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Emerging Issue: Coastal and Marine Spatial Planning: Found in the Wind: The Value of Early Consultation and Collaboration with Other Ocean Users for Successful Offshore Wind Development

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Found in the Wind:

The Value of Early Consultation and Collaboration with Other Ocean Users for Successful Offshore Wind Development

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Governors of at least twelve East Coast states, from both political parties, and the Obama Administration have made offshore wind development a top priority. Their hoped-for pace of development, however, leaves the potential for gaps in understanding and accommodating other ocean users. When faced with the prospect of displacement, these other ocean users (some of whom date from colonial days) are naturally protective and become suspicious if the offshore wind planning process appears to pass them by.

What can be missing is the very element that federal

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initiatives profess they seek to ensure—comprehensive inclusion in planning of all interested parties from the outset. Whether the goal is marine spatial planning, access to ports, sustainable and profitable fisheries management, environmental assessment of wind energy areas (WEAs) under Department of Interior's (DOI's) "Smart from the Start" initiative, or issuance of a commercial project lease on the outer continental shelf (OCS), other ocean users affected by the action must be brought to the table in a timely and meaningful way.

Current law requires such public outreach, but sequencing remains a major issue. Critical decision-making moments often occur well before prescribed notice-and-public comment periods. Likewise, important analytical studies to inform decision-making are sometimes prepared before outreach begins. Bringing together interested parties early and often, in a meaningfully engaged fashion, can allay fears, expedite compromise, and promote growth of this new ocean industry while preserving economically important historic uses.

OCEAN REGULATORY AND MANAGEMENT INITIATIVES INVOLVING OFFSHORE WIND

Near-coastal areas are often very busy places. As a result, offshore wind development projects can simultaneously implicate a series of management and planning initiatives devoted to a range of economic and other uses, including coastal and marine spatial planning (CMSP); the Bureau of Ocean Energy Management's state-oriented Intergovernmental Renewable Energy Task Forces and "Smart from the Start" initiative; and the U.S. Coast Guard's Atlantic Coast Port Access Route Study (ACPARS). Significantly, each of these initiatives is distinct, and involves separate processes and objectives, many of which we describe briefly below. State, and often local, governments are involved in all of these federal initiatives, but differing state agencies or local departments may participate, depending on the program. Federally chartered managers of ocean resources such as regional fishery management councils and non-governmental bodies such as maritime pilots' associations also have roles to play in creating offshore wind energy development plans that are harmonious with other ocean uses. As described later in this essay, however, the various federal initiatives do not always

engage these important groups, who are often closer to the ocean users than the state or federal agencies that administer the regulation of their activities and management of their resources.

Further, in the private sector, historic ocean users are deeply embedded in the social and economic fabric of coastal communities, and remain skeptical of offshore wind's promises of new jobs and environmental benefits, particularly if these are realized at the cost of risking their ways of life. Many also fear the proliferation of a daunting array of independent regulatory and management bodies, each with the potential to affect negatively their livelihoods. Finally, historic users often lack the time and resources, not to mention the opportunity, to participate in these various regulatory and planning processes.

In the face of this diverse and often volatile brew, offshore wind energy development will require both programmatic integration and public support to achieve its promise. In this essay, we will first introduce prominent programmatic and management regimes with which offshore wind developers will need to interact, then discuss certain of the principal legal requirements, and conclude with recommendations on how to help promote and ensure public support for offshore wind development. We decided to co-author this essay because we believe strongly in the importance of early, informed, candid, and inclusive planning and management processes for offshore wind development, and the opportunities it provides to help revitalize and diversify our working waterfronts.

COASTAL AND MARINE SPATIAL PLANNING (CMSP)

CMSP has been colloquially described as the "biggest piece of legislation Congress never passed." President Obama initiated the process last year in Executive Order 13,547,¹ following failed legislative efforts such as the Oceans Conservation, Education, and National Strategy for the 21st Century Act² and the National Oceans Protection Act of 2009.³ Both bills failed to pass the 111th Congress. More specifically, President Obama established the Interagency Ocean Policy Task Force on June 12, 2009. The

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1. Exec. Order No. 13,547, 75 Fed. Reg. 45,023 (July 19, 2010).
 2. H.R. 21, 110th Cong. (2007).
 3. S. 858, 111th Cong. (2009).

