Consistency Conflicts and Federalism Choice: Marine Spatial Planning Beyond the States' Territorial Seas

Michael Burger
Associate Professor of Law

This paper can be found at:
41 Envtl. L. Rep. 10602 (2011)

Consistency Conflicts and Federalism Choice: Marine Spatial Planning Beyond the States' Territorial Seas

by Michael Burger

Michael Burger is an Associate Professor, Roger Williams University School of Law.

Editors' Summary

Offshore areas are under pressure to industrialize for renewable energy. To plan for offshore wind development, Rhode Island engaged in a marine spatial planning process that resulted in the Ocean Special Area Management Plan, a regulatory invention of the Coastal Zone Management Act. Notably, the RI O-SAMP maps and plans for uses in federal waters beyond the three-mile line dividing state and federal jurisdiction, as well as within the state's territorial sea, posing a challenge to the boundaries of offshore federalism. Conceiving of the question of how to balance federal, state, and local interests in siting offshore renewable energy facilities as one of "federalism choice," there are sound theoretical and pragmatic rationales that weigh in favor of encouraging other states to adopt the O-SAMP model.

With the Barack Obama Administration's promotion of a "clean energy economy"[1] and a new federal permitting scheme in place,[2] private developers and state and federal agencies are making increased efforts to site, permit, and build offshore wind farms and other marine renewable energy facilities. Yet, a number of technical, political, and legal hurdles to achieving industrial-scale offshore renewable energy production remains. In particular, the means to achieve political accommodation and regulatory integration of private, local, state, and federal interests under existing law has yet to be fully articulated.

Two proposed offshore wind projects off the coast of Rhode Island, and the marine spatial planning process the state's coastal resources agency undertook to site them, exemplify some of the challenges that remain. Marine spatial planning (MSP) is a public process in which decisionmakers and stakeholders analyze and allocate the spatial and temporal distribution of human activities in ocean and coastal areas to achieve politically determined environmental, social, and economic goals.[3] To identify appropriate areas for wind farms, Rhode Island employed MSP to create the Rhode Island Ocean Special Area Management Plan (RI O-SAMP).[4] The Coastal Zone Management Act (CZMA)[5] authorizes states to create SAMPs to achieve specific policy goals within a particular geographic area; in the past, SAMPs have been directed toward improving water quality and protecting habitat in individual watersheds and estuaries, and coordinating waterfront development and revitalization plans in specific coastal communities.[6] The RI O-SAMP, however, is innovative in at least two respects. First, it utilizes marine spatial planning and the SAMP process together to coordinate the development of

Author's Note: With thanks to Dennis Esposito, Susan Farady, Jared Goldstein, Keith Hirokawa, and Michael Sant'Ambrogio for comments and support, and to Jackie Rolleri and Sarah Parker for their fine research assistance.

1. WhiteHouse.gov Issues Pages, *Energy and Environment*, http://www.whitehouse.gov/issues/energy-and-environment (last visited Mar. 22, 2011).
2. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, Final Rule, 74 Fed. Reg. 19638 (Apr. 29, 2009) (codified at 30 C.F.R. pt. 250, 285, and 290).
3. United Nations Educational, Social, and Cultural Organization, *Marine Spatial Planning Initiative* home page, http://www.unesco-ioc-marinesp.be/ (last visited May 18, 2011).
4. *See* Rhode Island Ocean SAMP, Adopted by the Rhode Island Coastal Resources Management Council (Oct. 19, 2010), *available at* http://www.crmc.ri.gov/samp_ocean/finalapproved/RI_Ocean_SAMP.pdf [hereinafter O-SAMP].
5. 16 U.S.C. §§1451-1466, ELR Stat. CZMA §§302-319. *See* National Oceanic and Atmospheric Administration (NOAA), Office of Ocean and Coastal Resource Management, *In Depth: Understanding Special Area Management Plans*, http://coastalmanagement.noaa.gov/issues/special_indepth.html (last visited Mar. 22, 2011).
6. *See* NOAA, Office of Ocean and Coastal Resource Management, *Examples of SAMPs*, http://coastalmanagement.noaa.gov/issues/special_examples.html (last visited Mar. 22, 2011).

offshore wind with existing uses and management regimes. Second, it pushes beyond the three-mile line that marks the boundary between state and federal waters; that is, it stakes a regulatory claim to federal waters.

The scholarship to date on offshore wind and marine renewables has focused on the need to integrate ecosystem-based management into ocean governance through MSP,[7] and the benefits of scaling up to the regional level.[8] These twin principles—MSP-informed ecosystem-based management and regional ocean governance—are incorporated into the design of the National Ocean Council, established by President Obama in July 2010[9] to oversee the creation of regional "coastal and marine spatial plans."[10] (Importantly, these plans will lack the force of law.[11]) The emphasis in the scholarly literature has largely been on federal decisionmaking, or on how information and power move from the federal government to the states. The RI O-SAMP's innovations, however, present something of a countercurrent, with information and power moving from the states to the federal government.

This Article argues that there are sound theoretical and pragmatic rationales that weigh in favor of encouraging states to follow the RI O-SAMP model for proactive ocean planning in federal waters. Part I explains how federal law divides jurisdiction and regulatory authority inside, across, and beyond the three-mile line. Part II surveys the current state of offshore wind development in the United States and describes the RI O-SAMP in more detail. It then examines how the RI O-SAMP might be treated by state governments, federal agencies, and courts under the CZMA.

Part III steps back to look at the broader question of what the O-SAMP model reveals about how to balance federal, state, and local interests in siting offshore renewable energy facilities, conceiving of the question as one of what I am calling "federalism choice." A robust dialog on this topic has evolved in recent years, offering a number of variations on the theme of cooperative federalism.[12] Those perspectives are important and informative for the purposes of this Article—indeed, the RI O-SAMP model is precisely the kind of experiment in regulatory adaptation and intergovernmental coordination that cooperative federalism seeks to achieve. Yet, this literature does not, by itself, answer the questions posed by offshore renewables. This part works with the complex context defined by historical offshore dynamics and the evolving structures of ocean governance to undertake a federalism choice analysis. It argues that the CZMA gives states and federal agencies a place to negotiate interjurisdictional MSP arrangements, while the National Ocean Council's aspiration toward regional planning offers the possibility that these arrangements might eventually trickle up into even more coordinated governance. Part IV briefly concludes.

I. Jurisdiction and Boundary Blurring Along the Three-Mile Line

A. *Jurisdictional Divisions and Offshore Renewables*

Jurisdiction over tidal waters in the United States is clearly divided between the federal government and the states. The Submerged Lands Act (SLA)[13] gives states jurisdiction from the mean high-tide line out to three nautical miles,[14] and grants coastal states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters."[15] The federal government does retain some power within the states' territorial seas—including the power to regulate "commerce," "navigation," "power generation," and "national defense"[16]—but it does not have the rights to "management, administration, leasing, use and development of the lands and natural resources."[17] Beyond the states' territorial seas, the federal government claims jurisdiction out to 200 nautical miles, the boundary

7. *See, e.g.*, Rachel E. Salcido, *Offshore Federalism and Ocean Industrialization*, 82 Tul. L. Rev. 1355 (2008); Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. Envtl. L. & Litig. 317 (2006).
8. *See, e.g.*, Salcido, *supra* note 7; 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 (2009); Marc J. Hershman & Craig W. Russell, *Regional Ocean Governance in the United States: Concept and Reality*, 16 Duke Envtl. L. & Pol'y F. 227 (2006).
9. Exec. Order No. 13547, 75 Fed. Reg. 43023, §6 (July 19, 2010).
10. The proposed regions are the Alaska/Arctic Region, Caribbean Region, Great Lakes Region, Gulf of Mexico Region, Mid-Atlantic Region, South Atlantic Region, and West Coast Region, http://www.whitehouse.gov/sites/default/files/microsites/091209-Interim-CMSP-Framework-Task-Force.pdf, at 12.
11. As noted by the Council: "In and of themselves, [Coastal and Marine Spatial] Plans, would not be regulatory or constitute final agency decision-making . . . [T]hey are intended to guide agency decision-making, and agencies would adhere to the final CMS Plans to the extent possible, consistent with existing authorities." National Ocean Council, *Legal Authorities Relating to the Implementation of Coastal and Marine Spatial Planning* 2, *available at* http://www.whitehouse.gov/sites/default/files/microsites/ceq/CMSP%20Legal%20Compendium%201-31-11%20FINAL.pdf.
12. *See, e.g.,* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 248-49 (2005); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 108-09 (2005); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 Iowa L. Rev. 1, 8-14 (2003); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 Emory L.J. 155 (2006).
13. Submerged Lands Act, 43 U.S.C. §§1301-1315 (2006).
14. In Texas, Puerto Rico, and the west coast of Florida, states have jurisdiction out to nine nautical miles. United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960); 48 U.S.C. §749 (1982).
15. 43 U.S.C. §1311(a)(1).
16. 2004 U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century*, at 71 (July 24, 2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf.
17. 43 U.S.C. §1314.

