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Blanco v. Burton: What Did We Learn from Louisiana's Recent OCS Challenge?

Ryan M. Seidmann

James G. Wilkins

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Blanco v. Burton: What Did We Learn from Louisiana's Recent OCS Challenge?*

RYAN M. SEIDEMANN AND JAMES G. WILKINS**

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** Ryan M. Seidemann holds a B.A. in anthropology from Florida State University, an M.A. in anthropology from LSU, and a J.D./B.C.L. from the Paul M. Hebert Law Center at LSU. He is a member of the Louisiana bar and is an Assistant Attorney General and Chief of the Lands & Natural Resources Section, Civil Division, Louisiana Department of Justice. James G. Wilkins holds a B.S. in biology from Centenary College, an M.S. in marine biology from Texas A&M University, and a J.D. from the Paul M. Hebert Law Center at LSU. He is a member of the Louisiana bar and is the Director of the Louisiana Sea Grant Legal Program and Associate Professor, Louisiana Sea Grant College Program.

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I. INTRODUCTION

In 2002, researchers at the Louisiana Sea Grant Legal Program began a comprehensive examination of the utility of several environmental laws to protect Louisiana's coastline from damage caused by oil and gas activity on the Outer Continental Shelf (OCS).¹ This research focused on the power of the states under the Coastal Zone Management Act (CZMA), the Outer Continental Shelf Lands Act (OCSLA), and National Environmental Policy Act (NEPA) to force the federal government to do a better job of accounting for and mitigating environmental damage occasioned by the direct, cumulative, and indirect impacts of OCS oil and gas activity.² The approach proposed in this research was not novel. Indeed, Louisiana had already tried to use these laws in this manner once before, with disappointing results.³ However, this research did present a careful analysis of these laws with a proposal for employing them, once again, to attempt to protect Louisiana's coastal zone. The opportunity to put this research to the test arose again before the results were published. This article summarizes the experience of the State of Louisiana (the State or Louisiana) in this recent challenge against the federal government and critically analyzes the results.

1. The results of this research are contained in 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 (2006) [hereinafter Langford et al.].

2. *Id.* at 102-03.

3. *Louisiana v. Lujan*, 777 F. Supp. 486 (E.D. La. 1991).

A. Lease Sale 200

Following the devastation left in the wake of Hurricanes Katrina and Rita, Louisiana Governor Kathleen Babineaux Blanco revisited, in late 2005, the possibility of forcing the federal government, particularly the Minerals Management Service (MMS), to exercise greater caution and diligence when permitting oil and gas activities off of the Louisiana coast.⁴ Governor Blanco claimed that MMS planned to continue with OCS mineral leasing activities following the storms without undertaking a meaningful analysis of those storms' impacts on Louisiana's coastal zone.⁵ Under the OCSLA, MMS is charged with managing the nation's mineral assets on the OCS.⁶ This task is accomplished via leasing of large portions of the OCS in lease sales, conducted biannually in the Gulf of Mexico.⁷ Following the lease sales, MMS is charged with the task of permitting individual exploration and development plans within the leased areas.⁸ The laws noted above require MMS to undertake analyses of the environmental impacts of this leasing and permitting (NEPA) and coordination and consultation with the adjacent coastal states (CZMA and OCSLA) prior to the activities.⁹ Louisiana had contended, for some time, that MMS was doing a less-than-complete job of measuring and mitigating mineral impacts on its fragile coastal zone.¹⁰

It was on this basis that Louisiana decided to challenge MMS's actions. The timing of Louisiana's challenge meant that the target of the challenge would be Lease Sale 200, scheduled by MMS to occur in August 2006 and to cover substantial portions of the Western Gulf of Mexico (off the coast of Louisiana and Texas).

4. Press Release, Office of the Governor Kathleen Babineaux Blanco, State of La., Governor Blanco Sends Message to Washington About Need for OCS Revenues (Jan. 6, 2006), <http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&articleID=1632&printer=1>.

5. *Id.*

6. MMS, U.S. Dep't of the Interior, The News Room: Frequently Asked Questions, <http://www.mms.gov/ooc/newweb/QandA.htm> (last visited Apr. 28, 2008); see Langford et al., *supra* note 1, at 108-14.

7. MMS, U.S. Dep't of the Interior, Offshore Minerals Management, <http://www.mms.gov/offshore> (last visited Apr. 28, 2008).

8. MMS, U.S. Dep't of the Interior, The News Room: Frequently Asked Questions, <http://www.mms.gov/ooc/newweb/QandA.htm> (last visited Apr. 28, 2008).

9. See generally Langford et al., *supra* note 1; Katherine Henry, State and Federal Interaction Affecting the Oil and Gas Industry: Partners or Adversaries?, Presentation at the 54th Mineral Law Institute at Louisiana State University (2007) (transcript available from author).

10. See generally the comment letters discussed in Langford et al., *supra* note 1, at 143-45.

It was at this time that the Louisiana Sea Grant Legal Program's research became the framework of the State's challenge and the academic research now had real application.

B. The Relevant Laws

In order to fully appreciate Louisiana's challenge to MMS, it is important to understand the relevant authorities that formed the basis of that challenge. Comprehensive analyses of the CZMA, the OCSLA, and NEPA have been undertaken by several authors in recent years¹¹ and will thus not be rehashed here. Rather, the reader is directed to these sources for a comprehensive review of these laws, while this source contains a brief overview of their operative portions relevant to Louisiana's 2006 case.

1. NEPA

NEPA requires that an environmental impact statement (EIS) be completed for any major federal action significantly affecting the quality of the human environment.¹² Offshore lease sales are considered, by law, to be just such an action.¹³ Among other things, an EIS must include information on the environmental impacts of such an action as well as alternatives to the action.¹⁴ "A critical part of this analysis is the development of an 'environmental baseline' and then analyzing the reasonably foreseeable direct, indirect and cumulative effects of the proposed action on that baseline."¹⁵ Louisiana's NEPA challenges centered on these issues: MMS failed to adequately document the environmental impacts of Lease Sale 200; MMS did not provide viable alternatives to Lease Sale 200; and, following the altered environmental baseline¹⁶ caused by Hurricanes Katrina and Rita, MMS's conclu-

11. See, e.g., Langford et al., *supra* note 1. See also Henry, *supra* note 9.

12. 42 U.S.C. § 4332(2)(c) (2006).

13. 43 U.S.C. §§ 1346, 1351 (2006).

14. 42 U.S.C. § 4332(2)(c) (2006).

15. Henry, *supra* note 9, at 5 (citing 40 C.F.R. §§ 1508.7, .8 (2005)).

16. Although the term "environmental baseline" is used in the Code of Federal Regulations (C.F.R.) to refer to certain environmental assessments of the Outer Continental Shelf, it is not defined. 30 C.F.R. § 282.28(b) (2005). The term is defined in the C.F.R. with respect to the Endangered Species Act (ESA):

[t]he environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early . . . consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

sions regarding impacts were flawed because they relied on a pre-hurricane baseline.¹⁷

2. CZMA

The CZMA requires that “[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.”¹⁸ Known as the “consistency provision” of the CZMA, the above-quoted language, theoretically, gives coastal states substantial oversight and even control with respect to federal activities on the OCS.¹⁹ Under this provision, the federal agency that proposes such activity must examine the impacts in light of an adjacent coastal state’s coastal zone laws and enforceable policies to ensure that those laws are not violated in the proposed action.²⁰ The federal agency will issue a consistency determination (CD) to the state that is supposed to show how the proposed action is consistent with the state’s coastal program.²¹ Louisiana’s CZMA claim revolved around a disagreement with MMS regarding the consistency of Lease Sale 200 with the Louisiana Coastal Resources Program (LCRP).

3. OCSLA

Section 19 of the OCSLA (Section 19) requires the federal government to solicit comments from the governors of the adjacent coastal states on the size, timing, and location of a proposed lease sale.²² This comment requirement does not provide coastal governors with a veto over proposed federal activities on the OCS.²³ Rather, it provides a forum for the states to further voice concerns or reservations regarding a lease sale and to receive reasoned re-

50 C.F.R. § 402.02 (2005). The use of the term “environmental baseline” in this article is analogous to the ESA usage of the term.

17. See, e.g., Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction at 22, 27-28, *Blanco v. Burton*, No. 06-3813 (E.D. La. Jul. 27, 2007) [hereinafter *State Memorandum*].

18. 16 U.S.C. § 1456(c)(1)(A) (2006).

19. Langford et al., *supra* note 1, at 108-13. Although these provisions do not provide states with veto authority over federal OCS actions, a successful legal challenge to such federal activities will essentially result in a veto.

20. Henry, *supra* note 9, at 3.

21. *Id.*

22. 43 U.S.C. § 1345(a) (2006); Henry, *supra* note 9, at 6.

23. Henry, *supra* note 9, at 6-7; see also, H.R. REP. NO. 95-590, at 153 (1977).

sponses from the Secretary of the Department of the Interior (DOI) (the parent agency of MMS) as to why the agency plans to go forward.²⁴ The OCSLA requires MMS/DOI to implement a governor's proposals unless they are not practicable.²⁵ If the proposals are not implemented, the Secretary of DOI must provide the reasoned responses discussed above.²⁶ Louisiana's claims under the OCSLA centered around Governor Blanco's recommendation under Section 19 that MMS/DOI postpone Lease Sale 200 until the impacts of Hurricanes Katrina and Rita on Louisiana's coastal environment could be fully studied and until studies of the manner in which those impacts relate to OCS oil and gas development could be accomplished.²⁷ MMS/DOI chose not to follow Governor Blanco's proposal and did not provide a substantive explanation for its decision.²⁸

II. LOUISIANA'S CHALLENGE

A. What was the case about?

Louisiana's case was about environmental protection—PERIOD. It could not, under the existing law, demand monetary damages, attorneys fees, or a greater share of OCS revenues.

The State received a considerable amount of criticism in the press that it had instituted its action against MMS to force greater revenue sharing from minerals derived on the OCS.²⁹ A cursory review of the State's filings in *Blanco v. Burton* clearly demonstrates the fallacy of these criticisms. The State presented numerous alleged violations by MMS of the relevant federal laws governing the OCS process that raised significant concerns about the protection of the State's coastal environment in a post-Ka-

24. Henry, *supra* note 9, at 6-7; H.R. REP. NO. 95-590, at 153 (1977).

25. *Massachusetts v. Clark*, 594 F. Supp. 1373, 1384 (D. Mass. 1984).

26. Henry, *supra* note 9, at 7.

27. See generally Letter from Kathleen Babineaux Blanco, Governor of La., to Renee Orr, MMS (May 30, 2006) (on file with author).

28. See Letter from Rejane M. Burton, Dir., MMS, to Kathleen Babineaux Blanco, Governor of La., 1 (Jun. 11, 2006) (on file with author).

29. See, e.g., John A. Sullivan, *Gov. Blanco Won't Seek 2nd Term; Tenure Impacted Energy Industry*, NATURAL GAS WK., Mar. 26, 2007, at 1 (commenting that "Blanco went to court to block the lease sale, unless Louisiana got more royalties from offshore leasing"); see also, Cathy Landry, *La. Asks Court to Block Lease Sale, to Pressure U.S. on Revenue Sharing*, INSIDE ENERGY WITH FED. LANDS, July 24, 2006, at 10 (commenting that "[w]hile the lawsuit seeks only to prevent the lease sale until MMS completes an environmental study on the impact of new drilling in the wake of last year's hurricanes Katrina and Rita, the real issue behind the suit is money.").

trina/Rita environment.³⁰ Thus, despite the claims of some critics it is clear that the suit had nothing at all to do with revenue sharing. The case always was and always will be an environmental protection case and a case about the power of a state's voice in the protection of its coast.³¹

How powerful is this voice? Can the coastal states actually have an impact on policy decisions in Washington, D.C. when their environments are at stake? State officials in Louisiana believed that they could get the federal government to rethink its oil and gas policy in a way that would be more protective of the coastal zone. One way to do this was to force the federal agency to adhere to its own laws under the CZMA and NEPA. If the federal government loses a challenge to OCS activities under either NEPA or the CZMA consistency provisions, the most likely outcome would be more paperwork: a better and more comprehensive EIS and better attempts to demonstrate and achieve consistency with the State's coastal resources program. The hope was that such studies would lead to more careful permitting actions off Louisiana's coast that should ensure that activities undertaken pursuant to such permits would be more environmentally protective.

Louisiana is currently the nation's top domestic supplier of oil and natural gas.³² Eighty percent of all of the United States' oil and gas passes through Louisiana in some form.³³ For all of the damage that the State's coastal environment suffers by serving as the conduit for the nation's energy needs, very little attention is paid to it.

Congress enacted NEPA and the consistency provisions of the CZMA to ensure that (among other things) the states off whose

30. See generally Complaint for Declaratory Judgment and Injunctive Relief at 2, Blanco v. Burton, No. 06-3813, 2006 WL 2366046 (E.D. La. 2006) [hereinafter State Complaint].

31. The pressure of Louisiana's scrutiny of the true environmental impacts of the OCS lease sales may have influenced some in Congress to vote for a revenue sharing bill as a way of helping the state mitigate the impacts but that was not the purpose of the lawsuit.