White House Council on Environmental Quality (CEQ) led the Task Force's efforts to develop a process to manage our oceans. On July 19, 2010, the Task Force released a set of final recommendations on ocean policy. On the same day, the President adopted the recommended executive order.⁴ In the same executive order, President Obama created the National Ocean Council (NOC) and ordered the development of regional marine spatial plans.⁵

The President's CMSP program is designed to develop nine overarching regional marine spatial plans, each to be the result of ecosystem-based planning techniques based on the latest information. At its core, the success of CMSP depends on public participation; however, the principal CMSP consultations mainly involve governmental and tribal entities. As the Task Force noted, CMSP is about "[e]nsuring a comprehensive and collaborative framework for the stewardship of the ocean, our coasts, and the Great Lakes that facilitates cohesive actions across the Federal Government as well as participation of State, tribal, and local authorities, regional governance structures, non-governmental organizations, the public, and the private sector."⁶ The key words here are *comprehensive* and *collaborative*. Deeds need to follow these aspirational words.

BOEM TASK FORCES AND "SMART FROM THE START"

Contemporaneously with promoting CMSP, the Obama Administration has vigorously promoted offshore wind energy development. Among other things, it reorganized the former Minerals Management Service (MMS) into the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE),⁷ which on October 1, 2011 again was divided into the Bureau of

4. Exec. Order No. 13,547, 75 Fed. Reg. at 45,023.

5. *Id.* at 45,023.

6. THE WHITE HOUSE COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE 15 (2010).

7. BOEMRE was created as a response to the Deepwater Horizon Gulf of Mexico oil spill. *Making the Gulf Coast Whole Again: Assessing the Recovery Efforts of BP and the Obama Administration: Hearing Before the H. Comm. On Oversight and Government Reform*, 111th Cong. 3 (2011) (statement of Michael R. Bromwich, Director, Bureau of Ocean Energy Management, Regulation and Enforcement, United States Dep't of the Interior).

Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement, completing the reorganization of the former MMS. BOEM now has regulatory oversight of offshore wind, wave, and tidal or ocean current energy projects in federal waters, as conferred to its predecessor agency by the Energy Policy Act of 2005 (EPAAct).⁸ Compliance with the National Environmental Policy Act (NEPA) represents an important series of steps relating to lease issuance by BOEM.⁹

The renewable ocean energy provisions of EPAAct led to an extensive MMS rulemaking process that culminated in the April 2009 rulemaking (Lease Rule).¹⁰ Under the Lease Rule, the issuance of a lease and subsequent approval of wind energy development on the OCS is a staged decision-making process that occurs in four distinct phases: (1) planning and analysis; (2) lease issuance; (3) approval of a Site Assessment Plan (SAP); and (4) approval of a Construction and Operation Plan (COP). The first phase is to identify suitable areas for wind energy leasing

8. See Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 388, § 1337, 119 Stat. 594, 744 (codified as amended at 43 U.S.C. § 1337 (2006)) (amending the Outer Continental Shelf Lands Act). In relevant part, the EPAAct authorized the Secretary of the Interior to grant rights of way, easements, and leases of OCS for activities that produce and support production of energy from sources other than oil and gas. The Secretary delegated this authority to the former MMS, which became BOEMRE and is now BOEM.

9. See 42 U.S.C. § 4321-4370H (2006). NEPA contemplates a multi-stage analytical approach to assess the environmental impacts of a proposed federal action and compare the action to other alternatives. See generally *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010). Generally, the first NEPA step is the preparation of an environmental assessment (EA). See 40 C.F.R. § 1501.3 (2011). "An EA is a concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare a [far more detailed environmental impact statement (EIS)] or a finding of no significant impact [(FONSI)]" that can conclude the NEPA review for the federal action in question. *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 503-504 (quoting 40 C.F.R. § 1508.9(a)(1)). "The Department of the Interior has decided that its agencies . . . must prepare an EA for each proposed federal action, unless it is subject to a categorical exclusion, covered by an earlier environmental document, or the relevant bureau has already decided to prepare an EIS." *Id.* at 504 (citing 43 C.F.R. § 46.300(a)); see also 40 C.F.R. § 1501.4(a)-(b) (agency criteria for deciding whether to prepare an EIS).

10. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, Final Rule, 74 Fed. Reg. 19,638 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).

consideration through collaborative, consultative and analytical processes. The second phase, issuance of a lease, gives the lessee the exclusive right to subsequently seek BOEM approval for development of the leasehold. The lease does not grant the lessee the right to construct any facilities; rather, it grants the lessee the right to use the leased area to develop its plans, which must be approved by BOEM before the lessee can move on to the next stage of the process.

