



OCEAN RENEWABLE ENERGY COALITION

The National Trade Association for Hydrokinetic and Marine Renewables

President Obama Signs Executive Order Creating National Oceans Council and Implementing Coastal Marine Spatial Planning

On July 19, 2010, President Obama signed an Executive Order adopting a new, national marine stewardship policy focused on protection of the ocean, coastal and Great Lakes ecosystems through increased planning by improved coordination between federal, state, tribal and local authorities, as well as ocean users. The Order adopts the recommendations of the Interagency Ocean Policy Task Force, which includes the creation of a National Ocean Council that would spearhead implementation of new ocean policy, and guide development of regional coastal and marine spatial plans (CMSP) that would build upon, and improve, existing federal, state and local decision-making and planning.¹

This summary describes OREC's role in the Task Force proceedings and provides a brief overview of the salient features of the Executive Order and final Task Force recommendations. The Task Force apparently considered many of the comments raised by OREC,² though it ultimately declined to adopt our recommendations. OREC had recommended that the Task Force make renewable energy development an express priority in its national ocean policy by reducing the time and costs associated with permitting renewable energy projects. OREC remains optimistic that planning, if done properly, can facilitate marine renewables development. OREC stands ready to participate in the regional council meetings to ensure that the views of the offshore marine renewable industry are represented as CMSP moves forward.

¹ The Executive Order, still unnumbered, is available at <http://www.whitehouse.gov/the-press-office/executive-order-stewardship-ocean-our-coasts-and-great-lakes>. The Interagency Policy Task Force's 96 page report and recommendations are available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans>.

² See Task Force Report at 88-96 (discussing generally, submitted comments, many raised by OREC as well as other parties)

I. Background of Proceedings

Approximately a year ago, the Interagency Ocean Policy Task Force was created and tasked by the President to create a framework for national ocean policy, as well as provide recommendations for CMSP. To this end, the Task Force conducted many meetings nationally, as well as separate meetings for various stakeholders. On behalf of OREC, Sean O’Neill and Carolyn Elefant participated in the two Task Force meetings for the offshore renewables industry held in Washington D.C. in July and September 2009.

OREC also filed extensive comments (available at our website, <http://www.oceanrenewable.com/policy-positions/>) on both the proposed framework and CMSP policy. Generally, OREC endorsed the long term goals of CMSP, as described by the Task Force, including encouraging sustainable use of oceans, increasing certainty in planning and improving coordination. However, OREC proposed changes to ensure that these goals would be accomplished. OREC’s recommendations included:

- Encourage streamlining of the permit process and facilitate development of test centers;
- Support data gathering to inform development decisions;
- Leverage off existing regional planning efforts to avoid duplication; and,
- Adopt principles of adaptive management and proportionality to address uncertainty in lieu of the precautionary approach.

II. Final Task Force Recommendations

On July 19, 2010, the Task Force released its final recommendations on a national ocean policy and CMSP. These recommendations were adopted by an Executive Order signed by the President that same day. Sean O’Neill, President of OREC, was one of a small group of stakeholders and agency officials invited to the White House following the signing.

The first part of the Executive Order sets forth a national ocean policy for stewardship of the nation’s oceans and implementation principles. The second part focuses specifically on development of CMSP as a means to achieve the national policy objectives. Both parts are discussed briefly below, as well as OREC’s views on resolutions to various issues.

A. Ocean Policy and Implementation Strategy

The national ocean policy established by the Executive Order is fairly benign. Provisions include measures to protect the health of our nation’s oceans and ecosystems, relying on best available scientific data to inform decisions regarding ocean use, and fostering collaboration and cooperation among federal, state and local officials, as well as stakeholders with regard to ocean

policy. Though OREC had hoped that the national policy (like that in the UK's Coastal and Marine Bill) would expressly recognize the importance of marine renewables for combating global warming and improving the health of oceans, OREC supports the goals of the Executive Order.

B. Coastal and Marine Spatial Planning

To accomplish the national ocean stewardship objectives, the Executive Order, adopting the Task Force's recommendations, establishes a National Ocean Council (NOC). The NOC has authority for implementation of coastal and marine spatial planning (CMSP). As conceived by the Executive Order, nine regional bodies will be established to develop regional level CMSPs that reflect broader national goals, and the NOC has authority to approve the regional plans.

1. Definition of CMSP

The Executive Order defines CMSP as follows:

"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.

