Lingering Relevance of the Coastal Zone Management Act to Energy Development in our Nation's Coastal Waters?

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> I was not on watch that night, but sometime between 10:20 and 10:30 that evening I was called by the operational duty officer up there, Curtis Andrews, and he requested if I could come in as quickly as possible, that they had an unfolding event that gave the appearance of a mass rescue operation coming into play. So I proceeded on in.[1]

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1. *U.S. Coast Guard/MMS Marine Board of Investigation into the Marine Casualty, Explosion, Fire, Pollution, and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico 21-22 Apr. 2010*, at 21-22 (2010) [hereinafter *Joint Hearings*] (statement of Kevin Robb, Civilian Search and Rescue Specialist, United States Coast Guard District 8 Command Center, New Orleans, La).

What Kevin Robb of the Coast Guard referred to as "an unfolding event" would turn out to be one of the worst environmental disasters in American history. On April 20, 2010, British Petroleum's (BP) DEEPWATER HORIZON oil drilling platform, situated in the Gulf of Mexico some forty-five miles off the coast of Louisiana, exploded.[2] Over the succeeding hours, the world watched as the rig burned and then sank in approximately 5000 feet of water over the Mississippi Canyon Outer Continental Shelf Block 252 area.[3] Eleven crewmembers aboard the DEEPWATER HORIZON lost their lives in the initial blast that led to the fire.[4] The sinking of the platform caused the drill pipe, which ascended from the ocean floor to the surface rig, to break off, precipitating what would become the largest oil spill in United States history.[5] It would be eighty-six days and several failed attempts before BP would plug the well on the ocean floor.[6] Estimates of the volume of crude oil that leaked from the broken drill pipe ranged from 1000 barrels per day[7] to 62,000 barrels per day,[8] with definitive volumes still in dispute.[9]

What went so awry on BP's DEEPWATER HORIZON that led to the loss of eleven lives and an oil spill of unprecedented magnitude? The investigations into this question are ongoing and it is unlikely that a definitive answer will be known for some time. Yet, some general

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2. *Id.* at 46; *see also id.* at 6 (statement by Captain Hung Nguyen, United States Coast Guard, Commander, Sector Ohio Valley).

3. Patrik Jonsson, *Ecological Risk Grows as Deepwater Horizon Oil Rig Sinks in Gulf*, CHRISTIAN SCI. MONITOR, Apr. 22, 2010, at 1, *available at* 2010 WLNR 8394910; *Inquiry into Deepwater Horizon Gulf Coast Oil Spill: Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 5.25, 111th Cong. (May 12, 2010) [hereinafter *Inquiry Transcript*] (statement of Rep. Edward Markey).

4. *See Joint Hearings*, *supra* note 1 (statement of Captain Nguyen).

5. Mona Moore, *Coming Our Way?: Local Officials Keeping Track of Whether Oil Spill Off Louisiana Will Reach Beaches*, N.W. FLA. DAILY NEWS, Apr. 28, 2010, *available at* 2010 WLNR 8766968; *Deluge of Oil Highlights Research and Technology Needs for Effective Cleanup of Oil Spills: Hearing Before the Subcomm. on Energy and Env't of the H. Comm. on Energy and Commerce*, 111th Cong. (2010) (statement of Jeffrey Short, Pac. Sci. Dir.), *available at* 2010 WLNR 11827264 (commenting that the BP oil spill, as of early June 2010, was already the largest marine oil spill in United States history).

6. It is important to note that, as of the time of this writing, the well has only been plugged via a static kill method, and permanent efforts to seal the well forever are still ongoing. Jaquetta White, *Bottom Kill Won't Be Completed Until After Labor Day*, TIMES-PICAYUNE (New Orleans), Aug. 19, 2010, http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/bottom_kill_wont_be_completed.html.

7. Moore, *supra* note 5.

8. Campbell Robertson & Clifford Krauss, *BP Oil Spill: 4.9 Million Barrels*, INT'L HERALD TRIB., Aug. 4, 2010, at 4, *available at* 2010 WLNR 15416809.

9. *Id.* Although, best estimates of the total volume released from the well appear to indicate that the BP oil spill may rank as the largest accidental oil spill in world history.

problems—both in terms of technology and regulation—are apparent even at this early stage. From a functional perspective, several safety mechanisms associated with the DEEPWATER HORIZON's drilling operations appear to have failed. Most notably, the blowout preventer, a mechanism situated on the wellhead 5000 feet underwater designed to stop the flow of oil from the well, apparently malfunctioned.[10] Questions related to the reliability of such safety mechanisms have identified more endemic problems associated with deepwater drilling. Among these problems is the apparent systemic failure by federal regulators to properly ensure that the systems were functioning as they should.[11] But perhaps even more troubling is what appears to be a pattern of lax regulatory oversight and inadequate legal protection against such disasters.[12]

As the Gulf Coast now begins the long process of recovering from another of the nation's worst disasters in its history, for the second time in roughly five years, the initial inquiry by the Administration and Congress appears directed at the Minerals Management Service's (MMS) alleged "capture" by the regulatory community.[13] Indeed, testimony before

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10. *Inquiry Transcript*, *supra* note 3, at 8 (statement of Rep. Bart Stupak).

11. Specifically, when questioned regarding the agency's adherence to its own regulations, MMS personnel testified that they were never told to undertake certain reviews. *Joint Hearings*, *supra* note 1, at 275-76 (statement of Frank Patton, New Orleans District Drilling Engineer, Minerals Mgmt. Serv.) (stating that he was not aware of federal regulations requiring certain safety assurances with regard to the failed blowout preventer on rigs such as the DEEPWATER HORIZON and did not include such reviews in his permitting process).

12. *See id.* at 27-29 (statement of Michael Saucier, Regional Supervisor for Field Operations, Gulf of Mexico Region, Minerals Mgmt. Serv.) (stating that a report questioning the efficacy of the shear rams that failed in the DEEPWATER HORIZON incident was completed for the agency "around 2000, 2003," but that no information ensuring of the functionality of these rams was included with BP's DEEPWATER HORIZON application to the MMS).

13. *See Inquiry Transcript*, *supra* note 3, at 25 (statement of Rep. Edward Markey) ("I think a root cause for this accident is the 'drill baby drill' boosterism. There was oil industry boosterism that minimized potential hazards. There was a boosterism on the part of the previous administration that got rid of protections that they viewed as obstacles to increased drilling. Now we see the results. Boosterism led to complacency and complacency led to disaster, and this is a disaster. But it was not inevitable, it was preventable. And now we must enact protections that prevent similar catastrophes in the future."); *see also Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. (2010) *available at* 2010 WLNR 15494756. This notion emerged in the 1950s and 1960s, and Justice Douglas echoed this sentiment when he wrote that federal agencies "are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency" that can develop over time. Sierra Club v. Morton, 405 U.S. 727, 745 (1972). Some suggest that the notion of regulatory capture is perhaps too conceptual and lacking in empirical evidence. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163, 184 (1992). *See generally* WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES (1967); LOUIS M.

Congress and ultimately the Department of the Interior's (DOI) decision to disband the MMS all emphasize the common belief that the agency has been "captured" by the industry and accepts, too often, industry standards.[14] Others have focused on how the MMS allowed BP to drill the Macondo well at Mississippi Canyon Block 252 (MC252) without the benefit of preparing any environmental document under the National Environmental Policy Act (NEPA).[15] While these are all legitimate concerns, the dialogue, to date, all but ignores the role of the states, particularly those along the Gulf Coast, whose environment, citizens, and economy are acutely affected.

This Article attempts to expand the current dialogue by exploring the role of the states, under the Coastal Zone Management Act (CZMA or ACT), to influence energy development occurring off their coasts. In the aftermath of the BP oil spill, the Administration and Congress undoubtedly are likely to modify the current regulatory regime affecting offshore oil and gas development. The MMS already is gone, replaced instead by three new entities.[16] Its inspection and monitoring program has been changed, and the Notice to Lessees governing information for

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KOHLMEIER, JR., THE REGULATORS: WATCHDOG AGENCIES AND THE PUBLIC INTEREST (1969); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985). Whether this concept actually explains agency behavior is untested, but recent investigations into the MMS's behavior do illustrate that some small number of lower level MMS employees had relationships with those in the regulated community. *See Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Sen. Russ Feingold), *available at* 2010 WLNR 15494765 ("Since the rise of the regulatory state in the mid 1960s, there has been a well-placed fear that government regulators have far too cozy a relationship with the corporations they regulate. A recent report by the Inspector General of the Department of the Interior exposed widespread corruption at the former Minerals Management Service. Federal regulators responsible for protecting the waters of the Gulf of Mexico allowed industry officials to fill out their own inspection reports, and they accepted lavish meals, tickets to sporting events, and other inappropriate gifts from the oil companies they were responsible for overseeing. We may never know whether these ethical lapses played a role in the events leading up to the DEEPWATER HORIZON oil spill, but these events demonstrate that we need to be doing a better job to ensure that there are no significant conflicts of interest or other inappropriate ties between regulators and the corporations they purport to regulate."). *See generally* Juliet Eilperin & Scott Higham, *How the Minerals Management Service's Partnership with Industry Led to Failure*, WASH. POST, Aug. 24, 2010, http://washingtonpost.com/wp-dyn/content/where/2010/08/24/AR2010082406754.html.

14. On August 12, 2010, the new head of the former MMS (now the Bureau of Ocean Energy Management, Regulation, and Enforcement) indicated, "I think there is a perception, and the reality, that we have been heavily reliant on the domestic oil and gas industry in setting standards." Lynn Garner, *Bromwich Says Interior Relies Too Much on Industry for Offshore Drilling Standards*, BNA DAILY ENV'T REPORT, Aug. 13, 2010, at A8.

15. *See Inquiry Transcript*, *supra* note 3.

16. *Salazar Splits Minerals Management Service in Three*, ENV'T NEWS SERVICE, May 19, 2010, http://www.ens-newswire.com/ens/may2010/2010-05-19-092.html.

blowout preventers similarly has been modified.[17] Categorical exclusions have been lifted for exploration and development activities, and liability caps under the Oil Pollution Act (OPA) may be changed.[18] And, among other things, a worst-case scenario analysis might be required as part of the NEPA process.[19] Yet, nowhere in this discussion is whether, and to what extent, states ought to be more actively involved in future decisions that vitally affect their interests.[20] When it was passed, the CZMA promised the states that they may have some influence in helping shape future policies affecting their shores, particularly for energy projects, mostly oil and gas development. But slow development of the Act, its current practice, as well as its limitations, all have coalesced to diminish its utility as an effective tool for state input into Outer Continental Shelf (OCS) energy development.

This inadequacy became a critical element of Louisiana's lawsuit against the federal government in 2006: *Blanco v. Burton*.[21] When, therefore, the DEEPWATER HORIZON disaster occurred, the problems in the functioning of the federal government's regulation of OCS mineral exploration and production were not new or shocking to Louisiana or to the federal government. In fact, it was precisely the outcome of the disaster that Louisiana is now coping with that formed the basis of the warnings in the *Blanco* litigation. To be sure, neither the oil and gas industry nor the coastal states are completely blameless in the DEEPWATER HORIZON disaster. The industry has a venerable history of cutting corners on safety and environmental protections to save time and money. And states have long been loath to challenge either the federal government's lax policies or the industry's lax self-regulation for fear of the economic impacts of those challenges.[22] But the states are

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17. *Id.*

18. Philip Thomas, *Senators Hope To Raise Oil Pollution Act Liability Cap to $10 Billion for Gulf Oil Spill Victims*, MISS. LITIG. REV. & COMMENT., May 4, 2010, http://www.mslitigationreview.com/2010/05/articles/gulf-oil-spill-litigation/senators-hope-to-raise-oil-pollution-act-liability-cap-to-10-billion-for-gulf-oil-spill-victims.

19. Holly Doremus, *A Great Case for Worst Case Analysis*, LEGAL PLANET (May 1, 2010), http://legalplanet.wordpress.com/2010/05/01/a-great-case-for-worst-case-analysis/.

20. Both Louisiana and Texas have, in different capacities, questioned the efficacy of the DOI's moratorium, with Louisiana filing an amicus curiae brief in one case and Texas filing its own complaint in another. Brief supporting Plaintiffs' Motion for Preliminary Injunction, Hornbeck Offshore Serv., L.L.C. v. Salazar (No. 10-cv-01663) (filed June 21, 2010); Petition for Judicial Review and Request for Injunctive Relief, Texas v. Salazar (No. 10-cv-02866) (filed Aug. 11, 2010).

