regulatory authority for the state to deny consistency for OCS lease sales that do not provide some effort at implementing mitigating measures.¹⁸⁶ At present, the most effective mitigation measure for the offset of the detrimental OCS activities is a share of the royalties from these leases that will be dedicated to the conservation and restoration of Louisiana's coastal zone.¹⁸⁷

180. The brown pelican was once extinct in Louisiana and had to be reestablished with birds from Florida. *Id.*; see O'Connell et al., *supra* note 177, at 155; see also Bill Fontenot, *TLC for Pelicans in Louisiana*, WILDLIFE CONSERVATION, July/Aug. 2000, at 16.

181. LA. ADMIN. CODE tit. 43, § 701(G)(11), (G)(13).

182. Letter from Terry Howey to Chris C. Oynes, *supra* note 139; Bill Walsh, *EPA Removes Ban on New Drilling in Gulf of Mexico; No Link Found to 'Dead Zone'*, TIMES-PICAYUNE (New Orleans), June 25, 2004, at A1; see also T.J. Ward et al., *Toxicity Identification Evaluations of Produced-Water Effluents*, 16 ENVTL. TOXICOLOGY & CHEMISTRY 2020, 2020 (1997) (commenting on the inherent toxicity of produced water from oil and gas operations).

183. Ward et al., *supra* note 182, at 2020.

184. *Id.*

185. Letter from Terry Howey to Chris C. Oynes, *supra* note 139.

186. See LA. REV. STAT. ANN. §§ 49:214.30, 214.32(B), 214.32(F), 214.41(C) (1990); see also LA. ADMIN. CODE tit. 43, § 723(C)(8)(a) (explaining the state's denial of consistency).

187. In section 1 of act 8 of the First Extraordinary Session of 2005, the Louisiana Legislature amended Louisiana Revised Statute 49:213.7(C) to provide for just such a dedication. Subsection (1) of Louisiana Revised Statute 49:213.7(C) now reads, in pertinent part, "federal revenues that are received by the state generated from Outer Continental Shelf oil and gas activity and eligible, as provided by federal law, is to be . . . deposited and credited by the treasurer to the

VI. THE FEDERAL CONSISTENCY REVIEW PROCESS IN LOUISIANA AND HOW IT HAS BEEN APPLIED

A. *The Mechanics of Consistency Review for Federal Agency Activities*

1. Submission of Consistency Determination to the State

According to SLCRMA, federal activities that directly affect the coastal zone require a consistency determination.¹⁸⁸ Louisiana follows the procedures established in the CZMA and has not duplicated them in state law or regulation.¹⁸⁹ The CZMA requires the permitting federal agency to submit its consistency determination and proof to the coastal state (in Louisiana's case, CMD) that the proposed activity is consistent with the CMP.¹⁹⁰ The CMD then conducts a short technical review, which includes brief comments by interested state agencies such as the Louisiana Department of Wildlife and Fisheries (DWF),¹⁹¹ and lists the Guidelines in checklist form. The CMD uses the checklist to determine if the proposed activity is in "conformance" or "possible nonconformance" with the CMP.¹⁹² The CMD completes the technical review sheet and recommends a consistency determination to the DNR Secretary, who makes the final decision on consistency within three months or as provided in federal regulations and state law.¹⁹³

If the DNR Secretary determines that the federal action "*may* significantly affect land and water resources within the coastal zone,"¹⁹⁴ he or she must give notification to the federal agency and the DWF Secretary at the earliest possible stage of the proposed action. The

Coastal Protection and Restoration Fund." Additionally, subsection (2), another new portion of Louisiana Revised Statute 49:213.7(C), provides that "such federal revenues shall be used only for the purposes of coastal wetlands conservation, coastal restoration, hurricane protection, and infrastructure directly impacted by coastal wetlands losses."

These new provisions represent a substantial showing on behalf of Louisiana that it is serious about coastal restoration and should help to send a message to the federal government that monies that inure to the State from OCS royalties will be used to remedy the harms of OCS activities and coastal degradation. It is further up to the State to now demonstrate that providing these royalties is in the best interests of the nation and national security.

188. See LA. REV. STAT. ANN. § 49:214.32(B).

189. See *id.* § 49:214.32; 15 C.F.R. § 930.1-6.10, 11, 30-101, 110-116, 120-131, 150-154 (2006).

190. 16 U.S.C. § 1456(c)(1)(C) (2000).

191. See LA. REV. STAT. ANN. § 49:214.32; LA. ADMIN. CODE tit. 43, § 701(F).

192. See Appendix A. Appendix A is the CMD Coastal Use Consistency Determination Technical Review Sheet (Review Sheet), which contains the above-referenced checklist. The Review Sheet is also informative for its demonstration of the basics of consistency review by CMD.

193. See 15 C.F.R. § 930; LA. REV. STAT. ANN. § 49:214.32(C)(7).

194. LA. REV. STAT. ANN. § 49:214.32(D) (emphasis added).

Secretaries of DNR and DWF act together to make comments proposing changes needed to ensure the activity is consistent with the state CMP.¹⁹⁵ The comments are to be incorporated into the action to the maximum extent practicable.¹⁹⁶ Louisiana law has no other consistency procedures for federal activities. However, provisions for further action, such as mediation, secretarial review, and judicial action are found in the CZMA and the Code of Federal Regulations (C.F.R.).¹⁹⁷ The fact that Louisiana statutes and regulations do not have well-developed consistency procedures may raise the question of whether the state can exercise its consistency authority to the full extent allowed by federal law. However, the federal consistency statute and regulations are self-activating and do not require that a state replicate them in its CMP to exercise the consistency authority granted by federal law.¹⁹⁸ Indeed, the CZMA consistency provisions only require that coastal states establish procedures for public notice of consistency certifications by federal licensees or permit applicants.¹⁹⁹ The need for uniformity among the state programs in federal consistency procedure requires that state laws or regulations supplementing federal law in this area not be substantially different from federal requirements.

2. State Objection to Federal Agency's Consistency Determination

The CZMA states, "Each Federal agency action within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."²⁰⁰ The federal agency must provide to the state a consistency determination (a finding that the action is consistent with the state's CMP) at the earliest time possible in the planning of the activity, but at least ninety days before the final approval of the federal agency activity.²⁰¹ OCS lease sales conducted by MMS are considered federal agency actions.²⁰²

Should the state object to the federal agency's consistency determination; the state must describe, with supporting information, how

195. *Id.*

196. *Id.*

197. *See, e.g.*, 16 U.S.C. § 1456(H) (2000), 15 C.F.R. §§ 930.116, 930.45.

198. *See generally* 16 U.S.C. § 1456.

199. *See generally id.* § 1456(c)(3)(A).

200. *Id.* § 1456(c)(1)(A).

201. 15 C.F.R. § 930.36(b).

202. *Id.* § 930.51(a).

the proposed activity will be inconsistent with the CMP.²⁰³ The state should describe any alternate activities, including mitigation, to the proposed activity.²⁰⁴ If the state has objected to consistency based on a lack of information, the state must describe what information is necessary to determine consistency.²⁰⁵ The regulations strongly urge the federal agency and the state to “attempt to resolve their differences informally” within the ninety-day period.²⁰⁶ In the event of such a serious disagreement between the state and the federal agency that the parties can not resolve it within the ninety-day period, the parties are encouraged, but not required, to request mediation by the Secretary of Commerce or the Office of Coastal Resources Management’s (OCRM) mediation services.²⁰⁷ If the parties agree to mediation, which is nonbinding, the Secretary must provide a public hearing in the local area of concern with all available, pertinent information.²⁰⁸ The availability of mediation, however, does not limit the parties’ use of alternative forums for dispute resolution, such as judicial review in federal court.²⁰⁹

The CZMA consistency provisions provide two ways by which the federal agency may proceed with the proposed activity even if the state objects to a federal agency’s consistency determination.²¹⁰ The federal agency may proceed only if: (1) under the “consistent to the maximum extent practicable” standard, consistency with the CMP is prohibited by existing law, and the federal agency has described these legal reasons to the state; or (2) even though the state objects to consistency, the federal agency determines the proposed action is fully consistent with the CMP.²¹¹ In such situations, the federal agency must notify the state before proceeding with an activity to which the state has objected.²¹² Mediation and judicial review remain available to all parties²¹³ and if the parties have bypassed mediation or are not satisfied with the outcome of mediation they may seek judicial redress.²¹⁴ If a federal court has determined the

203. *Id.* § 930.43(a).

204. *Id.*

205. *Id.* § 930.43(b).

206. *Id.* § 930.43(d).

207. *Id.* § 930.44; 16 U.S.C. § 1456(h) (2000). The Office of Coastal Resources Management is in the National Oceanic and Atmospheric Administration.

208. 15 C.F.R. § 930.113.

209. *Id.* § 930.116.

210. *Id.* § 930.43(d)(1)-(2).

211. *Id.* § 930.43(d).

212. *Id.* § 930.43(e).

213. *Id.* § 930.44.

214. 16 U.S.C. § 1456(c)(1)(B) (2000). Although this provision does not directly state that redress is available through the court system, it implies as much when it mentions the President’s power to override certain federal court decisions on these matters. Additionally, a federal

federal agency activity is not consistent to the maximum extent practicable with the state CMP, the Secretary of Commerce may request that the President of the United States exempt the inconsistent federal activity from compliance with the state CMP.²¹⁵ The Secretary must certify that mediation is unlikely to be successful in reaching a compromise, and the President may “exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States.”²¹⁶

B. Process of Secretarial Appeal by Federal Licensee or Permit Applicant and Some Examples

When a state denies consistency to an activity carried out under a federal license or permit as opposed to an activity performed by a federal agency, the affected applicant (such as an oil and gas company that intends to operate in the OCS) may appeal a state’s determination to the Secretary.²¹⁷ The Secretary may then agree with the state and uphold the consistency denial or disagree and reverse the state’s decision.²¹⁸

Secretarial reviews of federally licensed or permitted activities carried out under OCS mineral exploration leases may have relevance to the judicial review of a state’s consistency denial of a federal lease sale. Congress’s recognition of the inevitable consequences of OCS leasing, drilling, production, and transmission of petroleum products, with their attendant and well-documented effects on state coastal zones, is

agency’s overriding of a state’s inconsistency determination should be tantamount to final, appealable agency action under general administrative law. Certainly the exhaustion of all agency avenues for relief (i.e., getting an unsatisfactory result in agency mediation), under standard administrative law, should permit an agency decision to be subject to judicial review as final agency action. See 5 U.S.C. § 704 (2000); see also ERNEST GELHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS 376 (1997) (noting that “the APA states that ‘final agency action’ is subject to judicial review”).

215. 16 U.S.C. § 1456 (c)(1)(B).

216. *Id.* “Unfortunately, neither the statute nor the regulations define ‘paramount interest.’” Jeffrey H. Wood, *Protecting Native Coastal Ecosystems: CZMA and Alaska’s Coastal Plain*, 19 NATURAL RESOURCES & ENV’T, Summer 2004, at 57, 63. Wood goes on to note that the case of *Colon v. Carter*, 633 F.2d 964 (1st Cir. 1980), grants extremely broad discretion to the President on matters of “paramount interest,” possibly meaning that, were the President to overturn a finding of inconsistency, a court challenge to this action would be incredibly difficult. Wood, *supra*, at 57, 63.

