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MARINE SPATIAL PLANNING IN U.S. WATERS

An Assessment and Analysis of Existing Legal Mechanisms, Anticipated Barriers, and Future Opportunities

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Marine spatial planning (MSP) can be an effective tool for implementing ecosystem-based management to protect, maintain, and restore ocean ecosystem health; to reduce user conflicts; and to foster sustainable development. The Commonwealth of Massachusetts and the State of Rhode Island have undertaken MSP processes. MSP has reduced conflicts and improved planning in the North Sea. Now, President Obama's Interagency Ocean Policy Task Force is poised to present a proposed framework for MSP at the federal level. In this context, Ocean Conservancy commissioned the attached report by the Environmental Law Institute reviewing the U.S. legal framework for ocean management and assessing the most relevant federal statutes to determine how they could encourage or hinder MSP.

The results are mixed. In some cases, existing statutory authorities give federal agencies a significant amount of discretion to consider marine ecosystems and current and future uses of the ocean in their decision making. Examples include traditional and alternative energy development and shipping lane designations. If directed by executive order or other administrative action, agencies could use this latitude to ensure that planning and permitting of various activities conform to a marine spatial plan. Additionally, existing authorities provide substantial opportunities for federal agencies to coordinate their activities and work with local, state, regional, and tribal authorities—coordination that is critical to successful management across jurisdictional lines and successful MSP.

Despite the potential for use of existing authorities to implement MSP, federal legislation could materially improve the system by providing a clearer mandate and removing existing impediments. Consultation requirements could be formalized and made mandatory. In individual statutes, specific barriers to decision making based on a federal marine spatial plan could be removed. Comprehensive legislation directing all federal agencies to pursue their activities in a manner consistent with marine spatial plans would facilitate MSP and provide a clear signal that whatever the specific activity-based or sector-based mission of a particular agency, adhering to a marine spatial plan would protect, maintain, and restore the marine environment and the human uses that depend on that environment. Legislation would also ensure that the priority given to MSP would continue beyond any particular administration's tenure.

Ocean Conservancy believes that the following report will contribute to the important national discussion of MSP by providing the foundation for further analysis of how federal law could be used or improved in order to permit the nation to enjoy the benefits of MSP.

Acknowledgments

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EXECUTIVE SUMMARY

Over the past several years, public and private entities around the world have expressed increasing interest in marine spatial planning (MSP) as a tool for ocean governance. MSP refers to the allocation of human uses and activities within a marine area, across both space and time, to achieve specified objectives. As human uses of the marine environment increase, MSP provides a means of managing potentially conflicting activities and ensuring sustainable use of resources by accounting for cumulative effects on an area. The process has been implemented in various ocean regions, from the Barents Sea to the Great Barrier Reef Marine Park to the Florida Keys National Marine Sanctuary.

MSP gained attention in the United States when President Obama issued a Memorandum calling for a national ocean policy and establishing an Interagency Ocean Policy Task Force to be led by the Council on Environmental Quality.[1] His Memorandum gave the Task Force ninety days to develop recommendations for a comprehensive national policy that protects U.S. oceans and lakes, a framework for coordinating these stewardship efforts that includes national security interests, and an implementation strategy with prioritized objectives. It gave the Task Force an additional ninety days to "develop, with appropriate public input, a recommended framework for effective coastal and marine spatial planning." The Memorandum requires that the MSP framework have "a comprehensive, integrated, ecosystem-based approach."

This report seeks to support the Task Force's effort by clarifying what existing legal provisions support MSP and identifying opportunities for implementing MSP in federal and state ocean waters and submerged lands. The first section assesses the federal mechanisms that could lead to MSP in the United States, anticipated barriers to implementation, and potential enhancements. It first analyzes provisions within the laws and regulations that make up the bulk of the current sector-based U.S. marine governance framework. It then summarizes some of the potential legislative and executive actions that could be taken to further MSP. The second section surveys existing regional ocean governance partnerships and how they may further or inhibit federal MSP efforts. The final section identifies potential interactions between state and federal authorities during the development and implementation of a marine spatial plan.

The analysis focuses on the statutes and associated regulations of the National Marine Sanctuaries Act, American Antiquities Act, Endangered Species Act, Marine Mammal Protection Act, Coastal Zone Management Act, Deepwater Port Act, Outer Continental Shelf Lands Act, Natural Gas Act, Federal Power Act, Magnuson-Stevens Fishery Conservation and Management Act, Ports and Waterways Safety Act, Ocean Dumping Act, Clean Water Act, Rivers and Harbors Act, Submerged Lands Act, and National Environmental Policy Act. Many of these statutory and/or regulatory provisions contain place-based mechanisms, tools for establishing activity restrictions, consultation requirements, and permitting and licensing processes in the marine environment.

Existing authority to implement place-based restrictions in ocean areas may directly contribute to the spatial allocation process that is the basis of MSP. Activity restrictions can supplement this process. Consultation requirements promote the interagency and inter-entity coordination that is essential to effective planning, making decisions about tradeoffs, and implementation. Permitting and licensing processes provide another avenue to implement the spatial plan on a case-by-case basis.

In its current state, the U.S. ocean and coastal governance framework is divided among myriad agencies and by numerous sectors. Although most areas and activities are covered somewhere in the statutes, there are significant gaps in the tools and discretion they provide for MSP. There are few requirements that a

[1] Presidential Memorandum, National Policy for the Oceans, Our Coasts, and the Great Lakes (June 12, 2009).

sector fully consider outside uses and activities when making its planning or permitting decisions, much less that it consider a comprehensive spatial plan. Some statutes specifically encourage optimization of sector-specific activities. Such single-sector approaches may limit the discretion agencies have to implement a comprehensive marine spatial plan. Many laws contain consultation provisions, which range from mandatory and extensive to optional and minimal in the extent of interests that the agency must consider. In practice such consultation can be limited by administrative costs and delays. Finally, marine permitting and licensing requirements vary greatly, meaning that there is considerable variability in agencies' discretion to permit or license according to a comprehensive marine spatial plan.

The second section of this report describes the regional partnerships that may facilitate MSP. There are regional partnerships currently in effect that, at least on paper, encompass the entirety of the waters offshore of the forty-eight contiguous states. The legal authorities of most of these partnerships are not strong, if they exist at all, and so do not threaten a federal MSP process. They coordinate the priorities and actions within their region, and are an important resource to consider when determining the most effective method for implementing MSP.

The final section assesses the primary areas where states may positively or negatively influence federal MSP efforts. The Submerged Lands Act and the Coastal Zone Management Act are the primary laws that govern state-federal interactions within state waters. However, there are also a number of provisions in other federal laws—including the National Marine Sanctuaries Act, the Outer Continental Shelf Lands Act, and the Ports and Waterways Safety Act, to name but a few—that contain consultation requirements or delegate partial management authority to the states. These authorities could affect federal MSP, but with a greater impact in state than federal waters. The federal government, however, retains its paramount interests in the ocean and submerged lands and could choose to limit state authority.

Without a doubt, MSP could be comprehensively enacted through new congressional legislation. Absent such action, however, the creation and implementation of a marine spatial plan will likely depend on a variety of provisions found within the existing fragmented and sector-based ocean governance system. This analysis suggests that no individual tool or mechanism can, in its current state, single-handedly support MSP. Rather, comprehensive federal implementation of MSP will require amalgamation of the various provisions that authorize or require place-based designations, activity restrictions, consultation, and permitting procedures.

While all statutes contain at least some tools relevant for MSP, place-based designations and planning mechanisms are not as prevalent as would be ideal for supporting an MSP framework. Table 1 provides a brief summary of the federal statutes that do require or allow area-based designations and have planning mechanisms. In the absence of a new federal mandate, these authorities would remain important for developing and implement a federal MSP approach. These provisions and other tools, such as consultation requirements and permitting procedures, are addressed in greater detail in the body of the report.

Table 1. Federal Authority to Create Area-Based Designations

PROVISIONS	DESIGNATING AUTHORITY & APPLICABLE AREA	ELEMENTS OR CRITERIA FOR DESIGNATION & PLANNING	PROHIBITED OR REQUIRED ACTIVITIES WITHIN DESIGNATED AREA
NATIONAL MARINE SANCTUARIES ACT			
Sanctuary designations and activity permits *See pp. 4-6*	*Dept. of Commerce* 0-200 miles	• Area of special national significance; • Where designation is needed to ensure coordinated and comprehensive protection; and • Size and nature of area permits comprehensive and coordinated conservation and management	• Activities that destroy, cause loss of, or injure sanctuary resources are prohibited • New activities may be prohibited/ permitted by Sec. of Commerce • Oil, gas, and mineral extraction is often prohibited in the designation • MMS cannot issue alternative energy leases in OCS portions of a sanctuary
Sanctuary management plans *See pp. 11-12*	*Dept. of Commerce* 0-200 miles	• Mechanisms to coordinate existing authorities within the area; • Implementation regulations; and • Evaluation of advantages of cooperative state/federal management if part of sanctuary is in state waters	
AMERICAN ANTIQUITIES ACT			
National marine monuments and activity permits *See pp. 6-7*	*President (management authority delegated to a federal agency)* 0-200 miles	• Historic landmark, structure, or other object of historic or scientific interest on federal government lands	• Specific activities individually prohibited when monument established • Permits may be issued for new activities Oil/gas/mineral extraction is prohibited • MMS cannot issue alternative energy leases in OCS portions of a monument • FERC needs congressional authority to issue a hydrokinetic lease
ENDANGERED SPECIES ACT			
Critical habitats *See pp. 7-8*	*Dept. of Commerce or the Interior* 0-200 miles	• Essential for the conservation of the species; and • May require special management considerations or protection	• No categorical prohibitions
MARINE MAMMAL PROTECTION ACT			
Essential habitats *See pp. 8-9*	*Dept. of Commerce or the Interior and Marine Mammal Commission* 0-200 miles	• Areas of significance, including rookeries and mating grounds • It is recommended but not required that essential habitats be protected	• No categorical prohibitions
Conservation plans *See pp. 13-15*	*Dept. of Commerce or the Interior* 0-200 miles	• Must prepare conservation plans for species or stocks designated as depleted	
Take reduction plans *See pp. 13-15*	*Dept. of Commerce or the Interior* 0-200 miles	• Must prepare take reduction plans for strategic marine mammal stocks that interact with a commercial fishery with frequent or occasional takes • May prepare for non-strategic stocks in a fishery with frequent takes	
COASTAL ZONE MANAGEMENT ACT			
National estuarine reserves	*Dept. of Commerce and governor of coastal state* 0-3 miles	• Coastal governor nominates area • Then Sec. of Commerce may designate if, among other things, it is a representative estuarine ecosystem	• Reserves are intended for research, education, preservation, and restoration • They are increasingly focused on stewardship in practice

See pp. 9-10		• Sec. of Commerce can make grants to coastal states for such areas	• No categorical prohibitions
PORTS AND WATERWAYS SAFETY ACT			
Designation of shipping fairways *See pp. 41-43*	*Coast Guard* 0-200 miles	• Needed for safe access routes for ports or other places subject to U.S. jurisdiction, but that need is balanced with the needs of all other reasonable uses of the area involved	• Artificial islands and fixed structures, whether temporary or permanent, are prohibited • Navigation must be given priority
DEEPWATER PORT ACT			
Navigational safety zones *See pp. 16-18*	*Dept. of Transportation (Delegated to Coast Guard)* 3-200 miles	• Navigational safety around deepwater ports	• No uses, installations, or structures that are incompatible with port operation • Specific permitted activities are defined by regulation
MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT			
Fishery management plans (FMP) *See pp. 30-33*	*Dept. of Commerce; Regional Fishery Management Councils* 3-200 miles	• Councils must implement an FMP for each stock • Councils may implement a Fishery Ecosystem Plan	• Among other things, FMPs may designate zones where and/or times when fishing is restricted or prohibited (e.g. gear limits, season closures) • Implemented through fishing permits
Essential fish habitats (EFH) *See pp. 33-35*	*Dept. of Commerce; Regional Fishery Management Councils* 3-200 miles	• Waters and substrate necessary to species (or group) spawning, breeding, feeding, or maturation • Must include descriptions of EFH and potential adverse effects from fishing/non-fishing activities in FMP • May designate Habitat Areas of Particular Concern	• FMPs must minimize adverse impacts of fishing on EFH • All relevant Dept. of Commerce programs must further EFH conservation • Other federal agencies must consult regarding proposed actions that might adversely affect EFH (although not bound by recommendations)
OUTER CONTINENTAL SHELF LANDS ACT			
Leasing programs for oil and gas *See pp. 18-20*	*MMS* 3-200 miles	• Five-year schedule of OCS oil and gas lease for the OCS; reviewed annually • Management must consider the area's economic, social, and environmental values, and the potential impact of oil and gas exploration • President can withdraw areas from disposition	• Among other things, timing and location of activities should consider geographical, geological, and ecological information, and the location of other sea and seabed uses • Timing and location of leasing should balance potential environmental damage, oil and gas discovery, and adverse coastal zone impacts
Leases for oil and gas *See pp. 20-22*	*MMS* 3-200 miles	• Before a lease is sold, MMS must assess environmental impacts on human, marine, and coastal environments	• MMS must submit assessments of the cumulative impacts of all leases on the human, marine, and coastal environments every three years
Leases for alternative energy *See pp. 22-23*	*MMS* 3-200 miles	• For hydrokinetic activities on the OCS, pursuant to an MOU the project applicant must obtain a lease from MMS and then a license from FERC	• Activities must be carried out in a manner that protects the environment and conserves natural OCS resources; does not interfere with reasonable marine uses; and considers location of other leases and uses of the sea or seabed
OCEAN DUMPING ACT			
Dumping site designation *See pp. 36-39*	*EPA* 0-200 miles	• Dumping in the site will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities	• Site management plans are required for designation • No permit for ocean dumping may be issued for a site that is not designated • Corps must use the recommended sites for the dumping of dredged material "to the maximum extent feasible"

INTRODUCTION

The United States controls over 3.4 million square nautical miles of ocean and coasts.[2] Yet despite the size of this area, the wealth of the resources within it, and the dependence of coastal and inland states alike on its services, there is no comprehensive U.S. ocean, coastal, and Great Lakes policy or management plan.

Instead, the current federal ocean and coastal management framework is fragmented and sector-specific, with numerous agencies managing different human uses and activities under various laws and regulations. There are two primary drawbacks to such an approach. First, although a sector-specific framework leads to management of individual activities, it does not account for the cumulative effects of all sectors operating in U.S. waters. These cumulative effects must be considered to ensure the sustainability of human uses and activities. Second, single-sector management does not appropriately address user conflict, for it does not fully consider the effects of one sector on another or lead to rational trade-off decisions. As human uses of ocean and coastal resources increases, so does the likelihood of overlap and competition between them.

The U.S. ocean and coastal governance framework should be reformed to address these deficiencies. One potential approach is to incorporate marine spatial planning (MSP). As defined by the Intergovernmental Oceanographic Commission (IOC), MSP is "a public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process."[3] In 2006 the IOC, a division of the United Nations Educational, Scientific, and Cultural Organization, co-hosted the first international workshop on MSP. The resulting report identified and began addressing questions and issues related to MSP, and in 2009 the IOC published an MSP implementation guide.

The IOC guide specified that to be effective, MSP must be:

- **Ecosystem-based**, balancing ecological, economic, and social goals and objectives toward sustainable development[;]
- **Integrated**, across sectors and agencies, and among levels of government[;]
- **Place-based** or **area-based**[;]
- **Adaptive**, capable of learning from experience[;]
- **Strategic and anticipatory**, focused on the long-term[; and]
- **Participatory**, [with] stakeholders actively involved in the process.[4]

As the IOC suggests, the underlying principles of MSP align with the concept of ecosystem-based management (EBM). According to a consensus statement signed by over 200 scientists and policy experts, marine ecosystem-based management is an integrated approach that considers the cumulative impacts of all activities on an ecosystem in order to maintain healthy, productive, and resilient ocean and coastal ecosystems that can continue to provide the ecosystem services upon which humans depend.[5] It does so by focusing on ecosystem structure and processes, recognizing the interconnectedness within and

[2] National Oceanic and Atmospheric Administration, Aquaculture Program, *The United States is an Ocean Nation*, http://aquaculture.noaa.gov/pdf/20_eezmap.pdf (last visited Sept. 6, 2009). A square nautical mile is equivalent to roughly 1.3 square miles.
[3] Charles Ehler & Fanny Douvere, *Marine Spatial Planning: A Step-by-Step Approach Toward Ecosystem-based Management*, Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, IOC Manual and Guides No. 53, ICAM Dossier No. 6, at 18 (2009) [hereinafter *IOC (2009)*]; *see also* Charles Ehler & Fanny Douvere, *Visions for Sea Change: Report of the First International Workshop on Marine Spatial Planning*, Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, Manual Guides No. 48, IOCAM Dossier No. 4, at 24 (2007) [*hereinafter IOC (2007)*].
[4] *IOC (2009)*, *supra* note 3, at 18.
[5] Karen L. McLeod *et al.*, *Scientific Consensus Statement on Marine Ecosystem-Based Management* (Mar. 21, 2005), available at http://www.compassonline.org/pdf_files/EBM_Consensus_Statement_v12.pdf.

between ecosystems, and integrating ecological, social, economic, and institutional perspectives.[6] However, MSP and ecosystem-based management are not synonymous. MSP is a specific governance tool, which may or may not be used to achieve ecosystem-based management.

Although the process may vary, leading experts have articulated the ideal stages of MSP (see Table 2). While the creation of a marine spatial plan is a key component, there are numerous other steps that must be taken both to inform the plan and to ensure it is adequately implemented.

Table 2. The Ideal Stages of MSP.

Gopnik (2008)[7]	Ehler & Douvere (2009)[8]
1. Setting high-level policy goals 2. Issuing guidance documents for planners 3. Conducting spatial assessments of the ecosystem and human uses 4. Engaging stakeholders 5. Creating plans based on scenario analyses and negotiation 6. Drawing detailed maps with assignments of zones 7. Issuing regulations 8. Monitoring and enforcement 9. Evaluation and adaptation	1. Identifying need and establishing authority 2. Obtaining financial support 3. Organizing the process through pre-planning 4. Organizing stakeholder participation 5. Defining and analyzing existing conditions 6. Defining and analyzing future conditions 7. Preparing and approving the spatial management plan 8. Implementing and enforcing the spatial management plan 9. Monitoring and evaluating performance 10. Adapting the marine spatial management process

Over the past several years, MSP has become an increasingly important mechanism for ocean governance. In June 2009, President Obama issued a Memorandum to Executive Departments calling for a national ocean policy and establishing an Interagency Ocean Policy Task Force to be led by the Council on Environmental Quality.[9] The Task Force currently is developing its recommended framework for effective coastal and marine spatial planning. This report seeks to support the Task Force's effort by identifying the existing legal provisions that could support MSP, the opportunities for successful implementation, and the ways in which states and regional partnerships could influence the process. It focuses on the federal governance system in federal and state ocean waters and submerged lands.[10]

[6] *Id.*
[7] Morgan Gopnik, *Integrated Marine Spatial Planning in U.S. Waters: The Path Forward* (2008), at 11-12, available at http://www.massoceanaction.org/docs/Report-IntegratedMarineSpatialPlanninginUSWaters.pdf.
[8] *IOC (2009)*, *supra* note 3, at 18.
[9] Presidential Memorandum, National Policy for the Oceans, our Coasts, and the Great Lakes (June 12, 2009).
[10] State waters include the waters from the low tide mark to three nautical miles offshore (except Texas and the west coast of Florida, which have nine nautical mile boundaries). These state waters are part of the U.S. territorial seas under international law. Federal waters extend from the state boundaries to 200 nautical miles offshore as allowed under international law. This area includes part of the territorial seas (out to twelve nautical miles) and the 188 nautical mile exclusive economic zone. State submerged land boundaries coincide with the state water boundaries (i.e. 3 nautical miles in most instances). In contrast, federal submerged lands (i.e. the Outer Continental Shelf) extends to at least 200 nautical miles offshore but may be extended beyond this point if the continental shelf meets appropriate requirements under the United Nations Convention on the Law of the Sea.

I. FEDERAL AUTHORITY FOR MARINE SPATIAL PLANNING

Although there is no existing national MSP framework, numerous provisions within U.S. laws and policies support MSP. The following section explains the utility of these provisions and identifies those that hold the greatest promise for providing part of the foundation of a national MSP system. Conversely, some provisions may impede MSP efforts. The analysis includes an assessment of such obstacles and indicates their potential effects. Some of the provisions discussed are mandatory and others discretionary. The analysis focuses on the subset of federal statutes and regulations most relevant to MSP, rather than covering each of the 140 federal laws that affect ocean governance.[11]

While the purpose of MSP is to manage ocean uses in a comprehensive manner, existing U.S. laws and policies are organized by sector. Similarly, the following section is arranged by sector. This should be viewed as an analytical device rather than an endorsement of a sector-based approach. Following the sector-by-sector analysis is a discussion of a subset of cross-cutting laws that, at least in scope and intent, have the potential to affect all sectors. Therefore this section is divided as follows:

A. Conservation
B. Energy Production and Resource Extraction
C. Fishing and Aquaculture
D. Dredging and Dumping
E. Marine Transportation
F. Cross-Cutting Laws: NEPA, CWA, and CZMA
G. Military and National Security Activities
H. Tribal Rights

Parts A through F contain an analysis of existing statutory and regulatory provisions and an assessment of how they could be used to support or impede MSP. The conclusions are framed by the IOC definition of MSP and the six factors it identifies as necessary: that MSP be (1) ecosystem-based, (2) integrated, (3) area-based, (4) adaptive, (5) strategic and anticipatory, and (6) participatory.[12] Part G (Military Activities) and Part H (Tribal Rights) discuss important rights, exceptions, and exemptions relevant to the military and to tribes that may affect an MSP process.

This report focuses primarily on the potential to implement MSP in federal waters.[13] But MSP efforts in federal waters must consider the influence of the states, just as MSP efforts in state waters would need to consider the authority of the federal government. The Submerged Lands Act gave the states jurisdiction over waters from zero to three nautical miles from shore, except for Florida and Texas, which have larger zones.[14] But some laws, like the Clean Water Act, effectively extend this jurisdiction by allowing states to govern activity outside state waters that affect state waters.

Likewise, state authority in state waters is not exclusive. The federal government retains authority over federal activities and issues concerning interstate and foreign commerce in state waters. Therefore, state and federal authorities are inherently intertwined when addressing state or federal waters, a situation that

[11] For example, the National Historic Preservation Act and the National Wildlife Refuge Act may yield additional information, but were not analyzed in this report. The present analysis considers the National Environmental Policy Act, Clean Water Act, Coastal Zone Management Act, Submerged Lands Act, Outer Continental Shelf Lands Act, Federal Power Act, Natural Gas Act, Deepwater Port Act, Rivers and Harbors Act, Ocean Dumping Act, Endangered Species Act, Marine Mammal Protection Act, National Marine Sanctuaries Act, American Antiquities Act, Ports and Waterways Safety Act, and Magnuson-Stevens Fishery Conservation and Management Act. Other statutes are mentioned when pertinent but not analyzed in-depth. There are also laws other than those categorized as "cross-cutting" that could affect all sectors (such as the Clean Air Act).
[12] *See supra* text surrounding notes 3–4.
[13] ELI is currently analyzing and writing a report that considers the rights of states and the potential for federal MSP in state waters.
[14] 43 U.S.C. § 1312.

could be valuable for crafting comprehensive MSP that covers both jurisdictions. Of note, however, is the fact that state authorities in marine waters are not expressly reserved to the states in the Constitution.[15] They are granted by acts of Congress, such as the Submerged Lands Act, which means that Congress has the authority to change them.

A. Conservation

i. Place-Based Designations

The federal government can, and in some cases is required to, make place-based designations where human use is restricted or more carefully regulated for the purpose of environmental preservation or conservation. These conservation areas vary in form and function, depending largely on the law from which the authority is derived. This section examines the following Acts:

- The National Marine Sanctuaries Act (NMSA) authorizes the Secretary of Commerce to designate as a national marine sanctuary "any discrete area of the marine environment" that is of "special national significance" and is otherwise inadequately protected by state and federal authorities.[16]
- Under the American Antiquities Act, the President may proclaim as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States."[17]
- The Endangered Species Act (ESA) requires the Secretary of Commerce to designate as "critical habitat" any areas essential to the conservation of endangered or threatened species.[18]
- The Marine Mammal Protection Act (MMPA) recommends that the Secretary of Commerce or of the Interior, depending on the species at issue, protect essential marine mammal habitats, including rookeries, mating grounds, and other significant areas.[19]
- Under the Coastal Zone Management Act (CZMA), the Secretary of Commerce may designate an estuarine area as a national estuarine reserve if the governor of the coastal state nominates the area and the Secretary finds, among other things, the area to be a representative estuarine ecosystem and suitable for long-term research.[20]

National Marine Sanctuaries Act

The NMSA was passed in 1972 for the purpose of designating marine areas of special significance as national marine sanctuaries and comprehensively managing them.[21] The National Marine Sanctuaries Program, housed in the National Oceanic and Atmospheric Administration's (NOAA's) National Ocean Service and under the Department of Commerce, currently oversees thirteen sanctuaries and one national monument. Existing sanctuaries range in size from one quarter of a square mile to over 5,000 square miles.[22]

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[15] This is true for all ocean and seabed resources beyond the low tide mark. For a discussion of this analysis, *see infra* notes 585 to 593 and accompanying text.
[16] 16 U.S.C. § 1433. The National Marine Sanctuaries Act is part of the broader Marine Protection, Research and Sanctuaries Act that also includes the Ocean Dumping Act.
[17] *Id.* § 431.
[18] *Id.* § 1533(a)(3)(A)(i).
[19] *Id.* § 1361(2).
[20] *Id.* § 1461(b).
[21] *Id.* § 1431(b).
[22] *See, e.g.,* Coastkeeper Alliance, *North Coast Closer to Permanent Protection*, http://www.cacoastkeeper.org/news/north-coast-closer-to-permanent-protection (last visited Oct. 6, 2009).

Designation of a national marine sanctuary is discretionary; the Secretary of Commerce may designate a marine area as a sanctuary if the Secretary determines that the area meets five standards.[23] First, the designation must fulfill the purposes and policies of NMSA.[24] Second, the area must be of "special national significance" because of its living resources; resource or human-use values; or other qualities such as ecological, historical, scientific, or cultural importance.[25] Third and fourth, the Secretary must find that designation is needed to supplement state and federal authorities to ensure coordinated and comprehensive protection of the area.[26] Fifth, the area must be of a size that will permit comprehensive and coordinated management.[27] Sanctuaries may be designated in state and/or federal waters.[28]

Most activities are allowed in national marine sanctuaries unless the terms of a specific sanctuary's designation subject an activity to regulation.[29] Actors may apply for a permit to engage in a regulated activity.[30] No activity is allowed to "destroy, cause the loss of, or injure any sanctuary resource."[31] The designation of a sanctuary does not terminate an existing lease, permit, license, or right of access or subsistence use,[32] but the Minerals Management Service (MMS) is prohibited from issuing a lease, easement, or right-of-way for any alternative energy project within a national marine sanctuary that extend into its jurisdiction, the Outer Continental Shelf (OCS).[33]

As explained in the energy section, MMS has leasing authority on the OCS over non-hydrokinetic alternative energy production under OCSLA, and over hydrokinetic alternative energy in collaboration with the Federal Energy Regulatory Commission (FERC) in accordance with a memorandum of understanding (MOU) between the two entities. Since MMS is not allowed to issue leases in sanctuaries, wind energy is prohibited in OCS sanctuary waters. Wave, tidal, and current energy production activities cannot receive MMS leases in sanctuaries beyond three miles. FERC has authority to issue permits and exemptions for those activities in those areas, but the MOU has a clause stating that FERC will not issue a license or exemption if the applicant has not first obtained an MMS lease.[34]

Pursuant to these authorities, wave, tidal, and current energy production activities likely will not occur in the federal waters of sanctuaries. However, an MOU is not a legally binding document. There is no general prohibition of oil, gas, or mineral extraction in sanctuaries, but many of the sanctuaries independently prohibit such activities.

National marine sanctuaries present a significant opportunity for place-based multi-use management in areas of national significance, which could include adequate protections of ocean life, character, and resources. Existing sanctuaries could provide a model for a federal MSP approach. In fact, the Florida Keys National Marine Sanctuary has developed and implemented a comprehensive place-based multi-use management framework. Designation of a sanctuary under the NMSA can be for any number of different reasons, and hence many areas could satisfy the standards necessary for designation and be managed in accordance with an MSP approach.

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[23] 16 U.S.C. § 1433(a).
[24] *Id.* § 1433(a)(1).
[25] *Id.* § 1433(a)(2).
[26] *Id.* § 1433(a)(3)-(4).
[27] *Id.* § 1433(a)(5).
[28] *Id.* § 1437(k).
[29] *See id.* § 1434(a)(4).
[30] 15 C.F.R. § 922.42–.44.
[31] *See* 16 U.S.C. §§ 1436(1), 1441(c)(3).
[32] 16 U.S.C. § 1434(c)(1).
[33] 43 U.S.C. § 1337(p).
[34] Memorandum of Understanding between the U.S. Department of the Interior and Federal Energy Regulatory Commission § II(C), (G)-(H) (Apr. 9, 2009).

However, there are several barriers to using this law for federal MSP in areas not already designated as sanctuaries. First, there is an effective moratorium on new designations. In the 2000 Amendments to the NMSA, Congress prohibited proposing a new sanctuary unless the Secretary has published a finding that "the addition of a new sanctuary will not have a negative impact on the System," and sufficient resources are available to implement the management plans of each sanctuary in the system and inventory the known resources of each sanctuary within ten years.[35] Without amendment to this portion of the Act, it is unlikely that new sanctuaries will be designated. Even if the conditions are met or the law is amended, there is no requirement for the Secretary of Commerce to designate any and the designation process can be arduous; some designations have been the result of Congressional action.

American Antiquities Act

Passed in 1906, the Antiquities Act gives the President the authority to declare as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States."[36] There presently are 100 national monuments, and although marine areas have been designated national monuments since 1961 (Buck Island Reef in the Virgin Islands), the Papahānaumokuākea Marine National Monument (PMNM) in 2006 was the first specifically named a "marine national monument." In 2009, President Bush again exercised this power when he set aside the Rose Atoll Islands and the Pacific Remote Islands Marine National Monuments and the Northern Marianas Islands National Monument.

In a proclamation designating a national monument, the President delegates management authority over the monument to a federal agency or multiple agencies. In the case of the PMNM, the Secretary of Commerce (through NOAA) and the Secretary of the Interior (through FWS) were each given primary authority over certain areas of the monument, with the requirement to consult with the other agency.[37] PMNM is managed as part of the National Marine Sanctuaries Program. Other monuments are administered by the Department of the Interior (National Park Service, Bureau of Land Management, and Fish and Wildlife Service), Department of Agriculture (U.S. Forest Service), the Department of Veterans Affairs, or a combination thereof.

For the most part, use restrictions in national monuments are decided case-by-case, depending on the terms of the proclamation and subsequent management plans. For example, the PMNM proclamation restricts, among other things, fishing (with commercial fishing completely prohibited after 2011), altering submerged lands, and swimming and diving in certain areas.[38]

However, some activities are explicitly prohibited by other statutes. Mineral extraction, including oil and gas drilling, is prohibited in all national monuments in accordance with the Mineral Leasing Act of 1920.[39] MMS is prohibited from issuing a lease, easement, or right-of-way for any alternative energy project within parts of a national monument that extend into its jurisdiction, the Outer Continental Shelf.[40] And FERC is prohibited from permitting, licensing, leasing, or authorizing a hydrokinetic facility or transmission lines in a national monument without specific authority of Congress.[41]

With regard to place-based designations in marine waters, the Antiquities Act offers opportunities for area-based preservation, and could offer opportunities for satisfying preservation designations under a

[35] 16 U.S.C. § 1434(f).
[36] *Id.* § 431.
[37] Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006).
[38] *Id.*
[39] *See* 30 U.S.C. § 181.
[40] 43 U.S.C. § 1337(p).
[41] 16 U.S.C. § 797(a).

federal MSP framework—requiring only an action of the President. The roughly 140,000 square nautical miles of the PMNM suggests that the monuments can cover large areas.

But the Antiquities Act also has limitations for purposes of MSP. The Act states that "the [monument] shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[42] In addition to this explicit size limitation, the Act only applies to federal lands and waters, so including state lands and waters within the boundary of the monument would require cooperation for the monument to be truly successful. The fact that mineral extraction and alternative energy development are prohibited in national monuments reduces the ability to use the law as a tool for comprehensive MSP. Finally, national marine monuments are not required; they are designated at the discretion of the President,[43] and only then are duties of the delegated agency created.[44]

In summary, the numerous rationales available for designating a monument and the expedited fashion with which it can be accomplished make the Antiquities Act an important law for protecting certain marine areas as part of a larger spatial plan, but its use is limited by restrictions on size and use.

Endangered Species Act

The ESA was enacted in 1973 for the purpose of protecting and recovering species on the brink of extinction.[45] Central to accomplishing this objective is conservation of the critical habitats on which species designated as threatened or endangered depend.[46] To this end, when the Secretary of Commerce or the Interior (depending on the species at issue) determines that a species is threatened or endangered, he or she is required to "designate any habitat of such species which is then considered to be critical habitat; and … may, from time-to-time thereafter as appropriate, revise such designation."[47]

The term "critical habitat" is defined in the ESA as:

> (i) the specific areas within the geographical area occupied by the species … on which are found those physical or biological features
>
> (I) essential to the conservation of the species and
>
> (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species … upon a determination by the Secretary that such areas are essential for the conservation of the species.[48]

Specific features to be considered in determining critical habitat include food, shelter, and areas for reproduction.[49] Thus, critical habitats are mandatory, place-based protections for the purpose of species preservation.

A critical habitat is not a preserve or refuge. There are no inherent restrictions on human activities in areas designated as critical habitat, and what limitations do occur apply only to uses affecting the

[42] *Id.* § 431.
[43] *Id.*
[44] The question of whether the President has the authority to abolish a monument has not been resolved, but the Antiquities Act does not expressly delegate to the President the authority to revoke a monument designation, an attorney general's opinion concludes that the President lacks this authority, and no monument has ever been abolished by a President. The President may modify an existing monument and, like many other designations, Congress can abolish a monument. Pamela Baldwin, *Congressional Research Service Report for Congress: Authority of a President to Modify or Eliminate a National Monument* (Aug. 2000).
[45] *See* 16 U.S.C. § 1531.
[46] *Id.* § 1531(b).
[47] *Id.* § 1533(a)(3)(A).
[48] *Id.* § 1532(5)(A).
[49] 50 C.F.R. § 424.12(b).

threatened or endangered species. Critical habitat designations can include detailed information about specific activities that adversely affect a species, but they do not categorically prohibit those activities.

Further, a critical habitat designation affects only those activities carried out, permitted, or funded by federal agencies under Section 7 of the ESA.[50] Section 7 requires all federal agencies to consult with the appropriate agency (NMFS or FWS) to ensure that their activity does not jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat.[51] According to NMFS, "In many cases, the primary benefit of the designation of critical habitat is that it provides specific notification to Federal agencies that a listed species is dependent on a particular area or feature for its continued existence and that any Federal action that may affect that area or feature is subject to the consultation requirements of section 7 of the ESA."[52]

Section 7, and hence critical habitat requirements, does not apply to non-federal activities. In addition, designating critical habitat, or even listing species in the absence of critical habitat designation, has the potential to disrupt the stability of a marine spatial plan since new critical areas or listed species locations might overlap with zones designated for other uses. Although the ESA mandates designation of critical habitats, 74% of listed species still did not have critical habitat designations as of 2005.[53]

For MSP purposes, critical habitat could identify important marine areas and restrict how and possibly what activities are conducted in those areas. Given the limitations to its applicability and impact, however, it likely will not be a significant building block for comprehensive MSP.

