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The U.S. National Ocean Policy: One Small Step For National Waters, But Will It Be The Giant Leap Needed For Our Blue Planet?

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THE U.S. NATIONAL OCEAN POLICY: ONE SMALL STEP FOR NATIONAL WATERS, BUT WILL IT BE THE GIANT LEAP NEEDED FOR OUR BLUE PLANET?

Angela T. Howe[*]

I. INTRODUCTION

In 2009, as renowned oceanographer Sylvia Earle accepted an award at the TED[1] Conference, she described the ocean as "the blue heart of the planet" and implored the audience to support efforts to restore the oceans with "all means at our disposal."[2] The Obama administration has made ocean protection a priority for the United States, launching a new National Ocean Policy (NOP) in July of 2010 to unify management of the nation's coasts and waters.[3] In an era that demands both protection and productivity of our nation's oceans, this is exactly what is needed: a strong, coherent national policy based on science and informed by local stakeholders.

The NOP was the culmination of over six decades of concerted ocean planning and protection.[4] The language of the policy starts out by

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1. TED ("ideas worth spreading") stands for Technology, Entertainment, and Design. *See* TED: IDEAS WORTH SPREADING, http://www.ted.com (last visited Nov. 1, 2011).

2. Sylvia Earle, *The Blue Heart of the Planet*, POPULATION PRESS, http://www.populationpress.org/publication/2011-1-earle.html (last visited Oct. 9, 2011).

3. *See* Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 22, 2010).

4. *See* U.S. COMM'N ON OCEAN POL'Y, FINAL REPORT – PRE-PUBLICATION COPY: AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 19-26 (2004), *available at* http://www.oceancommission.gov/documents/prepub_report/chapter2.pdf; *see also*

recognizing the value of our coasts: "The oceans, our coasts, and the Great Lakes provide jobs, food, energy resources, ecological services, recreation, and tourism opportunities, and play critical roles in our Nation's transportation, economy, and trade, as well as the global mobility of our Armed Forces and the maintenance of international peace and security."[5]

Historically, ocean management has been focused on individual sectors and separate regulations for each ocean activity. The NOP is a response to the Byzantine patchwork of federal, state, and local authorities that guide ocean policy, which has become such a quagmire that it hardly allows for "smooth sailing" for the ocean law regulators or those being regulated. In the United States, which has the largest ocean area of any country in the world, spanning over 3.4 million square nautical miles,[6] there are at least 20 federal agencies and 140 federal statutes concerning ocean management.[7] This poses a significant challenge to dealing with the cumulative impacts and cross-sectorial harms that are affecting our oceans. For example, one ocean activity may be regulated by a plethora of overlapping laws and overseen by several different agencies with differing agency mandates. Even governmental agencies that regulate ocean activity have been challenged when trying to decipher which legal standards apply to new ocean activities, such as a new wave energy project.[8]

While the ocean is facing a death by a thousand cuts, the federal government has been trying to put a thousand small bandages on the problems one-by-one, instead of taking a step back to try to cure the disease. An overarching law or legal framework is needed to deal with ocean issues. The problem of fragmented ocean governance has become more apparent and critical in recent years as new ocean activities have emerged, such as renewable offshore energy, aquaculture, and liquefied

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Council on Foreign Relations, Transcript: Critical Choices in Ocean Governance (Mar. 8, 2010), *available at* http://www.cfr.org/arctic/critical-choices-ocean-governance/p21653.

5. Memorandum of June 12, 2009: National Policy for the Oceans, Our Coasts, and the Great Lakes, 74 Fed. Reg. 28,591, 28,591 (June 17, 2009).

6. *The United States is an Ocean Nation*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://aquaculture.noaa.gov/pdf/20_eezmap.pdf (last visited Nov. 1, 2011).

7. *AFP: Obama Gives US First National Ocean Policy*, CARIBBEAN ENV'T PROGRAMME, http://www.cep.unep.org/news-and-events/afp-obama-gives-us-first-national-ocean-policy (last visited Oct. 9, 2011).

8. *See, e.g.*, Memorandum of Understanding Between the U.S. Dep't of the Interior and Fed. Energy Regulatory Comm'n (Apr. 9, 2009), *available at* http://www.doi.gov/news/pressreleases/upload/FERCMMSDOI-FERCMOU-pdf.pdf.

natural gas terminals.[9] These location specific activities pose potential conflicts across sectors with varying severity.[10]

Just as Americans enjoy the Clean Water Act for protection of water and the Clean Air Act for protection of air, there is now a bedrock environmental policy for oceans. But we have yet to see the NOP be used as a management tool for our oceans. "If not now, when?" asked retired U.S. Coast Guard Admiral Thad Allen, the man in charge of the *Deepwater Horizon* oil spill response and an active player in the ocean policy formulation, at the marine conservation community's Blue Vision Summit in Washington D.C. in May 2011.[11]

To that end, this Article explores how the new NOP can best fix the gaps in the existing legal framework and solve the most pressing problems of ocean management in the United States. The purpose of this Article is to inform the audience of the nature, history, and promulgation of the nation's first NOP, address the challenges to implementing the NOP, and offer recommendations that will help lead to the success of the NOP.

Specifically, this Article sets out by discussing the public trust doctrine as a foundation for managing our common public trust properties in the coasts and oceans; offers a history of national ocean governance, including a review of the work of the Stratton Commission, U.S. Commission on Ocean Policy, Pew Oceans Commission, and Joint Ocean Commission Initiative; this Article then analyzes the NOP as an executive order and compares it to past executive orders dealing with the nation's oceans, namely the establishment of the Papahanaumokuakea Marine National Monument and the Federal Presidential Oil Drilling Moratorium; and it subsequently discusses potential applications of the NOP through coastal and marine spatial planning and wave energy. For illustrative purposes, coastal and marine spatial planning is discussed using ocean management plans recently established in Massachusetts and Rhode Island, while offshore energy progress and challenges are explained through the Cape Cod Wind and Reedsport, Oregon Wave Energy projects. The cutting edge coastal and marine spatial planning framework, activated through the Massachusetts and Rhode Island Plans, demonstrates how the priority objectives of the NOP can be used at the state level. This Article culminates in a discussion of the challenges that

9. *See* Larry B. Crowder et al., *Resolving Mismatches in U.S. Ocean Governance*, 313 SCIENCE 617 (2006).

10. *Id.*

11. David Helvarg, *Blue Notes #89: Can We Have our Ocean Policy Yet?*, BLUE FRONTIER CAMPAIGN (July 19, 2011), http://www.bluefront.org/wordpress/?p=2342.

the NOP will surely face: the need to reconcile the top-down policy with the most effective local and regional form of policy refinement and implementation, the need to fund the national objectives of the policy, and the need for political will to codify and support the NOP. For those working to implement the NOP and ensure its success in securing the health and productivity of our oceans, the more profound part of this Article can be found in the recommendations section which covers the need for public outreach, the need for measured progress with adaptive management, and the need to take cues from regional and local stakeholders.

II. THE PUBLIC TRUST

When more than one group is interested in an ocean resource or area, it leads to the problem of resource allocation. For instance, near the world famous Trestles surf break in Southern California, which lies within the San Onofre State Beach coastal area, an application was recently submitted for a wave energy project.[12] There has also been a very controversial proposal to construct a toll road through the state park and watershed that would feed sediment to the coastal area.[13] The overlapping interests for this one fragile coastal destination led to the problem of resource allocation. Not only could the proposed uses impose direct negative impacts on existing uses, but any new resource use is likely to affect costs and benefits realized by other sectors.[14] Additionally, "cumulative impacts of ocean uses affect resource status . . . [and] the value of resources to various user groups . . . ."[15] Because our oceans are common property, the potential tragedy lies in the fact that numerous "incentive[s] for overuse [exist] that can lead to long-term resource loss . . . ."[16]

Coastal waters themselves are not subject to private ownership and are under the control of the state, generally out to a three-mile limit which separates state waters from federal waters.[17] The land from the

12. Tony Barboza, *San Onofre Wave Farm Idea Churns Up Concerns*, L.A. TIMES, Mar. 30, 2011, http://articles.latimes.com/2011/mar/30/local/la-me-wave-farm-20110330.

13. *See* CAL. COASTAL COMM'N, STAFF REPORT AND RECOMMENDATION ON CONSISTENCY CERTIFICATION NO. CC-018-07 (2007).

14. James N. Sanchirico et al., *Comprehensive Planning, Dominant-use Zones, and User Rights: A New Era in Ocean Governance*, 86 BULL. OF MARINE SCI. 273, 273 (2010).

15. *Id.* (citation omitted).

16. *Id.*

17. *See* 16 U.S.C. § 1453(3) (2006); 43 U.S.C. § 1301(a)(2), (b) (2006).

mean high-tide line[18] out into state waters (submerged land) is usually referred to as "sovereign lands" or "public trust lands."[19] Title to these areas is generally owned by the adjoining state and held in trust for the public by the state.[20] As beneficiary of the trust, the public is entitled to use the resources for a variety of recreational and commercial purposes.[21] On land, there are usually concerns about the "takings" clause restricting government conduct, but a unique exception to the takings clause exists at sea: the navigation servitude exception, which kicks in when the federal government acts to protect or improve navigation in coastal waters.[22] The navigation servitude exception applies to virtually all state-created property rights and interests in coastal waters, including the underlying submerged land.[23]

The public trust doctrine is an ancient legal principle that dates back to Roman law and has been incorporated into U.S. coastal laws over the years.[24] The idea of protecting coastal areas, including rivers, lakes, and oceans (or, navigable waters), for the benefit of the public goes back as far as the Ch'in Dynasty in China (249-207 B.C.E.), which protected public access to the water.[25] The concept has been pervasive throughout world history, existing in "ancient Islamic law, eleventh century regional French law," thirteenth century Spanish civil code, and in the cultural law of various Native American tribes.[26] In scholarly literature, it is most commonly traced to the Roman Institutes of Justinian (in the year 533).[27] The concept later appeared in England during the Middle Ages through the Magna Carta (1215), and was incorporated into English common law, which the original thirteen colonies of the United States relied upon for common law.[28]

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18. In some states the mean low-tide line is used.

19. *See Frequently Asked Questions*, CAL. STATE LANDS COMM'N, http://www.slc.ca.gov/Online_Forms/FAQ.html (last visited Oct. 9, 2011).

