ARTICLES

RESISTING REGULATORY ROLLBACK IN THE TRUMP ERA: THE CASE FOR PRESERVING CZMA CONSISTENCY

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SUMMARY

On March 11, 2019, the National Oceanic and Atmospheric Administration published an advance notice of proposed rulemaking to amend regulations that implement the Coastal Zone Management Act's (CZMA's) consistency requirement. This Article places the notice in context, focusing on the CZMA's role in state review of offshore oil and gas development and its evolution to provide a predictable framework that balances coastal state interests with the nation's energy needs. It argues that current circumstances and facts do not support amending the regulations and that such changes should have an uphill battle in court.

For almost the past half-century, federal law has given state governments a unique voice in oil and gas development on the United States' outer continental shelf (OCS, or offshore). Specifically, the Outer Continental Shelf Lands Act (OCSLA) requires the U.S. Department of the Interior (DOI) to solicit state opinions when it prepares a five-year lease program for the OCS.[1] The Coastal Zone Management Act (CZMA)[2] provides that federal decisions, including approval of OCS lease sales and exploration and development plans, must be consistent with federally approved state coastal plans (consistency).[3]

On March 11, 2019, the National Oceanic and Atmospheric Administration (NOAA) published an advance notice of proposed rulemaking (ANPRM)[4] seeking suggestions on amending the regulations that implement the CZMA's consistency requirement. The request is just one in a deregulatory rulemaking frenzy directed at encouraging fossil fuel energy development and rolling back =environmental protections. This Article places the CZMA notice in this deregulatory torrent and argues that current circumstances and facts do not support amending the regulations and that such changes, if promulgated, should have an uphill battle in court.

Part I describes the context in which the consistency rulemaking is taking place. This context includes the Donald Trump Administration's pursuit of a petroleum-based energy strategy, wholesale regulatory rollback, and an evolving jurisprudence on rulemaking and a changing judiciary, including new U.S. Supreme Court Justices with pronounced views on the administrative state generally and agency rulemaking specifically.

Part II presents information regarding the CZMA, focusing on its role in state review of OCS development, how that role has driven changes to the Act and its implementing regulations, and the ANPRM.

Part III identifies possible legal arguments against changes, critically examines the ANPRM's rationale, and argues that the Administration should not pursue rulemaking based on the political and legal weaknesses of such changes.

Author's Note: Since the 1980s, the author's practice, writings, and lectures have focused on permitting under the Coastal Zone Management Act and state coastal programs. From 1985-1990, he represented the state of Alaska in its efforts to keep Bristol Bay off of the Bush Administration's five-year outer continental shelf program.

1. 43 U.S.C. §1344(c)(1).
2. 16 U.S.C. §§1451-1466, ELR Stat. CZMA §§302-319.
3. 16 U.S.C. §1456. As discussed below, consistency's application to the OCS was contested from the start and was not resolved until 1990.
4. Procedural Changes to the Coastal Zone Management Act Federal Consistency Process, 84 Fed. Reg. 8628 (Mar. 11, 2019) [hereinafter Advance Notice].

I. Context: Trump Energy Policy, Deregulation, and Judicial Review of Rulemaking

A. Trump's Hydrocarbon Energy Policy

In March 2017, two months after taking office, President Trump issued his first Executive Order pertaining to energy policy to "implement his campaign promise to rescind or revise the majority of environmental regulations placed on energy production by the Barack Obama Administration."[5] Section 2(a) of the Order directed agency heads to "review all existing regulations that . . . potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources." The Order required each agency to submit a final report within six months. In October 2017, the U.S. Department of Commerce issued its final report.[6] It did not identify the CZMA as a "burden" to oil and gas development, a point Part III will revisit.

A month later, the president issued Executive Order No. 13795, Implementing an America-First Offshore Energy Strategy.[7] The Order comprises eight directives. Most germane to this analysis is the Order's instruction to the Secretaries of the Interior and Commerce to create a streamlined permitting process for oil and gas exploration activities.[8] The Order requires that a report be delivered to the director of the Office of Management and Budget, the chairman of the Council on Environmental Quality, and the assistant to the president for economic policy within 180 days (on or before October 25, 2017).[9]

B. Regulatory Rollback

Since the president issued these Orders, his Administration has aggressively implemented them and other deregulation policies. A September 2019 review identifies 85 environmental rules that the Trump Administration is rolling back.[10] This deregulation has targeted rules under virtually every major environmental statute, carbon emission reduction strategies, and oil and gas development.[11] The volume and import of these efforts have spawned a cottage industry of rulemaking trackers.[12] The consistency rulemaking, therefore, is moving through rulemaking and ultimately to the courts in a closely watched rising tide of deregulation.

C. Rulemaking and the Courts: "Administrative Law Is Not for Sissies"

The consistency and other rulemaking will likely end up in court, where the courts will apply the Administrative Procedure Act (APA).[13] Justice Antonin Scalia, in a 1989 lecture to Duke University law students on *Chevron U.S.A, Inc. v. Natural Resources Defense Council*[14]—the seminal case on court deference to agency rules—warned, "administrative law is not for sissies."[15] Recent events have heightened Justice Scalia's caution. The Trump Administration's concerted deregulatory agenda alone would make administrative law a fraught battlefield. In addition, the volume of litigation likely to be generated by these efforts comes when "[s]cholars and courts have sharply differing views about where the Supreme Court stands with respect to *Chevron* generally, and, more specifically, the extent to which an agency must support its statutory interpretation with factual materials or cost-benefit analyses in order for its interpretation to be considered reasonable."[16]

Further obscuring the battlefield is the presence of new Supreme Court Justices. Justice Neil Gorsuch's views on agency rulemaking authority, for example, have already generated considerable analysis.[17] Justice Brett Kavanaugh