Marine Mammal Protection Act

The MMPA was passed in 1972 to protect populations of marine mammals from the adverse effects of man's actions.[54] It prohibits, with certain exceptions, the "take"[55] of marine mammals and importation of marine mammals and marine mammal products into the U.S.[56] The law extends to any person, vessel, or other means of conveyance in state or federal waters or the EEZ and to those subject to the jurisdiction of the U.S. on the high seas.[57] MMPA authority is split between the Secretary of Commerce, through NOAA, and the Department of the Interior.[58] The Secretary of Commerce manages issues concerning cetaceans and pinnipeds, excluding walruses; all other marine mammals, including polar bears, fall under the jurisdiction of the Secretary of the Interior.

The MMPA emphasizes the significance of place-based protection, stating that "efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal."[59] Baur, et al. (2009) suggest that this provision, combined with the rulemaking authority of Section 1382(a) of the MMPA, provides the Secretaries of Commerce and the Interior with the authority to promulgate regulations to protect essential habitats of marine mammals.[60] However, protection of essential habitats is not explicitly required, only recommended. Habitat protections through authority of the MMPA have been attempted only twice, both times in conjunction with critical habitats under the ESA. Essential habitats have been created in Glacier Bay National Park to

[50] *See, e.g.,* Designated Critical Habitat; Steller Sea Lion, 50 Fed. Reg. 45,272 (Aug. 27, 1993).
[51] 16 U.S.C. § 1536(a).
[52] Designated Critical Habitat; Steller Sea Lion, 50 Fed. Reg. 45,272.
[53] Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 CONSERVATION BIOLOGY 399 (2006).
[54] 16 U.S.C. § 1361.
[55] "Take" is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id*. § 1362(13).
[56] *See id.* § 1371(a).
[57] *Id*. § 1372(a).
[58] *Id*. § 1362(12)(A).
[59] *Id*. § 1361(2).
[60] Donald C. Baur, *et. al.*, *Legal Authorities for Ecosystem-Based Management in U.S. Coastal and Ocean Areas*, SP036 ALI-ABA 343 (2009).

protect humpback whales from cruise ships and in parts of Florida to protect manatees from passing boats.[61]

The place-based language of the MMPA is broad enough to advance some aspects of MSP. But its authority over only those uses that affect marine mammals, a lack of agency obligation, and past experience limit the potential utility of this law for purposes of MSP. Essential habitat protections under the MMPA carry greater regulatory authority than critical habitat protections under the ESA. For example, rather than trigger additional consultation when reviewing federal activities, MMPA essential habitat protections can directly regulate actions, including those by state and private parties. Also, the MMPA applies without restriction to any person, vessel, or other means of conveyance in state or federal waters or the EEZ. Thus, essential habitat designations and regulations on uses in essential habitats could be fairly comprehensive.

The fact that there is no obligation on the part of the respective Secretaries to protect essential marine-mammal habitats limits the practical effect of the MMPA. By contrast, critical habitat designations are required under the ESA, and they are still a challenge to develop—most listed species still do not have critical habitat designated.[62] MMPA designations focus on a single species in potentially multiple areas with few congressionally mandated standards for designation, all factors that likely make MMPA place-based authority hard to exercise. In addition, MMPA applies only to uses that affect marine mammals. While many uses potentially affect marine mammals, not all uses do in all cases, reducing the value of the MMPA as a tool for MSP.

The MMPA does contain a provision that mandates quasi-place-based regulations, albeit exclusively for fishing activities. The respective Secretaries, after consultation with the Marine Mammal Commission, must publish a list of fisheries that have frequent, occasional, or no known incidental takings.[63] The owner of each vessel engaged in a fishery with frequent or occasional incidental takes must have an incidental take exemption in order to engage lawfully in that fishery.[64] As defined in the MMPA, a fishery has a geographical, as well as scientific, recreational, economic, and technical element to it.[65] Therefore, there is a place-based aspect of this permitting authority, and it could play a role in overlapping fishing and conservation interests in a federal MSP framework.

Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) establishes a program within the Department of Commerce, implemented by NOAA, that offers cost-sharing grants to coastal states (including the Great Lakes states and U.S. territories) to develop and implement coastal zone management programs.[66] In addition to these financial incentives, the Act authorizes the federal government to delegate "federal consistency review" authority to each coastal state that has an approved coastal management program.[67] Federal consistency review allows states to monitor proposed federal actions and ensure that they are consistent with the

[61] Ellen E. Bolen, Can the Endangered Species Act Keep the Polar Bear (Ursus maritimus) Out of Hot Water? 17 (2007) (unpublished Masters dissertation, Duke University), available at http://dukespace.lib.duke.edu/dspace/bitstream/10161/300/1/MP_eeb10_a_052007.pdf.
[62] Hagen & Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology* 20 Conservation Biology 399 (2006).
[63] 16 U.S.C. § 1383a(b)(1)(A).
[64] *Id*. § 1383(a)(b)(3)(A).
[65] *Id*. § 1362(16)(A).
[66] *See* 16 U.S.C. §§ 1453(1), 1455(a), 1455b(f). For further information on CZMA as it relates to MSP, *see infra* notes 372-385 and accompanying text.
[67] *See id*. §§ 1454, 1456(c)-(d).

enforceable policies of the state's program.[68] Of the 35 states and territories eligible to participate in the Program, 34 have CZM programs.[69]

The CZMA primarily is a delegation of federal authority, through federal consistency review, rather than an elaboration of it. However, it does grant one place-based conservation authority to the federal government: national estuarine reserves. As with other aspects of the CZMA, there is significant federal-state cooperation required in the development and implementation of these estuarine reserves. The Secretary of Commerce may designate an estuarine area as a national estuarine reserve if the governor of the coastal state in which it lies nominates the area.[70] Also, the Secretary must find that: the area is a representative estuarine ecosystem suitable for long-term research, and contributes to the biogeographical and typological balance of the system; the law of the coastal state provides long-term protection for reserve resources; designation will enhance public awareness and provide opportunities for public education; and the coastal state has complied with any regulations issued by the Secretary to implement this section of the CZMA.[71]

The Secretary may make grants to states for acquiring and managing these reserve areas and conducting educational activities, as well as to a state or individual to support research and monitoring.[72] Reserves are managed by a lead state agency or university with input from local partners. In total, the National Estuarine Research Reserve System includes 27 distinct estuarine areas, ranging in size from under 1 square mile to nearly 600 square miles.[73] The estuarine reserves are intended for research and education as well as preservation and restoration purposes.

National estuarine reserves likely would play an important, albeit limited, role in MSP by providing a mechanism for preservation and conservation of key estuarine ecosystems. The reserves are place-based, conservation-oriented, and often significantly limit the use of the area. They offer additional federal authority in the state waters deemed reserves, through research guidelines and the authority to remove the reserve designation. In this way, they can provide a platform for cooperation between federal and coastal state governments. Presumably, existing reserves will be included in a comprehensive MSP program, but their use may be limited because the Secretary is not obligated to designate national estuarine reserves and the reserves are designed for preserving and researching the area rather than managing multiple uses.

ii. Planning and Coordination Requirements

In addition to place-based designations, most federal conservation laws include mandatory and suggested planning activities and coordination with other interested parties, including federal agencies, state and local governments, and private organizations and individuals. These planning and coordination provisions can supplement the place-based designations noted above for purposes of MSP. Likewise, a lack of planning and coordination requirements can reduce the practical influence of even the most comprehensive place-based designations. The more coordination requirements there are in the laws, the more established linkages there are for implementing MSP. Discretionary planning and consultation is helpful, but they do not provide a mechanism to force cooperative activity. In essence, planning and coordination provisions can serve to build relationships and information pathways that can be used to successfully build and implement a federal MSP framework among the many parties that are necessarily involved.

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[68] *See id*. § 1455(c)-(d).
[69] NOAA., *CZMA Federal Consistency Overview* (2007), at 3. The single non-participating state, Illinois, currently is developing its coastal management program.
[70] *See infra* text surrounding notes 608-609.
[71] 16 U.S.C. § 1461(b).
[72] *Id*. § 1461(e)(1).
[73] NOAA, *Reserve Designation Dates, Acreage and Biogeographic Regions*, http://nerrs.noaa.gov/Background_Chart.html (last visited Oct. 6, 2009).

National Marine Sanctuaries Act

The NMSA has several, generally broad, planning and coordination requirements that could support MSP. Explicitly noted in the Act's purposes and policies is the development and implementation of "coordinated plans for the protection and management of these areas with appropriate Federal agencies, State and local governments, Native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas."[74] While this is a general, non-binding objective, the NMSA does require the Secretary of Commerce to develop a management plan for each proposed sanctuary.

The plan must include, among other things, mechanisms to coordinate existing authorities within the sanctuary; goals, objectives, responsibilities, and strategies for managing resources; implementation regulations; and an evaluation of the advantages of cooperative state and federal management, if applicable.[75] There is no specification as to whether a sanctuary should implement single-use or multiple-use management plans and regulations. Some sanctuary plans and regulations, such as those for the Florida Keys National Marine Sanctuary, establish zoning programs that addresses many, if not all, potential uses of the sanctuary. The plans for other sanctuaries are not as comprehensive in scope. Plans must be reviewed every five years.[76]

The NMSA also identifies several avenues of consultation and coordination, some mandatory and others discretionary. When proposing to designate a sanctuary, the Secretary of Commerce must submit notice of the proposal and draft sanctuary designation documents to the House Committee on Resources, the Senate Committee on Commerce, Science, and Transportation, and the governor of each state in which part of the sanctuary would be located.[77] The Secretary must consider a report by either Committee before publishing a notice to designate the sanctuary.[78] If the governor of a state in which the sanctuary would be located certifies to the Secretary that a term or terms of the designation are unacceptable, the unacceptable term(s) will not be effective in the jurisdiction of that state.[79]

Similarly, if any portion of the sanctuary would be located in federal waters, the Secretary of Commerce must allow the appropriate regional fishery management council an opportunity to draft fishing regulations that the council deems necessary to implement the proposed designation.[80] The Secretary also must cooperate with other fishery management authorities with rights or responsibilities in the proposed sanctuary.[81] When making determinations and findings with regard to the proposed sanctuary, the Secretary of Commerce must consult the House Resources Committee; the Senate Commerce, Science, and Transportation Committee; the Secretaries of State, Defense, Transportation, and the Interior, and heads of other interested federal agencies; responsible officials of appropriate state and local government entities; officials from regional fishery management councils that may be affected; and other interested persons.[82]

Other means of consultation and coordination are optional. For example, the Secretary of Commerce may establish one or more advisory councils for the purpose of advising about the designation and management of sanctuaries.[83] Members of the councils may be appointed from federal or state agencies,

[74] 16 U.S.C. § 1431(b)(7).
[75] *Id*. § 1434(a)(2)(C).
[76] *Id*. § 1434(e).
[77] *Id*. § 1434(a)(1)(C).
[78] *Id*. § 1434(a)(6).
[79] *Id*. § 1434(b)(1).
[80] *Id*. § 1434(a)(5).
[81] *Id*.
[82] *Id*. § 1433(b)(2).
[83] *Id*. § 1445a(a).

regional fishery management councils, local user groups, conservation and other public interest organizations, scientific and educational organizations, and other interested parties.[84] In addition, when implementing research, monitoring, evaluation, and education programs in a sanctuary, the Secretary of Commerce may consult with federal, regional, interstate, state, and local agencies.[85] The Secretary also may enter into contracts and other agreements with, or make grants to, state and local governments, regional and interstate agencies, and other individuals to implement the NMSA.[86]

Whether optional or obligatory, the connections with other authorities identified in the NMSA cover most, if not all, of the relevant parties and provide a means for coordination at various stages of sanctuary development and implementation. All of these avenues will be critical if sanctuaries are to play a material role in the federal MSP framework.

Executive Order 13158

President Bill Clinton issued Executive Order (E.O.) 13158 on May 26, 2000. The order called for a strengthened and expanded national system of marine protected areas (MPAs) to better protect the natural and cultural resources of the marine environment.[87] The Department of Commerce and the Department of the Interior are tasked with developing this comprehensive and scientifically based system of marine protected areas. In so doing, they must consult with the Department of Defense, Department of State, U.S. Agency for International Development, Department of Transportation, Environmental Protection Agency, National Science Foundation, and other pertinent federal agencies.[88] The Departments of Commerce and the Interior must share information, tools, and strategies as well as provide guidance to other agencies for the exercise of their respective authorities as they pertain to MPAs.[89] These two agencies also must consult with coastal states, tribes, regional fishery management councils, and other entities as appropriate for coordinating federal, state, territorial, and tribal actions in the establishment and management of MPAs.[90]

Progress pursuant to E.O. 13158 has been slow. The first assessment of where additional MPAs might be sited has only recently been undertaken, nearly ten years after the E.O. was signed. However, the additional lines of inter-agency and inter-governmental communication called for by E.O. 13158 could be helpful in developing and implementing MSP. Furthermore, the E.O. created the Marine Protected Area Center and the Marine Protected Area Federal Advisory Committee, composed of non-federal scientists and resources managers,[91] and this emphasis on science could instill more of an ecosystem-based approach to MPA selection and management and ultimately aid the success of MSP.

Endangered Species Act

The ESA promotes planning and coordination with any party whose activity has the potential to adversely affect endangered and threatened species. The method applied often depends on the party whose activity is at issue. For actions funded, authorized, or carried out by a federal agency, that agency must consult with the Secretary of Commerce or the Interior to ensure that the activity is unlikely to "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse

[84] *Id.* § 1445a(b).
[85] *Id.* § 1440(e).
[86] *Id.* § 1442(a).
[87] Exec. Order No. 13,158, 65 Fed. Reg. 34,909, § 1 (2000).
[88] *Id.* § 4(a).
[89] *Id.*
[90] *Id.* § 4(b).
[91] *Id.* § 4(c), (e).

modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical."[92]

If the Secretary advises that an endangered or threatened species may be present and the activity is a "major construction action" as defined by NEPA, the agency must conduct a biological assessment for the purpose of identifying the potential effects of the activity on any such species and critical habitat likely to be affected.[93] The Secretary must subsequently issue a biological opinion explaining how the agency action would affect the species and critical habitat.[94] If jeopardy or adverse modification is found, the Secretary must, if possible, recommend reasonable alternatives that would not violate the ESA.[95]

For activities that do not involve the federal government, a private party or local or state government can avoid punishment for a "take"[96] of an endangered or threatened species by applying for and receiving an incidental take permit. The take must be incidental in the course of an otherwise lawful activity, and the applicant must submit to the Secretary a conservation plan.[97] The plan must address the likely effects of the taking, the steps the applicant will take to minimize and mitigate those effects, and what alternative actions the applicant considered and why they were not chosen.[98] If the Secretary finds that the activity meets the necessary criteria and the applicant will carry out the plan, the Secretary will issue the incidental take permit, along with terms and conditions as the Secretary deems appropriate.[99]

In addition, the ESA requires the Secretaries of Commerce and the Interior to "cooperate to the maximum extent practicable with the States."[100] The Act also explicitly allows the Secretaries to enter into agreements with any state for purposes of administering and managing any area established to conserve endangered or threatened species.[101]

These planning and coordination requirements in the ESA may not affect all human uses or have the geographical breadth of some other laws, but the applicability of the ESA to all parties makes these requirements potentially important for MSP purposes. Biological assessments and conservation plans could capitalize on and conform to a marine spatial plan, while still meeting ESA requirements, and thus provide support for the implementation of MSP from coastal shores to the seaward limits of the EEZ. Planning could be affected as new species are listed. The ESA's emphasis on state-federal cooperation could offer a mechanism for coordinating management of state and federal waters in the course of developing and implementing a marine spatial plan.

Marine Mammal Protection Act

The MMPA requires two types of plans and several means of coordinating with other federal agencies, states, and private parties. The Secretaries of Commerce and the Interior, depending on the species, must have conservation plans for North Pacific fur seals and Steller sea lions.[102] Both have been completed.[103] They also have an ongoing obligation to prepare such plans as soon as possible for any species or stock

[92] 16 U.S.C. § 1536(a)(2). [Section 7]
[93] *Id*. § 1536(c); 50 C.F.R. § 402.12(b).
[94] 16 U.S.C. § 1536(b)(3)(A).
[95] *Id*.
[96] The ESA defines the term "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id*. § 1532(19).
[97] *Id*. § 1539(a).
[98] *Id*. § 1539(a)(2)(A).
[99] *Id*. § 1539(a)(2)(B).
[100] *Id*. § 1535(a).
[101] *Id*. § 1535(b).
[102] *Id*. § 1383b(b).
[103] Eugene H. Buck, *Congressional Research Service Report for Congress: Summaries of Major Laws Implemented by the National Marine Fisheries Service* (Mar. 1995), available at http://ncseonline.org/NLE/CRSreports/legislative/leg-11.cfm.

designated as depleted, unless the relevant Secretary determines that the plan will not promote the conservation of the species or stock.[104]

The Secretaries also must develop and implement a take reduction plan for each strategic marine mammal stock that interacts with a commercial fishery that frequently or occasionally causes mortality and serious injury across a number of such marine mammal stocks.[105] The Secretaries may develop and implement take reduction plans for non-strategic stocks that interact with commercial fisheries that frequently cause mortality or serious injury to marine mammals.[106] The purpose of take reduction plans is to prevent further depletion of the stocks and assist in their recovery.[107] Take reduction plans for a species or stock listed as threatened or endangered under the ESA must be consistent with any recovery plan developed in accordance with Section 4 of the ESA.[108]

In the course of prescribing regulations necessary to carry out the purposes of the MMPA, the Secretaries of Commerce and the Interior must consult with federal agencies that may be affected.[109] Conversely, other federal agencies are required "to cooperate with the Secretary, in such manner as may be mutually agreeable, in carrying out the purposes of this subchapter."[110]

The Secretaries of Commerce and the Interior may enter contracts, leases, cooperative agreements, or other transactions with any federal or state agency, public or private institution, or other person to implement the MMPA.[111] The Secretaries "may utilize, by agreement, the personnel, services, and facilities of any other Federal agency for purposes of enforcing this subchapter."[112] The Secretaries "may also designate officers and employees of any State or of any possession of the United States to enforce the provisions of this subchapter."[113] The Secretaries must transfer management authority of a marine mammal species to a state under certain conditions.[114]

Like the ESA, the MMPA has limited value for creating a comprehensive MSP framework because of its species-focused restrictions, including geographic limitations based on the range of marine mammals and application only to those human uses that affect marine mammals. However, the MMPA applies to all parties in state as well as federal waters, which strengthens federal influence in state waters and could support cooperation between state and federal authorities for MSP purposes. The MMPA also mandates consultation by the Secretaries of Commerce and the Interior with other federal agencies and demands that those other agencies cooperate.[115] The MMPA authorizes the Secretaries of Commerce and the Interior to use federal and state personnel for enforcement purposes.[116] Further, existing conservation plans and take reduction plans could inform the MSP process and support the implementation of a marine spatial plan.

In sum, these provisions could be used as means of promoting dialogue and fostering agreement at each stage of MSP development and implementation as it applies to proper management of marine mammals. However, challenges with implementing these provisions to date as well as agency motivations to

[104] 16 U.S.C. § 1383b(b).
[105] *Id.* § 1387(f)(1).
[106] *Id*.
[107] *Id*.
[108] *Id*. § 1387(f)(11).
[109] *Id.* § 1382(a).
[110] *Id.* § 1382(b).
[111] *Id.* § 1382(c).
[112] *Id.* § 1377(a).
[113] *Id.* § 1377(b).
[114] *Id*. § 1379(b).
[115] *Id.* § 1382.
[116] *Id.* § 1377.

preserve their authorities could limit the value for MSP of these MMPA planning and coordination requirements.

iii. Summary

Several conservation-oriented federal laws offer opportunities to contribute to a federal MSP framework. National marine sanctuaries and national monuments are place-based designations that allow multiple uses compatible with conservation objectives, and the NMSA and Executive Order 13158 require coordination with most, if not all, authorities relevant to comprehensive MSP. But sanctuaries and monuments cannot themselves provide for comprehensive MSP because select activities are categorically prohibited in sanctuaries and monuments, the standards for designating a sanctuary or monument limit their application to only a portion of the total ocean area, states can retain authority in waters under their jurisdiction within the sanctuary or monument, there is no requirement that sanctuaries or monuments be established, and once established no requirement to undertake MSP.

The ESA requires the designation of place-based habitat protection areas, both the ESA and MMPA apply to all parties conducting any activity in state or federal waters or the EEZ, and they establish strict procedural requirements for numerous other users of marine waters. But the influence of the ESA and MMPA is limited to the species they protect, and the place-based protections of each law have been sparsely implemented.

The CZMA established a place-based estuarine research reserve system that plays a material role in integrating federal and state marine management, but it is not designed to address multiple uses, designation is not mandatory, it is limited to estuarine environments, and a limited number of estuaries have been designated to date.

When viewed as a whole, these conservation-oriented laws could serve as a substantial backbone for MSP. The shortcomings of some, such as geographical limitations, a single-sector focus, and a lack of coordination and planning requirements, are the strengths of others. But to capitalize on the potential contributions of each law toward MSP, the agencies implementing the laws must collaborate. Despite numerous consultation requirements and other means of forcing consensus on marine management, the mandates are insufficient to force unwilling agencies to participate. Willing agencies have tools to craft comprehensive marine protections, if not full multi-use MSP, in federal waters, as well as to significantly influence the management of state waters.

The conservation provisions described in this section reflect several of the characteristics identified by the IOC as necessary for effective MSP:

- ECOSYSTEM-BASED:
  - National marine sanctuaries and national monuments may adopt an ecosystem-based management approach within an individual sanctuary or monument;
- INTEGRATED:
  - NMSA and E.O. 13158 require coordination with most, if not all, authorities relevant to comprehensive MSP;
- AREA-BASED:
  - National marine sanctuaries and national monuments (although select activities are categorically prohibited and states can retain authority over coastal waters);
  - ESA critical habitats;
  - ESA and MMPA activity restrictions; and
  - CZMA estuarine research reserves.

B. Energy Production and Resource Extraction

The seabed of the United States contains oil, gas, and non-energy mineral resources, and ocean waters and winds provide an opportunity for alternative energy development. Some of these resources, such as oil and gas, have been explored and developed for decades. Others, such as alternative energy production, are newly emerging uses. The complex framework that governs these spatially related resources is largely oriented towards maximizing energy production. Nonetheless, there are several opportunities for interagency consultation, federal-state coordination, and environmental considerations.

An important basis for analysis of offshore resources is an understanding of federal versus state rights to offshore areas. The Submerged Lands Act[117] granted states ownership of the seabed out to three miles (except for Texas and the west coast of Florida, which have nine nautical mile boundaries).[118] However, it preserved the federal government's right to navigation, flood control, and power production within state waters as paramount interests.[119] This is an important distinction because many offshore resources and activities are energy-related.

The following section is organized by type of resource—oil and natural gas, alternative energy resources, and non-energy minerals. Within each type of resource, the analysis is organized by statute.

i. Oil and Natural Gas

Deepwater Port Act

The Deepwater Port Act (DPA) offers limited opportunities for MSP. Although it requires a license from the Secretary of Transportation for the ownership, construction, operation, and decommissioning of a deepwater port in federal waters, and for the transportation of oil or natural gas from a deepwater port to the U.S.,[120] the requirements for application approval are limited.

Each applicant must submit a detailed plan to the Secretary of Transportation, including descriptions of the port's proposed location and capacity, storage facilities, pipelines, refineries, and procedures for port construction, operation, and maintenance.[121] The Secretary may issue a license if, among other things, "he determines that the construction and operation of the deepwater port will be in the national interest and consistent with national security and other national policy goals and objectives, including energy sufficiency and environmental quality."[122] At present, national discussions place substantial emphasis on the importance of energy production,[123] including its linkages to national security. On the other hand, the revised ocean policy expected from the Ocean Policy Task Force should become one of the national policy goals and objectives that must be considered in siting decisions, and MSP will likely be an important tool to achieve that goal. Thus the Secretary's discretion in issuing a DPA license could be limited by the requirement that it conform to a federal marine spatial plan.

The Secretary of Transportation is required to designate "safety zones" around deepwater ports and establish pollution prevention procedures. This task has been delegated to the U.S. Coast Guard.[124]

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[117] Submerged Lands Act 43 U.S.C. §§ 1301-1356a.
[118] *Id.* § 1312.
[119] *Id.* § 1311(d).
[120] Deepwater Port Act, 33 U.S.C. §§ 1502(9), 1503(a),(c). Provisions of a lease under OCSLA may release the licensee from decommissioning requirements. *Id.* § 1503(e)(3).
[121] *Id.* § 1504(c)(2).
[122] *Id.* § 1503(c)(3).
[123] *See* discussion of Executive Order 13212, *infra* text surrounding note 138.
[124] *See* 33 C.F.R. § 150.915.

First, the Coast Guard must designate a navigational safety zone around the deepwater port. Before establishing the zone, it must consult with the Secretaries of the Interior, Commerce, State, and Defense.[125] The Coast Guard then delineates what activities are permitted within the zone through regulations—no uses, installations, or structures are allowed that are incompatible with port operation.[126]

Second, the Coast Guard must establish procedures, "with respect to rules governing vessel movement, loading and unloading procedures, designating and marking of anchorage areas, maintenance, law enforcement, and the equipment, training, and maintenance required to" prevent marine pollution, clean up any discharged pollutants, and otherwise prevent or minimize adverse impacts from port construction and operation. The procedures can be established by regulation or through licensees' operations manuals,[127] and apply to all vessels, which the DPA broadly defines as any means of transportation on or through the water.[128] These provisions could be the basis for conforming activities around a deepwater port to a marine spatial plan.

The DPA also requires coordination with and review by other entities.

First, the Secretary of Transportation must consult with the Secretaries of the Army, State, and Defense, and forward a copy of the application to any federal agency or department that has jurisdiction over any aspect of the ownership, construction, or operation of the proposed facility. The other agencies or departments will review it and make a recommendation as to whether the application should be approved (if recommending disapproval, it will be accompanied by their reasoning and explain how the applicant could be brought into legal compliance).[129]

Second, the Act gives the Environmental Protection Agency (EPA) 45 days to inform the Secretary of Transportation whether the application will violate the Clean Air Act, Clean Water Act, or Marine Protection, Research, and Sanctuaries Act.[130] Third, the Secretary of Transportation must submit the application for review to the Governor of the "adjacent" coastal state(s) (any state the port will connect to via pipeline, whose waters are within 15 miles of the proposed port, or that faces equal or greater environmental risk as a state directly connected by pipeline).[131] If the application is inconsistent with state environmental protection, land and water use, or coastal zone management programs, it must be conditioned to bring it into compliance[132]—the laws of the adjacent state apply to the port as long as they are consistent with federal laws and regulations.[133]

The most useful aspect of the Act with regard to MSP lies in the coordination of multiple agencies that occurs during the licensing process. The Secretary of Transportation delegates application processing responsibility to the Maritime Administration (MARAD) and the U.S. Coast Guard. MARAD issues deepwater port construction and operation licenses, while the U.S. Coast Guard establishes the environmental review evaluation criteria.[134]

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[125] 33 U.S.C. § 1509(d).
[126] *Id.*
[127] *Id.* § 1509(a).
[128] *Id.* § 1502(19).
[129] *Id.* § 1504(e)(2).
[130] *Id.* § 1503(c)(6). The National Marine Sanctuaries Act is part of the Marine Protection, Research, and Sanctuaries Act.
[131] *Id.* § 1508(a)(1).
[132] *Id.* § 1508(b)(1).
[133] *Id.* § 1518(b). If the adjacent coastal state (which the port will connect to via pipeline) does not have, or is not developing, a coastal zone management program, then the Secretary of Transportation will not issue the license at all. *Id.* § 1508(c).
[134] Lt. Ken Kusano, *The Deepwater Port Act: Understanding the Licensing Process*, available at http://www.slc.ca.gov/Division_Pages/MFD/Prevention_First/Documents/2004/LNG%20ON%20THE%20WEST%20COAST/Kusano%20paper.pdf (last visited Aug. 31, 2009).

In 2004, ten agencies with relevant regulatory authorities signed a Memorandum of Understanding (MOU) to clarify and expedite the licensing process.[135] The MOU summarized their respective general responsibilities, and then outlined the consultation process for deepwater port license applications. Among other things, it also specified that the Coast Guard and MARAD were the lead agencies for NEPA compliance.[136] The MOU was "intended only to improve the cooperation among the Participating Agencies to expedite decisions on deepwater ports," not "to direct or bind any person outside [of them]."[137] Despite its nonbinding nature, however, the MOU represents a practical method for obtaining interagency cooperation and coordination.

Overall, the DPA provides three useful mechanisms for working toward an MSP framework. First, if MSP is adopted as part of the national ocean policy, it may be one of the national policy goals and objects the Secretary must consider when evaluating a DPA license. Second, MARAD can establish safety zones around deepwater ports and prescribe activities within them. Third, in order to expedite the licensing process, the ten-agency MOU clarifies their responsibilities and pledges compliance with agreed-upon timelines. The consultation required with potentially affected coastal states may improve coordination between state and federal entities, but it also might allow states delay or otherwise complicate the siting of deepwater ports, possibly affecting federal MSP.

Executive Order 13212

Part of the reason for the interagency MOU expediting the DPA licensing process was to ensure consistency with Presidential E.O. 13212. E.O. 13212 established a policy of the George W. Bush Administration that executive departments and agencies take appropriate action to expedite the review of energy-related project permits, or to accelerate their completion, "while maintaining safety, public health, and environmental protections."[138] Although the E.O. does not change any statutory authorities or responsibilities, it encourages agencies to use their discretionary authority to expedite energy production. Thus, if MSP is adopted at the federal level, the President may want to amend or retract this E.O. to encourage a more comprehensive approach to ocean and coastal management, rather than a single-sector focus.

Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act (OCSLA)[139] gives the Department of the Interior jurisdiction over the planning, leasing, permits, easements, and rights-of-way for mineral exploration and development on the Outer Continental Shelf (OCS). The OCS is defined as the submerged federal lands seaward of state coastal waters (3-200 miles offshore in most instances),[140] although the Department may also lease tracts that underlie the federal-state border.[141] The Department assigns its OCSLA responsibilities to the Minerals Management Service (MMS),[142] giving MMS the authority to lease areas of the OCS for activities focused on oil and gas, non-energy minerals including sand and gravel, and, pursuant to the

[135] Memorandum of Understanding Related to the Licensing of Deepwater Ports among the U.S. Departments of Commerce, Defense, Energy, Homeland Security, Interior, State, and Transportation, the U.S. Environmental Protection Agency, the Federal Energy Regulatory Commission, and the Council on Environmental Quality (May 20, 2004), available at http://www.uscg.mil/hq/cg5/cg522/cg5225/docs/dwp_white_house_task_force_energy_streamlining.pdf.
[136] *Id.* § IV.
[137] *Id.* § V(D).
[138] Exec. Order No. 13212, 66 Fed. Reg. 28357, ¶ 2 (2001).
[139] OCSLA, 43 U.S.C. §§ 1331-1356a.
[140] *Id.* § 1331(a). For a description of federal waters and submerged lands, see *supra* note 10.
[141] *Id.* § 1337(g)-(h).
[142] Authority was transferred following the passage of the Federal Oil and Gas Royalty Management Act in 1982. Minerals Management Service, *About the Minerals Management Service: OCS Lands Act History*, http://www.mms.gov/aboutmms/OCSLA/ocslahistory.htm (last visited Sept. 1, 2009).

Energy Policy Act of 2005, alternative energy including wind, solar, and hydrokinetic projects[143] and other activities on existing structures (e.g., potentially aquaculture on former oil rigs).[144]

The oil and gas development process consists of several stages, including lease plan, lease sale, exploration, and production. The most influential stage, and the one that holds the greatest potential for MSP, is MMS' development of oil and gas leasing programs. The five-year leasing programs, which include lease sale schedules, provide an opportunity to incorporate area-wide planning efforts. After the leasing program is established, there are additional opportunities to integrate MSP considerations during the individual lease sale and review of exploration plans and development and production plans.

The leasing program, including the lease sale schedule, is designed according to several principles. First, OCS management should consider the economic, social, and environmental values of the area's renewable and nonrenewable resources, and the potential effects of exploration on other resources and the marine, coastal, and human environments.[145] Second, the timing and location of oil and gas activities should consider, among other things: (i) geographical, geological, and ecological characteristics; (ii) the location of other sea and seabed uses, such as fisheries, navigation, deepwater ports, and other anticipated uses; (iii) the laws and policies of affected states that the state governors identify as relevant; and (iv) the relative environmental sensitivity and marine productivity of different areas.[146]

Third, the timing and location of leasing shall balance potential environmental damage against potential oil and gas resources and potential adverse coastal zone impacts. Finally, leasing activities must assure fair market value for the leases and rights the government conveys.[147] During development of the leasing program, MMS must invite program suggestions from interested federal agencies and affected state governors, and MMS must subsequently review the leasing program annually.[148] In addition, MMS must also establish management regulations, including procedures for handling nominations for areas to be offered for or excluded from leasing.[149] The leasing program is subject to NEPA review.

These requirements offer several opportunities for incorporating MSP considerations. The program must consider "the location of other sea and seabed users," implying that oil and gas development must coexist with these other uses, and the environmental sensitivity of different areas. The program must also be reviewed annually, providing a venue for adaptability to changing circumstances. Therefore it may be possible to incorporate MSP-oriented considerations, such as apportioning areas for different uses based on tradeoffs, directly into the leasing process.

The need for more than a superficial environmental analysis was recently affirmed by the D.C. Circuit. Although MMS is given leeway in its decision-making, the Court invalidated a leasing program based on an insufficient analysis.[150] MMS had established a five-year offshore leasing program for Alaska in 2007, but the court found that the agency had not fulfilled its duty to consider "the relative environmental sensitivity . . . of different areas of the [OCS]."[151] MMS had relied exclusively on a NOAA shoreline environmental sensitivity study to complete its assessment, and the court found that inadequate. Because the environmental sensitivity analysis was insufficient, the court also found that the balancing of potential environmental damage, oil and gas discovery, and adverse coastal zone impacts was improper.[152]

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[143] *See infra,* Alternative Energy—Outer Continental Shelf Lands Act, text surrounding notes 178-189.
[144] Energy Policy Act of 2005, Pub. Law 109-58, § 388(a) (amending OCSLA § 8(p)(1)). *See infra* text surrounding note 215.
[145] 43 U.S.C. § 1344(a).
[146] *Id.*
[147] *Id.*
[148] *Id.* § 1344(c)-(e).
[149] *Id.* § 1344(f).
[150] Center for Biological Diversity v. U.S. Department of the Interior, 563 F.3d 466 (D.C. Cir. 2009).
[151] 43 U.S.C. § 1344(a)(2)(G).
[152] 563 F.3d at 488.

Although the minimum threshold of environmental analysis remains unclear, the court decision indicates that the provisions in question are not to be treated superficially.

The second stage of oil and gas activity on the OCS is MMS' solicitation of sealed competitive bids and subsequent issuance of leases to the highest bidder. Before a lease is sold, MMS conducts a study of the lease area to assess and manage environmental impacts on the human, marine, and coastal environments; the studies are then supplemented as needed. MMS must submit an assessment of the cumulative impacts of all leases on the human, marine, and coastal environments every three years.[153] The first cumulative effects assessment, which was submitted to Congress in 1988, provided a retrospective look at the environmental effects of oil and gas activities between 1954 and 1987. Reports have been submitted more frequently since then.[154] As with the leasing program environmental analysis mentioned above, the area studies offer a chance to inject management mechanisms into the oil and gas development process. The triennial cumulative impacts assessments provide a source of much-needed information on the OCS.