217. 16 U.S.C. § 1456(c)(3); 15 C.F.R. § 930.120-131.

218. 15 C.F.R. § 930.120-131.

evidenced by the 1990 amendments to the CZMA.²¹⁹ In deciding whether OCS lease sales are consistent to the maximum extent practicable with a state CMP, a court will necessarily have to consider past and future impacts to the state's coastal resources from development activities that are *designed* and *expected* to follow.²²⁰ It would seem to follow then that the same kind of proof required to support a consistency denial of development activities under a lease would be relevant in supporting consistency denials of OCS lease sales. Thus, even though the main focus of this Article is on OCS lease sales, a federal action, it is informative to examine the administrative record of consistency objections to private operators' OCS plans carried out under a federal license or permit to demonstrate the evidentiary standard that may be employed. Keeping in mind that there are differences in the standards for the two categories, plans must be "consistent" rather than "consistent to the maximum extent practicable" and, because the effects of lease sales are more attenuated, the burden of proof necessary to sustain a consistency objection to federally licensed or permitted OCS plans should serve as a model for sustaining consistency denial to an OCS lease sale.²²¹ It would be hard to argue that Louisiana does not know with reasonable certainty the effects that will flow from lease sales followed by plans, and then by actual exploration and production activities given the state's vast experience with these matters.²²²

There have been fourteen cases where the oil and gas industry appealed a state's consistency objection to the Secretary of Commerce. Of these, the Secretary overrode the states' determination in seven cases²²³ and did not override in seven decisions.²²⁴ The secretarial review process is executed using the following procedure:

219. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990) (codified at 31 U.S.C. § 1341). See generally H.R. REP. NO. 101-964, pt. A, at 316 (1990) (noting that fifty percent of the nation's wetlands have been destroyed and more are likely to decline, and that state management programs must play a larger role in protecting coastal resources).

220. The conferees intend this determination to include effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term "affecting" is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. H.R. REP. NO. 101-964, pt. A, at 970-71.

221. *Id.*

222. See, e.g., DNR Memorandum, *supra* note 143 (providing ample evidence that Louisiana is well aware of the effects of OCS activities on its coastal zone, as it undertakes a thirty-one-page review of these effects from a scientific perspective); see also BTNEP, *supra* note 177.

223. See generally Decision and Findings in the Consistency Appeal of Union Oil Company of California to an Objection from the California Coastal Commission, Nov. 9, 1984;

1. Significant threshold issues are decided. Two examples are:
 - a. Did the state follow procedures required by the CFR in denying consistency?
 - b. Did the state have an anti-drilling bias such that its consistency denial was not grounded in a fair assessment of the facts?
2. Grounds for overriding a state's denial of consistency

Ground 1—Is the activity consistent with the objectives and purposes of the CZMA?

 - a. The activity must further the national interest as articulated in the CZMA and;
 - b. The activity's national interest outweighs its adverse coastal effects and;
 - c. No reasonable alternatives exist to make the activity consistent with the state CMP.

Ground 2—The Activity is necessary in the interest of national security.

Decision and Findings in the Consistency Appeal of Gulf Oil Corporation Before the Secretary of Commerce, Dec. 23, 1985; Decision and Findings of the Secretary of Commerce in the Consistency Appeal of the Korea Drilling Company, LTD. from an Objection by the California Coastal Commission, Jan. 19, 1989; Decision and Findings in the Consistency Appeal of Texaco, Inc., from an Objection by the California Coastal Commission, May 19, 1989; Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska, July 20, 1990; Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc., from an Objection by the State of Florida, Jan. 8, 1993; Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc., from an Objection by the State of Florida, June 20, 1995 [hereinafter 1995 Mobil E & P]. All of these decisions are *available at* <http://www.ogc.doc.gov/czma.nsf/sec?OpenPage> (last visited Feb. 24, 2006).

224. *See generally* Findings and Decision in the Matter of the Appeal by Exxon Company, U.S.A. to the Consistency Objection by the California Coastal Commission to Exxon's Proposed Development of the Santa Ynez Unit by Means of Development Option A, Feb. 18, 1984; Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A. to an Objection from the California Coastal Commission, Nov. 14, 1984; Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc., from an Objection by the California Coastal Commission, Oct. 29, 1990; Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc., from an Objection by the State of Florida, Jan. 7, 1993 [hereinafter 1993 Mobil E & P]; Decision and Findings in the Consistency Appeal of Union Exploration Partners, Ltd. with Texaco, Inc., from an Objection by the State of Florida, Jan. 7, 1993; Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc., from an Objection by the State of North Carolina, Sept. 2, 1994; Appeals of Mobil Oil Exploration and Producing Southeast, Inc., from Objections by the State of North Carolina to its Drilling Discharge Plan and Its Plan of Exploration for Manteo Leases, Dec. 8, 1999. All of these decisions are *available at* <http://www.ogc.doc.gov/czma.nsf/sec?OpenPage> (last visited Feb. 24, 2006).

1. Procedural and Threshold Issues

For the Secretary of Commerce to override a state's consistency denial, the Secretary must first consider any significant threshold issues that may arise.²²⁵ These issues arise on a case-by-case basis and may include compliance with the procedures and former attitudes towards consistency. One issue that arose in the 1993 Mobil E & P review, a Florida consistency denial for a Plan of Exploration off the Florida Keys in January 1993, was the allegation that Florida had not complied with the letter of the law.²²⁶ The allegation was merely that the State of Florida had not complied with 15 C.F.R. § 930.64(d) by requesting certain information from the applicant.²²⁷ Although Florida prevailed on the issue, the important lesson for Louisiana is to follow the exact procedures set forth in the C.F.R. Another factor in the 1993 Mobil E & P review was that Mobil accused Florida of having a bias against drilling as a reason for denying consistency.²²⁸ The Secretary stated that Florida's attitude toward drilling would not be considered.²²⁹ The Secretary's decision that Florida's prior attitude toward drilling will not be considered in a consistency dispute may be important to Louisiana since this state has, with one exception, always found OCS oil and gas activities to be consistent with its CMP and it may be argued that an about-face is arbitrary.²³⁰

2. Ground 1: The Activity Is Consistent with the CZMA

Once the threshold issues have been passed, the first of two substantive grounds on which the Secretary of Commerce can override a state's objection is a finding that the activity is consistent with the objectives or purposes of the CZMA.²³¹ For the Secretary to find that the activity is consistent with the objectives of the CZMA, three elements must be met.²³²

The first element of Ground 1 is that the activity must further "the national interest as articulated in § 302 or § 303 of the [CZMA], in a

225. See 1993 Mobil E & P, *supra* note 224, at 6.

226. *Id.*

227. *Id.*

228. *Id.* at 9.

229. *Id.*

230. See *generally infra* Part VII. The argument against arbitrariness would be that the cumulative impacts along with the hurricane effects have drastically changed the formula for consistency review.

231. 16 U.S.C. § 1456(c)(3)(A) (2000).

232. 15 C.F.R. § 930.121 (2006).

significant or substantial manner.”²³³ Before 2000, in cases of oil and gas drilling, meeting the first element was nearly automatic because national energy self-sufficiency is an objective of the CZMA and oil and gas drilling is a means of achieving energy self-sufficiency.²³⁴ However, the C.F.R. was amended in 2000 to require that the activity must further the national interest in a “*significant or substantial manner*,” which increases the burden on the applicant by making the first element harder to meet.²³⁵ Because there have been no decisions since this time, we do not yet know what the evidentiary standard under this new language will be.

The second element of Ground 1 is that “the national interest furthered by the activity outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively.”²³⁶ For this balancing test, the Secretary must consider the adverse effects of the project itself, in combination with other past, present, or reasonably foreseeable activities affecting the coastal zone.²³⁷ The Florida secretarial reviews placed emphasis on secondary and cumulative effects of offshore drilling and Louisiana should be able to demonstrate that lease sales, by their nature, have had and will have secondary and cumulative adverse effects on its coastal zone, all of which should be considered in a secretarial review.²³⁸ In the 1993 Mobil E & P decision, the Secretary stated that the adverse effects to coastal resources from Mobil’s proposed OCS activities outweighed the national interest because the affected area was so unique.²³⁹ The affected area included mangroves, seagrasses, marshes, coral reef, and live-bottom habitat.²⁴⁰

233. *Id.* § 930.121(a). A discussion of “paramount national interest” appears *supra* note 216.

234. *See, e.g.*, 1993 Mobil E & P, *supra* note 224.

235. 15 C.F.R. § 930.121(a) (emphasis added).

The Secretarial review function is not intended to upend the State management structure by replacing the State agency’s decision with the Secretary’s, for projects which are essentially local government land use decisions and which do not significantly or substantially further the national interest in the CZMA’s objectives. The purpose of the Secretary’s review is to ensure that projects which do not significantly or substantially further the national interest in the CZMA’s objectives, and where the national interest outweighs impacts to coastal uses and resources, may be federally approved notwithstanding their inconsistency with the enforceable policies of a management program.

65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000) (codified at 15 C.F.R. 930.120-45).

236. 15 C.F.R. § 930.121(b).

237. 1995 Mobil E & P, *supra* note 223, at 13.

238. See the scientific support for this contention discussed generally in BTNEP, *supra* note 177. *See also* Turner, *supra* note 172, at 6, 8.

239. *See* 1993 Mobil E & P, *supra* note 224, at 34.

240. *See id.* at 13-35.

In contrast, in the 1995 Mobil E & P decision, Florida's denial of consistency for Mobil's proposed drilling activity off the coast of Pensacola was overturned by the Secretary in part because evidence to prove uniqueness was not presented.²⁴¹ The Secretary stated that there was insufficient information in the record for him to make a decision²⁴² and that he must err on the side of permitting the activity.²⁴³ The lesson for Louisiana is that to prevail in a secretarial consistency review will require a large amount of factual material showing the importance of Louisiana's unique coastal areas and resources. For Louisiana to tip the scales of this balancing test, the Secretary will surely require proof of the uniqueness of Louisiana's coast and the specific importance of each habitat. Such proof should not be unduly burdensome for the state to produce, as these topics have appeared in the scientific literature for many years.²⁴⁴

The third element of Ground 1 for Secretarial override requires that "[t]here is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program."²⁴⁵ Florida failed to prove that a reasonable alternative existed to Mobil's activity.²⁴⁶ Because it is difficult for the state to suggest consistent alternatives for offshore oil and gas drilling as a source for new hydrocarbon sources, Louisiana will also have substantial trouble arguing an alternative under element three.²⁴⁷ In the current oil and gas environment, it is difficult to argue that there is a reasonable alternative to exploration and production. The simple reality is that the activity is going to occur and it will affect the coastal zone. However, the current environmental status of the Gulf Coast, following the hurricane devastation of 2005, mandates that some mitigating action be taken to offset the damages of exploration and production. Thus, the only feasible alternative is for the state to deny consistency, for which it has ample grounds, until the federal government will commit to a royalty-sharing program for OCS activities or to adequate mitigation of OCS activity harms. The former approach could guarantee a substantial income stream for the state that, following the 2005 and 2006

241. See 1995 Mobil E & P, *supra* note 223, at 41.

242. *Id.* at 48.

