

Ocean Management & Planning in the United States: From Competition to Cooperation

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I Introduction

The United States of America is a coastal nation, abutting the Atlantic Ocean, Pacific Ocean and Arctic Ocean, as well as the Gulf of Mexico and the Great Lakes.² Its Exclusive Economic Zone (EEZ) covers 4.4 million square miles (7.08 million km²) – an area larger than the combined land mass of its fifty states.³ The waters above the continental shelf and the sea floor itself provide abundant resources, including fish, natural gas, oil, and opportunities for alternative energy. These resources' lucrative potential, particularly the billions of dollars represented by offshore oil and gas, created a lengthy jurisdictional battle between the federal government and coastal states known by some as the "Seaweed Rebellion."⁴

When states initially joined the union, Congress recognized their title to offshore lands up to three marine miles or three marine leagues.⁵ Later, however, the Supreme Court declared that the federal government owned the submerged lands up to the low water mark, based on principles of international law and the national sovereign's paramount interests in national security.⁶

As technology improved to allow greater access to offshore energy resources, coastal states pushed hard for control over outer continental shelf lands and energy development decisions.⁷ They recognized that energy development activities – like drilling for oil in deep water – created significant environmental hazards for marine life and coastal populations, and yet states were deprived of the opportunity to lease offshore oil platforms or enjoy in their royalty revenues. The Santa Barbara oil spill of 1968 underscored this point dramatically;⁸ the even more destructive Deepwater Horizon oil spill off the Gulf of Mexico in April 2010 reinforces the cost to coastal states of offshore oil exploration.⁹

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² Rachel E. Salcido, Offshore Federalism and Ocean Industrialization, 82 Tul. L. Rev. 1355, 1360-61 (2008) (citing and quoting U.S. Ocean Action Plan: The Bush Administration's Response to the U.S. Commission on Ocean Policy at 3, available at <http://groups.ucanr.org/HumboldtBayEBM/files/38672.pdf> (last visited July 23, 2010)).

³ Mary Turnipseed et al, The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine, 36 Ecology L. Q. 1, 3 (2009).

⁴ Edward A. Fitzgerald, The Seaweed Rebellion: The Battle Over Section 8(g) Revenues, 8 J.ENERGY L. & POL'Y 253 (1988).

⁵ Edward A. Fitzgerald, The Seaweed Rebellion: Federal/State Provincial Conflicts Over Offshore Energy Development in the United States, Canada and Australia, J. Conn. J. Int'l. L. 255, 256 -257 (1992).

⁶ *Id.* at 258 ("The Supreme Court, focusing on the international aspects of the conflict, declared that the federal government's sovereign interests in navigation, national defense, international relations, and commerce established paramount rights over offshore lands below the low-water mark.") (citing *United States v. California*, 332 U.S. § 19 (1947)).

⁷ *See id.* at 261.

⁸ *See id.*

⁹ *See* Jane Lubchenco and Nancy Sutley, Proposed U.S. Policy for Ocean, Coast and Great Lakes Stewardship, *Science* Vol. 238, at 1485 (28 June 2010) ("The Deepwater Horizon-BP oil spill in the Gulf of Mexico is a start

Federalism – the division of power between the federal government and state governments – dominates offshore energy issues in the United States.¹⁰ Offshore federalism arose initially in disputes over ownership of certain marine areas and occurs most frequently when development is proposed in areas under federal jurisdiction, which is often the case for offshore oil or wind energy installations.¹¹ Over time, as conflicts between state governments and the federal government were resolved by the courts, legislatures on state and federal levels began through regulation, governance practices, and good politics to cooperate with each other. We now have a system commonly termed “cooperative federalism,”¹² at least with regard to managing the nation’s coastal regions.¹³

In general, as explained more fully in Part II below, states have jurisdiction over activities within the submerged lands and waters from their coastlines out to 3 nautical miles, while the federal government has authority over the territorial sea (from 3-12 nm) and the EEZ (from 12-200 nm).¹⁴ Each governmental regime is compelled to abide by the public trust doctrine, adopted from English common law, which “obliges states to hold certain lands and waters in trust for their citizenry.”¹⁵

Jurisdictional conflict is not simply place-based, however. Congress over the years has passed numerous laws granting authority over certain human uses of the ocean to different administrative agencies. “The diversity of current and potential uses of U.S. coastal and ocean waters – fishing, aquaculture, oil and mineral exploitation, energy generation, shipping, defense and recreation – is mirrored by the plethora of statutory authorities and agencies that regulate them.”¹⁶ According to a 2003 report authored by the Pew Oceans Commission, “more than 140 federal laws pertain to the oceans and coasts” involving at least six departments of the federal government and dozens of federal agencies.¹⁷

This article explores in Part II just a few of the primary federal laws establishing jurisdictional and governance obligations between the federal and state governments, and setting forth major environmental policies, with regard to the nation’s oceans and coasts. In Part III, the article demonstrates how selected states have taken initiative to develop ocean management plans relating to state waters and, in some cases, overlapping with federal waters. Part IV addresses recent

reminder of the intimate dependence of coastal communities on healthy coastal and ocean ecosystems and of the urgent need to revise policies to ensure wise stewardship of coasts, oceans, and Great Lakes.”).

¹⁰ Salcido, *supra* n. 2, 82 Tul. L. Rev. at 1375.

¹¹ *Id.* at 1376.

¹² *See id.*

¹³ *See* J.B. Ruhl, Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Non-Federal Lands: Time for Something Completely Different?, 66 U. Colo. L. Rev. 555, 616-23 (1995) (describing the Coastal Zone Management Act regime as cooperative as compared to coercive).

¹⁴ *See* Turnipseed et al., *supra* n. 3, 36 Ecology L. Q. at 4.

¹⁵ *Id.* at 8. Professor Joseph Sax summarized the doctrine as resting upon three principles: “First, that certain interests – like the air and the sea – have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And finally, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.” *Id.* (quoting Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* 165 (1971)).

¹⁶ *Id.* at 4.

¹⁷ Pew Oceans Commission, *America’s Living Oceans: Charting a Course for Sea Change* at 26, May 2003, available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceans_final_report.pdf.

developments at the federal level to explore coastal and marine spatial planning. The article concludes by noting the urgent need for cooperation among state and federal governments to effectively implement and enforce these myriad planning efforts.

II U.S. Federal Laws Affecting Offshore Energy Development

Several major statutes passed by Congress sought to resolve the jurisdictional conflict between the federal government and the states, and provide states with environmental protections and opportunities to participate in Outer Continental Shelf energy development decisions.