The third stage, exploration, includes an untried but potentially useful opportunity. All geological, geophysical, and other exploratory activities must be conducted pursuant to an exploration plan. The only exception is for preliminary activities that do not cause adverse impacts, do not go further than 500 feet into the OCS seabed, and are done in order to prepare an exploration or development plan.[155] The exploration plan details the scheduled activities, equipment, location of planned wells, and other relevant information.[156] MMS' regulations specify that the lessee shall submit, among other things, supporting information regarding the onsite flora and fauna, including endangered species and critical habitats; onshore and offshore environmentally sensitive areas; and an assessment of direct and cumulative onshore and offshore effects likely to result from the exploration.[157]

MMS will approve an exploration permit if doing so "will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance."[158] Therefore, although limited to the exploratory activities themselves, the exploration plan approval process may provide a mechanism by which to restrict geological and geophysical exploration to protect aquatic life, historical objects, and other activities—a mechanism to incorporate multiple-use considerations.

The fourth stage is the approval of the lessee's oil and gas development and production plan. Outside of the central and western planning areas of the Gulf of Mexico,[159] a development and production plan must be submitted within five years of lease issuance or the lease will be canceled.[160] The plan must detail the lessee's planned work, environmental and safety standards, and other information required by DOI regulation.[161] MMS will review the plan and, if approval is found to be a major Federal action in

[153] 43 U.S.C. § 1346(a)-(b), (e). An oil and gas lease is usually issued for a tract smaller than 5,760 acres, and for not more than 10 years. *Id.* § 1337(b).
[154] Maureen A. Bornholdt & Eileen M. Lear, *Outer Continental Shelf Oil and Natural Gas Resource Management Program: Cumulative Effects 1992-1994*, U.S. Department of the Interior, Minerals Management Service, OCS Report MMS 97-0027 (1997); Maureen A. Bornholdt & Eileen M. Lear, *Outer Continental Shelf Natural Gas and Oil Resource Management Program: Cumulative Effects 1987-1991*, U.S. Department of the Interior, Minerals Management Service, OCS Report MMS 95-0007 (1995); Jeffrey P. Zippin, *Environmental Assessment for Exclusive Economic Zone Mineral Development Activities; the Lessons Learned from Offshore Oil and Gas Development*, *in* OCEAN RESOURCES, VOL. I 321–22 (D.A. Ardus & M.A. Champ, eds., 1990); William Van Horn *et al.*, *Outer Continental Shelf Oil and Gas Program: Cumulative Effects*, U.S. Department of the Interior, Minerals Management Service, OCS Report MMS 88-0005 (1988).
[155] 43 U.S.C. § 1340(B); 30 C.F.R. § 250.200-.201.
[156] 43 U.S.C. § 1340(b)-(c).
[157] 30 C.F.R. § 250.203(b).
[158] 43 U.S.C. § 1340(g)(3).
[159] In the central and western planning areas of the Gulf of Mexico, a development operations coordination document (DOCD) is submitted instead of a Development and Production Plan. *See* 30 C.F.R. § 250.204(d)(1); MMS, *Leasing Oil and Natural Gas Resources—Outer Continental Shelf*, at 29, available at http://www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf (last visited [DATE]).
[160] 43 U.S.C. § 1351(h)(2)(c).
[161] *Id.* § 1351(a)-(c).

accordance with NEPA, will give the draft EIS to the Governor of an affected state and to any local government that requests it.[162]

MMS will not approve a plan that would threaten national security or defense.[163] Also, if exceptional circumstances will "probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), . . . or to the marine, coastal or human environments," MMS will only approve the plan if the threat will decrease within a reasonable timeframe and the advantages of approval outweigh the disadvantages.[164] Although it incorporates ecological considerations into the approval process, this review stage does not offer significant opportunities for implementing part of an MSP framework.

Regarding federal-state interaction, MMS will not approve a plan, license, or permit that will affect land or water uses of an adjacent coastal zone with an approved coastal zone management program, absent state concurrence with a consistency finding.[165] If the development and production plan includes natural gas activities, the lessee must also submit the plan to FERC.[166] Within 60 days of a proposed lease sale or development and production plan, the governor or executive of an affected state or local government can submit recommendations to MMS about its size, timing, or location. If they "provide a reasonable balance between the national interest and the well-being of the citizens of the affected State," MMS will accept the recommendations. MMS can also enter into cooperative agreements with states affected by leasing activities, which among other things may include sharing of information, joint planning and review, and joint surveillance and monitoring arrangements to enforce state and federal laws and regulations.[167]

Under OCSLA, the Secretary of the Interior has the authority (delegated to MMS) to grant rights of way through the submerged lands of the OCS to transport oil, natural gas, and minerals through pipelines under prescribed regulations and conditions, including maximum environmental protection through the use of the best available and safest technologies. Rights-of-way can be granted regardless of whether the lands are already included in a lease.[168] The Department of Transportation's Office of Pipeline Safety can implement safety standards for all pipeline transportation and facilities, although the Coast Guard sets LNG marine transfer safety standards.[169]

The Act also specifically provides for the reservation of certain lands and rights. One such right is the President's authority to withdraw any unleased lands on the OCS from disposition.[170] Numerous executives have used this authority. In 1990 President George H.W. Bush withdrew the majority of the OCS (excluding areas offshore of Texas, Louisiana, and Alabama) from oil and gas development through 2000. The moratorium was incorporated by reference and extended to 2012 by President Bill Clinton in 1997, but then lifted by President George W. Bush in 2008.[171] Despite the breadth of their authority, it is important to note that the right only extends to withdrawing the lands "from disposition." Therefore planning, studies, and exploration can still continue. A congressional moratorium, on the other hand, could extend to such activities.[172]

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[162] *Id.* § 1351(e)-(g).
[163] *Id.* § 1351(h)(1)(C).
[164] *Id.* § 1351(h)(1)(D).
[165] *Id.* § 1351(d).
[166] *Id.* § 1351(k). MMS and FERC will then jointly decide which will be the lead NEPA agency.
[167] *Id.* § 1345.
[168] *Id.* § 1334(e).
[169] *Id.* DOT's authority comes from the Natural Gas Pipeline Safety Act. The Coast Guard's authority stems from the Ports and Waterways Safety Act of 1972.
[170] 43 U.S.C. § 1341(a).
[171] Adam Vann, *Congressional Research Service Report for Congress: Offshore Oil and Gas Development: Legal Framework* (May 2007), at 4-7; Marc Humphries, *Congressional Research Service Report for Congress: Outer Continental Shelf Leasing: Side-by-Side Comparison of Five Legislative Proposals* (Sept. 2008), at 1-3.
[172] Vann, *Offshore Oil and Gas Development*, *supra* note 171, at 4-7.

In sum, OCSLA requires balancing the benefits of resource extraction versus the harm incurred, including substantial consideration of the potential environmental and social impacts of oil and gas development. A possible avenue for siting oil and gas activities as part of a comprehensive MSP framework is found in one of the planning requirements for offshore oil and gas leasing programs: during designation, MMS must consider the location of other sea and seabed uses, such as fisheries, navigation, deepwater ports, and other anticipated uses. To date this promise has not been fulfilled, due in part to the national emphasis on energy production in recent years as evidenced by E.O. 13212.

Natural Gas Act

The Natural Gas Act (NGA), originally passed in 1938, gave FERC authority over the interstate transportation or sale and the import or export of natural gas.[173] Federal approval is required to import or export natural gas, which will be given as long as the action is consistent with the public interest.[174]

FERC approval is required for the siting, construction, expansion, and operation of onshore or offshore natural gas facilities.[175] When considering an onshore or offshore liquefied natural gas (LNG) facility application, FERC must consult with the designated agency of the state in which the terminal has been proposed regarding state and local safety. In addition to others, state and local safety considerations include "the natural and physical aspects of the location."[176] The applicant also must submit to FERC an environmental report that includes, among many other things, an assessment of potential direct, indirect, and cumulative effects of the project, as well as proof of consultation with the U.S. Fish and Wildlife Service and various historic preservation entities.[177] While not comprehensive, these considerations likely would promote compliance with a marine spatial plan.

As discussed previously, LNG terminals in federal waters also involve other agencies and laws, including the U.S. Coast Guard (under the Deepwater Port Act and Ports and Waterways Safety Act), the Department of Transportation's Maritime Administration (under the Maritime Transportation Security Act).

ii. Alternative Energy

Outer Continental Shelf Lands Act

MMS is responsible for leasing the OCS for alternative energy uses, including wind, tidal, and wave facilities, and the use of decommissioned offshore oil and gas platforms.[178] The Energy Policy Act of 2005 granted the Secretary of the Interior authority to "grant a lease, easement, or right-of-way on the Outer Continental Shelf . . . if those activities . . . produce or support production, transportation, or transmission of energy from sources other than oil and gas."[179] The agency cannot, however, approve such energy-related activities on the OCS to take place in a National Park, National Wildlife Refuge, National Marine Sanctuary, or National Monument.[180]

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[173] Natural Gas Act, 15 U.S.C. § 717(b).
[174] *Id.* §§ 717(a), 717b(a). The public interest element was based on findings (informed by reports by the Federal Trade Commission and others) that the transport and sale of natural gas was a matter of public interest, and thus that federal regulation of such matters was necessary in the public interest. *Id.* § 717(a). There is no specific definition of what constitutes the public interest.
[175] *Id.* § 717b(e). The definition of LNG terminal includes "all natural gas facilities located onshore or in State waters." *Id.* § 717a(11).
[176] *Id.* § 717b-1(b)(4).
[177] 18 C.F.R. §§ 153.8(7), 380.12.
[178] For a discussion of the relationship between FERC licensing and MMS leasing, *see infra* notes 215–218 and accompanying text.
[179] Energy Policy Act of 2005, Pub. Law 109-58, § 388(a) (amending OCSLA § 8(p)(1)). The leases must be granted by a competitive sealed bidding process, unless after public notice MMS finds no competitive interest. MMS, *Guidelines for the Minerals Management Service Renewable Energy Framework* (July 2009), at ch. 4(B), available at http://www.mms.gov/offshore/RenewableEnergy/PDFs/REnGuidebook_03August2009_3_.pdf.
[180] 43 U.S.C. § 1337(p)(10).

In April 2009, MMS released new regulations for alternative energy development on the OCS, and in July 2009 it issued the first portion of associated guidelines (five chapters forthcoming).[181] Unlike with oil and gas, there is no initial planning process to identify the lease area. MMS alternative energy leases can be granted via a competitive or noncompetitive process, depending on whether the Secretary determines there is competitive interest in a site. Regardless, after the lease is granted the lessee must submit a site assessment plan (within six months for a competitive lease, or at the start of a noncompetitive one) and a construction and operation plan (within five years for either). Among other things, both plans must show that the planned activities conform to all applicable laws, do not unreasonably interfere with other OCS uses (including national defense and security), and do not cause undue harm or damage to natural resources, life, property, environment, or historically or archaeologically significant sites.[182] There is a 25-year limit on commercial leases to produce, sell, and deliver alternative energy, and a five-year limit on limited leases for testing renewable energy production technology and for site assessment.[183]

An opportunity for coordinating multiple uses within an area arises in the OCSLA requirement that non-oil-and-gas energy-related mining and exploration activities be carried out in a manner that protects the environment, prevents waste, and conserves the natural resources of the OCS.[184] The activities must not interfere with reasonable uses of the EEZ, high seas, and territorial seas, and must consider other leases, easements, right-of-ways, or any other use of the sea or seabed (such as for a fishery, sea lane or navigation, or a deepwater port).[185] These provisions provide a basis for making tradeoffs regarding the siting of an alternative energy facility or another use in an area. In addition, the activities must be coordinated with relevant federal agencies and protect U.S. national security interests.[186] MMS must consult and coordinate with the governor or executive of any state or local government that might be affected by the lease, easement, or right-of-way.[187]

Probably the most notable aspect of MMS' alternative energy authority is that the agency explicitly anticipates MSP and the interagency coordination it will require. The agency's regulations include a list of its responsibilities under OCSLA as amended by the 2005 Energy Policy Act. Among other things, MMS is to ensure that authorized activities provide for "[c]oordination with relevant Federal agencies (including, in particular, those agencies involved in planning activities that are undertaken to avoid conflicts among users and maximize the economic and ecological benefits of the OCS, including multifaceted spatial planning efforts)."[188] This requirement is repeated when MMS addresses whom it will coordinate and consult with before issuing a lease; MMS will also consult with the governor of affected states, the executive of affected local governments, and affected Indian tribes.[189]

[181] Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638 (Apr. 29, 2009); MMS Renewable Energy Guidelines, *supra* note 179.
[182] 30 C.F.R. § 285.605-6, 620-1. For a complete list of submission requirements, see *id.* §§ 285.610-11, 285.626-627. A Site Assessment Plan for a commercial lease describes the project proponent's planned activities, and must include physical characterization and baseline environmental surveys. A Construction and Operation Plan describes proposed construction, operation, and decommissioning plan. *Id.* §§ 285.605, 620.
[183] 30 C.F.R. § 285.235-236; MMS Renewable Energy Guidelines, *supra* note 179, ch. 4(A); Energy Policy Act of 2005, *supra* note 179, § 388 (amending OCSLA § 18(p)); MMS-FERC MOU, *supra* note 34. A ROW is granted for the installation of cables, pipelines, and associated facilities that transmit or transport a renewable energy resource product not associated with a single OCS lease, while a RUE is granted for installations that support the production, transportation, or transmission of a renewable energy resource product not associated with a single OCS lease. 30 C.F.R. § 285.112; MMS, Workshop on the Outer Continental Shelf Renewable Energy Regulatory Framework (June 4, 2009), available at http://www.mms.gov/PDFs/DCworkshop060409.pdf
[184] 43 U.S.C. § 1337(p)(4).
[185] *Id.* § 1337(p)(4)(I)-(J).
[186] *Id.* § 1337(p)(4)(E)-(F).
[187] *Id.* § 1337(p)(7).
[188] 30 C.F.R. § 285.102.
[189] *Id.* § 285.203.

Federal Power Act

Under the Federal Power Act, FERC has authority to issue licenses for hydrokinetic projects in state and federal waters.[190] As with MMS alternative energy leasing, there is no required planning process that results in federal designation of areas for hydrokinetic energy licensing. That said, the Federal Power Act does offer one mechanism to link hydrokinetic licensing to a federal MSP framework—the requirement that projects be best adapted to a comprehensive plan.

When deciding whether to issue a license for a hydrokinetic project under the FPA, FERC shall:

> in addition to the power and development purposes for which licenses are issued, [ ] give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.[191]

This broad statement sets up a requirement to consider the ecological and social impacts of hydropower projects. Although "equal consideration" has not been interpreted to require "equal treatment" of development and non-development values, both factors must receive the same reflection and evaluation.[192] The statute explicitly mandates consideration of multiple uses: energy production, fish and wildlife, and recreation, while preserving environmental quality.

Those wishing to develop a hydrokinetic project within state waters can first obtain a preliminary permit, which grants the developer priority status at the site and the opportunity to study it further for up to three years; in FERC's words, "while an entity holds a preliminary permit for a project site, no other entity may file a permit or license application, and should the permit holder file a license application before the permit expires, the Commission will prefer an application from the permit holder to that of a competitor, all else being equal."[193] The preliminary permit process only requires the applicant to submit a description of the site, project, planned field studies (taking into consideration environmental impacts), and legal authorities and designations at the proposed site.[194] In 2008 FERC issued an order on rehearing related to two preliminary permits issued in Northern California, which stated that "[b]ecause the issuance of a [preliminary] permit can have no environmental impacts, there are few reasons for the Commission to deny a permit application."[195] Therefore the permit grants the holder priority without requiring significant examination. However, FERC has agreed not to issue preliminary permits within the OCS, per the FERC/MMS MOU.[196]

Next, the developer can apply for a 30-50 year license via one of three licensing processes—Integrated Licensing Process (ILP), Traditional Licensing Process (TLP), or Alternative Licensing Process (ALP)—or apply for a short-term license for a hydrokinetic pilot project.[197] FERC made ILP the default licensing

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[190] For a discussion of the relationship between FERC licensing and MMS leasing, *see infra* notes 215 and accompanying text.
[191] Federal Power Act, 16 U.S.C. § 797(e).
[192] *See* Environmental Law Institute, Mitigation of Impacts to Fish and Wildlife Habitat: Estimating Costs and Identifying Opportunities 86 (2007) (citing FERC, Report on Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000 (2001) at 7-8, 10); FERC, Handbook for Hydroelectric Project Licensing and 5 MW Exemptions From Licensing 2-24 (2004).
[193] 16 U.S.C. §§ 797(f), 798, 800; FERC, Order on Rehearing: Pacific Gas and Electric Co., Projects Nos. 12781-001, 12781-002, 12779-001, and 12779-002, 125 FERC ¶ 61,045, ¶ 24 (Oct. 16, 2008).
[194] 16 U.S.C. §§ 797(f), 798, 800.
[195] FERC Order on Rehearing: Pacific Gas and Electric Co., *supra* note 193, at ¶ 26 (citing Dan L. Hansen, 120 FERC ¶ 61,069, at p.8 (2007) (explaining that "the question of whether it would be in the public interest to authorize a project . . . is premature at the preliminary permit stage").
[196] 16 U.S.C. §§ 797(f), 798, 800; MMS-FERC MOU, *supra* note 216.
[197] FERC, Licensing Hydrokinetic Pilot Project (2008), at 5, available at http://www.ferc.gov/industries/hydropower/indus-act/hydrokinetics/pdf/white_paper.pdf.

procedure, unless the applicant applies to FERC to use an alternative procedure via the steps outlined in 18 C.F.R. § 4.34(i). The ILP offers an avenue to obtain comprehensive information about the proposed project area.

Under ILP, the license applicant must prepare what is known as an "Exhibit E." Exhibit E provides the basis for FERC to approve, reject, or conditionally approve permit applications based on environmental impacts. An environmental exhibit includes a general description of the river basin—or, presumably, the marine environment—as well as cumulatively affected resources, applicable laws, project facilities and operations, and the applicant's proposed actions and action alternatives.[198] It should have the form and contents of an environmental assessment,[199] and discuss the project's compliance with the Clean Water Act Section 401, Endangered Species Act, Magnuson-Stevens Fishery Conservation and Management Act, Coastal Zone Management Act, National Historical Preservation Act, Pacific Northwest Power Planning and Conservation Act, and Wild and Scenic Rivers and Wilderness Acts.[200] The application must also explain why the project would comply with a relevant comprehensive plan (see below).[201]

If an application is generally found not to conform with ILP pre-filing consultation and filing requirements, including an acceptable Exhibit E, the Office of Energy Projects Director will notify the applicant within 30 days, who then has 90 days to revise and resubmit. If the application is still deficient, it will be rejected.[202] If the application is patently deficient, the applicant may not be given the opportunity to resubmit.[203]

In addition to the conditions that apply to all issued licenses, if the hydrokinetic activity is located within a reservation the license may be subject to additional conditions.[204] The FPA definition of "reservations" includes not just tribal lands in Indian reservations, but also national forests, military reservations, other federally owned lands and interests "withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws," and lands and interests held for any public purposes.[205] The definition specifically includes national monuments and national parks, and FERC has previously held that national marine sanctuaries qualify as reservations.[206] The designation is important because in order to issue a license in a reservation, FERC must find that "the license will not interfere or be inconsistent with the purposes for which such reservation was created or acquired."[207] In addition, the license will be subject to conditions that the supervising agency "deem[s] necessary for the adequate protection and utilization of such reservation."[208] Thus FERC may have additional discretion to prioritize preservation and implement conditions when considering applications for hydroelectric projects within national monuments, parks, and marine sanctuaries.

One of the strongest MSP-related provisions in the FPA lies in FERC's authority to require each project be "best adapted to a comprehensive plan" for improving waterways for interstate or foreign commerce, improving water-power development, protecting and enhancing fish and wildlife, and other beneficial public uses. FERC must consider the extent to which the project is consistent with existing comprehensive plans developed by federal and state agencies (of the state in which the project is

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[198] 18 C.F.R. § 5.18(b); *see also* FERC, Handbook for Hydroelectric Project Licensing, *supra* note 192, app. D.
[199] FERC, Hydropower: Licensing—Matrix Comparing Three Processes, http://www.ferc.gov/industries/hydropower/gen-info/licensing/matrix.asp (last visited Sept. 2, 2009).
[200] 18 C.F.R. § 5.18(b)(3).
[201] *Id.* § 5.18(d).
[202] *Id.* § 5.20(a).
[203] *Id.* § 5.20(b).
[204] 16 U.S.C. § 797(e).
[205] *Id.* § 796(2).
[206] Finavera Renewables Ocean Energy, 121 FERC ¶ 61,288 *at* ¶ 23 n26 (Dec. 21, 2007) (Order Issuing Conditioned Original License) (citing AquaEnergy Group LTD, 102 FERC ¶ 61,242 at ¶ 14 (2003)).
[207] 16 U.S.C. § 797(e).
[208] *Id.*

proposed). It must also consider the recommendations of federal and state agencies involved in flood control, navigation, irrigation, recreation, and cultural and other relevant resources, and the recommendations of affected Indian tribes.[209] FERC may then decide whether to require project modifications. This provision could provide a mechanism for making sure FERC-approved projects comply with a comprehensive federal or state-based MSP framework.

The comprehensive plan provision is playing out in Oregon's state waters, where FERC and the state have entered into a MOU and agreed to coordinate environmental reviews and licensing of wave energy facilities. Oregon is developing a comprehensive plan for wave energy siting in state waters as part of its territorial seas plan, and the MOU states that "[i]f Oregon develops and files with the Commission a comprehensive plan . . . for the siting of wave energy projects in the Territorial Sea of Oregon under section 10(a)(2)(A)(ii) of the FPA and 18 C.F.R. § 2.19," then FERC will consider whether a preliminary permit, pilot project license, or other license application for a wave energy project in Oregon's state waters is consistent with that plan.

In addition, if pursuant to FPA Section 10(a)(3) Oregon proposes any terms and conditions in order to make consistency with the comprehensive plan certain, FERC will consider them. The MOU does not specify what such "consideration" entails or requires. The MOU also recognizes that Oregon may seek plan approval under the CZMA, which would independently require FERC decisions to be consistent with it.[210] However, the MOU is not a legally binding document and can be dissolved by either party with thirty days' notice.[211] FERC has similar coordination MOUs with Washington, for all hydrokinetic activities, and Maine, for tidal energy projects.[212]

Finally, the FPA contains consultation requirements. FERC must consult and coordinate with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and state fish and wildlife agencies. If FERC does not include in the issued license any recommendations for fish and wildlife protection, mitigation, and enhancement that the agencies issue during the public comment period, it must publish a statement of its reasons and explanation for why its alternate conditions satisfy the Act.[213] Beyond simple recommendations, the Departments of the Interior and Commerce can also prescribe fishways—physical structures, facilities, and devices that allow safe and timely upstream and downstream fish passage.[214]

Outer Continental Shelf Lands Act & Federal Power Act: MMS-FERC MOU

MMS has sole jurisdiction to issue leases, easements, and rights-of-way for wind, solar, other non-hydrokinetic, and *federal* hydrokinetic energy projects on the OCS. Under the Federal Power Act, FERC has jurisdiction to license non-federal hydrokinetic energy projects in state and federal waters, which includes "[p]rojects that generate electricity from waves or directly from the flow of water in ocean currents, tides, or inland waterways."[215]

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[209] *Id.* § 803(a)(1)-(2); 18 C.F.R. § 2.19.
[210] Memorandum of Understanding between FERC and the State of Oregon by and through its Departments of Fish and Wildlife, Land Conservation and Development, Environmental Quality, State Lands, Water Resources, Parks and Recreation, and Energy ¶ 5 (Mar. 2008).
[211] *Id.* ¶ 10.
[212] Memorandum of Understanding between FERC and the State of Maine by and through its Governor and Departments of Conservation, Environmental Protection, Inland Fisheries and Wildlife, and Marine Resources, State Planning Office, and Governor's Office of Energy Independence and Security (Aug. 13, 2009); Memorandum of Understanding between FERC and the State of Washington by and through its Departments of Ecology, Fish & Wildlife, Natural Resources, Community Trade and Economic Development, and State Parks and Recreation Commission, and the Governor's Office of Regulatory Assistance, available at http://www.ferc.gov/legal/maj-ord-reg/mou/mou-wa.pdf (last visited Oct. 7, 2009).
[213] 16 U.S.C. § 803(a)(j); 18 C.F.R. § 4.34(b).
[214] 16 U.S.C. § 811.
[215] FERC, Industries: Hydropower—Industry Activities, Hydrokinetic Projects, http://www.ferc.gov/industries/hydropower/indus-act/hydrokinetics.asp (last visited Sept. 1, 2009); Order on Rehearing: Pacific Gas and Electric Co., Nos. 12781-001, 12781-002, 12779-001, and 12779-002, 125 FERC ¶ 61,045, ¶ 56 (FERC, Oct. 16, 2008); Order Denying Rehearing: Makah Bay Ocean Wave Energy Pilot Power Plant, No. DI02-3-001, 102 FERC ¶ 61,242, ¶ 12 (Feb. 28, 2003).

This concurrent jurisdiction in federal waters led to the formulation of a MOU between MMS and FERC in April 2009.[216] The MOU clarifies the agencies' understanding of their jurisdiction over offshore renewable energy projects. It specifies that MMS has sole jurisdiction over non-hydrokinetic renewable energy projects on the OCS. As for hydrokinetic projects, MMS has jurisdiction to issue leases, easements, and rights-of-way on the OCS, while FERC has jurisdiction to issue licenses and exemptions in federal and state waters. While FERC will issue preliminary permits in state waters, it has agreed not to issue preliminary permits for hydrokinetic projects on the OCS. MMS agreed to make its OCS hydrokinetic leases, easements, and rights-of-way contingent on subsequently receiving a license or exemption from FERC, while FERC agreed it would not issue a license or exemption in waters under MMS jurisdiction if the applicant has not obtained an MMS lease, easement, or right-of-way.[217] MMS conducts any necessary environmental assessments, such as those required by NEPA, for any leases, easements, or rights-of-way it issues, while FERC can choose to become a cooperating agency; FERC conducts such assessments for any licenses or exemptions it issues, and MMS can likewise choose to become a cooperating agency.[218]

Overview

In sum, there are several applicable frameworks for marine alternative energy, each of which could provide mechanisms to support an MSP framework:

(1) Non-hydrokinetic alternative energy projects (e.g. wind and solar energy) on the OCS are subject to two requirements that bear on MSP. First, alternative energy activities cannot be approved within a national park, national wildlife refuge, national marine sanctuary, or national monument.[219] Second, OCSLA contains a number of consultation requirements. In addition to consulting and coordinating with affected governors, executives of affected local governments, and affected Indian tribes, MMS' regulations recognize the need to coordinate with relevant federal agencies, especially those involved in conflict-avoidance efforts such as spatial planning.

(2) Nonfederal hydrokinetic activities (wave, tidal, and current energy) on the OCS are subject to both MMS' leasing provisions and FERC's licensing provisions under the FPA. Three elements of this legal framework could support MSP. Of greatest relevance, the FPA requires a project to be best adapted to an applicable comprehensive plan for public benefit; such a comprehensive plan could in fact be an MSP framework. FERC's Integrated Licensing Process includes an environmental review similar to NEPA's Environmental Assessment process (in addition to NEPA requirements), and applicants are explicitly required to describe cumulatively affected resources and the project's compliance with a number of federal laws. Finally, the FPA requires FERC to consult with and consider recommendations related to protection, mitigation and enhancement from state fish and wildlife agencies, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

(3) In addition to the other FPA provisions, nonfederal hydrokinetic activities in state waters are similarly subject to FERC's Integrated Licensing Process, but applicants are able to obtain priority consideration through the minimal requirements of the Preliminary Permit process. Although it grants the permit-holder priority during the FERC licensing process, the preliminary permitting process does not involve significant substantive analysis.

[216] MMS-FERC MOU, *supra* note 34.
[217] *Id.* § II(C), (G)-(H).
[218] *Id.* § II(B), (D).
[219] *See supra* text surroundings notes 39–41.

iii. Summary

The resource extraction sector is managed according to multiple laws. Several provisions could be used to further MSP as it applies to this sector. The relevant laws do list a number of required consultations and environmental considerations, and they are more area-based than is true for other ocean use sectors. All of these may potentially be tools for MSP. Pushing in the other direction, however, is text encouraging the maximization of energy production.

The best tool for incorporating the oil and gas sector into an MSP framework is found in the planning requirements for offshore oil and gas leasing programs. When developing the leasing program, MMS must consider the location of other sea and seabed uses, such as fisheries, navigation, deepwater ports, and other anticipated uses.

The best tool for incorporating the hydrokinetic energy sector into an MSP framework is the Federal Power Act requirement that the project must comply with a comprehensive plan for public benefit in the area, which could be a marine spatial plan should it be created.

From a planning perspective, although there are a number of required ecological and human use considerations in decision-making, the agencies have significant discretion in how to apply or balance them with other factors. For oil and gas, the D.C. Circuit recently affirmed the requirement that the environmental assessment cannot be insubstantial, but it also excluded the impact of oil and gas consumption from that assessment. Also, E.O. 13212 still tasks agencies with expediting the authorization and production of energy resources, which stimulates findings that the benefits of oil and gas extraction outweigh its harm.

In addition to site designation for oil and gas and the need to consider ecological and human uses, the energy sector is often explicitly excluded from engaging in activities in some ocean regions. Offshore alternative energy's statutory and regulatory interaction with conservation areas is complex (see Table 3). MMS cannot issue alternative energy leases, easements, or rights-of-way within a national park, national wildlife refuge, national marine sanctuary, or national monument. Oil and gas activities are only statutorily excluded from national monuments and national parks, although on a case-by-case basis Congress has typically also excluded them from national marine sanctuaries during the designation process. FERC can license hydrokinetic projects in national marine sanctuaries and national wildlife refuges but is excluded from doing so within the federal waters of national monuments or national parks absent congressional authorization.

Table 3. Energy-Related Activities Excluded from Federal Conservation Areas

Oversight Entity	National Monument	National Marine Sanctuary	National Park	National Wildlife Refuge
MMS	Non-hydrokinetic alternative energy	Non-hydrokinetic alternative energy	Non-hydrokinetic alternative energy	Non-hydrokinetic alternative energy
MMS	Oil and gas	*Oil and gas	Oil and gas	
FERC	**Hydrokinetic		**Hydrokinetic	

* Oil and gas has typically been prohibited through the individual designations of national marine sanctuaries.
** Hydrokinetic projects are permitted in state waters, and in national monuments and parks if authorized by Congress.

From a consultation perspective, OCSLA and the FPA have a number of beneficial provisions. Foremost among those is the recently enacted MMS provision for alternative energy on the OCS. In addition to affected states, local governments, and Indian tribes, it explicitly requires MMS to consult with other federal agencies, "including, in particular, those agencies involved in planning activities that are undertaken to avoid conflicts among users and maximize the economic and ecological benefits of the

OCS, including multifaceted spatial planning efforts." In addition, among other coordination and consultation requirements, the FPA requires FERC to consult with and incorporate or consider the recommendations from state fish and wildlife agencies, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

These provisions reflect several of the characteristics identified by the Intergovernmental Oceanographic Commission as necessary for effective MSP:

- ECOSYSTEM-BASED:
  - MMS must complete environmental analyses during OCSLA oil and gas leasing program development, which helps provide an information basis for addressing ecosystem-wide issues;
  - MMS must consider other sea and seabed uses during OCSLA oil and gas leasing program development;
  - Applicants for a FERC hydrokinetic license must complete an Exhibit E (environmental assessment);
- INTEGRATED:
  - MMS must consider other sea and seabed uses during OCSLA oil and gas leasing program development;
  - MMS must consult with affected states, local governments, Indian tribes, and agencies engaged in planning to avoid user conflict before issuing an alternative energy lease;
  - MMS and FERC entered into a MOU clarifying the OCSLA-FPA hydrokinetic energy leasing, licensing, and permitting process on the OCS;
  - FERC must consult with FWS and NMFS before issuing an FPA hydrokinetic license;
  - If an area has a comprehensive plan adopted for public benefit, FERC must verify that the proposed project complies with it before issuing a FPA hydrokinetic license;
  - *Working against integration is the complexity of the statutory and regulatory framework for energy production and resource extraction;*
  - *Working against integration is Executive Order 13212, which encourages agencies to expedite authorization of energy projects and production of energy resources;*
- AREA-BASED:
  - DPA safety zones around deepwater ports;
  - Oil and gas development in accordance with the five-year lease plan;
  - Hydrokinetic energy development in compliance with a comprehensive plan should one exist; and

C. Fisheries and Aquaculture

i. Relevant provisions

While many federal and state laws influence fishing, the primary legislation governing fishery management in federal waters is the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The MSA was originally enacted in 1976 to claim and protect U.S. sovereign rights to the fishery resources of the continental shelf.[220] The MSA governs fisheries in federal waters. This includes those that cross into state waters but are predominantly in federal waters, although the latter may be subject to separate regulations.[221] The Act was amended in 1996 to provide for protection and conservation of

[220] 16 U.S.C. § 1801-1891d.

[221] *Id.* § 1856(b) (states retain jurisdiction over their fisheries, unless the Secretary of Commerce finds that (i) the fishery is governed by a federal fishery management plan and is predominately fished in the EEZ, or (ii) the state is adversely affecting the implementation of a federal fishery management plan).

essential fish habitats, reduction of fish bycatch, and rebuilding of overfished stocks.[222] Most recently, the 2007 reauthorization of the MSA mandated, among other things, the use of annual catch limits and accountability measures to end overfishing and provided for widespread market-based fishery management through limited access programs.

Fishery Management Councils

The MSA established eight regional Fishery Management Councils (Councils) to assist in the stewardship of fishery resources.[223] The voting members of a Council are the principal adjacent state officials with marine fishery management responsibility and expertise, the regional NMFS director, commercial and recreational fishing experts designated by the Secretary of Commerce, and in some cases a representative from an Indian tribe.[224] The nonvoting members are the regional U.S. Fish and Wildlife Service director, district Coast Guard commander(s), executive director of the regional Marine Fisheries Commission, and a U.S. State Department representative.[225]

Since 2006, each new council member is expected to complete a training course developed by the Secretary of Commerce on fishery-related topics.[226] Among the Council's primary responsibilities are: establishing fishery management plans, including essential fish habitat (EFH) designations; establishing catch limits; and establishing multi-year fisheries research priorities, which among other things help NMFS determine its research priorities and budget for the region.[227]

Each Council is required to establish a Scientific and Statistical Committee to help ensure that the Council is developing and using the best scientific information. This committee also helps the Council set five-year research priorities for fisheries, habitats, and other relevant fields.[228] In both of these capacities, the Scientific and Statistical Committee may help obtain the fisheries ecosystem knowledge that is necessary to effectuate appropriate management methods. The Council also must create a fishing industry advisory committee to assist with fishery management plans and other advisory bodies as necessary.