32. Landry, *supra* note 29, at 10.

33. Nick Bouterie, *Offshore Revenue Bill Has Problems*, BATON ROUGE ADVOCATE, July 7, 2006, at B8. It is somewhat difficult to nail down the actual percentage of oil and gas that passes through Louisiana. Another source states that the amount is one-fifth of all of the oil and gas that enters the nation. Anne R. Konigsmark, *La. Parish Wonders What's Next: Peninsula's Residents Disappointed, Fearful After \$1.6 Billion for Levee Upgrades Axed*, USA TODAY, May 1, 2006. Some of the distinction appears to come from whether the source is U.S. land and waters or worldwide sources. The higher figure seems to represent the former and the lower, the latter.

coasts OCS oil and gas development occurs have a check on the wanton actions of the federal government.³⁴ The general idea is that the decision makers in Washington may not be aware of the local environmental impacts of their decisions that are made thousands of miles away. Providing the coastal states with a voice in coastal protection because they should know their coasts more intimately than the federal government is the purpose behind the consistency provisions.³⁵

B. The Comment Letters

The environmental analysis for Lease Sale 200 was completed in 2002 as part of the 2002-2007 five-year plan EIS.³⁶ There was no way for MMS to have taken account of the changed environmental baseline following the 2005 hurricane season without undertaking a new environmental analysis. Because there was so much devastation in Louisiana's coastal zone as result of Hurricanes Katrina and Rita, the State hoped, without really expecting much, that MMS would take these impacts into consideration in its EA and consistency determination for Lease Sale 200. Due to the substantial amount of damage that occurred on offshore rigs and onshore infrastructure, it seemed only logical that once MMS got back on its feet from the storms,³⁷ it would have to take a hard look at the future implications of this damage on Gulf coastal environments.

34. Such was certainly the case with the 1990 amendments to the CZMA. See Sam Kalen, *The Coastal Zone Management Act of Today: Does Sustainability Have a Chance?*, 15 S.E. ENVTL. L.J. 191, 201-03 (2006).

35. Edward A. Fitzgerald, *California Coastal Commission v. Norton: A Coastal State Victory in the Seaweed Rebellion*, 22 UCLA J. ENVTL. L. & POL'Y 155, 185 (2004) (commenting that "State control was superior to federal authority because the coastal states possessed the 'resources, administrative machinery, enforcement powers, and constitutional authority on which to build sound coastal management programs.' The coastal states already had control over coastal resources, possessed inherent zoning authority, and were closer to regional problems than the federal government.").

36. MMS, U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT: GULF OF MEXICO OCS OIL AND GAS LEASE SALES 2003-2007: CENTRAL PLANNING AREA SALES 185, 190, 194, 198, AND 201; WESTERN PLANNING AREA SALES 187, 192, 196, AND 200 (2002).

37. MMS in New Orleans was out of commission due to Hurricane Katrina for some time. See, e.g., Press Release, MMS, Gulf of Mexico Region Adjudication Office Reopens in New Orleans (Oct. 18, 2005) <http://www.mms.gov/ooc/press/2005/press1019.htm> (noting the reopening of certain MMS functions in New Orleans). See also, Press Release, MMS, MMS Regional Office Operations Return to New Orleans; Commitment to Stay in the Area (Nov. 1, 2005) <http://www.mms.gov/ooc/press/2005/press1101a.htm> (noting the reopening of MMS offices in New Orleans).

MMS has a practice of, once completing an EIS, tiering each subsequent EA and CD off of that EIS and previous EAs and CDs until the next EIS is done.³⁸ Although this may be an efficient means of creating the legally required environmental documents for MMS, it creates a largely cut-and-paste approach to the creation of EAs and CDs that essentially reference older documents without substantial new impacts analyses being done. The problem with this approach, demonstrated *infra*, is that environmental changes between EISs are given only cursory treatment in the tiered EAs and CDs. Despite the devastation of Hurricanes Katrina and Rita, MMS did not undertake a completely new environmental analysis of the affected areas prior to Lease Sale 200.³⁹ Rather, MMS tiered the EA and CD for Lease Sale 200, giving only a superficial and perfunctory mention of the damage of the storms,⁴⁰ with no assurance that the damages to OCS facilities would not have impacts on any facilities erected pursuant to Lease Sale 200 or on Louisiana's coastal environment.

The State received this disappointing CD, dated March 31, 2006, and it had sixty days to respond.⁴¹ The CD was woefully inadequate in terms of ensuring consistency with Louisiana's Coastal Use Guidelines.⁴² Louisiana's response was voluminous and comprehensive.⁴³

In a twenty-four-page letter dated June 14, 2006, Governor Kathleen Blanco responded to what Louisiana considered to be the major shortcomings of MMS's Lease Sale 200 CD. As an initial matter, Governor Blanco stated: "[W]e find that proposed Lease Sale 200 is not consistent with the enforceable policies of the Louisiana Coastal Resources Program . . . [and that] the proposed federal action has the potential to adversely affect the Louisiana Coastal Zone socioeconomics, infrastructure, and wetland

38. Henry, *supra* note 9, at 6.

39. The affected areas from Hurricanes Katrina and Rita effectively blanketed the entire Western Planning Area. See MMS, U.S. Dep't of the Interior, Gulf of Mexico Leasing Maps & Official Protraction Diagrams (2007), <http://www.gomr.mms.gov/homepg/lseale/opd2.pdf> (showing the Western Planning Area (denoted WGM) as spanning the Texas coast, with much of the operations extending off the Texas and Louisiana coasts—directly in the line of fire for Hurricanes Katrina and Rita).

40. See Henry, *supra* note 9, at 7-9.

41. Letter from Rejane M. Burton, Dir., MMS, to Scott A. Angelle, Sec'y, La. Dep't of Natural Res. (Mar. 27, 2006) (on file with author).

42. See generally Letter from Kathleen Babineaux Blanco, Governor of La., to Renee Orr, MMS 1 (June 14, 2006) (on file with author) [hereinafter June 2006 Letter from Governor Blanco to Ms. Orr].

43. *Id.*

resources to an unacceptable degree.”⁴⁴ This clear statement that the State was unconvinced that MMS had undertaken a meaningful environmental analysis or made reasonable attempts to mitigate OCS-related impacts should have been sufficient to put MMS on notice that Louisiana was now serious about protecting its coast.⁴⁵ It is also important to note that the concerns voiced by the State were not limited to MMS’s failure to account for hurricane impacts. In this vein, Governor Blanco stated, “As the State has argued for years, the costs and damages incurred by the State, in its role as the primary supporter of the infrastructure necessary for the mineral development of the OCS, are greatly disproportionate to the benefits received by the State.”⁴⁶ This statement is important as it set the stage for the State to challenge not only MMS’s failure to critically evaluate the impacts from Hurricanes Katrina and Rita, but also its repeated ignorance of the cumulative and indirect impacts to Louisiana’s coastal zone that result from OCS activity.

Following opening statements on the inadequate analyses and nonchalance generally exhibited by MMS towards Louisiana’s coastal concerns, Governor Blanco instituted a point-for-point refuting of the unfounded claims of the federal government. One of the major problems with the CD, according to Governor Blanco, was the lack of “comprehensive data and information sufficient to support MMS’s determination” of consistency with the LCRP.⁴⁷ An oft-repeated refrain emerges from this letter: Governor Blanco notes that MMS “erroneously assumes that it is still appropriate after these catastrophic storm events, for MMS to essentially rely on and repeat older CDs.”⁴⁸ This failure to critically evaluate changed circumstances and to continue the practice of tiering, when simple logic would dictate otherwise, appears in several of the State’s comment letters as well as the Judge’s opinion, *infra* Part III. The Governor goes on to recount the numerous Coastal Use Guidelines that MMS failed to consider in the Lease Sale 200

44. *Id.* at 1.

45. Since the inception of its coastal zone management program Louisiana had expressed concerns about the environmental impacts from OCS leasing but, with one exception, had never attempted to challenge an OCS consistency determination. *See, e.g.*, Letter from Terry Howey, Adm’r, CMD, Dep’t Natural Res., to Chris C. Oynes, MMS (Aug. 3, 1994) (on file with author); Letter from Ron Gomez, Secretary, Dep’t Natural Res., to Thomas A. Readinger, MMS (May 14, 1991); LOUISIANA DEP’T OF NATURAL RES., INFORMATION SUPPLEMENT: LEASE SALE #135 12 (July 29, 1991).

46. June 2006 Letter from Governor Blanco to Ms. Orr, *supra*, note 42, at 1.

47. *Id.* at 3.

48. *Id.*

CD, including required information on soil and water conditions; flood and storm hazards;⁴⁹ the techniques and materials used in the construction, operation, and maintenance of the OCS infrastructure and facilities;⁵⁰ drainage patterns;⁵¹ alternatives to proceeding with Lease Sale 200;⁵² economic impacts;⁵³ impacts on traditional land uses, fisheries, and tourism;⁵⁴ impacts on natural features and wildlife;⁵⁵ cumulative and indirect impacts;⁵⁶ local government strain;⁵⁷ alteration of wetlands and other sensitive areas;⁵⁸ disruption of social patterns;⁵⁹ archaeological impacts;⁶⁰ among several others.

The sum total of the concerns expressed in Governor Blanco's letter is broad and substantial. Governor Blanco did not state that the lease sale should not go forward. Rather, she stated that, before the lease sale was to occur, substantially more environmental work needed to be done to ensure the protection of Louisiana's coastal zone.

MMS's response was dismissive, calling the utility of the consistency provisions of the CZMA into substantial doubt.⁶¹ MMS summarily dismissed the State's concerns, without explanation, pejoratively implying that the State did not know what it was talking about and that MMS's consistency determination was correct the first time around.⁶² Despite this comprehensive examina-

49. *Id.* at 5-6.

50. *Id.* at 6.

51. *Id.*

52. *Id.* at 6-7.

53. *Id.* at 7-8.

54. *Id.* at 9.

55. *Id.* at 9-10.

56. *Id.* at 10-11.

57. *Id.* at 11-13.

58. *Id.* at 13-15.

59. *Id.* at 15-16.

60. *Id.* at 16-19.

61. Letter from Rejane M. Burton, Dir., MMS, to Kathleen Babineaux Blanco, Governor of La. (June 30, 2006).

62. In response to the voluminous CD objection letter from Governor Blanco, MMS responded with a letter that stated:

We have thoroughly evaluated all applicable guidelines of the Louisiana Coastal Resources Management Act of 1978 and the activities resulting from proposed Sale 200. . . . [W]e believe that proposed Sale 200 activities will be consistent with the provisions identified as enforceable by Louisiana in the Louisiana Coastal Resources Program. . . . While we acknowledge that the State of Louisiana believes that potential Sale 200 activities will not be fully consistent with those subject provisions, we believe that proposed Sale 200 activities will be consistent with the LCRP. We will be

tion of MMS's shortcomings with respect to the Lease Sale 200 CD, a letter from Director Burton, dated July 11, 2006, made it clear that MMS had no intention to stop Lease Sale 200.⁶³ Their reasoning was economic, citing the injury that the oil and gas industry would suffer should Lease Sale 200 be postponed to allow for sufficient environmental study.⁶⁴ No consideration of Louisiana's concerns in any of its comment letters was made by Director Burton. On July 13, 2006, MMS posted its Final Notice of Sale without making any change to its environmental analyses to address Louisiana's concerns.⁶⁵

The State also submitted comments on the Lease Sale 200 EA and MMS's Finding of No New Significant Impact (FONNSI),⁶⁶ which were due on May 18, 2006.⁶⁷ Once again, MMS dismissed the State's concerns.⁶⁸

The State noted, in a nineteen-page letter to MMS, that one of the major problems with the CD and EA, was MMS's failure to critically evaluate the impacts of OCS activity in light of the devastation of the 2005 hurricane season.⁶⁹ Despite this and other shortcomings, the State began its comments on the EA and FONNSI, as it has done many times in the past, by noting its general support for OCS oil and gas development.⁷⁰ In addition to the State's concerns that MMS had not taken the requisite "hard look" at the consequences of Hurricanes Katrina and Rita to coastal Louisiana and the future of OCS activity off its shores, Louisiana challenged MMS's practice of "tiering" its environmental analyses off of previous work.⁷¹

proceeding with the remainder of the planning process for the proposed Sale 200 as scheduled.

Id. No critical analysis of Louisiana's concerns is apparent in this one-page letter.

63. *Id.*

64. *Id.*

65. The Final Notice of Sale, 71 Fed. Reg. 40,538 (July 17, 2006). The original notice, disseminated via MMS's website on July 13, 2006, is available at <http://www.gomr.mms.gov/homepg/lseale/200/fcov200.pdf> (last visited Apr. 28, 2008).

66. MMS, PROPOSED OCS LEASE SALE 200, WESTERN GULF OF MEXICO – ENVIRONMENTAL ASSESSMENT (OCS EIS/EA MMS 2006-016).

67. *See generally* Letter from Gerald Duszynski, Acting Assistant Sec'y, Coastal Mgmt. Div., La. Dep't of Natural Res., to Chris Oynes, MMS (May 17, 2006) (on file with author).

