



**The Role of the Regional Fishery Management Councils in
Multi-Sector Spatial Planning:
Exploring existing tools and future opportunities**

**Prepared by Meghan Jeans of the Fisheries Leadership & Sustainability Forum
for the 2011 West Coast Forum**

EXECUTIVE SUMMARY

Coastal and marine spatial planning (“CMSP”) is an evolving tool to help support ecosystem-based management through coordinated management and integrated ocean governance. CMSP is a process that proactively manages the spatial and temporal distribution of human activities and provides a means of managing potentially conflicting activities and accounting for cumulative impacts to ensure sustainable use of marine resources. From a fisheries management perspective, the role of the Regional Fishery Management Councils (“RFMCs” or “Councils”) in the broader CMSP framework remains an outstanding question. Understanding the nature and extent of their authority under existing laws, the types of information and data that are useful to spatial planning efforts, and what opportunities exist for them to contribute and influence the process can help federal fishery managers engage constructively in these types of coordinated planning processes.

There are numerous ways in which Councils can contribute constructively to multi-sector spatial planning¹ and plenty of benefits that fisheries management may derive from a more coordinated marine management system. The first part of the paper considers the origins and drivers of CMSP and contemplates the potential role and value of Councils within a regional CMSP framework.

Recognizing that user-user and user-ecosystem conflicts will continue to persist in the marine environment regardless of whether a formal CMSP is developed and implemented, the second part of this paper explores existing tools and strategies to engage the fisheries sector in broader ocean planning efforts. Examining the current legal framework, we highlight incentives and avenues for Council involvement and identify ways that Councils can capitalize on their existing authority to influence and coordinate with other ocean users.

The analysis focuses on the relevant statutes and associated regulations of the Magnuson-Stevens Fishery Conservation and Management Act, the National Environmental Policy Act, the Clean Water Act, the Coastal Zone Management Act and the Outer Continental Shelf Lands Act; however there are a range of other legal instruments that may provide Councils with some authority to engage in multi-sector spatial planning and decision making. The statutory and/or regulatory provisions highlighted here contain area-based mechanisms, tools for establishing activity restrictions, provisions supporting ecosystem-based management approaches, coordination and consultation requirements, and/or permitting and licensing processes in the marine environment.

With input from current fishery managers including Council members and staff as well as representatives of NOAA Fisheries, this report also explores some of the current challenges and opportunities associated with multi-sector spatial planning and outlines some potential strategies by which Councils can play a more active role in spatial planning in our oceans – with or without the development and implementation of a regional CMSP.

¹ This report employs the term “multi-sector spatial planning” as an overarching term that includes coastal and marine spatial planning (CMSP) as envisioned in the National Policy as well as inter-sector coordination absent a formal framework for CMSP.

ACRONYMS

ACL	Annual Catch Limit
AM	Accountability Measure
APA	Administrative Procedures Act
APD	Application for Permit to Drill
BOEMRE	Bureau of Ocean Energy Management, Regulation and Enforcement ²
CFMC	Caribbean Fishery Management Council
CMSP	Coastal and Marine Spatial Planning
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
DOI	Department of Interior
DOC	Department of Commerce
DOCD	Development Operations Coordination Document
EAM	Ecosystem Approach to Management
EBM	Ecosystem-Based Management
EEZ	Exclusive Economic Zone
EFH	Essential Fish Habitat
EP	Exploration Plan
ESA	Endangered Species Act
FEP	Fishery Ecosystem Plan
FMP	Fishery Management Plan
FONSI	Finding of No Significant Impact
GMFMC	Gulf of Mexico Fishery Management Council
HAPC	Habitat Area of Particular Concern
MAFMC	Mid-Atlantic Fishery Management Council
MMPA	Marine Mammal Protection Act
MMS	Minerals Management Service
MOU	Memorandum of Understanding
MSA	Magnuson-Stevens Fishery Conservation & Management Act
MSY	Maximum Sustainable Yield
NEFMC	New England Fishery Management Council
NEPA	National Environmental Policy Act
NIMS	National Information Management System
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NOC	National Ocean Council
NOS	Notice of Sale
NPFMC	North Pacific Fishery Management Council
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act

² Effective October 2011, BOEMRE will be sub-divided into the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE). BOEM will primarily promote and manage development of offshore oil, gas, and alternative energy resources, while BSEE will handle safety and environmental regulatory compliance.

OY	Optimum Yield
PFMC	Pacific Fishery Management Council
RFI	Request for Interest
RFMC	Regional Fishery Management Council
RPB	Regional Planning Body
SAFMC	South Atlantic Fishery Management Council
SSC	Scientific and Statistical Committee
USCOP	United States Commission on Ocean Policy
WPRFMC	Western Pacific Regional Fishery Management

TABLE OF CONTENTS

Executive Summary	2
Acronyms	3
I. Introduction	7
II. Origins of Coastal and Marine Spatial Planning	8
III. Regional Fishery Management Councils: Jurisdiction & Authority	10
IV. Opportunities for Regional Fishery Management Councils within a Coastal and Marine Spatial Planning Framework	11
A. How the Regional Fishery Management Councils May Contribute to CMSP	13
B. How CMSP May Benefit Fisheries Management	14
V. Existing Management Tools to Support Council Engagement In Multi-Sector Spatial Planning and Decision-Making	14
A. Direct Authority	15
1. Optimum Yield and Annual Catch Limits	15
2. Essential Fish Habitat	16
a. Essential Fish Habitat Designation	16
b. Essential Fish Habitat Conservation	17
3. Fishery Ecosystem Plans	20
4. Aquaculture Fishery Management Plans	22
B. Indirect & Discretionary Authority	25
1. National Environmental Policy Act	25
2. Clean Water Act	26
3. Coastal Zone Management Act	27

C.	Current Permitting Processes & Opportunities	27
1.	Inter-Agency Coordination	28
2.	Offshore Oil and Gas Development	29
a.	Five-Year Leasing Program	29
b.	Planning for Specific Sale	30
c.	Exploration Plan Approval	33
d.	Development and Production Plans	33
3.	Alternative Energy Development	34
a.	Requests for Interest	34
b.	Calls for Information and Nominations	35
c.	Area Identification	35
d.	Sale Notices	35
e.	Lease Sales	36
VI.	Strategies for Council Engagement in Multi-Sector Spatial Planning	36
VII.	Conclusion	38
	Acknowledgements	39

I. Introduction

Effective ecosystem-based management cannot be done in isolation by a single sector. Absent coordination with other agencies and sectors involved in non-fishing ocean uses, efforts by federal fishery managers to implement ecosystem-based management and promote sustainable use of marine resources may be compromised. While there is widespread agreement on the need for more coordinated governance to achieve ecosystem-based management, the path forward is less clear. Enter coastal and marine spatial planning (CMSP).³ CMSP is generally characterized as a:

“...comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas. It identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives. In practical terms, CMSP provides a public policy process for society to better determine how the ocean, coasts, and Great Lakes are sustainably used and protected -- now and for future generations.”⁴

CMSP has been recommended as a possible solution to criticisms that the current system is:

“...slow, reactive, and uncoordinated, leading to piecemeal decision making which follows the logic of the particular case and is uninformed by any clear principles or overarching management objectives. In failing to provide a consistent frame of reference for future decision making, [the current system] engenders a high level of uncertainty among all uses of the sea.”⁵

Indeed, CMSP is seen as a means of reconciling some of these deficiencies and achieving ecosystem-based management and other governance goals. Broadly speaking, effective CMSP is intended to be ecosystem-based, integrated, area-based, adaptive, strategic and participatory.⁶

Whether CMSP gains any significant traction at the regional or national level remains to be seen. In the meantime, federal fishery managers maintain some authority to implement spatial management measures and place-based restrictions to achieve their conservation and management goals. Leveraging these existing spatial management tools in fisheries can help fishery managers provide input on priorities for maintaining ecosystem health and move towards more integrated management. Regional Fishery Management Councils (RFMCs or Councils) may build on the tools and information derived from fisheries management activities to effectively engage in consultations with other ocean user groups and facilitate more coordinated ocean governance and ecosystem-based management.

³ For the purposes of this report, CMSP and MSP (marine spatial planning) are used interchangeably.

⁴ Final Recommendations of the Interagency Ocean Policy Task Force (Final Recommendations), as adopted by Executive Order 13547, *Stewardship of the Ocean, Our Coasts, and the Great Lakes*.

⁵ Symes, David. 2005. *Marine Spatial Planning: A Fisheries Perspective*. Report to English Nature, 7.

⁶ *Id.* at 17.

“In practice the idea of [marine spatial planning] embodies two complementary activities: (i) the development of proactive, forward looking strategic planning and (ii) reactive systems of development control to determine whether or not certain economic activities may or may not be permitted in a given location.”⁷ This report explores both the proactive and reactive angles by examining the challenges and opportunities available to Councils to play a role in spatial planning in our oceans – with or without the enactment of a formal CMS plan. It also considers ways in which the Councils may contribute to and benefit from regional CMSP processes regardless of their official relationship to the regional planning bodies (RPBs). By examining the current legal framework and highlighting incentives and avenues for council involvement, this paper identifies ways that Councils can utilize their existing authority to influence and coordinate with other ocean users and resource managers. With input from current fishery managers, this report examines some of the challenges and opportunities associated with multi-sector spatial planning, and considers strategies to enhance coordination and facilitate constructive Council engagement with the broader ocean community.

II. Origins of Coastal and Marine Spatial Planning

The movement towards a comprehensive national ocean policy grounded in ecosystem principles began in 1989 when the scientific community called upon Congress to amend the Magnuson-Stevens Fishery Conservation and Management Act (MSA) “to promote a total ecosystem perspective in managing the Nation’s fish stocks.”⁸ Though the call went unheeded at the time, subsequent amendments to the MSA mirrored this transition towards a more holistic ecosystem-based approach to management. The 1996 reauthorization of the MSA (Sustainable Fisheries Act) included a provision requiring federal fishery managers to identify and protect habitat essential to the growth and survival of fish stocks.⁹

Later, the 2007 amendments to the MSA included a provision that called for a study “on the state of the science for advancing the concepts and integration of ecosystem considerations in regional fishery management.”¹⁰ The subsequent study by NOAA Fisheries called for the establishment of fishery ecosystem plans (FEPs) to integrate ecosystem principles and goals and merge the species-centric fishery management plans (FMPs).¹¹ Still, the focus of the MSA remains very sector-specific and federal fishery managers have little authority to manage the habitat and ecosystem impacts of other ocean users and vice versa. Acknowledging this challenge, the study also recommended that Councils engage more directly with other ocean user groups. Citing the need to enhance inter-agency communication and support a broad ecosystem perspective, the study urged Councils to consider ways that they could contribute to the planning and decision making processes of other entities while better incorporating the input of non-fishing interests into the Council process.¹²

⁷ *Id.* at 7.

⁸ William F. Fox et al., Statement of the Union of Concerned Scientists on the Reauthorization of the Magnuson Fishery Conservation and Management Act (1989).

⁹ 16 U.S.C. § 1853 (a)(7).

¹⁰ 16 U.S.C. § 1882(f)(1).

¹¹ National Marine Fisheries Service 2009. Report to Congress: The State of Science to Support an Ecosystem Approach to Regional Fishery Management. U.S. Dep. Commerce, NOAA Tech. Memo. NMFS-F/SPO-96, 24 p.

