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# Examination of the Federal Consistency Provision of the Coastal Zone Management Act in Rhode Island

William Yost

*Sea Grant Law Fellow, Roger Williams University School of Law*

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**EXAMINATION OF THE FEDERAL CONSISTENCY PROVISION OF THE  
COASTAL ZONE MANAGEMENT ACT IN RHODE ISLAND**

William Yost



*Marine Affairs Institute*



THE  
UNIVERSITY  
OF RHODE ISLAND

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## The Coastal Zone Management Act

In 1972, Congress passed the Coastal Zone Management Act (CZMA)<sup>1</sup> after a finding that there was a “national interests in the effective management, beneficial use, protection, and development of the coastal zone.”<sup>2</sup> The “coastal zone” is comprised of the coastal waters of every state with a shoreline, including the Great Lake states, and includes the land inland from the shorelines to the extent necessary to control shorelands.<sup>3</sup> Embedded in the CZMA is an effort to balance the national objective to attain greater energy self-sufficiency by encouraging energy development in the coastal zone with the demands for the effective protection of the land and water resources in the coastal zone.<sup>4</sup> Unlike other federal acts, the CZMA provides the states with incentives for participation, not penalties for violation, and affords the states the ability to prioritize their own unique coastal interests.<sup>5</sup>

Under the CZMA, every coastal state may submit a Coastal Zone Management Plan (CZMP) to the Secretary of Commerce for approval.<sup>6</sup> Thus, each state’s participation in the CZMA is voluntary, yet funding is conditioned on approval of its CZMP. The CZMA provides an extensive list of program elements that each state must include in its CZMP in order to get approval, including an identification of the boundaries of the coastal zone, definitions of what shall constitute permissible land and water uses within the coastal zone, and a description of the organizational structure used to implement the management program.<sup>7</sup>

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<sup>1</sup> Coastal Zone Management Act, 16 U.S.C.A. §§ 1451-1465 (1972)

<sup>2</sup> 16 U.S.C.A § 1451(a).

<sup>3</sup> See 16 U.S.C.A § 1453(1).

<sup>4</sup> See 16 U.S.C.A § 1451.

<sup>5</sup> See LT Patrick J. Gibbons, *Too Much of a Good Thing? Federal Supremacy & the Devolution of Regulatory Power: The Case of the Coastal Zone Management Act*, 48 Naval L. Rev. 84, 91 (2001).

<sup>6</sup> 16 U.S.C.A § 1454.

<sup>7</sup> See 16 U.S.C.A. §1455(d)(1)-(2).

## The Federal Consistency Provision

The CZMA's *Federal Consistency Provision* provides that once a state management program has gone into effect, "[e]ach federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."<sup>8</sup> The purpose of the federal consistency provision is to ensure that federal activities are consistent with federally-approved CZMPs.

There are essentially four categories of federal activities that require a consistency determination: federal agencies; entities applying for a federal license or permit; entities which plan to develop an area which has been leased under the Outer Continental Shelf Lands Act (OCS); and state or local governments which submit applications for federal assistance.<sup>9</sup> In all cases involving activities of a federal agency, the federal agency conducts the federal consistency determination for the relevant state agency.<sup>10</sup> This determination must be made "at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity...."<sup>11</sup>

However, the state, through its CZMP, conducts the federal consistency determination for the remaining three categories of federal activities not involving a federal agency.<sup>12</sup> Before the state makes a federal consistency determination for entities applying for a federal license or permit, that entity must submit to the state a certification that its proposed activity "complies with the enforceable policies of the state's approved program."<sup>13</sup> In addition, entities that plan to develop OCS areas that could affect a state's coastal zone, as well as state or local governments

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<sup>8</sup> 16 U.S.C.A §1456(c)(1)(A).

<sup>9</sup> See 16 U.S.C.A §1456(c).

<sup>10</sup> 16 U.S.C.A §1456(c)(1)(C)

<sup>11</sup> 16 U.S.C.A §1456(c)(1)(C).

<sup>12</sup> 16 U.S.C.A §1456(c)(3)(A)-(B)-(d).