If the planning and analysis phase indicates that two or more developers have overlapping geographic interests in a potential offshore wind area, the Lease Rule provides for a competitive lease sale. In the original Lease Rule, a competitive lease sale was preceded by an environmental impact statement (EIS), and developers objected to this requirement, since its rule also required them to prepare a site-specific, project-specific EIS before BOEM would consider a COP for approval. In response to these concerns, Secretary of the Interior Ken Salazar announced his “Smart from the Start” initiative for the Atlantic OCS in November 2010. This initiative amended the Lease Rule published in April 2009 to expedite the planning and analysis phase by streamlining the environmental review process described below. Before discussing the “Smart from the Start” changes, we consider the different considerations covered by the planning and analysis phase.

Three considerations are of paramount importance in planning and analyzing where and how to proceed with offshore wind leasing in the OCS. The first involves identifying candidate areas to be offered for offshore wind development. The second involves determining whether competition exists among wind energy developers for use of the identified area. The third entails an environmental review to determine whether the identified areas have significant economic, cultural, navigational, and strategic impacts on other, pre-existing ocean users, and to revise the geographic footprint to avoid or minimize such negative impacts.

An evolving process has been employed to identify candidate areas for wind energy development. Under the original Lease Rule as published in April 2009, BOEMRE initiated the leasing process by publishing in the Federal Register Requests for Interest (RFIs) with sixty day response periods. The RFI areas

were developed by the Intergovernmental Renewable Energy Task Forces that BOEMRE established in each state when requested by that state's governor.¹¹

Before "Smart from the Start" was announced, RFIs had already been issued for Massachusetts, Delaware, and Maryland. Under Secretary Salazar's new program, BOEMRE replaced the RFI with a Call for Information and Nominations (Call), which has a forty-five day response period. Under "Smart from the Start," RFI areas are now called Wind Energy Areas (WEAs). As explained above, subsequent WEAs are subject to the new Call process. Thus far, only New Jersey and the Rhode Island-Massachusetts Area of Mutual Interest (AMI) have had Calls published under "Smart from the Start." Calls are impending for Virginia and Maryland.

To streamline the planning and analysis phase of offshore wind development, "Smart from the Start" made two significant changes to the original April 2009 Lease Rule. Each of these changes has removed steps that would otherwise have provided opportunities for public comment. As we will demonstrate, this makes it even more important for the BOEM Intergovernmental Renewable Energy Task Forces to engage other ocean users in meaningful consultation and collaboration early during this phase of the development process.

First, in the case when a BOEM-initiated RFI had indicated no competitive interest, the original Lease Rule required publication of a Notice of Proposed Lease Area and Request for Competitive Interest to confirm the absence of competition before proceeding with the less-involved non-competitive leasing process. This original requirement for a second Notice was deemed to be

11. Press Release, Salazar Launches 'Smart from the Start' Initiative to Speed Offshore Wind Energy Development off the Atlantic Coast (Nov. 23, 2010), *available at* <http://www.doi.gov/news/pressreleases/Salazar-Launches-Smart-from-the-Start-Initiative-to-Speed-Offshore-Wind-Energy-Development-off-the-Atlantic-Coast.cfm>. Task Forces bring together the knowledge and perspectives of tribes, local and state governments, and other federal agencies. Task Force members cannot alter the regulatory framework or leasing process, but rather they provide input on how BOEM can best implement the processes in OCS waters off their respective states. To date, Task Forces have been established for nine states along the Atlantic Coast. Each state's activities are documented at <http://www.boemre.gov/offshore/RenewableEnergy/StateActivities/Projects.htm>.

redundant, and also inconsistent with the non-competitive process prescribed by the original Lease Rule for cases in which a developer submits an unsolicited request for an OCS renewable energy lease, where BOEM is required to publish only a single notice.¹² Note, however, that this second Notice also provided an opportunity for all interested and affected parties to comment and provide information, *including information on existing uses* or other environmental issues and concerns, which now no longer exists.¹³

Second, for BOEM-initiated leasing activities, “Smart from the Start” implemented the concept of “spot zoning” to create the WEAs, described above. Just like land-based spot zoning, DOI and BOEM intend to demarcate areas of the Outer Continental Shelf specifically for offshore wind energy. Within each WEA, BOEM would prepare an environmental assessment (EA) under NEPA to cover the scope of activities associated with lease issuance and site assessment. BOEM’s EA would not, however, address activities associated with site-specific construction and operation, which the developer must consequently propose on a project-by-project basis in compliance with NEPA.

In this revised process, BOEM would issue a Call for Information and Nominations (Call) for a given state’s WEA that would have been identified through communication and coordination among federal, state, local, and tribal agencies, as

12. Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf—Acquire a Lease Noncompetitively, 76 Fed. Reg. 8962, 8962 (Feb. 12, 2011) (to be codified at 30 C.F.R. pt. 285).