5. Sam Pickerell, Implementing an America-First Offshore Energy Strategy (Executive Order 13795), Duke SciPol 1 (2018), https://scipol.org/printpdf/track/dcpd-201700287-executive-order-13795-implementing-america-first-offshore-energy-strategy-0.
6. Memorandum from Wilbur Ross, Secretary, U.S. Department of Commerce, to Mick Mulvaney, Director, Office of Management and Budget (Oct. 25, 2017), Re: Department of Commerce's Final Report Reviewing Agency Actions as Required by Executive Order 13783.
7. Bureau of Ocean Energy Management (BOEM), *National OCS Oil and Gas Leasing Program*, https://www.boem.gov/regions/gulf-mexico-ocs-region/leasing-and-plans/national-ocs-oil-and-gas-leasing-program (last visited Dec. 10, 2019); for a review of the Executive Order, see Pickerell, *supra* note 5, at 1.
8. Pickerell, *supra* note 5, at 1-2; the Order also directed the Secretaries of the Interior, Defense, Commerce, and Homeland Security to review a variety of past executive actions under their purview to identify obstacles to fossil fuel energy development. *Id.*
9. *Id.* at 2. Repeated Internet searches and targeted conversations with NOAA staff and other close observers of this Executive Order did not produce a copy of this report, if one was published.
10. Nadja Popovich et al., *85 Environmental Rules Being Rolled Back Under Trump*, N.Y. Times, Sept. 12, 2019, https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html; for a discussion of deregulation as part of the Trump Administration's broader efforts, see also American Bar Association & Environmental Law Institute, Environmental Protection in the Trump Era (2018).
11. Popovich et al., *supra* note 10 and *infra* note 12.
12. *See generally* Brookings, *Tracking Deregulation in the Trump Era*, https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ (last updated Nov. 12, 2019); Harvard Environmental and Energy Law Program, *Regulatory Rollback Tracker*, https://eelp.law.harvard.edu/regulatory-rollback-tracker/ (last visited Dec. 10, 2019); Sabin Center for Climate Change Law, *Climate Deregulation Tracker*, http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/ (last visited Dec. 10, 2019). To track litigation regarding President Trump's deregulation efforts, see New York University School of Law Institute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, https://policyintegrity.org/deregulation-roundup (last updated Nov. 6, 2019).
13. *See generally* 5 U.S.C. §551.
14. 467 U.S. 837, 14 ELR 20507 (1984).
15. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989). For a timely discussion of judicial review under the APA in the President Trump era, see Caitlin McCarthy et al., *The Burden of Unburdening: Administrative Law of Deregulation*, 48 ELR 10767 (Sept. 2018).
16. Catherine M. Sharkey, *The* Chevron-State Farm *Framework: A New Age for Hard Look Review at Step Two?*, Harv. L. Rev. Blog (Jan. 2, 2018), https://blog.harvardlawreview.org/the-chevron-state-farm-framework-a-new-age-for-hard-look-review-at-step-two/; *see also* Valerie C. Brannon & Jared P. Cole, Cong. Research Serv., R44954, *Chevron* Deference: A Primer, summary (2017), https://fas.org/sgp/crs/misc/R44954.pdf ("Courts and scholars alike debate . . . how closely courts should scrutinize agency interpretations for reasonableness.").
17. William W. Buzbee, *The Tethered Presidency: Consistency and Contingency in Administrative Law*, 98 B.U. L. Rev. 1357, 1370 (2018) (Justice Gorsuch has opined that "an agency can enact a new rule . . . affecting huge swaths of the national economy one day and reverse itself the next"); *see also* Heather Elliott, *Justice Gorsuch's Would-Be War on* Chevron, 21 Green Bag 2D 315 (2018).

recently articulated his views on limits to agency rulemaking authority that signal he will be an active voice on regulatory matters.[18]

Despite these uncertainties, several court watchers persuasively argue that courts will carefully review the Administration's regulatory rollback. For example, after thoroughly reviewing the Supreme Court's APA cases and lower court rulings on Trump's efforts so far, Georgetown University Prof. William Buzbee describes: "[T]he Supreme Court's persistent doctrinal emphasis over thirty years [is] that an agency must address . . . underlying facts, science, circumstances, the record, and the agency's past reasoning."[19] Professor Buzbee dubs these factors collectively "contingencies," and this Article uses this term to refer to the factors that courts will consider in reviewing changes to existing regulations.

New York University's Catherine Sharkey sees in recent Supreme Court cases an emerging conceptual framework "which directs courts to scrutinize the factual premises and underlying policy reasons supporting an agency's interpretive position."[20] Sharkey bases her paradigm on *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* (*State Farm*),[21] in which the Supreme Court applied "hard look" judicial review and rejected the Ronald Reagan Administration's decision to rescind a prior administration's requirement that new cars be equipped with passive restraints.[22]

Part II, which follows, provides a brief history of the CZMA, its co-evolution with offshore oil and gas development, and the "underlying facts, science, circumstances, record, and the agency's past reasoning" or "contingencies" that produced the current consistency regulations.

II. The CZMA and Its Role in OCS Energy Development

A. CZMA Basics

The CZMA was enacted in 1972 as a voluntary program to encourage states to manage their coastal areas.[23] In this regard, the U.S. Congress found that the "increasing and competing demands upon the lands and waters of our coastal zone" had "resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shore-line erosion."[24] Accordingly, "Congress declared a national policy to protect the coastal zone, to encourage the states to develop coastal zone management programs, to promote cooperation between federal and state agencies engaged in programs affecting the coastal zone, and to encourage broad participation in the development of coastal zone management programs."[25]

The Act establishes two mechanisms to pursue this policy: state-adopted coastal management programs (CMPs) and federal consistency with these programs. These are discussed in turn below.

1. CMPs

Using grants and other incentives, the CZMA encourages coastal states to develop CMPs[26] that describe the uses subject to the program, the program's authorities and enforceable policies, the state's coastal zone boundaries, the management program's organization, and related management concerns.[27] An approved plan must adequately consider the "national interest" and "the views of the Federal agencies principally affected by such program."[28] In addition to federal agency input, NOAA considers comments from local governments, industry, nongovernmental organizations, and the public before approving state plans and their amendments.[29]

NOAA's required approval ensures that states consider federal agency activities, such as issuing licenses and permits, and approvals, including OCS plans. For example, NOAA has denied proposed state plan provisions that would prohibit all oil and gas activities off a state's coast because such policies conflict with the CZMA requirements to consider the national interest in energy development.[30] Thirty-five coastal states are eligible to participate in the federal CMP.[31] Alaska is not currently participating.[32]

2. Consistency

The CZMA federal consistency provision is an important incentive for states to develop coastal programs. The Commerce Department has described federal consistency as "a limited waiver of federal supremacy and authority."[33] Others describe consistency as an example of "cooperative federalism" where the federal and state governments share management responsibilities.[34] Once NOAA approves a state plan, CZMA §307(c)(1) requires federal activities

18. *See* Statement of Justice Kavanaugh on Petition for Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit, Paul v. United States, 589 U.S. __ (2019) (No. 17-8330). For a discussion of the potential implications of this statement, see Ian Millhiser, *Brett Kavanaugh's Latest Opinion Should Terrify Democrats*, Vox, Nov. 26, 2019, https://www.vox.com/2019/11/26/20981758/brett-kavanaughs-terrify-democrats-supreme-court-gundy-paul.
19. *See* Buzbee, *supra* note 17, at 1401.
20. *See* Sharkey, *supra* note 16.
21. 463 U.S. 29, 13 ELR 20672 (1983).
22. For a discussion of *State Farm* and its current application, see Jack Beermann, *The Deregulatory Moment and the Clean Power Plan Repeal*, Harv. L. Rev. Blog (Nov. 30, 2017), https://blog.harvardlawreview.org/the-deregulatory-moment-and-the-clean-power-plan-repeal/.
23. For a concise, authoritative review of the CZMA and implementing rulemaking, see Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788 (Jan. 5, 2006) [hereinafter 2006 Final Rule]; Secretary of the Interior v. California, 464 U.S. 312, 316, 14 ELR 20129 (1984).
24. *Interior v. California*, 464 U.S. at 316-17 (citing 16 U.S.C. §1451(c)).
25. *Id.* (citing 16 U.S.C. §1452).
26. *Id.*
27. 2006 Final Rule, *supra* note 23, at 789.
28. 16 U.S.C. §§1455(c)(8), 1456(b).
29. 2006 Final Rule, *supra* note 23, at 789.
30. *Id.*
31. *Id.*
32. Alaska Coastal Management Program Withdrawal From the National Coastal Management Program Under the Coastal Zone Management Act (CZMA), 76 Fed. Reg. 39857 (July 7, 2011).
33. 2006 Final Rule, *supra* note 23, at 790.
34. Tim Eichenberg & Jack Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism,"* 14 Ecology L.Q. 9 (1987).

