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COASTAL AND MARINE SPATIAL PLANNING
STRATEGIC ACTION PLAN COMMENT
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FOUR KEY ACTIONS FOR THE CMSP ACTION PLAN

The **Environmental Law Institute (ELI) Ocean Program**[1] submits this comment to highlight key opportunities to satisfy the federal agencies' statutory obligations, by building on the national ocean policy, stewardship principles, coastal and marine spatial planning (CMSP) national priority objective, and accompanying information established in response to Executive Order 13547, "Stewardship of the Ocean, Our Coasts, and the Great Lakes."[2]

Specifically, this comment focuses on how the CMSP Strategic Action Plan (CMSP SAP) can be used to support national and regional CMSP development by integrating CMSP with existing federal laws, policies, and regulations.

Table 1. Four Key Actions to Include in the CMSP SAP

1. Create a CMSP process that integrates CMSP development and implementation with **environmental impact assessment under the National Environmental Policy Act.**
2. Create a CMSP process that integrates CMSP development and implementation with **offshore leasing decisions under the Outer Continental Shelf Lands Act.**
3. Create a CMSP process that integrates CMSP development and implementation with **water quality protection under the Clean Water Act.**
4. Ensure that the CMSP SAP is **appropriately integrated with other SAPs** developed pursuant to the Task Force's recommendations and National Ocean Council mandate.

[1] ELI's comment is based on several years of research focused on law and policy mechanisms to implement ecosystem-based management for the oceans, including coastal and marine spatial planning. For more information, *see* ENVIRONMENTAL LAW INSTITUTE (ELI) AND CENTER FOR OCEAN SOLUTIONS, COASTAL AND MARINE SPATIAL PLANNING: LEGAL CONSIDERATIONS (2010); ELI, MARINE SPATIAL PLANNING IN U.S. WATERS: AN ASSESSMENT AND ANALYSIS OF EXISTING LEGAL MECHANISMS, ANTICIPATED BARRIERS, AND FUTURE OPPORTUNITIES (2009) (included here as an appendix); ELI, OCEAN AND COASTAL ECOSYSTEM-BASED MANAGEMENT: IMPLEMENTATION HANDBOOK (2009); ELI, EXPANDING THE USE OF ECOSYSTEM-BASED MANAGEMENT IN THE COASTAL ZONE MANAGEMENT ACT (2009). Additional information and reports are available at http://www.eli.org/Program_Areas/ocean_projects.cfm.

[2] Executive Order 13547, Stewardship of the Ocean, Our Coasts, and the Great Lakes (July 19, 2010).

According to Executive Order 13547 (Ocean Policy EO), it is now the national policy to "protect, maintain, and restore the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources."[3] To achieve this national ocean policy, President Obama has established a new National Ocean Council and mandated all federal agencies to:

- implement the national ocean policy, the stewardship principles, and the national priority objectives;
- participate in the CMSP process; and
- comply with certified coastal and marine spatial plans

"… to the fullest extent consistent with applicable law."[4] This includes following the detailed final recommendations developed by the precursor Interagency Ocean Policy Task Force (Task Force), which the Ocean Policy EO incorporates by reference.[5]

In developing nine Strategic Action Plans to support implementation of the national priority objectives, the National Ocean Council is to "identify specific and measurable near-term, mid-term, and long-term actions, with appropriate milestones, performance measures, and outcomes to meet each [national priority] objective."[6]

To achieve the Coastal and Marine Spatial Planning National Priority Objective (NPO), the Interagency Ocean Policy Task Force (Task Force) recommends development of an SAP to "[i]mplement comprehensive, integrated, ecosystem-based coastal and marine spatial planning and management in the United States."[7] A major rationale for CMSP is that

> It would allow for the reduction of cumulative impacts from human uses on marine ecosystems, provide greater certainty for the public and private sector in planning new investments, and reduce conflicts among uses and between using and preserving the environment to sustain critical ecological, economic, recreational, and cultural services for this and future generations.[8]

While in isolation the existing system of laws and regulations fails to achieve these objectives, when examined collectively, many U.S. laws and regulation are designed to address cumulative impacts, provide regulatory certainty, reduce conflicts among users and the ecosystem, and preserve the ecosystem. **The National Ocean Council, in developing the CMSP SAP, has an opportunity to develop a framework that builds from and integrates with the current system of laws and policies, rather than create a new layer of government bureaucracy.**

Specifically, the **National Environmental Policy Act (NEPA)** is an environmental impact assessment law that is designed to evaluate direct, indirect, and cumulative impacts of proposed activities in combination with all other past, present and reasonably foreseeable future activities that affect an ecosystem. It can be a platform upon which to build the environmental analysis that must accompany

