

2006

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

Andrew S. Jessen

University of Maine School of Law

Follow this and additional works at: <http://digitalcommons.maine.edu/oclj>

Recommended Citation

Andrew S. Jessen, *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.* (2006).
Available at: <http://digitalcommons.maine.edu/oclj/vol12/iss1/6>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

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

*Andrew S. Jessen**

I. INTRODUCTION

With the passage of the Coastal Zone Management Act¹ (CZMA or Act) in 1972, Congress sought to protect the Nation's dwindling coastal resources. The Act has been reauthorized several times since, and despite opposition from the Reagan and Bush administrations, it has managed to only be strengthened in its more than thirty years of existence. Ninety-nine percent of the United States coastline is now protected by a state program approved under the Act. Given that each state is responsible for administering its own coastal zone management program, much variety in the effectiveness of these programs has emerged. In the continuing wake of Hurricane Katrina, as mistakes are pondered and solutions proposed, Louisiana's less than effective use of the Act serves as a useful entry point into an examination of what has gone wrong in protecting Louisiana's fragile coastline. Louisiana has the most remaining wetlands in the United States and generates a significant portion of the country's commercial fishery output. Concurrently, the state is losing more wetlands than anywhere in the country and is in danger of sacrificing its vital fishing industry to shortsighted energy development interests.

This Comment seeks to establish that an honest, more aggressive use of the federal consistency provision would more effectively protect Louisiana's coastal resources. This Comment first examines the origin and

* University of Maine School of Law, Class of 2007.

1. 16 U.S.C. §§ 1451-1465 (2000).

evolution of the CZMA to illustrate that the Act has been, and will continue to be, an important factor in the management of coastal resources. The fact that Congress has reauthorized and strengthened the Act several times suggests as much. Furthermore, some states have used the Act in a powerful manner to trump what would otherwise be strong federal interests. Included within this section of the Comment are brief analyses of the Act's reauthorizations, as well as how states develop their individual coastal management plans. Second, the Comment briefly details Louisiana's use of the CZMA and of its coastal resources, to facilitate an understanding of how the state arrived at its current position. The state has not been as aggressive with its powers under the Act as it could be—the dearth of existing case law suggests it has utilized the Consistency Provision to its fullest extent in a very limited fashion, if at all. Third, other proposed solutions to Louisiana's coastal management efforts are briefly examined to suggest that the CZMA is one of the best available alternatives at this juncture. Next, Louisiana's use of the CZMA is compared to that of other, arguably more successful, states. Examples are plentiful, with California, Delaware, Florida, and Washington the most prominent. These states have exerted their authority under the Act to either eliminate or severely limit harmful uses in their coastal zones. Following this analysis, the Comment seeks to address specific obstacles Louisiana may encounter if it endeavors to use the Consistency Provision more aggressively. Finally, the Comment makes recommendations for a more effective utilization of the Act in Louisiana, including blocking future oil and gas lease sales, and raising consistency objections for renewals of federal licenses and permits.

II. BACKGROUND AND DEVELOPMENT OF THE CZMA

A. *Enactment*

Following the economic boom of World War II, there was a rapid expansion of activity in the coastal zone.² By the mid 1960s, Congress recognized the resulting decline in coastal resources and water quality as a national crisis.³ Julius Stratton led what became known as the “Stratton Commission,” which struggled to suggest a comprehensive approach for protecting the coast. The Stratton Commission's final report⁴ focused on

2. Lieutenant Patrick J. Gibbons, *Too Much of a Good Thing? Federal Supremacy & The Devolution of Regulatory Power: The Case of the Coastal Zone Management Act*, 48 NAVAL L. REV. 84, 87 (2001).

3. *Id.* at 88.

4. Report of the Commission on Marine Science, Engineering and Resources, *Our*

development and land use interests, recognizing that states possessed the greatest amount of knowledge about their respective coastlines. Coupled with the federal government's strong interest in uniformity—and its prominent position as a coastal actor, both as polluter and developer—the report suggested the partnership format that became one of the key aspects of the Act.⁵ Congress did not want to preempt a traditionally state area of authority.⁶ Thus, one of the primary goals of the CZMA is to “enhance state authority by encouraging and assisting states to assume planning and regulatory powers over their coastal zone.”⁷ The Act has been characterized as an example of “‘cooperative federalism,’ in which the federal government delegates administrative and enforcement responsibilities to the states”⁸

The CZMA has three major defining characteristics. First, the federal government grants funds to a state for development of a state coastal zone management plan (CMP). Second, that plan must be approved by the National Oceanic & Atmospheric Administration (NOAA) and the Secretary of Commerce (Secretary), at which point additional funds are made available for administration of the plan. Finally, once an approved plan is in place, the state gains authority to utilize the Consistency Provision of the CZMA.⁹ The Consistency Provision, explained further below, allows states a type of veto power over federal activities in the state's delineated coastal zone.

B. State Development of Coastal Management Plans

In formulating a CMP, the state has many opportunities to interject its own independent rules and regulations. To get a plan approved, however,

Nation and the Sea: A Plan for National Action (United States Government Printing Office 1969).

5. *Id.* at 89-90. The term “coastal zone,” coined by Stratton, implies “integration across geographic boundaries.” *Id.* at 91.

6. Edward M. Cheston, *An Overview and Analysis of the Consistency Requirement Under the Coastal Zone Management Act*, 10 U. BALT. J. ENVTL. L. 135, 136 (2003). States are inherently closer to regional problems and have traditionally held authority over zoning and wetlands preservation. See Gibbons, *supra* note 2, at 101.

7. Cheston, *supra* note 6, at 140 (quoting S. REP. NO. 92-753 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4776).

8. Gibbons, *supra* note 2, at 84.

9. See 16 U.S.C. § 1456 (2000). “Each 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.” *Id.* at § 1456(c)(1)(A).

the state must show that it provided federal agencies an opportunity to participate in its development. Furthermore, prescribed enactment procedures must be followed, "including holding public hearings and designating a single agency with the authority to implement the program and to receive and administer the grants."¹⁰ If a state is deemed ineffective in administering its CMP, funding may be revoked by the Secretary.¹¹ Plans vary considerably in their structure and administration from state to state. Some states delegate the consistency determination to a single individual, such as the state's Governor. Others make broad delegations to all agencies dealing with coastal permitting issues. The statutory language itself also varies widely from state to state.¹² In some, the goals of preserving the coast shine through more readily. Others, like Louisiana's CMP, have a broader, pro-development slant to their language, with emphasis placed on accommodating as much development as possible.¹³

10. Gibbons, *supra* note 2, at 93. See 16 U.S.C. § 1455(d) (2000). The state management program must include, *inter alia*, a definition of permissible uses; guidelines as to priorities of uses; a planning process for energy facilities; and a planning process for identifying and lessening the impact of shoreline erosion. See also NOAA, Dept. of Commerce, 15 C.F.R. § 923.53 (2006), for regulations regarding the language of a state Consistency Provision.

11. See NOAA, Dept. of Commerce, 15 C.F.R. § 923.135(b) (2006).

12. One particularly relevant comparison in this regard is between the consistency language contained in Florida's CMP, as opposed to that contained in Louisiana's. Florida's language is much more specific, naming the various federal activities that will be subject to consistency review. See FLA. STAT. § 380.23(3) (2005). Florida also delegates the consistency determination to the agency responsible for administering the relevant federal program. *Id.* Another interesting element of Florida's consistency language is the fact that the state holds the determining agency responsible for defending its determination, if challenged. *Id.* Louisiana's Consistency Provision is broader, simply stating that "[a]ny governmental undertaking, conducting, or supporting activities directly affecting the coastal zone shall ensure that such activities shall be consistent to the maximum extent practicable with the state program and any affected approved local program having geographical jurisdiction over the action." LA. REV. STAT. ANN. § 49:214.32(B) (2006). Under the Louisiana CMP, one individual is ultimately responsible for the consistency determination. *Id.* at § 49:214.32(C)(1).

13. The declaration of public policy for Louisiana's CMP is healthy enough:

The legislature declares it the public policy of the state:

(1) To protect, develop, and, where feasible, restore or enhance the resources of the state's coastal zone. . . . (3) To support and encourage multiple use of coastal resources consistent with the maintenance and enhancement of renewable resource management and productivity, the need to provide for adequate economic growth and development and the minimization of adverse effects of one resource use upon another, and without imposing any undue restriction on any user.