"conducting or supporting activities directly affecting the coastal zone" to be "consistent" with the state plan "to the maximum extent practicable."[35] Federal agency activities that have coastal effects must be consistent to "the maximum extent practicable" with the federally approved enforceable policies of the state coastal plans discussed above. In addition, nonfederal applicants for federal authorizations and funding must be fully consistent with the coastal plans' enforceable policies.

NOAA's implementing regulations, discussed further below, require federal agencies to prepare a "consistency determination" for any activity that will "directly affect" the coastal zone of a state with an approved management plan. The determination must identify the "direct effects" of the activity and inform state agencies how the activity has been tailored to achieve consistency with the state program.

Table 1 summarizes CZMA consistency's major statutory tenets.

As discussed below in Section II.B., Congress has amended the CZMA since 1972 to arrive at these tenets stated above. This evolution's story constitutes the "underlying facts, science, circumstances, record, and the agency's past reasoning" against which a reviewing court should examine any amendments to the current regulations. Therefore, the following section examines this evolution in detail.

B. The CZMA's Role in OCS Energy Development

Since the CZMA's enactment, offshore energy development has been a major source of conflict about the Act's intended reach[36] and a significant driver of the CZMA and its implementing regulations' evolution. This evolution divides into two major stages: (1) 1977-2001—*Secretary of the Interior v. California*, the *Exxon Valdez* oil spill, the 1990 CZMA reauthorization, and 2000 rulemaking; and (2) 2001-2006—the 2001 National Energy Policy Development Group (Energy Policy Group) report, 2004 Ocean Commission report, 2005 Energy Policy Act, and the 2006 consistency regulation amendments. This section discusses the contingencies of these statutory and regulatory changes to provide a baseline against which to evaluate regulatory changes that might emerge from the ANPRM.

1. Stage 1: *Secretary of the Interior v. California*, the *Exxon Valdez* Oil Spill, the 1990 Reauthorization, and 2000 Rulemaking

Stage 1 of consistency's evolution begins with California adopting its CMP in 1977, proceeds with the state's attempts to apply consistency to a federal OCS lease sale, peaks with the contrary Supreme Court and congressional determinations on the central question of consistency's application to the OCS, and culminates in the 2000 rulemaking. During this period, the United States also experienced the catastrophic *Exxon Valdez* oil spill and renewed attention to ocean pollution on a variety of fronts.[37]

In 1977, five years after the CZMA's enactment, the Commerce Department approved California's CMP.[38] The same year, DOI began preparing OCS lease sale 53 off California's Santa Barbara coast.[39] Between the fall of 1978 and 1980, DOI analyzed and refined the sale, eventually identifying 243 tracts for the lease sale.

From July to December of 1980, the California Coastal Commission repeatedly informed DOI that the Commission had determined the lease sale to be an activity "directly affecting" the California coastal zone, and demanded a CZMA consistency determination. DOI disagreed and refused. In response to DOI's proposed notice of sale, the Commission specifically identified OCS oil spills' impacts on the southern sea otter, whose range was within 12 miles of 31 lease tracts, as a potential direct effect of the sale. The Commission, therefore, concluded that "leasing within 12 miles of the Sea Otter Range in Santa Maria Basin would not be consistent" with the California CMP.[40]

DOI again rejected the state's conclusion that the lease sale triggered consistency and, therefore, rejected California's demand for a consistency determination. In spring 1981, DOI issued a final notice of sale for 115 tracts. California sued in federal court to enjoin the sale of 29 tracts, arguing that leasing "sets in motion a chain of events that culminates in oil and gas development, and that leasing therefore 'directly affects' the coastal zone" and triggers consistency. The district court granted summary judgment to California and the U.S. Court of Appeals for the Ninth Circuit affirmed the district court judgment requiring DOI to prepare a consistency determination.[41]

The Supreme Court granted certiorari and reversed. After finding the CZMA's plain language ambiguous and reviewing the Act's legislative history, the Court concluded that Congress did not intend consistency to apply

35. 2006 Final Rule, *supra* note 23 (citing 16 U.S.C. §1456(c)(1)).

36. For a detailed contemporaneous discussion of the CZMA's application to OCS development, see Edward A. Fitzgerald, Secretary of Interior v. California: *Should Continental Shelf Lease Sales Be Subject to Consistency Review?*, 12 B.C. Envtl. Aff. L. Rev. 425 (1985), *available at* https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1643&context=ealr; Frances L. McChesney & Michael Chernau, *CZMA Consistency and OCS Leasing: Supreme Court to Review* California v. Watt, 13 ELR 10266 (Sept. 1983). For an early, negative critique of consistency authored by an Exxon Corporation attorney, see Shelby H. Moore Jr., *Outer Continental Shelf Development and Recent Applications of the Coastal Zone Management Act of 1971*, 15 Tulsa L.J. 443 (1980). For a thorough and authoritative account of the central role that OCS development played in the first two decades of CZMA consistency from a congressional staffer, see Thomas Kitsos et al., *CZARA of 1990: A Critical Time for Coastal Management*, 41 Coastal Mgmt. 198-218 (2013), *available at* http://dx.doi.org/10.1080/08920753.2013.784890.

37. Kitsos et al., *supra* note 36.

38. Secretary of the Interior v. California, 464 U.S. 312, 317, 14 ELR 20129 (1984).

39. OCS lease sales are conducted by DOI. Oil and gas companies submit bids and the high bidders receive priority in the eventual exploration and development of oil and gas resources situated in the submerged lands on the OCS. A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization. *Id.*

40. *Id.* at 318.

41. *Id.* at 319-20. For a discussion of the case proceedings up to the Ninth Circuit, see McChesney & Chernau, *supra* note 34.