68. *See generally* Letter from Chris C. Oynes, Reg'l Dir., MMS, to Gerald M. Duszynski, La. Dep't of Natural Res. (June 14, 2006) (on file with author).

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

70. *Id.* at 1.

71. *Id.* at 17.

The practice of “tiering” essentially means that MMS creates one periodic EIS (usually the multi-sale EIS) and then merely rehashes and incorporates the findings of that study to all lease sale environmental documents produced for the following several years.⁷² The practical result of this approach, as opposed to conducting complete environmental analyses from the ground up for each federal action, is that a cut-and-paste approach is created, whereby assumptions that are years-old are relied upon. Very little, if any, new information or data are analyzed, and each purportedly new environmental document essentially parrots the previous ones, regardless of changed circumstances. Such an approach, as occurred with Lease Sale 200, can easily overlook storm impacts as well as cumulative and indirect impacts.

The State informed MMS, in the EA letter, that this approach is an unacceptable means of analyzing environmental impacts.⁷³ The State also belabored the inadequacy of MMS’s treatment of cumulative and indirect impacts.⁷⁴ Ultimately, the State, in noting that the issuance of the EA and FONNSI and MMS’s plan to proceed with the proposed action were premature, stated that “[l]ast year’s hurricane season has given us both a tragic understanding of poor planning and an unprecedented opportunity to rectify the past decisions that have contributed to the situation in which the State now finds itself.”⁷⁵ The State then made a strong case, based on MMS’s inadequate EA and ongoing studies of the impacts of Hurricanes Katrina and Rita on both Louisiana’s coast and the future of OCS activity, that MMS should postpone Lease Sale 200 until more and better environmental information was available.⁷⁶

Despite the reality that MMS’s tiering and rush to conduct Lease Sale 200 caused them to overlook both the devastation wrought on Louisiana’s coast by the 2005 storms and the implications of OCS activity on Louisiana’s altered environmental baseline, MMS maintained, in a response to Louisiana’s comments on the EA and FONNSI, that “we have made a concerted and thorough effort to update all significant information that has changed

72. See Henry, *supra* note 9, at 6; see also, 40 C.F.R. § 1502.20 (2007).

73. Letter from Gerald Duszynski, Acting Assistant Sec’y, Coastal Mgmt. Div., La. Dep’t of Natural Res., to Chris Oynes, MMS 4-7 (May 17, 2006) (on file with author).

74. *Id.* at 7-10.

75. *Id.* at 10.

76. *Id.* at 10-17.

since the original multisale EIS and previous EA's [sic]."⁷⁷ Apparently this thorough effort did not pick up the Katrina and Rita impacts.

In response to Louisiana's finding that the FONNSI was invalid, MMS noted that substantial new evidence had been added to the EA following the storms. MMS then launched into a discussion of the fact that, despite the tragic nature of the 2005 storms, "these natural disasters occur independently of impacts related to OCS lease sales, despite the change in baseline conditions"⁷⁸ MMS apparently treats OCS impacts as though they occur in a vacuum and are not affected by "trivial" matters such as hurricanes that destroy 217 square miles of Louisiana wetlands.⁷⁹ The remainder of MMS's response is equally nonsensical, but did evidence an intent to proceed with Lease Sale 200 despite Louisiana's pleas for reconsideration.

MMS also commented on Louisiana's failure to critically object to OCS activities in the past.⁸⁰ Although this should not be a consideration in the CZMA/NEPA process,⁸¹ MMS tried to cast doubt on the sincerity of the State's concerns through this statement. This fact and the statement would haunt the State for the remainder of the comment process and throughout the litigation. The State had to take great pains to point out that: (1) a state can change its position on OCS development; and (2) although the State had only objected once before to a lease sale, it had, for years, noted its concern regarding cumulative and indirect impacts of OCS activity that it believed that MMS should address in its environmental analyses.⁸²

Using her authority under Section 19 of the OCSLA, in a letter dated May 30, 2006, Governor Blanco commented on the "size, timing, or location"⁸³ of proposed Lease Sale 200.⁸⁴ Once again, Governor Blanco reiterated the State's support for OCS oil and

77. Letter from Chris C. Oynes, Reg'l Dir., MMS, to Gerald M. Duszynski, Acting Assistant Sec'y, La. Dep't of Natural Res. 1 (Jun. 14, 2006) (on file with author).

78. *Id.* at 1-2.

79. See JOHN A. BARRAS, U.S. GEOLOGICAL SURVEY, OPEN-FILE REPORT 06-1274, LAND AREA CHANGE IN COASTAL LOUISIANA AFTER THE 2005 HURRICANES: A SERIES OF THREE MAPS, (2006), <http://pubs.usgs.gov/of/2006/1274/>.

80. Letter from Chris C. Oynes, Reg'l Dir., MMS, to Gerald M. Duszynski, Acting Assistant Sec'y, La. Dep't of Natural Res., *supra* note 77, at 1.

81. See Langford et al., *supra* note 1, at 128-35.

82. See, e.g., Letter from Charles G. Groat, La. Geological Survey, to John L. Rankin, MMS (Oct. 8, 1982) (on file with author); Letter from David Treen, Governor of La., to William C. Clark, Sec'y of the Interior (Feb. 8, 1984) (on file with author).

83. 43 U.S.C. § 1344(a) (2007).

gas development.⁸⁵ However, Governor Blanco also stated that “[t]he State . . . has determined that the timing of proposed Lease Sale 200 is inappropriate.”⁸⁶

Governor Blanco’s concerns in her Section 19 letter were solely related to the timing of Lease Sale 200 with respect to the unstudied impacts of Hurricanes Katrina and Rita on Louisiana’s coastal zone.⁸⁷ The Governor compared the lack of information that led to the 1969 Santa Barbara oil spill to MMS’s plan of action with Lease Sale 200.⁸⁸ She noted that “[t]he devastating effects of the Santa Barbara spill are precisely what the State of Louisiana is now afraid of should OCS activity continue, unchecked, in the wake of the hurricane damage to the State’s topography and industrial infrastructure.”⁸⁹

Citing these fears and MMS reports that placed substantial numbers of pipelines and platforms in the direct path of Hurricanes Katrina and Rita, Governor Blanco recommended that Lease Sale 200 “be postponed and, instead, included in the next five-year leasing program.”⁹⁰ The hope was that such a delay would allow time for necessary impacts analyses to be completed and that a clearer picture of Louisiana’s post-Katrina/Rita coastal zone would emerge, allowing for more informed decision-making. MMS dismissed the State’s concerns without much explanation.⁹¹

C. The Lawsuit

On July 20, 2006, Governor Blanco and the State of Louisiana filed their Complaint against Director Burton, MMS, and the Department of the Interior (DOI) in the Eastern District of Louisiana.⁹² The Complaint was filed for alleged violations of the Administrative Procedures Act (APA),⁹³ NEPA,⁹⁴ the CZMA,⁹⁵

84. Letter from Kathleen Babineaux Blanco, Governor of La., to Renee Orr, MMS (May 30, 2006) (on file with author).

85. *Id.* at 1.

86. *Id.*

87. *Id.* at 2.

88. *Id.*

89. *Id.*

90. *Id.*

91. See Letter from Rejane M. Burton, Dir., MMS, to Kathleen Babineaux Blanco, Governor of La. (July 11, 2006) (on file with author).

92. See State Complaint, *supra* note 30.

93. 5 U.S.C. §§ 701-706 (2007).

94. 42 U.S.C. §§ 4321-4370(f) (2007).

95. 16 U.S.C. §§ 1451-1465 (2007).

and the OCSLA.⁹⁶ The Complaint was followed, on July 25, 2006, by the State's Motion for Preliminary Injunction and an accompanying memorandum.⁹⁷ Basically, in these filings, the State alleged that MMS's EA, FONNSI, CD and its notice of decision to hold Lease Sale 200 were "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with NEPA, the CZMA, or the OCSLA."⁹⁸

Following a lengthy discussion of the history of NEPA, the CZMA, and the OCSLA, as well as Louisiana's oil and gas history and the history of Hurricanes Katrina and Rita, the State asserted four claims for relief against MMS in the Complaint.⁹⁹ The first count contained MMS's alleged violations of NEPA.¹⁰⁰ The State alleged that, because MMS must evaluate the impacts of Lease Sale 200 through a post-Katrina/Rita lens and because no revised environmental baseline following the storms was used, MMS's failure to prepare a supplemental EIS or an adequate EA was a violation of NEPA and the attendant Council on Environmental Quality regulations.¹⁰¹ More pointedly, the State claimed that "[d]efendants, therefore, failed to take the requisite 'hard look' at the direct, indirect, and cumulative impacts of the OCS oil and gas development and exploration activities that would be authorized under proposed Lease Sale 200, on Louisiana and its coastal resources and communities."¹⁰² Further, the State alleged that "[d]efendants' preparation of the EA, their decision to issue the FONNSI, and their decision to hold proposed Lease Sale 200, as proposed, are arbitrary and capricious, an abuse of discretion, and not in accordance with NEPA and its governing regulations."¹⁰³

The second count related to the State's position that MMS had not provided adequate data to make a consistency determination under the CZMA.¹⁰⁴ As noted above and as discussed at length in Part II B,¹⁰⁵ *supra*, MMS must provide adequate data to support its conclusion that any OCS activity is consistent with the

96. 43 U.S.C. §§ 1331-1356(a) (2007).

97. State Memorandum, *supra* note 17.

98. See generally State Memorandum, *supra* note 17, at 22-63.

99. See State Complaint, *supra* note 30, at 29-37.

100. *Id.* ¶ 93-102.

101. *Id.* ¶ 101; 40 C.F.R. § 1502.9(c)(iii) (2007).

102. State Complaint, *supra* note 30, ¶ 101.

103. *Id.* ¶ 102. See also 5 U.S.C. § 706(2)(A) (2006).

104. See State Complaint, *supra* note 30, ¶ 103-109.

105. See, e.g., Langford et al., *supra* note 1.

LCRP.¹⁰⁶ The State contended, in Count II, that such information was lacking and that the failure of MMS to supplement the record with more and better data, following repeated requests, was unacceptable and insufficient.¹⁰⁷ Accordingly, the State contended that MMS's failures in this regard and their consistency determination in the absence of such data represented an arbitrary and capricious decision under the APA.¹⁰⁸

Count III was largely related to Count II, containing allegations that MMS's consistency determination was arbitrary and capricious. In this count, the State contended that MMS's failure to consider most of the State's 94 Coastal Use Guidelines represented a failure to comply with the requirements, under 16 U.S.C. § 1456(c), to ensure that "federal activities be consistent to the maximum extent practicable with the enforceable policies of a State's coastal management program."¹⁰⁹

In Count IV, the State alleged that the Secretary of the Interior derogated his duty under the OCSLA¹¹⁰ by not adequately responding to Governor Blanco's comments in her Section 19 letter of May 30, 2006. The basis of this count was the State's contention that "Governor Blanco's recommendations provide for a reasonable balance between the national interest and the well-being of the citizens of the State of Louisiana."¹¹¹ The perceived arbitrariness and capriciousness on this matter was that, under 43 U.S.C. § 1345(c) and 30 C.F.R. § 256.31(b) (the OCSLA), the Secretary of the Interior must "accept the Governor's recommendations, 'if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.'"¹¹² Because Louisiana contended that Governor Blanco's recommendations were consonant with the balance of interests in the OCSLA, the Secretary's failure to adopt them was arbitrary and capricious.

In its request for relief, the State requested a declaration that MMS had violated the OCSLA, CZMA, and NEPA.¹¹³ The State further requested that MMS be enjoined from proceeding with

106. 15 C.F.R. § 930.39(a) (2007).

107. See State Complaint, *supra* note 30, ¶ 107.

108. 5 U.S.C. § 706(2)(A).

109. See State Complaint, *supra* note 30, ¶ 111.

110. 43 U.S.C. §1456(c) (2006); 30 C.F.R. § 256.31(b)-(c) (2007).

111. See State Complaint, *supra* note 30, ¶ 123.

112. *Id.* ¶ 120.

113. State Complaint, *supra* note 30.

Lease Sale 200 and that the defendants be issued a writ of mandamus to prevent them from continuing to act in the manner that the State alleged was violative of the OCSLA, CZMA, NEPA, and the APA.¹¹⁴

The bulk of the Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction provided support for the claims made in the Complaint.¹¹⁵ New information provided to the court in the Plaintiffs' Memorandum related to the irreparable harm necessary for the issuance of a preliminary injunction.¹¹⁶ In this portion of the Memorandum, the State focused on the indirect and cumulative impacts¹¹⁷ that flow from the conduct of one lease sale. The State relied heavily, in its discussion of these impacts, on the testimony of experts and local leaders submitted into the record by way of affidavits. The State argued that the cumulative and indirect impacts of OCS lease sales caused substantial irreparable and irreversible harm to Louisiana's coast through exacerbated wetlands loss and degradation, habitat destruction, tourism problems, archaeological site destruction, and socioeconomic problems.¹¹⁸ The State used the devastation wrought by Hurricanes Katrina and Rita as examples of a worst-case scenario should such coastal abuse be permitted to continue unabated and unchecked.¹¹⁹ Taken together, the State argued that these harms

114. *Id.*

115. *See* State Memorandum, *supra* note 17, at 20-63.