¹² *Id.*

Meanwhile, Congress took its first steps toward more integrated ocean policy with the Oceans Act of 2000, which authorized the creation of the U.S. Commission on Ocean Policy (USCOP) to evaluate and recommend a comprehensive national ocean policy.¹³ The 2004 USCOP report, and a similar report produced by the Pew Oceans Commission in 2003,¹⁴ recognized that reform of the existing fragmented and uncoordinated ocean governance framework was necessary to better understand and account for ecosystem dynamics in marine resource management. Noting that “improved communication and coordination would greatly enhance the effectiveness of the nation’s ocean policy,”¹⁵ the USCOP also suggested that “a comprehensive offshore management regime is needed that enables us to realize the ocean’s potential while safeguarding human and ecosystem health, minimizing conflicts among users, and fulfilling the government’s obligation to manage the sea in a way that maximizes the long-term benefits for all the nation’s citizens.”¹⁶

CMSP, an evolving tool for achieving ecosystem-based management through coordinated and adaptive management and integrated ocean governance, emerged in 2009 as one of the nine priority objectives identified by President Obama’s Interagency Ocean Policy Task Force (Task Force). The Task Force was convened to develop recommendations for a national ocean policy and a framework for coastal and marine spatial planning. The Task Force recommended the creation of a National Ocean Council (NOC) to strengthen ocean governance and coordination. The Task Force also identified the adoption of ecosystem-based management and implementation of “comprehensive, integrated, ecosystem-based coastal and marine spatial planning and management in the United States” as priority objectives.¹⁷ The Final Recommendations note that the CMSP “process is designed to decrease user conflict, improve planning and regulatory efficiencies, decrease associated costs and delays, engage affected communities and stakeholders, and preserve critical ecosystem functions and services.”¹⁸ Concurrent with the publication of the Final Recommendations, President Obama signed Executive Order 13547 on July 19, 2010, which adopted the Final Recommendations of the Task Force and created the NOC. The Final Recommendations’ guidelines for CMSP implementation include a three-year timeframe for the establishment of regional planning bodies (RPBs) and the development of CMS plans to be approved by the NOC. The National Ocean Policy and forthcoming CMSP strategic action plan establish a process for CMSP but do not prescribe particular outcomes. The development of and decisions about specific spatial plans will be made by the RPBs. To support the development of the regional spatial plans, the Final Recommendations include the development of a national information management system (NIMS) to coordinate, integrate, and manage data (See Box 4). All applicable data and

¹³ Oceans Act of 2000, PL 106-256.

¹⁴ Pew Ocean Commission, [America's Living Oceans: Charting a Course for Sea Change](#), June 2003.

¹⁵ US COMMISSION ON OCEAN POLICY, AN OCEAN BLUEBRINT FOR THE 21ST CENTURY: FINAL REPORT at 5 (2004) available at <http://www.oceancommission.gov>

¹⁶ *Id.* at 9.

¹⁷ WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE, July 19, 2010, available at http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf.

¹⁸ WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE, July 19, 2010 available at www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf.

information should be incorporated into the National Information Management System by 2015 and implementation of regional CMS plans is slated to begin by 2020.

The Executive Order and federal funding opportunity generated interest and momentum regionally and each region has already expressed its own variation on what CMSP could mean in their own geography. However, without an enduring statutory mandate and capacity to implement CMSP effectively, the future of CMSP is uncertain. Nevertheless, rapid expansion of existing ocean uses, the emergence of new ocean uses and associated potential use-use and use-ecosystem conflicts are likely to keep the question of how best to accommodate and plan for these uses on the national radar. Whether CMSP gains any traction at the regional level will depend in large part on political will, perceived need and the availability of resources. Even in regions where CMSP is more fully developed, it is unclear what role the Councils will play. Still, the underlying issues and challenges associated with user-user and user-ecosystem conflicts are likely to persist. In the absence of a more coordinated governance framework and formalized role for the RFMCs, there are tools currently available to fishery managers to facilitate constructive engagement in multi-sector spatial planning and decision-making now.

Box 1.

HIGHLIGHTS IN THE EVOLUTION OF ECOSYSTEM-BASED FISHERIES MANAGEMENT IN THE UNITED STATES

- **1987:** NMFS Program Development Plan for Ecosystem Monitoring and Fisheries Management.
- **1999:** Ecosystem Principles Advisory Panel (EPAP) Report at the request of Congress recommending that RFMCs develop a fisheries ecosystem plan (FEP) for every ecosystem within their jurisdiction.
- **2001:** NOAA Marine Fisheries Advisory Panel considers ecosystem-based management (EBM) and recommends pilot projects to develop FEPs.
- **2003:** Pew Oceans Commission report issued highlighting EBM.
- **2004:** Congress appropriates \$2M for use by four Atlantic fisheries councils and commissions for EBM pilot workshops.
- **2004:** U.S. Commission on Ocean Policy report issued and EBM highlighted.
- **2005:** NMFS proposed MSA reauthorization language for development of FEPs.
- **2006:** Congress does not adopt specific ecosystem-based fisheries management provisions. NMFS focuses on annual catch limits (ACLs).
- **2009-11:** With ACLs underway, NOAA Fisheries is considering approaches to advance ecosystem-based fishery management.

III. Regional Fishery Management Councils: Jurisdiction & Authority

The MSA authorized the creation of eight Councils to manage the living marine resources within the United States' exclusive economic zone (EEZ). Each RFMC is composed of voting and non-voting members representing federal and state agencies as well as recreational, commercial, and in some cases tribal fishing interests.¹⁹ Voting members include the regional administrator of NOAA Fisheries, officials representing the adjacent state and/or U.S. territorial agencies with

¹⁹ 16 U.S.C. §1852(b)

authority or expertise in marine fisheries management, and fishing interests appointed by the Secretary of Commerce. Non-voting members are limited to representatives of the U.S. Coast Guard, the U.S. Fish and Wildlife Service, the U.S. Department of State, and the executive director of the relevant interstate marine fisheries commission.²⁰

In accordance with the MSA, each Council must prepare fishery management plans (FMPs) and implementing regulations for the fisheries within their EEZ.²¹ It is important to note that the RFMCs have no independent regulatory authority. Rather, they function as quasi-regulatory bodies, engaging stakeholders, developing FMPs and plan amendments, and providing management recommendations to NOAA Fisheries who retains delegated regulatory authority under the MSA. The conservation and management measures developed by the RFMCs are forwarded for approval to the Secretary of Commerce, who delegates review authority to NOAA Fisheries to ensure consistency with the requirements of the MSA and other applicable laws. Authority for final approval of FMPs and associated regulations rests with the Secretary of Commerce.²²

IV. The Role of Regional Fishery Management Councils within a Coastal and Marine Spatial Planning Framework

With the emergence of CMSP, the role that the RFMCs will play in a multi-sector spatial planning framework is yet to be determined. While the Final Recommendations require the Regional Planning Bodies (RPBs) to develop a formal mechanism for consultation with the Councils, the role and influence of a Council is likely to be region-specific and a function of how willing and/or able fishery managers and stakeholders are to engage in a more integrated marine management process.²³ While the objectives of a more coordinated, participatory and efficient planning process for ocean uses are not controversial in and of themselves, skepticism by some of the fisheries sector regarding the merits and implications of multi-sector spatial planning remain. “In the absence of any indication of *how* such decisions will be reached, by whom and on the basis of what information, the fishing industry’s fears as to the implications of MSP and its suspicion over the transparency of the decision making process are not hard to understand.”²⁴ While the authority and impetus behind CMSP is derived at the federal level, the question of *how* decisions will be reached and the role that the Councils may play will likely be determined at a regional level. Indeed, within the U.S., CMSP implementation remains largely unscripted and will ultimately be the product of what those who are engaged in its development make of it.

To date, much of the Council focus has been on whether or not they will have a seat on the RPBs (Box 2), but the influence and role of the fisheries sector in multi-sector spatial planning does not hinge on this determination alone. Even if the Councils secure a seat on the RPBs, it is not certain how effective engagement at that level will be. “Formulating a coherent industry view on spatial planning issues is particularly difficult in a multi-faceted activity, characterized by a

²⁰ 16 U.S.C. § 1852(c).

²¹ 16 U.S.C. § 1852(h)(1).

²² 16 U.S.C. § 1854(a).

²³ WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE, July 19, 2010 at 53. Available at: www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf.

²⁴ Symes, David. 2005. *Marine Spatial Planning: A Fisheries Perspective*. Report to English Nature, 9.

Box 2.

REGIONAL PLANNING BODIES

“The NOC would work with the States and federally-recognized tribes, including Alaska Native Villages, to create regional planning bodies – coinciding with the regional planning areas – for the development of regional CMS Plans. The membership of each of the nine regional planning bodies would consist of Federal, State, and tribal authorities relevant to CMSP for that region (e.g., resource management, including coastal zone management and fisheries management, science, homeland and national security, transportation, and public health). Members would be of an appropriate level of responsibility within their respective governing body to be able to make decisions and commitments throughout the process. Each regional planning body would identify Federal and non-Federal co-leads. Appropriate State and tribal representation would be determined by applicable States and tribes, consistent with the types of representation described by the NOC per Section XVI of this Part. Regional planning bodies would develop a mechanism to engage other indigenous community representatives with jurisdictional responsibilities or interests relevant to CMSP, as well as coordinate with appropriate local authorities throughout the CMSP process. **In addition, the regional planning bodies would provide a formal mechanism for consultation with the Regional Fishery Management Councils across their respective regions on fishery related issues given their unique statutory responsibilities under the Magnuson-Stevens Fishery Conservation and Management Act and quasi-regulatory role in fisheries management.** The NOC would prepare guidance for regional planning bodies in meeting these consultative process requirements in order to ensure consistency across regions.”

Excerpted from: WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE, July 19, 2010 available at www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf

proliferation of small, independent businesses and by potentially strong divisions of interest.”²⁵ Indeed, each Council is composed of a diversity of interests and perspectives such that if they were to have a seat on the RPB, it is unclear whether and to what extent the diversity of interests among Council members will impact the clarity of input from Councils to the CMSP process.

While there is a case for establishing a seat for the Councils on the RPBs, Council representatives can add tremendous value to multi-sector spatial planning and decision-making regardless of whether or not they serve on their respective RPBs. The Task Force acknowledged the importance of Council involvement in coastal and marine spatial planning by requiring the RPBs to develop a formal consultation mechanism with the Councils.²⁶ Proponents of CMSP envision a relationship between the Councils and the CMSP process as symbiotic where the Councils can both contribute to and benefit from CMSP.

²⁵ *Id.* at 7.

²⁶ WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE, July 19, 2010 at 53. Available at: www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf

A. How the Regional Fishery Management Councils May Contribute to CMSP

NOAA is likely to occupy a seat on the RPBs. In this capacity, the agency will have voting and signatory authority and may serve as a conduit to bring its resources to bear in the CMSP process. Likewise, the NOAA official will also be charged with representing the interests of NOAA Fisheries and by extension the relevant Council. The Councils and individual Council members can play a critical role in the CMSP process by providing key data and information inputs directly through their representative on the RPB (e.g., NOAA representative, relevant state agency officials, etc.) and/or through some other advisory channel to help inform and support CMSP.

Box 3.

NATIONAL INFORMATION MANAGEMENT SYSTEM

One of the priorities and foundational components for CMSP identified by the Interagency Ocean Policy Task Force is the development of a national information management system (NIMS) to coordinate, integrate, and manage data. The NOC, working with the regional planning bodies, will create a system that is compatible with existing federal information systems, captures relevant federal information resources, enables effective governance and accountability across agencies, and preserves data confidentiality, as appropriate. Included in the NIMS will be a central CMSP data portal with links to regional data portals, guidelines and minimum data standards, a map viewer, and CMSP information and research needs. The General Services Administration (GSA) will host the NIMS through the <http://www.data.gov> website. Guidance on these fundamental pieces to the NIMS will be released as part of a strategic action plan and a prototype CMSP portal will be operational and available for review by mid-October 2011. The full scale NIMS is scheduled to be built within two years. An interagency working group has been established with subgroups to identify priority science questions and relevant data layers and evaluate, among other things, core functionalities, technical capabilities, and long-term management considerations for NIMS.