The Councils are charged with overseeing the sustainable harvests of fish stocks. Structurally, however, critics have argued that industry interests have been overrepresented in the Councils, contributing to policies that prioritize catch maximization and leading to overfishing.[229] Others have questioned whether there has been sufficient user participation in the plan development and rulemaking process. User participation contributes to the perception of the management structures as fair and legitimate, which may decrease the likelihood of fishermen violating the regulations.[230]

Fishery Management Plans

The Councils must prepare and implement fishery management plans (FMPs)[231] based on the best scientific information available.[232] The FMPs and accompanying fishery management measures and

[222] *Id.* § 1801.
[223] *Id.* § 1852. The eight Councils are for the North Pacific, Pacific, West Pacific, Gulf, Caribbean, South Atlantic, Mid-Atlantic, and New England.
[224] *Id.* § 1852(b).
[225] *Id.* § 1852(c). The Pacific Council has an additional nonvoting member appointed by the Governor of Alaska.
[226] *Id.* § 1852(k).
[227] *Id.* § 1852(h)
[228] *Id.* § 1852(g).
[229] *See, e.g.*, Thomas A. Okey, *Member of the eight Regional Fishery Management Councils in the United States: are special interests over-represented?*, 27 MARINE POLICY 193 (2006).
[230] *See* Dennis M. King & Jon G. Sutinen, *Rational noncompliance and the liquidation of Northeast groundfish resources*, MARINE POLICY doi:10.1016/j.marpol.2009.04.023 (forthcoming 2010), available at http://www.sciencedirect.com/science/journal/0308597X; *see also* Susan S. Hanna, *User participation and fishery management performance within the pacific fishery management council*, 28 OCEAN & COASTAL MANAGEMENT 23 (1995).
[231] 16 U.S.C. § 1852.

actions must be submitted to NMFS for review to determine if they are consistent with national standards, other provisions of the MSA, and other applicable laws.[233] Generally, the FMP must include, among other things, a description of the fishery and conservation and management measures, an assessment of the present and probable future condition of the fishery, a description of essential fish habitat, and an assessment of the needed scientific data.[234] Most of the national standards outlined within the MSA primarily focus on the fishing sector itself, without mention of other sectors,[235] and therefore do not afford much opportunity to incorporate MSP considerations.

However, according to one national standard, FMPs must prevent overfishing and maintain optimum yield (OY).[236] An FMP must assess and predict maximum sustainable yield (MSY) and OY from the fishery.[237] MSY is the highest level of fishing that can be sustained over a long term.[238] OY, on the other hand, is the fishing level that provides the greatest national benefits—i.e., the MSY "as reduced by any relevant economic, social, or ecological factor; and, in the case of an overfished fishery, that provides for rebuilding to a level consistent with producing the MSY in such fishery."[239]

To achieve the OY standard, the 2007 MSA amendments enacted requirements that RFMCs establish annual catch limits and implement regulations to prevent overfishing and increase accountability.[240] NMFS finalized guidelines on how to comply with the new requirements in January 2009.[241] If it chooses, the RFMC may also establish a limited access program to achieve OY.[242]

Together, the revised statute and guidelines state that the annual catch limits (ACL) cannot exceed the Scientific and Statistical Committee's recommended levels,[243] and must be less than or equal to the acceptable biological catch (ABC).[244] ABC, in turn, is a level that accounts for scientific uncertainty in overfishing limits (OFL).[245] The ACL is then the basis for setting accountability measures. There are two types of accountability measures: those for preventing an annual catch limit overage, such as area closures and changes in trip limits, and those triggered when the limit is exceeded, such as next-year overage adjustments.[246] In addition, the optional annual catch target (ACT) is the management goal—a catch level that accounts for management uncertainty in controlling actual catch, which the guidelines recommend including as an accountability measure.[247] The system as a whole is meant to account for scientific and management uncertainty.[248]

In the context of MSP, it is possible that OY could use MSP to identify and delineate the important economic, social, and ecological considerations that should factor into to setting the total allowable catch. When reviewing FMPs, the Secretary of Commerce must consult with the Secretary of State regarding

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[232] *Id.* § 1851(a)(2).
[233] *Id.* § 1852(h)(1).
[234] *Id.* § 1853(a).
[235] *Id.* § 1851(a).
[236] 16 U.S.C. § 1851(a)(1).
[237] *Id.* § 1853(a)(3).
[238] 50 C.F.R. § 600.310(c)(1)(i).
[239] *Id.* § 600.310(f)(1)(i); *see also* 16 U.S.C. § 1802(33).
[240] *Id.* § 1852(h)(6) (the RFMC must "develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g) of this section"); *Id.* § 1853(a)(15) (an FMP must "establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability").
[241] 50 CFR § 600.310 (codifying Magnuson-Stevens Act Provisions; Annual Catch Limits; National Standard Guidelines, 74 Fed. Reg. 3178 (Jan. 16, 2009)).
[242] 16 U.S.C. § 1853(b)(6).
[243] 16 U.S.C. § 1852(h)(6).
[244] 50 C.F.R. § 600.310(f)(2)(iv), (f)(5).
[245] *Id.* § 600.310(f)(2)(iv), (f)(3).
[246] *Id.* § 600.310(g).
[247] *Id.* § 600.310(f)(2)(v), (f)(6).
[248] *Id.* § 600.310(b)(3).

foreign fishing and with the Secretary of Homeland Security regarding enforcement.[249] FMP development also triggers NEPA review. The 2007 MSA amendments required NMFS to revise and update agency procedures for review of FMPs to conform to NEPA timelines, and to integrate the applicable environmental analysis procedures required under NEPA.[250]

Within the FMP the Council has discretionary authority, after weighing the benefits and impacts of closure and based on the best scientific information available, to designate zones where and/or times when fishing is limited or prohibited in order to reduce the adverse effects of fishing on vulnerable or rare species or areas.[251] Such zones can also be designated specifically to protect deep sea coral from fishing gear and vice versa.[252] The Council also may limit or require specific gear, vessels, or equipment, or establish other requirements or restrictions deemed necessary and appropriate for fishery conservation and management.[253]

Councils already have used these provisions extensively to designate areas for different fisheries uses. Due to the wide discretion that the Councils have in setting restrictions, they could play a role in a broader MSP effort if they used their discretion to limit the impacts of fishing in areas that are important to other sectors.

Fishery Ecosystem Plans

The 1996 MSA amendments mandated that NMFS establish a panel of experts to consider the current application of ecosystem principles in fisheries management, and how to incorporate them in the future.[254] NMFS subsequently established the Ecosystems Principles Advisory Panel, which reported its findings to Congress in 1999.[255] The report's primary recommendation was that, in addition to establishing FMPs, each Council develops a Fishery Ecosystem Plan (FEP). The FEPs will integrate ecosystem principles and goals into the management structure, through delineation of what physical, biological, and human information is needed, descriptions of how such information could be used, and implementation of guiding management policies.[256] More generally, FEPs were envisioned as a way to integrate the disparate FMPs.[257]

The North Pacific Fishery Management Council established a pilot FEP for the Aleutian Islands, which explicitly states that it is a non-legal, non-binding, policy and planning document meant to serve as an educational tool.[258] The West Pacific Fishery Management Council issued a Hawaiian Archipelago FEP that identifies management objectives, marks geographical boundaries, designates managed species, and details fishery regulations. It is meant to foster management coordination and public participation.[259] Meanwhile, the South Atlantic Fishery Management Council is in the midst of developing a FEP, and the

[249] *Id.* § 1854(a)(2)(B)-(C).
[250] *Id.* § 1854(i)(1). NMFS proposed rules to integrate the NEPA analysis with FMP review in May 2008, but they have not yet been promulgated. Critics claimed the proposals would weaken the NEPA analysis.
[251] 16 U.S.C. § 1853(b)(2)(A)-(C); 50 C.F.R. § 600.310(a)(2)(iv)(B).
[252] *Id.* § 1853(b)(2)(A)-(C).
[253] *Id.* § 1853(b)(4), (12).
[254] *Id.* § 1882(a), (f).
[255] Ecosystems Principles Advisory Panel, Ecosystem-Based Fishery Management—A Report to Congress (Apr. 1999), *available at* http://www.safmc.net/Portals/0/EMHome/Eco-bas-fis-man.pdf.
[256] *Id.* at 2, 27.
[257] *Id.* at 27.
[258] North Pacific Fishery Management Council, *Overview of the Aleutian Islands Fishery Ecosystem Plan*, available at http://fakr.noaa.gov/NPFMC/current_issues/ecosystem/AIFEPbrochure1207.pdf (last visited Oct. 7, 2009).
[259] Western Pacific Regional Fishery Management Council, *Hawaii Archipelago Fishery Ecosystem Plan*, available at http://www.wpcouncil.org/media/documents/Displays%20and%20Brochures/Hawaii_FEP_Bro_13.pdf (last visited Oct. 7, 2009).

New England Fishery Management Council is slated to begin developing an ecosystem management plan this year.[260]

FEPs represent a potentially useful method for developing fishery management regulations that properly consider the impacts of other sectors on the ecosystem. Collectively, they could provide a platform upon which to develop more comprehensive MSP, keeping in mind that the focus of such plans remain sector-based—i.e., fisheries-focused. A drawback to the FEP approach, however, is that thus far FEPs are not mandatory under the MSA, leaving it up to the individual Councils to decide whether to develop and adopt them. As a result, development of FEPs has been slow. In addition, in instances where an FEP has been established, there is no legal obligation to create implementing regulations. On the other hand, there is no apparent barrier to a Council choosing to develop such regulations, or to incorporate the FEP into the relevant FMP and thus make the provisions legally binding.

Essential Fish Habitat

One of the specific purposes of the Act is "to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat."[261] Essential fish habitat (EFH) is defined as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity."[262] The FMPs developed by the Councils must include a description of EFH, identify ways to minimize the adverse effects on the habitat caused by fishing, and identify actions to conserve and enhance the EFH.[263] MSA regulations state that the "extent of the EFH should be based on the judgment of the Secretary and the appropriate Council(s) regarding the quantity and quality of habitat that are necessary to maintain a sustainable fishery and the managed species' contribution to a healthy ecosystem."[264] The Council must designate EFH for each managed species, and can also designate EFH for groups of species with similar needs.[265]

The EFH provisions provide one of the strongest mechanisms for linking fisheries management to a federal MSP framework. Through these provisions, the Councils are able to protect particular areas based on consideration of the effects of all uses. The regulations specifically require that the FMPs consider and describe the potential adverse effects on EFH[266] from fishing activities, including the cumulative impacts from multiple fishing activities as well as the adverse impacts from non-fishing related activities.[267] The regulations describe non-fishing related activities broadly to include "dredging, filling, excavation, mining, impoundment, discharge, water diversions, thermal additions, actions that contribute to non-point source pollution and sedimentation, introduction of potentially hazardous materials, introduction of exotic species, and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH."[268]

Cumulative impacts on the EFH are those that "result from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions, regardless of who undertakes such

[260] South Atlantic Fishery Management Council, Habitat and Ecosystem Section, *Moving Towards Ecosytem Management,* http://safmc.net/ecosystem/Home/EcosystemHome/tabid/435/Default.aspx (last visited Oct. 7, 2009).
[261] 16 U.S.C. § 1801(b)(7).
[262] *Id.* § 1802(10).
[263] 50 C.F.R. § 600.815(a)(5).
[264] *Id.* § 600.815(a)(1)(iv)(E).
[265] *Id*.
[266] The regulations define adverse effect to mean "any impact that reduces quality and/or quantity of EFH. Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality and/or quantity of EFH. Adverse effects to EFH may result from actions occurring within EFH or outside of EFH and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions." 50 C.F.R. § 600.810.
[267] *Id.* §§ 600.815(a)(2)(i), 600.815(a)(4).
[268] *Id.*

actions."[269] The FMP must contain a discussion of how the impacts affect EFH function, on either an ecosystem- or watershed-wide scale, as well as an assessment of the risks resulting from cumulative and synergistic impacts.[270] Further, the regulations require that the FMPs "identify actions to encourage the conservation and enhancement of EFH, including recommended options to avoid, minimize, or compensate" for these potential adverse effects.[271]

EFH designations affect different actors in different ways. First, the FMPs must minimize to the extent practicable the adverse impacts of fishing on EFH and identify other means of encouraging the conservation and enhancement of EFH.[272] Second, the Secretary of Commerce is required to "review programs administered by the Department of Commerce and ensure that any relevant programs further the conservation and enhancement of essential fish habitat."[273]

Third, other federal agencies must consult with the Secretary of Commerce (in practice, often NMFS and/or the appropriate Council) regarding proposed actions that might adversely affect EFH.[274] In response, the Secretary must recommend to the agency measures that can be taken to conserve EFH. The agency is not bound by NMFS' recommendations, but must respond to the Secretary and any commenting Council. If the agency follows the recommendations, the response must explain the measures that will be taken to avoid, mitigate, or offset the activity's impact on EFH.[275] If the agency does not abide by them, it must provide an explanation for its decision.[276] In practice, the political clout of the fisheries sector and the transparency provided by having to explain why the recommendations were rejected could strongly encourage other sectors and agencies to cooperate.

The strength of the EFH provisions to support true conservation of fish stocks and the ecosystems on which they rely, as well as to serve as an influential place-based conservation mechanism in MSP, will depend on whether Councils, NMFS, and the Secretary of Commerce choose to implement them in a meaningful way. To date, EFH has had limited utility because Councils have broadly designated areas as "essential," leading to the notion that everything is essential and thereby making the provision meaningless.

To overcome this problem, NMFS created the habitat areas of particular concern (HAPC) designation. Pursuant to MSA regulations, within an EFH, HAPCs may be designated based on the importance of their ecological function, their sensitivity to human-induced environmental degradation, current or pending stress from development activities, and rarity.[277] Although the designation itself does not provide any additional protection, the premise is that such designations will help the Councils prioritize conservation efforts.[278]

As with critical habitats under the ESA, EFHs are not inherently preserves or refuges. There are no categorically prohibited activities for EFH. If significant protections are "practicable," if other Commerce Department programs are required to meet a high standard of support for EFH, and if the Councils wish to put their full effort behind preventing adverse impacts from other federal activities, then EFH provisions could be a powerful tool to support MSP. While identifying and protecting EFH is theoretically a good conservation measure, in practice it has proven difficult both to identify essential habitats and to quantify

[269] *Id.*
[270] *Id.*
[271] *Id.* § 600.815(6).
[272] 16 U.S.C. § 1853(a)(7).
[273] *Id.* § 1855(b)(1)(C).
[274] *Id.* § 1855(b)(2).
[275] *Id.* § 1855(b)(4); 50 C.F.R. § 600.905; 50 C.F.R. § 600.920(k).
[276] *Id.* § 1855(b)(4)(B).
[277] 50 C.F.R. § 600.815(a)(8).
[278] *See* NMFS, Office of Habitat Conservation, Habitat Protection Division, *Essential Fish Habitat*, http://www.nmfs.noaa.gov/habitat/habitatprotection/efh/index.htm (last visited Sept. 4, 2009).

adverse effects to them.[279] However, the New England Fishery Management Council has developed a vulnerability assessment tool to improve its EFH identification capacity.[280]

Marine Aquaculture

Aquaculture is an expanding industry in the United States, spurred by increasing demand for seafood. But while states have individually enacted laws and regulations to manage aquaculture activities within their waters, there is no overarching governance framework for marine aquaculture in federal waters. Offshore marine aquaculture activities may implicate the Departments of Agriculture and the Interior, NOAA, the Food and Drug Administration, the Army Corps of Engineers, the Coast Guard, and EPA, but no single agency is responsible for comprehensively overseeing them.[281]

This situation creates regulatory uncertainty, and one of the recommendations of the U.S. Commission on Ocean Policy was to amend the National Aquaculture Act to make NOAA the lead agency for environmentally and economically sustainable aquaculture.[282] The U.S. Action Plan then stated the Bush Administration's intention of proposing an act that would provide the Department of Commerce with such authority.[283] Absent such a legislative mandate, NOAA has established an Aquaculture Program that lists establishing a comprehensive regulatory program as one of its top priorities.[284]

The first FMP for offshore aquaculture was recently established. In June 2009 notice of an offshore aquaculture plan for the Gulf of Mexico, submitted by the Gulf of Mexico Fishery Management Council, appeared in the Federal Register. The plan establishes a regional permitting process for an estimated five to twenty aquaculture operations in the Gulf of Mexico EEZ during the next ten years.[285] After time for consideration by the Secretary of Commerce, the Offshore Aquaculture FMP entered into effect September 3, although implementing regulations have not yet been published and NOAA will not accept project applications until they are in place.[286] Also, environmental organizations have recently filed suit questioning NMFS authority under the MSA to authorize such operations.[287]

While announcing the establishment of the Gulf of Mexico Offshore Aquaculture FMP, NOAA reiterated that although it believes aquaculture can be regulated under existing fisheries laws, it is committed to establishing a comprehensive regulatory framework for offshore aquaculture.[288] Therefore the governance system for offshore aquaculture remains unsettled. If a comprehensive aquaculture framework were eventually established, it could contain spatial allocation mechanisms and consideration of other ocean uses requirements in support of MSP.

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[279] *See, e.g.*, Phillip S. Levin & Gregory W. Stunz, *Habitat triage for exploited fisheries: Can we identify essential "Essential Fish Habitat?"*, 64 ESTUARINE, COASTAL AND SHELF SCIENCE 70 (2005).
[280] *See* Michelle Bachman, Presentation to the ASMFC Habitat Committee, *NEFMC's Swept Area Seabed Impact Model: A tool for evaluating the adverse effects of fishing on Essential Fish Habitat* (July 10, 2009), available at http://eli.org/pdf/seminars/07.28.09dc/preble.pdf (reference material for the remarks of David S. Preble at the July 28, 2009, ELI seminar on Marine Spatial Planning).
[281] U.S. Commission on Ocean Policy, An Ocean Blueprint for the 21st Century (2004), at 330-36, available at http://oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf.
[282] *Id.* at 334, Rec. 22-1.
[283] U.S. Ocean Action Plan: The Bush Administration's Response to the U.S. Commission on Ocean Policy, at 23, available at http://ocean.ceq.gov/actionplan.pdf (last visited Oct. 7, 2009).
[284] *See* NOAA, *NOAA Aquaculture Program*, http://aquaculture.noaa.gov (last visited Oct. 7, 2009).
[285] Gulf of Mexico Fishery Management Council, *Fishery Management Plan for Regulatory Offshore Marine Aquaculture in the Gulf of Mexico* (2009).
[286] NOAA, *Aquaculture*, *supra* note 284.
[287] *See, e.g.,* Anon., *Govt Sued over Offshore Aquaculture Plan*, FIS (Oct. 8, 2009), available at http://www.fis.com/fis/worldnews/worldnews.asp?l=e&country=0&special=&monthyear=&day=&id=34111&ndb=1&df=0.
[288] Press Release, NOAA, NOAA to Pursue National Policy for Sustainable Marine Aquaculture (Sept. 3, 2009), available at http://sero.nmfs.noaa.gov/sf/pdfs/Aquaculture%20Press%20Release.pdf.

ii. Summary

In sum, there are several fishing provisions that may be relevant for supporting a comprehensive federal MSP framework. The three most promising are fishery ecosystem plans, essential fish habitat designations, and the discretionary authority of the Councils to designate zones for conservation and management purposes. Fishery Ecosystem Plans are well-structured conceptually, but they are not required and lack binding authority in the absence of implementing regulations. The essential fish habitat provisions of the MSA are likely the most useful mechanism for implementing MSP in the statute, as they consider the cumulative impacts of all fishing and non-fishing activities on habitats identified as essential to a fish stock. Because the Councils have significant flexibility to prescribe fishing activities in designated zones, they could choose to restrict fishing when necessary to reduce conflict with other sectors. Another relevant mechanism is the Scientific and Statistical Committees, which help to ensure that the Councils are collecting and using the best scientific evidence and can contribute to the knowledge base necessary for effective MSP.

However, the MSA's authority in the MSP context is limited by its few restrictions on the activities of other agencies and the few consultation requirements in the course of developing FMPs. In addition, other purposes of the Act, such as maximizing sustainable fishing, may reduce the power of the MSA for purposes of conservation specifically and MSP more broadly. The political strength of the commercial and recreational fishing industries could make the MSA more influential in MSP than the black-letter law explicitly suggests, but it also could have the opposite effect if those industries choose to oppose MSP.

These provisions reflect several of the characteristics identified by the Intergovernmental Oceanographic Commission as necessary for effective MSP:

- ECOSYSTEM-BASED:
  - Scientific and Statistical Committees help ensure Councils are collecting and using the best scientific evidence;
  - Although nonbinding, the principle underlying Fishery Ecosystem Plans is consideration of the ecosystem as a whole;
  - *Working against ecosystem-based planning are the stated purposes of the MSA, which include maximizing sustainable fishing;*
- INTEGRATED:
  - Essential fish habitat, which consider the effects of both fishing and non-fishing activities, must be designated and require non-fishing agencies to consult with NMFS regarding impacts;
- AREA-BASED:
  - Councils may implement activity restrictions in designated areas; and
  - Essential fish habitat, which consider the effects of both fishing and non-fishing activities, must be designated.

D. Dredging and Dumping

i. Relevant provisions

Dredging and dumping in marine waters is regulated by several different laws and agencies, occasionally in concert and other times independently. In summary:

- The transport and dumping of dredged material is regulated by the Army Corps of Engineers (Corps) in cooperation with the Environmental Protection Agency (EPA) under the Ocean

Dumping Act (ODA). Within three miles of the coast, the dumping of dredged materials is also regulated by the Corps and EPA under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act.

- The transport and dumping of all other wastes permitted by law is regulated by the EPA under the ODA.
- Dredging within three miles of the coast is regulated by the Corps under Section 10 of the Rivers and Harbors Act.
- Dredging for purposes of sand, gravel, or other mineral extraction beyond state waters to the boundary of the OCS is regulated by the Minerals Management Service (MMS) under the Outer Continental Shelf Lands Act (OCSLA).

Ocean Dumping Act

Of primary relevance to development of a federal MSP framework, the ODA requires a designated site and a site management plan before materials can be dumped. The ODA was passed in 1972 to regulate the dumping of all materials into ocean waters. Jurisdiction of ODA extends from state waters to the outer edge of the EEZ, and beyond to the extent that the material originated in the United States or from vessels under the jurisdiction of the United States.[289]

Under the ODA, the Administrator of EPA has primary permitting authority over dumping in the ocean of any material except dredged material, over which the Corps has primary authority, and those materials for which no permit may be issued: medical waste, high-level radioactive waste, and radiological, chemical, and biological warfare agents.[290] The Corps' authority over dumping of dredged material under this law is subject to the oversight of the EPA Administrator. Prior to issuing any permit, the EPA Administrator must be notified and given an opportunity to evaluate it, at which point he or she may deny the permit, approve it outright, or approve it with conditions[291]

For the dumping of dredged material and other permissible materials, the relevant agency may issue a permit if the activity "will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities."[292] The specific criteria for making this determination include, among other things, the need for the dumping; its effects on "human health and welfare, including economic, esthetic, and recreational values;" its effects on fisheries, wildlife, and shore lines; its effects on marine ecosystems; and its effects on other uses of the ocean, including research, fishing, and other resource exploitation.[293] Thus, the relevant agency is to consider most, if not all, current and potential human uses and the environment in deciding whether to issue the permit, suggesting that the Corps and EPA could comply with a marine spatial plan when making ocean dumping permitting decisions.

The ODA also has a planning and place-based element. No permit for dumping may be issued for a site that is not designated, and a site may not be designated without a site management plan.[294] The EPA Administrator is required to designate sites or times for ocean dumping, and, "to the maximum extent feasible," the Corps must use these recommended sites for the dumping of dredged material.[295] The designation of these sites must be consistent with the criteria listed above and, where feasible, located beyond the edge of the continental shelf.[296] The ODA requires the EPA Administrator to develop site

[289] 33 U.S.C. § 1412(a).
[290] *Id*.
[291] *Id*. § 1413(c).
[292] *Id*. §§ 1412(a), 1413(a).
[293] *Id*. § 1412(a); *see id*. § 1413(b).
[294] *Id*. § 1412(c)(4).
[295] *Id*. §§ 1412(c)(1), 1413(b).
[296] *Id*. §§ 1412(a)(l), (c)(1).

management plans and, for sites that also will be used for the dumping of dredged material, to collaborate with the Corps.[297] Presumably, EPA could develop site designations in compliance with a marine spatial plan.

Given the diversity of human uses and other factors that the EPA and Corps are required to consider in the course of designating dumping sites and issuing permits, a marine spatial plan could make designating dumping sites easier and support the implementation of comprehensive MSP. Also, past and present ocean dumping sites will be important considerations in the development of MSP. The criteria for designating future sites may help anticipate where future sites would best be located and should be included in MSP.

Clean Water Act

The Clean Water Act (CWA) was passed in 1972 for the purpose of restoring and maintaining the chemical, physical, and biological integrity of U.S. waters. Section 404 of the CWA addresses one part of that effort, regulating the discharge of dredged and fill material in navigable waters. The jurisdiction of this law overlaps that of the ODA, but only within three miles of land since that is the extent of authority under CWA Section 404.[298]

The CWA and ODA have the same procedures and criteria, which allows a uniform approach to permitting disposal of dredged and fill materials. Under the CWA, the Army, acting through the Corps of Engineers, is the responsible agency.[299] Disposal sites must be specified for each permit, and guidelines for site designation are to be developed by the EPA Administrator in conjunction with the Secretary of the Army.[300] Also, the criteria for guidelines are very similar.[301] Any question of conflict between these two laws is essentially moot given the uniform set of standards promulgated by EPA.[302]

Rivers and Harbors Act

The Rivers and Harbors Act was enacted in 1899. Section 10 of the Act prohibits, among other things, the excavation, filling, or other manner of altering "the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge … or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army."[303] Thus, the Rivers and Harbors Act gives authority over dredging and disposal of dredged materials within three miles of the coast to the Corps (see below for discussion of expanded jurisdiction under OCSLA).[304]

Details of the unique requirements for permitting the disposal of dredged material are provided in the CWA, ODA, and associated regulations and are discussed in the preceding sections. There is only one provision unique to dredging in the Corps' general permitting requirements: the Corps must consider, to

[297] *Id*. § 1412(c).
[298] The term "navigable waters" is defined in the Clean Water Act as "the waters of the United States, including the territorial seas." *Id*. § 1362(7). The term "territorial seas" is defined as "extending seaward a distance of three miles" from shore. *Id*. § 1362(8).
[299] *Id*. § 1344(a).
[300] *Id*. § 1344(b).
[301] *Id*. §§ 1344(b), 1343(c).
[302] *See* 40 C.F.R. §§ 220-229.
[303] 33 U.S.C. § 403.
[304] The Rivers and Harbors Act applies to the "navigable waters of the U.S.," which is defined in regulations as "three geographic (nautical) miles seaward from the baseline." 33 C.F.R. § 329.12(a). The Act does include a provision stating that "Structures or work outside ["navigable waters of the U.S."] are subject to [the Act], if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity." *Id.* § 322.3(a). This provision appears to be constructed to address activities upstream and on land that affect the navigability of waters, but it may also have relevance beyond three miles from land. A close reading of the provision suggests that it only would apply if structures beyond three miles affect the navigability of waters within three miles.

the maximum extent practicable, relevant non-federal dredging activities in connection with federal navigation projects and coordinate with interested federal, state, regional, and local agencies.[305] This provision could aid MSP development by providing a mandate to coordinate the planning and implementation of dredging activities across all actors and interested parties.

For all permitting decisions, the Corps has a standard set of criteria that includes, among other things, the public and private need for the project; direct and indirect loss of and damage to wildlife resources; compliance with applicable effluent limitations and water quality standards; and impact on historic, cultural, scenic, and recreational values, including national monuments and marine sanctuaries.[306] In addition, the Corps must consult with the appropriate regional directors of U.S. Fish and Wildlife Service and National Marine Fisheries Service and head of the state agency responsible for fish and wildlife regarding the impact of the proposed project on wildlife resources.[307] Permit applications for activities in a national marine sanctuary will not be approved unless the applicant provides a certification from the Secretary of Commerce that the activity is consistent with all relevant laws and regulations governing the sanctuary.[308]

While the consultation requirements do not cover all potentially interested parties, they do involve some key actors, and the criteria by which the Corps makes its permitting decisions are rather comprehensive. For purposes of MSP, this is a good foundation for Corps involvement should it find value in cooperating. However, there are few strict requirements and little oversight of permitting decisions, and thus little in current law to force the Corps to cooperate with MSP development or implementation.

Outer Continental Shelf Lands Act

OCSLA was enacted in 1953 for the purpose of extending the jurisdiction of the United States to the Outer Continental Shelf and establishing an expeditious and orderly manner of developing the resources of that area.[309] Among other things, the Act extends the jurisdiction of the Corps to the edge of the EEZ for purposes of preventing obstruction to navigation caused by "artificial islands, installations, and other devices" attached to the seabed for producing, developing, or exploring for resources therefrom or transporting such resources.[310] While this gives the Corps additional authority beyond three miles, the scope of that authority is more limited than it is within three miles.

OCSLA also authorizes MMS to permit the extraction of minerals, including sand, gravel, and shell resources, from submerged lands beyond state waters to the seaward edge of the U.S. continental shelf.[311]

Unlike with oil and gas, MMS does not develop five-year leasing programs for non-energy mineral leases, but rather makes case-by-case decisions. Sulfur deposit leases are distributed through a competitive sealed bidding process, on par with oil and gas leases.[312] Leases for minerals other than sulfur can be granted one of two ways. For both public and private applicants, MMS may conduct a competitive bidding process in any area of the OCS not then under lease and award the lease to the highest bidder.[313] Alternatively, an applicant may negotiate with MMS for a lease to extract sand, gravel, or shell resources

[305] 33 C.F.R. § 322.5(c).
[306] *Id*. § 320.4.
[307] *Id*. § 320.4(c).
[308] *Id*. § 320.4(i).
[309] 43 U.S.C. § 1332(3).
[310] *Id*. § 1333; *see also* 33 C.F.R. § 322.3(b).
[311] *See id*. § 1337(k). OCSLA defines "outer Continental Shelf" as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." *Id*. § 1331(a). Section 1301 of Title 43 includes within its definition of "lands beneath navigable waters" tidal waters under state jurisdiction.
[312] *Id*. § 1337(i)-(j).
[313] *Id*. § 1337(k)(1).

for shore protection, beach restoration, or coastal wetlands restoration undertaken by a federal, state, or local government.[314]

The same process is available for a construction project funded at least in part by the federal government.[315] If a federal agency is involved in this latter process, it must enter into a memorandum of agreement with MMS about future use of the resources, and MMS must notify the House Committee on Merchant Marine and Fisheries, House Committee on Natural Resources, and Senate Committee on Energy and Natural Resources prior to the agency's use of the resources.[316]

Laws and regulations governing sand mining on the OCS do not include place-based designations. However, the Gulf of Mexico OCS Region of MMS recently issued a Notice to Lessees and Operators and Pipeline Right-of-way Holders (NTL) regarding the avoidance and protection of sediment resources in the Gulf of Mexico. The NTL notes the scarcity and significance of sand useful for restoration efforts as well as the inaccessibility of some resources for extraction on account of existing infrastructure and biologically and archeologically sensitive areas.[317] MMS has identified and mapped significant sediment resources in the OCS of the Gulf of Mexico.[318] This NTL classifies as "bottom-disturbing activities," and thus prohibits, any activity located within 1,000 feet of a designated sediment resource, 65 feet below the natural seafloor, and lasting more than 180 days.[319] This approach for the management of sediment resources likely will be valuable for MSP development and implementation.

ii. Summary

Requirements for designating sites for dumping of dredged material or other permitted wastes, along with the numerous required considerations for choosing a dump site and evaluating a permit application, suggest that current regulations of ocean dumping are conducive to MSP. The primary limitation to this current system for purposes of MSP is the lack of comprehensive consultation requirements or oversight. As for dredging, the regulations regarding permit approval, particularly the consultations required for that process, are weak. Mineral extraction, such as sand and gravel mining, also lacks significant requirements for permit evaluation and consultation with other parties. Beyond three miles, dredging for purposes other than mineral extraction, such as navigation, does not appear to be regulated. Thus, it may be difficult to force any dredging activities to comply with a comprehensive plan.

These provisions reflect several of the characteristics identified by the Intergovernmental Oceanographic Commission as necessary for effective MSP:

- ECOSYSTEM-BASED:
  - Many factors must be considered when choosing a dump site and evaluating a permit application; and
- AREA-BASED:
  - Sites must be designated for the dumping of dredged materials or other permitted wastes.

[314] *Id*. § 1337(k)(2)(A)(i).
[315] *Id*. § 1337(k)(2)(A)(ii).
[316] *Id*. § 1337(k)(2)(D).
[317] MMS, Gulf of Mexico OCS Region, *Notice to Lessees and Operators of Federal Oil, Gas, and Sulphur Leases, Pipeline Right-of-way Holders, and Lessees of Minerals Other than Oil, Gas, and Sulfur [sic] on the Outer Continental Shelf, Gulf of Mexico OCS Region*, NTL No. 2009-G04 (effective Jan. 27, 2009), *available at* http://www.gomr.mms.gov/homepg/regulate/regs/ntls/2009NTLs/09-g04.pdf.
[318] *Id*.
[319] *Id*.

E. Maritime Transportation

i. Relevant provisions

Several statutory provisions could support inclusion of traffic schemes into comprehensive MSP, given existing requirements to properly consider and account for other activities and site designations. While a number of factors, not least military activity, affect decisions regarding navigation and where and when shipping occurs, authority over this issue primarily rests in the hands of the U.S. Coast Guard. The Ports and Waterways Safety Act of 1972 (PWSA), as amended, vests the Secretary of Homeland Security, as head of the department in which the Coast Guard presently operates, with authority to control and supervise vessel traffic in the navigable waters of the United States and areas covered by international agreements.[320]

The law defines "navigable waters" in this context to include the territorial sea out to twelve miles from shore.[321] The Coast Guard also may act to protect navigation and the marine environment, which includes the waters and submerged lands of the territorial sea and OCS.[322] Unless stated in an international treaty, convention, or agreement to which the U.S. is a party, the Coast Guard's PWSA jurisdiction does not extend to any foreign vessel engaged in innocent passage through the territorial sea and not destined for or departing from a port or place subject to U.S jurisdiction.[323]

Specifically, the Coast Guard may control vessel traffic in jurisdictional waters that it determines to have vessel congestion, reduced visibility, adverse weather, or be otherwise hazardous.[324] These controls include specifying when vessels may move and establishing routing schemes and operating conditions.[325] The Coast Guard also is tasked with designating "fairways" for vessels operating in the territorial sea and on the high seas for the purpose of providing safe access routes for ports or other places subject to U.S. jurisdiction.[326]

In designating fairways for vessel traffic, the Coast Guard must, "to the extent practicable, reconcile the need for safe access routes with the needs of all other reasonable uses of the area involved."[327] Among the marine uses of the area specifically required to be considered in a fairway designation are exploration for and extraction of oil, gas, and other mineral resources; deepwater ports; other structures on or above the seabed; marine and estuarine sanctuaries; and recreational and commercial fishing.[328] Importantly, no designation may deprive anyone of exercising a right granted by a lease or permit vested prior to publication of notice of the designation.[329] The Coast Guard will determine whether the designation would deprive the person of a right, but it must first consult with the official under whose authority the permit was issued or lease executed.[330] In addition, before making any fairway designation, the Coast Guard must consult with the Secretaries of State, the Interior, Commerce, and the Army as well as the governors of affected states.[331]

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[320] 33 U.S.C. § 1223(a)(1).
[321] *Id*. § 1222(5).
[322] *Id*. §§ 1222(1), 1223(a)(1).
[323] *Id*. § 1223(d).
[324] *Id*. § 1223(a)(4).
[325] *Id*.
[326] *Id*. § 1223(c)(1).
[327] *Id*. § 1223(c)(3)(C).
[328] *Id*. § 1223(c)(3)(B).
[329] *Id*. § 1223(c)(2).
[330] *Id*.
[331] *Id*. § 1223(c)(3)(B).

