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Piecemeal Legislative Proposals: An Inappropriate Approach to Managing Offshore Oil Drilling

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COMMENT

PIECEMEAL LEGISLATIVE PROPOSALS: AN INAPPROPRIATE APPROACH TO MANAGING OFFSHORE OIL DRILLING

INTRODUCTION

The election of George W. Bush in 2000 as the forty-fourth President of the United States, a perceived pro offshore oil-drilling President[1], was followed by several legislative proposals aimed at limiting or ceasing oil drilling off the coast of most of the states.[2] This comment dis-

[1] *See* Gary C. Bryner, The National Energy Policy: Assessing Energy Policy Choices, 73 U. COLO. L. REV. 341, 361 (2002) (citing Nat'l Energy Pol'y Dev. Group, National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future, Summary of Recommendations, ch. 5, Energy for a New Century: Increasing Domestic Energy Supplies (2001)). The Bush Administrations energy plan "calls on federal agencies to promote enhanced recovery of oil and gas from existing wells, encourage oil and gas technology through public-private partnerships, reduce impediments to federal oil and gas leases, and reduce royalties and create other financial incentives to encourage environmentally sound offshore oil and gas development." *Id. See generally* Steve Cook, Energy: Bush Pledges to Uphold Moratorium on Oil Drilling in California Offshore Areas, 105 DAILY ENV'T REP. (BNA) A-2 (May 31, 2001) [hereinafter Cook]. "The National Energy Policy unveiled May 17 by President Bush...noted that moratoria on [OCS] drilling off the West Coast, the East Coast and parts of the Gulf Coast of Florida were imposed because of concerns over potential oil spills, but that existing [OCS] oil wells have spilled only one-thousandth of 1 percent of production." *Id.*

[2] *See* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, §§ 107, 109-10, 156, 117 Stat. 11. Prohibits the Department of Interior from expending any funds "for the conduct of offshore preleasing, leasing and related activities" currently under Presidential Moratorium, "any lands located outside Sale 181," "activities in the Mid-Atlantic and South Atlantic planning areas," and a "Sense of Congress" that no funds are to be made available for the thirty-six existing leases off the coast of California while settlement negotiations are ongoing with the Department of Interior "for the retirement of the leases." *Id.*; California Coastal Protection and Louisiana Energy Enhancement Act, S. 1952, 107th Cong. (2001). S. 1952 is a "bill to reacquire and permanently protect certain leases on the [OCS] off the coast of California by issuing credits for new energy production in less environmentally sensitive areas in the Western and Central Planning Areas of the Gulf of Mexico." *Id.*; COAST Anti-Drilling Act, H.R. 2318, 107th Cong. (2001); COAST Anti-Drilling Act, S. 1086, 107th Cong. (2001). S. 1086 and H.R. 2318 place a permanent leasing ban on the Mid and North Atlantic OCS planning areas. *Id.*; H.R. 2285, 107th Cong. (2001). H.R. 2285 places a permanent moratorium on leasing offshore New Jersey. *Id.*; Coastal States Protection Act, S. 901, 107th Cong. (2001). This bill would "prohibit offshore oil leasing in an area adjacent to a "coastal State that has declared a moratorium on such activity. . .." *Id.*; H.R. 1631, 107th Cong. (2001); Outer

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cusses why these legislative proposals are unworkable in light of the nation's goals for managing offshore oil drilling. Nonetheless, many of these legislative proposals highlight the coastal state's specific concerns, as well as, improvements to the offshore oil leasing decision-making process to alleviate those concerns.

Section I of this comment discusses the federal and state government's role in the offshore oil leasing decision-making process. It also highlights the historical tools, such as temporary moratoriums and appropriations prohibitions used by the Congressional Delegates of several of the coastal states to ensure there was no offshore oil drilling on Outer-Continental Shelf ("OCS") lands adjacent to their coasts for the past twenty years. Section II discusses the legislation proposed by Congressional Delegates of several of the coastal states in response to their concerns over the Administration's pro-drilling attitude. The proposed legislation encompasses use of historical tools, as well as, new tools, such as permanent moratoriums, swapping existing lease rights off of one coast for potential rights off of another or simply buying back existing lease rights. Section III examines the disadvantages of the newly proposed tools and the continued use of the appropriations tool. Finally, Section IV proposes possible solutions to the coastal states' opposition to offshore oil leasing. Furthermore, these proposals ensure key goals surrounding the nation's oil production management are not frustrated.

I. BACKGROUND

A. THE ORIGINS OF THE FEDERAL GOVERNMENT'S STATUTORY AUTHORITY TO LEASE LAND IN THE OCS FOR OIL DRILLING

Until the end of World War II, the coastal states regulated both waters within three nautical miles of their shoreline, as well as, the offshore lands beyond three nautical miles.[3] This regulatory scheme stemmed

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Continental Shelf Protection Act, S.771, 107th Cong. (2001). Both bills place a permanent leasing moratorium in the OCS areas offshore Florida and allow the Department of the Interior to buy-back existing leases. *Id.*; H.R. 1503, 107th Cong. (2001). H.R. 1503 places a permanent prohibition on the Department of Interior to expend any funds for Mid Atlantic coast offshore oil lease sales. *Id.*; Comprehensive and Balanced Energy Policy Act of 2001, S. 597, 107th Cong. (2001). This legislation is aimed at reducing the size of Lease Sale 181. *Id.*; H.R. 1066, 107th Cong. (2001). This bill would "prohibit offshore oil leasing in an area adjacent to a "coastal State that has declared a moratorium on such activity. . .." *Id.*; H.R. 262, 107th Cong. (2001). This bill would require a temporary moratorium on leasing in the OCS adjacent to the California coast. *Id.*

[3] Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945), 3 C.F.R. 67 (1943-1948 Compilation) [hereinafter Truman Proclamation]. *See generally* Sierra B. Weaver, Local Management of Natural Resources: Should Local Governments be Able to Keep Oil Out?, 26 HARV. ENVTL. L. REV. 231, 232-34 (2002). The first known offshore oil wells were located off the coast of Cali-

from the federal government's lack of interest in offshore lands and its focus on wartime efforts.[4] As the United States dedicated its available resources to the wartime efforts, it "precluded the federal government from taking control from the states until [after the war]."[5] It was during this period of state-led offshore regulation that coastal states were solely responsible for making all offshore oil leasing permitting decisions.[6]

In 1945, however, President Harry S. Truman issued a proclamation claiming U.S. jurisdiction over "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States."[7] Truman issued this proclamation in response to concerns over national security.[8] In 1947, the U.S. Supreme Court validated Truman's proclamation.[9] In *United States v. California*, the U.S. Supreme Court held that "the Federal Government rather than the state[s] has paramount rights in and power over ["all offshore lands beyond the low-water mark"]."[10] This court decision marked the beginning of the "Seaweed Rebellion."[11]

Six years into the Seaweed Rebellion, Congress passed the Federal Submerged Lands Act ("FSLA").[12] Passage of the FSLA is attributed, in large part, to political pressure placed on Congress by coastal states over their 1945 coastal water jurisdiction loss.[13] The FSLA returned to the states their right to control the waters as historically done before Truman's proclamation.[14] In most cases, this included the coastal states' rights to regulate submerged land within three nautical miles of the shoreline.[15] Congressional passage of the FSLA did, however, maintain

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fornia. *Id.* at 232. The leasing decisions were made by oceanfront property owners and the counties. *Id.* In all, hundreds of leases were approved by the state. *Id.* at 233 (citing ROBERT SOLLEN, AN OCEAN OF OIL: A CENTURY OF POLITICAL STRUGGLE OVER PETROLEUM OFF THE CALIFORNIA COAST 9 (1998)).

[4] Weaver, *supra* note 3, at 234 (citing EDWARD A. FITZGERALD, THE SEAWEED REBELLION: FEDERAL-STATE CONFLICTS OVER OFF SHORE ENERGY DEVELOPMENT 28 (2001)).

[5] *Id.*

[6] Weaver, supra note 3, at 233 (citing 1921 Cal. Stat. ch. 303, at 404, as amended by 1923 Cal. Stat. ch. 285, at 593, repealed by Cal. Stat. ch. 536, at 944; SOLLEN; *supra* note 3, at 12; FITZGERALD, *supra* note 4).

[7] Weaver, *supra* note 3, at 234 (citing Truman Proclamation, *supra* note 3).

[8] *Id.*

[9] United States v. California, 332 U.S. 19, 38 (1947).

[10] Weaver, *supra* note 3, at 234 (citing California, 332 U.S. at 38).

[11] *Id.* at 234. *See generally* Michael E. Shapiro, Sagebrush and Seaweed Robbery: State Revenue Losses from Onshore and Offshore Federal Lands, 12 ECOLOGY L.Q. 481, 482 (1985). The Seaweed Rebellion represents the conflict between coastal states and the federal government over offshore development. *Id.* (citing Note, The Seaweed Rebellion Revisited: Federal-State Conflict Over Offshore Oil and Gas Leasing, 18 WILLAMETTE L. REV. 535 (1982)).

[12] 43 U.S.C. §§ 1301-1315 (2000).

[13] *See* Weaver, *supra* note 3, at 234.

[14] 43 U.S.C. §§ 1301-1315. *See* Weaver, *supra* note 3, at 234.

[15] 43 U.S.C. § 1301(b). "[I]n no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical

the federal government's exclusive jurisdiction over regulation of submerged land found more than three nautical miles from the shoreline.[16]

In addition to formulating a jurisdictional demarcation line, the Federal Government received Congressional authority to lease the submerged land under United States jurisdiction for oil and gas development with Congress's 1953 enactment of the Outer Continental Shelf Lands Act ("OCSLA").[17] The OCSLA authorizes the Secretary of the Interior to provide for the lease of ocean parcels within the federal government's jurisdiction. [18] The 1953 OCSLA effectively took the offshore leasing decision-making process out of the hands of the coastal states and placed it squarely into the Federal Government's hands. The OCSLA failed, however, to identify or authorize any coastal state involvement in the offshore leasing decision-making process.[19]

In summary, Congress's 1953 passage of the FSLA and OCSLA instituted change in the management of submerged land located on the OCS. First, Congress established clear jurisdictional lines providing the coastal states with control of water and submerged land located within three nautical miles of their shorelines. Second, Congress authorized the federal government to lease portions of the OCS for oil and gas exploration. Finally, these statutes did not require the federal government to obtain any input before making offshore leasing decisions. In fact, it took over twenty years before this requirement was mandated.[20]

B. THE COASTAL STATES' STATUTORILY AUTHORIZED ROLE IN THE OFFSHORE LEASING PROCESS

The coastal states' role in the offshore leasing decision-making process originated from legislation largely enacted as a result of the first oil-rig disaster[21] and the coastal states' dissatisfaction with having no

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miles into the Atlantic Ocean or Pacific Ocean, or more than three marine leagues in the Gulf of Mexico." *Id.*

[16] *Id.*

[17] 43 U.S.C. §§ 1331-1356(a) (2000). *See generally* 43 U.S.C. § 1331(a). "The term [OCS] means all submerged lands lying seaward and outside of the area of lands beneath navigable waters [the historical boundaries of the states]...and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." *Id.*

[18] *Id.* § 1331(b), 1337.