20. *Id.*

21. *See* Shivley v. Bowlby, 152 U.S. 1, 57 (1894).

22. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

23. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW: CASES AND MATERIALS 2 (3d ed. 2007).

24. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

25. Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L.Q. 1, 10 (2009).

26. *Id.*

27. *Id.*

28. *Id.* at 10-11.

The public trust doctrine that entered into U.S. jurisprudence through English common law is now a legal concept explicitly present in many state constitutions and legislation.[29] Even though the doctrine has been present for over two hundred years in the United States, a court has never "explicitly established a common law public trust doctrine either for federal lands or for the federal ocean."[30] "The doctrine traditionally protects the public's rights to fishing, navigation, and commerce" in tidal waters and the underlying submerged lands.[31] In recent years, the doctrine has been applied to issues ranging from wetlands destruction, to water rights in the West, and even to beach access battles between private property owners and beachgoers.[32]

Unlike private property on land, we cannot simply divide the ocean into individual plots for private ownership. Not only would this scenario severely contradict the solidified common law public trust doctrine, but it would also lead to many unhappy citizens. For instance, in California the "rapidly growing resident and tourist populations would find themselves competing for a diminishing resource. . . . [I]f we divide up California's 1,100 miles of coast evenly between its thirty-seven million residents, we would each have about two inches of shoreline."[33] Additionally, the entirety of the coastline is not made up of flat, sandy beaches; many areas have steep cliffs or sea walls and no recreational beach, so the amount of usable coast per person is reduced to only about one inch per person.[34] In addition to the small amount of coastline shared among Californians:

> Californians share our personal inch with millions of visitors who help support the state's thriving ocean economy. As urban and built environments expand, California's wild coastal areas will come under increasing development pressure and attendant pressure to armor. Unable to migrate past the walls, our intertidal zones, beaches, and dune systems will yield to the rising sea.[35]

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29. *Id.* at 8.

30. *Id.*

31. *Id.*

32. *Id. See* Katie Tannenbaum, *Beach Access*, BEACHAPEDIA COASTAL KNOWLEDGE RESOURCES, http://www.beachapedia.org/Beach_Access (last visited Oct. 9, 2011) (discussing beach access controversies).

33. Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533, 541 (2007).

34. *Id.*

35. *Id.* at 542.

The public trust doctrine allows for coastal resources to be held by the state in "perpetual trust for the people" and for those resources to be protected.[36] "[T]he doctrine provides the most fundamental basis for responding to the threats" facing our coasts and oceans.[37] The public trust purposes have been expanded beyond navigation, commerce, and fishing to include public recreation and encompass environmental preservation—it is these fundamental ecosystem processes that are most threatened by rampant and unplanned ocean development.[38] The public trust doctrine provides the foundation and rationale for protecting our oceans through a sustainable ocean management policy.

III. THE DEPTH OF ISSUES FACING OUR OCEANS

Coastal ecosystems are already stressed by anthropogenic impacts such as overfishing, coastal development, habitat loss and destruction, invasive species, and pollution.[39] For water quality concerns alone, there are watersheds stressed by oil spills, such as the recent BP *Deepwater Horizon* spill in the Gulf of Mexico in April 2010, as well as multiple pollutants from point sources (like factories) and nonpoint sources that produce coastal runoff.[40] Further concerns arise from impacts of climate change. As sea levels rise, so does the need to manage the changing coastline, including moving infrastructure back and away from the ocean's edge. The oceans are also basically a huge carbon sink—they function to absorb the carbon dioxide emitted through the combustion of fossil fuels, which is gradually acidifying the ocean environment and causing it to become increasingly hostile to marine life.[41] Average pH on the surface of the ocean has already decreased by about 0.1 units in seawater pH compared to preindustrial levels, equivalent to a thirty percent increase in acidity.[42] In the era of climate change, pressures on

36. *Id.* at 552.

37. *Id.*

38. *Id.*

39. *See, e.g.*, *Estuaries & You: Anthropogenic Disturbances*, ESTUARIES.GOV, http://www.estuaries.gov/About/Default.aspx?ID=250 (last updated May 24, 2011).

40. See *What is Nonpoint Source Pollution?*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/polwaste/nps/whatis.cfm (last updated Sept. 29, 2011) for information about nonpoint source pollution.

41. John Pickrell, *Oceans Found to Absorb Half of All Man-Made Carbon Dioxide*, NAT'L GEOGRAPHIC NEWS, July 15, 2004, http://news.nationalgeographic.com/news/2004/07/0715_040715_oceancarbon.html.

42. O. Hoegh-Guldberg et al., *Coral Reefs Under Rapid Climate Change and Ocean Acidification*, 318 SCIENCE 1737 (2007).

fisheries, coastlines, and other ocean resources are likely only to intensify, "requiring increased legal measures to prevent the complete decimation of fish stocks and their attendant marine ecosystems."[43]

The United States should work to protect important ocean resources from these stressors because the oceans play a critical role in the economy.[44] To that end, consider the fact that domestic ocean sector industries provided over two million jobs and over $138 billion in gross domestic product in 2004 resulting from a variety of sectors, including ocean tourism, recreation, and living resources.[45] In fact, "one of every six jobs in the United States is marine-related and over one-third of the U.S. gross national product originates in coastal areas."[46] From coastal leisure and hospitality industries alone, the continental United States generates over $176 billion.[47] For further evidence that our oceans play a key role in the economy consider also that, "[c]oastal and marine waters support over 28 million jobs, while providing tourist destinations for 189 million Americans each year [and] [t]rans-ocean shipping contributes over $700 billion annually to the U.S. gross domestic product while employing 13 million Americans."[48] Additionally, U.S. consumers shell out in excess of $55 billion each year for products produced by fisheries.[49]

The NOP "provides a way to unify the more than 140 federal laws and dozens of federal agencies that have some jurisdiction over U.S. waters in the Pacific and Atlantic oceans."[50] A National Ocean Council will head up the NOP and "implement a coastal and marine planning

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43. Robin Kundis Craig, *Avoiding Jellyfish Seas, or, What Do We Mean by "Sustainable Oceans," Anyway?*, 31 UTAH ENVTL. L. REV. 17, 44 (2011).

44. *See Oceans Impact the Economy*, NAT'L OCEAN POLICY COAL., http://oceanpolicy.com/about-our-oceans/oceans-impact-the-economy/ (last visited Oct. 10, 2011).

45. JUDITH T. KILDOW ET AL., NAT'L OCEAN ECON. PROGRAM, STATE OF THE OCEAN AND COASTAL ECONOMIES 6 (2009). *See also Market Data: Ocean Economy Data*, NAT'L OCEAN ECON. PROGRAM, http://www.oceaneconomics.org/Market/ocean/oceanEcon.asp (last visited Oct. 30, 2011) (2,323,904 jobs existed in 2004 for all ocean sectors in all counties and all industries).

46. *Ocean*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.noaa.gov/ocean.html (last visited Oct. 30, 2011).

47. MICHAEL GRAVITZ ET AL., OCEANS UNDER THE GUN: LIVING SEAS OR DRILLING SEAS 28 (2009).

48. *Pew Says New U.S. National Ocean Policy Will Help Safeguard Economy*, PEW CHARITABLE TRUSTS (July 19, 2010), http://www.pewtrusts.org/news_room_detail.aspx?id=60045.

49. *Id.*

50. *Id.*

system that will identify areas where industrial uses make sense and others that should be protected from such development."[51] Through increasingly thorough and balanced assessments of the risks and benefits of marine activities, coastal managers will be able to make better siting decisions, minimize harm to marine life, and better manage unavoidable risks when necessary.[52]

IV. THE ROAD TO A NATIONAL OCEAN POLICY

The 2010 NOP was by no means a new concept to practitioners and academics familiar with ocean management. Various ocean law leaders, commissions, and scholars have called for the creation of a NOP over the years.[53] In planning for a "sea change" in the nation's policies regarding ocean resources, a marked need for ocean management clarity and coordination has emerged. The following Section reveals the rich history of U.S. ocean governance, which has culminated in the recent creation of the NOP.

A. Stratton Commission: the Model for a Sea Change in National Marine Policy

In 1966, Congress enacted the Marine Resources and Engineering Development Act, which focused unprecedented attention on the nation's coasts and oceans.[54] This major piece of legislation tackled issues of ocean policy and the organization and coordination of regulation that the NOP also aspires to solve today.[55] The 1966 Act eventually resulted in the creation of the National Oceanic and Atmospheric Administration (NOAA) and was known for creating a blue ribbon presidential panel on marine science activities.[56] This panel, entitled the Commission on Marine Science, Engineering and Resources, was charged with evaluating national needs and capabilities concerning ocean management.[57] Chaired by Julius Adams Stratton, the Stratton Commission, as it became known, formulated recommendations regarding the appropriate governmental structure to conform with

51. *Id.*
52. *See id.*
53. *See infra* Part IV.A-D.
54. *See* 33 U.S.C. §§ 1101-1108 (2006).
55. *See id.*
56. *A History of NOAA,* NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.history.noaa.gov/legacy/noaahistory_3.html (last updated June 8, 2006).
57. *Id.*

national priorities.[58] The Commission's federal marine policies would go on to guide the nation for the next thirty years.[59] Julius Stratton had previously served as the President of the Massachusetts Institute of Technology and the Chairman of the Board of the Ford Foundation and was said to have the gift of character and intellect,[60] which no doubt served the Commission well as it went on to be one of the most effective panels on ocean governance in the nation's history.[61]

The origins of the Commission date back to several years earlier, when the National Academy of Sciences established a ten-member Committee on Oceanography (NASCO) to study the nation's marine activity and interplay with science, technology, education, supporting services, and international cooperation.[62] NASCO was essentially the "result of a letter written in 1956 by the Chief of Naval Research to the National Academy [of Sciences], proposing such a committee."[63] Internationally, the United Nations was simultaneously showing the will to establish a law of the sea and a policy surrounding international ocean management.[64]

After nineteen multi-day plenary meetings analyzing the nation's marine programs and promise, the Stratton Commission released its *Our Nation and the Sea* report on January 9, 1969.[65] The comprehensive report focused on three major issues: the sea as the new frontier, the need to protect the coastal environment from overexploitation and pollution, and a detailed plan to reorganize the federal marine and coastal programs.[66] The Commission also recommended a new, independent civilian agency for the administration of marine and atmospheric programs; thus came the birth of NOAA less than two years after the report was released.[67]

Importantly, the Stratton Commission's recommendation to form a national coastal zone management program also gave rise to the Coastal

58. William J. Merrell et al., *The Stratton Commission: The Model for a Sea Change in National Marine Policy*, 14 OCEANOGRAPHY 11, 11 (2001).