Once designated, the area within the bounds of a vessel fairway must prioritize navigation above all other uses.[332] No artificial island or fixed structure, whether temporary or permanent, is permitted in a vessel fairway; temporary underwater obstacles may be permitted under certain conditions.[333] While these rules are rigid, the boundaries of the fairway need not be. The Coast Guard may alter the course of a vessel fairway to accommodate the needs of other uses when they cannot reasonably be accommodated otherwise.[334] The one limitation is that the boundaries of the fairway may not change in a manner that, in the opinion of the Coast Guard, would adversely affect the purpose and continuing value of the designation.[335]

Other place-based designations of marine waters that can be created by the Coast Guard include "safety zones." A safety zone is a fixed area or perimeter around a moving vessel where access is limited to authorized people or vessels for safety or environmental purposes.[336] Safety zones may be temporary or permanent, and thus provide a great deal of flexibility with regard to place-based restrictions on maritime navigation. Any person may request a safety zone, and it may be established on the initiative of any authorized Coast Guard official.[337]

In the course of the Coast Guard carrying out its numerous duties and responsibilities noted above, certain additional procedures and considerations are required. The Coast Guard must account for, among other things, environmental factors, local practices and customs, economic impact and effects, vessel traffic characteristics, and the proximity of potentially or actually conflicting activities such as fishing grounds and oil and gas drilling operations.[338] The Coast Guard also must consult with and consider the views of ports and harbor authorities or associations, representatives of the maritime community, environmental groups, and other potentially affected parties.[339]

In addition, the Coast Guard must notify the International Maritime Organization (IMO) of any regulations issued pursuant to the PWSA for consideration as international standards.[340] The IMO develops international guidelines, criteria, and regulations for ships' routing systems. Upon adoption of a measure, the IMO provides geographic coordinates of the new route to its 168 Member States and various navigational chart entities worldwide, including NOAA.[341]

ii. Summary

The Coast Guard has the tools to regulate maritime navigation in a manner conducive to comprehensive MSP. Its authority is not enough to significantly control other sectors and by itself establish MSP, but it adds an important piece to the larger collection of federal authorities. The Coast Guard's relevant jurisdiction covers state and federal waters and beyond. It has the authority to establish and modify vessel fairways that keep certain uses out of shipping corridors and safety zones that keep vessels out of areas used for other purposes. In carrying out its responsibilities, the Coast Guard must consider many other uses of marine waters, including environmental protection, and in some cases consult with officials or representatives of those use interests.

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[332] *Id*. § 1223(c)(1).
[333] 33 C.F.R. 166.105(a).
[334] 33 U.S.C. § 1223(c)(5).
[335] *Id*.
[336] 33 C.F.R. § 165.20.
[337] *Id*. § 165.5.
[338] 33 U.S.C. § 1224(a).
[339] *Id*. § 1224(b).
[340] *See id.* §§ 1223(c)(5)(D)(i), 1230.
[341] *See* Office of Waterways Mgmt., U.S. Coast Guard, *Second Port Access Route Study to Analyze Potential Vessel Routing Measures for Reducing Vessel (Ship) Strikes of North Atlantic Right Whales*, http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/pars.pdf (last visited Oct. 7, 2009).

In the course of developing a marine spatial plan, existing fairways and safety zones will assist in establishing a baseline of use sites.[342] The authority to change these place-based designations and create new ones will add some flexibility in mapping to maximize marine uses and avoid conflicts where possible—in some cases protecting other uses from shipping and in other cases protecting shipping from other uses. The requirements to consider other ocean uses will provide some impetus, if not legal leverage, for the Coast Guard to participate in and cooperate with this process.

The most glaring limitations of Coast Guard authority to regulate shipping in accordance with a marine spatial plan are lack of control of foreign vessels not using U.S. ports, and uncertainty regarding what qualifies as a "safety" purpose for the designation of vessel fairways and safety zones. But neither of these issues should be a significant concern for the overall value that Coast Guard authorities can provide to a federal MSP effort.

These provisions reflect several of the characteristics identified by the Intergovernmental Oceanographic Commission as necessary for effective MSP:

- INTEGRATED:
  - Coast Guard must consider many other uses of marine waters, and in some cases consult with representatives of those interests, when establishing vessel fairways and/or safety zones; and
- AREA-BASED:
  - Coast Guard can establish and modify vessel fairways that exclude certain uses and/or safety zones that exclude vessels for other purposes.

F. Cross-Cutting Laws

i. Relevant provisions

In addition to the numerous laws that regulate only one or a few marine use sectors, three federal laws have more wide-ranging applicability. The following laws essentially add to the requirements imposed by other, more sector-specific laws:

- The National Environmental Policy Act (NEPA) requires consideration of the environmental effects of any major federal agency action, including permitting, prior to its undertaking.
- The Clean Water Act (CWA) requires a number of water pollution prevention measures of the states, and authorizes the Environmental Protection Agency (EPA) to issue permits for pollutant discharges, including in ocean waters beyond three miles from shore.
- The Coastal Zone Management Act (CZMA) requires federal agency actions to comply with the enforceable policies of an approved state coastal management program.

National Environmental Policy Act

NEPA requires all federal agencies to consider the environmental effects of their proposed activities, evaluate possible alternative actions, and disclose these reviews to the public.[343] This Act has the potential to support a comprehensive federal MSP framework. As described below, the policy behind NEPA aligns with MSP goals; environmental analysis requirements could be better achieved if informed

[342] This type of baseline information related to already designated areas and zones can be explored using the NOAA/MMS Multi-purpose Marine Cadastre, *available at* http://www.csc.noaa.gov/digitalcoast/tools/mmc/index.html.
[343] 42 U.S.C. § 4332.

by an MSP framework, and the possibility for tiered environmental analysis at different stages of program and project development could ensure continued adherence to a marine spatial plan.

The Act includes a number of directives for how federal agencies conduct their activities, including integrating the use of natural and social sciences in planning and decision-making, giving appropriate consideration to unquantified environmental amenities and values, and developing alternatives to proposed actions.[344] But arguably the most notable NEPA requirement is the need to include an environmental impact statement (EIS) in every recommendation or report on agency proposals for legislation and other major federal actions that significantly affect the environment.[345] Although NEPA does not require agencies to choose the most environmentally beneficial alternative, an EIS makes public the information on environmental impacts that is reviewed in the decision-making process, adding pressure to agencies to avoid these impacts.

An EIS is required only for "major federal actions" that "significantly" affect the environment. The Council on Environmental Quality (CEQ) has defined "major federal actions" as including "adoption of official policy, formal plans, and programs as well as approval of specific projects, such as construction activities in a particular location or approval of permits to an outside applicant."[346] Thus, the EIS requirement potentially applies to a wide range of federal agency activities, including issuance of permits to private parties.

In the course of determining whether an activity will significantly affect the environment, federal agencies commonly prepare an Environmental Assessment (EA). If the action is a major federal action and it will significantly affect the environment, a more thorough EIS is required. In an EIS, the agency must explain, among other things, the expected environmental impact of the proposed action, any negative environmental effects that cannot be avoided, alternatives to the proposed action, and the relationship between short-term uses and long-term sustainability.[347]

In describing the expected environmental impact in the EIS, an agency must identify the range of actions, alternatives, and impacts necessary for an accurate analysis, a process known as "scoping."[348] Actions to be considered may include connected, cumulative, and similar actions.[349] CEQ regulations define "cumulative actions" as those that, "when viewed with other proposed actions[,] have cumulatively significant impacts."[350] CEQ regulations define "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[351] Cumulative impact analysis can effectively broaden the considerations in an EIS and make the overall process more comprehensive.

Prior to developing an EIS, the responsible federal official must consult with those federal agencies with jurisdiction or special expertise regarding the environmental impacts potentially arising from the proposed activity.[352]

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[344] *Id*.
[345] *See id*. § 4332(2)(C).
[346] Memorandum from A. Alan Hill, Chairman, Council on Envt'l Quality, to Heads of Federal Agencies (1983), available at http://www.nepa.gov/nepa/regs/1983/1983guid.htm.
[347] 42 U.S.C. § 4332(2)(C).
[348] 40 C.F.R. § 1508.25.
[349] *Id*. § 1508.25(a).
[350] *Id*. § 1508.25(a)(2).
[351] *Id*. § 1508.7.
[352] 42 U.S.C. § 4332(2)(C).

Certain NEPA provisions could play a significant role in MSP development and implementation. First, the policy statements in NEPA embody the ideas of MSP, calling for coordination and long-term environmental protection: "it is the continuing responsibility of the Federal Government to use all practicable means … to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings…"[353]

Second, the EIS provisions, including its procedural requirements, can promote a coordinated approach to planning in the marine environment, perhaps even comprehensive MSP. The need to assess environmental effects, evaluate cumulative impacts, and explain alternatives requires an agency to be more thorough in evaluating its activities and look beyond its own jurisdiction. A federal marine spatial plan could be developed with prior consideration of all potential direct and cumulative effects and would therefore support the cumulative effects analysis of an EIS. The consulting requirement would further enforce that practice. A more collaborative approach to planning can result in fewer hurdles in the analysis and consultation process of NEPA, as many user conflicts and environmental concerns could be avoided or mitigated earlier in the process.

Third, MSP could benefit from what is termed the "tiering" approach to an EIS: an initial EIS is developed for a regional plan or program of a federal agency or agencies, and later an EIS for a specific activity implementing the plan or program is developed. Tiering has the potential to simplify the requirements and review of a site-specific EIS by not requiring the duplication of discussions in the initial EIS, focusing instead on the issues relevant to the specific proposal.[354] By creating a marine spatial plan and developing an appropriate EIS, the information required in proposal-specific EIS likely will be less burdensome for those conforming to the plan, because much of the general environmental information about the region will be incorporated by reference in the conforming proposal's EIS. Thus, this modified process supported by CEQ has the potential to further encourage project planners to follow the plan, supporting MSP implementation.

Clean Water Act

The CWA establishes the basic scheme for restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.[355] The Environmental Protection Agency (EPA) is the lead federal agency under the CWA. While most mandates of the CWA are directed at the states, the EPA is tasked with ensuring that those mandates are fulfilled and with providing guidance, research, and funding to states.[356] The EPA also is the sole permit-issuing authority for pollutant discharges beyond three miles from shore under the CWA.[357]

Water quality standards (WQS) provide a means of determining whether waters are healthy or impaired.[358] Total maximum daily loads (TMDLs) provide a quantitative objective for bringing impaired waters into compliance with WQS. States must adopt and submit to the EPA for review WQS for all

[353] *Id*. § 4331(b).
[354] Memorandum from A. Alan Hill, *supra* note 346.
[355] 33 U.S.C. § 1251(a).
[356] *Id*. § 1251(d).
[357] *See id*. § 1343.
[358] As described by EPA, "Water Quality Standards are the foundation of the water quality-based pollution control program mandated by the Clean Water Act. Water Quality Standards define the goals for a waterbody by designating its uses, setting criteria to protect those uses, and establishing provisions to protect waterbodies from pollutants." EPA, Water Quality Standards, *at* http://www.epa.gov/waterscience/standards/.

intrastate waters based on their uses.[359] States also must develop TMDLs for those waters within their respective boundaries for which effluent limitations are not stringent enough to meet applicable WQS.[360]

State boundaries under the CWA extend seaward to the edge of the territorial sea,[361] which the CWA defines as "the belt of the seas measured from the line of ordinary low water … and extending seaward a distance of three miles."[362] Therefore, these requirements of the states apply to marine waters out to three miles from shore. But most coastal states have only a few WQS for marine waters, a comparatively small marine monitoring program, and TMDLs for but a few some estuarine environments.

The CWA does not expressly require the EPA to develop TMDLs or WQS for waters beyond three miles from shore. Mandates regarding the development of TMDLs and WQS are expressly directed at the states.[363] The law is silent on these matters with regard to waters beyond state jurisdiction. The CWA *does* require the EPA Administrator to "promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans."[364] But these guidelines do not serve the same role as WQS do: they focus on the impacts of a single type of pollutant discharge, whereas WQS focus on characterizing the state of the water. WQS serve as a means for identifying water quality impairment and setting objectives for corrective measures. There is no apparent prohibition against the EPA developing TMDLs for (or applying WQS to) waters beyond three miles from shore, but without first applying WQS, there is no clear water quality objective (allowable load amount) for purposes of developing a TMDL.

Unlike WQS and TMDLs, the CWA extends the regulation of pollutant discharges (NPDES permits) beyond three miles from shore.[365] The EPA Administrator has authority over this permitting. States may be delegated this authority for waters within their respective boundaries, but each permit application and actions relating to its consideration still must be transmitted to the EPA Administrator.[366]

A NPDES permit, whether within three miles from shore or beyond, is required by statute to comply with EPA guidelines for determining whether a discharge would unreasonably degrade marine waters.[367] The guidelines include consideration of, among other things, the

> composition and vulnerability of the biological communities which may be exposed to such pollutants, including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystem, such as those important for the food chain … importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism … existence of special aquatic sites including, but not limited to marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs … [e]xisting or potential recreational and commercial fishing, including finfishing and shellfishing … applicable requirements of an approved Coastal Zone Management plan…"[368]

[359] *Id.* § 1313(a)(3)(A).
[360] *Id.* § 1313(d)(1).
[361] *See id.* § 1362(7). The state territorial seas for the purpose of the CWA should not be confused with the 12-mile territorial sea defined under international law.
[362] *Id.* § 1362(8).
[363] *See id.* § 1313.
[364] *Id.* § 1343(c)(1).
[365] *See id.* § 1343.
[366] *Id.* §§ 1342(a)(5), 1343(b).
[367] *Id.* § 1343(a).
[368] 40 C.F.R. § 125.122.

Thus, the environmental factors to be considered are rather comprehensive. If a federal marine spatial plan is developed, EPA may be able to condition a NPDES permit on compliance with relevant parts, if not the entirety of the plan.

The CWA likely will have limited impact on federal MSP. The CWA has few requirements for marine waters, particularly beyond three miles, and even less implementation. The EPA governs NPDES permitting within and beyond three miles from shore, and it oversees the development of WQS and TMDLs by the states within three miles of shore. If a state fails to fulfill its obligations with regard to marine waters, the EPA can perform those tasks for it. To date, the quality of marine waters has mostly been a priority only with regard to fecal coliform bacteria that results in beach closures and seafood contamination, limiting the impact of the CWA on other uses of and discharges into marine waters under current practice.

CWA programs do offer potential place-based strategies. For example, regional TMDLs covering a large marine area could aid in the comprehensive management of various human uses. However, they are limited. TMDLs are only required out to three miles from shore; water quality monitoring often is relatively scarce in those waters; and sets of marine WQS commonly are incomplete. Thus, the tools necessary to develop an effective marine TMDL usually are missing.

The guidelines for NPDES permitting within and beyond three miles require consideration of many environmental factors, but comparatively few other human uses and cumulative impacts, both of which will be important for MSP. Consultation requirements in the CWA are not very comprehensive, so there would be little legal pressure to cooperate in an MSP process because of the CWA. With regard to planning, each state is required to have a continuing planning process approved by the EPA Administrator.[369] The process must result in plans for all navigable waters within the state,[370] including the territorial sea.[371] The CWA does not impose a similar requirement on the EPA.

Therefore, the CWA offers only a few realistic contributions to MSP development and implementation: a rationale for MSP (ensuring the biological, chemical and physical integrity of U.S. waters), a federal-state relationship with regard to water quality regulation within three miles of shore, state planning processes with which to coordinate, and control over pollutant discharges from nearly any sector and anywhere in marine waters.

Coastal Zone Management Act

As described previously,[372] the CZMA offers funding and delegation of some federal authority to each coastal and Great Lakes state that develops a coastal zone management program meeting certain criteria. Thus, the CZMA primarily expands state authority in coastal zones and the areas that influence them through federal consistency review. Federal consistency review allows states to ensure that federal actions are consistent with the enforceable policies of the state's program.[373] This power of review, the financial incentives, and the voluntary nature of the CZM Program have led 34 of the 35 eligible coastal and Great Lakes states and territories to participate.[374]

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[369] 33 U.S.C. § 1313(e)(2).
[370] *Id*. § 1313(e)(3).
[371] *See id.* § 1362(7).
[372] *See supra* notes 66-73 and accompanying text for an introduction to CZMA and discussion of the provisions related to national estuarine research reserves.
[373] *See* 16 U.S.C. § 1455(c)-(d).
[374] *CZMA Federal Consistency Overview*, *supra* note 69. The single non-participating state, Illinois, currently is developing its coastal management program.

The first layer of obligations in the CZMA is imposed on the states. A state coastal management program must be approved by NOAA before federal consistency and other state authorities under the CZMA apply. To be approved, the program must include, among other things, a planning process for the protection of public coastal areas of environmental, ecological, esthetic, cultural, historical, and recreational value and "a planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone."[375] The state program also must "adequately" consider the national interest in planning and managing the coastal zone, including the siting of facilities of greater than local significance, such as energy facilities.[376]

In addition, program requirements include place-based designations of areas of particular concern,[377] as well as procedures for designating preservation and restoration zones for areas of conservation, recreational, ecological, historical, or esthetic interest.[378] As for uses of marine waters and the coastal zone generally, the state program must have "broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority."[379]

Thus, the CZMA imposes planning and place-based requirements that are relevant to MSP in state waters. Establishing planning processes for conservation and energy facility siting, particularly with the requirement that they be cognizant of national interests, could significantly supplement a national MSP effort. It prompts the states to do what the federal government does not necessarily have the jurisdictional authority to do in state waters. But the value of these provisions is limited for purposes of national MSP by the fact that the federal government has little if any enforcement authority over whether and how these various plans and designations are developed and implemented by the states. Once a state program is approved, NOAA evaluates it on a periodic basis, usually every three years.[380] Since this is not a re-approval process, NOAA's authority under current law is limited to making suggestions rather than mandating program changes.[381]

States, however, gain some authority over federal actions that affect a state's coastal area. Once a state coastal management program is approved, federal agency activities are subject to the enforceable policies of each state's program.[382] This authority applies whether the federal activity occurs within or outside state boundaries, as long as it affects the coastal area within state boundaries in a manner that violates state enforceable policies. Thus, because of the CZMA, the federal government would need to consider enforceable policies of the state program even for an MSP process that covers only federal waters.

While not a requirement of either state or federal government, the CZMA expresses congressional support for Special Area Management Plans (SAMPs),[383] defined as "a comprehensive plan providing for natural resource protection and reasonable coastal-dependent economic growth containing a detailed and comprehensive statement of policies; standards and criteria to guide public and private uses of lands and waters; and mechanisms for timely implementation in specific geographic areas within the coastal zone."[384]

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[375] 16 U.S.C. § 1455(d)(2).
[376] *Id*. § 1455(d)(8).
[377] *Id*. § 1455(d)(2)(C).
[378] *Id*. § 1455(d)(9).
[379] *Id*. § 1455(d)(2)(E).
[380] *See id*. § 1458.
[381] NOAA, *Discussion Paper: Current and Future Challenges for Coastal Management* (2006), at 30, available at http://coastalmanagement.noaa.gov/czm/media/discussion_paper.pdf.
[382] 16 U.S.C. § 1456(c)(1)(A).
[383] *Id*. § 1452(3).
[384] *Id*. § 1453(17).

SAMPs are not envisioned as federally driven; rather, the CZMA offers funding to states to develop and submit for federal approval program changes that support SAMP development and implementation.[385] SAMPs can become an enforceable part of a state coastal program, making federal activities also subject to its provisions.

The CZMA has no further requirements or guidance for SAMP development or implementation, and this malleability is part of the reason for its success. The Rhode Island Coastal Resources Management Council currently is developing an Ocean SAMP that includes a management plan for uses and activities in state and federal ocean waters off the state's coast. While this approach to MSP can only be enforced insofar as plans in state waters are affected, collaboration with federal agencies in the planning process offers greater hope that the federal government will voluntarily comply with the SAMP in federal waters. Thus, SAMPs are not a tool for federal MSP, but federal agency participation in state SAMP development, where appropriate, can significantly support federal-state relationships for MSP.

The CZMA is a delegation of federal authority rather than an elaboration or expansion of it, yet the Act has potential to significantly influence MSP, whether in state waters, federal waters, or both. In certain circumstances, the state must consider interests beyond its boundaries. From the other side, federal agencies must comply with enforceable policies of each state's program. Although the collaboration between federal and state governments required by the CZMA is not comprehensive, the mandates and incentives in the CZMA should be used to build strong, wider-reaching, voluntary collaboration between states and the federal government for purposes of MSP.

ii. Summary

As with the more sector-based laws, the CZMA, CWA, and NEPA can be useful for MSP. They draw together sectors and governing bodies, especially providing further connection between state and federal actions. EPA oversight of state water quality programs, federal agency compliance with state coastal programs, federal agency consideration of environmental impacts regardless of jurisdiction, inter-agency consultation requirements, and state consideration of issues beyond their borders when developing a coastal program all provide important links between relevant actors.

These three laws also have the potential to establish valuable place-based regulations, particularly in state waters and with some amount of federal oversight, which influence a large number of sectors and agencies. Designated protected areas of ecological value under state coastal programs, as well as SAMPs and regional TMDLs, can control the uses of highly valuable, vulnerable, or polluted state waters in a relatively comprehensive manner. But like many of the other laws mentioned above, the CZMA, CWA, and NEPA would require more complete enforcement to achieve their potential for MSP, and could benefit from minor to major amendments. For example:

- Consultation requirements could be expanded;
- SAMPs could be made to include a clear federal process where appropriate;
- Water quality regulations in federal waters could look like those of state waters;
- Discretionary actions could be made mandatory; and
- Compliance with marine spatial plans could be explicitly encouraged if not required.

Even just a few changes to enforcement or the statutes themselves could go a long way toward supporting federal MSP.

[385] *Id.* § 1456b(b).

These provisions reflect several of the characteristics identified by the Intergovernmental Oceanographic Commission as necessary for effective MSP:

- ECOSYSTEM-BASED:
  - federal agency consideration of environmental impacts regardless of jurisdiction;
- INTEGRATED:
  - EPA oversight of state water quality programs;
  - federal agency compliance with state coastal programs;
  - federal agency consideration of environmental impacts regardless of jurisdiction;
  - inter-agency consultation requirements;
  - state considerations of issues beyond its borders when developing a coastal program;
- AREA-BASED:
  - Under the CZMA states can designate and protect areas of ecological value;
  - Under the CZMA states can establish SAMPs; and
  - Under the CZMA regional TMDLs can control the use of highly valuable, vulnerable, or polluted state waters.

G. Military and National Security Activities

One possible limitation to achieving a comprehensive MSP framework using existing legal mechanisms lies in the exemption of military or national security-related activities from many of the laws mentioned above. The following section outlines these statutory exemptions.

i. Conservation

National Marine Sanctuaries Act

There is no specific exemption for military activities in marine sanctuaries under NMSA. When determining whether a site meets the standards of a national marine sanctuary, the Sanctuary Program must consult with, among others, the Secretaries of State, Defense, Transportation, and Interior, and the heads of other interested federal agencies.[386]

Only Department of Defense or U.S. Coast Guard vessels are permitted to refuse to let an officer board in relation to enforcement of NMSA's provisions.[387]

When proposing a national marine sanctuary, the designation documents must include a resource assessment that contains information on past, present, or future material disposal or discharge near the proposed sanctuary. This information is to be prepared in consultation with the Secretaries of Defense and Energy and the Administrator of the Environmental Protection Agency. Whether the information is publicly disclosed depends on national security regulations.[388]

Marine Mammal Protection Act

There is a broad exemption for national defense activities within the MMPA. An action, or category of actions, taken by the Department of Defense may be exempted from the requirements of the MMPA if necessary for national defense. The Secretary of Defense will consult with the Secretaries of Commerce

[386] 16 U.S.C. § 1434; 15 C.F.R. § 922.22-.23.
[387] 16 U.S.C. § 1436(3)(A).
[388] *Id.* § 1434(a)(2)(B)(iii).

and/or Interior as appropriate when making the determination. The exemption cannot apply for more than two years, but is eligible for renewal after additional consultation.[389] Notice of the exemption must be submitted by the Secretary of Defense to the House and Senate Committees on Armed Services within 30 days, which may be given in classified form if necessary for national security.[390]

While the MMPA implements a moratorium on the taking and importation of marine mammals and derivative products, there are special provisions that relate to military readiness activities. For such activities, if the Secretary permits incidental takes within five-year periods, the authorization must include regulations that specify permissible take methods and other means of minimizing practicable adverse impacts. The determination of "least practicable adverse impacts on such species or stock" must consider personnel safety, implementation practicability, and impact on military readiness activity effectiveness, as determined after consultation with the Department of Defense.

If the Secretary permits incidental harassment, the same requirement applies.[391] Moreover, any authorization of incidental take, withdrawal or suspension of incidental take authorization, or authorization of incidental take by harassment is not subject to certain requirements if it affects military readiness activities. These exceptions include the requirements that the authorization be confined to a specified geographic region(s) and/or to a small number of animals.[392]

Under the MMPA, there is a separate definition of "harassment" used for military readiness activities and scientific research activities conducted by (or on behalf of) the Federal government. While the standard definition of harassment includes acts that have the potential to injure a wild marine mammal or marine mammal stock, the military/research definition includes acts that either injure or have the *significant* potential to injure. Similarly, the standard definition applies to acts that have the potential to disturb a wild marine mammal or marine mammal stock, but the military/research definition only pertains to acts that actually disturb of are *likely* to disturb.[393] Thus the standard is less stringent for military readiness and scientific research activities.

Endangered Species Act

The Department of Defense is not exempted from the Endangered Species Act's prohibition on the take of endangered and threatened species. However, although military activities are not categorically excused from Section 7 consultation requirements, the Endangered Species Committee is required to exempt any agency action that the Secretary of Defense finds is necessary for national security reasons.[394]

In addition, Department of Defense lands—or other areas it owns, controls, or that are designated for its use—should not be designated as critical habitats, so long as there is an integrated natural resources management plan in place that the Secretary of Commerce or Interior finds sufficiently protects the species in question.[395] The Secretary of Commerce or Interior must also consider a potential critical habitat designation's impact on national security, and assuming the failure to designate will not lead to the species' extinction, weigh the benefits of designation against those of excluding the area from designation.[396]

[389] *Id.* § 1371(f).
[390] *Id.* § 1371(f)(4).
[391] *Id.* § 1371(a)(5)(A)(ii), (D)(vi).
[392] *Id.* § 1371(a)(5)(A), (B), (D), (F).
[393] *Id.* § 18(A)-(B).
[394] *Id.* § 1536(j).
[395] *Id.* § 1533(a)(3)(B).
[396] *Id.* § 1533(b)(2).

ii. Energy Production and Resource Extraction

Deepwater Port Act

The Deepwater Port Act requires the Secretary of Transportation to consult with the Secretaries of Commerce, State, and Defense before setting navigation safety zones around deepwater ports.[397]

Further, the granting of a license is contingent upon, among other things, the Secretary of Transportation's finding that the "construction and operation of the deepwater port will be in the national interest and consistent with national security and other national policy goals and objectives, including energy sufficiency and environmental quality."[398] He or she must also consult with the Secretaries of the Army, State, and Defense to assess their opinions of what impact the license will have on their programs.[399]

Outer Continental Shelf Lands Act

The Secretary of the Interior may cancel a lease or permit if, after a hearing, he or she determines that the leased or permitted activity will probably cause serious harm or damage to the national security or defense.[400] This authority was recently confirmed as it relates to renewable energy leases and grants in MMS' renewable energy guidelines, which state that a lease or grant can be cancelled if circumstances include national security or defense needs.[401]

When a non-oil and gas lease, easement, or right-of-way for energy and energy-related purposes is granted, the Secretary of the Interior must ensure that any related activities provide for the protection of U.S. national security interests.[402]

Moreover, any lease issued constructively contains a provision whereby operations can be suspended during a state of war or national emergency declared by the President or by Congress. The Secretary of Defense can recommend such suspension to the Secretary of the Interior, in which case the lessee is entitled to receive just compensation.[403]

With presidential approval, the Secretary of Defense can designate areas of the Outer Continental Shelf as restricted from exploration and development if those areas are needed for national defense. If he or she does so, only the Secretary of Defense can grant permission to explore or operate in such areas. An affected lease will then be extended for a period equal to that of its suspension, and the lessee is entitled to just compensation.[404]

When the Secretary of the Interior is considering an oil and gas development and production plan, he or she shall disapprove it either (i) if operations threaten national security or defense, or (ii) if he or she determines that, due to exception geological conditions, resources values, or other circumstances, implementing the plan would probably cause serious harm or damage to national security or defense.[405] Finally, the Secretary of the Army is granted the authority to prevent any obstructions to navigation.[406]

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[397] 33 U.S.C. § 1509(d).
[398] *Id.* § 1503(c)(3).
[399] *Id.* § 1503(c)(7).
[400] 43 U.S.C. § 1334(a)(2)(A)(i).
[401] MMS Renewable Energy Guidelines, *supra* note 179, at ch.5, ¶ I (citing 30 CFR § 285.437).
[402] 43 U.S.C. § 1337(p)(4)(F).
[403] *Id.* § 1341(c).
[404] *Id.* § 1341(d).
[405] *Id.* § 1351(h)(1)(C)-(D).
[406] *Id.* § 1333(e).

Natural Gas Act

FERC must enter into a Memorandum of Understanding with the Secretary of Defense to ensure coordination and consultation in relation to LNG facilities that may affect an active military installation (which does not include facilities used primary for civil works). Similarly, FERC must obtain the Secretary of Defenses' agreement before authorizing a LNG facility that affects a military installation's training or other activities.[407]

iii. Dredging and Dumping

Rivers and Harbors Act

Under the Rivers and Harbors Act, the Secretary of the Army can direct the Chief of Engineers to maintain river and harbor projects that exceed authorized project depths, if necessary for defense purpose and if the Chief of Engineers finds the waterways are also needed for general commerce services.[408]

iv. Cross-Cutting Laws

Submerged Lands Act

When Congress codified the delineation of state waters in the Submerged Lands Act, it explicitly retained navigational rights and regulatory authority as related to commerce, navigation, national defense, and international affairs.[409] The Act also specifics that, during times of war or if necessary for national defense purposes, the federal government has the right to acquire any portion of state lands through the Takings Clause of the Fifth Amendment; and it also has the right of first refusal if state natural resources are being sold.[410] Finally, the Secretary of Defense, with presidential approval, can withdraw certain Outer Continental Shelf areas from exploration and operation if national defense calls for it.[411]

Clean Water Act

The Clean Water Act contains provisions for marine sanitation devices specifically applicable to Armed Forces vessels. First, the Secretary of Defense has the authority to determine that compliance would not be in the interest of national security. Second, while marine sanitation device regulations and certification for most vessels are issued by the Secretary of the department in which the Coast Guard operates (presently Homeland Security), the regulations and device certifications for Department of Defense vessels are issued by the Secretary of Defense.[412]

Finally, there is a Uniform National Discharge Standard for Armed Forces vessels, which applies to discharges, other than sewage, incidental to normal vessel operation. However, the Secretary of Defense may find that compliance is not in the interest of national security. Moreover, the EPA Administrator, Secretary of Defense, Secretary of the Coast Guard department (Homeland Security), Secretary of Commerce, and interested states are jointly responsible for finding incidental operation discharges for which it is "reasonable and practicable to require use of a marine pollution control device to mitigate adverse impacts on the marine environment."[413]

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[407] 15 U.S.C. § 717b(f).
[408] 33 U.S.C. § 562a.
[409] 43 U.S.C. § 1314(a).
[410] *Id.* § 1314(b).
[411] *Id.* § 1341(d).
[412] 33 U.S.C. § 1322(b)(1), (d), (g)(2).
[413] *Id.* § 1322(n).

Coastal Zone Management Act

The President may exempt federal agency actions from compliance with the CZMA if he or she determines they are of paramount interest to the United States.[414] The Secretary of Commerce may exempt activities if he or she determines it is in the interest of national security.[415]

The policy declarations of the CZMA state that coastal zone management programs should grant priority consideration to coastal-dependent uses and siting of major facilities related to, among other things, national defense.[416]

After a state coastal zone management program has been approved, before a federal agency can permit or license an activity that will affect the state's coastal waters, it must obtain (or conclusively presume) the state's concurrence with the applicant's certification that the activity complies with the state's enforceable ocean policies. The only exceptions are if the federal agency itself finds, after a reasonable period of time, that the activity is consistent; or if the federal agency finds that the activity is otherwise necessary in the interest of national security. The same is true for exploration, development, or production plans for leased areas of the Outer Continental Shelf that may affect state waters, and for state and local government applications for federal assistance.[417]

v. Acts without Explicit National Security, Defense, or Military Exceptions

- *National Environmental Policy Act*
- *American Antiquities Act*
- *Magnuson-Stevens Fishery Conservation and Management Act*
- *Federal Power Act*

vi. Summary

There is no uniform exemption for military, defense, and national security activities from the laws that govern U.S. ocean and coastal waters. Instead, there are a variety of exemptions contained in various statutes. These exemptions range from broad, such as the up to two-year exemptions from the MMPA that may be issued for national defense activities, to more narrow exceptions, such as those for Armed Forces vessel marine sanitation devices under the Clean Water Act. In recent years there has also been extensive debate over whether national security activities may be exempt from statutes that do not contain explicit exemption provisions.[418] In sum, although the nature and effects of military and national security activity exemptions cannot be generalized, such exemptions are important to consider when developing a marine spatial plan.

H. Tribal Rights

Precisely identifying the potential role of tribal authority in a federal MSP process and its ability to support or undermine the process is challenging because of the complex nature of Indian law—a body of law concerning the relationship between federal government and recognized Native American tribes.[419] Canby, Jr. (2004) considers the following four themes as the basis of Indian law doctrine:

[414] 16 U.S.C. § 1456(c)(1)(B).
[415] *Id.* §§1456(c)(3)(A), 1456(d).
[416] *Id.* § 1452(2)(D).
[417] *Id.* §§ 1456(c)(3)(A)-(B), (d).
[418] *See* Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365 (2008).
[419] Alaska Natives are included among the recognized federal Indian tribes but also have special rights delineated in federal laws and noted in this section. In contrast, Native Hawaiians are not recognized by the federal government as being among the federal Indian tribes, so do not have

> *First*, the tribes are independent entities with inherent powers of self-government. *Second*, the independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes. *Third*, the power to deal with and regulate the tribes is wholly federal; the states are excluded unless Congress delegates power to them. *Fourth*, the federal government has responsibility for the protection of the tribes and their properties, including protection from encroachments by the state and their citizens.[420]

The rights of tribes to participate in management decisions or have exclusive or shared use of resources or occupation of territory depends upon explicit rights stated in federal laws for all tribes, core legal principles that guide federal judicial decisions in tribal cases, and specific rights for individual tribes that are often laid out in individual treaties, statutes, or agreements with the federal government.[421] This section briefly describes tribal rights to ocean waters and submerged lands and the role of tribes in relevant ocean and coastal or overarching environmental laws.[422]

i. Aboriginal & Recognized Title

Aboriginal Title & Paramountcy Doctrine

In the first Supreme Court decision regarding the relationship between the federal government and Indian tribes, the Court held that tribes retained a right of occupancy to land unless the federal government extinguished that right.[423] The concept of aboriginal title derived from this and subsequent cases. Title usually is deemed to be extinguished by treaties between the U.S. and specific tribes. Also, some statutes explicitly extinguish title, as is seen in the Alaska Native Claims Settlement Act.[424]

Aboriginal title claims can include claims to fishing grounds on the OCS. At issue when considering MSP is identifying which tribes retain aboriginal title that relates to the marine environment and the nature of the aboriginal title retained. Ninth Circuit case law holds that the paramountcy doctrine trumps unextinguished aboriginal claims to the *exclusive* use and occupancy of the OCS.

The paramountcy doctrine was established in connection with state claims to seabed resources. As explained in *United States v. Louisiana*, the paramountcy doctrine provides that

> [p]rotection and control of the [seabed] area are indeed functions of national external sovereignty. The marginal sea [as well as the OCS] is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.[425]

This meant that states did not have a right to the resources of the continental shelf without express transfer of those resources from Congress.

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many of the federal rights conferred to other Native Americans. Native Hawaiians do, however, have special rights under the Hawaii Constitution that could come into play in a federal MSP framework in state waters.

[420] *Id.* at 1–2.

