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State and Federal Interaction Affecting the Oil & Gas Industry: Partners or Adversaries?

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1. Introduction

Through a number of statutes passed in the 1970s, Congress expressed its intent that coastal producing states would be partners with the federal government in the development of Outer Continental Shelf (OCS) oil and gas resources, which can have significant adverse effects on coastal resources.¹

For many years, the federal government has taken the partnership of the Gulf Coast states for granted in its offshore leasing activities. The partnership has become increasingly lopsided. While most of the basic statutory and regulatory procedures for obtaining input from the states have been followed, the Five-Year Lease Planning process, followed by individual lease sales, have largely implemented the foregone conclusions of the federal government with respect to what lease tracts will be offered for development and when those tracts will be offered for bid, regardless of the impact on coastal resources and without adequate environmental analysis. The Gulf Coast states usually have acquiesced in those conclusions, although not always.²

However, in the aftermath of Hurricanes Katrina and Rita, the states, particularly Louisiana, have a heightened awareness of the impacts of offshore development on coastal resources. In an effort to ensure that these impacts are appropriately identified and addressed, Louisiana has sent a strong signal to the federal government that the offshore leas-

¹ The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq., defines the OCS as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." Id. § 1331(a). Essentially, the OCS is the area of the continental shelf beyond the territory of the coastal states. In the OCSLA, the coastal states were awarded leasing rights to offshore areas extending no less than three miles and no more than three marine leagues (approximately 9 miles) from their respective coastlines. Id. §§ 1312, 1313. In the Gulf of Mexico, Louisiana, Mississippi and Alabama are entitled to the three-mile distance; Texas and Florida are entitled to three marine leagues. See United States v. Louisiana, 394 U.S. 1 (1969).

² For example, in 1991, the State of Louisiana filed a complaint and a motion for preliminary injunction against the U.S. Department of the Interior to prevent Lease Sale 135 from being held until a valid consistency determination was prepared. The court denied the motion based on its findings that the State was not likely to succeed on the merits of its claims regarding the adequacy of the consistency determination and the environmental analysis. Louisiana v. Lujan, 777 F. Supp. 486 (E.D. La. 1991).
ing process will no longer be "business as usual." In *Blanco v. Burton*, the State of Louisiana insisted upon, at a very minimum, an accurate environmental assessment of the damage to the coastline from the two hurricanes and an updated, thorough assessment of the onshore impacts of further federal offshore leasing and production activities. Following Judge Engelhardt’s preliminary injunction decision, a settlement was reached on this issue that protected the status quo until appropriate environmental assessments are completed. The question is whether, with regard to OCS leasing activities, the federal government will change its attitude towards the Gulf Coast states or whether it will continue to pursue an essentially solitary strategy in the future.

This paper first presents an overview of the OCS leasing process and addresses the context of state and federal interaction as Congress intended in the Coastal Zone Management Act (CZMA), the National Environmental Policy Act (NEPA), and the Outer Continental Shelf Lands Act (OCSLA). Next, it addresses the events that led up to *Blanco v. Burton*, in an effort to put the lawsuit into proper perspective, and reviews the issues that were presented in the lawsuit, the preliminary injunction decision and the settlement terms. Finally, it addresses unresolved issues that remain after the lawsuit and the future of federal OCS leasing activities in the Gulf of Mexico.

II. *Overview of the OCS Leasing Process*

The OCSLA entrusted the Secretary of the Interior with the duty of overseeing and promulgating regulations concerning leasing of the OCS. In carrying out his duties, the Secretary is required to consider and balance the potential for environmental harm, the potential for adverse impact to the coastal zone, and the potential for the discovery of resources, while also ensuring receipt of fair market value for the lands leased and the rights conveyed. The OCSLA authorizes the Secretary to grant oil and gas leases to the highest qualified responsible bidder. The Secretary has delegated his leasing authority to the Minerals Management Service (MMS).

Section 18 of the OCSLA requires the Secretary to prepare an oil and gas leasing program consisting of a 5-year schedule of lease sales. The OCSLA provides that the schedule shall indicate the size, timing and location of leasing activity for the five-year period which will best meet

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3 Civil Action No. 06-3813 (E.D. La. dismissed Oct. 24, 2006).
5 42 U.S.C. § 4321 et seq.
6 43 U.S.C. § 1331 et seq.
8 Id. § 1337(a)(1).
9 Id. § 1344.
national energy needs. Section 18 further provides that management of the OCS "shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the [OCS], and the potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and human environments."

In addition, the OCSLA requires the Secretary to invite and consider suggestions for proposed lease programs from the governor of any state which may become an affected state under the proposed program.

The Central and Western Gulf of Mexico constitutes one of the world’s major oil and gas producing areas and has proved a steady and reliable source of crude oil and natural gas for more than 50 years. As a result of congressional moratoria and Presidential Directives withdrawing certain areas from OCS leasing activities in response to concerns that offshore oil and gas development poses unacceptable environmental risks and threatens coastal interests, OCS oil and gas leasing activity now occurs mostly in the Gulf of Mexico and Alaska.

III. Rights of Coastal States and Obligations of the Federal Government in the OCS Leasing Process

Through a series of laws enacted by Congress in the 1970s, the coastal states were granted significant rights in the OCS leasing process, and Congress imposed corresponding obligations on the federal government to ensure that the states’ voices were heard. These rights and obligations are discussed below.

