The BP Macondo Well Exploration Plan: Wither the Coastal Zone Management Act?

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The Deepwater Horizon spill of April 20, 2010, serves as an acute reminder of the potentially devastating consequences of coastal activities. During the 1950s and 1960s, the nation earnestly began to explore how to protect our marine and coastal communities.[1] Then, in 1972, the U.S. Congress passed the Coastal Zone Management Act (CZMA),[2] and shortly thereafter it enacted the Outer Continental Shelf Lands Act (OCSLA) Amendments of 1978.[3] Both acts recognize the fragility of our marine and coastal environments and, at least optically, emphasize the importance of outer continental shelf (OCS) energy development, and yet neither statute—at least as implemented to date—appears sufficiently robust to protect our resources for the future. By the late 1990s, it became apparent to many that existing programs were not adequately protecting our coasts and marine environment. Today, "[i]ncreasing impacts on the world's oceans from coastal and offshore development, overfishing, a changing climate and increased levels of carbon dioxide, natural events, and other sources are straining the health of marine ecosystems and the Great Lakes."[4] Our present challenge, therefore, is to ensure that our programs do as much as possible to: (1) protect our marine and coastal environments; (2) bolster the resiliency of these environs to withstand ecological changes; and (3) afford sufficient flexibility to adapt to changing ecological conditions.

This Article explores some of the reasons why the CZMA in particular appears to have become rendered of little relevance to this challenge, particularly as a tool for examining offshore oil and gas development. Indeed, in recent inquiries into the administration of the Minerals Management Service (MMS) program, the CZMA and its role receives virtually no mention.[5] Perhaps even more telling, in the lawsuits against the U.S. Department of the Interior's (DOI's) limited moratoria against future exploratory drilling, the plaintiffs, including the state of Texas, argue that the DOI should have consulted with coastal states before imposing the moratoria, yet there is no mention of the CZMA in the complaints, even though consultation is a critical component of the Act.[6] This is understandable: historically, the coastal zone management (CZM) program has been slow to develop, with considerable reluctance by the DOI to apply the program to OCS energy development, and instead, the OCSLA and the National Environmental Policy Act (NEPA)[7] dominate and eclipse most of the discussion about the OCS oil and gas program.

I. The CZMA: An Overview

In response to the growing awareness of the need for more effective management of our ocean and coastal resources,[8] 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."[9] Through the inducement of offering grants, the Act encouraged states to develop coastal management plans (CMPs) that would wrest control from local communities, which at the time were perceived to be less able than the state to address the comprehensive problem

1. *See, e.g.,* U.S. Commission on Marine Science, Engineering, and Resources, Our Nation and the Sea: A Plan for National Action, H.R. Doc. 91-42 (1969).
2. 16 U.S.C. §§1451-1466, ELR Stat. CZMA, §§302-319.
3. Pub. L. No. 95-372, 92 Stat. 629 (1978) (codified as amended in scattered sections of 43 U.S.C.).
4. Kara Schwenke et al., *Networks of Marine Protected Areas: What Are They and Why Are They Needed?*, 26 J. Marine Educ. 3 (2010).
5. When the U.S. Government Accountability Office (GAO) recently discussed the difficulties with the MMS' implementation of NEPA, it tellingly omitted any mention of the CZMA in its report. U.S. GAO, Oil and Gas Management: Key Elements to Consider for Providing Assurance of Effective Independent Oversight, GAO-10-852 (June 17, 2010).
6. First Amended Complaint, Ensco Offshore Co. v. Salazar, Civ. No. 10-CV-01941-MLCF-JCW (E.D. La., filed July 20, 2010); Petition for Judicial Review and Request for Injunctive Relief, State of Texas v. Salazar, Civ. No. 10-CV-02866 (S.D. Tex., filed Aug. 11, 2010).
7. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
8. *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).
9. H.R. Rep. No. 96-1012, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4362.

of coastal development.[10] The Act also afforded those states that developed plans with the ability to review certain federal activities for consistency with an approved CMP.[11]

States, presently 34, interested in participating in the program must have a federally approved plan. These plans and any plan amendments are submitted for approval to the Office of Ocean and Coastal Resource Management (OCRM), National Oceanic and Atmospheric Administration (NOAA), within the U.S. Department of Commerce.[12] Once a plan is approved, the elements in that approved plan become "enforceable policies." As such, states may 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 policies).[13] 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.[14]