[19] *See* Sarah Armitage, Note: Federal Consistency Under the Coastal Zone Act — A Promise Broken by Secretary of Interior v. California, 15 ENVTL. L. 153, 156 (Fall, 1984).

[20] 16 U.S.C. §§ 1451-1465 (2000). *See also* 43 U.S.C. §1332(4) (2000). *But see* 43 U.S.C. § 1332 (1970). There was no requirement for state input until this section was amended by the 1978 amendments to the OSCLA. *Id.*

[21] *See* Weaver, *supra* note 3, at 234-35. In January of 1969, an oil-rig off the coast of California suffered a blowout. *Id.* at 234. A rig, known as Union Oil Platform "A," erupted, spilling over 3.25 million gallons of oil." *Id.* (citing SOLLEN, *supra* note 3, at 47-48).

role under the OCSLA.[22] The legislation leading to the coastal states' involvement in offshore leasing decision-making included the passage and subsequent amendment of a new act, as well as the amendment of an existing statute. In 1972, the Coastal Zone Management Act ("CZMA") became law.[23] The CZMA provides "special protection to delicate coastal areas."[24] In 1978, Congress amended the OCSLA.[25] The main purpose of the amendment to the OCSLA was to "[provide] affected states with a 'leading role' in OCS decision-making."[26] Finally, Congress amended the CZMA in 1990.[27] This amendment was largely in response to a 1984 U.S. Supreme Court interpretation of a portion of the CZMA resulting in less control for the coastal states in protecting their shores.[28]

1. CZMA

Looking first at the CZMA, its goals are twofold. The CZMA was established to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone."[29] It was also developed to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the . . . implementation of management programs to achieve wise use of the land and water resources of the coastal zone."[30]

To implement the two-fold goal of the CZMA, Congress supplied two primary tools.[31] First, is an incentive for the coastal states to develop a state Management Plan ("MP").[32] Under the incentive approach, the Secretary of Commerce is authorized to issue grants to coastal states to assist them in preparing and implementing the MPs.[33] Second, is the authorization of coastal state review. Coastal states are authorized, once they have developed their MPs, to review all federal activities to ensure

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[22] *See* Armitage, *supra* note 19, at 156.

[23] 16 U.S.C. §§ 1451-1465 (2000).

[24] Weaver, *supra* note 3, at 235.

[25] Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, Title I, 92 Stat. 629-98 (1978).

[26] Armitage, *supra* note 19, at 156 (citing Berger & Saurenman, The Role of Coast States in Outer Continental Shelf Oil and Gas Leasing: A Litigation Perspective, 3 VA. J. NAT. RESOURCES L. 35, 36 (1983)).

[27] 16 U.S.C. §§ 1451-1465 (2000).

[28] H.R. CONF. REP. NO. 101-964, at 969-75 (1990).

[29] 16 U.S.C. § 1452(1). *See generally* 16 U.S.C. §1453(2). The "coastal zone" includes state water (not federal) as defined by the FSLA at 43 U.S.C. § 1301(a)(2) (2000).

[30] 16 U.S.C. § 1452(2).

[31] *Id.* §§ 1455(a), 1456(c).

[32] *Id.* § 1455(a).

[33] *Id.*

they are consistent with the MP.[34] There are two consistency provisions.[35] The first states that "each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved State [MPs]."[36] The second requires applicants for a federal permit or license to "provide . . . certification that the proposed activity . . . will be conducted in a manner consistent with the [state MP]."[37]

Final determination as to whether the federal activity is consistent with a state's MP lies with the federal government.[38] Both the President of the United States and the Secretary of Commerce may overrule a coastal states' objection that an activity is not consistent with its MP.[39] The President can overrule a coastal states' objection by determining that the activity is "in the paramount interests of the United States."[40] The Secretary of Commerce may overrule a coastal states' objection if the Secretary finds the activity is "consistent with the objectives of [the statute] or is otherwise necessary in the interest of national security."[41]

More than thirty years after the start of the Seaweed Rebellion, the coastal states finally regained some voice regarding activities, such as offshore oil leasing, which could affect their coasts. The CZMA enactment ensured the federal government took the coastal state's MPs into consideration for "activities directly affecting the coastal zone" and before issuing a federal permit.[42] Despite this increased role, the coastal states had no congressionally defined role in the offshore oil leasing decision-making process.

2. 1978 Amendment to the OCSLA

The 1978 amendment to the OCSLA provides the states with a significant role in the offshore oil leasing decision-making process. The amendment, much like the creation of the CZMA, was a direct result of the coastal states' dissatisfaction with not having a legislatively mandated role in the offshore oil leasing decision-making process.[43] Specifically, the OCSLA Congressional Policy states:

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[34] *Id.* § 1456(c).
[35] *Id.* § 1456(c)(1), 1456(c)(3).
[36] *Id.* § 1456(c)(1) (1982).
[37] *Id.* § 1456(c)(3).
[38] *Id.* § 1456(c).
[39] *Id.* §§ 1456(c)(1)(B), 1456(c)(3)(B)(iii).
[40] *Id.* § 1456(c)(1)(B).
[41] *Id.* § 1456(c)(3)(B)(iii).
[42] *Id.* §§ 1456(c)(1) (1982), 1456(c)(3).
[43] Armitage, *supra* note 19, at 156 (citing Berger & Saurenman, supra note 26, at 36).

> since exploration, development, and production of the minerals of the [outer-continental shelf] will have significant impacts on . . . the coastal [s]tates, and on other affected [s]tates, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments . . . such [s]tates and . . . local governments are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of minerals of the [OCS].[44]

Overall, the coastal states' role was enhanced in two ways. First, the Secretary of the Interior ("Secretary") must "consider state and local mechanisms through which the statutory purpose can be achieved."[45] Second, the Secretary must coordinate and consult with state and local governments over the "size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan ["DPP"]."[46]

Section 18 of the amended OCSLA provides the Secretary with guidelines in preparing a leasing program.[47] Specifically, the Secretary "shall invite and consider suggestions" from affected coastal states.[48] Further, once the Secretary has prepared a proposed leasing program, he or she "must submit a copy of [the proposed leasing program] to the Governor of . . . [the] affected State for review and comment."[49] In addition to requesting review and comments, "if the Governor of an affected State requests any modifications, the Secretary is required to respond in writing granting or denying such request . . . and stating the reasons."[50]

Section 19 of the amended OCSLA ensures coastal states have a voice regarding the "size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan."[51] Specifically, Section 19 directs the Secretary to "accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the [s]tate."[52]

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[44] 43 U.S.C. § 1332(4) (2000).
[45] Weaver, *supra* note 3, at 236 (citing 43 U.S.C. §§ 1344, 1345 (1994 & Supp. V 1999)).
[46] 43 U.S.C. § 1345(a) (2000).
[47] *Id.* § 1344(a).
[48] *Id.* § 1344(c)(1).
[49] *Id.* § 1344(c)(2).
[50] *Id.*
[51] 43 U.S.C. § 1345(a) (2000).
[52] *Id.* § 1345(c).

The OCSLA's 1978 amendment also divided the offshore leasing process into four distinct stages.[53] The first involves the Minerals Management Service ("MMS"), the Department of Interior's ("DOI") agency responsible for the offshore oil leasing process, developing and publishing the schedules and proposed sales of the leases.[54] Specifically, the MMS is required to "formulate a five-year leasing program, indicating size, timing, and location of the sales."[55] The second stage involves "divid[ing] the offshore area(s) into tracts . . . , offer[ing] them for lease, and accept[ing] bids on those tracts . . .."[56] Once a lease is purchased, the lessee can then conduct preliminary activities.[57] Preliminary activities consist of "geophysical and other surveys . . . [that] do not result in any significant adverse impact on the natural resources of the [OCS]."[58] Following completion of the preliminary activities, lease purchasers next prepare and submit a proposed exploration plan ("EP") to the MMS.[59] The EP consists of four components addressing the proposed activity location, equipment choices, mapping and federal or state certification.[60] Specifically, the plan must include: a description of the exploration activities; a description of the mobile drilling unit; a map of the proposed wells; and either a certificate of consistency determination by the federal agency or a certificate of consistency by the coastal state.[61] Once the lease purchasers have completed and submitted the EP to the MMS, the final step entails the completion, submission and subsequent DPP approval.[62]

Overall, the 1978 OCSLA amendment significantly enhanced the coastal state's role in the offshore oil leasing process. Basically, the amendment requires the federal government to receive input from the

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[53] Armitage, supra note 19, at 157.

[54] Minerals Management Service, About the Minerals Management Service, *available at* www.mms.gov/about mms (last visited Feb. 14, 2003) (on file with Golden Gate Law Review).

[55] Armitage, supra note 19, at 157 (citing 43 U.S.C. § 1344(a) (1982)).

[56] Armitage, supra note 19, at 157 (citing 43 U.S.C. § 1337(b)(1) (1982)).

[57] *See* 30 C.F.R. § 250.201 (2002).

[58] *Id.*

[59] 43 U.S.C. § 1340(a)-(c) (2000). *See also* 30 C.F.R. § 250.203 (2002).

[60] *See* California v. Norton, 150 F. Supp 2d 1046, 1049 (N.D. Ca. 2001) (citing 43 U.S.C. § 1340(c), 30 C.F.R. §203.203).