59. *Id.*

60. John A. Knauss, *The Stratton Commission—Its History and Its Legacy*, 3 OCEANOGRAPHY 53, 54 (1990).

61. *See* Merrell, *supra* note 58, at 16.

62. *See* Knauss, *supra* note 60, at 53.

63. *Id.*

64. Merrell, *supra* note 58, at 12.

65. *Id.* at 14. *See also* Knauss, *supra* note 60, at 55.

66. Merrell, *supra* note 58, at 14-15.

67. *Id.* at 15. *See also* Knauss, *supra* note 60, at 55.

Zone Management Act[68] (CZMA).[69] Congress passed the Act in 1972, creating a national program that would primarily be implemented by the states and that is still the preeminent law on coastal management today.[70] In fact, the Stratton Commission influenced over ten pieces of major ocean legislation between 1966-1976, affecting ocean pollution, national marine sanctuaries, marine mammal protections, estuarine reserves, fishery conservation and management, and seabed mining.[71]

B. U.S. Commission on Ocean Policy

The Oceans Act of 2000[72] established the U.S. Commission on Ocean Policy (USCOP)—a sixteen-member commission assigned to review domestic ocean policy and report recommendations to states, Congress, and the President.[73] The USCOP's 2004 report, entitled *An Ocean Blueprint for the 21st Century*, offers extensive recommendations for administrative and legislative action, including increased use of marine protected areas and marine reserves, strengthening of the CZMA, United States accession to the United Nations Law of the Sea Convention, and use of the precautionary approach in marine resource management.[74] On December 19, 2004, the USCOP expired, as provided under the terms of the Ocean Act of 2000.[75] The USCOP's blueprint, however, provided for steps to move ahead and implement a new NOP.

On December 17, 2004, in response to the Commission's findings and recommendations, President George W. Bush established a Secretarial-level Committee on Ocean Policy as part of the Council on Environmental Quality and released the U.S. Ocean Action Plan.[76] Following the White House announcement of these actions, the USCOP responded with a preliminary assessment of the Ocean Action Plan,

68. *See* Merrell, *supra* note 58, at 16.

69. 16 U.S.C. §§ 1451-1466 (2006).

70. Merrell, *supra* note 58, at 16.

71. *Id*. at 15-16.

72. Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 648.

73. *See* Oceans Act of 2000 § 3.

74. *See* U.S. COMM'N ON OCEAN POL'Y, FINAL REPORT: AN OCEAN BLUEPRINT FOR THE 21ST CENTURY (2004).

75. Oceans Act of 2000 § 3(i).

76. *Bush Creates Panel to Oversee Ocean Policy*, ENV'T NEWS SERVICE, Dec. 20, 2004, http://www.ens-newswire.com/ens/dec2004/2004-12-20-10.html.

calling it a promising first step toward the implementation of a comprehensive NOP.[77]

C. Pew Oceans Commission

The USCOP recommendations are supported by various subsequent reports, including those by the Pew Oceans Commission.[78] Pew Charitable Trusts established the eighteen-member Pew Oceans Commission, originally led by the Honorable Leon Panetta, which focused on developing recommendations for a new and comprehensive ocean policy.[79] Pew Oceans Commission presented its recommendations on ocean policy reform in its 2003 report, *America's Living Oceans: Charting a Course for a Sea Change*.[80] Pew Oceans Commission continued the work of the Stratton Commission, taking into account new environmental, economic, and policy challenges that had emerged in the past thirty years.[81] The group specifically recommended that ecosystem-based management (EBM) approaches be incorporated into U.S. laws governing the ocean environment;[82] EBM is now "broadly accepted as crucial for marine conservation and resource management."[83] Pew Oceans Commission also noted that it is important to include regulatory controls on non-native or "invasive" species coming to U.S. waters, as well as controls for sources of pollution, especially nutrients, that are harming marine ecosystems.[84]

D. Joint Ocean Commission Initiative

The Joint Ocean Commission Initiative (JOCI) resulted from a collaboration between members of the Pew Oceans Commission and

77. Press Release, U.S. Comm'n on Ocean Pol'y, Commending President Bush on Initial Step Toward a National Ocean Policy (Dec. 17, 2004), *available at* http://www.oceancommission.gov/newsnotices/dec17_04.html.

78. *See, e.g.,* PEW OCEANS COMM'N, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE (2003).

79. *Id.* at iii-iv, x.

80. *Id.* at i.

81. *Id.* at 27.

82. *Id.* at 44.

83. Phillip S. Levin et al., *Integrated Ecosystem Assessments: Developing the Scientific Basis for Ecosystem-Based Management of the Ocean*, 7 PLOS BIOLOGY 23, 23 (2009) (citing NSTC JOINT SUBCOMM. ON OCEAN SCI. & TECH., CHARTING THE COURSE FOR OCEAN SCIENCE IN THE UNITED STATES FOR THE NEXT DECADE (2007)).

84. PEW OCEANS COMM'N, *supra* note 78, at 60.

USCOP.[85] JOCI is a bipartisan, collaborative group that aims to "encourage action and monitor progress toward meaningful ocean policy reform."[86] Today, the JOCI Leadership Council is made up of representatives from prominent universities and environmental groups, independent scientists, national security leaders, and representatives from a variety of ocean industries, including fisheries, shipping and energy.[87] JOCI is meant to serve as a resource for policy makers at all levels of government who are interested in pursuing ocean policy reforms consistent with JOCI's recommendations.[88] JOCI leadership is now focused specifically on promoting the establishment and effective implementation of a comprehensive U.S. national ocean policy.[89]

In sum, the history of efforts in the United States to reform ocean governance and inform ocean planning, from the work of the Stratton Commission to the recent policy work of the JOCI, has shaped the NOP and continue to influence the future of ocean governance. Specifically, the Pew Oceans Commission's *America's Living Oceans: Charting a Course for Sea Change* report,[90] as well as JOCI's 2007 *An Agenda for Action: Moving Regional Ocean Governance from Theory to Practice*,[91] point out the deficiencies in the existing regulatory system, including the lack of mandatory coordination and integration between agencies and across resources.[92] A sector-by-sector approach to ocean governance undermines the siting of potential new and emerging activities. It also fails to provide for special protections of areas that may be found to be biologically significant or have significant value as cultural or recreational resources. Between anticipated uses of ocean and coastal areas for aquaculture, coastal development, liquefied natural gas terminals, desalination plants, wave or wind farm energy facilities, and new unknown developing technologies, there will be a need for regulatory approvals based on a deep understanding of the most apropos

85. *See About Us*, JOINT OCEAN COMM'N INITIATIVE, http://www.jointoceancommission.org/about-us.html (last visited Oct. 10, 2011) [hereinafter JOCI *About Us*].

86. *Id.*

87. *See Commissioners,* JOINT OCEAN COMM'N INITIATIVE, http://www.jointoceancommission.org/commissioners.html (last visited Oct. 10, 2011).

88. *See* JOCI *About Us*, *supra* note 85.

89. *Id.*

90. PEW OCEANS COMM'N, *supra* note 78.

91. JOINT OCEAN COMM'N INITIATIVE, AN AGENDA FOR ACTION: MOVING REGIONAL OCEAN GOVERNANCE FROM THEORY TO PRACTICE (2007).

92. Deborah A. Sivas & Margaret R. Caldwell, *A New Vision for California Ocean Governance: Comprehensive Ecosystem-Based Marine Zoning,* 27 STAN. ENVTL. L. J. 209, 250 (2008).

ocean use.[93] Each of these ocean uses "poses the potential to adversely impact both existing uses and ecosystem function[s]."[94] Therefore, it is critical to heed historical knowledge and the analyses of ocean governance issues while planning to manage resources for centuries into the future.

V. PROMULGATION OF A NATIONAL OCEAN POLICY

On July 19, 2010, President Obama announced his commitment to implementing the first *National Policy for the Stewardship of the Ocean, Our Coasts, and the Great Lakes.*[95] This decision came on the heels of the June 17, 2009 Presidential Memorandum addressing the need for a unifying national ocean policy to guide future decisions affecting our oceans,[96] which followed decades of policy making and governance assessments for how to manage the nation's valuable maritime assets.[97] Thus, the NOP was born. The Obama administration's directive called for federal agencies to adopt and implement the Final Recommendations of the White House Interagency Ocean Policy Task Force,[98] a body established by President Obama in June 2009 to make such recommendations on U.S. ocean policy.[99] The Task Force recommendations called for the establishment of a NOP with a strong federal coordinating structure and an effective framework for implementation based on coastal and marine spatial planning, all to be overseen by a National Ocean Council.[100] To achieve this NOP, the Obama administration established this new National Ocean Council and charged them with identifying near-term, mid-term, and long-term actions with appropriate milestones, goals, and performance measures.[101] Not only had the 2009 Task Force urged a NOP, but it was also a recurring recommendation from reports by the USCOP and the Pew

93. *Id.* at 251.

94. *Id.*

95. Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 22, 2010).

96. Memorandum of June 12, 2009: National Policy for the Oceans, Our Coasts, and the Great Lakes, 74 Fed. Reg. 28,591, 28,591-92 (June 17, 2009).

97. *See supra* Part II.

98. Exec. Order No. 13,547, 75 Fed. Reg. at 43,023.

99. Memorandum of June 12, 2009: National Policy for the Oceans, Our Coasts, and the Great Lakes, 74 Fed. Reg. at 28,591-92.

100. COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE 4 (2010).

101. Exec. Order No. 13,547, 75 Fed. Reg. at 43,024-25.

Oceans Commission, which was then championed by JOCI.[102] The NOP "is part of an ongoing evolution in thought regarding how best to manage fragile marine resources."[103]

In its 2010 executive order, the Obama administration also mandated that all federal agencies: implement the NOP, the stewardship principles, and the national priority objectives; participate in the coastal and marine spatial planning process; and comply with certified coastal and marine spatial plans.[104] Nine strategic action plans were also developed to support implementation of the national priority objectives, including

(1) Ecosystem-Based Management;
(2) Coastal and Marine Spatial Planning;
(3) Inform Decisions and Improve Understanding;
(4) Coordinate and Support;
(5) Resiliency and Adaption 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.[105]

The executive order makes clear that the aim of the NOP is to "achieve an America whose stewardship ensures that the ocean, our coasts, and the Great Lakes are healthy and resilient, safe and productive, and understood and treasured so as to promote the well-being, prosperity, and security of present and future generations," through these various objectives.[106] The National Ocean Council engaged with local communities throughout the summer of 2011 to develop strategic action plans to achieve the nine national priority objectives that address some of the most pressing challenges facing these areas.[107]

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102. *See* JOINT OCEAN COMM'N INITIATIVE, FROM SEA TO SHINING SEA: PRIORITIES FOR OCEAN POLICY REFORM 15-17 (2006).

103. J. Brett Grosko, *Interagency Ocean Policy Task Force Established*, 42 Trends, Jan.-Feb. 2011 at 1, 1. The discussions "giving rise to this evolution hearken back to the Stratton Commission's 1969 report." *Id.*

104. Exec. Order No. 13,547, 75 Fed. Reg. at 43,025-26.

105. *See* National Ocean Council; Strategic Action Plan Content Outlines, 76 Fed. Reg. 33,726, 33,727 (June 9, 2011).

106. Exec. Order No. 13,547, 75 Fed. Reg. at 43,023.

107. *See National Ocean Council,* WHITE HOUSE, http://www.whitehouse.gov/administration/eop/oceans (last visited Oct. 30, 2011); Peter Stauffer, *Listening Sessions: National Ocean Policy*, SURFRIDER FOUND. COASTAL BLOG

The NOP was passed via an executive order of the President of the United States.[108] An executive order is a directive issued by the President, which has the force of law and requires no action by the legislature or judiciary.[109] Executive Order 13,547 declared that it is now national policy to "protect, maintain, and restore the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources."[110]

For the NOP, the intent of the administration and leaders of the policy is that it will be followed by an act of Congress to show support for effective implementation of the NOP, including the establishment of an ocean investment fund,[111] especially because history demonstrates that the most successful executive orders are those that were subsequently codified to some extent by congressional action.[112] However, given the current congressional atmosphere and unrelated pressures on our federal legislature, it may not come soon.

Interestingly, there have been other executive orders issued regarding the management of ocean resources. For example, the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve was first established by an act of President Bill Clinton in 2000 through Executive Order 13,178.[113] President George W. Bush later designated that reserve as a national monument by proclamation on June 15, 2006,[114] under the 1906 Antiquities Act.[115] The Antiquities Act provides for an even more streamlined process of protection than a sanctuary designation.[116] Consequently, using the Antiquities Act bypassed a year of consultations and the need for an environmental impact statement for the proposed Northwestern Hawaiian Islands National Marine Sanctuary (NWHI) by

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(June 1, 2011), http://www.surfrider.org/coastal-blog/entry/listening-sessions-national-ocean-policy1.

108. Exec. Order No. 13,547, 75 Fed. Reg. at 43,023.

109. *See* JOHN CONTRUBIS, CONG. RESEARCH SERV., 95-722 A, EXECUTIVE ORDERS AND PROCLAMATIONS 1 (1999), *available at* http://www.llsdc.org/attachments/wysiwyg/554/crs-95-772.pdf.

110. Exec. Order No. 13,547, 75 Fed. Reg. at 43,023.

111. *See* JOINT OCEAN COMM'N INITIATIVE, AMERICA'S OCEAN FUTURE: ENSURING HEALTHY OCEANS TO SUPPORT A VIBRANT ECONOMY 2-4 (2011).

112. *See, e.g.,* Proclamation No. 8112, 72 Fed. Reg. 10,031 (Feb. 28, 2007).

113. Exec. Order No. 13,178, 65 Fed. Reg. 76,903 (Dec. 7, 2000).

114. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006).

115. 16 U.S.C. § 431 (2006).

116. *See* James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 624-31 (2001).

making this area a national monument.[117] The legislated process for stakeholder involvement in the planning and management of a marine protected area had already taken five years of effort, but the abrupt establishment of the NWHI as a national monument, rather than a sanctuary, provided immediate and more resilient protection, revocable only by an act of Congress.[118] The area, now known as Papahānaumokuākea Marine National Monument, allowed for significant protection of the marine environment.[119] The area accounts for approximately half of the locally landed bottomfish in Hawaii, and these fish are highly valued by local chefs and consumers.[120]

In stark contrast to an executive order establishing a national monument, an executive order declaring a moratorium on national offshore oil drilling is an example of a fleeting and weaker executive order.[121] In 1990, responding to the eleven million gallon *Exxon Valdez* oil spill, President George H. W. Bush used his executive authority to place a moratorium on any leasing or pre-leasing activity in the lower forty-eight states' offshore areas, including a small portion of the eastern Gulf of Mexico.[122] President Clinton also limited new drilling in the rich Bristol Bay fishing grounds in Alaska until 2012; that moratorium was extended until 2017 by President Barack Obama.[123] In addition, since

117. *See Sanctuary Designation*, PAPAHĀNAUMOKUĀKEA MARINE NAT'L MONUMENT, http://www.papahanaumokuakea.gov/management/designation/designation.html (last updated Sept. 28, 2011).

118. Jim Connaughton, *Ask the White House*, WHITE HOUSE (June 20, 2006), http://georgewbush-whitehouse.archives.gov/ask/20060620.html.

119. Proclamation No. 8112, 72 Fed. Reg. 10,031 (Mar. 6, 2007).

120. Press Release, W. Pac. Reg'l Fishery Mgmt. Council, Federal Fishery Managers Address Impacts of NWHI Monument on Bottomfish Fishery and Research Throughout Hawaii Archipelago (Oct. 18, 2006).

121. *See Offshore Drilling and Exploration*, N.Y. TIMES, Aug. 5, 2011, http://topics.nytimes.com/top/reference/timestopics/subjects/o/offshore_drilling_and_exploration/index.html?scp=1-spot&sq=offshore%20drilling&st=cse.

122. Presidential Statement on Outer Continental Shelf and Oil and Gas Development, 26 WEEKLY COMP. PRES. DOC. 1006-07 (June 26, 1990). *See also* Steven L. Myers & Carl Hulse, *Bush Lifts Drilling Moratorium, Prodding Congress*, N.Y. TIMES, July 14, 2008, http://www.nytimes.com/2008/07/14/washington/14drillcnd.html; MINERALS MGMT. SERV., MMS FAST FACTS: OIL AND GAS PRODUCTION ON THE FEDERAL OUTER CONTINENTAL SHELF (2008), *available at* http://www.boemre.gov/ooc/PDFs/MMSFastFactsJune.pdf.

123. *Presidential Memorandum – United States Outer Continental Shelf*, WHITE HOUSE (Mar. 31, 2010), http://www.whitehouse.gov/the-press-office/presidential-memorandum-united-states-outer-continental-shelf; *Success Story: Bristol Bay – A National Treasure,* PEW ENV'T GROUP (Feb. 22, 2011), http://www.pewenvironment.org/news-room/other-resources/success-story-bristol-bay-a-national-treasure-8589942867.

1981, Congress has protected those same offshore waters with a moratorium emplaced as part of its appropriations process.[124] Unfortunately, the Congressional moratorium expired in 2008, and President George W. Bush lifted the executive moratorium before he left office.[125] This example illustrates the fragility of an executive order without a codifying act of Congress.

VI. EXECUTION OF A NATIONAL OCEAN POLICY

"A policy is a temporary creed liable to be changed, but while it holds good it has got to be pursued with apostolic zeal." - Mohandas Gandhi

A. Applications of our National Ocean Policy

The existing piecemeal management process of our ocean resources is incapable of functioning well in the twenty-first century as development of new marine-related activities, population growth, and climate change continue to act as stressors on our ocean environment. A sector-by-sector approach to resource management is not consistent with marine systems that demand flexibility and adaptability for successful utilization of resources. In order to achieve lasting and prosperous ocean management, the government "must find a way to implement ecosystem-based management that accommodates both the principles of conservation biology and our continuing need to access, use, and enjoy the ocean's bounty."[126] The recipe for success in achieving sustainability through sound ocean governance calls for integrated coastal and marine spatial planning, based upon ecosystem function.[127]

1. Coastal and Marine Spatial Planning

One can only guess how the full history of the NOP will play out, but the beginnings of the policy application are marked by a strong desire to

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124. *Offshore Drilling and Exploration*, *supra* note 121.

125. *See Bush Lifts Executive Ban on Offshore Drilling*, CNN.COM (July 14, 2008), http://edition.cnn.com/2008-07-14-/politics/bush.offshore_1_offshore-oil-drilling-fadel-gheit-exploration?_s=PM:POLITICS.

126. Sivas & Caldwell, *supra* note 92, at 213.

127. *See id.* ("We believe integrated marine spatial planning, explicitly tied to ecosystem function, holds promise for achieving sustainability without significant social dislocation.").

foster coastal and marine spatial planning (CMSP).[128] CMSP (formerly often called marine spatial planning or MSP) is a process for analyzing and allocating the spatial and temporal distribution of human activities in coastal and marine areas to achieve ecological, economic, and social objectives.[129] CMSP is the most advanced, supported, and discussed component of the NOP.[130]

President Barack Obama issued a June 2009 memorandum that called for the creation of the Ocean Policy Task Force to develop a "framework for effective coastal and marine spatial planning."[131] That framework was directed to include an "ecosystem-based approach that addresses conservation, economic activity, user conflict and sustainable use."[132] For the Ocean Policy Task Force, 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.[133]

CMSP encompasses EBM[134] because it is a means of implementing EBM to maintain healthy, productive, and resilient conditions in the ocean,

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128. *See National Ocean Policy Implementation Initiative*, MERIDIAN INST., http://www.merid.org/en/Content/Projects/National_Ocean_Policy_Implementation_Initiative.aspx (last visited Oct. 10, 2011).

129. *Marine Spatial Planning,* UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG., www.unesco-ioc-marinesp.be (last updated Jan. 28, 2010).

130. *See* Sivas & Caldwell, *supra* note 92.

131. Memorandum of June 12, 2009: National Policy for the Oceans, Our Coasts, and the Great Lakes, 74 Fed. Reg. 28,591, 28,592 (June 17, 2009).

