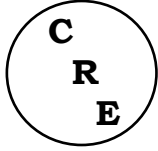


Center for Regulatory Effectiveness



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July 1, 2011

Nancy H. Sutley
National Ocean Council
722 Jackson Place NW
Washington, DC 20503

Re: Comments on Strategic Action Plan Content Outlines

Dear Chairwoman Sutley:

The Center for Regulatory Effectiveness (CRE) is pleased to submit these comments to the National Ocean Council (NOC) regarding NOC's Notice of Availability of the Strategic Action Plan Content Outlines and request for comments.¹ Coastal Marine Spatial Planning as proposed, is redundant of existing frameworks for managing ocean uses, it is operating without the requisite Congressionally approved legal authority, and lacks transparency and involvement from stakeholders. Accordingly, CRE recommends that NOC use existing legislative and regulatory frameworks to manage the ocean. In the alternative, CRE recommends that NOC implements CMSP in a more transparent manner that includes greater involvement by stakeholders and compliance with the Data Quality Act.

I. CMSP is Redundant of Existing Legal Frameworks

A. OCSLA Provides a Comprehensive Framework to Govern Ocean Uses

The Outer Continental Shelf Lands Act (OCSLA), administered by the Department of the Interior (DOI), establishes the framework for regulating and planning ocean uses. Specifically, OCSLA mandates that:

Management of the Outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the Outer Continental Shelf, and the

¹ 76 Fed. Reg. 33726, June 9, 2011.

potential impact of oil and gas exploration on other resources values of the Outer Continental Shelf and the marine, coastal, and human environments.²

Importantly, when citing energy development projects on the Outer Continental Shelf, the Secretary is required to consider impacts on all of the ocean waters, not just the Outer Continental Shelf. Specifically, the Secretary must consider the impacts on “marine, coastal, and human environments.”³ Marine environment is defined as the “physical, atmosphere, and biological components...[that] determine the productivity, state, condition and quality of the marine ecosystem, including the *waters of the high seas*, contiguous zone, *transitional*, and *intertidal areas*, salt marshes, and *wetlands within the coastal zone*.”⁴ The coastal environment includes the physical and biological features that affect the condition and quality of the “terrestrial ecosystem from the shoreline inward to the boundaries”⁵ of the coastal waters and adjacent shore lands, including “islands, transition and intertidal areas, salt marshes, wetlands, and beaches.”⁶

In addition, OCSLA requires the Secretary of the interior to consider:

- (a) existing information concerning the geographical, geological, and ecological characteristics of [energy development] regions;
- (b) an equitable sharing of development benefits and environmental risks among the various regions;
- ...
- (d) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;
- ...
- (F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary’s consideration;
- (G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and

² 43 U.S.C. § 1344(a)(1).

³ *Id.*

⁴ *Id.* at § 1331(g) (emphasis added).

⁵ *Id.* at § 1331(h).

⁶ *Id.* at § 1331(e).

(H) relevant environmental and predictive information for different areas of the outer Continental Shelf.⁷

Similar to OCSLA, CMSP proposes to provide 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.”⁸ President Obama’s Executive Order further defines CMSP as a program that “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.”⁹

Thus, spatial planning for future and anticipated ocean uses under CMSP is the very same comprehensive planning that already occurs under OCSLA. As such, CMSP will create redundancy of existing regulatory frameworks. The redundancy of ocean planning will come at a great cost to taxpayers that will provide questionable improvements over the existing regulatory program conducted by DOI.

B. OCSLA Requires a Balancing of Environmental and Economic Uses of the Ocean

Under OCSLA, the Secretary is required to “consider available relevant environmental information in making decisions . . . , in developing appropriate regulations and lease conditions, and in issuing operating orders.”¹⁰ The Secretary is required to “conduct a study of any area or region included in any oil and gas lease sale or other lease in order to establish information needed for assessment and management of environmental impacts on the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected.”¹¹

Moreover, before any leasing decisions are made, the Secretary of Interior must “obtain proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.”¹² In *California v. Watt*, the D.C. Circuit Court held that the Secretary of the Interior “must strike the proper balance ‘to the maximum extent practicable.’ The Secretary must evaluate [energy development], which can

⁷ *Id* at § 1344(a)(2).