of the U.S. Exclusive Economic Zone (EEZ).[18] Under the still-unratified United Nations Convention on the Law of the Sea III, signatories have extensive rights over natural resources within their EEZs, including the right to develop renewable energy resources.[19]

The power to site offshore wind and other renewable facilities beyond the three-mile line is vested solely with the federal government. As amended by the 2005 Energy Policy Act (2005 EP Act), the Outer Continental Shelf Lands Act grants the Secretary of the Interior power to authorize alternative energy projects on the outer continental shelf (OCS).[20] In March 2006, the Secretary delegated this authority to the agency formerly known as the Marine Minerals Service (MMS).[21] Traditionally, the Federal Energy Regulatory Commission (FERC) had jurisdiction over most domestic energy projects; in April 2009, after a few years of jurisdictional bickering, the MMS and FERC signed a Memorandum of Understanding dividing authority over alternative energy development on the OCS, with the MMS taking responsibility for wind energy and FERC taking responsibility for tidal, wave, geothermal, ocean thermal, current, and other hydrokinetics.[22] The MMS then promulgated a final rule for approving leases for offshore wind and marine renewables on the OCS.[23]

The three-mile line was drawn based upon ancient and somewhat arbitrary principles.[24] Today, it is irrelevant in at least two important ways. First, it is ecologically irrelevant. Marine ecosystems do not follow the contours of the three-mile jurisdictional limit; nor do marine species. Second, it is energy-irrelevant. Viable areas for alternative energy, including wind, can be inside or outside of the three-mile line, or both. Where renewable energy projects are sited on the OCS, they will have to connect to the electric grid onshore; thus, the energy has to cross the three-mile line if it is to make land, and transmission lines will inevitably run through coastal waters *within* one or another state's territorial sea.[25] In the absence of new federal legislation vesting connection siting authority in a federal agency, states will have authority over offshore wind's connectivity through the property rights and jurisdictional control vested under the SLA.[26]

It is not surprising that the three-mile line has, historically, resulted in tension between coastal states and the federal government.[27] Nor is it surprising that industry has sought uniform application of federal authority beyond the states' territorial seas. Most recently, the three-mile line figured into a dispute between private shipping companies and the California Air Resources Board, whose South Coast Air Quality Management District promulgated "Vessel Fuel Rules" requiring ships coming to call at Long Beach or Los Angeles to use certain fuel types within 24 miles of the shore.[28] Despite the Vessel Fuel Rules' extraterritorial reach, the U.S. Court of Appeals for the Ninth Circuit found that they were not preempted by either the SLA or general maritime law principles.[29] There is not yet a similar case regarding contemporary attempts to develop offshore resources, but the three-mile line is plainly problematic, and there is little question that it impedes both the development of comprehensive ecosystem-based management regimes and the expeditious review of individual projects or programs.[30]

B. CZMA: Coastal Planning and Consistency Review

The CZMA provides a regulatory bridge across the three-mile line, offering federal agencies and the states a potential location for negotiating solutions to the siting problems posed by offshore wind and other marine renewables.

From its inception, the CZMA was intended to prospectively resolve user conflicts in the high-density space of the coastal zone by balancing "ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development."[31] The simultaneity of local and

18. Federal waters actually consist of three zones: the federal territorial sea, the contiguous zone, and the EEZ. The federal territorial sea extends seaward out to 12 nautical miles. Under the United Nations Convention on the Law of the Sea, within the territorial seas, the federal government can adopt laws pertaining to navigation, protection of cables and pipelines, fisheries, conservation of living resources and the environment, pollution, and scientific research. United Nations Convention on the Law of the Sea III, art. 21, Dec. 10, 1982 [hereinafter UNCLOS III]. In the contiguous zone, which extends from 12 to 24 nautical miles, the United States exercises control over customs, fiscal, immigration, and sanitary laws. *Id.* art. 33. The third zone, the EEZ, overlaps with the contiguous zone and extends from 12 nautical miles seaward to the 200-nautical-mile mark. *Id.* art. 57.
19. UNCLOS III specifically recognizes coastal nations' "sovereign rights" for the "economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds" and "jurisdiction" with regard to "the establishment and use of . . . installations and structures" and marine scientific research and the protection and preservation of the marine environment. UNCLOS III, *supra* note 18, art. 56.
20. 43 U.S.C. §1337(p)(1).
21. However, the U.S. Army Corps of Engineers retained authority over permitting obstructions in navigable waters. 43 U.S.C. §1337(p)(9) (2006).
22. Memorandum of Understanding Between the U.S. Dep't of the Interior and the Fed. Energy Regulatory Comm'n (Apr. 9, 2009), *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf.
23. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, Final Rule, 74 Fed. Reg. 19638 (Apr. 29, 2009) (codified at 30 C.F.R. pts. 250, 285, and 290).
24. For a concise history of the development of the three-mile line and an explanation of its arbitrariness, see Robert J. Wilder, *The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism*, 32 Va. J. Int'l L. 681 (1991).
25. This issue was recently evident in state litigation surrounding Massachusetts' state energy facility siting board's ability to authorize local construction permits for the Cape Wind project. *See* Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board, 932 N.E.2d (Mass. 2010).
26. *See* Robert W. Eberhardt, *Federalism and the Siting of Offshore Wind Facilities*, 14 N.Y.U. Envtl. L.J. 374, 381-86 (2006) (discussing state control of lands under the SLA).
27. *See*, *e.g.*, Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DePaul L. Rev. 981 (1991); Michael Allan Wolf, *Accommodating Tensions in the Coastal Zone: An Introduction and Overview*, 25 Nat. Resources J. 7 (1985).
28. Pacific Merchant Shipping v. Goldstene, 2011 U.S. App. LEXIS 6239 (Mar. 28, 2011).
29. *Id.*
30. Salcido, *supra* note 7, at 1370; Deborah A. Sivas & Margaret R. Caldwell, *A New Vision for California Ocean Governance: Comprehensive Ecosystem-Based Marine Zoning*, 27 Stan. Envtl. L.J. 209, 213-26 (2009) (detailing emerging user conflicts in relation to proposed LNG, aquaculture, desalination, and wave energy facilities).
31. 16 U.S.C. §1452(1), (2) (2006); *see also* S. Rep. No. 92-753 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776.

national interests was immediately apparent. As noted in a U.S. Senate report accompanying the CZMA:

> The coastal zone presents one of the most perplexing environmental management challenges . . . entail[ing] mediating the differences between conflicting uses and overlapping political jurisdiction. The uses of valuable coastal areas generate issues of intense state and local interest, but the effectiveness with which the resources of the coastal zone are used and protected often is a matter of national importance.[32]

With numerous opportunities for renewable energy development, coastal resources are experiencing new kinds of pressure, spurring new legislative and regulatory responses at the state and federal levels.[33]

To achieve a balance, the CZMA does two things. First, it provides states funding to develop coastal management programs (CMPs) that are then approved and made enforceable by the National Oceanic and Atmospheric Administration (NOAA).[34] Second, the CZMA provides for "consistency review." Consistency review allows the states to deny or restrict activities both within and outside the coastal zone if the reasonably foreseeable "coastal effects" would be inconsistent with the enforceable policies of a state's CMP.[35] Coastal effects are broadly defined, including "any reasonably foreseeable effect on any coastal use or resource resulting from a federal agency activity or federal license or permit activity,"[36] and the "effects test" transcends any number of jurisdictional boundaries, including the boundary marking federal land located within a state's coastal zone,[37] the landward boundary between the coastal zone and upland areas,[38] and the three-mile line between the state's territorial sea and federal waters.[39]

Viewed through a federalism lens, consistency review is the CZMA's most unique and important feature, constituting a "limited waiver of federal supremacy and authority"[40] that is highly unusual, if not entirely unique, in environmental law. The limitations on that waiver exist at both the CMP and consistency review stages, and they are critical, as they check state authority both within and beyond the three-mile line. At the CMP stage, the CZMA requires states to consider the "national interest,"[41] and to give "priority consideration . . . to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation."[42] The CZMA also gives the Secretary of Commerce authority to periodically evaluate CMPs and to review claims that a given state has failed to account for the national interest.[43] At the consistency review stage, the CZMA allows either federal agencies or the Secretary of Commerce to override individual adverse consistency determinations when certain conditions are met.[44]

The next part uses the RI O-SAMP as a case study to detail how these CZMA provisions will determine the force state MSP is able to exert on siting renewable energy facilities in federal waters.