132. *Id.*

133. COUNCIL ON ENVTL. QUALITY, *supra* note 100, at 33.

134. Ecosystem-based management is defined as:

> [A]n integrated approach to management that considers the entire ecosystem, including humans. The goal of ecosystem-based management is to maintain an ecosystem in a healthy, productive, and resilient condition, so that it can provide the services humans want and need. Ecosystem-based management differs from current approaches that usually focus on a single species, sector, activity or concern; it considers the cumulative impacts of different sectors.

Ecosystem-based Management, SURFRIDER FOUND., http://beachapedia.org/Ecosystem-based_Management (last visited Oct. 10, 2011).

making CMSP a focal point for accomplishing the first two priorities of the NOP's nine national priority objectives.[135]

2. Statewide Application—Massachusetts and Rhode Island

Two states are out in front in terms of implementing the NOP with a basis in CMSP. Both Massachusetts and Rhode Island have been working within their respective state's coastal management program toward the implementation of a comprehensive ocean plan for the most successful future of their ocean resources.[136]

a. Massachusetts

The Massachusetts Oceans Act, enacted in May 2008, is a comprehensive ocean planning law for the state of Massachusetts. The act requires the state to develop a first-in-the-nation comprehensive statewide plan to manage development in state waters, balancing natural resource preservation with traditional and new uses, including renewable energy.[137] The new Ocean Management Plan, published on December 31, 2009, was developed by the Executive Office of Energy and Environmental Affairs in consultation with a seventeen member ocean advisory commission and an ocean science advisory council[138] and was the product of an extraordinary planning process.[139] The governor's office released the draft plan in June 2009, which itself was the product of eighteen public meetings, ninety stakeholder consultations, and countless hours on the part of private citizens and state officials alike.[140] In the subsequent five-month period of public review, the office received more than three hundred written comments and heard hours of testimony during five public hearings and twenty-five informational meetings, led

135. *See* National Ocean Council; Strategic Action Plan Content Outlines, 76 Fed. Reg. 33,726, 33,727 (June 9, 2011).

136. *See generally* Massachusetts Ocean Act of 2008, MASS. GEN. LAWS ch. 114 (2008); RHODE ISLAND OCEAN SPECIAL AREA MANAGEMENT PLAN, R.I. COASTAL RES. MGMT. COUNCIL (2010).

137. *Massachusetts Ocean Act of 2008*, MASS. OFFICE OF COASTAL ZONE MGMT., http://www.mass.gov/czm/oceanmanagement/oceans_act/index.htm (last visited Sept. 15, 2011).

138. *See generally* EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, FINAL MASSACHUSETTS OCEAN MANAGEMENT PLAN (2009) [hereinafter FINAL MASS. OCEAN PLAN], *available at* http://www.env.state.ma.us/eea/mop/final-v1/v1-complete.pdf.

139. *Id.* at 1-2.

140. *Id.* at 1-3.

in part by the Office of Coastal Zone Management.[141] The Ocean Management Plan identifies and establishes goals, siting priorities, and performance standards for development within offshore state waters.[142] Additionally, the existing regulatory framework is now explicitly linked to the plan because, under the Oceans Act, "all certificates, licenses, permits and approvals for any proposed structures, uses or activities in areas subject to the ocean management plan shall be consistent, to the maximum extent practicable, with the plan."[143]

The plan establishes three management area categories—prohibited, renewable energy, and multi-use—within ocean waters under Massachusetts's jurisdiction; permissible uses in each area are contingent upon the management area designation.[144] Whereas some uses, activities, and facilities are expressly banned in the prohibited area pursuant to the Ocean Sanctuaries Act, as amended by the Massachusetts Ocean Act,[145] the development of wind and other renewable energy is actually encouraged in the renewable energy areas.[146] To that end, the plan identifies two areas (following an environmental review) that are presumed to be suitable for developing offshore wind facilities.[147] In contrast to the other management areas, all uses, activities, and facilities are allowed in the multi-use area.[148] In making a determination regarding the permissibility of a particular use in a specific location, the plan utilizes siting and performance standards rather than spatial designations.[149] The following is an excerpt from the June 2009 draft plan:

> [T]he ocean plan combines elements of both designated-area and performance standard-based management by establishing three categories of management area: Prohibited, Regional Energy, and Multi-Use. Under this approach, special, sensitive or unique natural resources and important existing water-dependent uses are provided enhanced protection in the siting, development, and operation of new uses, facilities, and activities. Renewable

141. *Id.*

142. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, DRAFT: MASSACHUSETTS OCEAN MANAGEMENT PLAN 1 (2009) [hereinafter DRAFT MASS. OCEAN PLAN], *available at* http://www.env.state.ma.us/eea/mop/draft-v1/draft-v1-complete.pdf.

143. *Id.* at 4-20.

144. FINAL MASS. OCEAN PLAN, *supra* note 138, at 2-1–2-4.

145. *Id*. at 2-1

146. *Id.* at 2-1–2-2.

147. *Id*.

148. *Id*. at 2-3.

149. *Id.* at 2-4–2-6.

> energy facilities are screened through strict compatibility criteria, and—for commercial-scale wind projects—facilities are allowed only in designated areas. The majority of state waters in the planning area remain open to uses, activities and facilities as allowed under the Ocean Sanctuaries Act, which preserves opportunity for new and emerging uses and flexibility for future changes based on new data and technologies and social values that will change over time.[150]

Also in 2009, Massachusetts developed an information base—the Baseline Assessment of the Massachusetts Ocean Management Planning Area (Baseline Assessment)—that would underlie its Ocean Management Plan and inform marine spatial planning efforts in ocean waters under Massachusetts's jurisdiction.[151] The Baseline Assessment maps feature various factors including important ecosystem components, "the distribution, density, and abundance of 'special, sensitive, or unique (SSU) estuarine and marine life and habitats[,]'" and human uses that would have a considerable impact on the immediate and surrounding environment, such as renewable energy projects.[152] Additionally, the Baseline Assessment identifies both pressures and threats to ecosystems and key factors driving ecosystem change.[153] Furthermore, the Baseline Assessment contains an adaptive management component and a requirement that it be updated every five years.[154] The five-year update requirement helps ensure that stakeholders have and use up-to-date information when conducting cumulative impacts review, thus enhancing the quality and value of that review and the ability to hone in on project components with the greatest environmental significance.[155] The plan has been submitted to NOAA for incorporation into the existing coastal zone management plan for the State.[156] It will be enforced through the State's regulatory and permitting processes, including the Massachusetts Environmental Policy Act and the State's waterways law.[157]

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150. DRAFT MASS. OCEAN PLAN, *supra* note 142, at 4-2.

151. ENVTL. LAW INST., LINKING REGIONAL GOVERNANCE TO IMPACT ASSESSMENT: A CUMULATIVE IMPACTS FRAMEWORK FOR THE CALIFORNIA CURRENT ECOSYSTEM (forthcoming Dec. 2011) (draft at 33-34) (on file with author).

152. *Id.* (draft at 33).

153. *Id.* (draft at 33).

154. *Id.* (draft at 33-34).

155. DRAFT MASS. OCEAN PLAN, *supra* note 142, at 4-8.

156. *Coastal and Marine Spatial Planning Examples: Massachusetts Ocean Plan*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://cmsp.noaa.gov/examples/massachusetts.html (last visited Oct. 10, 2011).

157. *See generally* DRAFT MASS. OCEAN PLAN, *supra* note 142, at 5-1–5-9.

Interestingly, Massachusetts chose to tackle the challenge of funding the coastal and marine spatial planning activities called for in the act by establishing a "user pays" financing mechanism to help finance regional ocean conservation, restoration, and management.[158] Thus, persons or entities obtaining permits or licenses for specific ocean uses must "pay an ocean development mitigation fee."[159] The "user pays" ocean development mitigation fee is paid into an Ocean Resources and Waterways Trust Fund which was created by the Act and also includes funds from various other sources such as "appropriations and funds authorized by the general court and designated to be credited to the trust fund[,]" grants, and other appropriations directed to the fund.[160] Among other attributes, the user fee system clearly links management efforts and environmental permitting and, consequently, helps ensure that future use of the ocean will be planned and provided for under Massachusetts's regulatory regime.[161]

b. Rhode Island

Rhode Island has developed an Ocean Special Area Management Plan (SAMP) to define use zones for its ocean waters, using the best available science during the research and planning process as well as open public input and involvement.[162] The Ocean SAMP is geared toward an investment in renewable resources, such as offshore wind energy, to fulfill the state's commitment to reducing its carbon footprint.[163] Specific actions within the plan include providing regulatory standards for guiding development and obtaining public review of regulations for protecting ocean resources as part of the Rhode Island coastal management regulatory program.[164] Rhode Island's Ocean Plan

158. ENVTL. LAW INST., *supra* note 151 (draft at 46-47).

159. *Id.* (draft at 47).

160. *Id.* (draft at 46-47).

161. *See id.* (draft at 47).

162. 1 R.I. COASTAL RES. MGMT. COUNCIL, RHODE ISLAND OCEAN SPECIAL AREA MANAGEMENT PLAN, executive summary, at 1-2 (2010), *available at* http://www.crmc.ri.gov/samp_ocean/finalapproved/RI_Ocean_SAMP.pdf.

163. *Coastal and Marine Spatial Planning Examples, Ocean Special Area Management Plan for Rhode Island*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://cmsp.noaa.gov/examples/rhodeisland.html (last visited Oct. 10, 2011) [hereinafter *CMSP Examples: RI*].

164. *Id.*

also designates waters off the state's coast for renewable energy development.[165]

The designated use zones are intended to protect or enhance current uses, including habitat, commercial, and recreational uses, while providing for future uses, such as renewable energy development.[166] The oceanographic research that the plan is based on required two years and eight million dollars.[167] Although the study area spanned approximately 1,500 square miles, the approval covers only the portion that applies to state waters, which extend three miles from the Rhode Island shoreline and three miles around Block Island.[168] The state's coastal management agency, the Rhode Island Coastal Resources Management Council, led this planning process.[169] The University of Rhode Island headed up the data development for this plan, which included "seafloor mapping, bird observations, marine mammal observations, and fisheries data, . . . investigating acoustic impacts, wind and wave analysis, and cultural resource distribution."[170] Stakeholder outreach and public involvement were considered crucial to the success of developing the Ocean SAMP; all Rhode Islanders were invited to share their concerns about offshore energy and ocean management in the policy development stages.[171]

The Ocean SAMP is a federally recognized coastal management and regulatory tool. On July 22, 2011, NOAA adopted the Ocean SAMP after an extensive review process, and Administrator Jane Lubchenco heralded the Rhode Island plan as a model for other states to follow as they search for the best locations for offshore renewable energy while still balancing the interests of commercial and recreational fishermen, boaters, environmentalists, and others.[172] The Ocean SAMP "is being

165. R.I. COASTAL RES. MGMT. COUNCIL, *supra* note 162, ch. 8, at 195-97.

166. *Id.,* executive summary, at 1-2.