LA. REV. STAT. ANN. § 49:214.22 (2006). But the state agency responsible for administering the program seems to interpret the statement in a manner favorable to development. For

C. Reauthorizations

The CZMA has been subject to reauthorization several times since its original enactment. When the Act was first reauthorized, in 1976, Congress recognized the danger posed to coastal resources by the impending development of Outer Continental Shelf (OCS) energy facilities. In the midst of a national energy crisis, Congress reauthorized the CZMA and urged states to develop processes to effectively manage the impact of OCS development.¹⁴ In 1980, the Act was again reauthorized and strengthened. At this juncture Congress sought to clarify the public policy of the Act and provide states with more specificity.¹⁵ The Act was once again reauthorized in 1990, when Congress specifically overturned a 1984 Supreme Court decision that had limited state use of the Consistency Provision by narrowly defining the term “directly affecting.”¹⁶ This had the effect of making “all federal activities inside or outside the coastal zone subject to consistency determinations if they affected the coastal zone.”¹⁷

The last official reauthorization of the Act occurred in 1996. That reauthorization expired in 1999, and the U.S. Commission on Ocean Policy recommended that the Act be reauthorized and strengthened in its 2004 report.¹⁸

example, on the agency’s website, the objective of Louisiana’s CMP is formulated as follows: “Its broad intent is to encourage multiple uses of resources and adequate economic growth while minimizing adverse effects of one resource use upon another without imposing undue restrictions on any user.” Louisiana Department of Natural Resources, Coastal Management Division, <http://dnr.louisiana.gov/crm/coastmgt/coastmgt.asp> (last visited Oct. 1, 2006).

14. See S. REP. NO. 94-277, at 19-21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1768, 1786-89.

15. See H.R. REP. NO. 96-1012, at 16 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4362, 4364. The legislative history suggests that Congress hoped states would develop coastal management plans focusing on preservation, “priority consideration to coastal dependent uses in the coastal zone,” public access, and public and local participation. *Id.*

16. *Secretary of the Interior v. California*, 464 U.S. 312, 315 (1984).

17. Gibbons, *supra* note 2, at 97. In *Secretary of the Interior v. California*, the Supreme Court held that the sale of OCS oil and gas leases by the Department of the Interior was not subject to a consistency determination because it did not “directly affect” the coastal zone. California argued that the sale of the leases set off a chain of events eventually resulting in the development of OCS resources—an activity clearly impacting the coastal zone. *Id.* The 1990 amendment was “intended to clarify that the relevant factor in consistency determinations would not be the location of agency activity, but on the effect, including reasonably foreseeable indirect effects.” *Id.* at 108.

18. S. REP. NO. 109-137, at 3 (2005) (Comm. on Commerce Rep.).

Currently, the 2005 reauthorization of the CZMA is pending approval by Congress. The renewed Act is not significantly altered, and has in fact been strengthened in several respects. One positive change is that a limit on funding grants has been removed, allowing states to receive additional monies to implement coastal management programs.¹⁹ The reauthorization also stresses the importance of community level development, preventing nonpoint source pollution, and protecting estuary systems.²⁰ Debate at the committee level for the reauthorization bill focused on the streamlining of the permitting process for offshore industries.²¹ Supporters feel the process allows sufficient time for state comment and the development of a record for potential appeals.²² Crucially, the Consistency Provision remains.

D. The Consistency Provision

Perhaps the most controversial element of the CZMA, the Consistency Provision, is also a strong incentive for states to develop and maintain a CMP in line with the expectations of Congress.²³ The provision essentially

19. 151 CONG. REC. S1290 (daily ed. Feb. 10, 2005) (statement of Sen. Snowe). Previously, there had been a two million dollar cap. The new bill also authorizes increased overall funding for fiscal years 2006-2010. *Id.*

20. *Id.*; see also S. REP. NO. 109-137, at 13-14, Congressional Findings (2005) (Comm. on Commerce Rep.):

(14) There is a need to enhance cooperation and coordination among states and local communities, to encourage local community-based solutions that address the impacts and pressures on coastal resources and on public facilities and public service caused by continued coastal demands, and to increase state and local capacity to identify public infrastructure and open space needs and develop and implement plans which provide for sustainable growth, resource protection and community revitalization.

(15) The establishment of a national system of estuarine research reserves will provide for protection of essential estuarine resources, as well as for a network of State-based reserves that will serve as sites for coastal stewardship best-practices, monitoring, research, education, and training to improve coastal management and to help translate science and inform coastal decisionmakers and the public.

Id.

21. *Id.* at 3.

22. *See id.*

23. See 16 U.S.C. § 1456 (2000), for the text of the Consistency Provision:

(c) Consistency of Federal activities with state management programs; . . . certification.

(1)(A) Each 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. *Id.*

The provision is a "carrot" to the states which allows the federal government some level of uniformity for a coastal management plan while allowing states to block what would

gives states with an approved CMP a veto power over federal activity that affects the state coastal zone. “Federal activity” falls into two broad categories: (1) activity conducted by a federal agency or (2) activities/development that requires a federal license or permit. The federal agency which conducts or supports the activity generally makes the initial consistency determination. If the state objects, it can seek mediation by the Secretary of Commerce or judicial intervention to enjoin the activity.²⁴ In the case of a license or permit, the applicant must provide a certification with their application that their activities are consistent with the state CMP.²⁵ Whatever entity is responsible for making the consistency determination must do so after all relevant materials have been received. The amount of time an agency has to do so varies by state.²⁶ If a state finds that the proposed federal activity is inconsistent with its CMP, it must inform the federal agency or permit applicant: (1) how the activity is inconsistent; (2) with what specific enforceable policies it conflicts; and (3) suggested alternative measures that would make the activity “consistent to the maximum extent practicable” with the CMP.²⁷ Once this decision is made, it can be overridden by the Secretary of Commerce or the President—but the battle does not end there. The state may then pursue litigation to contest the ultimate federal decision. The objective of the Consistency Provision, and the regulations that implement it, is to “assure that all Federal agency activities including development projects affecting any

otherwise be an allowable federal activity. John A. Duff, *The Coastal Zone Management Act: Reverse Pre-Emption or Contractual Federalism?*, 6 OCEAN & COASTAL L.J. 109, 112 (2001). When a state objects to a federal activity, it must have a rational basis for that objection; “this has proven to be a NEPA like tool that fosters sound and informed decision making.” *Id.* The Consistency Provision is “hotly contested and fiercely debated.” Cheston, *supra* note 6, at 138; *see also* NOAA, Dept. of Commerce, 15 C.F.R. § 930.1 (2005).

24. J. Christopher Martin, *The Use of the CZMA Consistency Provisions to Preserve and Restore the Coastal Zone in Louisiana*, 51 LA. L. REV. 1087, 1093 (1991). Martin pursues an identical thesis admirably in his 1991 work. Since his publication, the state has continued to proceed in a less than desirable manner. The Act itself has been subject to additional reauthorizations and Louisiana has been struck by multiple hurricanes. Also, in the decade and a half since Martin’s article, several other examples of states effective utilization of the Consistency Provision have emerged. Essentially, a need to re-examine the Consistency Provision, and perhaps re-emphasize its importance in the battle for Louisiana’s wetlands, is vital. This Comment seeks to do so.

25. Gibbons, *supra* note 2, at 95.

26. Section 381 of the Energy Policy Act of 2005 mandates deadlines for decisions on consistency appeals. Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005). In general however, the process can be described as lengthy, sometimes taking years to complete.

27. 15 C.F.R. § 930.43, 930.63 (2006). Both the activity and permit consistency determination regulations provide for public participation in the process.

coastal use or resource will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved [state] management programs.”²⁸

Critics of the Consistency Provision contend that it has a “reverse pre-emption” effect on federal activity and authority²⁹ and that the federal government’s hands are tied in regard to conducting legitimate federal activities that promote national interests.³⁰ Critics also argue that the provision leads to inefficiency in government, and undermines the federal system by restricting federal agencies acting under explicit constitutional authority, including national defense.³¹ However, without the provision, there would be little incentive for state participation in the program because the financial incentives do not alone justify the extensive expenditures an effective state coastal management program requires.

III. LOUISIANA’S COASTAL RESOURCE MANAGEMENT

Louisiana possesses forty percent of the nation’s wetlands and is experiencing eighty percent of the nation’s wetland losses.³² The state’s coastal zone consists of eighteen parishes and includes approximately seven million acres.³³ Wetlands in Louisiana disappear at a rate of twenty-five to fifty square miles each year.³⁴ While the state has some of the most lucrative energy resources in the nation, it also possesses some of the most productive commercial fisheries. Balancing these two interests has proven a formidable task. The state passed its coastal management plan, the State

28. 15 C.F.R. § 930.30 (2006).