21. No. Civ. A. 06-3813, 2006 WL 2366046 (E.D. La. Aug. 14, 2006).

22. Although both Texas and Louisiana opposed the moratorium against new deepwater exploratory drilling until information about the spill could be distilled, Alabama filed a lawsuit against the industry, "citing negligence and failure to adhere to recognized industry safety

cabined in their ability to influence OCS energy development, even though the CZMA offered them this promise.

Part I of this Article provides an overview of the OCS oil and gas regulatory program, and in particular the role of the CZMA; Part II of the Article is a summary of the OCS oil and gas regulatory program, focusing primarily on the CZMA. With the CZMA often touted as the shining example of cooperative federalism, Part III examines how the Act, to date, has only demonstrated a limited ability to provide states with a sufficiently meaningful role in helping to shape offshore oil and gas activity. And many of the systemic problems with the OCS oil and gas program, now abundantly clear after the BP oil spill, are neither new nor without sufficient advance warning signs. Roughly five years ago, the State of Louisiana expressed considerable concern with the lack of meaningful environmental review by the MMS, and when it brought a lawsuit against the agency the court echoed the State's warning that the agency had not taken its obligations seriously.[23] That lawsuit, *Blanco v. Burton*, and Louisiana's relationship with the MMS, is reviewed in Part IV. In this review, Part IV briefly catalogues how the cavalier attitude demonstrated by the MMS toward environmental and other concerns continued even after *Blanco*, up through the unfortunate incident on April 20, 2010. The conclusion then offers some observations and recommendations.

I. THE DEVELOPING OCS REGULATORY REGIME: AN OVERVIEW

From the outset of OCS mineral development, the states have been stymied in their efforts to help shape the permissible range of energy-related activities off their shores. To begin with, through a series of United States Supreme Court decisions in the 1940s and 1950s, coastal states began to lose control over the ability to affect mineral production and development activities off of their coasts.[24] Congress then facilitated greater interest in OCS activities with the passage of the Submerged Lands Act[25] (SLA) and the Outer Continental Shelf Lands Act[26]

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standards." Susanne Pagano, *Alabama Sues BP, Transocean, Others for Negligence, Safety Violations in Oil Spill*, ENV'T REP. (BNA), at A10 (Aug. 16, 2010).

23. *Blanco*, 2006 WL 2366046, at *4.

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

25. 43 U.S.C. §§ 1301-1315 (2006).

26. *Id.* §§ 1331-1356(a).

(OCSLA) in 1952.[27] Indeed, an original goal of OCSLA was to "promote the orderly development of the outer continental shelf."[28]

OCSLA provides the contours for how the federal government, at its discretion, may lease OCS interests beyond state water boundaries for mineral development. OCSLA divides the OCS oil and gas program into four stages: first, the Department may award individual leases only if those leases (and tracts) have been included in a five-year leasing plan, which must be reviewed annually; second, the MMS engages in specific lease sales for those leases identified in the plan; third, once a lease has been awarded, the lessee then may, upon application and approval, undertake exploration; and fourth, subsequent development activities in particular areas.[29] In the OCSLA Amendments of 1978, particularly in sections 18 and 19, the coastal states' governors were given the ability to voice concerns (although these concerns need not be heeded by the federal government) regarding the size, timing, and location of OCS leasing activities off of their coasts.[30] But historically, once the MMS issues a five-year leasing plan and a multisale environmental impact statement (EIS) for leases covered by that plan, the affected state(s) and public in the Gulf Region lack meaningful opportunity to comment on many postlease activities, including whether activities are consistent with policies designed to protect affected state and local communities and their resources. This is because the impetus to offer the leases identified in the five-year plan, at least until recently, has been strong. Former MMS Director Johnnie Burton, for instance, testified before Congress that, "DOI is keeping to its 5-year lease sale timetable and has held all sales as planned and on time."[31]

But other, more specific environmental programs, such as the CZMA, effectively subsume any state role under the OCSLA in

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27. Carolyn R. Langford, Marcelle S. Morel, James G. Wilkins & Ryan M. Seidemann, *The Mouse That Roared: Can Louisiana's Coastal Zone Management Consistency Authority Play a Role in Coastal Restoration and Protection?*, 20 TUL. ENVTL. L.J. 97, 107 (2006).

28. Robin Kundis Craig, *Regulation of U.S. Marine Resources: An Overview of the Current Complexity*, 19 NAT. RESOURCES & ENV'T 3, 7 (2004).

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

30. 43 U.S.C. §§ 1344-1345. The States' ability to influence decisions under section 18 of the 1978 amendments were diminished by the Ninth Circuit's decision in *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1988).

31. *Department of Interior Budget for Fiscal Year 2006 in Energy and Minerals Program: Oversight Hearing Before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Natural Res.*, 109th Cong. 3 (2005) (statement of Johnnie Burton, Director of the Minerals Management Service).

influencing OCS development.[32] Concerned about the lack of sufficient coastal land use planning, and recognizing the need for more effective management of our ocean and coastal resources,[33] Congress passed the CZMA "to encourage and assist States in developing and implementing management programs to preserve, protect, develop, and where possible, to restore or enhance the resources of our nation's coast by the exercise of planning and control with respect to activities occurring in their coastal zones."[34] By offering grants to those states with federally approved coastal management plans (CMPs), the Act encouraged states to develop statewide plans that would address potentially cumulative coastal impacts not necessarily addressed by myopic individual local communities.[35] Along with the prospect for dollars, the Act gives states with approved plans the authority to assess whether certain federal activities are consistent with an approved CMP.[36]

CMPs and any plan amendments must be submitted for approval to the National Oceanic and Atmospheric Administration's (NOAA) Office of Ocean and Coastal Resource Management (OCRM), within the Department of Commerce.[37] After a plan is approved, the elements in that approved plan become "enforceable policies."[38] States may then review federal activities, licenses, and permits to determine if they are consistent with the state's enforceable policies as embodied in the federally approved plan. For federal activities affecting any coastal use or resource, the federal agency must provide the state with a determination that the activity is consistent with the state's enforceable policies in the plan to the maximum extent practicable (that is, to the extent that the agency has the legal ability to comply with those

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32. The authors recognize that NEPA, too, eclipses each of these programs to the extent that any environmental analysis must be contained in a NEPA document, and generally the NEPA document serves as the foundation for any environmental analysis.

33. *See, e.g.*, U.S. COMM'N ON MARINE SCI., ENG'G & RES., OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION, H.R. DOC. No. 91-42 (1969).

34. H.R. REP. No. 96-1012, at 14 (1980).

35. *See generally* Garrett Power, *The Federal Role in Coastal Development*, *in* FED. ENVTL. L. 792 (Erica L. Dolgin & Thomas G.P. Guilbert eds., 1974); Sam Kalen, *The Coastal Zone Management Act of Today: Does Sustainability Have a Chance?*, 15 SOUTHEASTERN ENVTL. L.J. 191, 199 (2006); Thomas J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C. L. REV. 1 (1972).

36. 16 U.S.C. § 1456(c) (2006).

37. *Id.* § 1455(b); *see Coastal Programs: Partnering with the States To Manage Our Coastline*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/programs/czm.html (last visited Nov. 16, 2010).

38. Content of a Consistency Determination, 15 C.F.R. § 930.39 (2009).

policies).[39] In any disagreement between the federal agency and a state about whether an activity is consistent with a state's CMP enforceable policies, the federal agency's judgment prevails unless the state mediates and resolves the dispute or otherwise takes the agency to court and wins.[40]

A state with an approved plan has greater leverage when reviewing private activities requiring a federal license or permit. Applicants for a federal license or permit whose activities occur in or affect the coastal zone must submit to the appropriate state agency a consistency certification; this certification must explain why the applicant considers the activity to be consistent with all the enforceable policies in the approved state CMP.[41] The state must then notify the federal agency whether it concurs with or objects to the applicant's certification. If a state fails to object within six months of receiving all the necessary data and information, its concurrence is presumed.[42] A state also may issue a conditional concurrence, identifying conditions that must be satisfied by the applicant before the activity can be considered consistent with the state CMP.[43] The federal agency may not issue the license or permit if a state objects, unless the Secretary of Commerce, on appeal, overrides the objection.[44] To override a state objection, the Secretary of Commerce must affirmatively find, with the burden of proof on the appellant, that the activity is either consistent with the objectives of the CZMA or is necessary in the interest of national security.[45]

The incentives Congress offered those states that developed a CMP are the sole reason some states, particularly Louisiana, have coastal

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39. *See id.* The test is whether coastal effects are "reasonably foreseeable." *Id.*; *see also id.* § 930.32(a)(1).

40. *See id.* § 930.43(d); *id.* § 930.44; Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 71 Fed. Reg. 788, 790-91 (Jan. 5, 2006). The federal agency also may receive a presidential exemption. 16 U.S.C. § 1456(c)(1)(B).

41. 16 U.S.C. § 1456(c)(3)(A).

42. *Id.* § 1456(c)(3)(A).

43. An applicant receiving a conditional concurrence must either modify its federal application to include those conditions or notify the state that it is rejecting the conditions, in which case the concurrence is treated as an objection. *See id.* § 1456(c)(3)(A).

44. *Id.*

45. *Id.* § 1456(c)(1)(B). The Coastal Zone Protection Act of 1996 amended the process for a secretarial override, Pub. L. No. 104-150, June 3, 1996, while the Energy Policy Act of 2005 established a modified review procedure for appeals to the Secretary for "energy" projects. *See* Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 71 Fed. Reg. 788, 790-91 (Jan. 5, 2006) (codified at 15 C.F.R. pt. 930) [hereinafter Coastal Zone Management Regulations].

management programs today.[46] Those incentives included funding to develop and operate the state programs, funding to assist state and local governments to address the impacts of energy development on their coastal zones, and authority to affect federal actions impacting coastal resources, known as consistency authority.[47] Although the Coastal Energy Impact Program, which was added in 1976, expired in 1990,[48] the federal funding, combined with state matching funds, for operation of state coastal management programs continues,[49] as does the states' consistency authority.

II. THE CZMA AND OCS ENERGY DEVELOPMENT

In statutes such as the CZMA, Congress intended that states, not federal agencies, would play the primary management role with regard to coastal resources. The CZMA is one of the cornerstone examples of, at least theoretically, how the concept of cooperative federalism is to be played out in the regulation of environmental protection.

Cooperative federalism, a partnership between the state and federal governments, has become the model approach to environmental regulation.[50] The cooperation between the federal government and the governments of the several states is often necessary as a consequence of the size and diversity of our nation, the variation of environmental concerns among the many localities, and the policy considerations involved in environmental decision-making. Further, the federal government is without adequate resources to address all of our nation's environmental regulatory programs and problems without help from state and local authorities.[51] Quite often environmental programs are more

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46. Ernest L. Edwards, Deborah F. Zehner & B. Richard Moore, Jr., *Constitutional and Policy Implications of Louisiana's Proposed Environmental Energy Tax: Political Expediency or Effective Regulation?*, 58 TUL. L. REV. 215, 227-28 (1983).

47. *See also* Coastal Zone Management Regulations, *supra* note 45. *See generally* Rachael E. Salcido, *Offshore Federalism and Ocean Industrialization*, 82 TUL. L. REV. 1355, 1382-84 (2008).

48. Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, § 6209, 104 Stat. 1388 (1990) (concluding the Coastal Energy Impact Program, which was codified in the Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013 (1976)).

49. Coastal Zone Management Act, 16 U.S.C. § 1456 (2006) (as amended by the Omnibus Reconciliation Act of 1990 § 6209); Linda A. Malone, *The Coastal Zone Management Fund*, 1 ENVTL. REG. LAND USE § 3:2 (2009).

50. *See* Trent Dougherty, Nolan Moses & Will Reisinger, *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen/Suits To Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1 (2010).

51. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1196 (1977) ("The federal government . . . is dependent upon state and local authorities to implement these policies

successful when the policies are tailored to local conditions, a process that also mandates the involvement of the states. Finally, because environmental programs often affect land use, lifestyles, and local economic activity, federal officials often solicit local support through cooperation in order to alleviate local concerns about federal intrusion into local matters.[52]

Cooperative federalism also fosters diversity in federal regulatory programs, because "it promotes competition within a federal regulatory framework" and permits "experimentation with different approaches that may assist in determining an optimal regulatory strategy."[53] The ability of states to tailor environmental regulation to fit the specific needs of the community and the local landscape demonstrates one of the main benefits of cooperative federalism. Indeed, Justice Brandeis illustrated this ability of federalism to allow for adaptation to the local environment in this famous observation in 1932:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.[54]

After all, in many instances the states ultimately will be left with the long-lasting effects of those projects on the local environment, thus making their participation in the early stages of any decisionmaking process very important. It seems only appropriate, therefore, that states retain their ability to ensure that the health, safety, and welfare of their citizens, natural resources, and environment are protected.