167. Coastal Serv. Ctr., Nat'l Oceanic & Atmospheric Admin., *Marine Spatial Planning: Rhode Island Puts its Unique SAMP on Ocean Management*, 14 COASTAL SERVICES, Jan.-Feb. 2011, at 5.

168. *NOAA, CRMC Celebrate Ocean SAMP Federal Approval*, R.I. COASTAL RES. MGMT. COUNCIL (July 27, 2011), http://www.crmc.ri.gov/news/2011_0727_noaasamp.html.

169. *CMSP Examples: RI*, *supra* note 163.

170. *Id.*

171. *Rhode Island Ocean Special Area Management Plan: Documents,* UNIV. OF R.I. & R.I. COASTAL RES. MGMT. COUNCIL, http://seagrant.gso.uri.edu/oceansamp/pdf/documents/doc_osamp_factsheet/pdf (last visited Oct. 10, 2011).

172. Jane Lubchenco, *Making Coastal and Marine Spatial Planning Work: The Rhode Island Ocean Special Area Management Plan (SAMP)*, NAT'L. OCEANIC & ATMOSPHERIC ADMIN. (July 22, 2011),

held up as a model [for other states to] emulate."[173] The Coastal Resources Center at the University of Rhode Island has already held a three-day workshop to teach coastal planners from numerous states and countries about the plan to use best available information to regulate the use of their waters.[174]

The Massachusetts and Rhode Island examples illustrate how a state's coastal planning agency, authorized through the state consistency requirements with the federal CZMA, can work to protect near shore resources.[175] Importantly, the legal authority for all of these actions can be found through the CZMA, which is a means to address ocean management issues in state and federal marine waters through the CZMA federal consistency provision.[176] These states are the frontrunners in developing overarching policies for management of our coasts and oceans in the face of several competing business sectors and the great need for continued protection and adaptive management. Massachusetts's and Rhode Island's efforts to include public outreach in the planning process, as well as to proactively address the need to provide funding for adaptive management, serve to strengthen the plans. This model should be recognized and considered on the national level for NOP.

3. Ocean Renewable Energy Facilities

The nation's oceans and coasts are generating increasing interest among investors in wave, offshore wind, and tidal energy development in marine waters.[177] Development of this energy sector can have a plethora

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http://www.noaanews.noaa.gov/stories2011/20110722_rhodeisland_samp.html ("Rhode Island's process and plan is now *the* template process for others to use.").

173. Alex Kuffner, *R.I.'s Offshore-Wind Mapping is Held Up as Model*, PROVIDENCE J., May 29, 2011, http://www.projo.com/news/environment/content/SAMP_MODEL_05-29-11_68OAD9P_v26.2516eeb.html.

174. *Id.*

175. *See generally* OFFICE OF OCEAN & COASTAL RES. MGMT., NAT'L OCEANIC & ATMOSPHERIC ADMIN., STATE JURISDICTION AND FEDERAL WATERS: STATE COASTAL MANAGEMENT PROGRAMS, OCEAN MANAGEMENT AND COASTAL AND MARINE SPATIAL PLANNING (2011), *available at* http://seagrant.gso.uri.edu/coast/cmsp_material/state_fed-waters.pdf (last visited Oct. 10, 2011). Note that Rhode Island Ocean SAMP only applies to state waters (out to three nautical miles). *Id.* at 2. The enforceable policies in a NOAA-approved R.I. Ocean SAMP apply to activities in federal waters, as well, through the CZMA federal consistency provision. *Id.*

176. *Id.*

177. *See* KALO ET AL., *supra* note 23, at 822-32; *see also* Press Release, U.S. Dep't of the Interior, Secretary Salazar, FERC Chairman Wellinghoff Sign Agreement to Spur

of impacts on marine ecosystems, navigation, commercial and recreational fishing, surfing, kayaking, sailing, and many other ocean uses.[178] An example of the failure of the existing sector-by-sector approach and the lack of an overarching law for ocean governance can be seen through the confusion that results when an offshore energy project is proposed.[179] There are so many overlapping laws and agencies that it is difficult to know where to begin. For instance, the Outer Continental Shelf Lands Act (OCSLA) governs federal offshore oil and gas activities in the United States.[180] In the congressional policy statement supporting the Act, OCSLA calls for "expeditious and orderly development, subject to environmental safeguards."[181] It is now the job of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), under the Department of the Interior, to reconcile these seemingly competing objectives.[182] Unfortunately, OCSLA suffers from a number of shortcomings, including the lack of a comprehensive national energy plan to guide oil and gas development decisions, not to mention a lack of a prioritized plan of protection for ocean resources.[183] OCSLA also lacks an effective mechanism to ensure sufficient community involvement in the decision-making process.[184] This perpetuates the inefficient sector-by-sector approach to ocean management.[185]

The deficiencies with OCSLA were also evidenced by the Cape Wind offshore wind energy project off the coast of Cape Cod in Massachusetts. The Cape Wind project was eventually evaluated under OCSLA but only after being transferred from U.S. Army Corps of Engineers' jurisdiction, where it had initially been placed under pursuant

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Renewable Energy on the U.S. Outer Continental Shelf (Apr. 9, 2009), *available at* http://www.doi.gov/news/pressreleases/2009_04_09_releaseA.

178. *See*, *e.g.*, Dennis Newman, *The Deal that May Seal Wave Power for Oregon*, NATURALOREGON.ORG (Feb. 2, 2010), http://www.naturaloregon.org/2010/02/02/the-deal-that-may-seal-wave-power-for-reedsport/.

179. *See* Michael R. Bromwich, Dir. of the Bureau of Ocean Energy Mgmt., Regulation & Enforcement, Remarks at API Delta Chapter's 2010 Meritorious Service Awards Luncheon in New Orleans (Mar. 22, 2011), *available at* http://www.boemre.gov/ooc/press/2011/press0322b.htm.

180. 43 U.S.C. §§ 1331-1356a (2006).

181. Michael LeVine & Andrew Hartsig, *Management and Oversight of Offshore Oil and Gas – the Need for Change*, 42 TRENDS 1, 1 (Nov.-Dec. 2010) (internal quotation omitted).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1, 14.

to the federal Rivers and Harbors Act.[186] This transition brought years of delay and required the federal environmental review process to start anew.[187] It was not surprising to see four lawsuits initiated against the project, including challenges made under the National Environmental Policy Act, Endangered Species Act, Migratory Bird Treaty Act, and OCSLA.[188] The silver lining of the Cape Wind issue in Massachusetts is that it helped set in motion the events leading to passage of the Massachusetts Ocean Act (discussed above).[189] Not only was this act the first in the nation to set out a comprehensive statewide ocean management plan, but it made possible offshore renewable energy development in most of the state's waters.[190] The Massachusetts Ocean Act also provides specific guidance that is expected to stimulate responsible offshore wind development.[191]

Due to the confusion caused by the many laws and agencies regulating offshore energy, an attempt to settle the jurisdictional conflicts between agencies regulating renewable energy projects on the Outer Continental Shelf was made in 2009.[192] Secretary Salazar of the Department of the Interior and Federal Energy Regulatory Commission (FERC) Chairman Wellinghoff signed a memorandum of understanding clarifying the responsibilities of the Minerals Management Service (under the Department of Interior) and FERC for siting new projects.[193] The objective of the agreement was to establish a cohesive, streamlined process through which the agencies can lease, license, and regulate all domestic offshore renewable energy development activities, including hydrokinetic sources such as wave, tidal, and ocean current.[194] Under the agreement, FERC has exclusive jurisdiction to issue licenses for construction and operation of hydrokinetic projects and responsibility for conducting National Environmental Policy Act review.[195] Before the license can be issued, however, the Minerals Management Service must

186. Susan M. Reid, *Cape Wind: Charting a New Course for a Clean Energy Future*, 42 TRENDS 1, 6 (Nov.-Dec. 2010).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *See* Memorandum of Understanding Between the U.S. Dep't of the Interior & Fed. Energy Regulatory Comm'n (Apr. 9, 2009), *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf.

193. *See generally id.*

194. *Id.* at 1.

195. *Id.*

grant a lease, easement, or right-of-way for the site.[196] The Minerals Management Service (now BOEMRE) agreed to coordinate and cooperate to ensure consistency with the OCSLA, the Federal Power Act, and any other laws applicable to these types of projects.[197] This proactive step to clarify the regulatory atmosphere surrounding offshore renewable energy has helped pave the way for future agency cooperation and establish clear standards of regulation, while also allowing private interests and the public to understand what to expect.

One example of an arguably successful offshore energy project that incorporated fundamental tenets of the new NOP, including public outreach and CMSP, is the Reedsport Wave Energy project off the coast of Reedsport, Oregon.[198] Through agency coordination, a specific project area was selected for construction of the 1.5 megawatt commercial wave energy project consisting of ten buoys in a quarter square mile of ocean, approximately three miles off the coast of Oregon.[199] Significantly, this project included dozens of agencies and stakeholder groups collaborating early on to develop the appropriate project design.[200] It also required monitoring and adaptive management.[201] Through the concerted effort to include community involvement and agency coordination to develop a project on the principles of EBM and CMSP in Oregon, this effort accomplished the following NOP objectives: (1) EBM; (2) CMSP; and (3) coordination and support, garnering a community-supported ocean energy project approval.

On August 2, 2010, dozens of government agencies, regional stakeholder groups, and environmental organizations signed a historic settlement agreement with the project proponent, Ocean Power Technologies (OPT), in support of the construction and operation of the Reedsport OPT Wave Park.[202] The parties to the settlement agreement participated in a three-year process to develop consensus on aspects of project design, required monitoring, and contingencies for adaptive

196. *Id.*

197. *Id.* at 2.