[3] Executive Order 13547, § 2.
[4] *Id.* § 6.
[5] *Id.* § 1.
[6] Interagency Ocean Policy Task Force, Final Recommendations of the Interagency Ocean Policy Task Force 7 (July 19, 2010).
[7] *Id.* at 32.
[8] *Id.* at 33.

the coastal and marine spatial plans (CMS plans). By developing CMSP in connection with NEPA analyses, the NOC could enable a more certain regulatory environment and decrease the burden on project proponents to conduct large-scale and costly cumulative impact analyses.

Also, implementation of sector- and issue-specific laws and regulations could be improved through the development and use of CMSP. In order to ensure that agencies appropriately utilize this new and important planning tool, the NOC should specify how agencies could integrate existing siloed programs with the broader CMSP framework. This comment focuses specifically on the potential utility of integrating CMSP with the existing **Outer Continental Shelf Lands Act (OCSLA)** and **Clean Water Act (CWA)** programs.

Action 1

Create a CMSP process that integrates CMSP development and implementation with environmental impact assessment under the National Environmental Policy Act.

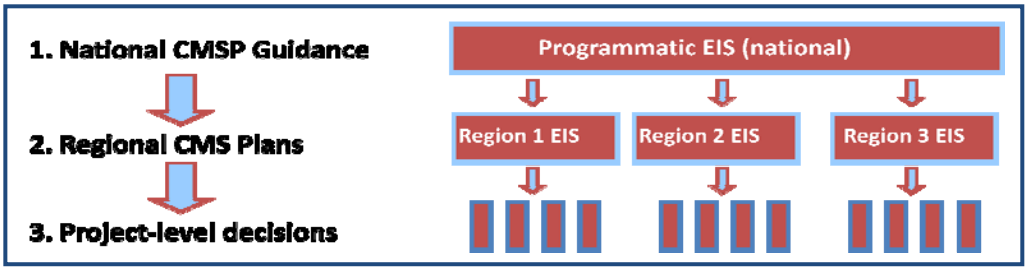
There is great potential to utilize the CMSP process to comply with statutory obligations to conduct environmental impact assessment in the ocean and coastal environment under the National Environmental Policy Act (NEPA). As Table 2 indicates, CMSP and NEPA have similar objectives and approaches.

Table 2. Similarities between NEPA and CMSP

Action/Approach	NEPA	CMSP
Environmental baseline assessment	X	X
Consideration of alternatives (trade-offs)	X	X
Cross-sector approach	X	X
Spatially explicit analysis	X	X
Identify and assess cumulative impacts	X	X
Planning tool	X	X
Tool to coordinate across agencies & jurisdictions	X	X

Specifically, a "tiered" NEPA approach offers a promising way to utilize the CMSP process to achieve NEPA's ecological, social, and economic objectives. Figure 1 provides a schematic showing how NEPA could be integrated with the CMSP process.

Figure 1. Integrating NEPA and CMSP



One type of NEPA document is called a programmatic environmental impact statement or PEIS. A programmatic EIS is most often used by agencies to conduct an environmental impact analysis of broad policies, plans, and programs. The NEPA Task Force in its 2003 recommendations categorized PEIS as addressing one of three actions: policy and/or strategy, land use, and program (Table 3).[9]

Table 3. Summary of Actions Addressed by PEIS[10]

Category of Action	Description	Example
Policy and/or strategy	National or regional integrated multiple program analyzes that establish program goals and objectives.	APHIS—"Proposed Rule for the Importation of Unmanufactured Wood Articles from Mexico—with Consideration for Cumulative Impact of Methyl Bromide Use" TVA—"Integration of NEPA into a Comprehensive Environmental Management Systems" BPA—"Business Plan" and an example of use in "Longview Energy Development Plan" USCG—"Deepwater Program"
Land Use	Integrated planning analyzes for a fixed geographical or landscape scope; might prescribe general standards and controls and procedures for project implementation.	White River National Forest Plan and EIS APHIS—"Bison Management Plan for Montana and Yellowstone National Parks"
Program	Resource or program-specific focused planning analyzes that decide future priorities for development and scheduling and set controls for implementation of site-specific actions.	APHIS—"Rangeland Grasshopper and Mormon Cricket Suppression Program" BPA—"Fish and Wildlife Improvement Plan"