A. The Coastal Zone Management Act

"In many ways the CZMA is the cornerstone of federal efforts to protect and manage our nation’s coastlines," and represents "a unique federal-state collaboration." Congress enacted the CZMA “to encourage and assist the States in developing and implementing management programs to preserve, protect, develop, and where possible, to restore or enhance the resources of our nation’s coast by the exercise of planning and control with respect to activities occurring in their coastal zones.” Passed in 1972 following the publication of the Stratton Commission’s 1969 Report, “Our Nation and the Sea,” the CZMA encouraged states to develop coastal management programs and in return guaranteed, in part, that federal activities

10 Id. § 1344 (a)(1).
11 Id. § 1344 (c)(1).
12 Timothy Beatley, David J. Brower & Anna K. Schwab, AN INTRODUCTION TO COASTAL ZONE MANAGEMENT 102 (2d ed. 2002).
would be consistent with the enforceable policies of any such program, unless otherwise precluded by law or exempted by the President.\textsuperscript{14}

Section 307(c) of the CZMA states 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."\textsuperscript{15} Thus, a federal agency carrying out an activity affecting any coastal use or resource must provide a "consistency determination" to the relevant state agency.\textsuperscript{16}

An OCS lease sale is a federal agency activity under the CZMA federal consistency regulations.\textsuperscript{17} If MMS determines that a lease sale will have reasonably foreseeable coastal effects, it must provide a consistency determination to the affected state or states examining whether the lease sale is "consistent to the maximum extent practicable" with the enforceable policies of the state's coastal management program.\textsuperscript{18} If a state objects, MMS may proceed with an OCS lease sale either when MMS provides the state with the reasons why the OCSLA and MMS's administrative record supporting the lease sale decision prohibits MMS from fully complying with the state's enforceable policies, or if it determines that its activity is fully consistent with the state's enforceable policies.\textsuperscript{19} In either case, MMS must provide the state agency with written notice that it is proceeding over the state's objection and explaining why the activity is consistent to the maximum extent practicable and/or fully consistent.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{17} 16 U.S.C. § 1456(c)(1)(A).
\item \textsuperscript{18} Id. § 1456 (c)(1)(C); 15 C.F.R. § 930.34 (a)(1).
\item \textsuperscript{19} See Coastal Zone Management Act Federal Consistency Regulations; Final Rule, 65 Fed. Reg. 77,123, 77,132 (Dec. 8, 2000) ("OCS oil and gas lease sales are subject to the consistency requirement.").
\item \textsuperscript{20} The regulations make clear that "consistent to the maximum extent practicable" means "fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency." 15 C.F.R. § 930.32(a)(1).
\item \textsuperscript{15} 15 C.F.R. § 930.43(d); Coastal Zone Management Act Federal Consistency Regulations; Final Rule, 71 Fed. Reg. 788, 790-91 (Jan. 5, 2006). The Department of Commerce has interpreted the CZMA to allow a federal agency to disagree with a state about whether a particular activity is fully consistent with a state's coastal management program. Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,123, 77,142 (2000).
\end{itemize}
Section 930.39 of the implementing regulations provides that the consistency determination must include a “detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency’s consistency statement.” MMS must provide supplemental consistency determinations if the activity will affect any coastal use or resource differently than previously analyzed, such as where there are “significant new circumstances or information relevant to the proposed activity and the proposed activity’s effect on any coastal use or resource.” In addition, the consistency determination “must be based upon an evaluation of the relevant enforceable policies of the [state’s] management program,” and a description of this evaluation must be included in, or otherwise provided to the state together with, the consistency determination.

In recognition of the important state-federal collaborative process established in the CZMA, the Departmental Manual of the U.S. Department of the Interior sets forth extensive CZMA conflict resolution procedures. The Manual provides that when a State notifies MMS that one of its activities has been found not to be consistent with the State’s approved coastal zone management program, “every attempt should be made” to resolve such conflict by MMS. If MMS is not successful in finding a solution, it should request the assistance of the appropriate Regional Environmental Officer, a Departmental officer, to resolve the conflict. If the conflict still cannot be resolved, the MMS Director must forward the matter through the Assistant Secretary for Lands and Minerals Management to the Department’s Office of Policy Analysis, which will discuss the issue with MMS, other agency officials and the State. If no resolution is found, the Department will request informal assistance from NOAA to find a resolution in accordance with 15 C.F.R. § 930.11. If no resolution is reached after these efforts, MMS may submit a request to the Secretary of the Interior for formal mediation from the Secretary of Commerce.

B. The National Environmental Policy Act

NEPA is an integral part of the OCS leasing process. Congress enacted NEPA in 1969 with the goal of “declar[ing] a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” NEPA’s action-forcing provisions guaran-

15 C.F.R. § 930.39(a).
22 Id. § 930.46(a)(2).
23 Id. § 930.39(a).
tee that federal agencies will comply with both the letter and spirit of the statute, including the preparation of an environmental impact statement (EIS) for major federal actions significantly affecting the quality of the human environment, such as a lease sale under the OCSLA. An EIS must address: (1) the environmental impact of the proposed action; (2) adverse environmental effects of the proposed action; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible commitments of resources which would be involved in the proposed action.

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. The "direct" impacts of an action are those effects "which are caused by the action and occur at the same time and place." "Indirect effects" are those effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." Finally, agencies must consider cumulative effects, or the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."

An agency must prepare a supplemental EIS (SEIS) if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Agencies "[m]ay also prepare supplements when the agency determines that the purposes of [NEPA] will be furthered by doing so."

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26 Id. § 4332(2)(C). The 1978 amendments to the OCSLA expressly provided that offshore lease sales are "major federal actions" that require an EIS. See 43 U.S.C. §§ 1346, 1351.

27 Id. § 4332(2)(C). See also 40 C.F.R. § 1502.16.

28 40 C.F.R. §§ 1503.7, 1508.8.

29 Id. § 1508.8(a).

30 Id. § 1508.8(b).

31 Id. § 1508.7. See also id. § 1508.27(b)(7)(requiring an agency to consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts."

32 40 C.F.R. § 1502 9(c)(1).

33 Id.
MMS generally prepares a multi-sale EIS for each 5-year schedule of sales in the Gulf of Mexico and an Environmental Assessment (EA) for the individual lease sales, which tier off of the multi-sale EIS.  

**C. The Outer Continental Shelf Lands Act**

A primary objective of Congress in the 1978 Amendments to the OCLSA was to enhance the role of coastal states in OCS oil and gas leasing decisions made by the federal government. Congress contemplated that affected coastal states would play an important role in the pre-lease decisions regarding the size, timing and location of a lease sale. To that end, Congress enacted section 19 to ensure that the states, through their governors, would have a “leading” role, particularly in decisions regarding the size, timing and location of lease sales.