243. 1993 Mobil E & P, *supra* note 224.

244. See, e.g., O'Connell et al., *supra* note 177.

245. 15 C.F.R. § 930.121(c) (2006).

246. The Secretary notes that Florida did attempt to offer an alternative to Mobil's activity in the form of a delay to gather more information. 1995 Mobil E & P, *supra* note 223, at 45. However, the Secretary rejected this as a viable alternative. *Id.*

247. *Id.*

Extraordinary Sessions of the Louisiana Legislature, is dedicated to strengthening our coastline against future natural disasters and mitigating past anthropogenic changes to the coastal zone to counter the effects of exploration and production activities.²⁴⁸

3. Ground 2: The Activity Is Necessary in the Interests of National Security

Ground 2 for overriding a state's decision is that the activity is necessary in the interest of national security.²⁴⁹ The standard is that a national security interest would be significantly impaired if the activity could not take place as proposed.²⁵⁰ The applicant would have to specifically identify how denial of that particular activity could impair the national security.²⁵¹ While this is a high burden for the applicant, it is not impossible, especially in light of recent world events.²⁵² However, a case can also be made that coastal erosion threatens national security by damaging the extensive energy production, processing, and transmission infrastructure of coastal Louisiana.

The secretarial reviews of consistency denials of OCS oil and gas development activities indicate that Louisiana has a good chance of passing a secretarial review with similar facts and succeeding in a consistency denial of OCS lease sales if similar standards are applied by a mediator or a court to federal agency actions.²⁵³ The state's coastal

248. See generally Coastal Protection and Restoration Authority Act (codified as amended at LA. REV. STAT. §§ 213.1, 213.8, 214.1, 214.12(A)(1), 214.13 (2006)).

249. 15 C.F.R. § 930.122.

250. *Id.* § 930.122.

251. See 1993 Mobil E & P Decision, *supra* note 224, at 42.

252. The world events that are currently implicated in the national security component analysis are the war in Iraq, rising oil prices, the skyrocketing Chinese demand for oil and gas, and decreased domestic production of oil. See generally Christopher Dickey et al., *Cash from Chaos: It Was Hoped the Iraq Invasion Would Secure a Key Oil Patch and Eventually Spread Freedom; but Guess Who's Getting Rich?*, NEWSWEEK, Oct. 25, 2004, at 54 (commenting on the fact that the Iraq war has not made oil cheaper or more available for the United States); Michael D. Lemonick et al., *How To Kick the Oil Habit: As Prices Rise, the Race for New Energy Sources—From Wind Farms to Liquid Coal—Heats up; Get Ready for the Withdrawal Symptoms*, TIME, Oct. 31, 2005, at 60 (commenting that gas prices have risen twenty-five percent in a year); *OPEC Interests in Oil Demand of China*, 17(1) CHINA CHEM. REP. 7 (2006) (noting that China is the world's fastest-growing energy market); David D. Newsom, *99-Cent-Per-Gallon Illusions*, CHRISTIAN SCI. MONITOR, Apr. 8, 1998, at 19 (commenting that despite new technology continuing to yield heretofore unknown oil resources worldwide, domestic U.S. oil production continues to decline). All or any one of these problems in the U.S. oil supply chain can be easily used by an applicant to overcome most arguments that disallow OCS activities would indeed threaten national security (Ground II) by increasing our dependence on foreign supplies in an increasingly volatile mineral market.

253. See 15 C.F.R. §§ 930.43, 110-116; 16 U.S.C. § 1456(c)(1)(B) (2000).

environment is unique and extremely valuable to Louisiana and the nation and its protection should outweigh the national interest to inflict unmitigated damages from OCS oil and gas development, indeed its conservation and restoration furthers a national interest.²⁵⁴ The scientific literature tends to confirm this assertion.²⁵⁵ The reasonable alternative to OCS leasing and development is for the nation to help Louisiana mitigate and repair the damage, past, present and future, caused by those activities.

With respect to a secretarial override of a state's consistency denial of a federally licensed or permitted activity necessary to the interest of national security, there is a high burden on the applicant to prove a national security interest. Examining the language of prior decisions would indicate that the burden of proving a national security interest is a difficult task.²⁵⁶ For example, in the 1993 Mobil E & P decision, the Secretary stated that the national security arguments of foreign oil independence raised by Mobil and the federal government were not sufficient to support the requirement that a national security interest is furthered by the proposed activity.²⁵⁷ However, it should be borne in mind that the world events noted in footnote 253 could change the calculations of finding a national security interest.

VII. HISTORY OF FEDERAL CONSISTENCY REVIEW IN LOUISIANA

A. *Early Attempts To Protect Louisiana's Coastal Zone from Adverse OCS Activities*

In 1983, Secretary of the Interior James Watt introduced the policy of area-wide leasing in the Gulf of Mexico.²⁵⁸ This program opened an unprecedented number of acres for leasing.²⁵⁹ It also greatly increased the adverse environmental effects of leasing on the Gulf by increasing the volume of leasing activity.²⁶⁰ Louisiana voiced strong opposition to this plan, but could only use its OCSLA commenting authority to challenge

254. See 15 C.F.R. § 930.121(b) (explaining the balance of national and coastal interests).

255. See generally BTNEP, *supra* note 177.

256. See 1993 Mobil E & P, *supra* note 224, at 42.

257. Although the comments of the federal agencies clearly link Mobil's proposed POE plan of exploration with furthering the national defense and security interest in lessening this Nation's dependence on foreign oil and the enhancement of our domestic supply, none of the comments specifically address how these interests would be "significantly impaired" if Mobil's proposed POE is not allowed to proceed in its present form. These general conclusory comments fail to meet the standard for the criteria of Ground II. *Id.*

258. Supplement on Lease Sale 135, *supra* note 38, at 7.

259. *Id.*

260. See generally *id.* (explaining the historical development of OCS leasing in the Gulf).

the leasing because prior to the 1990 CZMA amendments consistency authority did not apply to OCS activities.²⁶¹ In 1984, Governor Treen voiced his concerns to then Secretary of the Interior William Clark by saying that without some sort of revenue sharing program from OCS leases “it will become increasingly difficult to continue to support accelerated, area-wide leasing in the Gulf.”²⁶² Governor Treen suggested revenue sharing in accordance with the policies presented in section 8(g) of the OCSLA.²⁶³ A meeting with federal government officials to discuss revenue sharing possibilities was arranged, but the federal officials cancelled the meeting a day before the scheduled time.²⁶⁴ In response, Louisiana sought to enjoin Lease Sale 81, but failed because the CZMA had not yet been amended to allow states to object to OCS lease sales.²⁶⁵

In a memo to Garrey E. Carruthers, Assistant Secretary of Land and Minerals Management, DNR Secretary William C. Huls stated that seeking an injunction was not just an effort to get more federal money but also an effort at coastal conservation in general.²⁶⁶ Governor Treen’s administration vowed to continue fighting for federal money from OCS leases but this action occurred at the end of his term and he lost his 1984 bid for reelection to Edwin Edwards.²⁶⁷ After Governor Edwards’ election, efforts by the state to get federal assistance from OCS lease revenues stopped. This was due to two factors: (1) there was very little support from Edwards’ office for such efforts because the oil and gas

261. *Id.* at 12; *see also* Letter from Charles Groat, La. St. Geologist, to John L. Rankin, MMS (Oct. 8, 1992) (noting the state’s opposition to the plan) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

262. Letter from David Treen, Governor of La., to William C. Clark, Sec’y of the Interior (Feb. 8, 1984) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

263. 43 U.S.C. § 1337(g) (2000). States that states must receive a “fair and equitable” division of revenue. *Id.* This portion now stands at twenty-seven percent for coastal states, paid monthly. Revenue sharing was eventually passed into law. However, these funds have proven insufficient for Louisiana’s coastal restoration needs. It is noteworthy that Louisiana’s congressional delegation is making an effort to remedy these shortcomings. Representative Bobby Jindal (R-La.) recently introduced legislation in the House of Representatives that seeks to increase Louisiana’s share of the OCS royalties from the current level to seventy-five percent for areas three to twelve nautical miles from shore and fifty percent thereafter. *See* H.R. REP. NO. 4761, 109th Cong., § 7(b)(3)-(4) (2000); *see also* Gerard Shields, *La. Delegation Seeks Coastal Funds*, THE ADVOCATE (Baton Rouge, La.), Feb. 17, 2006, at 5A (commenting that other members of Congress are expected to introduce similar legislation soon).

264. Letter from William C. Huls, Sec’y, DNR, to Garrey Carruthers, Assistant Sec’y, Land & Minerals Mgmt., at 1 (May 3, 1984) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

265. *Id.*

266. *Id.* at 4.

267. *See* Paul Taylor, *Louisiana’s Movable Feast Flies to Paris To Retire Edwards’ Debt*, WASH. POST, Jan. 19, 1984, at A2.

industry was adamantly opposed and hostile to Louisiana's coastal zone management program at the time,²⁶⁸ and (2) Louisiana's coastal managers were not yet able to use federal consistency authority for OCS activities and, having already failed in enjoining an OCS lease, may have felt that there was little else that could be done.

In March of 1990, MMS released the draft Environmental Impact Statement (EIS) for three OCS lease sales: 131, 135, and 137.²⁶⁹ At the time, these lease sales were still not subject to consistency review because of the ruling in *Secretary of the Interior v. California*.²⁷⁰ The Louisiana Geological Survey (LGS), in accordance with their authority under the OCSLA, submitted comments to MMS on the sales.²⁷¹ LGS expressed concern over sensitive areas, failure to discuss mitigation measures, and inadequate plans for oil spills.²⁷² In August of 1990, MMS released the final EIS for the three leases.²⁷³ Louisiana was still powerless to challenge the lease sales until November 1990 when the CZMA was amended to make it clear that states have consistency review authority for OCS lease sales.²⁷⁴ In January of 1991, Governor Roemer and Louisiana DNR Secretary Ron Gomez met with Secretary of the Interior Manuel Lujan to discuss the lease sales and possible plans for an impact assistance program.²⁷⁵ Secretary Lujan assured them that serious consideration would be given to the issue.²⁷⁶ Lease Sale 131 was granted consistency in February with Secretary Gomez noting that the consistency was granted due to "the continued need for oil and gas development in this time of global uncertainty."²⁷⁷ However, DNR

268. Indeed, one author has noted of Edwards' first two terms in office that, "environmental concerns were a joke—literally." JOHN MAGINNIS, *THE LAST HAYRIDE* 252 (1985). Maginnis goes on to note that Edwards began to change his tune as his abysmal environmental record came up in the 1983 campaign, but that he still had strong ties to antienvironmental industry groups. *Id.* at 251-54.