II. Offshore Wind, the O-SAMP, and the Case of Terrific Turbines

The offshore wind industry in the United States, like other offshore renewable energy industries, is still in its nascence, and with a split U.S. Congress and the shifting prioritizations of conflicting offshore uses at the federal, state, and local levels, it is difficult to predict how, whether, and where projects will advance in the coming months and years. The effective development and deployment of offshore wind technology also faces very real technical and regulatory hurdles, including: the relatively high cost of wind energy[45]; the installation of offshore wind facilities in water at depths greater than 90 feet[46]; the routing, permitting, and construction of interconnections to the existing electric grid[47]; the lack of information about potential adverse impacts associated with installation, operation, and maintenance of turbines[48]; and

32. S. Rep. No. 92-753, *supra* note 31, at 4778.
33. *See, e.g.*, Coastal State Renewable Energy Promotion Act, H.R. 1690, 111th Cong. (2009); Joseph J. Kalo & Lisa C. Schiavinato, *Wind Over North Carolina's Waters: The State's Preparedness to Address Offshore and Coastal Water-Based Wind Energy Projects*, 87 N.C.L. Rev. 1819 (2009) (recommending number of steps for N.C. to facilitate offshore wind industry); Robert S. Berger & Dwight Kanyuck, *Creating a Public Plan for New York's Great Lakes Offshore Wind Power: A Strategy for Energy and Economic Development* (May 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133562; State of New Jersey Department of Environmental Protection, *Ocean Wind Power Ecological Baseline Study Final Report* (July 2010), *available at* http://www.nj.gov/dep/dsr/ocean-wind/report.htm.
34. 16 U.S.C. §1454-1455, 1458 (2006). CMPs are "comprehensive management plans that describe the uses subject to the management program, the authorities and enforceable policies of the management program, the boundaries of the State's coastal zone, the organization of the management program, and related State coastal management concerns." Coastal Zone Management Act Federal Consistency Regulations, Final Rule/Technical Corrections, 71 Fed. Reg. 75864 (Dec. 19, 2006). A CMP application must meet a number of criteria in order to obtain approval from NOAA. 16 U.S.C. §1455-1456.
35. 16 U.S.C. §1456(c)(1)(a), (c)(3).
36. 15 C.F.R. §930.11(g).
37. 16 U.S.C. §1453(5) (definition of "coastal zone"); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 17 ELR 20563 (1987); City of Sausalito v. O'Neill, 386 F.3d 1186 (9th Cir. 2004) (holding arbitrary and capricious consistency determination regarding commercial development within Golden Gate National Recreation Area).
38. U.S. Department of Commerce, *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millenium Pipeline Company, L.P. From an Objection by the State of New York* (Dec. 12, 2003), *available at* http://www.ogc.doc.gov/czma.nsf/F9A7796F451A71048525720400718AAB/$File/Milennium+Decision.pdf.
39. 16 U.S.C. §1456(c)(1)(a).
40. *Id.*
41. 16 U.S.C. §1455(d)(8). Federal regulations set forth in detail regarding how states are to consider national interests in order to satisfy this requirement. 15 C.F.R. §923.52(c).
42. 16 U.S.C. §1452(2)(D).
43. 16 U.S.C. §1458.
44. *See infra* Section II.C.
45. *See* U.S. Energy Information Administration, *Levelized Cost of New Generation Resources in the Annual Energy Outlook 2011*, *available at* http://www.eia.doe.gov/oiaf/aeo/pdf/2016levelized_costs_aeo2011.pdf (last visited Mar. 22, 2011).
46. *See, e.g.*, National Renewable Energy Laboratory, *Large-Scale Offshore Wind Power in the United States, Executive Summary* 4-6, *available at* http://www.nrel.gov/docs/fy10osti/49229.pdf.
47. Kamaal R. Zaidi, *Wind Energy and Its Impact on Future Environmental Policy Planning: Powering Renewable Energy in Canada and Abroad*, 11 Alb. L. Envtl. Outlook 198, 235-37 (2007).
48. *See id.* at 237-38; *see also* Paula Ferreira & Filipa Vieira, *Evaluation of an Offshore Wind Power Project: Economic, Strategic, and Environmental Value*, 71 World Acad. Sci., Eng'r & Tech. 938, 941 (2010).

the general lack of experience with permitting processes for these projects in both federal and state waters.

In the face of this uncertainty, the impetus toward offshore wind is nonetheless clear. In February 2011, the U.S. Department of Energy's (DOE's) Office of Energy Efficiency and Renewable Energy and the U.S. Department of the Interior's (DOI's) Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) announced a national strategy to "promote and accelerate responsible commercial offshore wind development in the U.S. in both federal and state waters."[49] DOE estimates that wind could supply 20% of the domestic electricity supply by 2030, with offshore resources providing a substantial percentage of this amount, especially for coastal states.[50] Meanwhile, BOEMRE, the successor agency to the MMS, has identified priority zones for commercial offshore wind development,[51] issued exploratory leases on the OCS off the coasts of Delaware and New Jersey,[52] and established task forces in Delaware, Maine, Maryland, Massachusetts, New Jersey, Rhode Island, and Virginia to "facilitate intergovernmental communications" for offshore wind projects and other renewable energy sources on the OCS.[53] To date, Requests for Interest (RFIs), invitations published by BOEMRE to assess whether there is a competitive interest in obtaining a commercial lease, have been issued in Delaware,[54] Maryland,[55] and Massachusetts.[56] Maryland's RFI received nine indications of interest,[57] and Delaware received two.[58]

On a regional level, a number of organizations have formed to promote offshore wind, including the U.S. Offshore Wind Collaborative, American Wind Energy Association, Offshore Wind Development Coalition, Atlantic Offshore Wind Energy Consortium, and the Great Lakes Wind Collaborative.[59] In addition, in March 2011, the Atlantic Wind Connection, a proposed offshore transmission line that would enable up to 7,000 megawatts (MWs) of offshore wind energy generation capacity to be integrated into the regional power grid that services areas between Virginia and the metropolitan New Jersey/New York City area, filed an unsolicited petition for a right-of-way with BOEMRE.[60] Simultaneously, individual states are moving forward with wind projects in state waters. Table 1 summarizes state activity, along with the BOEMRE-led developments described above. The next section describes Rhode Island's experiment with MSP in federal waters.

A. The RI O-SAMP

Rhode Island's renewable portfolio standard (RPS), first passed in 2004, requires the state to produce 16% of its electrical power demands with renewable energy by 2019.[61] Given the state's location and size, offshore wind provides the best chance to comply with the RPS.[62] To plan for the development of offshore wind—as well as for climate change mitigation and adaptation and a generally coherent approach to existing and future use of coastal waters—the Coastal Resources Management Council (CRMC), the state agency with jurisdiction over coastal resources, produced the RI O-SAMP to be incorporated into the state's approved CMP[63]; like other policies and planning provisions, SAMPs are incorporated into the CMP to be made effective under the CZMA.