Section 19 of the OCSLA requires that the Secretary of the Interior accept a Governor’s recommendations if those recommendations provide for a reasonable balance between the nation’s interests and the interests of the state. This interpretation is consistent with *Massachusetts v. Clark,* where the court issued a preliminary injunction against the award of a lease. There, the court observed that “[o]nce submitted to the Secretary, the Governor’s recommendations are conditionally binding.” The court added that the “Secretary is compelled to accept the Governor’s recommendations if they represent a ‘reasonable balance between the national interest and the well-being of the citizens of the affected state.’”

While Congress did not grant states a “veto power over OCS oil and gas Activities,” it did grant the governors of affected coastal states the

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34 NEPA regulations encourage agencies to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. “Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.” 40 C.F.R. § 1502.20.


36 Id. The Conference Committee stated that “this section [19] is intended to insure that the Governors of affected States . . . have a leading role in OCS decisions and particularly as to potential lease sales and development and production plans.” H.R. Rep. No. 95-1474, at 106 (1978), as reprinted in 1978 U.S.C.C.A.N. 1450.

37 43 U.S.C. § 1345(c).


40 Id.

initial authority to strike a reasonable balance between the national and state interests. The Secretary’s role under this provision is to act as a check on possible abuses of a governor’s authority, by reviewing the state’s recommendations to determine whether they constitute a reasonable balance of the competing interests recognized in the OCSLA. If the Secretary does not accept the governor’s recommendations, the Secretary has the burden to show why the recommendations do not represent a reasonable balance of those competing interests.

IV. Blanco v. Burton

A. Events Leading to the Lawsuit

Under MMS’s five-year OCS oil and gas leasing program for 2002-2007, eleven areawide lease sales were proposed for the Gulf of Mexico: four in the Western Planning Area, five in the Central Planning Area, and two in the Eastern Planning Area. MMS prepared a multi-sale EIS in November 2002 for the nine proposed lease sales in the Western and Central Gulf of Mexico Planning Areas. Lease Sale 200, the final lease sale proposed for the Western Planning Area under the 2002-2007 program, was scheduled from the beginning to be held in 2006.

In the late summer and fall of 2005, Hurricanes Katrina and Rita devastated coastal communities in Louisiana and Mississippi, including areas that support OCS-related infrastructure, destroyed acres of wetlands, and caused oil spills and other environmental contamination. Those coastal impacts were only the ones most immediately apparent.

Shortly thereafter, on November 22, 2005, MMS published a notice of its intent to prepare an EA for proposed Lease Sale 200.42 On December 22, 2005, the Louisiana Department of Natural Resources (LDNR) submitted extensive comments, presenting new information and issues, among others, relating to the 2005 hurricanes. On March 31, 2006, LDNR received from MMS a consistency determination for proposed Lease Sale 200 (CD), which concluded that the proposed lease sale was consistent with the enforceable policies of the Louisiana Coastal Resources Program (LCRP). According to the CD, it tiered off of the consistency determination prepared for Lease Sale 187 in 2003 and focused on the updated information from the Sale 200 and 196 EAs that was not available for the Sale 187 consistency determination.

On April 3, 2006, Governor Blanco received from MMS a copy of the Proposed Notice of Sale for Lease Sale 200. Pursuant to section 19 of the OCSLA, this letter sought the Governor’s comments and recommendations on the size, timing and location of the proposed sale. The next day, MMS published a notice of the availability of the Proposed Notice of Sale and a public notice that it had prepared an EA and a Finding of

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No New Significant Impact (FONNSI) for proposed Lease Sale 200, providing 30 days for comments on those documents.\footnote{71 Fed. Reg. 16,824 (April 4, 2006).} Despite recognizing that the 2005 hurricanes had caused widespread destruction, the EA concluded that MMS had identified no new significant impacts for Lease Sale 200 that were not already addressed in the 2002 multi-sale EIS and that it was not necessary to change the conclusions of the kind, levels or locations of impacts described in the EIS.

LDNR notified MMS by letter dated April 13, 2006, that the information presented in the CD was inadequate to allow review of the proposed lease sale, in light of the failure of the CD to recognize the damages wrought by the 2005 hurricanes. In addition, LDNR stated that adequate information concerning the impacts of the hurricanes to evaluate certain LDNR guidelines is yet to be compiled. MMS replied by letter dated May 4, 2006, that the CD was complete and further stated that hurricane-related impacts occur independently of impacts related to OCS lease sales.

On May 17, LDNR submitted its comments on the EA and FONNSI for Lease Sale 200, notifying MMS that the EA was inadequate to ensure that MMS would make an informed decision. LDNR informed MMS that the agency had failed, perhaps in a rush to keep to the schedule identified in the multi-sale EIS, to take the necessary steps to comply with the OCSLA, CZMA and NEPA requirements to ensure the protection of Louisiana’s coastal zone and the infrastructure that makes exploration and production of OCS resources possible in an efficient and economic fashion.

On May 30, 2006, Governor Blanco submitted comments and recommendations to MMS under section 19 of the OCSLA regarding the timing of proposed Lease 200. The Governor explained that the timing of the proposed lease sale was inappropriate and premature and recommended that the lease sale be delayed and made part of the upcoming 2007-2012 five-year lease program. In support of her recommendation, the Governor stated that postponing the lease sale would give MMS the opportunity to meaningfully assess the impact of OCS activities in light of the damage to coastal resources caused by the 2005 hurricanes.

On June 14, 2006, the State submitted comments to MMS objecting to the CD. Once again, the State asserted that MMS had failed to fully address the devastation caused by Hurricanes Katrina and Rita in its EA. The State further explained in detail how the CD was not consistent to the maximum extent practicable with the enforceable policies of the LCRP. MMS responded to the State on June 21, 2006, by letter from the Regional Director, suggesting that, although the agency took the position that the lease sale was consistent with the enforceable policies of the
LCRP, MMS would be willing to meet with State personnel to discuss the State’s concerns. Although the State and MMS pursued the possibility of a meeting, it did not take place.