13. Because the Delaware leasing process was so far along in its determination of no competitive interest when “Smart from the Start” was implemented, it followed the original Lease Rule process and published a second Request for Competitive Interest (RFCI). This second RFCI yielded four public comments, all by other ocean users. Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Off Delaware, Determination of No Competitive Interest, 76 Fed. Reg. 20,367, 20,367 (Apr. 12, 2011). Under “Smart from the Start,” with its elimination of this second RFCI, the non-competitive leasing process no longer offers such an opportunity for input by other ocean users, who now must wait for the developer to submit its Construction and Operation Plan to BOEM for environmental review. At that point, a project footprint will have been well defined, and alterations to accommodate other ocean users will be more costly to make and therefore more likely to be resisted by the developer. This increases the risk that other ocean users will seek litigation as a means of addressing their concerns.

facilitated through that state's Intergovernmental Renewable Energy Task Force. For nominated blocks within the WEA where no competing interests exist in responses to the Call, BOEM would begin the non-competitive leasing process, modified as described above, such that there would be no second opportunity for public comment prior to developer submission of the Site Assessment Plan and lease issuance.

For nominated blocks where there *is* competing interest, BOEMRE also eliminated an entire NEPA/Coastal Zone Management Act (CZMA)¹⁴ analysis. Under the original rule, determination of competitive interest was followed by an Area Identification process, followed by a NEPA analysis and CZMA consistency review. As shown in Figure 1, these steps would be eliminated under "Smart from the Start," such that upon review and evaluation of all responses submitted to the Call, and upon determination that competitive interest does exist, BOEM would proceed directly to a Proposed Sale Notice sent to the governors of potentially affected states, who have sixty days to comment. BOEM would then work to resolve potential conflicts or other

14. 16 U.S.C. §§ 1451-1466. The CZMA was enacted to

encourage the states to exercise their full authority over the lands and waters in the coastal zone [i.e., a state's coastal waters and adjacent shoreline] by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

Id. § 1451(i). The CZMA "require[s] States to submit their coastal management programs to the Secretary of Commerce for review and approval. In return, States with approved programs would receive federal funding for coastal management." *New Jersey v. Delaware*, 555 U.S. 597, 620 (2008) (citing 16 U.S.C. §§ 1454-1455). "The CZMA states that federal agencies taking actions 'that affect[] any land or water use or natural resources of the coastal zone' shall carry out these activities 'in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.'" *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 17 n.2 (2008) (alteration in original) (quoting 16 U.S.C. § 1456(c)(1)(A)). "[A]fter the Secretary of Commerce approves a state's coastal management plan, any applicant for a federal permit to conduct an activity that affects land or water uses in the state's coastal zone is required to certify that its activity complies with the enforceable policies of the state's approved program." *Amber Res. Co. v. United States*, 538 F.3d 1358, 1363 (Fed. Cir. 2008) (citing 16 U.S.C. § 1456(c)(3)).

environmental issues and concerns raised by these comments, issuing a Final Sale Notice at least thirty days before the competitive lease auction.

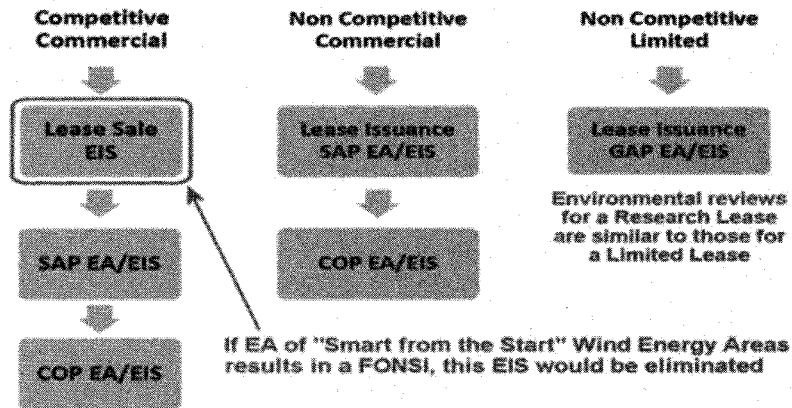


Figure 1. "Smart from the Start" eliminates the preparation of an EIS as a precondition to holding a commercial lease auction, and instead calls for an EA of the Wind Energy Areas identified by BOEM through its state-oriented Intergovernmental Renewable Energy Task Forces. Commercial leases have a thirty year term, with a Site Assessment Plan (SAP) covering the first five years and a Construction and Operation Plan (COP) covering the remaining twenty-five years. Limited Leases or Research Leases have a five year term, covered by a General Activities Plan (GAP).

