COASTAL & MARINE SPATIAL PLANNING:

LEGAL CONSIDERATIONS

BY

ENVIRONMENTAL LAW INSTITUTE

AND

THE CENTER FOR OCEAN SOLUTIONS

PREPARED FOR MERIDIAN INSTITUTE

IN SUPPORT OF THE CMSP LEGAL TOOLS WORKSHOP

JUNE 2010

ACKNOWLEDGEMENTS

This report was prepared by the Environmental Law Institute (ELI) and the Center for Ocean Solutions (COS) for Meridian Institute, through funding from the Gordon and Betty Moore Foundation. The report was written by Kathryn Mengerink (ELI), Matthew Armsby (COS), and Jordan Diamond (ELI). We gratefully acknowledge the information and revisions provided by Monica Goldberg (Ocean Conservancy), Jay Austin (ELI), Laura Cantral (Meridian Institute), and Kate Wing (Gordon and Betty Moore Foundation). We are also thankful to the workshop participants who provided valuable input on research questions to address in this paper. The views expressed in this report are solely those of ELI and COS.

CONTENTS

I. INTRODUCTION

A. OVERVIEW

This Background Paper was prepared for a workshop held at the Meridian Institute in Washington, DC on April 29-30, 2010. In the Paper, we summarize some of the major laws that are likely to inform the design and implementation of a coastal and marine spatial planning (CMSP) regime in the United States. Prior to developing this Paper, we asked workshop participants to suggest pressing legal questions to research in advance of the meeting. Many questions focused on the binding nature of CMSP and the relationship of CMSP to existing legal frameworks.

The Paper is divided into subsections to allow a reader to go directly to a particular statute or issue of interest. In Part II, The Nature of the Proposed CMSP Instruments, after briefly summarizing the CMSP process, we examine the legal implications of the use of devices such as interstate compacts and memoranda of understanding to establish and support regional planning bodies.

In Part III, Procedural Considerations, we examine whether the CMSP process or Instruments will trigger the application of major procedural and environmental statutes such the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). We consider whether a regional planning body would be a federal agency for purposes of the APA; whether CMSP development would trigger notice and comment rulemaking requirements; whether the CMSP Instruments would be evidence of final agency action susceptible to judicial review; and whether CMS Plans would be enforceable under any of these statutes. We also explore whether CMSP would require an environmental impact statement (EIS) under NEPA and Section 7 consultation under the ESA.

In Part IV, Implementation Considerations: Interface with Existing Federal Statutes, we briefly examine NEPA, the Magnuson-Stevens Fisheries Conservation and Management Act (MSA), the Outer Continental Shelf Lands Act (OCSLA), and the Federal Power Act (FPA), to explore how federal agencies could use these federal authorities to make and implement CMS Plans.

In Part V, The State-Federal Relationship, we consider how the legal framework that currently defines the federal-state relationship in the marine and coastal environment could facilitate CMSP development. In particular, we briefly examine the Paramountcy Doctrine and the Submerged Lands Act as the legal mechanisms underlying the federal-state relationship. We explore, in detail, how the Coastal Zone Management Act's (CZMA's) provisions for state coastal management programs (CMPs) could inform and/or enable CMSP development and implementation. Finally, we discuss some implications of states' federal consistency review authority for regional CMSP.

We recognize that we present only a subset of the legal issues that should be explored when considering CMSP development and implementation. The participants posed many excellent questions that we were unable to address in this brief Background Paper.

B. PROPOSED CMSP PROCESS

In this section, we briefly review the major steps outlined in the *Interim Framework for Effective Coastal and Marine Spatial Planning* (Interim Framework). In the Interim Framework, the Interagency Ocean Policy Task Force (Task Force) recommends that a National Ocean Council (NOC) and regional planning bodies (RPBs) undertake CMSP.[1] The proposed CMSP process begins with the development of NOC guidance and continues, through several steps, to the adoption, implementation and adaptation of coastal and marine spatial plans (CMS Plans; Table 1).

Table 1: Major Steps in the Task Force's Interim Framework for CMSP
Step 1. The President establishes the National Ocean Policy and framework centered on the NOC and places CMSP leadership and oversight in the NOC.
Step 2. The NOC develops overarching CMSP objectives, performance standards, process guidance, a template for regional Development Agreements, and an interagency dispute resolution process.
Step 3. Federal agencies, states, and tribes prepare for engagement in the CMSP process.
Step 4. Federal agencies, states, and tribes (Signatories) establish RPBs and create Development Agreements. Signatories agree to be bound by NOC's dispute resolution system.
Step 5. The RPB Signatories submit Development Agreements to the NOC for evaluation and approval.
Step 6. RPBs develop Work Plans for conducting the CMSP process and developing CMS Plans. Each Work Plan establishes milestones, identifies resources, specifies time frames, ensures that regional CMSP processes incorporate essential elements into each CMS Plan; and states the dispute resolution process.
Step 7. The NOC evaluates and approves Work Plans according to whether they (1) conform to national objectives and performance standards and (2) provide for regional objectives and performance standards.
Step 8. The RPBs develop CMS Plans according to the process outlined in their NOC-approved Work Plans. Each region's CMSP process and Plan account for the essential discrete steps and elements identified in the Task Force's Interim Framework.
Step 9. The NOC evaluates each CMS Plan for conformance with the national objectives and performance measures, as well as with regional objectives and performance measures identified in the Work Plans.
Step 10. Signatories implement CMS Plans using existing authorities and informal agreements. Over time, state and federal agencies incorporate the CMS Plans into their ongoing operations or activities.
Step 11. The NOC and RPBs evaluate the success of Signatories and other relevant agencies in attaining national and regional objectives and performance standards.
Step 12. CMSP is conducted over time as an adaptive management process. In accordance with the Interim Framework, NOC and RPBs ensure that regional CMS Plans reflect changes in agencies' enabling

[1] This summary is based on the Interim Task Force Framework and not the Final Framework. Therefore the summary and steps outlined here could change substantially.

Table 1: Major Steps in the Task Force's Interim Framework for CMSP
legislation and/or regulations as well as conditions on the ground or in the water. The NOC and RPBs ensure that Plans change as necessary to reflect developments in national and regional objectives and performance measures.

C. ASSUMPTIONS

For the purpose of this Background Paper, we assume the following:

1. The final framework and presidential action will encourage regions to develop CMS Plans that are binding.
2. The final framework and presidential action will call upon participants to use existing statutory authority.
3. The federal government will use incentives to bring states to the table, including financial incentives and the opportunity to inform planning in federal waters.
4. Not all federal and state agencies and tribes will be individually represented in the RPBs.
5. Scientific and stakeholder bodies will be used to inform the planning process.

II. THE NATURE OF THE PROPOSED CMSP INSTRUMENTS

A. OVERVIEW OF PROPOSED CMSP INSTRUMENTS

While the Task Force has not finalized its proposal for a national CMSP Framework, we assume for the purpose of this analysis that the process will run according to the outline identified in the Task Force's Interim Framework. The CMSP process would begin with presidential action calling upon federal agencies to undertake CMSP. The NOC would develop: (1) national CMSP guidance; (2) a template for regional CMSP; and (3) a dispute resolution process. [2] Federal agencies, state agencies, and tribes—the Signatories of each RPB—would then create and implement specific CMSP Instruments, including Regional Development Agreements, CMSP Work Plans, and CMS Plans.[3]

According to the Task Force, the signatories of each RPB would begin the regional CMSP process by preparing a Development Agreement, "an express commitment to work cooperatively to engage in CMSP and develop eventual CMS Plans, identify the lead representatives for each of the partners, and define ground rules, roles, and responsibilities of the partners."[4] The NOC would ratify each regional Development Agreement.

Once the NOC had ratified an RPB's Development Agreement, the RPB would prepare a regional Work Plan, which would set the stage for CMSP by establishing milestones, specifying timeframes and resources, and providing for essential process elements.[5] Following the NOC's approval of its Work Plan, the RPB would develop a CMS Plan and submit it to the NOC, which would evaluate the proposed plan for consistency with national goals and principles, national objectives, performance measures, and other guidance. [6] The NOC also would evaluate whether the RPB had identified mechanisms for implementing the proposed CMS Plan using existing laws and regulations. Upon NOC certification, the RPB would implement, monitor, evaluate, and adapt its CMS Plan as needed.

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[2] Interagency Ocean Policy Task Force, Interim Framework for Effective Coastal and Marine Spatial Planning 12 (Dec. 9, 2009), *available at* http://www.whitehouse.gov/sites/default/files/microsites/091209-Interim-CMSP-Framework-Task-Force.pdf.

[3] In many instances throughout this paper, we consider the CMSP Instruments collectively rather than individually. Throughout the document, "CMSP Instruments" refers to the proposed Regional Development Agreements, Work Plans and CMS Plans.

[4] *Id.* at 13. The OPTF does not specify whether the signatories alone may be parties to the Development Agreement. Conceivably, all relevant state agencies, federal agencies, and tribes could be parties. On the other hand, such a large agreement could be complex and unwieldy, so a subset of entities could represent all of the relevant agencies and tribes.

[5] *Id*.

[6] *Id.* at 18.

The legal ramifications of the CMSP Instruments will depend upon their legal structure and on the parties' intention to be bound by them. A related set of questions concerns the legal effects of the CMSP Instruments on non-signatories. Outstanding issues include the identification of the federal, state, and tribal entities that will act as signatories to each RPB and participate in the development of each CMSP Instrument.

B. THE FORM OF THE CMSP INSTRUMENTS

In this section, we consider two forms of agreements that could be used to establish regional CMSP processes: (1) interstate compacts; and (2) memoranda of understanding (MOUs).

1. Interstate Compacts

Interstate compacts are legal agreements between two or more states, which can include the federal government.[7] According to Zimmerman and Wendell, interstate compacts "can be enforced, if the need arises, more effectively than other known arrangements for the undertaking of cooperative programs on an interstate basis."[8] Interstate compacts can be used to create legally binding multi-state agreements and even create structures with regional regulatory authority (e.g., the Delaware River Basin Commission or the Atlantic States Marine Fisheries Commission).

> [The interstate compact] is available for coordination on all levels—federal, state, local and international—and for the building of vertical as well as horizontal relationships. No other device known to our federal experience can provide the single legal pattern effective on all levels and for all types of government that is possible under the interstate compact.[9]

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[7] Traditionally, compacts were state-to-state agreements. The Delaware River Basin Compact was the first to include the federal government as a party. FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 1 (Council of State Gov'ts 1976).

[8] *Id.* at 14. Early compacts authorized commissioners to administer core functions, while later compacts tended to require adherence to the statutes and regulations that might affect each state's implementation of the compact. From the mid-1950s through 1980s, "[m]ost compacts provided for rulemaking to regulate." However, as few compacts identified rulemaking procedures, "most courts continued to use contract-law principles in reviewing disputes." Kent W. Bishop, *Interstate Compacts—The Next Frontier for Administrative Procedure Rulemaking* 2-3 (2002), *available at* http://www.csg.org/knowledgecenter/docs/ncic/Bishop2-InterstateCompactLaw-ANewFrontierforAdministrativeProcedureRulemaking.pdf

[9] *Id.* at 50.

Typically, state parties codify compacts under state law.[10] If Congress consents to an interstate compact, the compact becomes federal law.[11]

According to the U.S. Constitution's Compact Clause, "no State shall, without the Consent of Congress … enter into any Agreement or Compact with another State, or with a foreign Power."[12] This proscription raises two questions: (1) how does Congress give its consent? And (2) when is congressional consent required?

The Form of Congressional Consent

Congress can give its explicit consent for an interstate compact by passing an act or joint resolution stating such consent. Congress also can give its consent in advance of a compact's formation.[13] Some compacts have operated for years in the absence of explicit congressional consent but with clear congressional knowledge, leading some experts to argue that congressional consent can be implied.[14] Some parties have used the law of interstate compacts to argue for increased judicial scrutiny and accountability of interstate governing bodies. The definition of congressional consent has been a key issue in some of these cases. For instance, in 2009, the Chesapeake Bay Foundation filed a lawsuit claiming that the Chesapeake Bay Agreement is an interstate compact. The Foundation used two arguments to support this claim: (1) Clean Water Act language stating that Congress consents to states entering into "agreements or compacts, for cooperative effort and mutual assistance for the prevention and control of pollution," constitutes consent in advance of the compact[15]; and (2) Clean Water Act language defining the Chesapeake Bay Agreement as the "formal, voluntary agreements executed to achieve the goal of restoring and protecting the Chesapeake Bay ecosystem…" constitutes express approval of the agreement. Under either theory, the Foundation argued, the Chesapeake Bay Agreement is an interstate compact.[16]

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[10] *Id.* at 1.

[11] According to the Supreme Court, "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

[12] U.S. CONST., art. I, § 10, cl. 3.

[13] Anon., *Interstate Compact Case Law 1976-2000* 7 (2001), available at http://www.csg.org/knowledgecenter/docs/ncic/CaseLaw.pdf (citing *Cuyler v Adams*, 449 U.S. 433 (1981) (holding that the Crime Control Consent Act, which stated that Congress consents to states forming agreements or compacts, was the congressional consent needed for a subsequent interstate compact)).

[14] *Id.* at 7; and ZIMMERMANN & WENDELL, *supra* note 7 at 21-22

[15] *Fowler v. Environmental Protection Agency*, No. 1:09-cv-00005-CKK at ¶ 143 (D.D.C., filed Jan. 5, 2009) (citing 33 U.S.C. § 1253(b)(1)).

[16] The Foundation settled its case with the U.S. EPA on May 11, 2010. The settlement "requires EPA to take specific actions by dates certain to ensure that pollution to local rivers, streams, and the Chesapeake Bay is reduced sufficiently to remove the Bay

Agreements Requiring Interstate Compacts

Not all interstate agreements require congressional consent.[17] Rather, only those compacts that would affect the political balance in the federal system of government or the power delegated to the federal government require congressional approval.[18] Most agreements between two or more states would not likely require congressional action. For example, in *New Hampshire v. Maine* (1976), the U.S. Supreme Court held that an agreement establishing a maritime boundary between New Hampshire and Maine did not require congressional consent because the agreement did not affect the power of the national government, affect the political balance within the federal government, or enhance the power of the states.[19]

Even when interstate agreements lead to coordinated state legislation, congressional consent may not be required, as the Supreme Court made clear in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System* (1985). In that case, two states had passed reciprocal statutes indicating a regionally specific intent to cooperate. However, the state actions lacked certain classic compact features: a jointly established organization or body for regulation or any other purpose; the conditioning of one state's action on action by the other state; either party's inability to modify or repeal the agreement unilaterally; and the presence of statutes requiring reciprocation of a regional limitation.[20] The Court also cited to interstate compact law, discussed above, regarding the balance of power between the states and the Federal Government. That is, even if the states' coordinated actions constituted evidence of intent to form a compact, not every such agreement would be invalid for failing to meet congressional approval.[21]

Enforcing Interstate Compacts

Interstate compacts resemble contracts that can be enforced by the parties making them or, in some cases, by third parties. Courts have tended to use contract-law principles when reviewing disputes that arise under interstate compacts. Non-parties may be able to file suit in federal court against interstate compact bodies: for instance, in two decisions, the U.S. Supreme Court held that regional

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from the federal 'dirty waters' list." Chesapeake Bay Foundation, EPA Signs Binding Commitment to Reduce Pollution, http://www.cbf.org/Page.aspx?pid=1124 (May 21, 2010). While the court never ruled on the merits of the Foundation's interstate compact arguments, the threat of liability under these and related theories likely played a role in the action.

[17] ZIMMERMANN & WENDELL, *supra* note 7 at 6-7.

[18] *Id.* at 21 (citing *Virginia v. Tennessee*, 148 U.S. 503 (1893)).

[19] INTERSTATE COMPACT CASE LAW, *supra* note 13, at 5 (citing *New Hampshire v. Maine*, 426 U.S. 363 (1976)). In another case, the Supreme Court stated that when applying *Virginia v. Tennessee*, "courts must consider the *potential* impact of the interstate agreement on the federal supremacy rather than the *actual* impact." *Id.* at 5-6 (citing *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452 (1978)).

[20] *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 175 (1985).

[21] *Id.* at 175-76 (citing *New Hampshire v. Maine* and *Virginia v. Tennessee).*

bodies established by interstate compact were not immune from lawsuit under the Eleventh Amendment.[22]

Interstate Compacts and CMSP

The Signatories of an RPB could adopt a Development Agreement in the form of interstate compacts; they also could agree to form interstate compacts in subsequent stages of the CMSP process. The Signatories could use a compact to create a regional body that included both state and federal parties and that held regulatory and/or decision-making authority. While this mechanism would not be necessary for CMSP, a Development Agreement in the form of an interstate compact could yield significant benefits in the form of a formal, legally binding, and enforceable agreement among states and the federal government.[23] Moreover, congressional consent could transform such a Development Agreement into federal law. Indeed, even if RPB Signatories did not expressly create a CMSP Instrument as an interstate compact, the language of the Development Agreement and related congressional action could lead to a court's interpretation that the instrument is, in fact, an interstate compact. Finally, forming an interstate compact would allow the Signatories to avoid potential constitutional challenge for violation of the Compact Clause.

The disadvantages of using an interstate compact include possible political barriers to obtaining multi-party agreement to a legally binding agreement; the time needed to develop and finalize the agreement; and the potential difficulty in altering the agreement at a later point in time.[24]

2. Memoranda of Understanding

There is no single legal definition of a memorandum of understanding (MOU). An MOU "may be used as a confirmation of agreed upon terms when an oral agreement has not been reduced to a formal contract. It may also be a contract used to set forth the basic principles and guidelines under which the parties will work together to accomplish their goals."[25] Typically, courts treat MOUs as formalized but

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[22] *Interstate Compact Case Law 1976-2000*, *supra* note 13, at 20-24.

[23] Zimmermann and Wendell noted, when discussing regional advisory bodies established by interstate compact, that "[s]uch advisory and recommendatory groups of state officials could operate without the formal framework of an interstate compact. ... Nevertheless, the value of compacts in this role is that they provide a formal, comparatively more binding and more permanent legal basis for the establishment of continuing study and advisory groups." *See supra* note 7, at 45.

[24] *Id.* at 54-56.

[25] USLegal Definitions, *at* http://definitions.uslegal.com/.

non-binding statements of expectations between two or more parties, although some courts have found MOUs to be contract-like.[26]

MOU Enforcement

One question is whether RPB Signatories would be able to enforce the terms of a CMSP Instrument if it were cast in the form of an MOU. Since the Signatories should be working together voluntarily to achieve regional objectives, this question may be somewhat academic. On the other hand, foreseeable changes in administration at the state or federal level could reduce a Signatory's willingness to participate in the CMSP process.

Many of the existing regional ocean governance agreements have MOU-like qualities, i.e. they are non-binding agreements that express a commitment to achieve shared objectives. In examining existing regional governance structures generally, the authors did not find any cases in which one of the government parties to an MOU sued its counterparts for failure to implement agreed-upon objectives. Nor did they find any cases in which one party to a regional ocean governance agreement sought to compel action.[27] This lack of case law should not be surprising given that most MOUs are intended to be soft-law, non-binding agreements.

Another question is whether third parties, e.g., the intended public or stakeholder beneficiaries of a CMSP Instrument that was framed as an MOU, could sue under the MOU to enforce the Instrument or prevent its implementation. The legal force of such an MOU would depend, in part, on the language and the subject matter of the agreement. It might also depend on actions that the Signatories have taken in furtherance of the CMSP Instrument: if the Signatories indicated that the terms of an MOU-like CMSP Instrument are binding, and if they behaved as if it were binding, a court could find that the instrument were, in fact, binding going forward.[28]

For instance, most regional governance experts would likely consider the Chesapeake Bay Program Agreements, such as the Chesapeake 2000 Agreement, to be unenforceable MOUs. However, in a lawsuit filed in 2009, the Chesapeake Bay Foundation sought to enforce the terms of the

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[26] For instance, the Victorian government in Australia defines an MOU as "a document that records the common intent of two or more parties where the parties do not wish to assume legally binding obligations. An MOU is usually less complex and less detailed than a contract, but provides a framework and set of principles to guide the parties in undertaking a project or working arrangement." Victorian Government Solicitor's Office, Memoranda of Understanding, Client Newsletter (June 2008), *available at* http://www.vgso.vic.gov.au/resources/publications/CCL/MemorandaofUnderstanding.aspx.

[27] We searched LexisNexis for the following agreements and programs: Chesapeake Bay Program, Puget Sound Partnership, Gulf of Mexico Alliance, West Coast Governors' Agreement, and the Gulf of Maine Council for the Marine Environment. The Chesapeake Bay Program appears in seven cases, all related to water quality. In none of these cases was the Program itself the focus of the lawsuit.

[28] Although in such a case, a court may well decide to analyze the agreement under Interstate Compact law.

Agreements under the APA.[29] The Foundation claimed that the EPA's "unlawful withholding of action, untimely delay, and arbitrary and capricious failure to comply with the terms of the Chesapeake Bay Agreements" violated the APA; the EPA had arbitrarily and capriciously failed to "undertake timely actions sufficient to meet the … goals of the Chesapeake Bay Agreements."[30] Although the parties settled the case in May 2010, the Foundation's claim suggests that the law of MOUs may contain enough gray area that MOUs could be used as one basis for creating and enforcing regional CMSP Instruments.[31] In another case, *Defenders of Wildlife v. Tuggle* (2009), third parties sought to prevent the U.S. Fish and Wildlife Service and U.S. Forest Service from implementing an MOU and an associated standard operating procedure (SOP) that guided the agencies' actions with respect to the management of a protected species.[32] The agencies had narrowly tailored the MOU and subsequent SOP to implement existing ESA regulations and management plans for Mexican wolves. The court held that the SOP in had marked "the consummation of the agenc[ies'] decisionmaking process" and had limited their discretion going forward; it was thus final agency action under the APA and grounds for suit under NEPA and the ESA.[33]

In both of these examples, the third parties used federal statutory requirements (e.g., Clean Water Act and ESA) and the terms of the MOUs in question as legal bases for suit. The Chesapeake Bay case may be somewhat less relevant to CMSP because the plaintiffs made claims under Section 117(g)(1) of the Clean Water Act, which specifically directed EPA to implement the Chesapeake Bay Agreements.[34] It is worth noting, however, that the CMSP Instruments could very well cite specific sections of other laws as existing sources of authority for particular actions. Third parties could use approaches similar to those presented here to support the implementation of CMSP.

III. PROCEDURAL CONSIDERATIONS

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[29] *Fowler v. Environmental Protection Agency*, No. 1:09-cv-00005-CKK ¶¶ 106-38 (D.D.C. Jan. 5, 2009). The plaintiffs in *Fowler* also made claims under § 117(g)(1) of the Clean Water Act and under the law of Interstate Compacts.

[30] *Id*.

[32] 607 F. Supp. 2d 1095 (D. Ariz. 2009).