The Councils' Scientific and Statistical Committees (SSCs) may also play a significant advisory role in a CMSP process. The Councils are required to establish SSCs to guide Council decision-making and ensure that management measures are based on the "best scientific information available."²⁷ The SSC provides the Council with "ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets, and reports on stock status and health, bycatch, habitat status, social and economic impacts of management measures, and sustainability of fishing practices."²⁸ The SSCs could play a vital role in CMSP by advising Councils on the types and quality of ecosystem and fisheries-related data and information they need and can contribute to CMSP efforts (Box 3).

Though specific data needs will vary by region and will be based on a variety of factors including the suite of ocean activities existing or proposed for an area, there are baseline inputs that Councils with guidance from their SSCs may contribute. These may

include, but are not limited to: bathymetric and seafloor mapping data, stock assessment data, species distribution information, essential fish habitat designations, information related to

²⁷ 16 U.S.C. § 1851(a)(2).

²⁸ 16 U.S.C. §1852(g)(B)

ecological functions and processes, ecological impacts, ecosystem services, and spatial management regimes and infrastructure.

Among the range of ocean uses, fishing is unique because of its patterns of spatial use and its dependence on a healthy and productive marine ecosystem. For CMSP to succeed, management strategies need to be based on a solid understanding of the spatial use patterns of the different sectors. The fisheries sector, indeed the Councils, have a long history of spatial management and biological and ecological data collection that is unparalleled in other sectors. Much of this experience and information can add tremendous value to regional CMSP efforts and the Councils can serve a critical advisory role in the planning process.

B. How CMSP may benefit fisheries management

Given the fragmented and sector-based structure of the current ocean governance system, fishery managers are limited in terms of their ability to fully consider non-fishing activities and impacts when developing fishery management measures. Similarly, fishery managers' authority to influence planning and permitting decisions by other ocean users is constrained under existing legal mechanisms. CMSP proposes to address these and other deficiencies by providing a framework for fishery managers to plan and account for interactions between fisheries and other ocean uses, and communicate with other user groups about areas of value to fisheries.

Recognizing that fishery managers have a vested interest in ensuring that other ocean uses do not compromise the health of the ecosystem or the species upon which the fishing sector relies, NOAA Fisheries' Ecosystem Principles Advisory Panel recommended that managers "[a]ssess the ecological, human, and institutional elements of the ecosystem which most significantly affect fisheries, and are outside Council/Department of Commerce (DOC) authority. Included should be a strategy to address those influences in order to achieve both [fishery management plan] and [fishery ecosystem plan] objectives."²⁹ Coastal and marine spatial plans, once certified, can enhance transparency and provide fishery managers with greater insight into the priorities and activities of other ocean users. In addition, CMSP can provide an informational foundation for FMP developments including essential fish habitat (EFH).

V. Existing Management Tools

CMSP is not intended to replace existing legal authorities. In practice, it is intended to supplement and strengthen the current capacity and ability of Councils to provide input into and influence planning and permitting decisions of other ocean uses. Whether or not a regional framework for CMSP is developed and implemented, Councils still have opportunities to engage in the management of non-fishing ocean uses in a more coordinated and constructive way under existing legal authorities. Whether a Council chooses to exercise its influence and authority depends on a variety of factors including awareness, availability of resources, and competing obligations and priorities.

²⁹ U.S. National Marine Fisheries Service Ecosystem Principles Advisory Panel, 1999: 3–4.

While Councils are advisory in nature with no direct regulatory authority, they do serve an obligatory function under the MSA. The MSA confers direct authority to the Councils to develop (albeit not approve, implement or enforce) conservation and management measures for fishery resources. The Councils also have indirect and discretionary authority to influence federal agency actions pursuant to the MSA and other statutory and regulatory provisions. The following subsections explore statutory intent as well as the authorities under which the Councils may directly and indirectly engage in multi-sector spatial planning and decision-making.

A. Direct Authority

The primary law governing federal fisheries management is the MSA. Under the MSA, Councils are required to develop FMPs to prevent overfishing, rebuild overfished stocks, and protect habitat. To achieve these management objectives, the 1996 and 2006 MSA reauthorizations recognize and promote a more holistic multi-sector and ecosystem-based approach to fisheries management. The MSA confers limited authority to the Councils to restrict non-fishing activities or engage in inter-agency consultations during the development of an FMP. However, both the spirit and letter of the law acknowledge a critical nexus between fishing and non-fishing ocean uses by requiring consideration of other ocean uses when establishing catch levels, recognizing and mitigating the impacts of non-fishing activities on fish habitat, and/or developing fishery ecosystem plans.

It is important to note that the Executive Order requires that CMSP be consistent with applicable law and will not vest the NOC or RPBs with new or independent legal authority superseding existing state, federal, or tribal authorities. As such, CMSP must be consistent with the requirements of the MSA, including its mandate to prevent and end overfishing and rebuild overfished stocks. This includes addressing non-fishing impacts that deplete fish populations.

1. Optimum Yield and Annual Catch Limits

The optimum yield (OY) and annual catch limit (ACL) requirements of the MSA provide Councils with a mechanism and incentive to understand and minimize the impacts of non-fishing activities on fishery resources.

FMPs must conform to ten national standards outlined in the MSA and detailed in the implementing regulations.³⁰ While the national standards account for social, economic, biological, and environmental factors associated with fisheries, they are narrowly focused on management of the fisheries sector and most do not explicitly authorize consideration of non-fishing interests and activities. One exception however is National Standard One which stipulates that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”³¹

OY is defined as the level of fishing that will not only prevent overfishing and rebuild overfished stocks but also “will provide the greatest overall benefit to the Nation, particularly with respect

³⁰ 16 U.S.C. §1851(a).

³¹ 16 U.S.C. §1851(a)(1).

to food production and recreational opportunities, and taking into account the protection of marine ecosystems.”³² The National Standard Guidelines describe the “greatest overall benefit to the Nation” as including “food production; national, regional and local economics; nutritional needs; recreational opportunities; the viability of, forage for, and evolutionary and ecological processes of species and ecosystems; and accommodating human use.”³³ While the guidelines do not have the force of law, they represent NOAA Fisheries’ interpretation of Congressional intent and are designed to guide the development of conservation and management measures by the Councils. The language of the guidelines suggests that OY should reflect not only the harvest goals of the fishing industry, but the needs of the ecosystem and other human uses.

To achieve OY within a fishery, the 2006 reauthorization of the MSA included new provisions requiring Councils to establish ACLs and accountability measures (AMs). Adopting a more precautionary approach, the law specifically requires Councils and their SSCs to account for both scientific and management uncertainty when establishing ACLs. Environmental conditions and the existing and potential impacts of fishing and non-fishing activities on fish productivity, abundance and distribution may contribute to the level of scientific uncertainty. The degree of management uncertainty, on the other hand, is primarily a function of the control that management measures have over total catch and the amount of information that catch data can provide. Lack of sufficient catch information and/or management precision can contribute to the level of management uncertainty.

To account for and mitigate the potential impacts of scientific and management uncertainty derived from fishing and/or non-fishing activities, managers may further reduce catch limits when specifying the ACL or annual catch target (ACT) and/or implement measures that reduce uncertainty by improving management control and precision. To maximize fishing opportunities and protect the resource, both scientific and management uncertainty in the fishery must be reduced. The MSA’s requirement to account for and incorporate uncertainty into the setting of ACLs and AMs provides greater incentive for fishery managers to enhance their awareness of and engagement in planning and decision-making for other ocean sectors, particularly those that might compromise fisheries conservation and management efforts.

2. Essential Fish Habitat

a. Essential Fish Habitat Designations

The 1996 Sustainable Fisheries Act introduced the concept of EFH into federal fisheries management requiring that FMPs developed by the Councils identify and describe habitat essential to managed fish. EFH is defined as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity”³⁴ and may include both state and federal waters. The implementing regulations (50 CFR 600) also require fishery managers to consider the ecological roles of the species and its interactions with other ecosystem components when assessing which habitat is necessary to fish.³⁵ EFH designations are reviewed on a five-year

³² 16 U.S.C § 1802(33).

³³ 50 C.F.R. § 600.310(e)(3)(iii).

³⁴ 16 U.S.C. § 1802(10).

³⁵ 62 FR 66531, December 1997.

cycle incorporating the best available science.³⁶

“[A] risk-averse approach was adopted for the description and identification of EFH to ensure that adequate amounts of habitat are conserved and to provide a basis for the broader ecosystem-management mandate reflected in the act.”³⁷ This approach combined with the shortage of consistent, spatially explicit information about the location of habitats and their direct contribution to fish productivity, resulted in very broad EFH designations in many regions that are minimally valuable for prioritizing areas most important to fish stocks. Still, EFH contributes significantly to our understanding of the natural history of managed fish species, provides a useful representation of the spatial extent of fisheries habitat to other ocean users, and serves as a trigger point for consultation with other federal agencies regarding the impact of non-fishing activities on fish habitat.

To focus conservation efforts and prioritize and distinguish areas of specific importance from general EFH designations, Councils may identify Habitat Areas of Particular Concern (HAPC).³⁸ HAPCs should be sub-sets of the broader EFH designations and meet at least of the four criteria laid out in the implementing regulations:

- Importance of the ecological function provided by the habitat;
- Extent to which the habitat is sensitive to human-induced environmental degradation;
- Whether, and to what extent, development activities are, or will be, stressing the habitat type; and
- Rarity of the habitat type.³⁹

As with EFH, the basis for HAPC designations varies by region. In some regions, designations are premised on habitat types that are especially vulnerable to human disturbance (i.e., sea grass beds, coral reefs, etc.) whereas other regions created spatially explicit HAPCs based on site-specific, localized scientific information or focused on a specific subset of EFH conservation needs.

b. Essential Fish Habitat Conservation

Simply designating an area as EFH or a HAPC conveys no specific protections. However, once EFH is identified, described and codified in FMPs, EFH conservation requirements in the MSA are triggered. One of the primary purposes of the MSA 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.”⁴⁰ Towards that end, the MSA requires Councils to minimize adverse effects of fishing to the maximum extent practicable, and to comment on and make recommendations to Federal and State agencies concerning any activity that substantially affects the habitat of an anadromous fishery resource under its

³⁶ 16 U.S.C. § 1852(h).

³⁷ Rosenberg, A. et al., *Ecosystem Approaches to Fishery Management Through Essential Fish Habitat*, Bulletin of Marine Science, 66(3); 536, 2000.

³⁸ 50 C.F.R. §600.815(a)(8).

³⁹ *Id.*

⁴⁰ 16 U.S.C. § 1801(b)(7).

authority. The MSA also requires Federal agencies to consult with NOAA Fisheries on actions that may adversely affect EFH,⁴¹ requires NOAA Fisheries to provide conservation recommendations, and provides the Councils with discretionary authority to make conservation recommendations for activities that may adversely affect EFH for any species. These conservation steps offer important opportunities for Councils to affect the implementation of CMSP.