For competitive leasing initiated by BOEM under "Smart from the Start," environmental review of the WEA lease sale will be combined with environmental review of the lease-holder's Site Assessment Plan (SAP). These reviews will not be combined, however, if there are activities in the SAP that fall substantially outside the scope of activities included in the initial environmental review, or new information discovered during preparation of the SAP indicates that an additional, project-specific, site-specific environmental review is needed. As shown in Figure 1, this change makes the timeline for environmental reviews of the competitive leasing process comparable to the timelines for non-competitive commercial leasing, with only two steps required in all cases; an initial environmental review for the general Wind Energy Area, which generally includes the SAP in its scope.

Figure 1 also shows that, in either the competitive or non-competitive context, a second, more focused environmental review

will be carried out for the lease-holder's site-specific, project-specific Construction and Operation Plan (COP). The rule still allows for a SAP and COP to be submitted simultaneously, but it would be virtually impossible for a developer to provide adequate NEPA/CZMA information for the COP environmental review within the time frame that the SAP must be submitted, which is sixty days for a non-competitive lease or six months for a competitive lease. Indeed, the scope of SAP activities is intended to cover the baseline measurement and information gathering activities required for environmental review of the COP.¹⁵

The initial environmental review process for the four Mid-Atlantic WEAs off New Jersey, Delaware, Maryland, and Virginia, was initiated with a Notice of Intent on February 9th, 2011.¹⁶ The final EA with a likely Finding of No Significant Impact (FONSI) is anticipated by the end of September 2011.

The initial environmental review process for the Area of Rhode Island and Massachusetts (AMI)¹⁷ was initiated with a Notice of Intent on August 18th, 2011.¹⁷ Based on the Mid-Atlantic WEA experience, it is reasonable to anticipate a four to six month period before the final EA is completed.

As a consequence of the two changes described above, the noncompetitive process now has one fewer opportunity for public notice and comment after the forty-five day comment period for a WEA Call has closed. Assuming that the SAP is within the scope of the initial NEPA/CZMA analysis of the WEA, then the only remaining opportunity for public comment in the non-competitive process would be during the NEPA/CZMA analysis of the COP. Any reduction or shifting of the project area at this point will be very costly for the developer.

15. The Department of Interior will also need to ensure that its internal resources and processes, including those of its Solicitor's Office, are able to accommodate these expedited timelines.

16. Commercial Wind Lease Issuance and Site Characterization Activities; Atlantic Outer Continental Shelf Offshore NJ, DE, MD, and VA, 76 Fed. Reg. 7226 (Feb. 9, 2011).

17. Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore Rhode Island and Massachusetts—Call for Information and Nominations, 76 Fed. Reg. 51,383 (Aug. 18, 2011).

ATLANTIC COAST PORT ACCESS ROUTE STUDY (ACPARS)

In order to provide safe access routes for the movement of vessel traffic proceeding to or from ports along the U.S. eastern seaboard from Maine to Florida, the Coast Guard initiated an ACPARS by Federal Register notice in May 2011.¹⁸ The objective of ACPARS is to enhance navigational safety by examining existing shipping routes and waterway uses, and reconcile the paramount right of navigation within designated port access routes with the leasing of OCS blocks for the construction and operation of offshore wind projects. This study will evaluate the continued applicability of, and the need for modifications to, existing vessel routing measures such as fairways and vessel Traffic Separation Schemes. The Coast Guard anticipates that data gathered and analyses generated during ACPARS may result in establishment of one or more new vessel routing measures, modification of existing routing measures, or disestablishment of one or more existing routing measures. Such ACPARS recommendations may require future rulemaking action and/or appropriate international agreements.

Ideally, the year-long ACPARS should have been completed before any offshore WEAs were identified. In practice, these initiatives are running in parallel, but the Coast Guard is making a concerted effort to complete its “red-yellow-green” analysis of the WEA lease blocks in time to inform the Call for a given WEA before it is issued.

LEGAL REQUIREMENTS

Neither CMSP nor “Smart from the Start” occurs in a legal vacuum. Regulators and prospective lessees still must comply with other legal requirements, most notably NEPA and CZMA. As with a typical NEPA analysis, an EA must first be prepared for either an entire WEA or an individual project site. If the EA demonstrates that ocean wind development would present no significant impact on the marine, coastal, avian, and human environments, then private developers may vie for a lease in the area. If the EA finds significant impact, an EIS is required.