[33] *Id*. at 1110-14.

[34] *Fowler*, No. 1:09 cv 00005 CKK at ¶¶ 107-09.

A. ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA) is a procedural statute that states the rules that agencies must follow in order to provide the public with access to information and opportunities to participate in regulatory decision-making processes.[35] The APA also enunciates the requirements for judicial review: it defines the realm of reviewable actions and the scope of judicial review.[36]

In this section, we address the question whether the APA will apply to the RPBs and the CMSP process. The answer to this question will depend upon a number of factors, including the specific identities of parties to the CMSP Instruments,[37] the form and content of the CMSP Instruments themselves, and the actions that the parties take to implement them. In brief, we conclude the following:

- RPBs are not likely to be considered federal agencies under the APA;
- Whether CMSP Instruments are considered "legislative rules" that require notice and comment rulemaking will depend upon the substantive issues that the CMSP Instruments address and the requirements that they establish;
- CMSP Instruments could constitute final agency action under the APA, and could therefore be subject to judicial review;
- Once a plan is developed, it is not likely that agencies could be compelled to implement it; and
- CMSP Instruments will likely inform subsequent judicial decisions under other federal statutes.

1. Regional Planning Bodies as Federal Agencies

APA requirements apply only to federal agencies.[38] Even if the regional planning bodies and their subsequent actions were the products of congressionally-approved interstate compacts (the most binding type of regional agreements), it is unlikely that courts would consider RPBs to be federal

[35] 5 U.S.C. §§ 553, 556-557 (Westlaw 2010). The APA covers both formal and informal "notice and comment" rulemakings.

[36] *Id.* §§ 704, 706.

[37] As noted previously, CMSP Instruments include Development Agreements, Regional Work Plans, and CMS Plans.

[38] *Id.* § 551.

agencies for purposes of APA review. Two federal district courts have held that interstate compact commissions are not considered agencies within the meaning of the APA.[39]

We note, however, that the commissions in these cases were composed only of state parties. The inclusion of federal parties could make the RPBs more likely to be ruled federal agencies for the purposes of APA review.

2. Notice and Comment Rulemaking

The Task Force states in the Interim Framework that the CMSP Instruments would not be binding rules. Yet an agency's claim that something is merely an "interpretive" rule or policy statement, rather than a binding "legislative" rule, is not legally determinative. An important question, then, is whether individual agencies would be obligated to follow APA rulemaking procedures when creating CMSP Instruments or portions of these instruments.

For purposes of this discussion, we assume that the RPBs would not develop CMSP Instruments with the *intention* that the Instruments would constitute "legislative" rules under the APA. In other words, we assume that the RPBs, lacking a congressional mandate to engage in CMSP, would also lack the authority to promulgate legislative rules on their own. We *do* assume that a court could find that one or more of RPB signatories had created a legislative rule when crafting or implementing one of the CMSP Instruments. Such a holding would be similar to the *Defenders of Wildlife* court's holding that a multi-party MOU and standard operating procedure represented a final agency action by the USFWS.[40]

Generally, a "substantive" or legislative rule is one that changes an existing law or policy, thus "affect[ing] individual rights and obligations." [41] As noted in *Animal Legal Defense Fund v. Quigg* (1991), "[t]o be "substantive", a rule must also be promulgated pursuant "to statutory authority . . . and implement the statute.""[42] An interpretative rule or policy statement, on the other hand, "merely clarifies or explains existing law or regulations."[43] APA rulemaking requirements do not apply to interpretive rules, general policy statements, "or rules of agency organization, procedure, or practice."[44]

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[39] *See* Molly Klapper, *"Notice and Comment" or "Informal Rulemaking" under Interstate Compacts* (2005), *available at* http://www.csg.org/knowledgecenter/docs/ncic/Bishop1-InformalNoticeandCommentRulemakinginInterstateCompacts.pdf ((discussing *The Organic Cow LLC v. Northeast Dairy Compact Commission*, 164 F. Supp. 2d 412 (D. Vt. 2001) and *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249 (D. Mass. 1998)).

[40] *See infra* notes 63-69 and accompanying text.

[41] *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991) (internal references omitted).

[42] *Id*. Notice and comment rulemaking requirements include providing notice of the proposed rule in the Federal Register, allowing the submission of comments, considering any submitted comments, offering a reasoned explanation for accepting or rejecting the comments, and publishing the final rule. 5 U.S.C. § 553.

[43] *Id.*

[44] *Id*. § 553(b).

"[M]atter[s] related to agency management," federal grants, and contracts are also exempt from APA rulemaking procedures.[45]

In recent commentary, Robert Fischman identifies four factors that courts will consider when determining whether a federal agency's policy instrument is "legislative" and therefore subject to notice and comment rulemaking requirements: (1) whether the agency has followed "publication and procedure" practices; (2) whether the policy instrument contains "binding" content; (3) whether the agency's intent was to create a legislative rule; and (4) "whether the policy emanates from a congressional mandate." [46]

Publication and Procedure

"The first factor[, publication and procedure,] looks at where the material is published and whether it is promulgated in conformance with APA [notice and comment] rulemaking. The closer the publication and procedure comes to the standards for legislative rules, the more likely a policy will bind an agency."[47] In *McGrail and Rowley v. Babbitt* (1997), the court held that a Fish and Wildlife Service manual would be considered non-binding "guidance" because the agency had not followed notice and comment procedures when adopting it.[48] In *Wilderness Society v. Norton* (2006), the court found that the National Park Service's Management Policies were non-binding policies, rather than binding rules, because the Service had not followed published the final version of the Management Policies in the Federal Register.[49]

RPBs or their members might be able to publish the CMSP Instruments in the Federal Register, simply to give the public notice of the policy guidance created during in the CMSP process. They might also use aspects of APA notice and comment rulemaking to generate greater legitimacy for the results of the CMSP process. It is thus foreseeable that one or more of the RPBs would satisfy the "publication and procedure" aspects of Fischman's analysis.[50]

Binding Content

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[45] *Id.* §553(a)(2) (stating that "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" is exempt from § 553 rulemaking requirements).

[46] *See* Robert L. Fischman, *From Words to Action; The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies*, 26 STAN. ENVTL. L. J. 77, 124-29 (2007).

[47] *Id.*

[48] *Id.* (citing *McGrail & Rowley v. Babbitt*, 986 F. Supp. 1386, 1394 (S.D. Fla. 1997).

[49] *Id.* (citing *Wilderness Society v. Norton* 434 F.3d 584, 595-96 (D.C. Cir. 2006)).

[50] It is also foreseeable that one or more member agencies of an RPB would satisfy the "publication and procedure" elements of Fischman's analysis in the course of (a) creating new policy in the course of the CMSP process; and/or (b) implementing CMS Plans or other CMSP Instruments. In that case, that an agency would still have to comply with all aspects of the APA's informal rulemaking requirements in order to use the policy statement as a legislative rule.

With regards to the "binding content" factor, Fischman explains that courts also will ask whether an agency's policy instrument would have a "binding," rather than a "generally advisory," effect on private parties or on the agency."[51] In the Eleventh Circuit, the inquiry is whether the policy instrument would constrain the agency's discretion. "As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency has not established a binding norm." [52] On the other hand, a mere interpretive rule or policy statement "does not have a present-day binding effect, that is, it does not impose any rights and obligations;" it "genuinely leaves the agency and its decisionmakers free to exercise discretion."[53]

Intent

Fischman's third factor is "agency intent." If an agency "states that it means to circumscribe its own discretion through [a policy instrument,] courts are apt to hold the agency to its word."[54] Courts may look for intent as expressed in an agency's written document; however, they can also infer intent from agency actions that fall outside the specific rule or policy in question.[55]

Together, Fischman's "binding content" and "agency intent" factors suggest that an RPB's need to comply with the APA will depend both on the language in each CMSP Instrument *and* on the actions that RPB signatories take to implement the CMSP Instrument. The more each CMSP Instrument indicates an intent to treat the Instrument as a constraint on agency discretion, the more likely a court will treat it as a legislative rule. By the same token, the more each CMSP Instrument allows flexibility in implementation and does not express intent to bind agency action, the more likely a court will view it as free from the notice and comment rulemaking requirements.

It bears repeating that if a RPB is not a federal agency, as is likely to be the case, APA requirements do not attach to the RPB even if its products meet the standard for legislative rules. However, agencies that are signatories to CMSP Instruments are still required to abide by APA requirements.

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[51] Fischman, *supra* note 46, at 125.

[52] *Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369, 1377 (11th Cir. 1983).

[53] *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (quoting A*merican Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980) (internal quotation marks omitted). *See also Pickus v. United States Board of Parole*,507 F.2d 1107, 1112-13 (D.C. Cir. 1974) (legislative rules "narrow [the decisionmaker's] field of vision" and are "of a kind calculated to have a substantial effect on ultimate [agency] decisions."); *Guardian Federal Savings & Loan Ass'n v. FSLIC*, 589 F.2d 658, 666-67 (D.C. Cir. 1978) ("If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is – a binding rule of substantive law.").

[54] Fischman, *supra* note 46, at 126-27.

[55] *Id*.

Congressional Mandate

Finally, Fischman asks whether an agency's policy instrument "emanates from a congressional mandate."[56] If an agency lacks a specific congressional mandate for issuing a particular policy instrument, courts may be less likely to find that instrument to be a substantive rule.[57]

Arguably, the "congressional mandate" factor weighs against a holding that the adoption of a CMSP Instrument is a legislative rulemaking: because there is no CMSP statute regarding CMSP, the RPBs lack authority to issue CMSP Instruments as substantive rules. A court would more likely apply this factor to find that RPB signatory action *implementing* the elements of a CMSP Instrument constituted a legislative rulemaking under the agency's existing authorities.

Broadly speaking and for the reasons listed above, it appears unlikely that the CMSP Instruments in their entirety would be deemed legislative rules that require notice and comment rulemaking. Depending on the implementation aspects of the CMSP Instruments, however, notice-and comment rulemaking requirements could be triggered for substantive management actions that are spelled out in the instruments. As we discuss above, the more likely outcome is that agencies would design legislative rules, through notice and comment rulemaking processes, to implement the CMSP Instruments. For example, the National Marine Fisheries Service could promulgate legislative rules, pursuant to its authority under the Magnuson-Stevens Fishery Conservation and Management Act, that also conform to elements of the CMSP Instruments. Whether multiple agencies could develop regulations implementing CMSP in a coordinated manner without being required to meet APA requirements deserves further investigation.

3. Final Agency Action

Under the APA, only final agency actions are subject to judicial review.[58] In this section, we consider the general question of whether the adoption of one or more CMSP Instruments could represent final agency action. We also consider whether courts could find that the adoption of some

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[56] *Id*. at 128.

[57] *Id*. (citing *Wilderness Society v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006) ("the fact that the [policy] does not emanate from a congressional mandate further supports the conclusion that it was not meant to establish binding norms.")). *See also McGrail & Rowley v. Babbit*, 986 F. Supp. at 1394.

[58] 5 U.S.C. § 704. We note, however, that the finality of an agency action under the APA does not necessarily make the action ripe for review. For example, the Supreme Court has held that the U.S. Forest Service's mere adoption of a Forest Plan, pursuant to the National Forest Management Act of 1976, was not ripe for review. The Court noted that under then-existing regulations, Forest Plans "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732 (1998). In dicta, however, the Court noted that certain elements of a Forest Plan, such as a final decision to close an area to off-road vehicle use, *could* create an injury that would be ripe for review. *Id.* at 738-39.

CMSP Instruments were final agency actions under the APA, even if the Instruments explicitly stated that they did not represent final agency action.

According to the Supreme Court, an agency action is considered final if it satisfies two conditions: "[f]irst, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[59] The following cases are examples of how courts have ruled on this issue.

In *Oregon Natural Desert Association v. United States Forest Service* (2006), the Ninth Circuit held that the Forest Service's adoption of its annual operating instructions constitute final agency action because the Forest Service uses those instructions as part of its decision-making process regarding the management of grazing allotments. [60] The instructions also "represent[ed] the consummation of the process and result[ed] in the imposition of enforceable rights and obligations on the permittee."[61]

By contrast, in *Fairbanks North Star Borough v U.S. Army Corps of Engineers* (2008) the Ninth Circuit found no final agency action when the Army Corps of Engineers decided that the plaintiff's property contained wetlands subject to the Clean Water Act's dredge and fill regulation, because the Corps decision "did not impose an obligation, deny a right, or fix some legal relationship." [62]

In applying the Ninth Circuit's holdings, the District of Arizona in *Defenders of Wildlife v. Tuggle* (2009) addressed the question of whether the adoption of a Standard Operating Procedure (SOP) pursuant to an MOU was a final agency action under the APA.[63] This case is of particular interest to the design of the CMSP process because, while only the U.S. Fish and Wildlife Service was named as a defendant, the instruments in question were an MOU and its implementing SOP with federal, state, tribal, and local agency signatories.

In *Defenders of Wildlife*, the plaintiffs claimed that the MOU and the issuance of SOP 13—an instrument used to implement an MOU—amounted to a final agency action that violated NEPA and the ESA requirements.[64] The MOU stated that it did "not create or establish any substantive or procedural right, benefit, trust responsibility, claim, cause of action enforceable at law, or equity in any administrative or judicial proceeding."[65] The Fish and Wildlife Service described the MOU as "merely an

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[59] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted).

[60] 465 F.3d 977 (9th Cir. 2006)

[61] *Id.* at 986.

[62] 543 F.3d 586, 597 (9th Cir. 2008) (citing *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990)).

[63] 607 F. Supp. 2d 1095 (D. Ariz. 2009).

[64] *Id.* at 1097-98.

[65] *Id.*

agreement that establishes a framework for adaptive management" and claimed that it was neither the consummation of a decision-making process nor a binding agreement.[66]

Standard Operating Procedure 13, however, "expressly" stated that it superseded aspects of an existing interagency management plan, which itself was referenced in Fish and Wildlife Service regulations.[67] The court found that "[a]s its purpose was to supersede [the official management plan], SOP 13 can be nothing less than the [official management plan]." The court found SOP 13 and the MOU to be inseparable elements of the same decision-making process; together, they marked the "consummation of the agency's decisionmaking process," which established rights and obligations with regard to protocols, placed limits on discretionary program management, and shifted some agency responsibilities.[68] Therefore, the court held that the MOU and adoption of SOP 13 was a final agency action.[69]

Whether the adoption of a CMSP Instrument constituted final agency action would depend on a number of factors: on the scope of management issues that it addressed; on the RPB's (or Signatories') treatment of the Instrument as the consummation of its decision-making process; and on the changes, if any, that the Instrument would effect on agencies' or stakeholders' legal rights and obligations.

In the cases described here, the courts found final agency action where agencies, without modifying existing regulations, had "consummated" particular decision-making processes by adopting policy instruments with concrete legal effects. In the course of conducting and implementing CMSP, RPBs and their signatories will certainly come to points at which their decisions could be said to consummate stages of the planning process. The question will then be whether particular policy instruments, such as the CMSP Instruments themselves, would be dispositive as to anyone's legal rights and obligations; if so, their adoption may be considered final agency action.

One argument is that the lack of a statutory mandate forecloses any possibility that the RPBs or signatories could use a CMSP Instrument to change any legal rights or obligations. On the other hand, if CMSP operates as a conglomeration of multiple agencies' regulatory processes under existing laws, a court might well treat the adoption of a CMSP Instrument as final agency action. Moreover, along lines similar to those in *Tuggle*, an individual agency could *implement* a CMSP Instrument by adopting a policy or regulatory instrument that effected real changes to legal rights and obligations. In that case, as in *Tuggle*, the initial policy statement (e.g., the CMS Plan) might come under court scrutiny.

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[66] *Id.* at 1107.

[67] *Id.* at 1110 ("*it supersedes relevant sections of the 1998 Mexican Wolf Interagency Management Plan reference[d] in the Mexican Wolf Final Rule (50 C.F.R. 17.84(k))*.") (emphasis in original).

[68] *Id.* at 1113.

[69] *Id*.

4. Compelling Action, Setting Aside Decisions, and Deference

Whether courts would enforce any of the CMSP Instruments is an important issue. Uncertainties include the weight that a court would afford the Development Agreements, Work Plans, and CMS Plans; whether a court would compel an agency to implement a CMSP Instrument; and whether a court would deem an agency's implementation or lack of implementation of a CMSP Instrument to be a violation of law under the APA's "arbitrary and capricious" standard of review.

Section 706 of the APA authorizes courts to "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…" Whether a court would consider CMSP Instruments to be enforceable under APA Section 706 will depend on the Instruments' contents and on their intended effects on agencies' decisions. The mere adoption of a CMSP Instrument would not automatically create a legally binding and enforceable commitment: as we discuss below, even when statutes have required agencies to adopt management plans, courts have held that agencies are not necessarily required to implement them.

Compelling Action

It seems unlikely that a court would compel an agency to implement a CMSP Instrument unless the Instrument merely reiterated the agency's existing statutory obligations or indicated the agency's intent to make a binding commitment.

In *Norton v. Southern Utah Wilderness Alliance* (*SUWA*) (2004), the Supreme Court focused on whether the Bureau of Land Management could be compelled to act for failing to implement a resource management plan developed under the Federal Land Policy and Management Act.[70] Even though the plan was mandated by statute and the plan's approval triggered NEPA's environmental impact statement requirement, the Court refused to find compel the Bureau to implement it. The Court held that "'will do' *projections* of agency action set forth in land use plans … are not a legally binding commitment enforceable under APA § 706(1)."[71] The Court did note, however, that "an action called for in a plan may be compelled when the plan merely reiterates duties the agency is already obligated to perform, or perhaps when language in the plan itself creates a commitment binding on the agency."[72]

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[70] 542 U.S. 55 (2004).

[71] *Id.* at 72, 73 (emphasis added). The *SUWA* Court declined to answer "whether the [specific] action envisioned by the statements is sufficiently discrete to be amenable to compulsion under the APA."

[72] *Id.* at 71.

As a later court noted, the *SUWA* decision "hinged on the aspirational nature of the land use plan," which imposed no specific duties to take action.[73]

The Endangered Species Act provides another such example: courts have consistently found that ESA recovery plans and implementation actions are largely discretionary and thus unenforceable. For example, the Eleventh Circuit stated in *Fund for Animals, Inc. v. Rice* (1996) that "recovery plans are for guidance purposes only."[74]

If CMS Plans and other Instruments are not required by statute, it is highly unlikely that a court would attempt to compel an agency to implement them. Courts would be more likely to enforce them if a CMSP Instrument reiterated or re-framed an agency's existing obligations or expressed an agency's intent to make a binding commitment. However, even if CMSP Instruments were not enforceable, they could be used to inform court decisions that relate to goals, objectives, or actions proposed in the Instruments.

Setting Aside Agency Action as Arbitrary and Capricious

Unless otherwise specified in another statute, informal rulemaking under the APA (which includes notice and comment rulemaking) is subject to an "arbitrary and capricious" standard of review.[75] The seminal cases defining arbitrary and capricious review are *Citizens to Preserve Overton Park v. Volpe* (1971) and *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* (1983).

In *Overton Park*, the Supreme Court considered the Federal Highway Administration's (FHA's) decision to permit a highway to be built through a public park, when statute prohibited FHA from doing unless there were no feasible and prudent alternatives.[76] The Court found that the APA's arbitrary and capricious standard of review required it to conduct a "substantial inquiry" consisting of a "thorough, probing, in-depth review" of the FHA's decision and to "consider whether the decision was based on a consideration of the relevant factors and whether there ha[d] been a clear error of judgment."[77] The Court based its analysis of the reasonableness of the FHA's decision on a review of the administrative

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[73] *Zhou v. FBI*, 2008 WL 2413896 (D.N.H. 2008).

[74] *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996); *see also Morrill v. Lujan*, 802 F. Supp. 424, 433 (S.D. Ala. 1992) (stating that "the contents of [recovery] plans are discretionary").

[75] 5 U.S.C. § 706(2)(A). This explanation is informed by JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (ABA 4th ed. 2006); WILLIAM F. FUNK & RICHARD H. SEAMON, EXAMPLES AND EXPLANATIONS: ADMINISTRATIVE LAW (2009).

[76] The Supreme Court reversed and remanded the judgment of the District Court and Sixth Circuit, which both rejected the petitioners' claim that the FHA violated relevant statutes when it authorized expenditures to construct the highway. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 406 (1971).

[77] *Id.* at 415-16 (citations omitted).

record that was before the FHA when it made its decision.[78] However, the Court also stated that the agency's decision was "entitled to a presumption of regularity"; although the Court's inquiry was "to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[79] The "searching and careful" inquiry required in *Overton Park* became known as "hard look" review.

Years later, the Supreme Court confirmed the law of hard look review when it invalidated the National Highway Traffic Safety Administration's rescission of a rule mandating the use of passive restraints in new cars. In *State Farm*,[80] the Court stated that:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.[81]

The Court also held that a more searching analysis is appropriate if there is evidence of an agency's inconsistent course of behavior. Revocation, in that case, "constitute[d] a reversal of the agency's former views as to the proper course." "An agency changing its course by rescinding a rule," wrote the Court, "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first place."[82]

These definitions of what constitutes arbitrary and capricious agency action are important to keep in mind when considering how agencies may use existing legal authority to create and implement CMS Plans and other Instruments. For example, if an agency were to rely on factors beyond its statutory authority in developing regulations to implement a CMS Plan, a court could find the agency's action to be arbitrary and capricious.

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[78] *Id.* at 419-20.

[79] *Id. at* 415, 416.

[80] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

[81] *Id.* at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1974)); LUBBERS, *supra* note 75, at 478.

[82] *Id.* at 41 (citing *Atchison, T. & S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973)).

Informing Decisions

While policy statements and interpretive rules are not entitled to *Chevron* deference,[83] courts do give them some deference. In *Skidmore v. Swift & Co.* (1944), the Supreme Court held that interpretations and opinions have persuasive authority.[84] In *Christensen v. Harris County* (2000), the Court affirmed that "interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in [*Skidmore*] but only to the extent that those interpretations have the "power to persuade."[85] Citing *Skidmore* and *Christensen*, the Court in *Alaska Dept. of Envtl. Conservation v. EPA* (2004) found that EPA's interpretation of the Clean Air Act that was presented in a guidance memo did not warrant *Chevron*-style deference but did "warrant respect."[86] In *U.S. v. Mead (2001)*, it noted that a *Skidmore* claim could be successful in a situation "where the regulatory scheme is highly detailed" and the agency "can bring the benefit of specialized experience."[87] A court, therefore, could find that an agency's interpretation of a statute as expressed in the CMSP Instruments has persuasive power when deciding a case.

B. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA) requires all federal agencies to consider the environmental effects of their proposed activities, evaluate possible alternative actions, and disclose

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[83] In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) the Supreme Court ruled that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." In *Christensen v. Harris County*, it affirmed that "a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." 529 U.S. 576, 586 (2000) (citing *Chevron*, 467 U.S. at 842-44). However, "[i]nterpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – not warrant Chevron-style deference." *Id.*

[84] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that "the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.")