29. Duff, *supra* note 23, at 110.

30. Cheston, *supra* note 6, at 152.

31. Gibbons, *supra* note 2, at 85.

32. Martin, *supra* note 24, at 1110. The Martin figures are from 1991. The State of Louisiana Coastal Restoration and Management Office attaches more alarming figures to this statistic—thirty and ninety percent, respectively. See <http://www.dnr.state.la.us/crm/coastalfacts.asp> (last visited Oct. 1, 2006). “Louisiana’s coastal zone consists of the area between the Mississippi Deltaic Plain to the east and the Chenier Plain in the western portion of the state.” Marc C. Hebert, *Coastal Restoration under CWPPRA and Property Rights Issues*, 57 LA. L. REV. 1165, 1167 (1997).

33. Julie D. Livaudais, *Conflicting Interests in Southern Louisiana’s Wetlands: Private Developers Versus Conservationists, and the State and Federal Regulatory Roles*, 56 TUL. L. REV. 1006, 1033 (1982).

34. Martin, *supra* note 24, at 1087. “Coastal erosion has been an enemy of Louisiana’s coastal wetlands and marshes since the early 1940s when a series of flood control levees were constructed along the Lower Mississippi River, confining the river to a single channel.” Hebert, *supra* note 32, at 1167. The “delicate balance” in place before this occurred allowed wetland restoration and the erosion process eased. *Id.*

and Local Coastal Resources Management Act (SLCRMA), in 1978.³⁵ The major factors contributing to coastal wetland loss in the state are natural subsidence, the levee systems, dredging, and development.³⁶ The Coastal Use Guidelines contained in Louisiana's SLCRMA are "quite extensive and allow the state to review virtually all significant activities occurring in the coastal zone area."³⁷ State coastal use permits are required for areas of state concern, while local use permits are required for areas of local concern.³⁸ Areas of state concern will generally deal with areas encompassing dredge and fill activities in "waters intersecting more than one waterbody," while areas of local concern are more isolated.³⁹ Once a permit application is received, a decision is rendered by the Coastal Management section of the

35. Martin, *supra* note 24, at 1090. The SLCRMA was approved by the federal government as a coastal resource management program in 1980. Currently, the administrative unit responsible for administering the SLCRMA is divided into three divisions: Coastal Restoration, Coastal Engineering, and Coastal Management. *See* Louisiana Department of Natural Resources, Office of Coastal Restoration and Management, <http://www.dnr.state.la.us/crm/about.asp> (last visited Oct. 1, 2006).

36. Martin, *supra* note 24, at 1087-89. Martin points out that natural subsidence, until recently, produced only a small amount of net land loss. Furthermore, the levee systems on the Mississippi have been in place since the 1800s, and large scale loss of coastal wetlands did not begin to occur until the 1950s. *Id.* at 1089. He thus suggests that the most detrimental factors are dredging and development. *Id.* at 1087-89. Most dredging is done for the benefit of the oil industry, as it assists in "navigation, mineral exploration and production." *Id.* at 1089. The loss of land due to erosion and subsidence harms the state not only in terms of potential hurricane damage, but also in the wallet. For example, in the Terrebonne Parish, "\$84 million of assessed property . . . lies below the Gulf Intracoastal Waterway and is in danger of washing away." Mark Schleifstein, *Corps is Narrowing its List of Coastal Erosion Projects: Only Limited Number Can Get Financing*, THE TIMES-PICAYUNE, Apr. 20, 2004, at National 2. One author places the blame for wetlands losses in areas such as Grand Isle and Fouchon directly upon the shoulders of the oil and gas industry:

Canals dredged and pipeline bulkheads built for the excavation of oil and gas were not kept in good repair. Many oil companies abandoned dry holes or unproductive wells without blocking off or filling in the canals dredged to reach the wells, even though such action was required by state law.

Hebert, *supra* note 32, at 1168.

37. Martin, *supra* note 24, at 1094.

The Coastal Use Guidelines provide stringent requirements which must be met by any actor in the coastal zone. In addition to broad general application guidelines, the Coastal Use Guidelines also contain specific guidelines for levees, linear facilities (pipelines), dredged spoil deposition, shore modification, surface alterations, hydrologic and sediments transports modifications, disposal of wastes, and oil, gas and other mineral activities.

Id. at 1099 n.88.

38. Livaudais, *supra* note 33, at 1033.

39. *Id.*

Department of Natural Resources. Any appeals are taken up with the Louisiana Coastal Commission, “an independent body within” the Department.⁴⁰

The state has long known the destructive danger of a potential hurricane strike, yet did little to protect its “natural buffer zone against hurricanes.”⁴¹ Unfortunately, efforts to address the threat of a major hurricane strike have consistently focused on raising and strengthening existing levee systems. In 1965, New Orleans was struck and heavily damaged by Hurricane Betsy, a Category 3 storm.⁴² The Army Corps of Engineers (Army Corps) then began in earnest to raise and strengthen levees, despite officials’ acknowledgement that even vastly improved levee systems could not withstand a Category 4 or 5 storm.⁴³

Previous research has estimated that “storm surge can be reduced by one foot for every two miles of coastal wetlands.”⁴⁴ Examinations of the failed levee systems in New Orleans following hurricane Katrina suggested that “wetlands . . . proved to be effective natural armor for levees.”⁴⁵ Wetlands slow the speed of storm surge by serving as a source of friction and elevation that the surge must overcome before it reaches the levee system.⁴⁶ If the surge speed and size is reduced, the levees can withstand a much more significant storm. This concept was illustrated by the surviving levees in the wake of Katrina; levees with a buffer of wetlands were left largely intact.⁴⁷ Although the levee systems in Louisiana have certainly played a crucial role in the subsidence of wetlands, this process “compressed to just a few decades when the discovery of oil and gas in the coastal zone set off a period of lightly regulated canal dredging.”⁴⁸ Canal construction and the pumping dry of marshes for oil exploration “severely

40. *Id.*

41. *Id.* at 1007. “Healthy wetlands have the crucial ability to absorb and buffer the energy from storm surges created by hurricanes, reducing their inland impact.” Hebert, *supra* note 32, at 1169.

42. Matt Scallan, *Big Storm Could Flood City Through Gaps in Floodwalls*, THE TIMES-PICAYUNE, June 1, 1993, at A1.

43. *Id.*

44. Bob Marshall, *Centuries of Missteps Sealed City’s Fate*, THE TIMES-PICAYUNE, Aug. 26, 2006, at National 1.

45. Bob Marshall, *Studies Abound on Why the Levees Failed*, THE TIMES-PICAYUNE, Mar. 23, 2006, at National 1.

46. *Id.*

47. *Id.* Furthermore, “sophisticated storm-surge models . . . consistently overpredicted surge heights in areas that were protected by wetlands.” *Id.*

48. Marshall, *supra* note 44. “By the 1970s more than 30,000 miles of canals had been dredged largely for oil, gas, and shipping interests; half the wetlands had been lost; and the Gulf had moved within sight of the city’s suburbs.” *Id.*

alters the natural hydrologic cycle and destroys fish, wildlife, and their habitats, by changing the amount of flowing water and allowing salt water to enter formerly freshwater areas.”⁴⁹ This same process lowers water table levels, causing marshes to “dry up and shrink,” resulting in subsidence.⁵⁰ Drilling for oil and gas also poses significant threats to the coastal environment via pipeline construction, dredging, and potential oil spills.⁵¹ Finally, the 2005 hurricane season made the need for Louisiana to protect and restore its wetlands abundantly clear as “Hurricanes Katrina and Rita shredded or sank at least 100 square miles of marshland along Louisiana’s fragile coastline,” placing populated areas at an even greater risk in the event of a future hurricane.⁵²

Aside from traditional environmental preservation ideals, Louisiana has exceedingly strong economic incentives to preserve and restore its wetlands and coastal zone. The state supports “over [thirty] percent of the Nation’s fisheries.”⁵³ Commercial fisheries in the state lead the nation in production, “with landings exceeding 1 billion pounds each year.”⁵⁴ Furthermore, tourism, property values, and even oil and gas revenues depend on the coastal zone remaining intact and healthy. Nevertheless, the state’s administration of the CZMA is among the most ineffective of any state in the Nation.