A. Submerged Lands Act

In 1945, U.S. President Harry Truman issued a proclamation declaring U.S. jurisdiction over “the natural resources of the subsoil and seabed of the continental shelf beneath the high seas.”¹⁸ In the late 1940s and early 1950s, the U.S. Supreme Court ruled, in multiple cases, in favor of the federal government and against the states, holding that the United States had paramount rights in offshore lands due to its “sovereign interests in navigation, national defense, international relations, and commerce” including the right to dominion over offshore resources.¹⁹ Following the 1952 Congressional elections, in which Republicans took a majority of the seats, Congress enacted the Submerged Lands Act (SLA), restoring title to the near-shore lands to the coastal states.²⁰

The SLA accomplished several purposes. First, coastal states were granted title to offshore lands within their historic boundaries and the rights to the natural resources contained therein. The federal government relinquished all claims to such lands. Second, coastal states were awarded an unconditional grant to offshore lands (at least) three miles from their coastline. In addition, the SLA confirmed the federal government’s right to regulate offshore activities for the purposes of navigation, national defense, international affairs and commerce.²¹

Within its three-mile zone, a state may lease or sell tracts or rights to private parties. But in the SLA the federal government reserved for itself ownership of the water column and airspace above the state’s submerged lands.²²

B. Outer Continental Shelf Lands Act

Shortly after the SLA was enacted, Congress effectively ratified President Truman’s 1945 proclamation through its passage of the Outer Continental Shelf Lands Act (OCSLA) in 1953.²³ The statute provides “that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are

¹⁸ Edward A. Fitzgerald, *The Seaweed Rebellion: Federal-State/Provincial Conflicts Over Offshore Energy Development in the United States, Canada and Australia*, 7 Conn. J. Int’l L. 255, 257 (1992) (citing Proclamation No. 2667, 10 Fed.Reg. 12,303 (1945))

¹⁹ *Id.* at 258 (citing *United States v. California*, 332 U.S. 19 (1947), *United States v. Louisiana*, 339 U.S. 699 (1950), and *United States v. Texas*, 339 U.S. 707 (1950)).

²⁰ *Id.*

²¹ *Id.* at 259

²² See Richard Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 Stan. L. Rev. 1107, 1111-12 (1976).

²³ *Id.* at 1112-13; see 67 Stat. 462, as amended 43 U.S.C. § 1131 (1988).

subject to its jurisdiction, control and power of disposition.”²⁴ The term “outer Continental Shelf” is defined in the OCSLA to include “all submerged lands lying seaward and outside of the area of lands beneath navigable waters ... and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.”²⁵ The OCSLA, combined with the Geneva Convention on the Continental Shelf,²⁶ thus secures to the federal government ownership of the large tracts of submerged land beyond state offshore jurisdiction.²⁷

Under the OCSLA, the Secretary of Interior is responsible for supervising the use of outer Continental Shelf (OCS) lands. The statute is predominantly concerned with OCS exploitation for purposes of oil and gas production, as the Secretary is given authority to “grant to the highest responsible qualified bidder by competitive bidding ... oil and gas leases on submerged lands” of the OCS.²⁸ These duties have for many years been delegated, in large part, to a division of the Department of Interior known as the Minerals Management Service (MMS), which, under the administration of President Barack Obama, recently changed its name to the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE).²⁹

Through exploitation of oil and gas reserves, and in recent years, deepwater, offshore oil exploration, the Department of Interior generates considerable revenue in royalty and lease payments.³⁰ Section 8(g) of the OCSLA establishes terms for sharing this revenue with coastal states in the event a lease lies within three miles of the state’s seaward boundary (e.g., three to six miles from the shore).³¹ In such a case, the Department of Interior is charged with setting aside the revenue and giving 27% of it to the affected coastal state.³² Section 8(g) revenue sharing encourages “greater cooperation between the federal and coastal state governments regarding OCS development” and helps “coastal states plan for and mitigate the adverse economic and environmental impacts of OCS development.”³³

The Energy Policy Act of 2005 amended the OCSLA to grant the Secretary of Interior authority to issue leases, easements, or rights-of-way for OCS energy-related activities other than oil and gas.³⁴ In 2006, the Secretary delegated that authority to the MMS (now the BOEMRE).³⁵ The agency has construed its authority to include “ exclusive jurisdiction with regard to the production, transportation, or transmission of energy from nonhydrokinetic alternative energy projects on the OCS, including

²⁴ 43 U.S.C. 1132(1).

²⁵ 43 U.S.C. 1331(1).

²⁶ Convention on the Continental Shelf, [1964] 15 U.S.T. 471 (pt. 1), T.I.A.S. No. 5578, 499 U.N.T.S. 311.

²⁷ Breeden, *supra* n. 22, at 1113-14.

²⁸ 43 U.S.C. § 1337(a).

²⁹ See Order No. 3302 of Secretary of Interior Ken Salazar of June 18, 2010, available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=35872>; see also <http://www.boemre.gov/>.

³⁰ Breeden, *supra* n. 22, at 1114-15. Breeden notes that the federal government’s interest in offshore oil revenues can lead it to “overlook the concerns of a significant portion of the nation’s people, our coastal populations, in setting policy for OCS development.” *Id.*

³¹ 43 U.S.C. § 1137(g)(2)

³² *Id.*

³³ Fitzgerald, *supra* n. 18, at 277.

³⁴ Energy Policy Act of 2005, 119 Stat. 594, Pub. L. No. 109-058, Section 388 (August 8, 2005).

³⁵ 30 C.F.R. Parts 250, 285 and 290, 74 Fed. Reg. 19638 (April 29, 2009).

renewable energy sources such as wind and solar.”³⁶ Indeed, the opportunity for offshore wind power development has been a driving force behind coastal states’ ocean planning efforts. Given the federal government’s role in permitting many offshore wind projects, it may also help drive a national effort for coastal and marine planning.

C. National Environmental Protection Act

No leased activity on the OCS can proceed without compliance with the National Environmental Protection Act (NEPA).³⁷ NEPA requires that all federal agencies and actors “integrate environmental values into their decision making process by considering the environmental impact of their proposed actions and reasonable alternatives to those actions.”³⁸ In particular, federal agencies must prepare an Environmental Impact Statement (EIS) before proceeding with a major project.³⁹ The EIS should include information about adverse environmental effects that cannot be avoided by the action, as well as potential alternatives to the proposed action.⁴⁰ Alternatively, the agency may determine that an action will not adversely affect the environment, and issue a Finding of No Significant Impact (FONSI).⁴¹

An agency’s compliance with NEPA may be challenged by an adversely affected private party or by concerns citizens pursuant to the Administrative Procedure Act, which authorizes a court to “compel agency action unlawfully withheld or unreasonably delayed” and to “hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] without observance of procedure required by law.”⁴² For example, an environmental justice advocacy group, Natural Resources Defense Council, convinced a federal court to enjoin the sale of oil and gas leases on the OCS by proving the Department of Interior had failed to describe the environmental impacts that would be caused by the oil and gas exploration or

³⁶ *Id.*, 74 Fed. Reg. 19639. This jurisdictional authority was declared after a battle with the Federal Energy Regulatory Commission (FERC) resulted in a memorandum of understanding between the agencies designed to clarify “jurisdictional understandings regarding renewable energy projects on the OCS in order to develop a cohesive, streamlined process that would help accelerate the development of wind, solar, and hydrokinetic energy projects.” *Id.* In addition to its jurisdiction over offshore wind and solar projects, BOEMRE retains jurisdiction to issue leases, easements, and rights-of-way regarding OCS lands for hydrokinetic projects while FERC “has exclusive jurisdiction to issue licenses and exemptions for hydrokinetic projects located on the OCS.” *Id.*

³⁷ 42 U.S.C. § 4321 *et seq.*

³⁸ See <http://www.epa.gov/compliance/nepa/>. The purpose behind NEPA is: “To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. § 4321.