Table 1. Selected Statutory Tenets to Federal Consistency*

Tenet	Tenet CZMA §
A federal action is subject to federal consistency if it has reasonably foreseeable coastal effects: the so-called "effects test"; actions cannot be categorically exempt.	307
States must base consistency decisions on enforceable policies that are approved by NOAA as part of the state's federally approved CMP.	307
Federal development projects within a state's coastal zone are automatically subject to consistency.	307(c)(2)
The federal agency determines whether a federal agency activity has coastal effects, and, if there are coastal effects, must provide a consistency determination to the affected state(s) no later than 90 days before final approval unless the federal agency and the state agree to a different schedule.	307(c)(1)
A federal agency activity must be carried out in a manner consistent to the maximum extent practicable with the enforceable policies of a state's CMP. However, a federal agency may proceed over a state's objection if the federal agency provides the state a written statement showing that its activity is consistent to the maximum extent practicable.	307(c) (1), (2)
States and federal agencies may seek mediation by the secretary to resolve serious federal consistency disputes.	307
An activity proposed by a nonfederal entity for a required federal license or permit (including an OCS oil and gas plan) is subject to federal consistency if the activity will have reasonably foreseeable coastal effects.	307(c)(3) (A), (B)
An applicant for a required federal license or permit resulting in coastal effects, including OCS plans, must provide affected states with a consistency certification and necessary information and data supporting the certification. The state must object or concur in six months or concurrence is presumed. For review of OCS plans states must first provide a three-month notice as to the status of its review and if the three-month notice is not provided, then concurrence is presumed.	307(c)(3) (A), (B)
An applicant can appeal the state's objection to the secretary of commerce, who can override the state's objection if the secretary finds that the activity is consistent with CZMA objectives or is otherwise necessary in the interest of national security. The secretary, in making a decision on an appeal, must provide a reasonable opportunity for detailed comments from the federal agency involved and from the state.	307(c)(3) (A)
The secretary has 30 days to publish a notice of appeal, then 160 days to develop a decision record, and may stay the 160-day period for 60 days, and has a 60- to 75-day period to issue a decision after the record is closed.	319
The authorizing federal agency cannot approve a federal license or permit for an activity with reasonably foreseeable coastal effects unless the state concurs or the secretary overrides the state's objection.	307(c)(3) (A), (B)

* **Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 790 (Jan. 5, 2006).**

to activities outside the territorial sea.[42] The four dissenting Justices argued the "directly affecting" language's plain meaning as well as the legislative histories could include federal OCS actions.[43]

In the years immediately following the Supreme Court's ruling, "[h]ighly public coastal pollution issues brought new challenges to states' abilities and authorities to manage their coastal resources."[44] These challenges included contamination from ocean dumping of industrial wastes, sewage sludge, and dredge materials in the New York Bight, and nonpoint water pollution in Boston Harbor, Chesapeake Bay, the Great Lakes, and Puget Sound.[45] In 1987, the Congressional Office of Technology Assessment released *Wastes in the Marine Environment*, a report that found that U.S. marine waters were threatened with continued degradation unless the federal government acted.[46] As if to ironically punctuate the report's finding, the *Exxon Valdez* went aground in March 1989, releasing 11 million gallons of oil and highlighting the risks of oil to the coastal environment.[47]

In 1990, following years of several attempts to do so, Congress reauthorized and amended the CZMA to overturn the decision and "restore the consistency authority" of the CZMA. Specifically, the amendments provided:

- Each federal agency activity *within or outside the coastal zone* that affects any land or water use or natural resource of the coastal zone must be carried out in a manner that is consistent to the maximum extent practicable with the enforceable policies of approved state CMPs.
- After a final federal court judgment, the Secretary of Commerce may certify that the activity is in "the paramount interest of the United States," and that mediation is unlikely to achieve compliance; on such certification the Secretary may request the president to grant an exemption to the consistency requirement.
- The agency must provide the consistency determination to the appropriate state agency no later than 90 days before the final federal activity approval.[48]

The U.S. House of Representatives conference report explained congressional intent to overturn the Supreme Court decision and "make clear that outer Continental Shelf oil and gas lease sales are subject to the requirements of section 307(c)(1)."[49] The amendments also added the term "enforceable policies" to CZMA consistency subsections and defined the term.[50]

In the late 1990s, NOAA began an informal effort with federal agencies, state agencies, and other stakeholders to identify issues and obtain comments on draft proposed revisions to the regulations.[51] These efforts culminated in the 2000 final rule, published on January 8, 2001.[52] According to NOAA, "most of the changes in the revised 2000 regulations were dictated by changes in the CZMA or by specific statements in the accompanying legislative history."[53]

2. Stage 2: Cheney's 2001 Energy Policy Group, Ocean Policy Commission, 9/11, Iraq Invasion, 2005 Energy Policy Act, and 2006 Regulations

In contrast to the 2000 rulemaking, which responded to congressional amendments to the CZMA following *Secretary of the Interior v. California* and 20 years of experience since NOAA promulgated the original rules, Stage 2 of the consistency requirement's evolution responded specifically to the Bush Administration's Energy Policy Group and its reexamination of energy policy.[54] As summarized in Table 2 and discussed in more detail below, the Energy Policy Group was controversial and resulted in an unprecedented conflict between Congress and the executive branch. In addition, the Ocean Policy Commission, mandated by the 2000 Ocean Policy Act, comprehensively reviewed U.S. ocean policy, including OCS leasing and CZMA consistency. Finally, the September 11 attack and U.S. invasion of Iraq formed a dramatic and legally significant backdrop against which the Bush Administration and ultimately Congress shaped the 2006 consistency regulations.

George W. Bush took office on January 20, 2001, less than two weeks after the 2000 consistency rules became effective. Within days, President Bush established the Energy Policy Group with Vice President Dick Cheney as its chair.[55] Five months later, in May 2001, the vice president submitted the group's report to President Bush.[56] In a bare-bones account of the Energy Policy Group's efforts, NOAA described the 2006 consistency amendments' origins as the report's (1) finding that Department of Commerce and DOI programs lacked "clearly defined requirements and information from Federal and State entities, as well as uncertain deadlines during the process," and (2) recommendation that the agencies "re-examine the cur-

42. For a detailed analysis of the Court's decision and an argument that Congress should repeal the consistency requirement, see Bruce Kuhse, *The Federal Consistency Requirements of the Coastal Zone Management Act of 1972: It's Time to Repeal This Fundamentally Flawed Legislation*, 6 Ocean & Coastal L.J. 77 (2001). For a contrasting perspective, see Kitsos et al., *supra* note 34.
43. Kuhse, *supra* note 42, at 90.
44. Kitsos et al., *supra* note 36, at 203.
45. *Id.*
46. *Id.*
47. *Id.* at 206.
48. Kuhse, *supra* note 42, at 90-92.
49. *Id.* at 91.
50. *Id.*
51. Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77124 (Dec. 8, 2000).
52. 2006 Final Rule, *supra* note 23, at 789.
53. *Id.*
54. *Id.* at 788.
55. Cong. Research Serv., RL31397, *Walker v. Cheney*: Statutory and Constitutional Issues Arising From the General Accounting Office's Suit Against the Vice President 1 (2002).
56. 2006 Final Rule, *supra* note 23, at 788.