269. CMD, Lease Sale 135 Chronology of Events, Document provided by DNR (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana) [hereinafter Lease Sale 135].

270. See 464 U.S. 312, 321 (1984).

271. See Lease Sale 135, *supra* note 269.

272. *Id.*

273. *Id.*

274. *Id.*

275. Telephone Interview by Carolyn Dupuy, Law Clerk, Sea Grant Legal Program, with Robert Gramling, Professor, Univ. of La.-Lafayette (2002)).

276. *Id.*

277. Letter from Ron Gomez, Sec'y, DNR, to Thomas Readinger, MMS (Feb. 19, 1991) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana). Although Secretary Gomez does not elaborate on what is meant by "global uncertainty," it is likely, considering the timing, that the first Persian Gulf War was the significant motivating factor behind this granting of consistency.

advised MMS that an impact assistance program was essential to its approval of any future OCS leasing activities.²⁷⁸

B. OCS Lease Sale 135

In March of 1991, MMS submitted a consistency determination for Lease Sale 135.²⁷⁹ DNR reviewed the sale in accordance with the state CMP and on May 14, 1991, sent MMS a letter stating that Lease Sale 135 was inconsistent with the state CMP.²⁸⁰ On June 28, MMS notified Governor Roemer, without citing reasons, of plans to proceed with the lease sale regardless of the consistency objection.²⁸¹ After this notification, a meeting between Secretary Lujan and Governor Roemer was scheduled, presumably to discuss an OCS revenue sharing plan. Governor Roemer then decided to grant consistency on Lease Sale 135 rather than take judicial action or request mediation because he believed that another meeting with Secretary Lujan would provide money for Louisiana's coastal restoration.²⁸² When Governor Roemer went to Washington, D.C., however, the meeting with Secretary Lujan was cancelled.²⁸³ After Louisiana granted consistency for Lease Sale 135, followed by the cancellation of the meeting with Secretary Lujan, Governor Roemer authorized DNR to reverse the state's position and deny consistency.²⁸⁴ On August 2, DNR formally requested from MMS that mediation with the Secretary of Commerce be granted in accordance with the procedures set out in the CZMA.²⁸⁵ On August 7, MMS advised DNR that it would not participate in mediation.²⁸⁶ Later that day, the State of Louisiana filed suit for declaratory judgment and injunctive relief against Secretary Lujan.²⁸⁷

The complaint in *Louisiana v. Lujan* alleged that MMS's consistency determination failed to provide sufficient analysis, information, or comprehensive data to show that the lease sale would be

278. Letter from Ron Gomez, Sec'y, DNR, to Scott Sewell, Dir., MMS (Aug. 2, 1991) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

279. Lease Sale 135, *supra* note 269.

280. *Id.*

281. *Id.*

282. See Telephone Interview by Carolyn Dupuy, *supra* note 275.

283. *Id.*

284. *Id.*

285. Lease Sale 135, *supra* note 269.

286. *Id.*

287. *Id.*; see also *Louisiana v. Lujan*, Minute Entry, Civil Action No. 91-2910, Section M (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

consistent with Louisiana's CMP.²⁸⁸ The complaint also stated that the program would have severe adverse impacts on the coast, including, but not limited to, the loss of twenty-eight to sixty-five square miles of coastal wetlands directly attributable to Lease Sale 135, reductions in biological productivity, and alteration of critical habitats for endangered species.²⁸⁹ The EIS was, the complaint said, an inadequate analysis of impacts and alternatives to the proposed project.²⁹⁰ The complaint stated, "No State in the Union has paid a greater price than Louisiana in terms of destruction of fragile coastal resources and loss of sensitive wildlife habitat so that the United States of America can enjoy the benefits of the energy resources of the Gulf of Mexico."²⁹¹

Also contained in the complaint were allegations that the consistency determination from MMS contained no information addressing the CMP requirements of Guideline 1.6.²⁹² There was also no discussion of practical or feasible alternatives to Lease Sale 135 such as: leasing strategies that would reduce wetland loss, leasing strategies with reclamation projects and mitigation proposals, or the offering of smaller tracts.²⁹³ The state requested a preliminary injunction prohibiting the lease sale until a valid consistency determination was presented for review, stating not only that the proposed lease sale was not consistent to the maximum extent practicable with Louisiana's CMP, but also that the EIS was inadequate.²⁹⁴

C. Louisiana v. Lujan

On August 16, 1991, Judge Beer denied the motion for preliminary injunction in the United States District Court for the Eastern District of Louisiana.²⁹⁵ The Louisiana Code of Civil Procedure considers the preliminary injunction as "an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion."²⁹⁶ The party seeking a preliminary injunction must meet four requirements to succeed:

288. Complaint for Declaratory Judgment and Injunctive Relief at 2, *Louisiana v. Lujan* (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

289. *See id.* at 10.

290. *See id.*

291. *Id.* at 4-5.

292. *See id.* at 8-9.

293. *See id.* at 11.

294. *See id.* at 2.

295. *Louisiana v. Lujan*, 777 F. Supp. 486, 487 (E.D. La. 1990).

296. *Id.* at 487 (citing *Canal Auth. v. Callaway*, 489 F.2d 567 (5th Cir. 1974)).

1. a substantial likelihood that the plaintiff will prevail on the merits,
2. a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted,
3. that the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendants, and
4. that the granting the preliminary injunction will not disserve the public interest.²⁹⁷

In deciding whether the state was likely to prevail on the merits, a significant factor in the court's decision was the timeliness of the state's objection to Secretary Lujan's decision.²⁹⁸ The federal defendants argued that the state's objection was not within the time frame imposed by the CZMA regulations.²⁹⁹ The court agreed that the objection was not filed within CZMA time limits but stated it was not clear that failure to meet the time requirements of the regulations constituted a complete bar to any subsequent challenges.³⁰⁰ The judge refused to rule definitively on the issue or interpret the regulations to bar the state's claims.³⁰¹ However, Judge Beer stated, ominously for the state, that Louisiana's "extreme delay in making its objections to be one of the compellingly relevant factors in its consideration of the plaintiff's ultimate ability to carry the heavy burden necessary to prevail on the merits" of the case.³⁰² It seems, from the judge's statement, that while the state's delay in raising its objections did not bar its claim, there was a much larger problem to surmount. The judge was unsatisfied with the information set forth by the state to support its claims of inconsistency.³⁰³ In the analysis of the decision one must be cognizant of the fact that failure to obtain a preliminary injunction is in no way determinative of failure in a trial on the merits. Had Louisiana filed a timely claim, the results could very well have been different.

Judge Beer found that Louisiana failed to show that it was likely to prevail on any of its three claims, two under the CZMA and one under the National Environmental Policy Act.³⁰⁴ The first of Louisiana's claims was that MMS did not meet the procedural requirements of the CZMA because the consistency determination did not adequately address the

297. *Id.* at 487-88.

298. *Id.* at 488.

299. *Id.* According to 15 C.F.R. § 930.78 (2006), concurrence is presumed after six months.

300. *Lujan*, 777 F. Supp. at 488.

301. *Id.*

302. *Id.*

303. *See id.* at 489.

304. *See id.* at 490.

state's concerns under its CMP.³⁰⁵ Judge Beer, citing the CZMA's regulations requiring that the consistency determination provide "data and information sufficient to support the Federal agency's consistency statement," ruled that the federal agency need not "convince the State" of its findings of consistency but merely support the findings.³⁰⁶ Judge Beer did not elaborate on what level of data and evidence would suffice for adequate support, or comment on who is in a better position to judge its sufficiency, the federal agency that may or may not have intimate knowledge of a state's coastal zone and the impacts thereto or the state's coastal management agency which surely does have such knowledge.³⁰⁷

The second of Louisiana's claims under the CZMA was that MMS's proposed action was in fact inconsistent with the state's CMP absent mitigation to counteract the adverse effects.³⁰⁸ Judge Beer found that the state offered "some convincing testimony that the lease-sale could have significant environmental impacts on Louisiana specifically the coastal wetlands" but that the state had a burden of proving the Secretary of the Interior's finding of consistency was arbitrary and capricious.³⁰⁹ The judge found that Louisiana had not met that burden.³¹⁰

Judge Beer's decision appears flawed on several points. First, as to the issue of the state missing the deadline to object to the MMS consistency determination, the regulation is unclear as to the actual time period within which the state must respond to the consistency determination, either as soon as possible, or within three or six months.³¹¹ MMS submitted the consistency determination in March and the injunction was filed in August, so under the six-month interpretation, Louisiana did not miss the deadlines at all.³¹² The judge may have been influenced by the manner in which the state changed its position on the consistency determination several times.³¹³ By stating that the timeline issue was "a compellingly relevant factor" in its consideration, the court seems to attach unusual significance to the questionable procedural technicality.³¹⁴ It may have appeared to the court that the state was

305. *Id.* at 488.

306. *Id.* at 488-89 (citing 15 C.F.R. § 930.39(a) (2006)).

307. *Id.*

308. *Id.* at 489.

309. *Id.*

310. *Id.*

311. 15 C.F.R. § 930.78(a)-(b).

312. *Id.*

313. *Id.*

314. *Lujan*, 777 F. Supp. at 488.

disingenuous in its motives because of the vacillations preceding the denial of consistency.

Other reasons cited by the court for denying the injunction request are also inconsistent with the intent of the CZMA. Citing 15 C.F.R. § 930.39(a), the court emphasized that the “consistency determination shall also include . . . *comprehensive data and information sufficient to support the Federal agency’s consistency statement.*”³¹⁵ Judge Beer turns the CZMA on its head by stating that the consistency determination need not contain sufficient information to convince the state that the lease sale is consistent, only that it must contain enough information to *support* such a finding.³¹⁶ This interpretation renders the federal consistency provision virtually meaningless. In an area as scientifically detailed as the effect of oil and gas activities on coastal resources, some evidence may offer some support to a consistency determination but run counter to current scientific understanding, especially the prevailing knowledge of those who work intimately with the resource issues in question. This interpretation provides a large loophole for MMS to supply some information that supports its position while ignoring a large body of evidence against granting consistency, allowing a court to rule that some evidence supporting consistency is conclusive despite stronger evidence to the contrary. The effectiveness of the CZMA consistency requirement rests on agencies having to supply states with detailed information concerning their proposed activities and with states being able to contest the determination based on valid data and findings to which the federal agency may not be privy or which the federal agency may have ignored.

Judge Beer’s interpretation places the burden on the state to prove that the lease sale is inconsistent rather than on the federal agency having to prove that the activity is consistent with the state CMP.³¹⁷ The court’s reasoning misinterprets the purpose of the 1990 Reauthorization

315. 15 C.F.R. § 930.39(a) (emphasis added).

The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency’s consistency statement. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied.

Id.; see also *id.* § 930.39(b).

316. *Lujan*, 777 F. Supp. 489.

317. For a general discussion, see Martin J. LaLonde, *Allocating the Burden of Proof To Effectuate the Preservation and Federalism Goals of the CZMA*, 92 MICH. L. REV. 438 (1993).