LDNR submitted supplemental comments on the Lease Sale 200 EA on July 10, 2006, in response to MMS’s June 16, 2006 notice of intent to prepare an EA for upcoming Lease Sale 201. LDNR stated that, because Lease Sale 201 is a reasonably foreseeable future action, MMS must meaningfully assess the cumulative impacts associated with Lease Sale 201 before proceeding with Lease Sale 200. The next day, LDNR received a letter from MMS which stated that, because Lease Sale 200 is tiered from the multi-sale EIS and references the cumulative impacts analysis in that EIS, the cumulative impacts associated with proposed Lease Sale 201 were assessed for proposed Lease Sale 200.

Also on July 10, 2006, LDNR received a short letter from MMS (dated June 30, 2006) in response to the State’s objection to the CD, which concluded that proposed Lease Sale 200 activities would be fully consistent with the provisions identified as enforceable by Louisiana in the LCRP.

MMS notified the State in a letter dated July 11, 2006, that it rejected the Governor’s recommendation to postpone the lease sale and that the agency would proceed with the sale as planned. In support of its determination that the Governor’s recommendation did not provide a reasonable balance between the national interest and the well-being of the citizens of Louisiana, MMS stated several reasons, including the potential that delay of the lease sale would cause companies to invest elsewhere; the impact on the delivery of new natural gas supplies; and the potential loss of funds to the U.S. Treasury.

On the same day, the MMS Director signed the final Notice of Lease Sale 200 announcing that the lease sale would take place in 30 days on August 16, 2006. The notice was published on July 17, 2006.44

B. Issues Raised in the Lawsuit

On July 20, 2006, Governor Blanco and the State filed a complaint for declaratory and injunctive relief against MMS in the U.S. District Court for the Eastern District of Louisiana.45 The plaintiffs alleged that the decision of the defendants to proceed with Lease Sale 200 without addressing the State’s concerns was arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act (APA), and was in

45 The complete list of defendants is the Director of MMS, MMS, the Secretary of Interior, and the U.S. Department of the Interior. The American Petroleum Institute was granted leave to intervene as a defendant. The pleadings in the lawsuit, as well as the decision, are available through the website of the Federal District Court for the Eastern District of Louisiana.
violation of NEPA, the CZMA and the OCSLA. The plaintiffs requested that the court: declare that the defendants violated and continue to violate said statutes and their implementing regulations; enjoin the defendants from opening any bids submitted in response to the Notice of Sale, or awarding any lease pursuant to the sale; issue a writ of mandamus preventing the defendants from acting in the allegedly unlawful manner in the complaint and requiring the defendants to act in the manner requested by the plaintiffs during the pendency of the action; and grant other relief deemed just, proper and equitable.

On July 27, 2006, the plaintiffs filed a motion for preliminary injunction and memorandum in support thereof. The motion requested that the court enjoin the defendants from opening any bids or awarding any leases in connection with Lease Sale 200 until a final ruling was issued on the merits of the complaint.

Oral argument on the plaintiffs’ motion for preliminary injunction was held on August 8, 2006, and the court issued its order on August 14, 2006, two days before Lease Sale 200 was scheduled to take place.

The court denied the State’s motion. However, the decision significantly signaled that the federal government had failed to comply with the intent of Congress that coastal states be treated as partners in the OCS leasing decisionmaking process. The court held that, at a minimum, the State made a prima facie showing that it was likely to succeed on the merits of all of its claims.

i. Likelihood of Success on the Merits

With respect to the NEPA claims, the plaintiffs claimed that the FONNSI for Lease Sale 200 was arbitrary and capricious, because it failed to (1) identify and assess the existing environmental baseline, and (2) adequately analyze the direct, indirect and cumulative impacts of the proposed action. The State asserted that the 2005 hurricanes significantly changed circumstances since the 2002 multi-sale EIS that warranted preparation of an SEIS. The court found that the plaintiffs demonstrated there was new information, “perhaps in abundance,” pertaining to the significant impacts the 2005 hurricanes had on the entire coastal area of Louisiana. In addition, although the EA took note of many of the changes caused by the hurricanes, it provided no real analysis to support its statement that the prior conclusions in the 2002 multi-sale EIS regarding impacts of OCS activities in connection with Lease Sale 200 were still valid.

Next, the State alleged that MMS acted arbitrarily and capriciously by (1) failing to support its CD with comprehensive information and

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46 Decision at p. 21. Citations to page numbers in the decision refer to the version that appears on the district court’s website.

47 Id. at p. 19.
data, and (2) failing to address most of the State’s Coastal Use Guidelines. Instead, the State claimed, MMS simply incorporated by reference its analysis from earlier CDs for a previous lease without considering the destruction of coastal wetlands and barrier islands by the 2005 hurricanes. The court held that MMS failed to include new, pertinent information that reflected significantly changed circumstances after the 2005 hurricanes. In addition, the court held that the CD’s treatment of the Coastal Use Guidelines was “so inadequate as to suggest that proceeding with Lease Sale 200 was a fait accompli even before the CD was compiled.” The court went so far as to state that the MMS’s “cavalier” approach to the issues might fall below the arbitrary and capricious standard.

Finally, with regard to section 19 of the OCSLA, the State claimed that MMS acted arbitrarily and capriciously by failing to accept the Governor’s recommendation that Lease Sale 200 be postponed until the next five-year lease cycle. Specifically, the State asserted that MMS did not make an adequate showing that the recommendation did not provide a reasonable balance between the national interest and the well-being of the State. The court agreed with the State’s assertion, finding that MMS’s response was “cryptic” and a “casual dismissal” of the Governor’s recommendations, which created the “distinct impression . . . that, no matter what recommendations the Governor submitted, they would be disregarded in favor of maintaining the Lease Sale schedule.”

ii. Irreparable Harm

At the outset of the decision, the court set a trial date on the complaint for November 13, 2006. Thus, in analyzing whether preliminary injunctive relief was warranted, the court focused on whether there would be immediate and imminent environmental harm in the 90-day period between the lease sale and the trial date.