<sup>13</sup> 16 U.S.C.A. §1456(c)(3)(A).

applying for federal assistance for programs that could affect a state's coastal zone must submit similar certifications to the state prior to the state making a federal consistency determination.<sup>14</sup>

A state must include in its CZMP a complete list of the federal license and permit activities which have an effect on its coastal zone which it wants to review for consistency.<sup>15</sup> In this respect, "federal license or permit" does not include OCS plans or leases issued pursuant to lease sales conducted by a federal agency, as these are considered federal agency actions.<sup>16</sup> The state may also review federal license or permit activity occurring outside of its coastal zone if the activity has a reasonably foreseeable effect on the coastal zone.<sup>17</sup> States must describe the geographic location of the federal activities if the activities occur in either federal waters or on federal lands; however, if the federal activities occur on federal lands within the state's coastal zone, the state need not describe the geographic location.<sup>18</sup>

In the past, there was some uncertainty as to whether a given licensing activity would even require a federal consistency determination if the underlying activity was not anticipated to "directly effect" a particular state's coastal zone. In fact, in 1984 the Supreme Court decided *Secretary of the Interior v. California*, wherein it held that the Department of the Interior's issuance of oil and gas leases in the OCS did not require a federal consistency review because the sale of a lease did not "directly effect" California's coastal zone.<sup>19</sup> However, Congress amended the CZMA in 1990 to explicitly overturn the Supreme Court's ruling in *Secretary of the Interior* by eliminating the "directly effects" condition with the intention of requiring all future

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<sup>14</sup> 16 U.S.C.A. §1456(c)(3)(B)-(d).

<sup>15</sup> 15 C.F.R. §930.53(a).

<sup>16</sup> 15 C.F.R. §930.51(a). These would include, for example, oil and gas lease sales conducted by the Bureau of Land Management. *Id.*

<sup>17</sup> 15 C.F.R. §930.53(a).

<sup>18</sup> 15 C.F.R. §930.53(a)-(1).

<sup>19</sup> *Secretary of the Interior v. California*, 464 U.S. 312, 315 (U.S. 1984).

OCS lease sales to undergo a federal consistency provision.<sup>20</sup> Now the state of the law is clear and requires that all OCS lease sales issued by federal agencies must undergo a federal consistency provision.

In the event that a state determines a federal activity is not consistent with its CZMP, it may file an appeal which takes one of two forms depending on the nature of the federal entity causing the inconsistent activity. For all federal agencies, the federal agency may proceed despite the State's objection if it meets three criteria: first, the federal activity must further the national interest; second, the national interest must outweigh the activity's adverse coastal effects; third, there must be no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.<sup>21</sup> For the remaining categories (federal license, OCS, and federal assistance), the agency making the appeal (appellant) must file a notice of appeal to the Secretary of Commerce within 30 days of the State's objection.<sup>22</sup> In addition, a federal license activity or a federal assistance activity may override a State's objection if the activity is "necessary in the interest of national security."<sup>23</sup>

### **The Rhode Island Ocean Special Area Management Plan**

Shortly after congress passed the Coastal Zone Management Act, the Rhode Island Legislature created its own Coastal Resources Management Council (CRMC) to "exercise effectively its responsibilities in the coastal zone through the development and implementation of

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<sup>20</sup> See *Amber Res. Co. v. United States*, 68 Fed. Cl. 535, 541 (Fed. Cl. 2005).

<sup>21</sup> See 15 C.F.R §930.121

<sup>22</sup> 15 C.F.R §930.121

<sup>23</sup> 15 C.F.R §930.121

management programs to achieve wise use of the land and water resources of the coastal zone.”<sup>24</sup> The CZMA identifies Special Area Management Plans (SAMP) as effective tools to meet these objectives for important coastal areas.<sup>25</sup> Like CRMCs or other similar organizations in other states, the Rhode Island CRMC has created a number of SAMPs to address the specific issues in various coastal areas in Rhode Island.<sup>26</sup> Recently, the Rhode Island CRMC became the first such organization in the nation to get approval of an Ocean SAMP to manage the offshore environment.<sup>27</sup>

The Rhode Island Ocean SAMP is an impressive milestone for Rhode Island and the culmination of two years of intense study and research by a team of university scientists and experts. Unlike SAMPs of other states that manage areas within a state’s coastal zone (which is limited to the territorial seas extending out to three miles from shore), the Ocean SAMP extends to thirty miles offshore.<sup>28</sup> One of its key features of the previous six Rhode Island SAMPS is a Marine Spatial Planning (MSP) process, used to achieve Ecosystem Based Management (EBM). EBM is “an integrated approach to management that considers the entire ecosystem, including humans. The goal of EBM is to maintain an ecosystem in a healthy, productive and resilient condition that provides the services humans want and need.”<sup>29</sup> The Ocean SAMP has applied the MSP process to its entire ocean zone, which is considered as the first zoning of offshore waters to “regulate uses and control development, including the fostering of preferred uses such as

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<sup>24</sup> R.I. GEN. LAWS §46-23-1 (West 2011).