When the Council, NOAA Fisheries or other Federal agencies take action to comply with EFH conservation requirements in MSA, a key question is whether or not the action would have an “adverse effect”. What constitutes an “adverse effect” is broadly defined and encompasses direct and indirect changes or harm to other species and ecosystem components that negatively impact essential fish habitat. “Adverse affect” is defined as any impact that reduces the quality and/or quantity of EFH.⁴² Adverse affects may include direct (e.g., contamination, physical disruption, etc.), indirect (e.g., loss of prey), site-specific or habitat-wide impacts, including individual or cumulative impacts. Notably, adverse effects “may result from actions occurring within EFH or outside of EFH and may include site-specific habitat or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions.”⁴³ To maintain or enhance the quality and quantity of fish habitat, each FMP should “...assess the *full range of human activities* and natural events that could adversely affect EFH...” (*emphasis added*).⁴⁴ “Full range of human activities” encompasses both fishing and non-fishing activities.⁴⁵

If fishing activities are determined to be adversely affecting EFH in a manner that is more than minimal and not temporary, provisions to “prevent, mitigate, or minimize [them], to the extent practicable” must be included in the FMP.⁴⁶ Likewise, FMPs must identify activities (e.g., coastal development, oil & gas development, agriculture, transportation, renewable energy installations, etc.) that may adversely affect EFH and cumulative impacts to EFH.⁴⁷ FMPs must also identify actions to encourage the conservation and enhancement of EFH including options to avoid, minimize or compensate for adverse effects. Moreover, “[e]ach FMP should contain recommendations, preferably in priority order, for research efforts that the Councils and NMFS view as necessary to improve upon the description and identification of EFH, the identification of threats to EFH from fishing and other activities. With the addition of the EFH provision, the law, for the first time, provided “an explicit linkage between fishery management programs, traditionally designed to manage the harvesting activity itself, and efforts to ensure that fishing and non-fishing activities do not undermine the productivity of the stocks.”⁴⁸

In addition to the requirement for Councils to take steps to minimize adverse effects of fishing to the maximum extent practicable, the MSA requires all federal agencies to consult with NOAA

⁴¹ 16 U.S.C. § 1853.

⁴² 50 C.F.R. § 600.810.

⁴³ 50 C.F.R. §600.815(a)(2).

⁴⁴ Rosenberg, A. et al. (2000), *Ecosystem Approaches to Fishery Management Through Essential Fish Habitat*, Bulletin of Marine Science, 66(3); p.536.

⁴⁵ Id.

⁴⁶ 50 C.F.R. §600.815(a)(2)(ii).

⁴⁷ 50 C.F.R. §600.815(a)(4).

⁴⁸ Rosenberg, A. et al., (2000) *Ecosystem Approaches to Fishery Management Through Essential Fish Habitat*, Bulletin of Marine Science, 66(3), p. 535.

Fisheries on all actions or proposed actions, permitted, funded, or undertaken by the agency, that may *adversely affect* EFH.⁴⁹ NOAA Fisheries must provide conservation recommendations for all Federal actions that would adversely affect EFH. The Federal action agency must respond to EFH conservation recommendations within 30 days to NOAA Fisheries recommendations. The response must include a description of the steps the Federal action agency plans to take to avoid, mitigate or offset the impact of its activity. If the Federal action agency does not adopt NOAA Fisheries' EFH conservation recommendations, the response must explain why.

With the exception of actions adversely affecting EFH of anadromous species, the Council is not obligated to provide EFH conservation recommendations independent of NOAA Fisheries. Rather, the MSA provides Councils with discretionary authority to “comment on and make recommendations to the Secretary and any Federal or State agency concerning any activity authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by any Federal or State agency that, in the view of the Council, may affect the habitat, including essential fish habitat, of a fishery resource under its authority.”⁵⁰ In many, if not most cases, the Councils rely on NOAA Fisheries to represent their interests in the consultation process. However, for activities of particular concern, comments and recommendations submitted to the action agency on behalf of the Council may strengthen the position and reinforce the recommendations of the fisheries sector while bolstering the administrative record.

As with required consultations described above, the action agency must provide a detailed written response to NOAA Fisheries and the relevant Council within 30 days of receiving conservation recommendations from NOAA Fisheries.⁵¹ The action agency is not obligated to adopt the recommendations of NOAA Fisheries or the Council; however their response must include a description of proposed measures to avoid, mitigate, or offset the impact of the activity on EFH.

The EFH conservation recommendations provided by NOAA Fisheries and the Council are advisory and non-binding to the federal action agency. However, when the federal agency's response is inconsistent with the recommendations of NOAA Fisheries, the federal agency must explain in writing its reasons for not following the recommendations. The NOAA Fisheries Assistant Administrator may request a meeting with the head of the federal action agency, as well as any other agencies involved, in order to discuss the proposed action and opportunities for resolving any disagreement, however participation by the federal action agency in such a meeting is voluntary.⁵² Theoretically, a Council could request that the Assistant Administrator initiate a meeting with the action agency or where a meeting has been requested, provide additional information support their conservation recommendations, however this is a relatively weak administrative process and this provision of the law has rarely, if ever, been invoked by NOAA Fisheries.

The non-binding nature of EFH conservation recommendations discourages some Councils from expending time and resources to provide input particularly where many councils are spread thin

⁴⁹ 16 U.S.C. §§ 1801-1884.

⁵⁰ 16 U.S.C. § 1855(b)(3).

⁵¹ 16 U.S.C. § 1885 (b)(4)(B).

⁵² 50 C.F.R. § 600.920(k).

addressing other management issues. Providing EFH conservation recommendations does, however, build an administrative record, which could provide the basis for future mitigation measures and potentially strengthen the case for fisheries in multi-sector legal disputes. A Council does not have standing to sue other Federal agencies over actions taken in defiance of their EFH conservation recommendations, though other parties may.

As with CMSP, the intent of the EFH provision is that Councils should be forward thinking and proactive with EFH and HAPC designations by identifying key habitats and recommending measures to mitigate the potential adverse impacts of existing and emerging uses on those habitats. In regions where a CMSP framework is developed and implemented,

“...the requirement that managers consider all adverse impacts to EFH creates an opportunity to use the information and designations originating from the CMSP process to inform EFH designation and implementation. CMSP documents could provide a central source of data on existing and planned activities in the regions; this data could inform the identification and designation of EFH and HAPC, as well as recommendations regarding related adverse impacts or conservation/enhancement actions to be included in each FMP.”⁵³

Typically, Councils rely on more of an ad hoc plan-by-plan approach to evaluating and minimizing adverse effects on habitat. However, the movement towards ecosystem-based management is prompting some Councils to explore means to integrate more proactive and ecosystem-based approaches into their EFH designations and impact mitigation strategies.

3. Fishery Ecosystem Plans

In recent years, the traditional single species approach to fisheries management has been called to task and there is a movement to transition to a more comprehensive and holistic ecosystem-based approach to management (EBM). In most cases however, interest in EBM has outpaced the science and management tools necessary to implement it effectively. Lack of clear management objectives for ecosystems combined with uncertainty regarding the potential economic and social benefits and *how* to manage for ecosystem health impede meaningful progress towards EBM. Still, the fisheries sector along with the broader ocean community is beginning to embrace a more integrated approach to marine resource management.

Recognizing the potential of an ecosystem-based management approach to improve fisheries management, Congress requested that NOAA Fisheries convene a panel of experts to assess the extent to which ecosystem principles were being applied in fisheries research and management and recommend how best to integrate ecosystem principles into future fisheries management and research.⁵⁴ In response, NOAA Fisheries formed the Ecosystem Principles Advisory Panel (EPAP), which produced a report in 1999 that outlined strategies for ecosystem-based fishery

⁵³ “Coastal and Marine Spatial Planning: Legal Considerations”, Environmental Law Institute and The Center for Ocean Solutions, Prepared for Meridian Institute in support of the CMSP Legal Tools Workshop, June 2010, available at: <http://www.centerforoceansolutions.org/initiatives/marine-spatial-planning/literature-reports>

⁵⁴ ECOSYSTEMS PRINCIPLES ADVISORY PANEL, ECOSYSTEM-BASED FISHERY MANAGEMENT—A REPORT TO CONGRESS 2, 27 (April 1999), available at: <http://www.nmfs.noaa.gov/sfa/EPAPrpt.pdf>.

management and recommended that Councils develop a fisheries ecosystem plan (FEP) for every ecosystem within their jurisdiction (See Box 4).⁵⁵ FEPs are intended to integrate ecosystem principles and goals by specifying the physical, biological, and human-related data needs for fisheries management and provide a method for integrating the different FMPs within each region.⁵⁶ Following the report, some Councils initiated efforts to develop FEPs for their region, however FEPs as a management tool are still in their infancy and continue to evolve.

The 2007 amendments to the MSA, which included a provision that called for a study “on the state of the science for advancing the concepts and integration of ecosystem considerations in regional fishery management,” reinforced Congressional intent to adopt a more ecosystem-based approach to fisheries management.⁵⁷ The subsequent study in 2009 supplemented and complemented the EPAP report by providing Congress with practical recommendations to advance the ecosystem approach to fisheries management highlighting the potential value of FEPS as well as the barriers to their implementation.⁵⁸

FEPs may prove to be an important tool enabling fishery managers to consider non-fishing impacts on the marine ecosystem when developing fishery management measures. They may also provide foundational information for the development of CMSP. If Councils develop scientifically rigorous FEPs, their concerns regarding the impacts of other uses might carry more weight, particularly if they are able to clearly demonstrate a chain of impact across the ecosystem (e.g. an industrial use that pollutes the water and causes declines in forage fish populations may adversely impact commercially important species at higher trophic levels).

FEPs are not mandatory under the MSA, therefore whether to develop an FEP is at the discretion of individual Councils. At present, there is no national template to guide their implementation, or describe their relationship to FMPs.⁵⁹ Progress in the development and implementation of FEPs has been slow and disparate across the regions. In those instances where an FEP has been established, there is no legal obligation to develop implementing regulations.

To date, only the NPFMC, SAFMC and WPRFMC (see Box 4) have approved and implemented FEPs while the remaining Councils continue to assess the adequacy of existing ecosystem-based management strategies and explore how they might more effectively incorporate EBM into their management frameworks. FEP development and cross-FMP mapping efforts may help Councils articulate priority areas for protection particularly in the context of multi-sector decision-making. Depending on how they are developed and implemented, FEPs could be an effective means of applying a CMSP to fisheries management. Conversely, the CMSP process could provide an important informational foundation for FEPs.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 16 U.S.C. § 1882(f)(1).

⁵⁸ National Marine Fisheries Service 2009. Report to Congress: The State of Science to Support an Ecosystem Approach to Regional Fishery Management. U.S. Dep. Commerce, NOAA Tech. Memo. NMFS-F/SPO-96, 24 p.

⁵⁹ North Pacific Fishery Management Council, *A Discussion Paper: Fishery Ecosystem Plan for the Aleutian Islands* (2006), available at: http://www.fakr.noaa.gov/npfmc/current_issues/ecosystem/AIFEP12_07.pdf (last visited August 19, 2011).

Box 4.

FISHERY ECOSYSTEM PLANS

North Pacific Fishery Management Council (NPFMC): In 2007, the NPFMC established a pilot FEP for the Aleutian Islands, “to provide enhanced scientific information and measurable indicators to evaluate and promote ecosystem health, sustainable fisheries, and vibrant communities in the Aleutian Islands region.” The FEP explicitly states that it is a non-legal, non-binding, policy and planning document meant to serve as an educational tool. It is also intended to provide the council with the information to be proactive rather than reactive in their planning and decision-making. One of the core components of the Aleutian Island FEP is cumulative impact analysis that evaluates the impacts of fishing and non-fishing impacts. While cumulative impact analyses are not new to the fisheries management process in the North Pacific, they are typically conducted through a narrow fisheries-specific lens rather than a more holistic ecosystem perspective.

