



2012 – 2017 OCS OIL & GAS PEIS SCOPING COMMENT

FOUR OPPORTUNITIES TO IMPROVE THE OCS OIL AND GAS PROGRAM FOR 2012–2017 BY IMPLEMENTING THE NATIONAL OCEAN POLICY AND TASK FORCE RECOMMENDATIONS

The Environmental Law Institute (ELI) submits this comment to highlight four key opportunities to satisfy the Department of the Interior’s (DOI’s) statutory obligations under the Outer Continental Shelf Lands Act (OCSLA) and the National Environmental Policy Act (NEPA), by building on the national ocean policy, stewardship principles, and national priority objectives and utilizing the planning bodies, strategic action plans (SAPs), and accompanying information established in response to Executive Order 13547, Stewardship of the Ocean, Our Coasts, and the Great Lakes¹ (Table 1). Specifically, this comment focuses on how these new ocean governance tools should inform and support the PEIS scoping process and development of the OCS Oil and Gas Program for 2012–2017 (Lease Program).²

Table 1. Summary of Opportunities

OPPORTUNITY 1. The OCS Oil and Gas Program for 2012–2017 should adhere to Strategic Action Plan actions and outcomes to ensure that offshore oil and gas activities support the national priority objectives set out in the Ocean Policy Executive Order and Task Force Recommendations.

- DOI should create heightened management requirements in the “areas of special sensitivity” as they are identified in accordance with the “Ecosystem-Based Management” Strategic Action Plan.
- DOI should ensure that the OCS Oil and Gas Program for 2012-2017 conforms to the “protection, maintenance, and restoration” framework established by the “Regional Ecosystem Protection and Restoration” Strategic Action Plan, and ensure that the Lease

¹ Executive Order 13547, Stewardship of the Ocean, Our Coasts, and the Great Lakes (July 19, 2010).

² 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.

Table 1. Summary of Opportunities

Program is designed so that oil and gas activities do not interfere with the ability to restore priority sites identified by this Strategic Action Plan.

- To ensure that the Lease Program does not overly burden already stressed ecosystems and communities, when designing the lease program the DOI should adhere to the “Changing Conditions in the Arctic” Strategic Action Plan actions and outcomes designed to minimize such stress.
- DOI should ensure that the Lease Program is consistent with the Arctic Strategic Action Plan actions designed to better conserve, protect, and sustainably manage Arctic coastal and ocean resources.

OPPORTUNITY 2. The OCSLA PEIS should be integrated or coordinated with the regional ecosystem assessments that are to accompany CMSP development (“CMSP ecosystem assessments”), 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.

OPPORTUNITY 3. 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 4: 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.

A MANDATE FROM THE PRESIDENT

According to Executive Order 13547 (Ocean Policy EO), it is 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, including DOI, 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 final recommendations developed by the Interagency Ocean Policy Task Force (Task Force), which the Ocean Policy EO incorporates by reference.⁵

The National Ocean Council is developing nine Strategic Action Plans to support implementation of the national priority objectives (Table 2). The SAPs are 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 Draft SAPs are expected in the summer of 2011 and slated for completion before the end of the year.

Table 2. Strategic Action Plans to Support National Priority Objective Implementation

1. Ecosystem-Based Management
2. Coastal and Marine Spatial Planning
3. Inform Decisions and Improve Understanding
4. Coordinate and Support
5. Resiliency and Adaptation to Climate Change and Ocean Acidification
6. Regional Ecosystem Protection and Restoration
7. Water Quality and Sustainable Practices on Land
8. Changing Conditions in the Arctic
9. Ocean, Coastal, and Great Lakes Observations, Mapping, and Infrastructure

While all of the SAPs will likely influence DOI’s offshore oil and gas management, this comment focuses on the utility of the following SAPs and related actions to achieve and support OCSLA and NEPA statutory obligations: (1) Ecosystem-Based Management (EBM SAP), (2) Coastal and Marine Spatial Planning (CMSP SAP), (6) Regional Ecosystem Protection and Restoration (Protection and Restoration SAP), and (8) Changing Conditions in the Arctic (Arctic SAP).

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).