116. *Id.* at 63-73.

117. Cumulative impacts are an important concept in environmental protection and coastal zone management. *See, e.g.,* Kyle B. Beall, *A Study of Environmental Politics: The Sandy Island Fiasco*, 6 S.C. ENVTL. L.J. 17, 41 (1997) (noting the concern of South Carolina officials with regard to potential cumulative impacts resulting from development plans on a coastal site in 1993). Small but continuing impacts amount to death by a thousand cuts, but it is difficult from a policy and political standpoint to disallow actions that, by themselves, have only small effect. *See* Kalen, *supra* note 34, at 208; Oliver A. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 364 (1988). No one wants to accept responsibility for being a part of a larger problem and will feel put upon if their actions are prohibited or regulated. There are numerous examples, however, of how these small impacts have had a devastating cumulative effect. One need only look at the oil and gas canals that have sliced up large portions of Louisiana's coastal wetlands one small piece at a time for proof of this phenomenon. LOUISIANA GEOLOGICAL SURVEY & U.S. EPA, SAVING LOUISIANA'S COASTAL WETLANDS: A NEED FOR A LONG-TERM PLAN OF ACTION 10 (Apr. 1987) (noting the destructive nature of individual oil and gas canals in Louisiana's coastal wetlands).

118. State Memorandum, *supra* note 17, at 63-73.

119. *See generally id. passim.*

clearly represented the irreparable harm necessary to support the issuance of a preliminary injunction.¹²⁰

The Defendants filed their Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction on August 3, 2006.¹²¹ As with the Plaintiffs' filings, a substantial portion of the Defendants' Memorandum (approximately 20 pages) was devoted to a review of the applicable law. This review, in the interest of brevity, will not be examined here. Instead, we will focus on the Defendants' defenses to the State's claims.

One of the major contentions of the Defendants was that the State had failed to make a case for the irreparable harm required to support the issuance of a preliminary injunction. "Plaintiffs cannot be harmed by the holding of Lease Sale 200. Any harm they might suffer is speculative and could arise only in the far future."¹²² The Defendants argued that because the State's primary concerns related to cumulative and indirect impacts, and because such impacts were long-term and would not begin to occur until the exploration and development phase of the OCS process, this did not rise to the level of immediate irreparable harm.¹²³

The point that the lease sale phase is merely an opening of bids and the awarding of leases was much belabored by the Defendants.¹²⁴ They argued that, because any actual activity on the leases would be subject to subsequent, project specific environmental reviews, the State had "conflate[d] the federal action challenged" by complaining of potential impacts that would stem from the exploration and development phase rather than the lease sale itself.¹²⁵

Of the State's concerns regarding potential wetlands impacts, the Defendants claimed that such concerns "simply lack[] merit."¹²⁶ "Plaintiffs' suggestion that the August 16, 2006, Lease Sale will have 'irreversible effects on Louisiana's wetlands' such that injunctive relief is immediately warranted strains credulity."¹²⁷ The Defendants also claimed that Lease Sale 200 would

120. *Id.* at 63-73.

121. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, Blanco v. Burton, No. 06-3813 (E.D. La. Aug. 3, 2003) [hereinafter Defendants' Memorandum].

122. *Id.* at 19.

123. *Id.*

124. *Id.* at 20.

125. *Id.*

126. *Id.* at 23 n.6.

127. *Id.* at 24.

have no impacts on infrastructure, recreation, tourism, commercial interests, archaeology, or historic properties.¹²⁸

The Defendants devoted a substantial amount of their Memorandum to reminding the court of the deference that they are entitled to as a federal agency. One example of this defense is the following statement: "Plaintiffs' suggestion that MMS cannot be trusted to adhere to its duties when conducting later analyses under OCSLA should be rejected by the Court."¹²⁹

The "public interest" also consumed a substantial amount of the Defendants' Memorandum. The Defendants cited congressional documents in support of their position that, although environmental concerns should be taken into account when conducting any phase of the OCS process, such concerns are subservient to the "public interest."¹³⁰ This public interest, according to the defendants, is the maximization of mineral resources on the OCS.¹³¹ In support of the burden to the public interest, should the State's position be accepted, the Defendants noted the current energy needs that would be affected if Lease Sale 200 were enjoined.¹³² "[A]ny delay of this sale imposes significant and unnecessary economic and national defense costs on the United States and the public."¹³³ "[I]f the Lease Sale is cancelled or delayed, losses to the U.S. Treasury could top \$285 million."¹³⁴

In defense of the environmental documents prepared for Lease Sale 200, the Defendants commented that they had analyzed new information, "with particular emphasis on the impacts of Hurricanes Katrina and Rita."¹³⁵ Additionally, apparently based on this new information, the Defendants asserted that "the EA appropriately identified the changes to the 'environmental baseline' with respect to wetlands."¹³⁶ Further defenses of the EA's assessments of social and infrastructural impacts are also included in the Memorandum.¹³⁷

The Defendants made much of the burden that would be placed on decision making should they be required to "supplement

128. *Id.* at 24-25.

129. *Id.* at 23.

130. *Id.* at 27-30.

131. *Id.*

132. *Id.*

133. *Id.* at 29.

134. *Id.* (citations omitted).

135. *Id.* at 31.

136. *Id.* at 33.

137. *Id.* at 38-42.

an EIS every time new information comes to light after the EIS is finalized.”¹³⁸ This theme became a substantial issue in the judgment, *infra* Part III.

Another of the most discussed issues in the Defendants’ Memorandum was along the lines of Louisiana’s history in past OCS concurrences and the State’s past oil and gas leasing history.¹³⁹ This issue is illustrated by the following quotations:

- Considering Louisiana’s past practice of concurring on similar CDs, its continuing approval of oil and gas activities in state and federal waters, and MMS’ extensive review of the potential environmental harms as set forth in the CDs, EIS, and EAs, MMS’ consistency determination was a reasonable one and cannot be viewed as arbitrary and capricious.¹⁴⁰
- [T]he State continues to conduct lease sales for oil and gas activities in its own waters. . . . Assuredly the State would not go forward with leasing of state submerged lands for oil and gas activities unless those activities were consistent with its LCRP policies.¹⁴¹

The Defendants concluded their rebuttal to the State’s claims with a justification of their actions with respect to Section 19 of the OCSLA.¹⁴² The Defendants claimed that the Secretary of the Department of the Interior (“the Secretary”) had fully complied with his duties under Section 19 by reviewing the Governor’s recommendations. He was not obligated to accept them and he rejected them following a balancing of the State’s concerns against the national interest.¹⁴³ The Defendants concluded their Memorandum with a request that the State’s Motion for a Preliminary Injunction be denied.

On August 2, 2006, the American Petroleum Institute (API) filed an intervention as a defendant in *Blanco v. Burton* in order to ensure that the oil and gas industry’s interests were protected.¹⁴⁴ This reason for intervening was made clear by the API: “API is aware that that [sic] Defendants will oppose Plaintiffs’ re-

138. *Id.* at 42 (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989)).

139. *Id.* at 50-53.

140. *Id.* at 49.

141. *Id.* at 57.

142. *Id.* at 61-65.

143. *Id.*

144. Intervenor’s Motion and Incorporated Memorandum for Expedited Hearing ¶ 6, *Blanco v. Burton*, No. 06-3813, 2006 WL 2366046 (E.D. La. 2006).

quest for a preliminary injunction. But one of the reasons for allowing API to intervene is that the federal government's interests are not identical to those of the industry."¹⁴⁵ The API's challenge to Louisiana's attempt to block Lease Sale 200 on environmental grounds was purely an economic argument. Their filings focused solely on an alleged irreparable injury to the oil and gas industry should the State prevail in its efforts to "delay, and ultimately cancel . . . the lease sale of blocks to be offered in OCS Sale No. 200."¹⁴⁶

In support of its position, the API noted the potential loss to industry of the hundreds of millions of dollars spent thus far in evaluating tracts on which to bid. Additional hardships noted by the API included such things as industry being required to expend additional funds to maintain bonuses in the event of a delay and the expense of keeping technical teams on standby to continue to evaluate bid statuses.¹⁴⁷ The API claimed that "[d]elay would also disrupt the ability of API member companies to obtain badly needed petroleum supplies for our country."¹⁴⁸ In addition, the API was concerned that competitors would gain some measure of unfair insight into bidding companies' plans should the bids be opened but then the sale ultimately be cancelled.¹⁴⁹ On these bases, the API pleaded for admission to the lawsuit as a party-defendant. The parties consented to the API's admission to the lawsuit as an intervenor-defendant without a hearing.

In its Memorandum of the American Petroleum Institute in Opposition to Plaintiffs' Motion for a Preliminary Injunction, the API largely echoed the issues raised by the Defendants. The API claimed that the threat of immediate harm was not demonstrated by the State, and indeed that it did not exist.¹⁵⁰ Additionally, the API argued that the Lease Sale stage of the process was the inappropriate stage at which to challenge environmental impacts, as no impacts flowed from the mere sale of leases.¹⁵¹ The API

145. *Id.*

146. Memorandum in Support of Motion for Leave to Intervene as a Defendant at 2, *Blanco*, 2006 WL 2366046.

147. See generally Memorandum of the American Petroleum Institute in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *Blanco*, 2006 WL 2366046 [hereinafter API's Memorandum].

148. Memorandum in Support of Motion for Leave to Intervene as a Defendant at 6, *Blanco*, 2006 WL 2366046.

149. *Id.* at 6-7.

150. API's Memorandum, *supra* note 147, at *4-*10.

151. *Id.* at *5-*8.

summed up their substantive challenge to the State's claims with a review of the alleged economic impacts that the issuance of a preliminary injunction would have on the oil and gas industry and a review of how the stopping of Lease Sale 200 would damage the public interest.¹⁵² Overall, despite the claims of the API that it would bring unique interests to the case through its intervention, its claims were, for the most part, identical to those of the Defendants.

III. JUDGE ENGELHARDT'S OPINION

The matter was assigned to Judge Kurt Engelhardt, a recent appointee to the federal bench. Recognizing the urgency of the State's concerns, the judge set a hearing on the preliminary injunction for three weeks from the filing of the lawsuit. He also promised to have a decision in the matter before the scheduled lease sale on August 16, 2006.

Following oral argument in which the State pointed out such things as MMS's failure to address most of the State's Coastal Use Guidelines, MMS's insistence that it had complied with the law, and the API's recap of the industry's economic concerns, Judge Engelhardt took the matter under advisement. He issued his decision on the preliminary injunction on August 14, two days before the scheduled lease sale was to occur: "Plaintiffs' Motion for Preliminary Injunction is DENIED."¹⁵³

The judge's sole reason for denying the State's request for a preliminary injunction to stop Lease Sale 200 was that, in his opinion, any actions taken by MMS under the actual Lease Sale would not cause immediate irreparable harm to the State before a full trial on the merits could be had.¹⁵⁴ Essentially, the judge did not feel that the actual granting of the leases led to the complained-of environmental impacts, but rather that it was the subsequent activity that did.¹⁵⁵ Despite the fact that the State had argued that the cumulative impacts that flow from a single lease sale, which represents the beginning of a largely unstoppable process, the judge apparently did not feel that the State met the high burden for a preliminary injunction. Also important to his decision was the fact that he set a trial date for the permanent injunc-

152. *Id.* at *10-*14.

153. Blanco v. Burton, No. 06-3813, 2006 WL 2366046, at *1 (E.D. La. 2006).

154. *Id.*

155. *See id.*

tion a mere three months from the date of the Lease Sale.¹⁵⁶ He did not feel that the complained-of impacts would occur pursuant to Lease Sale 200 by the time he made an ultimate decision on the matter.¹⁵⁷

The one line denial of the State's request in the forty-four-page opinion of the court was almost the only nod given to MMS by the judge. The remainder of the opinion was a scathing assessment of the poor practices and attitude of MMS, and it included the judge's assessment that the State would "have substantial likelihood of success on the merits."¹⁵⁸

Regarding MMS's EA for Lease Sale 200, the judge stated, "[T]he EA fails to recognize certain fundamental changes in the devastated coastline of Louisiana. Clearly, the earlier multi-sale EIS was rendered inadequate in some respects, irrelevant in others, by the well-documented catastrophic effects of the 2005 hurricanes."¹⁵⁹ Although the judge noted that MMS did acknowledge that the impacts of the storms were significant, even citing specific instances of destruction, even he seemed confused by the agency's dismissal of these effects without analysis.¹⁶⁰ To this end, he noted that:

with 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.*¹⁶¹

He also noted that all previous assumptions upon which the earlier analyses were based "were, for the most part, blown away in the winds and waters of Hurricanes Katrina and Rita."¹⁶² Judge Engelhardt also made much of what appeared to be MMS's preordained decision to go forward with Lease Sale 200 in the face of the mounting scientific evidence that suggested another ap-

156. *Id.*

157. *See id.*

158. *Id.* at 2.

159. *Id.* at 9.

160. *Id.*

161. *Id.* (emphasis added).