Case law regarding Louisiana’s use of the CZMA is limited. The cases that do exist, however, suggest ineffective usage of the Consistency Provision. In what this Author fears is an illustrative case, Louisiana failed to present the Secretary with evidence that the sale of an OCS lease would cause severe environmental damage.⁵⁵ Following approval of the lease, the

49. Livaudais, *supra* note 33, at 1007.

50. *Id.* at 1008.

51. See, e.g., *Louisiana Pipe Break Points Up Risks of Offshore Drilling*, THE TAMPA TRIBUNE, Apr. 16, 2002, at Nation/World 10. “[N]early 75,000 gallons of oil spilled into an estuary when a pipeline carrying offshore oil to a refinery ruptured. Strong winds complicated cleanup operations, and the oil tainted brackish waters rich in marine life.” *Id.*

52. Matthew Brown, *Coast Lost 64,000 Acres to Storms: Habited Areas Now at Even More Risk*, THE TIMES-PICAYUNE, Nov. 3, 2005, at National 1.

53. Hebert, *supra* note 32, at 1169.

54. *Id.* at 1170. “Economic benefits to the state from commercial marine fisheries are about \$1 billion a year, and saltwater recreational fishing is estimated to approach that figure.” *Id.*

55. See *Louisiana v. Lujan*, 777 F. Supp. 486, 489 (E.D. La. 1991). This case apparently arose during the administration of Louisiana Governor Buddy Roemer. Governor Roemer thought he had convinced the federal government to allocate more funds to the state, and subsequently signed off on the consistency determination. When the increase in funds never materialized, Governor Roemer attempted to renege on the consistency finding, and “went to court to stop the sale.” Mark Schleifstein, *Permits May Be Erosion Fighter: State Could*

state's coastal commission appealed the Secretary's decision, but was extremely late in doing so.⁵⁶ As a result, overturning the Secretary's decision required the court to find that the Secretary had acted in an arbitrary and capricious manner—a heavy burden for plaintiffs to carry, according to the court.⁵⁷ The State was woefully inadequate in addressing this arguable violation of the Consistency Provision of the CZMA, and did not appeal the district court decision. Considering this is one of the few cases available on the subject, it may be reasonable to hypothesize that the state is losing many consistency battles without even putting up a fight. Why has the state failed to utilize such an obvious tool to protect its most important resource? The CZMA is a unique legislative creation, rare in the fact that it abdicates federal rights in favor of state action. While much of the blame for the extent of the damage inflicted by Hurricane Katrina has fallen squarely on the shoulders of the federal government, Louisiana may bear a more significant share of responsibility for failing to assert powers that could have been used to limit coastal erosion, dredging, and pollution since 1978.

At least one author has argued, however, that the state and federal regulatory programs are inherently unable to deal with the problem of coastal wetland loss.⁵⁸ The funding for the agencies is limited, their structures are fragmented, and their personnel are stretched thin.⁵⁹ The inability of the agencies to stem the onslaught of oil and gas development has resulted in “a foregone conclusion that most of the remaining wetlands in Louisiana's coastal zone will be lost along with many of our coastal

Block Oil and Gas Drilling, THE TIMES-PICAYUNE, Dec. 17, 2004, at National 9.

56. *Louisiana v. Lujan*, 777 F. Supp. at 488. “[T]his Court does consider the plaintiffs [sic] extreme delay in making its objections, to be one of the compellingly relevant factors in its consideration of the plaintiffs [sic] ultimate ability to carry the heavy burden necessary to prevail on the merits.” *Id.*

57. *Id.*

58. See Oliver A. Houck, *Symposium: Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 359 (1988).

59. *Id.* at 361-62. “We have created a Dr. Seuss-like machine that produces occasionally good, but more often poor, compromises at the end of an elaborate pipeline.” *Id.* at 362. Louisiana appears to have been “solicitous to energy industry concerns at the expense of the environment.” Martin, *supra* note 24, at 1099. Rarely has its authority been used to restrain or halt any activity in the coastal zone, especially those undertaken by the oil industry or the Army Corps. For example, Louisiana's coastal management division wanted the spoil of dredging conducted in the Mississippi Gulf River Outlet to be deposited on the northern shore of the canal at issue to help control erosion of wetlands north of the canal. *Id.* at 1095. The canal had almost eroded through to an adjoining lake and if such a breach did occur, erosion of adjoining wetlands would occur at an increased rate. *Id.* at 1101. The levee system protecting St. Bernard Parish from hurricane surges was also threatened. *Id.*

communities.”⁶⁰ This theory must be called into question, however, by the successes of other states, such as California and Florida. If additional funding would in fact solve the problem, the state may be in luck, as the most recent reauthorization provides significant additional funding.⁶¹ Furthermore, oil and gas development does not need to be eliminated; rather, the damage inflicted by these interests simply needs to be limited, more effectively mitigated, or delayed while the state rebuilds.

Louisiana has been less than effective in slowing the rate of wetland loss. Examples of development interests trumping those of the coast abound⁶² and the state has been accused of managing the coastal zone in a manner that seeks to yield “merely non-detrimental” effects, rather than positive ones.⁶³

60. Houck, *supra* note 58, at 369 (internal quotation omitted). Oil and gas industries dredge hundreds of new canals a year, with approximately 10,000 miles having been dug over the last fifty plus years. *Id.* Furthermore, to transport the product derived from the coastal zone, the industry must lay thousands of miles of pipeline. *Id.* at 370. These canals erode and widen “at a rate that will double their size within ten years.” *Id.* Again, it is noted that these canals result in increased levels of saltwater in previously freshwater marshes. This leads to a destructive chain of events: “more saline waters kill[] the plant life that holds the soils together; the roots disintegrate; the soil disintegrates; and the marshes disappear.” *Id.*

61. S. REP. NO. 109-137, at 4, 12 (2005).

62. For example, “Louisiana governors have traditionally signed off” on lease sales. Jan Moller & Pam Radtke Russell, *Blanco: No Offshore Signoffs Unless La. Gets Royalty Share; Money Could Finance Hurricane Protection*, THE TIMES-PICAYUNE, Feb. 1, 2006, at National 3. Various articles substantiate the rubber-stamping that has occurred for lease sales in the state in the preceding decades by simply discussing the financial aspects involved and the prospects of future sales. *See, e.g.*, Mary Judice, *Offshore Oil, Gas Lease Sale Today: Record 1,790 Bids Submitted*, THE TIMES-PICAYUNE, Mar. 5, 1997, at C1; Jaquetta White, *Oil and Gas Lease Sales Gush to Seven-Year High: Skyrocketing Prices at the Pump Draw \$285 Million for Western Gulf Tracts*, THE TIMES-PICAYUNE, Aug. 18, 2005, at Money 1.

63. Martin, *supra* note 24, at 1099. Louisiana has the highest rate of coastal permit seekers in the nation, but has an extremely low decline rate—0.64%. *Id.* Interestingly, the state is limited to revenue sharing from the oil and gas industry production “within three miles of the shoreline.” Livaudais, *supra* note 33, at 1008. Thus, if the shoreline continues to recede, Louisiana stands to lose a large portion of the revenue it likely used to justify allowing development in the first place. *See id.* Livaudais notes what is perhaps obvious, but troubling nonetheless, that “[t]he need for state and local officials to generate revenue and employment for their constituents may interfere with their concern for conservation of wetlands ecosystems.” *Id.* at 1034. This proposition is somewhat counterintuitive; the state derives nearly as much revenue from oil and gas development as it does from commercial fishing and tourism—it is essentially robbing Peter to pay Paul.

IV. PROPOSED SOLUTIONS OUTSIDE AN EXPANDED UTILIZATION OF THE CZMA CONSISTENCY PROVISION

One of the major obstacles to effective coastal management, *i.e.* actually restoring coastal wetlands rather than simply seeking to stem the tide of their destruction, appears to have been a sense of apathy and economic infeasibility on the part of state and local governments in Louisiana. With the horrific and unfortunate destruction that Hurricane Katrina has wrought on the region, the state is faced with a difficult but opportune situation. There has probably never been more incentive or public support for managing the coast in a manner that would have potentially lessened the blow of the hurricane. While it is difficult to argue that the coast would have remained unscathed, it is certainly permissible to hypothesize that the levee system would not have been as stressed had more coastal wetlands remained. Furthermore, simply because Hurricane Katrina could not have been altogether avoided does not suggest that the damage from future hurricanes cannot be significantly impacted with more effective management policies. Along those lines, there are several possible alternatives available to the state as it rebuilds, both physically and politically.