⁸ White House Council on Environmental Quality, *Final Recommendations of the Interagency Ocean Policy Task Force*, at 41 (July 19, 2010) available at http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf

⁹ Exec. Order No. 13547, 76 Fed. Reg. 43023 (July 22, 2010) available at <http://www.whitehouse.gov/files/documents/2010stewardship-eo.pdf>

¹⁰ 43 U.S.C. § 1346(d)

¹¹ 43 U.S.C. § 1346(a)(1)

¹² 43 U.S.C. § 1344(a)(3)

be quantified in monetary terms, in conjunction with environmental and social costs.”¹³ The court further found:

The [Secretary’s] obligation...is to look at all factors and then balance the results. The Act does not mandate any particular balance, but vests the Secretary with discretion to weigh the elements so as to "best meet national energy needs." The weight of these elements may well shift with changes in technology, in environment, and in the nation's energy needs, meaning that the proper balance for 1980-85 may differ from the proper balance for some subsequent five-year period.¹⁴

Subsequent the leasing and development of an area pursuant to OCSLA, the Secretary is required to conduct additional studies as necessary and to monitor the marine and coastal environments and to identify significant changes to those environments.¹⁵ The Secretary must also submit to Congress and assessment of cumulative impacts of activities conducted under the OCSLA on human, marine, and coastal environments every three years.”¹⁶

C. OCSLA Requires Interagency and Public Involvement

CMSP is being established with the priority objective of having a regional approach that includes working closely with state, local, and tribal governments. However, OCSLA already has mechanisms in place that incorporate the recommendations of local and state officials in the planning and siting process. For example, OCLSA requires, “The Secretary shall, by regulation, establish procedures for carrying out his duties under this section, and shall plan and carry out such duties in full cooperation with affected States...The Secretary may also utilize information obtained from any State or local government, or from any person, for the purposes of this section. For the purpose of carrying out his responsibilities under this section, the Secretary may by agreement utilize, with or without reimbursement, the services, personnel, or facilities of any Federal, State, or local government agency.”¹⁷ In addition, the Secretary must consider the recommendations of local and state governments regarding the size, time, or location of

¹³ *California v. Watt*, 668 F.2d 1290, 1317 (D.C. Cir. 1981).

¹⁴ *Id.*

¹⁵ 43 U.S.C § 1346(b) (“Subsequent to the leasing and developing of any area or region, the Secretary shall conduct such additional studies to establish environmental information as he deems necessary and shall monitor the human, marine, and coastal environments of such area or region in a manner designed to provide time-series and data trend information which can be used for comparison with any previously collected data for the purpose of identifying any significant changes in the quality and productivity of such environments, for establishing trends in the areas studied and monitored, and for designing experiments to identify the causes of such changes).

¹⁶ *Id.*

¹⁷ 43 U.S.C § 1346(c)

proposed lease sales.¹⁸ Finally, the Secretary is authorized to form cooperative agreements with affected states for the purpose of “sharing information, . . . the joint utilization of available expertise, the facilitating of permitting procedures, joint planning and review, and the formation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws, regulations, and stipulations relevant to outer Continental Shelf operations both onshore and offshore.”¹⁹

In addition, under OCSLA, the Secretary is required to keep Congress and the public apprised of the cumulative effects of oil and gas leasing. OCSLA provides, “As soon as practicable after the end of every 3 fiscal years, the Secretary shall submit to the Congress and make available to the general public an assessment of the cumulative effect of activities conducted under this subchapter on the human, marine, and coastal environments.”²⁰

D. CMSP Directly Conflicts with the Congressionally Established OCSLA

CMSP is being implemented by an executive order and without legislation. As discussed above, there is currently an existing statutory framework for managing ocean uses. The implementation of CMSP will interfere with Congressionally and Judicially established mandates. Moreover, Congress made its intent clear that OCSLA governs the use of the ocean Outer Continental Shelf:

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.²¹

¹⁸ 43 U.S.C § 1345(a)

¹⁹ 43 U.S.C § 1345(e)

²⁰ 43 U.S.C § 1346(e)

²¹ 43 U.S.C. § 1332(a)(1)

CMSP has been established by an Executive Order. Generally, Executive Orders may enforce a law, but it cannot infringe upon Congress' exclusive power to enact legislation. Thus, an Executive Order cannot conflict with a clear Congressional mandate. As implemented, CMSP will be in direct conflict with the statutory framework created under OCSLA. The National Ocean Council should heed the recommendation of the Environmental Law Institute and proceed with CMSP via federal legislation.²²