162. *Id.*

proach was warranted.¹⁶³ In this vein, the judge commented on this cavalier attitude: “rather than a well-researched analytical approach to post-Katrina/Rita Louisiana, MMS and DOI have instead hastily provided expedient language designed to facilitate its preexisting decision.”¹⁶⁴

As to the State’s claims under the CZMA, the judge found that the CD failed to “take into account the increased environmental and economic risks to Louisiana’s OCS supporting infrastructure and sensitive coastal resources.”¹⁶⁵ Once again, this time in the CZMA discussion, the judge noted that, based upon the appearance of the CD, “the occurring of the Lease Sale was fore-ordained.”¹⁶⁶ He also noted that MMS failed to follow its own regulations when preparing the CD by not evaluating all of Louisiana’s relevant enforceable Coastal Use Guidelines and other authorities.¹⁶⁷ This he found to be arbitrary and capricious.¹⁶⁸ He also found the CD to contain “flawed analyses.”¹⁶⁹

As to the State’s OCSLA claims, the judge similarly found MMS’s activities to fall below reasonable standards.¹⁷⁰ He noted that MMS’s response to Governor Blanco’s Section 19 letter “contains a rather casual dismissal of the Governor’s recommendations by simply claiming that delay in leasing for even one sale will cause a discernable impact on new natural gas supplies being delivered.”¹⁷¹ More interestingly, the judge noted that:

the distinct impression created is that, no matter what recommendations the Governor submitted, they would be disregarded in favor of maintaining the Lease Sale schedule. In other words, the response letter could be used to override virtually any recommendations of any governor at any time, in order to proceed as the DOI secretary desires.¹⁷²

In later general discussions, the judge also chastised both MMS and API for suggesting that environmental analyses are un-

163. *Id.* at 10-11.

164. *Id.* at 10.

165. *Id.* at 11.

166. *Id.*

167. *Id.* at 12.

168. *Id.*

169. *Id.*

170. *Id.* at 13-14.

171. *Id.* at 14.

172. *Id.*

important at the lease sale stage of the OCS process.¹⁷³ One example of this language is the judge's statement that MMS's and API's argument that NEPA, the CZMA, and the OCSLA compliance at the lease sale stage was unnecessary or that these laws were "merely a 'speed bump' on the road to a predetermined destination" is particularly telling of his seeming contempt for the Defendants' cavalier attitude towards federal laws.¹⁷⁴ The State's claims were further bolstered when the judge, in an almost denigrating tone, chided MMS with his comment that "compliance with federal law can be a costly and bothersome proposition."¹⁷⁵

In concluding his scathing review of MMS's activities leading to Lease Sale 200, the judge warned anyone who would bid on Lease Sale 200 to do so "with such knowledge, that, in the opinion of the undersigned, Defendants' compliance with the NEPA, the CZMA, and the OCSLA is questionable at best, and that plaintiffs have a substantial likelihood of prevailing on the merits."¹⁷⁶ He also warned prospective bidders to enter their bids under the doctrine of *caveat emptor*, as he expected that Lease Sale 200 would be permanently enjoined following the November trial.¹⁷⁷

IV. THE STATE SETTLES

Lease Sale 200 went forward as planned on August 16, 2006. It netted record-setting profits for the federal government despite the warnings of Judge Engelhardt.¹⁷⁸

Following the lease sale, pursuant to Judge Engelhardt's orders, the parties entered into settlement negotiations that lasted from late August until mid-October. Presumably as a result of Judge Engelhardt's strong language in his opinion, MMS came to the table with substantial concessions. On October 24, 2006, the parties reached a settlement on terms very favorable to the State of Louisiana, eliminating the need for the November trial.¹⁷⁹ The terms of the settlement represented a larger win for the State than it could have gotten had it prevailed at trial.

The salient points of the settlement are as follows:

173. *Id.* at 17-20.

174. *Id.* at 17.

175. *Id.* at 20.

176. *Id.* at 21.

177. *Id.*

178. Press Release, MMS, Western Gulf of Mexico Sale Attracts \$462.8 Million in Bids (Aug. 16, 2006, <http://www.mms.gov/oc/press/2006/press0816.htm>).

179. Settlement Agreement, *Blanco v. Burton*, No. 06-3813, 2006 WL 23666046 (E.D. La. 2006).

(1) no further OCS lease sales will be conducted in the Central or Western Gulf until MMS completes a new EIS that incorporates analyses of the 2005 hurricane impacts and the cumulative impacts of past lease sales;¹⁸⁰

(2) the next CD submitted to the State will not tier off of previous documents;¹⁸¹

(3) any exploration plan submitted to the State before the completion of the EIS must be accompanied by an EA which will not be subject to a categorical exclusion (CE);¹⁸²

(4) any response to a Section 19 letter from the Governor on the next lease sale will come from the Office of the Secretary of DOI and not a low-level representative;¹⁸³ and

(5) the court will retain jurisdiction over the settlement terms to ensure MMS's compliance.¹⁸⁴

Although Lease Sale 200 was not cancelled, the State was able to retain substantial oversight of any activities undertaken pursuant to that sale. In addition, Lease Sale 201, originally set for March of 2007, was cancelled.¹⁸⁵ This is beyond the scope of what the State could have gotten at trial.¹⁸⁶

Under Part (1) of the settlement terms, the State succeeded in putting a halt to OCS activities until MMS completed a new EIS. The subject of Louisiana's lawsuit was only stopping Lease Sale 200. The settlement put a stop to all lease sales following Lease Sale 200 until an EIS was completed that incorporated analyses of the 2005 hurricane impacts and the cumulative impacts of past lease sales. Although MMS had an EIS in the works at the time of

180. *Id.* at 3.

181. *Id.*

182. *Id.* at 4. The term "categorical exclusion," in a NEPA context, is defined as: a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

40 C.F.R. § 1508.4 (2007).

183. *Id.* at 4-5.

184. *Id.* at 6.

185. Lease Sale 201 was cancelled because MMS could not complete the agreed-upon studies in time for the March date.

186. The settlement went beyond the scope of the lawsuit's focus—Lease Sale 200—and resulted in the cancellation of Lease Sale 201. Because Lease Sale 201 was not a part of the State's suit, had the settlement terms been different, a separate suit would have been necessary to affect that sale.

settlement,¹⁸⁷ there was no way to incorporate the settlement requirements and get it to final form in time to hold the next scheduled lease sale. Thus, Lease Sale 201, originally scheduled for March 2007, was cancelled.¹⁸⁸ The acreage was included in the proposed Lease Sales 204 and 205, scheduled for August 2007 and March 2008, respectively.¹⁸⁹

Part (2) of the settlement was aimed at eliminating the cut-and-paste nature of MMS's environmental documents. MMS/DOI agreed not to tier off of earlier documents in preparing the next CD (which would be for Lease Sale 204 because Lease Sale 201 was cancelled). The idea behind this settlement term was that forcing MMS to make a completely new document would force a more meaningful examination of the LCRP and impacts to the coastal zone. The outcome of these hopes is discussed *infra*.

Part (3) of the settlement was a compromise between the State and MMS on Lease Sale 200. Because MMS would not rescind Lease Sale 200, which had already occurred by the time of settlement, the State secured a promise that no exploration and development activity would occur on acreage let under Lease Sale 200 without the completion of an EA for that activity. This essentially put a halt to the exploration and development of the Lease Sale 200 acreage until the EIS was completed, effectively shutting down Lease Sale 200 as well. Additionally, knowing that most exploration and development activities are afforded CEs under NEPA,¹⁹⁰ in order to ensure State oversight over these activities, the EAs would be submitted to the Coastal Management Division of the Louisiana Department of Natural Resources for consistency review. Although this was an important part of the settlement, no such activity occurred before the finalizing of the new EIS. Thus, this portion of the settlement was not tested.

Part (4) of the settlement was intended to require DOI to show low-level officials at MMS were not dismissing the State's concerns without meaningful examination of the State's concerns

187. See MMS, OUTER CONTINENTAL OIL & GAS LEASING PROGRAM: 2007-2012, DRAFT ENVIRONMENTAL IMPACT STATEMENT (2006) (the completion date of this DEIS was July of 2006, meaning that the new five-year program was well under way in the planning stages even when Louisiana filed its lawsuit in July of 2006).

188. John A. Sullivan, *MMS Cancels Planned Gulf Lease Sale, Begins Environmental Study*, NATURAL GAS WK., Nov. 27, 2006, at 3.

189. *Id.*

190. See *League for Coastal Protection v. Kempthorne*, 2006 WL 3797911 (N.D. Cal. 2006) (noting that 36 categorical exclusions were granted for exploration and development activities off the central California coast in November of 1999).

by the leadership at DOI. This term ensured that the concerns were brought to the attention of a cabinet-level official within the federal government.

Part (5) of the settlement is fairly self-explanatory. This part ensures that the court would be able to issue orders to MMS to force it to comply with the terms of the settlement should its performance on any other parts be found to be deficient. This was simply a mechanism to ensure that the Defendants would act in good faith and live up to the terms of the settlement.

V. A CRITICAL ANALYSIS OF THE OPINION

For many years,¹⁹¹ and with increased intensity in the Lease Sale 200 comment letters,¹⁹² the State of Louisiana has decried the cumulative and indirect impacts of OCS activity on its coastal zone. These impacts include cumulative damage to coastal wetlands from increased vessel traffic and pipeline construction, increased strain on State and local infrastructure such as roads and social services as a result of increased OCS activity, among many others.¹⁹³ These impacts were occurring constantly before the 2005 hurricanes and continue to occur after them. Indeed, had the storms never occurred, Louisiana would still have had substantial grounds for challenging Lease Sale 200 based on these impacts, as it attempted to do in 1991.¹⁹⁴

Despite the State's efforts to focus much of its challenge on these constant impacts, Judge Engelhardt seemed unconcerned.¹⁹⁵ There is no discussion of the State's claims of injury resulting from cumulative and indirect impacts in the Judge's Order and Reasons. It is difficult to divine a reason for this failure to consider such significant claims. Did the judge simply feel that the claims lacked merit? Did he misconstrue the State's claims regarding cumulative and indirect impacts as merely hurricane-related problems? Did the cumulative and indirect impacts just get lost in the shuffle of considering so many issues? It is impossible to know. What we do know, though, is that *Blanco v. Burton*

191. See, e.g., Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, MMS (Apr. 15, 2005) (on file with author).

192. See e.g., Letter from Kathleen Babineaux Blanco, Governor of La., to Renee Orr, MMS (Jun. 14, 2006) (on file with author).

193. *Id.*

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

195. The judge did acknowledge the State's concerns but did not undertake a critical analysis of them. See Order and Reasons at 16-17, *Louisiana v. Lujan*, 777 F. Supp 486 (E.D. La. 1990) (No. 06-3813).

taught us nothing about the strength of state challenges to OCS activity solely for its cumulative and indirect impacts. The judge's focus on hurricane damage and MMS's failure to adequately study the impacts of the storms on its prior assumptions about Louisiana's coastal environment made this case more of a commentary on how the federal government deals with disasters than a test of state power under federal environmental laws. The hurricane focus, while vindicating the State's concerns and claims in its comment letters on that matter, largely appears to limit the precedential value of the case. With no critical analysis of MMS's evaluation of cumulative and indirect impacts in its environmental studies and with no consideration of the federal consistency requirements of the CZMA, it is difficult to understand how future courts might rule on OCS challenges based on this case.

It is encouraging that the judge was highly critical of MMS's less-than-complete considerations of storm impacts on Louisiana's coastal environment. The judge's strong language and poor view of that agency's compliance with its own laws should raise a red flag that will put other courts on alert for corner-cutting by MMS in the future.¹⁹⁶ For example, regarding the inadequate assumptions made by MMS, the judge assessed, "The Court agrees with the State's submission that the direct, indirect and cumulative impacts of the proposed activity are likely to be significantly different; and that the EA provides no real analysis or insight of why those impacts are not now different."¹⁹⁷

Of the CD, the judge commented that "[v]oid of anything more than a perfunctory passing mention of such, MMS has failed to include new, pertinent information that reflects significantly-changed circumstances after Hurricanes Katrina and Rita"¹⁹⁸ and that "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."¹⁹⁹

The judge's harsh assessments of MMS's practice in preparing its environmental documents abound in his opinion and are too numerous to recount here. These assessments represent one of the major accomplishments of Louisiana's challenge. They es-

196. Examples of these assessments have already been quoted in this article. *See, e.g., supra* notes 151, 153, & 156 and accompanying text.

197. *Blanco v. Burton*, No. 06-3813, 2006 WL 2366046, at *9 (E.D. La. 2006).

198. *Id.* at *11.

199. *Id.*

establish a clear message to future courts that, though MMS may be due deference as a federal agency, that deference must be tempered with a critical analysis of the agency's actions, as they very well may be substantially inadequate. It seems that, following *Blanco v. Burton*, no court should reasonably be able to dismiss a state's environmental concerns regarding MMS activity without a comprehensive examination of the process behind its conclusions.

The judge's assessment of MMS also puts the agency in a difficult position should Louisiana decide to challenge its environmental assessments again. The deficiencies noted by the judge will surely be reexamined in future challenges in an effort to determine whether the agency has taken serious criticisms to heart and attempted to change its ways or whether it has disregarded the sound assessments of the judge and continued with a business-as-usual approach. Basically, the judge's strong language should put MMS on notice that its corner-cutting will no longer be tolerated. This shot across the bow of MMS should stand as a stern warning that, should there be no changes in practice, the next court will not be so deferential to the agency's actions. For these reasons, Louisiana's case was a resounding success, not just for Louisiana's coastal environment, but for all coastal states. It should have the effect of raising the bar on the quality of environmental studies done by MMS, as the next court will certainly not be as forgiving as this one should nothing change.