As noted above, 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."[55] In an effort to effectuate this aspirational principle, Congress concluded that the most effective management of the coastal zone could be achieved by

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because of the nation's size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources.").

52. Jonathan H. Adler, *The Green Aspects of* Printz*: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 578-80 (1998).

53. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1698 (2001).

54. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Scott A. Zimmerman, *Feds and Fossils: Meaningful State Participation in the Development of Liquefied Natural Gas*, 33 ECOLOGY L.Q. 789, 808 (2006).

55. 16 U.S.C. § 1452(1) (2006).

cooperation among federal, state, and local authorities.[56] The general idea behind this mandated cooperation is that, although the federal government may have a need to issue permits and conduct activities in a particular state's coastal zone, the impacted states should have a voice in the proposed uses of their coastal zones. Likely one important reason why Congress intended for the states to have a voice over activities occurring within their boundaries is that states are more familiar with the conditions of their coasts than the federal government. This cooperative federalism, incorporated by Congress into the plain language of the CZMA, is the law's cornerstone.

Yet the CZMA arguably has not served as a meaningful program for reviewing and potentially shaping OCS development. As such, the CZMA, coupled with NEPA, initially served as the primary program for exploring how best to balance energy development with protecting our marine and coastal resources. But not until several years after the CZMA's enactment did the NOAA even issue its first regulations implementing the Act;[57] and not until approximately twenty years later did the NOAA begin to modernize its regulatory program.[58]

Even more troubling is the tortured history surrounding the DOI's effort to mitigate the force of state influence under the CZMA. Early on, the DOI sought to circumscribe the states' involvement in OCS leasing. Even though the impact to state and local communities from OCS oil and gas activities has been appreciated for a while,[59] it was not until 1990 that

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56. *See id.* § 1451(i)-(m).

57. In fact, one observer notes that intervening matters such as the energy crisis in 1973 and the CZMA Amendments in 1976 stalled the promulgation of regulations until 1977-1978. Bruce Kuhse, *The Federal Consistency Requirements of the Coastal Zone Management Act of 1972: It's Time To Repeal This Fundamentally Flawed Legislation*, 6 OCEAN & COASTAL L.J. 77, 86 (2001). During the Act's first decade, commentators observed that the federal government occasionally, when engaged in its own activities, acted contrary to the wishes of the local community or without their consultation. *See, e.g.*, MELVIN B. MOGULOF, SAVING THE COAST: CALIFORNIA'S EXPERIMENT IN INTER-GOVERNMENTAL LAND-USE CONTROL 71-72 (1975). In 1996, Michael Blumm observed that the Act "has yet to have an on-the-ground impact on land and water use decisions in the nation's coastal areas." Michael C. Blumm & John. B. Noble, *The Promise of Federal Consistency Under § 307 of the Coastal Zone Management Act*, 6 ENVTL. L. REP. 50,047, 50,047 (1976).

58. Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 65 Fed. Reg. 77, 124 (Dec. 8, 2000).

59. The Coastal Zone Enhancement Grant Program, enacted in 1976, although subsequently repealed, illustrates the early recognition that coastal communities would be adversely affected by OCS development. Coastal Zone Management Act of 1976, Pub. L. No. 94-370, 90 Stat. 1013 (1976).

the OCS leasing program became subject to meaningful CZMA application.[60]

The DOI initially decided that it was unnecessary to subject lease sales to a consistency determination.[61] Some at the time disagreed, reasoning, "the decision on whether or not to lease is probably the only effective point where states may hope to regulate OCS impacts on their coastal zone."[62] After initial skirmishes and moratoria, the State of California challenged the DOI's position in *Secretary of the Interior v. California*, where the Supreme Court affirmed the DOI's judgment that only activities in the coastal zone that directly affect the coastal zone are subject to state review under the CZMA.[63] The statutory language at the time applied to activities "directly affecting" a state's coastal zone.[64] The Court narrowly read that provision as meaning that there had to be a direct, tangible impact of federal activities for anything even to be considered as potentially violating the CZMA.[65] The Court determined that lease sales are only paper transactions, which do not cause any "direct effects" on the coastal zone. This decision "weakened both the national and state coastal management programs" and "[e]ncouraged . . . federal agencies . . . to widen the exemption carved from the law."[66]

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60. *See* John K. Van De Kamp & John A. Saurenman, *Outer Continental Shelf Oil and Gas Leasing: What Role for the States?*, 14 HARV. ENVTL. L. REV. 73 (1990) (describing importance of litigation to ensure compliance with the Act).

61. *See* Federal Consistency with Approved Coastal Management Programs, 43 Fed. Reg. 10,510, 10,512 (Mar. 13, 1978) (discussing disagreement between the Dep't of Commerce and the DOI); *see also* Karen A. Shaffer, *OCS Development and the Consistency Provisions of the Coastal Zone Management Act—A Legal and Policy Analysis*, 4 OHIO N.U. L. REV. 595, 604 (1977). According to the DOI, only activities inside the coastal zone and directly affecting the coastal zone required CZMA review. *See* Karen L. Linsley, *Federal Consistency and Outer Continental Shelf Oil and Gas Leasing: The Application of the "Directly Affecting" Test to PreLease Sale Activities*, 9 B.C. ENVTL. AFF. L. REV. 431 (1980); Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401 (1984).

62. Richard Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 STAN. L. REV. 1107, 1138 (1976).

63. 464 U.S. 312 (1984). *See generally* Edward A. Fitzgerald, California Coastal Commission v. Norton*: A Coastal State Victory in the Seaweed Rebellion*, 22 U.C.L.A. J. ENVTL. L & POL'Y 155, 161 (2004).

64. 464 U.S. at 317.

65. *Id.* at 321.

66. Jack H. Archer, *Evolution of Major 1990 CZMA Amendments: Restoring Federal Consistency and Protecting Coastal Water Quality*, 1 TERR. SEA J. 191, 193 (1991). In 1991, Linda Malone commented that "[i]nadequate and sometimes nonexistent funding, case by case decisionmaking [sic], state/federal conflicts, uncoordinated planning, pressure for development and energy, insufficient research information, splintered federal authority, and restrictive court decisions are a few of the problems that have plagued the CZMA." Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use To Preserve Coastal Areas*, 62 U. COLO. L. REV. 711, 714 (1991).

Congress eventually addressed this problem in the Omnibus Budget Reconciliation Act of 1990,[67] where it amended the CZMA to ensure that lease sales would be covered by the Act.[68] It recognized that the lease sale stage is a meaningful event from which a "chain of events" can reasonably be anticipated and also as the stage at which the most effective opportunity to review the direct, indirect, and cumulative effects of OCS oil and gas activity on coastal resources and their consistency with a state's coastal management program exists.[69]

But post-1990 implementation of the Act by the DOI for OCS oil and gas leasing has not necessarily been significantly more deferential toward the CZMA. To begin with, as recently as the 2000 CZMA regulations, the DOI still asserted that a consistency determination for its five-year plans was unnecessary in light of OCSLA and the role of the states under that Act.[70] The NOAA, of course, rejected this view, noting that Congress resolved the matter unquestioningly in the 1990 amendments, but the DOI's comment nonetheless conveys a certain lack of appreciation for the program.[71] And when the MMS sought to avoid having its decision to suspend a lease subject to a state's consistency review, the United States Court of Appeals for the Ninth Circuit ruled against the agency, and in doing so explained the importance of examining impacts at the lease sale stage.[72] A lease suspension would have extended the lives of the leases at issue, which otherwise would have expired for failure to begin production in paying quantities within the requisite time frame. Although the Department of Commerce had said that lease suspensions could not be categorically excluded from CZMA review,[73] the MMS nevertheless argued that a lease suspension is

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67. Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

68. *See* Joint Explanatory Statement of the Committee of Conference, H.R. REP. NO. 101-964, at 970 (1990) (Conf. Rep.); *see also* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124-25, 77,132 (Dec. 8, 2000) (stating that Congress made clear that OCS lease sales are subject to the consistency requirement). When lessees argued before the United States Court of Federal Claims that they were tendering their leases back to the United States, because the 1990 Amendments to the CZMA materially altered the statutory framework and made the leases subject to state consistency review, that court observed that Congress expressly overruled *Secretary of the Interior v. California* and that "[t]he amendment of § 307(c)(1) furthered Congress' effort to 'enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zone' by widening the array of federal activities subject to consistency review." Amber Res. Co. v. United States, 68 Fed. Cl. 535, 557 (2005).

69. *See* 65 Fed. Reg. at 77,130 (discussing "chain of events" concept in the CZMA regulations).

70. *Id.* at 77,124.

71. *Id.* at 77,131.

72. California v. Norton, 311 F.3d 1162 (9th Cir. 2002).

73. 65 Fed. Reg. at 77,144.

categorically excluded from environmental review under NEPA, and that the CZMA similarly does not apply.[74] The court held that this argument "has been specifically rejected by Congress" in the 1990 Amendments to the CZMA, which were designed "to overturn the decision of the Supreme Court . . . and to make clear that Outer Continental Shelf oil and gas lease sales are subject to the requirements of section 307(c)(1)."[75]

By contrast, the influence that coastal states may exercise over other nonfederal, energy-related activities affecting the coastal zone has proven somewhat greater, although this influence is continuously constrained by the need for federal approval of any changes to a state's CMP. Two principal aspects of the CZMA program confront a state when it reviews for consistency a federal license or permit applicant's energy-related activity. To begin with, the Act and Commerce Department decisions treat the siting of coastal-dependent energy facilities[76] as furthering the national interest for purposes of the CZMA.[77]

Second, a state objection to a proposed project or activity is only valid if it is based upon an "enforceable policy" in the state's CMP.[78] An "enforceable policy" includes only those policies that have been

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74. *Norton*, 311 F.3d at 1175-76.

75. *Id.* at 1172-73 (quoting, in part, H.R. REP. NO. 101-508, at 970).

76. The CZMA defines an energy facility as:

> [A]ny equipment or facility which is or will be used primarily-(A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource; or (B) for the manufacture, production, or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).

16 U.S.C. § 1453(6) (2006).

77. *See* 65 Fed. Reg. at 77,150; *see, e.g.*, Weaver's Cove Energy, L.L.C. v. R.I. Coastal Res. Mgmt. Council, 589 F.3d 458 (1st Cir. 2009); Decision and Findings by the U.S. Sec'y of Commerce in the Consistency Appeal of Islander East Pipeline Co., LLC, at 3-4, 6-10 (May 5, 2004), *remanded on other grounds*, Connecticut v. U.S. Dep't of Commerce, No. 3:04cv 1271 (SRU), 2007 WL 2349894 (D. Conn. Aug. 15, 2007); Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc. from an Objection by the State of Fla., 1995 NOAA LEXIS 37, at *11 (Sec'y of Commerce June 20, 1995). Of course, satisfying this element is often not difficult, even for nonenergy projects. *See* Consistency Appeal of S. Pac. Trans. Co. to an Objection from the Cal. Coastal Comm'n, 1985 NOAA LEXIS 73, at *9 (Sec'y of Commerce Sept. 24, 1985) ("[B]ecause Congress has broadly defined the national interest in coastal zone management to include both protection and development of coastal resources, [the first] element will 'normally' be found to be satisfied on appeal."). Yet, oddly, "energy independence" is not included under the CZMA's national interest umbrella. *See* Decisions and Findings by the U.S. Sec'y of Commerce in the Consistency Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC from an Objection by the State of N.Y. (Sec'y of Commerce Apr. 13, 2009) [hereinafter Broadwater], http://www.ogc.doc.gov/czma.nsf/4932OADEF708E3EF85257597005EFA67/$File/Broadwater_Decision_04-13-2009.pdf?OpenElement.

78. Federal Consistency with Approved Coastal Management Programs, 15 C.F.R. § 930.11(h) (2009).

incorporated into a state's federally approved CMP.[79] Any substantive amendments to a state CMP must be submitted to and approved by the NOAA's OCRM.[80] This can become problematic if a state is not prescient enough to anticipate future concerns so as to seek and obtain federal approval for plan changes to address those concerns well before an applicant approaches the state for a consistency determination. At least one court has addressed this issue and found that absolute predictability of coastal management requirements is not required by the CZMA.[81]

Liquefied Natural Gas (LNG) projects provide one apt example of how the CZMA, in practice, has proved less accommodating to state

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79. *Id.*

80. 16 U.S.C. § 1455(e)(3)(A); 15 C.F.R. § 930.11(h); id. § 30.52; *see* OFFICE OF OCEAN & COASTAL RES. MGMT., NOAA, FED. CONSISTENCY REQUIREMENTS 4 (2004).