[61] *Id.*

[62] 43 U.S.C. § 1351 (2000). A development and production plan includes: "(1) the specific work to be performed; (2) a description of all facilities and operations located in the [OCS] which are proposed by the lessee or known to him (whether or not owned or operated by such lessee) to be directly related to the proposed development, including the location and size of such facilities and operations, and the land, labor, material, and energy requirements associated with such facilities and operations . . . ; (3) the environmental safeguards to be implemented on the [OCS] and how such safeguards are to be implemented; (4) all safety standards to be met and how such standards are to be met; (5) an expected rate of development and production and a time schedule for performance; and (6) such other relevant information as the Secretary may be regulation require".

affected coastal states before making any offshore oil leasing decisions.[63] Nonetheless, legislative efforts to develop "cooperative federalism" through the enactment of the CZMA and amendment of the OCSLA, the Seaweed Rebellion continued in full force until the passage of the 1990 amendment to the CZMA.[64]

3. 1990 Amendment to the CZMA

Prior to the passage of the 1990 amendment to the CZMA, there were no clear legislative guidelines to determine at what point consistency review was required.[65] In 1984, the U.S. Supreme Court, in *Secretary of the Interior v. California*, interpreted the consistency requirement of the CZMA and determined the sale of gas and lease oils does not directly affect the coastal zone, and therefore, no consistency determination under the CZMA was required.[66] Due to dissatisfaction with the court's interpretation, six years later Congress amended the CZMA to "leave no doubt that all federal agency activities and all federal permits are subject to the CZMA consistency requirements."[67] Thus, lease sales required a consistency review under the amended CZMA.[68]

The 1990 amendment to the CZMA significantly impacted lease purchasers and their ability to drill offshore. As previously stated, the amendment legislatively replaced the U.S. Supreme Court's decision in *Secretary of the Interior* and heightened the priority of consistency review "in an earlier stage than that of the development of the EP and DPP."[69] Congress was able to heighten the priority of consistency review by deleting the word "directly" as the modifier for "affects", thus giving it a much broader reading.[70] As a result of this heightened priority, the "consistency provision" of the CZMA now reads: "Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resources 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 [MPs]."[71]

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[63] 43 U.S.C. §§ 1344, 1345.

[64] *See* Weaver, *supra* note 3, at 241.

[65] Norton, 150 F. Supp. 2d at 1051. "Between 1972 and 1984, it was not clear whether consistency review was required for the sale of leases on the [OCS] off the coast of California." *Id.*

[66] Secretary of the Interior v. California, 464 U.S. 312, 325-330 (1984).

[67] Norton, 150 F. Supp. 2d at 1052 (citing H.R. CONF. REP. NO. 101-964, at 970-71 (1990)).

[68] Norton, 150 F. Supp. 2d at 1052.

[69] *Id.* "Congress indicated in the legislative history that this amendment was intended to make clear that the sale of oil and gas leases is subject to the CZMA." *Id.*

[70] *Id.*

[71] *Id.* (citing 16 U.S.C. § 1456 (c)(1)(A)).

Recently, the state of California tested the amended language of the CZMA in *California v. Norton*.[72] In *California*, the Northern District court was required to determine whether the MMS's granting of a suspension of existing leases, granted between 1968 and 1984, were required to undergo consistency review by the state.[73] The court agreed with the state of California and found that the granting of a lease suspension, extending the primary term of the leases, is subject to consistency review by the state.[74] Specifically, the court noted that since these leases were sold before the 1990 amendment to the CZMA, there was no previous consistency determination because, according to the U.S. Supreme Court, lease sales did not "directly affect" the coastal states.[75] Therefore, highlighting the Congressional intent in the 1990 amendment for all lease sales to be revised for consistency with the coastal states MP, the court found that the MMS shall ensure the suspensions are consistent with California's MP as required by the CZMA.[76] This decision was upheld on appeal by the Ninth Circuit based on the same rationale of the Northern District court.[77]

In summary, Congress finally recognized the coastal states as stakeholders after loosing all authority to regulate drilling activities in the OCS lands adjacent to their coasts with the passage of the FSLA and OCSLA. The passage and subsequent amendment of the CZMA provided a grant to coastal states to develop MPs and required all federal activity affecting a coastal state to be reviewed for consistency with the affected states' MP.[78] The 1978 amendment to the OCSLA requires the Secretary to request and review the affected coastal states comments regarding offshore leasing decisions prior to their enactment.[79] Although these statutes and subsequent amendments gave the coastal states a role in the offshore oil leasing decision-making process, the Seaweed Rebellion continued.

C. LEGISLATIVE TOOLS USED TO STOP OFFSHORE OIL LEASING PRIOR TO THE CURRENT ADMINISTRATION

Despite the enactment and subsequent amendment of the CZMA, as well as the amendment to the OCSLA, coastal states opposed to offshore drilling have sought other means to control the OCS lands adjacent to the

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[72] Norton, 150 F. Supp. 2d 1046.
[73] *Id.* at 1047-48.
[74] *Id.* at 1053-54.
[75] *Id.* at 1049-50, 1052, 1054.
[76] *Id.* at 1054.
[77] 311 F.3d 1162, 1173 (9th Cir. 2002).
[78] 16 U.S.C. §§ 1455(a), 1456(c).
[79] 43 U.S.C. §1332(4).

respective states.[80] There are two tools several of the coastal states' Congressional delegates have employed to keep the DOI's attempts to open OCS lands at bay. One is pressure on the President to declare a temporary moratorium.[81] Second is to control the DOI through its budget, using Congressional appropriations powers.[82]

In 1990, President George H.W. Bush declared a moratorium on most of the areas of the OCS.[83] The authority to declare a temporary moratorium stems from Section 12 of the OCSLA.[84] President Clinton extended the temporary moratorium, set to expire in 2002, to 2012.[85]

The second tool used to chill the DOI's prospects of drilling in the OCS is the Congressional appropriations power.[86] Congress can preclude the DOI from spending its federal funds on the offshore oil leasing process by amending the DOI's Appropriations Act.[87] Therefore, nearly each year since 1982, there has been a "statutory moratorium" included in the DOI's appropriations acts.[88]

These tools, for the most part, satisfied those coastal states opposed to offshore oil leasing. But, after the election of George W. Bush as President in 2002 and his appointment of Gale Norton as Secretary of the DOI, coastal states feared these tools would not be strong enough to keep the MMS at bay.[89] This has resulted in a plethora of legislation aimed at restricting, or even permanently prohibiting offshore oil leasing along most of the U.S. coastline.

D. COASTAL STATES' RESPONSE TO THE BUSH ADMINISTRATION'S OFFSHORE OIL LEASING AGENDA

The Seaweed Rebellion has reached a new level of intensity under the current Bush Administration. Due to the perception that the current

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[80] *See* CNN.Com, Clinton Extends Moratorium on Offshore Oil Drilling (June 12, 1998), *available at* www.cnn.com/TECH/science/9806/12/offshore.drilling.pm (last visited Oct. 8, 2002) (on file with Golden Gate Law Review) [hereinafter Moratorium].

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] 43 U.S.C. § 1341(a) (2000).

[85] Moratorium, *supra* note 80.

[86] *Id.*

[87] *See, e.g.*, Ryan Kim, House OKs End to Funds for Offshore Oil Drilling, SAN FRANCISCO CHRON., July 18, 2002, at A3 [hereinafter Kim]. The House proposed an amendment to DOI's appropriations which would preclude the DOI from expending Federal Funds for the development of the thirty-six existing leases off the California coast. *Id.*

[88] *See* Weaver, supra note 3, at 242 (citing FITZGERALD, supra note 4, at 99-102).

[89] *See* Bryner, *supra* note 1 and accompanying text.; Sierra Club, Bush's Cabinet: Gale Norton at the Helm, *available at* /www.sierraclub.org/politics/cabinet /norton.asp (last visited June 7, 2002) (on file with Golden Gate Law Review) [hereinafter Sierra Club].

Administration maintains a "pro-drilling" attitude[90], coupled with the appointment of a Secretary of the Interior who admits supporting the elimination of the current temporary offshore oil leasing moratoriums[91], politicians from several coastal states have vigorously responded to attempts made by the administration to conduct offshore oil drilling. These coastal states have proposed legislation aimed at ensuring there is no offshore oil drilling off their respective coasts during the current Administration.[92] In some cases, proposed legislation even calls for a permanent ban on drilling off shore.[93] An examination of the proposed legislation and surrounding rationale will illustrate this heightened tension between the current Administration and several coastal states over offshore oil drilling. The proposed legislation stems from coastal states' fears that, despite the voice given them in the offshore oil leasing process by the previously discussed statutes, the George W. Bush Administration will not listen.

a. Florida Congressional Response

In response to the current Secretary's ("Norton") announcement that the U.S. Government would be opening bidding on the "first offshore oil and natural gas lease in the Eastern Gulf of Mexico since 1988,"[94] Congressional Delegates from Florida quickly responded with legislation taking offshore oil leasing decisions out of the hands of the current Administration.[95] First, there was legislation proposed in the Senate to decrease the size of the original sale area, known as Lease Sale 181.[96] Second, Florida Senators and Representatives proposed legislation to amend the OCSLA with a primary goal of permanently banning offshore drilling on the OCS off the State of Florida.[97] Finally, there was an amendment

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[90] *See generally* Bryner, supra note 1, at 361 (citing Nat'l Energy Pol'y Dev. Group, National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future, Summary of Recommendations, ch. 5, Energy for a New Century: Increasing Domestic Energy Supplies (2001)).; Cook, *supra* note 1 and accompanying text.

[91] *See* Sierra Club, *supra* note 89. "[I]n response to a question regarding areas currently subject to leasing moratoria, Norton replied the Administration would support exclusion of moratorium areas in California and. Florida, but she would not make the same commitment to other areas currently covered by the moratorium...." Id Additionally, Ms. Norton, as Secretary of Interior, explained to reporters she could consider lifting the moratorium. *Id.*

[92] *See* Consolidated Appropriations Resolution, 2003, §§ 107, 109-10, 156; S. 1952; H.R. 1503.

[93] *See* H.R. 1631, S. 901, S.771, S. 901; H.R. 1066.

[94] Offshore Lease Bids Opening Set Dec. 5, THE J. REC., Oct. 31, 2001, *available at* 2001 WL 4527274 [hereinafter Offshore Bids].

[95] *See* H.R. 1631. *See also* S. 771. Both bills prohibit offshore oil drilling in the following planning areas: eastern Gulf of Mexico, Straits of Florida and the South Atlantic, extending from the Straits of Florida to the Florida and Georgia border. *Id.*

[96] Comprehensive and Balanced Energy Policy Act of 2001, S. 597.