Table 2. Chronology of Key Events During 2006 Rulemaking

Date	Event
2000	Ocean Policy Act enacted
January 8, 2001	2000 CZMA rules take effect
January 20, 2001	George W. Bush takes office
January 29, 2001	Bush establishes the Energy Policy Group
May 2001	Energy Policy Group issues its report
September 11, 2001	Al Qaeda attacks Untied States
July 2002	ANPRM for consistency regulations
March 2003	United States invades Iraq
2004	Ocean Policy Commission issues final report
August 2005	Bush signs 2005 Energy Act
2006	Final rule

rent federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf (OCS)."[57]

Contemporaneous accounts of the Energy Policy Group's work, however, indicate more complex and politically charged circumstances leading to the 2006 rules.[58] Specifically, beginning in the spring of 2001 (before the group issued its report) until late February 2002, the U.S. General Accounting Office (GAO), in response to Reps. John Dingell (D-Mich.) and Henry Waxman (D-Cal.), systematically and repeatedly sought documents from the vice president and the Energy Policy Group.[59] When the Administration refused to release the requested information, the GAO sued the vice president in federal district court in February 2002—the first time that the GAO had ever sued the executive branch. Judicial Watch and the Sierra Club also sued.[60] By late December 2003, courts had dismissed both suits, maintaining the Energy Policy Group's secrecy.[61]

While the vice president was conducting his closeted review of energy policy, the U.S. Commission on Ocean Policy was holding public hearings and comprehensively reviewing U.S. ocean policy pursuant to the Oceans Act of 2000.[62] The Commission, chaired by Admiral James Watkins and consisting of 16 commissioners appointed by President Bush, held public meetings around the country and conducted 18 regional site visits. The Commission received oral and written testimony from hundreds of people filling 1,900 pages.[63]

The Commission's review of existing laws included the CZMA generally and consistency specifically.[64] At the Commission's New Orleans hearing, the oil and gas

57. *Id.* (citing the Report of the National Energy Policy Group, May 2001, at 5-7).
58. Cong. Research Serv., RL31713, *Walker v. Cheney*: District Court Decision and Related Statutory and Constitutional Issues (2004).
59. *See* GAO, Chronology of GAO's Efforts to Obtain NEPDG Documents From the Office of the Vice President, April 19, 2001, to August 25, 2003 (2003), https://www.gao.gov/press/chronologynepdg.8.21.03_1.pdf.
60. *See* Bruce P. Montgomery, *Congressional Oversight: Vice President Richard B. Cheney's Executive Branch Triumph*, 120 Pol. Sci. Q. 581-617 (2005/2006); Randolph J. May, *The Reluctant Referee*, Legal Times, Jan. 6, 2003, http://www.pff.org/issues-pubs/other/opinion/030106LegalTimes.html.
61. Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004).
62. U.S. Commission on Ocean Policy, An Ocean Blueprint for the 21st Century: Final Report (2004).
63. *Id.*
64. U.S. Commission on Ocean Policy, Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades—Appendix 6 to An Ocean Blueprint for the 21st Century: Final Report 17, 21-27 (2004).

industry submitted consolidated testimony. Regarding the consistency process, the testimony stated, "CZMA federal-state checks and balances have generally worked in the Central and Western Gulf of Mexico, in contrast to the costly delays, investment uncertainty, and problematic consistency process in the Atlantic, Pacific, and Eastern Gulf of Mexico OCS."[65] After considering this and other testimony on the CZMA, the Ocean Policy Commission concluded:

> [T]he current OCS leasing and development program is one that is, on balance, coherent and *reasonably predictable*. Although the comprehensiveness of the program has not precluded the political battles noted above nor avoided restrictions on leasing in frontier areas, *in those regions of the nation where offshore development is accepted, the internal administrative process is well known and understood by those who invest in offshore leases* and those who choose to observe and comment on such activity.[66]

The Commission did not recommend changes to the CZMA's consistency provisions, but did recommend that Congress use a portion of the revenues the federal government receives from the leasing and extraction of OCS oil and gas to provide grants to all coastal states to be invested in the conservation and sustainable development of renewable ocean and coastal resources.[67]

Five months after the Energy Policy Group submitted its report and while the Ocean Commission was listening to testimony, Al Qaeda launched its September 11, 2001, attacks, completely altering the political landscape. While the battle between members of Congress and the executive branch was playing out over Energy Policy Group records, the Bush Administration invaded Afghanistan on October 7, 2001, and Iraq in March 2003.

It was against this violent geopolitical backdrop that NOAA began its rulemaking to respond to the Energy Policy Group report. In July 2002, NOAA published an ANPRM, seeking comments on whether changes should be made to NOAA's federal consistency regulations.[68] In response to public comments on this notice, NOAA issued its proposed rule in June 2003, three months after the Iraq invasion.

While this rulemaking was pending, and U.S. troops were fighting in Afghanistan and Iraq, Congress passed the Energy Policy Act of 2005.[69] President Bush signed the bill into law on August 8, 2005,[70] the first omnibus energy legislation enacted in more than a decade.[71] The Congressional Research Service described the context for the new law as being "shaped by competing concerns about energy security, environmental quality, and economic growth." Others described the final product as a "doubling down"[72] on a petroleum-dominated energy policy, and "duck[ing] the most important energy challenges."[73]

Regarding CZMA consistency, the Energy Policy Act resolved issues raised by the proposed rule related to appeals of state consistency decisions. Specifically, the Energy Policy Act established the appeal deadlines identified in Table 1: (1) 30 days to publish a notice of appeal; (2) an additional 160 days to develop a decision record, with provisions to stay the 160-day period for 60 days; and (3) a 60- to 75-day period to issue a decision after the record is closed. These deadlines are shorter than NOAA proposed, but longer than the deadlines some commenters recommended in comments on the proposed rule.[74] In addition, the Energy Policy Act prescribed the method of developing the Secretary's decision record for appeals of energy projects. Following the enactment of the Energy Policy Act, NOAA waited until the Ocean Policy Commission released its final report and published the final rule in January 2006.[75]

In sum, the 2006 consistency regulations were initiated following an industry-dominated and secretive report process that called for a review of the appeal process. In contrast to the Energy Policy Group, a thorough and public review by the Ocean Policy Commission found the process to be well understood and predictable. In the end, Congress tempered the pro-industry requests for an expedited process, but still provided a more compressed timetable than NOAA recommended in the proposed rule. Congress acted while the United States was engaged in the war on terrorism and on-the-ground warfare in Iraq.

As discussed in Part III, this remarkable war backdrop, together with the Ocean Commission's measured analysis, argues against the Trump Administration's presumption that the current rules create too many barriers to OCS development. Rather, the circumstances leading to the 2006 regulations suggest that the executive branch pushed very hard to make the regulations more responsive to the oil and gas industry and that Congress set a more balanced schedule. As discussed in Part III, these circumstances create a high bar against which a reviewing court should review further pro-industry changes.