One option would be to impose a “best available technology” (BAT) standard on oil and gas companies operating in the coastal zone.⁶⁴ A second option would be to advocate for increased funding from the federal level in the hopes of encouraging more aggressive state action; however, with the federal budget already constrained, this appears unlikely.⁶⁵ Furthermore, some states have been moderately successful under the current approach, thus suggesting that the problems faced by Louisiana do not stem from the federal level.

Much faith has been placed in the massive cooperative restoration effort being staged by Louisiana and the Army Corps. This series of projects is aimed at *restoration* and falls under the authority of the Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA).⁶⁶ This is just one

64. Houck, *supra* note 58, at 372-73. Houck argues that a BAT standard is particularly appropriate for these industries because they are in the best position, financially, to absorb the cost of developing new technology. *Id.* at 373. He suggests, for example, hovercrafts for transporting persons and equipment. *Id.* He goes on to suggest that any level of the administrative framework could potentially implement such a standard—the EPA, the Army Corps, or the coastal districts. *Id.* at 374.

65. However, additional funding has in fact been made available by the pending 2005 reauthorization of the CZMA, which as of August 26, 2006 was still on the legislative calendar.

66. 16 U.S.C. §§ 3951-3956 (1994). In 1997, there were a “total of 66 projects in the nine basins with a baseline cost of approximately \$169.2 million.” Hebert, *supra* note 32,

piece of the puzzle, however, and with limited funding, the Army Corps appears to be more interested in protecting areas that have to date suffered little erosion, rather than restoring an area already lost.⁶⁷ These piecemeal projects may assist in the rebuilding of Louisiana's coastal wetlands, but they do not offer a legal framework for preventing future damage. A final alternative worth mentioning is noted by commentators Jack Archer and Terrance Stone. Their approach advocates, *inter alia*, the incorporation of the public trust doctrine into the application of the CZMA.⁶⁸ The approach suggests that the state or authority can avoid takings challenges under the rationale of the public trust doctrine by designating coastal areas as "areas of particular concern" and protecting them vigilantly.⁶⁹ However, as noted *infra*, takings challenges do not appear to have been a major obstacle in the administration of the Act. While public trust doctrine principles may certainly play a role in the management of coastal resources, they must operate in concert with management plans already in place.⁷⁰ The best alternative is for the state to utilize the Consistency Provision of the CZMA in a more aggressive fashion. It can do this by requiring a showing of consistency for any new or potentially suspended oil or gas lease, and for future permit applications. While this alternative will not solve Louisiana's wetlands problems, it will go a long way in addressing them and perhaps serve as a wakeup call to the oil and gas industry in the state.

Detractors might argue that the state will simply lose any potential litigation battle over a consistency determination. But, the burden of proving consistency is on the federal agency or permit/license applicant. Thus, the potential exists for the state to "set the consistency bar high in order to force benefits, and then pursue litigation if unsatisfied."⁷¹

at 1178. While most, if not all, of these projects are admirable endeavors, they have been tripped up by inadequate funding and "problems concern[ing] property rights and civil damages under Louisiana law." *Id.* at 1180. "[U]nder Louisiana law the courts have been generous towards the rights of the riparian landowner." *Id.* at 1182.

67. Mark Schleifstein, *Corps is Narrowing its List of Coastal Erosion Projects: Only Limited Number Can Get Financing*, THE TIMES-PICAYUNE, Apr. 20, 2004, at National 2.

68. Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81, 99 (1995).

69. *Id.* at 108.

70. *Id.* at 100.

State coastal and environmental managers rely upon police power, statutes, and constitutions for their authority. . . . [T]he Public Trust provides a source of authority, separate from *and in addition to* a state's police power, to manage, protect, and preserve public trust lands and waters for the benefit of the people.

Id. (emphasis added).

71. Gibbons, *supra* note 2, at 110. Given the "track record of other coastal states when

Examples of states doing so are few and far between—but they do exist. To the extent that states have sought to assert their powers under the consistency provision of the CZMA, they have been largely successful.

V. THE EFFECTIVE USE OF THE CONSISTENCY PROVISION
IN OTHER STATES

A. *California and Delaware*

California's Coastal Management Act requires that all spoils (dredged materials) from the coastal zone be used for beach nourishment.⁷² In *California Coastal Commission v. United States*,⁷³ the Navy attempted to deposit dredged materials in a location other than where previously agreed to in the consistency negotiation.⁷⁴ Using the CZMA Consistency Provision, the California Coastal Commission (CCC) was able to "hold out" to force a more expensive solution to the Navy's unexpected dredging difficulty, and essentially was able to compel the Navy to deposit the dredged materials in the original location—despite the greater expense.⁷⁵ California has also successfully used the CZMA to protect its fishing industry by forcing the oil industry to conduct its offshore exploration activities only while the fishing season is closed.⁷⁶

In *Southern Pacific Transportation Company v. California Coastal Commission*,⁷⁷ another example of California's comparably effective use of the CZMA, the state exerted its authority to prevent the removal of rail lines in abandonment proceedings without a consistency review.⁷⁸ There, the

disputes have gone as far as litigation, Louisiana should win more than its share of the cases." Martin, *supra* note 24, at 1102.

72. Gibbons, *supra* note 2, at 113 (citing Cal. Pub. Res. Code § 30233 (b)).

73. Cal. Coastal Comm'n. v. United States, 5 F. Supp. 2d 1106 (1998).

74. Gibbons, *supra* note 2, at 113. The Navy had proposed to remove 7.9 million cubic yards of sand in order to deepen a channel into San Diego so that an aircraft carrier could be relocated. *Id.* The resolution of the issue took over three years. *Id.*

75. *Id.* at 115-16. Gibbons sees this outcome in a negative light because of the expense to the federal government in litigating the issue. *See id.*

76. Martin, *supra* note 24, at 1100 (citing Exxon Corp. v. Fischer, 807 F.2d 842 (9th Cir. 1986)). In that case, Exxon sought to drill oil wells that the Secretary had found would not have "substantial effect" on land and water uses in the coastal zone. Exxon Corp. v. Fischer, 807 F.2d at 846. Nevertheless, the Secretary upheld the CCC's challenge because he found that adverse impact could be avoided completely by restricting drilling to the off-season. *Id.*

77. 520 F. Supp. 800 (N.D. Cal. 1981).

78. *See id.* at 803. "[T]his court holds that Congress did not intend to leave [Interstate Commerce Commission] abandonment proceedings outside the scope of the CZMA." *Id.*

railroad company sought to avoid the requirements under the Consistency Provision by arguing that federal law preempted the CZMA,⁷⁹ and that the imposition was a violation of the Commerce Clause.⁸⁰ The court ruled there was no conflict between the abandonment provisions of the Interstate Commerce Act and the CZMA because the consistency requirements did not prevent the Interstate Commerce Commission from making its “core decision” regarding the initial cessation of service.⁸¹ Furthermore, the Commerce Clause was not implicated because the railroad had not “demonstrated that the potential loss of some income due to a short delay as a result of CZMA-mandated consistency review is a significant burden on the railroad’s performance of its interstate commerce function.”⁸²

California’s Coastal Commission has, to date, been the best example of a state effectively utilizing the Act’s powers. The CCC has not been overturned or challenged in many instances. Furthermore, it has successfully pushed the language of the Act to protect its coastal zone. California has a longer coastline, a much larger population, and, perhaps as a result, has more fiscal resources than Louisiana. However, states with comparably sized, or even smaller coastlines have used the Act to their advantage as well.

For example, Delaware has successfully used its powers under the CZMA to prevent any new bulk transfer facilities in the state’s coastal zone.⁸³ Delaware’s declaration of public policy for its Coastal Zone Act is straightforward and encompassed in a single paragraph.⁸⁴ In a case challenging the statute’s ban on new bulk product transfer facilities, the law was upheld.⁸⁵ The reasoning of the court in that decision suggested a high

The court also noted that the legislative history of the CZMA indicated that the consistency power of the states was to be limited only by “matters of overriding national interest.” *Id.* (quoting S. REP. NO. 94-277, *reprinted in* 1976 U.S.S.C.A.N. 1768, 1776).

79. *Id.* at 802.

80. *Id.* at 806.

81. *Id.*

82. *Id.* at 807.