[97] H.R. 1631. *See also* S. 771.

introduced prohibiting the DOI from funding the proposed Lease Sale 181.[98]

The original lease area, proposed under the Clinton Administration, encompassed 5.9 million acres and came as close as seventeen miles from Florida's panhandle coast.[99] The proposed legislation modified the original proposed lease area by decreasing it from 5.9 million acres to 1.47 million acres.[100] Additionally, the proposed legislation ensured the closest oil rig would not be visible from the Florida coast.[101]

Norton accepted Florida's proposal to reduce the size of Lease Sale 181.[102] Norton explained the reduction in the lease area's size resulted from the DOI listening to Florida's citizens.[103] Norton further explained the DOI simply responded to environmental and tourism concerns related to the lease sale.[104] In addition to Norton's comments regarding the DOI's decision to reduce the lease size, there is speculation the reduction was a product of political nepotism.[105] Accounts show the President's brother and Governor of Florida, Jeb Bush, is opposed to offshore oil drilling near the cost of Florida and the decision came just in time for his re-election bid.[106] Finally, Norton's promise to reduce the size of Lease Sale 181, thereby ensuring no offshore oil leasing within one hundred miles of the Florida coast, is not a long-term commitment.[107] This promise expires in 2007 when the MMS develops its five-year lease plan.[108]

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[98] 147 CONG. REC. S.7484 (daily ed. July 11, 2001) [hereinafter S7484] (statement by Sen. Graham). Sen. Graham offered Amendment No. 893 to delay federal spending on Lease Sale 181. *Id. See also* 147 CONG. REC. S.7521, 7522 (daily ed. July 11, 2001) [hereinafter S7521] (statement by Sen. Nelson) Sen. Nelson offered Amendment No. 893 to delay federal spending on Lease Sale 181. *Id.*

[99] Offshore Bids, *supra* note 94.

[100] Offshore Bids, *supra* note 94. *See generally* S7484, *supra* note 98.

[101] S. 597 § 101(b). "[I]n carrying out the sale, the Secretary of the Interior shall modify the lease area by excluding 120 blocks in a narrow strip beginning 15 miles from the coast of Alabama. *Id.* The Secretary shall include the 913 blocks in the area that is greater than 100 miles from the coast of Florida in Lease Sale 181." *Id.*

[102] Mike Ferullo, Energy: Norton Announces Scaled-Back Oil, Gas Drilling Plan in Eastern Gulf of Mexico, 127 DAILY ENV'T REP. (BNA) A-1 (July 3, 2001) [hereinafter Ferullo]. "Norton told reporters that the smaller 181 lease area is at least 100 miles from the shore of Florida, and the oil and gas platforms will not be visible from any of the state's popular tourist destinations." *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* Offshore Bids, *supra* note 94. "The Bush Administration shrunk the acreage in protests from Florida Gov. Jeb Bush . . .." *Id. See also* Ferullo, *supra* note 102. Gov Jeb Bush wrote his brother to "express concerns" about Lease Sale 181. *Id.*

[107] *See* National Resources Defense Council, The Bush Record, *available at* /www.nrdc .org/bushrecord/water_drilling.asp (last visited July 18, 2002) (on file with Golden Gate Law Review) [hereinafter NRDC]. "Norton has said the Administration will sell no new petroleum leases in the eastern gulf outside a 1.47 million acre area 100 miles southwest of the Florida-Alabama border for at least five years." *Id.*

[108] *See id. See generally* Consolidated Appropriations Resolution, 2003, § 109. "No funds may be expended by the Department of Interior to conduct offshore oil . . . preleasing, leasing and

The second piece of legislation, titled the "Outer Continental Shelf Protection Act," (hereinafter "OCSPA"), proposed by both Florida Senators and Representatives, focuses on amending the OCSLA with three goals in mind.[109] It proposes to permanently ban offshore oil leasing off the Florida coast, buy-back existing leases off the Florida coast and make a procedural change in the consistency review portion of the offshore oil leasing process.[110] The first and foremost goal of the OCSPA is to "transform the annual moratorium on leasing and pre-leasing activity off the coast of Florida into a permanent ban . . .."[111] The area encompassed is vast.[112] The proposed area includes the Eastern Gulf of Mexico, the Straits of Florida, and the Florida section of the South Atlantic.[113] The second goal is a proposal to buy back the leases in the Eastern Gulf of Mexico.[114] Three oil companies previously purchased the leases in the Eastern Gulf of Mexico.[115] Florida Representatives consider lease buy-back important because, as indicated by Senator Graham, the existing leases "are an immediate threat to Florida's natural heritage and economic engine."[116] The third goal of the OCSPA is to correct a procedural flaw in the offshore oil leasing process.[117] This legislation would require MMS to submit an environmental impact statement to the Governor of the state adjacent to the proposed leasing area before he or she makes a consistency determination as allowed under the CZMA.[118] This third goal is an attempt to ensure there is a more informed and reasoned decision made at the earliest time in the offshore oil leasing process.[119] This portion of the OCSPA will be discussed in greater detail in the proposal section of this comment.

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related activities in the eastern Gulf of Mexico planning area for any lands located outside Sale 181, as identified in the final [OCS] 5 year Oil and Gas Leasing Program, 1997-2002." *Id.*

[109] H.R. 1631. *See also* S. 771.

[110] 147 CONG REC S.3923, (daily ed. Apr. 25, 2001) [hereinafter S3923] (statement by Sen. Graham).

[111] *Id.*

[112] *See* H.R. 1631. *See also* S. 771.

[113] *Id.*

[114] S3923, *supra* note 110.

[115] Minerals Management Service, Interior Reaches Agreement to Acquire Mineral Rights in Everglades, Settles Litigation on Offshore Oil and Gas Leases in Destin Dome, May 29, 2002, *available at* /www.gomr.mms.gov/homepg/whatsnew /newsreal/020529hq.html (last visited Sept. 29, 2002) (on file with Golden Gate Law Review) [hereinafter MMS Agreement]. The oil companies who purchased the leases were Chevron, Conoco and Murphy Oil. *Id.*

[116] S3923, *supra* note 110.

[117] *Id.* "This bill will "correct ... an egregious conflict in the regulatory provisions where an effected state is required to make a consistency determination for a proposed oil and gas production or development under the Coastal Zone Management Act prior to receiving the Environmental Impact Statement, EIS, for them from the Mineral Management Service." *Id.*

[118] *Id.*

[119] *Id.*

Amendment of the OCSLA to buy back existing leases adjacent to Florida is the only goal of the abovementioned proposed legislation the George W. Bush Administration has considered.[120] In May of 2002, nearly one year after this legislation was proposed, the Administration agreed to a two-part buy-back.[121] Part one was a buy-back of the leases located off the beaches of Florida.[122] These buy-backs encompassed leases referred to in the proposed legislation.[123] The second part dealt with oil, natural gas and mining rights in the Everglades.[124] Part two of the buy-back encompassed areas of the Everglades not included in the proposed legislation.[125] The total cost for the two buy-backs is 235 million dollars.[126]

Despite the promise of this two-part buy-back, the only portion of the buy-back likely to occur is the portion requested in the OCSPA. [127] Proponents of this legislation intended the buy-back to settle a lawsuit brought by Chevron, Conoco and Murphy Oil alleging breach of contract for nine natural gas leases located in an area known as the Destin Dome.[128] To settle this lawsuit, the three companies agree to relinquish rights to seven of the nine leases issued to them during the 1980's and promises not to submit a development plan on the two remaining leases until 2012 in exchange for 115 million dollars.[129] The money to buy back these seven leases and delay the other two will come from the Judgment Fund.[130] A Judgment Fund is kept to allow the federal government to settle lawsuits.[131]

As the leases in the Everglades were not a product of legislation stemming from a lawsuit, as were the leases in the Destin Dome, buy-back of these leases is less likely.[132] Congressional approval is required to buy back those leases located in the Everglades not covered by the

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[120] Dana Wilkie, Offshore Drilling Negotiable, Officials Say Oil Lease Buyout Among Possibilities, SAN DIEGO UNION & TRIB., June 20, 2002, at A4 [hereinafter Wilkie].

[121] NRDC, *supra* note 107.

[122] *Id.*

[123] S. 771. *See also* H.R. 1631.

[124] NRDC, *supra* note 107.

[125] *See* H.R. 1631. *See also* S. 771.

[126] NRDC, *supra* note 107. The cost of the requested buy-back was 115 million dollars and the cost of the Everglades buy back was 120 million dollars. *Id.*

[127] *See* Mary Helen Yarborough, White House-Supported Lease Buybacks May Not be Funded, July 29, 2002, *available at* 2002 WL 10516086 [hereinafter Yarborough].

[128] *See* S. 771; Minerals Management Service, Activities Offshore Florida, *available at* www.gomr.mms.gov/homepg/offshore/egom/offflor.html. (last visited Sept. 29, 2002) (on file with Golden Gate Law Review) [hereinafter Activities].

[129] Activities, *supra* note 128. 2012 was chosen because it is the year that the current temporary moratorium expires. *Id.*

[130] Yarborough, *supra* note 127.

[131] MMS Agreement, *supra* note 115.

[132] *See* Yarborough, *supra* note 127. *See also* MMS Agreement, *supra* note 115.

proposed legislation.[133] After negotiations, Norton has "agreed in principle to acquire the mineral rights" in the Everglades.[134] Under this agreement, the DOI would exchange 120 million dollars in cash or bidding credits for the mineral rights in the Everglades currently held by the company, Collier.[135]

The Bush Administration's willingness to buy back the Destin Dome leases had raised even more eye-brows than the decision to reduce the size of Lease Sale 181.[136] Some speculate this move to buy back offshore oil leases had more to do with the President's desire to help his brother in Florida who was up for re-election in 2002 rather than the Administration's concern for the potential impacts of offshore oil leasing off the Florida coast.[137] In a MMS news release, however, Norton stated "[w]hen it comes to energy development on federal lands, each case must be evaluated individually in cooperation with the people who live in the area."[138] Norton further stated, as it related to reducing the number of leases off the Florida coast, "the amount of oil available was relatively small compared to the nation's overall energy needs, the impact of development could be significant, and the government and people of Florida supported this action."[139]

The final piece of legislation from the Florida Senators was an amendment to the DOI and Related Agencies Appropriations Act (hereinafter "Amendment 893").[140] Amendment 893 would have delayed the use of federal funds for six months to execute a final lease agreement for the recently reduced Lease Sale 181.[141] Florida Senators proposed this six-month delay for two reasons.[142] First, it was thought to provide ample opportunity for a re-examination of the OCSLA to "assure that appropriate environmental studies are done before the leases are granted," as opposed to current law calling for environmental studies after the grant of the lease.[143] The second purpose of this requested delay was to

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[133] *Id.*

[134] MMS Agreement, *supra* note 115.