The Ocean Policy EO and accompanying Task Force recommendations focus particularly on the use of CMSP as a mechanism to achieve the national ocean policy, and the Task Force provided a detailed overview of its recommended CMSP process (Table 3). Because of the emphasis on the CMSP approach, this comment devotes considerable attention to the potential utility of CMSP and the accompanying information to support OCSLA decision-making.

Table 3. What is coastal and marine spatial planning?

CMSP is a process for planning all human activities in and on the ocean. This comprehensive process is designed to reduce conflict among ocean users by figuring out the times and locations for different activities. It specifically tries to reduce two types of conflict: conflict between multiple activities/actors, and conflict between activities and the ecosystem.⁷ While some activities are easily compatible and may enhance other management goals, others may compete for available space, effectively precluding or negatively impacting one another.

CMSP is designed to build from local or regional objectives. In the U.S. regional planning bodies are tasked with establishing economic, social, and/or ecosystem goals that they wish to achieve over the short- and long-term. These goals will then guide regional planners and decision-makers as they examine the existing and planned future uses of the ocean and coastal resources. The regional planners and decision-makers often then determine where (and when) each activity is best suited to occur.⁸ The idea is to balance human needs and development with marine ecosystem protection, to make sure that the marine ecosystem continues to be able to support critical ecosystem services (including subsistence hunting). The process often results in better data management and sharing and improved communication between stakeholders and agencies.

One of the common products of CMSP is a plan (CMS plan), which may geographically map the parties' agreement. That is, it may show when and where the parties have agreed that particular uses and activities should take place. The plan or vision is then implemented by the various actors responsible for ocean management through tools like voluntary agreements, regulations, and/or guidelines for relevant permitting or licensing processes.

⁷ See Charles Ehler & Fanny Douvère, *Marine Spatial Planning: A Step-by-Step Approach Toward Ecosystem-based Management*, Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, IOC Manual and Guides No. 53, ICAM Dossier No. 6, at 18 (2009).

⁸ *Id.*

A CALL FOR SUPPORT FROM THE OIL SPILL COMMISSION

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.⁹

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.”¹⁰

OPPORTUNITIES

As part of 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 comment briefly summarizes how the Strategic Action Plans and Coastal and Marine Spatial Plans (CMS Plans) can be integrated into and support planning and decision-making under NEPA and OCSLA.

OPPORTUNITY 1. The OCS Oil and Gas Program for 2012–2017 should adhere to Strategic Action Plan actions and outcomes to ensure that offshore oil and gas activities support the national priority objectives set out in the Ocean Policy Executive Order and Task Force Recommendations.

Timeline: All SAPs are under development now, with draft plans expected in Summer 2011 and final plans before the end of the year. With this timeline, the OCS Oil and Gas Program for 2012–2017 should be able to utilize the draft and/or final SAPs when developing the PEIS and the five-year lease program.

The SAPs will result in “specific and measurable near-term, mid-term, and long-term actions, with appropriate milestones, performance measures, and outcomes to meet each objective.”¹¹

⁹ 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/>.

¹⁰ *Id.* at 263.

These specific and measurable actions, designed to achieve national priority objectives, will be important articulations of the desired future state of the nation's ocean resources and economic and ecosystem health. SAP actions, milestones, performance measures, and outcomes could therefore be used to inform OCSLA decision-making by:

- Providing information related to regional and state priorities that can be used to identify potential ecosystem, economic and social objectives and impact concerns, including potential cumulative impacts;
- Potentially serving as regionally articulated limits to environmental and other impacts, which could signal the point at which impacts are considered "significant" and have reached unacceptable levels under the environmental impact assessment process; and
- Supporting the agency's decisions related to mitigation, monitoring, and adaptive management.

The following is a brief summary of relevant SAP objectives that could be used to frame the breadth of the PEIS analysis and the development of the OCS Oil and Gas Program for 2012–2017:

The **Ecosystem-Based Management** national priority objective calls for a SAP that, among other things, identifies and prioritizes geographic areas of special sensitivity or such areas in greatest need of ecosystem-based management.¹² The 2012-2017 Lease Program could be framed in a way that enables creation of heightened management requirements in the areas of special sensitivity as they are developed or designated.

