
The Impact of Coastal and Marine Spatial Planning on Deepwater Drilling

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It has been more than one year since the BP Deepwater Horizon (DWH) rig blew up in the Gulf of Mexico, killing eleven workers on the rig, “producing the largest accidental marine oil spill in U.S. history,” destroying wetlands in Louisiana, and deeply affecting the lives of residents and fishermen along the Gulf Coast. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING (BP COMMISSION), DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (FINAL REPORT), www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf. A Gulf Coast Claims Facility has been established to administer a \$20 billion fund from the responsible party, British Petroleum (BP), and final payments to affected claimants are just being proffered by the administrator of the fund, Ken Feinberg, a well-known lawyer and manager of similar trust funds for compensation of victims. The National Oceanic and Atmospheric Administration (NOAA), as lead trustee for natural resources damaged or lost as a result of the spill, has begun the natural resource damage assessment process required by the Oil Pollution Act of 1990. It is difficult at this point to catalogue the extent of the damage and to foresee the impact, psychological and otherwise, on the lives of the fishermen.

In the midst of this ongoing damage assessment, claims, and restoration process, three seemingly unrelated events have taken place. On July 19, 2010, President Obama issued Executive Order 13547 creating a new ocean policy for the United States, establishing a new National Ocean Council and calling for the creation of a series of Coastal and Marine Spatial Plans (CMSPs) along all of our coasts, including Hawaii, Alaska, and the Great Lakes. Exec. Order No. 13547, 75 Fed. Reg. 43,023 (July 22, 2010). Initially, following the DWH spill, the administration imposed a moratorium on all deepwater drilling permits but recently has lifted the moratorium and issued a number of new deepwater drilling permits in the Gulf of Mexico. Finally, recent conflicts in Libya and the Middle East have driven up the price of oil and gas in the United States, resulting in increasing demands to use the Strategic Petroleum Reserve to tamp down the price of gas at the pump and calls for increased development of offshore U.S. oil and gas reserves.

Were the United States to develop and implement a series

of CMSPs along the U.S. coasts, it could help resolve use conflicts for offshore waters, allow the public to participate more fully in the debate where to site current and new sources of energy, including oil and gas and renewable sources, and potentially facilitate the issuance of additional deepwater drilling permits. This article reviews Executive Order 13547, explains the nature of coastal and marine spatial planning, reviews the legal authority for and impact of CMSPs, and attempts to predict the impact of this planning process on deepwater drilling.

First, let us review the history of coastal and marine spatial planning. The concept of maritime spatial planning, as it is known in Europe, originated, in part, from the boundary principles of the U.N. Convention on the Law of the Sea (UNCLOS, 1982). UNCLOS allowed nations to expand their jurisdictional claims to the limits of the 200-mile Exclusive Economic Zone (EEZ), a 12-mile territorial sea, and a 24-mile contiguous zone. Although President Reagan rejected Part XI of UNCLOS governing deep seabed mining, he accepted the rest of UNCLOS and proclaimed that the United States had sovereign rights to explore, exploit, conserve, and manage the natural resources of a 200-mile EEZ around the United States, thereby expanding the nation’s boundaries in a manner more extensive perhaps than the Louisiana Purchase. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

The principle of marine spatial planning itself may have been first adopted in Agenda 21, a set of principles produced by the Rio Conference of 1992. Finally, it is reiterated in Executive Order 13547, calling for a new ocean policy for the United States, discussed at length below.

The European Union, recognizing its dependence and proximity to the sea, took an early lead in calling upon its member nations to develop marine spatial plans. As Fokion Fotiadis, the Director-General of the European Commission’s Directorate-General for Maritime Affairs and Fisheries put it recently, “[t]he European Commission is committed to pursuing . . . and [facilitating] the development and use of maritime spatial planning within the European Union as part of our new sustainable approach to manage our seas and oceans.” European Commission, *Maritime Spatial Planning for the EU’s Seas and Oceans: What’s It All About?* (Luxembourg: Publications Office of the European Union, 2010).

Several European nations have developed marine spatial plans to resolve use conflicts. For example, Belgium has developed a master plan for the Belgian part of the North Sea and designated areas for offshore wind, marine protected areas, and sand and gravel extraction, among other uses. A similar integrated management plan for the North Sea off the Nether-

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lands has been developed and identifies offshore use zones for shipping routes, military exercises, and ecologically valuable areas. Finally, Germany has established a plan to resolve conflicts among old and new energy uses. Further analysis can be found in F. Douvère & C. N. Ehler, *New Perspectives on Sea Use Management: Initial Findings from European Experience with Marine Spatial Planning*, J. ENVTL. MGMT. 90 (2009) at 77–88.