198. *Reedsport Wave Energy*, OREGON SOLUTIONS, http://orsolutions.org/osproject/reedsport-wave-energy (last visited Nov. 10, 2011).

199. Newman, *supra* note 178.

200. *Id.*

201. *See id.*

202. *See* Rick Wilson, *Surfrider Foundation Signs Historic Settlement Agreement on Reedsport, Oregon Wave Energy Project*, SURFRIDER FOUNDATION COASTAL BLOG (Aug. 2, 2010), http://www.surfrider.org/coastal-blog/entry/surfrider-foundation-signs-historic-settlement-agreement-on-reedsport-orego.

management.[203] This is an example of a project where fisherman convened with industry entrepreneurs and government officials to make a plan to establish spatial zoning, including adaptive management, to govern this first large-scale wave energy project in the state's ocean resource. Although the method may have been time intensive on the front end, this process will enable the project to succeed at the long-term goal of efficiently generating ocean energy without harming the marine environment.[204]

4. Criticisms of Ocean Zoning

While CSMP is largely considered a positive and useful approach to ocean governance, the straight zoning of the ocean may not always be such a good idea. As mentioned above, the coastal zone and offshore waters are public trust assets and not meant for private or exclusive ownership.[205] Additionally, a moving three-dimensional ocean is not conducive to selling off in plots for private ownership or use, as is done on land. "[T]he marine environment is fundamentally and categorically different from the terrestrial environment," which more easily allows for fixed property rights and ownership patterns.[206] Marine public trust resources are held in trust by the state "not only for traditional purposes including navigation and commerce, but also for recreation and preservation of ecological processes."[207] The NOP and any related CMSP must be grounded in the fundamental principle that marine trust resources must be managed in a manner that best serves the long-term interests of the larger community.

Incorporating the public trust doctrine into the NOP would further this goal by serving as a legal authority and common law platform for implementing the policy.[208] Indeed, some scholars argue that "[t]he Obama administration should explicitly incorporate the language and principles of the public trust doctrine . . . as it implements the new policy to ensure that federal agencies adopt and perform their duties as stewards

203. *See* Reedsport OPT Wave Park, LLC, *Oregon Territorial Sea Plan, Project Resource Inventory, Reedsport OPT Wave Park, FERC Project Number 12713* (2011), http://www.oregon.gov/LCD/OCMP/docs/Public_Notice/P-12713_TSP_Analysis.pdf?ga=t.

204. *Id.* at 18.

205. *See supra* Part II.

206. Sivas & Caldwell, *supra* note 92, at 227.

207. *Id.* at 234.

208. Steve Roady et al., *The Public Trust Doctrine: A Better Way to Manage Our Oceans*, SOLUTIONS (Feb. 2011), http://www.thesolutionsjournal.com/node/878.

of the oceans and coasts for current and future generations."[209] Doing so would require federal agencies to: "(1) . . . preserve trust resources and not . . . waste them; (2) . . . administer the trust solely in the interest of its beneficiaries (both present and future); and (3) . . . provide complete and accurate information to trust beneficiaries regarding the management of the trust."[210] The result of such a framework would be a marine management regime that prioritizes a precautionary approach to ocean governance when balancing competing marine uses. Because marine habitats and fisheries can be slow to rebuild after destruction by outside forces, there should first be an emphasis on marine reserves and fisheries protection.[211] Accordingly, under such an approach, marine reserves and restoration areas of critical habitat and biological diversity would be set aside first.

Overall, CMSP should be a framework-based application of ocean governance used to assess the competing interests in ocean resources and anticipate cumulative impacts, rather than a plot-by-plot zoning system like that found on land—a system that is far too rigid to handle the currents and changing tides of our oceans. A framework approach provides guidelines and tools for management but allows flexibility for the detailed creation of appropriate regulatory structure to accommodate location-specific issues. The public trust doctrine is an apt foundation, under law, to allow for CMSP to protect valuable ocean and coastal resources for the maximized benefit to the public.

B. Challenges for NOP

While the NOP will face challenges ahead, none of those challenges are insurmountable. Since the publication of the Stratton Commission's report, *Our Nation and the Sea,* in 1969, there has been a great deal of progress made in the realm of ocean resource management, but much more progress needs to be made.[212] As with any new nationwide legal framework, its full implementation and success depends upon political will and adequate funding. Additionally, in proving the strength and viability of the policy through preliminary implementation efforts, local and regional visions of ocean utilization must be reconciled with a national vision for our nation's oceans.

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209. *Id.*

210. *Id.*

211. *See* Callum Roberts, The Role of Marine Protected Areas in Sustaining Fisheries, http://www.un.org/depts/los/consultative_process/documents/6_roberts.pdf.

212. *See supra* Parts I-IV.

1. A Need for Political Will to Act in Congress

As referenced in Part V above, the longevity and success of the NOP executive order may depend on whether the order can be codified into law.[213] Similar to the executive order creating the moratorium on offshore oil drilling that lacked implementing legislation, the NOP executive order will be vulnerable to a change in administration and/or political climate, and therefore subject to relatively easy reversal, absent codification under U.S. law.

In the alternative, the NOP presents an opportunity to incorporate existing laws dealing with ocean governance, such as the CZMA and the public trust doctrine, into the new policy. However, this act of incorporation would have the potentially negative effect of tying the NOP to past interpretative precedent and case law associated with the established laws. The policy could then also vary from state to state as interpretations of the CZMA and public trust doctrine typically do.[214]

The ideal scenario for NOP implementation would include a new bill that could be perfectly tailored to the NOP's regulatory formula, intermediate goals, and overall objectives; Congress may not be willing to pass such a law in the near term. In the interim, continued work with state coastal zone planners and incorporation of fundamental concepts from other ocean governance laws will help keep the NOP progressing in a strong manner.

2. A Need for Funding

The need for funding to implement and execute the NOP goes hand in hand with the need for political will. Congress can both enact a law and choose how much funding is appropriated to such an act. Unfortunately, not only has important ocean legislation failed to pass in the last decade, including an organic act for NOAA called Oceans-21 and reauthorization of the Beach Act of 2000, there has also been a dearth of funding for ocean issues.[215] The National Endowment for the Oceans bill

213. *See supra* Part V.

214. *See e.g.*, Robin Kundis Craig, *A Comparative Guide to Western States' Public Trust Doctrines: Public Values, Public Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

215. *See generally* The Oceans Conservation, Education, and National Strategy for the 21st Century Act, H.R. Res. 21, 111th Cong. (2009) (known as Oceans-21); Beaches Environmental Assessment and Coastal Health Act of 2000, Pub. L. No. 106-284, 114 Stat. 870 (amending Federal Water Pollution Control Act § 303, 33 U.S.C. §1313 (2006)).

has also been in discussion for several years on Capitol Hill; most recently it was placed in an omnibus land and water bill, which also failed to pass.[216] While there is a chipping away at the need for national action to support our ocean issues,[217] what is really needed is a full-scale bite. Given the threat of a double-dip recession, the recently downgraded U.S. credit rating, engagement in wars abroad, and the partisan politics that are currently at play in Congress, securing funding for the NOP will likely be an uphill battle.[218] In the past, private philanthropic foundations, like Pew Charitable Trusts, have put money toward ocean governance efforts.[219] This type of funding, however, is difficult to expect in today's financial climate.

Recognizing the great need for a well-established and comprehensive policy for our marine environment, President Obama included in his 2011 budget a request for funding of $12 million for a marine spatial planning program, $20 million in regional partnership grants, and $5 million to study ecosystems.[220] At least one member of Congress was expected to propose an amendment to stop funding for National Ocean Policy through a Fiscal Year 2012 Commerce Appropriations bill, H.R.

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216. *See generally* Press Release, Whitehouse, Snowe Introduce Landmark Legislation to Protect Oceans and Coasts (July 22, 2010), *available at* http://whitehouse.senate.gov/newsroom/press/release/?id=AE197E77-1783-403C-8B94-1708538144E8.

217. In addition to the recent efforts to establish funding for oceans through the National Endowment for the Oceans, a move that was recently praised by the Joint Initiative Leadership Council, *Joint Initiative Leadership Council Applauds Efforts by Senator Boxer and Senator Whitehouse to Establish a National Endowment for the Oceans*, Joint Ocean Comm'n Initiative (Oct. 3, 2011), http://www.jointoceancommission.org/, there has also been a rising request for funding of water quality and public health issues, see, for example, Clean Coastal Environment and Public Health Act of 2011, S. 1582, 112th Cong. (2011), as well as funding of marine debris issues, see, for example, Marine Debris Act Reauthorization Amendments, H.R. 1171, 112th Cong. (2011).

218. *See* Joan M. Bondareff, *The Impact of Coastal and Marine Spatial Planning on Deepwater Drilling*, 26 NATURAL RESOURCES & ENV'T 3, 5 (Fall 2011).

> In his 2012 budget, President Obama requested $6.8 million for CMSP work and $20 million for regional ocean partnership grants to foster the work of the NOC and begin the regional planning process . . . . [B]ut, it remains to be seen whether the request for federal funds will be agreed to in this era of budget cutting.

Id.

219. *See generally Marine Conservation Campaigns*, PEW CHARITABLE TRUSTS, http://www.pewtrusts.org/our_work_category.aspx?id=134 (last visited Oct. 10, 2011).

220. Nat'l Ocean Council, *Final Recommendations of the Interagency Ocean Policy Taskforce: Frequently Asked Questions*, WHITEHOUSE.GOV, http://www.whitehouse.gov/administration/eop/oceans/faq (last visited Oct. 10, 2011).

2112.[221] The current federal budget crisis promises to be a large obstacle to the progression of national ocean governance.