The court concluded that, although the State may have been correct that, over time, “significant injury to the State and its communities, resources and infrastructure might occur as a result of Lease Sale 200 operations,” such future indirect and cumulative effects did not demonstrate sufficient irreparable harm for preliminary injunctive relief before the upcoming trial date. The court further stated that any injunctive relief provided by the court following trial on the merits would be as effective as preliminary injunctive relief.

48 Id. at pp. 24-25.
49 Id. at p. 25.
50 Id. at p. 28.
51 Id. at p. 31.
52 Id. at p. 34.
53 Id. at p. 35.
iii. Adverse Effect on the Public Interest

After consideration of the competing State and national interests, the court found that preliminary injunctive relief was not warranted, given the imminent trial of the State’s claim.\(^{54}\) The court elaborated that the opening of the bids for Lease Sale 200 would not have an adverse effect on the public interest and any effects from the opening and awarding of bids before the trial date would be minimal.\(^{55}\)

iv. Favorable Balance of Hardships/Potential Harm

The court agreed with the State that forcing the defendants to meet their federal obligations would not be a hardship.\(^{56}\) However, the court found that economic hardships might be incurred by residents and businesses in coastal Louisiana if Lease Sale 200 bidding and ancillary activities were enjoined before the November trial, particularly since such activities would eventually take place, after statutory compliance was ensured.\(^{57}\) Thus, the court concluded that such factor weighed against issuance of a preliminary injunction.

The Settlement Agreement

Immediately following issuance of the court’s decision, the parties entered into settlement discussions. The settlement agreement was submitted to the court on October 24, 2006, and was incorporated into a dismissal order issued the same day.

Under the settlement agreement, the federal defendants agreed that they would not conduct any future OCS oil and gas lease sales in the Central or Western Gulf of Mexico Planning Areas until after the issuance of a record of decision (ROD) based on a new EIS, which covers the next proposed lease sale and considers the cumulative impact of past lease sales, including Lease Sale 200. In addition, the federal defendants agreed that the CD for the next lease sale in the Central or Western Gulf would not tier off of any CD for a prior lease sale. Further, prior to the issuance of the ROD, the federal defendants agreed not to submit to the State for review any exploration plan pursuant to Lease Sale 200 without also submitting an EA on such plan. The parties agreed that the EA would include an analysis of the direct, indirect and cumulative impacts of the proposed exploration plan activity, including identifying onshore support services and infrastructure that the applicant intends to utilize, as well as any such onshore support services and infrastructure that have been affected by Hurricanes Katrina or Rita. Finally, with respect to the next lease sale in the Central or Western Gulf, the federal defendants

\(^{54}\) Id. at 40-41.
\(^{55}\) Id.
\(^{56}\) Id. at 41.
\(^{57}\) Id.
agreed that any response submitted by the State under section 19 of the OCSLA will be made by the Office of the Secretary of the Department of the Interior.

In exchange for these commitments, the State agreed to the dismissal of the lawsuit. However, the parties agreed that the court would retain jurisdiction to oversee compliance with the terms of the settlement agreement. The dismissal order provided that the case will be dismissed with prejudice if the State does not file a motion to enforce the terms of the agreement within 60 days after the federal defendants notify the State that they have satisfied their obligations under the agreement.

Since the settlement agreement was signed, MMS announced on November 17, 2006, that Lease Sale 201, which was scheduled for the spring of 2007, was cancelled. The announcement explained that the acreage included in Lease Sale 201 will be included instead in Lease Sale 205, the first sale for the 2007-2012 five-year program, scheduled for the fall of 2007.

V. Unresolved Leasing Issues

Since the settlement of the lawsuit, MMS has taken various actions to advance the next five-year leasing program. The State, of course, has been watching to see whether MMS will take a different approach to fulfilling its NEPA, CZMA and OCSLA obligations than it did in connection with Lease Sale 200. To date, as demonstrated in the following summary, the State has not been favorably impressed with MMS's new environmental analyses. Although many steps remain in developing the OCS leasing program for the 2007-2012 period, including issuance of final EISs for the Five-Year Program and the Gulf of Mexico lease sales, there are a substantial number of outstanding unresolved issues.

A. The 2007-2012 Five-Year Program and Multi-Sale DEIS

On August 25, 2006, MMS published public notice of the availability of a draft EIS for the 2007-2012 program.58 The State of Louisiana filed comments in response on November 24, 2006, on both the DEIS and the proposed leasing program.

The State emphasized at the outset that it supports the development of the nation's energy resources and looks forward to continuing to play a critical role in oil and gas development in the Gulf of Mexico. However, the State asserted that in light of the devastation from Hurricanes Katrina and Rita, added to the already significant effects on Louisiana's coastal resources and infrastructure from OCS oil and gas leasing activity, it is essential that relevant and sufficient data must be developed and analyzed before conducting any future leasing in the Gulf. The DEIS

repeatedly observes that the impacts of the hurricanes on the coastal resources and infrastructure are still not fully known, although surveys by state and federal agencies are in progress.

More specifically, the State asserted that the proposed five-year program and the DEIS inappropriately continue the trend of using assumptions, without any analysis of the actual direct, indirect and cumulative effects of existing, much less future, oil and gas activities. This type of assumed analysis can no longer be justified, as coastal Louisiana faces the increasing threat of rising sea levels and possibly greater storm activity as a result of rising Gulf Coast temperatures. The State pointed out that, although over the last three decades, MMS has produced many NEPA documents examining the potential effects of OCS leasing activities, it has never made any attempt to assess the reliability of these estimates and projections. The State has repeatedly requested MMS to conduct such assessments, with no action on the part of MMS.