[421] *See, e.g.,* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 1-10 (2004).

[422] It is beyond the scope of this project to examine the role and rights of specific tribes or to fully explore the regulations and cases that relate to specific statutory provisions.

[423] Johnson v. McIntosh, 21 U.S. 543 (1823).

[424] For a discussion of this Act, *see infra* text surrounding notes 444-447.

[425] United States v. Louisiana, 339 U.S. 699, 704 (1950).

In *Eyak v. Trawler Diane Marie, Inc*, the Ninth Circuit held that the paramountcy doctrine applies to Native American tribes, and therefore there is no *exclusive* aboriginal title to use or occupy ocean territory (in federal or state waters).[426] In this case, several Alaska Native villages sought review of a district court decision granting summary judgment in favor of the Secretary of Commerce and thereby denying the Alaska Native villages the exclusive rights to use and occupancy based on unextinguished aboriginal title to a portion of the OCS.[427] The villages claimed that the management regulations promulgated by the Secretary of Commerce for halibut and sablefish fisheries in the Gulf of Alaska violated their aboriginal rights.[428]

In upholding the district court decision, the Ninth Circuit stated that "[a]ny claim of sovereign right or title over the ocean by any party other than the United States, including Indian tribes, is equally repugnant to the principles established in the paramountcy cases."[429] Therefore, the court held that "the Native Villages are barred from asserting exclusive rights to the use and occupancy of the OCS based on unextinguished aboriginal title."[430]

Based on Ninth Circuit holdings, Native American tribes could not undermine federal MSP in federal or state waters by claiming rights to exclusive use and occupation based on unextinguished aboriginal title. This court decision, however, does not extinguish all aboriginal claims to *non-exclusive* use and occupancy.[431] Therefore, tribes may have non-exclusive rights that could undermine some aspects of federal MSP. Also, other Circuits and the Supreme Court have yet to weigh in on this issue, and some scholars argue that the Ninth Circuit incorrectly applied the paramountcy doctrine to aboriginal title claims.[432]

Recognized Title

In addition to aboriginal title, tribes also have recognized title derived from federal treaties, statutes, and in rare cases executive orders.[433] Citing two Supreme Court cases, Canby Jr. (2004) notes that lands held by tribes pursuant to treaty, statute, or executive order usually do not include the beds of navigable waters unless Congress made it clear that its intent was to convey such an interest.[434] The Court, in *Idaho v. United States*, describes the two-part test to determine Congress' intent as follows: "We ask whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands."[435] In the case of *Idaho v. United States*, the Court found that the Coeur d'Alene tribe held title to almost all of the submerged lands of the Coeur d'Alene Lake.

Therefore, when developing federal MSP it will be important to evaluate existing treaties and statutes that relate to tribal lands to understand whether any tribes have recognized title to submerged lands in the ocean and coastal environment.

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[426] Native Village of Eyak v Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir.1998), *cert. denied* 1999 U.S. LEXIS 4042 (June 14, 1999).
[427] *Id.* at 1091.
[428] *Id.*
[429] *Id.* at 1095.
[430] *Id.* at 1097.
[431] As the Ninth Circuit indicated in Village of Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989) (stating that "aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest." *Id.* at 1277); but limited by *Native Village of Eyak*, 154 F.3d 1090 (stating that "we caution the Native Villages not to read too much into our statement in Gambell that aboriginal rights may coexist with the federal government's paramount interests in the OCS. As we made clear in that case, only limited assertions of aboriginal subsistence rights were contemplated; exclusive rights to use or occupy areas of the ocean were never considered." 154 F.3d at 1095).
[432] *See, e.g.,* Andrew P. Richards, *Aboriginal Title or the Paramountcy Doctrine?* Johnson v. Mcintosh *Flounders in Federal Waters off Alaska in* Native Village of Eyak v. Trawler Diane Marie, Inc., 78 WASH. L. REV. 939 (2003); David J. Bloch, *Colonizing the Last Frontier*, 29 AM. INDIAN L. REV. 1 (2004).
[433] Described in CANBY, JR., *supra* note 421, at 376-78.
[434] *Id.* at 381 (citing Montana v. United States, 450 U.S. 544 (1981); and Idaho v. United States, 533 U.S. 262 (2001)).
[435] *Idaho*, 533 U.S. at 273.

ii. Tribal Rights According to Federal Statutes

Laws and Provisions Applicable in All Regions

Overall, there are few explicit tribal provisions in federal ocean, coastal, and environmental statutes that would affect federal MSP. The following statutes have no specific mention of tribal rights: Coastal Zone Management Act, American Antiquities Act, Deepwater Port Act, Natural Gas Act, Outer Continental Shelf Lands Act, the Ocean Dumping Act, Rivers and Harbors Act Section 10, and the National Environmental Policy Act.

Some laws create consulting requirements or otherwise encourage coordination with relevant tribes. These include the National Marine Sanctuaries Act, the Federal Power Act, and the Magnuson-Stevens Fishery Conservation and Management Act (for the Pacific region). Because MSP is a planning tool for ocean and coastal use and development, it would be important to include relevant tribal representatives in planning decisions that relate to these laws and sectors in order to satisfy the requirements of these laws.[436]

Federal Indian tribes have the potential to play a large role in water quality management under the Clean Water Act (CWA). In accordance with CWA Section 518, federally recognized Indian tribes are to be treated as states for the purpose of Section 101(g) relating to authority of states over water.[437] If an Indian tribe has a substantial governing body that meets a list of CWA criteria, the Administrator of the EPA is authorized to treat tribes as states for the purpose of the following provisions: title II (Grants for Construction of Treatment Works) and sections 104 (research, investigations, training and information), 106 (grants for pollution control programs), 303 (water quality standards and implementation plans), 305 (state reports on water quality; transmittal to Congress), 308 (records and reports; inspections), 309 (enforcement), 314 (clean lakes), 319 (nonpoint source management programs), 401 (certification), 402 (national pollution discharge elimination system), and 404 (permits for dredged or fill material).[438]

Thus tribes with substantial governing bodies have the potential to play an integral role in water quality management. The extent to which tribes should participate in a federal MSP in accordance with CWA would depend upon the nature of the MSP program—e.g. whether or not it addressed land-based activities—as well as the jurisdiction of the tribes—e.g. whether it includes coastal or ocean environments.

Laws and Provisions Applicable Specifically to Alaska and/or the U.S. Arctic

In addition to sharing many of the rights granted to tribes found in the lower forty-eight states, Alaska Natives have many unique rights expressed in a variety of statutes. Because of the strong role that Alaska Natives play in the region and the many retained rights to resources, development of federal MSP in the waters surrounding Alaska will likely require the inclusion of Alaska Natives in the decision-making processes.

Some overarching natural resource laws provide specific rights to Alaska Natives. The Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) protect the rights of Alaska Natives (Indians, Aleuts, and Eskimos) to take species for the purpose of subsistence and production of authentic

[436] This is not to say that tribal representation is not important for a comprehensive scheme or when there is no specific mention of tribal rights under an Act.
[437] 33 U.S.C. § 1377.
[438] *Id.*

native goods.[439] In the case of non-endangered or non-threatened marine mammals, treaty rights could also allow other federally recognized tribes to legally take.[440]

In 2000, the U.S. signed the Agreement between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population. Congress passed the Polar Bear Conservation and Management Act of 2006, amending the MMPA, to implement this treaty.[441] The Act allows the Alaska Nanuuq Commission—representing the villages that engage in subsistence take of polar bears—to participate in the co-management of the resource.

The Act gives the Secretary of the Interior the responsibility of developing and implementing regulations in support of the treaty. In addition, it allows, but does not require, the Secretary to share management authority with the Nanuuk Commission if the Commission: ''(1) enter[s] into a cooperative agreement with the Secretary under section 119 for the conservation of polar bears; (2) meaningfully monitor[s] compliance with this title and the Agreement by Alaska Natives; and (3) administer[s] its co-management program for polar bears in accordance with—(A) this title; and (B) the Agreement."[442] Therefore, if federal MSP applies to the Alaska region, development of an MSP that affects polar bear management will likely need to include participation by the Nanuuk Commission.

Section 305(i) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) creates a community development quota system that provides a percentage of the total allowable catch from directed fisheries in the Bering Sea and Aleutian Islands to western Alaska villages, residents of which are mostly Alaska Natives.[443]

The ESA, MMPA, and MSA establish rights for Alaska Natives to harvest and in some cases co-manage natural resources. Because of these rights, an MSP process in this region will likely need to include appropriate Alaska Native representation as well as be developed in compliance with the statutory provisions protecting subsistence harvest.

Two laws are of particular relevance to Alaska Natives and Alaska's lands and natural resources—the Alaska Native Claims Settlement Act (ANCSA) and the Alaska National Interest Lands Conservation Act (ANILCA).

ANCSA extinguishes "[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist."[444] However, as a subsequent court case demonstrated, the extinguishment of aboriginal title applies only to the state waters and seabed of Alaska and not the Outer Continental Shelf waters and seabed.[445] Therefore, aboriginal claims may still exist for the region beyond the three-mile state territorial limits—keeping in mind that aboriginal title cannot mean exclusive rights due to the paramountcy doctrine.[446] In place of aboriginal title, ANCSA created a fund for Alaska Natives and authorized Alaska Natives to select approximately 40 million acres of federal public land.[447]

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[439] ESA, 16 U.S.C. § 1539(e); MMPA, 16 U.S.C. §§ 101(a)(6), 101(b).
[440] MMPA § 14 indicates that the Act in no way alters treaty rights. In particular, the Makah Tribe has treaty rights to gray whale harvest and is currently in the process of receiving the appropriate permits from National Marine Fisheries Service to begin the harvest again.
[441] United States-Russia Polar Bear Conservation and Management Act of 2006, §§ 501-509, 16 U.S.C. §§ 1423-1423h.
[442] *Id.* § 1423c (MMPA § 119 is equivalent to 16 U.S.C. § 1388).
[443] 16 USC § 1855(i).
[444] 43 U.S.C. § 1603.
[445] Amoco Production Co. v. Village of Gambell, 480 US 531 (1987); Village of Gambell v Hodel, 869 F.2d 1273 (9th Cir. 1989).
[446] Native Village of Eyak, *supra* note 426.
[447] For a discussion of this law, *see* CANBY, JR., *supra* note 421, at 398-405.

ANILCA creates a system of management of Alaska lands withdrawn by the federal government. One purpose of the Act is "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."[448] "[N]onwasteful subsistence uses of fish and wildlife" is the priority consumptive use of resources on public lands.[449] However, public lands do not include federal waters and seabed, and the Ninth Circuit and the State of Alaska are split on whether public lands include state waters.[450] The federal government regulates fish and game on public lands in cooperation with local advisory committees in accordance with ANILCA.[451]

Treaty Rights in the Pacific Northwest

Treaty rights are particularly important for ocean and coastal management in the Pacific Northwest region and are briefly discussed here. In several treaties created between Pacific Northwest tribes and the federal government, tribes were granted off-reservation fishing rights. In all, the U.S. established nine treaties with twenty-two tribes in the Pacific Northwest that delineate the rights reserved by the tribes.[452] These treaties reserved Indians' rights to take fish both on reservations and at the "usual and accustomed" fishing sites.[453] A series of cases from 1884 to the present has explored the meaning of these fishing rights clauses, including access to fishing sites and harvest allocation rights.

Two Supreme Court cases found that the Indian tribes had reserved rights to access fishing sites in all places that the tribes had used at the time the treaty was created, including areas of ceded lands and outside ceded lands that were customary sites.[454] Therefore, MSP in the Pacific Northwest should be sure to preserve tribal access to fishing sites that were customary sites at the time of the treaty.

According to the courts, fishing regulations can limit Indian fishing only if it is "reasonable and necessary for the conservation of the fish resource."[455] In a famous decision by Judge Boldt, the court held that the tribes are entitled to a fair share of the harvest and that this means that the tribes have a right to fifty percent of the harvestable fish in treaty areas including freshwater and coastal areas.[456] In another case, the courts found that hatchery fish should be counted among the total number of fish allocated to tribes.[457]

In addition to case law, treaty rights also are protected under specific federal statutes including, for example, the Pacific Whiting Act of 2006[458] and the MSA (providing a place on the Pacific Council for a representative of treaty tribes and requiring explanation of treaty rights in fishery management plans).[459]

The Cape Wind Controversy—An Example of Potential Challenges

Recently, two federally recognized Indian tribes have raised concerns about the development of wind farms in Nantucket Sound. The tribes claim that the placement of the turbines may disturb ancestral burial

[448] 16 U.S.C. § 3101(c) (1980).
[449] *Id.* § 3112(2).
[450] CANBY, JR., *supra* note 421, at 421 (citing Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995); and Totemoff v. State, 905 P.2d 954 (Alaska 1995)).
[451] 16 U.S.C. § 3115; *see also* CANBY, JR., *supra* note 421 at 421-22.
[452] Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 Am. Indian L. Rev. 41, 42 (2006).
[453] *Id.* at 41.
[454] *Id.* at 44-51 (citing United States v. Winans, 198 U.S. 371 (1905) and Seufert Bros. Co. v. United States, 249 U.S. 194 (1919)).
[455] *Id.* at 58 (quoting Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969)).
[456] *Id.* at 58-67 (citing United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974)).
[457] *Id.* at 78-83.
[458] Pacific Whiting Act of 2006, §§ 601-611 (2007).
[459] 16 U.S.C. § 1853(a)(2) requires fishery management plans to contain a description of the fishery including the nature and extent of Indian treaty fishing rights. In accordance with §§ 1852(a)(1)(F), (b)(5), the Pacific Fishery Management Council must include a tribal representative from a tribe with federal recognized fishing rights in Washington, Oregon, Idaho, or California.

sites and obstruct views of the sound, which would interfere with their spiritual and cultural practices.[460] The tribes have asked the National Park Service to place the Sound on the list of National Historic Places as a Traditional Cultural Property.[461] A listing does not necessarily prevent development but would lead to greater scrutiny of activities that could affect the listed site. In the context of MSP, this example demonstrates the need to work with relevant tribes to ensure that cultural heritage sites and practices that could be impacted by designations are identified in advance of area designations.

I. Conclusion

More than 140 laws and 20 agencies combine to form the foundation of federal marine governance in the United States. In practice these authorities could work in unison to create ecosystem-based MSP. Figure 1 provides a geographical summary of the tools and mechanisms that were described and analyzed in the preceding sections. For federal MSP to have a reasonable chance of success, however, notable gaps and obstacles would need to be addressed.

Federal laws governing marine waters cover most uses in most areas. But the sector-based nature of the laws and some missing pieces suggest that this structure is far from complete, and might be little more than serviceable for purposes of MSP in its current form.

First, there are a few holes in the geographic coverage of federal marine laws, whether due to authorities of the states or simple omissions in federal law. Second, several laws and other authorities, such as optimum-yield fishing requirements and expedited energy project permit reviews, may directly counter the objectives of MSP and would therefore need to be addressed in order to successfully implement MSP. Third, many of the laws relevant to marine management require fewer considerations in decision-making than is adequate for compliance with a marine spatial plan. Without the mandate to consider all pertinent uses, an agency may not be able to defer to a preferred ocean use. Finally, actual mandates to follow a comprehensive regional plan are rare in federal marine laws, leaving a significant onus on required considerations, consultations, and decision-making tools for success in implementation.

Regulatory holes and affirmative obstacles to MSP exist even among this rather expansive network of federal authorities in the ocean. Perhaps of greatest importance are the authorities that would actively work against MSP. Although there are myriad others, two of the primary obstacles are national security exemptions and contrasting statutory objectives.

Uses and activities that involve national security are typically either explicitly exempted from the laws that govern the ocean and coasts or are subject to lesser restrictions, making it unlikely that the military could be bound by a marine spatial plan. But since national security activities are not explicitly exempted from NEPA, significant data about military uses and their potential effects could support the marine spatial planning process.

Perhaps more directly, some agencies are required to maximize certain activities, making it difficult to balance those interests with others in an MSP context. For example, the Magnuson-Stevens Fishery Conservation and Management Act encourages the prosecution of fisheries pursuant to optimum yield determinations. Similarly, the Outer Continental Shelf Lands Act requires that the OCS be made available for expeditious and orderly development. Executive Order 13,212 requires federal agencies to expedite energy-related project permit reviews and to accelerate the completion of such projects, prompting agencies to use their discretionary authorities to promote energy production. When one objective is

[460] *See* Associated Press, Indian Tribes Object to Cape Wind Farm Proposal (July 15, 2009), *available at* http://www.turnto10.com; *see also* Thomas Grillo, *Mass. Tribes Fume Over Cape Wind Say Giant Turbines Would Destroy Views*, Boston Herald (Nov. 3, 2009).
[461] *Id.*

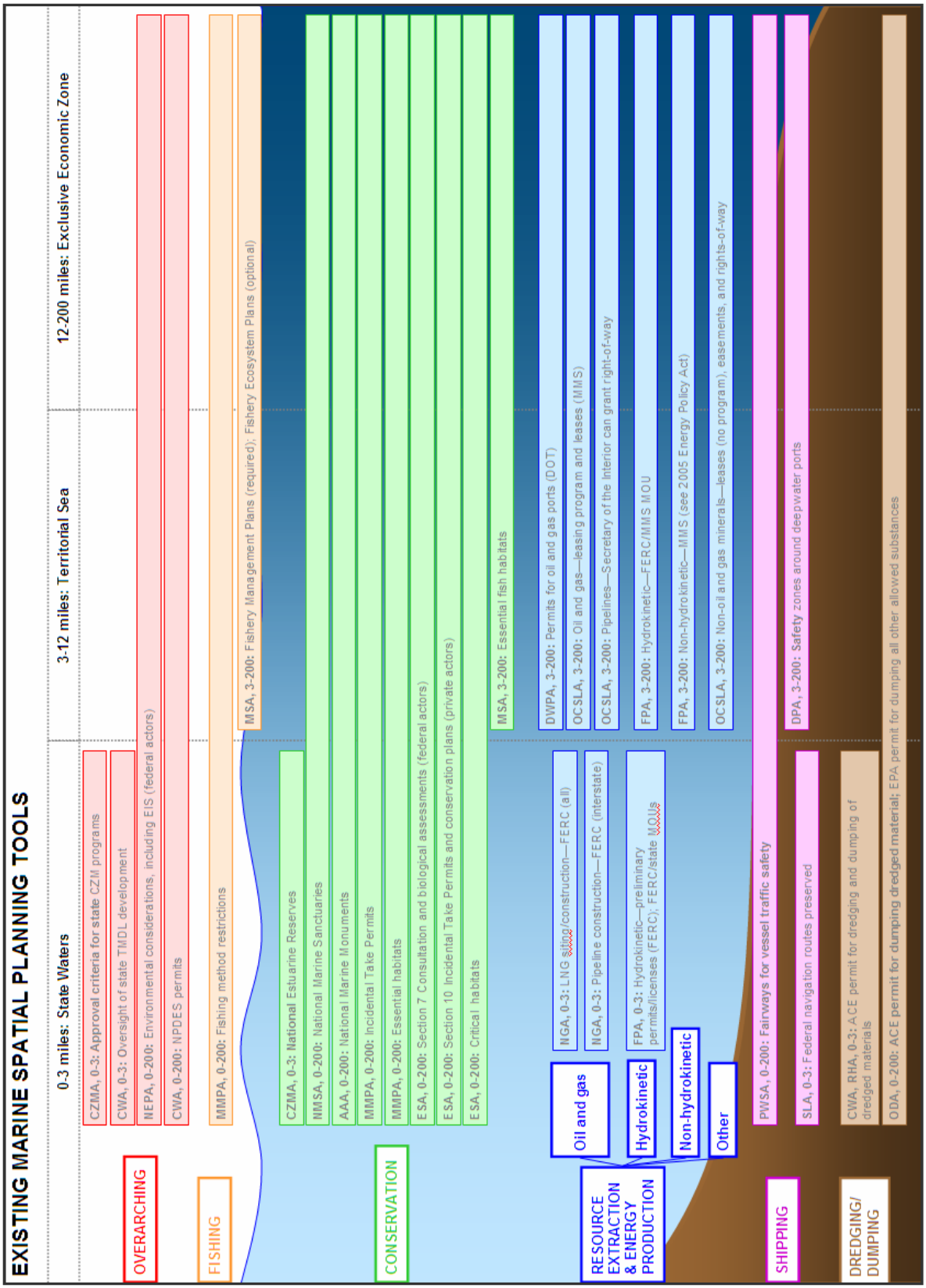
heavily weighted, an agency has little opportunity to consider other marine activities, let alone a comprehensive plan, even if otherwise directed to do so.

Even if there is not an affirmative obligation to maximize a particular ocean use, gaps in a list of considerations in decision-making could adversely affect MSP. For MSP to function, the decision-maker must have some authority to consider the marine spatial plan, or at least the other uses and conservation efforts that compose the plan. Many of the major federal laws governing ocean use have rather comprehensive consultation and consideration requirements in the course of establishing exclusionary zones or permitting a use. Some federal laws even include tools, such as Total Maximum Daily Loads under the Clean Water Act and Environmental Impact Statements under the National Environmental Policy Act, that can aid geographically and/or substantively comprehensive permitting decisions.

But several laws are particularly weak in the breadth of interests they must consider. For example, the Magnuson-Stevens Fishery Conservation and Management Act requires only consultation with the Departments of Commerce, State, and Homeland Security when reviewing fishery management plans, despite the numerous agencies that conduct or permit activities in areas covered by those plans. Similarly, the Army Corps of Engineers has few consultation requirements when permitting dredging and the disposal of dredged material, but the criteria for decision-making do cover many issues.

Where the sector-based nature of these many federal laws becomes most evident is in the general lack of required compliance with, or at least consideration of, a comprehensive plan, be it a marine spatial plan or some other form. A few exceptions exist. Guidelines for MMS' alternative energy siting on the OCS require coordination with agencies involved in multifaceted spatial planning efforts. The Federal Power Act requires that each project be adapted to a comprehensive plan. While MSP may still be able to function without this mandate on every agency, significant pressure is thereby placed on the existing consultation and consideration requirements of individual laws to allow other actors to enforce the plan against the acting agency.

Figure 1. Summary of Existing Tools and Mechanisms to Support MSP.



J. Potential Federal Executive and Legislative Actions

The following section summarizes some of the potential legislative and executive mechanisms for establishing a marine spatial plan.

i. Legislation

The farthest-reaching and most comprehensive federal action for establishing and providing an implementation structure for MSP would be the passage of federal legislation. Congress' authority to amend existing laws and pass new ones is limited only by the Constitution. Because the Supreme Court's paramountcy doctrine holds that the national government has sole authority to use, occupy, and manage ocean and seabed resources, Congress has vast authority to prescribe management requirements in the ocean environment. Therefore federal legislation could repeal legal obstacles to MSP as well as add new supportive provisions. It also could address multiple laws simultaneously and establish a comprehensive MSP policy.

Legislative amendments that repeal an existing provision or otherwise upset a well-established area of law might remove an obstacle to the development or implementation of MSP, and therefore could be very important, although potentially difficult to enact. By and large, however, MSP-supportive legislation would not need to override existing provisions. Rather, it could achieve much simply by introducing additional elements into the existing framework. At the other end of the spectrum, a single act of Congress could comprehensively cover all relevant agencies, establishing a process for developing and amending a marine spatial plan as well as requiring all agencies to comply with it.

ii. Agency Action

In the absence of congressional or presidential action, federal agencies themselves may be able to undertake some changes to at least partially support MSP. Within the bounds of their authorities as delegated by Congress, federal agencies can individually and voluntarily amend their existing regulations. Changes to rules and regulations require a formal rulemaking process; changes to policy guidance and memorandums do not. Moreover, there are few explicit requirements to comply with a comprehensive plan—such as might result from MSP—in existing marine laws and regulations. Federal agencies could promulgate a regulation, issue guidance, or take some other form of action to require or encourage compliance with a federal marine spatial plan.

For example, MMS' alternative energy guidelines require coordination with federal planning efforts to avoid conflict among ocean users, including multifaceted spatial planning efforts; similarly, the Federal Power Act requires FERC to comply with any existing comprehensive plans in state waters when licensing hydrokinetic activities. In addition, they could establish an interagency MOU stating that they will use their existing discretionary authority to support MSP. For example, ten agencies established an MOU to clarify and help enforce the requirements of the Deepwater Port Act. A similar mechanism could be used to detail the foundational principles of a marine spatial plan. Although nonbinding, such an agreement would be a first step to achieving the interagency coordination and collaboration necessary to successfully implement MSP.

iii. Executive Order

Presidents have issued Executive Orders and Proclamations since soon after the nation was formed.[462] The President has two sources for the authority to issue an Executive Order. First, authority for a specific action may be found explicitly or implicitly in congressional legislation. Second, the President may be authorized to act pursuant to the Constitution, which grants the President executive power and states that the President "shall take care that the laws be faithfully executed."[463] The statement inherently demonstrates that the President is not a lawmaker, but rather an executor; Congress was given sole lawmaking authority.[464]

In sum, an Executive Order may enforce a law, but it cannot infringe upon Congress' exclusive right to enact legislation. Therefore an Executive Order cannot conflict with a congressional mandate. Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* provides the leading assessment of presidential authority: when Congress has remained silent on an issue, presidential actions depend solely on the strength and powers of the Executive, and there is a realm where the distribution of presidential versus congressional authority is unclear.[465] If the President's action is explicitly authorized, it may have the force and effect of law.[466] Congress can revoke an Executive Order if it was based on congressionally granted authority, while a sitting President can revoke or amend any Executive Order issued by a predecessor.[467]

As yet there has not been any explicit or implicit congressional action related to MSP. As a result, an Executive Order on the subject would operate within the intermediate gray area of Justice Jackson's analysis: the President would not have the backing of congressional authority, but neither would he or she be contradicting congressional action, so long as he or she built upon existing law rather than attempting to override or contradict it.[468]

The following examples highlight some ways in which past Presidents have used their executive authority to achieve similar or related goals:

- *President Clinton called for **inter-agency and inter-governmental coordination** in the expansion of a national system of marine protected areas.* Executive Order 13,158 was issued on May 26, 2000, by President Clinton. To enhance protection of marine natural and cultural resources and ensure their sustainable use, the Order called for a stronger, expanded, comprehensive national system of marine protected areas.[469] The Departments of Commerce and the Interior were tasked with leading this effort and directed to consult with other executive agencies,[470] coastal states, tribes, Regional Fishery Management Councils, and

[462] Harold C. Relyea, *Congressional Research Service Report for Congress: Presidential Directives: Background and Overview* (2007), at 5-6. Executive Order 1 is President Lincoln's Emancipation Proclamation.
[463] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952); U.S. CONST., art. II, § 3.
[464] Youngstown, 343 U.S. at 587–88; U.S. CONST., art. I, § 1.
[465] Youngstown, 343 U.S. at 637-38.
[466] *See* T.J. Halstead, *Congressional Research Service Report for Congress: Executive Orders: Issuance and Revocation* (2001), at 1-2 (citing Staff of House Comm. On Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of a Use of Presidential Powers (Comm. Print 1957); Armstrong v. United States, 80 U.S. 154 (1871); Farkas v. Texas Instrument, Inc., 372 F.2d 629 (5th Cir. 1967); Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3rd Cir. 1964); Jenkins v. Collard, 145 U.S. 546, 560-61 (1893)).
[467] *See id.* at 4-5.
[468] Recent commentary has addressed the possibility of extending the public trust doctrine, which has roots in English common law and has already been incorporated into state coastal laws, to apply to federal waters as well. *See* Mary Turnipseed, Stephen E. Roady, Raphael Sagarin, & Larry B. Crowder, *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). *See also infra,* text surrounding notes 580-584.
[469] Exec. Order No. 13,158, 65 Fed. Reg. 34,909 § 1 (2000).
[470] Including the Departments of Defense, State, and Transportation, the U.S. Agency for International Development, the Environmental Protection Agency, the National Science Foundation, and pertinent others. *Id.* § 4(a).

other appropriate entities.[471] As relates to marine protected areas, Commerce and the Interior are required to share information, tools, and strategies, and to provide guidance to other agencies.[472] The order also established the Marine Protected Area Center and Marine Protected Area Federal Advisory Committee of non-federal scientists and resources managers.[473] Although the inter-agency effort has yielded few advances, it demonstrates the President's ability to call for such coordination.

- *President Bush directed agencies to **exercise existing authority in a specified manner.*** On May 18, 2001, President George W. Bush issued Executive Order 13,212.[474] As mentioned previously, the order directed executive departments and agencies to take appropriate action to expedite energy-related project permit reviews and project completion, while ensuring that safety, public health, and environmental protections were upheld.[475] It also established an interagency task force to oversee and assist the agencies with implementation.[476] The order was subsequently modified by Executive Order 13,302, which added projects that will strengthen pipeline safety to the list of eligible projects.[477]

- *President Clinton required agencies to incorporate a **new objective into their missions.*** President Clinton established a policy to address environmental justice issues in minority and low-income populations via Executive Order in early 1994. The Order broadly required each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[478] Agencies were directed to do so to the extent of their authority, and to act in a way that prevented discriminatory effects based on race, color, or national origin.[479] An interagency working group was established to coordinate and guide agency efforts and to develop interagency model environmental justice projects.[480]

- *President Obama created a federal leadership entity to **consult and collaborate with state bodies.*** President Obama issued Executive Order 13,508 on May 12, 2009. Despite federal, state, and local efforts, the Order recognized the continuing degraded state of Chesapeake Bay waters and the numerous sources of pollution.[481] Therefore the President established a Federal Leadership Committee to oversee watershed and ecosystem strategy and program development and implementation.[482] The Federal Leadership Committee is to produce an implementation strategy for existing programs, which among other things shall define environmental goals and benchmarks, while various agencies have been tasked with preparing recommendations for achieving different goals within the Bay.[483] In multiple

[471] *Id.* § 4(b).
[472] *Id.* § 4(a).
[473] *Id.* §§ 4(c), (e).
[474] Exec. Order No. 13,212, 66 Fed. Reg. 28537 (2001).
[475] *Id.* ¶ 2.
[476] The task force was to be composed of representatives from the Departments of State, the Treasury, Defense, Agriculture, Housing and Urban Development, Justice, Commerce, Transportation, the Interior, Labor, Education, Health and Human Services, Energy, and Veterans Affairs, the Environmental Protection Agency, the Central Intelligence Agency, the General Services Administration, the Office of Management and Budget, the Council of Economic Advisers, the Domestic Policy Council, and the National Economic Council. It was to be led by the Chair of the Council on Environmental Quality, who could also select other representatives. *Id.* ¶ 3.
[477] Exec. Order No. 13,302, 68 Fed. Reg. 27429 (2003) (amending Exec. Order No. 13,212).
[478] Exec. Order No. 12,898, 59 Fed. Reg. 7629 § 1-101 (1994).
[479] *Id.* §§ 1-101, 6-608.
[480] *Id.* § 1-102.
[481] Exec. Order No. 13,508, 74 Fed. Reg. 23099 preamble (2009).
[482] The Federal Leadership Committee consists of "senior representatives" from the Departments of Agriculture, Commerce, Defense, Homeland Security, the Interior, Transportation, and other agencies the Committee determines should be included. It is chaired by the Administrator of the Environmental Protection Agency (or the Administrator's designee). *Id.* § 201.
[483] *Id.* §§ 202-203.

places the Order directs the federal agencies to consult, collaborate, and coordinate with state entities.[484]

- *Presidents Nixon, Carter, and Reagan established* ***federal regional councils.*** In 1972, President Nixon issued Executive Order 11,647 and established a Federal Regional Council to oversee the ten regions of the United States that had been designated in the 1969 Government Reorganization Act.[485] The Order was amended several times and then revoked in 1979.[486] However, the revocation Order was itself revoked by President Reagan in 1981, in an Order that established ten Federal Regional Councils for the purpose of "promoting Federal policies and to support interagency and intergovernmental coordination."[487] In addition to acting as liaisons with state, tribal, regional, and local offices, the Councils were tasked with ensuring major agency policy and budgeting decisions and federal initiatives were understood. The Councils also coordinated the response to the social and economic effects of federal activities, and identified significant problems.[488] However, the Councils were disbanded and the Order revoked by a subsequent Executive Order in 1983.[489]

In the context of a MSP framework, it is likely that an Executive Order could be useful in two ways.

First, an Executive Order could establish a policy calling for MSP. This could be a strategic method for helping to ensure that the favorable provisions of numerous ocean-related laws are used to the extent possible. The main impact of such an action would be to encourage agencies to use their discretionary authority to support a marine spatial plan. For example, NOAA has discretionary authority to designate Marine Sanctuaries; an Executive Order would encourage it to use that authority in support of a comprehensive marine spatial plan.

Second, an Executive Order could establish an MSP oversight body, much like that proposed in the Interagency Ocean Policy Task Force Interim Report issued on September 10, 2009. There are currently over a dozen federal agencies that have at least partial jurisdiction over ocean resources, uses, and activities. The most expeditious way to implement national marine spatial plan may be to designate the proposed National Ocean Council (NOC) as the single body with oversight authority to ensure that plan elements are enacted in a consistent manner.

The value of an oversight authority remains constant regardless of whether MSP is mandated by federal legislation, encouraged by an Executive Order, or voluntarily undertaken by relevant federal agencies (e.g., per an MOU). The remainder of this section discusses options for such an oversight body and potential subsidiary entities.

The proposed NOC is a good candidate for an oversight body, although including the National Oceanic and Atmospheric Administration as a principal level member would be important. The proposed NOC would be jointly chaired by the Council on Environmental Quality (CEQ) and the Office of Science and

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[484] *See, e.g.*, §§ 203–206, 301, 401, 701.
[485] Exec. Order No. 11,647, 37 Fed. Reg. 3167 (1972).
[486] Exec. Order No. 11,647 was modified by Exec. Order Nos. 11,731 (1973), 11,892 (1975), and 12,038 (1978), and then revoked by Exec. Order No. 12,149 (1979). *See* National Archives, Executive Order Disposition Table, *Executive Order 11647*, http://www.archives.gov/federal-register/executive-orders/1972.html#11647 (last visited Sept. 25, 2009).
[487] Exec. Order No. 12,314, 46 Fed. Reg. 38,329 (1981). The Councils consisted of principal policy officers from nine federal agencies, a presidentially designated Chair, representatives from the Office of Management and Budget (OMB) at their election, and representatives from any significantly affected agency. The agencies represented were the Departments of the Interior, Agriculture, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, and Education, and the Environmental Protection Agency. *Id.* § 1. The Office of Management and Budget was designated the oversight agency, and was instructed to consult with the White House Office of Policy Development. *Id.* § 3.
[488] *Id.* § 2.
[489] Exec. Order No. 12,407, 48 Fed. Reg. 7717 (1983).

Technology Policy (OSTP), and include principal and deputy level members from the Departments of State, Defense, the Interior, Agriculture, Health and Human Services, Commerce, Labor, Transportation, Energy, and Homeland Security; the Office of the Attorney General; the Environmental Protection Agency; CEQ; the Office of Management and Budget; the National Aeronautics and Space Administration; the Office of the Director of National Intelligence; OSTP; the National Science Foundation; the Federal Energy Regulatory Commission; the Joint Chiefs of Staff; the Assistants to the President for National Security Affairs, Homeland Security, Domestic Policy, and Economic Policy; a designee from the Vice President; and other officers or employees of the United States as the Co-Chairs may from time to time designate. The NOC would also have a Steering Committee made up of CEQ, OSTP, and the leaders of the proposed Ocean Resource Management Interagency Policy Committee and Ocean Science and Technology Policy Committee.[490]

In addition to a national oversight body, it may also be useful to establish regional councils to oversee the creation, application, and modification of regional marine spatial plans. The advantage of such a structure would be to provide flexibility, so that differences between various regions are accounted for; meanwhile, the national oversight entity would ensure the plans adhere to the overarching framework and remain as consistent as possible. Regional councils could be composed of representatives from affected management bodies and sectors. Potential members include:

- Representatives from the regional divisions of the federal agencies listed above;
- Affected state governors and relevant agencies, and affected heads of local governments and relevant local entities;
- Regional partnerships, such as the Gulf of Mexico Alliance, Mid-Atlantic Regional Council on the Ocean, and West Coast Governors' Agreement on Ocean Health;
- Appropriate tribal representatives; and
- Representatives of individual sectors, such as fishing, alternative energy, and environmental nongovernmental organizations.