By contrast, a state with an approved plan possesses 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.[15] And the Act specifically addresses OCS exploration, development, and production plans.[16] The state must then notify the federal agency whether it concurs with or objects to the applicant's certification, and if it fails to do so within six months of receiving all the necessary data and information, its concurrence is presumed. 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.[17] The federal agency may not issue the license or permit if a state objects, unless the Secretary of Commerce, on appeal, overrides the objection.[18] 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 necessary in the interest of national security.[19]

II. Has the OCSLA Dominated the CZMA?

From the outset, the CZMA arguably afforded state and local communities with little ability to affect OCS development. To begin with, when Congress passed the CZMA, the OCSLA Amendments establishing the modern-day process for leasing were six years away.[20] As such, the CZMA, coupled with NEPA, initially served as the primary program for ensuring against undue risk to our marine and coastal resources. Yet, it was not until several years after CZMA's enactment that the agency issued its first regulations implementing the Act,[21] and thereafter it took roughly another 20 years before the agency modernized those regulations.[22] One comprehensive review of the Act observes that, "[d]espite acceptance of [the Act's basic premise], the federal management role has been modest at best: meagerly funded, timid in scope, and conflicted in its goals and objectives."[23]

As a consequence, the OCSLA and the 1978 Amendments served as the primary focus for OCS activities. These Amendments, with the national energy crisis looming a few years over the past horizon, announced a national policy for the "expeditious and orderly development" of the OCS.[24] Congress also established a four-stage process for OCS oil and gas development: (1) the issuance of a five-year leasing program; (2) the issuance of specific lease sales; (3) the approval of exploration plans; and, lastly (4) the approval of development and production plans.[25] The first phase is critical, because the issuance of leases, and any subsequent activities under any particular lease, can only occur if the lease or leases have been included in the relevant five-year leasing program. This five-year leasing program, moreover, triggers the preparation of an envi-

10. *See generally* Garrett Power, *The Federal Role in Coastal Development, in* Federal Environmental Law 792 (Erica L. Dolgin & Thomas G.P. Guilbert eds., Envtl. L. Inst. 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).
11. 16 U.S.C. §1456(c) (2006).
12. 16 U.S.C. §1455(b). *See* NOAA, Coastal Programs: Partnering With States to Manage Our Coastline, http://coastalmanagement.noaa.gov/programs/czm.html (last visited Sept. 22, 2010).
13. *See* 15 C.F.R. §930.39 (2010). The test is whether coastal effects are "reasonably foreseeable." *See* §§930.31(a)(1), .39.
14. *See* 15 C.F.R. §§930.43(d), .44; *see also* Coastal Zone Management Act Federal Consistency Regulations, 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).
15. 16 U.S.C. §1456(c)(3)(A).
16. 16 U.S.C. §1456(c)(3)(B).
17. 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* 15 C.F.R. §930.4 (2010).
18. 16 U.S.C. §1456(c)(3)(A).
19. 16 U.S.C. §1456(c) ("consistent with the objectives of this chapter or otherwise necessary in the interest of national security"). 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). *See also* 16 U.S.C. §1466 (appeals relating to offshore mineral development).
20. CZMA, Pub. L. No. 92-583, 86 Stat. 1280 (Oct. 27, 1972).
21. *See, e.g.,* Proposed Regulation, Federal Consistency With Approved Coastal Zone Management Programs, 41 Fed. Reg. 42878 (Sept. 28, 1976). During the Act's first decade, commentators observed that the federal government, when engaged in its own activities, occasionally acted contrary to the desire of the local community or without their consultation. *See, e.g.*, Melvin B. Mogulof, Saving the Coast 39, 71-72 (1975). In 1976, Michael Blumm and John Noble 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 ELR 50047 (Aug. 1976).
22. Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 65 Fed. Reg. 77124 (Dec. 8, 2000).
23. Timothy Beatley et al., An Introduction to Coastal Zone Management 286 (2002).
24. 43 U.S.C. §1332(3).
25. 43 U.S.C. §§1331-1356a.

ronmental impact statement (EIS), the first of several NEPA documents. Subsequent NEPA documents include, typically to date, a multi-sale EIS for the region, as well as the individual environmental assessments (EAs) for particular lease sales. And, while the OCSLA demands a balancing of several factors when deciding whether, when, and how to lease in the OCS,[26] consideration of environmental issues associated with OCS activities historically has not fared well: early on, the DOI impermissibly ignored comments by Massachusetts for leases off New England[27]; the National Academy of Sciences reported on the inadequate analysis accompanying decisions in Florida and California[28]; and early leasing plans under the Act were challenged for insufficient environmental analysis.[29] Adequate environmental compliance remains of continuing concern, as recent cases illustrate.[30]