Site-specific or action-specific EIS or EA documents follow from the programmatic EIS in a process known as "tiering." Such a tiered approach enables decision-makers to move analytically from broad and often cumulative impacts to more site-specific or action-specific impacts in a tiered fashion.[11]

[9] NEPA Task Force Recommendations, Chapter 3. Programmatic Analyses and Tiering (2003), *available at* http://ceq.hss.doe.gov/ntf/report/chapter3.pdf (last visited Feb. 11, 2011).
[10] Adapted from NEPA Task Force Recommendations. *Id.* This table excludes a column on "additional information" that included contact information.
[11] For a general discussion of programmatic EIS and tiering, *see* Beth C. Bryant, *NEPA Compliance in Fisheries Management: the Programmatic Supplemental Environmental Impact Statement on Alaskan Groundfish Fisheries and Implications from NEPA Reform*, 30 HARV. ENVTL. L. REV. 441 (2006).

Council on Environmental Quality (CEQ) regulations further define tiering as follows:

> Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:
>
> > (a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis. (b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.[12]

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."[13] 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.[14]

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."[15]

For CMSP, the tiering process could include the following stages: (1) 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 regional planning bodies 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.

[12] 40 CFR § 1508.28.
[13] 42 USC § 4331(b)(3).
[14] NEPA TASK FORCE, *supra* note 146, at 39 (2003).
[15] 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

Action 2

Create a CMSP process that integrates CMSP development and implementation with offshore leasing decisions under the Outer Continental Shelf Lands Act.

ELI is not alone in recognizing the opportunity to build from the new national ocean policy structures, plans, and information. There has been high-level recognition of the value of implementing the Ocean Policy EO and Task Force recommendations to achieve statutory obligations. For example, in the wake of the BP Deepwater Horizon oil disaster, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling called for integration of the five-year leasing program with coastal and marine spatial planning. Specifically, the Commission stated that

> Integrating five-year leasing plans and associated leasing decisions with the coastal and marine spatial planning process will be an important step toward assuring the sustainable use of ocean and coastal ecosystems. It could also reduce uncertainty for industry and provide greater predictability for potential users of different areas.[16]

Thus, the Commission recommended that "[t]he Department of the Interior should reduce risk to the environment from OCS oil and gas activities by strengthening science and interagency consultations in the OCS oil and gas decision-making process."[17]

As part of the OCSLA obligations, and including the OCS Oil and Gas Program for 2012–2017, DOI has the opportunity to satisfy the Ocean Policy EO obligations while at the same time satisfying its NEPA and OCSLA requirements. The remainder of this section briefly summarizes how the Coastal and Marine Spatial Plans (CMS Plans) can be integrated into and support planning and decision-making under NEPA and OCSLA.

Table 4. Three Ways to Integrate CMSP and OCSLA

OPPORTUNITY 1. The OCSLA PEIS process should be integrated or coordinated with the regional ecosystem assessments that are to accompany CMSP development, to increase understanding of ecosystem processes and human use impacts, better predict potential cumulative impacts, and support and inform management and decision-making at both the regional and sector-specific levels.

- Using CMSP-derived ecosystem information as a platform for OCSLA-specific impact assessment should improve DOI's efficiency and minimize the time and expense required to collect the same information from scratch.
- Building from CMSP ecosystem assessments should help DOI identify appropriate mitigation or monitoring priorities based on a better understanding of larger ecosystem processes, the connectivity between important habitat areas, and trends in key resources for each region.

[16] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling 262-63 (2010), *available at* http://www.oilspillcommission.gov/.
[17] *Id.* at 263.

Table 4. Three Ways to Integrate CMSP and OCSLA

OPPORTUNITY 2. Environmental analysis and decision-making under OCSLA should rely, in part, on the CMSP ecosystem assessments and CMSP Plans.

- A CMS Plan and accompanying ecosystem assessment could:
  - Serve as a mechanism to identify environment harm, fisheries and navigational needs, and the views of each region, including state and local government views.
  - Help determine when actions would be considered "unduly harmful."
  - Be included as part of the "environmental information" used to make decisions related to oil and gas leasing, development, exploration and production.
  - Form the basis of an environmental sensitivity determination, as well as its consideration of other "sea and sea-bed uses" and the laws and policies of affected states.

OPPORTUNITY 3: DOI should overcome the "cart before the horse" challenge of the PEIS and lease program process preceding SAP and CMSP development by creating conditional approval of the Lease Program and allowing incorporation of SAP and CMSP actions and incorporation of ocean policy planning decisions and information as they become available.