In the United States, early references to a comprehensive oceans policy and the need to plan for current and new uses of the oceans appear in the reports of the two ocean commissions, the Pew Ocean Commission and the U.S. Commission on Ocean Policy. Their reports were issued in 2003 and 2004, respectively. Congress held hearings on the two Commission reports but did not adopt many of their recommendations. The concept of marine spatial planning in the EEZ has never been codified in U.S. law.

Were the United States to develop and implement a series of Coastal and Marine Spatial Plans along the U.S. coasts, it could help resolve use conflicts for offshore waters.

On June 12, 2009, President Obama established an inter-agency task force on ocean policy and directed the group to report back to him in one year on the state of the oceans in the United States. The Task Force produced its final report on July 19, 2010. See The White House Council on Environmental Quality, *Final Recommendation of the Interagency Ocean Policy Task Force* (July 19, 2010), www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf. The report identified a new ocean policy for the United States and included as one of its principal recommendations that the United States should develop CMSPs to manage the resources of the EEZ, OCS, and territorial sea. The Task Force's recommendations were also incorporated by reference in Executive Order 13547.

In brief, the new ocean policy calls for protecting, maintaining, and restoring the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources; using the best available science to inform decisions; supporting sustainable uses of the ocean, coasts, and Great Lakes; increasing scientific understanding of these ecosystems; and ensuring a comprehensive and collaborative framework for the stewardship of these resources. (Task Force Report, *supra*, at 14–15). The stakeholders, including federal, state, tribal and local authorities, regional governing bodies, NGOs, and the public and private sectors are tasked with producing CMSPs.

As defined in Executive Order 13547, the term “coastal and marine spatial planning” means:

a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas. Coastal and marine spatial planning identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives. *In practical terms, coastal and marine spatial planning provides a public policy process for society to better determine how the ocean, our coasts, and Great Lakes are sustainably used and protected—now and for future generations.* Exec. Order No. 13547, 75 Fed. Reg. 43,023 (July 22, 2010) (emphasis added).

While the definition is certainly a mouthful, the ultimate goal of marine spatial planning is a transparent and flexible planning process to identify locations for offshore uses and to anticipate and resolve conflicts among competing uses. The area to be covered by the plans includes the territorial sea of the United States, the 200-mile EEZ, and the Continental Shelf landward to the mean high-water line. The plans also will include the waters of the Great Lakes from the ordinary high-water mark to the limit of the U.S. and Canada maritime boundary. The Task Force Report explicitly states that privately owned lands are excluded from the planning areas. However, the waters may reach inland to cover bays and estuaries in coastal and Great Lakes settings, which could include the internal waters of the Chesapeake Bay and Puget Sound.

Membership of each regional planning group includes representatives of federal, state, and tribal authorities pertaining to each region. States are divided into nine regions (for purposes of developing the CMSPs), as follows:

1. **Alaska/Arctic Region:** Alaska;
2. **Caribbean Region:** Puerto Rico and U.S. Virgin Islands;
3. **Great Lakes Region:** Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania*, and Wisconsin;
4. **Gulf of Mexico Region:** Alabama, Florida, Louisiana, Mississippi, and Texas;
5. **Mid-Atlantic Region:** Delaware, Maryland, New Jersey, New York, Pennsylvania, and Virginia;
6. **Northeast Region:** Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont;
7. **Pacific Islands Region:** Hawaii, Commonwealth of the Northern Mariana Islands, American Samoa, and Guam;
8. **South Atlantic Region:** Florida, Georgia, North Carolina, and South Carolina; and
9. **West Coast Region:** California, Oregon, and Washington.

[*Pennsylvania is included twice because it is both a coastal and Great Lakes state.]

For a better depiction of the regions affected, please view the NOAA map of the United States divided into large marine ecosystems and the nine regional planning areas at Council on Environmental Quality, *Final Recommendation of the Interagency Ocean Policy Task Force*, 52 (July 19, 2010),

www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf.