18. Port Access Route Study: The Atlantic Coast from Maine to Florida, 76 Fed. Reg. 27,288 (May 11, 2011).

NEPA seeks to ensure that the government considers a wide range of environmental and human impacts before deciding to issue a lease for ocean wind development. BOEM's listed requirements for GAPs and SAPs under the noncompetitive leasing process identify the array of environmental issues to be considered.¹⁹ In either instance, the developer must conduct geotechnical, geological, shallow hazards, archaeological, and biological surveys of the area.²⁰ The developer also must submit the results of these studies, including potential hazard assessments on meteorology, oceanography, sediment transport, geology, and shallow geological or manmade structures; water quality information on turbidity and total suspended solids from construction; biological resources information on benthic communities, marine mammals, sea turtles, coastal and marine birds, fish and shellfish, plankton, seagrasses, and plant life; potential effects on threatened or endangered species, sensitive biological resources, and archaeological resources; social and economic information on employment, existing offshore and coastal infrastructure (including major sources of supplies, services, energy, and water), land use, subsistence resources and harvest practices, recreation, recreational and commercial fishing (including typical fishing seasons, location, and type), minority and lower income groups, coastal zone management programs, and view shed; and effects on coastal and marine uses including military activities, vessel traffic, and energy and nonenergy mineral exploration or development.²¹

But does complying with NEPA ensure that the government and project developers sufficiently engage affected parties in a manner that smoothes the ocean wind development process? Most of the required NEPA information is gathered through commissioned studies by scientists, social scientists, archaeologists, economists, and other professionals. However, input from port authorities, locally owned businesses, commercial and recreational fishermen, or the groups that represent them is critical if this review is to be more than an academic exercise.

19. SAP's are described in 30 C.F.R. §§ 285.605-285.613 (2011). GAP's are described in 30 C.F.R. §§ 285.640-285.648 (2011).

20. 30 C.F.R. §§ 285.610(b), 285.645(a).

21. 30 C.F.R. §§ 285.610(b), 285.645(a).

Unless outreach occurs, the only chance these other ocean users have to contribute their perspective is during public comment periods *after* EAs and EISs are drafted and filled with conclusions based on professional studies. When the practicalities of NEPA are considered, it becomes clear that NEPA on its own is not a sufficient mechanism for public participation.

More to the point, the EAct requires specific consultations, which can be overlooked in a NEPA analysis. For example, in issuing a lease, the Secretary of the Interior must ensure that any activity associated with the lease will be carried out in a manner that protects “correlative rights in the [OCS]” and prevents “interference with reasonable uses (as determined by the Secretary[of Interior]) of the exclusive economic zone, the high seas, and the territorial seas.”²² The Interior Secretary also must require that developers of the proposed activity consider “any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation.”²³ Finally, this law also mandates public notice and comment for every proposed lease.²⁴ It is thus evident that the EAct contemplates that government and offshore wind developers will reach out to other user groups more directly than is required under NEPA.

LESSONS LEARNED WHEN LEGALLY-REQUIRED OUTREACH FALLS SHORT

In our experience, when a developer fails to conduct meaningful outreach to affected stakeholders as required by law and fails to listen to the public’s feedback, the project is susceptible to delays, added expenses, and, worse, litigation. The Cape Wind Energy Project provides a case in point. The project consists of a 130 turbine wind farm on Horseshoe Shoals in the federal waters of Nantucket Sound, Massachusetts. The area includes the best grounds for a robust commercial conch fishery, which is the largest fishery in Martha’s Vineyard in terms of landed tonnage and economic value. The project’s footprint, as approved, also covers a large portion of the Shoals’ most productive fishing grounds for a number of the Cape and Islands’

22. 43 U.S.C. § 1337(p)(4)(G), (I) (2006).

23. *Id.* § 1337(p)(4)(J)(ii).

24. *Id.* § 1337(p)(4)(K).

other important fisheries, such as the squid fishery. Significantly, and additionally, the area includes grounds sacred to multiple Native American tribes.

Cape Wind undertook numerous studies as part of the NEPA and related legal processes, first for the U.S. Army Corps of Engineers, which had federal regulatory jurisdiction prior to EPOA, and again for BOEMRE, after its predecessor agency, the MMS, assumed federal regulatory jurisdiction under EPOA. Even with two full NEPA analyses, each culminating in its own voluminous EIS, the selection of the preferred project site on Horseshoe Shoals appears to have been made before any meaningful engagement of other ocean users, notably commercial fisheries, Native Americans, and the surrounding Cape and Islands communities. Project site location is by far the most significant decision potentially affecting the livelihoods of other ocean users, and with the preferred site being chosen without consulting them, subsequent opportunities for public comment via the NEPA processes have been viewed as “after the fact” and have led to strong resistance among these user groups, which have initiated court actions, greatly slowing the pace of project development.