OCSLA OPPORTUNITY 1. The current OCSLA PEIS process should be integrated or coordinated with the regional ecosystem assessments being conducted for, to increase understanding of ecosystem processes and human use impacts, better predict potential cumulative impacts, and support and inform management and decision-making at both the regional and sector-specific levels.

Timeline: CMSP is in its initial stages, and it is unlikely that a CMSP regional assessment will be completed by the time the current OCSLA PEIS is complete or the OCS Oil and Gas Program for 2012–2017 is developed. However, the OCS Oil and Gas Program for 2012–2017 could be designed with conditional language to enable subsequent incorporation of CMSP regional ecosystem assessment information as it becomes available.

As explained in the Interagency Ocean Policy Task Force Final Recommendations, a CMSP ecosystem assessment is part of the CMSP process.[18] The purpose of the ecosystem assessment is to serve as the scientific basis upon which to develop a CMS plan. In addition, the CMSP ecosystem assessment will likely have broader utility for informing all regional ocean management decisions, including OCSLA decisions. By building from information developed under a CMS plan, DOI will likely have a stronger understanding of potential cumulative impacts and be better positioned to minimize potential harms.

Further, using CMSP-derived ecosystem information as a platform for OCSLA-specific impact assessment could improve procedural efficiency and minimize the time and expense required to collect the same information from scratch. It could improve the quality of OCSLA-specific environmental impact

[18] Interagency Ocean Policy Task Force, *supra* note 6 at 59.

assessments by providing a broader picture of the ecosystem. For example, a CMSP ecosystem assessment could indicate the distribution and significance of resources and habitat, and the interconnections between various ecosystem components.

Building from CMSP ecosystem assessments may help identify appropriate mitigation or monitoring priorities that might otherwise be missed. In addition, CMSP ecosystem assessments may help improve the quality of required mitigation in light of an improved understanding of larger ecosystem processes, the connectivity among habitats, and trends in key resources.

Box 2. Lessons from Massachusetts

Massachusetts recently developed a marine spatial plan to guide ocean development decisions. This example indicates the potential utility of the CMSP ecosystem assessment to inform oil and gas decision-making and, in particularly, the PEIS process.

In 2009, Massachusetts prepared a *Baseline Assessment of the Massachusetts Ocean Management Planning Area* (Baseline Assessment) to support marine spatial planning in Massachusetts waters. The Baseline Assessment constitutes the information base of the Massachusetts Ocean Management Plan (Plan).[19] After the state Secretary of Energy and Environmental Affairs adopted the Plan, "all certificates, licenses, permits and approvals for any proposed structures, uses or activities in areas subject to the ocean management plan" were required to be consistent with the Plan to the maximum extent practicable.[20] This requirement encompasses approvals made under the Massachusetts Environmental Policy Act (MEPA).[21]

The Baseline Assessment and supporting work group documents provide the scientific context for the state's efforts to manage conflicts and compatibilities between present and future human uses, and between human uses and the environment. The Baseline Assessment assembles and synthesizes the best available science on present conditions, characteristics, and human uses within the marine planning area.[22] It identifies key ecosystem components and maps the distribution, density, and abundance of "special, sensitive or unique [SSU] estuarine and marine life and habitats."[23] It also maps significant human uses within and adjacent to the management area, including renewable energy development, and identifies specific areas suitable for wind energy development. Further, it identifies important pressures and threats (e.g. water pollution) and principal drivers of ecosystem change. The Baseline Assessment incorporates an adaptive management element and must be updated every five years.

Notably, the Baseline Assessment includes many of the elements that are required in the description of the "existing environment" under MEPA, and therefore may be used to provide current baseline information against which the magnitude and significance of impacts of proposed projects or actions are evaluated. The Assessment provides important baseline information related to existing uses, recognizing them as significant interests, which should be considered in evaluating significant cumulative impacts under MEPA. Further, special, sensitive or unique resource information and maps

[19] MASS. GEN. LAW ch 21A § 4C (2008) (Massachusetts Oceans Act).
[20] MASS. GEN. LAW ch 21A § 4C (2008).
[21] 301 C.M.R. § 11.07(6)(g).
[22] *See generally* State of Massachusetts, Ocean Management Plan, vol. 2 (2008).
[23] MASS. GEN. LAW ch 21A § 4C (2008).

provide "clear baseline information that will allow proponents, agency staff, and the public to focus on areas of greatest potential environmental significance."[24] Information in the Baseline Assessment is meant to direct and focus scoping for cumulative impacts "on aspects of a given project of greatest potential environmental significance"[25] and appropriate alternative actions.