II. CMSP Lacks Transparency and Direct Representation of Stakeholders

Over the past year, the implementation of CMSP has been marked by a lack of transparency and participation by stakeholders. There has been extremely limited information on the source of funding for CMSP and the details of what CMSP will look like and how it will affect ocean users. Of more concern, is the lack of transparency and participation by current ocean users in CMSP.²³

The lack of participation is especially prevalent with the related ocean planning program—The Department of Interior's Smart from the Start Initiative.²⁴ The Smart from the Start Initiative is seen as "test case" for CMSP.²⁵ As such, it has failed to be transparent and include current ocean users in the planning process. The Smart from the Start Initiative is a program that intends to streamline the leasing process for offshore wind energy by establishing Wind Energy Areas (WEAs), which are ocean locations that DOI has designated as particularly well suited for the development of offshore wind projects. However, in the process of citing WEAs, DOI has cut out current stakeholders from the planning process.

Specifically, fishermen have been shut out of the process in the siting of WEAs and leasing sites. In developing WEAs, formal consultations have not occurred with Regional

²² Environmental Law Institute, *Marine Spatial Planning in US Waters: An Assessment and Analysis of Existing Legal Mechanisms, Anticipated Barriers, and Future Opportunities*, p 63 (2009) available at <http://www.policyarchive.org/handle/10207/bitstreams/22069.pdf>

²³ The only place in all of the Strategic Action Plans that call for direct engagement with current ocean users is in the call for increased funding by the Corporate Wetland Restoration Partnership. National Ocean Council, *Regional Ecosystem Protection and Restoration Strategic Action Plan: Full Content Outline*, p. 6, June 2, 2011, available at http://www.whitehouse.gov/sites/default/files/microsites/ceq/sap_6_repr_full_content_outline_06-02-11_clean.pdf (citing the goal to "Increase, by 50 percent, annual CWRP financial and in-kind contributions to Federal ocean, coastal, and Great Lakes protection and restoration projects").

²⁴ See Phil Taylor, *Interior Offshore Wind Leasing Program Seen as 'Test Case' for Marine Spatial Planning*, New York Times, June 23, 2011, available at <http://www.nytimes.com/gwire/2011/06/23/23greenwire-interior-offshore-wind-leasing-program-seen-as-16182.html> ("As the 27-agency National Ocean Council begins the formidable task of mapping out the myriad resources of the nation's oceans, lakes and coasts, some are looking to the Interior Department's offshore wind program for hints of how early planning can improve federal decisionmaking. Interior's plan to expedite wind leasing and development off the Atlantic Coast is viewed by some as an early glimpse of the potential for coastal and marine spatial planning, or CMSP.").

²⁵ *Id.*

Fishery Management Councils. For example, DOI recently published a RFI for potential leases in 3,000 square miles of ocean in the Nantucket Sound.²⁶ Fishermen and the public only became aware of the proposal after DOI held a hearing in New Bedford, with the comment period ending only 12 days later.²⁷ Massachusetts lawmakers were outraged by the lack of transparency and the speed with which DOI was moving ahead with the leasing process. In a letter signed by Senator Scott Brown, Senator John Kerry, and Representatives Barney Frank and John Tierney, the lawmakers proclaimed, “We feel that amount of time is insufficient for affected stakeholder to analyze and submit comments on an energy development proposal that could have lasting impacts in the region.”²⁸ Representative Frank commented, “I am deeply disappointed by this decision by DOI and upset that neither Congress, the fishing industry, nor fishing regulators were notified before the decision was made.”²⁹ After the outcry from the public and lawmakers, BOEMRE reduced the area allocated for the WEA by half.³⁰ Recognizing the detrimental impact on Massachusetts fishermen and interference with established shipping lanes, BOEMRE reduced the amount of land dedicated to wind leasing by half.³¹

As the “test case” for CMSP, the Smart from the Start Initiative has failed to be transparent and include current ocean users in the planning process.³² Thus far, CMSP has suffered from the same deficiencies as its predecessor. This is especially evident by the National Ocean Council’s failure to release to the public its heavily relied upon report, *Science for an Ocean Nation: An Update of the Ocean Research Priorities Plan*.³³

²⁶ 75 Fed. Reg. 82055, December 29, 2010.

²⁷ Patrick Cassidy, *Wind Energy Leasing Plan Under Fire by Mass. Lawmakers*, Cape Code Times, February 23, 2011, available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20110223/NEWS/102230324/-1/rss02>.