[85] *Christensen*, 529 U.S. at 586.

[86] *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 487-88 (2004).

[87] 533 U.S. 218, 235 (2001) (noting a caveat to the notice and comment rulemaking requirement for *Chevron* deference: "as significant as notice and comment is in pointing to *Chevron* authority, the want of that procedure [] does not decide the case[;] we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

their considerations to the public.[88] NEPA requires federal agencies to prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."[89] Although NEPA does not require agencies to choose the most environmentally beneficial alternative, an EIS makes public the predicted environmental impacts of the preferred and other alternatives that the agency has reviewed during its decision-making process.

In this section, we look at whether the adoption of CMSP Instruments would constitute "major Federal actions significantly affecting the quality of the human environment," and thus require an EIS.

1. Major Federal Action

According to the CEQ's NEPA regulations, "major federal actions" include "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies."[90] Categories of such federal actions include "[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based; [and] [a]doption of programs, such as a group of concerted actions to implement a specific policy or plan."[91]

This section considers two questions: (1) will CMS Plans be "formal" and "official" enough to constitute major federal actions? (2) Assuming yes, is the action "federal" for NEPA purposes.

On many occasions, courts have been asked to determine whether environmental assessments and plans required by other statutes constitute major federal actions. And in many cases, courts have held that plans required by statute are such formal and official plans and are major federal actions for NEPA purposes and therefore require an environmental assessment. These include the following examples:

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[88] 42 U.S.C. § 4332 (Westlaw 2010).

[89] *Id*. at (2)(C). NEPA also includes a number of directives for how federal agencies conduct their activities, including integrating the use of natural and social sciences in planning and decision-making and giving appropriate consideration to unquantified environmental amenities and values.

[90] 40 C.F.R. § 1508.18; *see also* Memorandum from A. Alan Hill, Chairman, Council on Envtl. Quality, to Heads of Federal Agencies re: Guidance Regarding NEPA Regulations (1983), *available at* http://www.nepa.gov/nepa/regs/1983/1983guid.htm. Many courts interpret "major" and "significantly" to have similar meanings. *See* CHARLES H. ECCLESTON, THE NEPA PLANNING PROCESS: A COMPREHENSIVE GUIDE WITH EMPHASIS ON EFFICIENCY 170 (John Wiley & Sons 1999). *See* next section for a discussion of the term "significantly."

[91] 40 C.F.R. § 1508.18.

- Issuance of a Biological Opinion under the ESA can be a major federal action.[92]
- Approval or rejection of a fishery management plan under the Magnuson-Stevens Fishery Conservation and Management Act is a major federal action.[93]
- Approval of land use plans under the Federal Land Policy and Management Act is a major federal action.[94]

However, when plans are not explicitly required, courts could find that planning activities are not formal plans that can be deemed major federal actions requiring NEPA review. In *Kleppe v. Sierra Club* (1976), the Supreme Court explored the NEPA requirements related to regional planning and found that regional studies and activities were not major federal actions under NEPA.[95] The Court reversed the lower court decision because "there exist[ed] no proposal for regionwide action that could require a regional impact statement."[96] In this case, the Department of the Interior had developed a programmatic EIS as part of its new *national* coal program and had undertaken several activities at the *regional* level related to developing coal resources in the Northern Great Plains region.[97] The plaintiffs filed suit claiming that an environmental assessment was required for the *regional* planning activities. The appellate court found that the agency had "contemplated" a regional plan or program, and that the regional studies amounted to "attempts to control development" on a regional scale; therefore, a NEPA analysis was required. Disagreeing, the Supreme Court stated that "the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for a major federal action."[98]

In the case of CMSP development and planning, there is no statutory basis for planning. A court could interpret this to mean that the plans do not constitute major federal actions. On the other hand, courts could find that the planning that occurs in response to an Executive Order calling upon agencies to undertake planning as part of their existing statutory duties and/or NOC calling upon regions to undertake planning would overcome the *Kleppe* line of reasoning.

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[92] *Consol. Salmonid Cases v. Locke*, 2010 U.S. Dist. LEXIS 20278 (E.D. Cal., Feb. 5, 2010) (citing *Ramsey v. Kantor,* 96 F.3d 434 (9th Cir. 1996) (stating that "[f]irst, under certain circumstances, a biological opinion may qualify as a major federal action for NEPA purposes; second, not every biological opinion is a major federal action").

[93] Ramsey v Kantor, 96 F.3d 434, 444-45 (1996). The Western District of Washington has held that federal fishery management plans "undisputedly constitute major federal actions requiring an EIS." *Greenpeace v. National Marine Fisheries Service*, 55 F. Supp. 2d 1248, 1257 (W.D. Wash. 1999). Designation of essential fish habitat also is a major federal action requiring environmental review under NEPA. *Oceana v. Evans*, 384 F. Supp. 2d 203, 237 (D.D.C. 2005).

[94] *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004)

[95] 427 U.S. 390 (1976).

[96] *Id.* at 415.

[97] *Id.* at 396-98

[98] *Id.* at 406.

In *Save Barton Creek Association v. FHA* (1992), the Fifth Circuit noted that there is "no litmus test for determining whether an action is a major federal action."[99] Beyond reviewing the NEPA regulations, courts often look at the level of federal funding and involvement in an action when determining whether it is a "major federal action." For example, in *Mineral Policy Center v. Norton* (2003), the D.C. District Court identifies three factors that the D.C. Circuit uses to discern major federal actions: (1) whether the project is federal; (2) whether it receives significant federal funding; and (3) in the case of a non-federal actor, whether his or her actions require "affirmative conduct" from a federal agency, such as the issuance of a permit.[100] The Ninth Circuit considers the level of funding and the level of federal agency "decisionmaking power, authority, and control" when determining whether an agency action is a major federal action.[101]

When considering whether the adoption of a CMSP Instrument is "federal" for NEPA purposes, two aspects CMSP processes should be analyzed separately: the NOC's development and adoption of national standards and other guidance, and the RPBs' development and adoption of regional CMSP Instruments.

Assuming that NOC standards and guidance are formal plans or official documents in accordance with CEQ NEPA regulations,[102] the issue becomes whether the standards and guidance are "federal." Using the *Mineral Policy Center* criteria, the NOC-led aspect of the CMSP process has characteristics of major federal actions under NEPA: NOC is composed of federal agencies that adopt formal plans that will guide federal agency conduct and serve as the basis for regional plans. NOC actions will be financed by the federal government. And future agency action will be based upon the NOC guidance and approval. The NOC-led aspect of CMSP also satisfies the Ninth Circuit reasoning: NOC actions will be federally funded and federal agencies will retain decision-making power and authority throughout the process of developing national standards and guidance.

The second aspect of CMSP to evaluate the "federal" question is the regional CMSP processes. The regional aspect of CMSP will include states and tribes as well as federal agencies. The presence of non-federal entities on RPBs raises the question of whether regional CMSP actions would be deemed major *federal* actions for NEPA purposes. For example, in *Glenbrook Homeowners Association v. Tahoe Regional Planning Agency* (2005), the Ninth Circuit held that the bi-state Lake Tahoe Regional Planning

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[99] *Save Barton Creek Ass'n v. Fed. Highway Admin.,* 950 F.2d 1129, 1134 (5th Cir. 1992).

[100] *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 54-55 (D.D.C. 2003) (citing *Macht v. Skinner*, 916 F.2d 13 (D.C. Cir. 1990)).

[101] *Ka Makani 'O Kohala Ohana Inc. v. Dept. of Water Supply*, 295 F.3d 955, 960-961 (9th Cir. 2002) (holding that a grant of two percent of the funding for a project and a lack of any federal decision-making authority rendered an action *not* a major federal action under NEPA). Similarly, the Ninth Circuit found no major federal action even when EPA approved a wastewater treatment plant and provided $5 million to support the facility; because water treatment plants are "intrinsically a local matter" and because the $5 million constituted only 6% of the total cost of the project, EPA did not have sufficient control over the facility to federalize it. *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1101-02 (9th Cir. 2007).

[102] 40 C.F.R. § 1508.18.

Commission was not a federal agency for NEPA purposes, so its actions could not be characterized as major federal actions.[103] One possibility, in light of *Glenbrook* and similar cases, is that that leadership from non-federal entities would remove CMSP actions from the scope of NEPA.

However, it is worth noting that the Tahoe Regional Planning Agency only includes state bodies; it does not include federal agency representatives. The RPBs that will lead the regional CMSP processes, by contrast, will include many federal agencies; a court is thus more likely to find that the RPB actions are federal actions. Further, regional CMSP efforts will likely *depend* on federal funding at their outset; under both *Mineral Policy Center* and Ninth Circuit case law, such substantial funding would lend further weight to a finding that RPB actions are major federal actions. Finally, before RPBs or their signatories implement any of the CMSP Instruments, the NOC (a federal body) must approve those instruments. It seems, then, that throughout the CMSP process, federal agencies would retain decision-making authority as part of the RPBs and through the NOC process. Therefore, as currently envisioned, it could well be argued that the adoption of regional CMSP Instruments would constitute major federal actions.

2. Significantly Affecting the Environment

Once an action has been determined to be a "major federal action" that requires NEPA analysis, the next issue is whether the action is one that "significantly affect[s] the quality of the human environment" and therefore requires an environmental impact statement.[104] As a first step, federal agencies must first decide if the project: (1) requires an EIS at the outset because it is a type of project of such magnitude that it will always require an EIS; (2) requires an environmental assessment (EA) to determine if an EIS is required; or (3) can be categorically excluded from NEPA because it has been predetermined to have no significant impact. An EA is often viewed as a mini-EIS that includes a smaller-scale analysis of potential environmental impacts in order to determine if a full-blown EIS is required. EAs result in a "finding of no significant impact" (FONSI) or a finding of significance.

The CEQ's NEPA regulations provide three helpful definitions. First, in describing the factors that contribute to a finding of significance, the regulations state that the finding "requires considerations of both context and intensity." Second, an agency's finding can encompass both direct and reasonably foreseeable indirect impacts, as well as cumulative impacts. Third, the regulations specify that an agency shall interpret the term "'human environment' comprehensively to include the natural and physical environment and the relationship of people with that environment."[105] Although there has been a great deal of litigation on the matter, there is little generalized legal guidance instructing what will or will not qualify as significant. The courts usually use similarly imprecise words such as "appreciable" and

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[103] *Glenbrook Homeowners Ass'n v Tahoe Regional Planning Agency*, 425 F.3d 611, 615-16 (9th Cir. 2005).

[104] 42 U.S.C. § 4332(2)(C).

[105] 40 C.F.R. §§ 1508.08 (defining "effects"), 1508.14 (defining "human environment"), 1508.27 (defining "significantly").

"important."[106] According to Eccleston, "guidance from the courts has been so narrowly defined that it generally lacks applicability beyond very restricted circumstances."[107]

Some categories of actions are excluded from NEPA because they do not have a significant effect on the human environment. According to CEQ regulations, agencies can identify "a category of actions which do not individually or cumulatively have a significant effect on the human environment" and exclude them from NEPA review.[108] There is one instance where an agency attempted to categorically exclude plans from NEPA review: in 2006, the U.S. Forest Service categorically excluded the adoption and amendment of Forest Plans under NFMA from environmental review under NEPA.[109] The Forest Service based this decision on the claim that plans themselves have no effect on the environment because impacts occur when specific activities are approved. Despite this attempt to categorically exclude plans from NEPA review, no other agency has undertaken this line of reasoning, and the Forest Service itself set aside the rule for other reasons.[110] Moreover, many planning and environmental assessment activities—even those conducted in pursuit of conservation objectives—require EISs: courts have held that Biological Opinions under the ESA and Fishery Management Plans under the MSA require EISs.[111]

The significance finding will rest, in part, on the nature of CMSP Instruments. For example, a Development Agreement that simply lays out the obligations of parties participating in CMS planning is unlikely to create reasonably foreseeable significant impacts, and could potentially be categorically excluded from NEPA review. In comparison, the potential large scale ramifications of a CMS Plan mean that it is highly unlikely that it would be categorically excluded from NEPA review. Therefore, agencies (or RPBs) would need to decide if CMS Plans would always require an EIS or if an EA is warranted. Because CMS Plans when implemented will likely have far reaching effects on the management of ocean resources, they are likely to be significant actions for NEPA purposes. However, such a finding will likely turn on the details of the CMS Plans and the agency actions that are expected to flow directly from the plans.

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[106] CHARLES H. ECCLESTON, NEPA AND ENVIRONMENTAL PLANNING: TOOLS, TECHNIQUES, AND APPROACHES FOR PRACTITIONERS 156-7 (2008).

[107] *Id*.

[108] See 40 C.F.R. § 1508.04.

[109] *See* Ron Bass, *U.S. Forest Service Categorically Excludes Forest Plans from NEPA*, THE IMPACT REPORT (Jan. 2007).

[110] Personal communication, April 20, 2010.

[111] *See Consol. Salmonid Cases v. Locke*, *supra* note 92, at 23-24; *Greenpeace v. NMFS,* 55 F. Supp. 2d 1248, 1269-72 (W.D. Wash. 1999).

3. Exceptions

Few judge-made NEPA exceptions exist, and a brief review of these exceptions demonstrates that they would not apply to CMSP.

First, some courts have held that certain conservation-focused actions (e.g., listing a species[112] or designating critical habitat under the ESA[113]) do not require NEPA analysis. The courts are split on the existence and application of this exception.[114] As conceived by the Task Force, CMSP will affect a wide variety of human activities, some of which could negatively impact the marine environment. CMSP is thus more than a conservation program. Given the relative narrowness of the exception for conservation programs, and uncertainty about the precise nature of CMSP, it seems unreasonable to assume going forward, that this exception would apply to CMSP.

A judge-made doctrine, the "functional equivalence doctrine," renders EIS requirements inapplicable if an agency would fulfill NEPA policies by complying with its own substantive and procedural requirements.[115] While the doctrine has been applied to EPA and the Coast Guard, no other agencies have enjoyed the exception. Therefore, even though aspects of CMSP would likely have features in common with EIS requirements,[116] the narrow application of this doctrine, and the fact that environmental assessment would not proceed under a specific statutory mandate, make it unlikely that a court would consider aspects of CMSP the functional equivalents of a NEPA process.

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[112] *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981).

[113] *Douglas County v. Babbitt*, 48 F.3d 1495, 1507 (9th Cir. 1995).

[114] *Compare Douglas County, 48 F.3d.* at 1507 (finding that NEPA analysis is not required for critical habitat designation) *with Catron County Bd. of Comm'rs v. FWS*, 75 F.3d 1429, 1436 (10th Cir. 1996) (requiring NEPA analysis for such designations).

[115] For a discussion of this doctrine, *see* Jonathan M. Cosco, *NEPA for the Gander: NEPA's Application to Critical Habitat Designations and other "Benevolent" Federal Actions*, 8 DUKE ENVTL. L. & POL'Y FORUM 345, 356-58 (1998). This doctrine is based on the principle that a general rule does not apply when there is a more specific rule governing the issue. *Id.* The functional equivalence doctrine generally provides a narrow exception: it has been applied most frequently to EPA actions and rarely to other agency actions. Also, many planning and environmental assessment activities require EIS development under NEPA, including the issuance of Biological Opinions in some cases and the development of fishery management plans. *Consol. Salmonid Cases v. Locke*, 2010 U.S. Dist. LEXIS 20278 (E.D. Cal., Feb. 5, 2010); *Greenpeace v. National Marine Fisheries Serv.,* 55 F. Supp. 2d 1248 (W.D. Wash. 1999). According to the D.C. Circuit, "compliance with NEPA's … requirements has not been considered necessary when the agency's organic legislation mandates procedures for considering the environment that are 'functional equivalents' of [NEPA's] process." *American Trucking Assoc. v. EPA*, 175 F.3d 1027, 1042 (D.C. Cir. 1999).

[116] For instance, in the Interim Framework on Effective CMSP, the Task Force recommends regional assessments that include physical and ecological conditions and parameters, anticipated human impacts on the relationship and linkages within and among ecosystems, ecosystem services, and spatial distribution and compatibilities/conflicts of current and emerging ocean uses. The Task Force also recommends that the RPBs engage in an analysis of alternative future use scenarios to assess, forecast, and analyze tradeoffs and cumulative impacts and benefits. Interim Framework, *supra* note 2, at 15-16.

C. *ENDANGERED SPECIES ACT CONSULTATION*

Brief Overview

In this section, we briefly consider whether aspects of the CMSP process would trigger the Endangered Species Act (ESA) consultation requirements. The ESA[117] was enacted in 1973 to protect endangered and threatened species and their habitats. Under the ESA, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) may list species as endangered or threatened on the basis of their biological status and threats to their existence.[118] Once a species is listed, FWS and NMFS must designate the critical habitat of the species based on the "best scientific data available," taking into account the economic and national security impacts of a listing.[119] With a few exceptions, ESA prohibits any action that causes a "take" of a listed species, as well as any kind of commerce in listed species.[120] The ultimate goal is to "recover" listed species.[121]

The ESA requires all federal agencies to consult with FWS and NMFS to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the existence of a listed species or adversely modify the species' designated critical habitat.[122] To determine whether formal consultation is required, the agency determines whether any listed, proposed, or candidate species may be present in the area.

If the proposed action is a "major construction action,"[123] and if a listed species may be present, then the agency must conduct a biological assessment.[124] Biological assessments are intended to determine whether any endangered or threatened species or critical habitats are likely to be affected by the proposed action. If the proposed action is not a "major construction action," the agency is not required to conduct a biological assessment; it can still choose, however, to engage in informal consultation with FWS or NMFS to determine whether formal consultation is required.[125] If either the biological assessment or the informal consultation shows that the action is likely to result in adverse

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[117] 16 U.S.C. § 1531 *et seq*.

[118] *Id*. § 1533(b).

[119] *Id*. § 1533(a)(3), (b)(2).

[120] *Id*. § 1538(a)(1).

[121] *Id*. § 1533(f)(1); U.S. Fish & Wildlife Service, ESA Basics (2009), *available at* http://www.fws.gov/endangered/factsheets/ESA_basics.pdf.

[122] *Id*. § 1536(a)(2).

[123] ESA regulations define a major construction action as "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in [NEPA]." *Id.* § 50 C.F.R. § 402.02.

[124] 16 USC § 1536(a). If the Secretary of the Interior advises—or the assessment concludes—that only species proposed to be listed, or candidates to be proposed are present, then no biological assessment is required. However, the agency must still informally confer with FWS and/or NMFS. 50 C.F.R. § 402.12(d), (k).

[125] 50 C.F.R. § 402.13.

impacts to listed species or critical habitat, then the agency must undertake formal consultation with FWS or NMFS.[126]

If formal consultation is required, the federal agency provides detailed information to FWS or NMFS about the proposed activity and its potential effects. FWS or NMFS then develops a biological opinion, which states "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."[127] If there is a "jeopardy finding," FWS or NFMS must recommend reasonable alternative actions for the action agency; the agency may also apply for an exemption for the proposed action.[128] Alternatively, if the activity may have adverse impacts but will not jeopardize the species' continued existence, the biological opinion may allow specified incidental take to occur during completion of the proposed action.[129]

As mentioned above, biological assessments are only required for "major construction activities." Thus, if the proposed action is not a construction (or similarly physical) activity that qualifies as a major action that significantly affects the environment, no biological assessment is required.[130]

However, the consultation requirement in general has a much more sensitive trigger. The ESA consultation process, notwithstanding the requirement that agencies prepare biological assessments for major construction actions, is triggered by "*any* action authorized, funded, or carried out by [a federal] agency."[131] An "action," in turn, "means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," and any activity "in which there is discretionary Federal involvement or control."[132] Examples include, but are not limited to: actions intended to conserve listed species or their habitat; the promulgation of regulations; the granting of licenses, contracts, leases, easement, rights-of-way, permits, or grants-in-aid; and actions directly or indirectly causing modifications to the land, water, or air.[133]

The question whether a proposed activity constitutes an "action" that triggers ESA consultation has been the subject of much litigation since the ESA was enacted. Currently, three elements inform a

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[126] If the action is not likely to adversely affect listed species or critical habitat, the consultation process concludes. 16 USC § 1536(c); 50 C.F.R. §§ 402.12(b), (k), 402.13(a).

[127] 50 C.F.R. § 402.14.

[128] 16 USC § 1536(g)-(h); 50 C.F.R. part 451. If the agency has engaged in consultation in good faith, made "a reasonable and responsible effort" to modify the proposed action or consider alternatives, conducted any required biological assessments, and not made irreversible commitments of resources, the Endangered Species Committee will consider granting an exemption if certain conditions are met.

[129] 16 USC § 1536(c); 50 C.F.R. §§ 402.14(a)-(c), (g)(4), (i)-(j).

[130] 50 C.F.R. §§ 402.12(b), 402.02 (definition of "major construction activities").

[131] 16 USC § 1536(a)(2) (emphasis added).

[132] *See* 50 C.F.R. §§ 402.02 (definition of "Action"), 402.03.

[133] *Id.*

court's analysis: whether an action is nondiscretionary; whether an action is federal; and whether there is an "action" at all.[134] We analyze these elements below.

Non-Discretionary Actions

The Supreme Court recently confirmed that nondiscretionary actions do not require ESA consultation.[135] In *National Association of Home Builders v. Defenders of Wildlife* (2007), the Court found that EPA was not required to consult with FWS or NMFS when it delegated NPDES permitting authority to states because the delegation was nondiscretionary and required by statute.[136] In the context of CMSP, no federal statute requires agencies to create or implement CMS Plans or other Instruments, so there is no chance that a court could find that the adoption of a CMSP Instrument is a non-discretionary action on statutory grounds. A question for further analysis is whether an Executive Order directing federal agencies to implement CMS Plans to the extent allowed by existing law would be considered non-discretionary.

The "Federal" Action Requirement

An action can be considered federal either if it is directly undertaken by a federal entity, or if it is a federally-approved or -assisted nonfederal activity. As foreseen by the Task Force, RPBs would include substantial federal representation. Moreover, federal agencies are likely to implement portions of CMSP Instruments through various planning and regulatory activities. In either case, a court would likely consider important parts of the CMSP process to be "federal" for ESA purposes.

The "Action" Requirement and Plans as Actions

The ESA's definition of "action" encompasses a wide range of federal activities, including activities that might have only indirect effects on listed species. While this definition is seemingly broad enough to encompass CMS Plans and other Instruments, the question of whether the "action" definition can actually be used to force Section 7 consultations for large-scale agency plans and programs is a disputed one.

In *Pacific Rivers Council v. Thomas* (1994), the Ninth Circuit held forest management plans to be agency actions requiring ESA consultation, stating that "there is little doubt that Congress intended to

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[134] *See* DONALD C. BAUR & WILLIAM ROBERT IRVIN, ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 116 (ABA 2002).