Transpiring over a two-year period between 2008-2010, the effort, led by the Coastal Resource Center of the University of Rhode Island, involved coordination among resource users, researchers, academic institutions (including Roger Williams University School of Law), environmental and civic organizations, and local, state, and federal government agencies,[64] and utilized ecosystem-based management.[65] The plan covers an area of approximately 1,467 square miles—its boundary borders the state waters of Connecticut, Massachusetts, and New York, and encompasses portions of Block Island Sound, Rhode Island Sound, and the Atlantic Ocean—extending up to 30 miles offshore and including both state and federal waters (the Study Area).[66] The study underlying the plan examines, among other things, marine ecology, climate change, cultural and historical resources, fisheries, tourism and recreation, and marine transportation, as well as renewable energy and other offshore development in the Study Area.

---

49. U.S. DOE, *A National Offshore Wind Strategy: Creating an Offshore Wind Energy Industry in the United States*, *available at* http://www1.eere.energy.gov/windandhydro/pdfs/national_offshore_wind_strategy.pdf (last visited Mar. 22, 2011).
50. U.S. DOE, *20% Wind Energy by 2030: Increasing Wind Energy's Contribution to U.S. Electric Supply*, http://www1.eere.energy.gov/windandhydro (last visited Mar. 22, 2011) (internal citations removed) [hereinafter *20% by 2030*].
51. *See Large-Scale Offshore Wind Power in the United States: Assessment of Opportunities*, National Renewable Energy Lab. 144 (Sept. 2010) (hereinafter NREL *Offshore Wind*).
52. Press Release, MMS, Secretary Salazar Announces Five Exploratory Leases for Offshore Wind Energy Development off Coasts of New Jersey and Delaware (June 23, 2009), http://www.mms.gov/ooc/press/2009/press0623.htm (last visited Mar. 22, 2011).
53. BOEMRE, *State Activities*, http://www.boemre.gov/offshore/RenewableEnergy/StateActivities.htm (last visited Mar. 22, 2011) [hereinafter BOEMRE *State Activities*].
54. Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Delaware—Request for Interest, 75 Fed. Reg. 21653 (Apr. 26, 2010).
55. Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Maryland—Request for Interest, 75 Fed. Reg. 68824 (Nov. 9, 2010).
56. Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Massachusetts—Request for Interest, 75 Fed. Reg. 82055 (Dec. 29, 2010).
57. BOEMRE, *State Activities, Commercial Indications of Interest*, http://www.boemre.gov/offshore/renewableenergy/PDFs/stateactivities/MD/TableSummarizingMDRFI012011.pdf (last visited Mar. 22, 2011).
58. Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) off Delaware, Notice of Proposed Lease Area and Request for Competitive Interest, 76 Fed. Reg. 4716 (Jan. 26, 2011).
59. *See* NREL *Offshore Wind*, *supra* note 51.
60. Press Release, Atlantic Wind Connection Files Unsolicited Right of Way Application With BOEM (Mar. 31, 2011), *available at* http://www.atlanticwindconnection.com/ferc/BOEM/ROW%20application%20press%20release.pdf.
61. *See* R.I. Gen. Laws §§39-26-1 et seq. (2006).
62. O-SAMP, *supra* note 4, at 11.
63. *Id.* at 7.
64. *Id.* at 1.
65. *Id.* at 4.
66. *Id.* at 9.

Table 1: BOEMRE and State Activity

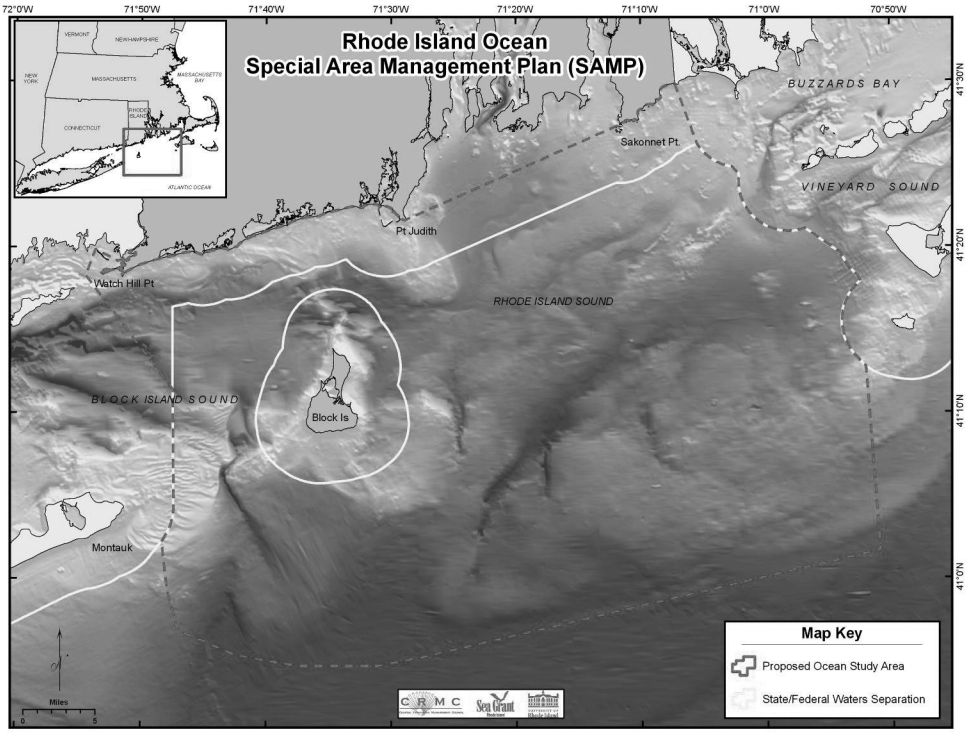
	DE	ME	MA	MD	NJ	NY	NC	OR	RI	VA	SC	GA	MI	TX	CA	OH	HI
BOEMRE Activities																	
BOEMRE issued exploratory/interim lease for OCS wind energy development off state's coast	X				X												
BOEMRE established an ocean energy task force in state	X	X	X	X	X	X	X	X	X	X	X						
BOEMRE published request for interest for offshore energy projects	X		X	X													
BOEMRE/state received indications of interest	X		X	X	X		X		X	X							
BOEMRE issued Request for Competitive Interest	X																
BOEMRE approved state offshore wind project	/X/		X														
State Activities	DE	ME	MA	MD	NJ	NY	NC	OR	RI	VA	SC	GA	MI	TX	CA	OH	HI
State is conducting, or has conducted, studies for potential offshore wind projects	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
State has conducted a form of marine spatial planning for state waters			X						X								
State has conducted a form of marine spatial planning for federal waters			X						X								
State or private company issued Request for Proposals/Interest/ Information for offshore wind projects	X	X		X	X	X			X			X				X	
Offshore wind projects have been proposed in state	X		X		X	X	X	X	X	X			X	X		X	
State established a power purchase agreement for offshore wind project	X		X						X								

The origins of offshore wind in Rhode Island predate the O-SAMP. In April 2007, then-Gov. Donald Carcieri initiated a feasibility study; one year later, the state issued a request for proposals, and in September 2008, Deepwater Wind LLC was selected from among seven bidders and granted "preferred developer" status.[67] The exact terms of the agreement were complicated, as no regulatory regime for permitting offshore wind facilities in state waters existed at the time, and the exact location of the project was unknown. Much was to be determined after the CRMC completed the O-SAMP.[68] While developing the O-SAMP, the CRMC maintained a "firewall" between any politically or financially motivated parties and the science research and assessments.[69]

Deepwater Wind has now proposed a project in an area approximately three miles southeast of Block Island, identified in the O-SAMP as appropriate for offshore wind development, which would consist of five to eight turbines located in both state and federal waters.[70] The company has also submitted an unsolicited lease request to BOEMRE for a 270-square-mile area in federal waters between Massachusetts and Rhode Island, and is seeking permission to build a 200-turbine wind farm there capable of producing over 1,000 MWs.[71] The area, on Rhode Island Sound between Block Island and Martha's Vineyard, is part of the Study Area; it has also been identified by the two states as