The major disappointment of Judge Engelhardt's Order and Reasons was his failure to find that the Lease Sale rose to the level of the irreparable harm required for the issuance of a preliminary injunction.²⁰⁰ Although it is impossible to know for sure why the judge did not find that irreparable harm would flow from the Lease Sale, it seems reasonable that his failure or refusal to critically consider the State's allegations regarding cumulative and indirect impacts would have to play a substantial role.

Viewed in isolation, as the Defendants urged the judge to do,²⁰¹ a lease sale is nothing more than an opening and reading of bids for potential future exploration and development activities, a paper transaction. However, a complete understanding of the importance of the lease sale stage of the OCS exploitation process cannot be had in such isolation. The lease sale process must be

200. *Id.* at *1.

201. A similar argument was successfully advanced in *Sec'y of the Interior v. California*, 464 U.S. 312, 342 (1984), but has since been legislatively overruled. See Kalen, *supra* note 34, at 205-206.

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.²⁰² The lease sale stage of the process is where the last comprehensive examination of all subsequent environmental impacts may be had and where the cumulation of all potential exploration and development activities should be viewed in concert.²⁰³ Never again, for all activities that flow from one sale, will there be a chance to view their cumulative harms in a legally required environmental document.²⁰⁴ 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.²⁰⁵ Indeed, many of these activities, when viewed in isolation, do not appear to represent significant threats. Thus, they are permitted and often afforded the status of a categorical exclusion from NEPA review.²⁰⁶ Although it may very well be that such individual, isolated events do not amount to substantial environmental threats, the cumulation of all of the potential activities that are given the green light by a single lease sale can, very easily, amount to a “death by a thousand cuts” to a state’s coastal environment.²⁰⁷

Further adding to the necessity to find the lease sale process as the final and substantial impact on the entire OCS process is the volume of industry resources that become committed to planned activities after the lease sale occurs.²⁰⁸ It is very possible that, once bids are made and awarded, the winning industries begin to acquire vested rights in their leases that will become more and more difficult to take away later should environmental harms be determined at a future date. Indeed, although Judge Engelhardt believed that no harm could occur between his denial of the preliminary injunction and a hearing on the permanent injunction

202. Kalen, *supra* note 34, at 208-11. 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).

203. Kalen, *supra* note 34, at 208-11.

204. See *id.*

205. 30 C.F.R. §§ 250.202, 282.20, & 282.28.

206. *League for Coastal Protection v. Kempthorne*, 2006 WL 3797911 (N.D. Cal. 2006); 40 C.F.R. § 15084 (2007).

207. See *supra* note 117 (discussing cumulative impacts in environmental protection and coastal zone management).

208. Interview with Megan K. Terrell, Assistant Attorney Gen., La. Dep’t of Justice, in Baton Rouge, La. (Aug. 14, 2006).

some ninety days later,²⁰⁹ MMS had already awarded bids long before the tolling of the ninety days. This means that, should he have found for the State at the permanent injunction stage, the industries who had won their bids may very well have had Fifth Amendment takings claims against MMS for their lost investments in the interim period. Such would have been a precarious situation; one that could explain the API's change of position the day following the judge's issuance of his Order and Reasons.²¹⁰

Due to both 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 future courts focus their attention. Later injunctions, at the exploration and development stage, are comparative slaps on the wrists of the federal government that do little to assist in coastal protection or to avoid harm to industry.

VI. ISSUES RAISED BY THE DEFENDANTS THAT WERE NOT ADDRESSED BY THE JUDGE

The bulk of Judge Engelhardt's Order and Reasons was devoted to the allegations of the State. The Defendants raised numerous defenses to the State's allegations, most of which were not addressed by the court. The major defenses that were raised related to the State's history of concurring in consistency determinations and the State's own in-state oil and gas leasing activity in the time since Hurricanes Katrina and Rita. The latter was addressed by the court and is further considered in Part VII. The

209. Blanco v. Burton, No. 06-3813, 2006 WL 2366046, at *1 (E.D. La. 2006).

210. See Motion for Amended Order, American Petroleum Institute as Applicant-for-Intervention, Burton v. Blanco, No. 06-3813 (E.D. La. Aug. 15, 2006). In its Motion for Amended Order, filed on August 15, 2006—the day after Judge Engelhardt issued his Order and Reasons—the API requested that the court issue an order directing MMS not to open the sealed bids for Lease Sale 200 and require that MMS provide notice to bidders prior to actually opening the bids in order that the bids may be retracted, if necessary, based on the outcome of the State's lawsuit. Part of the impetus for this request was that the API's members were concerned that, should the State prevail at a trial on the merits—a reality that appeared likely based on the strong language of Judge Engelhardt's opinion—the bid deposits would have already been deposited into the U.S. Treasury and would be very difficult to retrieve. See *id.* at 2. The API also claimed that allowing the lease sale to go forward in light of a pending trial would undermine the sealed bid process by essentially tipping the hands of the bidders when the bids may have to be thrown out and resubmitted. *Id.* at 3.

former is addressed here along with some of the other important issues raised by the Defendants but left unaddressed by the judge.

A. The State of Louisiana's History of OCS Approval

The Defendants attempted to portray the State as somewhat opportunistic in its decision to choose 2006 as the time to begin objecting to lease sales by contrasting the years of concurrences to OCS activities as a sudden change in policy. Examples of this attempt to use the State's history against it abound in the Defendants' Memorandum:

Considering Louisiana's past practice of concurring on similar CDs, its continuing approval of oil and gas activities in state and federal waters, and MMS's extensive review of the potential environmental harms as set forth in the CDs, EIS, and EAs, MMS' consistency determination was a reasonable one and cannot be viewed as arbitrary and capricious.²¹¹

Perhaps the State was a bit opportunistic, choosing to take a stand on the protection of its coast in the immediate wake of two natural disasters that awakened even the most ardent skeptics of coastal protection to the legacy of decades of environmental degradation. Is this wrong? Surely not. Admittedly, there was a change in policy from past governors to the Blanco Administration. However, neither of these facts should be dispositive of the merits of the State's case, and apparently Judge Engelhardt gave them no credence as evidenced by his lack of attention to such matters in his Order and Reasons.

Indeed, the Judge's decision not to consider the State's history of assenting to OCS activities was directly in keeping, whether conscious or not, with Department of Commerce decisions on exploration and development permit denials under the CZMA.²¹² In such matters, the Secretary of Commerce has noted that a state's prior history with respect to OCS activities is not relevant to the question of the validity of particular claims. In other words, each case should be judged on its own merits and a state cannot be estopped from objecting to OCS activities merely because it has not

211. Defendant's Memorandum, *supra* note 121, at 49.

212. See Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc. from an Objection by the State of Florida at 9 (U.S. Dep't of Commerce NOAA Jun. 20, 1995), <http://www.ogc.doc.gov/czma.nsf> (click on arrow to the left of "Decisions of the Secretary," select document dated 06/20/1995, then click on "MobilPensacola.pdf").

done so in the past. Such a scenario as the Defendants urged in their Memorandum would effectively eviscerate the utility of the consistency provisions of the CZMA and the entire NEPA process and Judge Engelhardt rightly left this matter unaddressed.

B. Impacts to the National Interest

A section of the Defendants' Memorandum was devoted to why the issuance of a preliminary injunction would be detrimental to the national interest.²¹³ Although the Defendants made much of this issue, the judge left the matter unaddressed.

The Defendants argued that, should a preliminary injunction be issued to stop Lease Sale 200, "the Secretary will be restricted from effectively implementing his duty under the OCSLA to develop the mineral resources of the OCS."²¹⁴ Beyond the statutory duties of the Secretary to maximize returns from the OCS, an examination of the national interest argument is warranted.

The Defendants' arguments were unsurprising. They focused on the volatile energy situation worldwide with such comments as, "[t]he Nation is experiencing a shortage of natural gas and natural gas is difficult to import . . . any delay of this sale imposes significant and unnecessary economic and national defense costs on the United States and the public."²¹⁵ The Defendants also noted that, "if the Lease Sale is cancelled or delayed, losses to the U.S. Treasury could top \$285 million."²¹⁶

What the Defendants did not touch on (not surprisingly, as it would have been a statement against their interests) was the energy and national security problems caused by continuing the federal government's wanton disregard for Louisiana's coastal zone. It is precisely the failure of the federal government to ensure more environmentally sound activities undertaken pursuant to permitted OCS activities that threatens the continued exploitation of this resource more than one cancelled lease sale.

The bulk of the infrastructure to support Gulf of Mexico OCS activities is based in Louisiana's coastal zone.²¹⁷ The current coastal land loss, of which the cumulative and indirect OCS im-

213. Defendant's Memorandum, *supra* note 121, at 26-30.

214. *Id.* at 27.

215. *Id.* at 29

216. *Id.*

217. Henry, *supra* note 9, at 3.

pacts are a contributor,²¹⁸ threatens the continued existence of this infrastructure. Were this infrastructure to be damaged or destroyed, the national interest would be staggeringly damaged. The failure to recognize the protection of Louisiana's coastal zone as a primary interest of the protection of national security interests could lead to massive losses in the future. Indeed, as Hurricanes Katrina and Rita recently demonstrated, these threats may not come from slow, cumulative processes. The damage from such storms poses a clear and present threat to Louisiana's OCS support infrastructure that can be mitigated by more protective policies towards the land areas within the coastal zone.²¹⁹

Because Louisiana's coastal wetlands also protect the strategic petroleum reserve,²²⁰ the interests of not only energy independence as a national security concern, but the actual fuel for the nation's security depend on the continued survival of Louisiana's coastal zone. Rather than the Defendants' claims that national security is threatened if one lease sale does not go forward as planned, it is certainly threatened if the failure to protect the coast leads to infrastructure damage that disrupts the delivery of the OCS products to market.

C. Attempts to Frame the Case as Being About Money

Although there were no such claims in any document filed by the State, the Defendants tried to frame the State's environmental compliance challenge as a bid for a greater share of OCS revenues. Such attempts to divert the court's attention from the environmental issues are evidenced by statements such as the following: "Louisiana has repeatedly suggested that it does not want to stop OCS oil and gas activities in the Gulf of Mexico; to the contrary, it wants more federal assistance associated with OCS activities. MMS has repeatedly advised the State that 'only Congress can authorize this funding.'"²²¹

218. Kalen, *supra* note 34, at 193. See also Andrew S. Jessen, Comment, *Louisiana and the Coastal Zone Management Act in the Wake of Hurricane Katrina: A Renewed Advocacy for a More Aggressive Use of the Consistency Provision to Protect and Restore Coastal Wetlands*, 12 OCEAN & COASTAL L.J. 133, 157 (2006).

219. For a comprehensive discussion of the storm-protective nature of wetlands, see generally Ryan M. Seidemann & Catherine D. Susman, *Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives*, 17 J. ENVTL. L. & LITIG. 441 (2002).

220. See Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 1, at 65 n.251 (1984) (noting the extensive strategic petroleum reserve infrastructure running through Louisiana's wetlands).

221. Defendants' Memorandum, *supra* note 121, at 29-30.

The “more money from Congress” issue became the white elephant in the room throughout the entirety of the State’s challenge. It would be a falsehood to state that Louisiana did not and does not need more money from the federal government to protect its coastal zone from natural and anthropogenic devastation. However, as the Defendants rightly pointed out, such funding cannot come from challenges to OCS activities under the theory that MMS has done a shoddy job of complying with federal law in its environmental analyses and mitigation programs.²²² States have a sovereign right to take a variety of steps to carry out their public trust duties.²²³ Among these steps are such things as congressional delegates lobbying for more financial support from the federal government for environmental protection,²²⁴ filing suit against polluters for restoration and remediation of contaminated sites,²²⁵ passing more stringent environmental protection laws,²²⁶ and suing the federal government to ensure the compliance of federally permitted activities with existing environmental laws.²²⁷ All of these avenues have been pursued by Louisiana in the past few years. Thus, Louisiana’s challenge to MMS’s activities must be viewed as yet another component of a more environmentally protective paradigm that is currently in place in the State. Unfortunately, despite numerous attempts to disabuse the media of the notion that the State’s case had merits as an environmental challenge,²²⁸ some continued to view the matter as the litigious blackmail of Congress with the ransom being a greater share of OCS revenues.²²⁹ Thankfully, Judge Engelhardt did not take the bait from the Defendants on this issue. The matter was not addressed in his opinion. Conversely, he did find Louisiana’s strictly envi-

222. *Id.*

223. See generally James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861 (1992).

224. See Langford et al., *supra* note 1, at 145-47.

225. See, e.g., State of Louisiana’s Petition for Intervention and for Continuance of Trial Date, *Weeks v. Shell Oil Co.*, No. 100,988 (La. 16th Jud. Dist., Div. A. Sept. 5, 2005).