[135] *Id.*

[136] *See generally* Wilkie, *supra* note 120. "Some observers believe Bush's move was designed to help his brother, Florida Gov. Jeb Bush, who [was] up for re-election . . .." *Id.*

[137] *Id. See also* Froma Harrop, Bush Games the Environment, THE PROVIDENCE J. BULL., Dec. 4, 2002, *available at* 2002 WL 103169944. "Strategy #3: Protect only swing-state environments. *Id.* This political calculus took center stage in the divergent treatment of Florida and California before the Nov. 5 election. . .." *Id.*

[138] MMS Agreement, *supra* note 115.

[139] *Id.*

[140] S7521, *supra* note 98. *See generally* S7484, *supra* note 98, at S7485 (statement by Sen. Graham). Sen. Graham explains the rationale behind Amendment No. 893. *Id.*

[141] S7484, *supra* note 98, at S7485.

[142] *Id.*

[143] *Id.*

give more time for existing lease negotiation.[144] The Senate, however, rejected this proposed amendment to delay the preparation of the leases in the reduced Lease Sale 181.[145]

Thus, after this flurry of legislation triggered by the Administration's planned Lease Sale 181, only two portions of one piece of legislation, the OCSPA, are open and unanswered by Congress or the Administration. Both of these portions of the OCSPA involve amendments to the OCSLA. The first is an amendment to the OCSLA to permanently ban offshore oil leasing off the coast of Florida.[146] The second is an amendment to the OCSLA that would make a procedural change in the consistency review portion of the offshore oil leasing process.[147]

b. California Congressional Response

California Senators' and Representatives' legislative proposals under the Bush Administration are aimed at achieving three goals related to the OCS area adjacent to the California coast.[148] The first goal is to place a temporary moratorium on "leasing, exploration, and development on lands of the [OCSLA]" adjacent to the state of California.[149] The second goal is to ensure no drilling activity occurs on previously acquired leases off California's southern coast.[150] The third goal is to prohibit any new offshore oil leasing in presently prohibited areas located in the OCS

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[144] *Id.*

[145] Chamber Action, 147 CONG. REC. DAILY DIG. D. 693, Jul. 12, 2001. This amendment was rejected by a vote of 67 to 33. *Id.*

[146] S. 771. *See also* H.R. 1631. *But see* Consolidated Appropriations Resolution, 2003, § 109. Prohibits the DOI from using funds to "conduct offshore oil . . . preleasing, leasing and related activities in the eastern Gulf of Mexico planning area for any lands located outside [Lease] Sale 181, as identified in the final [OCS] 5-year Oil . . . Leasing Program, 1997-2002." *Id.*

[147] *Id.*

[148] *See* Consolidated Appropriations Resolution, 2003, §§ 107, 156. Section 107 prohibits the Department of Interior from expending funds on preleasing and leasing activities currently under Presidential Moratorium. *Id.* Section 156 expresses a Sense of Congress that no funds shall be used for the thirty-six undeveloped existing leases off the California coast while settlement negotiations are ongoing to terminate the leases. *Id.*; S. 1952. This bill would allow oil companies who hold leases off the California coast to trade those leases for leases in the Gulf of Mexico. *Id.*; 149 CONG. REC. S1512-01, at S1571 (daily ed. Jan. 28, 2003) [hereinafter S1512-01]. Senate approves House Resolution 2 adding amended section 143 which is a sense of the Senate not to allow the DOI to allocate funds for the thirty-six existing leases off the coast of California. *Id.*; 148 CONG. REC. S.8416-01 (daily ed. Sept. 10, 2002) [hereinafter S8416-01] (statement of Sen. Reid on behalf of Sen. Boxer). Sen. Reid requests to add amendment No. 4523 which would "express the sense of the Senate regarding thirty-six undeveloped oil and gas leases in the Southern California Planning area of the [OCS]." *Id.*; H. R. 262, 107th Cong. (2001). This bill would require a temporary moratorium on leasing in the OCS adjacent to the California coast. *Id.* Kim, *supra* note 87. Rep Capps amendment to DOI appropriations act precluding use of federal funds for development of thirty-six existing leases passes 252-172. *Id.*

[149] H.R. 262.

[150] Consolidated Appropriations Resolution, 2003, § 156; S. 1952. *See also* S1512-01, *supra* note 148 and accompanying text; S8416-01, *supra* note 148 and accompanying text.

adjacent to the California coast.[151] Finally, the House and Senate proposed companion legislation unrelated to the OCS lands adjacent to California.[152] A Senator and several Representatives from California sponsored this companion legislation aimed at amending the OCSLA to permanently prohibit mineral leasing activity in the OCS of any state with a moratorium within its own submerged lands.[153] Even though this legislation does not relate specifically to California's OCS lands, it would have an immediate impact off the California coast if passed.[154]

The proposed legislation to place a temporary moratorium on leasing activities on the lands of the OCS adjacent to the California coast, House Bill 262, is divided into two sections: one addresses pre-leasing and leasing activities and the other addresses exploration and development activities.[155] First, the proposed legislation would prohibit the Secretary of the DOI from conducting a lease sale or issuing a lease until the later of the following two dates: January 1, 2011 or forty-five consecutive days after Congress has been in session and has issued the final environmental impact statement relating to the second five-year oil and gas leasing program prepared under section 18 of the OCSLA.[156] This legislation would also prohibit the DOI Secretary from approving, in the OCS lands adjacent to California, any "exploration plan, development and production plan, or application for permit to drill or permit any drilling for oil or gas under the [OCSLA] until Congress has been in session for [forty-five] consecutive days[157] following the completion and submission of specified studies."[158] Prior to Congressional submission, three scientists must review the studies.[159] As of the date of this comments publica-

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[151] Consolidated Appropriations Resolution, 2003, § 107. *See* Press Release, Congressman George Miller, California Lawmakers Voice Opposition to Proposals to Ease Restrictions on Offshore Oil Drilling, (May 16, 2001), *available at* www.house.gov/georgemiller/re151601.html (last visited July 2, 2002) (on file with Golden Gate Law Review) [hereinafter Miller].

[152] S. 901. *See also* H.R. 1066.

[153] *Id.*

[154] *See generally* Moratorium, *supra* note 80. The state of California has passed a law permanently banning drilling for oil in California waters. *Id.*

[155] H.R. 262.

[156] *Id.*

[157] *Id.* "In computing any 45-day period of continuous sessions of Congress under this Act—(1)continuity of session is broken only by an adjournment or the Congress sine die; and (2) the days on which either House of Congress is not in session because of an adjournment of more than 3 days to a day certain are excluded." *Id.*

[158] *Id.* The studies are "studies with respect to the Southern California, Central California and Northern California Planning Areas to acquire information found inadequate for [OCS] lands offshore California by the National Research Council report entitled "The Adequacy of Environmental Information for [OCS] Oil and Gas Decisions: Florida and California" issued in 1989 by the National Research Council's Committee to Review the [OCS] Environmental Studies Program . . .." *Id.*

[159] *Id.* These scientists shall be nominated by the Scipps Institute of Oceanography and approved by both the Secretary of the Interior and the Governor of the state of California. *Id.* More-

tion date, Congress and the Administration have not yet addressed this legislation.

In an effort to ensure no drilling would occur in thirty-six previously leased tracts off the California coast, various California Senators and Representatives launched two types of attacks.[160] One attack came in the form of an appropriations tool used by both the Senate and the House.[161] The second attack came in the form of legislation that would allow the lessees of the California offshore tracts to swap those tracts for tracts in the Gulf of Mexico.[162]

Prior to the use of the appropriations tool to deter leasing activity on existing leases, it is necessary to step back and examine a non-legislative tool previously considered to deter leasing activity on existing leases. One month after the Administration offered to buy-back the existing leases off the Florida coast, the Governor of California requested the same deal for the thirty-six existing leases off the California coast.[163] The Administration, however, turned down the Governor of California's request.[164] Norton explained the Administration's decision stemmed from California's citizens lack of opposition to offshore drilling.[165] However, the 2001 Republican Gubernatorial Candidate's position on offshore drilling quickly informed the Administration and Norton that California citizens do indeed oppose offshore drilling. This candidate announced his support of the buy-back of California's thirty-six existing leases.[166] In response to this, Norton wrote the candidate a letter stating that the Administration "would be pleased to enter into discussions about a permanent solution for the federal leases."[167] The letter also indicated the Administration's willingness to purchase California's thirty-six existing leases.[168] Instead of waiting for a federally mandated buy-out of California's thirty-six existing leases, the House and Senate relied on their appropriations tool.[169] In what many portrayed as a "major step"

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over, none can be employees of the DOI and they must be "well qualified in their scientific disciplines required for performance of the particular study or studies they review." *Id.*

[160] *See* Consolidated Appropriations Resolution, 2003, § 156; S. 1952; S1512-01, *supra* note 148 and accompanying text; S8416-01, *supra* note 148 and accompanying text; 148 CONG. REC. H4820-01(daily ed. July 17, 2002) [hereinafter H4820-01].

[161] Consolidated Appropriations Resolution, 2003, § 156; S1512-01, *supra* note 148 and accompanying text; S8416-01, *supra* note 148 and accompanying text; H4820-01, *supra* note 160.

[162] S. 1952.

[163] NRDC, *supra* note 107.

[164] H4820-01, *supra* note 160, at H8429.

[165] *Id.*

[166] Carla Marinucci, Simon Calls for Ban on Offshore Oil, SAN FRANCISCO CHRON., June 9, 2002, at A21.

[167] Marc Sandalow, White House Hints it May Buy up Oil Leases, SAN FRANCISCO CHRON., June 20, 2002, at A1.