In a similar vein, the **Regional Ecosystem Protection and Restoration** national priority objective calls for a plan that prioritizes the location and scope of coastal restoration. And it calls for a plan that protects, maintains, and restores populations and essential habitats supporting fisheries, protected species, ecosystems, and biological diversity.¹³ Once the SAP is developed, the Lease Program should adhere to the protection, maintenance, and restoration framework established by this SAP, and DOI decisions should ensure that oil and gas activities do not interfere with the ability to restore priority sites identified by the SAP.

Because the OCS Oil and Gas Program for 2012–2017 is specifically considering potential expanded lease areas in the Chukchi and Beaufort Seas, it will be especially important for DOI to adequately consider a third national priority objective, **Changing Conditions in the Arctic**. This objective recognizes the added stress to Arctic ecosystems and communities created by increased human activity, and it calls for a SAP that addresses "[b]etter ways to conserve, protect, and sustainably manage Arctic coastal and ocean resources."¹⁴ To ensure that the OCS Oil and Gas Program for 2012–2017 does not overburden these already stressed ecosystems and communities, the Lease Program should abide by the SAP actions designed to minimize such stress. Similarly, the Lease Program should be consistent with the SAP actions designed to better conserve, protect, and sustainably manage the Arctic coastal and ocean resources.

¹¹ Interagency Ocean Policy Task Force, *supra* note 6, at 7.

¹² Interagency Ocean Policy Task Force, *supra* note 6 at 32.

¹³ *Id.* at 38.

¹⁴ *Id.* at 39.

DOI's adherence to the SAPs could help it satisfy express OCSLA requirements to:

- Consider environmental harm when developing OCS resources, as required by OCSLA Section 3;¹⁵
- Use the SAPs to ensure that geological and geophysical exploration activities are not "unduly harmful to aquatic life" as required by OCSLA Section 11;
- Use SAPs as part of the "relevant environmental information" as required by OCSLA Section 20; and
- Use SAPs as part of the basis for the environmental sensitivity analysis required by OCSLA Section 18.

Box 1. Lessons from Norway: Managing Oil and Gas, Shipping, and Fishing

Norway provides a good example of the role of CMSP in oil and gas development because it has addressed oil and gas development as part of its marine spatial planning efforts. Also, Norway is active in Arctic oil and gas development, so lessons may be learned in support of U.S. Arctic oil and gas development.

In 2001-2002, the Norwegian Ministry of Environment issued a report that, among other things, called for development of ecosystem-based management plans for Norwegian marine waters. The goal was to establish more coordinated marine management. The first stage was creation of an integrated management plan for the Barents Sea, focusing on the environment, fishing, oil and gas activities, and shipping. Lessons learned during plan development would then inform the creation and adoption of similar integrated management plans for the Norwegian Sea, and then the North Sea.

The planning process included conducting four environmental impact assessments to determine the impacts of various activities and pressures on the ecosystem and local communities. As requested, it focused on the co-existence of oil and gas, shipping, and fishing activities, which previously were all managed separately. The resulting Barents Plan establishes a framework for managing all human activities in the area, to ensure that the marine ecosystem continues to be healthy and productive. As part of this approach, the Plan identifies areas of particular value or concern (for example, areas that are environmentally sensitive) to inform management decisions. Norway continues to use this integrated management approach in other areas, developing a plan for the Norwegian sea in 2009 and undertaking efforts now to establish a North Sea plan.

Sources: Royal Norwegian Ministry of the Environment, Report No. 12 to the Storting (2001-2002), Report No. 8 to the Storting (2005-2006), and Report No. 37 to the Storting (2008-2009); UNESCO, Marine Spatial Planning Initiative, MSP Around the World: Norway, http://www.unesco-ioc-marinesp.be/spatial_management_practice/norway (last visited March 20, 2011); Knut F. Kroepelien, *The Norwegian Barents Sea Management Plan and the EC Marine Strategy Directive*, 16 REV. OF EUR. CMTY. & INT'L ENVTL. LAW 27, 31 (2007); Norwegian Polar Institute, Barents Sea 2007-High Activity in Important Area, <http://npweb.npolar.no/english/articles/1208773699.31> (last visited March 20, 2011).