A number of states have initiated their own ocean planning processes that may well serve as models for the new plans. Because state jurisdiction ends generally at the 3-mile limit, working with federal agencies on CMSPs will provide an opportunity for states to influence the outcome of the plans for the waters of the adjacent EEZ and Great Lakes. The following states have developed ocean management plans: Massachusetts, Hawaii, California, Rhode Island, Oregon, and Washington State. Some of the state plans have also proved useful in helping to resolve siting conflicts. For example, the Commonwealth of Massachusetts was able to identify the location of an offshore wind project by designating two areas for offshore wind. See Peter Brennan, *Massachusetts Ocean Plan Delegates Offshore Wind Regulation*, Offshore Wind Wire (Jan. 4, 2010), www.offshore-windwire.com/2010/01/04/ocean-plan-delegates-regulation. California, on the other hand, adopted an ocean plan in 2005 that continued to call for a ban on drilling on the OCS adjacent to California. See *Water Quality Control Plan, Ocean Waters of California* (2005), www.swrcb.ca.gov/water_issues/programs/ocean/docs/oplans/oceanplan2005.pdf.

The Task Force Report established a five-year schedule for bringing the nine CMSPs into fruition. The Report anticipates that the first year will be devoted to public and stakeholder outreach; organizing the respective federal agency representatives in each region; developing a model agreement; organizing and convening a national workshop; and development by the National Ocean Council (NOC) of a national information management system. 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. Regions will have to have some seed money to begin the planning process and staff the development of CMSPs; but, it remains to be seen whether the request for federal funds will be agreed to in this era of budget cutting.

The next two years are to be spent on development, in the regions, of a work plan and an initial regional planning process. Over the next three years, the regions should complete their CMSPs, submit them to the NOC for review and approval, and begin to implement the plans. The Task Force expects that all plans will be “certified” and put into effect by 2015. By certification, the Task Force means a review by the NOC to ensure that the plan is consistent with the new ocean policy above. Certification would not occur until after a thirty-day public review period.

Legal Authority for Coastal and Marine Spatial Planning and Legal Effect of Certified Plans

A key unanswered question is what legal effect the CMSPs will have once adopted and certified by the NOC. The plans are intended to guide future agency decision making, not be the equivalent of regulations or constitute final agency decision making. (Task Force Report, *supra*, at 62.) This will have a

direct bearing on the impact of the CMSPs on offshore oil and gas development, especially in deep waters. If the plan is simply a document written by bureaucrats without public participation and buy-in, it may not be a very meaningful document. On the other hand, if the public and stakeholders participate in the plan’s development and federal, state, and local regulations are modified to conform to the plan, it may become a serious roadmap to predict future sites for offshore drilling and future renewable energy platforms, including offshore wind.

Unless the United States develops comprehensive marine spatial plans, we will continue to battle each permit and new use on a case-by-case basis.

The Task Force Report claims that the administration has all the authority it needs to create and develop CMSPs. In fact, an appendix to the Report identifies more than forty statutes that serve as the basis for the authority to develop CMSPs. Key among the laws cited are the Coastal Zone Management Act (CZMA), the Outer Continental Shelf Lands Act, the Clean Water Act, the Clean Air Act, the Endangered Species Act, the Magnuson Act, and the Deepwater Port Act. Probably the closest law that proposes the establishment of ocean plans is the CZMA, which encourages states, albeit in state waters, to develop state ocean resource management plans. 16 U.S.C. § 1451(m). As described above, several states have done so.

In addition to claiming that no additional authority is required to develop the plans, the Report also asserts that the plans will not supersede or replace existing laws or regulations. Future challenges to CMSPs may well depend on whether all stakeholders have bought into the planning process. At some point in the future, however, it is possible that conflicts with underlying laws will arise and agencies and stakeholders may recommend changes to those laws to encompass new uses of the ocean and also to better resolve use conflicts.

Impact of Coastal and Marine Spatial Plans on Deepwater Drilling and Other Energy Uses of the EEZ

On January 11, 2011, the BP Commission, co-chaired by former Senator Bob Graham (D-FL) and former EPA Administrator William Reilly, issued its Final Report. While the principal purpose of the report was to identify the root causes of the BP spill, the BP Commission also adopted a series of policy recommendations, including one that specifically endorsed the use of marine spatial planning as a way to manage future offshore drilling. The Commission did not recommend that

offshore or deepwater drilling be banned, but, instead, stated that “drilling in deepwater does not have to be abandoned. It can be done safely. That is one of the central messages of this report.” (BP Commission Report, *supra*, at 293).

BP Commission Recommendation E.7 provides:

The appropriate federal agencies, including EPA, Interior, and NOAA, and the Trustees for Natural Resources should better balance the myriad economic and environmental interests concentrated in the Gulf region going forward. *This would include improved monitoring and increased use of sophisticated tools like coastal and marine spatial planning.* Many of these tools and capacities will also be important to manage areas of the OCS outside the Gulf. BP Commission Report, *supra*, at 282 (emphasis added).