[168] *Id.*

[169] *See* S1512-01, *supra* note 148; S8416-01, *supra* note 148; H4820-01, *supra* note 160.

toward eliminating the threat posed by the thirty-six existing leases, the House and Senate passed an amendment to the DOI's 2003 appropriation bill prohibiting the use of any funds for development of the thirty-six existing leases.[170] The rationale behind these amendments prohibiting the DOI from using funds towards the development of the thirty-six existing leases is that the delay in spending will allow the DOI time to negotiate with the lessees who, similar to the lessees in Florida, have filed suit against the federal government because they have been prevented from drilling.[171] The efforts of these Congressional Delegates paid off when the enacted 2003 appropriations bills included a "Sense of the Congress" section directing that "no funds be made available . . . for any fiscal year by the [DOI] to approve any exploration, development, or production plan for, or application to drill on, the thirty-six undeveloped leases . . .."[172]

The second piece of legislation aimed at extinguishing the thirty-six existing leases is an offer to swap these California coastal leases for leases in the Gulf of Mexico.[173] The purpose of this proposed legislation, called the "California Coastal Protection and Louisiana Energy Enhancement Act," is to "reacquire and permanently protect certain leases in the OCS off the California coast by issuing credits for new energy production in less environmentally sensitive areas in the Western and Central Planning Areas of the Gulf of Mexico."[174] This proposed legislation moves the lessees' investments from the California coast to the Gulf of Mexico.[175] This legislation, introduced by California Senator Boxer and Louisiana Senator Landrieu, would benefit both California and Louisiana because it would presumably "add to the production of oil and gas off the Louisiana gulf coast while solving a difficult problem associated with production off the California coast."[176]

In anticipation of the President's Energy Report, California Representative Lois Capps sponsored a bipartisan House resolution to prohibit any new offshore oil leasing in presently prohibited areas located in the

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[170] Kim, *supra* note 87. The amendment was approved in the House by a bi-partisan vote of 252-172. *Id.*

[171] Congress Gearing up to Block California Offshore Oil Drilling, SAN DIEGO UNION & TRIB., *available at* 2002 WL 100342848. *See generally* Mary Helen Yarborough, Lawyer to *Seek* Refund for Offshore Calif. Leaseholders, Sept. 12, 2002, *available at* 2002 WL 101575787. The 11 leaseholders will seek recovery of the 1.25 billion paid to the federal government and "unspecified damages". *Id.* If they prevail, any judgments would be paid from the Judgment Fund held by the Treasury Department. *Id.*

[172] Consolidated Appropriations Resolution, 2003, § 156.

[173] S. 1952.

[174] *Id.*

[175] *Id. See* 148 CONG REC S.896-02, (daily ed. Feb. 15, 2002) [hereinafter S896-02] (statement by Sen. Landrieu).

[176] S896-02, *supra* note 175.

OCS adjacent to the California coast.[177] This resolution resulted from a fear that the Administration would seek to explore offshore oil lease options off the California coast.[178] This fear stemmed from two concerns: a perception that the President's Energy Policy would call for more offshore oil drilling and Norton's recommendation to the Administration to develop a pilot project to explore new areas for oil exploration.[179] Speculation suggested that the California coast might serve as a test site for this new pilot project.[180] This legislation was included in the enacted 2003 appropriations bill.[181]

Legislation sponsored by Senator Boxer, titled the "Coastal States Protection Act" (hereinafter "CSPA") proposed in three previous sessions of Congress over the past two years, has again received support.[182] Similar to Senator Boxer's version, California Representatives have also introduced their version of the CSPA that would place a permanent moratorium on all offshore lands adjacent to a coastal state that has a state moratorium on leasing activities.[183] This companion legislation is in response to what many perceived as "mounting pressures to explore new sources of domestic oil and gas."[184] If this legislation passes, it will permanently ban offshore oil leasing off California's coast since California legislation permanently prohibits oil and gas exploration in its state waters.[185]

Of the previously discussed legislation either relating to or having a potential direct effect upon the OCS off the California coast, the only legislation addressed by the current Administration relates to the thirty-six undeveloped leases and the OCS lands currently under a Presidential Moratorium.[186] The Administration, however, has not addressed the legislation relating to the temporary moratorium, swapping of existing leases or a permanent moratorium on all offshore lands adjacent to a coastal state having a moratorium on leasing activities.

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[177] Miller, *supra* note 151.

[178] *Id.*

[179] *See id.*

[180] *Id.*

[181] Consolidated Appropriations Resolution, 2003, § 107.

[182] *See* S. 901.

[183] H.R. 1066. "When there is in effect with respect to lands beneath navigable waters of a coastal State a moratorium on oil, gas, or other mineral exploration, development, or production activities established by statute or by order of the Governor, the Secretary shall not issue a lease for the exploration, development, or production of minerals on submerged lands of the [OCS] that are seaward of or adjacent to those lands." *Id.*

[184] 147 CONG. REC. S.5016 (daily ed. May 16, 2001) [hereinafter S5016] (statement by Sen. Boxer).

[185] *Id.*

[186] Consolidated Appropriations Resolution, 2003, §§ 107, 156.

c. New Jersey's Congressional Response

A DOI leasing plan and potential for future price spikes in energy sparked the New Jersey Congressional Delegation to introduce three pieces of legislation to ensure no drilling occurs off the New Jersey shores.[187] The DOI leasing plan authorized a study considering the "effects of resuming offshore drilling on the Atlantic coast from Canada to North Carolina."[188] New Jersey Representative LoBiondo saw this as a "first step to the resumption of oil and gas leasing."[189] Additionally, there was concern that "some officials [would] make rash decisions based on political expediency instead of sound policy."[190]

Two pieces of proposed legislation call for an amendment to the OCSLA to permanently ban offshore oil leasing and the third piece of legislation would prohibit the DOI from expending funds to develop offshore oil leases.[191] The prohibition of funds would preclude the DOI from funding offshore oil lease sale preparations not only off the coast of New Jersey; it includes the entire Mid-Atlantic coast.[192] Of the two pieces of proposed legislation calling for an amendment to the OCSLA to permanently ban offshore oil leasing, the Senate's legislation, titled the "Clean Ocean and Safe Tourism Anti-Drilling Act" is more encompassing.[193] The House's proposed legislation, House Bill 2285, only addresses protection of the OCS lands adjacent to New Jersey.[194] The proposed legislation from the Senate encompasses the Mid and North Atlantic planning regions.[195] As of this comment's publication, the only legislation relating to the OCS lands off the coast of New Jersey which has been enacted is the 2003 appropriations bill prohibiting the DOI from expending funds for "preleasing, leasing and related activities in the Mid-Atlantic and South Atlantic planning areas."[196]

Based on the previously discussed proposed legislation, it is evident the Seaweed Rebellion has reached a new level of intensity under

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[187] *See* S. 1086. Prohibits oil leases in the Mid and North Atlantic Planning areas. *Id.*; H.R. 2285. Prohibits oil leases in the OCS lands off the coast of New Jersey. *Id.*; H.R. 1503. Prohibits the DOI from expending funds for a Mid-Atlantic coast oil lease. *Id.*; 147 CONG. REC. S.6603 (daily ed. June 22, 2001) [hereinafter S6603] (statement of Sen. Corzine). 147 CONG. REC. E.1173 (daily ed. June 21, 2001) [hereinafter E1171] (statement of Rep. LoBiondo).

[188] E1173, *supra* note 187.

[189] *Id.*

[190] *Id.*

[191] *See* S. 1086; H.R. 2285, H.R. 1503.

[192] H.R. 1503. DOI would be prohibited from expending funds for any oil lease sale "on any lands of the [OCS] between the seaward boundary between the States of Connecticut and Rhode Island and the seaward boundary between the States of North Carolina and South Carolina." *Id.*

[193] *See* S. 1086. *See also* H.R. 2285.

[194] H.R. 2285.

[195] S. 1086.

[196] Consolidated Appropriations Resolution, 2003, § 110.

the current Bush Administration. Politicians from Florida, California and New Jersey are no longer comfortable relying solely on the annual appropriations tool or a Presidential declaration of a temporary moratorium. It is their desire to permanently end offshore oil drilling off the submerged federal lands located adjacent to their respective coasts.

II. CRITIQUE

Having introduced the current legislative tools used by Congressional Delegates of several coastal states, it is important to analyze whether they are appropriate tools for the management of OCS oil resources. This section explores the disadvantages of the newly proposed permanent and temporary moratoriums. Additionally, this section considers the continued use of the appropriations tools associated offshore oil leasing decision-making process.

The tool to use for the management of the OCS, as envisioned by Congress, is the OCSLA.[197] But, several pieces of the proposed legislation along with the previously issued moratoriums and appropriations tools previously discussed frustrate some of the purposes and a major policy of this management blueprint. Specifically, these tools frustrate ensuring national security by reducing dependence on foreign sources, and balancing offshore oil development with the protection of the "human, marine and coastal environments."[198] Additionally, these tools take the offshore oil leasing decision-making process out of the hands of the federal government, disregarding the United States policy that the OCS is a "vital national reserve held by the Federal Government for the public."[199]

A. NATIONAL SECURITY AND DEPENDENCE ON FOREIGN SOURCES

Permanently limiting offshore oil exploration and development of federal lands adjacent to a handful of coastal states will have devastating consequences to the U. S. national and energy security interests.[200] A

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[197] *See* 43 U.S.C. §§ 1332(3), 1333(a)(1) (2000).

[198] 43 U.S.C. §§ 1802(1)-(2) (2000).

[199] *Id.* § 1332(3).