[135] *Id.* (citing and discussing *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995)).

[136] 551 U.S. 644, 665-67, 673 (2007); *see* Katharine Mapes, *Case Comment: National Association of Home Builders v. Defenders of Wildlife*, 32 HARVARD ENVTL L. REV. 263 (2008).

enact a broad definition of agency action in the ESA."[137] Similarly, in *Lane County Audubon Society v. Jamison* (1992), the Ninth Circuit found a spotted owl management guideline to be an agency action in part because it "'may affect' the spotted owl, since it sets forth criteria for harvesting owl habitat."[138] These cases suggest that an agency plan such as a CMS Plan could be considered "action" under the ESA.

However, a recent application of the ripeness doctrine to oil and gas planning may complicate the application of the ESA consultation requirements to agency plans, even if they constitute "actions." Under the Outer Continental Shelf Lands Act, the Department of the Interior engages in a planning process to establish its five-year leasing program. In *Center for Biological Diversity v. U.S. Department of Interior* (2009), the D.C. Circuit found that a challenge to the Department of the Interior's approval of a leasing program under OCSLA without engaging in ESA consultation was not ripe for review.[139] The court held that was not ripe, in part because of the "multi-stage nature" of the leasing process.[140] It stated that:

> Regardless of whether there has been an agency action under the ESA, the completion of the first stage of a leasing program does not cause any harm to anything because it does not require any action or infringe on the welfare of animals. The welfare of animals is, by design, only implicated at later stages of the program, each of which requires ESA consultation and additional environmental review by Interior.[141]

The CMS Plans and other Instruments are intended to guide the management of U.S. waters, including the physical distribution of activities. They may therefore affect listed, proposed, or candidate species and their habitats. For instance, if RBPs use the CMSP process to create plans that establish criteria for disrupting sea-floor habitat, major CMSP decisions could be considered actions that require ESA consultation. It is therefore likely that CMSP Instruments could be found to be of the general type of agency action contemplated by the ESA and subject to its consultation requirements. The application of the ripeness doctrine may continue to be a problem, although it is hard to predict exactly how courts would rule in light of the *Center for Biological Diversity* case.

Timing

A final question is whether the CMSP process would be considered a program that gives agencies flexibility to determine when ESA consultations should occur. In 2002, the Central District of California found the Navy's Littoral Warfare Advanced Development program not subject to

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[137] 30 F.3d 1050, 1054 (9th Cir. 1994); David Mason, *Forest Guardians v. Forsgren and NFMA Planning Reform: the Return of Maximum Forest Service Discretion*, 85 DENV. U. L. REV. 653, 658-59, n.53 (2008).

[138] 958 F.2d 290, 293-94 (9th Cir. 1992).

[139] 563 F.3d 466 (D.C. Cir. 2009).

[140] *Id.* at 483.

[141] *Id.*

programmatic ESA review, stating that "an agency has substantial discretion to determine whether a 'program'… or its component elements are the more appropriate object of ESA consultation." In conclusion, the court stated:

> [Case law] suggests that an agency will be required to conduct programmatic review only if an agency's decision not to engage in programmatic or comprehensive ESA consultation would lead to inappropriate segmentation of the ESA analysis and allow actions to go forward that will inevitably result in particular consequences without subjecting those inevitable consequences to ESA review at the outset. *Thus the relevant analysis under ESA appears to be highly analogous to the analysis the Court has already engaged in with regard to programmatic NEPA review*.[142]

This language is from an unreported case from a district court. However, it raises the possibility that, when the CMSP process contemplates multiple stages of activity, ESA consultation must occur early enough to avoid "inappropriate segmentation" of the analysis. According to the court's reasoning, if CMSP triggers a tiered programmatic NEPA review process, then it may be appropriate to engage in ESA consultation in a tiered way as well.

[142] *NRDC v. U.S. Dep't of the Navy*, 2002 WL 32095131, at *24 (C.D. Cal. Sept. 17, 2002) (citing *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988)) (emphasis added).

IV. IMPLEMENTATION CONSIDERATIONS: INTERFACE WITH EXISTING FEDERAL STATUTES

In this section, we consider how CMSP can be implemented under the existing federal legal framework. A multitude of laws are important to consider for CMSP implementation.[143] Here, we examine CMSP implementation using the National Environmental Policy Act, the Magnuson-Stevens Fisheries Conservation and Management Act, the Outer Continental Shelf Lands Act, and the Federal Power Act as examples of the possibilities and potential challenges for CMSP implementation under existing authority.

A. NATIONAL ENVIRONMENTAL POLICY ACT

In the previous NEPA section, we addressed whether the development of CMS Plans and other Instruments would trigger NEPA requirements. Here, we examine how NEPA could be used to bolster the CMSP process. We examine two issues in particular: (1) tiering NEPA documents and (2) developing new NEPA regulations for CMSP.

1. Tiering

One question regarding the application of NEPA to the CMSP process is whether the NOC, the RPBs, or other federal agencies could use a NEPA "tiering" approach to structure planning-related environmental analysis. The D.C. district court recently stated its approval of NEPA tiering "in situations where completing a program 'involves many separate sub-projects and will take many years.'" The

[143] For an examination of federal authorities for CMSP, *see generally* ENVIRONMENTAL LAW INSTITUTE, MARINE SPATIAL PLANNING IN U.S. WATERS (2009), *available at* http://www.elistore.org/reports_detail.asp?ID=11377.

Tenth Circuit has approved of tiering "where the specificity that NEPA requires is not possible until concrete specific proposals are submitted."[144]

Not all courts approve of tiering to the same extent, however. The Ninth Circuit has specified that NEPA regulations only permit tiering from an EIS to another EIS; an EIS could not be tiered off of a non-NEPA document, such as a national forest management plan, in addition to the document's accompanying EIS.[145]

Benefits associated with tiering include reducing redundant analyses (through incorporation by reference) and improving cumulative effects assessments and comprehensive mitigation measures.[146] One concern about tiering is the possibility that points of analysis can deferred as unripe at early stages of the NEPA process, only to be superficially covered or even skipped over at later stages.[147] "The public is concerned that when tiering occurs the issues are vaguely described at the programmatic level and then not fully explored or refined at the site-specific level."[148]

The comprehensive cross-sector planning embodied by the CMSP process is the type of coordinated program that NEPA tiering is meant to facilitate. NEPA charges the federal government with "attain[ing] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."[149] A 2003 NEPA Task Force, reporting on strategies to modernize NEPA, highlighted the need for federal, state, and local agencies and tribal representatives to collaborate on cross-jurisdictional issues.[150]

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[144] *Wilderness Society v. Salazar*, 603 F. Supp. 2d 52, 61-62 (D.D.C. 2009) (citing *Nevada v. Dep't of Energy*, 457 F.3d 78, 91 (D.C. Cir. 2006); *Park County Resource Council, Inc. v. Dep't of Agriculture*, 817 F.2d 609, 624 (10th Cir. 1987)).

[145] *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 810 (9th Cir. 1999) (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998)).

[146] As stated in CEQ's NEPA regulations:

> Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

40 C.F.R. § 1502.20. *See also* NEPA TASK FORCE, REPORT TO CEQ: MODERNIZING NEPA IMPLEMENTATION: THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY 35 (2003), *available at* http://ceq.hss.doe.gov/ntf/; Bureau of Land Management, *Understanding the Differences between Programmatic and Project-level NEPA*, at 22 (presentation undated), *available at* gttp://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/presentations.Par.64982.File.pdf/Differences_Between_Programmatic_and_Project-level_NEPA.pdf.

[147] For example, in *Shenandoah Valley Network v. Capka*, a case involving high-speed rail in Virginia, the plaintiffs unsuccessfully "challenge[d] [an agency's] use of tiering in the development of the I-81 improvement plan, alleging that the tiering concept is a subterfuge to avoid compliance with NEPA." The court did not find arbitrary the agency's decision to issue a Tier 1 record of decision before a state study on the issues had been completed. 2009 WL 2905564, at *8 (W.D. Va. Sept. 3, 2009).

[148] NEPA TASK FORCE, *supra* note 146, at 38 (2003).

[149] 42 USC § 4331(b)(3).

[150] NEPA TASK FORCE, *supra* note 146, at 39 (2003).

Developing an EIS at an early stage of the CMSP process could result in more comprehensive analyses, as well as efficiency gains, when NEPA review of project-level actions tiers from the broader EIS. One idea is that a Tier 1 analysis would look at area-wide or program-wide cumulative environmental impacts and the mitigation measures that might effectively constrain them. A Tier 2 analysis would then focus "on those issues and mitigation measures specifically relevant to the narrower action but not analyzed in sufficient detail in the document."[151]

For CMSP, the tiering process could include the following stages: (1) after the NOC is formed, completing an EIS for the national CMSP program; (2) completing an EIS for each regional CMS Plan; and (3) completing EISs as necessary for CMS Plan implementation actions. In such a tiered review system, a national-level assessment could analyze, for the CMSP Framework as a whole, the principles and objectives that RPBs should prioritize and the mitigation strategies that they should adopt in regional CMS Plans. In turn, the CMS Plans could guide the scoping of more specific NEPA reviews.

2. New Regulations

A second question regarding the application of NEPA to CMSP is whether the Council on Environmental Quality (CEQ) could promulgate NEPA regulations designed specifically to structure parts of the CMSP process. In the *Interim Report of the Interagency Ocean Policy Task Force*, the Task Force recommends that the CEQ serve as one of the Co-Chairs of the NOC. In addition to its Task Force and NOC responsibilities, CEQ is responsible for developing NEPA regulations.[152] Serving this dual role could provide CEQ an opportunity to create NEPA regulations designed specifically for CMSP. New regulations could address the levels of NEPA analysis that would be appropriate for each stage of the planning process; flesh out a tiering approach; and provide stronger linkages between CMSP and the actions that agencies use to implement it.

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[151] Department of the Interior, Bureau of Land Management, NEPA Handbook H-1790-1 at 27 (2008), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf

[152] *See* Exec. Order No. 11514, Protection and Enhancement of Environmental Quality (Mar. 5, 1970), *as amended by* Exec. Order No. 11991 (May 24, 1977), *available at* http://ceq.hss.doe.gov/nepa/regs/eos/eo11514.pdf.

B. MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

1. Overview

The Magnuson-Stevens Fishery Conversation and Management Act (MSA) governs fishing in the U.S. exclusive economic zone (EEZ).[153] It establishes eight regional fishery management councils (RFMCs) that develop fishery management plans (FMPs) for each fishery that requires conservation and management, FMP amendments as needed, and implementing regulations.

The National Marine Fisheries Service (NMFS) reviews proposed FMPs and regulations for their consistency with the MSA, the FMP (for regulations), and other applicable laws.[154] FMPs must be consistent with the following MSA provisions, among others:

- National standards, including requirements that FMPs achieve optimum yield and prevent overfishing,[155] "be based on the best scientific information available,"[156] minimize bycatch to the extent practicable,[157] and "promote the safety of human life at sea;"[158] and
- The requirement to designate essential fish habitat (EFH) and "minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat."[159]

NMFS regulations provide that FMPs should identify habitat areas of particular concern (HAPCs) based on the importance and rarity of the habitat, its sensitivity to human impacts, and the extent of development activities stressing the habitat.[160] FMPs may close areas to fishing, limit the times when fishing can occur, and restrict the gear used.[161]

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[153] 16 U.S.C. §§ 1801-1891d.

[154] *Id.* § 1852(h)(1), 1851; 1854(a)-(b); *see also* §§ 1801(b)(4), 1853(a)(1)(C).

[155] *Id*. § 1851(a)(1) (national standard 1).

[156] *Id.* § 1851(a)(2) (national standard 2).

[157] *Id.* § 1851(a)(9)(national standard 9).

[158] *Id.* § 1851(a)(10) (national standard 10)

[159] *Id.* § 1851 (a)(7).

[160] 50 C.F.R. § 600.815(a)(8).

[161] *See* 16 U.S.C. § 1853(b)(2)(A), (b)(4).

The MSA also requires federal agencies to consult with NMFS concerning actions or proposed actions that "may adversely affect" EFH.[162] RFMCs may, and *must* in cases involving anadromous fisheries, comment on these activities.[163] If NMFS determines that the action or proposed action "would adversely affect any EFH," the federal agency proposing the action will recommend measures to conserve the habitat, which NMFS will respond to in writing.[164]

NMFS has developed guidelines concerning how to implement the national standards and other FMP requirements,[165] which the MSA explicitly provides "do not have the force and effect of law."[166] To date, NMFS regulations and interpretive guidance have narrowly focused on fisheries. NMFS could facilitate the incorporation of CMS Plans into fisheries management by amending its guidance to be more comprehensive.

After reviewing the FMP or amendment and implementing regulations for consistency with the MSA and other statutes, NMFS approves, partially approves, or rejects them. The agency "does not have authority to unilaterally substantively modify or add to the [RFMC]'s proposed plan or the implementing regulations."[167] If NMFS partially or completely disapproves a proposed FMP or regulation, it must issue recommendations as to how the RFMC can revise the proposal to bring it into compliance.[168] If the RFMC does not submit a revised plan for approval, NMFS may prepare an FMP itself.[169]

2. Participation in the CMSP Process

NOAA, and possibly NMFS, would likely participate in RPBs, sign the CMSP Instruments, and use their resources to help develop and implement the CMS Plan. Even if NMFS is not a signatory, it will act in accordance with NOAA's decisions.

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[162] *Id*. § 1855(b)(2).

[163] *Id.* § 1855(b)(3).

[164] *Id.* § 1855(b)(4).

[165] *See, e.g.*, 50 C.F.R . §§ 600.315 (national standard 2), 600.815 (EFH).

[166] 16 U.S.C. § 1851(b).

[167] *Fishermen's Finest, Inc. v. Honorable Carlos M. Gutierrez*, 2008 WL 2782909 (W.D. Wash. July 15, 2008) (citing *Oceana, Inc. v. Evans*, 2005 WL 555416, *26 (D.D.C. Mar. 9, 2005), *Assoc. Fisheries of Me. v. Evans*, 350 F. Supp. 2d 247, 253 (D.Me. 2004) ("Although the Act gives the Secretary certain powers that allow him to influence policy [], he is generally obliged to implement and enforce the management plans and amendments designed by the regional councils. The Secretary is even more constrained once he has approved an FMP or amendment proposed by a council.")); *Connecticut v. Daley*, 53 F. Supp. 2d 147, 160-61 (D. Conn. 1999) (the Act "is clear that when the Secretary is presented with proposed amendments and regulations, he does not have the independent authority to, *sua sponte*, add a regulation that is inconsistent with the proposal from the Council and Commission.").

[168] *Id.*; 16 U.S.C. §§ 1854(a)(3), (b)(1)(A)-(B).

[169] 16 § 1854(c)(1)(B).

Since the RMFCs are technically advisory bodies, it is unlikely that they will serve on RPBs or sign CMSP Instruments. Nevertheless, there are many ways in which the RMFCs and their members can be significantly involved in CMSP. The Councils must establish scientific and statistical committees (SSCs) that assist them in evaluating scientific information and that "shall provide … ongoing scientific advice for fishery management decisions."[170] SSC members could participate in the advisory bodies to the NOC and RPBs; they could also use information from the CMSP process as a basis for fishery management measures. Members of state governments who serve on the RFMCs could also serve on the Governance Advisory Council, the RPBs, or other CMSP bodies.

3. Force and Effect of the CMSP Process and Resulting Plans

National Standard 1 specifies that the conservation and management measures in an FMP must achieve "optimum yield" (OY) on a continuing basis, while preventing overfishing.[171] OY, as defined by the Act, is the amount of catch that provides the greatest total benefit to the country, and is equivalent to the maximum sustainable yield (MSY) "as reduced by any relevant social, economic, of ecological factor."[172] The wording of National Standard 1 and the definition of OY suggest that a broad range of factors could affect the determination of OY; indeed, NMFS guidelines[173] currently define the first part of OY, "benefits to the nation," to include 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.[174] NMFS guidelines currently restrict the definitions of "social, economic, and ecological factors" to narrow fishing-related concerns.[175] Because the guidelines are "interpretations" of statutory mandates and inherently contain some flexibility, NMFS could make them consistent with both MSA requirements and the provisions of a broader CMS Plan. Also, new guidance interpreting National Standard 1 could allow RMFCs to develop FMPs in conformance with broader aspects of CMS Plans.

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[170] *Id.* § 1852(g)(1)(A)-(B).

[171] The MSA and related regulations specify the proper methodology for determining OY using various management measures. *See* 16 U.S.C. § 1852(h)(6); 50 C.F.R. §§ 600.310(b)(2)(v)(D), (e)(3)(2), (f)(2)-(7), (g); NMFS, Office of Sustainable Fisheries, Proposed Revisions to the National Standard 1 Guidelines (June 2008), *at* http://www.nefmc.org/press/council_discussion_docs/June2008/ACLs_Proposed-NS1Rev_6-2-08_final-NO-notes.pdf. The D.C. Circuit has held that FMPs must have at least a fifty percent chance of obtaining set targets. *NRDC v. Dale*y, 209 F.3d 747, 754 (D.C. Cir. 2000).

[172] 16 U.S.C. § 1802(33).

[173] As required by the MSA, the Secretary of Commerce has established guidelines to help RFMCs design FMPs that comply with the ten National Standards delineated within the Act. The guidelines do not have the force or effect of law, but they "are intended as aids to decisionmaking" and "summarize Secretarial interpretations that have been, and will be, applied." 16 U.S.C. § 1851(b); 50 C.F.R. § 600.305(a)(3). "The guidelines are intended as aids to decisionmaking; FMPs formulated according to the guidelines will have a better chance for expeditious Secretarial review, approval, and implementation. FMPs that are in substantial compliance with the guidelines, the Magnuson-Stevens Act, and other applicable law must be approved." *Id*.

[174] 50 C.F.R. § 600.310(e)(3)(iii).

[175] *Id*. §§ 600.310(e)(1)(i)(A), (e)(1)(iv), (e)(3)(iv).

As noted above, FMPs must be based on the best scientific information available.[176] During the CMSP process, preliminary information, analysis, and mapping could be provided to the RFMCs, their subcommittees and staff (including SSCs) and NMFS so that FMPs reflect the data underlying each CMS Plan before it is certified. Once a CMS Plan is certified, it and the supporting documentation could be considered to represent the best scientific information available and thus serve as the basis for FMPs pursuant to National Standard 2.

FMPs must identify EFH and practicable methods for minimizing any adverse fishing impacts on it, as well as "other actions to encourage the conservation and enhancement of such habitat."[177] The regulatory definition of "adverse effect" broadly encompasses direct or indirect changes and harm to other species and ecosystem components that negatively impacts EFH. Importantly, 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." [178] If fishing activities are adversely effecting EFH, FMPs must contain provisions to "prevent, mitigate, or minimize [them], to the extent practicable,"[179] as well as identify non-fishing related activities that may adversely affect EFH.[180]

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. [181]

In the event that NMFS disapproves a plan as inconsistent with the MSA or other law, NMFS's recommendations to the RFMCs could be based on a CMS Plan as supported by the MSA's conservation and management provisions. If an RFMC were resistant to NMFS's recommendations, NMFS could continue to disapprove the proposed plan, amendment and/or regulations; given sufficient resistance and time, it could develop its own FMPs that were compliant with CMSP.

In 2007, the MSA was amended to include a provision calling for a study "on the state of the science for advancing the concepts and integration of ecosystem considerations in regional fishery

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[176] *See* 16 U.S.C. § 1851(a)(2).

[177] 16 U.S.C. §§ 1801(b)(7), 1802(10); 50 C.F.R. § 600.815(a)(1)(iv)(E); 16 U.S.C. § 1853(a)(7).

[178] 50 C.F.R. § 600.810(a).

[179] *Id.* § 600.815(a)(2)(ii).

[180] *Id*. § 600.815(a)(4) (which may include, but is not limited to: "dredging, filling, excavation, mining, impoundment, discharge, water diversion, thermal additions, actions that contribute to non-point source pollution and sedimentation, introduction of potentially hazardous materials, introduction of exotic species, and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH").

[181] *See id.* § 600.815(b) regarding the identification of measures for protecting EFH and HAPC.

management."[182] The resulting study called for the establishment of fishery ecosystem plans (FEPs), which would integrate ecosystem principles and goals by specifying the physical, biological, and human-related data that the RFMCs and NMFS need to manage fisheries, as well as the means by which they could obtain that data in the course of implementing management policies. FEPs are intended to provide a method for integrating the FMPs within each region.[183] If a RFMC chose to develop an FEP, such a plan could be an ideal method for applying a CMS Plan to fisheries management. The CMSP process could serve to build an informational foundation for FEPs, and FEPs could apply the decisions in the CMS Plan in the fisheries context.

C. OUTER CONTINENTAL SHELF LANDS ACT

The Secretary for the Department of the Interior (DOI) is slated to be a member of the NOC and is tasked with administering the Outer Continental Shelf Lands Act—a responsibility he delegates to the Minerals Management Service (MMS).[184] OCSLA governs oil and gas, alternative energy, and non-energy mineral development and production on the Outer Continental Shelf (OCS).[185]

1. Oil and Gas Development

The oil and gas leasing process consists of a mandatory sequence of planning and development actions: (1) the creation of a five-year leasing program, (2) individual lease sales, (3) exploration, and (4) development and production. Because MMS has significant discretion at each step, it may have the flexibility to make decisions that conform to aspects of CMS Plans.[186]

One opportunity to incorporate CMSP into the OCSLA process is to use CMS Plan information in the environmental analyses that MMS must conduct throughout the leasing process. The Supreme Court has noted that "Congress has []taken pains to separate the various federal decisions involved in formulating a leasing program, conducting lease sales, authorizing exploration, and allowing

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[182] 16 U.S.C. § 1882(f)(1).

[183] 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.

[184] MMS, About the Minerals Management Service: OCS Lands Act History, *available at* http://www.mms.gov/aboutmms/OCSLA/ocslahistory.htm; The White House Council on Environmental Quality, Interim Report of the Interagency Ocean Policy Task Force 18 (Sept. 2009), *available at* http://www.whitehouse.gov/assets/documents/09_17_09_Interim_Report_of_Task_Force_FINAL2.pdf.

[185] 43 U.S.C. §§ 1331-1356a; 1337(p).

[186] Because this paper was prepared prior to the Deepwater Horizon oil spill, it does not consider any executive or legislative actions related to OCSLA and MMS taken after May 1, 2010.

development and production;" and that "[t]he stated reason for the four part division was to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production."[187] Accordingly, MMS's analyses grow narrower in scope as the OCSLA process continues.[188] CMSP could help MMS front-load the environmental review process with high quality information.