<sup>25</sup> 16 U.S.C.A §1456b(a)(6).

<sup>26</sup> <http://www.crmc.ri.gov/samps.html>.

<sup>27</sup> Official Ocean SAMP, Letter from CRMC Chairman Tikoian, [http://www.crmc.ri.gov/samp\\_ocean/finalapproved/0\\_TikoianIntroLetter.pdf](http://www.crmc.ri.gov/samp_ocean/finalapproved/0_TikoianIntroLetter.pdf) . The Ocean SAMP was approved by NOAA on May 4, 2011. *Id.*

<sup>28</sup> R.I. Admin Code 16-1-17:140.2.

<sup>29</sup> R.I. Admin Code 16-1-17:110.5.

alternative energy production, principally wind power.”<sup>30</sup> While this paper focuses primarily on energy uses, it should be noted that the Ocean SAMP mapped the ocean waters for a wide range of marine and human uses.

The Ocean SAMP has set out four major goals to balance the development and protection of Rhode Island’s ocean-based resources. These goals are to:

- 1.) Foster a properly functioning ecosystem that is both ecologically sound and economically beneficial.
- 2.) Promote and enhance existing uses.
- 3.) Encourage marine-based economic development that considers the aspirations of local communities and is consistent with and complementary to the state’s overall economic development, social, and environmental needs and goals.
- 4.) Build a framework for coordinated decision-making between state and federal management agencies.<sup>31</sup>

Essentially, Rhode Island is interested in using its ocean waters for economic benefits in the form of energy development, yet it wants to accomplish this while simultaneously preserving its precious ecosystems and maintaining some type of checks and balances over the federal government. In accordance with these broad goals, the Ocean SAMP specifically endeavored to accomplish the “streamlining of federal and state permitting processes for such offshore facilities and establishing a cost-effective permitting environment for potential investors.”<sup>32</sup>

Recently, the National Oceanic and Atmospheric Administration (NOAA) authorized the RI CRMC to review any federal activity in this offshore area.<sup>33</sup> Naturally, the Ocean SAMP’s approval and authorization to conduct review of federal activity in the Ocean SAMP zone are achievements worthy of great praise for Rhode Island CRMC and all of its hardworking researches and scientists. However, there are still a number of questions and uncertainties

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<sup>30</sup> John M. Boehnert and Adena Leibman, *Is Zoning Coming to an Ocean Near You?* ABA Vo. 35, No. 1 (Fall 2011).

<sup>31</sup> R.I. Admin Code 16-1-17:130.4(a)-(d).

<sup>32</sup> John M. Boehnert and Adena Leibman, *Is Zoning Coming to an Ocean Near You?* ABA Vo. 35, No. 1 (Fall 2011).

<sup>33</sup> Email.

regarding how impending federal consistency reviews and complications will be resolved in this new frontier.

### **Renewable Energy and Foreseeable Consistency Complications**

One area of significant concentration for the Ocean SAMP where federal consistency complications are certain to arise is the development of renewable energy in the form of wind turbines in federal waters. In creating the Ocean SAMP, the CRMC identified certain ocean waters as having the most promise for renewable energy development after a thorough study of oceanographic, commercial, environmental, climatic and other criteria.<sup>34</sup> Currently, the CRMC has the authority to issue leases to wind developers for projects in Rhode Island waters, while the U.S. Department of the Interior Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) issues such leases for projects in federal waters.<sup>35</sup> For procedures related to consistency determinations, BOEMRE distinguishes between competitive leases (which follow a bidding procedure),<sup>36</sup> for which BOEMRE itself prepares a consistency determination, and noncompetitive leases, which follow the procedures outlined in the regulations for federal license and permit activities.<sup>37</sup>

For leases issued by BOEMRE on a noncompetitive basis, the applicant must submit a consistency certification and other necessary information to the CRMC in order for the CRMC to conduct a consistency review.<sup>38</sup> Since the BOEMRE's lease applications are themselves

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<sup>34</sup> R.I. Admin Code 16-1-17:870.2.