OCSLA OPPORTUNITY 2. Environmental analysis and decision-making under OCSLA should rely, in part, on the CMSP ecosystem assessments and CMSP Plans.

> Timeline: Since the CMSP ecosystem assessments and CMS Plans will not be complete in time for the final PEIS and development of the OCS Oil and Gas Program for 2012–2017, DOI could create conditional language to enable subsequent incorporation of CMSP regional ecosystem assessment information as it becomes available.

According to Section 5 of OCSLA, the Secretary of the Interior has broad authority to develop rules needed to "provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein." This and other provisions of OCSLA indicate that the Secretary has the broad authority to utilize the CMS Plans (and more broadly the national ocean policy and framework) for OCSLA decision-making.

OCSLA policy requires DOI to consider environmental harm when developing resources, take actions that do not affect fisheries and navigation, and consider views of state and local governments.[26] Because CMS Plans are developed in collaboration with state and tribal governments, they could serve as one of the key mechanisms for satisfying OCSLA obligations to consider state and local government views. Further, CMSP is intended to minimize user conflict and create regulatory certainty. The CMS Plans should serve as one of the mechanisms to ensure that oil and gas development activities do not adversely affect fisheries and navigational needs. Also, one required element of CMS plans is identification of important ecological areas, habitats, flora, and fauna. DOI should use such information to ensure that the lease program does not unduly impact such identified resources.

Under OCSLA Section 11, any authorized person can conduct geological and geophysical exploration as long as such activities do not interfere or endanger other operations and "which are not *unduly harmful* to aquatic life in such area."[27] CMS Plans should help determine when actions would be considered "unduly harmful."

Section 20 requires consideration of environmental information. Specifically, "[t]he Secretary shall consider available relevant *environmental information* in making decisions (including those relating to exploration plans, drilling permits, and development and production plans), in developing appropriate regulations and lease conditions, and in issuing operating orders."[28] CMS Plans should be included as part of the "environmental information" used to make decisions related to oil and gas leasing, development, exploration and production.

[24] State of Massachusetts, Ocean Management Plan, vol. 1 at 2-8 (2008).
[25] State of Massachusetts, Ocean Management Plan, vol. 1 at 2-8 (2008).
[26] OCSLA § 3.
[27] OCLSA § 11 (emphasis added).
[28] OCSLA, § 20 (emphasis added).

In addition to the general requirements under OCSLA, Section 18 creates the four-step oil and gas leasing process (five-year leasing program, lease sale, exploration, and development and production). The first step, the five-year leasing program, serves as the base of the pyramid and provides the broad planning framework upon which subsequent decisions are made.[29] By design, 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. CMSP offers significant opportunities to inform this five-year leasing program process.

The analysis requirements for development of the five-year leasing program align nicely with the CMSP regional scoping requirements (Table 5). Therefore, the information developed to support CMSP is likely to be a good starting place for analysis in the OCSLA lease program context.

Table 5. Comparing OSCLA and CMSP

OSCLA Requirements	CMSP Regional Overview Requirements[30]
(1) geographical, geological, and ecological characteristics	(1) "the planning area's ecosystems and their biological, chemical, and physical environments"
(2) the location of other sea and seabed uses	(2) "social, recreational, human health, safety, security, and economic uses"
(3) the relevant laws and policies of affected states	[CMS plan is to include a description of the regulatory framework related to CMSP]
(4) the relative environmental sensitivity and marine productivity of different areas	(4) "ecological and conservation considerations, including identification of important ecological areas, habitats, flora, and fauna; and other concerns of the region"

In addition to the four OCSLA requirements, the leasing program also must balance any potential oil and gas resources against the potential for environmental damage and adverse coastal zone impacts.[31] OCSLA implementing regulations require consideration of factors such as "multiple-use conflicts"[32] and use of the "views and recommendations of Federal agencies, State agencies, local governments, organizations, industries and the general public as appropriate."[33]

As data are collected and preliminary mapping takes place as part of the CMSP process, this information can be used to structure and inform the Lease Program process**.** A certified CMS Plan could form the basis of an environmental sensitivity determination, as well as its consideration of other "sea and sea-bed uses" and the laws and policies of affected states. Integrating oil and gas decision-making with CMS Plans and related ecosystem assessments can ensure that best available information is used in decision-making, advance regional goals and objectives, minimize potential user conflict, support regulatory certainty, and more effectively minimize cumulative impacts to coastal and ocean environments.