Another opportunity to incorporate CMSP into the OCSLA process is to use OCSLA's public consultation and CZMA consistency review requirements to insert CMS Plan alternatives and information into MMS's decisions. Consultation requirements appear at all stages of the leasing process. For activities that could impact state waters, affected state, local, and/or tribal representatives (as well as private stakeholders) could use these consultation requirements to recommend that MMS explicitly consider the contents of CMS Plans in each stage of decision-making.

Since the explosion and spill at the *Deepwater Horizon* drilling platform, the regulatory structure surrounding oil and gas leasing has come under pointed scrutiny. A variety of proposed reforms, including revision of OCSLA to put greater emphasis on environmental protection and restructuring of MMS, have been advanced. While it is probable that any such reforms would affect the intersection of OCSLA and the CMSP process, it is beyond the scope of this paper to consider the potential effects of the various proposals.

Five-Year Leasing Programs

By design, the first stage of the leasing process, the establishment of the five-year leasing program, is a comprehensive environmental, economic, and social assessment of the leasing area, albeit one with the narrow goal of facilitating oil and gas development. This stage offers significant long-term opportunities for ensuring that oil and gas activities adhere to decisions made in the course of CMSP.

For instance, when determining the location and timing of oil and gas activities in each five-year leasing program, OCSLA directs MMS to consider (1) geographical, geological, and ecological characteristics; (2) the location of other sea and seabed uses; (3) the relevant laws and policies of affected states; and (4) the relative environmental sensitivity and marine productivity of different areas. It also must balance any potential oil and gas resources against the potential for environmental damage and adverse coastal zone impacts.[189] The D.C. Circuit recently affirmed that MMS's environmental

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[187] *Secretary of the Interior v. California*, 464 U.S. 312, 340-41 (1984).

[188] The Ninth Circuit has emphasized that "[t]he tiered OCSLA process allows general analysis at the lease-sale stage, but the agency must then consider site-specific impacts before approving an individual exploration plan."*Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 825 (9th Cir. 2008) (citing *Pit River Tribe v.* U.S. *Forest Service*, 469 F.3d 768, 784 (9th Cir. 2006) and *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1135 (D. AK 1983)).

[189] 43 U.S.C. § 1344(a).

sensitivity analysis must be substantive.[190] OCSLA implementing regulations require consideration of factors such as "multiple-use conflicts"[191] and use of the "views and recommendations of Federal agencies, State agencies, local governments, organizations, industries and the general public as appropriate."[192] MMS also must invite federal agencies and affected state governors to provide suggestions on the program while it is being developed, and MMS must review the program annually.[193]

As data are collected and preliminary mapping takes place as part of the CMSP process, this information can be used to structure MMS's analysis. Once the NOC has certified a CMS Plan, MMS could incorporate the CMS Plan into its environmental sensitivity determinations, as well as its consideration of other "sea and sea-bed uses" and the laws and policies of affected states. Moreover, the consultation requirements would offer RPB Signatories the opportunity to submit and support CMS Plans at an early stage in decision-making.

Lease Sales

Following its adoption of a five-year leasing plan, but before it conducts an actual lease sale, MMS identifies specific areas that will be available for leasing. It also drafts lease stipulations and conditions to address the projected environmental impacts of the lease sale.

To inform these decisions and to meet NEPA and OCSLA requirements, MMS must conduct a wide-ranging inquiry that includes consultation with other federal agencies and consideration of multiple-use conflicts. MMS must consult with "appropriate Federal Agencies," and must consider "all available environmental information, multiple-use conflicts, resource potential, industry interest and other relevant information."[194] It also must consider comments from "States and local governments and interested parties in response to calls for information and nominations."[195] In areas that are included in the lease sale, MMS must, in consultation with "appropriate Federal agencies," develop measures, such as lease stipulations and conditions, to mitigate adverse environmental impacts. MMS must also identify any proposed stipulations and conditions in the sale notice.[196]

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[190] The court found the assessment of relative environmental sensitivity in the 2007-2012 Alaska offshore leasing program to be insufficient, and as a result found MMS's balancing of potential environmental damage, oil and gas discovery, and adverse effects on coastal areas improper. *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466 (D.C. Cir. 2009).

[191] 30 C.F.R. § 256.26(a).

[192] *Id.* § 256.26(b).

[193] 43 U.S.C. § 1344(c)-(f).

[194] 30 C.F.R. § 256.26(a).

[195] *Id*.

[196] *Id.* § 256.29(a).

MMS must also conduct an environmental study of the proposed lease area in order to assess and manage any impacts on the human, marine, and coastal environments.[197] The study "shall, to the extent practicable, be designed to predict environmental impacts of pollutants introduced into the environments and of the impacts of offshore activities on the seabed and affected coastal areas."[198] It shall also "be designed to predict impacts on the marine biota which may result from chronic low level pollution or large spills associated with [OCS] production."[199] The Ninth Circuit has held that MMS's environmental review must meet NEPA standards.[200] As with the environmental sensitivity assessment that MMS must conduct when it develops five-year leasing programs, this environmental study offers a discrete opportunity for MMS to integrate CMS Plans and information explicitly into its decisions. Once a CMS Plan has been certified, it could be used as one basis for lease stipulations or conditions necessary to protect the marine environment as provided by the plan could be recommended to be included.[201]

Beyond meeting OCSLA's requirements for environmental studies, the information-gathering, mapping, and analysis conducted for CMSP could be used to support interagency consultation and stakeholder participation in the lease sale process.[202] Agencies and CMSP participants could, for instance, use CMS Plans to identify areas that appear to be particularly appropriate or inappropriate for oil and gas leasing in light of "available environmental information [and] multiple-use conflicts."[203]

One question about the interface of CMSP and the OCSLA lease sale process is how the timing of the two processes will align. Under OCSLA, initial lease terms run from five to ten years;[204] even if CMSP and Plan implementation began in the near future, leases already sold by MMS would fall outside the reach of CMSP—at least until their terms expired and came up for renewal.

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[197] *Id*. §§ 1346(a)-(b), (e). MMS then solicits sealed, competitive bids and issues the leases, which typically have terms of 5 or 10 years but can be extended if production is still ongoing.

[198] 30 C.F.R. § 256.82.

[199] 43 U.S.C. § 1346(a)(3). The D.C. District Court held that failure to make such a prediction, when a prediction has been attempted but is not possible due to a lack of research (which is being pursued), is not fatal to the decision-making process. *North Slope Borough v. Andrus*, 486 F. Supp. 332, 359 (D.D.C. 1980), *reasoning upheld in* 642 F.2d 589 (D.C. Cir. 1980).

[200] *Village of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984) ("In sections 1346 and 1351, OCSLA requires preparation of a full environmental impact statement. At the lease sale stage, OCSLA implies this review must meet NEPA standards.") (citations omitted).

[201] 30 C.F.R. § 256.29(a).The statutory and regulatory language concerning lease stipulations or conditions only addresses adverse environmental impacts. *Id*. A universal lease stipulation requiring compliance with an eventual CMS Plan might be inappropriate given this focus. However, the definitions of "marine environment," "coastal environment," and "human environment" in OCSLA are fairly broad. *See* 43 U.S.C. § 1331 (g), (h), (i). If lease conditions or stipulations were written very generally to comport with the Plan, the MMS Director might greater discretion to approve or reject exploratory plans (see below) for consistency with the Plan.

[202] Of course, complete CMS Plans could also form part of the information base for stakeholder participation.

[203] *Id.* § 256.26(a).

[204] 43 U.S.C. § 1337(b)(2).

Two strategies could be used to bring the OCS lease sale process more in line with CMSP. Pursuant to OCSLA regulations, MMS retains the right "to reject any and all bids received for any tract, regardless of the amount offered."[205] One strategy would be to use this provision to limit the terms of pending lease sales to bring the leases' renewal timelines in sync with future cycles of the CMSP process. A second strategy might be to use this provision to delay lease sales until the first iterations of the CMSP process were complete. MMS could then use its authority to reject bids that are inconsistent with the resulting CMS Plans. Either strategy could preserve planners' options over the medium term and could make the CMSP process more meaningful with respect to OCSLA implementation.[206]

As part of its duties under OCSLA and the Coastal Zone Management Act (CZMA), MMS must prepare a publicly transparent "consistency determination" to ascertain whether the proposed sale is consistent with the enforceable coastal zone policies of affected states.[207] MMS must seek recommendations from governors and local government executives regarding the location and timing of leased activities, and must accept the governors' recommendations if they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." MMS may, but is not required to, accept the recommendations from local governments.[208]

Local and state officials could use the information developed as part of the CMSP process to inform their participation in the review of consistency determinations. Moreover, once a CMS Plan was in place, if its provisions were deemed to strike a balance between national and state concerns,[209] the Plan could serve as one basis of strong state recommendations that MMS must accept.[210]

Exploration and Development and Production

Following MMS' sale of leases to private applicants, the applicants engage in "exploration" and "development and production." CMSP could inform MMS and applicant decisions during these processes.

Under OCSLA, applicants must prepare an exploration plan (EP) for any geological, geophysical, and other exploratory activities. EPs must address the logistics of exploration[211] and must include an

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[205] 30 C.F.R. § 256.47(b). A decision to reject a bid is reviewable by the courts under the APA's "arbitrary and capricious" standard of review. *Chevron Oil Co. v. Andrus,* 588 F.2d 1383, 1391 (1979).

[206] We do not intend to provide any opinion about the legality of limited lease terms or temporary delays in the leasing process.

[207] MMS, Oil and Gas Leasing on the Outer Continental Shelf 3 (undated).

[208] 43 U.S.C. § 1345(a)-(c).

[209] We would expect this balance to emerge from the CMSP process because it would utilize the expertise and opinions of both states and federal agencies.

[210] This requirement also applies to the approval of development and production plans. See below.

[211] 43 U.S.C. § 1340.

environmental impact analysis with information about critical habitats, environmentally sensitive areas, and the likely direct and cumulative on- and offshore effects of exploration.[212] Each EP must also conform to "sound conservation practices and protect[] the rights of the lessor."[213] The Ninth Circuit has explained that when MMS assesses the impacts of each EP, "it has a duty to take a hard look at the consequences of drilling in specific sites."[214]

The Secretary of the Interior cannot approve an EP if he or she determines that it would cause serious harm or damage that "the proposed activity cannot be modified to avoid."[215] MMS will not approve an EP if it will be "unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance."[216] If the proposed exploration activities "would probably cause serious harm or damage to … fish and other aquatic life," MMS can require the project applicant to modify the activities under consideration or disapprove of the plan altogether. If an EP is disapproved on this basis, MMS may cancel the underlying lease.[217] Information or analysis developed pursuant to CMSP could help the Secretary understand which activities may cause serious harm and damage and therefore support this decision-making process.

An EP must include a consistency certification stating that the proposed activities are consistent with the state's coastal management program.[218] The state must concur (or be conclusively presumed to concur) with the CZMA consistency determination before the Secretary can grant a license or permit for the activities subject to the EP.[219] If a State objects to the consistency determination, an applicant can appeal to the Secretary of Commerce.[220] Once MMS determines that an EP is complete and complies with all necessary standards, it must send a copy to the Governors and coastal zone management agencies of any affected states, pursuant to the CZMA.[221]

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[212] 30 C.F.R. § 250.227. During the evaluation of the EP, MMS will "prepare environmental documentation under [NEPA]" and NEPA regulations. *Id*. § 250.232(c).

[213] *Id*. § 250.202(c).

[214] *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 825 (9th Cir. 2008) (finding the environmental analysis associated with MMS's approval of an exploration plan to be insufficient).

[215] 43 U.S.C. § 1340(c)(1)(A)-(B). *See id.* § 1334(a)(2)(A)(i) for the standards for canceling a lease or permit.

[216] 43 U.S.C. § 1340(g); 30 C.F.R. § 250.200-.201

[217] In that case, the lessee "shall be entitled to compensation." 43 U.S.C.s § 1340(c)(1)(B).

[218] 30 C.F.R. § 250.226(a).

[219] 43 U.S.C. § 1340(c)(2); 30 C.F.R. § 250.232(a)(1)-(2).

[220] *Id.* at § 250.235(b).

[221] *Id.* at § 250.232(a).

Following the EP phase of the OCSLA process, applicants must submit development and production plans (DPP) within five years of the lease sale in order to keep their leases.[222] Like EPs, DPPs must describe the planned work as well as any relevant environmental and safety standards. A DPP must conform to sound conservation practices, protect the rights of the lessor, not unreasonably interfere with other OCS uses, and not cause undue or serious harm or damage to the human, marine, or coastal environment.[223] If exceptional circumstances will "probably cause serious harm or damage to life (including fish and other aquatic life, to property, to any mineral deposits . . . or to the marine, coastal, or human environments," the DPP will only be approved if the danger will decrease within a reasonable timeframe and disadvantages are outweighed by project benefits.[224]

Like EPs, DPPs also are subject to CZMA consistency review: MMS cannot approve a license or permit for a DPP activity that will likely affect uses or resources within a state's coastal zone unless the State concurs (or is presumed to concur) with the consistency determination or the Secretary of Commerce makes a consistency finding or determines it is necessary in the interest of national security.[225] In addition, any affected State governor or affected local government executive may submit recommendations to the Secretary regarding a proposed DPP, just as they may submit recommendations regarding the size, timing, and location of proposed lease sales.[226] The governor or executive has sixty days after receipt of the DPP to submit his or her recommendations. The Secretary must accept the Governor's recommendations—and may accept the local government executive's recommendations—if they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State."[227]

Because MMS must assess the foreseeable impacts of specific oil and gas activities in the course of approving EPs and DPPs, both stages of approvals could serve as opportunities for MMS to incorporate CMS Plans into the leasing process. For instance, the environmental impact reviews required for EPs and DPPs could serve as vehicles for comments and information from any agencies or stakeholders involved with the CMSP process. Any NEPA analyses developed during the CMSP process could be incorporated into the NEPA analyses for EPs and DPPs (and vice versa).

Moreover, the CZMA could offer a vehicle for substantive links between CMSP and the OCSLA process. If a state were to incorporate a CMS Plan into its approved coastal management program, MMS

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[222] 43 U.S.C. § 1351. However, in the central and western planning areas of the Gulf of Mexico, applicants submit a development operations coordination document (DOCD) instead of a development and production plan. The two types of plans are subject to similar regulatory requirements. *See* 30 C.F.R. §§ 250.202, 250.204(d)(1); MMS, Leasing Oil and Natural Gas Resources, Outer Continental Shelf 29, *available at* http://www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf.

[223] 30 C.F.R. § 250.202.

[224] 43 U.S.C. §§ 1351(a), (h)(1)-(2); 30 C.F.R. § 150.204(d)(1); MMS, Leasing Oil and Natural Gas Resources, Outer Continental Shelf, at 29.

[225] 43 U.S.C. § 1351(d).

[226] *Id*. § 1345(a).

[227] *Id.* § 1345(b)-(c).

would be obliged to ensure that all proposed EPs and DPPs that might affect the state's land and water uses remained consistent with that program.[228]

2. Alternative Energy Development

MMS conducts a leasing process for alternative energy facilities, although the process differs significantly from that used for oil and gas leasing. In 2009, MMS issued regulations and initial guidelines for alternative energy development on the OCS and signed an MOU with the Federal Energy Regulatory Commission (FERC) for leasing and licensing hydrokinetic projects on the OCS.[229] As a general matter, this new regime requires applicants to conduct their alternative energy activities in a manner that protects the environment, prevents waste, and conserves the natural resources of the OCS. Applicants must avoid interfering with reasonable uses of the EEZ, high seas, and territorial seas; and consider other leases, easements, right-of-ways, and any other use of the sea or seabed.[230] The generality of these requirements provides MMS with considerable flexibility to consider multiple additional uses of the OCS and affords MMS an opportunity to make alternative energy siting consistent with CMSP.

Indeed, MMS has created a highly flexible set of legal tools to implement this leasing regime. For instance, it plans to issue leases on an individual basis via both competitive and noncompetitive processes.[231] Moreover, lease applicants have varying amounts of time to submit plans for site assessments, construction and operation, and general activities.[232] Each plan, however, must contain detailed project information that, among other things, will feed into MMS's NEPA compliance process.[233]

We note that of all the laws and regulations reviewed in this document, MMS's regulations for alternative energy leasing contain the most direct and compelling language in support of CMSP. Under these regulations, MMS has responsibility for ensuring that the authorized activities are conducted "in a manner that provides for … [c]oordination with relevant Federal agencies (including, in particular, those

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[228] If the state and the applicant cannot resolve their differences and the state continues to object, the applicant can appeal to the Secretary of Commerce, who can override the objection if he or she finds that the exploration plan is compliant with the overall purposes of the CZMA or is in the national interest. 14 U.S.C. § 1456(c)(3)(B)(iii).

[229] Depending on whether there is competitive interest in a site, alternative energy leases may be issued through a competitive or noncompetitive process. MMS, Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638, 19639 (Apr. 29, 2009); MMS, Guidelines for the Minerals Management Service Renewable Energy Framework (July 2009), *available at* http://www.mms.gov/offshore/RenewableEnergy/PDFs/REnGuidebook_03August2009_3_.pdf; Memorandum of Understanding between the U.S. Department of the Interior and Federal Energy Regulatory Commission (Apr. 9, 2009), *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf.

[230] 43 U.S.C. § 1337(p)(4).

[231] 43 U.S.C. § 1337(p); 30 C.F.R. §§ 285.112, 285.235-36, 285.605-6, 285.620-1.

[232] For commercial leases (25 years), the lessee then has up to six months to submit a site assessment plan (SAP) and five years from SAP approval to submit a construction and operations plan (COP). For limited leases for testing new technology (5 years), the lessee has six months to submit a general activities plan (GAP).

[233] 30 C.F.R. § 285.605-285.649.

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*)."[234] The regulations repeat this mandate in sections regarding required consultations with affected states' governors, executives of local governments, and Indian tribes.[235] These consultation requirements should give state, local, and tribal entities significant additional opportunities to ensure that MMS's decisions comport with the terms of CMS Plans.

3. Additional Considerations

Questions about the timing of linkages between CMSP and MMS's OCS leasing programs raise significant additional questions about the use of CMSP to inform oil and gas development more generally. According to the timeline proposed in the *Interim Framework*, the CMSP process is to begin within 18 months of the organization of the NOC. At the very earliest, CMSP will begin in December 2011—at which point MMS will already have developed its 2012-2017 leasing program.[236] It seems clear that if CMSP and OCS leasing operate on periodic schedules, they will not be conducted concurrently. While any timing difference may not inhibit the formation of links between the two programs, the question remains: assuming CMS Plans were to inform all federal programming, how would CMSP inform the next round of OCS decision-making? For instance, would a CMS Plan factor into EPs and DPPs that tier off of a five-year leasing program and lease sale, even if CMSP did not inform the development of the five-year program in the first instance?

A second question is *how* MMS should incorporate CMS Plans and other instruments into its OCS leasing decisions. With regard to alternative energy leasing, the current regulations suggest that MMS must at least consider the CMS Plans and other Instruments; it is far less certain that MMS would be *bound* by them.

As for oil and gas leasing, the role of CMS Plans in decision-making at national scales seems less clear. MMS has considerable discretion to pursue national energy production goals in most areas of U.S. waters; offshore energy development is only flatly prohibited in established protected areas such as national parks, national wildlife refuges, national marine sanctuaries, and national monuments.[237]; While MMS also has significant discretion under NEPA and OCSLA as to the information that it includes in its analyses, it remains subject to an Executive Order, E.O. 13212, that calls upon agencies and

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[234] *Id*. § 285.102(a)(5) (emphasis added).

[235] *Id*. §§ 285.102, 285.203.

[236] No additional lease sales are to occur in the Chukchi and Beaufort Seas under the 2007-2012 plan, although exploration activities will continue. The development of the 2012-2017 plan will be guided by President Obama's and Interior Secretary Salazar's recent announcement of a comprehensive strategy for offshore oil and gas exploration and development. *See* Secretary Salazar Announces Comprehensive Strategy for Offshore Oil and Gas Development and Exploration, Mar. 31, 2010, http://www.doi.gov/news/pressreleases/2010_03_31_release.cfm.

[237] 43 U.S.C. § 1337(p)(10); *see* ENVIRONMENTAL LAW INSTITUTE, MARINE SPATIAL PLANNING IN U.S. WATERS, *supra* note 143 at 28.

executive departments to take expedite the review of energy-related project permits and to accelerate their completion.[238] MMS's wide discretion, in light of this EO, provides little certainty that CMSP could guarantee the inclusion of any particular kind, depth, or source of information into OCS leasing decisions.

A third important question is whether MMS would consider *only* CMS Plans as overarching guidance when developing any subsequent leasing programs, or whether it would consider additional plans and programs with spatial components. For instance, if the RFMCs and NMFS designated EFH that a round of CMS planning did not foresee, could MMS consider the EFH as well as the existing CMS Plan in approving an Exploration Plan? Would it have to?

D. FEDERAL POWER ACT

1. Overview

The Federal Power Act (FPA) provides the Federal Energy Regulatory Commission (FERC) with the authority to license hydrokinetic projects—including wave and tidal energy projects—in both state and federal waters. FERC is an independent regulatory agency within the Department of Energy; both the FERC chairman and the Secretary of Energy are slated for inclusion on the NOC. It is unclear whether representatives of both agencies would be included on one or more of the RPBs.

2. FERC Authority to Adhere to Plans

The FPA does not contain an area-wide planning mechanism. Instead, it authorizes FERC to approve, condition, or disapprove individual projects. However, if FERC wishes to conduct its licensing in compliance with the CMS Plans, several FPA provisions could support such decision-making:

- The requirement that hydrokinetic projects be "best adapted to a comprehensive plan;"
- The requirement that FERC give "equal consideration" to power and non-power considerations when considering a project application; and
- FERC's additional authority to condition uses in "reservations."

The most useful provision for supporting and implementing CMSP is the one that gives FERC authority to require each hydrokinetic project to be "best adapted to a comprehensive plan" for improving waterways, water-power development, fish and wildlife protection and enhancement, and other beneficial public uses. If a federal or state comprehensive plan for a place already exists, FERC

[238] Exec. Order No. 13212, 66 Fed. Reg. 28357, ¶ 2 (2001).

must (1) assess the extent to which the project is consistent with it, and (2) assess whether project modifications are necessary to bring the proposed project into conformity with the plan.[239] FERC and the courts "have held the Section 10(a) standard to be [a] broad public interest standard, requiring consideration of all factors affecting the public interest."[240] Moreover, case law from the 1960s still controls on the scope of FERC's considerations. For instance, in *Green Island Power Authority v. FERC* (2009), the Second Circuit found that the FPC (FERC's predecessor) was "under a statutory duty to give full consideration to alternative plans," even if it ultimately "ha[d] no authority to command the alternative."[241]

The FERC siting process can involve a variety of plans at multiple scales, but the "plan conformance" provision has most recently been invoked by statewide planning initiatives in Maine, Washington, and Oregon. For example, in March 2008, FERC and the State of Oregon signed an MOU stating that if Oregon develops a comprehensive plan for wave energy projects within state waters, FERC will consider the extent to which proposed projects are consistent with it. FERC will also consider any terms and conditions that Oregon recommends for proposed projects. The MOU emphasizes that Oregon could submit its comprehensive plan for NOAA approval as part of its coastal management program[242]; in that case, the plan would be binding on FERC and its licensees within state waters.