<sup>35</sup> R.I. Admin Code 16-1-17:820.4.4.

<sup>36</sup> If BOEMRE determines there is a competitive interest in a given lease, it will follow a bidding procedure and award a competitive lease; otherwise, it will issue a noncompetitive lease. *See* 30 C.F.R. §285.231.

<sup>37</sup> *See* R.I. Admin Code 16-1-17:1030.1

<sup>38</sup> 15 C.F.R. §930.58(a). The certification shall state: "The proposed activity complies with the enforceable policies of (Rhode Island) approved management program and will be conducted in a manner consistent with such program." *Id.* at §930.57(b). The other necessary information includes a copy of the applicant's application to BOEMRE and an evaluation of the coastal effects of the proposal. *Id.* at §930.58(a).

extensive and because the construction of offshore windfarms involves a complex, multi-step process, it is a pertinent concern of the CRMC to understand when in the process it can, should, or must make its consistency determination. The Ocean SAMP helps make this determination easier by requiring a preliminary meeting between the CRMC, applicant, and the Habitat Advisory Board (which advises the CRMC) for all state-issued permits prior to submission of the permit application to discuss marine and habitat-related issues.<sup>39</sup> The CRMC also encourages applicants for federal permits to engage in similar meetings, but cannot require them.<sup>40</sup>

In fact, prior to construction but after the lease has been awarded, the applicant must submit various plans for approval by BOEMRE, and two of these must be submitted to the CRMC for a federal consistency determination.<sup>41</sup> The first requirement of BOEMRE is the Site Assessment Plan, which describes the applicant's planned activities in the leased site; the second is the General Activities Plan (GAP), which describes the applicant's planned construction activities.<sup>42</sup>

In following its desire to promote coordination among the various parties (the CRMC, federal and state agencies, and energy developers) and to streamline the application process for the applicant, the SAMP requires that similar sets of documents must be submitted to the CRMC so that it may conduct its consistency determination.<sup>43</sup> The CZMA consistency review for all leases is done in two phases.<sup>44</sup> First, like BOEMRE, the CRMC requires the applicant submit a Site Assessment Plan, which is a pre-construction plan that describes the proposed activities and how the applicant will conduct a resource assessment for the proposed area.<sup>45</sup> Based on certain

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<sup>39</sup> R.I. Admin Code 16-1-17:270.2.

<sup>40</sup> *Id.*

<sup>41</sup> 30 U.S.C.A. §285.612-647.

<sup>42</sup> 30 U.S.C.A §285.605-640.

<sup>43</sup> R.I. Admin Code 16-1-17:860.2.5.

<sup>44</sup> See Peter J. Shaumberg and Angela F. Colamaria, *Sitting Renewable Energy Projects on the Outer Continental Shelf: Spin, Baby, Spin!*, 14 Roger Williams U. L. Rev. 624, 658 (2009).

<sup>45</sup> *Id.*

qualifications, the CRMC may allow the applicant to utilize ocean data collected by the Ocean SAMP in its SAP and resource assessment.<sup>46</sup> Once the SAP is approved, the applicant may begin conducting the activities that were approved in the SAP (geological surveys, biological surveys, etc.), but must seek approval from the CRMC to conduct any non-approved SAP activities.<sup>47</sup>

Following the SAP is the Construction and Operations Plan (COP), which shall describe all of the applicant's planned construction activities, both on and off-shore, and must demonstrate that all planned construction will be conducted in a safe manner that does not cause harm or interfere with other uses of the ocean.<sup>48</sup> Like the SAP, the required documentation is generally consistent with what BOEMRE requires for the GAP. Again, the applicant may not begin any construction activity until the CRMC approves its COP, and the applicant must seek additional approval for any construction activity not contemplated in the COP.<sup>49</sup>

For either phase, following the date that the CRMC receives the applicant's consistency certificate and other required documentation, it has six months to conduct its consistency review.<sup>50</sup> In addition, the CRMC shall provide public notice of the proposed license activity to the areas of the coastal zone that are likely to be affected by the activity.<sup>51</sup> The purpose of this requirement is to encourage public participation which is an important perspective for the CRMC to consider in its consistency determination. If, during the six month review period, the CRMC decides to object to the applicant's consistency, it must notify the applicant as well as the federal

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> 15 C.F.R. §930.60(a). If the applicant fails to submit either the certification or the other necessary information, the CRMC has thirty days to notify the applicant of the incomplete submission. *Id.* at §930.60(a)(1)-(2).