See: *North Pacific Fishery Management Council, Aleutian Island Fishery Ecosystem Plan, 2007. Available at: http://www.fakr.noaa.gov/npfmc/current_issues/ecosystem/AIFEP12_07.pdf*

Western Pacific Regional Fishery Management Council (WPRFMC): Until 2010, federal fisheries within the jurisdiction of the WPRFMC were managed under five species-based FMPs. Now, those fisheries are managed under five place-based FEPs that are intended to be adaptive and foster management coordination and public participation. The objectives identified for the FEPs include accounting for ecosystem knowledge and uncertainties, considering the impact of external influences and balancing diverse social objectives by identifying management objectives, marking geographical boundaries, designating managed species, and detailing fishery regulations.

See: *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*

South Atlantic Fishery Management Council (SAFMC): In April 2009, the SAFMC finalized its FEP for the South Atlantic region. The FEP, which evolved from the Council's Habitat Plan, involves a more thorough characterization of the South Atlantic marine ecosystem and is intended as a source document providing “the Council with a foundation from which to attain a more comprehensive understanding of habitat and biology of species, fishery information, social and economic impacts of management and ecological consequences of conservation and management.” The FEP will be updated every five years and will support and guide ecosystem-based management (EBM), however implementation of the EBM approach will occur through the Council's Comprehensive Ecosystem-Based Amendments (CE-BAs). “This approach will build on the biological, economic, and social information presented in the FEP, and provide the Council with the opportunity to evaluate needed actions across multiple fisheries and facilitate development of FMP amendments or measures that apply across FMPs.” Notably, “[t]he combined FEP and CE-BA development process complements, but does not replace, existing FMPs.”

See: *South Atlantic Fishery Management Council, Fishery Ecosystem Plan of the South Atlantic Region, Volume 1: Introduction and Overview, April 2009*

4. Aquaculture Fishery Management Plans

In many regions, aquaculture is an emerging activity in federal waters; however, regulatory authority over aquaculture development and operation is not well defined under the law. While it is NOAA's intent that NOAA and the Councils should lead the development of marine aquaculture, the agency's authority to regulate aquaculture under the MSA presents challenges.⁶⁰ Indeed, some maintain that new legislation may be a prerequisite to empower NOAA with

⁶⁰ National Oceanic and Atmospheric Administration, Marine Aquaculture Policy, June 2011.

regulatory authority over aquaculture in federal waters. This interpretation however conflicts with NOAA's longstanding position that pursuant to the MSA, the definition of "fishing" encompasses aquaculture. While this remains an outstanding debate, some Councils and regional NOAA offices are moving ahead by developing aquaculture FMPs and/or policies and approving permits for aquaculture installations.

The Gulf of Mexico Fishery Management Council (GMFMC) recently developed the nation's first Aquaculture FMP. The FMP, which authorized commercial offshore aquaculture facilities in the Gulf of Mexico, identifies areas that would be suitable for aquaculture projects. Many of these areas overlap with areas that contain existing oil and gas leases or areas with potential for future leases. Unlike wild harvest fisheries, aquaculture operations often require fixed location and/or exclusive use of an area.⁶¹ As NOAA Fisheries claims jurisdiction over the permitting of aquaculture activities and areas, and Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) claims jurisdiction for permitting oil and gas leases, there will likely be disputes over authority in the future.

The Secretary of Commerce did not expressly approve the Gulf of Mexico's Aquaculture FMP. Instead, it took effect by operation of law as a result of the Secretary's inaction. The Secretary's inaction was a strategy by NOAA to preserve some element of authority, however uncertain, to address environmental and fishery concerns posed by aquaculture operations in federal waters. The U.S. Army Corps of Engineers and the Environmental Protection Agency (EPA) have some regulatory authority over siting and water quality issues, however NOAA was concerned that other marine resource conservation issues such as fisheries and habitat management could not be addressed by other legal authorities or entities.⁶²

Still, there remains significant legal ambiguity regarding whether NOAA and the Councils can claim management jurisdiction over aquaculture activities in federal waters. A recent lawsuit highlighted some of the potential conflicts with siting aquaculture facilities in the Gulf of Mexico. In *Gulf Restoration Network, Inc. v. Nat'l Marine Fisheries*⁶³, fishing and environmental groups challenged the Gulf Council's Aquaculture FMP, alleging that the FMP violated provisions of the MSA and NEPA. Those challenging the FMP also asserted that the decision to allow the FMP to take effect was beyond the power of the agency and violated provisions of the MSA and the NEPA. The court found that several steps had to be taken before any concrete harm to the groups could result from the FMP. Since aquaculture had not yet taken place in the Gulf of Mexico pursuant to the FMP and the FMP neither forbade nor required any action on the part of parties, the court held that the claims were not ripe for judicial review. In short, the groups had not shown injury in fact or that harm was imminent.

The court noted, however, that environmental and fisheries groups could protect all of their rights and claims by returning to court when the controversy ripened, i.e. when an aquaculture project was actually permitted and cited. Without any formal regulations implementing the

⁶¹ Aquaculture activities do not always involve fixed locations. The Kona Blue Water Farms' tuna farming operations in federal waters off the Big Island of Hawaii involve towed net pens.

⁶² Letter from to James W. Balsiger, Ph.D., Acting Asst. Adm'r for Fisheries, NMFS, to Dr. Robert Shipp, Chairman, Gulf of Mexico Fishery Management Council (Sept. 3, 2009).

⁶³ *Gulf Restoration Network, Inc. v. Nat'l Marine Fisheries Serv.*, 730 F. Supp. 2d 157, (D.D.C. 2010).

FMP, plaintiffs lacked a statutory cause of action. Moreover, the groups had no cause of action under the Administrative Procedures Act (APA) because NOAA Fisheries' actions were not final. Until an aquaculture facility is permitted, it is difficult to determine whether the permitting authority claimed by NOAA Fisheries by way of the Gulf Council's Aquaculture FMP is legally defensible.

Meanwhile in the Western Pacific, environmental and native Hawaiian groups are challenging a recently issued permit for an offshore aquaculture facility. According to the complaint, the Kona Blue Water Farms' one-year permit "is the first ever commercial fishing permit issued for an aquaculture facility in federal waters."⁶⁴ The plaintiffs allege *inter alia* that NOAA Fisheries exceeded its statutory authority by issuing a "Special Coral Reef Ecosystem Fishing Permit" and did so without the requisite environmental impact study.⁶⁵ The complaint contends that under federal law, NOAA Fisheries can only issue a fishing permit if authorized to do so under a regional FMP. Since no such FMP exists that authorizes the permitting of an offshore aquaculture facility, plaintiffs allege that the agency "acted outside [its] authority and arbitrarily and capriciously in issuing [the permit]."⁶⁶

Unlike the Gulf of Mexico example, in which the Council developed a management plan in advance of any proposals or permit applications for aquaculture operations in federal waters, there was no approved plan amendment developed by the WPRFMC authorizing the issuance of permits for aquaculture facilities. The current FEP for Hawaii fisheries considers aquaculture to be one of seven *non-fishing* activities that may adversely impact the ecosystem.⁶⁷ The WPRFMC did however approve a policy in 2007 to encourage the development of aquaculture operations in federal waters provided they adhere to guidelines outlined by the Council.⁶⁸ The non-binding policy, which has been updated and revised since, states that

"...[a]quaculture operations should be conducted in accordance with a management plan that incorporates a routine environmental monitoring program. The plan should be approved prior to beginning of operations as part of the permitting process and modified as needed in accordance with adaptive management principles and based on the results of the monitoring program."⁶⁹

Towards that end, the WPRFMC has discussed a potential amendment to the Hawaii FEP to authorize management of offshore aquaculture, however, they are still in the process of determining whether and how to amend the FEP to manage offshore aquaculture.⁷⁰

⁶⁴ Complaint at 8, Kahea and Food & Water Watch, Inc. v. Nat'l Marine Fisheries Service, No. CV11 00474, United States District Court for the District of Hawaii, August 2, 2011.

⁶⁵ *Id.* at 17.

⁶⁶ *Id.* at 22.

⁶⁷ Western Pacific Regional Fishery Management Council, *Fishery Ecosystem Plan for the Hawaii Archipelago* (2009). Available at: <http://www.wpcouncil.org/hot/> (Last visited August 21, 2011).

⁶⁸ Western Pacific Fishery Management Council, *Aquaculture Policy (2009)*. Available at: <http://www.wpcouncil.org/hot/> (Last visited August 21, 2011).

⁶⁹ *Id.* at 3.

⁷⁰ An amendment to the Hawaii FEP to authorize management of offshore aquaculture was discussed at the WPRFMC's 151st Council Meeting, held June 16-18, 2011.

Councils who develop aquaculture FMPs may have a stronger basis for influencing aquaculture-siting decisions and mitigating potential impacts of fish farming operations on wild harvest fisheries and the marine ecosystem, however this remains uncharted territory with substantial legal and jurisdictional uncertainties. Whether the courts clarify jurisdictional authority for the management of offshore aquaculture remains to be seen. Therefore, as other Councils contemplate the development of aquaculture FMPs, they should be aware of potential legal barriers and challenges they may confront.

B. Indirect & Discretionary Authority

Under existing law, the EFH consultation provisions of the MSA provide the strongest and most direct pathway for Council input into siting decision of other ocean uses. However, NOAA Fisheries and, by extension, the Councils derive authority from other statutory and regulatory sources that may enable them to coordinate and provide input into federal agency actions that might undermine fishery conservation and management goals. A number of statutes, including the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and the Coastal Zone Management Act (CZMA) contain environmental review procedures through which the Council may provide comments to the federal action agency.

In many instances EFH consultation and environmental review under these other statutory authorities are triggered simultaneously. To improve administrative efficiency, the EFH consultation guidance advises: “consultations should be consolidated with existing environmental review procedures to the greatest extent possible.”⁷¹ To use existing environmental review procedures to comply with EFH consultation provisions, the regulations require that the following criteria be met:

- NOAA Fisheries must make a finding that the existing process will satisfy the MSA requirements;
- The process must provide NOAA Fisheries with timely notification (sufficient to develop EFH Conservation Recommendations); and
- The Federal action agency must provide NOAA Fisheries with an assessment of the impacts on EFH.⁷²

The following section examines these authorities and highlights the means by which the Council might provide input either independently or concurrently with EFH consultation.

1. National Environmental Policy Act

With or without a formal framework for CMSP, the National Environmental Policy Act (NEPA) plays a central role in promoting more collaborative and integrated decision-making. NEPA is a procedural statute that requires all federal agencies to consider the environmental effects of their proposed activities, evaluate potential alternatives, and communicate the results of those reviews to the public.⁷³ Similar to the policy goals of CMSP, the spirit and intent of NEPA is to facilitate

⁷¹ Essential Fish Habitat Consultation Guidance Version 1.1, 2004. National Marine Fisheries Service, Office of Habitat Conservation at 2.1.

⁷² 50 C.F.R. § 600.920(f)(1).

⁷³ 42 U.S.C. § 4332.

greater coordination and environmental protection via a transparent and participatory process of environmental review. The law notes that,

“...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.”⁷⁴

At its core, NEPA requires agencies to prepare an environmental impact statement (EIS) for major federal actions that significantly affect the health of the human environment.⁷⁵ The Council on Environmental Quality (CEQ) defines “major federal actions” to include “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.”⁷⁶ As such, the requirement to prepare an EIS may be triggered by a wide range of federal activities including the approval of lease agreements, the issuance of permits to private entities and the approval of fishery management plans.