67. Rhode Island Economic Development Corporation, *Carcieri Names Deepwater Wind as Developer for Rhode Island's Offshore Wind Farm* (Sept. 26, 2008), http://www.riedc.com/news/2008/09/carcieri-names-deepwater-wind-as-developer-for-rhode-islands-off-shore-wind-farm (last visited Mar. 22, 2011).
68. *Id.*
69. Rhode Island Ocean SAMP, *Ocean Zoning: The Regulatory Jigsaw Puzzle: Information and FAQs* 2, *available at* http://seagrant.gso.uri.edu/oceansamp/pdf/documents/doc_regulatory_factsheet.pdf.
70. Deepwater Wind, *Block Island Wind Farm*, http://dwwind.com/block-island/block-island-project-overview (last visited Mar. 22, 2011). The ongoing controversy surrounding the Deepwater Wind project is perhaps emblematic of the types of political and legal problems facing offshore wind, though it also clearly reflects Rhode Island's particular culture. In December 2009, Deepwater Wind and National Grid entered into a 20-year power-purchase agreement for the Block Island wind farm. The Rhode Island Public Utility Commission rejected the agreement as not "commercially reasonable." Three months later, in June 2010, the Rhode Island General Assembly passed legislation amending state law to authorize the previously rejected power purchase agreement. Then-Attorney General Patrick Lynch filed a lawsuit challenging the constitutionality of the legislation, which current Attorney General Peter Kilmartin has dropped. The Conservation Law Foundation is now prosecuting the lawsuit.
71. Alex Kuffner, *Size Doubled of Proposed Wind Farm in R.I. Sound*, Providence J., Dec. 8, 2010, *available at* http://www.projo.com/news/content/DEEPWATER_CHANGES_12-08-10_GLLB4TV_v50.4f9d955.html.

RI O-SAMP Study Area Boundary



Source: Rhode Island Environmental Data Center

an Area of Mutual Interest and is addressed in a Memorandum of Understanding between them.[72]

B. The O-SAMP and the CZMA

As noted above, the CZMA consists of two main components: coastal management planning and consistency review. How the O-SAMP is made to fit into Rhode Island's CMP will determine how it will play into consistency review. This section analyzes the options available for integrating the RI O-SAMP into the CMP and a range of likely consistency review scenarios. The purpose of this prospective exercise is to see whether the CZMA provides sufficient constraints on state authority, even when the state reaches across the three-mile line into federal waters.

1. Integrating the O-SAMP Into the CMP

As of this writing, the status of the RI O-SAMP under the CZMA is neither fixed nor tested. There are several possible pathways. First, Rhode Island could, in theory, petition NOAA to revise its CMP to include an explicit grant of regulatory authority over the entire O-SAMP Study Area. For any number of reasons, this is highly unlikely, not least of which is that the R.I. CRMC is of the opinion that CMPs are necessarily limited to the state's territorial sea.[73] The federal government's ceding actual regulatory authority to the state might also raise potential issues under the Supremacy Clause, the Property Clause, and the dormant Commerce Clause of the U.S. Constitution.[74]

A somewhat less controversial option would be to incorporate the O-SAMP's findings and recommendations for state and federal waters such that they become "enforceable policies" of the CMP. Under the CZMA consistency review provisions, federal agency activities must comply to "the maximum extent practicable" with the enforceable policies of a state's CMP,[75] whereas federally permitted or licensed activities (together, federally approved activities) must be "fully consistent" with those policies. The difference is an important one: where a federal agency believes consistency with the state CMP to be "prohibited by existing law," it may override a state's objection.[76] Applicants for federal permits or licenses have no such right, though

72. State of Rhode Island, Lincoln D. Chafee, Office of the Governor, *Memorandum of Understanding* (July 26, 2010), *available at* http://www.governor.ri.gov/documents/RI%20MA%20MOU.pdf. Notably, another offshore wind company, Neptune Wind, has proposed a development in the same area; BOEMRE is in the process of addressing the competing proposals. *See* Sarah Schumann, *Options Weighed on Offshore Wind in Shared Waters*, ECORI News, http://www.ecori.org/front-page-journal/2011/5/5/options-weighed-on-offshore-wind-in-shared-waters.html (last visited May 31, 2011).

73. Rhode Island CRMC/University of Rhode Island SeaGrant, The Ocean SAMP Adoption Process 2-3, *available at* http://seagrant.gso.uri.edu/oceansamp/pdf/documents/about_adoptionprocess.pdf.

74. *See, e.g.,* Scott C. Whitney et al., *State Implementation of the Coastal Zone Management Consistency Provisions*—Ultra Vires *or Unconstitutional?*, 12 Harv. Envtl. L. Rev. 67, 99-109 (1988) (arguing that state authority under the CZMA might run afoul of Supremacy Clause and dormant Commerce Clause).

75. 16 U.S.C. §1456(c)(1)(a); 71 Fed. Reg. 75864 (Dec. 19, 2006).

76. 15 C.F.R. §930.32(a)(1). *See also* Tim Eichenberg & Jack Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism,"* 14 Ecology L.Q. 9, 23-25 (1987) (discussing legislative history and early regulatory history of provision).

they may appeal an adverse consistency determination to the Secretary of Commerce. Thus, although the federal government would retain ultimate regulatory authority, making the O-SAMP, in its entirety, an "enforceable policy" of the CMP would represent a significant grant of authority to the state. Indeed, such a grant of authority would mark a significant change in the federal approach to CZMA consistency review. Currently, consistency review is undertaken on a case-by-case basis. Marine spatial planning principals, as typified by the RI O-SAMP, are, ideally, prospective and proactive. Approval of the RI O-SAMP as an enforceable policy of the state's CMP would, in essence, allow the state to zone proximate federal waters.

Rhode Island could also petition NOAA to amend its CMP to make wind development within the Study Area a so-called listed activity, meaning it would be presumed to have significant coastal effects and therefore be subject to consistency review.[77] Alternatively, Rhode Island could petition NOAA to amend its CMP to incorporate the O-SAMP in regards to state waters, leaving offshore wind in federal waters "unlisted," meaning the state would have to request approval from NOAA to review projects on a case-by-case basis.[78]

The implications of this choice hinge on consistency review procedures: federal agency activities require the federal agency to submit a "consistency determination" to the relevant state agency,[79] who then informs the federal agency of its concurrence or objection.[80] If the state objects, the federal agency is, in the first instance, encouraged to seek a mediated resolution,[81] but the federal government may override the state objection if it finds either: (1) full consistency is prohibited or (2) its proposed action is consistent with the CMP.[82] If the state challenges the federal agency override in court and the federal agency loses, the president may override the court if the project is of "paramount" national interest.[83] In contrast, an applicant for a federal permit or license must submit a "consistency certification" to the state.[84] If the state objects, the applicant may appeal to the Secretary of Commerce. Thus, the decision to list offshore wind or not will affect the presumption of coastal effects, and it will likely shift the burden of persuasion, but it will not alter who makes the consistency determination or who has the final word.

77. *See* 15 C.F.R. §§930.34(b), 930.53.
78. *See id.* §§930.34(c), 930.54.
79. *Id.*; 16 U.S.C. §1456(c)(1)(C). *See also* 15 C.F.R. §930.36.
80. 15 C.F.R. §930.41.
81. *Id.* §930.43(d).
82. *Id.* §930.43(d)(1), (2).
83. 16 U.S.C. §1456(c)(1)(B).
84. 15 C.F.R. §930.54(a)-(d).

2. Consistency Review

CZMA consistency review's potential to disrupt federal priorities has long been recognized.[85] Early critiques even posited that the extraterritorial effects of CZMA review raised fundamental constitutional questions.[86] There is also a long history of advocacy for the countervailing notion that state jurisdiction should extend further out into federal waters.[87] In considering the wisdom in promoting the RI O-SAMP's extraterritoriality, it is important to see whether consistency review and the appeals process sufficiently limit the state's real authority. The following sections imagine fictional scenarios in federal waters off the coast of Rhode Island to illustrate that they do.

a. The Federal Agency Activity Scenario

Assume that BOEMRE submits a "consistency determination" for a combined lease sale to and site assessment plan (SAP) for Terrific Turbines, a Deepwater Wind competitor who wants to develop a wind farm in federal waters within the Study Area, but in an area not identified as appropriate for offshore wind development.[88] Rhode Island objects, finding the lease sale and/or SAP inconsistent with its CMP. How might consistency review play out?