<sup>51</sup> 15 C.F.R. §930.61(a).

agency and the director of OCRM.<sup>52</sup> The CRMC's objection must be based on either the applicant's failure to provide necessary application materials, or a determination that the applicant's proposed activities are inconsistent with the CZMP's enforceable policies; this determination may include a suggestion of alternative measures the applicant could implement to make its activities consistent.<sup>53</sup>

### **President Obama's National Ocean Policy**

On June 12, 2009, not long after his inauguration, President Obama established the Interagency Ocean Policy Task Force for the purpose of "developing recommendations to enhance our ability to maintain healthy, resilient, and sustainable ocean, coasts, and Great Lakes resources for the benefit of present and future generations."<sup>54</sup> Just over a year later, on July 19, 2010, Obama signed an executive order which established a National Policy for the Stewardship of the Ocean, giving effect to the task force's *Final Recommendations*.<sup>55</sup> The executive order directed federal agencies to begin implementing these recommendations, and also created a National Ocean Council (NOC) to oversee the mission and to "strengthen ocean governance and coordination."<sup>56</sup>

The NOC essentially replaces the Committee on Ocean Policy, which former President Bush established by executive order in 2004.<sup>57</sup> In its *Final Recommendations*, the task force readily implied that the Committee on Ocean Policy was only moderately effective at uniting

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<sup>52</sup> 15 C.F.R. §930.63(a).

<sup>53</sup> 15 C.F.R. §930.63(b)-(c).

<sup>54</sup> The White House Council On Environmental Quality, *Final Recommendations of the Interagency Ocean Policy Task Force 1* (July 19, 2010) [hereinafter *Final Recommendations*], available at [http://www.whitehouse.gov/files/documents/OPTF\\_FinalRecs.pdf](http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf).

<sup>55</sup> *The Interagency Ocean Policy Task Force*, Press Release, The White House (Last Visited: 10/19/11), <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans>.

<sup>56</sup> *Id.*

<sup>57</sup> *Final Recommendations* at 4.

federal agencies to tackle ocean-related issues.<sup>58</sup> Thus, the NOC is the response to the Committee on Ocean Policy’s shortcomings, and has been endowed with “strengthen[ed] decision-making and dispute resolution processes,” and clearly defined roles.<sup>59</sup> At the center of the NOC’s framework is a Steering Committee, which “ensur[es] integration and coordination on priority areas within the NOC.”<sup>60</sup> On February 23, 2011, the Obama Administration announced the members of the Governance Coordinating Committee, which is assigned with the coordination of coordinating ocean policy issues.<sup>61</sup>

The overarching goal of the *Final Recommendations* is to provide for the development of our oceans using the best science and technology available in order to ensure the preservation of our precious resources and marine life by accounting for human impacts and climate change.<sup>62</sup> The *Final Recommendations* highlight the fact that our coastal communities are facing sea-level rise, biological diversity is in decline, and habitats are being altered as human demands for our oceans are increasing in a variety of ways including energy development, shipping, recreation, aquaculture, and implementing national security.<sup>63</sup> Thus, it undertakes the challenge of facilitating the determination of which activities should occur where to best serve all of the competing interests at stake, not the least of which is the environment.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *About the National Ocean Council*, The White House, <http://www.whitehouse.gov/administration/eop/oceans/about>.

<sup>61</sup> *Obama Administration’s National Ocean Council Names State, Local and Tribal Representatives to Coordinating Body*, Press Release, The White House (Feb. 23, 2011), available at [http://www.whitehouse.gov/administration/eop/ceq/Press\\_Releases/February\\_23\\_2011](http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/February_23_2011).

<sup>62</sup> See *Final Recommendations* at 12-15

<sup>63</sup> See *Id.* at 12.