[29] *Id.*
[30] Interagency Ocean Policy Task Force, *supra* note 6 at 59.
[31] 43 U.S.C. § 1344(a). The D.C. Circuit recently affirmed that DOI's environmental sensitivity analysis must be substantive. 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).
[32] 30 C.F.R. § 256.26(a).
[33] *Id.* § 256.26(b).

OCSLA OPPORTUNITY 3. DOI should overcome the "cart before the horse" challenge of the PEIS and lease program process preceding SAP and CMSP development by creating conditional approval of the Lease Program and allowing incorporation of SAP and CMSP actions and incorporation of ocean policy planning decisions and information as they become available.

As noted previously, it is unlikely that a CMSP regional assessment will be completed by the time the OCSLA PEIS is complete or the OCS Oil and Gas Program for 2012–2017 is developed. And certainly the CSM Plans will not be completed by the time the Lease Program is finalized. However, the target for finalization of initial CMS Plans is 2015, two years before the end of the 2012-2017 Lease Program.

In order to appropriately consider the regional objectives and needs, the 2012-2017 Lease Program could be approved conditionally in order to allow for subsequent incorporation of CMSP regional ecosystem assessment information and SAP and CMSP decisions as they become available. Furthermore, the CMSP and SAP materials will certainly be available when it comes time to prepare the 2017-2022 Lease Program, and these comments would remain relevant.

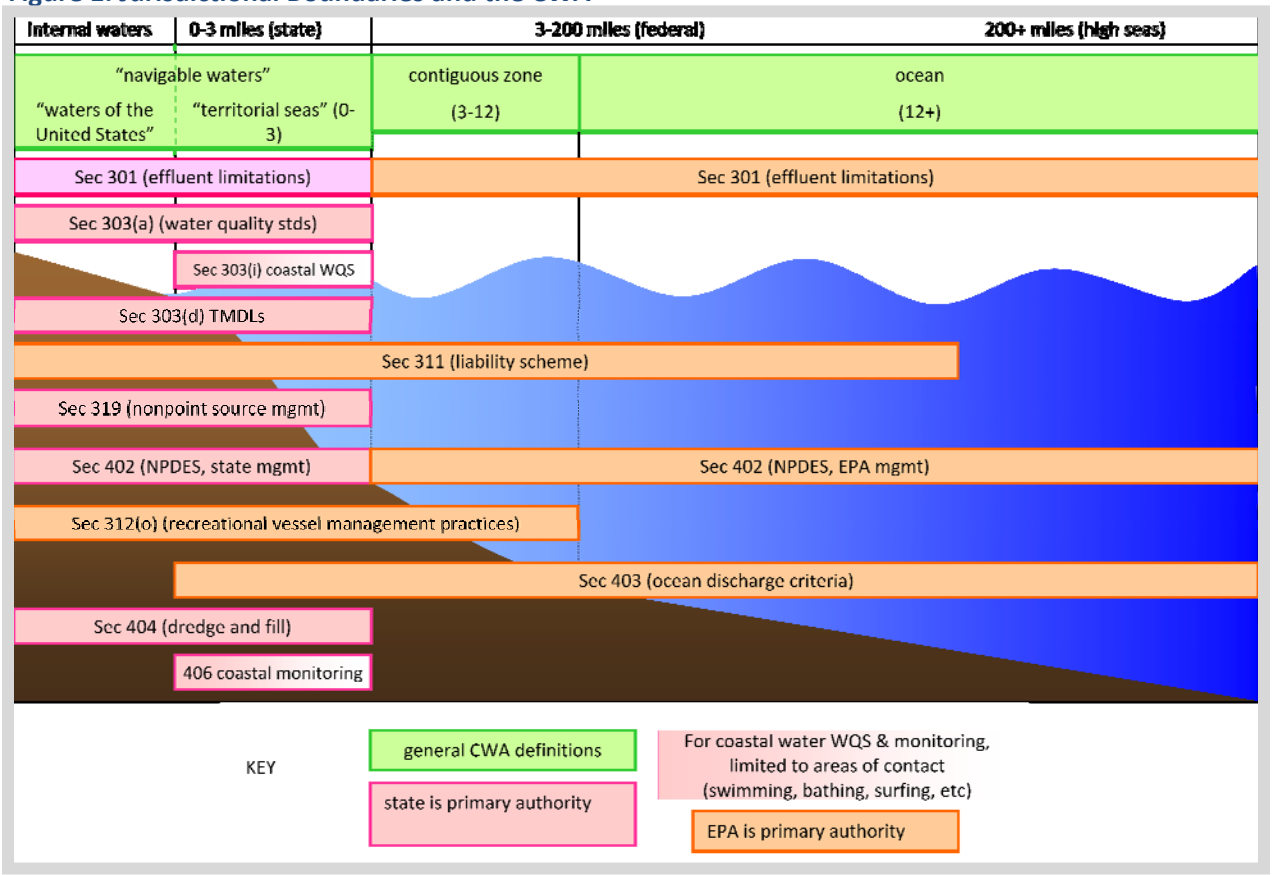
Action 3

Create a CMSP process that integrates CMSP development and implementation with water quality protection under the Clean Water Act.