³⁹ 42 U.S.C. § 4332(2)(C). The statute mandates that all federal agencies shall “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on— (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. *Id.* § 4332(2)(C)(i-v).

⁴⁰ *Id.*

⁴¹ 40 C.F.R. §1501.4 (2004).

⁴² 5 U.S.C. § 706 (2004).

consider alternative methods of satisfying national energy needs.⁴³ State governments can also use NEPA to challenge the federal government's decisions to grant development rights on the OCS.⁴⁴ As one commentator notes, "The magnitude of litigation ... and the weight case law has given to NEPA as a force to be reckoned with in environmental planning far outstrips what anyone had in mind or hoped when the statute was first enacted."

In the end, however, NEPA actions serve primarily to delay or stall offshore energy projects, not necessarily to prevent them.⁴⁵ Still, the statute is designed to force federal agencies to stop and think about environmental consequences of their actions, and to involve the public (including state governments) in proposing appropriate alternatives. NEPA's creation of the Council on Environmental Quality (CEQ)⁴⁶ is also relevant to more modern coastal and marine planning initiatives, where the CEQ plays a prominent role.⁴⁷

D. Marine Sanctuaries Act

The National Marine Sanctuaries Act (NMSA), originally enacted as Title III of the Marine Protection, Research, and Sanctuaries Act of 1972,⁴⁸ was passed along with NEPA and other environmental protection laws in the wake of the 1969 oil spill off the coast of Santa Barbara, California.⁴⁹ The Act might be called the nation's first attempt at comprehensive ocean planning. "Members of Congress stated that they were creating an important program likely to ensure balanced planning for a wide range of uses on a broad geographic scale--in effect, a program to provide for comprehensive multi-use management of the oceans."⁵⁰

The purposes of the NMSA include to:

- "identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance and to manage these areas as the National Marine Sanctuary System";
- authorize the comprehensive management of these areas consistent with existing regulations;

⁴³ Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

⁴⁴ See, e.g., Breeden, *supra* n. 22, at 1128-29 (describing lawsuit by California against Department of Interior over its designation of tracts off the California coast for potential oil and gas leasing).

⁴⁵ *Id.* at 1129 ("In any project the Interior Department eventually will succeed in writing an adequate impact statement, and leasing or development will go forward.")

⁴⁶ "There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment." 42 USC § 4342.

⁴⁷ See, *infra* notes 159-160 and accompanying text (discussing the role of CEQ director as co-chair of the National Ocean Council).

⁴⁸ Pub. L. No. 92-532, 86 Stat. 1052, 1061-63.

⁴⁹ Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. Envtl. L.J. 711, 714-15 (2003).

⁵⁰ *Id.* at 715.

- maintain, protect and restore marine habitats;
- enhance public awareness and education of the marine environment;
- support and promote marine scientific research;
- facilitate public and private uses of the resources of the protected marine areas;
- develop and implement coordinated plans for protecting and managing these areas in collaboration with multiple federal agencies, state and local governments, and other relevant entities;
- create models for conserving the areas and innovative management techniques; and
- cooperate with global marine conservation programs.⁵¹

The statute's aims are to be carried out by the National Oceanic and Atmospheric Administration (NOAA),⁵² a unit of the Department of Commerce that also has jurisdiction over the nation's fisheries.⁵³ Under the Act, NOAA is to apply several criteria to designate and manage marine sanctuaries,⁵⁴ and must give the states and the general public many opportunities to participate in designation decisions.⁵⁵ In addition, in the course of making a marine sanctuary designation, NOAA is to prepare an EIS, and conduct a resource assessment in consultation with the Secretaries of the Interior, Energy, and Defense, as well as the Administrator of the EPA.⁵⁶ Echoes of this multi-agency approach are proposed in the more recent ocean management policies of the Obama administration, discussed *infra* in Part IV.

E. Coastal Zone Management Act

The early 1970s brought several environmental protection statutes to life. In addition to NEPA and the NMSA, Congress passed the Clean Air Act⁵⁷ and the Clean Water Act,⁵⁸ among others. Most of these statutes directed federal agencies to regulate human activities for the protection of the environment, and even set forth specific obligations states had to meet to comply with federal standards. One innovative statute was the Coastal Zone Management Act (CZMA), credited with a goal of "foster[ing] cooperation between federal, state and local governments through purely voluntary means."⁵⁹

⁵¹ 16 U.S.C. § 1431(b)(1-9).

⁵² "Technically the statute empowers the Secretary of Commerce to develop these management plans for designated areas, but the Secretary delegated the authority to administer those provisions of the Act to the Administrator of NOAA. See Marine Sanctuaries, Program Guidelines, 39 Fed. Reg. 10,255 (Mar. 19, 1974) (noting March 13, 1974 delegation of authority to the NOAA Administrator to exercise authority under Title III of the Marine Protection, Research, and Sanctuaries Act of 1972.)" Owen, *supra* n. 49, at n.6.

⁵³ "NOAA's National Marine Fisheries Service (NOAA Fisheries) is the lead federal agency responsible for the stewardship of the nation's offshore living marine resources and their habitat. NOAA Fisheries manages, conserves and protects fish, whales, dolphins, sea turtles and other living creatures in the ocean."

<http://www.noaa.gov/fisheries.html>.

⁵⁴ See 16 U.S.C. § 1433.

⁵⁵ 16 U.S.C. § 1434. The statute has been criticized as ineffective because it did neither forced NOAA to make designations, nor provided incentives for NOAA to act or consequences for its failure to act. "On one hand, it was clearly intended to be comprehensive. On the other hand, it left actual decisions about the scope of the sanctuary program to NOAA, and provided NOAA with many obstacles blocking designation and few incentives to act. This paradox, not surprisingly, led to disappointingly minimal protection." Owen, *supra* n. 49, at 721.

⁵⁶ 16 U.S.C. § 1434(2).

⁵⁷ 42 U.S.C. § 7401, et seq. (1970).

⁵⁸ 33 U.S.C. § 1251, et seq. (1972).

⁵⁹ Salcido, *supra* n. 2, at 1381.