83. Martin, *supra* note 24, at 1100.

84. See DEL. CODE ANN. tit. 7, § 7001 (2005). The declaration includes a ban on any new offshore bulk transfer facilities because of the danger of pollution and the potential for more heavy industry in the coastal zone. *Id.* The “protection of the environment, natural beauty, and recreation potential of the State” are placed on equal footing with the development of new industries. *Id.*

85. See *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225 (D. Del. 1986). The statute defines “bulk product transfer facility” as “any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa.” *Id.* at 1230 n.9. Delaware is ideally situated for facilities such as these because of its east coast location and the depth of its waters.

level of deference for action taken under the state's coastal management plan.⁸⁶ The court reached this conclusion in part because the plan had to be approved by the Secretary of Commerce, and was implicitly approved by Congress, thereby insulating it from a Commerce Clause attack.⁸⁷ The court also specifically noted that Congress had reauthorized the CZMA in 1976 "to help the States to deal with problems resulting from increased energy-related activities in the coastal zone."⁸⁸ The court also noted that Congress and the Secretary likely understood the choices states would be faced with in balancing economic and environmental interests.⁸⁹

B. Massachusetts and Washington

Other states have also made effective use of the Consistency Provision. In 1983, Massachusetts successfully had an injunction issued to stop the sale of a lease for oil and gas development on the OCS.⁹⁰ There, the Secretary of Commerce made an initial determination that the lease sale was in fact consistent with the Massachusetts coastal management plan, but Massachusetts disagreed.⁹¹ Despite this disagreement, the Secretary proceeded with the sale, and Massachusetts filed for a preliminary injunction.⁹² The State specifically argued that the lease sale was inconsistent with "Policy 9" of its management program.⁹³

These facilities are generally used to transfer oil from large tankers to smaller ones, for the purposes of navigating shallow waters elsewhere on the coast. *See id.* at 1229.

86. *Id.* at 1250.

87. *Id.* at 1252. Also of interest is the note made by the court regarding the fact that "[j]obs and tax revenues were among the reasons invoked in opposition to the Delaware [Coastal Zone Act]." *Id.* at 1237. Presumably, many of the same arguments regarding the oil and gas industries are encountered in Louisiana. This decision provides at least some support for the proposition that Louisiana's Coastal Commission could exert more authority.

88. *Id.* at 1245.

89. *Id.* at 1248. *See also id.* at 1250. "The Secretary's approval is not a rubber stamp, but is subject to statutory requirements." *Id.*

90. *See Conservation Law Found. v. Watt*, 560 F. Supp. 561, 583 (D. Mass. 1983).

91. *Id.* at 566.

92. *Id.* at 567. The State alleged, *inter alia*, "that the defendants have violated the Coastal Zone Management Act, [16 U.S.C. §§ 1451-1465] (CZMA) by failing to demonstrate that Lease Sale 52 is consistent to the maximum extent practicable with the Massachusetts Coastal Zone Management Program." *Id.* at 568.

93. *Id.* at 574. Policy 9 provides:

- a. Accommodate exploration, development and production of offshore oil and gas resources while minimizing impacts on the marine environment, especially on fisheries, water quality and wildlife, and on the recreational values of the coast, and minimizing conflicts with other maritime-dependent uses of coastal waters or lands. Encourage maritime-dependent facilities serving supply, support or transfer functions

The court agreed and made several strong statements in support of the CZMA and the Massachusetts coastal zone management law. Specifically, the court “recognize[d] that a wide range of uses and concerns come within purview of the Act.”⁹⁴ Here, Massachusetts made a determination that over 100 tracts would need to be deleted from the lease sale, among other requirements, to make it consistent with state law.⁹⁵ The Secretary neglected to adopt all of these measures leading the court to note “[i]t is plain from the language of the Act and regulations that the burden of establishing compliance with a state program is on the federal agency proposing the contemplated action, and not on the state.”⁹⁶ This language runs contrary to language in the *Louisiana v. Lujan* decision.⁹⁷ Does this suggest a less hospitable environment for consistency challenges to succeed in Louisiana? Perhaps, but it is difficult to make such a conclusion when the state has failed to sufficiently exercise its power in the first place. The utter lack of litigation history surrounding the CZMA in Louisiana is confounding, especially given the relative abundance of decisions in other states with arguably less vital interests in the coastal zone.

Washington’s administration of its coastal management plan has also proven effective. A private plaintiff there successfully used the Washington Shoreline Management Act to enjoin the Navy from building a homeport in the state until the permitting process was complete.⁹⁸ Friends of the

to locate in existing developed ports.

b. Evaluate indigenous or alternative sources of energy (coal, wind, solar and tidal power) and offshore mining to minimize adverse impacts on the marine environment, especially with respect to fisheries, water quality, and wildlife, and on the recreational values of the coast.

Id.

94. *Id.* at 575. The court also stated that “the legislative history of the Act indicates that a broad definition of ‘direct effect’ was intended by Congress.” *Id.*

95. *Id.* at 576.

96. *Id.*

97. *See Louisiana v. Lujan*, 777 F. Supp. at 489. “In support of [the claim that the sale is inconsistent with the state’s coastal management plan] . . . plaintiffs put forward some convincing testimony that the lease-sale could have significant environmental impacts on Louisiana, specifically the coastal wetlands. . . . Such evidence is, however, insufficient to meet plaintiff’s burden.” *Id.* Also of interest in the *Conservation Law Foundation v. Watt* opinion is the court’s note that “[t]he resources, if they are there, will remain intact. The technology, both as to resource extraction and as to environmental preservation, can only improve.” 560 F. Supp. at 582. The court was referring to the fact that the lease of the OCS rights was only the first step in a long process perhaps ultimately leading to the development of oil and gas wells. *Id.* *A fortiori*, the slight delay encountered by the Secretary in formulating a more thorough consistency determination does not pose a significant threat to the stated Congressional objective of developing energy interests. *Id.*

98. *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 937 (9th Cir. 1988).

Earth, among others, argued that by commencing construction on the homeport prior to the conclusion of the permitting process, the Navy had violated provisions of the Washington Shoreline Management Act (WSMA).⁹⁹ The Navy argued three points regarding the alleged WSMA violation. First, counsel for the Navy argued that the WSMA was not a state program “control[ling] the discharge of dredged or filled materials,” a designation that requires compliance with state regulations under the Clean Water Act.¹⁰⁰ Second, the Navy argued that it was immune from suit under the doctrine of sovereign immunity because the WSMA “is essentially a land use law implementing the state’s Coastal Zone Management Program, for which there has not been a waiver of sovereign immunity.”¹⁰¹ Finally, the Navy also argued that the permit process for the WSMA was redundant.¹⁰² The Ninth Circuit disposed of these arguments by first noting that the WSMA does in fact regulate and control “dredging and water quality within Washington’s shoreline area.”¹⁰³ To address the sovereign immunity argument, the court made an interesting distinction. If the Navy successfully characterized the WSMA as seeking to regulate land use, it would be immune from suit because the activity was taking place on federal lands.¹⁰⁴ However, the court reasoned that because the statute did not “mandate any particular use of the land,” the federal lands exception did not apply.¹⁰⁵ From there, it was a short leap of reasoning to dispose of the final argument regarding duplication of process. The court held that “because land use regulation and environmental regulation are distinguishable, there is not necessarily duplication when a state statute requires an environmental permit, merely because one is also required by a federal agency.”¹⁰⁶ The

99. *Id.* at 928.

100. *Id.* at 935.

101. *Id.*

102. *Id.*

103. *Id.* “The [WSMA] states as one purpose ‘protecting against adverse effect to . . . the waters of the state and their aquatic life Uses shall be preferred which are consistent with control of pollution.’” *Id.* (citing WASH. REV. CODE § 90.58.020 (1988)). The court also pointed to a regulation implementing the act, requiring local governments to minimize the environmental impact of dredging. *Id.* (citing WASH. ADMIN. CODE 173-16-060(16)(a) (1988)).

104. *Id.* at 936.