Amendments.³¹⁸ The purpose of the amendments is to expand state power and to give states the ability to control, change, and prevent adverse effects in their coastal areas.³¹⁹ Forcing the state to prove inconsistency does not comply with the goals of the CZMA.

Furthermore, the power allocated to the states under the CZMA is an unusual abandonment of federal supremacy over states.³²⁰ In the CZMA, Congress mandated that federal agencies must comply with state CMPs, not the other way around.³²¹ Additionally, affected federal agencies are given the chance to comment on and shape the state CMP during the approval phase.³²² State and local agencies have greater expertise with regard to their unique ecological situation, making them more qualified than federal agencies to make such a determination.³²³ Despite the fact that allocation of the burden of proof is not stated plainly in the CZMA, Judge Beer's decision is clearly in violation of the purpose of the CZMA, its amendments, and the underlying public policy. After deciding that Louisiana failed to meet its burden of establishing substantial likelihood of success on the merits, Judge Beer found no need to address any of the other requirements for an injunction.³²⁴ The injunction was denied and no appeal was filed.³²⁵ A gubernatorial election was held in November 1991, and Edwin Edwards again took office in January 1992. The Edwards Administration chose not to pursue the consistency litigation any further.³²⁶

D. Federal Consistency Review in Louisiana in the Aftermath of Lease Sale 135 and Louisiana v. Lujan

Since the failure of *Lujan*, Louisiana has not objected to a consistency determination from MMS. A 1992 memo from David Soileau, Assistant Secretary to DNR Secretary Jack McClanahan, makes

318. See generally H.R. REP. NO. 101-964, pt. A, at 968-69 (1990). The explanatory section notes that the amendments are intended to clarify that all federal agency activities are subject to consistency requirements and to encourage states to improve their coastal zone management program in coastal wetlands management and other areas.

319. *Id.* at 968.

320. For a detailed discussion of federal supremacy, the reader is directed to Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

321. See 16 U.S.C. § 1456(c)(1)(A) (2000).

322. *Id.* § 1456(b).

323. LaLonde, *supra* note 317, at 458.

324. See *Louisiana v. Lujan*, 777 F. Supp. 486, 490 (E.D. La. 1990).

325. *Id.*

326. Memorandum from David Soileau, Assistant Sec'y, DNR, to Jack McClanahan, Sec'y, DNR, re: OCS/Impact Assistance Issue (Jan. 14, 1992) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

it clear that the Edwards Administration would not pursue litigation regarding federal consistency.³²⁷ The administration was doing the utmost to preserve its image and even spoke of possible damage control if the Sierra Club decided to sue, at the same time expressing indifference to the environmental protection community's complaints.³²⁸

In the meantime, Louisiana has suffered severe environmental consequences of the ever-expanding oil and gas industry off its coast, especially wetland loss and habitat depletion.³²⁹ For every OCS EIS issued, the CMD has notified the MMS of areas of concern with the EIS for the lease sales and the subsequent OCS activity.³³⁰ Even though genuine concern has been expressed, DNR has continually granted federal consistency³³¹ and with the exception of *Lujan*, Louisiana's governors seem to have been very reluctant to use consistency denial as a tool to influence federal actions. Support from the governor's office and the DNR Secretary, with whom the final decision on consistency lies, is crucial to pursuing the use of consistency denial to affect federal policy.

Since 1991, the letters from the governor and the DNR Secretary to MMS granting consistency for lease sales have become increasingly uniform.³³² The letter usually starts by reminding MMS that Louisiana "has paid in the past and continues to pay massive environmental costs" from oil and gas leasing.³³³ A DNR analysis of the MMS consistency determination then follows which looks at the Guidelines point-by-point, often showing that MMS has provided inadequate information in a number of areas or that portions of the determinations are inconsistent.³³⁴ Despite CMD's documentation of potential harm to the state's coastal zone in their consistency determinations, once that determination has

327. *Id.*

328. *Id.*

329. *See supra* Part II.

330. *See, e.g.*, Letter from Jack C. Caldwell, Sec'y, DNR, to Thomas A. Readinger, MMS (June 17, 1996) (noting that approximately 247 acres of wetlands will succumb to erosion as a result of the federal activity proposed therein); Letter from Martha A. Swan, Acting Sec'y, DNR, to S. Scott Sewell, MMS (Oct. 25, 1991) (noting the detrimental impacts of OCS activities on Louisiana's wetlands and seafood industry). Materials on file with the Louisiana Sea Grant Legal Program, La. State Univ., Baton Rouge, Louisiana.

331. *See generally* Letter from Jack C. Caldwell, *supra* note 330.

332. *See, e.g.*, Letter from Terry Howey, Adm'r, CMD, to Thomas Readinger, MMS (Apr. 22, 1993); Letter from David Soileau, Assistant Sec'y, DNR, to Thomas Readinger, MMS (Jan. 21, 1994); Letter from Jack McClanahan, Sec'y, DNR, to Robert Armstrong, MMS (May 8, 1995); Letter from Jack Caldwell, Sec'y, DNR, to Thomas Readinger, MMS (Jan. 9, 1996). Materials on file with the Louisiana Sea Grant Legal Program, La. State Univ., Baton Rouge, Louisiana.

333. *See* sources cited *supra* note 332.

334. *Id.*

been submitted to the DNR Secretary, there is no procedure for CMD to influence the final secretarial or gubernatorial decision.³³⁵ In the end, each formulaic letter from DNR to MMS states that Louisiana enjoys the benefits of oil and gas leasing and appreciates the ability to comment on the lease sale.³³⁶ After reviewing a lease sale or an EIS, DNR has traditionally stated that the OCS activity is consistent with the state CMP, although certain environmental issues of concern to the state are worthy of comment.³³⁷ Then DNR usually invokes section 18 of the OCSLA, which requires that all lease sales be prepared with “a proper balance between the potential for environmental damage, the potential for discovery of oil and gas, and the potential for adverse impacts on the coastal zone” because Louisiana’s entire coastline is directly adjacent to the Central Gulf of Mexico Planning Area and therefore exposed to all of the adverse impacts in that area.³³⁸

It is clear that if administration policies were different, CMD would be much more active and critical in its consistency determinations. CMD would probably find some actions inconsistent without sufficient mitigation in the form of financial assistance or waiver of state matching funds required for United States Army Corps of Engineers (Corps) projects designed to mitigate or repair OCS-related damages. The longer Louisiana continues to grant consistency in these situations, the harder it will be for Louisiana to succeed in litigation if they ever decide to deny a consistency determination.

E. Attempts To Obtain Federal Assistance for Louisiana’s Coastal Restoration

The damage to Louisiana’s coastal areas from federally sanctioned activities is accompanied by a lack of funding to support preservation and restoration projects.³³⁹ The Louisiana congressional delegation and governors have attempted to get the federal government to help mitigate damage caused by activities it has sanctioned and supported, but so far

335. E-mail from Greg DuCote, Coastal Manager, DNR, to Ryan M. Seidemann, Assistant Attorney General, Louisiana Department of Justice (Feb. 23, 2006, 06:30:00 CST).

336. Letter from Terry Howey, *supra* note 332.

337. Memorandum from the La. Sec’y of the DNR to the Program Dir. of the Office of Program Dev. & Coordination of the MMS, re: OCS Lease Sale 157 (Jan. 9, 1996). In the end, most of the formulaic letters from DNR to MMS after 1992 state that Louisiana enjoys the benefits of oil and gas leasing and appreciates the ability to comment on the lease sales (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

338. 43 U.S.C. § 1344(a)(3) (2000).

339. See Gerald Shields, *Congress Puts Off La. Bills*, THE ADVOCATE (Baton Rouge, La.), Sept. 30, 2006, available at <http://www.theadvocate.com/news/politics/4273386.html?showAll=y&c=y> (noting that Louisiana could have received billions from recent litigation).

those efforts have not succeeded. CARA³⁴⁰ passed in the House of Representatives in May 2000 by a 315-102 vote.³⁴¹ CARA would have created a fund with \$2.8 billion in OCS revenues each year for fifteen years.³⁴² The money was to come from the \$4 to \$5 billion collected from OCS lease royalties that go directly into the U.S. Treasury's general fund.³⁴³ Under CARA, coastal states would have received \$1 billion for coastal restoration.³⁴⁴ The Louisiana coast certainly could have benefited from these drilling royalties and it seemed fair, especially since a portion of the OCS lease money to fund CARA was being generated in the Gulf of Mexico off the coast of Louisiana, which received the brunt of the damage.³⁴⁵ Senator Mary Landrieu introduced a similar measure in the Senate, but despite the support of sixty-three senators, CARA ultimately failed in appropriations committees due to strong opposition by property rights proponents and arguments that the bill lacked state accountability and congressional control of billions of dollars.³⁴⁶ The House Resources Committee again approved CARA in July 2001, and the bill was moving for vote on the House floor but was taken off any priority list due to the attacks of September 11, 2001.³⁴⁷

In the past, Louisiana's governors have not always been vocal supporters of coastal restoration efforts. However, since the election of Governor Blanco in 2002, it appears that the political tide is changing. In January of 2003, Governor Blanco spent fifteen minutes alone with President Bush during a car ride to the airport. She seized this

340. H.R. 701, 106th Cong. (1999).

341. Larisa Epatko, *CARA Bill Clears House by 315-102 Vote*, ENERGY & ENV'T DAILY, May 11, 2000, available at http://www.eenews.net/EEDaily/searcharchive/test_search-display.cgi?q=CARA&file=%2FEEDaily%2Fsearcharchive%2FDaily%2000%2FMay11%2F05110001.htm.

342. *Id.*

343. H.R. 701, 106th Cong. § 5.

344. *Id.* § 5(b)(1).

345. *Id.* Also included in the bill is a controversial funding proposal—\$900 million for the Land and Water Conservation Fund (LWCF). Half of the LWCF monies would go to federal land purchases and the other half as matching grants to states for conservation purposes. *Why CARA Not Good for Country*, GREAT LAKES SPORT FISHING COUNCIL WKLY. NEWS, Aug. 13, 2001, available at <http://www.great-lakes.org/8-13&20-01.html#n22>; *Hearing on H.R. 701 and H.R. 798: Hearing Before the H. Comm. on Resources*, 106th Cong. 56-589 (1999) (statement of Steve Borell, Alaskan Miners Ass'n).

346. Larisa Epatko, *Interior Funding Complicated Senate Action on CARA Bill*, ENERGY & ENV'T DAILY, Sept. 25, 2000, available at http://www.eenews.net/EEDaily/searcharchive/test_search-display.cgi?q=CARA&file=%2FEEDaily%2Fsearcharchive%2FDaily-Monday%2000%2F09250010.htm.