As its title suggests, the CZMA was enacted to preserve, protect, enhance and appropriately develop the resources of the United States' coastal zone.⁶⁰ It also set out to “encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs.”⁶¹ The statute calls for creation of special area management plans;⁶² participation by the public and various governmental entities in coastal management policy development;⁶³ and cooperation among federal agencies and between federal, state and tribal governance entities.⁶⁴

Congress's approach to coastal zone management differed from other regulatory laws of the times in that it recognized “the key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone.”⁶⁵ This goal is accomplished by encouraging states to develop “unified policies, criteria, standards methods, and processes for dealing with land and water use decisions of more than local significance.”⁶⁶

The statute urges states to prepare Coastal Management Plans (CMPs) and creates an incentive to do so by providing federal grants to those states who submit approved CMPs.⁶⁷ State CMPs are approved if they comply with regulatory guidelines set forth by the U.S. Secretary of Commerce and several other elements, such as identification of the coastal zone boundaries, approved shoreline land uses, prioritization of various coastal uses, and details about state-level governance of the coastal zone (among others).⁶⁸

In addition to financial incentives, the federal government encourages states to prepare CMPs by giving them “a consultation role in shaping development projects in federally managed areas based on the state's coastal management plan.”⁶⁹ In particular, the CZMA mandates that “[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.”⁷⁰ These “consistency requirements” imposed on federal agency actions “provide an avenue for states to participate in or influence management of ocean resources under federal jurisdiction.”⁷¹ This framework is the essence of cooperative federalism.

⁶⁰ 16 U.S.C. § 1452(1).

⁶¹ *Id.* § 1452(2).

⁶² *Id.* § 1452(3).

⁶³ *Id.* § 1452(4).

⁶⁴ *Id.* § 1452(5).

⁶⁵ Ruhl, *supra* n. 13, at 617 (quoting 16 U.S.C. § 1451(i)).

⁶⁶ *Id.*

⁶⁷ 16 U.S.C. § 1455(b) (“The Secretary may make a grant to a coastal state under subsection (a) of this section only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this chapter and has been approved in accordance with subsection (d) of this section.”).

⁶⁸ 16 U.S.C. § 1455(d)(2)(A-I).

⁶⁹ Salcido, *supra* n. 2, at 1382.

⁷⁰ 16 U.S.C. § 1456(c)(1)(A).

⁷¹ National Oceanic & Atmospheric Administration, Department of Commerce, Discussion Paper: Current and Future Challenges for Coastal Management at 17 (Sept. 12, 2006), available at http://www.coastalmanagement.noaa.gov/czm/media/discussion_paper.pdf.

III States Undertake Ocean Planning

Many coastal states have coastal management programs that prepare Coastal Management Plans, administer federal grants under the CZMA, and coordinate policies with federal agencies. These programs have varying degrees of responsibility and authority, and are housed within different governmental departments depending on the state.⁷²

Through these programs and targeted state legislation, states have been engaging in various forms of “marine zoning” and area planning efforts for over twenty years,⁷³ and the idea of ocean zoning is hardly novel.⁷⁴ In the second half of this decade, however, some states’ leading efforts to comprehensively map and zone in three dimensions their ocean waters, including in some instances overlapping federal waters, have set a precedent for other coastal states and even the federal government to follow. This article describes only three such programs as leaders in state-level coastal and marine spatial planning.

A. California

Over seventy-five percent of California’s population⁷⁵ lives on or near its 1,100 miles (1770 km) of coastline.⁷⁶ The state is a self-described “leader in ocean and coastal management,” having “established the first coastal management program in the world with the creation of the San Francisco Bay Conservation and Development Commission in 1969.”⁷⁷ A statewide coastal conservation initiative followed shortly thereafter, and, under the California Coastal Act of 1976,⁷⁸ the state created the California Coastal Commission and the California State Coastal Conservancy.⁷⁹ Among other things, the California Coastal Commission (Commission) designates environmentally sensitive habitat areas (ESHAs) in both marine and terrestrial environments, and as such “does engage in some form of ecosystem-based management and area-based management.”⁸⁰ The California Coastal Act does not, however, “authorize the Commission to engage in proactive master planning and zoning for state waters.”⁸¹

⁷² See, e.g., Alaska Coastal Management Program, within the Department of Natural Resource (<http://dnr.alaska.gov/coastal/acmp/>); Maine Coastal Program, within the Maine State Planning Office (<http://www.maine.gov/spo/coastal/about.htm>); New York State Department of State Division of Coastal Resources (<http://www.nyswaterfronts.com/index.asp>); Oregon Coastal Management Program, within the Department of Land Conservation and Development (<http://www.oregon.gov/LCD/OCMP/>).

⁷³ See Barbara A. Vestal, *Dueling with Boat Oars, Dragging through Mooring Lines: Time for More Formal Resolution of Use Conflicts in States’ Coastal Waters?*, 4 *Ocean & Coastal L.J.* 1, 63-70 (1999) (describing several state programs that incorporate marine zoning or spatial planning components).

⁷⁴ See, *id.* at n. 261 (citing J.R. Schubel, *ZONING: A RATIONAL APPROACH TO ESTUARINE REHABILITATION AND MANAGEMENT* 4 (Marine Sciences Research Ctr., State Univ. of N.Y. No. 754, 1975)).

⁷⁵ See Deborah A. Sivas and Margaret R. Caldwell, *A New Vision for California Ocean Governance: Comprehensive Ecosystem-Based Marine Zoning*, 27 *Stan. Envtl. L.J.* 209, 213 (2008).

⁷⁶ The California Ocean Protection Council, *A Vision for Our Ocean and Coast: Five-Year Strategic Plan* (2006), available at http://www.opc.ca.gov/webmaster/ftp/pdf/docs/OPC_Strategic_Plan_2006.pdf.

⁷⁷ California Resources Agency and California Environmental Protection Agency, *Protecting Our Ocean: California’s Action Strategy*, Final Report to Governor Arnold Schwarzenegger (September 2004), at 2, available at http://resources.ca.gov/ocean/Cal_Ocean_Action_Strategy.pdf.

⁷⁸ Cal. PRC Ann. § 30000, et seq.

⁷⁹ *Id.* § 30004.

⁸⁰ Sivas et al, *supra* n. 75, at 233.

⁸¹ *Id.*

California's next significant step toward ocean management was the California Ocean Resources Management Act (CORMA) of 1989,⁸² which, upon amendment in 1991, transferred responsibility for "all non-statutory marine and coastal management programs" to the Secretary for Environmental Affairs, and required a report and a plan.⁸³ The result was the 1997 "Ocean Agenda" that called for "comprehensive and coordinated ocean resource management" to replace the myriad agencies and departments with overlapping authority and jurisdiction over coastal and marine resources.⁸⁴ The Ocean Agenda encouraged efforts to bring together these state agencies and establish a process for soliciting advice from and cooperation with other areas of government, as well as the public and private sectors.⁸⁵

Following the CORMA report, California passed the Marine Life Management Act of 1998,⁸⁶ which shifted responsibility for commercial fisheries to the California Fish and Game Commission;⁸⁷ the California Marine Life Protection Act of 1999,⁸⁸ which created "a master planning team of scientists and experienced coastal managers to develop a details master plan network of marine protected areas" in state waters;⁸⁹ and the Marine Managed Areas Improvement Act of 2000,⁹⁰ which was designed to streamline, classify and improve the management of numerous special designations of protected marine areas.⁹¹

These efforts were stepping stones to a more comprehensive program, announced with the California Ocean Protection Act (COPA) of 2004.⁹² COPA set out to again significantly reform California's marine governance system. Among the principles guiding California's new ocean governance regime are "sustainability, ecosystem health, precaution, recognition of the interconnectedness between land and ocean, decisions informed by good science and improved understanding of coastal and ocean ecosystems, and public participation in decisionmaking."⁹³

COPA established a cabinet level oversight body called the Ocean Protection Council.⁹⁴ The Council's members include the Secretaries of the Resources Agency and of Environmental Protection, as well as the Chair of the Public Lands Commission and two governor-appointed members of the public. The council was charged with:

- Coordinating all state agencies' activities "related to the protection and conservation of coastal waters and ocean ecosystems";
- Establishing policies for the "collection, evaluation, and sharing of scientific data related to coastal and ocean resources";
- Establishing a science advisory team consisting of seasoned scientists from a range of disciplines to provide "independent and timely analysis of reports and studies, indentifying areas of scientific consensus or uncertainty, using the best available science";

⁸² Cal. PRC § 36000, et seq. (1990).