¹⁵ OCSLA § 3

OPPORTUNITY 2. The OCSLA PEIS should be integrated or coordinated with the regional ecosystem assessments being conducted for CMSP (“CMSP ecosystem assessments”), 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 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. Specifically, the Task Force calls for an assessment that,

based on environmental, social, economic, and other necessary data and knowledge, describe[es] the existing and predicted future conditions, uses, and characteristics of the ocean, coastal, or Great Lakes areas covered in the CMS Plan. The regional assessment would include: relevant biological, chemical, ecological, physical, cultural, and historical characteristics of the planning area; ecologically important or sensitive species/habitats/ecosystems; and areas of human activities. The assessment would also include an analysis of ecological condition or health and of cumulative risks as well as forecasts and models of cumulative impacts. The regional assessment would explain the information obtained and analyses conducted during the planning process and how they were used to help determine management decisions and plan alternatives.¹⁶

The purpose of the CMSP 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 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

¹⁶ Interagency Ocean Policy Task Force, *supra* note 6 at 59.

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 particular, 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).¹⁷ 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.¹⁸ This requirement encompasses approvals made under the Massachusetts Environmental Policy Act (MEPA).¹⁹

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.²⁰ It identifies key ecosystem components and maps the distribution, density, and abundance of “special, sensitive or unique [SSU] estuarine and marine life and habitats.”²¹ 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 provide “clear baseline information that will allow proponents, agency staff, and the public to focus on areas of greatest potential environmental significance.”²² 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”²³ and appropriate alternative actions.

¹⁷ MASS. GEN. LAW ch 21A § 4C (2008) (Massachusetts Oceans Act).

¹⁸ MASS. GEN. LAW ch 21A § 4C (2008).

¹⁹ 301 C.M.R. § 11.07(6)(g).

²⁰ See generally State of Massachusetts, Ocean Management Plan, vol. 2 (2008).

²¹ MASS. GEN. LAW ch 21A § 4C (2008).

²² State of Massachusetts, Ocean Management Plan, vol. 1 at 2-8 (2008).

²³ State of Massachusetts, Ocean Management Plan, vol. 1 at 2-8 (2008).

OPPORTUNITY 3. 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.²⁴ 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 designed 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 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.”²⁵ 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.”²⁶ 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.

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.²⁷ By

²⁴ OCSLA § 3.

²⁵ OCSLA § 11 (emphasis added).

²⁶ OCSLA, § 20 (emphasis added).

²⁷ *Id.*

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 3). Therefore, the information developed to support CMSP is likely to be a good starting place for analysis in the OCSLA lease program context.

Table 3. Comparing OCSLA and CMSP	
OCSLA Requirements	CMSP Regional Overview Requirements²⁸
(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 listed in Table 3, the leasing program also must balance any potential oil and gas resources against the potential for environmental damage and adverse coastal zone impacts.²⁹ OCSLA implementing regulations require consideration of factors such as “multiple-use conflicts”³⁰ and use of the “views and recommendations of Federal agencies, State agencies, local governments, organizations, industries and the general public as appropriate.”³¹

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.

²⁸ Interagency Ocean Policy Task Force, *supra* note 6 at 59.

²⁹ 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).

³⁰ 30 C.F.R. § 256.26(a).

³¹ *Id.* § 256.26(b).

OVERARCHING CHALLENGE: THE CART BEFORE THE HORSE

One of the greatest hurdles for appropriate integration of the SAPs and CMSP with the five-year leasing program is that the 2012 OCS Oil and Gas Program for 2012–2017 decision-making process is happening before SAPs are finalized and well before the development of CMS plans in each region. The challenge, then, is to create a five-year leasing program that is flexible enough to allow incorporation of the SAPs and CMS plans and related information as these resources become available.

OPPORTUNITY 4: 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 to allow incorporation of SAP and CMSP actions and incorporation of ocean policy planning decisions and information as it becomes available.

As noted previously, it is unlikely that a CMSP regional assessment will be completed by the time the 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 should still be relevant.

For additional information, please see http://www.eli.org/Program_Areas/ocean_projects.cfm or contact Kathryn Mengerink, J.D. Ph.D., Director, Ocean Program, Environmental Law Institute at mengerink@eli.org or (858) 822-5821.