347. See Larisa Epatko, *CARA Bill Waits in Wings as Other Needs Take Precedence*, ENERGY & ENV'T DAILY, Sept. 24, 2001, available at http://www.eenews.net/EEDaily/searcharchive/test_search-display.cgi?q=CARA&file=%2FEEDaily%2001%2Fsept24%2F09240111.htm.

opportunity to make a direct appeal for \$50 million in coastal restoration funding. Despite public support from the White House, Louisiana received only \$8 million.³⁴⁸ On February 28, 2004, Governor Blanco published an editorial in the *New York Times* in response to a February 21 article on the destruction of Iraq's wetlands. Governor Blanco stated that while Chesapeake Bay, the Florida Everglades, and now wetlands in Iraq have all been the recipient of federal funds for restoration, Louisiana has not.³⁴⁹

The rapid loss of Louisiana's coast is a problem faced by not only the state but also the nation. Irresponsible economic choices over sound environmental decisions and the failure of critical federal legislation such as CARA magnify this problem. Louisiana's cause could be helped if national environmental groups supported its efforts, but the national perception that Louisiana has a laissez-faire attitude toward environmental damage by a perceived greedy oil and gas industry has prevented national environmental groups from lining up behind this proposal.

F. A Sea-Change? Governor Blanco and Lease Sale 198

As the dust began to settle from the devastation wrought on coastal Louisiana as a result of Hurricanes Katrina and Rita, a glimmer of hope emerged from Governor Kathleen Blanco's office, indicating that there has been, perhaps, a substantial change in Louisiana's policy towards OCS consistency determinations. The storms brought the damages and degradation of a century of oil and gas exploration and production in the state into bold relief, as these damages likely facilitated some of the devastation in the region through wetlands loss and general contamination. In partial response to this reality, and also as a likely result of the substantial budgetary shortfalls that the state now faces as a result of the storms, Governor Blanco sent a letter to MMS on January 30, 2006, informing the federal government that the state is "currently unable to determine whether the assumptions made in the MMS consistency determination are still valid and therefore unable at this time to determine the consistency of Lease Sale 198 with our coastal zone management program."³⁵⁰ Lease Sale 198 is described by MMS as

348. *Bush Budget Low on Coast Money*, THE ADVOCATE (Baton Rouge, La.), Feb. 7, 2004, at 6.

349. Kathleen Babineaux Blanco, *Louisiana's Wetlands*, Letter to the Editor, N.Y. TIMES, Feb. 28, 2004, at A14.

350. Letter from Kathleen Blanco, Governor, La., to Renee Orr, Chief, MMS Leasing Div. (Jan. 30, 2006), available at <http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&>

covering approximately 21 million acres in the Central GOM [Gulf of Mexico] Outer Continental Shelf (OCS) Planning Area offshore Louisiana, Mississippi, and Alabama. The blocks are located from 3 to about 210 miles offshore in water depths of 4 meters to more than 3,400 meters. MMS estimates the proposed lease sale could result in the production of 276 to 654 million barrels of oil and 1.59 to 3.3 trillion cubic feet of natural gas.³⁵¹

It is precisely this sheer volume of minerals and the anticipated royalties that the federal government expects to reap from Lease Sale 198 that Louisiana is in desperate need of obtaining a share of for coastal restoration purposes. Indeed, in her letter to MMS, Governor Blanco notes this exact reality. She notes that

[d]espite having abundant resources, in the form of OCS revenues, to protect the development required for supporting OCS activities . . . the federal government has not devoted adequate resources to this end. Instead, Louisiana is being asked to continue its role as the workhorse for OCS development while no provisions are being made to ensure the sustainability of the onshore support for that development.³⁵²

It should be noted, however, that this letter does not constitute an objection to Lease Sale 198. Rather it merely serves as a sounding board for the governor for this important issue. At the time of this publication, it is unclear whether or not Governor Blanco's policies will ultimately result in OCS royalties inuring to Louisiana from future lease sales. It will be some time before the full impact of this letter and the recent change in attitude in the governor's office is known. However, following Governor Blanco's speech opening the 2006 Extraordinary Session of the Louisiana Legislature in which she committed her administration's policy to blocking future OCS activities until Louisiana can secure fifty percent of OCS royalties from the federal government³⁵³ seems to indicate that

catID=1&articleID=1632. A hard copy of this letter is also on file with the Louisiana Sea Grant Legal Program, La. State Univ., Baton Rouge, Louisiana.

351. Press Release, MMS, MMS Issues Proposed Notice of Central Gulf Lease Sale 198 (Nov. 22, 2005), available at <http://www.gomr.mms.gov/homepg/whatsnew/newsreal/2005/051122.pdf>. A hard copy of this news release is also on file with the Louisiana Sea Grant Legal Program, La. State Univ., Baton Rouge, Louisiana.

352. Letter from Kathleen Blanco, *supra* note 350.

353.

Louisiana is fighting for 50% of the oil and gas royalties from off-shore drilling. We need this money to finance a comprehensive hurricane protection and coastal restoration system. The two storms melted 100 square miles of coastline into the sea. Our fragile environment changes the way we do business. If no effort is made to guarantee our fair share of royalties, I have warned the federal government that we will be forced to block the August sale of off-shore oil and gas leases. . . . It's time to play hardball, as I believe that's the only game Washington understands.

Louisiana's coastal zone has found a new and much-needed ally in the state's executive office.

VIII. DISCUSSION

A. *The New Imperative: The Implications of Hurricanes Katrina and Rita for Louisiana's Coastal Protection Policies*

The 2005 tropical cyclone season awakened the nation, and more specifically, Louisiana, to the fragility of the coastal zone. The first and most severe blow from this season was dealt when Hurricane Katrina rolled ashore in Southeast Louisiana and then South Mississippi early in the morning on August 29, 2005. The storm was not sufficiently weakened when it passed over the ecologically troubled wetlands of coastal Louisiana which, under normal conditions, would have acted as a barrier for the rest of the state from the brunt of the storm. The Hurricane continued on, largely unabated, wreaking havoc on the coastal parishes and New Orleans itself. As the storm surge lashed at the levees protecting New Orleans, they succumbed, spilling the contents of Lake Pontchartrain into New Orleans. Flood waters poured into the bowl-shaped city, much of which lies below sea level, swamping virtually everything in their path.

In other parts of the state, the coastal storm surge brought substantial floodwaters into St. Bernard and Plaquemines parishes and Jefferson Parish was overcome by the massive amounts of rainfall.³⁵⁴ When the storm passed, the path of devastation was staggering. Early estimates of the toll of Hurricane Katrina on South Louisiana top all previous damage costs from other tropical cyclones in the United States.³⁵⁵ The storm flooded the entire New Orleans metropolitan area, displaced over a million people, obliterated wetlands, and spread contamination throughout the affected areas.³⁵⁶

Kathleen Babineaux Blanco, Governor Blanco's Speech to the Louisiana Legislature (Feb. 6, 2006), available at <http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&catID=1&articleID=1650>.

354. See, e.g., Bruce Nolan, *The Overview: 'Look, Look Man, It's Gone,'* TIMES-PICAYUNE (New Orleans), Aug. 30, 2005, available at http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola_Times-Picayune/archives/2005_08_30.html (available only online due to Hurricane Katrina); Sheila Grissett, *East Jeff Looking To Fix Pumping Plan: Evacuated Workers Were Not at Posts,* TIMES-PICAYUNE (New Orleans), Oct. 5, 2005, at 4; Matthew Brown, *Seizure of Land Near Levee Planned: Plaquemines, Corps Working on Details,* TIMES-PICAYUNE (New Orleans), Dec. 9, 2005, at 1.

355. See, e.g., Jonathan Stempel, *Storm Cost Put at \$26 Billion (U.S.),* TORONTO STAR, Aug. 30, 2005, at E09.

356. Valerie Bauer & Jeff D. Opdyke, *Escape from the Big Easy,* WALL STREET J., Aug. 30, 2005, at B1; David Osborne, *Hurricane Katrina: Loss of Wetlands Opens Floodgates to Disaster:*

As if the damage wrought upon Louisiana from Katrina was not enough, less than a month later, Hurricane Rita hit the western portion of the state.³⁵⁷ This storm devastated coastal communities in Cameron and Vermilion parishes and destroyed more of the state's precious wetlands.³⁵⁸

The barrier³⁵⁹ and filtering effect of Louisiana's coastal wetlands has been substantially reduced by a century or more of activities by mineral production companies and through the massive civil works projects by entities such as the Corps.³⁶⁰ The unfortunate result of this anthropogenic damage to Louisiana's coastal wetlands is that not only has it reduced their ability to protect the area from the 2005 hurricanes, but it also substantially contributed to further wetlands loss. Indeed, one early report of the amount of wetlands lost to the storms is likened to the combined human and natural toll that was expected on the wetlands for the next forty-five years. In the course of a few days associated with the passing of Katrina and Rita, "100 square miles of Louisiana's southeastern coastal marsh were turned into open water by the two hurricanes."³⁶¹ In addition to the damage wrought upon Louisiana's coastal wetlands by the hurricanes, the state has now lost a significant barrier from the wrath of future storms.

The failure of Louisiana's natural storm barrier, its wetland, and the damage to the economy and infrastructure of the state by these storms has created a new environment for the consideration of coastal zone protection issues. If the state is to survive, economically and environmentally, the protections that have been built into various laws, such as the CZMA, must be used to their maximum effectiveness in order to restore and strengthen our coastline so that the state will not have to endure such devastation again.

B. A Projection for Future Consistency Assessments in Louisiana

The federal consistency provisions of SLCRMA and the CZMA are the most direct avenue for Louisiana to make the federal government and

New Orleans, THE INDEPENDENT (London), Sept. 1, 2005, at 6; Juliet Eilperin, *Flooded Toxic Waste Sites Are Potential Health Threat*, WASH. POST, Sept. 10, 2005, at A15.

357. Kevin Blanchard, *Ravaged by Rita: La. Coast Slammed—Again*, THE ADVOCATE (Baton Rouge, La.), Sept. 25, 2005, at 1-A.

358. *Id.*; *La. Officials List Needs: \$32 Billion for Damages from Hurricane Katrina*, THE ADVOCATE (Baton Rouge, La.), Sept. 26, 2005, at 1-A.

359. Dennis Hirsch, *Wetlands' Importance Now Made Clear*, ATLANTA J.-CONSTITUTION, Sept. 12, 2005, at 11A.

360. Mike Dunne & Amy Wold, *Wetlands Damage Massive: Loss Equals Decades of Normal Shrinkage*, THE ADVOCATE (Baton Rouge, La.), Nov. 3, 2005, at 1-A.

361. *Id.*

the nation aware of the real costs of OCS energy exploration and production, the urgent need to begin repairing the damage, and Louisiana's strong commitment to protecting its coastal resources. It is unquestionable that Louisiana has statutory authority to assert its consistency requirements with respect to OCS activities. However, it may benefit Louisiana to amend SLCRMA to mirror the language of the 1990 amendments to the CZMA³⁶² to make it clear that it intends to assert consistency authority to the full extent allowed by federal law.³⁶³ This would ensure a broader understanding that the statute encompasses the effects of OCS activities under the state's consistency authority. It will be clear in some instances that proposed federal activities are not consistent with the LCRP yet the Technical Review Sheet that CMD uses to review a federal agency's submitted information has categories only for "Compliance" and "Possible NonCompliance."³⁶⁴ The semantics of the Technical Review Sheet may seem like a minor point but it fosters the belief that the state would not seriously consider denying consistency to a federal activity. The Technical Review Sheet should be changed to include a category for "Non-Compliance." Another indication that the state does not take its consistency authority seriously is the fact that neither SLCRMA nor the Coastal Use Guidelines provide procedures for consistency review. While these provisions are found in the CZMA and C.F.R., the fact that they are not contained in Louisiana law, at least by reference, indicates a weak commitment to asserting consistency authority. Consistency review procedures should in some way be incorporated into Louisiana law.