⁸³ Sivas, *supra* n. 75, at 234.

⁸⁴ *Id.* at 234-35.

⁸⁵ *Id.* at 236-37.

⁸⁶ Cal. Fish & Game Code § 7050, et seq.

⁸⁷ Sivas, *supra* n. 75, at 237.

⁸⁸ Cal. Fish & Game Code § 2850, et seq. (1999).

⁸⁹ Sivas, *supra* n. 75, at 238.

⁹⁰ Cal. Fish & Game Code § 1525, et seq. (2000).

⁹¹ Sivas, *supra* n. 75, at 239-240.

⁹² Cal. PRC § 36600, et seq.

⁹³ Cal. PRC § 35505(c).

⁹⁴ *Id.* §§ 35515(c) and 35600(a).

- Transmit research results to administrative agencies to inform their policy decisions; and
- Recommend legislation to further COPA's goals.

In 2006, the council issued a five year strategic plan called "A Vision for Our Ocean and Coast."⁹⁵ In the "vision" section, the council called for future ocean management boundaries that correspond with ecosystem regions, for ocean managers to proceed with caution, and for governance to be "effective, participatory, and well-coordinated among government agencies, the private sector, and the public."⁹⁶ Its proposal for improved governance called for an inventory of laws to "identify gaps or overlaps between jurisdictions affecting priority ocean and coastal issues."⁹⁷ The plan also encouraged the state's environmental enforcement efforts to be coordinated between agencies whenever possible.⁹⁸

The plan falls far short of creating a framework for coastal and marine spatial planning, however, and indeed does not even mention zoning or spatial planning as a goal or outcome. The closest it comes to suggesting the idea is to encourage the incorporation of ecosystem-based management principles through EBM pilot programs in many regions of the state.⁹⁹ Applying EBM principles goes hand-in-glove, at times, with ocean mapping, planning and zoning, but is not a substitute for spatial planning or zoning. California's efforts at ocean governance, however, remain influential on a national level.

B. Rhode Island

Rhode Island's designated authority to manage federal consistency matters pursuant to the CZMA is the Coastal Resources Management Council (CRMC), a state agency charged to conduct "coordinated long range planning and management designed to produce the maximum benefit for society" from the state's coastal resources.¹⁰⁰ Pursuant to a legislative mandate, the CRMC created a Marine Resources Development Plan in 2005, intending it to be a first step in a region-wide, multi-state Special Area Management Plan (SAMP).¹⁰¹ The multi-state plan was never developed, but the idea of a SAMP had taken root.¹⁰² When offshore wind farms became a priority for the state in 2007, the CRMC proposed creating a SAMP "as a mechanism to develop a comprehensive management and regulatory tool that would proactively engage the public and provide policies and recommendations for appropriate siting of offshore renewable energy."¹⁰³

The broad goals of Rhode Island's Ocean SAMP are to:

- "Foster a properly functioning ecosystem that is both ecologically sound and economically beneficial."¹⁰⁴
- "Promote and enhance existing uses."¹⁰⁵

⁹⁵ The California Ocean Protection Council, *A Vision for Our Ocean and Coast: Five-Year Strategic Plan (2006)*, available at http://www.opc.ca.gov/webmaster/ftp/pdf/docs/OPC_Strategic_Plan_2006.pdf (hereafter "Vision").

⁹⁶ *Id.* at 12.

⁹⁷ *Id.* at 18.

⁹⁸ *Id.*

⁹⁹ *Id.* at 20.

¹⁰⁰ Rhode Island Ocean Special Area Management Plan (SAMP), DRAFT of July 23, 2010, Chapter 1, Section 110(1), available at http://seagrant.gso.uri.edu/oceansamp/pdf/sampfull/100_Intro_7_23_fullsamp.pdf.

¹⁰¹ *Id.*, Chapter 1, § 150(1).

¹⁰² *Id.* § 150(2).

¹⁰³ *Id.* § 150(3).

¹⁰⁴ *Id.* § 130(4)(a).

¹⁰⁵ *Id.* § 130(4)(b).

- “Encourage marine-based economic development that considers the aspirations of local communities and is consistent with and complementary to the state’s overall economic development, social, and environmental needs and goals.”¹⁰⁶
- “Build a framework for coordinated decision-making between state and federal management agencies.”¹⁰⁷

The following principles are to guide the Ocean SAMP’s design and development:

- Transparency: Making project activities easily understandable and available to the general public.¹⁰⁸
- Inclusiveness: Ensuring that all stakeholders have an opportunity to participate in the SAMP planning process.¹⁰⁹
- Honoring existing ocean uses: Understand, regard and respect major existing activities such as fishing, recreation, transportation and military activities in planning for future uses.¹¹⁰
- Best available science: Base management and regulatory decisions on ecosystem based management approaches using best available science, conducting studies as necessary before future activity is approved.¹¹¹
- Adaptive management: Incorporating information gathered continuously, through monitoring and evaluation, in order to constantly improve practices and make changes to the SAMP as necessary.¹¹²

The SAMP is intended to guide permitting and planning decisions already delegated to the CRMC. It does not create a new entity or call upon multiple agencies to convene or cooperate. The Ocean SAMP defines the process by which ecosystem-based management is organized as marine spatial planning (MSP), and claims that the CRMC has “successfully applied MSP to achieve EBM along Rhode Island’s coastline” since 1983.¹¹³

Rhode Island’s SAMP is in draft form as of this writing. The plan specifically covers not only state waters, but also adjacent waters under federal jurisdiction. Possibly its crowning achievement is the cooperative role the SAMP team encouraged the relevant federal agencies to play in developing this comprehensive plan.

C. Massachusetts

The Massachusetts Ocean Management Plan represents a model ocean planning process on at least three levels: It was developed in a relatively short period of time with involvement from multiple

¹⁰⁶ *Id.* § 130(4)(c).

¹⁰⁷ *Id.* § 130(4)(d).

¹⁰⁸ *Id.* § 130(5)(a).

¹⁰⁹ *Id.* § 130(5)(b).

¹¹⁰ *Id.* § 130(5)(c).