But perhaps a bit more disturbing, a tortured history surrounds federal appreciation of the importance of the CZMA for OCS oil and gas activities under the OCSLA. From the beginning of the modern OCS leasing program, the DOI assiduously has 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, and indeed Congress, in 1976, amended the CZMA to add a coastal impact assistance program, purportedly to offset the impact of offshore oil and gas activities,[31] it was not until 1990 that the OCS leasing program became subject to meaningful CZMA application.[32]

The DOI initially decided that it was unnecessary to subject lease sales to a consistency determination (CD).[33] 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."[34] After initial skirmishes and moratoria,[35] the state of California challenged the DOI's position in *Secretary of the Interior v. California*,[36] 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. 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."[37] Congress eventually addressed this problem in the Omnibus Budget Reconciliation Act of 1990,[38] where it amended the CZMA to ensure that lease sales would be covered by the Act.[39] It recognized that the lease sale stage is a meaningful event from which a "chain of events" can reasonably be anticipated and which provides 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 CMP.[40]

But post-1990 implementation of the Act by the DOI for OCS oil and gas leasing has not necessarily been signifi-

26. *See generally* Milo C. Mason, *Offshore Energy Development, in* Ocean and Coastal Law and Policy 409 (Donald C. Baur et al. eds., 2008).
27. Massachusetts v. Clark, 594 F. Supp. 1373, 1384, 15 ELR 20132 (D. Mass. 1984). *See also* Conservation Law Foundation v. Watt, 560 F. Supp. 561, 13 ELR 20445 (D. Mass.), *aff'd*, Massachusetts v. Watt, 716 F.2d 946, 13 ELR 20893 (1st Cir. 1983). For challenges to early plans, see *California v. Watt*, 668 F.2d 1290, 12 ELR 20001 (D.C. Cir. 1981); *California v. Watt*, 712 F.2d 584, 13 ELR 20723 (D.C. Cir. 1983); *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 19 ELR 20386 (D.C. Cir. 1988).
28. National Research Council, The Adequacy of Environmental Information for Outer Continental Shelf Oil and Gas Decisions: Florida and California (1989).
29. *See, e.g.,* Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 39 ELR 20091 (D.C. Cir. 2009).
30. In *Native Village of Point Hope v. Salazar*, No. 09-73942 (9th Cir. July 21, 2010), the district court held that the agency failed to comply with NEPA. The Ninth Circuit, in 2010, observed that "[o]n three separate occasions, this Court entered orders stopping the drilling. Alaska Wilderness League v. Kempthorne, Nos. 07-71457, -71989, -72183 (9th Cir. July 19, 2007) (suspending Shell's exploration drilling program); Alaska Wilderness League v. Kempthorne, (9th Cir. Aug. 15, 2007) (order granting petitioners a stay); Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 39 ELR 20284 (9th Cir. 2008), *withdrawn*, 559 F.3d 916 (9th Cir. 2009)," *petition dismissed as moot*, 571 F.3d 859 (9th Cir. 2009). Native Village of Point Hope v. Salazar, 2010 WL 1917085, **15-16 (9th Cir. Mar. 8, 2010).
31. CZMA Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013. Congress subsequently abolished this program, and it has since been replaced, first, by the Coastal Zone Enhancement Grant program, Coastal Zone Reauthorization Act Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990), and, later, by the Coastal Zone Protection Act of 1996, Pub. L. No. 104-150, 110 Stat. 1380.
32. *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) (former California State attorneys describing importance of litigation for ensuring compliance with the Act).
33. *See* Part 930—Federal Consistency With Approved Coastal Management Programs, 43 Fed. Reg. 10510, 10512 (Mar. 13, 1978) (discussing disagreement between the Department of Commerce and the DOI). *See* 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). Departmental attorneys apparently believed that only activities inside 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 Pre-Lease 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).
34. Richard Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 Stan. L. Rev. 1107, 1138 (1976).
35. *See generally* Edward A. Fitzgerald, California Coastal Commission v. Norton: *A Coastal State Victory in the Seaweed Rebellion*, 22 UCLA J. Envtl. L & Pol'y 155, 161 (2004).
36. 464 U.S. 312, 14 ELR 20129 (1984).
37. *See generally* 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, 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).
38. Pub. L. No. 101-508, 104 Stat. 1388, Title VI (1990).
39. *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. 77124, 77125, 77132 (Dec. 8, 2000) (stating that Congress made clear that OCS lease sales are subject to the consistency requirement). When lessees argued before the U.S. 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).
40. *See* 65 Fed. Reg. at 77130 (discussing "chain of events" concept in the CZMA regulations).