First, BOEMRE may override the state objection if it finds that the lease sale and SAP are "consistent to the maximum practicable" with the CMP or if it makes an independent consistency finding.[89] Thus, even if the O-SAMP's findings and recommendations have been made an enforceable policy of the CMP, the agency may proceed. If offshore wind in the Study Area is made a "listed activity," significant coastal effects will be presumed, but, again, BOEMRE may find either that the action is fully consistent with the CMP or that it is consistent to the maximum extent practicable. If offshore wind remains unlisted, Rhode Island will have to persuade the federal government that significant coastal effects are reasonably foreseeable just to obtain the right to consistency review. In this scenario, BOEMRE may be disinclined even to submit a consistency determination.

Next, Rhode Island may challenge BOEMRE's override in court. Assume the court finds that, in light of the

85. Richard Kuersteiner, *Coastal Federalism: The Role of the Federal Supremacy Doctrine in Federal and State Conflict Resolution*, 1 JAG J. 39 (1984) (arguing that consistency requirement threatens delay, litigation, and inefficiency for naval functions and that Supremacy Clause should tip balance in favor of federal interests).
86. *See* Whitney et al., *supra* note 74.
87. Tim Eichenberg, *State Jurisdiction Under the Coastal Zone Management Act After Extension of the U.S. Territorial Sea*, 2 Terr. Sea J. 119, 121 (1992) (detailing congressional proposals to extend state jurisdiction); Salcido, *supra* note 7, at 1419-24 (evaluating arguments for increased state influence and management).
88. Under BOEMRE's regulations, there are several phases of CZMA review for offshore wind: a combined review for the federal lease sale and the applicant's site assessment plan; a second review for proposed construction, operation, and conceptual decommissioning plans; and a potential third review, years away, when actual decommissioning plans are submitted. 74 Fed. Reg. 19690 (Apr. 29, 2009).
89. 15 C.F.R. §930.43(d)(1), (2).

studies conducted for the O-SAMP, BOEMRE's determination or override is arbitrary and capricious; Rhode Island wins. The president may still override the court if the project is of "paramount" national interest.[90] The presidential power to override the courts is intended to be narrowly circumscribed and to be used "only in extraordinary circumstances."[91] Since the "paramount interests" exemption was added to the CZMA in 1990, the only time the president has used the exemption was in 2008, when President George W. Bush found that the Navy's use of Mid-Frequency Active sonar in military testing and training was vital to national security interests.[92] Environmental groups seeking an injunction against the sonar testing challenged the Navy's action on a number of grounds, but in its opinion, the U.S. Supreme Court did not address President Bush's CZMA override. It did, however, find that the balance of the equities and the public interest tipped strongly in favor of permitting the Navy's training exercises to proceed.[93] Given this part of the analysis, it seems likely that the Court would have supported the president's decision.

The *NRDC v. Winters* case illustrates a military instance, where national security was more plainly at stake than in the siting of individual energy facilities. As discussed in the next section, a court is likely to be skeptical of the argument that the loss of any one offshore wind farm or renewable energy facility will damage national security interests.

b. The Federally Approved Activity Scenario

Assume now that Terrific Turbines submits a "consistency certification"[94] for the construction and operation for the same wind farm. Rhode Island denies the certification. Terrific Turbines then appeals to the Secretary of Commerce. The Secretary may override the state if the Secretary finds that either the activity is consistent with CZMA objectives or that it is otherwise necessary in the interest of national security.[95] What does the Secretary do?

To make a de novo consistency finding, the Secretary must find that: (a) the activity furthers the national interest as articulated in §302 or §303 of the CZMA "in a significant or substantial manner"; (b) the national interest furthered by the activity outweighs the activity's adverse coastal effects when those effects are considered separately or cumulatively; and (c) there is no reasonable alternative available that would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's CMP.[96] To date, the Secretary of Commerce has reviewed 44 appeals under these criteria, and has overridden the state approximately 32% of the time. In energy-related decisions, the Secretary has overridden the state 47% of the time. In oil and gas decisions on the OCS, the Secretary has overridden the state 54% of the time. Notably, the Secretary has found that a proposed project did not further the national interest on only two occasions, and neither of those was an energy-related project.[97]

Accordingly, the Terrific Turbines project would almost certainly be found to further the national interest. The analysis will come down to the extent of the impacts on local uses and resources and the availability of alternatives. The O-SAMP, with its detailed scientific and planning studies, will factor heavily in the balancing and alternatives analyses. Here, the choice of how to integrate the O-SAMP into the CMP may well prove determinative: If the O-SAMP's findings and recommendations are made an enforceable policy of the CMP, the project will fail. If offshore wind in the O-SAMP Study Area is made a "listed activity," significant coastal effects will be presumed, and Terrific Turbines will have the burden of overcoming that presumption. If offshore wind remains unlisted, Rhode Island is armed with sufficient information to warrant both NOAA granting consistency review and to support an inconsistency finding before the Secretary; however, the state will likely face a higher burden, and the Secretary may well prove less willing to defer to the O-SAMP.

The Secretary may also override a state consistency determination "if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed."[98] The Secretary's decision regarding what is considered a "national security interest" is "aided by information submitted by the [U.S.] Department of Defense or other interested Federal agencies."[99] While the Secretary is not bound by their suggestions, the Secretary is supposed to give weight to them; the Secretary must also consider "whether the objected-to activity directly supports national defense or other essential national security objectives."[100] To date, the Secretary has not relied on the national security rationale to override a state consistency determination. The national security argument is central, however, to the current energy debates; given the rhetoric surrounding "energy security," it will undoubtedly arise in offshore wind and marine renewables siting controversies.

From early in the CZMA's history, the DOI and DOE have argued that there are "broad national security benefits inherent in securing domestic energy resources and

90. *Id.* §1456(c)(1)(B).
91. Eichenberg, *supra* note 87, at 136, citing to 136 Cong. Rec. H8068, H8076 (daily ed. Sept. 26, 1990) (statement of Rep. Jones).
92. *See* NRDC v. Winters, 555 U.S. 7 (2008). For a critique of the state authority exercised in this case, see Joseph Romero, *Uncharted Waters: The Expansion of State Regulatory Authority Over Federal Activities and Migratory Resources Under the Coastal Zone Management Act*, 56 Naval L. Rev. 137 (2008).
93. *Winters*, 555 U.S. at 31-35.
94. *See supra* notes 79-84 and accompanying text.
95. 16 U.S.C. §1456(c)(3)(A).
96. 15 C.F.R. §930.121(a)-(c).
97. *See* Appeals to the Secretary of Commerce Under the Coastal Zone Management Act (CZMA)—Mar. 10, 2010, *available at* http://coastalmanagement.noaa.gov/consistency/media/appealslist.pdf. These results conform to the results of an earlier study, in which the authors examined consistency appeals decisions made prior to 1990. *See* Eichenberg & Archer, *supra* note 76, at 41-45.
98. 15 C.F.R. §930.122.
99. *Id.*
100. *Id.*

alleviating future energy-supply disruptions."[101] The U.S. Department of Commerce has been receptive to the idea that development of large oil and gas fields promote national security interests, yet from the outset has questioned whether it could be shown that national security interests would be "significantly impaired" by denying a permit to any one project.[102] The issue arose recently in the *Millennium Pipeline Co., L.P. v. Gutierrez* case,[103] where the state of New York found that a proposed natural gas pipeline was inconsistent with its CMP because it threatened part of the city of New York's water supply system. On appeal, the Secretary decided, against the recommendations of DOE and FERC, that the pipeline was not "necessary in the interest of national security,"[104] and that a project is only necessary if "a national security interest would be significantly impaired were the activity not permitted to go forward as proposed."[105] On review, the U.S. District Court for the District of Columbia (D.C.) Circuit found that the Secretary's "specific and significant impairment" language was not an abuse of discretion, and that the Secretary reasonably decided that "'general statements that the project furthers or is important to the national interest fail to satisfy the requirements [of a] specific and significant impairment.'"[106]

Thus, CZMA consistency review extends the states' reach beyond the three-mile line by authorizing review of federal projects and federal approvals in federal waters; the RI O-SAMP, through its incorporation into the RI CMP, could result in an even greater degree of state control over federal waters, allowing it to prospectively plan for future uses, rather than merely responding to individual projects and their inevitable conflicts, as they arise. In any of the projected scenarios, the CZMA sufficiently constrains state authority by, first, requiring consideration of national interests in the CMP, and, second, retaining ultimate federal power through federal agency overrides and the appeals process.