For CMSP, the Task Force Recommendations make specific reference to one potential role of the Clean Water Act, stating that "ocean, coastal, and Great Lakes activities that affect land-based ecosystems should be considered and accounted for during CMSP efforts using the existing State and Federal programs including the Coastal Zone Management Act (CZMA), Clean Water Act, Clean Air Act, and other relevant authorities." Furthermore, the CWA may play a more direct role in CMSP, since it allows for place-based protection, including the designation of no-discharge zones. In fact, at one point EPA considered designating "special ocean sites" geared at minimizing discharge to such important areas.

Authority for addressing point and nonpoint sources of ocean pollution under the Clean Water Act varies depending on the specific provisions in the statute. Figure 1 provides an overview of the key regulatory elements of the CWA and how they apply to the ocean.

Figure 1. Jurisdictional Boundaries and the CWA



CWA OPPORTUNITY 1: Update ocean discharge criteria to adhere to ecosystem requirements identified by the CMSP ecosystem analysis and CMS Plans.

Ocean Discharge Criteria offer an opportunity to achieve water quality objectives in accordance with the Ocean Policy EO, Water Quality SAP, and CMSP. In addition to the NPDES point-source permitting program laid out in CWA Section 402, Section 403 sets forth additional requirements for NPDES permits for discharges to the territorial sea, contiguous zone, and ocean, and calls for EPA to establish ocean discharge criteria.[34] In accordance with this section, EPA may permit a point source discharge to these waters only if it determines that the discharge will not result in "unreasonable degradation of the marine environment." Unreasonable degradation is defined by regulation as:

(1) Significant adverse changes in ecosystem diversity, productivity and stability of the biological community within the area of discharge and surrounding biological communities,

(2) Threat to human health through direct exposure to pollutants or through consumption of exposed aquatic organisms, or

[34] 33 U.S.C. § 1343(a); For a thorough discussion of ocean discharge criteria, *see* Robin Kundis Craig & Sarah Miller, *Ocean Discharge Criteria and Marine Protected Areas: Ocean Water Quality Protection Under the Clean Water Act*, 29 B.C. Envtl. Aff. L. Rev. 1 (2001).

> (3) Loss of esthetic, recreational, scientific or economic values which is unreasonable in relation to the benefit derived from the discharge.[35]

EPA determines whether a discharge will cause unreasonable degradation of the marine environment based on ten factors set forth in the regulations.[36]

If EPA determines that the discharge will not cause unreasonable degradation after any necessary permit conditions have been applied, it may issue the permit. Conversely, if the agency determines that the discharge will cause unreasonable degradation even with permit conditions, or that there is insufficient information to determine whether unreasonable degradation will occur, it may not permit the discharge. Notably, if the discharge complies with state water quality standards for that pollutant, it is presumed not to cause unreasonable degradation of the marine environment.[37]

Despite an attempt in the early 2000s, EPA has not updated the ocean discharge criteria since 1980, and as currently written, the criteria provide limited guidance for dischargers. Therefore, the ocean discharge criteria could be a target for improvement consistent with CMSP. One advantage of building from this provision is that EPA has sole authority to regulate all ocean discharges in accordance with the ocean discharge criteria. In other words, the agency has the ability to regulate ocean point source discharges in all ocean waters.

In order to better protect ocean and coastal waters and take advantage of the CMSP process, EPA could revive its efforts to develop new ocean discharge criteria. The prior proposed rule, which was withdrawn, included elements that still resonate today. Some of these described by Kundis Craig (2001) include the following:

- Definition of a 3-200 mile "use" as "Healthy Ocean Waters."
- Creation of discharge criteria based on the above use.
- Establishment of "special ocean sites" that would limit new discharges, and would encourage states to adopt areas as "no discharge zones"[38]

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[35] 40 C.F.R. § 125.121.