3. A Need to Reconcile the Bottom-up Model of Planning and Top-down Governance

Implementation of the NOP should be based on the knowledge and workings of regional infrastructure and public involvement. Currently, the NOP offers a very large and overarching framework, which is directed by top players in the Washington, D.C. oceans governance arena.[222] While the leaders of the policy are no doubt the leading experts in the field of national ocean governance, the task at hand is too large to navigate through a traditional top-down model of law or policy-making. Rather, the overarching NOP must be implemented in a way that takes its cues from the grassroots and regional level. Both coastal residents—who literally have an ocean as their backyard—and regular active visitors to the coast have a wealth of useful and necessary knowledge. Thus, engaging those stakeholders will make the process more informed and the outcome more likely to be acceptable to locals than if their input was excluded. Soliciting local and regional input will be the most effective way to create opportunities for user groups to voice their opinions in a comfortable and approachable setting. The stakeholder participation through these public comment opportunities should provide for local, regional, and then national coordination of activities in order to "maximize long-term resource yield."[223] Fortunately, there are already seven regional alliances in the United States that have begun to focus on local and regional ocean planning through a bottom-up model, including the West Coast Governors' Agreement on Oceans Health, the Mid-Atlantic Regional Council on the Ocean, the Gulf of Mexico Alliance, the Great Lakes Commission, the Gulf of Maine Council on the Marine Environment, the Northeast Regional Ocean Council, and the South Atlantic Alliance.[224]

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221. *See* Letter from Priscilla Brooks, Ocean Program Dir., Conservation Law Found., et al., to Sen. Harry Reid, Majority Leader, U.S. Senate (Oct. 17, 2011), *available at* http://www.clf.org/wp-content/uploads/2011/10/Conservation-Groups-to-Sen-Reid-Oppose-Murkowski-Amendment-October-18-2011.pdf.

222. *See* Nat'l Ocean Council*, About the National Ocean Council*, WHITEHOUSE.GOV, http://www.whitehouse.gov/administration/eop/oceans/about (last visited Oct. 10, 2011).

223. *See* Sanchiricoet al, *supra* note 14, at 282.

224. *See Regional Alliances,* MID-ATLANTIC SEA GRANT, http://midatlanticoceanresearchplan.org/regional-alliances (last visited Oct. 10, 2011); *see also* Leila Sievanen et. al., *Linking Top-down and Bottom-up Processes Through the New*

C. Recommendations for a Successful National Ocean Policy

1. Allow the Policy to Bubble up from Local and Regional Efforts

Ocean utilization across U.S. waters is not one-size fits all, nor should our policy be this way. Our policy should work to complement local, state, and regional ocean planning efforts. Now that the NOP framework is in place, its deeper policy and detailed governance methods should be informed by the local and regional arenas. Improved ocean and coastal conservation will result from using ground-tested regional plans and building upon the work of the people who are closest to the everyday planning and management of the coasts.[225] These are the people who understand the most about reconciling competing user groups and providing for a sustainable marine environment.[226]

For instance, the West Coast Governors' Agreement (WCGA) has been looking deeply into the issue of ocean health and management for several years.[227] "The WCGA recognizes the challenges [that] the federal government faces as it attempts to implement a new national ocean policy with limited resources."[228] The WCGA is well positioned to help achieve the policy objectives of NOP and is also committed to leveraging its resources in this effort.[229] This is an example of a regional alliance willing to do the work on the ground. However, the WCGA is looking to "the federal government to clearly articulate its role and commitment to advance each of the nine NOP priorities so that the

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U.S. National Ocean Policy, 4 CONSERVATION LETTERS 298, 299 (Aug.-Sept. 2011) ("The success of policies emerging from higher levels—like the National Ocean Policy—requires enabling a mix of strategies along a spectrum from formal authority (whether federal, state, or local) to informal motivations to collaborate (often building on a sense of place or economic or cultural stake).").

225. "These regional plans will enable a more integrated, comprehensive, ecosystem-based, flexible, and proactive approach to planning and managing sustainable multiple uses across sectors and improve the conservation of the ocean, our coasts, and the Great Lakes." Craig, *supra* note 43, at 44.

226. *See id*.

227. *See West Coast Governors' Agreement on Ocean Health*, WEST COAST GOVERNORS' AGREEMENT ON OCEAN HEALTH, http://westcoastoceans.gov (last updated Apr. 15, 2011).

228. EXEC. COMM. OF THE WEST COAST GOVERNORS' AGREEMENT ON OCEAN HEALTH, COMMENTS ON THE NATIONAL OCEAN COUNCIL'S STRATEGIC ACTION PLAN OUTLINE 1-2 (2011), *available at* http://www.opc.ca.gov/webmaster/ftp/pdf/agenda_items/20110811/6.%20National%20Ocean%20Policy/Aug2011_OPCmtg_Item06_Attachment.pdf.

229. *Id.*

regions can position themselves to be as efficient and effective as possible."[230] The regional alliances do not want to overlap with national efforts, but complement them.[231] Additionally, the regional alliances do not want to overlap on fundraising efforts and end up competing with national efforts.[232] Along with regional alliances, success stories are being told at the statewide level, including Massachusetts and Rhode Island, where objectives of the NOP are already coming to fruition.[233] Federal agencies should provide leadership and coordination amongst the smaller jurisdictions. The local, state, and regional policy-makers and participants engaged in ocean governance should be considered the experts in the field, whereas the national participants are best employed in a leadership capacity or advisory role to give guidance on overall policy objectives.

2. The Execution of the NOP Should Encourage Public Involvement and Require Stakeholder Outreach

The viability of the NOP depends on its sound reasoning and stakeholder support. The sound reasoning for ocean management decisions should be based in local knowledge of ocean areas. Increased public involvement and stakeholder outreach can ensure that the NOP is successful in the implementation and execution stages. Accordingly, the White House explicitly called for stakeholder outreach and public input in its June 2009 memorandum, which called for ocean protection through "a unifying framework under a clear national policy, including a comprehensive, ecosystem-based framework for the longterm conservation and use of our resources."[234]

The mutual involvement of entrenched federal agencies on one end of the spectrum and private, recreational, or commercial interests on the other is needed to create public buy-in, as well as to enable community empowerment. To their credit, Massachusetts and Rhode Island wisely recognized the need for dedicated public outreach efforts during the

230. *Id.*

231. *See id.*

232. *See id.* at 11.

233. *See e.g. Energy Facility Siting: Case Studies*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/issues/energy_casestudies.html (last revised July 14, 2010).

234. Memorandum of June 12, 2009: National Policy for the Oceans, Our Coasts, and the Great Lakes, 74 Fed. Reg. 28,591, 28,591 (June 17, 2009).

planning process for their statewide ocean acts.[235] When entrusting a new governance system to protect the public's most valuable assets:

> [the] ultimate decisionmakers must be highly accountable to the public. The regulatory phenomenon of agency capture by particular stakeholders is a long-studied and well documented one. Mechanisms to ensure public accountability should, therefore, occupy a central place in any ocean governance reform plan. Such accountability can be created both through institutional structure design (e.g., transparent decision processes, administrative appeal systems, etc.) and by ensuring that the judiciary maintains its traditional role as the ultimate backstop for the protection of public trust resources.[236]

Additionally, according to marine EBM experts, the need to look to the local community for answers on ocean management is crucial.[237] Furthermore, many of the best management practices come from local groups and "[w]e expect that as the National Ocean Policy moves forward, these local efforts will continue to serve as a model for how to more proactively manage America's oceans."[238] Another benefit of using local knowledge in the decision-making process is that local actors can develop trust amongst the decision-makers, which helps increase the legitimacy of the process and increases compliance with the final decisions.[239]

3. NOP Should Emphasize Adaptive Management and Conservation

> *"Ignorance of environmental issues is bad business. Disregard of them is even worse." – Capt. Henry Bates*[240]

In the actual execution of the NOP for regulation of the use of our ocean resources, the policy should support measured, integrated growth through adaptive management along with the cornerstone of ocean conservation. Adaptive management allows for the best science

235. *See supra* Part IV.A.2.

236. Sivas & Caldwell, *supra* note 92, at 252.

237. *How do You Manage US Oceans? Look at Local Successes*, SCIENCE DAILY, Apr. 18, 2011, http://www.sciencedaily.com/releases/2011/04/110418114200.htm.

238. *Id.* (internal quotation marks omitted).

239. *Id.*

240. Kathy Metcalf, Presentation at the Environmental Law Institute Seminar: Noisy Oceans: Beyond Sonar (May 20, 2008), *available at* http://www.eli.org/pdf/seminars/05.20.08dc/05.20.08MetcalfPPT.pdf.

available to be employed to most effectively guide the future of our oceans. Ocean conservation, with an emphasis on marine reserves and protection of biologically diverse and sensitive areas, will help provide for the greatest likelihood of long-term sustainability of our ocean resources. Conservation is a key tactic for addressing the cumulative stressors that are affecting oceans every day, including climate change, overfishing, harmful algal blooms, invasive species, cumulative loss of wetlands, and the like.

The future health and welfare of the United States and its residents will depend, to a large degree, on the natural resources and wealth provided by our oceans. In addition to direct economic benefits, coasts and oceans add to quality of life by providing Americans with opportunities for play, relaxation, and mental recharge.[241] Furthermore, "the added 'non-market value' of coastal recreation [is estimated] to be far in excess of $30 billion annually."[242] Hundreds of millions of individuals visit the U.S. coast each year, making tourism and recreation the dominant sector of the ocean economy,[243] which should be taken into account when engaging in NOP efforts involving resource protection. For the coastal and marine environment to be protected and continue to yield the immense value that it has in the past, the U.S. must first protect the vitality of our marine assets today for the benefit of future generations.

VII. CONCLUSION

The problem is large. Our oceans are affected by natural and anthropogenic pressures on the environment, including ocean litter, water pollution, offshore oil and gas development, population growth, sewage discharge, cruise ships and shipping, coastal development, farming and land development, and overfishing, just to name a few.

The challenges are many. The current political environment poses major hurdles to enacting legislation to codify the NOP, not to mention funding concerns. Additionally, fragmentation of local, state, regional, and national implementation efforts threatens to undermine the federal vision.

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241. LINWOOD PENDLETON, THE OCEAN FOUND., THE U.S. ECONOMY NEEDS THE COASTAL ZONE MANAGEMENT ACT 1 (2009), *available at* http://www.coastalvalues.org/czmaecon.pdf.

242. *Id.*

243. *See* U.S. COMM'N ON OCEAN POL'Y, *supra* note 74, at 35.

But the need for the NOP now is greater than ever. With public input from stakeholder outreach, local and regional bottom-up participation, and progress based on adaptive management and conservation, the NOP can find success in managing the great wealth of our nation's waters. Just as the Stratton Commission and the Marine Resources and Engineering Development Act were enacted during an era of rapid technological development and increasing exploration at sea, now more than ever, the nation needs a re-commitment to strengthening the value of our oceans and a directed focus on the future of ocean management through the NOP.