Elaborating on this recommendation, the BP Commission encouraged Congress to fund grants for the development of regional planning bodies, at amounts requested by the president, and to site within the plans marine protected areas that can be used as “mitigation banks” to help offset any future harm to the marine environment and to help maintain robust fisheries in the Gulf.

The co-chairs of the BP Commission have testified before Congress on their recommendations. While some members of Congress, such as Congressman Sam Farr (D-CA) support the use of marine spatial planning, others such as the Chairman of the House Natural Resources Committee, Congressman “Doc” Hastings (R-WA), have questioned the utility of such plans and expressed concerns that “[r]estrictive national standards, along with ocean zoning, could place huge portions of our oceans off-limit to communities who rely on our oceans for commerce and recreations.” Rep. Doc Hastings, *Regulations Stifle Drilling, Push Gas Prices Up at Pump*, The Hill (Feb. 15, 2011), <http://naturalresources.house.gov/News/DocumentSingle.aspx?DocumentID=225130>.

Unless Congress provides the necessary seed funding for the development of CMSPs, we will not be able to determine how effective the plans can be to meet the expectations of the Task Force and the BP Commission. However, if states and federal agencies can begin to meet and discuss how to approach marine spatial planning and how to identify which uses should be located where, the process may yet prove to be fruitful. There are existing examples of federal-state discussions on uses of the ocean that may be the seeds of this discussion.

In the Gulf of Mexico, for example, interested stakeholders can help identify areas for deepwater drilling that will not impact fisheries, shipping lanes, and marine protected areas. This may help accelerate the permitting process for offshore drilling while allaying the fears of fishermen at the same time. Combining offshore drilling with a marine protected area and a scheme for sharing revenue could expedite the permitting process.

Along the Atlantic Coast, where offshore wind may soon become a reality, the Departments of the Interior and Energy have already established task forces with state representatives to identify areas for offshore wind. These discussions have led to a number of Requests for Information (RFIs) and Calls for Nominations off Massachusetts, Rhode Island, and North

Carolina, and one is about to be issued for the Commonwealth of Virginia. Eight companies have already responded to the Maryland RFI. These task force discussions can become the basis for future marine spatial planning to include other offshore uses besides renewable energy.

Along the West Coast, where states have not wanted offshore drilling since the famed 1969 Santa Barbara blowout, there may be a stronger interest in new forms of renewable energy, such as energy from wind, tides, and waves. It would be overly optimistic to gainsay that investing in the development of a CMSP will facilitate new offshore drilling adjacent to the California coast—but who knows? The Pacific Coast of the United States also could be a target for offshore wind. Developing a marine spatial plan for renewable energy combined with protections of marine resources may expedite the development of those resources.

In the Bering Sea, with the warming of the Arctic, Native Alaskans and other stakeholders will be able to focus on the critical issues of offshore drilling, marine mammal protection, and fisheries protections if they meet to develop a CMSP. Along the Gulf of Alaska, there are increasing opportunities for geothermal resource development. Getting interested federal, state, and local agencies to the table to discuss how best to bring these resources online while continuing to protect the marine mammal and fisheries resources of the adjacent seas will lead to a transparent plan that can be updated as new resources are identified and new priorities come forward. Eventually this kind of planning process will have to be brought to the Arctic and its increasingly open waters, but in that case, the United States will not be the only nation at the table.

There are already numerous competing uses of the waters between and among the Hawaiian Islands that are part of the Pacific Region. To date, offshore wind proposals have been met with local opposition. Each use, whether offshore wind, transportation, fisheries, or whales, has its own place in the pecking order and own statutory authority and agencies. But, there is no single group that can look at the ocean and its resources as a whole. Developing a CMSP can achieve what no individual statute, agency, or industry group can accomplish on its own—a roadmap to future siting and future permits.

Conclusions

The development of CMSPs may have a positive impact both on deepwater drilling for oil and gas as well as for the development of renewable resources. Even if the CMSPs are not strictly enforceable, they will provide an excellent opportunity for interested stakeholders, at the federal, state, and local government levels, as well as industry and NGOs, to meet and discuss how the waters of the EEZ and Great Lakes should be managed.

It was President Reagan who declared that the United States has exclusive rights to the resources of the EEZ. Unless the United States develops comprehensive marine spatial plans, we will be unable to take full advantage of his proclamation and vision but will continue to battle each permit and each new use of the ocean on a case-by-case basis. 🧠