cantly more deferential toward the CZMA. When the MMS sought to avoid having its decision to suspend a lease subject to a state's consistency review, the U.S. Court of Appeals for the Ninth Circuit ruled against the agency, and in so doing explained the importance of examining impacts at the lease sale stage.[41] 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 indicated that lease suspensions could not be categorically excluded from CZMA review,[42] the MMS nevertheless argued that a lease suspension is categorically excluded from environmental review under NEPA and that the CZMA similarly does not apply. 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)."[43]

Louisiana, too, has experienced little deference when it has sought to assert its rights under the CZMA for OCS oil and gas activities. 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."[44] According to the state, the MMS' treatment of consistency with the state plan was conclusory and lacked any meaningful analysis.[45] Although the court rejected the state's argument, it did so with little analysis and upon a judgment that the MMS' conclusion contained "sufficient information to *support*" its conclusion, regardless of the merits of its conclusion.[46] Most notably, in the aftermath of Hurricane Katrina, the state again sought to employ its CZM plan to avoid precipitous future oil and gas lease sales without more adequate environmental analysis as a consequence of the devastation. The state complained that the MMS' CD, following the hurricane, failed to address adequately the increased environmental and economic risks to Louisiana's OCS supporting infrastructure. The Department demonstrated little sympathy for these concerns, forcing Louisiana to go to court. And the court responded with a poignant observation:

> 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 [CD] 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 [CD] 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.[47]

III. BP Exploration Plan and Lack of Meaningful CZMA Review

Not surprisingly, at least until the Deepwater Horizon spill, the MMS' "fore-ordained" individual lease sales remain a potentially troublesome characteristic of the OCSLA oil and gas program and informs the MMS' approach toward BP's exploration plan for the Macondo Well, Mississippi Canyon Block 252 (MCB252), as well as the original Lease Sale 206. Historically, once the MMS issued a five-year leasing plan and a multi-sale EIS for leases covered by that plan, the affected state(s) and public in the Gulf Region lacked *meaningful opportunity* to comment on many post-lease activities, including on 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, once testified before Congress that the "DOI is keeping to its 5-year lease sale timetable and has held all sales as planned and on time."[48]

This staged process, oddly, has somewhat diminished the utility of the CZM program. To begin with, as recently as the 2000 CZMA regulations, the DOI still asserted that a CD for its five-year plans was unnecessary in light of the OCSLA and the role of the states under that Act. 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.[49] Louisiana, therefore, reviewed and acquiesced in the operative five-year plan, although it lodged several overall concerns about the program.

Much of what occurs thereafter has consisted of a combination of somewhat modified, regenerated, word-processed documents and responses. On June 25, 2007, for instance, the MMS formally notified the state that it was intending to prepare an EA for Lease Sale 206, although it further noted that the EA would tier off the multi-sale EIS and focus on any new information, and it afforded the state (and interested public) only 30 days to submit comments. After this

41. California v. Norton, 311 F.3d 1162, 33 ELR 20119 (9th Cir. 2002).
42. 65 Fed. Reg. at 77144.
43. *Id.* at 1172-73 (quoting, in part, H.R. Rep. No. 101-508, at 970 (1990) (Conf. Rep.)).
44. Complaint for Declaratory Judgment and Injunctive Relief, State of Louisiana ex rel. Guste v. Lujan, Civ. No. 91-2910, at 13 (Aug. 7, 1991) (on file with author).
45. Memorandum in Support of Motion for Preliminary Injunction, State of Louisiana ex rel. Guste v. Lujan, Civ. No. 91-2910, at 4-5 (Aug. 7, 1991) (on file with author).
46. State of Louisiana v. Lujan, 777 F. Supp. 486, 489, 22 ELR 20631 (E.D. La. 1991).
47. Blanco v. Burton, 2006 WL 2366046 (E.D. La. 2006).
48. *Interior Budget for FY 2006 in Energy and Minerals Programs: Oversight Hearing Before the Subcomm. on Energy & Mineral Resources of the H. Comm. on Resources*, 109th Cong. (2005) (statement of Johnnie Burton, Director, MMS, at 3) (on file with author).
49. 65 Fed. Reg. 77124, 77131 (Dec. 8, 2000).