In addition, the State commented that the DEIS simply repeats much of the outdated information contained in the EA for Lease Sale 200. For example, the DEIS neglects to correct MMS’s old figures for the estimate of lost coastal wetlands during the 2005 hurricanes, despite new reports of much larger figures by its sister agency, the U.S. Geological Survey. In addition, the DEIS discussion on employment appears to overlook the demographic shifts that have occurred in coastal Louisiana, despite the fact that elsewhere the DEIS notes that the hurricanes resulted in major socioeconomic changes affecting population, employment and regional income.

The State also commented that the DEIS’s treatment of mitigation for activities that could be authorized in the 2007-2012 leasing program is inadequate. The DEIS indicates that mitigation for such activities will be addressed during the lease stage and thereafter. Again, such deferral is unacceptable. The State asserts that this shifting of identification and consideration of appropriate mitigation is inconsistent with NEPA requirements, and that a program for mitigation can best be developed at the five-year program development stage and then be implemented during the lease sale stage and thereafter.

Finally, with respect to the alternatives discussed the State notes that the “No Action” alternative in the DEIS fails to address the meaningful issues, such as the short-term energy impact, if any, that might result from a 5-year hiatus in leasing in the Gulf, or to consider a broader range of potential impacts on local jurisdictions. In addition, the State commented that the final EIS should include a review of alternative leasing systems that may increase competition for, and revenue from, offshore leases in the Gulf. The State has requested inclusion of this discussion repeatedly, with no response from MMS.
Given the deferral of any meaningful discussion of impacts in the DEIS, the State commented that it was constrained to provide meaningful comments under section 18 of the OCSLA until it has the opportunity to review the draft multi-sale EIS for the 2007-2012 Gulf lease sales. However, the State asserted that absent the development of adequate information on impacts, there will be limited ability to ensure that any future OCS leasing activity is fully mitigated, as required by the State’s policies. Therefore, the State noted that it would appear to be more appropriate to consider a short hiatus in leasing in the Gulf until such information has been developed and analyzed.

B. The Draft Multi-Sale EIS for 2007-2012 Gulf of Mexico OCS Lease Sales

On November 17, 2006, MMS published notice of the availability of a draft EIS on tentatively scheduled 2007-2012 oil and gas leasing proposals in the Western and Central Gulf of Mexico. The State of Louisiana submitted detailed comments on January 5, 2007. As summarized below, the State found this DEIS to suffer from many of the same kinds of shortcomings as MMS’s earlier environmental documents.

For example, the State noted that MMS continues to defer examination of significant issues until later stages in the process and continues to make projections of potential activities without testing the accuracy of past projections. Without such testing, the reasonableness of the projections in the DEIS cannot be measured.

The State further asserted that levee-based protection of infrastructure, integrated with an aggressive coastal restoration effort, is essential to the survival of coastal Louisiana, which in turn is vital to continued OCS development in the Gulf of Mexico. The State suggested that the final EIS should include a risk-based analysis of hazards faced by the coastal communities and infrastructure that support OCS oil and gas activities in the Gulf, focusing on risk-identification, probabilities of occurrence and measures to preclude or ameliorate those risks. The State went on to assert that, because of the extent to which coastal wetlands are being degraded by OCS activities to meet the nation’s oil and gas needs, MMS should include in the final EIS a compensatory mitigation plan for the unavoidable loss of wetlands attributable to OCS-related activities. In addition, the State urged MMS to provide an economic review of its funding programs which provides information relative to the level of funding that has been expended for the range of activities it is involved in, for all states: that share the revenue.

In addition, the State expressed disagreement with the DEIS’s overall treatment of mitigation for the proposed activities. For example, the DEIS recognizes that revenue received by locally affected communities

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through revenue sharing would act as mitigation of OCS-related impacts to coastal communities such as Lafourche Parish. However, despite recognition elsewhere in the document of adverse OCS-related impacts to coastal communities, the DEIS fails to include any mitigation measures to address these impacts. In another instance, the DEIS briefly discusses mitigation measures, but fails to address their effectiveness at mitigating their targeted impacts. The State urged MMS to identify and describe mitigation measures to address impacts to affected coastal communities in the final EIS, including identifying those measures that MMS asserts are a standard part of the MMS program and describing how these measures are implemented by MMS to meet the “zero tolerance” standards stated in the DEIS.

With respect to alternative leasing strategies, the DEIS suggested this possibility for the first time in an MMS environmental document. However, the State expressed disappointment in its comments that only one alternative, nominated blocks, was discussed and quickly dismissed. The State asserted that it continues to maintain that areawide leasing may not be the most appropriate scheme for managing the finite OCS oil and gas resources of the Gulf, cited studies criticizing the areawide system, and reviewed possible alternatives that should be critically evaluated in the final EIS. Included in those alternatives is requiring bidding on royalties, as Louisiana does, or imposing a severance tax on the minerals extracted from the OCS. The State pointed out that MMS’s leasing practices not only lose revenues that could be shared with the states for resource restoration and protection efforts, but also establish an artificially created imbalance of competition between mineral leases in state and federal waters. In addition, the State emphasized the competitive and environmental benefits of reducing the number of lease sales per year from two to one, coupled with a nomination and tract selection leasing system. In summary, the State urged MMS to conduct a cost/benefit analysis of the areawide leasing system, as alluded to in a 2004 MMS study, before dismissing the alternatives.

The second half of the State’s comments focused on flaws in DEIS analysis of environmental impacts. Those flaws include:

i. the suggestion in the socioeconomic analysis that only labor market areas in Texas will be impacted by proposed actions in the Western Planning Area;

ii. the assumption in the socioeconomic analysis that there will be no changes in the Gulf Coast economy over the next 40 years in the face of well-documented acceleration of social change and the massive disruption of the economy by the 2005 hurricanes;

iii. the characterization of estimated wetlands losses as “negligible” and the underestimation of such losses attributable to OCS activities, as well as the failure to provide for compensatory mitiga-
tion, consistent with the State’s “no net loss of wetlands” policy, for any and all loss of wetland values that might not be provided through either the State’s coastal use or Corps of Engineers’ permitting process;

iv. inadequate analysis of the potential impacts resulting from a significant projected increase in the number of service-vessel and helicopter traffic;

v. inadequate assessment of land use and coastal infrastructure needs, such as roads, schools, power, water, communications systems, or waste collection and disposal;

vi. the failure to identify any mitigation measures to address significant impacts on infrastructure, land use and demographics in Port Fourchon, Lafourche Parish, other communities and LA Highway 1, as required by NEPA;

vii. the unsupported conclusions that no new waste disposal and storage facilities will be needed to support OCS program activities;

viii. the failure to address the hurricane protection necessary for onshore communities and infrastructure that will service OCS activities; and

ix. the failure to support the conclusion that impacts to coastal water quality will be minimal.