81. The court in *American Petroleum Inst. v. Knecht*, 456 F. Supp. 889, 919 (C.D. Cal. 1978), *aff'd on other grounds*, 609 F.2d 1306 (9th Cir. 1979), determined that the CMPs need not be so specific as to completely inform an applicant, ahead of time, of the rules and conditions of compliance. In that case, the court stated:

> The Court agrees with defendants that Congress never intended that to be approvable under § 306 a management program must provide a "zoning map" which would inflexibly commit the state in advance of receiving specific proposals to permitting particular activities in specific areas. Nor did Congress intend by using the language of "objectives, policies, and standards" to require that such programs establish such detailed criteria that private users be able to rely on them as predictive devices for determining the fate of projects without interaction between the relevant state agencies and the user. To satisfy the definition in the Act, a program need only contain standards of sufficient specificity "to guide public and private uses."
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> . . . .
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> The Amendments of 1976 made clear the national interest in the planning for, and siting of, energy facilities. . . . Apparently neither the Act nor the Amendments thereto altered the primary focus of the legislation: the need for a rational planning process to enable the state, not private users of the coastal zone, to be able to make "hard choices." "If those choices are to be rational and devised in such a way as to preserve future options, the program must be established to provide guidelines which will enable the selection of those choices." The 1976 Amendments do not require increased specificity with regard to the standards and objectives contained in a management program.
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> In conclusion, to the extent plaintiffs' more specific challenges to the Acting Administrator's § 306 approval are premised on an interpretation of congressional intent to require that such programs include detailed criteria establishing a sufficiently high degree of predictability to enable a private user of the coastal zone to say with certainty that a given project must be deemed "consistent" therewith, the Court rejects plaintiffs' contention.

Id. at 919 (citations omitted). It is not entirely clear that courts today are as lenient in permitting potentially vague standards. In *Blanco*, for instance, the court did not find persuasive Louisiana's argument that the State's public trust doctrine was incorporated into the CMP and served as an enforceable policy. Blanco v. Burton, No. Civ. A. 06-3813, 2006 WL 2366046, at *13 (E.D. La. Aug. 14, 1982).

interests. Rising gas prices, coupled with President Bush's efforts to expedite the development of energy projects,[82] and pushed by changes in the oversight of offshore LNG ports following the terrorist attacks of September 11, 2001,[83] the nation quickly—perhaps precipitously—once again sought to promote enhanced use of LNG. In the Energy Policy Act of 2005 (EPAct 2005), therefore, Congress amended the Natural Gas Act to provide the Federal Energy Regulatory Commission (FERC) with exclusive jurisdiction over the "siting, construction, expansion, or operation of an LNG terminal."[84] In doing so, however, Congress expressly provided that this provision does not affect the rights of states under the CZMA.[85] Regardless of LNG's potential role in a national energy policy, many of the affected states expressed concern with the lack of sufficient environmental review and protection necessary to permit these projects to proceed. Yet the extent of the states' residual power under the CZMA is unclear. Soon after EPAct 2005, the Department of Commerce informed New Jersey, informally and in advance of the State's formal submission for proposed amendments to its CMP, that certain proposed amendments to its plan, as well as a provision in its then-current plan, were "likely" preempted.[86] It explained that while state plans must address energy projects, those plans cannot purport to regulate the siting and operation of LNG terminals.[87]

When, for instance, a local community sought to ban any LNG terminals in the Chesapeake Bay Critical Area, an area that has received widespread attention and even presidential involvement, the community had difficulty employing the CZMA as an effective mechanism.[88] Through a local zoning amendment, Baltimore County, Maryland, sought to restrict the ability of AES Sparrows Point LNG, L.L.C. to site

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82. *See* Exec. Order No. 13212, 66 Fed. Reg. 28,357 (May 22, 2001).

83. *See* Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (2002).

84. Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, 119 Stat. 592, 686 (2005) (codified as amended at 15 U.S.C. § 717b(e)(1) (2006)).

85. 15 U.S.C. § 717b(d).

86. Letter from David Kennedy, Dir., Office of Ocean & Coastal Res. Mgmt., to Ruth E. Ehinger, Coastal Program Manager, N.J. Dep't of Envtl. Prot. (Oct. 4, 2006).

87. *Id.* The letter further commented on the difficulty of applying general state policies to otherwise preempted activities, suggesting that general state policies might not qualify as "enforceable" to the extent that they assert control over preempted activities, but that a determination would be made on a case-by-case basis. *Id.* at 4 & nn.3-4.

88. Joseph Briggett, Note, AES Sparrows Point LNG, L.L.C. v. Smith*: The Fourth Circuit Ignores Ambiguities in the Coastal Zone Management Act and Imposes a Stringent Approval Requirement on State Coastal Management Plans*, 22 TUL. ENVTL. L.J. 159, 159-60 (2008).

an LNG import terminal off its shores.[89] The company argued, inter alia, that the County's authority had been preempted by EPAct 2005, and further, that the zoning amendment was not part of Maryland's CMP "enforceable policies."[90] Although the lower court rejected both arguments, the United States Court of Appeals for the Fourth Circuit held otherwise.[91] It concluded that EPAct 2005 preempted the County's effort to regulate the siting of the terminal, and that the zoning amendment was not an enforceable policy because it had not been approved by the Department of Commerce.[92] As one commentator observes, "[a]lthough the decision will have the likely effect of denigrating state authority under the CZMA, its only practical effect is to impose a highly [impractical] formal requirement of approval for changes to coastal management plans[,] . . . because it forces NOAA to micromanage state coastal management programs."[93]

Conversely, carefully crafted state objections tied to specific enforceable policies can succeed. This occurred when the FERC licensed the proposed closed-loop Broadwater LNG Project off the coast of New York, over the State's objection.[94] In refusing to overturn the State's objection, the Department of Commerce addressed the Project's argument that the State impermissibly relied upon two local plans that were not part of the State's "enforceable policies."[95] The Department noted that the State did not rely on those plans, but only used them as supporting materials to describe the context of its decision.[96]

Many recent successful state efforts to address the effects of LNG ports rely on the veto power afforded adjacent states for offshore ports

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 170. At least for activities not subject to EPAct 2005, state CMPs that incorporate requirements to coordinate with any local permitting requirements may, even if those plans are not themselves explicitly enforceable polices, inform a state consistency determination. In *Mountain Rhythm Resources v. FERC*, 302 F.3d 958 (9th Cir. 2003), for example, the applicant for a federal hydroelectric license submitted a consistency determination to the Washington State Department of Ecology (DOE), which informed the applicant that it would need to seek a Shorelines Development Permit from the local community under the State's Shoreline Management Act (SMA). The court's opinion affirming the DOE's insistence on seeking a SMA permit suggests that the requirement was implicit in the State's CZM plan. *Id.* at 966 (noting that permit requirement was now explicit and deferred to the agency's interpretation that it was implicit in the former plan).
94. *See* Broadwater, *supra* note 77.
95. *Id.* at 5-6.
96. *Id.*

under the Deepwater Port Act,[97] as amended in 2002, for offshore ports, rather than under the ostensibly weaker CZMA.[98] The Gulf of Mexico proposals, for instance, sought to deploy in lieu of a closed-loop system an open rack vaporizer technology that would save up to approximately $40 million in annual expenses.[99] An open-loop system poses a greater threat to the environment because of its use of seawater rather than gas to regassify the LNG. "The governors of Louisiana, Alabama, and Mississippi formed an alliance boycotting the authorization of any future open-loop LNG facilities offshore of their states."[100] Yet a study of these LNG projects suggests that the federal permitting agencies favored the cheaper open-loop systems rather than accept the states' concerns.[101] In one case, for example, the Coast Guard's environmental review suggested little adverse environmental impact from Freeport McMoran's proposed LNG port in the Gulf. Louisiana Governor Kathleen Blanco was then forced to exercise her authority under the Deepwater Port Act to veto the proposal as a consequence of its potential effect on the marine and aquatic environment.[102]

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97. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (2002).

98. Recently, several states have expressed concern that federal agencies, such as the FERC, have issued what are called "conditional licenses," with the condition being that the applicant must receive a consistency certification from the relevant coastal state(s). These states argue that the certification must precede the federal license or permit, because otherwise the coastal state is put in the awkward position of having to be the party that "kills" an already "licensed" project. *See* Brief for the States of Louisiana, Connecticut, Delaware, Georgia, Hawaii, Idaho, Massachusetts, Minnesota, Mississippi, New Hampshire, Ohio, Oklahoma, Rhode Island, West Virginia, and Wisconsin as Amici Curiae Supporting Appellants, Oregon, et al. v. FERC (No. 09-70269, No. 09-70442, No. 09-70477, No. 09-70770 (consolidated)) (9th Cir. Feb. 1, 2010). In one case, the court held that the state lacked standing to raise the objection, because it nonetheless had the ability to reject the project. *See generally* Del. Dept. of Natural Res. & Envtl. Control v. FERC, 558 F.3d 575 (D.C. Cir. 2009). In another instance, several coastal states raised this same issue as amicus curiae in a challenge to a FERC LNG certificate for a project off the Oregon coast. *See Bradwood Landing, L.L.C. et al.*, 126 FERC 61035 (2009) (9th Cir. appeal pending).

99. *See* William D. Whitmore, Vern K. Baxter & Shirley Laska, *A Critique of Offshore Liquefied Natural Gas (LNG) Terminal Policy*, 52 OCEAN & COASTAL MGMT. 10 (2008).

100. *Id.* at 10.

101. *Id.*

102. *See Victory—Blanco Vetoes McMoran's Proposed LNG Project*, ASSOCIATED PRESS, May 5, 2006, *available at* http://louisiana.sierraclub.org/lng.asp. The Governor of Alabama similarly threatened to veto a project off that state's coast that proposed an open system. *See With Alabama Governor Opposed to Project, Conoco Phillips decides To Shelve LNG Terminal*, INSIDE FERC, (June 19, 2006) *available at* 2006 WLNR 11341704. The Deepwater Port Act triggers the CZMA consistency review, and requires that the affected coastal state governor make a decision within forty-five days. *See* Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (2006).

Before the Freeport McMoran veto, the Department of Transportation similarly rebuffed the State's push for requiring the use of a closed-loop system in the Gulf Landing facility, and the United States Court of Appeals for the Fifth Circuit upheld its decision.[103] In *Gulf Restoration Network v. U.S. Department of Transportation*,[104] the Louisiana Governor, along with other federal agencies, voiced concerns with the open system being allowed by the Department of Transportation. Governor Blanco's staff specifically lamented the lack of meaningful consideration of state concerns in the process, and the Governor wrote a stern letter echoing many of the concerns expressed by the National Marine Fisheries Service (NMFS) regarding the uncertainties of the open-loop system, but she stopped short of halting the project.[105] One of those concerns was the Department of Transportation's failure to consider the cumulative impact of three other proposed (but not approved) open-loop LNG ports in the Gulf. The Department had limited its cumulative impact inquiry by addressing only two other projects whose draft EISs had been approved and released to the public.[106] The court rejected these arguments and upheld the agency's judgment that best available technology under the Deepwater Port Act did not actually require the best available technology for the marine environment, but rather requires "construction that reasonably minimizes adverse impact to a reasonable degree given all relevant circumstances."[107]

III. LOUISIANA AND OCS DEVELOPMENT

Louisiana is at the epicenter of the nation's struggle to balance energy production with protection and wise use of coastal resources. The State's extensive oil and gas reserves have been exploited since the first

103. Gulf Restoration Network v. Dep't of Transp., 452 F.3d 362, 367 (5th Cir. 2006).

104. *Id.*

105. *See* Whitmore, *supra* note 99, at 14.

106. In the El Paso Energy Bridge Offshore LNG Terminal proposal, the NMFS apparently expressed reservations about the potential cumulative impact of several Gulf terminals operating under an open-loop system. *See id.* at 13.