III. Federalism Choice

The CZMA's statutory and regulatory scheme may allow for it, but does it make sense, on a theoretical level, to empower states to study and delineate priority and/or exclusive uses for areas in federal waters? Typically, cooperative federalism scholarship examines targets for environmental regulation within state borders and seeks to determine whether federalization or decentralization would achieve an "optimal" result.[107] In this instance, the direction of power is reversed, as states may seek to influence or control decisions made in federal territory.

This reversal alters the balancing, but many of the factors in the analysis remain the same, so it is worth recalling the conventional accounts. Several dominant rationales weigh in favor of federalization of environmental law: the need to address the interrelated problems of interstate externalities, the "race to the bottom," and "not in my back yard" opposition (NIMBY-ism); the efficiencies gained through federal uniformity; the benefits derived from pooling resources for gathering technical information, generating scientific knowledge, creating durable rules, and providing for enforcement; the potential for greater diversity of interest group participation; and the mobilization around national-moral imperatives.[108] On the flip side, it is often argued that decentralization may provide a means to a number of valuable ends: decisionmaking that is both more democratic and more responsive to local preferences; decisionmaking that is tailored to local environmental conditions; regulatory and policy innovation; adaptive management or other experimentalist or "New Governance" regimes; and interjurisdictional competition that can lead to economically efficient regulation.[109]

Scholars seeking to identify the appropriate level of regulatory authority often invoke the "matching principle," and attempt to "match" the jurisdiction to the scale and scope of the problem.[110] Much recent writing in this area has focused on climate change, and the apparent mismatch between the predominance of regional, state, and local initiatives and what is an ineluctably global problem.[111] Given the diversity and pervasiveness of climate change's sources, this scholarship often operates at a high level of abstraction. In looking at the O-SAMP, things are somewhat simpler: There are two directly conflicting problems—the need to develop a viable base of offshore renewable energy sources, such as offshore wind, and the need to protect the oceans from the adverse effects of extractive industry—overlaid with the complexity of existing and future uses and the probabilities of climate change impacts. Accordingly, the purpose here is somewhat narrower: to unpack the federalism choice confronting the confluence of offshore wind, state-based MSP, CZMA consistency requirements, and, eventually, regional MSP.[112]

A. *The Argument for O-SAMP Imitators*

CZMA consistency review provides a system for resolving federalism questions that harnesses the benefits of collaboration fostered in cooperative regimes, as well as the benefits of conflict that inhere in "uncooperative" ones,[113] by providing a "mandatory but flexible mechanism for resolv-

101. Eichenberg & Archer, *supra* note 76, at 45.
102. *Id.*
103. Millennium Pipeline Co., L.P. v. Gutierrez, 424 F. Supp. 2d 168 (2006).
104. *Id.*
105. *Id.*
106. *Id.* at 178-79.
107. For a summary of federalization-decentralization, see Michael Burger, *"It's Not Easy Being Green": Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. Cin. L. Rev. 835 (2010).
108. *Id.* at 854-55.
109. *Id.* at 855-56.
110. *See* Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Federal Authority*, 14 Yale L. & Pol'y Rev. 23, 25 (1996); Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130, 133, 158-60 (2005).
111. *See, e.g.,* Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 Denv. U. L. Rev. 791 (2008).
112. *See* Buzbee, *Contextual Environmental Federalism*, *supra* note 12.
113. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256 (2009).

ing potential conflicts between state and federal priorities and, in so doing, foster[ing] early consultation and negotiated coordination."[114] In employing a bottom-up approach, the RI O-SAMP model, consistent with the CZMA's layered approach, enhances the possibilities for collaboration and cooperation between and among local, state, and federal agencies and stakeholders.[115] In extending into federal waters, the RI O-SAMP model constitutes an act of territorial seizure that could lead to increased conflict. Is this innovation necessary, or even helpful? Applying the rationales that favor decentralization indicates that it is.

Local Tailoring and Democratic Values: The O-SAMP model allows for a greater degree of local tailoring, both to local environmental conditions and local political preferences. Siting decisions for offshore wind will have impacts on local marine ecosystems and coastal communities. These impacts include those stemming from occupation of the facility's site, as well as the construction and operation of transmission lines and onshore facilities. Importantly, while the Executive Order establishing the National Ocean Council calls for coordination and integration among federal agencies and between levels of government in regional MSP, it does not, and cannot, resolve conflicts among federal agencies and their divergent statutory mandates, nor among federal agencies and states within the regional area being assessed, nor among the states themselves, nor among states and their constituents, nor among ocean and coastal uses. A state-initiated process allows for more engagement with and participation by local stakeholders, which can provide policymakers with (1) critical information than can lead to more environmentally and socially tailored programs, and (2) stakeholder buy-in that can lead to greater programmatic efficiency and efficacy.

Experimentalism: Offshore wind technology and marine renewables in U.S. waters are only beginning to develop, and the processes that constitute MSP are still in the early stages of maturation. "In settings of volatility and diversity of conditions, especially where knowledge is incomplete and evolving rapidly, room for pragmatic adjustment and experimentation is critical."[116] Allowing coastal states to pursue the O-SAMP model should produce greater technological and regulatory experimentation than the federal government would produce on its own, either through a single agency-led effort or through the National Ocean Council's nine regions. For example, individual O-SAMPs could mobilize technologies that better respond to the variable ecological, oceanographic, bathymetric, wind, tidal, and other conditions in specific areas. States would likely approach the MSP processes with different analytic methods and evaluative criteria. These approaches can mutually inform one another and, in turn, inform ongoing regional MSP efforts under the National Ocean Council. At the same time, the information generated should also provide data for ongoing evaluations at the various levels of governance: states with overlapping federal waters could share information, all of which could trickle up to the regional bodies. This experimentation and information exchange would capture the "learning function" of regulatory overlap in an evolving area of environmental law.[117]

Redundancy and Overlap: The O-SAMP model also provides structural redundancy, or overlap, with the likely result that a state will maintain a high level of protectiveness over the course of time. An environmentally insensitive state administration is unlikely to take on special area management planning in federal waters, and if it does, the requisite federal review and approval should prevent junk science and overpermissiveness from determining the regulatory outcome. Moreover, changes in state administrations over time are unlikely to produce lower levels of protection; assuming the SAMP is incorporated into the CMP, to alter it would require NOAA approval. Similarly, states can ensure against federal administrations that may seek to overrun the OCS with new wind farms by locking in protections under the CZMA.

"Uncooperative Federalism" Values: The O-SAMP model also captures the values of institutionalized conflict in several interrelated ways. First, it provides additional administrative safeguards against federal abuses by imbedding state officials and bureaucrats within the federal regime in a way that goes further than the consultative and participatory roles envisioned in the National Ocean Council's regional governance regime.[118] Second, it allows state representatives to actually set the agenda, rather than merely participate or respond to it.[119] Third, it converts the states and their representatives and constituents from outsiders to insiders, making affiliation and integration more complete.[120] Finally, it arguably increases accountability, both as between state and federal bureaucrats[121] and as between the decisionmakers and the public-at-large.

Practical Considerations: Pragmatics also weigh in favor of encouraging the O-SAMP model. It would appear easily enough done: Administratively, NOAA would be charged with reviewing the proliferation of O-SAMPs and,

114. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 60 (2011); *see also* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1550 (2007) (describing cooperative federalism structures as multilayered regulatory schemes that involve federal, state, and local governments); Damien Leonard, *Raising the Levee: Dutch Land Use Law as a Model for U.S. Adaptation to Climate Change*, 21 Geo. Int'l Envtl. L. Rev. 543, 557 (2009) (CZMA represents a "brand of inter-governmental cooperation" that involves federal establishment of broad criteria, but recognizes that "the implementation of those criteria must occur on the state and local level to address the unique needs of that jurisdiction").

115. *See* Michael Burger, *Empowering Local Autonomy and Encouraging Innovation in Climate Change Governance: The Case for a Layered Regime*, 39 ELR 11161, 11170-71 (Dec. 2009) (discussing benefits of CZMA's "layered regime").

116. Buzbee, *supra* note 114, at 1619.

117. Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 122; *see also* Hari Osofsky, *Diagonal Federalism*, available on SSRN, forthcoming from *Alabama Law Review* 279 ("Bottom-up efforts capture more easily the many divergences that are needed for smaller-scale actors to respond to local conditions without the rigidity and constraint that often accompany top-down mandates.").