226. See, e.g., S.B. 665, 2006 Leg. (La. 2006); H.B. 2022, 2003 Leg. (La. 2003).

227. See, e.g., *Louisiana v. Lujan*, 777 F. Supp. 486 (1990); *Blanco v. Burton*, No. 06-3813, 2006 WL 2366046, at *1 (E.D. La. 2006).

228. See examples of such attempts in articles such as, Pam Radtke Russell, *Blanco Sues to Halt Sales of Energy Leases: Her Round-About Move Seeks More Royalties for State*, NEW ORLEANS TIMES PICAYUNE, July 21, 2006, at 1; *Blanco Not the First to Sue Over Oil Leases*, BATON ROUGE ADVOCATE, July 23, 2006, at B1.

229. See Sullivan, *supra* note 29; see also Landry, *supra* note 29, and accompanying text.

ronmental claims to have merit.²³⁰ It is no small vindication of the State's efforts to deflect uninformed charges of blackmail that even after Congress has allocated more OCS revenues to the State, Louisiana continues to strongly criticize MMS's handling of environmental matters that affect the State's coastal zone.²³¹

D. Louisiana as the Lone Dissenter Should Be Ignored

One final matter raised by the Defendants but ignored by the judge in *Blanco v. Burton* was an implied argument that because Louisiana was the only state to submit comments on Lease Sale 200 that it should be ignored as a lone dissenter.²³² Such a claim defies logic, as it, if followed to its end, would have the claims of any party that raises valid objections to any violation of the law by the federal government, should they be alone in objecting, branded as meritless for lack of community support. Such arguments amount to a reverse bandwagon argument, whereby the federal government's claims that "no one else is objecting, so why are you" would be grounds for ignoring otherwise meritorious issues. Again, as with the other previously discussed claims, Judge Engelhardt did not accept this one and he apparently found no need to comment on the lack of objections from Texas, Alabama, and Mississippi (the other adjacent states for a Western Gulf lease sale).

Also unconsidered in this implicit claim was the reality that Louisiana has the most to lose in terms of environmental integrity from OCS activities in the Gulf of Mexico. This reality results from Louisiana having substantially more exposed coastline than Texas, Mississippi, and Alabama and from the bulk of the onshore support for OCS activities residing within Louisiana's coastal

230. Examples of such a finding are rife in Judge Engelhardt's opinion. For example, the judge stated, "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." *Blanco v. Burton*, No. 06-3813, 2006 WL 2366046, at *11 (E.D. La. 2006). Another example comes from the Judge's comments on the Section 19 response from MMS:

the State has made a *prima facie* case that their offhanded dismissal of the Governor's recommendations with only a general response was not a serious consideration nor a reasoned determination to accept or reject these recommendations, in favor of a deliberate and forced effort to meet a preexisting scheduled lease sale date.

Id. at *14.

231. Henry, *supra* note 9, at 12-16.

232. Defendant's Memorandum, *supra* note 121 at 35 n.12.

zone.²³³ Thus if any state were to object to MMS's flawed environmental analyses, it should be Louisiana first, as it clearly has the most to lose.

VII. LESSONS LEARNED

Louisiana's challenge to MMS on OCS leasing represents the first real comprehensive challenge of such activities in at least two decades. Obviously, the case, while accomplishing much through Judge Engelhardt's critical evaluation of MMS's environmental practices, was not an all-out win for the State. However, lessons were learned from this challenge, both good and bad, that should provide guidance to future challengers. Some of these lessons are addressed in this part and some in Part VIII.

A. Experiences With the Affidavits and Assistance from the Scientific and Local Communities

Because the State's lawsuit against MMS was largely an administrative record review, it was not anticipated that there would be an opportunity to present external evidence and witnesses to refute what the State perceived as the unfounded conclusions contained in MMS's documents.²³⁴ The solution to this was to submit into the record twenty-three affidavits from experts around the country in coastal ecology, sociology, fisheries, archaeology, tourism, engineering and climatology.²³⁵ Also among the affidavits gathered by the State were anecdotal affidavits from lo-

233. See *Oil and Gas Licenses on the Outer Continental Shelf: Hearing Before the S. Comm. on Energy and Natural Resources*, 110th Cong. (2007) (testimony of Marjorie A. McKeithen, Assistant Secretary for Mineral Resources, Louisiana Department of Natural Resources).

234. Ryan M. Seidemann, *How the West was Won: Louisiana's Challenge to Western Gulf Lease Sale 200*, Presentation at the 12th Annual Gulf States and Caribbean Coastal Managers Meeting (2006) (transcript on file with author).

235. The affiants for the State of Louisiana in *Blanco v. Burton* were: Robert G. Bea, Ph.D. (engineering); Donald F. Boesch, Ph.D. (coastal environment); Mr. Henri R. Boulet (local leader); Mr. Windell A. Curole (local leader); Secretary Angèle Davis (tourism); Mark S. Davis, Esq. (environmental attorney); John W. Day, Ph.D. (coastal environment); C. Berwick Duval, Esq. (attorney and local leader); Mr. Ted Falgoust (local leader); Mark A. Ford, Ph.D. (coastal environment); Mr. Thomas M. French (economics); Robert B. Gramling, Ph.D. (sociology and economics); Mr. Jeffrey D. Harris (coastal environment); Prof. Oliver A. Houck (environmental attorney); Barry Keim, Ph.D. (climatology); Mr. Randy Lanctot (wildlife); John Lopez, Ph.D. (coastal environment); Charles R. McGimsey, Ph.D. (archaeology); Mr. Mark Northington (tourism); Mr. James D. Rives (coastal environment); Parish President Benny Rousselle (local leader); Christopher M. Stojanowski, Ph.D. (archaeology); Robert Eugene Turner, Ph.D. (coastal environment). *Blanco*, 2006 WL 2366046, at *1.

cal leaders. This allowed the State to make a strong case to the judge to counter MMS's claims, even in an administrative records review case.

The State was not alone in bolstering its case with affidavits. Both the Defendants and API submitted affidavits with their memoranda, though neither submitted nearly as many as did the State, nor did the Defendants' and Intervenors' affidavits cover as many topics as did the State's.

It was clear that the affidavits figured prominently into Judge Engelhardt's decision-making process. Such is evident by the following language from the Order and Reasons and its accompanying footnote: "Given the substantial evidence before this court that material changes have occurred since the Fall of 2002 with respect to the affected baseline environment, as well as the tendentious conclusions set forth in MMS's EA, the Plaintiffs' likelihood of success on the merits is strong."²³⁶ The response of the court to Louisiana's affidavits was favorable and, though other courts will certainly differ in the acceptance of such testimony, it should serve as a model for future OCS challenges by states.

The key to obtaining such affidavits is the cultivation of close collaborative relationships with the scientific and local communities early on in the comment process. Louisiana benefited from the existence of such networks throughout the Lease Sale 200 challenge process. During the comment process, the State had scientific and legal experts with specializations in the relevant fields review and comment on the State's letters. Caucuses were held with groups of scientists and with local leaders to frame the issues and ensure accuracy. Some of these experts ultimately executed affidavits for the case, some remained behind the scenes as advisors. All of this activity was done on a volunteer basis. There is little doubt that the strength of the State's case benefited substantially from these relationships early on in the process to ensure the maximization of intellectual resources at all points of the challenge.

B. Careful Adherence to the Entire Process

When Louisiana decided to challenge Lease Sale 135 in 1991, the decision was made at the very last minute.²³⁷ Consequently,

236. *Id.* at *9. The "substantial evidence" referred to was "the affidavits of Mr. [sic] Robert G. Bea, Mr. Mark S. Davis and several others attached to Plaintiffs' Memorandum." *Id.* at *9 n.15.

237. Langford et al., *supra* note 1, at 138-43.

the State suffered from a failure to preserve all administrative challenges and to meet administrative deadlines.²³⁸ The State lost that case without ever reaching the merits of the challenge.²³⁹

The State learned from its 1991 mistakes and approached Lease Sale 200 from a more comprehensive perspective. Preparations for a possible lawsuit began at the initiation of the administrative comment process. All deadlines were strictly adhered to (though the State did request extensions from time to time).²⁴⁰ Every “i” was dotted and every “t” was crossed. Thus, the mistakes of 1991 were not repeated and the State obtained a favorable decision on most of the merits of its case.

The lesson to be learned from Louisiana’s experiences with OCS challenges is that the process cannot be done properly in a flying-by-the-seat-of-your-pants fashion. Timelines must be made, resources must be allocated, deadlines must be met, and all procedural rules must be followed; there is no room for error or corner-cutting. Challenges to OCS activity must be well-planned in advance to avoid the pitfalls of a complex administrative process.

C. Louisiana’s Oil and Gas Activities as a Factor

One hard-learned lesson by the State was that its own oil and gas permitting activities within its coastal zone would become an issue. Although what the State does in its own jurisdiction is immaterial to whether the federal government has complied with the relevant environmental laws, the Defendants tried to make it an issue in an effort to deflect some of the blame for degrading Louisiana’s coast from themselves.²⁴¹ Thankfully, the State had a ready answer to this immaterial issue. However, states planning similar challenges to MMS should similarly be ready to address this matter.

The basic argument of the Defendants was that why should they be held to such a stringent standard of environmental compliance when the State does not conduct environmental studies in advance of oil and gas leasing activities within its borders? The

238. *See generally* Louisiana v. Lujan, 777 F. Supp. 486 (1990).

239. *Id.*

240. *See, e.g.*, Letter from Jim Rives, Acting Adm’r, Office of Coastal Restoration & Mgmt., Coastal Mgmt. Div., La. Dep’t of Natural Res., to Chris C. Oynes, MMS (May 19, 2006) (requesting an extension of a comment period related to Lease Sale 200) (on file with author).

241. *See* Defendants’ Memorandum, *supra* note 121, at 49.

answer to this question is simple. If something goes wrong on a federal lease that causes environmental damage to Louisiana, the State has no direct right of action for the damages. It cannot sue the lessees for failure to comply with regulations and it may have problems proving direct damages from environmental accidents or violations that occur off its coast. In other words, with federal leases, the State has no guarantee that its environment is protected if something goes wrong and, worse yet, it has to rely on the federal government to enforce environmental laws and regulations on the OCS even when the State alleges that the federal agencies tasked with environmental protection of the coastal zone are not complying with their own laws. This creates a substantial problem whereby the State is at the mercy of what the federal government pleases to do on the OCS.

In contrast to the lack of control of environmental compliance and harms in the OCS, in State waters, there is now a litany of legal options to ensure environmental protection. As an initial matter, language is present in the State leases that provides for site cleanup.²⁴² Such is not the case in federal leases.²⁴³ Additionally, the Louisiana Legislature has, over the past few years, passed legislation to ensure the remediation of environmental damage.²⁴⁴ These laws give the State the power to ensure remediation of contamination should anything go wrong on a State lease.²⁴⁵ Additionally, the Louisiana Attorney General has the authority to institute actions under the Public Trust Doctrine

242. See STATE OF LOUISIANA LEASE FOR OIL, GAS AND OTHER LIQUID OR GASEOUS MINERALS ¶ 4, <http://dnr.louisiana.gov/MIN/forms/2000%20blank%20lease%20form.pdf> (last visited Apr. 28, 2008).

243. See UNITED STATES DEPARTMENT OF THE INTERIOR, MINERALS MANAGEMENT SERVICE, OIL AND GAS LEASE OF SUBMERGED LANDS UNDER THE OUTER CONTINENTAL SHELF LANDS ACT, FORM MMS-2005 (1986). No pinpoint citation to a specific part of the lease form is available because there is no enforceable environmental protection language in the lease.

244. See H.B. 2022, 2003 Leg., Reg. Sess. (La. 2003); S.B. 665, 2006 Reg. Sess. (La. 2006).

245. It should be noted that since the passage of these laws, the State has proven that they are not mere window dressing. The State has intervened in no less than nine suits under these laws and has succeeded in securing remediation in all of the cases that have been resolved to date. See, e.g., *Emergency Petition for Intervention of Right and For Continuance of Trial Date, Armelise Planting Co. v. BP Amoco Corp.*, No. 25,826 (La. 23d Jud. Dist. 1/20/05); see also *Petition for Intervention of Right, Grisham v. TE Products Pipeline Co.*, No. 74244-A (La. 10th Jud. Dist. 2/17/05); *Petition for Intervention of Right, M.J. Farms, Ltd. v. ExxonMobil Corp.*, No. 24,055 (La. 7th Jud. Dist. 9/7/06).

for the remediation of contamination.²⁴⁶ None of these operations are available to the State if environmental harms occur pursuant to a federally granted lease.²⁴⁷ Judge Engelhardt appeared to be satisfied with the protection afforded against in-state environmental harms and did not consider the matter further in his opinion aside from a passing mention.²⁴⁸

One final comment on the mineral activity within State's coastal zone is necessary. Through the coastal use permitting process of the LCRP, Louisiana is required to consider cumulative impacts to coastal resources from all activities including mineral exploration and development.²⁴⁹ As discussed earlier it is extremely difficult to regulate individual activities on the basis of their cumulative effects. Mitigation is often piecemeal and isolated and, despite the "no net loss" goal, it does little to help protect and restore Louisiana's coastal wetlands in the comprehensive manner that will be necessary to accomplish that mammoth task.²⁵⁰ To assert that the State can adequately protect and restore its coastal resources against current impacts and the expected onslaught of new impacts from increased OCS development is misinformed at best, especially in light of the Defendants' characterization of those activities as being in the interests of national security.²⁵¹ If MMS is truly concerned about the adverse effects of its actions on the Louisiana coastal zone, it will work with the State to do a true, comprehensive assessment of all the cumulative impacts, including those from OCS development, and find a way to help the State address the problems. We are not talking about revenue sharing but rather bringing to bear the expertise and experience of the federal government to solve the puzzle of energy needs and environmental protection.