Overall, it appears that FERC would be able to adhere to the designations and uses embodied in a CMS Plan when deciding whether to approve, reject, or require modification of an application for a hydrokinetic project. While what qualifies as a comprehensive plan is not clearly defined, it is likely that CMSP—the premise of which is to provide holistic regional ocean planning—would be considered to generate such plans. Moreover, to the extent CMSP directed uses compatible with hydrokinetic projects to the same sites, FERC could use its authority to facilitate compatible siting.[243] Overall, it appears FERC would be able to adhere to the designations and uses embodied in the CMS Plan when deciding whether to approve, reject, or require modification of an application for a hydrokinetic project.

A second useful provision in the FPA is the one that requires FERC not only to consider energy and development benefits when assessing a permit application, but also to "give equal consideration to the purposes of energy conservation" and the protection of fish and wildlife, recreational opportunities, and other environmental quality attributes.[244] Equal consideration is not necessarily equal treatment: as the District of Columbia Circuit has highlighted, "FERC decides how to balance the various elements

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[239] 16 U.S.C. § 803(a)(1)-(2); 18 C.F.R. §2.19. FERC must also consider recommendations from, among others, federal and state agencies that handle navigation, relevant resources (recreational, cultural, other), and affected Indian tribes. *Id.*

[240] *Green Island Power Authority v. FERC*, 577 F.3d 148, 166 (2d Cir. 2009) (citing H.R. Rep. No. 99-507, at 12 (1986)).

[241] *Id.* at 167, 167 n.13 (quoting *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965)).

[242] MOU between FERC and the State of Oregon by and through its Departments of Fish and Wildlife, Land Conservation and Development, Environmental Quality, State Lands, Water Resources, Parks and Recreation, and Energy ¶ 5 (Mar. 2008).

[243] "FERC may authorize a license to permit project property use for non-project purposes by granting applications to amend the license." *VA Timberline, LLC v. Appalachian Power Co.*, 2008 WL 269544, at *4 (W.D. Va. 2008) (citing *Union Electric Company*, 90 FERC ¶ 161249, at *61833 (FERC 2000) and *Entergy* Corporation, 80 FERC ¶ 61266, at *61962-63 (FERC 1997)).

[244] 16 U.S.C. § 797(e)

listed in the FPA"subject only to the requirements that it consider the statutory factors and "meet the threshold standards of non-arbitrariness and substantial evidence."[245] Thus, although environmental considerations do not have "preemptive force," the FPA nonetheless explicitly requires FERC to consider multiple uses.[246]

The FPA's provision for "reservations" could also be useful for CMSP. To issue a license within a reservation, FERC must determine that the license "will not interfere or be inconsistent with the purposes for which such reservation was created or acquired" and may issue conditions necessary to protect it.[247] The FPA's definition of "reservations" is very broad: in addition to tribal lands, it includes national forests, military reservations, federally owned lands and interests kept from private appropriation under public land laws, and land or interests held for public purposes.[248] This definition encompasses national monuments and parks: in the administrative law decision *Finavera Renewables Ocean Energy*, FERC found it to encompass national marine sanctuaries.[249]

Currently, hydrokinetic activities are allowed in national marine sanctuaries, national monuments, and parks within state waters.[250] In the context of CMSP, reservation designations could be used to encourage FERC to apply more stringent requirements for projects that would be located in these areas. These added requirements may provide a way for FERC to place more emphasis on the side of non-development values (such as protection and conservation) when giving "equal consideration" to power and non-power uses.

3. Additional Considerations

The provision stating that FERC permits must be "best adapted to comprehensive plans" for public benefit is mandatory: if there a comprehensive plan is in place, the FPA requires FERC to consider it. However, the statute does not specify *how* FERC's ultimate decision should account for a plan. As is true with respect to virtually all decisions by federal agencies, courts give significant deference to FERC when reviewing its decisions. The D.C. Circuit stated that "[s]o long as the Commission has examined the

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[245] *Brady v. FERC*, 416 F.3d 1, 6 (D.C. Cir. 2005).

[246] *City of Centralia, Wash. V. FERC*, 213 F.3d 742, 748 (D.C. Cir. 2000) (citing *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1480 (D.C. Cir. 1990)).

[247] 16 U.S.C. § 797(e).

[248] 16 U.S.C. § 796(2).

[249] *Finavera Renewables Ocean Energy*, 121 FERC ¶ 61,288 at ¶ 23 n.26 (Dec. 21, 2007) (Order Issuing Conditioned Original License) (citing *AquaEnergy Group LTD*, 102 FERC ¶ 61,242 at ¶ 14 (2003)).

[250] ENVIRONMENTAL LAW INSTITUTE, MARINE SPATIAL PLANNING IN U.S. WATERS, *supra* note 143 at tbl.3.

relevant data and provided a 'reasoned explanation supported by a stated connection between the facts found and the choice made,' we will defer to the agency's expertise."[251]

Finally, the length of standard license terms under the FPA could present an obstacle to "adaptive" aspects of CMSP. In addition to five- year site assessment terms and, in some cases, short-term pilot projects, hydrokinetic licenses typically last 30-50 years. MMS's leases for hydrokinetic projects on the OCS default to a 25-year term, and may be altered to fit the duration of FERC's licenses.[252] The long duration of these leases and licenses may impede the adaptability of the CMSP process.[253]

V. THE STATE-FEDERAL RELATIONSHIP

A. THE PARAMOUNTCY DOCTRINE AND THE SUBMERGED LANDS ACT

The federal "paramountcy doctrine" and the Submerged Lands Act (SLA) lay out the basic federal-state relationship in U.S. marine waters and are therefore essential considerations for the design and implementation of CMSP. From a constitutional standpoint, the federal "paramountcy doctrine" establishes federal sovereignty over U.S. marine waters and the submerged lands beneath them—including "state waters" [254]—and precludes state claims to title or jurisdiction that are inconsistent with

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[251] *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997) (quoting *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 543 (D.C. Cir. 1992). As discussed above, FERC also has significant discretion to determine the meaning of "equal consideration" with respect to a given project, as well the types of projects that might be allowed in "reservations."

[252] MMS/FERC Guidance on Regulation of Hydrokinetic Energy Projects on the OCS (April 2009), *available at* http://www.ferc.gov/industries/hydropower/indus-act/hydrokinetics/pdf/mms080309.pdf.

[253] The Task Force's *Interim Framework* emphasizes that CMSP should be an adaptive process, that learns from its mistakes and adjusts to encompass new information, which is more difficult when considering such long-term licenses and leases. Interagency Ocean Policy Task Force, Interim Framework for Effective Coastal and Marine Spatial Planning 23 (Dec. 9, 2009), *available at* http://www.whitehouse.gov/sites/default/files/microsites/091209-Interim-CMSP-Framework-Task-Force.pdf.

[254] "State waters" is defined here as the waters reaching from the lower low water mark ('the low tide line') to a line three miles seaward from that line. *See generally U.S. v. California*, 332 U.S. 19 (1947). In many of the landmark cases establishing the federal-state relationship in U.S. waters, courts referred to this area as the "territorial sea"; the legal history of the Submerged Lands Act, OCSLA, and CZMA revolved around the assumption that the territorial sea extended only 3 miles from shore. In the late 1980s, however, the U.S. expanded the formal definition of the territorial sea to include an area up to 12 nautical miles from shore. President Ronald Reagan, Proclamation 5928, 54 Fed. Reg. 777 (Jan. 9, 1989). Importantly, the paramountcy doctrine applies only to waters below the low tide line and to a subset of marine waters understood as inland waters. "The doctrine does not apply to land under inland navigable waters such as rivers, harbors, and even tidelands down to the low water mark." *Northern Mariana Islands v. U.S.,* 399 F.3d 1057, 1062 (9th Cir. 2005), *cert. denied*, 547 U.S. 1018 (2006) (citing *U.S. v. California*, 332 U.S. at 30) (interior quotations omitted).

federal law.[255] The paramountcy doctrine gives Congress the sole authority to determine the spatial extent of state jurisdiction in U.S. marine waters.[256] It establishes paramount federal rights in the disposition of submerged lands and natural resources as well as the supremacy of federal regulatory authority.[257] Congress retains these Constitutional powers regardless of any grant of title or jurisdiction to the states.[258]

For purposes of federal law, state jurisdiction over submerged lands and natural resources in the territorial sea originates in the SLA,[259] which establishes states' seaward boundaries (at 3 miles for all states except Texas and Florida's Gulf Coast) and serves as a discrete grant of federal property and jurisdiction to the states.[260] Courts have affirmed the SLA as a constitutional exercise of the paramountcy doctrine and of Congress's powers under the Property Clause of the U.S. Constitution. In *U.S. v. Alaska* (1997), for instance, the U.S. Supreme Court held that the SLA "grants States submerged lands beneath a 3-mile belt of the territorial sea. The statute is a grant of federal *property* … The Submerged Lands Act does not call into question cases holding that the United States has paramount sovereign authority over submerged lands beneath the territorial sea."[261]

The SLA has different legal effects within the territorial sea depending on the type of resource or use in question. With respect to submerged lands and the mineral resources on or beneath them, states' interests resemble property interests.[262] With respect to living natural resources or wildlife, the SLA is

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[255] *See generally U.S. v. California*, 332 U.S. 19 (1947) (*California I*); *U.S. v. State of Louisiana*, 339 U.S. 699 (1950) (*Louisiana I*); *U.S. v. State of Texas*, 339 U.S. 707 (1950) (*Texas I*) [hereinafter The Paramountcy Cases].

[256] A number of Supreme Court decisions have clarified that Congress is the final arbiter of a state's maritime boundaries. *See generally California I*; *U.S. v. California*, 381 U.S. 139 (1965) (*California II*); *People v. Weeren*, 26 Cal.3d 654, 663 (1980), *cert. denied*, *Weeren v. California*, 449 U.S. 839 (1980); *U.S. v. Alaska*, 545 U.S. 75, 79 (2005).

[257] *California I*, 332 U.S. at 44; *Texas I*, 339 U.S. at 716; *U.S. v. Maine*, 420 U.S. 515, 518, 522 (1975) ("[The Paramountcy Cases] held that under our constitutional arrangement paramount rights to the lands underlying the marginal sea are an incident to national sovereignty and that their control and disposition in the first instance are the business of the Federal Government rather than the States.").

[258] *See U.S. v. Alaska*, 521 U.S. 1, 5, 38 (1997**)**; *Alaska v. United States*, 545 U.S. 75, 116 (2005) (Scalia, J., dissenting).

[259] 43 U.S.C. § 1301-15.

[260] In most cases, states' seaward boundaries extend to three geographical miles from the coast line. 43 U.S.C. § 1301(a).

[261] 521 U.S. 1 at 35 (1997) (emphasis added). *See also U.S. v. Maine*, 420 U.S. 515, 518 (1975) (favorably discussing *California I*'s holding that "ownership of marginal sea resources [in the first instance] was an attribute of federal, not state, sovereignty, regardless of the states' seaward boundaries for political purposes"); *State of Alabama v. State of Texas*, 347 U.S. 272, 273 (1954) (citing *California I*, 332 U.S. at 27) (holding that "the power of Congress to dispose of any kind of property belonging to the United States is vested in Congress *without limitation*," and therefore that Congress could dispose of territorial sea resources as a proprietor would) (emphasis added).

[262]The Supreme Court has referred to the interests conveyed to the States by the SLA as property interests rather than as mere jurisdictional interests. In *State of Alabama*, both the majority opinion and the concurring opinions considered the SLA to be a valid conveyance of federal property pursuant to the Property Clause of the U.S. Constitution. 347 U.S. at 273-75. In *U.S. v. California*, 436 U.S. 32, 41 (1978), the Court held that the SLA conveyed to California both administrative *and proprietary interests* in submerged lands within the Channel Islands National Monument. As recently as 1997, the Supreme Court has referred to the SLA as grant of federal property. *U.S. v. Alaska*, 521 U.S. at 35.

seen as a grant of concurrent regulatory jurisdiction; it is *not* a grant of proprietary rights.[263] According to the Supreme Court:

> [Section 1314 of the SLA retains] all of the United States' navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.[264]

Courts interpret this reservation of federal authority to favor the federal government despite the grant of proprietary interests to the states. To the extent that state and federal laws conflict as to resources within the territorial sea, federal law continues to preempt state law. For instance, in *U.S. v. Rands* (1967), the U.S. Supreme Court held that the SLA effected no change in Congress's commerce powers or in its navigational servitude.[265] Likewise, in *Zabel v. Tabb* (1970), the 11th Circuit held that SLA § 1314, "which encompasses and pervades the entire Act, makes it clear that Congress intended to and did retain all its constitutional powers over commerce and did not relinquish certain portions of the power by specifically reserving others."[266]

Congress's retention of commerce and navigation supremacy has played to the Federal Government's advantage in a number of disputes over living resources in the territorial sea. For instance, in *Douglas v. Seacoast Products* (1977), the U.S. Supreme Court held that § 1311 of the SLA is a grant of concurrent regulatory jurisdiction over living natural resources, rather than a grant of proprietary or exclusory rights.[267] Virginia argued that its "ownership" of marine resources pursuant to the SLA allowed it to exclude fishermen who resided outside the state; Seacoast Products argued that the Virginia statute violated its rights under federal fishing laws, which Congress had adopted pursuant to the Commerce Clause. The Court agreed that states' "ownership" of natural resources is not a defense to preemption scrutiny:

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[263] *See Toomer v. Witsell*, 334 U.S. 385, 402 (1948); *Douglas v. Seacoast Products*, 431 U.S. 265, 285 (1977); *People v. Weeren*, 26 Cal.3d 654, 666 (Cal. 1980), *cert. denied*, *Weeren v. California*, 449 U.S. 839 (1980) (holding that the SLA gave the states "a concurrent right, using their police power," to regulate fishing within state waters); *Barber v. State of Hawai'i*, 42 F.3d 1185, 1190-91 (9th Cir. 1995) (holding that the SLA was a grant of concurrent jurisdiction over navigation); *Murphy v. Dept. of Natural Resources*, 837 F. Supp. 1217, 1222-23 (S.D. Fla. 1993) (holding that the SLA preserved Congress's commerce and navigation supremacy but that "there is no evidence of congressional intent to retain exclusive jurisdiction.").

[264] SLA, 43 U.S.C. § 1314(a).

[265] 389 U.S. 121, 127 (1967).

[266] 430 F.2d 199, 205-06 (11th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (citing *Rands*, 389 U.S. at 127).

[267] 431 U.S. 265.

> Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to [living resources] until they are reduced to possession by skillful capture. *Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution*.[268]

When Congress passed the SLA, wrote the Court, it retained all of its powers under the Commerce Clause; it thus did not alter the preemptive effects of federal fishing laws. Virginia's regulation was therefore preempted under the Court's conflict preemption doctrine.[269]

The Court has also held in two instances that States' exercise of their public trust responsibilities cannot serve as a defense to federal preemption. In *Hughes v. Oklahoma* (1978), the Court explicitly rejected states' use of public trust theories to exclude non-citizens from the take of wildlife or natural resources.[270] The Court recognized "legitimate state concerns for conservation and protection of wild animals, but held that "States may promote this legitimate purpose only in ways consistent with the basic principle that our economic unit is the nation." Courts will therefore analyze states' conservation and wildlife protection laws under the Supreme Court's Commerce Clause jurisprudence."[271] Similarly, in *Toomer v. Witsell* (1948), the Court held that public trust "ownership theories" were merely legal fictions establishing States' police powers over natural resources. In exercising the police power, wrote the Court, States are always subject to preemption under federal constitutional or statutory law.[272]

B. THE CZMA AS A VEHICLE FOR STRUCTURING JOINT FEDERAL-STATE CMSP

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[268] *Id*. at 285 (emphasis added).

[269] *Id*. at 284-86. Concurring in part and dissenting in part, Justice Rehnquist wrote that the states have a "substantial proprietary interest [in their natural resources,] sometimes described as 'common ownership.'" 431 U.S. at 288. Although this interest did not necessarily constitute a "traditional property right," it did constitute a basis for "extremely broad" regulation of natural resources. "Only a direct conflict with the operation of federal law" justified preemption. *Id.* Justice Rehnquist also expressed concern as to the Court's SLA rulings. On its face, he said, the SLA "appeared to be a quitclaim of the entire interest held by the [federal] government when the Act was enacted, rather than a transfer of that interest subject to regulatory enactments previously passed under [Congress's Paramount] powers." If that were the case, then "the reservation-of-powers clause only gives fair warning of the possibility that the Government may, at some future time and in furtherance of these specified powers, find it necessary to intrude upon state ownership and management." He refused to provide a final interpretation, however, because the SLA's primary grant "*does not extend to any interest over free-swimming fish*." Those, he said, are "incapable of ownership." *Id*. (emphasis added).

[270] 441 U.S. 322, 326 (1978).

[271] *Id*. at 335-36.

[272] 334 U.S. 385, 392, 402 (1948).

Congress designed the Coastal Zone Management Act (CZMA) to be a foundation and framework for planning and programmatic decision-making in the coastal zone, which includes the states' territorial seas under the SLA. As such, the CZMA contains a number of provisions that could serve as cooperation and enforcement mechanisms for CMSP. The CZMA would be an imperfect mechanism for CMSP that reached to the seaward boundary of the U.S. EEZ and continental shelf because it focuses on uses and natural resources within the states' coastal zones. However, when developed with an eye to the overlapping federal and state jurisdiction in coastal waters, as well as the strategic use of states' federal consistency authorities (see below), the CZMA could be used to integrate state and federal decision-making within both state and federal waters. Conversely (as discussed in the following section), the CZMA provides for "federal consistency review," a legal tool that gives states considerable influence over federal activities. Foreseeably, states unwilling to participate in CMSP could use their consistency review authority to advocate for the status quo—politically if not legally—even if their existing programs are inconsistent with the processes or goals of CMSP. For both of these reasons, it is critically important to understand the CZMA.

As we explain in this section, the CZMA's coastal management program (CMP) development and amendment provisions could provide the foundations of a legal framework for CMSP, particularly in the territorial sea and intertidal regions. The process of amending CMPs—and the amended CMPs themselves—could provide needed accountability and enforceability mechanisms for the CMSP process and for plan implementation.

Notably, even if CMSP does not yield formal amendments to state CMPs, the CMP development and amendment provisions contain a number of measures that could be *adapted* for joint state and federal CMSP if it were pursued through other legal channels.

1. The CZMA's Relationship to the Paramountcy Doctrine, SLA, and OCSLA

As an exercise of congressional power under the paramountcy doctrine, the SLA establishes the ground rules by which many other federal statutes operate in and beyond state waters. For instance, key definitions in OCSLA and the CZMA incorporate states' seaward boundaries as set by the SLA. These statutes exemplify the notion of concurrent state and federal jurisdiction within—and in some cases outside—the territorial sea.

Together, the SLA and OCSLA establish a state-federal boundary for purposes of determining ownership and jurisdiction over submerged lands and natural resources in U.S. waters.[273] The OCSLA

[273] *See, e.g., State of Tex. v. Sec'y of the Interior*, 580 F. Supp. 1197, 1200 (E.D. Tex. 1984) ("The [OCSLA] and the [SLA] represent the political solution to the dispute over ownership of offshore lands which by 1953 had been labeled the Tidelands controversy. … These Acts … shifted the focal point of the conflict from the issue of which sovereign, state or federal, owned all offshore resources to issues related to the newly created common border separating federal and state offshore lands.").

definition of outer continental shelf specifically includes "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of [the SLA]. [T]he subsoil and seabed [of the OCS] appertain to the United States and are subject to its jurisdiction and control."[274] Using this boundary definition, the OSCLA extends the primacy of federal jurisdiction to resource extraction activities on the OCS.[275]

The CZMA builds on the boundary and jurisdictional rules established by the SLA and OCSLA. The U.S. Supreme Court summarized the relationship among the three laws in *Secretary of the Interior v. California* (1984):

> CZMA defines the "coastal zone" to include state but not federal land near the shorelines of the several coastal states, as well as coastal waters extending "seaward to the outer limit of the United States territorial sea." The territorial sea for states bordering on the Pacific or Atlantic Oceans extends three geographical miles seaward from the coastline. Submerged lands subject to the jurisdiction of the United States that lie beyond the territorial sea constitute the "outer continental shelf" (OCS). By virtue of the Submerged Lands Act, passed in 1953, the coastal zone belongs to the states, while the OCS belongs to the federal government.[276]

Against this backdrop, Congress passed the CZMA as a "limited waiver" of federal supremacy in order to "encourage" states to exercise a broader range of their police powers within a cooperative governance framework.[277] In exchange for states' development of comprehensive coastal management programs (CMPs), which the states have an "obligation to enforce,"[278] the CZMA requires federal actions

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[274] 43 U.S.C. § 1331(a).

[275] Notably, however, the OCSCLA reserves some role for state law: federal law applies to OCS disputes in most cases, but courts may adopt state law as "surrogate federal law" if federal law does not address a situation. 43 U.S.C. §§ 1333(a)(1), (a)(2)(A); *see Rodrigue v. Aetna Casualty & Surety Co*., 395 U.S. 352, 355 (1969) (stating that the overriding purpose of the OSCLA is "to define a body of [federal] law applicable to the seabed, the subsoil, and … fixed structures … [and] applying state law … only when not inconsistent with applicable federal law."); *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 783 (5th Cir. 2009) (for state law to apply as "gap filler" in OCSLA cases, the case in question must arise on a site covered by OCSLA, there must be a gap in federal maritime law, and the state law must not be preempted by federal law).

[276] 464 U.S. 312, 315 (internal citations omitted). The CZMA defines the "coastal zone" specifically in terms of the submerged lands and natural resources for which the states received title and jurisdiction under the SLA. CZMA § 401(1), 16 U.S.C. § 1453(1); 15 C.F.R. §§ 923.2(h), 923.32(a)(1). It defines "outer continental shelf" activities by similar language in OCSLA. CZMA § 401(13), 16 U.S.C. § 1453(13).

[277] 16 U.S.C. §§ 1452(2)-(6), 1456(a)-(b); NOAA, Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 71 Fed. Reg. 788, 789 (Jan. 5, 2006) [hereinafter "Preamble to 2006 Fed. Consistency Regulations"] ("Congress partially waived the Federal Government's supremacy over State law when it created the CZMA."); *see also Sec'y of the Interior v. California*, 464 U.S. 312, 316-17 (1984) (describing the purpose of the CZMA); *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 394–395 (1987) (''While the CZMA states a national policy in favor of coastal zone management, it does not on its face expand state authority to regulate in ways that would otherwise be invalid under the Commerce Clause.''). *See generally* Coastal Zone Management, H.R. Rep. No. 92-1049 (May 5, 1972), as *reprinted in* LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, AS AMENDED IN 1974 AND 1976 WITH A SECTION-BY-SECTION INDEX, at 313.