## Coastal and Marine Spatial Planning

The *Final Recommendations* does not shield the fact that time is of the essence. This sense of urgency is most visibly expressed in its identification of *Nine Priority Objectives*, one of which is Coastal and Marine Spatial Planning (CMSP).<sup>64</sup> Similar to the Ocean SAMP's MSP processes, CMSP is an integrated spatial planning process used to identify areas most suitable for "various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives."<sup>65</sup> Essentially, CMSP is intended to identify which ocean zones are best suited for intensive development projects, and which should be preserved because of sensitive resources or other environmental concerns.<sup>66</sup> As the Ocean SAMP has demonstrated, this is not an entirely novel approach, so there is some question as to how CMSP will mesh with states like Rhode Island that are already developing or have already implemented a version of ocean mapping.

The NOC will implement CMSP by establishing nine regional planning bodies to create nine distinct regional CMS Plans.<sup>67</sup> The "Northeast Region" will be comprised of all six New England states, including Rhode Island.<sup>68</sup> While the *Final Recommendations* acknowledges that a successful CMSP effort is dependent upon strong partnerships among federal, state, tribal, and local authorities, it purports that CMSP would "build upon and incorporate" the efforts of states that have already begun marine planning.<sup>69</sup> Therefore, while the NOC's priority seems to be the

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<sup>64</sup> *Id.* at 41

<sup>65</sup> *Id.*

<sup>66</sup> See John M. Boehnert and Adena Leibman, *Is Zoning Coming to an Ocean Near You?* ABA Vo. 35, No. 1 (Fall 2011).

<sup>67</sup> *Final Recommendations* at 52.

<sup>68</sup> *Id.* at 53.

<sup>69</sup> *Final Recommendations* at 46.

implementation of CMSP, it is unclear whether the substantive efforts of a state like Rhode Island with its Ocean SAMP<sup>70</sup> would require alterations to align with the national policy.

### **Legal Framework of Coastal Marine Spatial Planning**

In order to better understand how potential issues with the federal consistency of CMSP might play out, it is necessary to determine the legal authority and origins of CMSP. According to the *Final Recommendations*, the NOC will facilitate a bottom-up process using existing authorities to achieve CMSP, which will “not vest the NOC with or regional planning bodies with new or independent legal authority to supersede existing Federal, State, or tribal authorities.”<sup>71</sup> Exactly how NOC has the authority to instruct or compel existing agencies (at essentially every level of government) to participate in CMSP is far from readily apparent. As Joan Bondareff, former acting deputy administrator of the Maritime Administration, U.S. Department of Transportation, points out, “The Task Force Report claims that the administration has all the authority it needs to create and develop CMSPs....Probably the closest law that proposes the establishment of ocean plans is the CZMA, which encourages states, albeit in state waters, to develop state ocean resource management plans.”<sup>72</sup>

Bondareff does not foreclose the possibility that certain agencies or stakeholders might challenge the legality of CMSP, and posits that the success of the planning process could impact the likelihood of conflicts and challenges arising.<sup>73</sup> Since the *Final Recommendations* indicate that CMS plans would be “developed among Federal, State, tribal, local authorities, and regional

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<sup>70</sup> Both the Ocean SAMP and CMSP use an Ecosystem Based Management approach. *Id.* at 48.

<sup>71</sup> *Id.* at 62.

<sup>72</sup> Joan M. Bondareff, *The Impact of Coastal and Marine Spatial Planning on Deepwater Drilling*, 26 Nat. Resources & Env't 3, 5 (2011).

<sup>73</sup> *See id.*

governance structures, with substantial stakeholder and public input,”<sup>74</sup> it is evident that they are heavily dependent on the cooperation of a number of competing interests. Despite bringing into question the legal authority of the CMSP, Bondareff seems to suggest potential legal conflicts would be resolved by amending existing law, noting “agencies and stakeholders may recommend changes to those laws to encompass new uses of the ocean and also to better resolve use conflicts.”<sup>75</sup>

The *Final Recommendations* do not pretend that the cooperative efforts of the regional planning bodies are unlikely to identify gaps or inconsistencies in the law. Having contemplated this, the NOC proposes that the various agencies should be ready to amend existing laws under their authority when inconsistencies or confrontations are identified. As Joseph Siegel, Senior Attorney and Alternative Dispute Resolution Specialist for the Environmental Protection Agency (Region 2 Office in New York), explains “[the] NOC would oversee efforts to identify gaps and conflicts in federal statutes. It would then work to figure out how to harmonize the various laws of the different agencies. It would also consider how to collectively use federal, state, tribal, and local laws to implement the goals of the NOC’s coastal and marine spatial planning.”<sup>76</sup>