107. *Gulf Restoration Network*, 452 F.3d at 373. Project economics ultimately affected the project's viability. *See* Whitmore, *supra* note 99, at 14. In the proposed Weaver's Cove LNG project on the Atlantic Coast, a similar saga is now playing out, with little emphasis on the CZMA. *See* Scott Yount, *Senator Brown Opposes Fall River LNG Terminal*, NEW ENG. CABLE NEWS, June 12, 2010, http://www.necn.com/06/12/10/Sen-Brown-opposes-Fall-River-LNG-termina/landing.html?blockID=252440&feedID=4215. New Jersey also recently rejected an LNG project near its coast. Sari Zeidler, *New Jersey Governor Rejects Liquefied Natural Gas Island*, LI HERLAND, April 29, 2010, http://www.liherald.com/detail/24596.html?content_source=&category_id=5&search_filter=&event_mode=&event_ts_from=&list_type=&order_by=&order_sort=&content_class=&sub_type=&town.

Louisiana well was drilled near Jennings in 1901,[108] followed by the world's first oil well over inland waters at Caddo Lake in 1910.[109] South Louisiana's real treasure, its wetlands, began to run up against the hard edge of the oil and gas industry in the 1920s and has not fared well since.[110]

In the years before the state had a coastal management program, abuses to wetlands in the interest of getting at the black gold beneath them were essentially unabated. These abuses ranged from direct destruction by digging thousands of miles of navigation canals and pipeline ditches,[111] to discharge of all manner of toxic fluids directly into sensitive marshlands and swamps[112]—not to mention impacts from the building of the infrastructure required to support such a massive endeavor.[113] Evidence is now emerging that withdrawal of subsurface fluids has caused localized wetland subsidence.[114] Even in the early years of Louisiana's coastal management program, the political power of the oil and gas industry made it difficult for the administrators of the program to

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108. Scott A. Hemmerling, Environmental Equity in Southeast Louisiana: Oil, People, Policy, and the Geography of Industrial Hazards 64-65 (Apr. 13, 2007) (unpublished Ph.D. Dissertation, La. State Univ.) (on file with author).

109. *Id.* at 256.

110. DONALD W. DAVIS, WASHED AWAY? THE INVISIBLE PEOPLES OF LOUISIANA'S WETLANDS 435-59 (2010) (discussing the environmental and sociocultural impacts of the oil and gas industry to Louisiana's wetlands).

111. *See also* K.M. WICKER, R.E. EMMER, D. ROBERTS & J. VAN BEEK, U.S DEP'T OF THE INTERIOR, MMS, GULF OF MEX. OCS REGION, PIPELINES, NAVIGATION CHANNELS, AND FACILITIES IN SENSITIVE COASTAL HABITATS: AN ANALYSIS OF OUTER CONTINENTAL SHELF IMPACTS; VOLUME I: TECHNICAL NARRATIVE (1989). *See generally* D.R. Cahoon & R.E. Turner, *Accretion and Canal Impacts in a Rapidly Subsiding Wetland II. Feldspar Marker Horizon Technique*, 12(4) ESTUARIES & COASTS 260 (1989); JAMES B. JOHNSTON, DONALD R. CAHOON & MEGAN K. LAPEYRE, OUTER CONTINENTAL SHELF (OCS)-RELATED PIPELINES AND NAVIGABLE CANALS IN THE WESTERN AND CENTRAL GULF OF MEXICO: RELATIVE IMPACTS ON WETLAND HABITATS AND EFFECTIVENESS OF MITIGATION, OCS STUDY, MMS 2009-048 (2009); R. EUGENE TURNER & DONALD R. CAHOON, CAUSES OF WETLAND LOSS IN THE COASTAL CENTRAL GULF OF MEXICO, OCS STUDY, MMS 87-0119 (1988); R. EUGENE TURNER & CARROLL L. CORDES, RELATIONSHIP BETWEEN CANAL AND LEVEE DENSITY AND COASTAL LAND LOSS IN LOUISIANA, U.S. FISH AND WILDLIFE BIOLOGICAL REPORT 85-14 (1987); R. Eugene Turner, *Wetland Loss in the Northern Gulf of Mexico: Multiple Working Hypothesis*, 20 ESTUARIES & COASTS 1 (1997).

112. Kerry M. St. Pe et al., *An Assessment of Produced Water Impacts to Low-Energy, Brackish Water Systems in Southeast Louisiana*, *in* PROCEEDINGS OF THE FIRST INTERNATIONAL SYMPOSIUM ON OIL AND GAS EXPLORATION AND PRODUCTION WASTE MANAGEMENT PRACTICES (1990).

113. *See generally* DAVIS, *supra* note 110, at 435-59.

114. *See generally* Robert A. Morton, Julie C. Bernier, & John A. Barras, *Evidence of Regional Subsidence and Associated Interior Wetland Loss Induced by Hydrocarbon Production, Gulf Coast Region, USA*, 50 ENVTL. GEOL. 261 (2006).

enforce meaningful reforms to some of the industry's more destructive practices affecting coastal natural resources.[115]

But when the State finally began to assert its rights under the CZMA for OCS oil and gas activities, it received little support. Soon after the 1990 amendments clarifying the application of the CZMA, the State of Louisiana informed the MMS that it was concerned with a proposed lease sale. In particular, the State argued that the proposed lease sale would "result in significant, adverse impacts on Louisiana coastal parishes, affect governmental bodies, will cause adverse disruption of existing social patterns, and adverse effects of cumulative impacts."[116] According to the State in *Louisiana v. Lujan*, the MMS's treatment of consistency with the state plan was conclusory and lacked any meaningful analysis.[117] Although the court rejected the State's argument, it did so with little analysis and upon a judgment that the MMS's conclusion contained "sufficient information to support" its conclusion, regardless of the merits.[118]

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115. U.S Dep't of Commerce Nat'l Oceanic & Atmospheric Admin., Office of Coastal Zone Mgmt. & La. Dept. of Natural Res. Coastal Mgmt. Section, Louisiana Coastal Resources Program Final Environmental Impact Statement, Appendix p, Response to Comments Received on Draft Environmental Impact Statement (1980) (discussing, in particular, the extreme hostility towards the proposed coastal management program expressed by every oil and gas company and organization who submitted comments); *see also* Op. La. Atty. Gen. No. 77-193 (concerning the State's first proposal setting its coastal zone boundary that attempted to severely limit the scope and impact of the Louisiana Coastal Management Program (formally known as the Louisiana Coastal Resources Program or LCRP)). One of the authors, James G. Wilkins, was employed in the Louisiana Department of Natural Resources, Coastal Management Division (CMD) as a Coastal Resource Analyst in 1983 and 1984 and later served as special legal counsel to CMD. During his time at CMD he personally observed many incidences of the oil and gas industry resisting best practices management measures designed to reduce the impacts of oil and gas development on coastal resources. That resistance included politically pressuring the highest levels of Louisiana government on the staff of CMD to relax enforcement of the Coastal Use Guidelines. For a period of time after the inception of the program bills were introduced several times in the Louisiana Legislature to repeal the LCRP in whole or in part. *See* Interview with Professor Mike Wascom, former Dir. of the La. Sea Grant Legal Program & Special Counsel to the LCRP; *see also* John Johnston, James Rives & David Soileau, *Geologic Review: Better Regulation Through Interagency Cooperation*, *in* Proceedings of the Sixth Symposium on Coastal and Ocean Mgmt., Charleston, SC (July 11-14, 1989) (describing how the geologic review process significantly reduced the impacts to wetlands of oil and gas canal dredging). The authors of this source personally witnessed strong resistance to the geologic review process by the oil and gas industry before they grudgingly accepted and eventually embraced it.

116. Complaint for Declaratory Judgment and Injunctive Relief, at 13, Louisiana v. Lujan, 777 F. Supp. 486 (E.D. La. 1991).

117. 777 F. Supp. 486, 489 (E.D. La. 1991); Memorandum in Support of Motion for Preliminary Injunction, Louisiana v. Lujan, 777 F. Supp. 486 (E.D. La. 1991) (on file with author).

118. *Lujan*, 777 F. Supp. at 489.

A. Blanco v. Burton

Then, in 2006, Louisiana took another bold step for a major oil producing state, when its Department of Natural Resources' Coastal Management Division disagreed with the MMS's consistency determination for Central Gulf of Mexico Lease Sale 200, thereby denying consistency.[119] To say this move shocked the oil and gas industry and the federal government is an understatement. The massive damage inflicted by Hurricanes Katrina and Rita animated—if not mandated—the State's decision.[120] Those two storms ferociously brought home to many people the fact that the coast had seriously degraded over the preceding decades. Meanwhile, Louisianans were in denial about the degradation—a denial induced, at least partially, by the prosperity flowing from energy development. When Katrina turned 186 square miles of marsh immediately southeast of New Orleans into open water on her way to flooding the City, it was evident that the wetland ecosystem had degraded to a point where it could no longer protect the City by absorbing storm surge. That shocking realization forced Governor Kathleen Blanco to challenge the federal government's all-too-often repeated assertions that OCS oil and gas development has little or no impact on Louisiana's coastal resources. In the end, the case revealed the façade behind the federal government's approach toward environmental analysis following the release of a multisale EIS.

A principal element of the case involved the MMS's artful circumvention of actual environmental analysis through the aggressive use of tiering and incorporation by reference. Generally, once the MMS completed an EIS, it then tiered each subsequent environmental assessment (EA) and consistency determination (CD) off of that EIS and previous EAs and CDs until the next EIS.[121] Although this appears legitimate and seems like an efficient means of creating the legally required environmental documents for the MMS, it creates a largely copy-and-paste approach to the creation of EAs and CDs that essentially reference older documents without analyzing any substantial new impacts. The problem with this approach is that environmental changes between EISs are given only cursory treatment in the tiered EAs and

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119. *See generally* Letter from Kathleen Babineaux Blanco, Gov. of La., to Renee Orr, Chief Leasing Div., Minerals Mgmt. Serv. (June 14, 2006) (on file with author).

120. *See* Letter from Gerald Duszynski, Acting Assistant Sec'y, La. Dep't of Natural Res., to Chris Oynes, Minerals Mgmt. Serv. 2-7 (May 17, 2006) (on file with author).

121. Katherine L. Henry, State and Federal Interaction in the Oil & Gas Industry, Presentation at the 54th Annual Louisiana Mineral Law Institute 6 (Paul M. Hebert Law Center 2007).

CDs. This practice became obvious and problematic when the EA for Lease Sales 198 and 200 suggested that the massive damage from Hurricanes Katrina and Rita could essentially be ignored when determining the baseline for the assessment of impacts from the lease sales and had little bearing on cumulative impacts.[122]

The State moved for a preliminary injunction to halt the lease sales, based on lack of adequate data and an insufficient analysis of the effects the sale would have on Louisiana's coastal resources in the environmental documents and the CD, and challenged the scientific findings in those documents.[123] Over the years, this process had become a predictable dance, with the MMS essentially saying "we have to go through the motions and check off these boxes but we know you are so beholden to the monetary benefits that you won't protest too much" and the state saying "you had better listen to us and address our concerns but if that's too much trouble we will take what we can get." As such, what the State received was no change in operating procedures or attention to OCS impacts.

The case offered Louisiana a chance to demonstrate that it was serious about protecting and restoring its coastal ecosystems, even if it threatened some of the economic benefits derived from activities that adversely affected those ecosystems. To be sure, the State did not wish to injure the oil and gas industry, and said so repeatedly,[124] but demanded recognition of the true impacts of OCS activities and accountability for that damage in some form—but how that was to be accomplished was not fully articulated. The State presented an unassailable case, with evidence derived from a host of scientific studies, that the MMS had

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122. In fact, in the environmental documents for the first lease sale subsequent to Hurricanes Katrina and Rita, Lease Sale 198, the MMS did not even consider the possible impacts of those storms on Louisiana's environmental baseline, opting to defer such essential analyses to a later date. *See* MINERALS MGMT. SERV., ENVIRONMENTAL ASSESSMENT, PROPOSED OCS LEASE SALE 198, CENTRAL GULF OF MEXICO, OCS EIS/EA MMS 2005-059, at 1 (Nov. 10, 2005), *available at* http://www.gomr.mms.gov/PDFs/2005/2005-059.pdf ("The potential impacts of Hurricanes Katrina, in August 2005, and Rita, in September 2005, are not addressed in this EA; they will be analyzed and incorporated into subsequent lease sale EA's [sic] as information and data permit.").

123. *See generally* Complaint for Declaratory Judgment and Injunctive Relief, Blanco v. Burton, No. Civ. A. 06-3813, 2006 WL 2366046 (E.D. La. Aug. 14 2006).