There are three important factors to consider when designing a council system. First, how should decisions on marine spatial plans be made? The environmental community has proposed regional decision-making consistent with nationally-established goals and objectives (from both the national ocean policy and any specific goals and objectives established by the NOC). Regional marine spatial plans would be checked for consistency with national goals and approved by the NOC.[491]

Second, the regional councils may encounter institutional obstacles, such as susceptibility to interest groups, as arguably has been the case with the regional fishery management councils under the Magnuson-Stevens Act. Third, there are already some regional ocean partnerships in place, and any council system should consider opportunities to coordinate with them (see discussion in the next section).

[490] Council on Environmental Quality, Interim Report of the Interagency Ocean Policy Task Force (Sept. 10, 2009), at 6–7, 18-19.
[491] Conservation Law Foundation, Natural Resources Defense Council, Oceana, Ocean Champions, Ocean Conservancy, Pew Environment Group, The Nature Conservancy, and World Wildlife Fund, *Recommendations for a Framework for Marine Spatial Planning: a Tool to Implement Ecosystem-based Management to Achieve the Goal of Ecosystem Health* (Nov. 2009).

II. REGIONAL PARTNERSHIPS AND COMPACTS

A. Introduction

Over the past few decades, multi-state agreements concerning management of coastal waters have sprung up around the country and given rise to a number of regional partnerships. In fact, with the newly created Governors' South Atlantic Alliance, all coastal waters of the contiguous U.S., including the Great Lakes, are covered by one of these partnerships. Foreign governments are included in a few of them. Regional partnerships have less relevance in Alaska, Hawaii, and the territories since they do not have neighboring U.S. states in the same way that the mainland states do. The states included in each partnership were primarily determined by ecosystem boundaries, and thus are well-situated for ecosystem-based management, including MSP, in state waters.

Because of their state-level origins, broadly collaborative nature, and ecosystem scope, the inclusion of these regional partnerships into federal MSP in some way would seem efficient and productive. But the manner in which the federal government should or will involve these partnerships in a federal process is a more complex question. This section briefly describes some of the prominent marine regional partnerships, identifies the pros and cons of their possible roles in federal MSP, and discusses potential changes that may affect their utility for federal MSP.

B. Regional Partnership Snapshots

The following section includes overviews of the seven primary regional partnerships that govern the North Atlantic, Mid-Atlantic, South Atlantic, Gulf of Mexico, and Pacific coasts, as well as the Great Lakes. Their missions, guiding principles, and memberships are described to facilitate comparison and highlight common approaches. They are arranged in chronological order of their creation.

i. Great Lakes Commission

The first regional partnership in the Great Lakes was the Great Lakes Commission. In 1955 the eight Great Lakes states created the Great Lakes Basin Compact, which received Congressional consent in 1958.[492] In addition to identifying key regional priorities for the Great Lakes, the Compact established the Great Lakes Commission. Composed of three to five members of each of the eight Great Lakes states, the Commission is dedicated to "promot[ing] the order, integrated, and comprehensive development, use, and conservation of the water resources of the Great Lakes Basin."[493] The Commission helps its members "speak with a unified voice and collectively fulfill their vision for a healthy, vibrant Great Lakes-St. Lawrence River region.[494] Quebec and Ontario became associate members through a Declaration of Partnership in 1999.[495]

As per its terms, the Compact became binding on each of the member states when their state legislatures enacted it.[496] A Board of Directors[497] provides oversight for Compact activities, which is designed to address five primary objectives:

[492] Great Lakes Basin Compact (1955); Great Lakes Commission, About the Great Lakes Commission, http://www.glc.org/about/ (last visited Nov. 10, 2009).
[493] Great Lakes Commission, Strategic Plan for the Great Lakes Commission (2007), at 2; Great Lakes Basin Compact, *supra* note 492, art. I.
[494] Strategic Plan for the Great Lakes Commission, *supra* note 493, at 2.
[495] Great Lakes Commission, Declaration of Partnership (1999), available at http://www.glc.org/about/pdf/declarations.pdf.
[496] Great Lakes Basin Compact, *supra* note 492, art. II.
[497] Great Lakes Commission, Board of Directors, http://www.glc.org/about/board.html (last visited Nov. 10, 2009).

1. To promote the orderly, integrated, and comprehensive development, use, and conservation of the water resources of the Great Lakes Basin (hereinafter called the Basin).
2. To plan for the welfare and development of the water resources of the Basin as a whole as well as for those portions of the Basin which may have problems of special concern.
3. To make it possible for the states of the Basin and their people to derive the maximum benefit from utilization of public works, in the form of navigational aids or otherwise, which may exist or which may be constructed from time to time.
4. To advise in securing and maintaining a proper balance among industrial, commercial, agricultural, water supply, residential, recreational, and other legitimate uses of the water resources of the Basin.
5. To establish and maintain an intergovernmental agency [to] the end that the purposes of this compact may be accomplished more effectively.[498]

Under the Compact, the member states agree to consider the Commission's recommendations on a number of topics, including measures for combating pollution and hydroelectric development.[499] In its most recent Strategic Plan, the Commission listed four primary goals. First, through communication and education, the Commission raises "public awareness of ecosystem management and the links between environmental quality and economic viability (and)…educates and empowers government, citizens and other stakeholders to effectively participate in decisions affecting the future of the region." Second, the Commission focuses on integrating and reporting information, ensuring research on the Great Lakes is conducted, collected, and made accessible. Third, in an effort to facilitate and build consensus, the Commission organizes forums for stakeholders to share ideas, research, and viewpoints. Fourth, the Commission engages in policy coordination and advocacy that "helps the region speak with a common voice."[500]

The Commission is one of several partnerships formed to try to address regional issues in the Great Lakes. For example, in 1983 the Governors of Wisconsin, Indiana, Michigan, New York, Minnesota, Pennsylvania, Illinois, and Ohio created the Council of Great Lakes Governors to address the pressing environmental and economic challenges confronting their region, and the Premiers of Ontario and Québec later joined as Associate Members.[501] On December 13, 2005, the Board of Directors of the Council signed the St. Lawrence River Basin Water Resources Compact, which was ratified by all eight states and Congress and signed by the President by the end of 2008.[502] There is also an International Joint Commission, a Great Lakes Fisheries Commission, and a Council of Great Lakes Mayors, among others.[503]

A 2003 GAO report observed a lack of coordination between the myriad regional organizations in the Great Lakes.[504] The report noted that despite the many actors involved there were still significant environmental issues that needed to be addressed in the region, such as toxic water contamination and aquatic invasive species. It concluded that an overarching strategy was needed to outline and monitor

[498] Great Lakes Basin Compact, *supra* note 492, art. I.
[499] Great Lakes Basin Compact, *supra* note 492, art. VII.
[500] Strategic Plan for the Great Lakes Commission, *supra* note 493.
[501] Council of Great Lakes Governors, Overview, About Us, http://www.cglg.org/Overview/index.asp (last visited Oct. 16, 2009).
[502] COUNCIL OF GREAT LAKES GOVERNORS, ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT (2005), *available at* http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf; Council of Great Lakes Governors, Great Lakes-St. Lawrence River Basin Water Resources Compact Congressional Consent Status, http://www.cglg.org/projects/water/CompactConsent.asp (last visited Oct. 16, 2009).
[503] For more information on the various regional organizations in the Great Lakes, see Environmental Law Institute, Ecosystem-Based Management: Laws and Institutions 5, 19 (2007); Joint Ocean Commission Initiative, Regional and State Ocean Activities Summary (2007), available at http://www.jointoceancommission.org/resource-center/7-Summary-of-Regional-Ocean-Governance-Initiatives/2007-03-05_Regional_Ocean_Activities_Summary.pdf; U.S. Commission on Ocean Policy, *supra* note 281, at 93.
[504] U.S. General Accounting Office, *Great Lakes: An Overall Strategy and Indicators for Measuring Progress Are Needed to Better Achieve Restoration Goals*, GAO-03-515 (Apr. 2003).

progress.[505] Then in 2004 President Bush issued an Executive Order creating an interagency task force to help coordinate the numerous laws and agencies affecting the Great Lakes.[506] The task force was assigned to work with interested parties to create a regional collaboration focused on Great Lakes natural resources and environmental issues, and the 2004 report of the U.S. Commission on Ocean Policy cited optimism for what it might achieve.[507] By the end of 2004 a Declaration and Framework were issued for the Great Lakes Regional Collaboration. The Collaboration then developed a Strategy to Restore and Protect the Great Lakes in 2005.[508]

ii. Gulf of Maine Council on the Marine Environment

The Gulf of Maine Council on the Marine Environment is a partnership of U.S. and Canadian federal and state agencies working "to maintain and enhance environmental quality in the Gulf of Maine to allow for sustainable resource use by existing and future generations."[509] Formed in 1989 by the Governors of Maine, Massachusetts, and New Hampshire and the premiers of New Brunswick and Nova Scotia, the Council serves as a forum for these jurisdictions to exchange information and engage in planning for the shared watershed.[510] It is administered through the U.S. Gulf of Maine Association, a 501(c)(3) nonprofit, and the Canadian Gulf of Maine Association.[511] The Council's Secretariat rotates through the jurisdictions, and through 2010 is housed in New Hampshire.[512]

The Council operates by consensus, and votes are non-binding on members that oppose or abstain from voting on a proposition.[513] Joining leaders from the state and provincial level on the Council are representatives from federal agencies on both sides of the border, nongovernmental organizations, and the private sector.[514] The Council oversees a Working Group composed of one representative each from the member state, provincial, and federal agencies, as well as the chair of each of the Council's numerous Committees.[515] The Working Group in turn oversees the Committees, which are staffed by individuals from member agencies and interested NGOs, and focus on Habitat, Contaminants, Maritime Activities and Cross-cutting Issues.[516]

Council decisions are guided by four primary principles: ecologically sustainable development; ecosystem-based planning and management; environmental protection through precaution; and public information and participation-based planning and management.[517] In addition to targeting premiers and governors, the Council sees its primary audience as consisting of coastal lawmakers, decision-makers, and managers; academics; Gulf of Maine residents and visitors; and the scientific community.[518]

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[505] *Id.* at 18, 47.
[506] Exec. Order No. 13,340, 69 Fed. Reg. 29,043 (2004), § 1.
[507] U.S. Commission on Ocean Policy, *supra* note 281, at 93.
[508] Great Lakes Declaration: Protecting and Restoring the Great Lakes through a Regional Collaboration of National Significance (2004), available at http://www.glrc.us/documents/GLDeclaration12032004.pdf; Framework for the Great Lakes Regional Collaboration (2004), available at http://www.glrc.us/documents/Framework12032004.pdf; Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes (2005), available at http://www.glrc.us/documents/strategy/GLRC_Strategy.pdf.
[509] Gulf of Maine Council on the Marine Environment [*hereinafter* GOMC], About the Council, Mission & principles, http://www.gulfofmaine.org/council/mission.php (last visited Oct. 14, 2009).
[510] GOMC, About the Council, http://www.gulfofmaine.org/council/ (last visited Sept. 28, 2009).
[511] *Id.*
[512] For a schedule of future Secretariats through 2014, see Gulf of Maine Council on the Marine Environment, About the Council, Secretariat, http://www.gulfofmaine.org/council/secretariat.php (last visited Oct. 14, 2009).
[513] GOMC, Operating Guidelines, http://www.gulfofmaine.org/council/internal/rh/opguidelines.doc (last visited Sept. 28, 2009).
[514] GOMC, About the Council, *supra* note 510.
[515] GOMC, Committees, Working Group, http://www.gulfofmaine.org/council/committees/working_group.php (last visited Sept. 28, 2009).
[516] GOMC, Committees and Task Forces, Overview, http://www.gulfofmaine.org/council/committees/ (last visited Sept. 28, 2009).
[517] GOMC, About the Council, Mission & principles, *supra* note 509.
[518] GOMC, GULF OF MAINE COUNCIL ON THE MARINE ENVIRONMENT ACTION PLAN 2007-2012, at 6, *available at* http://www.gulfofmaine.org/actionplan.

Although the Council does not have regulatory or policy-making authority, its goals align with state, provincial, and federal priorities, and thus the Council "promotes progress toward common goals."[519] The objectives of the Council, which are developed with public input, are detailed in five-year Action Plans.[520] The current Action Plan lists the following goals, aimed at advancing ecosystem-based management:

- Goal 1: Coastal and marine habitats are in a healthy, productive, and resilient condition.
- Goal 2: Environmental conditions in the Gulf of Maine support ecosystem and human health.
- Goal 3: Gulf of Maine coastal communities are vibrant and have marine-dependent industries that are healthy and globally competitive.[521]

Action Plan implementation is undertaken by the Council's Committees. For each overarching goal included in the Action Plan, the Council adopts a series of 18-month Work Plans that detail specific actions that should be taken.[522] One of the Council's strengths is that it acts as a repository for information about the Gulf of Maine and ongoing restoration and conservation projects, much of which can be accessed through its website. Information is available online about projects ranging from the Gulf of Maine Mapping Initiative, a bi-national public-private effort to survey, image, and map the regional seafloor, to the Ecosystem Indicator Partnership, a cross-cutting committee working to develop ecosystem monitoring indicators and integrating data into a web-based reporting system.[523]

iii. Gulf of Mexico Alliance

Formed in 2004, the Gulf of Mexico Alliance is a partnership between the Governors of Alabama, Florida, Louisiana, Mississippi, and Texas that works to ensure a healthy Gulf through increased collaboration across the Gulf Region. To that end, the Alliance engages the six Mexican Gulf states on issues of common concern, through coordination with the Gulf of Mexico States Accord.[524] The Alliance was instigated by an invitation from former Florida Governor Jeb Bush. Recognizing that the Gulf states had collaborated with EPA's Gulf of Mexico Program for years, he invited the other Gulf states to lead a regional partnership to "determine restoration goals, establish research priorities, and participate in the planning of the Integrated Ocean Observing Systems."[525]

The first Governors' Action Plan was a three-year plan, launched in 2006, focused on building partnerships in the region and preparing to implement a regional plan for ocean governance.[526] Building on the momentum it generated, the Alliance issued a second Action Plan. The Governors' Action Plan II is a five-year plan that identifies priority areas for achieving the goal of a healthy and productive Gulf of Mexico. Each priority includes Action Steps for the Alliance to follow.[527]

The six priority areas for 2009-2014 are:

- Water quality for healthy beaches and seafood;

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[519] *Id.* at 6.
[520] *Id.* at 5.
[521] *Id.* at 6, 17.
[522] *Id*. The most recent Work Plan was for January 2007 through July 2008. GOMC, Gulf of Maine Council on the Marine Environment Work Plan January 2007 to July 2008 (Dec. 2006), available at http://www.gulfofmaine.org/actionplan/Jan07-Jun08%20Work%20Plan%20Final.pdf.
[523] *See* Gulf of Maine Council on the Marine Environment, http://www.gulfofmaine.org (last visited Nov. 10, 2009).
[524] Gulf of Mexico Alliance [*hereinafter* GOMA], About the Alliance, http://gulfofmexicoalliance.org/about/welcome.html (last visited Sept. 28, 2009); Joint Ocean Commission,
[525] Letter from Florida Governor Jeb Bush to Mississippi Governor Haley Barbour, Apr. 26, 2004, available at http://www.dep.state.fl.us/gulf/leadership/files/govBush_letter1.pdf.
[G] GOMA, About the Alliance, *supra* note 524.
[527] GOMA, GOVERNORS' ACTION PLAN II FOR HEALTHY AND RESILIENT COASTS (2009), *available at* http://gulfofmexicoalliance.org/pdfs/ap2_final2.pdf.

- Habitat conservation and restoration;
- Ecosystems integration and assessment;
- Reducing nutrient impacts to coastal ecosystems;
- Coastal community resilience; and
- Environmental education.[528]

Each Alliance member state leads the efforts in at least one of the priority areas. The activities within Action Plan II are designed to address four primary challenges: sustaining the Gulf of Mexico economy; improving ecosystem health; mitigating the impacts of and adapting to climate changes; and mitigating harmful effects to coastal water quality.[529]

The Alliance is supported by a Federal Workgroup of federal agencies. Led by EPA, NOAA, and the Department of the Interior, the Federal Workgroup also includes CEQ, NASA, NSF, the Corps, and the Departments of Agriculture, Defense, Energy, Health and Human Services, State, and Transportation.[530] Numerous non-governmental entities provide additional support.[531]

iv. Northeast Regional Ocean Council

In response to the findings of the U.S. Commission on Ocean Policy and the Bush Administration's response,[532] in 2005 the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont formed the Northeast Regional Ocean Council (NROC). By its Terms of Reference, NROC is designed "[t]o assist the region's Governors identify [sic] coastal and ocean management priorities that require a coordinated regional response and to foster collaboration that effectively addresses these issues."[533]

Working with the Subcommittee on the Integrated Management of Ocean Resources (SIMOR), NROC has identified priority areas relating to the health and management of the region's ocean and coast. They are:

- Ocean and coastal ecosystem health;
- Rendering New England a "Coastal Hazards Ready" region;
- Ocean energy planning and management; and
- Maritime security.[534]

Each governor appoints up to two members to the Council. Since 2007, six seats have been reserved for federal agencies, who serve as equal partners. This change was specifically affected to make NROC a genuine state-federal partnership.[535] NOAA, the Department of the Interior, and EPA are the lead federal agencies.[536] Each year a state representative serves as the Council chair and a federal representative serves as the vice-chair. The Council aims to make decisions by consensus.[537]

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[528] *Id.* at 7.
[529] *Id.* at 8-9.
[530] *Id.* at 5, 9.
[531] Gulf of Mexico Alliance, About the Alliance, *supra* note 524.
[532] U.S. COMMISSION ON OCEAN POLICY, OCEAN BLUEPRINT FOR THE 21ST CENTURY (2004); BUSH ADMINISTRATION, U.S. OCEAN ACTION PLAN (2004).
[533] Northeast Regional Ocean Council [*hereinafter* NROC], Terms of Reference, http://community.csc.noaa.gov/nroc/index.php?option=com_content&view=article&id=69&Itemid=76 (last visited Oct. 14, 2009).
[534] NROC, NEW ENGLAND GOVERNORS' COAST AND OCEAN ACTION PLAN 2 (2007), *available at* http://community.csc.noaa.gov/nroc/index.php?option=com_docman&task=doc_view&gid=9&tmpl=component&format=raw&Itemid=55.
[535] *Id.* at 2.
[536] NROC Terms of Reference, *supra* note 533.
[537] *Id.*

The Council solicited input from a broader array of ocean constituents—including other federal and state agencies, regional and subregional programs, nongovernmental organizations, and universities—at an Ocean Congress that NROC hosted in 2007. The input informed the *New England Governors' Coast and Ocean Action Plan* that was issued later that year. The Action Plan identified the key issues within the priority areas, and potential NROC actions and other regional responses, although it did not specify which particular actions should be pursued or timelines for action.[538] Response projects are carried out by Standing Committees, which issue individual work plans and are staffed by representatives from federal and state agencies and the NGO community, academia, and/or industry.[539]

v. West Coast Governors' Agreement on Ocean Health

The West Coast Governors' Agreement on Ocean Health was established in 2006 by the Governors of California, Oregon, and Washington. It created a "coordinated West Coast ocean and coastal collaboration to address critical ocean and coastal protection and management issues facing all three states."[540]

In addition to agreeing to develop an Action Plan to address priority issues, the three member states made a commitment to take four immediate actions: supporting new funding for nonpoint source pollution control programs; sending a letter to the President and Congress opposing new offshore oil and gas leasing, exploration, and development; developing a coordinated West Coast research plan; and soliciting federal technical support for addressing regionally significant issues.[541]

An 18-month Action Plan was developed and disseminated in May 2008. It addresses seven priority areas:

- Ensuring clean coastal waters and beaches;
- Protecting and restoring healthy ocean and coastal habitats;
- Promoting the effective implementation of ecosystem-based management of our ocean and coastal resources;
- Reducing adverse impacts of offshore development;
- Increasing ocean awareness and literacy among our citizens;
- Expanding ocean and coastal scientific information, research, and monitoring; and
- Fostering sustainable economic development throughout our diverse coastal communities.[542]

Recognizing that many of the priorities are interconnected, the Action Plan states that ecosystem-based management is one of its overarching principles.[543] Noting that the Action Plan is "an ambitious vision," the Governors also acknowledge that realizing the objectives will require aid from the federal government, local governments, tribes, nongovernmental organizations, universities, and the public.[544] Each of the actions outlined specifies the support needed from federal or other partners in order to be successful.

Implementation is overseen by an Executive Committee, which consists of three state leads and three federal leads. The states leads are representatives from each of the three Governors' offices. The federal leads are from EPA (Region 9), the Department of Commerce (NOAA), and the Department of the

[538] NROC ACTION PLAN, *supra* note 534, at 7-10.
[539] NROC Terms of Reference, *supra* note 533.
[540] WEST COAST GOVERNORS' AGREEMENT ON OCEAN HEALTH [hereinafter WCGA] 1-2 (2006).
[541] *Id.* WCGA, *supra* note 540, at 2.
[542] *Id.* at 2; WEST COAST GOVERNORS' AGREEMENT ON OCEAN HEALTH, ACTION PLAN 11 (2008).
[543] WCGA ACTION PLAN, *supra* note 542, at 13-14.
[544] *Id.* at 2.

Interior (MMS). They were appointed by the CEQ Committee on Ocean Policy's Subcommittee on Integrated Management of Ocean Resources (SIMOR), at the Governors' request, in order to further state-federal collaboration.[545]

Numerous Action Coordination Teams, which are tasked with implementing the Action Plan, report to the Executive Committee.[546] Current Teams target climate change, integrated ecosystem assessment, marine debris, ocean awareness and literacy, polluted runoff, renewable ocean energy, seafloor mapping, sediment management, *Spartina* eradication, and sustainable coastal communities. The Teams are in the process of developing work plans, which will detail specific activities that the partnership should pursue in order to realize the goals laid out in the Action Plan "in a timely manner using the best available science."[547]

vi. Mid-Atlantic Regional Council on the Ocean

The Mid-Atlantic Regional Council on the Ocean (MARCO) is a partnership between the Governors of New York, New Jersey, Delaware, Maryland, and Virginia. Formed in June 2009 pursuant to the Mid-Atlantic Governors' Agreement on Ocean Conservation, MARCO seeks to enhance the health of the Mid-Atlantic's ocean and coastal resources. The four priorities identified in the Governors' Agreement are to:

- Coordinate protection of important habitats and sensitive and unique offshore areas on a regional scale;
- Promote improvements in the region's coastal water quality as a necessary focal point for regional action;
- Collaborate on a regional approach to support the sustainable development of renewable energy in offshore areas; and
- Prepare the region's coastal communities for the impacts of climate change on ocean and coastal resources.[548]

The Governors' Agreement was signed at the Mid-Atlantic Governors' Ocean Summit, which then convened discussion sessions on each of the four priority issues.[549] The resulting document, *Actions, Timelines, and Leadership to Advance the Mid-Atlantic Governors' Agreement on Ocean Conservation*, provides a summary of each session. Functionally an action plan, the document outlines objectives and initial actions to be taken to address each priority issue, and specifies a lead entity and timeframe for each initial action described.[550] It also recognizes the importance of coordination and collaboration, stating that it is but a first step towards regional action, that some of the actions listed will intersect with broader regional initiatives, and that these efforts are intended to be integrated with federal actions. It states:

> Key among these is marine spatial planning, a process that facilitates decision-making by presenting information on the suitability of offshore areas for certain activities. Through marine spatial planning, the States will have a more coordinated, proactive process for ensuring the protection of critical habitats, while also encouraging the appropriate development of offshore renewable energy resources. The regional actions being

[545] WCGA, Lead Agencies, http://westcoastoceans.gov/leads/ (last visited Sept. 28, 2009).
[546] WCGA, Action Teams, http://westcoastoceans.gov/teams/ (last visited Sept. 28, 2009).
[547] WCGA, Executive Overview: Action Coordination Teams' Draft Work Plans for Public Comment, at 4 (June 2009), available at http://westcoastoceans.gov/Docs/WCGA_Executive_Overview-FINAL.pdf; WCGA, Action Teams, http://westcoastoceans.gov/teams (last visited Sept. 28, 2009).
[548] MID-ATLANTIC GOVERNORS' AGREEMENT ON OCEAN CONSERVATION 3-4 (2009), *available at* http://www.midatlanticocean.org/agreement.pdf.
[549] MID-ATLANTIC REGIONAL COUNCIL ON THE OCEAN, ACTIONS, TIMELINES, AND LEADERSHIP TO ADVANCE THE MID-ATLANTIC GOVERNORS' AGREEMENT ON OCEAN CONSERVATION 1 (2009).
[550] MARCO ACTIONS, TIMELINES, AND LEADERSHIP, *supra* note 549.

> undertaken also will be coordinated with, and responsive to, broad federal efforts that are underway. These include President Obama's establishment of an Interagency Ocean Policy Task Force to coordinate federal efforts in offshore areas, and the Department of the Interior's development of a Comprehensive Energy Plan on U.S. Outer Continental Shelf.[551]

The Governors themselves are the members of MARCO. Each Governor also appoints a lead to the Executive Committee that will oversee state implementation of specified activities, ensuring efforts are coordinated and priority areas are addressed.[552] Still in its formative stages, MARCO intends to ask appropriate federal agencies to serve as partners in the agreement.[553]

vii. South Atlantic Alliance

In 2009, North Carolina, South Carolina, Georgia, and Florida formed the Governors' South Atlantic Alliance, a partnership seeking to enhance collaboration across the region to protect ocean and coastal resources. The Governors of the four states form the Executive Group, which appoints the members of a Steering Group that organizes and plans Alliance activities.[554] The Steering Group then appoints technical leads to the Issue Area Technical Teams.

The Issue Area Technical Teams are responsible for goal and strategy development and implementation, and each member state leads the efforts for at least one issue area.[555] The Governors' Agreement recognizes the value of a range of supporting partners, and invites support from federal agencies, nongovernmental organizations, the private sector, and local and municipal bodies.[556]

The Alliance is in the process of creating an Action Plan, which will include clear goals and strategies for achieving those goals.[557] One of the Alliance's goals is to align decisions across the region in order to realize the Alliance's mission. The Alliance has made clear that participation by a member state in any Alliance activity is voluntary.[558]

C. Regional Partnership Relevance for Federal MSP

For purposes of federal-state cooperation in MSP, whether in state waters, federal waters, or both, these regional partnerships can simplify the process. Of particular note is the fact that the partnerships, and more specifically the entities that some of them create, can reduce the necessary points of contact for collaboration. The federal government may be able to work more easily with one entity representing five states than with each of the five states individually. In addition, nearly all of these partnerships involve federal agencies in development and/or implementation of their plans.

On the whole, these regional partnerships are designed to create collaboration among the states and with other members on issues within their respective authorities, including recognition of the role of the federal government. Therefore, these agreements are fairly well designed for MSP in state waters: states are the primary authorities and the federal government commonly plays a supporting role with an opportunity for input.

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[551] *Id.* at 1.
[552] MID-ATLANTIC GOVERNORS' AGREEMENT ON OCEAN CONSERVATION (2009), *supra* note 548.
[553] *Id.*
[554] GOVERNORS' SOUTH ATLANTIC ALLIANCE [hereinafter GSAA], GOVERNORS' SOUTH ATLANTIC ALLIANCE PARTNERSHIP AGREEMENT 1-2 (2009), *available at* http://www.gcrc.uga.edu/SARRP/Documents/south%20atlantic%20alliance_signed.pdf.
[555] *Id.* at 2.
[556] *Id.* at 2-4.
[557] *Id.* at 4.
[558] *Id.*

When contemplating and implementing MSP in federal waters, the federal government could choose to interact with the regional partnerships in a variety of ways. Because the regional partnerships are focused on state waters, a federal marine spatial plan would not significantly cross over into their jurisdiction. Instead, the primary question will be how to best coordinate the state and federal planning efforts to maximize cooperation and avoid conflict. Potential scenarios are that the federal government will place a stronger presence in the regional partnerships before planning begins, without establishing regional entities to govern planning in federal waters; or that it will offer the regional partnerships a position on an independent council created and tasked with spatial planning for federal waters.

There are pros and cons to both of these approaches. The insertion of a stronger federal presence in the regional partnerships would increase communication between the state and federal efforts, regardless of what governance form the federal efforts took. However, it also likely would be resisted by the states that created the regional partnerships. A greater federal presence could affect state engagement in the partnership and thus its overall success.

By contrast, offering the regional partnerships a position on an independent council that is tasked with implementing MSP in federal waters would allow a balance of federal and state involvement without affecting the functioning of the regional partnerships. As noted in Section 1, the establishment of regional councils to plan federal waters provides the federal government significant leeway in who is represented in the MSP process. Including representatives from the regional partnerships on these new councils could create an efficient link to state involvement and respect the cooperative mechanisms that the states have chosen. There is less concern about states infringing upon federal domain than vice versa, and the independent council would be a federal corollary to the state partnership. If state and federal MSP efforts were combined, the interactions of the two sets of bodies would need to be re-examined to ensure they were not duplicating efforts or creating extraneous administrative burdens with overlapping requirements. The new federal councils would also require the investment of resources to establish and run them.

The MSP process will have a better chance of success if federal and state governments collaborate effectively. Whether the federal government tries to bolster the federal presence in existing partnerships or forms separate councils and then offers the partnerships positions on them will depend on a number of factors. These include the amount of resources available (e.g., to form and maintain independent federal councils); the specific goals of federal MSP efforts (e.g., the areas and activities included); and when such efforts are undertaken (e.g., have all the partnerships progressed to similar points).

D. Funding

There appear to be no general federal restrictions on regional partnerships receiving federal funds. Regional partnerships can receive federal funds for operational costs or specifically for achieving its objectives, and the means of procuring funds are numerous, including direct appropriations and grants from federal agencies. Each specific federal appropriation and federal grant may have its own restrictions on who may receive money and how it may be spent, and each state may have procedural hurdles for accepting or using those funds. However, these are case-by-case limitations rather than general restrictions on federal expenditures.

Regional partnerships can be centralized, with a single entity authorized to receive, use, and distribute funds. They can instead be decentralized: no central entity exists to handle funds but the partnership attracts financial support to meet its goals and each state individually receives the funding for its role in the partnership. This distinction between centralized and decentralized partnerships does not appear to affect a partnership's general ability to receive federal funds.

If the partnership does not have a central financial entity, monies raised and received by the partnership must go directly to the states. Even under this circumstance, there are numerous ways to receive and use federal funds to support a partnership and its objectives. For example, GOMA does not have a central entity, and the individual states receive competitive grants from NOAA and the EPA Gulf Program that directly support GOMA's goals and objectives. The West Coast Governors' Agreement on Ocean Health similarly does not have a central entity. It has attempted to secure money directly through federal appropriations bills for each of its states to support the organization and to implement its Action Plan, although to date the attempts have been unsuccessful. MARCO also lacks a central entity; one of its member states, Delaware, is using its existing federal coastal management and National Estuarine Research Reserve grants to support its MARCO-related efforts.

But direct funding to states leaves the partnership itself without much enforceable leverage over the member states. The ability of the partnership to receive and disseminate money, particularly federal funds, is important for its influence on the states and its ability to guide cooperation with a federal marine spatial plan.

Therefore a small central financial authority, most likely a non-profit organization created pursuant to Section 501(c)(3) of the Internal Revenue Code, can be a beneficial step. GOMC is administered through the 501(c)(3) nonprofit U.S. Gulf of Maine Association, which receives, uses, and distributes both federal and non-federal funds. GOMA and the West Coast Governors' Agreement each anticipate creating a 501(c)(3) nonprofit organization in the near future for the purpose of receiving and distributing funds for the partnership.

E. How Changes to Regional Partnerships may Influence Federal MSP

i. A Central Entity

There are a number of ways that existing regional partnerships could be changed to bolster their authority and control of purse strings in support of their ability to coordinate state relations with federal MSP. The simplest approach is the expansion of the underlying agreement for a partnership, creating a well-structured central entity and giving it the means to directly receive funds, whether federal grants, private donations, or some other means, and make decisions on how to spend those funds.

In addition to its implications for managing funds, a central entity for a regional partnership can simplify federal-state relations. A central entity could provide representatives that convey and defend the interests of the partnership as a whole, not just the interests of a state within the partnership, and thus make federal interaction with a regional partnership markedly different from interacting with each state independently. The more independent the central entity in the partnership is from the individual interests of the states and other members, the fewer people that would be needed to adequately represent the partnership, and the fewer the points of contact necessary to include the partnership in federal MSP decisions.

A central entity also can have influence over the members. This influence could be as informal as pressure to comply or as formal as enforceable authorities granted in the partnership agreement. In general, the more binding the authorities of a central entity, the more certain that its decisions will be carried out in practice, and hence the more valuable partnerships can be to the federal government in implementing a federal plan.

Few of the regional partnerships discussed above have a central entity with its own staff, and none have truly enforceable provisions. The agreements on which many of these partnerships are founded operate

more as promises to cooperate than a ceding of authority to a new, independent entity. For example, GOMA is in essence an agreement to make decisions on a consensus basis, with at least one representative from each member state and a rotating chairmanship, but no permanent staff. Most, if not all, of the member states are of the opinion that a more structured governance organization, allowing for officers and staff, is needed. Efforts to make these changes are at the beginning stages.

ii. A Compact

A potential means of elevating the significance of these regional partnerships is to codify them through compacts. However, the value of this approach for federal MSP is questionable, even disregarding political realities.

Interstate compacts predate the Constitution and are essentially treaties among sovereign states.[559] Included within Article I of the Constitution is what is known as the Compact Clause, which provides that "No state shall, without the consent of Congress, … enter into any agreement or compact with another state…"[560] However, since the Constitution limits the authorities of the federal government to those enumerated in the document, consent of Congress is required only for those compacts that alter the balance of power between state and federal government or affect a power delegated to the federal government.[561]

To the extent that a compact concerning MSP may affect the navigability of marine waters or another authority of the federal government, consent of Congress likely would be necessary. But Congressional approval is not particularly difficult to receive, since the Constitution does not specify the means or timing required for consent and the Supreme Court has held that approval may be expressly stated or implied and occur before or after the compact is enacted.[562]

If Congress consents to a compact, it becomes federal law. However, only the enforceable policies of the agreement are valuable for federal enforcement. Many interstate compacts are "regulatory" or "administrative," creating ongoing agencies whose rules are binding on the members to the extent authorized by the compact.[563] The Delaware River Basin Compact is a good example of this type of compact and one that vests real authority in the commission. Furthermore, some compacts simply establish a study commission to research an issue and report its findings to the members.[564]

Therefore, an interstate agreement in the form of a federally-approved compact may make the provisions of that agreement more binding, but being a compact does not change the substance of the agreement. Since none of the regional partnerships have binding authorities, if they became compacts as they are, federal enforceability would have little added value.

Many of the regional partnerships include federal representation, which promotes collaboration. Interstate compacts are fundamentally agreements between states, but an objective of some existing compacts is a response to national priorities in partnership with the federal government.[565] The federal government can be a party to a compact. For example, the federal government is a signatory of the Delaware River Basin Compact. However, when the federal government assumes such a role, there is a chance that the resulting commission qualifies as an authority of the government of the United States as defined by the federal

[559] William S. Morrow, Jr., The Case for an Interstate Compact APA, http://www.abanet.org/adminlaw/interstate/ICAPAPaper_Morrow.pdf.
[560] U.S. CONST. amend. I, § 10.
[561] *See, e.g.*, Virginia v. Tennessee, 148 U.S. 503 (1893).
[562] National Center for Interstate Compacts, Council of State Governments, *Understanding Interstate Compacts*, http://www.cglg.org/projects/water/CompactEducation/Understanding_Interstate_Compacts--CSGNCIC.pdf.
[563] *Id*.
[564] *Id*.
[565] *Id*.