[278] *See* CZMA §§ 306(d)(15), 16 U.S.C. § 1455(d)(15) (providing that the Secretary of Commerce shall not approve a state CMP unless the CMP "provides a mechanism to ensure that all State agencies will adhere to the program"); 307(c)(3)(A),

affecting states' coastal uses and resources to be consistent with the enforceable policies of states' CMPs.[279]

2. The Use of Coastal Management Programs to structure CMSP

Coastal Management Program Approval and Amendment – The Law

The CZMA requires states to develop comprehensive CMPs in order to receive consistency review authority and federal funding.[280] Importantly, for purposes of CMSP, the CZMA's definition of a "management program" is quite broad:

> The term management program includes, but is not limited to, a comprehensive statement in *words, maps, illustrations, or other media of communication*, including an articulation of enforceable policies and citation of authorities providing this enforceability, prepared and adopted by the State in accordance with the provisions of this Act and this part, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.[281]

A coastal and marine spatial plan would easily fit within this definition. The more relevant question is whether the states would meet the rest of the CMP development and amendment requirements, which include a number of substantive, procedural, and institutional criteria, when participating in or implementing CMSP.[282]

The CZMA establishes qualitative requirements regarding the scope of each state's CMP and the degree of clarity and predictability each CMP will provide to users and decision-makers. At a general

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1456(c)(3)(A) (requiring states to establish public procedures for consistency review and to notify federal agencies regarding consistency certification decisions); 15 C.F.R. § 923.41(b) (in order to meet CZMA requirements, state CMPs "must" identify means by which relevant laws "will be used to carry out the state's program); 15 C.F.R. § 930.6(a) ("A designated State Agency is required to uniformly and comprehensively apply all State coastal management requirements…"); 319(c), 1458(c) (authorizing the Secretary to withhold funding if states fail to implement their CMPs); Preamble to 2006 Fed. Consistency Regulations at 805 (citing 65 FR 77126–77127 (Dec. 8, 2000)) ("NOAA agrees that States cannot expressly waive their consistency responsibilities. The State has an obligation to enforce its federally-approved CMP and to provide public input into those decisions.").

[279] Preamble to 2006 Fed. Consistency Regulations at 789.

[280] 16 U.S.C. §§ 1454, 1455(d).

[281] 15 C.F.R. § 923.2(g).

[282] *See generally* 16 U.S.C. §§ 1455(d), 1456(c); 15 C.F.R. §§ 923.1(c), 923.3 (requirements for approval of a State's CMP); 16 U.S.C. § 1455(e)(3); 15 C.F.R. § 923.82 (requirements for CMP amendment).

level, each state's CMP must be consistent with national policies contained in Section 303 of the CZMA.[283] These policies express a wide range of environmental, economic, and social goals, including intergenerational sustainability; full consideration of economic, ecological, cultural, historic, and aesthetic values; natural resource protection; water quality; public access; coastal-dependent development; coastal protection as provided by natural features; public participation in decision-making; multi-scale planning; governmental efficiency; inter-governmental and inter-agency cooperation; and adaptation over time.[284]

Put simply, each CMP must provide for a combination of resource protection, the management of human development, and the "simplification of governmental processes."[285] Furthermore, each CMP must contribute to regulatory transparency and predictability by stating the "policies, standards, objectives, criteria, and procedures by which program decisions will be made" and providing (1) "a clear understanding of the content of the [management] program, especially in identifying who will be affected by the program and how; and (2) a clear sense of direction and predictability for decisionmakers who must take actions pursuant to or consistent with the management program."[286]

All of these general qualitative criteria seem consistent with the general purposes of CMSP as expressed in the Task Force's Interim Framework for CMSP.

In addition to qualitative criteria, the CMP development and amendment provisions establish procedural and institutional requirements that could serve the purposes of CMSP. [287] During the development of a CMP, the state must provide for the following:

Full participation of relevant local, state, regional, and federal agencies, as well as stakeholders and the general public.[288] By requiring states to include federal agencies in the planning process, Congress showed an intent for CMPs to encompass a wide range of fields that "impact or affect" the coastal zone," including energy production and transmission; recreation; transportation; food and fiber production; life and property protection; national defense; historic, cultural, aesthetic, and conservation values; mineral extraction; and pollution control.[289] In its 1979 Program Approval Regulations, NOAA suggested that states consider "advisory committees and/or technical advisory boards" that could

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[283] 16 U.S.C. § 1452; 15 U.S.C. § 923.3(a).

[284] *Id*.

[285] *Id*. at (c).

[286] 15 C.F.R. § 923.3(e); *but see American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 926 (C.D. Cal. 1978) (holding that while state CMPs must provide "guidance," they need not provide a "'zoning map"' which would implicitly avoid [a project proponent's] need to consult with the state regarding planned activities in or affecting its coastal zone").

[287] *See generally* 16 U.S.C. §§ 1455(d), 1456(c); 15 C.F.R. §§ 923.1(c), 923.3 (requirements for approval of a State's CMP); 16 U.S.C. § 1455(e)(3); 15 C.F.R. § 923.82 (requirements for CMP amendment).

[288] 16 U.S.C. § 1455(d)(1), 15 C.F.R. §§ 923.50-51, 923.55.

[289] 15 C.F.R. §§ 923.2(d), 923.51(a).

"provid[e] information needed to develop the [CMP], serv[e] as a conduit and evaluator of public interests and concerns, and determin[e] major program directions."[290]

Coordination of planning and decision-making at different scales on an ongoing basis, even after the CMP has been formally adopted.[291] The CZMA requires states, during the development and execution of a CMP, to consider the national interest in the siting of uses "of greater than local interest."[292] It also requires them to consider uses "of regional benefit."[293] Importantly, it requires states to identify a planning process for energy facilities "likely to be located in, or which may significantly affect, the coastal zone."[294] NOAA recommends pre-identification of appropriate energy facility sites, regular reporting requirements for energy regulating agencies, "provision of sufficient and specified lead time" for proactive decision-making, and "any other procedure which identifies likely facilities and their potential impacts in a timely manner."[295] NOAA recommends that states consider representative "councils, committees, or task forces" "as a vehicle for providing continuing consultation and coordination after program approval."[296]

Adoption of "specific, comprehensive, and enforceable policies" and a comprehensive program for their implementation.[297] An "enforceable policy" is a legally binding state policy "by which a State exerts control over private and public land and water uses and natural resources in the coastal zone."[298] Enforceable policies must be "sufficient to guide public and private uses" of the coastal zone, although

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[290] NOAA, Coastal Zone Management Program Development and Approval Regulations, Final Regulations, 44 Fed. Reg. 18590, 18611 (March 28, 1979) [hereinafter 1979 CMP Approval Regulations].

[291] 16 U.S.C. § 1455(d)(3); 15 C.F.R. §§ 923.56-57.

[292] 16 U.S.C. § 1455(d)(8); 15 C.F.R. § 923.52.

> These requirements do not stipulate that a State accommodate the national interest in a particular facility to the extent of assuring that such facilities will be sited in a state's coastal zone. They do assure, however, that there is a procedure during both program development and program implementation to assess the national interest in such facilities as well as their locational requirements.

1979 CMP Approval Regulations at 18592. *See also API v. Knecht*, 456 F. Supp. at 924 ("The Act presumes a balancing of the national interest in energy self-sufficiency with State and local concerns involving adverse economic, social, or environmental impacts.")

[293] 16 U.S.C. § 1455(d)(2)(H).

[294] *Id*. at (d)(8), (d)(12); Preamble to 2006 Fed. Consistency Regulations at 804 ("The CZMA requires States to consider the national interest when developing their management programs. When approving State programs and when evaluating proposed changes to State programs NOAA carefully considers elements of management program that may affect the national interest, particularly in energy facility siting.").

[295] 1979 CMP Approval Regulations at 18598.

[296] *Id*. at 18611.

[297] 16 U.S.C. § 1455(d)(2); 15 C.F.R. §§ 923.1(c)(2), (9), 923.3(b)-(e), 923.40-45.

[298] CZMA § 304(6a), 16 U.S.C. § 1453(6a); 15 C.F.R. § 930.11(h). To gain NOAA approval, a proposed enforceable policy cannot be facially preempted by federal law, and it must apply neutrally to all public and private entities, including federal agencies. Preamble to 2006 Fed. Consistency Regulations at 824; Final Program Change Guidance at 8; Federal Consistency Overview at 7 ("[I]f a state policy seeks to regulate an activity where state regulation is preempted by federal law, it is not legally binding under state law and would not be an enforceable policy under the CZMA.").

they "need not establish detailed criteria such that a proponent of an activity could determine the consistency of the activity without interaction with the state agency."[299]

Explicit identification and analysis of uses and areas subject to programmatic management, including use compatibilities, cumulative impacts, and vulnerability of species or areas of particular concern.[300] Each state must determine "specific use and special geographic areas that are to be subject to the management program"[301] and must include "an inventory and designation of areas of particular concern within the coastal zone, on a generic and/or site-specific basis, and broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority."[302] NOAA encourages states to use "maps that indicate the location of designated areas or types of areas" subject to management, as well as guidelines

> (i) To provide a basis for special management in areas of particular concern;
>
> (ii) To provide a common reference point for resolving conflicts; and
>
> (iii) To articulate further the nature of the interests to be promoted, prohibited, or managed as a result of designation. States may also establish priority of use guidelines that apply throughout the coastal zone and are encouraged to do so, especially as an aid to resolving use conflicts.[303]

Use of open and transparent public processes that "consider the interests of the general public, [stakeholders], local governments, and regional, State, interstate, and Federal agencies."[304] In arriving at elements of the management program, States are obliged to follow an open process which involves providing information to and considering the interests of the general public, special interest groups, local governments, and regional, State, interstate, and Federal agencies."[305]

Explicit identification of "sufficient legal authorities and organizational arrangements to implement the program and to ensure conformance to it."[306] Each state must have the ability to administer the enforceable policies of its CMP, control development as necessary to ensure compliance with the CMP, and "resolve conflicts among competing uses."[307] In its 1979 CMP Approval Regulations, NOAA suggested that "acceptable conflict resolution mechanisms" might include "mediation

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[299] 15 C.F.R. § 930.11(h); *see also* 1979 CMP Approval Regulations at 18597 (If a CMP includes unenforceable policies, "states should be aware that [NOAA] will judge the adequacy of a state's authorities … only on the enforceable policies.").

[300] 16 U.S.C. § 1455(d)(2); 15 C.F.R. §§ 923.1(c)(1)-(4), 923.11, 923.21-23.

[301] 15 C.F.R. § 923.1(c)(3).

[302] 15 C.F.R. § 923.21(a).

[303] 1979 CMP Approval Regulations at 18600.

[304] 16 U.S.C. § 1455(d)(1), (3)(b), (14); 15 C.F.R. §§ 923.1(c)(7), 923.3(a), (e), 923.51, 923.55-58.

[305] 15 C.F.R. § 923.1(c)(6).

[306] *Id*.

[307] 15 C.F.R. § 923.41(b).

procedures, administrative review, gubernatorial action, or judicial appeal provisions *provided that any such mechanism results in a decision which is binding upon the entities involved."*[308]

Mechanisms to ensure that all agencies will adhere to a program's enforceable policies and implementation measures in a transparent fashion.[309]

A list of any federal actions that the state foresees will meet the "effects test" and that will be subject to state consistency review.[310] *(See discussion below regarding federal consistency.)*

Advantages and Drawbacks of Using Coastal Management Programs as Foundations of CMSP

Congress designed the CZMA to provide procedural and institutional structures for cooperative federal-state planning and programmatic management. As the preceding subsection suggests, the CMP development and amendment provisions contain significant amounts of language—in conjunction with regulations and supporting legislative history—that could be used as a foundation of CMSP, particularly in the coastal zone. Here, we briefly outline the pros and cons of using the CZMA as a primary vehicle for CMSP.

Advantages

The CZMA's main strength lies in the substantial flexibility it gives to the states and to the federal government for CMP development and amendment. The Act's definition of "management programs" is likely broad enough to encompass coastal and marine spatial plans, while the "national policies" contained in Section 303 encompass most of the policies put forward by the Obama Administration in its Interim Framework for CMSP. The CZMA framework imposes few top-down substantive criteria on the states, but it does establish criteria for developing and implementing comprehensive plans and programs. In the process of developing a CMS Plan, therefore, federal and state government officials could likely use most, if not all, of the priorities in the Administration's framework.

A second major strength lies in the substantial discretion that the CZMA gives to NOAA for CMP approval and amendment. NOAA holds "considerable" discretion and deference in interpreting the CZMA and applying its CZMA regulations to state CMPs.[311] In *API v. Knecht* (1979), a group of extractive

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[308] 1979 CMP Approval Regulations at 18603 (emphasis added).

[309] 16 U.S.C. § 1455(d)(7), (11), (15)-(16); 15 C.F.R. §§ 923.1(c)(2), (6), (8), (9), 923.3(e), 923.40-45.

[310] 15 C.F.R. § 923.53.

[311] *See API v. Knecht*, 456 F. Supp. 889, *aff'd* 609 F.2d 1306, 1310-12 (9th Cir. 1979); *Southern Pac. Transp. Co. v. California Coastal Commission*, 520 F. Supp. 800, 803 (C.D. Cal. 1981) (citing *API*) (holding that "NOAA should be afforded considerable deference by the courts with respect to its interpretation of its own regulations."); *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1250 (D. Del. 1986), *aff'd on other grounds*, 822 F.2d 388 (3d Cir. 1987) (holding that "[t]he view of the agency charged with administering a statute is entitled to considerable judicial deference"); *see also Secretary of the Interior v.*

industry associations sued to enjoin NOAA's approval of the California CMP on grounds that NOAA had allowed California too much leeway in developing its CMP. For instance, they argued that the CMP was too vague to inform users of the regulations that would apply to them and that the CMP did not adequately provide for the national interest in energy facility siting. The court rejected all of plaintiffs' arguments, holding that "considerable deference is due [NOAA's] interpretations of [its] approval regulations."[312] Provided a state or states, in cooperation with NOAA, were to participate in and implement an ambitious CMSP process, NOAA would have substantial freedom to approve the resulting CMS Plan and thereby make it a significant part of the federal-state governance structure.

A third and related strength of the CZMA is that once NOAA has made a final decision about the scope or content of a state's CMP, other federal agencies must defer to its decisions. For instance, in *Mountain Rhythm Resources v. FERC* (2002), the Ninth Circuit held that FERC had properly deferred to the State of Washington's NOAA-approved CMP boundaries when ruling on a proposed hydroelectric project.[313] Mountain Rhythm argued that Washington's designated coastal zone was far bigger than that contemplated by the definition of "coastal zone" in the CZMA and regulations, and thus that its project was not subject to the terms of Washington's CMP. The court held that regardless of whether the coastal zone was too large in the first instance, Mountain Rhythm could not use another agency's decision-making process to escape the reach of a NOAA approved CMP. [314] In the CMSP context, federal agency deference to NOAA's CMP approval decision could help to drive federal coordination and CMS Plan implementation over the long term.

A final strength of the CZMA is that the definition of the "coastal zone" is quite broad on the inland/landward side of state waters. In *Mountain Rhythm*, the court held that FERC had properly deferred to NOAA's approval of a coastal zone that included the entirety of every coastal county; thus, a project that was more than 30 miles inland fell under consistency review.[315] A CMP amendment could be used to give CMSP effects far inland land, if such effects were desirable.

California, 464 U.S. 312, 321 n.6 (1984) ("Under normal circumstances NOAA's understanding of the meaning of [the CZMA] would be entitled to deference by the courts.").

[312] 456 F. Supp. at 907.

[313] 302 F.3d 958, 967 (9th Cir. 2002).

[314] *Id*. at 964-65; *see also* Preamble to 2006 Fed. Consistency Regulations at 823-24 (citing S. Rep. No. 753, 92nd Cong., 2d Sess. 20 (1972); 136 Cong. Rec. 8077 (Sep. 26, 1990)):

> Congress clearly envisioned that Federal agencies and applicants for federal authorizations might have to modify their activities to be consistent with State enforceable policies. … Congress initially intended and has subsequently affirmed that State consistency reviews based on State laws approved by NOAA would be applied to license or permit activities to be authorized by other Federal agencies with objectives different from those in the CZMA. …

[315] 302 F.3d at 951.

Drawbacks

We see four major drawbacks to using coastal management programs as a foundation for CMSP.

First, the CZMA was not designed specifically for spatial planning in a contemporary context. Although the CMP provisions provide the states and NOAA with broad discretion to design CMPs, the digital, information-driven outputs of a dynamic CMSP process might look quite different from the static, "constitution"-like CMPs that states use today. It is not clear that the formal program amendment mechanism can accommodate the adaptive management foreseen by many advocates of CMSP. The existing legal structure may be too bulky for CMSP, at least over the long term.

Similarly, the national policies expressed in Section 303 may no longer reflect the nation's priorities. For instance, whereas the CZMA conceives of "energy facilities" primarily as oil and gas extraction platforms and other infrastructure, planning for "energy facilities" today could yield designations for offshore renewables, tidal energy, and other installations that might deserve different treatment under the law. The conflict between CMSP priorities and existing statutory policies might cause problems in the case of a consistency appeal to the Secretary of Commerce, who would apply the *statutory* policies (as opposed to the CMSP policies) to any proposed projects (see below).

A second problem with—or, perhaps, a cautionary consideration for—using the CZMA is that any CMP amendments must be *voluntary*. In *State of Cal. by and through the Cal. Coastal Com'n v. Mack* (1988), the court held that NOAA lacks the authority to use the threat of funding withdrawal to coerce states into "improving" their approved CMPs.[316] Once NOAA has approved a state's CMP, "NOAA does not have authority to revisit [its] approvability … it may no longer examine the content of the approved program, only the adequacy of its execution."[317] Under *Mack*, CMP amendments could only serve as the foundation for CMSP if the states are willing partners in the process.

A third problem is the clear statutory definition of the "coastal zone," which limits the ocean area covered by a state CMP to the territorial sea. A state could use its approved list of federal activities and geographic areas subject to federal consistency review to expand the reach of its CMP. However, the state would be limited to *reacting* to federal consistency determinations and certifications outside the coastal zone, while federal agencies and project proponents could always proactively remove their actions from the reach of state consistency review by arguing that their actions did not meet the "effects test." In any case, the utility of the consistency power in the first place would depend on the

[316] 693 F. Supp. 821, 825 (N.D. Cal. 1988).

[317] *Id*.

posture and enforceable policies of the state in question. In short, the limited definition of the coastal zone would limit the area in which a CMP could actively drive coordinated agency decision-making.

A fourth and related problem is that Congress has declined to extend the CZMA into federal waters when given the chance. When considering the draft versions of the CZMA, Congress considered a federal waters programming process that would complement the state-waters portion of the Act. The draft provision directed the Secretary of Commerce, in coordination with the Secretary of the Interior, to develop a management program

> for the benefit of industry, commerce, recreation, conservation, transportation, navigation, and the public interest in the protection of the environment and shall include, but not be limited to, provisions for the development, conservation, and utilization of fish and other living marine resources, mineral resources, and fossil fuels, the development of aquaculture, the promotion of recreational opportunities and the coordination of research.[318]

Congress rejected this portion of the bill, however, "because the provisions relating thereto did not prescribe sufficient standards or criteria and would create potential conflicts with legislation already in existence concerning Continental Shelf resources…"[319] This explicit rejection of federal-waters programming could be a liability in a challenge to an extension of the CZMA into federal waters.

3. States' Federal Consistency Review Authority and the Design of CMSP

The CZMA's CMP development and amendment provision could provide foundational mechanisms for cooperative federal-state CMSP. However, as noted above, much of the CZMA's utility to—and threats to—CMSP resides in the states' exercise of their federal consistency review authorities. In this section, we review the scope of the CZMA's federal consistency provisions and outline their relevance to the adoption and implementation of coastal and marine spatial plans.

The "Effects Test" and Federal Actions that are Subject to Consistency Review

The CZMA's "federal consistency" provisions provide that federal actions must be consistent with the enforceable policies of approved state CMPs.[320] States review the consistency *certifications* of

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[318] Text of Proposed Legislation, H.R. 14146, *as reprinted in* LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, AS AMENDED IN 1974 AND 1976 WITH A SECTION-BY-SECTION INDEX, at 326.

[319] *Id*. at 458.

[320] *See generally* CZMA § 307(c)(1)-(3), 16 U.S.C. § 1456 (c)(1)-(3); 15 C.F.R. § 930, subparts C-F; Preamble to 2006 Fed. Consistency Regulations at 789; Federal Consistency Overview at 4.

applicants for federal licenses and permits, OCS plans, and federal assistance to state and local governments[321]; they review federal agencies' consistency *determinations* for "federal agency activities."[322] In either case, a State is said to conduct "consistency review."

A federal action is subject to consistency review if it has reasonably foreseeable effects on the uses and resources covered by a state's CMP. This "effects test" comes from Sections 307(c) and (d) of the CZMA, which authorize States to review federal actions "affecting" coastal uses and resources for consistency with the enforceable policies of their approved CMPs. [323]

The effects test covers an expansive range of federal actions. NOAA interprets the statutory term "affecting" very broadly, such that *any* federal action with *any* foreseeable effect falls within its ambit: "no federal actions are categorically exempt from federal consistency."[324]

> The application of the consistency requirement is not dependent on the type of activity or what form the activity takes (*e.g.*, rulemaking, regulation, physical alteration, plan). *Consistency applies whenever a federal activity initiates a series of events where coastal effects are reasonably foreseeable*.[325]

The CZMA and NOAA regulations identify the following four types of "federal actions" that could meet the effects test and that are therefore subject to consistency review:

First, *federal agency activities* are "activities and development projects performed by a Federal agency, or a contractor for the benefit of a Federal agency."[326] NOAA defines this term to include proposals for action "initiating an activity or series of activities when coastal effects are reasonably

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[321] CZMA § 307(c)(2)-(3), 16 U.S.C. § 1456 (c)(2)-(3); 15 C.F.R. § 930, subparts D-F.

[322] CZMA § 307(c)(1)(A), 16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. § 930, subpart C.

[323] The state's consistency review authority extends to *"any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity."* NOAA defines "effects" as direct and indirect effects, including cumulative effects, on a state's coastal environment and/or the state's coastal uses. 15 C.F.R. § 930.11(g). "The phrase 'any coastal use or resource' means *any land or water use or natural resource of the coastal zone*." *Id.* at (b).