The Cape Wind controversy unfortunately has had adverse collateral consequences for other offshore wind energy projects. For other ocean users, it provides an objective case study that validates the fears of those who already are inclined to distrust and opposition, such as commercial fishermen and Native Americans. For other project developers, the Cape Wind experience has created a riskier investment climate, with greater potential for delay, permitting uncertainty, and significant cost escalation during the project development phase.

DOI’s “Smart from the Start” program is designed to ensure that subsequent BOEM leasing decisions account for lessons learned. But even “Smart from the Start” is not always addressing other ocean user concerns in defining areas to be included in a Call for commercial leasing. For instance, Massachusetts and Rhode Island fishermen reacted with surprise and anger when BOEMRE proposed a sprawling 2,224 square-nautical-mile AMI off Rhode Island and Massachusetts’ south-

coast that swept in some of the most productive scallop and groundfish grounds in New England.²⁵ Ultimately, Massachusetts Governor Deval Patrick formed a commercial fisheries working group and successfully pursued that group's recommendation to reduce the proposed AMI by roughly half.

A troubling question remains—why didn't anyone notice that the proposed AMI included the historic, highly productive scallop beds contained in the Nantucket Lightship Scallop Access Area? When that area opened for rotational scallop fishing in 2010, fleet participants were able to harvest an 18,000-pound allocation in as little as three or four days, with next to no yellowtail flounder or other fish bycatch. As it turns out, NOAA's ocean habitat scientists and staff were consulted, but apparently nobody thought to include the New England Fishery Management Council or NOAA's sustainable fisheries personnel in these consultations. The exclusion of regional fisheries management councils is examined in more detail below, and recommendations are made on how they might be better engaged.

We wish the prognosis was more generally better for various CMSP initiatives. While the President's NOC initiative is purported to be the most inclusive, regional federal fishery management council representatives are being excluded from the regional planning bodies, citing the Federal Advisory Committee Act (FACA).²⁶ This impediment to the regional councils' participation is really quite astounding. NOAA's attorneys maintain that if process were opened up to fishery management council representatives, the public would have to be included, too.²⁷

25. See Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore Massachusetts—Request for Interest, 75 Fed. Reg. 82,055, 82,055, 82,060 (Dec. 29, 2010); Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore Massachusetts—Request for Interest, 76 Fed. Reg. 14,681, 14,682 (Mar. 17, 2011).

26. Section 8 of President Obama's Executive Order 13,547 provides that the lead federal agency for each regional planning body must establish advisory committees under FACA that will advise and guide the development of the plans. Exec. Order No. 13,547, 75 Fed. Reg. 43,023, 43,026 (July 19, 2010).

27. Congress created federal regional fishery management councils as part of what is now called the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884 (2006). Under the law, councils conduct detailed, public quasi-legislative processes to develop

Likewise, when any state asks BOEM to form an Intergovernmental Renewable Energy Task Force to inform its offshore wind development process, FACA rules provide for the exclusion of non-government organizations (NGOs) and private industry representatives in Task Force deliberations. Task Force meetings are open to the public so that NGOs and private industry representatives can observe their deliberations, and there is provision for a public comment period after the Task Force meeting adjourns, but this provides a perception of “after the fact” inclusion rather than meaningful engagement.

CONDUCTING APPROPRIATE OUTREACH AND MEANINGFUL ENGAGEMENT

For those parties not directly involved in offshore wind development, keeping track of each different initiative is challenging, at best. The decision-makers involved are different for each area, their goals are distinct, and each initiative is at a different stage, even if co-located. To the average fisherman, local business owner, tourist, or anyone whose job does not entail reading the Federal Register and monitoring all the federal and state agency websites on a regular basis, this complexity is downright overwhelming. For their part, regulators and project developers want to streamline a burdensome administrative development approval process.

So how can we ensure that other ocean users feel they have a meaningful voice, while at the same time ensuring that wind proponents can keep the ball moving? While it is widely recognized that involving appropriate stakeholders is one of the first and most critical elements of success, this step is often given scant attention in regulatory practice.²⁸

recommendations for federal fishery management plan elements and regulations. *Id.* § 1852(a), (h)-(i). The Secretary of Commerce is required by law to implement a council’s recommendations unless the Secretary determines that implementing the council’s recommendation would violate federal law or regulations. *Id.* § 1854(a)-(b). Council members also take a federal oath upon assuming their federal appointments to their respective councils.

28. The United Nations notes this very point in its discussion of ecosystem-based management. TUNDI AGARDY ET AL., U. NATIONS ENV’T PROGRAMME, TAKING STEPS TOWARD MARINE AND COASTAL ECOSYSTEM-BASED MANAGEMENT – AN INTRODUCTORY GUIDE, 8 (2011), available at www.unep.org/ecosystemmanagement.