105. *Id.* “Therefore, the dredging and water quality regulations of the [WSMA] and the Navy’s permit apply to the Navy’s construction of the Everett homeport, regardless of whether that activity occurs on federal or non-federal lands.” *Id.*

106. *Id.* (citing *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 594 (1987)). Most intriguing about this case is the fact that a private plaintiff was able to utilize language from the state coastal management plan to prevent harm to the state’s waters. The reason it worked out this way was because the WSMA required the Washington Department

case may serve as an example of how far the language of the CZMA can be pushed by public and private actors. Here, the Navy had already jumped through several regulatory hoops, but was still thwarted from engaging in an activity that would have resulted in unknown environmental consequences in Puget Sound.¹⁰⁷ With the environmental diversity and productivity associated with Louisiana's coastal zone, it would not seem to be an ideological stretch to expect the state to engage in similar consistency determinations. Why it was necessary for a private plaintiff to take action here is unclear—Washington's CMP likely allows private actors to appeal consistency determinations. This might be a method utilized by the state to shift costs, another potential solution for Louisiana to take into account.

VI. LOUISIANA REVISITED: LEVEES IN THE PATH OF CHANGE

Several potential obstacles will confront the state if it chooses to use its Consistency Provision more aggressively. Predictably, there will be resistance from the oil and gas industries, requiring political backbone from state government.¹⁰⁸ In addition, the issue of a Fifth Amendment unconstitutional taking by means of excessive regulation is ever present.¹⁰⁹ The Takings Provision is intended to prevent private individuals from

of Ecology to review the permit application after its initial issuance by the city where the homeport would be built. When it did so, it added additional conditions, one of which allowed for review of the permit by the Shorelines Hearings Board pursuant to the WSMA. This allowed Friends of the Earth to file a request for review, and when the Navy began negotiating a construction contract for the port, it violated the law. *See generally id.* at 930.

107. *Id.* at 928. The method the Navy proposed for disposing of the dredged materials was not sufficiently tested and may have resulted in the release of harmful metals and other pollutants into the marine environment. *Id.*

108. *See, e.g.,* Mark Schleifstein, *Permits May be Erosion Fighter; State Could Block Oil and Gas Drilling*, THE TIMES-PICAYUNE, Dec. 17, 2004, at National 9.

[S]uch a move could be politically risky. It might also backfire in Washington if Louisiana is viewed as using the permits to extort financial aid, even with clear evidence that offshore operations have damaged the state's environment . . . Florida and California have used the provision for years to block oil exploration off their shores. But experts say it takes more than the state simply declaring that offshore drilling is inconsistent . . . those states also had political power to back up their complaints, both as substantial voting blocs in Congress and electoral votes in presidential elections.

Id.

109. The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment applies to the states through the Fourteenth Amendment.

bearing a burden that should be borne by the public as a whole.¹¹⁰ Here the governmental interest at stake, coupled with the fact that rarely will a property be *completely* devoid of value, likely suggest that a takings challenge would not succeed—especially in hurricane ravaged Louisiana.¹¹¹ The political and physical environment in Louisiana is primed for the change advocated. Courts in other jurisdictions have consistently sustained actions of state coastal management agencies in regulating activities affecting the coastal zone—even if those effects may be attenuated. From a purely legislative standpoint, no changes are required—the coastal management program agencies simply need to make a substantial shift in administering the powers already granted by the Act.

In addition, the so-called “Seaweed Rebellion” is in full effect across a range of coastal states. Several states have legislation pending to strengthen their ability to repel OCS drilling.¹¹² In recent years, Florida has faced strong opposition from the oil and gas industry in its efforts to prevent OCS drilling in its coastal zone. Industry officials have referred to the state as “obstructionist” and “irrational” but state officials have been steadfast in their assertion that OCS drilling would be inconsistent with Florida’s coastal environmental protection scheme.¹¹³ Oil and gas industry lobbyists

110. Archer & Stone, *supra* note 68, at 100. Archer and Stone discuss the proposition of “regulatory takings,” where regulation goes “too far,” thus effecting a taking. *Id.* at 101 (citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922)).

111. *See also* Archer & Stone, *supra* note 68, at 101-108 (providing a concise summary of the Supreme Court’s takings analysis following *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)); *see also* Martin, *supra* note 24, at 1108-09:

Given the scope of destruction in the wetlands, the emergency nature of the situation, and the relatively well-accepted causal relationship which exists between dredging and land loss in the coastal zone, it does not seem likely that Louisiana will have any problem demonstrating to the courts a strong nexus between the more stringent regulation of dredging and other activities that damage the wetlands and the legitimate state interest of literally preserving its physical being.

Id.

112. Lynn S. Sletto, *Piecemeal Legislative Proposals: An Inappropriate Approach to Managing Offshore Oil Drilling*, 33 GOLDEN GATE U. L. REV. 557, 568 (2003).

Due to the perception that the current Administration maintains a “pro-drilling” attitude, coupled with the appointment of a Secretary of Interior who admits supporting the elimination of the current temporary offshore oil leasing moratoriums, politicians from several coastal states have vigorously responded to attempts made by the administration to conduct offshore oil drilling.

Id. at 567-68.

113. *See State, Chevron Battle Over Offshore Wells*, ORLANDO SENTINEL, Apr. 5, 2000, at D3. Chevron, specifically, has characterized Florida’s administration of the law a “blatant misuse.” Chevron contends that oil and gas production is in the national interest and would do no harm to Florida’s coast. *Id.*

have referred to the act as “nothing more than red tape,” and documents made public in 2002 show that President Bush’s energy task force was deluged with documents advocating the weakening of the CZMA.¹¹⁴ The Act has been a valuable resource for the state, and has prevented possibly “hundreds of rigs up and down the coast of Florida . . .”¹¹⁵ Unfortunately, the same cannot be said for Louisiana. The state should alter its current course and no longer allow development interests, short-term financing issues, or political battles to keep it from administering its CMP in the most effective manner possible.

VII. CONCLUSION

Clearly, there is room for improvement in Louisiana’s use of the CZMA and its Consistency Provision. Apart from the obvious need to utilize the Act to keep more harmful development from ever commencing, the state could also impose more stringent conditions when it does choose to issue permits and licenses. There is evidence to suggest that this has occurred in other states, making use of the Act more effective. Some pollution, dredging, and new industry may be inevitable—but the manner in which it occurs is in the hands of state regulators. More demanding mitigation¹¹⁶

114. See Tamara Lytle, *Florida Drilling Battles Not Over: The Oil Industry Wants to Take Away the State’s Power to Fight Offshore Rigs*, ORLANDO SENTINEL, Apr. 10, 2002, at A1. Interestingly, President Bush’s own brother, Governor Jeb Bush, has remained opposed to drilling off the Florida coast. He has publicly stated that any drilling could potentially cause “environmental damage to Florida’s beaches and ruin the tourism-based economy.” *Id.*

115. *Id.* The energy industry is obviously a powerful political voice, but so far the rights given to the states by the CZMA have not been weakened. One commentator notes, “[t]hese are multinational corporations more powerful than some countries, and they can’t stand the fact that a little state government can stop them from doing what they want to do . . .” *Id.* Florida occasionally points to Louisiana as an example of what will happen if the state’s right to assert the consistency provision is weakened. An op-ed piece in the Tampa Tribune notes:

The dangers drilling poses to Florida’s tourist-based economy were illustrated recently in Louisiana, where the industry likes to boast that offshore drilling has done no harm. In fact, the oil business has helped make a mess of the Pelican State’s environment. Canals dug to support offshore operations have contributed to widespread erosion and a dangerous loss of coastline. Toxins contaminate many waters.

Louisiana Pipe Break Points Up Risks of Offshore Drilling, THE TAMPA TRIBUNE, Apr. 16, 2002, at Nation/World 10.

116. Mitigation can be problematic as well because, obviously, not every community has a land bank or area that can be restored comparably to the one that is being destroyed. Furthermore, where the permitting process can take up to a decade, developers may be less willing to cooperate in meeting mitigation requests. See, e.g., Sandra Barbier, *Plan for*

requirements or more careful environmental analysis could be extracted from developers. It is also apparent, from examining the implementation of the CZMA in other states, that courts have been willing to grant broad authority to state regulators in the interest of protecting scarce coastal resources, even at the expense of industry. Energy development is important for national security, but as at least one court has noted that if the resources are there, they will remain there. What will be much more expensive to repair is the current destruction occurring in Louisiana's coastal zone as barrier islands erode, coastlines recede, and wetlands fill.¹¹⁷ The potential exists for billions of dollars to be lost in commercial fishery interests, recreation, and infrastructure.

Other states have found success when pushing the language of the Act to its outermost limits. While examples are limited, so are the alternatives. State legislation that would simply ban OCS drilling or other environmentally detrimental coastal zone activities detracts from the goal of uniformity enhanced by the CZMA. Other legislative tools, such as the National Environmental Protection Act (NEPA), do not provide the state with the same type of power. NEPA may be effective when used in concert with the CZMA, but cannot alone do the heavy lifting involved in protecting the coastal zone.