### **Federal Consistency of Coastal Marine Spatial Planning**

The *Final Recommendations* provides only a vague sketch of how federal consistency under the CZMA might work with respect to CMSP. While the *Final Recommendations* recognizes that the NOC cannot directly usurp state agencies’ power to grant permits in their approved coastal zones, it indicates that once a regional CMS plan is approved, it would be

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<sup>74</sup> *Final Recommendations* at 41.

<sup>75</sup> Bondareff, *supra* note 70, at 5.

<sup>76</sup> Joseph A. Siegel, *Energy and the Environment: Preventing and Resolving Conflicts*, 12 *Cardozo J. Conflict Resol.* 411, 422 (2011).

implemented into the respective federal, state, and tribal authorities.<sup>77</sup> This proposition leaves open the possibility that a regional CMS plan could include policies contrary to a given state's CZMP with respect to how that state issues leases. Therefore, a CMS plan generated and influenced by the NOC could essentially compel a state to revise its CZMP.

Naturally the *Final Recommendations* is hopeful that states will willingly cooperate with federal agencies to develop regional CMS Plans so that “the CMS Plan could include measures to ensure that it is consistent to the maximum extent practicable with the enforceable policies of a State’s CZMA program.”<sup>78</sup> Realizing that this optimistic scenario may not be the reality, the *Final Recommendations* suggests that “[t]he relevant State could consider potential changes to the State’s enforceable policies to achieve agreed upon regional CMSP objectives.”<sup>79</sup> This seems like a polite way of declaring that a given state might have to amend its NOAA-approved state plan to comply with a NOC-approved CMS Plan.

The *Final Recommendations* is also optimistic that states will choose to incorporate the regional CMS Plan into their respective approved CZMA programs, which would likely alleviate the need for a federal consistency determination under the CZMA.<sup>80</sup> “[I]f a State incorporates a CMS Plan into its federally approved CZMA program, then it is likely that the CMS Plan would not need a CZMA Federal consistency review.”<sup>81</sup> This optimism could derive from the fact that since the great majority of states do not have their own Ocean SAMPs and have not mapped their own ocean waters, CMSP in those states will be a fresh endeavor likely amenable to inter-agency cooperative efforts. However, when CMSP is conducted for the Northeast Region, which encompasses Rhode Island, more conflict is likely. Rhode Island has already invented its

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<sup>77</sup> *Id.* at 62.

<sup>78</sup> *Id.* at 63.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Final Recommendations* at 63.

“wheel,” and it has done so without the aid or *influence* of the NOC and without a discerning eye toward the national interests.

With respect toward potential federal consistency concerns, the NOC does not seem to readily contemplate Rhode Island’s situation. Instead, it suggests that most CMSP federal consistency issues under the CZMA will be avoided by virtue of federal and state collaboration towards CMSP. “Specifically, a CMS Plan having Federal and State buy-in provides a common frame of reference which will inform Federal agency and state coastal management authority decision-making regarding the application of the state’s coastal management program to a proposed Federal action. Decisions so informed are less likely to result in conflict.”<sup>82</sup> However, if states are unwilling to do this it leaves open the possibility that states could exert a consistency review of a federal activity in conjunction with a CMS Plan.

Perhaps Rhode Island, and specifically its CRMC, will be able to influence CMSP in the Northeast Region so that federal consistency determinations will not be necessary. It is likely that the CRMC will play an active role in the NOC’s CMSP in Rhode Island ocean waters since it has already expended a lot of effort and resources in creating the Ocean SAMP. Further, in order to preserve the goals and policies of the Ocean SAMP, it will need to influence all of the agencies involved in the CMSP process to incorporate the interests of the SAMP instead of the other way around.

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<sup>82</sup> National Ocean Council, *Legal Authorities Relating to the Implementation of Coastal and Marine Spatial Planning*, 4 available at [http://www.whitehouse.gov/sites/default/files/microsites/ceq/cmstp\\_legal\\_compendium\\_2-14-11.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ceq/cmstp_legal_compendium_2-14-11.pdf).