In addition, the State suggested that MMS issue a supplemental DEIS, with opportunity for comment, incorporating the results of an MMS-sponsored study of the local, regional, and national infrastructure at risk in the Gulf region, with a particular focus on energy infrastructure that was scheduled to be completed, according to the DEIS, at the end of 2006. The State reminded MMS that it should ensure that the FEIS considers and reflects any information in recent studies and reports that may be relevant to the analysis.

Finally, the State commented that in the final EIS, MMS should thoroughly consider and evaluate the impacts from expanded lease sale 205, including the cumulative impacts when added to the other lease sales identified in the DEIS, and include all necessary information and analysis regarding these impacts.

**B. Lease Sale 224**

Most recently, MMS published a Call for Information and Nominations and Notice of Intent (Call/NOI) to prepare a supplemental EIS on Lease Sale 224, which covers a portion of the “181 Area” of the Eastern Gulf Planning Area. This area was opened to oil and gas leasing in

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In its comments, the State urged MMS to thoroughly reevaluate the environmental impacts of the proposed sale in light of the current environmental and socioeconomic baseline after Hurricanes Katrina and Rita. The State further asserted that MMS must compare the assumptions, estimates, and projections in earlier NEPA documents examining the potential effects of OCS activities to coastal Louisiana with actual experience in order to determine their validity and make appropriate refinements.

In addition, the State commented that the information from two studies, which were referenced in the EA for Lease Sale 200, must be incorporated into the Lease Sale 224 SEIS. Those studies, on which MMS and LSU’s Coastal Marine Institute are working, will gather information on the 2005 hurricane-related impacts on the oil and gas industry and on OCS-related infrastructure and communities in the Gulf of Mexico region. The State asserted that a third study relating to subsidence and wetland loss should also be incorporated into the SEIS.

The State also repeated the view that its “no net loss of wetlands” policy requires mitigation of any wetlands loss. The State commented that the SEIS must explain how MMS will ensure that any potential adverse impacts to wetlands and other important coastal features and resources will be mitigated.

The State reminded MMS that pursuant to NEPA, the SEIS must thoroughly consider the cumulative impacts of the proposed lease sale, including those associated with past, ongoing and future OCS-related activity, particularly on the resources, communities and infrastructure in coastal Louisiana. In addition, the State maintained that the SEIS should include relevant non-OCS-related activities and impacts, such as those associated with liquefied natural gas facilities, as well as the reasonably foreseeable impacts of heightened storm activity predicted for the coming decades.

The State further recommended that the SEIS include an analysis of safety considerations related to OCS oil and gas infrastructure. The State asserted that the analysis should address issues such as whether infrastructure is being constructed using materials and techniques sufficient to withstand predicted heightened storm activity and whether evacuation plans provide only for getting personnel to bases immediately onshore, or provide as well for further evacuation from those bases.

Finally, in response to MMS's request for comments on possible conflicts between future OCS oil and gas activities that may result from the lease sale and state coastal management programs, the State asserted that those activities have the potential to adversely affect coastal uses and resources in Louisiana's coastal zone, including, but not limited to, socioeconomic resources, infrastructure, and wetlands resources. The State reminded MMS that pursuant to the CZMA, it must ensure that Lease Sale 224 will be carried out in a manner consistent to the maximum extent practicable with the enforceable policies of the LCRP.

VI. Unresolved Issues Associated with Mitigation Revenues

In the last two congressional sessions, legislation was enacted that earmarked funds specifically for assisting producing coastal states in mitigating the impacts from OCS oil and gas production. However, as discussed below, these laws, while helpful, are problematic in certain aspects and do not wholly solve the mitigation issues associated with the impacts from OCS oil and gas production on coastal resources and infrastructure.62

In section 334 of the Energy Policy Act of 2005, Congress enacted an amendment to the OCSLA section which provided for coastal impact assistance to the producing coastal states and their coastal political subdivisions in mitigating the impacts from OCS oil and gas production.63 The amendment requires MMS to disburse $250 million for each fiscal year from 2007-2010 to be allocated among the producing coastal states and their coastal political subdivisions, according to the formula set forth in the amendment. These funds can only be disbursed to states for which MMS has approved a coastal impact assistance plan; final plans must be submitted to MMS no later than July 8, 2008. MMS must approve or disapprove a coastal impact assistance plan within 90 days. The amendment provides that all amounts received under the program may be used only for one or more of the following purposes:

i. projects and activities for the conservation, protection, or restoration of coastal areas, including wetland;

ii. mitigation of damage to fish, wildlife, or natural resources;

iii. planning assistance and the administrative costs of compliance;

iv. implementation of a federally-approved marine, coastal, or comprehensive conservation management plan; and

62 Beginning in 1986, the coastal producing states have also received a maximum of 27% of revenues from federal lease tracts that lie wholly or partially within 3 nautical miles of the seaward boundary of coastal states. 43 U.S.C. § 1337(g). Louisiana has received roughly $1 billion in revenues under this provision over the last twenty years. This information can be found at http://dnr.louisiana.gov/sec/execdiv/techasml/facts_figures/table30.htm.

iv. mitigation of the impact of OCS activities through funding of onshore infrastructure projects and public service needs.\(^{64}\)

In addition, the amendment restricts the amount of funds that can be used for the purposes in subsections iii. and v. above to 23% of the amounts received in any fiscal year.\(^{65}\)

The State of Louisiana issued its draft Coastal Impact Assistance Plan in February 2007.\(^{66}\) Although the amounts received by any one producing coastal state under the Coastal Impact Assistance Program will be welcome and will no doubt assist in mitigating the impact of OCS activities on coastal resources and infrastructure, the yearly amount authorized by Congress must be allocated among seven producing coastal states. Moreover, the program has been authorized only through 2010. Finally, there are percentage limits on the yearly amounts that may be used for certain purposes.