246. See generally Wilkins & Wascom, *supra* note 213. This too has been used in recent years. *Weeks v. Shell Oil Co.*, No. 100,988 (La. 16th Jud. Dist., Div. A. Sept. 5, 2005).

247. One exception to this statement is the natural resources damage claims available to a state under the Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (2006). This law would provide for some reimbursement for the cost of the remediation of oil spills. Indeed, the State makes claims against the Act's fund through the Louisiana Oil Spill Coordinator's Office, however, the Act only applies to oil spills and does not capture the bulk of OCS-related problems, such as wetlands degradation and other cumulative and indirect impacts.

248. *Blanco v. Burton*, No. 06-3813, 2006 WL 2366046, at *16 (E.D. La. 2006).

249. LA. ADMIN. CODE tit. 43, § 723(A)(2) (2006).

250. See generally Katherine E. Yates, *Wetlands Mitigation and Mitigation Banking in Louisiana*, 59 LA. L. REV. 591 (1999).

251. Defendant's Memorandum, *supra* note 121, at 29.

VIII. DISCUSSION

Judge Engelhardt's ruling has both beneficial and disappointing components. It is heartening to see a ruling that includes such a critical analysis of the poor practices of a federal agency that is supposed to conduct its activities in a manner that minimizes impacts to Louisiana's coastal environment. However, there were substantial omissions in the judge's ruling. The most significant of these omissions was the judge's failure to critically examine or rule on the federal government's compliance with the consistency provisions of the CZMA. This failure leaves unanswered the question of whether these provisions, enacted to give coastal states a voice against federally-caused environmental degradation, do actually grant that power to the coastal states. Because the judge chose to largely focus on NEPA compliance, the most powerful coastal zone protection provisions under federal law as applies to OCS activity, the CZMA consistency provisions, remain untested. Because MMS failed to consider ninety of the State's 94 Coastal Use Guidelines,²⁵² it is hard to imagine how Lease Sale 200 could have been found to be consistent to the maximum extent practicable with the LCRP. Instead of finding NEPA violations, Judge Engelhardt could easily have stopped Lease Sale 200 under the CZMA consistency provisions, but he did not. It is impossible to know why these provisions were not a central factor in the judge's decision making process, but his failure to address them is a disappointing oversight.

The other particularly disappointing aspect of the judge's ruling in *Blanco v. Burton* is the fact that the bulk of the decision focused on the hurricane damage to coastal Louisiana alone. This critique is in no way meant to marginalize the impacts of the 2005 storms on Louisiana, but rather to say that the case leaves observers of OCS challenges wondering if, in a nondisaster environment, the State would have garnered such support from the court.

Despite numerous attempts to raise the long-term cumulative and indirect impacts of OCS activity on Louisiana's coastal zone, the crux of the ruling in *Blanco v. Burton* was MMS's failure to adequately account for the storm damage in its environmental documents, not its failure to adequately account for the decades of environmental impacts from OCS activities that occur and accumulate day after day, year after year. The increased vessel wakes, the periodic construction of new pipelines, the degradation

252. *Blanco v. Burton*, 2006 WL 2366046, at *12.

of coastal infrastructure; none of these problems were addressed by the judge, though they accounted for substantial amounts of the State's case.

What Judge Engelhardt actually handed down as his ruling on August 14, 2006, was a disaster opinion rather than a true test of the power of NEPA, the CZMA, and the OCSLA. Undoubtedly, MMS took a beating from the judge in his assessments of its handling of environmental analyses. This constituted no small victory for the State and was a substantial vindication of many of the State's claims. However, the failure to put the CZMA consistency provisions to the test was a great failing of this case. Had the judge focused more broadly on all of the complained-of shortcomings in MMS's environmental work, a more substantial precedent could have been set in which a state's ability to protect its coast through the use of its federal consistency authority could have been proven.

Despite the judge's focus on the failings of a federal agency following massive natural disasters, the opinion is certainly not without precedential value in other respects. It certainly puts MMS on notice that it is no longer acceptable to provide incomplete and unsupported conclusions in its environmental documents. This notice will be extremely useful in the event of future challenges by other states, as it could serve to establish a pattern of poor practices for which a new court should have little patience should the same problems resurface in a new factual context. In other words, the opinion clearly tells MMS to clean up its act and if the agency fails to take the strong criticisms to heart and change some practices, there will be much explaining to do before future courts.

IX. CONCLUSION

Although the State of Louisiana did not win its bid for a preliminary injunction to stop Lease Sale 200, it has shown that effective challenges to MMS can be mounted with strong factual backing. Because the settlement terms were so favorable to the State, the case was a victory for the coastal environment even if the opinion, while good in many respects, fell short of expectations in others.

The opportunity for other courts to test NEPA, the CZMA, and the OCSLA may be on the near horizon. Louisiana has continued its strong opposition to what it perceives as MMS's insufficient environmental analyses in the post-Lease Sale 200

environment. The State has submitted comment letters²⁵³ with harsh words regarding MMS's continued handling of OCS impacts on Louisiana's coastal environment.²⁵⁴ The State did decide, however, not to pursue litigation over the 2007-2012 Multisale EIS and Lease Sale 204.²⁵⁵ However, Louisiana's strong language in its comment letters continues to hold the spectre of litigation. The State has also submitted similarly strong comment letters on Lease Sale 224,²⁵⁶ the lease sale in the Eastern Gulf of Mexico that was authorized by the recent revenue sharing legislation.²⁵⁷

It seems that Louisiana's success with its lawsuit over Lease Sale 200 has spurred nationwide attention to the ability of states to assert their rights under various environmental laws. In February of 2007, the North Slope Borough and the Alaska Eskimo Whaling Commission sued MMS under NEPA seeking to enjoin Lease Sale 202. Lease Sale 202, scheduled for April of 2007, covers federal leases in the Beaufort Sea.²⁵⁸ The plaintiffs claimed various insufficiencies of MMS's EA and FONNSI for Lease Sale 202 violated NEPA provisions, including the impacts of seismic activity on polar bears and whales and the cumulative impacts of lease sale-related activities.²⁵⁹

Disappointingly, Judge Ralph Beistline in the District of Alaska was not as insightful in his decision as was Judge Engelhardt in Louisiana. Judge Beistline substantially deferred, probably more than was warranted considering the opinion in *Blanco v. Burton*, to MMS and its technical expertise.²⁶⁰ Like Louisiana in

253. See, e.g., Letter from Scott A. Angelle, Sec'y, La. Dep't of Natural Res., to Renee Orr, MMS (Jul. 16, 2007) (on file with author).

254. *Id.*

255. This is evident from the consistency determination concurrence for Lease Sale 204. See Letter from Jim Rives, Acting Adm'r, Coastal Mgmt. Div., La. Dep't of Natural Res., to Renee Orr, MMS (June 25, 2006) (on file with author) (dated 2006 in error; letter should have been dated 2007); Letter from Gerald Duszynski, Assistant Sec'y, Coastal Mgmt. Div., La. Dep't of Natural Res., to Joseph A. Christopher, MMS (May 14, 2007) (on file with author).

256. Letter from Gerald Duszynski, Assistant Sec'y, Coastal Mgmt. Div., La. Dept. of Natural Res., to MMS Reg'l Supervisor (Mar. 16, 2007).

257. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 43 U.S.C. § 1331 (2006).

258. MMS, FINAL NOTICE OF SALE, BLOCKS AVAILABLE FOR LEASING, BEAUFORT SEA OIL AND GAS LEASE SALE 202 (2007).

259. Complaint for Declaratory and Injunctive Relief, *North Slope Borough v. Minerals Management Service*, No. 07-cv-00023-RRB (D. Alaska Feb. 26, 2007).

260. Order Denying Motion for Preliminary Injunction at 11-12, *North Slope Borough*, No. 07-cv-00023-RRB, 2007 WL 1106110 (D. Alaska Apr. 12, 2007) [hereinafter NSB Opinion].

Blanco v. Burton, the plaintiffs' request for a preliminary injunction was denied.²⁶¹

The arguments of the defendants were very similar to those proffered in *Blanco v. Burton*.²⁶² Among these were that "potential injury anticipated by Plaintiffs is speculative and would arise only, if at all, at the future exploration and development stages which are subject to additional regulatory control."²⁶³ The defendants also decried the impacts of a preliminary injunction to the national interest of domestic oil and gas development.²⁶⁴ As noted at length above, these arguments are circular. If you cannot challenge at the lease sale stage and activities at the exploration and development stage are subject to a categorical exclusion and are otherwise too incremental to be identified except cumulatively, then the legal protections afforded the states with respect to OCS development are rendered meaningless. Certainly Congress did not intend this result and it is unfortunate and shortsighted that Judge Beistline took the defendants' bait.

In addition to the North Slope Borough challenge to Lease Sale 202, the Center for Biological Diversity ("CBD") has recently filed suit against MMS on the 2007-2012 Leasing Program in the District of Columbia Circuit.²⁶⁵ The CBD's claims include alleged violations of the OCSLA, the ESA, and NEPA by MMS.²⁶⁶ The CBD's Petition for Review does not provide any details on its allegations, but the tenor of its comment letter on the Leasing Program is telling of future filings.²⁶⁷ The CBD, in short, claims that MMS's Draft EIS and Leasing Program contain "deficiencies in content, analysis, and conclusion . . . so severe as to render the documents and any decision approving them legally infirm."²⁶⁸ The noted deficiencies include a failure to analyze greenhouse gas emissions, use of outdated information, failure to adequately consider cumulative impacts, among others.²⁶⁹ It will be interesting

261. *Id.* at 4.

262. *Id.* at 3.

263. *Id.* at 3.

264. *Id.*

265. Petition for Review, Center for Biological Diversity v. United States Dep't of the Interior, No. 07-1247 (D.C. Cir. Jul. 2, 2007).

266. *Id.*

267. Letter from Kassie Siegel & Brendan Cummings, Dirs., Ctr. for Biological Diversity, to Renee Orr & James F. Bennett, MMS (Nov. 21, 2006) (on file with author).

268. *Id.*

269. *Id.*

to watch the development of this case and its impacts on future MMS decision making.

Unfortunately, neither post-*Blanco v. Burton* OCS challenges raised CZMA concerns with respect to MMS's OCS activities. Compounding this disappointment is Judge Engelhardt's failure to put the CZMA to the test in *Blanco v. Burton*.²⁷⁰ It is surprising and disappointing that the North Slope Borough challenge did not rely on the substandard practices of MMS found by Judge Engelhardt in *Blanco v. Burton* to bolster its claims. Citation to the *Blanco v. Burton* opinion may have gone a long way towards raising Judge Beistline's suspicions of the deference that he afforded MMS in that decision.

It is unclear, as of yet, if Louisiana accomplished its goal of achieving greater protection of its coastal environment with its 2006 lawsuit against MMS. There are some indications that MMS has made some effort to do a better job with its environmental documents,²⁷¹ and this is encouraging. However, it will likely be several years before the full effect of the 2006 litigation is known. *Blanco v. Burton* should set the burden of proving the insightfulness and utility of its environmental documents high for MMS in future legal battles. Hopefully, Judge Engelhardt's scathing assessments of that agency will not go unnoticed nor will the warnings of Louisiana, as indicated by its highly-publicized challenge, go unheeded.

270. This is not to say that the CZMA is being completely unused in a litigious context. The recent decision from the District of Maryland in *AES Sparrows Point LNG, LLC v. James T. Smith, Jr.*, 2007 WL 1826889 (D. Md. 2007), demonstrates that local governments do still have some authority under the CZMA. Unfortunately, this case, which covered the siting of a liquefied natural gas terminal near Baltimore, was largely about zoning issues and did not directly address environmental harm. Additionally, the California Coastal Commission (CCC) is currently testing the power of the consistency provisions of the CZMA, though not as they relate to OCS activities. The CCC has sued the United States Navy in the Central District of California, claiming that sonar tests off the California coast will adversely impact marine mammals and sea turtles, thus making the proposed action inconsistent with the state's coastal management plan. Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Relief and Writ of Mandamus, *California Coastal Comm'n v. United States Dep't of the Navy*, No. CV 07-01899 (Cent. Dist. Ca. Mar. 22, 2007); see also, Carolyn Raffensperger, *A State Preempts the U.S. Navy*, 24 ENVTL. FORUM 18 (2007).

271. See MMS, U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT: 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 (2007); see Letter from Jim Rives, Acting Adm'r, Coastal Mgmt. Div., La. Dep't of Natural Res., to Renee Orr, MMS (Jun. 25, 2006) (on file with author) (dated 2006 in error; letter should have been dated 2007).