[324] Preamble to 2006 Fed. Consistency Regulations at 792 (citing H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 968–75, 971; 136 Cong. Rec. H 8076 (Sep. 26, 1990); and 65 FR 77125 (December 8, 2000)); *see also* Federal Consistency Overview at 5.

[325] NOAA, Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 65 Fed. Reg. 77,124, 77,125 (Dec. 8, 2000) [hereinafter Preamble to 2000 Fed. Consistency Regulations] (emphasis added). The broad reach of the effects test originates in the 1990 CZMA Amendments, which repudiated a contrary holding in *Secretary of the Interior v. California*, 464 U.S. 312, 324-31 (1984). The 1990 CZMA Amendments "reflect an unambiguous Congressional intent that all Federal agency activities meeting the 'effects' test are subject to the CZMA consistency requirement; that there are no exceptions or exclusions from the requirement as a matter of law; and that [consistency review] requires a factual determination, based on the effects of such activities on the coastal zone, to be applied on a case-by-case basis."*Id*.; Preamble to 2006 Fed. Consistency Regulations at 792 (citing H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 968–975, 971; 136 Cong. Rec. H 8076 (Sep. 26, 1990); and 65 FR 77,125 (December 8, 2000)); Federal Consistency Overview at 5.

[326] Federal Consistency Overview at 4. *See* CZMA § 307(c)(1)("Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs"); 15 C.F.R. § 930 subpart C.

foreseeable," *including plans and rulemakings*.[327] *Development projects* are Federal agency activities involving "the planning, construction, modification, or removal of public works, facilities, or other structures, and includ[ing] the acquisition, use, or disposal of any coastal use or resource."[328] *The issuance of a general permit* is a Federal agency activity "if the general permit does not involve case-by-case or individual issuance of a license or permit by a Federal agency."[329] Finally, as a general matter, "Federal agency activity" is a catch-all term that covers any federal actions with coastal effects that would not be covered by other provisions of the Act.[330] Federal agency actions therefore include a wide range of actions, such as:

> Fisheries Plans by the National Marine Fisheries Service, Naval exercises, the disposal of federal land by the General Services Administration, a U.S. Army Corps of Engineers (Corps) breakwater or beach renourishment project, an OCS oil and gas lease sale by the Minerals Management Service (MMS), improvements to a military base, Naval disposal of radioactive or hazardous waste performed by a private contractor, [and] activities in National Parks such as installation of mooring buoys or road construction.[331]

Presumably, CMS Plans would fall within the definition of federal activities.

Second, *Federal license or permit activities* are "activities performed by a non-Federal entity requiring federal permits, licenses, or other form[s] of federal authorization."[332] NOAA defines this term to include "any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone and that any Federal agency is empowered to issue to an applicant."[333] The term encompasses permits and licenses such as "[Army] Corps 404 permits, [Army] Corps permits for use of ocean dump-sites, Nuclear Regulatory Commission

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[327] 15 C.F.R. § 930.31(a). That said, a planning or rulemaking would only be subject to consistency review if it would (a) have foreseeable coastal effects; and (b) would "result in a plan to take action" or an "action or directive." Preamble to 2006 Fed. Consistency Regulations at 792.

[328] 16 U.S.C. § 1456(c)(2); 15 C.F.R. § 930.31(b).

[329] 15 C.F.R. § 930.31(d). NOAA decided that it would treat all general permits as "federal agency activities" in its 2006 Federal Consistency Regulations. Concurrence with a general permit precludes a State from conducting consistency review for any individual uses of that permit. Preamble to 2006 Fed. Consistency Regulations at 793. If a State were to *object* to the issuance of a general permit, the relevant federal agency could still issue the permit; however, the State would retain consistency review authority over all individual uses. *Id*. at 793, 808-809.

[330] 15 C.F.R. § 930.31(c).

[331] Federal Consistency Overview at 4.

[332] *Id*. *See* CZMA § 1456(c)(3)(A) (establishing consistency certification requirements for "any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone"); 15 C.F.R. § 930, subpart D.

[333] 15 C.F.R. § 930.51(a). OCS plans are covered specifically by 15 C.F.R. § 930, subpart E.

licenses for nuclear power plants, [or] licenses from the Federal Energy Regulatory Commission (FERC) for hydroelectric facilities."[334]

Third, *OCS plans* are any exploration, development or production plans for areas leased under OCSLA "which [are] submitted to the Secretary of the Interior or designee …and which describe[] in detail Federal license or permit activities."[335] States have authority to review OCS plans for consistency as long as the plans would cause reasonably foreseeable coastal effects.[336]

Fourth, *Federal assistance to state and local governments* is "assistance provided under a federal program to an applicant agency through grant or contractual agreements, loans, subsidies, guarantees, insurance, or other form of financial aid."[337] Examples of such assistance include "Federal Highway Administration funds to coastal state and local governments, construction grants for wastewater treatment works, hazardous waste management trust fund, and Housing and Urban Development grants."[338] Grants to the states for CMSP would presumably fall within this category of federal actions.

States may provide NOAA with a list of federal activities that are presumed to have coastal effects and that would be subject to consistency review.[339] NOAA must approve this list, which becomes part of the state's approved CMP. Once a state puts a federal action on its list, "all applications for the listed Federal [actions] are automatically subject to the consistency process."[340] To establish consistency

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[334] Federal Consistency Overview at 4. A state's consistency review authority over federal license or permit activities also encompasses "renewals and major amendments" to existing licenses or permits when the renewal or amendment would generate new or "substantially different" effects than those the agency has already evaluated. 15 C.F.R. § 930.51(b). NOAA states that it will construe broadly the terms "major amendment," "renewal," and "substantially different" in order to afford a state the opportunity to review activities and coastal effects it has not previously reviewed under its existing CMP. *Id*. at (e).

[335] 15 C.F.R. § 930.73(a); *see* 16 U.S.C. § 1456(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 [OCSLA] 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 [a coastal state], [certify] that each activity which is described in detail in such plan complies with the enforceable policies of such state's [CMP]…

[336] Preamble to 2006 Fed. Consistency Regulations at 792 (citing 15 C.F.R. § 930.53-54). States could conceivably describe particular geographic areas in which OCS plans would presumably affect coastal uses or resources. In that case, "NOAA would approve only if the State made a factual demonstration that effects on its coastal uses or resources are reasonably foreseeable as a result of activities authorized by a particular EP or DPP." *Id*.

[337] Federal Consistency Overview at 4; *see also* 16 U.S.C. § 1456(d); 15 C.F.R. § 930.91. NOAA defines an "applicant agency" as "any unit of State or local government, or any related public entity such as a special district, which, following management program approval, submits an application for federal assistance." *Id*. at § 930.92.

[338] Federal Consistency Overview at 4.

[339] 15 C.F.R. §§ 930.53-54, 923 subpart H; Preamble to 2006 Fed. Consistency Regulations at 802-803.

[340] *Id.*

review authority over actions not on its list, the state must request that NOAA review the proposal for the action and determine whether the action would satisfy the effects test.[341]

The Meaning of "to the Maximum Extent Practicable" and Other Language Holding Entities to the Terms of a Coastal Management Program

As noted above, the CZMA requires federal actions that meet the effects test to be consistent with the enforceable policies of approved state CMPs.[342] However, the CZMA applies different standards of review to different federal actions: the standard for the consistency *certifications* that must accompany federal authorizations is different than the standard for consistency *determinations* that must accompany federal agency activities.

A federal agency may not approve a proposed federal authorization—a license, permit, OCS plan, or grant/loan application—unless a state has first concurred with the accompanying consistency certification.[343] This standard of review is quite strong: "the CZMA gives states a conditional veto over federally licensed or permitted projects that are not consistent with 'the enforceable policies of the state's approved [CMP],' subject to a final override by the Secretary [of Commerce]."[344]

By contrast, federal agency activities such as plans, rulemakings, or general permits must be consistent "to the maximum extent practicable" with states' enforceable policies.[345] NOAA defines "to the maximum extent practicable" to mean "fully consistent with the enforceable policies of management programs *unless* consistency is prohibited by existing law applicable to the Federal agency."[346] Only in cases of clear statutory conflict or in "exigent circumstances" can an agency depart legally depart from the consistency requirement:

> The [CZMA] was intended to cause substantive changes in Federal agency decision-making within the context of the discretionary powers residing in agencies. Accordingly, whenever legally permissible, Federal agencies shall consider enforceable policies of

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[341] *Id*.

[342] *See generally* CZMA § 307(c)(1)-(3), 16 U.S.C. § 1456 (c)(1)-(3); 15 C.F.R. § 930, subparts C-F; Preamble to 2006 Fed. Consistency Regulations at 789; Federal Consistency Overview at 4.

[343] *See* 15 C.F.R. §§ 930.64 (federal licenses and permits), 930.80 (OCS plans), 930.97 (federal assistance); Federal Consistency Overview at 15.

[344] *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 583 F. Supp. 2d 259, 267 (D.R.I. 2008); *see also California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 590 (1987) ("If the State neither concurs nor is presumed to concur [with the consistency certification], the federal agency must reject the application, unless the Secretary of Commerce finds that the application is consistent with the objectives of the CZMA or is "otherwise necessary in the interest of national security.").

[345] 16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. § 930.30.

[346] 15 C.F.R. § 930.32(a)(1).

> management programs as requirements to be adhered to in addition to existing Federal agency statutory mandates.[347]
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> A Federal agency may deviate from full consistency … when such deviation is justified because of an emergency or other similar unforeseen circumstance ('exigent circumstance') which presents the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. Any deviation shall be to the minimum extent necessary to address the exigent circumstance.[348]

Under this standard, a Federal agency may proceed with a proposed activity over a state's objection *if* the Federal agency has described, in writing, any legal authority that prohibits full consistency and has explicitly found that its action is consistent to the maximum extent practicable with the enforceable policies of the state's CMP.[349] In all cases, "[t]he burden of demonstrating maximum consistency practicable with [a state] CMP rests with the [Federal agency]." For instance,

> For Federal agency activities … such as OCS Lease Sales, a Federal agency may proceed with the activity over a State's objection if the Federal agency determines its activity is consistent to the maximum extent practicable with the enforceable policies of the State's CMP. This means that even if a State objects, MMS may proceed with an OCS lease sale when MMS provides the State with the reasons why the OCSLA and MMS's administrative record supporting the lease sale decisions prohibit MMS from fully complying with the State's enforceable policies. MMS could also proceed if it determined that its activity was fully consistent with the State's enforceable policies."[350]

One case in particular shows this standard at work. In *California Coastal Commission v. U.S.* 1998), the California Coastal Commission (California) sought to enjoin the Navy from implementing a revised project proposal in which it would dredge sand and ordnance from a site within state waters.[351] The Navy had explored alternative dredging methods before providing California with a consistency determination for its preferred alternative. However, the Navy never shared the final alternatives analysis with the state.[352] The Navy proceeded to obtain a dredge-and-fill permit from the Army Corps of Engineers and indicated its intention to proceed with the project.[353] California sued the Navy in federal District Court, arguing (1) that the Navy's amended proposal was not consistent to the maximum extent

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[347] *Id*. at (a)(2).

[348] 15 C.F.R. § 930.32(b).

[349] *Natural Resources Defense Council v. Winter*, 530 F. Supp. 2d 1110, 1117 (C.D. Cal. 2008), *aff'd on other grounds*, 518 F.3d 658 (9th Cir. 2008), *rev'd on other grounds*, 129 S. Ct. 365 (2008); *see also* 15 C.F.R. § 930.32(a)(2).

[350] Preamble to 2006 Fed. Consistency Regulations at 791.

[351] 5 F. Supp. 2d 1106 (S.D. Cal. 1998).

[352] *Id*. at 1109, 1111-12.

[353] *Id*. at 1109.

practicable with the California CMP, which required that project proponents select the least environmentally damaging alternative; (2) that the Navy had failed to select a less damaging alternative; and (3) that the Navy's analysis had failed to document the costs of the available alternatives, such that California could compare the Navy's preferred alternative to other options.[354]

The District Court agreed with California and held that the Navy had not met its burden of showing that the proposed dredge-and-dump project was consistent to the maximum extent possible with California's CMP.[355] While the Navy alleged that it had submitted "feasible, less environmentally damaging alternatives" pursuant to the CMP, the court found that it had not properly provided California with complete evidence to support its determination.[356] The court enjoined the Navy from proceeding until the parties had studied alternatives and negotiated a jointly acceptable solution.[357]

States' Consistency Review Powers and the CMSP Process

A state's ability to use consistency review to influence CMSP or Plan implementation would depend on the particular CMSP Instruments or implementation actions that triggered the effects test. Indeed, the effects test is the crucial criterion for evaluating whether a planning instrument or implementation activity will be subject to consistency review: as noted above, states may exercise their consistency review authority over *any* federal action with *any* foreseeable effect on uses or resources in the coastal zone, and no federal action is categorically exempted from consistency review.

The next question is exactly what aspects of CMSP a state would want to influence. Because the CZMA provides different standards for different federal actions, states' ability to use consistency review to influence CMSP would depend on the resemblance of CMSP Instruments to "federal agency activities" or other federal actions, as well as on the stage of the planning or implementation process at which a state wanted to exert its authority.

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[354] *Id*. at 1108-09.

[355] *Id. at 1112.*

[356] *Id*.

[357] *Id*. Another example is *Conservation Law Foundation v. Watt*, 560 F. Supp. 561, 576 (D. Mass. 1983) in which the District Court held that "the burden of establishing compliance with a [CMP] is on the federal agency proposing the contemplated action, and not on the state." The Secretary [of Commerce] was required to base his decisions on "statutory provision, legislative history, or other legal authority" as provided in NOAA Regulations; he could not meet that burden merely by relying on "similar aims and goals between the state and federal regulatory schemes."

Dispute Resolution for Consistency Decisions Regarding "Federal Agency Activities"

If CMSP Instruments would have foreseeable effects on coastal uses or coastal resources, and if they would resemble traditional federal plans, rulemakings, or other actions that do not result in authorizations to third parties, they would likely be subject to federal consistency review, under which federal agency activities and development projects must be consistent to the maximum extent practicable with the enforceable policies of state CMPs.[358] The more likely a CMSP Instrument would yield actions, "a plan to take action, or a rulemaking proposing an action or a directive" [359] that that met the effects test, the more likely it would be subject to consistency review.

If a state found that the CMSP Instrument were not consistent to the maximum extent practicable with its enforceable policies—i.e., if the federal agency/agencies had not met their burden—the state and/or federal agencies could seek non-binding mediation by NOAA OCRM or by the Secretary of Commerce.[360]

In addition to seeking mediation, "a state may always sue a federal agency under the Administrative Procedure Act" for non-compliance with CZMA requirements.[361] Whereas applicants for federal authorizations or assistance must appeal adverse state decisions to the Secretary of Commerce before proceeding (see below), a federal agency may proceed with an activity over state objections with a written notice to that effect.[362] However, the federal agency still holds the burden of showing that the proposed activity is consistent to the maximum extent practicable with the enforceable policies of the state in question.[363] If the state disagrees with the federal agency, the state may seek judicial review of the agency's decision, even if mediation procedures have not concluded.[364]

In most cases, a final court decision would bind the state and federal agencies in question. The CZMA does provide a "Presidential exemption" for activities found to be in the "paramount interest of the United States": the President can issue the exemption after any appealable "final judgment, decree,

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[358] 16 U.S.C. § 1456(c)(1)-(2).

[359] *Id*.

[360] CZMA § 307(h), 16 U.S.C. § 1456(h); 15 C.F.R. §§ 930.44, 930.110-16; Preamble to 2006 Fed. Consistency Regulations at 791; Preamble to 2000 Fed. Consistency Regulations at 77142; Federal Consistency Overview at 12. Mediation would also be available if an activity previously reviewed for consistency was going "off the rails" by failing to comply with the consistency provisions over time. 15 C.F.R. § 930.45.

[361] Preamble to 2000 Fed. Consistency Regulations at 77142; *see, e.g., Cal. Coastal Commission v. U.S.,* 5 F. Supp. 2d at 1110 ("Judicial review of a federal agency action under the CZMA is obtained through the Administrative Procedure Act.").

[362] *See* 15 C.F.R. § 930.43(d)-(e); *State of Delaware Dept. of Nat. Resources and Envtl. Control v. U.S. Army Corps of Engineers*, 681 F. Supp. 2d 546, 557 (D. Del. 2010); Federal Consistency Overview at 9.

[363] *See* 15 C.F.R. § 930.39; *Conservation Law Foundation v. Watt*, 560 F. Supp. 561, 576 (D. Mass 1983) ("It is plain from the language of the Act and regulations that the burden of establishing compliance with a state program is on the federal agency proposing the contemplated action, and not on the state.").

[364] *Id*. at § 930.116.

or order of any Federal court."[365] This provision has been used only once, in the events leading to the Supreme Court's decision in *Winter v. NRDC* (2008).[366] The President granted the CZMA exemption after a decision that enjoined the Navy from conducting certain sonar exercises because it had shown that proposed sonar exercises would be consistent to the maximum extent practicable with the enforceable policies of California's CMP.[367] The courts ultimately decided the case on non-CZMA grounds. It is worth noting, however, that the District Court expressed concern about the Presidential exemption provision's viability under the Constitutional separation of powers doctrine.[368]

Altogether, the burden of persuasion that the CZMA's "federal agency activity" provisions place on federal agencies, and the court access that they give to states, favor the states' exercise of consistency review authority with respect to federally-initiated CMSP. That is, states seem to have clear authority to ensure that CMSP Instruments are consistent with the enforceable policies of their CMPs.

Dispute Resolution for Consistency Decisions Regarding CMS Plan Implementation

Even if CMSP Instruments themselves were not subject to federal consistency review, states would have multiple chances to review any plan implementation actions for consistency with the enforceable policies of their CMPs. Any federal license, permit, OCS plan, or federal grant or loan in furtherance of CMSP would be subject to consistency review if it had foreseeable effects on coastal zone uses or resources.[369] While "federal agency activities" must only be consistent to the maximum extent practicable, these actions must be fully consistent with states' enforceable policies.[370]

"The authorizing Federal agency cannot approve a federal license or permit for an activity with reasonably foreseeable coastal effects unless the state concurs or the Secretary overrides the State's objection."[371] Unlike federal agencies, which may proceed over state objections to federal agency activities, applicants for federal authorizations must appeal an adverse state decision to the Secretary of Commerce.[372] The Secretary can override a state's objection if he finds (1) that the action is consistent with the objectives or purposes of the CZMA; or (2) that the action is otherwise necessary in the interest

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[365] CZMA § 307(c)(1)(B), 16 U.S.C. § 1456(c)(1)(B); Preamble to 2006 Federal Consistency Regulations at 791.

[366] 129 S. Ct. 365. *See* Preamble to 2006 Federal Consistency Regulations at 791 (noting that as of 2007, the Presidential exemption had never been used).

[367] *Id*. at 372-73. *See NRDC v. Winter*, 645 F. Supp. 2d 841, 854 (C.D. Cal. 2007).

[368] Particularly, the principle that the political branches of the Federal Government may not revise final decisions of Article III courts. *See NRDC v. Winter*, 527 F. Supp. 2d 1216, 1232 (C.D. Cal. 2008).

[369] *See supra* discussion of federal actions subject to consistency review.

[370] *See* 15 C.F.R. § 930.64 ("Following receipt of a State agency objection to a consistency certification, the Federal Agency shall not issue the federal license or permit except as provided [by Secretarial appeal].").

[371] CZMA § 307(c)(3)(A)-(B); Preamble to 2006 Fed. Consistency Regulations at 790.

[372] CZMA §§ 307(c)(3), 319, 16 U.S.C. §§ 1456(c)(3), 1465; 15 C.F.R. § 930.130(d)-(e); Preamble to 2006 Fed. Consistency Regulations at 791; Federal Consistency Overview at 10.

of national security.[373] If the Secretary overrides a state objection, the Federal agency may issue its authorization.[374]

It is important to note that the standard of review for a state's consistency decision changes during the Secretarial appeals process. Whereas the state applies the enforceable policies of its approved CMP, the Secretary does not apply those policies when it re-examines the state's decision. Rather, the Secretary applies the policies of the CZMA itself in a *de novo* review of the activity in question.

> While the Secretary may decide whether the State has complied with CZMA requirements by basing its objection on enforceable policies and objecting in a timely manner, *the Secretary does not review the substantive basis for the State's decision*. The Secretary will not substitute his decision for that of the States. Such an action would be contrary to a basic principle of the CZMA that, CZMA coastal management decisions are made by the States pursuant to State law incorporated into federally approved CMPs. Hence, *the Secretary's balancing of the coastal effects with the national interest and applying the CZMA objectives is a de novo review*.[375]

Both applicants and states can appeal an adverse Secretarial decision to a federal court under the APA; the Secretary's decision constitutes final agency action.[376] On appeal, the court will apply an "arbitrary and capricious" standard of review to the Secretary's determination that the project is consistent (or not) with the policies of the CZMA.[377]

The court access and standard of review that the CZMA affords states and private applicants under the federal authorization provisions are relevant, but not dispositive, to the question of whether states could use their consistency review authorities to adversely influence the implementation of a CMSP regime. "States have concurred with approximately 95 percent" of the "tens of thousands" of federal authorizations submitted for review.[378] Moreover, only a small number of actions (141) have caused disputes that escalated to the Secretarial Appeal level; the Secretary has issued a final decision on an even smaller number (44). Of the remainder, most appeals were withdrawn or settled, while a small number were dismissed or addressed on procedural grounds. [379]

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[373] *Id*.

[374] *Id*.

[375] Preamble to 2006 Fed. Consistency Regulations at 822 (emphasis added).

[376] 15 C.F.R. § 930.130(c).

[377] *See, e.g., Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168 (D.D.C. 2006) (private applicant appeal); *State of Connecticut v. U.S. Dept. of Commerce*, 2007 WL 2349894 (D. Conn. 2007) (state appeal).

[378] *See* NOAA, *Appeals to the Secretary of Commerce under the Coastal Zone Management Act (CZMA)* – March 10, 2010, available at http://coastalmanagement.noaa.gov/consistency/media/appealslist.pdf

[379] *Id*.

Given the uncertainty about the form of a CMSP regime and the statistics about the use of consistency review to influence federal authorizations, the role of consistency review in CMSP implementation (through agency permits, licenses, etc.) is uncertain. The enforceable policies of state CMPs have undoubtedly influenced many proposed federal actions: most state concurrences are the result of negotiated agreements between the federal agencies, states, and private applicants, such that federal plans and regulations *and* state enforceable policies play key roles in consistency certifications. Only when disputes are *extremely* difficult to resolve do states object to a proposal *and* applicants escalate their disputes all the way to a final Secretarial decision. It is quite difficult to foresee the nature of these disputes as they would arise in the course of CMSP implementation, especially as the goal of CMSP is to harmonize state and federal decision-making. The "federal agency activities" provision is much more likely to play a role in CMSP and should therefore be a larger focus of attention in the near term.