[200] *See generally* Talk of the Nation: US Dependence on Imported Oil and Its Effect on National Security (National Public Radio Broadcast, Feb. 6, 2002) (transcript on file with Golden Gate Law Review) [hereinafter NPR]. (statement of Sen. Murkowski). "We are now importing 57 percent of the total crude oil we consume in this country." *Id.* (statement of Mr. Podesta). "We're dependent on oil coming from the Middle East, where 25 percent of our imports come." *Id.* (statement of Ms. Coon). There needs to be a reduction in the dependence on oil from the Middle East. *Id.* "Individual American citizens and our military need that reliable source of oil, and right now with the unstable countries, regimes, you could have disruptions in supply that will cause price fluctuations and price spikes." *Id.* (statement by Mr. Conan). "September 11th vividly illustrated this country's

decrease in OCS oil production will likely result in an increase in U.S. reliance on foreign imports.[201] Moreover, further dependence on foreign oil sources decreases the U.S. national security since the foreign sources will have "leverage" over the United States.[202]

Prior to the 1978 amendments to the OCSLA, Congress found that although the U.S. experienced increased energy demands would continue to rise, U.S. domestic oil production failed to meet the demand.[203] Specifically, Congress acknowledged U.S. energy demands created an increasing dependence on oil from foreign nations.[204] Thus, Congress declared, as the primary purpose for amending the OCSLA in 1978, the need to "establish policies and procedures for managing the oil . . . resource . . . of the OCS . . . to result in expedited explorations and development of the OCS . . . to achieve national economic and energy policy goals, assure national security, [and] reduce dependence on foreign sources . . .."[205]

Despite Congress' 1978 attempt to "assure national security" and "reduce dependence on foreign sources" by amending the OCSLA, domestic oil production continues to decrease while oil demand increases.[206] By 2001, the U.S. imported more than half of its oil needs.[207] Currently, the United States depends on oil and gas for about sixty percent of its energy.[208] Energy analysts expect this number to increase to sixty-six percent over the next eighteen years.[209] To date, the OCS, however, produces only one quarter of U.S. oil needs.[210]

To make matters worse, a significant portion, twenty-five percent, of the oil imported into the U.S. originates from the Middle East.[211] Ad-

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dependence on imported oil, a fact that deeply affects foreign and military policies." *Id. See generally* Joe E. Spencer and Steven L. Rauzi, Crude Oil Supply and Demand: Long-Term Trends, 31 ARIZ. GEOLOGY N. 4 (Winter 2001), *available at* www.azgs.state.az.us/Winter2001.htm// (last visited Oct. 3, 2002) (on file with Golden Gate Law Review) [hereinafter Spencer & Rauzi]. "Oil production in the United States has declined for thirty years, while demand has increased." *Id.*

[201] *See* Spencer & Rauzi, supra note 200. *See generally* Mineral Management Service, Secretary Norton Announces Proposed Five-Year Plan For Outer Continental Shelf Oil and Gas Leasing, *available at* www.mms.gov/ooc/press/2002/press 318.htm (last visited Sept. 30, 2002) (on file with Golden Gate Law Review) [hereinafter 5 Year Plan] (statement of Sec. Norton). "The United States depends on oil and gas for about 60 percent of our energy, and this percentage is expected to increase to more than 66 percent by 2020." *Id.*

[202] NPR, *supra* note 200 (statement of Ms. Coon). A disruption in Saudi Arabia will likely cause a disruption in oil supply. *Id.*

[203] 43 U.S.C. §§ 1801(1)-(3) (2000).

[204] *Id.*

[205] *Id.* § 1802(1).

[206] *Id. See generally* Spencer & Rauzi, *supra* note 200.

[207] Spencer & Rauzi, *supra* note 200.

[208] 5 Year Plan, *supra* note 201.

[209] *Id.*

[210] *Id.*

[211] NPR, *supra* note 200 and accompanying text. (statement of Mr. Podesta).

ditionally, the Middle East holds approximately sixty-five percent of the world's proven oil reserves compared with three percent held by the United States.[212] In light of the September 11, 2001 terrorist attacks and increased tensions between Iraq and the United States, reliance upon middle-eastern oil sources is tenuous.[213]

B. BALANCING OFFSHORE OIL DEVELOPMENT WITH THE PROTECTION OF THE HUMAN, MARINE AND COASTAL ENVIRONMENTS

The use of temporary and permanent moratoriums, as well as, annual appropriations to block DOI spending on preparing offshore leases does not allow for the balancing of "energy resource development with the protection of the human, marine and coastal environments."[214] Instead, it effectually removes the balancing process from the offshore oil leasing decision-making while placing great emphasis on the political power of the coastal states opposed to offshore oil drilling.[215] Thus, the environmental burdens of offshore oil development are felt in only a handful of coastal states.[216] Yet, the general public believes the U.S. should base its burden of fulfilling its energy needs on "legitimate concerns of environmental risks, socioeconomic effects and physical compatibility."[217]

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[212] *Id.*

[213] *See generally* Peoples Daily, Iraq says Ready to Halt Oil Supply to US, *available at* http://english.peopledaily.com.cn/200204/02/eng20020402_93344.shtml (last visited Oct. 3, 2002) (on file with Golden Gate Law Review). Iraq official indicated they were ready to use oil as a weapon against the US in response to a call by Iran. *Id. See generally* National Press Club, National Press Club Morning Newsmaker with Senator Frank Murkowski (R-AK), (Federal News Service, Nov. 1, 2000) (transcript on file with Golden Gate Law Review). "What we're seeing here is our nation being held hostage by the Mideast . . . [t'he Mideast is a tinderbox . . . and one of the most impassioned enemies over there are already lighting the fires — Iran, Iraq. *Id.* We're unable to respond because our foreign policy interest have been compromised as a consequence of the result of our failed energy policy." *ID.*

[214] 43 U.S.C. § 1802(2)(B).

[215] *See* Weaver, *supra* note 3, at 247. "[T]he use of appropriations to block drilling off the coasts of certain states, offshore energy development may be completely divorced from either environmental or energy policy, existing only as a potential financial allocation to be bargained over in the political sphere. *Id.*

[216] *See generally* Senate Republicans Hold News Conference on President Bush's National Energy Policy, *available at* 2001 WL 522381 (statement by Sen. Sessions). "I'm not sure the state of Florida ought to be given the unilateral right to deny deep Gulf drilling. *Id.* The public interest, the national interest would be above that." *Id. See generally* CNN.com, Offshore Oil Drilling Could Flood Coastal States with Billions, May 17, 2001, *available at* www.cnn.com/2000/NATURE/09/01/cara.bill/index.html (last visited July 7, 2001) (on file with Golden Gate Law Review). Jack Caldwell, secretary of the state [of Louisiana] Department of Natural Resources commented, in an article addressing compensation for states with extensive offshore drilling operations, "We are bearing a disproportionate burned of impacts from offshore operations." *Id.*

[217] Weaver, supra note 3, at 248 (citing San Luis Obispo Chamber of Commerce & Environmental Center of San Luis Obispo, The Costs of Oil and Gas Development Off the Coast of San Luis

C. OFFSHORE OIL IS A VITAL NATIONAL RESOURCE TO BE MANAGED BY THE FEDERAL GOVERNMENT

As one of the stated policies of the 1978 amendment to the OCSLA, the federal government is to manage and hold OCS lands for the public.[218] Specifically, the federal government is tasked with the "expeditious and orderly development, subject to environmental safeguards", of this national resource.[219] Congress tasked the federal government with managing this national resource for the benefit of all of the public and not just a few coastal states.[220] Moreover, President Truman's 1945 proclamation similarly declared coastal waters belonged to the Federal Government for purposes of natural resource energy exploration. Combining President Truman's 1945 proclamation with the abovementioned stated policy of the 1978 amendment to the OSCLA, the federal government is in the best position to manage this resource.[221]

In summary, although the appropriations and moratorium tools used by the members of Congress since George W. Bush's inauguration inform the current Administration that Congress is adverse to offshore oil drilling adjacent to their respective shores[222], the tools relied upon by Congress nonetheless frustrate purposes of the OCSLA, as amended by Congress in 1978. Specifically, Congressional reliance on the aforementioned tools interfere with the goals of ensuring national security, reducing foreign oil dependence, balancing offshore oil development with human, marine and coastal environment protection and placing the decision-making process for offshore oil development in the hands of the coastal states.[223]

III. PROPOSAL

Despite the disadvantages of the current proposed legislation, certain improvements in the offshore oil decision-making process may alle-

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Obispo County (May 1998), *available at* www.slochamber.org/buisness/cooger.html) (last visited Feb. 5, 2003) (on file with Golden Gate Law Review).

[218] 43 U.S.C. § 1332(3) (2000).

[219] *Id.*

[220] *Id.*

[221] *Id. See* Truman Proclamation, *supra* note 3.

[222] U.S. Senate Committee On Energy and Natural Resources Holds Second Day of Confirmation Hearing for Interior Secretary-Designate Gale Norton, January 19,2001, *available at* 2001 WL 49357. When asked by Senator Graham from Florida whether she would "respect the wishes of the individual states in determining the oil and gas development on [OCS] properties adjacent to those states" she replied: "The wishes of the individual states are certainly at the core of President-elect Bush's support for the existing moratoria, and I would be happy to explore with this committee and with you any additional views by other states." *Id.*

[223] 43 U.S.C. §§ 1332(3), 1802(1)-(2) (2000).

viate the concerns of the politicians from several of the coastal states who desire the permanent prohibition of offshore oil drilling in the OCS lands adjacent to their respective shores. The improvements consist of three proposals discussed below. The first proposal relies on an OCSLA amendment to include an environmental baseline.[224] The second proposal relies on coastal states' Governors' veto power over DOI decisions to offer leases in the OCS lands adjacent to their respective shores. The final proposal relies on the incorporation of an Environmental Impact Statement ("EIS"), provided by the MMS, so as to better inform the affected coastal states prior to their consistency review process.[225]

A. ENVIRONMENTAL BASELINE

An environmental baseline would establish a line of demarcation, indicating where drilling would be prohibited, in areas determined to be environmentally sensitive using a nationally accepted process.[226] Amending the OSCLA to include an environmental baseline would address the concerns of those coastal states who believe the balance between the concern for their natural resources and the nation's need for an energy supply are tipped more in favor of drilling for oil, especially under the George W. Bush Administration.[227] Additionally, any limits on offshore oil drilling using an environmental baseline would be based on the "preservation of competing national natural resources" rather than which coastal states have the greatest political influence.[228]

The process for developing an environmental baseline has been addressed in the form of legislation.[229] Although this legislation, House Bill 262, is aimed specifically at the natural resource concerns of the state of California, its general principles can be applied to all states.[230] House Bill 262 calls for a scientific study prior to any approval of activities associated with exploration and development activities in the federal lands off the California coast.[231] Additionally, once the studies are conducted, they will not be approved without review by at least three scien-

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[224] Weaver, *supra* note 3, at 257.

[225] S3923, *supra* note 110 (statement by Sen. Graham).

[226] Weaver, *supra* note 3, at 257.

[227] *See generally* S7484, *supra* note 98 (statement by Sen. Graham). Sen. Graham comments regarding an amendment to the DOI appropriations bill prohibiting the use of funds for Lease Sale 181 for 6 months: "the current laws that govern [OCS] drilling in my judgment are imbalanced. *Id.* They do not give proper consideration to other factors in addition to energy production, factors such as economic and environmental needs." *Id.*

[228] Weaver, *supra* note 3, at 258.