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65. Testimony Submitted by the American Petroleum Institute, Domestic Petroleum Council, Independent Petroleum Association of America, International Association of Drilling Contractors, National Ocean Industries Association, Petroleum Equipment Suppliers Association, and the United States Oil and Gas Association to the U.S. Commission on Ocean Policy, New Orleans, Louisiana (Mar. 8, 2002).
66. U.S. Commission on Ocean Policy, *supra* note 62, at 354-55 (emphasis added).
67. *Id.* at 360.
68. Procedural Changes to the Federal Consistency Process, 67 Fed. Reg. 44407-10 (July 2, 2002) (ANPRM).
69. H.R. 6, 109th Cong. (2005).
70. Pub. L. No. 109-58, 119 Stat. 594 (2005).
71. Mark Holt & Carol Glove, Cong. Research Serv., RL33302, Energy Policy Act of 2005: Summary and Analysis of Enacted Provisions CRS-1 (2006).
72. Timmons Roberts & Liam Downey, *When Bush and Cheney Doubled Down on Fossil Fuels: A Fateful Choice for the Climate*, Brookings, July 7, 2016, https://www.brookings.edu/blog/planetpolicy/2016/07/07/when-bush-and-cheney-doubled-down-on-fossil-fuels-a-fateful-choice-for-the-climate/.
73. Press Release, American Council for an Energy-Efficient Economy, Conference Energy Bill Misses the Big Targets (July 28, 2005), https://aceee.org/press/2005/07/conference-energy-bill-misses-big-targets.
74. 2006 Final Rule, *supra* note 23, at 789.
75. *Id.* This NOAA chronology leaves an unexplained year-long gap between the release of the U.S. Commission on Ocean Policy report and adoption of the final rule.

3. ANPRM

As discussed in Part I, NOAA published its ANPRM in the spring of 2019. The notice seeks comments on three topics.

First, the notice asks "[w]hat changes could be made to NOAA's federal consistency regulations . . . that could streamline federal consistency reviews and provide industry with greater predictability when making large investments in offshore renewable and non-renewable energy development?"[76]

Second, NOAA seeks comments on "whether and how NOAA could achieve greater efficiency to process an appeal in less time and increase predictability in the outcome of an appeal—while continuing to meet the requirements and purposes of the CZMA."[77] In addition, NOAA requested comment on the types of new information that may be produced at different stages of OCS oil and gas projects to provide an indication of what information may be relevant to subsequent appeals.

Third, the notice seeks comments on the fees to be paid by applicants seeking secretarial review of state consistency decisions. The fees include an "application fee of not less than $200 for minor appeals and not less than $500 for major appeals."[78]

Part III below examines the Administration's premise for amending the consistency regulations considering the circumstances that produced the 2000 and 2006 regulations and today's context.

III. Discussion

Part II examined the contingencies that produced the current regulations, last amended in 2006. Part II also described the Trump Administration's ANPRM and its rationale of increasing "efficiency" (by "streamlining") and "certainty" for the industry. This part examines facts and current circumstances as they pertain to the stated objectives of shortening the appeal process and making its outcome more certain for oil and gas development. The discussion concludes that the underlying facts and circumstances do not support such changes.

A. The Record of the States' Use of Consistency Supports Retaining the Current Regulations

Since 1978, the Bureau of Ocean Energy Management (BOEM) has approved more than 10,600 OCS exploration plans and more than 6,000 development plans. According to NOAA, states have found most of these OCS plans to be consistent with their coastal programs.[79]

During the CZMA's 47-year history through 2018, the offshore oil and gas industry has appealed a state's federal consistency objection to the Secretary of Commerce only 18 times.[80] The Secretary issued a decision in 14 of those cases and four appeals settled. Of the 14 decisions, seven overruled the state's objection and seven decisions upheld.[81] Two recently filed appeals, discussed further below, are pending before the Secretary of Commerce.

Since the 1990 CZMA amendments, there has been only one state objection to an OCS lease sale. In that one objection, the Office of Ocean and Coastal Resource Management determined that the state's objection was not based on enforceable policies, BOEM determined that it was consistent with the state's CMP, and the lease sale proceeded.[82] There have been no state objections to a lease sale since the 2006 amendments.[83] Thus, all lease sales offered by BOEM since the 1990 amendments have proceeded after state federal consistency review.[84]

In addition, since 1990, there have been six state objections to OCS exploration or development plans. In three of those cases, the Secretary did not override the state's objection. In two of the cases, the Secretary did override the state, allowing BOEM approval of the permits described in the plans, and in one case, the state objection was withdrawn as a result of a settlement agreement between the federal government and the oil companies involved in the project.

Until 2019, there had been no appeals of OCS exploration or development plans in the 13 years since the 2006 regulations. Last year, South Carolina and North Carolina each determined that OCS seismic exploration would not be consistent with their CMPs. The applicant appealed these determinations to the Secretary of Commerce.[85]

These statistics indicate that a high degree of certainty already exists regarding the consistency process and OCS development. In the 29 years since the 1990 amendments, industry was able to pursue its plans in all but three cases. In those three cases, the Secretary of Commerce agreed that the industry plans were inconsistent with state programs.

In addition, and more importantly, there is no indication that the states' or Secretary's decisions in those three

76. Advance Notice, *supra* note 4.
77. The notice presented a detailed example suggesting that it might be possible and desirable to limit the record for review by the Secretary of Commerce under certain hypothetical scenarios. *Id.* at 8632.
78. *Id.* Under NOAA's regulations, an appeal involving a project valued in excess of $1 million is considered major. 15 C.F.R. §930.125(c) (2019). The applicant can seek a fee waiver from the Secretary based on inability to pay. *See* 16 U.S.C. §1456(i)(1).
79. 2006 Final Rule, *supra* note 23, at 791.
80. *Id.*
81. *Id.*
82. *Id.*
83. See NOAA's CZMA appeal spreadsheet for more information on CZMA appeals at https://coast.noaa.gov/data/czm/consistency/appeals/fcappealdecisions/mediadecisions/appealslist.pdf (last visited Dec. 10, 2019).
84. *Id.*
85. Letter from Christopher Stout, Coastal Zone Consistency Manager, South Carolina Department of Health and Environmental Control, to Gary Poole, Business Development Manager, WesternGeco, LLC (July 8, 2019), Re: South Carolina Department of Health and Environmental Control—Office of Ocean and Coastal Resource Management's Objection to Consistency Certification Submitted by WesternGeco, LLC (HNN-BMBP-FT3KS); Letter from Braxton Davis, Director, North Carolina Division of Coastal Management, to Gary Poole, Business Development Manager, WesternGeco, LLC (June 11, 2019), Re: North Carolina Division of Coastal Management's Objection to WesternGeco's Proposal to Conduct Geological and Geophysical Surveys Off North Carolina's Coast.

cases could not have been reasonably predicted based on the state plans and early comments. Since the 2006 rules implementing the appeals deadline, there were no appeals until 2019, leaving little factual record on which to justify any change to these regulations that favor industry. As discussed below in more detail, there is a high degree of certainty about where states are likely to find OCS development to be inconsistent or consistent with state programs. It is not the CZMA that introduces uncertainty to the industry, but rather the Trump Administration's interest in greatly expanding the areas in which OCS activities occur.