¹¹¹ *Id.* § 130(5)(d).

¹¹² *Id.* § 130(5)(e). The SAMP document further defines adaptive management as follows: “Adaptive management is a systematic process for continually improving management policies and practices by learning from the outcomes of previously employed policies and practices. Adaptive management requires careful implementation, monitoring, evaluation of results, and adjustment of objectives and practices. Adaptive management usually allows more reliable interpretation of results, and leads to more rapid learning and better management.” *Id.*, Chapter 11, Section 1130(1).

¹¹³ *Id.*, Chapter 1, § 110(5).

stakeholders; it is backed with the hefty authority of a powerful cabinet-level position representing many key state agencies; and its scientific basis was supported initially, and will continue to be informed in the future, pursuant to a major grant from a private foundation that coordinated many participants. In 2003, the Massachusetts governor appointed a task force to investigate ocean use, trends and governance mechanisms, and propose changes in legislation and ocean administration.¹¹⁴ Following its report, *Waves of Change*,¹¹⁵ the Massachusetts legislature passed the Massachusetts Ocean Act of 2008.¹¹⁶ The statute directed that the Secretary of the Executive Office of Energy and Environmental Affairs (EEA) develop an integrated ocean management plan.¹¹⁷ The Act was signed on 28 May, 2008; the final report was due by 31 December, 2009.¹¹⁸

To assist the Secretary of EEA with developing the plan, the Ocean Act created an ocean advisory commission comprised of state legislators; directors of the coastal zone management, environmental protection, and marine resources commissions; and several other members of the public appointed by the governor, including one representing commercial fishing interests and one with knowledge of offshore renewable energy development.¹¹⁹ The Ocean Act also established “an ocean science advisory council to assist the secretary in creating a baseline assessment and obtaining any other scientific information necessary for the development of an ocean management plan.”¹²⁰

In parallel with these official and regulatory developments, a powerful coalition of motivated scientists, policymakers, lawyers, fishermen and environmental organizations joined together to form the Massachusetts Ocean Partnership (MOP).¹²¹ This independent “public-private partnership” was funded by the Gordon and Betty Moore Foundation through 2011 “to convene diverse stakeholders and develop a Five Year Strategic Plan to advance Ecosystem-based Marine Spatial Planning” in Massachusetts.¹²² The MOP worked closely with the EEA in preparing and publicly vetting the Ocean Management Plan.

The partnership between EEA and MOP proved effective during plan development and continues during plan implementation. While EEA was responsible for development of the plan pursuant to the legislative mandate of the Oceans Act (including management of the plan development process and drafting of the plan itself), MOP funding and staff provided EEA with necessary support. For example, MOP funding helped EEA maximize the public involvement goal (videos of workshop presentations were made available on-line). Additionally, MOP funded important policy analyses (e.g., a review of other ocean management efforts from around the world to identify a potential frameworks for Massachusetts) and development of derived data products (e.g., transformation of raw Vessel

¹¹⁴ See <http://www.mass.gov/czm/oceanmanagement/taskforce/index.htm>.

¹¹⁵ http://www.mass.gov/czm/oceanmanagement/waves_of_change/pdf/wavesofchange.pdf.

¹¹⁶ Chapter 114 of the Acts of 2008, available at <http://www.mass.gov/legis/laws/seslaw08/sl080114.htm>.

¹¹⁷ 21A M.G.L. § 4C (2008).

¹¹⁸ See Massachusetts Ocean Management Plan, Chapter 1, at 1-1, available at <http://www.env.state.ma.us/eea/mop/final-v1/v1-text.pdf>.

¹¹⁹ 21A M.G.L. § 4C(c).

¹²⁰ *Id.* § 4C(d).

¹²¹ See Massachusetts Ocean Partnership website, “Founding Stakeholders,” available at <http://massoceanpartnership.org/about/who-we-are/founding-stakeholders/>.

¹²² *Id.*, “History,” at <http://massoceanpartnership.org/about/who-we-are/history/>.

Monitoring Systems data), and continues to help EEA address identified priority science needs (e.g., characterizing spatial patterns of recreational activity in Massachusetts waters).¹²³

The final Massachusetts Ocean Management Plan set forth four goals, as synthesized from the charge given in the Ocean Act of 2008:

- “Balance and protect the natural, social, cultural, historic, and economic interests of the marine ecosystem through integrated management;”¹²⁴
- “Recognize and protect biodiversity, ecosystem health, and the interdependence of ecosystems;”¹²⁵
- “Support wise use of marine resources, including renewable energy, sustainable uses, and infrastructure;”¹²⁶ and
- “Incorporate new knowledge as the basis for management that adapts over time to address changing social, technological, and environmental conditions.”¹²⁷

The Oceans Act directed the plan to establish management areas, as well as performance standards for any proposed development within those areas. Accordingly, the plan created three categories of management areas: Prohibited, Renewable Energy, and Multi-Use.¹²⁸ The plan names only one area as prohibited.¹²⁹ Renewable Energy Areas are appropriate for commercial and community scale wind energy development (unlikely in the plan’s first five years) as well as wave and tidal power facilities.¹³⁰ The Multi-Use Area comprises the remainder (a vast majority) of the planning area, open to all uses, activities and facilities. Management in this area “is based on specific marine resources identified as key components of the Massachusetts marine ecosystem (‘special, sensitive or unique marine or estuarine life and habitat’).”¹³¹

Governance of the plan rests principally with the EEA, as the Oceans Act directs the secretary to make consistent with the plan, after its implementation, “all certificates, licenses, permits and approvals for any proposed structures, uses or activities in areas subject to the ocean management plan.”¹³² This should serve to streamline the plan’s implementation and enforcement so that it can most efficiently take effect.

Perhaps one detraction from Massachusetts’s otherwise model efforts to rapidly and decisively prepare a comprehensive, ecosystem-based marine spatial plan is the exclusion from the plan of commercial fisheries management. The Oceans Act leaves jurisdiction over commercial and recreational marine

¹²³ *Id.*, “The Public-Private Partnership,” available at <http://massoceanpartnership.org/about/the-public-private-partnership/>.

¹²⁴ Massachusetts Ocean Management Plan, Vol. 1, Ch. 1, at 1-3, available at <http://www.env.state.ma.us/eea/mop/final-v1/v1-text.pdf>.

¹²⁵ *Id.*

¹²⁶ *Id.*, Vol. 1, Ch. 1, at 1-4.

¹²⁷ *Id.*

¹²⁸ *Id.*, Vol. 1, Ch. 2, at 2-1.

¹²⁹ *Id.* (“The Prohibited Area ... is coincident with the Cape Code Ocean Sanctuary, within which a variety of uses, activities and facilities are expressly prohibited by the Ocean Sanctuaries Act”).

¹³⁰ *Id.*

¹³¹ *Id.*, Vol. 1, Ch. 2, at 2-3.