[229] H.R. 262.

[230] *Id.*

[231] *Id.*

tists.[232] These three scientists are to be "nominated by the Scripps Institute of Oceanography and approved by the Secretary of the Interior and the Governor of the State of California.[233] Moreover, these scientists cannot be employees of the DOI and must be "well qualified in the scientific disciplines required for performance of the particular study or studies they review."[234]

A requirement for the use of an environmental baseline, and a process for establishing that baseline, should be applied to Section 18 of the OCSLA.[235] This is the balancing section of the OCSLA.[236] This section calls for "a reasonable balance between national interest and the well-being of the citizens of the affected State."[237] Use of scientific evaluations from the state and local governments at the beginning of the offshore oil leasing process would simplify the balancing and ensure state and local environmental concerns are given the proper consideration.

The use of an environmental baseline will provide all coastal states with a voice early in the offshore oil leasing decision-making process. It will be based on scientific data instead of political strength. In addition, it will place a threshold limit on oil drilling, ensuring coastal states their sensitive natural resources, as determined by scientific data, will not be harmed.

B. GOVERNOR'S VETO

Allowing a Governor of a coastal state to veto a decision by the DOI to prepare offshore oil leases for bidding with a Congressional override would serve to promote cooperative federalism in two important ways. First, a Governor's use, or threatened use, of a veto would ensure the DOI is heeding the concerns of the coastal states. Second, a Congressional override would ensure the preservation of the important role of the federal government in the offshore oil leasing program as well as ensuring a "uniform level of environmental protection."[238] Finally, a current

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[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] 43 U.S.C. § 1345(c) (2000).

[236] *Id. See generally* Weaver, *supra* note 3, at 257. "[T]he balancing process inherent in Section 18(a)'s competing principles . . .."

[237] *Id.* at § 1345(c).

[238] Weaver, *supra* note 3, at 260 (citing Carol M. Browner, Environmental Protection: Meeting the Challenges of the Twenty-First Century, 25 HARV. ENVTL. L. REV. 329, 330 (2001)). *See* Truman Proclamation, *supra* note 3; 43 U.S.C. § 1332(3).

Governor's veto scheme is already in place and can be used as a prototype for the offshore oil leasing decision-making process.[239]

Authorizing a Governor of an affected coastal state to veto the DOI's decision to prepare leases for bidding would provide the affected coastal state with a greater voice in the process. Currently, both the amended OCSLA and CZMA allow a Governor of the affected coastal states to provide input in the offshore oil easing process.[240] Section 18 of the amended OCSLA requires the Secretary to request and consider suggestions from affected coastal states.[241] Further, once the Secretary "has prepared a proposed leasing program, he or she is required to submit it to the governors of the affected states for review and comment."[242] Additionally, under the CZMA, the applicants for a federal permit or license must "certify to both the permitting federal agency and the affected state that the activity complies with the state's MP."[243] But, as previously discussed, the federal government is allowed to override a Governor's objection that the project is not consistent with its MP.[244] Thus, allowing a Governor to veto due to consistency concerns will ensure concerns of the potentially affected coastal state are given full effect by leveling the playing field for that coastal state.

Although giving a Governor the power to veto will significantly enhance the coastal state's voice in the offshore oil leasing decision-making process, it is necessary to provide a Congressional override to preserve the important role of the federal government in the offshore oil leasing program.[245] Allowing a veto with no Congressional override would, as previously discussed, completely separate the national energy interests and national environmental interests from the offshore oil leasing decision-making process. The result would be a system where the decision-making is based on who has the least political resistance to offshore oil leasing and not on what natural resources are potentially harmed by offshore oil leasing.[246]

The use of a Governor's veto in legislation concerning nuclear energy sites is already in place and can serve as a model of what a Gov-

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[239] Nuclear Waste Policy Act of 1982, §§ 115, 116, 42 U.S.C. §10101 et seq. (2000).

[240] 16 U.S.C. §§ 1456 (c)(1), (3) (2000). 43 U.S.C. § 1344(c)(1) (2000).

[241] 43 U.S.C. § 1344(c)(1) (2000).

[242] Weaver, *supra* note 3, at 236 (citing 43 U.S.C. § 1344(c)(2)(1994 & Supp. V 1999)).

[243] Weaver, *supra* note 3, at 237 (citing 16 U.S.C. § 1456(c)(3)(1994 & Supp. V 1999)).

[244] 16 U.S.C. §§ 1456 (c)(1)(B), 1456(c)(3)(B)(iii) (2000).

[245] *See* Truman Proclamation, *supra* note 3; Weaver, *supra* note 3, at 260 (citing Brower, *supra* note 238, at 330).

[246] Weaver, *supra* note 3, at 261. "Leasing off the Central Coast [of California] might be put to an end by a string of local votes, yet the Gulf of Mexico might fall victim to expansion development if developers found the region more politically welcoming. . . [s]uch a system would fail to take account of other national interests." *Id.*

ernor's veto in the offshore oil leasing process would look like.[247] Specifically, a Governor of the affected coastal state would be provided with a notice of the decision by the DOI to prepare the leases for sale.[248] After receiving this notice, the Governor, and the legislature of the state, would then have the opportunity to submit a notice of disapproval to Congress.[249] The significant result of this notice is that the DOI can go no further in preparing the leases for sale.[250] After the submission of a notice of disapproval, Congress would then respond to the notice within a specified time period.[251] The Congressional response would state whether to allow the lease sale to continue.[252]

Giving the Governor of a coastal state veto power to overrule a DOI decision to prepare federal offshore land sales that may then only be overridden by Congress would enhance the concept of cooperative federalism. The use or threatened use of a veto would ensure that the DOI more carefully consider the states' concerns, during either the OCSLA process[253] or the CZMA consistency review.[254] Furthermore, it will still maintain the critical role of the federal government in the offshore leasing decision-making process from a national energy policy perspective.[255]

C. EIS Requirement Prior to Consistency Review

It is imperative that coastal states are able to make informed and reasoned decisions when determining whether federal activities are in compliance with the state's MP.[256] As previously discussed, coastal states are authorized, once they have developed their MPs, to review all federal activities to ensure they are consistent with their MP.[257] Despite this review authorization, there is no EIS requirement prior to a state making a consistency determination.[258] Thus, a state is providing input

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[247] 42 U.S.C. §§ 10135, 10136 (2000).

[248] *Id.* at § 10136(a).

[249] *Id.* at § 10136(b).

[250] *Id.* at § 10135(b).

[251] *Id.* at § 10135(c).

[252] *Id.*

[253] 43 U.S.C. § 1344(c)(1).

[254] 16 U.S.C. §§ 1456 (c)(1)(A),1456(c)(3)(A).

[255] *See generally* 43 U.S.C. § 1332(3) (describing the OCS as a "vital resource reserve held by the Federal Government for the public."); Truman Proclamation, *supra* note 3 (declaring the OCS under the control of the DOI in the interest of development and conservation of the "natural resources of the seabed").

[256] *See generally* 16 U.S.C. § 1451(b) (2000). "The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, esthetic resources of immediate and potential value to the present and future well-being of the Nation." *Id.*

[257] 16 U.S.C. § 1456(c)(1)(A) (2000).

[258] S3923, *supra* note 110 (statement by Sen. Graham).

on a proposed oil and gas production or development plan without the critical environmental information received through an EIS.[259]

Two pieces of legislation previously discussed were proposed to address the concern for a coastal state's duty and ability to make an informed decision regarding offshore oil leasing. The first came in the form a DOI appropriations amendment.[260] Senator Graham from Florida proposed a six-month delay in providing funding for Lease Sale 181 to allow time for consideration of the potential environmental impacts of leases not accomplished until after the permit requests.[261] The second came in the form of the OCS Protection Act, introduced by the Senators from Florida, which offers a solution to this procedural flaw.[262] One of the three stated goals of this act is to require the MMS to provide an affected coastal state with an EIS prior to the states consistency review process.[263]

The MMS should be required to submit an EIS for any proposed federal activity prior to the states consistency review process. If not, leases will be permitted without critical environmental information. Without supplying this critical information, states will continue to make consistency determinations in a vacuum.

In summary, several improvements can be made in the offshore oil decision-making process that may alleviate the previously discussed concerns of the politicians from several of the coastal states without frustrating several of the purposes of the OCSLA. These include an environmental baseline, veto authority over offshore oil leasing decisions made by the DOI with a Congressional override, and a mandate requiring the MMS to submit an EIS to the affected states prior to their consistency review process.[264] Ideally all three of these proposed improvements should be implemented.

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[259] *Id.*

[260] S7484, *supra* note 98, at 7485.

[261] *Id.* "In my judgment, . . . let's do the environmental surveys before we grant the lease, before we create the expectations that a lease carries with it, before people apply for the permit to drill, so we have satisfied ourselves on environmental, economic, and the other consideration that this is a property which will be appropriate to drill should a lease be granted." *Id.*

[262] S3923, *supra* note 110.

[263] *Id.* The other two goals are: to permanently ban offshore oil leasing in the Eastern Gulf of Mexico, the Straits of Florida and the Florida section of the South Atlantic; and to buy back leases in the Eastern Gulf. *Id.*

[264] S3923, *supra* note 110. *See* Weaver, *supra* note 3, at 257. *See e.g.*, 42 U.S.C. §§ 10135, 10136 (describing the right of a Governor of a state selected by Congress to receive nuclear waste to submit a "notice of disapproval" and Congressional voting power to override that disapproval).

IV. CONCLUSION

These piecemeal legislative proposals are ineffective for managing this national energy resource. They frustrate some of the goals and major policies of the OCSLA, such as national security, reducing dependence on foreign sources, balancing offshore oil development with the protection of the human, marine and coastal environments, as well as, takes the decision-making process for this national resource out of the hands of the federal government. But, the proposed legislation and continued use of historical tools to prevent offshore oil drilling are proof of the tension between several of the coastal states and the Administration. Furthermore, this tension has reached a level of intensity never before seen in the Seaweed Rebellion. In order to address this heightened tension, yet ensure the goals of the OCSLA are not frustrated, a Governors Veto with Congressional override, an environmental baseline and EIS prior to a coastal states' consistency review are appropriate.

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