118. Bulman-Pozen & Gerken, *supra* note 113, at 1285-87 (2009).

119. *Id.* at 1287.

120. *Id.* at 1288-89

121. *Id.* at 1289-91.

where necessary, coordinating interstate overlaps in federal waters.[122] Regional MSP bodies would be charged with integrating the state-derived information into the evolving regional plans. In fact, the state O-SAMPs should take care of much of the regional bodies' toughest assignments: hashing out competing interests in close proximity to the coastline. Financially, the RI O-SAMP received only $2.6 million in federal funding. Other states with larger coastlines would obviously require more, but the funds would be spent on generating plans for state and proximate federal waters that are more likely to result in an appropriate balance of competing interests and uses, and so worth the investment.

B. The Argument for Federalization

Planning for offshore wind is also, of course, a federal problem, and there are several counterarguments that ought to be recognized. The remainder of this section addresses, first, the economic federalization account, and then three other factors important in any contextual federalism analysis: political incentives; environmental ills and their contexts; and regulatory history.[123]

The Economic Account—Interstate Spillovers/Economic Efficiency/NIMBYism: The potential effects of offshore wind facilities include scenic effects on private property, public lands, and coastal and ocean areas; impacts on wildlife and habitat; and commercial fisheries.[124] The nature and range of these impacts might counsel for either a more federalized or decentralized approach, depending on whether the siting decision results in interstate "spillover" effects.[125] For instance, siting in areas that affect the scenery of private property in one state, relatively sedentary wildlife populations, state-specific ecosystems, or fisheries of particular importance to a single state would theoretically lead toward a more decentralized regime.[126] But none of these is particularly likely. Scenic impacts, for instance, on the Cape Cod or Point Reyes National Seashores, or on Olympic or Arcadia National Parks, are not limited to the residents of California, Maine, Massachusetts, or Washington.[127] The species likely to be most affected by offshore wind facilities are migratory birds and fish. And commercial fisheries are, by and large, managed by regional fisheries management counsels under the Magnuson-Stevens Act,[128] an indication of the interstate nature of the nation's most important commercial fisheries.

The United States has a vested interest in reducing both greenhouse gas emissions and dependence on foreign oil. These national goals would, ostensibly, be of little concern to a state acting in a narrower self-interest. Indeed, the economic account would further argue that states will either be too restrictive in setting standards to site facilities within their jurisdiction in order to prevent unwanted impacts on highly important local values, or else they will be too lax in order to lure industry to the state. Accordingly, on the conventional federalism account, federal regulation of offshore wind is appropriate.

And yet, given the number of conflicting uses of federal waters, and the different scope of effects offshore wind would have on each, it is impossible to say that a uniform rule, i.e., one-way federal regulatory authority, should govern.[129] Moreover, trends in environmental regulation defy this story.[130] As made evident by state leadership in offshore wind development, as well as in regional and state climate change initiatives, states, when properly constrained and incentivized, are proving themselves competent to act in ways that balance local, state, and federal interests. Thus, although there is clearly a sound justification for a dominant federal presence in managing MSP in federal waters, the economic rationale fails to justify an exclusive one.

Regulatory Uniformity: The RI O-SAMP model, widely deployed, could result in a greater degree of jurisdictional confusion and regulatory uncertainty than would otherwise be desirable for evolving offshore renewable energy industries. This confusion and uncertainty could disrupt two different federal processes: BOEMRE's leasing of offshore federal parcels for renewable energy facilities under the 2009 regulations, and the regional MSP processes to be undertaken under the auspices of the National Ocean Council. On the one hand, different approaches taken by different states could produce inconsistent processes and results, making the CZMA consistency review process for leases even more unwieldy than it already is.[131] The use of different technologies might treat similar variables—such as seabed floor topography, wind or wave patterns, or species population counts—differently. States could wind up with conflicting data. In addition, it is distinctly possible that the various inputs might not trickle up to regional planners working under the National Ocean Council efficiently or effectively.

Clearly, these are legitimate concerns. Some level of coordination is required to achieve national goals for offshore wind and marine renewable energy.

122. On a related note, CZMA consistency regulations also provide for "interstate consistency review," whereby a participating state may review "any reasonably foreseeable effect resulting from a federal action occurring in one State of the United States on any coastal use or resource of another State that has a federally approved management program." 15 C.F.R. §§930.150 to .157.

123. Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 114.

124. For a review of environmental impacts from offshore wind and other marine renewables, see generally Final Programmatic Environmental Impact Statement for Alternative Energy Development and Production and Alternate Use of Facilities on the Outer Continental Shelf, Chapter 5, "Potential Impacts of Alternative Energy Development on the OCS and Analysis of Potential Mitigation Measures," *available at* http://ocsenergy.anl.gov/eis/guide/index.cfm.

125. Robert W. Eberhardt, *Federalism and the Siting of Offshore Wind Facilities*, 14 N.Y.U. Envtl. L.J. 374, 395-405 (2006) (describing different potential impacts and whether they support federal or state-based response).

126. *Id.*

127. Lujan v. Defenders of Wildlife, 504 U.S. 555, 22 ELR 20913 (1992) (recognizing recreational, aesthetic, and environmental interests of individuals with history of use and plans for future use of remote areas).

128. *See* Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §1852 (2006); *see also* Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 1976 U.S.C.C.A.N. (90 Stat.) 331, 347.

129. Buzbee, *supra* note 114, at 1604-06.

130. *See generally* Keith H. Hirokawa, *Sustaining Ecosystem Services Through Local Environmental Law*, 28 Pace Envtl. L. Rev. 760 (2011).

131. *See* Whitney et al., *supra* note 74.

Contextual Federalism: Political Incentives, Environmental Conditions, Regulatory History: In conducting a contextual federalism analysis, these three highly erratic variables must factor in. Yet, the O-SAMP model, which could involve every state eligible for funding under the CZMA, defies a strict application. The political incentives surrounding offshore wind, marine renewable, and MSP will differ depending on, among other things, state politics and local power dynamics. Similarly, the environmental conditions in federal waters and the regulatory histories of the states will vary greatly. Yet, these are the same reasons that counsel in favor of decentralization—responsiveness to local political preferences and environmental conditions.

Ultimately, the environmental and democratic benefits of local tailoring, experimentalism, and designed conflict outweigh the potential for a degree of economic inefficiency and regulatory confusion in giving legal effect to state-based marine spatial planning for offshore renewable energy in federal waters. Under existing law—both the CZMA and the 2009 regulations—the federal government retains ultimate decisionmaking authority in federal waters. The RI O-SAMP model will likely result in higher grade information, more democratic responsiveness, more dynamic technological and regulatory developments, and a greater degree of protection of ocean resources, while allowing for renewable energy development to proceed without significant additional costs.

IV. Conclusion

This Article assumes that ecosystem-based ocean management is an achievable and desirable goal, and MSP is an appropriate means to reach it. The regional approach advanced by the National Ocean Council is undoubtedly a sound one. However, as currently constituted, the National Ocean Council is an intergovernmental entity with an uncertain funding base, designed to serve a coordinating function. Its regional plans will have little, if any, legal import. This leaves ecosystem-based management and MSP toothless in the very real conflicts over how to use ocean space. State-based MSP in federal waters, as exemplified by the RI O-SAMP, could more deeply imbed these key principles in present-tense decisionmaking.

Whether one approaches the issue from the top-down perspective of regional planning or the bottom-up approach of state-based planning, the three-mile line dividing state and federal jurisdiction interferes both with the implementation of MSP and the achievement of ecosystem-based management. The CZMA bridges the regulatory divide by granting states a limited authority over projects in federal waters; the limits on this authority are sufficient to allow states to go further than they have in the past, and, within the constraints of the CMP approval process and consistency review, to study, map, plan, and possibly even zone future uses in proximate federal waters. On a theoretical level, there are significant advantages to greater regulatory diversity and experimentation in the evolving fields of offshore wind and offshore renewable energy production, while the advantages of a more centralized approach are, to an extent, already captured by the CZMA and NOAA's 2009 regulations. Thus, recognizing the federalism choice before them, federal agencies, states, and courts should opt in to state planning in federal waters.