The Councils are already intimately familiar with the NEPA process as they regularly prepare environmental review documents to help them assess the impacts and evaluate possible management options for FMPs and/or plan amendments. In the context of multi-sector spatial planning and decision-making however, NEPA provides Councils with an opportunity to act as interested stakeholders and provide input (as opposed to merely soliciting it) regarding the potential impacts to fisheries of other ocean uses. Prior to preparing an EIS, the federal action agency must consult with those federal agencies with jurisdiction and/or expertise regarding the environmental impacts that may result from the proposed activity.⁷⁷ In the event that a major federal action necessitates consultation with NOAA Fisheries, the Council has an opportunity to provide information and input directly to NOAA to influence and/or support the agency’s conclusions and recommendations to the federal action agency. A Council may also provide comments directly to the action agency independent of NOAA Fisheries during public comment periods. Since NEPA requires federal agencies to integrate natural and social science data and information into planning and decision-making, Councils have an opportunity to inform the process and development of management alternatives with data and analyses provided by the fisheries sector.

2. Clean Water Act

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the U.S. and for regulating surface water quality standards. Under the CWA, it is unlawful for any person to discharge any pollutant from a point source into U.S. waters without a National Pollution Discharge Elimination System (NPDES) permit from the EPA. The EPA regulates all waste streams generated from oil and gas activities on the outer continental shelf (OCS), to prevent the degradation of the marine environment and to assess of

⁷⁴ *Id.* §4331(b).

⁷⁵ *Id.* § 4332(2)(c).

⁷⁶ Memorandum from A. Alan Hill, Chairman, Council on Env’tl Quality, to Heads of Federal Agencies (1983). Available at: <http://nepa.gov/nepa/regs/1983/1983guid.htm>.

⁷⁷ *Id.* § 4332(2)(c).

the effects of the proposed discharges. In addition, the EPA has classified aquaculture facilities as point sources of pollutions that would also require a NPDES permit.⁷⁸ Meanwhile, fishing and tendering vessels are exempt from the General NPDES permit, which covers incidental discharges inside three miles. Outside of three miles, the EPA requires NPDES permits for seafood processing waste discharges.

While the consultation requirements of the CWA are limited, actions that discharge into the coastal zone or the OCS may adversely affect fish habitat and could trigger EFH consultation between the action agency, EPA and NOAA Fisheries. To the extent that the Council deems it valuable to comment on the activity, it may do so indirectly through NOAA Fisheries or directly under EFH consultation and/or NEPA commenting authority.

3. Coastal Zone Management Act

The Coastal Zone Management Act of 1972 (CZMA) encourages coastal states to create comprehensive programs to facilitate more coordinated management and manage impacts to coastal resources. The state coastal management programs are developed pursuant to CZMA and NOAA requirements, with input from federal agencies, local governments and the public. The CZMA expands state power extends state authority beyond state waters and landward boundaries of each state's coastal zone by providing states with federal consistency review authority.⁷⁹ States with coastal management programs may review federal agency activities that have reasonably foreseeable effects on the state's coastal zone to ensure they are consistent with the policies of the state's coastal management program. Thus, a diverse range of activities qualify under the CZMA's broad language regarding activities that may affect any land or water use or natural resource of the coastal zone. For example, drilling for oil on the sea floor should qualify since drilling operations and facilities (including exploration and construction phases) could impact habitat for fish that may migrate in and out of state's coastal zones. While Councils do not have a direct role in the federal consistency review process, they could engage indirectly by communicating concerns about proposed activities that might adversely impact fishery conservation and management goals to the relevant state agency representative on their Council.

C. Current Permitting Processes & Opportunities

Permitting and licensing requirements and timelines for other ocean uses vary considerably across agencies and sectors. While it is crucial for fishery managers to understand the origins of their authority in order to provide timely and constructive input into planning and siting decisions, equally important is an awareness of the various processes through which these decisions are made. Indeed, without an understanding of the processes and timelines, Councils may miss important opportunities to provide input and information relevant to fisheries conservation and management.

Some ocean uses, such as alternative energy projects, are so new that the government review timelines and procedures are still being developed. Meanwhile, decision-makers are still struggling to resolve issues related to jurisdiction and authority for other ocean uses such as aquaculture. This paper does not endeavor to cover the broad range of ocean activities and their

⁷⁸ 40 CFR 122.24.

⁷⁹ 16 U.S.C. §1455(c)-(d).

respective planning processes. Instead, we look at two examples related to energy development, oil and gas leasing and alternative energy siting, to illustrate processes and opportunities for Councils to provide input.

1. Inter-Agency Coordination

The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE, formerly known as the Minerals Management Service (MMS)), a bureau within the U.S. Department of the Interior (DOI), is the federal agency that manages the nation's natural gas, oil and other mineral resources on the Outer Continental Shelf (OCS).⁸⁰ The OCS constitutes all submerged lands lying seaward of state coastal waters that are under U.S. jurisdiction. NOAA, on the other hand, is responsible for a variety of activities concerning the OCS including managing fisheries and protected species and protecting marine and coastal habitat. Inter-agency coordination between NOAA and BOEMRE can be a challenge in light of their jurisdictional differences, misaligned administrative timeframes, and competing political pressures and priorities. Nevertheless, both agencies agree that coordination is crucial to prevent devastating accidents like the April 2010 *British Petroleum Deepwater Horizon* spill in the Gulf of Mexico.

NOAA and BOEMRE entered into a Memorandum of Understanding (MOU) in May 2011. Consistent with the recommendations of the National Commission on the *BP Deepwater Horizon* Oil Spill and Offshore Drilling, the MOU included a commitment by the agencies to consult on any upcoming environmental issues relating to energy development of the OCS.⁸¹ Specifically, the two agencies agreed to cooperate and coordinate by:

1. Defining specific processes to ensure effective and timely communication of agency priorities and upcoming activities;
2. Identifying and undertaking critical environmental studies and analyses;
3. Collaborating on scientific, environmental and technical issues related to the development and deployment of environmentally sound and sustainable offshore renewable energy technologies; and
4. Increasing coordination and collaboration on decisions related to OCS activities, including with respect to research and scientific priorities.⁸²

Central to the MOU is an agreement between the agencies to meet regularly to develop ways to appropriately align regulatory and decision-making processes and identify the best available science to support future regulatory decisions. The MOU also commits the agencies to an annual evaluation of activities and progress related to National Ocean Policy objectives.

While the agreement is a positive step towards greater coordination and communication between

⁸⁰ On June 21, 2010, the Minerals Management Service was renamed the Bureau of Ocean Energy Management, Regulation and Enforcement and reorganized. See Press Release, June 21, 2010, Salazar Swears-In Michael R. Bromwich to Lead Bureau of Ocean Energy Management, Regulation and Enforcement <http://www.boemre.gov/ooc/press/2010/press0621.htm>.

⁸¹ Memorandum of Understanding on Coordination and Collaboration Regarding Outer Continental Shelf Energy Development and Environmental Stewardship, May 19, 2011, available at http://www.boemre.gov/ooc/pdfs/MOU_BOEMRE_NOAA_May2011.pdf.

⁸² *Id.* at 1.

the agencies and the activities they regulate, the non-binding nature of MOUs combined with asynchronous decision-making timelines and challenging logistics may make it difficult to coordinate effectively. Of particular interest to the fisheries sector is how updates to EFH overlap with timelines that BOEMRE follows for permitting oil and gas leases. Nevertheless, enhanced communication between the agencies should generate greater transparency and an awareness of opportunities for fishery managers to engage on energy siting decisions.

2. Offshore Oil and Gas Development

The Outer Continental Shelf Lands Act (OCSLA) assigns the Secretary of the Interior responsibility for the administration of mineral exploration and development of the OCS. OCSLA empowers the Secretary to grant leases to the highest qualified responsible bidder on the basis of sealed competitive bids and to formulate regulations as necessary to carry out the provisions of the Act. OCSLA, as amended, provides guidelines for implementing an OCS oil and gas exploration and development program.

Throughout the process, there are various environmental reviews and opportunities for inter-agency consultation and public comment. Not surprisingly, the oil and gas leasing process involves a tremendous expenditure of time, resources and money. As the leasing process progresses and investments increase, the political and financial commitments also grow. Therefore, to the extent that the Council identifies oil and gas exploration and development as a potential threat to their fisheries conservation and management goals, it would behoove Councils to weigh in early and often in the process.

It is worth noting that oil and gas development is not occurring in all Council regions. In those regions, such as the North Pacific and the Gulf of Mexico where there are active leases, the lease approval process may vary somewhat according to the needs and conditions of the particular region. The process outlined below highlights the general federal process as required by the OCSLA, but Councils should be aware that regional nuances and disparities exist.

a. Five-Year Leasing Program

BOEMRE has oversight responsibility on oil and gas leasing activities within the OCS. Section 18 of OCSLA requires the Secretary of the Interior to prepare a five-year oil and gas leasing program (Five-Year Program) that balances the priorities of national energy needs, environmentally sound and safe operations, and fair market return to the taxpayer.⁸³ The Five-Year Program, which consists of a schedule of proposed lease sales that shows the size, timing, and location of leasing activity, includes three separate comment periods including two separate draft proposals, a final proposal and development of an environmental impact statement (EIS).⁸⁴ At each of these stages, the Council has an opportunity to provide input.

⁸³ Oil and Gas Leasing on the Outer Continental Shelf, Bureau of Ocean Energy Management, Regulation and Enforcement at www.boemre.gov/PDFs/5BOEMRE_Leasing101.pdf (Last visited September 6, 2011).

⁸⁴ *Id.* at 2.

b. Planning for Specific Sale

i. Call for Information and Nominations and Notice of Intent to prepare an EIS

Following completion of the Five Year Program, the agency initiates planning for a specific sale. This process involves several comment periods beginning with a Call for Information and Nominations (“Call”) and a Notice of Intent to prepare an EIS. At this stage, industry is asked to identify which blocks within an OCS planning area they have interest in potentially leasing. The public may also comment on areas that should or should not be considered for leasing, as well as issues relevant to the EIS. The EIS must include a range of information some of which is within the realm of expertise and experience of the fisheries sector. In addition to comments regarding the appropriateness of certain geographic areas to oil exploration, a Council may provide input to BOEMRE in writing and/or via attendance at scoping meetings on various elements of the EIS including the description of the existing environment; the analysis of possible effects on the environment, including socioeconomic and cumulative effects; the description of the assumptions upon which the analysis is based; and potential mitigating measures.

ii. Area Identification

Following the 45-day comment period for the Call/Notice of Intent, BOEMRE analyzes the comments received and considers resource potential and environmental effects before identifying the area to be evaluated in the EIS (“Area Identification”).

iii. Draft EIS and Proposed Notice of Sale

Subsequent to area identification, BOEMRE publishes a Draft EIS with a 60-day public comment period. During this time, the agency hosts public hearings and solicits input from stakeholders on the Draft EIS. Again, the Council may submit comments and/or provide testimony relative to the content of the EIS as appropriate. After publication of the Draft EIS, the proposed Notice of Sale (NOS) is released. The proposed NOS document indicates the time and location of the proposed lease sale with terms and conditions and applicable mitigation measures.

iv. Final EIS and Consistency Determination

After BOEMRE considers the comments on the Draft EIS, a Final EIS is published followed by a 30-day comment period. At the same time, the proposed NOS is forwarded to the Governor(s) of the affected state(s) for review and comment within 60 days. Concurrent with review by the Governor(s), BOEMRE prepares a consistency determination as required by the CZMA to determine whether the proposed lease sale is consistent with the coastal zone policies of the affected state(s). The state has 60 days to respond. As with other consistency determinations, a Council may have an opportunity to influence the state’s determination through communication and coordination with the state agency representatives to the Council.

v. Final Notice of Sale and Lease Sale

Provided the consistency determination is approved by the state(s), BOEMRE then publishes a Final Notice of Sale no less than 30 days in advance of the scheduled lease sale. The sale is conducted via a sealed bidding process with lease blocks being awarded to the highest bidder.

vi. Lease Stipulations

During the lease sale process, OCSLA regulations require the Director of BOEMRE, in consultation with “appropriate” federal agencies to develop measures, such as lease stipulations, to mitigate adverse environmental impacts.⁸⁵ If NOAA is considered an appropriate federal agency, the Councils may have an opportunity to provide input via their parent agency. If NOAA is not directly engaged in the lease stipulation phase, it is likely that BOEMRE will incorporate and consider NOAA and the Council’s previous comments submitted during the 5-Year Program development and lease sale phases. Indeed, the Director of BOEMRE must consider comments from “States and local governments and interested parties in response to calls for information and [sale area] nominations.”⁸⁶ Not unlike CMSP, which through an integrated and collaborative process aims to address and analyze cumulative impacts, OCSLA requires that the Director “consider all available environmental information, multiple-use conflicts, resource potential, industry interest and other relevant information.”⁸⁷ There is no requirement that the Director adopt or adhere to the comments or recommendations provided by sister agencies or other commenters, but the lease stipulation process does afford another opportunity for the Council to voice its concerns, submit recommendations and build an administrative record to support potential third party lawsuits.