One recommendation would be to ensure that key NGOs and private industry representatives are engaged “off-line” by federal and state representatives on the BOEM Renewable Energy Intergovernmental Task Forces, or sign on to be cooperating agencies with a voice in scoping environmental reviews under NEPA. For their part (and whatever their legal status under FACA), regional fishery management councils work extensively with commercial and recreational fishermen on a host of issues. The Councils know the key players in each fishery and have direct access to them. They also know the main trade groups and advocates that actively represent the fishermen. These advocacy entities have a working knowledge of the collective concerns of the group they represent. Shipping, the military, and other ocean users often have similar regulatory ties to federal and state agencies. By contacting appropriate governing bodies, the FACA-allowed representatives who serve on Task Forces can obtain a wealth of information and leads on who should be consulted next.

In many cases government regulators already have collected and maintain substantial databases of scientific and commercial information regarding pre-existing uses. For example, the National Marine Fisheries Service (NMFS) collects detailed information showing exactly where commercial fishermen fish and what they catch. Regional fishery management council scientists integrate this fishery information with benthic habitat information in publicly available reports. Overlaying these data on top of a potential offshore wind area of interest has the added benefit of letting the regulator know which fishing gear types are of concern, which in turn informs which group of fishermen should be approached for further information and which do not have an interest in the area.

A deliberate and constructive process of comparing conflicting uses should occur before asking offshore wind developers to make a significant investment in an area by responding to a BOEM Call. Although BOEM and NMFS have a Memorandum of Understanding (MOU) to facilitate the exchange of information regarding ocean-based renewable energy,²⁹ Such a high-level

29. Memorandum of Understanding on Coordination and Collaboration Regarding Outer Continental Shelf Energy Development and Environmental Stewardship between the U.S. Department of the Interior and U.S. Department of Commerce (May 19, 2011), *available at*

MOU cannot replace the value of Task Force representatives directly reaching out to the individual people who will be affected most by the siting and operation of offshore wind projects, but it does provide an avenue by which those individuals can be identified.

RECOMMENDATIONS

As a result of our analysis of “Smart from the Start” and collective experience with its practice in New England and the Mid-Atlantic region, we make the following recommendations:

1. The state-oriented Intergovernmental Renewable Energy Task Forces that have been established by BOEM can be exemplary platforms for coordination, communication, and information exchange, provided they include all affected groups. National and regional initiatives such as CMSP and ACPARS should be sure their agendas are included in Task Force deliberations via their participating organizations’ representatives on the Task Force.
2. The Federal Advisory Committee Act (FACA) should be applied in a practical manner to ensure that those serving a federal role in the oceans management process, such as federal fishery management council representatives, are permitted to participate directly in these panels. If a narrower interpretation of FACA prevents this, then the BOEM Leader of the Task Force should assign Task Force governmental representatives specific outreach tasks (and BOEM staff support, as needed) to engage their particular community of private industry and non-government stakeholders, requesting periodic reports on outreach activities.
3. “Smart from the Start” has eliminated a seemingly redundant Request for Competitive Interest from the non-competitive leasing process, but in doing so has also eliminated an important opportunity for additional public comment from other ocean users. This might best be corrected by amending the rules so that upon

Determination of No Competitive Interest, BOEM would notify the governors of affected state of BOEM's intent to issue a non-competitive lease, giving them sixty days to comment. This would restore an important opportunity for early public comment and make the non-competitive process timeline consistent with the competitive process, provided that the governors undertake truly representative outreach and engagement efforts in a timely manner.

4. Although it is popularly believed that the requirement for NEPA/CZMA analysis is a major factor in slowing the regulatory process of offshore lease issuance and development, it has been the states' experience that a major hold-up has been the fact that neither BOEMRE nor BOEM have their own Solicitor's Office. As DOI is now organized, BOEMRE must send all Federal Register notices to the DOI Solicitor's Office for surnaming, and for some states, this has taken up to three months. BOEM should have its own Solicitor's Office, with in-house attorneys who can develop the dedicated expertise and become familiar with offshore renewable energy issues, enabling them to expedite surnaming more quickly than DOI headquarters. This would be a substantial streamlining step that can be taken without any compromise of public comment opportunities.

Finally, as a guiding principle, we encourage offshore wind developers and their proponents to resist the temptation of first approaching the "low-hanging fruit" of other ocean user groups who are most likely to support their projects. This new ocean industry will develop more smoothly and quickly if its proponents first approach those who have the most to lose, ensuring that these most vulnerable, pre-existing ocean users are engaged from the outset in actual decision-making so that they feel some ownership of the process and will want their investment of time to yield successful results.