²⁸ *Id.*

²⁹ Lawmakers Demand More Public Input on US Offshore Wind Plan, Recharge News, February 23, 2011.

³⁰ The Bureau of Ocean Energy Management, Regulation and Enforcement, *BOEMRE Announces It Will Reduce Area Offshore Massachusetts Under Consideration for Commercial Wind Energy Leasing*, May 2, 2011, available at <http://www.boemre.gov/ooc/press/2011/press0502.htm>; see also Keith Chu, *US agency halves offshore Massachusetts wind leasing area*, Platts, May 2, 2011 available at <http://www.platts.com/RSSFeedDetailedNews/RSSFeed/ElectricPower/6045512>.

³¹ *Id.*

³² See Phil Taylor, *Interior Offshore Wind Leasing Program Seen as ‘Test Case’ for Marine Spatial Planning*, New York Times, June 23, 2011, available at <http://www.nytimes.com/gwire/2011/06/23/23greenwire-interior-offshore-wind-leasing-program-seen-as-16182.html>.

³³ National Ocean Council, *Inform Decisions and Improve Understanding Strategic Action Plan: Full Content Outline*, p. 2, June 2, 2011, available at http://www.whitehouse.gov/sites/default/files/microsites/ceq/sap_3_idui_full_content_outline_06-02-11_clean.pdf (This report is being used “as the primary basis for prioritizing research activities within their agencies”).

The NOC admits that in order to obtain economic, ecological, and social benefits, CMSP must “be transparent, and be informed by all stakeholders and the general public.”³⁴ With the implementation of CMSP, the NOC has failed to fulfill these objectives.

III. The Data Quality Act Applies to CMSP

The DQA and its general government-wide guidance³⁵ requires that information disseminated to the public shall be “accurate, clear, complete and unbiased,” shall be developed “using sound statistical and research methods,” and shall be useful for its intended purpose.³⁶ If the information is considered “influential,” it should be held to higher standards.³⁷ In particular, “influential” scientific information must be transparent with regard to the data and methodology used so that it is substantially reproducible.³⁸ Information is “influential” if it would have a “clear and substantial impact on important public policies or important private sector decisions.”

If CMSP is to proceed as planned, the National Ocean Council must comply with the Data Quality Act (DQA). The proposed National Information Management System and Data Portal will be an information dissemination subject to the DQA. As stated by the NOC, to yield economic, ecological, and social benefits, CMSP “must incorporate the principles of *sound science* for ecosystem-based and adaptive management.”³⁹ Full compliance with the DQA and its general government-wide guidance will ensure that the CMSP incorporates the principles of sound science.

IV. Conclusion

For the foregoing reasons, CRE recommends that the NOC work within the existing statutory and regulatory framework to develop a comprehensive plan to manage ocean uses. It is essential that the National Ocean Policy incorporates the United States national interests, which includes commercial and recreational ocean users. Thus far, the implementation of CMSP has lacked transparency and participation from stakeholders and the public. Moreover, CMSP is redundant of the existing framework created under OCSLA.

³⁴ National Ocean Council, *Coastal and Marine Spatial Planning Strategic Action Plan: Full Content Outline*, p. 2, June 2, 2011, available at

http://www.whitehouse.gov/sites/default/files/microsites/ceq/sap_2_cmsp_full_content_outline_06-02-11_clean.pdf

³⁵ After OMB issued the government-wide guidance, all agencies issued their own conforming guidance.

³⁶ 67 Fed. Reg. at 8459.

³⁷ *Id.* at 8452.

³⁸ *Id.* at 8460.

³⁹ National Ocean Council, *Coastal and Marine Spatial Planning Strategic Action Plan: Full Content Outline*, p. 2, June 2, 2011, available at

http://www.whitehouse.gov/sites/default/files/microsites/ceq/sap_2_cmsp_full_content_outline_06-02-11_clean.pdf

CENTER FOR REGULATORY EFFECTIVENESS

CRE will continue to monitor developments for CMSP on its Ocean Zoning Interactive Public Docket (IPD) and provide a forum for public comments, which CRE invites NOC to review periodically. The IPD is available at <http://www.thecre.com/creipd/>. If you need further information regarding any issue discussed in this comment letter, please do not hesitate to contact me at secretary1@mbsdc.com or (202) 265-2383.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jim Tozzi". The signature is written in a cursive style with a large, stylized initial "J".

Jim Tozzi
Center for Regulatory Effectiveness