Special stipulations are often included in OCS oil and natural gas leases in response to concerns raised by affected states, federal agencies, and other stakeholders. Examples of stipulations include: biological surveys of sensitive seafloor habitats, environmental training for operations personnel, special waste-discharge procedures, archaeological resource reports to determine the potential for historic or prehistoric resources, special operating procedures near military bases or their zones of activity, and other restrictions on OCS oil and natural gas operations. Lease stipulations are legally-binding, contractual provisions designed as mitigating measures to address specific concerns pertinent to the lease. The lease stipulations only apply to oil and gas activities and not to the public at large.

Leases often specify “No Activity Zones,” geographic areas in which exploration and development operations are not permitted, to protect important areas from damage due to drilling, platform and pipeline placement, and anchors.⁸⁸ Although No Activity Zones often

⁸⁵ 30 C.F.R. § 256. 29.

⁸⁶ 30 C.F.R. § 256. 26.

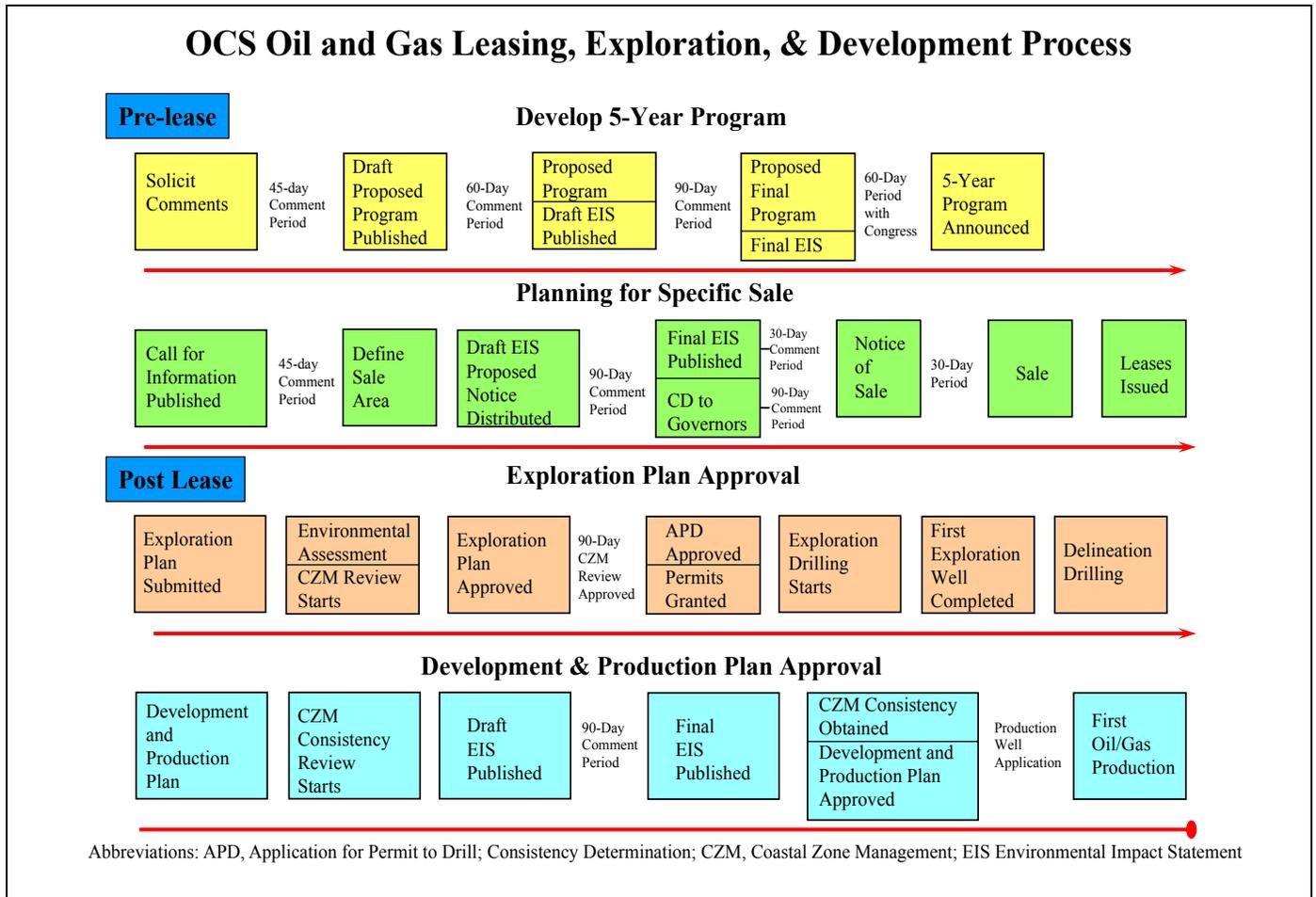
⁸⁷ *Id.*

⁸⁸ NEPA Task Force (2002-04) Council on Environmental Quality, Compendium of Useful Practices, available at, <http://ceq.hss.doe.gov/ntf/compendium/flowergardenbanks.html>.

overlap with HAPC designated areas, they do not typically identify the HAPC designation as the reason for limiting activity and No Activity Zones are often defined more narrowly than the HAPCs in relation to specific topographical features on the seafloor.

In addition, leases typically include a provision requiring that the lessee comply with additional rules and regulations that may be issued after the lease is awarded to prevent waste and ensure the conservation of the natural resources of the OCS.⁸⁹ BOEMRE can use a Notice to Lessees and Operators (NTL) to quickly notify operators nationwide or within a particular OCS region about changes in administrative practices, procedures for complying with rules, regulations, and lease stipulations, or to clarify requirements and convey information. For example, BOEMRE may require certain safety equipment that previously had not been required, as prescribed in regulation.

Box 5.



⁸⁹ Notices, Letters, and Information to Lessees and Operators. Available at: <http://www.gomr.boemre.gov/homepg/regulate/regs/ntlltl.html>

c. Exploration Plan Approval

The exploration phase commences following the lease sale. During the exploration phase there is a substantial amount of drilling, ship traffic and platform construction. To conduct exploratory drilling, the lessee submits an Exploration Plan (EP) to BOEMRE for review. BOEMRE along with other federal and state agencies must then review the EP. Following this review, BOEMRE, with input from other relevant agencies, develops an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) pursuant to the requirements of NEPA. The public, including the Regional Fishery Management Councils have an opportunity to comment on the environmental review document. After completing the environmental review and any necessary modifications to the EP, BOEMRE conditionally approves the EP, pending final approval from federal agencies (i.e., Fish and Wildlife Service, Department of Defense, etc.) and state review for coastal zone management consistency.⁹⁰ While Councils do not have a formal role in federal consistency reviews at the state level, there may be an opportunity for a Council to provide indirect input into the process via the relevant state agency representative(s) to the Council. The lessee then submits an Application for Permit to Drill (APD) that includes more technical details about containment of oil spills and mechanical fitness of the platforms. After the APD is approved, drilling can begin.

d. Development & Production Plans

If the lessee completes its exploration and discovers oil and/or natural gas, it submits to BOEMRE a plan on how it will develop the prospect. This development and production plan (DPP) must be consistent with other applicable federal laws and must include the number and location of wells, the type of structure that will be used, and how the lessee will transport the oil and/or natural gas to shore. Once the applicant submits a DPP, BOEMRE must release it for public review and comment for 60 days.

In accordance with federal regulations, a DPP will be declared a “major federal action” prompting development of an EIS at least once in each OCS planning area (other than the Western and Central GOM Planning Areas).⁹¹ Similar to the pre-lease sale phase, BOEMRE must submit the DPP Draft EIS to the Governor of each affected state as well as to the executive of each affected local government who requests a copy.⁹² Additionally, BOEMRE must forward a copy of the draft EIS to the state's CZMA agency for consistency determination and make copies of the draft EIS available to any appropriate federal agency, interstate regional entity, and constituents for a 90 day public comment period.

The Council has several opportunities to comment during the development and production phase (see Box 5), however the likelihood of significant changes to leasing areas or activities is much

⁹⁰ 16 U.S.C. 1451 (c)(3)(B), “any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land or water use or natural resource of the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with the enforceable policies of such state’s approved management program and will be carried out in a manner consistent with such program.”

⁹¹ 30 C.F.R. § 250.269(a).

⁹² 30 C.F.R. § 250.269(c).

less than during the earlier phases in the process given the substantial investment of time and resources to get to this stage.

3. Alternative Energy Development

In April 2009, the Department of Interior completed its Final Renewable Energy Framework (“Framework”) authorizing BOEMRE to oversee the granting of leases, easements, and rights-of-way for renewable energy development on the OCS pursuant to OCSLA. The program includes siting and construction of offshore wind farms, wave, tidal, current and solar installations.

Notably, the Framework expressly contemplates CMSP and the level of coordination it will require. The governing regulations include a list of BOEMRE’s responsibilities under OCSLA. The regulations require that BOEMRE ensure that authorized renewable energy 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).”⁹³

As with oil and gas leasing, the competitive lease sale process for alternative energy development is a multi-step and multi-year endeavor that engages both prospective lessees and those whose interests may be affected by the proposed projects, including the Regional Fishery Management Councils. Currently, most of the focus for renewable energy development is concentrated along the Atlantic Coast and driven in part by BOEMRE’s “Smart from the Start” program.