As noted above, in late December 2006, Congress passed and the President signed the Gulf of Mexico Energy Security Act of 2006. Perhaps the most significant aspect of this legislation was the provision of substantial additional revenues to the coastal states from OCS leases in the Gulf. The congressional representatives from Louisiana had attempted to secure such relief for decades as the State watched its coastal resources decline. However, following Hurricanes Katrina and Rita, Congress appeared finally to listen.

With respect to revenue sharing, section 5 of the Act provides that from 2007-2016, an additional portion of the revenues from new leases entered into for areas in the 181 Area located in the Eastern Planning Area and the 181 South Area, which the Act opened to oil and gas leasing, will be allocated to the Gulf producing states. Beginning in 2017, additional revenues will be allocated to the Gulf producing states from new leases for the 181 Area, the 181 South Area, and the 2002-2007 planning area. The legislation restricts use of the additional revenues to the following purposes:

i. projects and activities for the purposes of coastal protections, including conservation, coastal restoration, hurricane protection, and infrastructure directly affected by coastal wetland losses;

ii. mitigation of damage to fish, wildlife, or natural resources;

iii. implementation of a federally-approved marine, coastal, or comprehensive conservation management plan;

iv. mitigation of the impact of OCS activities through the funding of onshore infrastructure projects; and

\(^{64}\) Id. § 1356a(d)(1).

\(^{65}\) Id. § 1356a(d)(3).

v. planning assistance and the administrative costs of compliance.

The listed purposes are almost identical to the purposes listed in the Coastal Impact Assistance Program. The only limitation on use of amount received is that no more than 3% may be used for planning assistance and administrative compliance costs. In addition, the Act caps the total amount of revenues made available for 2016-2055 cannot exceed $500 million per year.

In testimony before the Senate Committee on Energy and Natural Resources on January 25, 2007, the Assistant Secretary, Office of Mineral Resources for LDNR testified that Louisiana is projected to receive at least $13 billion over the next 30 years as a result of the new legislation. The Assistant Secretary further testified that the dedicated funds would be used to finance a comprehensive coastal protection and restoration plan that will be finalized in the spring of 2007.

The long-awaited revenue sharing legislation will provide Louisiana and other producing coastal states with a significant source of funds for mitigating the impact of OCS activities. However, the bulk of those funds will not be available for use until 2017. Thus, the issue of responsibility and funding for mitigation before 2017 remains an open question. During the next ten years, more damage will occur to coastal resources from OCS oil and gas development activities, in addition to the damage that has already taken place, but has not yet been mitigated. The funds that will be available to the coastal producing states for mitigation during the next ten years are not adequate to keep pace with the ongoing damaging impacts.

As the State has pointed out in its comments on the most recent MMS environmental documents, mitigation must be addressed in order to comply with NEPA. To date, the MMS has not adequately addressed this issue in its NEPA documents. The NEPA regulations require an agency to identify mitigation possibilities in an EIS in discussing project alternatives and the resulting environmental effects. In addition, an agency must state, as part of its ultimate decision, whether it has adopted mitigation measures. If the agency has adopted mitigation measures, it must implement those measures.

The Council on Environmental Quality (CEQ), the agency responsible for the NEPA implementing regulations, has provided additional guidance on mitigation as follows:

67 Significantly, the State of Louisiana had already passed a constitutional amendment that specifically directed that the funds be used for restoring Louisiana's wetlands and for hurricane protection. La. Const. art. VII, § 10.2 (amended 2006).
68 40 C.F.R. §§ 1502.14(f), 1502.16(h).
69 Id. § 1505.2.
70 Id. § 1505.3.
The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. . .

* * *

All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed to as part of the [Record of Decision] of these agencies. This will serve to alert agencies or officials who can implement these extra measures, and will encourage them to do so. . . [T]o ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus, the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. 71

MMS has not discussed mitigation in its environmental analyses for OCS lease sales in sufficient detail to ensure that the environmental consequences of its leasing actions have been fairly evaluated. 72 Instead, in its environmental analyses, MMS has taken an overly narrow approach of simply listing the available statutory sources for mitigation funding. 73 At a minimum, under NEPA, MMS must identify all relevant, reasonable mitigation measures that could address the impacts of OCS oil and gas leasing activities on coastal resources and infrastructure. Whether MMS has the responsibility under the OCSLA to go even farther and ensure that those impacts are mitigated is yet to be determined.

VII. The Future of Oil and Gas Leasing in the Gulf of Mexico

The future of oil and gas leasing in the Gulf of Mexico depends in large measure on how well MMS complies in the future with its obligations under NEPA, the CZMA and the OCSLA in future leasing actions. The State of Louisiana has already successfully affected the OCS leasing schedule through litigation in an effort to persuade MMS to pause long enough to conduct a meaningful environmental review of the impacts of OCS oil and gas leasing. That review should include a proper assessment.


of the current environmental baseline, based on new information that either has been developed or is in the process of being developed, before proceeding with future leasing actions that could cause irreparable harm to coastal resources and infrastructure. It remains to be seen whether MMS will take full advantage of that opportunity.

It also remains to be seen whether MMS will begin treating the producing coastal states as true partners in the OCS oil and gas leasing process through meaningful dialogue to address the states' concerns, as Congress intended, or whether MMS will simply continue to respond to the states in a perfunctory manner that gives the impression that the final decisions on environmental analyses and consistency determinations are foregone conclusions. If MMS continues on that course, the agency has already been warned by one court that it may be enjoined on a permanent basis until it complies with its statutory obligations. In the long run, such a course could unnecessarily create even more delay for OCS oil and gas development.