124. *See, e.g.*, Joe Gyan, Jr., Interior Defends Lease Sales, BATON ROUGE ADVOC. A1, Aug. 5, 2006, *available at* 2007 WLNR 23743626 (quoting an unidentified federal government lawyer during the pendency of the *Blanco* litigation as acknowledging that "Louisiana has repeatedly suggested that it does not want to stop OCS oil and gas activities in the Gulf of Mexico").

indeed ignored and downplayed the direct, indirect, and cumulative impacts of OCS leasing and development on Louisiana's coastal zone.[125]

Although the State presented a strong case that this federal agency—the one charged with the protection of the State's coastline from damage related to mineral exploration and development—was deficient in their duties, the lawsuit was at the time perceived by the court as not much more than an academic commentary on bureaucratic ambivalence and the abstract means by which mineral production exacerbates damage caused by tropical cyclones in the coastal zone.[126] Little did those working on the State's challenge to the adequacy of these analyses expect that within four years, the most dire predictions of a catastrophic failure would be occasioned by missteps in oversight by the MMS and lax adherence to safety and environmental standards by the oil and gas industry. It is possible, had more attention been paid to the court's findings in this lawsuit, which are briefly reviewed below, that some, if not all, of the problems leading to the DEEPWATER HORIZON incident could have been avoided. The harsh assessments of the MMS in the *Blanco* case in 2006 are eerily similar to the dysfunctional picture of that agency that has emerged in the wake of the DEEPWATER HORIZON incident.

In *Blanco*, Louisiana pointed out how its copy-and-paste environmental analyses led to the MMS's virtually preordained findings that, despite the 2005 hurricanes and their impact on Louisiana's environmental baseline, there were no significant environmental changes that warranted closer examination by that agency before leasing could continue. In fact, in commenting on these shortcomings, Judge Engelhardt noted:

> [W]ith little or no analysis as to why, MMS concludes virtually every discussion of changes caused by the hurricanes with a generalized statement that its prior conclusions as to the impacts of OCS activities in connection with Lease Sale 200 remain unchanged. *Abbreviated summaries and unsupported conclusions do not suffice for insightful and well-reasoned analysis of potential significant impacts as the result of changed circumstances*.[127]

He further noted that all previous assumptions upon which the earlier analyses were based "were, for the most part, blown away in the winds

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125. *See generally* Ryan M. Seidemann & James G. Wilkins, Blanco v. Burton*: What Did We Learn From Louisiana's Recent OCS Challenge?*, 25 PACE ENVTL. L. REV. 393 (2008).

126. *Id.*

127. Blanco v. Burton, No. Civ. A. 06-3813, 2006 WL 2366046, at *9 (E.D. La. Aug. 14, 2006) (emphasis added) (internal citation omitted).

and waters of Hurricanes Katrina and Rita."[128] The State similarly complained that the MMS's consistency determination, following the hurricane, failed to address adequately the increased environmental and economic risks to Louisiana's OCS-supporting infrastructure. The MMS demonstrated little sympathy for these concerns, and the court responded caustically:

> MMS's treatment of the Coastal Use Guidelines set forth in the LCRP is so inadequate as to suggest that proceeding with Lease Sale 200 was a *fait accompli* even before the [consistency determination] was compiled. MMS has failed to demonstrate, as it must, that the action and its direct, indirect and cumulative impacts are consistent with those of Louisiana's 94 Coastal Use Guidelines that would apply herein. Thus, because the [consistency determination] does not adequately evaluate all of the "relevant enforceable policies" of the LCRP . . . it would appear to have been compiled in an arbitrary and capricious manner such that the result, i.e. the occurring of the Lease Sale, was fore-ordained.[129]

Unfortunately, as Louisiana made clear in its numerous comment letters to the MMS after its 2006 challenge, this copy-and-paste style of environmental analysis continued.[130] In fact, despite some perfunctory efforts to appease the State pursuant to its settlement agreement in *Blanco*, the MMS undertook no substantial retooling of its environmental analyses after its lashing by the court.

B. Resumption of the Status Quo

After *Blanco*, the MMS reissued the EIS and resumed the lease sale process.[131] It also commissioned some new long-term research studies on OCS onshore impacts.[132] The results of those studies will not be available for some time and so cannot be incorporated into current lease sale considerations.[133] It appears, despite the MMS's statement to the

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128. *Id.*

129. *Id.* at *11.

130. *See, e.g.*, Letter from Gregory J. Ducote, Adm'r, Interagency Affairs/Fields Serv. Div., Coastal Mgmt., La. Dep't of Natural Res., to Renee Orr, Leasing Div., MMS (Sept. 21, 2009) (noting numerous repeated assertions made as statements of fact by the MMS).

131. U.S. Dep't of the Interior, Minerals Mgmt. Serv., GULF OF MEXICO OCS OIL AND GAS LEASE SALES: 2007-2012, WESTERN PLANNING AREA SALES 204, 207, 210, 215, AND 218, CENTRAL PLANNING AREA SALES 205, 206, 208, 213, 216, AND 222, Gulf of Mex. OCS Region Final Environmental Impact Statement, OCS EIS/EA MMS 2007-018 (2007).

132. *See, e.g.*, Letter from Gerald Duszynski, Acting Assistant Sec'y for Coastal Mgmt., La. Dep't of Natural Res., to Reg'l Supervisor, Gulf of Mex. OCS Region, Minerals Mgmt. Serv., at 2 (Mar. 16, 2007) (referencing an MMS-commissioned study into the impacts of Hurricanes Katrina and Rita).

133. In fact, as of the date of this writing, some four years from the settlement of the *Blanco* litigation and some five years since the landfalls of Hurricanes Katrina and Rita, the

contrary, that its method of dealing with federal consistency did not change much after *Blanco*.[134]

In the wake of the case, Louisiana has maintained a firm stance on its position that the federal government's environmental impacts analyses of OCS activities on Louisiana's coastal zone are lacking. Among Louisiana's complaints post-*Blanco* are such things as the MMS's failure to examine actual impacts to the coastal zone (as opposed to making predictions about impacts that are never tested or verified)[135] and that the MMS has made no real effort to change its somewhat cavalier attitude towards Louisiana's concerns or the threats of poor environmental analyses to the Louisiana coast.[136] Ultimately, the State concluded that the MMS was not adhering to its own regulations and promises made in the *Blanco* settlement, which prompted the State to begin rejecting the MMS's findings that its proposed lease sales were consistent with Louisiana's Coastal Resources Program as well as rejecting the MMS's findings of no new significant impact under its NEPA analyses.[137]

In 2008, the then-Secretary of the Louisiana Department of Natural Resources (LDNR) issued a letter denying consistency for Lease Sale 208.[138] In that letter, Secretary Scott Angelle warned that Lease Sale 208

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above-referenced studies have yet to be completed. For example, the study entitled "Spatial Restructuring and Fiscal Impacts in the Wake of Disaster: The Case of the Oil and Gas Industry Following Hurricanes Katrina and Rita" (GM-92-42-125), which had an anticipated completion date of September 2009, was listed as "ongoing" on the MMS's Web site, http://www.gomr.mms.gov/homepg/regulate/environ/ongoing_studies/gm/GM-92-42-125.html (last visited Aug. 19, 2010).

134. *See, e.g.*, Louisiana's post-*Blanco* concerns as expressed in a Letter from Gerald Duszynski, Acting Assistant Sec'y for Coastal Mgmt., La. Dep't of Natural Res., to Reg'l Supervisor, Gulf of Mex. OCS Region, Minerals Mgmt. Serv. (Mar. 16, 2007); *see also* Letter from Garret Graves, Exec. Assistant to the Gov., Coastal Activities, to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (May 22, 2008); Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., MMS (May 21, 2008).

135. Letter from Gerald Duszynski, Acting Assistant Sec'y for Coastal Mgmt., La. Dep't of Natural Res., to Reg'l Supervisor, Gulf of Mex. OCS Region, Minerals Mgmt. Serv. (March 16, 2007); *see also* Letter from Garret Graves, Exec. Assistant to the Gov., Coastal Activities, to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (May 22, 2008).

136. Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (May 21, 2008).

137. *See, e.g.*, Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv., at 3 (Nov. 7, 2008) ("Because the CD for Lease Sale 208 tiers from a flawed NEPA document, it too is inherently flawed. As such, the State can not concur with the MMS's determination that Lease Sale 208 will be consistent to the maximum extent practicable with . . . Louisiana's approved Coastal Resources Program."); Letter from Gregory J. DuCote, Acting Adm'r, Office of Coastal Restoration & Mgmt., La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv., at 1 (June 5, 2009) ("[T]he information provided is insufficient to support [the MMS's] determination of consistency.").

138. *See* Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (Nov. 7, 2008).

and prior lease sales "are jeopardizing the ecological and economic sustainability of Louisiana's coastal zone."[139] In this letter, Secretary Angelle references two previous letters that raised similar concerns.[140] Both of these previous letters expressed concern over the lack of meaningful analysis of "routine, accidental, indirect or cumulative impacts" and a concern and that the "type of 'assumed' analysis and model estimating without feedback mechanisms to ensure the accuracy of impact predictions can no longer be justified, as coastal Louisiana faces ever increasing OCS oil and gas development."[141] Several earlier letters, for example one on March 16, 2007, state similar themes, that the "assumptions, estimates, and projections of anticipated wetland loss and other adverse impacts to coastal Louisiana [should be compared] with actual experience, in order to determine their validity and make appropriate refinements."[142] The letters also request that the pending the MMS studies be incorporated into the supplemental EIS for the lease sale in question.[143] In a November 7, 2008 letter, Secretary Angelle made the following statement:

> MMS contends that the actual Lease Sale, in and of itself, produces no impacts to the coastal zone of Louisiana, as it is merely the action of offering acreage for bids, and awarding leases for those tracts. Furthermore, MMS contends that it is not responsible for the actions that occur as a result of the sale, and that regulating these activities is the responsibility of the State, along with other federal agencies. The State proffers, as it has in the past that these activities would not take place in the absence of the OCS program, and thus the federal agency responsible for promoting and enabling these activities is responsible for appropriately and accurately addressing the associated impacts.[144]

The State undoubtedly believed that that the MMS was reverting back to the arguments the federal government proffered in *Secretary of the Interior v. California*: that it only knocked down the first domino and it is not responsible for the carefully planned and orchestrated sequence of events that were destined to flow from that first act.[145]

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139. *Id.* at 1.

140. *Id.*

141. *Id.*

142. Letter from Gerald Duszynski, Acting Assistant Sec'y for Coastal Mgmt., La. Dep't of Natural Res., to Reg'l Supervisor, Gulf of Mex. OCS Region, Minerals Mgmt. Serv., at 2 (Mar. 16, 2007).

143. *Id.* at 2-3.

144. Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv., at 2 (Nov. 7. 2008).

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

Two more consistency denial letters were issued by LDNR, one each in 2009 and 2010 for Lease Sales 210 and 213, respectively.[146] These letters are similar to the November 2008 letter and previous letters, stating that indirect and cumulative impacts are not well documented or addressed and compensatory mitigation for these impacts must be established.[147]

The MMS response to these denials of consistency by the State of Louisiana has been twofold: to ignore them and to enlist the CZMA federal partner, the NOAA's OCRM, to chastise the State for failing to follow the proper procedure mandated by the CZMA and its regulations for consistency determination denials.[148] Specifically, the OCRM states that Louisiana does not "clearly state whether it concurs with or objects to the Federal agency activity."[149] This is despite the fact that the denial letter states "Louisiana does not agree with the MMS's determination that Lease Sale 213 will be consistent, to the maximum extent practicable, with the enforceable policies of Louisiana's approved Coastal Resources Program."[150] The OCRM reaches this conclusion as a result of its "understanding that the State is treating the response as neither an objection nor a concurrence,"[151] yet the OCRM provides no reason for that conclusion. The OCRM letter goes on to find another fault with Louisiana's consistency denial letter for Lease Sale 213, that the State's denial does not include "a description of how the proposed activity will be inconsistent with specific enforceable policies and include citations to those policies."[152] The OCRM letter indicates that Louisiana must "(1) describe the specific effects to Louisiana's uses and resources resulting from the lease sales; (2) identify specific enforceable policies

146. *See* Letter from Gregory J. DuCote, Acting Adm'r, Coastal Mgmt. Div., La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (June 5, 2009) (denying consistency for Lease Sale 210); Letter from Louis E. Buatt, Assistant Sec'y, Office of Coastal Mgmt., La. Dep't. of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (Jan. 14, 2010) (denying consistency for Lease Sale 213).

147. Letter from Louis E. Buatt, Assistant Sec'y, Office of Coastal Mgmt., Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (Jan. 14, 2010).