Commercial leases to produce, sell, and deliver alternative energy are for twenty-five years at a minimum, while limited leases for testing renewable energy production technology and for site assessment may be granted for a maximum of five years. The leasing process is outlined below.

a. Requests for Interest

In contrast to oil and gas development, the initial planning process to designate areas for renewable energy development at the federal level is less structured. BOEMRE may publish in the Federal Register a general or specific Request for Interest (RFI) to assess interest in: leasing all or part of the OCS, granting easements, and/or permitting right of ways. Prospective applicants must then submit information describing the area of interest for a lease; the project’s objectives; a general schedule of proposed activities; available and relevant renewable energy resource and environmental data related to the area of interest for the project; project facilities, devices and infrastructure; anticipated power production and likely purchasers; a statement that the proposed project activity conforms with State and local energy planning requirements, initiatives or guidance; documentation showing the applicant is qualified to hold a lease;⁹⁴ and any other information requested in the Federal Register notice.⁹⁵ BOEMRE uses this information

⁹³ 30 CFR § 285.102

⁹⁴ 30 CFR § 285.107

⁹⁵ 30 CFR § 285.213

to determine whether there is a competitive interest. If there is a competitive interest, BOEMRE may prepare and issue a national, regional, or more specific schedule of lease sales for one or more types of renewable energy.⁹⁶ If the agency concludes that there is no competitive interest in the areas proposed, applicants may file unsolicited requests for the non-competitive issuance of leases.⁹⁷

b. Calls for Information and Nominations

Following the RFI, BOEMRE may publish in the Federal Register a Call for Information and Nominations (Call) for leasing in specified areas.⁹⁸ The Call is the first step in a competitive lease sale process and provides an opportunity for all interested and *affected* parties to provide information about the proposed leasing activities and existing conditions that may affect or be affected by those activities.⁹⁹ At this stage in the leasing process, the Regional Fishery Management Councils may play an advisory role by providing input and information to BOEMRE relative to the ecology of the region and spatial use of fisheries. Information must be received within 45 days of publication of the Call in the Federal Register.¹⁰⁰

c. Area Identification

During the area identification stage, BOEMRE, in consultation with appropriate federal agencies, states, local governments, affected Indian tribes, and interested parties, identifies areas for environmental analysis and consideration for leasing.¹⁰¹ The agency will consider areas for leasing that were nominated in response to the Call or other areas that BOEMRE determines as appropriate.¹⁰² Council input provided during the Call regarding the appropriateness of proposed areas for renewable energy development may be considered by BOEMRE.

d. Sale Notices

For a lease sale, BOEMRE must first publish a Proposed Sale Notice followed by a Final Sale Notice in the Federal Register. A sale notice includes information regarding the lease area, lease provisions and conditions, auction details, lease form, bid evaluation criteria, lease award and appeal procedures, and lease execution procedures.¹⁰³ Following publication of the Proposed Sale Notice, there is 60-day comment period after which BOEMRE must consider all public comments before developing the final lease sale terms and conditions. To the extent that the Council has information relevant to the proposed lease sale and/or anticipates that the sale may compromise fishery conservation and management goals, the Council has an opportunity to provide more detailed comments on specific lease areas. The details of the final lease sale are

⁹⁶ United States Dept of the Interior, Minerals Management Service, Office of Offshore Renewable Energy Programs, *Guidelines for the Mineral Management Service Renewable Energy Framework*, July 2009, p. 16.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 30 CFR § 285.213.

¹⁰¹ United States Dept of the Interior, Minerals Management Service, Office of Offshore Renewable Energy Programs, *Guidelines for the Mineral Management Service Renewable Energy Framework*, July 2009, p. 16.

¹⁰² *Id.*

¹⁰³ *Id.*

published in a Final Sale Notice in the Federal Register at least 30 days before the date of sale.¹⁰⁴

e. Lease Sales

Included in the lease sale notice package are maps of the lease area that provide block-specific information and requirements. To award the leases, BOEMRE uses auctions at a lease sale.¹⁰⁵

Following a competitive lease sale, the lessee must submit a site assessment plan within six months and a construction and operation plan within five years. Both plans must demonstrate that the planned activities conform to all applicable laws, do not unreasonably interfere with other OCS uses (including fisheries), and do not cause undue harm or damage to natural resources, life, property, environment, or historically or archaeologically significant sites.¹⁰⁶

VI. Strategies for Council Engagement in Multi-Sector Spatial Planning

Regional experiences with inter-agency communications and collaborations may vary significantly and depend largely on the individuals at the respective agencies and the Council and their relationships and understanding of each other's needs and interests. In some regions there is a perception that there is not a sufficient process or mechanism in place to ensure that the Council is aware of and/or able to provide input into activities that may impact their ability to manage fisheries in their jurisdiction. It is the impression of some Council members that comments, once received by the action agency, are often ignored or disregarded without sufficient explanation or justification. Absent a comprehensive framework for CMSP that details how federal and state agencies and other interested parties can more effectively interact in planning processes, the Councils can still take steps to improve coordination and communication with other agencies and sectors to ensure that fisheries interests are represented in marine management. The following suggestions are derived from personal communications with Council members and staff as well as NOAA Fisheries representatives with experience navigating the challenges of multi-sector spatial planning and inter-agency coordination.

- **Document:** Keeping a clear and accessible record of communications between the Council and the relevant action agencies is critical. Documenting past correspondence (both formal and informal) as well as comment submissions and their outcomes, could provide some justification and strength for any claims the Council may have that their input is not being considered. Developing an organized system for tracking comments submitted and any subsequent responses from the action agency could help facilitate greater awareness and transparency.
- **Communicate:** Councils may want to consider developing a more formal mechanism or designating a conduit for information. Unlike NOAA Fisheries, which by law must be

¹⁰⁴ 30 CFR § 285.216.

¹⁰⁵ United States Dept of the Interior, Minerals Management Service, Office of Offshore Renewable Energy Programs, *Guidelines for the Mineral Management Service Renewable Energy Framework*, July 2009, p. 17.

¹⁰⁶ 30 CFR §§ 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 the proposed construction, operation, and decommissioning plan. Id. §§ 285.605, 620.

notified by the relevant regulatory agency whenever there is an activity requiring consultation, Councils are not automatically notified of activities. Thus, Councils may choose to be more proactive. If there is a point person within NOAA Fisheries who regularly receives, communicates and/or responds to such notices, it would be to the Council's advantage to cultivate that relationship and formally request that notices related to fisheries be forwarded onto the Council on a regular basis. Alternatively, the Council could designate a staff member to stay abreast of and report to the Council on non-fishing activities into which the Council may want to provide input.

- **Prioritize:** To ensure that a Council's time and resources are being used efficiently and directed towards those non-fishing activities that may have the greatest impact on fishery resources, a Council may want to consider developing a system to filter or prioritize projects where they anticipate providing input. For example, the Council may prioritize a particular type of activity (oil and gas, wind energy, etc.) or a particular fishing area, habitat type, or species of concern (HAPCs could be a useful tool in this regard). This may also help a Council prioritize its own research and data needs or develop finer resolution spatial data to support areas, uses and species of that are of the greatest concern.
- **Delegate:** Often, timing is the issue that precludes a Council from providing input into other proposed ocean activities. The challenge with comment and consultation timeframes is that they often do not correspond to the Council meeting schedules, resulting in missed opportunities for Council involvement in multi-sector spatial planning. Some Councils (officially or unofficially) delegate authority to draft and provide comments to a committee (i.e., Habitat Committee) or to Council staff. Delegating authority may enable a Council to provide input into activities without being limited by incongruent timeframes
- **Prepare:** Should a Council decide to delegate its commenting and/or consultative authority to its staff or committees, it is even more important that the Council identifies its priorities to enable advance planning and ensure that the broader Council perspective is represented. In addition to HAPC designations, which can help prioritize particular areas or habitat types of interest to the Council, policy statements on particular topics, areas, species, or uses may help ensure that comments drafted on behalf of the Council are consistent with the Council's policies and positions.
- **Coordinate:** Often, NOAA Fisheries will provide its own comments on proposed activities, but will solicit the input of the relevant Council. In some instances, it may be sufficient for the agency to provide its comments and simply note that the Council is in agreement (provided they actually are). In other cases, it may provide additional weight and authority for the Council to weigh in independent of NOAA Fisheries. Either way, greater communication and coordination between the Council and NOAA Fisheries is critical.
- **Follow-Up:** Some Council members note that once comments are submitted, there is rarely any follow-up by the Council, NOAA Fisheries or the action agency. In the case of EFH/HAPC consultation, the action agency is required to provide justification for its decisions particularly if it does not adopt the recommendations of consulting agencies or entities such as the Council. There are few, if any, lawsuits calling an agency to task for

failure to respond with proper justification for its action. Consequently, there is little risk to them in not doing so. In addition to documenting incidents where this has occurred, it may benefit the council to communicate and coordinate with NOAA Fisheries about perceived non-responsiveness of other agencies. If there is enough of an interest and concern, NOAA Fisheries can convene some inter-agency discussions and perhaps develop inter-agency agreement or MOU, or at a minimum, put the agency in question on notice that fishery managers are paying attention.

VII. Conclusion

In 2011, the eight Regional Fishery Management Councils issued a collective statement acknowledging that “[a]s the need for seafood grows, so do competing uses of the ocean such as marine aquaculture and ocean energy.” They further noted that “[t]he future of marine spatial planning will play a pivotal role in maintaining and improving stewardship of the ocean.”¹⁰⁷ Indeed, greater coordination and communication between ocean users is necessary to minimize conflicts, improve efficiencies and promote sustainable use of marine resources.

The productivity and sustainability of marine fish populations depend on a healthy and diverse marine environment, therefore it is incumbent upon those charged with their conservation and management to account for and minimize to the extent practicable the impacts of both fishing and non-fishing activities. While Councils have limited authority to restrict non-fishing ocean uses, there are management tools and strategies that Councils can employ to engage in and influence spatial planning and decision making to help achieve fishery conservation and management goals.

Moreover, Councils have a long history of scientific and socio-economic research and data collection and spatial management that may add value to CMSP and other multi-sector planning and decision-making processes. Now, more than ever, Councils have an opportunity to leverage their authority and expertise to play a constructive role in the broader ocean community by using their experience and expertise to facilitate a more coordinated system of ocean governance.

¹⁰⁷ U.S. Regional Fishery Management Councils: Decades of Knowledge and Experience in Coastal and Marine Spatial Planning, 2011. Available at: www.fisherycouncils.org

ACKNOWLEDGEMENTS

This paper was prepared by Meghan Jeans, Program Director with the Fisheries Leadership & Sustainability Forum (“Fisheries Forum”) at the Center for Ocean Solutions at Stanford University. The Fisheries Forum gratefully acknowledges the information and revisions provided a range of by individuals including the staff of the Fisheries Forum, Meg Caldwell (Center for Ocean Solutions), Larry Crowder (Center for Ocean Solutions), Erin Prahler (Center for Ocean Solutions), Melissa Foley (Center for Ocean Solutions), Linwood Pendleton (Nicholas Institute for the Environment), Andrea Treece (Earthjustice), Chris Kellogg (New England Fishery Management Council), Robert Boyles (South Carolina Department of Natural Resources and the South Atlantic Fishery Management Council), Robert Gill (Gulf of Mexico Fishery Management Council), Kevin St. Martin (Rutgers University), David Witherall (North Pacific Fishery Management Council), Karen Abrams (NOAA Fisheries), Sara Solis (Bureau of Ocean Energy Management, Regulation and Enforcement), Lyndsay Fritz (Center for Ocean Solutions), Matthew Armsby (Center for Ocean Solutions), John Weber (Northeast Regional Ocean Council), Daniel Dunn (Duke University), David Stein (NOAA Coastal Resources Center), Ginny Faye (NOAA Fisheries), and Miles Croom (NOAA Fisheries). The Fisheries Forum strives to be a policy neutral organization. As such, this paper does not advocate for a particular approach or strategy. Instead, it attempts to characterize some of the diverse perspectives concerning coastal and marine spatial planning and the role of the Regional Fishery Management Councils in multi-sector spatial planning.