If Louisiana were to use its federal consistency authority to deter further degradation of the state's coastal zone, it would have to be forthright and meticulously accurate in its consistency denial. One of the reasons why *Lujan* was dismissed was the fact that the state filed an objection to MMS's consistency determination of the problematic lease sale only after initially granting consistency.³⁶⁵ No doubt the state's vacillation gave the court reason to doubt its sincerity. Given the history of federal consistency under the CZMA both in Louisiana and other coastal states, actual denial of consistency, where warranted and supported by the evidence, will be necessary for Louisiana to gain

362. The most important part of these changes was the broadening of state power by changing "directly affects" to "affects" in 16 U.S.C. § 1456 (2000).

363. Simply changing Louisiana Revised Statute Annotated § 49:214.32(B) from "directly affects" to "affects" should suffice.

364. See Appendix A.

365. See *supra* Part VII.C.

federal assistance in redressing the adverse impacts of OCS development and achieving its conservation and restoration goals. In any federal consistency objection, Louisiana needs to follow the letter of the law, especially the C.F.R., very carefully. Many cases fail on technicalities because of the complicated process.³⁶⁶ A consistency determination should be challenged or denied as early as possible, preferably at the lease sale stage, before production or development. Waiting until after a lease purchase and denying consistency to OCS development plans raises the issue of reimbursement if development and production activities are not allowed. However, that option is not foreclosed and other states have successfully denied consistency for development and production plans.³⁶⁷ The information provided in the consistency objection must be very detailed and fact intensive, listing effects of OCS activities on specific fauna, flora, and habitat types, and socioeconomic effects and how the affects are inconsistent with specific provisions of the CMP. Louisiana must prove that its coastal zone ecosystem, cultural, and economic resources, including the vast energy producing infrastructure that exists there, are unique and vital to the state and indeed the security of the United States. Ample evidence and data exist to support Louisiana's assertions. Consistency denials should be based on failure to prevent damage to Louisiana's special coastal area, lack of mitigation measures, and resources to counter inevitable adverse effects. To gain national support for its conservation efforts, Louisiana must demonstrate a commitment to valuing long-term stewardship of its resources rather than a willingness to sell the heritage of future generations to the highest and, oftentimes, most irresponsible bidder. The U.S. Commission on Ocean Policy has recognized the necessity of a more equitable use of OCS revenues to assist those states that have sacrificed the most in supplying the nation's energy needs.³⁶⁸ However, from past experience it seems

366. An example of a failure due to a party not adhering to the CZMA regulations is the non-OCS case, the Barnes Nursery, Inc., Project. In this case, which covered the construction of an irrigation canal in Ohio's coastal zone, the applicant's efforts failed for inadequately addressing the statutory requirements for consistency. Although this was a victory for Ohio's protection of its coastal zone, it illustrates the ease with which these complex statutes and regulations can be inappropriately considered, even by experienced counsel. *See generally* Letter from Conrad C. Lartenbacher, Jr., Under Sec'y of Com. for Oceans & Atmosphere, to Steven D. Ball, Esq., & Jim Petro, Ohio Attorney Gen. (Dec. 20, 2003) (on file with the Louisiana Sea Grant Legal Department, La. State Univ., Baton Rouge, Louisiana).

367. *See generally* Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc., from an Objection by the State of North Carolina (Sept. 2, 1994), <http://www.ogc.doc.gov/czma.nsf/sec?OpenPage>. The State of North Carolina succeeded in denying consistency for drilling activity on a lease that was already operated by Mobil. *Id.*

368. OCEAN BLUEPRINT, *supra* note 5, at 1359.

clear that help will not be forthcoming merely because the state is deserving of help. It is time for Louisiana to make use of the national attention on the issue to be assertive. With political will and appropriate evidence Louisiana will be able to use its consistency authority in order to achieve its conservation goals.

IX. CONCLUSION: NO LONGER AN ACADEMIC ISSUE

In the wake of the devastation that South Louisiana received from the 2005 hurricane season, it has become painfully obvious that the state has failed its coastal areas. As a result of decades of neglect of Louisiana's coastal areas, both through the environmental degradation that is a constant side effect of oil and gas exploration and production, and from anthropogenic changes to the natural paths of silt-laden rivers, our coastal wetlands are disappearing. This disappearance has directly resulted in the loss of vital wetlands habitats and, most significantly, the loss of significant storm protection. Thus, the matter of whether or not Louisiana should make every effort available to protect and even rebuild its coastal areas is no longer a matter for debate among the members of the academic community as it has been for so many years. Our very lives and homes, and indeed the bulk of the nation's domestic energy supply, depend on the leaders of this state exercising their statutory authority under any available law to provide for more storm protection and coastal restoration. As we have noted in this Article, there is a glimmer of hope emerging from the governor's office in the form of threats to use the state's consistency denial power under the CZMA as leverage to force more financial support from the federal government for these essential projects. The timing for this could not be better. The state, in the wake of Hurricanes Katrina and Rita, has the attention of the entire nation, and it is now time to assure the taxpayers of the entire United States that it is not business as usual in Louisiana: we are serious about conservation and restoration now, we will use all of our power to facilitate projects to protect our coastline, we will block the continued degradation of our coastal zone in order to stem the tide of wetlands loss, and the livelihood of the rest of the nation depends on our survival.

It should be noted that the process for denying consistency for federal activities on the OCS is not necessarily the means to the ends that has been highlighted by Louisiana's politicians in recent months. That group largely views consistency denial as a stick to threaten the federal government to provide Louisiana with more funding from OCS royalties and nothing more. It is implicit in this threat that the state will utilize these monies to assist in offsetting the environmental and infrastructural

degradation caused by OCS activities. However, as presented in this Article, such a use for the OCS consistency denial authority is somewhat shortsighted. Recent research has shown that reconstructed coastal areas (especially wetlands) are not as effective as intact coastal areas as habitats and storm protection sources.³⁶⁹ Thus, the OCS consistency denial for merely the purpose of garnering federal reconstruction dollars is not as environmentally sound as in-situ protection of coastal areas. We, therefore, contend that OCS consistency denial power should not only be used as a threat to the federal government for more funds, and then never denying consistency again once those funds are acquired, the authority must also be employed to force the oil and gas industry to innovate ways to accomplish their energy supply projects in manners that are less destructive to the Louisiana coastal zone. If and when Louisiana succeeds in gaining more funds from OCS activities, the leaders of this state must not forget about their consistency power. They must continue to review all consistency applications critically and seriously deny consistency when more environmentally sound alternatives exist. This approach will ensure Louisiana's economic and environmental viability for the long-term. The consistency provisions of the CZMA must be used for their intended purpose: To provide for the protection and restoration of Louisiana's coastline before there is nothing left to protect. The state must see this fight through.

369. See generally Jocelyn Kaiser, *Wetlands Restoration: Recreated Wetlands No Match for Original*, 293 *SCIENCE* 25 (2001). For more detailed reviews of the scientific controversy surrounding this issue, the reader is directed to Katherine E. Yates, *Wetlands Mitigation and Mitigation Banking in Louisiana*, 59 *LA. L. REV.* 591 (1999); Seidemann & Susman, *supra* note 21.

APPENDIX

LA Department of Natural Resources

Coastal Management Division

COASTAL USE CONSISTENCY DETERMINATION

TECHNICAL REVIEW SHEET

APPLICANT _____ PARISH _____

PROJECT NAME _____

C# _____ P# (If applicable) _____

CMD Reviewer _____

CONSISTENCY TYPE: (Circle one) DFA FLP FAS Other

I. GENERAL INFORMATION:

A. Pre-application/geologic review meeting? ___Yes ___No

Impacts reduced? ___Yes ___No

B. Local program approved or pending? ___Yes ___No

C. Consistency Determination Chronology:

Date Received Decision Due Extension Requested

Additional Info Requested Additional Info Received

FI Requested FI Received Processing Fees Received

II. TECHNICAL EVALUATION:

A. Maps Used:

- 1. Quad(s) _____
- 2. Infra Red(s) _____
- 3. Other _____

B. Habitat Code(s): _____

C. General Description of project area _____

D. Other C Numbers in project vicinity (include any special concerns or problems of area Consistency Determinations or CUP's)

E. Comments from Other Agencies

- 1. LDWF _____
- 2. PARISH _____
- 3. USFWS _____
- 4. NMFS _____
- 5. OTHER _____

F. Sensitive Features:

- 1. Red Dots (# and description) _____

- 2. Scenic Rivers _____

LDWF Scenic Rivers Class B Permit Required?
____Yes ____No

3. Oyster Leases, seed grounds, reefs _____

4. Wildlife Management Areas, Refuges, Marsh Management Plans, other areas of special interest:

G. Project Parameters

1. Access. Will project require construction of access routes that may result in impacts to coastal resources? (i.e. board roads, channels) If so, describe _____

2. Miscellaneous Comments _____

3. Discuss Long Term Benefits or Adverse Impacts of the Project:

4. Disturbed Area/Mitigation. Provide a sketch of impact area and include calculations as to how disturbed area derived. Round to nearest 0.1 acre.

* Mitigation Required? ___ Yes ___ No

* Components of Mitigation Plan

III. GUIDELINES

Check the specific guidelines listed below for Conformance OR Possible Non-conformance with the LCRP Guidelines. (Louisiana Administrative Code, Title 43, Part I.)

A. § 701. G., Adverse Impacts. It is the policy of the coastal resources program to avoid the following adverse impacts. To this end, all uses and activities shall be planned, sited, designed, constructed, operated, and maintained to avoid, to the maximum extent practicable significant:

C ***** CONFORMANCE

PNC ***** POSSIBLE NON-CONFORMANCE

PNC C

- | | | | |
|-----|-----|-----|--|
| ___ | ___ | 1. | fresh water flow |
| ___ | ___ | 2. | economic impacts |
| ___ | ___ | 3. | discharges of inorganic nutrients |
| ___ | ___ | 4. | dissolved oxygen |
| ___ | ___ | 5. | natural biologically valuable areas |
| ___ | ___ | 6. | social patterns |
| ___ | ___ | 7. | temperature |
| ___ | ___ | 8. | salinity |
| ___ | ___ | 9. | sediment transport processes |
| ___ | ___ | 10. | cumulative impacts |
| ___ | ___ | 11. | discharges of suspended solids |
| ___ | ___ | 12. | reductions of water flow |
| ___ | ___ | 13. | discharges of pathogens or toxic substances |
| ___ | ___ | 14. | archaeological, historical, or cultural resources |
| ___ | ___ | 15. | secondary impacts in biologically productive areas |
| ___ | ___ | 16. | valuable habitats |
| ___ | ___ | 17. | public parks |
| ___ | ___ | 18. | wildlife and fish migratory patterns |
| ___ | ___ | 19. | land loss |
| ___ | ___ | 20. | storm danger potential |
| ___ | ___ | 21. | long-term biological productivity |

B. § 701. H., Modifier - "Maximum Extent Practicable"

Circle Yes or No

- Y N benefits resulting from the proposed use would clearly outweigh adverse impacts
- Y N no feasible and practical alternative locations, methods and practices for the use exist satisfy one of the following:
- Y N significant public benefits will result from the use;
- Y N the use would serve important regional, state or national interests, including the national interest in resources and the siting of facilities in the coastal zone identified in the coastal resources program;
- Y N the use is coastal water dependent.