B. *There Is Great Certainty About Which States Are Likely to Greenlight Development and Which Are Likely to Slow It or Stop It*

The ANPRM seeks ways to provide "greater predictability." This goal presumes that the current process is unpredictable, a presumption not supported by the facts. As discussed in Part II, in 2004, the Ocean Policy Commission considered industry testimony on this point and concluded that the leasing process, including CZMA consistency, was "reasonably predictable."[86] The above data regarding appeals support the Commission's conclusion.

Since the Commission's 2004 report, the certainty regarding which states support offshore development and which states oppose such development has remained constant. States most recently restated their positions in their comments on DOI's proposed five-year program for 2019-2024.[87] These comments identified policies and programs in addition to CZMA coastal programs that emphasize other coastal uses and seek to limit OCS oil and gas development. State attorneys general wrote a joint letter explaining why lease areas should be excluded from areas offshore of opposing states as a matter of law.[88]

Then-Secretary of the Interior Ryan Zinke almost immediately recognized the political wisdom of taking state opposition seriously. After meeting with then-Governor, now Sen. Rick Scott (R-Fla.), the Secretary indicated he would pull Florida areas from the final program. He later extended this commitment to other states that strongly oppose offshore oil and gas development off their coasts.[89]

In addition, states have enacted laws not yet approved as part of the CMPs, which clearly indicate that they do not view such development as consistent with their coastal management priorities. These state laws, while not part of their CMPs, provide additional certainty about how such states view OCS development.[90] The consistency process is likely to move slowly where industry decides nevertheless to proceed (assuming the next five-year program even includes such areas, contrary to Secretary Zinke's statements).

Thus, the greatest uncertainty posed to OCS leasing and development is the current Administration's effort to move beyond a decades-long working consensus that has limited such development to areas where there is at least some state support.[91] The industry should understand—if it does not already—that states and other stakeholders will object under every federal and state statutory scheme, causing the industry uncertainty and higher costs. Ironically, this outcome is entirely predictable. If the industry wants to avoid unpredictability, it should stay out of areas with no recent experience of OCS development and strong opposition.

C. *Congress Established the Appeal Time Lines*

The ANPRM presumes that the appeal process takes too much time and could be "streamlined" or made "more efficient." The limited number of appeals over the CZMA's life and since the 2006 amendments do not support the premise that the consistency appeal process has unnecessarily delayed offshore oil and gas development. More importantly and as discussed in Part II, Congress set the appeal time lines in the 2005 Energy Policy Act. The deadlines were less than NOAA had proposed, but greater than industry wanted.

Appeals that take place within the statutory baselines reflect the balance that Congress struck by statute and codified in the 2006 rulemaking. There is no factual basis arising from the past 14 years for providing less time through regulation than Congress did by statute. In this regard, the experience with industry's pending appeals of the North Carolina and South Carolina consistency-based objections to seismic explorations is instructive. In both appeals, the appellants, rather than the states, have requested deadline extensions.[92]

86. U.S. Commission on Ocean Policy, *supra* note 62.
87. For a detailed analysis of current state positions regarding OCS petroleum development, see Eric S. Laschever, *A Review of Coastal States' Comments on BOEM's Outer Continental Shelf Draft 5-Year Program*, 46 Coastal Mgmt. (2018), *available at* https://doi.org/10.1080/08920753.2018.1503910.
88. *Id.* at 5.
89. *Id.* at 14.
90. *See generally* Laschever, *supra* note 87. States that generally have supported offshore oil and gas development have not blindly endorsed all OCS lease sales. For a detailed account of Louisiana's lawsuit opposing a lease sale in the aftermath of Hurricanes Katrina and Rita, see Ryan Seidemann & James G. Wilkins, Blanco v. Burton: *What Did We Learn From Louisiana's Recent OCS Challenge?*, 25 Pace Envtl. L. Rev. 393 (2008). Further comment on Louisiana's experience that questions consistency's efficacy following the *Deepwater Horizon* disaster can be found in Sam Kalen et al., *Lingering Relevance of the Coastal Zone Management Act to Energy Development in Our Nation's Coastal Waters?*, 24 Tul. Envtl. L.J. 73 (2010).
91. Congress and the various presidents effectuated this consensus through moratoria and presidential withdrawals, respectively. For a discussion of these actions, see Milo C. Mason et al., *Offshore Mineral Development*, *in* Ocean and Coastal Law and Policy 393-94 (Donald C. Baur et al. eds., American Bar Association 2d ed. 2015).
92. Letter from Ramona Monroe, Attorney, to Wilbur Ross, Secretary, U.S. Department of Commerce (July 10, 2019) at 12, Re: WesternGeco's Notice of Appeal of North Carolina's Coastal Zone Management Act Consistency Objection (if "the Secretary determines that the proposed G&G activities do constitute an energy project, WesternGeco respectfully requests an extension of time to allow coordination with BOEM, as the lead federal permitting agency, and to prepare the consolidated record for filing"); Letter from Adam Dilts, Chief, NOAA Oceans and Coasts Section, to Ramona Monroe, Attorney, and Bradley Churdar, Chief Counsel, Office of Ocean and Coastal Resource Management (Sept. 6, 2019), Re: WesternGeco South Carolina Federal Consistency Appeal—Order (granting second deadline extension requested by WesternGeco).

D. *The Current Rulemaking Lacks Analysis and Congressional Involvement*

Past amendments to the CZMA regulations have followed lengthy fact-finding and analysis. More significantly, congressional involvement answered key policy questions that the final rules codified. The current effort lacks these important elements.

1. Lack of Analysis

As discussed in Part II, the 2000 rulemaking included several years of informal consultation. The 2006 rulemaking incorporated findings from the industry-dominated Energy Policy Group and was informed by the Ocean Policy Commission hearings and final report. These efforts produced a record on which NOAA based its rule amendments. NOAA's current rulemaking, in contrast, lacks any such analytical grounding. As noted in Part I, when directed by the president to document obstacles to energy production, the Commerce Department did not identify the CZMA generally or consistency specifically in its October 25, 2017, review of its permitting processes in response to Executive Order No. 13783.

2. Congressional Action to Calibrate the Balance Between State and Industry Perspectives

Congress drove the 2000 rulemaking process by answering the fundamental question of whether the CZMA applied at all to the OCS and, thus, if states had a significant voice in where and how such development would occur. In answering this question affirmatively, Congress essentially mandated that different policies, concerns, and processes would inform OCS development in different parts of the OCS. For the reasons discussed in Section III.B., this complexity is not the same as uncertainty. However, to the extent that the complexity produces different outcomes, the statute rather than the regulations produces these differences.

Similarly, Congress and the 2005 Energy Policy Act answered the question of how and under what deadlines consistency appeals would proceed. Even after the report process, NOAA still favored a longer appeal period. Congress has not enacted any legislation altering the 2006 framework it established for consistency decisions and appeals.

E. *The National Interest in Areas Subject to the CZMA Changes Over Time, Cutting Against Changes That Sacrifice Robust State Involvement*

The CZMA and OCSLA articulate the national interest in wise management of the OCS and its varied resources. While the law recognizes developing petroleum resources as a factor in calculating the national interest, the legal regime does not make petroleum development the highest or dominant factor in this calculation. The laws do not establish the proper balance, nor do they create a fixed balance. Several circumstances since 2006 suggest that developing petroleum-based OCS energy should receive less weight in achieving a balance that constitutes the national interest than the last regulatory revision.