Administrative Procedure Act (APA). Some compacts explicitly deny this categorization.[566] But the courts have been willing to inquire into whether a compact agency has sufficient "federal interest" to be considered a "quasi-federal agency."[567]

Application of the federal APA to a compact commission would mean that many aspects of commission operation would be regulated by a detailed list of federal rules. These additional rules likely would discourage the use of a compact for interstate agreements, particularly when federal involvement is desired. Since any interstate agreement that may address MSP, particularly MSP in federal waters, likely will include the federal government, federal APA applicability may be an issue when deciding whether to elevate the agreement to the level of a compact.

Another consideration regarding the form that an interstate agreement should take is the role of foreign governments. A compact could not involve foreign governments in the same way that an agreement with no binding qualities could. For example, the agreement creating GOMC is not binding because states are prohibited under the Constitution from making international commitments, and the Council includes two Canadian provinces.[568] However, MSP need not extend beyond the jurisdiction of the United States, and international commitments could be made in addition to a compact.

Compacts have the advantage of being more enforceable than other forms of agreement. But in general, current regional partnerships lack enforceable policies, not enforcement. In addition, compacts, like other agreements, do not inherently promote or require the creation of a central governing body. Compacts can include federal parties, but potential procedural requirements may temper this cooperation, a limitation not present in other forms of agreement. Similarly, compacts cannot include foreign parties, limiting the advances currently being made in regional partnerships with regard to ecosystem-based management. Therefore, there is little compelling reason for existing or new regional partnerships concerning marine management to become formal compacts.

F. Conclusion

The regional partnerships described above have different characteristics and are at different levels of maturity, but are also similar in several ways. One of the prominent overlaps is in their lists of priority areas, most of which include ecosystem health, water quality, and sustainable development (see Table 4). Even when not stated in precisely the same manner, the overall directions of the partnerships' priorities largely align.

However, the memberships of the partnerships vary significantly, a disparity that may be largely correlated with their ages (see Table 5). For example, the Gulf of Maine Council, formed in 1989, has a robust set of federal, state/provincial, and other members, while the Mid-Atlantic Regional Council on the Ocean and the South Atlantic Alliance, both formed in 2009, have so far only specified the state governors as members. The Northeast Regional Ocean Council and West Coast Governors' Agreement on Ocean Health both have federal and state members, but neither have other members, such as nongovernmental organizations or industry representatives. The variation in what stakeholders are included could mean that the partnerships offer substantially different opportunities for implementing MSP.

[566] *See* Delaware River Basin Compact, PUB. L. NO. 87-328, § 6501; Susquehanna River Basin Compact, PUB. L. NO. 91-575.
[567] William S. Morrow, Jr., The Case for an Interstate Compact APA.
[568] ACZISC Secretariat & Marine and Envt'l Law Inst. of Dalhousie Univ., *Overview of Current Governance in the Bay of Fundy / Gulf of Maine: Transboundary Collaborative Arrangements and Initiatives* 6 (Sept. 2006), available at http://aczisc.dal.ca/gomrpt.pdf.

Federal participants in MSP will need to determine what role the regional partnerships will play in the process, such as potentially inviting representatives from the partnership to participate in federal regional councils. Moreover, several potential changes to the regional partnerships may affect their influence on MSP. First, federal interaction with a regional partnership may be more effective if the partnership has a central entity that can collate and present the interests of the multiple state members. Second, a centralized body focuses the administration of funding that partnerships may receive. Third, a partnership may formalize its authority by becoming a compact, although its policies will only be as enforceable as they were before congressionally approved.

Table 4. Summary of the members and priority areas/objectives of the regional partnerships described above.

	Members			Mission and Priority Areas
	Federal	*State*	*Other*	
Great Lakes Commission[569]	(n/a) *There are numerous federal and non-federal observers.*	*Each member state appoints 3-5 delegates.* **United States** Member States • Illinois • Indiana • Michigan • Minnesota • New York • Ohio • Pennsylvania • Wisconsin *Representatives from Ontario and Quebec serve on the Board of Directors but not on the Commission.* **Canada** Associate Members • Ontario • Quebec	(n/a) *There are numerous federal and non-federal observers.*	"The purpose of the Commission is to carry out the terms and requirements of the Great Lakes Basin Compact, as noted in Article 1: To promote the orderly, integrated, and comprehensive development, use, and conservation of the water resources of the Great Lakes Basin." • Goal 1: Communication and education • Goal 2: Information integration and reporting • Goal 3: Facilitation and consensus building • Goal 4: Policy coordination and advocacy
Gulf of Maine Council[570] — Member agencies are in normal type *Councilors'*	**United States** • EPA (New England Regional Office; *Office of Ecosystem Protection*) • ACE Information Network (New England District; Waterways	**United States** Maine • Dept. of Marine Resources • State Planning Office Massachusetts • Office of Coastal Zone Management New Hampshire • Dept. of Environmental	**United States** • *Gulf of Maine Research Institute* • *Conservation Law Foundation* • *The Chewonki Foundation* • *New Hampshire Charitable Foundation*	"The mission of the Gulf of Maine Council on the Marine Environment is to maintain and enhance environmental quality in the Gulf of Maine to allow for sustainable resource use by existing and future generations." • Goal 1: Coastal and marine habitats are in a healthy, productive, and resilient condition. • Goal 2: Environmental conditions in the Gulf of Maine support ecosystem and human

[569] CGLG, Board of Directors, http://www.cglg.org/governors/index.asp (last visited Oct. 16, 2009); CGLG, Overview, Mission, *supra* note **Error! Bookmark not defined.**.
[570] GOMC, Knowledgebase, GOMC member agencies, http://www.gulfofmaine.org/knowledgebase/gomc_member_links.php (last visited Oct. 14, 2009); GOMC, About the Council, Councilors, http://www.gulfofmaine.org/council/councilors.php (last visited Oct. 14, 2009); GOMC, About the Council, Mission & principles, *supra* note 509.

organizations are in italics	Experiment Station) • Dept. of the Interior (FWS, USGS, NPS) • NOAA (CSC, NMFS) **Canada** • Environment Canada, Atlantic Region (Environmental Conservation Branch) • Canada Dept. of Fisheries and Oceans	Services • *Fish and Game Dept.* • *Division of Marine Fisheries* **Canada** New Brunswick • Environment • Dept. of Fisheries Nova Scotia • Fisheries and Aquaculture • Environment	• *Urban Harbors Institute* **Canada** • *WWF – Canada Atlantic Program* • *Shipping Federation of Canada* • *St. Croix International Waterway* • *Fundy North Fishermen's Association*	health. • Goal 3: Gulf of Maine coastal communities are vibrant and have marine-dependent industries that are healthy and globally competitive.
Gulf of Mexico Alliance[571]	• CEQ • NASA • NOAA • NSF • ACE • Dept. of Agriculture • Dept. of Defense • Dept. of Energy • Dept. of the Interior • Dept. of Health and Human Services • Dept. of State • Dept. of Transportation • EPA Gulf of Mexico Program	Alabama • Dept. of Conservation and Natural Resources • Dept. of Environmental Management • Dept. of Public Health Florida • Dept. of Environmental Protection • Fish and Wildlife Conservation Commission Louisiana • Dept. of Education • Dept. of Environmental Quality • Dept. of Natural Resources • Dept. of Wildlife and Fisheries • Office of Coastal Restoration and Management Mississippi • Dept. of Environmental Quality • Dept. of Marine Resources Texas	• America's WETLAND Foundation • Coastal America • Coastal Ecosystem Learning Centers • Coastal States Org. • Dauphin Island Sea Lab • Florida Institute of Oceanography • Gulf Business Coalition • Gulf Coast Research Laboratory • Gulf of Mexico Coastal Ocean Observing System • Gulf of Mexico Research Plan • Gulf of Mexico Foundation • Harte Research Institute • National Estuarine Research Reserve System • National Estuary Program • National Marine	"The Alliance is committed to a Gulf of Mexico region that includes healthy beaches and seafood, sustainable natural communities, productive marine ecosystems, and resilient coastal communities." • Water quality for healthy beaches and seafood; • Habitat conservation and restoration; • Ecosystems integration and assessment; • Reducing nutrient impacts to coastal ecosystems; • Coastal community resilience; and • Environmental education.

[571] GOMA ACTION PLAN II, *supra* note 527, at 9, 34.

		• Commission on Environmental Quality • General Land Office • Parks and Wildlife Department	Sanctuaries • National Sea Grant College Program • NatureServe • Northern Gulf Institute • The Nature Conservancy	
Northeast Regional Ocean Council[572]	• Dept. of the Interior (USGS) • Dept. of Agriculture (Natural Resources Conservation Service) • Dept. of Homeland Security (Coast Guard First District) • EPA (Region 1) • NOAA (Coastal Services Center; Northeast Fisheries Science Center (alt.)) • ACE	Connecticut • Dept. of Environmental Protection • U.S. Coast Guard Academy • Long Island Sound Program (alt.) Maine • Coastal Program • Dept. of Marine Resources Massachusetts • Office of Coastal Zone Management • Executive Office of Energy and Environmental Affairs New Hampshire • Coastal Program Rhode Island • Dept. of Environmental Management • Bays, Rivers, and Watersheds Coordination Team (alt.) Vermont • Agency of Natural Resources	(n/a)	"To assist the region's Governors identify [sic] coastal and ocean management priorities that require a coordinated regional response and to foster collaboration that effectively addresses these issues." • Ocean and coastal ecosystem health; • Render New England a "Coastal Hazards Ready" region; • Ocean energy planning and management; and • Maritime security.
West Coast Governors' Agreement on Ocean Health[573]	• Dept. of Commerce (NOAA) • EPA (Region 9) • Dept. of the Interior (MMS)	• California Governor • Oregon Governor • Washington Governor	(none specified)	As defined in the Action Plan, "a 'healthy ocean' means that marine, coastal, and estuarine ecosystems, the watersheds that drain into these waters, the plant and animal communities therein, and the physical, chemical, and

[572] NROC ACTION PLAN, *supra* note 534, at 11.
[573] WCGA ACTION PLAN, *supra* note 542, at 10.

				biological processes involved are diverse and functioning, and the economies and people dependent on them are thriving. A healthy ocean provides aesthetic, cultural, and recreational values. It also supports the character and quality of life of coastal communities and a vibrant, sustainable economy." • Ensuring clean coastal waters and beaches; • Protecting and restoring healthy ocean and coastal habitats; • Promoting the effective implementation of ecosystem-based management of our ocean and coastal resources; • Reducing adverse impacts of offshore development; • Increasing ocean awareness and literacy among our citizens; • Expanding ocean and coastal scientific information, research, and monitoring; and • Fostering sustainable economic development throughout our diverse coastal communities.
Mid-Atlantic Regional Council on the Ocean[574]	*To be determined*	• New York Governor • New Jersey Governor • Delaware Governor • Maryland Governor • Virginia Governor	(none specified)	Protect and restore regional ocean and coastal resources through shared action. • Coordinate protection of important habitats and sensitive and unique offshore areas on a regional scale; • Promote improvements in the region's coastal water quality as a necessary focal point for regional action; • Collaborate on a regional approach to support the sustainable development of renewable energy in offshore areas; and • Prepare the region's coastal communities for the impacts of climate change on ocean and coastal resources.

[574] MID-ATLANTIC GOVERNORS' AGREEMENT ON OCEAN CONSERVATION (2009), *supra* note 548, at 3-4.

South Atlantic Alliance[575]	(none specified)	• North Carolina Governor • South Carolina Governor • Georgia Governor • Florida Governor	(none specified)	"[T]o significantly increase regional collaboration among South Atlantic states, with federal agency partners and other stakeholders, to sustain and enhance the environmental (coastal/marine), natural resource, economic, public safety, social, and national defense missions of the respective states and the South Atlantic region."

[575] GSAA, GOVERNORS' SOUTH ATLANTIC ALLIANCE PARTNERSHIP AGREEMENT, *supra* note 554, at 1.

III. STATE AUTHORITIES RELEVANT TO FEDERAL MSP

A. Introduction

An enormous body of literature examines the issue of environmental law and state authority in a federal system of government,[576] and environmental law scholars continue to wrestle with the question of what authority states retain under existing federal statutes.[577] In some instances federal statutes explicitly preempt state regulation and control, as is seen with liquefied natural gas facility siting under the Energy Policy Act of 2005.[578] However, in many cases Congress has not explicitly addressed the question of preemption,[579] leaving courts to decide this question and scholars to explore it.

This section, therefore, does not purport to provide a comprehensive analysis of the delineation between state and federal marine authority as related to MSP. Rather, it assesses the most prominent provisions of federal statutes that states may use to support or undermine federal MSP.

B. Baseline Demarcations of State Authorities that May Affect Federal MSP

Critical to understanding states' authority in federal and state waters are the paramountcy doctrine, the Submerged Lands Act, and the CZMA. Together, this judicial doctrine and two laws delineate the broad rights of the states over the federal government and vice versa with regard to the management of ocean resources.

i. The Public Trust and Paramountcy Doctrines

As discussed in detail by Turnipseed et al. (2009), the public trust doctrine derives from English common law and requires that states hold certain lands and waters in trust for its citizens.[580] Under this doctrine, courts have held that states are obligated to manage shorelines, riverbanks, and lands subject to tidal flux (e.g., the land between the low and high water mark of the tide) as trust resources for the public.[581] While the states do not have inherent rights to ocean resources beyond the low tide line,[582] they are able to and do apply their public trust doctrines to ocean waters beyond the low tide line out to the limits of state territorial waters.[583]

While there is variability in how states have developed their public trust doctrine, Turnipseed et al. summarize the general trust obligations, stating that each state:

> [(1)] [h]as public trust interests, rights and responsibilities in its navigable waters [and nonnavigable tidelands], the lands beneath these waters, and the living resources therein; [(2)] [h]as the authority to define the boundary limits of the lands and waters held in public trust; [(3)] [h]as the authority to recognize and convey private proprietary rights (the *jus privatum*) in its trust lands, and thus diminish the public's rights therein, with the corollary responsibility not

[576] For example, a LexisNexis search of environmental law, federalism, and state rights identifies more than 1,000 law review articles.
[577] *See, e.g.,* Jonathan H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67 (2007).
[578] Energy Policy Act of 2005, § 311; for additional discussion *see* Angela J. Durbin, *Comment: Striking a Delicate Balance: Developing a New Rationale for Preemption while Protecting the Public's Role in Siting Liquified Natural Gas Terminals*, 56 EMORY L.J. 507 (2006).
[579] *See, e.g.,* Adler, *supra* note 577 *passim*.
[580] Turnipseed et al., *supra* note 468.
[581] *Id.* at 10-15.
[582] *See infra* notes 585-593 and accompanying text.
[583] Turnipseed et al., *supra* note 468, at 10-25.

> to substantially impair the public's use and enjoyment of the remaining trust lands, waters and living resources;
> [(4)] [h]as a trustee's duty and responsibility to preserve and continuously assure the public's ability to fully use and enjoy public trust lands and waters for certain trust uses; and
> [(5)] [d]oes not have the power to abdicate its role of trustee of the public's *jus publicum* rights, although in certain limited cases the State can terminate the *jus publicum* in small parcels of trust land.[584]

Therefore when developing MSP in state waters or in ways that may affect state ocean resources, it will be important to consider the obligations of each state to maintain public trust ocean resources for the benefit of its citizens.

The paramountcy doctrine states that the ocean, including both the territorial sea and the OCS, are fundamentally national rather than state territories. The doctrine derives from four Supreme Court cases.[585] The first three related to state authority over seabed resources in nearshore waters. California claimed authority to lease within a three-mile territorial sea, and Louisiana and Texas claimed a distance of 27 miles and 24 miles respectively. The Court rejected all of these claims, stating that the federal government has these rights as a function of its national sovereignty.

United States v. California was the first case to address the issue of whether the federal government or the states have rights to ocean resources. Based on a previous Supreme Court ruling that Alabama—and all original states of the Union—owned in trust for the people the navigable tidewaters and the lands beneath them between the high and low water mark in trust for the people, California asserted that it likewise held ocean resources in the three-mile marginal sea in trust for its people.[586] However, the Court rejected this argument stating that there was no understanding among nations at the time the U.S. was formed that a three-mile belt was part of the sovereign—therefore a right to hold these resources in trust for the people did not pass from the English crown to the states.[587] In this case, the Court held that "the Federal Government rather than the state has paramount rights in and power over [the three-mile belt], an incident to which is full dominion over the resources of the soil under that water area, including oil."[588]

In *United States v. Louisiana*, the Court further explained this relationship, holding that "[p]rotection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area."[589] In *United States v. Texas*, the Court held that even though Texas as a country had held rights over the shelf resources, when it became a state, it ceded those rights to the federal government.[590]

The fourth decision, *United States v. Maine*, occurred after the passage of the Submerged Lands Act, described below, and concerned the rights to resources beyond three miles from shore. In that case, the Court rejected the State's argument that the original colonial states had acquired dominion over all seabed resources prior to adoption of the Constitution, and never relinquished those rights to the federal government.[591] This decision reaffirmed the basis upon which the three preceding cases had been decided,

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[584] *Id.* at 24-25.
[585] For a summary of the paramountcy doctrine cases, *see Native Village of Eyak v. Trawler Diane Marie, Inc*, 154 F.3d 1090, 1092-94 (9th Cir. 1998), *cert. denied* 1999 U.S. LEXIS 4042 (U.S. June 14, 1999).
[586] U.S. v. Cal., 332 U.S. 19, 29-30 (1947).
[587] *Id.* at 31-32.
[588] *Id.* at 38-39.
[589] U.S. v. La., 339 U.S. 699, 704 (1950).
[590] U.S. v. Tex., 339 U.S. 707 (1950).
[591] U.S. v. Me., 420 U.S. 515 (1975).

even after the Submerged Lands Act granted limited authority to the states over the territorial sea. Based on the paramountcy doctrine, Congress has the authority to reclaim full authority over all ocean waters.

While these four cases addressed rights to seabed resources, they also apply to water column resources. As the Ninth Circuit noted in its recent case focused on paramountcy doctrine and tribal rights that the Supreme Court in *United States v. Texas* held that "[i]f the property, *whatever it may be*, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities."[592] The Ninth Circuit explicitly states that the paramountcy doctrine applies to hunting and fishing rights as well as submerged lands resources.[593]

ii. The Submerged Lands Act

In response to the first three cases noted above, Congress passed the Submerged Lands Act in 1953. The Act confers, within state boundaries, ownership of submerged lands, the waters above, and the natural resources therein to the states.[594] The boundary is set at three geographical miles from the coast except in limited circumstances (the west coast of Florida and Texas have nine-mile boundaries).[595]

But this authority is limited. The Act explicitly proclaims that the federal government retains authority over submerged lands and navigable waters for the purposes of commerce, navigation, national defense, and international affairs.[596] These authorities are paramount to the general authorities over the natural resources of the submerged lands that are granted to the states –the "proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others."[597] The Act also declares that it does not affect the powers of the federal government over navigation, flood control, and power production.[598]

Case law has yet to fully assess the relationship between the authorities retained by the federal government and the rights of the states under the Submerged Lands Act. Based on the language of the Act, the federal government should be able to plan in state waters those activities that relate to commerce, navigation, national defense, and international affairs, such as shipping lanes and military zones, regardless of state support. But the specific laws governing those activities directly, and the CZMA generally, may reduce federal autonomy on these issues, requiring state input in decision-making.

In the absence of new federal legislation, the Submerged Lands Act likely will limit the ability of the federal government to develop comprehensive, legally-binding MSP in state waters. However, as noted above, the paramountcy doctrine suggests that states have no inherent rights to control over the territorial sea, so Congress may rescind or amend the Submerged Lands Act just as it may with any statute. The Act could be amended to require state compliance with federal MSP.

iii. Coastal Zone Management Act

Congress passed the CZMA in 1972. Among other things, the Act grants states additional authority over state and federal marine waters, namely the ability to require proposed federal actions to comply with the

[592] Native Village of Eyak, *supra* note 426 at 22.
[593] *Id.* at 21.
[594] 43 U.S.C. § 1311 (2002).
[595] *Id.* § 1312.
[596] *Id.* § 1314.
[597] *Id.*
[598] *Id.* § 1311(d).

enforceable policies of the state's program, known as federal consistency review.[599] As explained in greater detail above, this authority arises once a state coastal zone program is approved by NOAA.[600]

Federal consistency review is required of any federal activity that affects land or water uses or natural resources of the coastal zone, which includes state marine waters identified in the Submerged Lands Act.[601] There is no geographical limit on where the activity occurs; all that matters is whether it affects the coastal zone. Therefore, this state authority over federal activity can extend into federal waters. Federal consistency likely would influence federal MSP efforts in state waters and at least nearshore federal waters, since the federal government would need to consider the potential impact that state enforceable policies have on site selection and other aspects of managing ocean uses.

However, state authority through federal consistency review is limited. Because federal consistency review is the application of the coastal state's enforceable policies, the review process is only as rigorous as the enforceable policies themselves. The CZMA defines "enforceable policy" as "State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone."[602] In essence, to bind the federal government, the state also must bind itself.

Further, not all state policies apply; only those policies explicitly included in the state's CZM program, which means policies that must be approved by NOAA, may be used for purposes of federal consistency review.[603] A state CZM program must also adequately consider the national interest, "including the siting of facilities such as energy facilities which are of greater than local significance."[604] Therefore enforceable policies, and hence federal consistency reviews, are limited in their scope. Another limiting factor is that once the state CZM program is approved, there are currently no re-approval requirements in the Act—that is, if national priorities change, there is no opportunity to re-examine the CZM programs to ensure they reflect them. NOAA has authority only to review a state's proposed changes to its CZM program, or to offer the states guidance and suggestions.

While there are no categorical exceptions to activities that are subject to federal consistency review, the CZMA includes the opportunity for case-by-case exemptions. When a federal agency activity is deemed inconsistent with state enforceable policies, the President may exempt it from compliance with the state program if he or she "determines that the activity is in the paramount interest of the United States."[605] If the activity is not conducted by a federal agency but requires a federal license or permit, the Secretary of Commerce may grant the license or permit despite non-compliance if he or she finds that the activity is "necessary in the interest of national security."[606] Thus, the federal government does have means of overcoming the federal consistency requirement, but these exemptions are narrow. They almost assuredly could not cover all instances in which a federal activity conducive to federal MSP fails to comply with state enforceable policies. As a result, on the whole, federal consistency review has the potential to significantly influence federal MSP, particularly in state waters but also in federal waters.

In addition, Special Area Management Plans (SAMPs) have the potential to serve as a means of coordinating federal and state planning and implementation efforts. SAMPs are explained in greater detail

[599] 16 U.S.C. § 1456(c)(1)(A).
[600] *Id*. See *supra* text surrounding footnotes 372-382.
[601] *Id*.
[602] *Id*. § 1453(6a).
[603] *See id*. § 1456(c)(1)(A).
[604] *Id*. § 1455(d)(8).
[605] *Id*. § 1456(c)(1)(B).
[606] *Id*. § 1456(c)(3)(B).

above.[607] They have garnered attention as a state-based means of ocean planning that can draw in pertinent federal agencies for collaborative decision-making. If approved, SAMPs can be an enforceable part of a state's CZM program, potentially requiring the federal government to comply with the plan in state waters as a part of federal consistency review. Any planning outside of state waters does not have the same enforceability since it is outside state jurisdiction, but the state likely would be hopeful that federal agencies that were a part of the SAMP's development would voluntarily comply with the plan in federal waters.

To date, Rhode Island is the only state developing a SAMP with the intention of planning state and federal waters. But if this approach is adopted by other states, the federal government may be well served by linking federal MSP in with state efforts through SAMPs for a collaborative, comprehensive marine spatial plan.

Of lesser significance, but still a potential influence on federal MSP, the CZMA also grants coastal states authority in the selection of national estuarine reserves. The first step in this designation process is nomination by the governor of the state in which the estuary is located.[608] Among the next steps, the Secretary of Commerce must find that the laws of the state provide long-term protection and will provide for a stable environment, and the state must comply with all requirements and regulations issued by the Secretary.[609] Without state cooperation, new national estuarine reserves would not be possible, an important consideration if estuarine reserve expansion is a part of federal MSP.

C. Other Relevant Statutes and Provisions

In addition to the authorities in territorial waters granted to the states by the federal government in the Submerged Lands Act and the CZMA, there are two primary ways in which states may exert influence on federal MSP: consultation requirements and instances where the federal government has granted state authority to oversee the specific regulated activity or use. The following section describes these two areas of state-federal interaction and identifies where they exist in current federal law.

i. Consultation

Many federal laws require federal agencies to consult with coastal states that may be affected by federally undertaken or authorized activities. These consultations provide a valuable opportunity to share information and coordinate strategic development. Conversely, the consultation process can slow decision-making procedures. Below are the primary state consultation requirements contained in the laws analyzed in Section 1 of this report.

- **NMSA:** For federal waters, there is little in the language of NMSA that would enable states to undermine or force a sanctuary designation. States have the opportunity to provide input—the Secretary is required to consult with appropriate state agencies and authorities including the coastal zone program.[610] If the state governor finds the designation or a term of designation unacceptable, the designation or particular term will not go into effect for areas of the sanctuary that extend into that state's waters.[611]

[607] See *supra* text surrounding footnotes 383-385.
[608] *Id*. § 1461(b)(1).
[609] *Id*. § 1461(b)(2).
[610] *Id*. § 1433(b)(2).
[611] *Id.* § 1434(b).

- **ESA:** States have the right to provide comments on endangered and threatened species and critical habitat designations, and the Act encourages federal-state coordination and cooperation.[612]

- **E.O. 13158:** The Departments of Commerce and the Interior are the lead agencies for developing a comprehensive and science-based system of marine protected areas. The agencies must consult with coastal states and tribes, among others, as appropriate when coordinating federal, state, territorial, and tribal actions to establish and management such areas.[613]

- **DPA:** When considering applications for deepwater port licenses, the Secretary of Transportation must consult with a coastal state that the port will connect to via pipeline, whose waters are within 15 miles of the proposed port, or that faces equal or greater environmental risk as a state directly connected by pipeline. Should the state find the application inconsistent with its environmental protection programs, land and water use programs, or coastal zone management program, then the application must be amended so as to bring it into compliance. So long as they are consistent with federal law, the adjacent coastal state's laws apply to the port.[614]

- **OCSLA—Oil and gas:** There are two general state consultation requirements within the oil and gas activity approval process. First, if an adjacent coastal state has an approved coastal zone management program, MMS will not license or permit an activity within a Development and Production Plan or Exploration Plan that affects the coastal state without its concurrence with a consistency finding.[615] Second, a coastal state or local government generally has 60 days to submit recommendations to MMS about the size, timing, or location of a lease sale or Development and Production Plan. MMS may accept the recommendations if they reasonably balance state and federal interests.[616]

- **OCSLA—Alternative energy:** When MMS considers an application for an alternative energy lease, easement, or right-of-way on the OCS, it must consult and coordinate with (among others) state governors, executives of local governments, and affected Indian tribes that might be affected.[617]

- **NGA:** Liquefied natural gas facilities, whether onshore or offshore, fall under the purview of FERC. However, when considering an application for a new facility, FERC is required to consult with the state, to ensure adequate consideration of state and local safety.[618]

- **FPA:** Under the Federal Power Act, FERC issues hydrokinetic energy projects in both state and federal waters. When issuing a hydrokinetic license, FERC must consult and coordinate with, in addition to the U.S. Fish and Wildlife Service and NMFS, state fish and wildlife agencies. It must explain any recommendations it does not adopt.[619]

- **PWSA:** Before designating a vessel fairway, the Coast Guard must consult with several federal and state entities. In particular, the Coast Guard must consult with governors of affected coastal States, so as to take into consideration "all other uses of the area under consideration."[620]

[612] *Id*. § 1535.
[613] Exec. Order No. 13,158, *supra* note 87, at § 4(b).
[614] 33 U.S.C. §§ 1508(a)(1), (b)(1), 1518(b).
[615] 43 U.S.C. §§ 1351(d), 1340(c)(2).
[616] *Id*. § 1345.
[617] *Id*. § 1337(p)(7); *see also* 30 C.F.R. § 285.203.
[618] 16 U.S.C. § 717b-1(b)(4).
[619] *Id*. § 803(a)(j); 18 C.F.R. § 4.34(b).
[620] 33 U.S.C. § 1223(c)(3)(B).

- **RHA:** Before approving a dredging or dumping permit, the Army Corps of Engineers must consult with the head of the coastal state agency that is responsible for fish and wildlife, to consider the project's potential impact on wildlife resources.[621]

ii. Overlapping Jurisdiction

Some federal laws apply equally within state waters and federal waters, which may in practice give rise to federal-state interactions. In addition, some of the federal laws that apply in state and federal waters contain provisions that explicitly grant the states authority to oversee the regulated uses or activities within their waters. The benefit of such delegation is that the states, which may have the best available data and knowledge of the issues, bear responsibility for implementation and management. The drawback is that it may be more difficult to coordinate compliance with a marine spatial plan.

The following provisions are the primary areas of concurrent or delegated federal-state jurisdiction:

- **NMSA:** When considering protection and enforcement within a sanctuary, one remote hurdle is Section 312, which attaches liability to damage, loss, or injury to sanctuary resources. However, if the activity causing the damage, loss, or injury is authorized under state law, a person cannot be held liable. This provision could limit the ability to enforce this liability scheme in some instances.[622]

- **ESA:** States do not have the authority to undermine ESA provisions and regulations. The Act explicitly preempts state laws that would permit what is prohibited or prohibit what is exempted or permitted in accordance with the Act.[623] States can, however, take a more aggressive role in protecting threatened and endangered species, as long as such actions do not prohibit authorized exemptions or permitted activities.[624]

- **MMPA:** States can play a central role in management of marine mammals found within their respective territories. The Act gives the Secretary the authority to confer MMPA authority in state waters to the states if certain conditions are met.[625] If the marine mammals are found beyond state waters, the Act requires the development of cooperative allocation agreements.[626] Once this authority is transferred, the only way the Secretary can remove this authority is with a finding that the program is not being implemented or is being implemented in a manner inconsistent with the Act.[627] For states with management authority, a federal MSP framework or part of a framework that relies on the Marine Mammal Protection Act likely would require close cooperation in state waters and some cooperation in federal waters. It should be noted that the MMPA specifically addresses the role of the State of Alaska and Alaska Natives, which need to be considered for MSP frameworks relying on MMPA and applying in this region.

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[621] *Id*. § 320.4(c).
[622] While there are many settlements for liability damages in sanctuaries (*see* ENVIRONMENTAL LAW INSTITUTE, MITIGATION OF IMPACTS TO FISH AND WILDLIFE HABITAT: ESTIMATING COSTS AND IDENTIFYING OPPORTUNITIES 63-83 (2008)), a brief search of Westlaw identified only one case that has addressed this issue in any way (search conducted October 1, 2009). In U.S. v Fisher, 977 F. Supp. 1193 (1997), the court found that liability exceptions, including activities authorized by federal or state law, did not apply to a treasure-hunting company that damaged seagrass in the Florida Keys Sanctuary.
[623] 16 U.S.C. § 1535(f).
[624] *Id*.
[625] *Id*. § 1379.
[626] *Id*. § 1379(d).
[627] *Id*. § 1379(e).

- **OCSLA—Oil and gas:** There are two ways in which the oil and gas leasing framework is influenced by states. First, the timing and location of activities specified in the five-year oil and gas leasing plan should consider, among other things, the laws and policies of affected states that the states' governors find relevant.[628] MMS must also invite suggestions from affected state governors during the development of a leasing plan.[629] Second, when MMS is considering a lessee's oil and gas Development and Production Plan, if approval is found to constitute a major federal action under NEPA, the agency will give the draft EIS to an affected state's governor and local governments that request it.[630]

- **FPA:** The FPA explicitly requires hydrokinetic projects located in state waters to be best adapted to a comprehensive plan for the area, whether developed by federal or state agencies, that is aimed at improving waterways, interstate commerce, water-power development, fish and wildlife protection, or other beneficial public uses. There are specific requirements that apply to projects located within a reservation.[631]

- **MSA:** Regional Fishery Management Councils, which bear substantial authority to implement the provisions of the MSA, contain both state and federal members. The adjacent state officials with primary marine fishery management responsibility and expertise are voting members on a Council, as sometimes Indian tribe representatives are as well.[632]

- **RHA:** When considering a dredging permit application, the Army Corps of Engineers must consider relevant non-federal dredging activities associated with federal navigation projects and coordinate with interested federal, state, regional, and local agencies.[633]

D. Conclusion

In federal waters, states have limited authority to influence federal MSP. However, they have many opportunities to influence the development and implementation of a federal marine spatial plan through consultation requirements, conferred authorities, and established means of cooperation. In contrast, in state waters, states have substantial authority, largely through the Submerged Lands Act and CZMA, to support or undermine federal MSP. However, Congress has the authority to statutorily alter the level of influence that the states have over federal MSP in both federal and state waters.

- *Under the existing ocean governance system, the ability of the federal government to implement a marine spatial plan is largely limited to federal waters.* The federal government has granted the coastal states significant authority over activities in state waters, but it has retained authority over some. For example, the federal government has authority over hydrokinetic projects and the siting of liquefied natural gas facilities in state waters (under the FPA), but it does not have authority over oil and gas leasing there (under OCSLA). Thus a federal marine spatial plan would largely only be enforceable in federal waters, absent voluntary enforcement in state waters by the coastal states. As the federal-state jurisdictional divide is not an ecosystem-based boundary, to achieve comprehensive ecosystem-based MSP federal and state entities would need to coordinate their separate efforts.

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[628] 43 U.S.C. § 1344(a).
[629] *Id*. § 1344(c)-(e).
[630] *Id*. § 1351(e)-(g).
[631] 16 U.S.C. § 803(a)(1)-(2).
[632] *Id.* § 1852.
[633] 33 C.F.R. § 322.5(c).

- *There are numerous federal statutes that require consultation between the federal and coastal state governments.* The consultation requirements most commonly appear in instances where activities in federal waters may affect coastal state waters. Some of the consultations are advisory, such as the states' right under the ESA to provide comments on endangered and threatened species and critical habitat designations; others are binding, such as the requirement that a state governor agree with the terms of a sanctuary designation that crosses into state waters, otherwise the disputed terms will not apply within the state portion of the sanctuary. While some of the consultation provisions may be used to impede federal MSP, they are predominately a valuable forum for soliciting state input and coordinating federal and state interests during the development and implementation of a federal marine spatial plan. Such coordination reduces the likelihood of state disagreement with the plan later on.

- *Federal MSP should be undertaken in cooperation with states to ensure that the federal consistency review requirement of the CZMA does not undermine such efforts.* Federal consistency review requires state approval for any federal activity that may affect a state coastal zone, not just within state waters. A federal marine spatial plan should be developed in cooperation with coastal states to ensure that it is compatible with the enforceable policies in state coastal management programs. Otherwise the states could potentially block proposed federal activities even if they comply with the federal marine spatial plan. Coordination between state and federal governments could be facilitated through the development of SAMPs, which have been used as a structure for cooperative management. In addition, in its current form the CZMA does not contain provisions that would require a state coastal management program to comply with a marine spatial plan. Once NOAA approves a state coastal management program, there is no review or reauthorization requirement. NOAA can only approve changes to a state's program, and provide recommendations or guidance to the states. Adding a re-approval process would require legislative amendment.

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