NEPA process, on October 26, 2007, the state received a 68-page CD for Lease Sale 206, which also incorporated by reference the environmental analysis from the multi-sale EIS, and emphasized, as it typically does in these documents, that the "lease sale process is mainly a paper transaction."[50] At one point, the CD even mistakenly refers to Lease Sale 224 instead of Lease Sale 206.[51] Although the state did not object to the CD, it nevertheless indicated that the MMS' 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 multi-sale EIS, and that 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 in our coastal zone."[52]

Subsequently, the state similarly reviewed the CD for BP's exploration plan for MCB252, but political inertia and lack of resources make 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 similarly suffers: neither the public nor the state will be afforded an opportunity to review the proposed federal action and its consistency with coastal resource protection.[53] The only environmental analysis is what is presented in the exploration plan application and in the lease sale and multi-sale 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.[54] The MMS explained that its 2006 and 2007 regulations afforded it the ability to "limit the amount of information or analysis." This NTL, however, further noted that lessees proposing exploration plans in the Gulf were required to prepare a consistency certification.[55] But NTLs, by the way, are not reviewed for consistency and only intermittently discussed with the states when being developed.

Louisiana received the CD for MCB252 on March 12, afforded the public a 15-day window for comment, but, again with limited information, issued its approval on March 30, in order to avoid having to extend the time period and risk repercussions. 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' decision to afford some organizations approximately two weeks to comment on the proposed activity was insufficient.[56]

IV. Conclusion

This history suggests that the entire OCSLA program warrants increased attention. Both the OCSLA and the CZMA were intended to afford states and the pubic with a significant role in deciding whether, where, when, and how oil and gas development would occur off our nation's coasts. Aside from separately issued moratoria governing most of the coastlines, the public and the states, particularly the leading energy-producing state of Louisiana, has had minimal opportunity to shape activities under the program. Indeed, for years, Louisiana has objected to areawide leasing, only to be told by the MMS that the issue is being deferred until later.[57] It is that type of continuing deferral, masked in the NEPA process through a possibly overly aggressive use of tiering, that has permitted serious environmental issues to escape meaningful review, as well as meaningful opportunity for public input. And throughout this process, the CZMA, the original statute designed to address OCS energy development, has become lost.

50. MMS, Determination of Whether Lease Sale 206 Central Planning Area Is Consistent With the Louisiana Coastal Resources Program, at 2 (on file with author).
51. *Id.*
52. Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, Chief, Leasing Div., MMS, (Dec. 10, 2007) (on file with author). How tiering has been deployed was addressed in the Executive Office *Report Regarding the Minerals Management Service's National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development* 22 (Aug. 16, 2010).
53. Categorical exclusions have become quite controversial recently, as their use has grown. *See* Memorandum from Nancy H. Sutley, Chair, CEQ, to Heads of Federal Departments and Agencies, Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act (Feb. 18, 2010). We all are now too familiar with the fact that BP's exploration activities were approved with the use of a categorical exclusion. And a similar concern exists for the use of such exclusions for onshore oil and gas activities. *See* U.S. GAO, Oil and Gas Management: Key Elements to Consider for Providing Assurance of Effective Independent Oversight, GAO-10-852T, 8 (June 17, 2010); U.S. GAO, 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, GAO-09-872 (Sept. 26, 2009). The Department has since responded by discontinuing the use of these particular categorical exclusions. *Cf.* Memorandum from Michael R. Bromwich, to Walter Cruickshank, *Use of Categorical Exclusions in the Gulf of Mexico Region*, Aug. 16, 2010.
54. MMS, NTL No. 2008-GO4, Information Requirements for Exploration Plans and Development Operations Coordination Documents (Apr. 1, 2008), *available at* https://www.gomr.mms.gov/homepg/regulate/regs/ntls/2008NTLs/08-g04.pdf.
55. On June 18, 2010, in response to the spill, the Department rescinded the limitations in the April 2008 MMS, NTL No. 2010-NO6, Information Requirements for Exploration Plans, Development and Production Plans, and Development Operations Coordination Documents on the OCS, *available at* https://www.gomr.mms.gov/homepg/regulate/regs/ntls/2010NTLs/10-n06.pdf.
56. Petitioners' Consolidated Brief at 17, Native Village of Point Hope v. Salazar, 2010 WL 1917085 (9th Cir. Mar. 8, 2010) (Nos. 09-73942 and 10-70166), 2010 WL 1219036.
57. Robert Gramling aptly discusses many of the problems with the administration of the OCS program, but in particular writes that "area-wide leasing strategy essentially abrogates [the Secretary's authority to manage and balance the impact of OCS activities], leaving the question of scope and range of federal sales and consequently the impact of those sales to the buyers." Robert Gramling, Oil on the Edge: Offshore Development, Conflict, Gridlock 157-58 (SUNY Press 1996).