148. Letter from Donna Wieting, Acting Dir., Office of Ocean and Coastal Res. Mgmt., Nat'l Oceanic & Atmospheric Admin., to Louis E. Buatt, Assistant Sec'y, Office of Coastal Mgmt., La. Dep't. of Natural Res. (Mar. 5, 2010).

149. *Id.* at 1.

150. Letter from Louis E. Buatt, Assistant Sec'y, Office of Coastal Mgmt., La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv., at 2 (Jan. 14, 2010) (denying consistency for Lease Sale 213).

151. Letter from Donna Wieting, Acting Dir., Office of Ocean and Coastal Res. Mgmt., Nat'l Oceanic & Atmospheric Admin., to Louis E. Buatt, Assistant Sec'y, Office of Coastal Mgmt., La. Dep't of Natural Res., at 1 (Mar. 5, 2010).

152. *Id.* at 2.

that the lease sales are inconsistent with; or (3) identify the State's information needs to determine consistency with specific enforceable policies."[153] As far back as 2006, the State had been citing its ninety-four Coastal Use Guidelines and its Constitution as the enforceable policies that lease sales were not consistent with and stating that compensatory mitigation for indirect and cumulative impacts not assignable to a particular actor would be necessary for lease sales and the activities flowing from them to be consistent.[154] On October 19, 2006, Mr. Jim Rives, Acting Administrator of the LDNR Coastal Management Division (CMD), issued a letter to Chris Oynes, the MMS's Regional Director of the Gulf of Mexico Region, in response to a request by Mr. Oynes that the CMD describe the specific enforceable policies implicated in OCS lease sales consistency determinations. In that letter, Mr. Rives stated:

> The federal agency or the applicant for a federal license or permit is in the best position to know how or what the impacts will be of a proposed activity or action, and as such which of the State's enforceable policies are relevant to that activity or action. It may not be possible, therefore, to reasonably foresee every enforceable policy that may be relevant in advance of the specific circumstances present at the time of the proposed action or activity. . . . Yet, in the interest of providing you with a more concise, but admittedly non-binding, list of those enforceable policies that the Minerals Management Service should, in our opinion, consider during the preparation of its consistency determinations for OCS lease sales, and which the State feels are most likely to be implicated solely at the lease sale stage, we would identify the following.[155]

The letter then lists thirty federally approved Coastal Use Guidelines as well as other enforceable policies that are likely to be triggered by activities resulting from OCS lease sales.[156] The widespread and diverse nature of the impacts that will obviously result from OCS lease sales make it difficult to pinpoint many of those that will occur from any one particular lease sale. For instance, much of the development in the coastal zone associated with the increased economic activity that will occur as more OCS rigs come on line, thereby creating more jobs and more demand for services, will be difficult to trace to a specific lease sale. Some of those activities are exempt from permitting and mitigation

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153. *Id.* at 2.

154. *See, e.g.*, Letter from Kathleen Babineaux Blanco, Gov. of La., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv., at 4-22 (June 14, 2006).

155. Letter from Jim Rives, Acting Adm'r, Coastal Mgmt. Div., La. Dep't of Natural Res., to Chris Oynes, Reg'l Dir., Gulf of Mex. Region, Minerals Mgmt. Serv. (Oct. 19, 2006).

156. *Id.*

requirements such as the building of single family homes.[157] Further, there are no good means by which to assess cumulative impacts.

The June 14, 2006 letter from Governor Blanco denying consistency for Lease Sale 200 listed specific ways that the activities that would result from the lease sale were inconsistent with the State's enforceable CMPs. Judge Engelhardt's opinion certainly considered those identified activities as specific enough to find:

> It is apparent that the cavalier approach adopted [by the MMS] to these critical issues rendered a seemingly inadequate result, and one that might fall below the 'arbitrary and capricious' standard, indicating Plaintiffs' substantial likelihood of success on the merits of the CZMA claim.[158]

The State also had been reiterating repeatedly that studies of these impacts were incomplete and unverified.[159] It thus seems somewhat disingenuous that the OCRM would take the position that the State's consistency denials are too vague to comply with federal law especially in light of the fact that the MMS had, for some time and continues to some extent, even after Judge Engelhardt's admonishment, to use the same vague, unsupported consistency analyses. True, the State could have—and should have—listed each specific guideline with which the federal activity is inconsistent in every letter, but the State's denial letters and the other correspondence they reference seem more than descriptive enough to satisfy the requirements of the CZMA.[160] To reiterate, Louisiana used the same type of justifications for seeking an injunction in *Blanco*, and the court found that information sufficient enough to suggest that the State was likely to prevail on the merits of its case.[161] In light of the above, the attitude of Louisiana's federal CZMA partner is troubling and presents a major obstruction to Louisiana exercising its consistency authority in OCS energy matters.

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157. LA. REV. STAT. § 49:214.34(A)(7) (2010).

158. Blanco v. Burton, No. Civ. A. 06-3813, 2006 WL 2366046, at *13 (E.D La. 2006); *cf.* Am. Petroleum Inst. v. Knect, 456 F. Supp. 889 (C.D. Cal. 1978).

159. *See, e.g.*, Letter from Kathleen Babineaux Blanco, Gov. of La., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (June 14, 2006).

160. *See, e.g.*, Letter from Gregory J. DuCote, Acting Adm'r, Coastal Mgmt. Div., La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., Minerals Mgmt. Serv. (June 5, 2009) (noting substantial gaps in the MMS's science in support of its finding that Lease Sale 210 was consistent with Louisiana's CMP); *see also Am. Petroleum Inst.*, 456 F. Supp. at 925 (interpreting the specificity of State Coastal Management Program enforceable policies required by the CZMA).

161. *Blanco*, 2006 WL 2366046, at *2.

C. The DEEPWATER HORIZON

Not surprisingly, until perhaps recently, the MMS's foreordained individual lease sales remained a potentially troublesome characteristic of the OCSLA oil and gas program and informed the MMS's approach toward BP's exploration plan for the Macondo well, MCB252, as well as the original Lease Sale 206. After the MMS prepares both the five-year preliminary EIS and multisale EIS, much of what occurs thereafter consists of a combination of word-processed, regenerated documents and responses.

On June 25, 2007, for instance, the MMS formally notified the State that it intended to prepare an EA for Lease Sale 206, although it further noted that the EA would tier off the multisale EIS and focus on any new information, and it afforded the State (and interested public) only thirty days to submit comments.[162] After this NEPA process, on October 26, 2007, the State received a sixty-eight page CD for Lease Sale 206, which also incorporated by reference the environmental analysis from the multisale EIS and emphasized, as it typically does in these documents, that the "lease sale process is mainly a paper transaction."[163] At one point, the CD even mistakenly referred to Lease Sale 224 instead of Lease Sale 206.[164] Although the State did not object to the CD, it nevertheless indicated that the MMS's staged process and tiering masked consideration of important issues: the five-year plan deferred certain issues until later, which were then deferred again in the multisale EIS, and the State is "now faced with a Consistency Determination for a specific OCS Lease Sale that does not adequately address the deferred issues. The State remains concerned that this approach of tiering analysis disguises the secondary and cumulative effects of OCS leasing activities of our coastal zone."[165]

Subsequently, the State similarly reviewed the CD for BP's exploration plan for MCB252, but political pressure and lack of resources made the State's review problematic. When the NEPA process is truncated by, for instance, the use of a categorical exclusion, as was the case for the BP MCB252 exploration plan, the CZMA, too, will suffer, because neither the public nor the State will be afforded an opportunity

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162. MINERALS MGMT. SERV., ENVIRONMENTAL ASSESSMENT, PROPOSED GULF OF MEXICO OCS OIL AND GAS LEASE SALE 206: CENTRAL PLANNING AREA 65 (2007).

163. MINERALS MGMT. SERV., DETERMINATION OF WHETHER LEASE SALE 206 CENTRAL PLANNING AREA IS CONSISTENT WITH THE LOUISIANA COASTAL RESOURCES PROGRAM 2 (2007).

164. *Id.*

165. Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, Chief Leasing Div., Minerals Mgmt. Serv. (Dec. 10, 2007) (on file with author).

to review the proposed federal action and its consistency with coastal resource protection.[166] The only environmental analysis is what is presented in the exploration plan application and in the lease sale and multisale environmental documents. And in this case, the information necessary for the CD was outlined in an April 2008 MMS Gulf of Mexico Region Notice to Lessee (NTL), which is the NTL that limited the type of information on blowout and worst-case discharge scenarios a lessee was required to submit with a plan of operations.[167] The MMS explained that its 2006 and 2007 regulations afforded it the ability to "limit the amount of information or analysis."[168] This NTL, however, further noted that lessees proposing exploration plans in the Gulf were required to prepare a consistency certification.[169] But NTLs are not reviewed for consistency and are only intermittently discussed with the states when being developed.

Louisiana received the CD for MCB252 on March 12, 2009, afforded the public a fifteen day window for comment, and, again with

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166. Categorical exclusions have become quite controversial recently, as their use has grown. *See* Nancy H. Sutley, Chair, Council on Envtl. Quality, Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act (Feb. 18, 2010), *available at* http://ceq.hss.doe.gov/nepa/regs/Categorical_Exclusion_Draft_Nepa_Guidance_FINAL_02182010.pdf. We all are now too familiar with the fact that BP's exploration activities were approved with the use of a categorical exclusion. *Cf.* Notice of Review Request for Public Comment, 75 Fed. Reg. 103 (May 28, 2010). And a similar concern exists for the use of such exclusions for onshore oil and gas activities. *See* GOV'T ACCOUNTABILITY OFFICE, OIL AND GAS MANAGEMENT: KEY ELEMENTS TO CONSIDER FOR PROVIDING ASSURANCE OF EFFECTIVE INDEPENDENT OVERSIGHT 8 (June 17, 2010); GEN. ACCOUNTING OFFICE, ENERGY POLICY ACT OF 2005: GREATER CLARITY NEEDED TO ADDRESS CONCERNS WITH CATEGORICAL EXCLUSIONS FOR OIL AND GAS DEVELOPMENT UNDER SECTION 390 OF THE ACT (Sept. 26, 2009). Although geophysical and geological activities are not categorically excluded for activities in the Arctic, they were in the Gulf until very recently. *See Bureau of Ocean Energy Mgmt., Regulations & Enforcement*, GEOLOGICAL AND GEOPHYSICAL EXPLORATION REGS. COORDINATION, http://www.gomr.mms.gov/homepg/regulate/regs/laws/gandg.html (last visited Nov. 15, 2010). It should be noted that the DOI has recently administratively revoked the ability to obtain categorical exclusions for exploration and production activities in the Gulf as well. *See Categorical Exclusions for Gulf Offshore Activity to be Limited While Interior Reviews NEPA Process and Develops Revised Policy*, BUREAU OF OCEAN ENERGY MGMT., REG., & ENFORCEMENT, http://www.doi.gov/news/doinews/Categorical-Exclusions-for-Gulf-OffshoreActivity-to-be-Limited-While-Interior-Reviews-NEPA-Process-and-Develops-Revised-Policy.cfm (last accessed Aug. 28, 2010).

167. U.S. DEP'T OF INTERIOR, MINERALS MGMT. SERV., GULF OF MEX. OCS REGION, NOTICE TO LESSEES AND OPERATORS OF FEDERAL OIL, GAS, AND SULPHUR LEASES IN THE OUTER CONTINENTAL SHELF, GULF OF MEXICO OCS REGION (Apr. 1, 2008), *available at* https://www.gomr.boemre.gov/homepg/regulate/regs/ntls/2008NTLs/08-N02.pdf.

168. *Id.*

169. On June 18, 2010, in response to the spill, the DOI rescinded the limitations in the April 2008 notice. *See id.*; U.S. DEP'T OF INTERIOR, BUREAU OF OCEAN ENERGY MGMT., REGULATION, AND ENFORCEMENT, NAT'L NOTICE TO LESSEES AND OPERATORS OF FED. OIL, AND GAS LEASES, OUTER CONT'L SHELF (OCS) (June 18, 2010), *available at* http://www.boemre.gov/nHs/PDFs/NTL_OMB_control.pdf.

limited information, issued its approval on March 30, 2009, in order to avoid having to extend the time period and risk repercussions.[170] It is hard to imagine how this truncated process, with minimal opportunity for public input, amidst a time when there are diminishing state resources and capability for reviewing oil and gas exploration plans—a similar problem we now appreciate that the MMS encountered—affords an affected state or the interested public with any meaningful ability to review and comment on what we now know can be activities with dramatic consequences. In a similar circumstance, the parties challenging exploration plans in the Arctic complained that the MMS's decision to afford some organizations approximately two weeks to comment on the proposed activity was insufficient.[171]

IV. CONCLUSION

Many factors coalesced to contribute to the BP oil spill, and the Administration already has identified and reacted to the obvious ones. It has changed the NTLs for blowout preventers and worst-case scenarios. It also has eliminated the use of categorical exclusions for exploration plans, and further indicated that it will prepare a supplemental EIS for the activities in the Gulf. And it has disbanded the MMS and reorganized the new resulting bureaus into what we hope will be a better functioning organization. But much more needs to be done.