[36] 40 C.F.R. § 125.122(a). These factors are:

> (1) The quantities, composition and potential for bioaccumulation or persistence of the pollutants to be discharged;
> (2) The potential transport of such pollutants by biological, physical or chemical processes;
> (3) The composition and vulnerability of the biological communities which may be exposed to such pollutants, including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystem, such as those important for the food chain;
> (4) The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism.
> (5) The existence of special aquatic sites including, but not limited to marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;
> (6) The potential impacts on human health through direct and indirect pathways;
> (7) Existing or potential recreational and commercial fishing, including finfishing and shellfishing;
> (8) Any applicable requirements of an approved Coastal Zone Management plan;
> (9) Such other factors relating to the effects of the discharge as may be appropriate;
> (10) Marine water quality criteria developed pursuant to section 304(a)(1).

[37] 40 C.F.R. § 125.122(b).

[38] Kundis Craig & Miller, *supra* note 34 at 26-29 (2001).

CWA OPPORTUNITY 2: Develop recreational boating regulations in a way that requires adherence to CMS Plans.

With few exceptions, any discharge of a pollutant from a point source into internal, state, and federal waters requires a permit under the NPDES program. Permits can be granted either to individual dischargers or as part of a general permit. For example, the Vessel General Permit is a recently developed general NPDES permit, which, the EPA estimates, applies to approximately 61,000 domestic vessels and approximately 8,000 foreign-flagged vessels.[39]

The NPDES program comes with exceptions and does not apply the same in all waters, and the definition of "discharge of a pollutant" varies according to ocean boundaries. In the freshwater and 0-3 mile area (i.e. navigable waters), "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."[40] In federal waters and high seas (i.e. waters of the contiguous zone and ocean), "discharge of a pollutant" is "any addition of any pollutant … from any point source *other than a vessel or other floating craft.*"[41] Therefore, vessels and floating crafts do not require NDPES permits under the CWA for discharges beyond the 3-mile limit. In accordance with this provision, EPA limited the Vessel General Permit to only discharges in the 0-3 mile ocean area.[42]

Further, with passage of the Clean Boating Act in 2008, recreational vessels were excluded from the vessel definition and the subsequent rule.[43] However, the new law also amended the CWA to add the new Section 312(*o*), which calls upon EPA to: develop regulations to identify discharges for which it is reasonable and practical to develop management practices to mitigate impacts; identify the applicable management practices; and create performance standards for each practice.[44] It then calls upon the Coast Guard to promulgate regulations that address the design, construction, installation, and use of the management practices.

In designing new regulations, EPA has an opportunity to develop best management practices and performance standards in accordance with CMSP, including ecosystem assessments and CMS plans.

[39] EPA, *Background*, *at* http://cfpub.epa.gov/npdes/vessels/background.cfm (last visited Jan. 3, 2011).
[40] 33 USC § 1362(12)(A).
[41] 33 USC § 1362(12)(A) (emphasis added).
[42] For more information on the Vessel General Permit, *see* EPA, Vessel Discharges, *at* http://cfpub.epa.gov/npdes/home.cfm?program_id=350 (last visited January 3, 2011). Prior to 2008, EPA specifically excluded all ocean vessels from NDPES discharge requirements. However, the 9th Circuit found this regulation to be a direct violation of Clean Water Act requirements and vacated the previous rule. *Northwest Environmental Advocates v EPA*, 537 F.3d 1006 (9th Cir 2008).
[43] Pub. L. 110-288 (2008).
[44] For a brief summary, *see* EPA, *Development of Best Management Practices for Recreational Boats under Section 312(o) of the Clean Water Act*, *at* http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2040-AF03?opendocument (last visited Jan. 3, 2011).

RECOMMENDED ACTION 4.

Ensure that the CMSP SAP is appropriately integrated with other SAPs developed pursuant to the Task Force's recommendations and National Ocean Council mandate.

As a tool for ecosystem-based management implementation, it is especially important to link the CMSP SAP with the ecosystem-based management SAP.

In addition to the CMSP SAP, the NOC is developing strategic action plans for eight other priority objectives. These are: (1) Ecosystem-Based Management; (2) Inform Decisions and Improve Understanding; (3) Coordinate and Support; (4) Resiliency and Adaptation to Climate Change and Ocean Acidification; (5) Regional Ecosystem Protection and Restoration; (6) Water Quality and Sustainable Practices on Land; (7) Changing Conditions in the Arctic; and (8) Ocean, Coastal, and Great Lakes Observations, Mapping, and Infrastructure. As the core approach envisioned by the Task Force, the concepts, objectives, and actions taken to effectively implement CMSP should inform, influence, and affect implementation of the other national priority objectives. The NOC should, accordingly, ensure that all strategic action plans are appropriately aligned and integrated.