

Obama Administration Establishes National Policy to Protect Oceans, Coasts, and Great Lakes and Creates National Ocean Council to Oversee and Implement New Policy

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On July 19, 2010, President Obama issued an Executive Order creating a national policy to promote stewardship of the ocean, coasts, and Great Lakes, to be implemented by federal agencies under the guidance of a new National Ocean Council (Council). The Order provides for the development of coastal and marine spatial plans (CMS Plans) based on ecosystem management to analyze current and future uses of ocean, coastal, and Great Lakes areas. The CMS Plans would identify areas most suitable for various types of activities and could impact existing and future commercial uses of these areas, such as oil and gas recovery and renewable wind and hydrokinetic projects, commercial and recreational fisheries, and those land-based industries that may degrade water quality and the ocean ecosystem through industrial runoff. The national policy emphasizes the need to provide for enhanced sustainability of the ocean, coastal and Great Lakes ecosystems and resources through science and adaptive management, and emphasizes understanding of the ecosystems' response to climate change and ocean acidification, as well as national security and foreign policy interests.

BACKGROUND

Although the Executive Order refers to the recent Deepwater Horizon oil spill in the Gulf of Mexico, its major driver appears to be the Final Recommendations of the Interagency Ocean Policy Task Force (Task Force), released simultaneously with the Executive Order and which the Executive Order adopts in full. The Task Force is a multi-agency entity led by the Council on Environmental Quality (CEQ) that was created by Executive Order in June 2009 to develop a national policy that ensures the protection, maintenance, and restoration of the health of ocean, coastal, and Great Lakes ecosystems and resources, including coastal and marine spatial planning (CMSP). Task Force members included two-dozen federal agencies and offices, including the Departments of Agriculture, Commerce, Defense, Justice, the Interior, and Energy, as well as the Environmental Protection Agency (EPA) and the Federal Energy Regulatory Commission (FERC).

The Council, which was recommended by the Task Force, will supersede the existing Committee on Ocean Policy that was created by President George W. Bush in 2004. It will be co-chaired by the Chair of CEQ and the Director of the White House Office of Science and Technology Policy. The Council's other members include the Secretaries of most cabinet-level agencies, such as State, Defense, the Interior, Agriculture, Commerce, Transportation, and Energy, and the heads of independent agencies such as EPA and the National Science Foundation (NSF). FERC, an independent agency in the Executive Branch of the federal government, is invited to participate consistent with its statutory authorities and legal obligations. The Executive Order directs all Council members, or other Executive branch offices whose actions affect the ocean, the coasts and the



Great Lakes, to participate in the CMSP process. Each implicated department, agency or office is also required to prepare an annual report describing its actions over the previous year to implement the Executive Order that includes a description of received written comments regarding that agency's compliance and its response to such comments.

COASTAL AND MARINE SPATIAL PLANNING

The purpose of the CMSP process is to identify areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystems to meet economic, environmental, security and social objectives. The planning process would broaden the scope of considerations in existing permitting for competing offshore uses (e.g., commercial fishing, and oil and gas exploration and development, and recreational purposes like boating and beach access) to permit a more integrated, comprehensive, ecosystem-based, flexible and proactive approach to planning managing these uses and activities.


The planning area includes the territorial sea, the United States' Exclusive Economic Zone (EEZ), and the Continental Shelf, as well as inland bays and estuaries. To make the task more manageable, the entire planning area is divided into nine regional planning areas based on large marine ecosystems: Alaska/Arctic, Caribbean, Great Lakes, Gulf of Mexico, Mid-Atlantic, Northeast, Pacific Islands, South Atlantic, and West Coast. Each of these regions would have a CMS Plan based on region-specific objectives to be developed by a regional planning body composed of federal, state, and tribal authorities relevant to the region, in consultation with the public and scientific and technical experts. The Council would oversee all regions' CMS Plan development and provide a dispute resolution process should conflicts arise. Each CMS Plan would then be certified by the Council for national consistency. Agencies intending to take an action inconsistent with a certified CMS Plan will be required to provide advance notice to the regional planning body and the Council, including justification for non-adherence to the plan.

RELATIONSHIP OF CMS PLANS TO EXISTING AUTHORITIES

The Executive Order creates no new or independent legal authority. CMS Plans will not be considered to be regulations and will not constitute final agency decision-making. Rather, the Council is intended to work within existing authority. The CMS Plans it certifies are intended to *guide* agency decision-making. However, the federal, state, and tribal authorities are anticipated to incorporate components of the CMS Plan into their respective regulations to the extent possible and enforce their regulatory programs consistent with their statutory authorities and the CMSP goals.

TIMELINE FOR IMPLEMENTATION

The new national policy will be developed in four phases, lasting through 2015 at the earliest. A preliminary phase is organization of the Council. During Phase I, the Council is expected to create Strategic Action Plans for CMSP over a year-long period while coordinating with federal agencies, states and federally recognized tribes, and while gathering data for science-based planning. Phase II, expected to begin nine months after the Council is organized and to consist of continued data gathering, initial regional step implementations, and work plan development. Full implementation of the CMSP process, Phase III, could take up to five years after the Council is organized. While Strategic Action Plans are being developed, Federal agencies are to continue to use



their existing processes for project development, but can begin to consider CMSP principles in their decision-making.

IMPLICATIONS

At this preliminary stage of development, the impact of the new national policy and the process to be implemented by the Council is uncertain. Much will depend on the substantive content of the regional CMS Plans that will be adopted, and how well the process works. The goal of the Executive Order is to establish a framework for a better coordinated and informed process for assessing the increasing and often competing uses of the nation's ocean, coastal, and Great Lakes water resources. That process envisions substantial stakeholder, scientific, and public input. On the one hand, increasing input can improve the process by developing a more complete record on which decisions can be based. On the other hand, the determination of which activities are suitable for specific areas may be controversial, and unless reasonable rules are established, the process can easily become more complex and lengthy, or bogged down by disputes that may delay the ultimate decision. Depending on how the Executive Order is implemented, these plans could have substantial impacts on a broad range of coastal development activities including entities operating existing energy projects or proposing to build new projects, fisheries, aquaculture, and commerce and transportation. These may include:

- A need to participate in the public and stakeholder engagement processes that will be used to develop regional CMS Plans, as well as in federal, state, or local rulemaking proceedings to implement regional CMS Plans;
- Additional consultation and data gathering requirements for initial permitting and permit renewals at the federal, state, and local level, including expanded emphasis on potential cumulative effects on “large marine ecosystems;” and
- New restrictions on energy development activities, commercial and recreational fisheries and aquaculture, as well as commerce and transportation, such as the establishment of zones where specific activities are prohibited, and new additional ongoing environmental impact analysis requirements.

FOR ADDITIONAL INFORMATION

For clients with business interests impacted by ongoing federal regulatory and policy developments relating to the use of U.S. waterways and coastal areas, Van Ness Feldman offers significant depth of experience and capabilities. Over half of the firm's 80 lawyers and policy advisors have worked as congressional staff, or at the U.S. Departments of the Interior and Energy, the U.S. Environmental Protection Agency, the Federal Energy Regulatory Commission, and the White House. Our professionals monitor federal regulatory and policy developments on a daily basis, and provide strategic advice to a range of clients. For more information, please contact any of the authors listed on this alert, or your usual Van Ness Feldman point of contact at 202.298.1800 in Washington, D.C. or 206.623.9372 in Seattle, WA.

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