¹³² Chapter 114 of the Acts of 2008, Section 4C(e) available at <http://www.mass.gov/legis/laws/seslaw08/sl080114.htm>.

fisheries in the hands of the division of marine resources,¹³³ and requires that any component of the Ocean Management Plan that has an impact on fishing shall be referred first to the division of marine resources and “shall minimize negative economic impacts on commercial and recreational fishing.”¹³⁴

In summary, Massachusetts swiftly and comprehensively developed what appears to be a sound, ecosystem based marine spatial plan with appropriate high-level governance to implement the plan, and well funded stakeholder involvement to maintain its political viability and scientific integrity.

IV Evolution of US Ocean Policy: Toward Coastal and Marine Spatial Planning

A. Crucial Reports on the Ocean Encourage Policy Changes

The dire condition of United States fisheries, scientific evidence of global climate change, increasing pollution of marine waters and other alarming environmental concerns prompted two major commissions – the Pew Oceans Commission and the government-sponsored U.S. Ocean Commission – to study and report on the state of US oceans and coasts early in the millennium.

1. Pew Oceans Commission Report

The Pew Oceans Commission, a “bi-partisan independent group of American leaders,” spent over two years convening meetings across the United States and studying environmental and policy concerns related to the ocean waters surrounding the US.¹³⁵ Its report, issued in May 2003, noted the existence of over 140 laws pertaining to the nation’s oceans and coasts, 43 of which were considered major legislation.¹³⁶ Acknowledging that without these laws the waters and coasts would be in even worse condition, the report charges that environmental quality has continued to degrade since their enactment. “They were intended to address specific issues, but collectively fail to provide an overall governance framework to maintain the health of marine ecosystems.”¹³⁷

The Pew report made several specific suggestions with regard to national-level ocean governance. First, it called for a new statute titled the National Ocean Policy Act that would set forth unifying principles and standards for ocean management decisions across all federal agencies and authorities.¹³⁸ Second, it urged creation of regional ocean governance councils that would: be representative and democratic; develop enforceable regional ocean governance plans based on science and using zoning principles; and coordinate with regional fisheries councils.¹³⁹ Third, the report recommended establishment of a national system of marine reserves.¹⁴⁰ Fourth, it urged Congress to make the National Oceanic and

¹³³ *Id.*, § 4C(k)(1) (“In the geographic area subject to the ocean management plan ..., commercial and recreational fishing shall be allowable uses, subject to the exclusive jurisdiction of the division of marine fisheries. Any component of a plan which regulates commercial or recreational fishing shall be developed, promulgated and enforced by the division of marine fisheries pursuant to its authority”)

¹³⁴ *Id.*, § 4C(k)(2).

¹³⁵ *America’s Living Ocean: Charting a Course for Sea Change*, at ix (May 2003), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceans_final_report.pdf.

¹³⁶ *Id.*, Chapter One, at 27.

¹³⁷ *Id.*

¹³⁸ *Id.*, Chapter Ten, at 102.

¹³⁹ *Id.* at 103-105.

¹⁴⁰ *Id.* at 106.

Atmospheric Administration an independent agency outside of the Department of Commerce.¹⁴¹ Lastly, it called for creation of a permanent National Oceans Council within the executive office of the U.S. President and comprised of secretary-level cabinet members.¹⁴²

2. U.S. Commission on Ocean Policy Report

Pursuant to the Oceans Act of 2000, the United States established a sixteen-member Commission on Ocean Policy (the Commission) “to make recommendations for coordinated and comprehensive national ocean policy.”¹⁴³ The Commission issued its final report—“An Ocean Blueprint for the 21st Century”—in September 2004, well after the Pew report.¹⁴⁴ The report contained over 200 recommendations for U.S. ocean and coastal policy.¹⁴⁵ Among these were four directly related to ocean governance. The first was a call for leadership on a national level, specifically, creation of a National Ocean Council within the office of the President. The NOC “would oversee all existing and new ocean- and coastal related interagency mechanisms and coordination efforts.”¹⁴⁶ It also recommended the creation of a Council of Advisors on Ocean Policy¹⁴⁷ which President George W. Bush established as part of the Council on Environmental Quality, a coordinating body within the Executive Office of the President.¹⁴⁸ President Bush did not create a National Ocean Council.

Another key recommendation of the Commission’s report was regional-level advisory bodies to assist the NOC. These committees would be comprised of representatives from “the private sector, nongovernmental organizations, and academia,” who would participate in a flexible and voluntary manner.¹⁴⁹ The report cited three major regional water quality programs that had been successful in different areas of the United States.¹⁵⁰ A third recommendation was for creation of a coordinated federal offshore management regime that prioritizes uses and streamlines permitting, citing marine protected areas as one form of effective management tool.¹⁵¹ Fourth, the report urged reorganization of the federal agencies overseeing various different ocean-based activities as a necessary means to developing consistent ecosystem-based management. Specifically, it cited the many recommendations to free NOAA from the Department of Commerce, and while stopping short of joining those recommendations, it did call for Congress to strengthen and clarify NOAA’s mission in the short term

¹⁴¹ *Id.* at 107.

¹⁴² *Id.* at 107-108.

¹⁴³ Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644 (2000) (codified as amended at 33 U.S.C. § 857-19 (2000)).

¹⁴⁴ U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century* (2004), available at http://oceancommission.gov/documents/full_color_rpt/welcome.html (last visited June 10, 2010).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, Chapter 4, at 79.

¹⁴⁷ *See id.*

¹⁴⁸ The Council on Environmental Quality was established pursuant to the National Environmental Policy Act of 1969. National Environmental Policy Act, 42 U.S.C. § 4321 (1969). *See also* The White House, Home, The Administration, Council on Environmental Quality, The Council on Environmental Quality-About, <http://www.whitehouse.gov/administration/eop/ceq/about> (last visited June 10, 2010).

¹⁴⁹ Ocean Blueprint, *supra* n. 243, Chapter 5, at 87.

¹⁵⁰ *Id.* at 87-88.

¹⁵¹ *Id.*, Chapter 6, at 103.

and possibly create an independent ocean management agency in the long term.¹⁵² The Commission expired in December 2004 under the terms of the Ocean Act.¹⁵³

B. Interagency Ocean Policy Task Force

Over the next few years, whispers of the potential for offshore renewable energy grew into loud calls for action. Proposals for offshore wind development in Massachusetts, Delaware and Rhode Island (among other states) encouraged states to develop ocean management plans, as described above. In 2008, Barack Obama was elected to serve as President of the United States along with a liberal Congress. The time was finally right for federal-level ocean planning.