C. § 701. I., Concurrent Uses

PNC C

- ___ ___ Uses shall to the maximum extent practicable be designed and carried out to permit multiple concurrent uses which are appropriate for the location and to avoid conflicts with other uses of the vicinity.

D. § 703., Guidelines for Levees

PNC C

- ___ ___ A. leveeing of unmodified or biologically productive wetlands shall be avoided to the maximum extent practicable.
- ___ ___ B. avoid segmentation of wetlands to the maximum extent practicable
- ___ ___ C. levees constructed for purpose of developing or otherwise changing the use of a wetland to the maximum extent practicable

- ___ ___ D. hurricane and flood protection levees shall be located at the wetland/non-wetland interface or landward to maximum extent practicable
- ___ ___ E. impoundment levees only constructed in wetland areas as part of an approved water or marsh management plan
- ___ ___ F. hurricane or flood protection levee systems designed, built and maintained to minimize disruption of existing hydrological patterns

E. § 705., Guidelines for Linear Facilities

PNC C

- ___ ___ A. avoid adverse impacts on areas of high biological productivity
- ___ ___ B. dredging and filling in wetland and estuarine areas avoided to the maximum extent practicable
- ___ ___ C. linear facilities involving dredging shall be of minimum practical size and length
- ___ ___ D. to the maximum extent practicable pipelines shall be installed through the “push ditch” method and the ditch backfilled
- ___ ___ E. existing corridors, rights-of-way, canals, and streams shall be utilized for linear facilities to the maximum extent practicable
- ___ ___ F. linear facilities and alignments shall be designed and constructed to permit multiple uses consistent with the nature of the facility to the maximum extent practicable
- ___ ___ G. linear facilities involving dredging shall not traverse or adversely affect any barrier island

- ___ ___ H. linear facilities involving dredging shall not traverse beaches, tidal passes, protective reefs or other natural gulf shorelines unless no other alternative exists
- ___ ___ I. minimize disruption of natural hydrologic and sediment transport patterns, water quality or wetlands
- ___ ___ J. prevent bank slumping and erosion, saltwater intrusion, and minimize potential for inland movement of storm-generated surges
- ___ ___ K. canals, channels, and ditches which connect more saline areas with fresher areas shall be plugged at waterway crossings
- ___ ___ L. multiple use of existing canals to the maximum extent practicable
- ___ ___ M. all pipelines constructed in accordance with parts 191, 192, and 195 of Title 49 of the Code of Federal Regulations and also LA R.S. 45:408
- ___ ___ N. dredged areas shall be backfilled or otherwise restored to pre-existing conditions upon cessation of use to the maximum extent practicable
- ___ ___ O. best practical techniques for site restoration and re-vegetation
- ___ ___ P. confined and dead-end canals avoided to prevent water stagnation and eutrophication to the maximum extent practicable

F. § 707., Guidelines for Dredged Spoil Deposition

PNC C

- ___ ___ A. spoil deposited to avoid disruption of water movement, flow, circulation, and quality
- ___ ___ B. spoil use to improve productivity or create new habitat, reduce or compensate for environmental damage done

- by dredging or prevent environmental damage, deposit spoil in upland areas to the maximum extent practicable
- ___ ___ C. spoil not to be disposed of in a manner that could result in impounding or draining of wetlands or the creation of development sites
- ___ ___ D. spoil not to be disposed of on marsh, oyster or clam reefs or in areas of submerged vegetation to the maximum extent practicable
- ___ ___ E. spoil not to be disposed of so as to create hindrance to navigation or fishing, or hinder timber growth
- ___ ___ F. spoil area constructed to retain spoil, reduce turbidity, and reduce shoreline erosion
- ___ ___ G. avoid alienation of state-owned property without the consent of DNR

G. § 709., Guidelines for Shoreline Modification

- PNC C
- ___ ___ A. non-structural methods of shoreline protection shall be utilized to the maximum extent practicable
 - ___ ___ B. use of best practical techniques to minimize adverse environmental impacts
 - ___ ___ C. shoreline structures marked/lighted in accordance with U.S. Coast Guard regulations, must not interfere with navigation, and should foster fishing and other recreational activities
 - ___ ___ D. avoid introduction of pollutants and toxic substances into coastal waters
 - ___ ___ E. piers and docks and other harbor structures designed to avoid obstruction of water circulation
 - ___ ___ F. marinas and other similar commercial developments be located to avoid adverse impacts on oyster beds or

- submerged grass beds to the maximum extent practicable
- ___ ___ G. neglected shoreline modification structures to be removed at owner’s expense
- ___ ___ H. structures shall not be built for the purpose of creating fill areas for development
- ___ ___ I. jetties, breakwaters, groins, and similar structures constructed to avoid downstream land loss and erosion to the maximum extent practicable

H. § 711., Guidelines for Surface Alterations

PNC C

- ___ ___ A. Industrial use should be encouraged in areas suitable for development and should occur, to the maximum extent practicable:
 - ___ ___ 1. on lands 5’ above MSL or on fastlands, or
 - ___ ___ 2. on lands which have foundations sufficiently stable to support their use, and,
 - ___ ___ a. the land is in high development area, or
 - ___ ___ b. there is an adequate infrastructure, or
 - ___ ___ c. the area has a tradition of similar use
- ___ ___ B. public and private works projects to support development shall be encouraged, but must be consistent with the guidelines to the maximum extent practicable
- ___ ___ C. wetland areas shall not be drained or filled to the maximum extent practicable
- ___ ___ D. coastal water dependent uses shall be given special consideration
- ___ ___ E. areas to be returned to pre-project conditions after termination of use to the maximum extent practicable

- — F. site clearing shall be limited to those areas immediately required for physical development to the maximum extent practicable
- — G. surface alterations to be located away from critical wildlife and vegetation areas to the maximum extent practicable
- — H. surface alterations which have adverse impacts shall not occur on barrier islands, beaches, isolated cheniers, natural ridges, spawning areas, or migratory routes to the maximum extent practicable
- — I. creation of low dissolved oxygen or heavy metal traps shall be avoided to the maximum extent practicable
- — J. surface mining and shell dredging shall be done using best practical techniques
- — K. creation of underwater obstructions shall be avoided to the maximum extent practicable
- — L. prevent the release of pollutants or toxic substances
- — M. only material free of contaminants shall be used as fill to the maximum extent practicable

I. § 713., Guidelines for Hydrologic and Sediment Transports

Modifications

PNC C

- — A. freshwater diversion methods to be encouraged
- — B. sediment deposition systems may be used to offset land loss
- — C. avoid undesirable deposition of sediments in sensitive habitat or navigational areas
- — D. diversion of freshwater through siphons, etc., to offset saltwater intrusion and to introduce nutrients into wetland encouraged

- ___ ___ E. water management plans shall result in an overall benefit to the productivity of the area
- ___ ___ F. water control structures shall be assessed separately based on individual merits
- ___ ___ G. weirs, etc., shall be designed to prevent “cut arounds”, permit tidal exchange, and minimize obstruction of migration of aquatic organisms
- ___ ___ H. impoundments shall not be constructed in brackish and saline areas to the maximum extent practicable
- ___ ___ I. surface and groundwater withdrawal shall not result in saltwater intrusion or land subsidence to the maximum extent practicable

J. § 715., Guidelines for Disposal of Wastes

PNC C

- ___ ___ A. location and operation of waste storage, treatment, and disposal facilities shall be avoided in wetlands to the maximum extent practicable
- ___ ___ B. handling of hazardous wastes shall be done in accordance with Act 334 of 1978 and the Resource Conservation and Recovery Act of 1976, P.L. 94-580
- ___ ___ C. waste facilities in wetlands shall be designed to withstand all expected adverse conditions
- ___ ___ D. waste facilities shall be constructed to prevent leaching
- ___ ___ E. the use of overland flow systems, sump lagoons and reservoirs shall be encouraged
- ___ ___ F. waste disposal sites shall be marked and wastes identified to the maximum extent practicable
- ___ ___ G. waste facilities in wetlands with pollution problems shall be closed and re-vegetated
- ___ ___ H. waste shall be disposed at approved disposal sites

___ ___ I. radioactive wastes shall not be disposed of in the coastal zone

K. § 717., Guidelines for Uses that Result in the Alteration of Waters

Draining into Coastal Waters

PNC C

___ ___ A. upland and upstream water management programs which affect coastal waters shall preserve or enhance existing water quality, volume and rate of flow to the maximum extent practicable

___ ___ B. runoff from developed areas shall be managed to simulate natural water patterns to the maximum extent practicable

___ ___ C. runoff and erosion from agricultural land shall be minimized

L. § 719., Guidelines for Oil, Gas, and Other Mineral Activities

PNC C

___ ___ A. geophysical surveying shall minimize damage to the environment

___ ___ B. number of exploration and production sites in wetland areas requiring floatation access shall be held to the minimum number by directional drilling, multiple use of existing canals and other techniques to the maximum extent practicable

___ ___ C. mineral activities shall be located away from critical wildlife and vegetation area to the maximum extent practicable

___ ___ D. mineral exploration and production facilities shall be constructed to maintain natural water flow and to avoid erosion to the maximum extent practicable

- ___ ___ E. access routes shall be designed to avoid adverse impacts on critical ecological areas to the maximum extent practicable
- ___ ___ F. drilling sites shall be constructed to prevent release of pollutants
- ___ ___ G. drilling activities and supplies shall be kept on barges, rigs, within ring levees or on the well site
- ___ ___ H. ring levees shall be replaced with smaller production levees or removed to the maximum extent practicable
- ___ ___ I. all drilling and production equipment shall be constructed to withstand adverse conditions
- ___ ___ J. mineral facilities shall be constructed to minimize adverse environmental impacts
- ___ ___ K. environmental protection and emergency (contingency) plans shall be developed
- ___ ___ L. use of dispersants, emulsifiers and similar chemical agents on oil spills is prohibited without prior Coast Guard or EPA approval
- ___ ___ M. mineral sites shall be restored to original condition upon termination of use to the maximum extent practicable
- ___ ___ N. creation of underwater obstructions which adversely affect fishing or navigation shall be avoided to the maximum extent practicable