The OCS oil and gas program does not afford the coastal states and the interested public with sufficient opportunity to understand and comment on program decisions. *Blanco* taught us that the program develops an unhealthy impetus toward leasing, followed by exploration and development, once the Interior Department releases its five-year plan and accompanying programmatic EIS and multisale EIS. *Blanco* also warned us that the Department's environmental documents are woefully lacking once those EISs are prepared. That BP was able to explore without adequate environmental review, or that the MMS failed to scrutinize environmental and other documents, reflects a historic laissez-faire approach toward OCS activity, and its potentially destructive consequences. Until the BP oil spill, the public arguably had been lulled into a false sense of complacency; in part, by the MMS's artful masking

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170. Letter from Gregory J. Ducote, Acting Adm'r, Interagency Affairs/Field Services Div., Coastal Mgmt. Div., La. Dep't of Natural Res., to Michelle Griffitt, Minerals Mgmt. Serv. (Mar. 30, 2009).

171. Native Vill. of Point Hope v. Salazar, Nos. 09-73942 et al., 2010 WL 1917085, at *17 (9th Cir. May 13, 2010).

of serious issues through the aggressive use of tiering.[172] Conversely, when the MMS does consider an issue, it often renders predictions without any postmonitoring follow-up to ensure that its predictions have some measure of accuracy. For many years, for instance, Louisiana has asked the MMS to revisit its predictions, and to test the efficacy of its impact analysis, but to no avail.

Consequently, when states such as Louisiana are confronted with OCS activities and begin to explore avenues for protecting their environment, citizens, and economy, their voices become muffled by the failure of cooperative federalism—the animating concept behind the CZMA. The CZMA, in part, demands too much and offers too little. States, for example, must first receive federal approval for any program changes, even if those changes are precipitated by an urgent need to address unique circumstances. This runs counter to modern environmental principles: our ability to predict the ecological consequences of activities is quite constrained, and as such we must provide sufficient flexibility and operate within a paradigm of adaptive management. The federal government, therefore, must be more willing than it has in the past to tolerate evolving and potentially changing state policies or interpretation of those policies.

The states also must be afforded a stronger voice in reviewing federal activities. If, for instance, a state and the federal agency disagree about whether an activity is consistent with a state's CMP, the only effective recourse for a state is to proceed to court against the United States. The timing of the lease sales makes the process even more difficult for states. Once a five-year plan and multisale EIS are released, the ability of a state to shape what occurs thereafter is minimal, even though the process generates considerable paperwork. The EAs to date, for instance, only focus on whether new information or changed circumstances exist which might warrant the development of a supplement to the multisale EIS. And up until recently, the exploratory drilling plans in the Gulf have been approved without any further NEPA review. As such, the process lacks any robust opportunity for meaningful

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172. The Council on Environmental Quality's (CEQ) encouragement for agencies to employ tiering, 40 C.F.R. §§ 1502.20, 1508.28 (2010), may have unduly permitted the shifting of environmental analysis down to the most discrete type of action, which here unfortunately ended up being a drilling plan that was authorized under a categorical exclusion. Tiering, here, therefore allowed BP's proposal to escape any meaningful and detailed review. This arguably reflects the inherent problem that some have encountered with trying to challenge aspects of the general five-year program in court, with the court responding that such issues would be addressed later. *See, e.g.*, Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 481 n.1 (D.C. Cir. 2009).

comment, particularly at the lease sale stage, which is perhaps the most critical opportunity to determine whether an action should move forward.

The lease sale process must be seen for what it actually is: the final stop on the road to exploitation that affords any comprehensive view of the impacts of all future exploration and development activity.[173] The lease sale stage of the process is where the last comprehensive examination of all subsequent environmental impacts may be had and where the accumulation of all potential exploration and development activities should be viewed in concert.[174] Under the current law, never again, for all activities let within one sale, will there be a chance to view their cumulative harms in a legally required environmental document.[175]

Once the lease sale environmental review process is complete, each exploration and development project is only required to produce an environmental document that examines the idiosyncratic implications of that single activity, known as the permitting stage.[176] Indeed, many of these activities, when viewed in isolation, do not appear to represent significant threats. Thus, until recently, they have been permitted and often afforded the status of a categorical exclusion from NEPA review.[177] Although it may very well be that such individual, isolated events do not amount to substantial environmental threats, the DEEPWATER HORIZON disaster demonstrated that it is essential to conduct the legally required environmental and safety reviews when mineral development activities are in the planning phases.

Due both to the industry interests that are threatened in a contested lease sale and the fact that a lease sale *must* be seen as the gateway to all of the threatened environmental harm stemming from OCS activity, the lease sale stage of the OCS process *must* be where irreparable harm is found and it *must* be where parties and courts focus their attention. While developing EAs for exploration and development plans is both likely and necessary at this point, emphasizing meaningful enhanced review at the exploration and development stage is neither sufficient nor complete—such review occurs too late and by definition will be too myopic. This suggests that, in lieu of a multisale EIS, the agency should develop a programmatic EIS accompanying the five-year plan, and then

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173. Kalen, *supra* note 35 at 208-211; *see also*, Sarah Armitage, *Federal 'Consistency' Under the Coastal Zone Management Act—A Promise Broken by* Secretary of the Interior v. California, 15 ENVTL. L. 153, 170 (1984).

174. Kalen, *supra* note 35.

175. *Id.*

176. 30 C.F.R. § 250.202, 282.20, 282.28 (2009).

177. League for Coastal Protection v. Kempthorne, No. C 05-0991-CW, 2006 WL 3797911 (N.D. Cal. Dec. 22, 2006).

before each individual lease sale prepare a separate EIS. A separate EIS for each lease sale will afford the affected coastal states with a greater ability to help shape the program and simultaneously protect their coasts. Congress, too, could assist by providing states with the ability to appeal to the Secretary of Commerce any dispute with a Federal agency over the application of a state CMP.

For the CZMA to be more than a law of lingering relevance, overhaul is needed. The CZMA has failed to provide a meaningful opportunity to states to voice their concerns with federal permitting, as evidenced through Louisiana's problems with OCS activities and other states' problems with LNG activities. It is evident that either a substantial rewrite of the CZMA is in order such that the air of cooperative federalism under which the Act was crafted may be realized or a new law is needed to revitalize the intent of the CZMA in a manner in which occurrences such as the DEEPWATER HORIZON disaster can be minimized.

We recommend amendment of the CZMA as the easiest route to resolve its current inadequacies through legislative means. Amendments must be accomplished in the vein of restoring the cooperative federalism of the law by giving more authority to the affected coastal states.

As it currently exists, the CZMA provides no authority for the states to undertake reviews of safety documents. This reality became an acute problem with the DEEPWATER HORIZON disaster, as, under the current law, Louisiana and other affected coastal states simply had to take the MMS's word that the technology used was adequate to protect against the blowout. In fact, as testimony has since shown, even the MMS did not completely discharge its legal duties in this regard.[178] Because of these shortcomings, assurances from the MMS as to the safety of the blowout preventer were empty. However, simply providing the authority to make these reviews is not enough. The states, on the other hand, must be capable of undertaking meaningful, critical reviews of federal permitting documents. As it stands, at least in Louisiana, the agency charged with reviewing leasing and exploration and development plans for consistency is not staffed with engineers and safety experts. Rather, that agency, the Office of Coastal Management at the LDNR, is staffed with biologists and other scientists whose tasks are to ensure compliance with environmental protection laws and guidelines. Accordingly, in addition to amending the CZMA to require state concurrence on safety plans and documents, we recommend that these amendments also

178. *See, e.g.*, *Joint Hearings*, *supra* note 1 (testimony of Frank Patton).

include a provision for the immediate diversion of a portion of federal OCS royalties to each coastal state. This would ensure sufficient funds for a safety review division within each affected state's relevant consistency review agency.

As demonstrated by the regular and consistent disregard for state concerns related to the environmental impacts of OCS activities through the consistency review and comment process, and in order to ensure cooperation between the states and the federal government, the CZMA must be amended to empower the states to stop a proposed federal action if that action is found to be inconsistent with a state's coastal plan. In other words, the authority to comment on proposed federal actions or permits affecting a state's coastal zone would no longer simply be a voicing of concerns with the only recourse to stopping inconsistent actions lying with the hope of a successful judgment in a lengthy and expensive trial in an Article III court. Rather, this new authority should provide the states with the equivalent of a veto power over federal consistency determinations. Such a bold step, ideally, would help to ensure that the environmental documents coming out of federal agencies (including the descendant agencies of the MMS) would be more comprehensive and scientifically sound on the front end, because the agencies could be faced with the specter of being sent back to the analysis phase by a state if the documents are insufficient.

As was also alluded to above, another component of the CZMA that must be changed in order to ensure that more protection against things such as the DEEPWATER HORIZON disaster is that the states must be given a meaningful window within which to review federal consistency determinations. No meaningful, comprehensive review of these complex determinations, along with their supporting documentation, can be had in the brief time frame currently provided.

The relationship between the NOAA's OCRM and the states must be reevaluated. It would seem that the same systemic problems that were found in the MMS to be contributing factors in the DEEPWATER HORIZON spill, namely tasking an agency with the conflicting goals of speedy energy production and environmental protection, also affect the OCRM. The CZMA itself is somewhat conflicted by placing energy production, protection, and conservation of coastal resources in tension with each other. The CZMA works to manage coastal development in order to minimize natural resource damage[179] and to promote energy self-sufficiency. It accomplishes this through federal financial assistance to

179. 16 U.S.C. § 1452 (2006).

help states deal with needs resulting from expanded energy activity affecting the coastal zone, which includes repairing natural resource damages.[180] On the other hand, the CZMA gives priority consideration to energy facilities.[181] The CZMA's regulations state that approved programs must consider the national interest in siting and planning for facilities, beyond local effects and significance.[182] The OCRM Web site states:

> Meeting energy needs and increasing the United States' energy independence are two of the highest priority national issues of the Coastal Zone Management Act (CZMA). The CZMA recognizes the importance of energy and government facilities in coastal zones. [sic] and directs states to have a facility siting process that considers the national interest in energy production and protecting coastal resources.[183]

One could argue though that the highest priority of the CZMA is in the opening policy statement: "The Congress finds and declares that it is the national policy . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations"[184] and that energy production is to be accommodated to the maximum extent practicable in the context of the conservation priority.[185] The recent actions of the OCRM in the OCS leasing consistency disputes raise questions as to whether the federal government has put conservation and protection of coastal natural resources in the backseat while energy production drives the policy bus and severs crucial federal/state conservative partnership. It may be necessary for Congress to refocus OCRM on the main goal of protecting vital natural resources that could and should be there for the benefit of many generations to come, long after the oil fields have played out.

Finally, although the DOI has recently taken administrative-level steps to rectify this problem, legislation to mandate the elimination of categorical exclusions for exploration and development plans is a necessity. Simply because a moratorium on categorical exclusions has

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180. *Id.* § 1451(j).

181. *Id.* § 1452(D).

182. 15 C.F.R. §§ 923.1(5), 923.52(a) (2009).

183. *See Energy and Government Facility Siting*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/ene_gov.html (last visited Aug. 25, 2010).

184. 16 U.S.C. § 1452.

185. *See* Am. Petroleum Inst. v. Knecht, 456 F. Supp. 889, 925 (C.D. Cal. 1978) (interpreting the CZMA to mean that the siting of energy facilities, including those for OCS petroleum development, take place in light of the CZMA's "broader finding of a 'national interest in the . . . beneficial use, protection, and development of the coastal zone' [and that the] Act gives 'high priority' to the protection of natural systems" and thus, energy production is not a paramount use over all others).

been administratively imposed in the wake of the DEEPWATER HORIZON disaster does not mean that, once the dust from this disaster settles, they can be reinstated with little difficulty. Incorporating such a requirement into the legislation would effectively eliminate the possibility that this corner-cutting approach would be used again.