In June 2009, President Barack Obama established the Interagency Ocean Policy Task Force (the Task Force).¹⁵⁴ The Task Force was led by the White House Council on Environmental Quality.¹⁵⁵ Its charge included “developing a recommendation for a national policy that ensures protection, maintenance, and restoration of oceans, our coasts and the Great Lakes” and recommending “a framework for improved stewardship, and effective coastal and marine spatial planning.”¹⁵⁶

The Task Force issued its interim report on September 10, 2009. In preparing the report, the Task Force consulted the report prepared by the U.S. Commission on Ocean Policy.¹⁵⁷ The Task Force gently suggested that the Committee on Ocean Policy established following that report was only “moderately effective” in bringing federal agencies together to coordinate national ocean policy, and that there was much room for improvement in setting a strong overarching policy for national ocean priorities; getting high-level direction and policy guidance from a “clear and identifiable authority;” and creating enhanced “ongoing and active engagement with state, tribal, and local authorities, and regional governance structures” among other things.¹⁵⁸

C. The National Ocean Council

On July 19, 2010, President Obama posted an Executive Order to the White House Blog¹⁵⁹ adopting many of the recommendations of the Interagency Ocean Policy Task Force and establishing the National Ocean Council.¹⁶⁰ The Council has as its co-chairs the Chair of the Council on Environmental Quality and

¹⁵² *Id.* Chapter 7, at 109-110.

¹⁵³ See 33 U.S.C. § 857-19(Sec. 3)(f)(2)(i) (“The Commission shall cease to exist 90 days after the date on which it submits its final report.”).

¹⁵⁴ The White House, Office of the Press Secretary, Memorandum for the Heads of Executive Departments and Agencies (June 12, 2009), *available at* http://www.whitehouse.gov/sites/default/files/page/files/2009ocean_mem_rel.pdf.

¹⁵⁵ See The White House, Council on Environmental Quality, The Interagency Ocean Policy Task Force, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans> (last visited June 10, 2010).

¹⁵⁶ *Id.*

¹⁵⁷ THE WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, INTERIM REPORT OF THE INTERAGENCY OCEAN POLICY TASK FORCE 3 (Sept. 10, 2009), *available at* http://www.whitehouse.gov/assets/documents/09_17_09_Interim_Report_of_Task_Force_FINAL2.pdf.

¹⁵⁸ *Id.* at 6.

¹⁵⁹ See <http://www.whitehouse.gov/blog>.

¹⁶⁰ See Executive Order – Stewardship of the Ocean, Our Coasts, and the Great Lakes, July 20, 2010 (available at <http://www.whitehouse.gov/files/documents/2010stewardship-eo.pdf>) (last visited July 23, 2010).

the Director of the Office of Science and Technology Policy.¹⁶¹ Its members include cabinet-level administrators:

[T]he Secretaries of State, Defense, the Interior, Agriculture, Health and Human Services, Commerce, Labor, Transportation, Energy, and Homeland Security, the Attorney General, the Administrator of the Environmental Protection Agency, the Director of the Office of Management and Budget, the Under Secretary of Commerce for Oceans and Atmosphere Administrator of the National Oceanic and Atmospheric Administration), the Administrator of the National Aeronautics and Space Administration, the Director of National Intelligence, the Director of the National Science Foundation, and the Chairman of the Joint Chiefs of Staff.¹⁶²

The co-chairs are also encouraged to invite the Chairman of the Federal Energy Regulatory Commission (FERC) to participate “to the extent consistent with the Commission’s statutory authorities and legal obligations.”¹⁶³ By assigning and inviting administrators of such high authority to the Council, the President signals a commitment to interdepartmental cooperation in an environmental stewardship and management challenge of grand proportions.

The Council members are required by the Executive Order to take actions consistent with and to implement its “policy,”¹⁶⁴ namely, to:

- protect, maintain, and restore the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources;
- improve the resiliency of ocean, coastal, and Great Lakes ecosystems, communities, and economies;
- bolster the conservation and sustainable uses of land in ways that will improve the health of ocean, coastal, and Great Lakes ecosystems;
- use the best available science and knowledge to inform decisions affecting the ocean, our coasts, and the Great Lakes, and enhance humanity’s capacity to understand, respond, and adapt to a changing global environment;
- support sustainable, safe, secure, and productive access to, and uses of the ocean, our coasts, and the Great Lakes;
- respect and preserve our Nation’s maritime heritage, including our social, cultural, recreational, and historical values;
- exercise rights and jurisdiction and perform duties in accordance with applicable international law, including respect for and preservation of navigational rights and freedoms, which are essential for the global economy and international peace and security;
- increase scientific understanding of ocean, coastal, and Great Lakes ecosystems as part of the global interconnected systems of air, land, ice, and water, including their relationships to humans and their activities;
- improve our understanding and awareness of changing environmental conditions, trends, and their causes, and of human activities taking place in ocean, coastal, and Great Lakes waters; and
- foster a public understanding of the value of the ocean, our coasts, and the Great Lakes to build a foundation for improved stewardship.

¹⁶¹ *Id.* at § 4(b)(i).

¹⁶² *Id.* at § 4(b)(ii).

¹⁶³ *Id.* at § 4(c).

¹⁶⁴ *Id.* at § 6(a)(i).

The Executive Order all executive departments, agencies and offices to “participate in the process for coastal and marine spatial planning and comply with Council certified coastal and marine spatial plans.”¹⁶⁵ Coastal and marine spatial planning is defined in the order as:

a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas. Coastal and marine spatial planning identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives. In practical terms, coastal and marine spatial planning provides a public policy process for society to better determine how the ocean, our coasts, and Great Lakes are sustainably used and protected -- now and for future generations.¹⁶⁶

The proposed policy for the National Ocean Council to follow encourages cooperation and coordination between state and federal (and tribal) governments at levels never fully experienced before. This integrated and cooperative approach “acknowledges the interconnectedness of human and natural systems”¹⁶⁷ as well as the mutual interests of multiple government jurisdictions and interested parties.

Notably absent from the Task Force report or the Executive Order creating the National Ocean Council, however, is an emphasis on coordination and cooperation with the country’s neighbors to the north and south – Canada and Mexico.¹⁶⁸ The need for bi-national policy integration for coastal and marine spatial planning is of course great with regard to the water bodies on shared borders. Presumably the regional planning councils to be established by the new National Ocean Council will include, where appropriate, representation from neighboring nations and provide opportunities for shared data and resources across borders.

V Conclusion

Since the United States began in earnest to regulate ocean uses to prevent environmental degradation, while at the same time encouraging exploitation of its natural resources for human food and energy consumption, it has generated multiple federal laws and regulations managed by a plethora of administrative agencies, departments and executive offices. It has also tried, through the Coastal Zone Management Act, to take into consideration the concerns and ideas of the coastal states upon whom much of the negative impacts of ocean exploitation fall. Through the National Ocean Council and, eventually, coastal and marine spatial planning efforts conducted throughout the nation by regional bodies, the US has an opportunity to streamline its ocean-related regulatory processes, coordinate decisions for the benefit of commerce and ecosystems alike, and involve state and local interests in a fully integrated and meaningful way.

¹⁶⁵ *Id.* at § 6(a)(ii).

¹⁶⁶ *Id.* at § 3(b).

¹⁶⁷ Lubchenco and Sutley, *supra* n. 9, at 1486.

¹⁶⁸ For a thorough discussion of the need for bi-national cooperation in marine spatial planning for the Gulf of Maine, for example, see Lucia Fanning and Rita Heimes, *Ocean Planning and the Gulf of Maine: Exploring Bi-National Policy Options*, 15 OCEAN & COASTAL L.J. 293 (2010).