1. Less Dependence on Foreign Oil

As discussed above, declining U.S. production and fear of dependence on foreign supplies greatly influenced the 2006 consistency rule amendments. Although the Middle East remains volatile, U.S. dependence on the region has declined.[93] As Kenneth Medlock III, senior director of the Center for Energy Studies at Rice University, puts it, "The U.S. produces so much oil now." He concludes, "Today we just live in a different world."[94] To the extent that U.S. dependence on foreign oil drove the 2006 amendments, our reduced dependence is a change in facts that cuts against rather than supports making it easier, rather than harder to lease the OCS to produce oil and gas. Put differently, the national interest in offshore energy development has changed.

2. Climate Change Makes Reducing Fossil Fuel Consumption More Urgent

Although climate change was well understood and the subject of scientific consensus when President Bush took office 18 years ago,[95] we have lost those 18 critical years in our response and the science indicates a narrower window than once thought to respond.[96] In addition, we have added almost two decades of experience with renewable and energy efficiency to the decades of experience[97] under our collective belts at the century's turn. As Brown University's Prof. Timmons Roberts and University of Colorado's Prof. Liam Downey note, "This is a pivotal moment in which we face a choice similar to the one that President Bush faced then: double down on what we know (fossil fuels) . . . or, make a decisive move toward renewables and efficiency."[98]

Significantly, it is not necessary to demonstrate that Professors Roberts and Downey identify the correct policy for our future. It is enough to observe that the current regulations emerged as a result of the Bush Administration's "double down" mentality and that today's circumstances do not provide a record to further tip the consistency regulations to more strongly favor OCS petroleum development—the rationale presented in the ANPRM.

In a similar vein, the current circumstances highlight the renewed importance of a strong state role in proactively managing coastal resources. As Tom Kitsos, chief counsel and senior policy analyst to the House Merchant Marine and Fisheries Committee during the first two decades of CZMA implementation, observed, "[w]hat CZM is today and how it is poised to confront significant future issues may be as important as what it was designed to be some forty years ago." Citing rising sea levels, ero-

93. Bradley Olson, *U.S. Becomes Net Exporter of Oil, Fuels for First Time in Decades*, Wall St. J., Dec. 6, 2018.
94. Jeanne Whalen, *Saudi Arabia's Oil Troubles Don't Rattle the U.S. as They Used To*, Wash. Post, Sept. 19, 2019, https://www.washingtonpost.com/business/2019/09/19/saudi-arabias-oil-troubles-dont-rattle-us-like-they-used/.
95. Roberts & Downey, *supra* note 72.
96. Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers*, *in* Global Warming of 1.5°C (Valérie Masson-Delmotte et al eds., IPCC 2018).
97. Roberts & Downey, *supra* note 72.
98. *Id.*

sion, nonpoint source pollution, and coastal population growth, Kitsos elaborates:

> The on-coming challenges border on the staggering: giant polar ice sheets in Antarctica and Greenland are losing orders-of-magnitude more ice than even two decades ago . . . coastal communities are increasingly vulnerable to severe or catastrophic weather events such as Hurricane Sandy; a changing climate is modifying the chemistry of the sea resulting in ocean acidification that threatens marine food chains . . .[99]

In sum, the national interest in balancing coastal uses as the CZMA was enacted to do requires the states to play the role that the Act contemplates. As Kitsos concludes, "The program that Congress enacted in 1972, and saved in 1990, remains poignantly relevant today and will be crucially important tomorrow." Slanting consistency toward the oil and gas industry undermines this crucially important role.

F. Rulemaking and the "Perils of Petro-Politics"

Professors Roberts and Downey powerfully catalogue what they call "the perils of petro-politics" in the Bush era:

> President Bush's decision . . . resulted in the U.S.-led war in Iraq—a war that took a million lives, ran up over a trillion in U.S. national debt, led to the rise of ISIS, and forced millions of people from their homes, destabilizing the region. It also kept the United States, the world's largest historical emitter of greenhouse gases, from reducing its greenhouse gas emissions.[100]

These international and existential risks resonate now as in 2001 as the current president calls for protecting Syrian oil fields from ISIS.[101] Professors Roberts and Downey present a different direction to reduce these perils.

Petro-politics have domestic political risks that, if more mundane than the above international "perils," are still remarkably consequential. As discussed in Section III.B., former Secretary Zinke's draft proposed five-year program immediately drew fire from his Republican flank, prompting Zinke to remove Florida offshore areas from the final program to help then-Governor Scott in his senate race; Scott's victory was important to the Republicans' hold on the U.S. Senate. Zinke's move illustrated that support and opposition to OCS development does not neatly follow partisan lines.[102] The consistency decisions currently pending before Secretary Wilbur Ross further illustrate the point: North Carolina is a swing state that will be important in deciding the 2020 presidential race. The political risks of alienating coastal community voters might persuade Trump to defer consistency rulemaking just as he has deferred the five-year program until after 2020.

Beyond political expediency, putting the consistency rulemaking on hold with the five-year program makes sense in developing an even plausible rulemaking record. Specifically, the next five-year program will strongly determine whether and how states will use their CZMA consistency authority. If the next program is like the current one, the argument for changing the rules is very weak because, as discussed above, industry has praised the consistency track record in states that support offshore oil and gas development and the Ocean Policy Commission noted the OCS program's predictability within those contours. If the next five-year program adds new lease areas off states opposing oil and gas development, then weakening such states' ability to effectively participate by changing consistency regulations to favor industry makes even less sense. While neither scenario supports changes favoring industry, it makes little sense to change consistency without knowing the lease program to which it will apply.

IV. Conclusion

The contingencies that a court will review in assessing any changes to the consistency regulations will be, in Professor Buzbee's words, "reality-based factors—including past legal documentation, history, regulatory experience, health impacts, science, data, models and predictions, past agency studies, and published explanations of the previous regulatory choice."[103] The above analysis illustrates that for almost 50 years, the CZMA's consistency provisions have evolved—with significant congressional direction—to provide a predictable framework that balances coastal state interests with the nation's energy needs. The Trump Administration would do well to leave the regulation undisturbed; and if the Administration proceeds a reviewing court should look hard at the contingencies this Article enumerates in judging changes.

99. Kitsos et al., *supra* note 36, at 217.
100. Roberts & Downey, *supra* note 72.
101. Amanda Macias, *Pentagon Echoes Trump, Says Securing Syrian Oil Fields Is Top Priority After ISIS Leader's Death*, CNBC, Oct. 28, 2019, https://www.cnbc.com/2019/10/28/pentagon-echoes-trump-says-securing-syrian-oil-fields-is-top-priority.html.
102. *See* Laschever, *supra* note 87.
103. Buzbee, *supra* note 17, at 1361.