Louisiana cannot abuse the Act, especially given the pro-energy development slant of the Bush administration, and a proposed rule that could theoretically curtail state power under the Act. However, Congress has continued to show support for broad state action and discretion under the Act, and appears poised to continue to do so. The state merely needs to pursue a more aggressive approach.

Wetlands Landfill Growth Advances: Firm Wins Approval of Parish Council, THE TIMES-PICAYUNE, Nov. 14, 2003, at Metro 1.

117. Louisiana is not blind to the fact that it is producing energy resources benefiting the entire country at the expense of its coastline. In regards to using the consistency provision more aggressively, Mark Davis, Director of the Coalition to Restore Coastal Louisiana, notes:

We would be putting forth the true proposition that if this country is going to legitimately develop its energy resources, it has to do so in a way that recognizes its impacts on the areas that service that production This nation's energy policy must adequately recognize the impacts that states, and particularly, Louisiana, have suffered on behalf of this nation in the course of producing an abundance of oil and gas.

Schleifstein, *supra* note 108.

A. *What Next? How Louisiana Might Go About Changing its Approach*

There is some evidence that Louisiana has considered stepping up the assertion of its rights under the Act. Both previous and current Louisiana governors have suggested as much, but have apparently lacked the political will or resources to do so.¹¹⁸ Law professors within the state advocate for a more aggressive use of the provision as well.¹¹⁹ Unfortunately, the perception of Louisiana's state government appears to be that the provision should be used merely as a bargaining tool, forcing the federal government to "direct a share of royalties to reconstruction and conservation efforts."¹²⁰ This perception may also be responsible for the State's failures in litigation surrounding the CZMA, as the State has not sufficiently tied the effects of OCS drilling to coastal erosion and pollution.¹²¹ However, that evidence is now strikingly clear, with one study finding that "onshore and offshore oil and gas exploration and production are responsible for more than 33 percent of the direct and indirect wetlands loss in Louisiana."¹²²

During the writing of this Comment, Louisiana asserted its authority under the CZMA, threatening to block oil and gas lease sales until the state receives a larger share of federal funds to restore its hurricane battered coastline.¹²³ Once again, however, the focus is on getting money out of the federal government, rather than simply using the powers the Act grants to the state to more effectively manage its coastline.¹²⁴ When the focus is placed on financial aspects, the credibility of the state is limited and it is less likely that the state would succeed in litigation over an assertion of the provision. According to a representative of the American Petroleum Institute, "oil producers are getting nervous about the governor's threat and hope Congress and the administration will reach agreement on sharing

118. *See id.*

119. *Id.* "I see it as part of a master plan to apply pressure . . . We're not going to receive any kind of concessions from the federal government unless we stand up and assert that this is having a terrible effect on the coast." *Id.* In 1991, when then Governor Buddy Roemer attempted to utilize the Consistency Provision to block a lease sale, he was outmaneuvered by the federal government, and the State subsequently brought suit too late to enjoin the sale. *Id.*

120. *See id.*

121. *Id.*

122. *Id.*

123. *See* Bruce Alpert, *Threat to Block Offshore Leases No Sure Thing: Blanco's Bid For Coastal Cash May Be Ignored*, THE TIMES-PICAYUNE, Feb. 16, 2006, at National 6.

124. *See id.* The state is seeking a fifty-fifty split of the revenue generated for the federal government by oil and gas production off Louisiana's shore. Currently, the state receives only a fraction of that revenue; it is estimated that the state received only \$32 million of the \$5.7 billion taken in by the federal government.

revenue.”¹²⁵ Discouraging as the impetus for Louisiana’s action may be, if it opens the state’s eyes to the potential benefits of the Act, the standoff with the federal government may be worthwhile. In any event, the controversy may signal a positive trend in the state’s progression. One potential concern, however, is that if Louisiana does not utilize the Consistency Provision appropriately, *i.e.*, in situations where it is truly warranted, Congress may be tempted to limit state authority under the Act in the future. As previously noted, however, the political environment for this type of assertion by Louisiana is sufficiently ripe for action, given the epic destruction the coastal zone has faced. If Louisiana does continue to pursue this course of action, and it appears that it may,¹²⁶ it would stand to lose many of the direct and indirect economic benefits brought to the state by the oil and gas industry. What it might gain are concessions from the federal government in terms of additional funds for coastal restoration. One drawback to this approach, however, is the implication that Louisiana will eventually sign off on the leases, once the state gets its financial due. If this is the case, the Consistency Provision will have merely been used as a means of extortion, not as a means to protect the environment by preventing harmful activities in the coastal zone.

Alternatively, the state could declare future lease sales inconsistent and extract environmental concessions (to make the activities consistent with the state CMP) from companies wishing to go forward with drilling operations in the Gulf. With oil profits at record highs, this does not seem unreasonable. Furthermore, it redirects the burden Louisiana is seeking to place on the federal government in the scenario noted above onto the shoulders of the wealthy oil and gas industry. In this scenario, the potential exists that companies would simply avoid bidding on lease sales in the Gulf because of the increased cost associated with making any proposed exploration consistent. Any economic benefits lost as a result of a development such as this could ultimately be regained through increased property values as a result of coastal restoration, more emphasis on tourism and fisheries production, and, theoretically, increased revenues when oil and gas are ultimately extracted from the floor of the ocean at some point in the future.

125. *Id.*

126. Governor Blanco seems to be following through on her threats to make use of the Consistency Provision to block a controversial sale of oil and gas leases in the eastern Gulf of Mexico. She has said, “[m]ake no mistake, [blocking the sales] is not an idle threat For the first time in more than a decade, we are seeing signs of movement on this issue.” Pam Radtke Russell, *Offshore Drilling Meetings to Start: La. Could Restate Lease-Sale Threat*, THE TIMES-PICAYUNE, Mar. 28, 2006, at Money 1.

Another consideration for the state is amending the language of its CMP to more directly address particular geographic areas or particular activities of concern. The state might single out particularly sensitive areas, or cite specific activities such as dredging and drilling that will be subject to heightened scrutiny under the state's CMP. While this would require approval from the Secretary of Commerce, it might give the state stronger footing in future litigation battles, should it choose to assert its power under the Consistency Provision more aggressively. The Act also contains a provision for citizen suits, which could be asserted by private individuals or groups "adversely affected" by a permit decision.¹²⁷ This has not been a common course of action in the state thus far, nor has it been in other states with similar provisions.

The Act is essentially a nationwide coastal zoning plan and should be perceived by the state as such. To analogize to local zoning plans, when a particular use is harmful to a community, it is limited to specific areas, ameliorated, or eliminated altogether. Congress gave this broad authority to the states with the CZMA and it has affirmed that delegation several times in the history of the legislation. Arguably, Louisiana's administration of the CZMA has been in direct conflict with congressional intent, and Congress has no authority under the Act to force Louisiana into action. Where Congress intended to give states the power to repel federal activities that were inconsistent with the states approved management plans, Louisiana has instead utilized the powerful provision merely as an attempt to secure additional funding. Again and again, through over thirty years of amendments, reauthorizations, and judicial decisions, the potential strength of the Act has been affirmed. Throughout this period, oil and gas exploration, canal dredging, and coastal erosion have continued almost unabated. In other coastal states, notably California, Florida, and Delaware, the Act has been utilized as intended, giving states a voice over powerful government and industry interests. While California and Florida can point to stronger delegations in Congress and better financial resources as reasons for their success, states such as Delaware and Washington cannot. Nevertheless, they have utilized the Act just as effectively.

The time has come for Louisiana to put a stop to the wholesale destruction of its coastline by asserting its delegated authority under the Consistency Provision of the CZMA. For now, the energy resources will perhaps remain buried in the Gulf. Obstacles including financial constraints, political roadblocks, and some negative judicial precedent certainly

127. See LA. REV. STAT. ANN. § 49:214.30, 49:214.35 (2005). "Any person adversely affected by an activity, including private citizens and environmental groups, is entitled to judicial review of final permit decisions." Livaudais, *supra* note 33, at 1033.

exist. While difficult to overcome, the state has perhaps its strongest incentive ever for doing so and may hope to abate the loss of thousands of acres of valuable coastline and wetlands, not only sustaining property values, but also perhaps lessening the blow of the next Katrina.