(emphasis added).^{*****}

Defining CMSP is important, since there are so many different varieties and definitions. OREC supports the information-gathering and planning aspects of CMSP, but favors a flexible, multi-use approach to avoiding conflicts. Thus, OREC is concerned that the Executive Order's language related to identification of suitable areas can, at some point, lead to strict zoning which might limit marine renewables sites before the industry has gathered all of the data regarding operating efficiencies and expected effects.

2. National Ocean Council (NOC)

The NOC will be co-chaired by the Chair of the Council on Environmental Quality (CEQ) and the Director of the Office of Science and Technology Policy. The Council will be comprised of the heads of 14 cabinets and federal agencies with responsibility for, or jurisdiction over, ocean related activities, including the Department of Interior,

Department of Energy, Chairman of the Joint Chiefs of Staff and NOAA. Because FERC is an independent agency, the President lacks authority to compel it to join the NOC via executive fiat; however, the NOC is directed to invite FERC to participate. Given FERC's dominant role in siting MHK technologies, FERC's participation in the NOC is essential.

It is not clear, from the Executive Order or the Task Force recommendations whether NOC will be subject to FACA, the Federal Advisory Council Act, which subjects federal entities engaged in certain policy making activities to open meetings and public notice requirements. However, per the Task Force's recommendations, NOC will receive support and advice from the Ocean Research and Resources Advisory Panel (ORRAP), (<http://www.nopp.org/committees/orrapp/>) which is subject to FACA.

NOC will serve several functions, including (1) guiding the national ocean policies (*supra* at Part II.A) agency decision making, (2) certifying that CMSP regional plans developed by regional councils are consistent with national goals for CMSP articulated by NOC and (3) developing standards for evaluating regional plans and resolution proceedings for resolving regional disputes.

3. Development of CMSP and Regional Councils

The Task Force recommends the development of CMSP plans on a regional basis, leveraging state efforts (such as in Massachusetts, Rhode Island and Oregon) to the extent possible, avoiding duplication of effort. Appropriate federal, state, regional and local authorities and stakeholders will participate in the regional CMSP process, which will follow a common protocol, set forth below:

Step 1: Identify Regional Objectives

Step 2: Identify existing efforts that will help shape the plan

Step 3: Engage stakeholders throughout the process

Step 4: Consult scientists and technical and other experts

Step 5: Analyze data, uses and services - this step would also identify data gaps

Step 6: Develop and evaluate alternative future spatial and management tradeoffs

Step 7: Release draft CMSP for comment

Step 8: Create final CMSP plan and submit for NOC review

Step 9: Implement, monitor and modify as needed NOC certified plan

The Task Force's recommendations anticipate that regional plans will be developed and approved by NOC by mid 2015. However, the actual time devoted to developing the regional plans is actually much shorter than the projected development and approval time of five years. According to the implementation schedule (Task Force Recommendations at 69), the first 9 to 24 months of the process will involve preparation of work plans by the regional bodies. Once work plans have been submitted to NOC, regional bodies will begin work on the CMSP plans, which could take place within 18 months.

The short time frame is of concern for several reasons. First, gaps may exist in data, and 18 months will not provide enough time to address those gaps. Second, it is unclear how the offshore industry, with limited resources can participate in nine regional efforts while still trying to get projects in the water. Finally, agencies have limited resources, and it is unclear if they will have the bandwidth to participate in CMSP planning while simultaneously working on the actual project permitting efforts. If CMSP moves forward with this aggressive time table, OREC hopes that, at a minimum, adequate resources will be available for agency participation.

4. Geographic Scope of CMSP

CMSP will apply within territorial seas, so will include waters above state submerged lands as well as the OCS. CMSP will also extend to the limits of the economic zone. Thus, CMSP will impact MHK projects that are proposed within the state's jurisdictional limits, as well as beyond on the OCS.

5. Interaction with Existing Law

How will CMSP interact with existing laws? The Task Force describes that CMSP will provide a better framework for agency decision making, but "is not intended to supercede" existing laws. Where legal constraints to implementation of CMSP exist, the NOC would work with agencies to address conflict or seek legislative solutions. Agencies are directed to apply CMSP to the extent possible under existing authority.

As conceived, CMSP essentially adds a new level of regulatory requirements to existing processes. Complying with CMSP will not eliminate the need for permits or environmental review under existing law – because CMSP will not supplant the existing requirements. At the same time, if an agency cannot fully implement CMSP because of statutory constraints, it may face pressure to change its policies which could produce additional delays and uncertainty.

There is an added wrinkle as well, in light of FERC. Because FERC is an independent agency, it is not bound by the Executive Order. OREC will attempt to seek

guidance from FERC on how it will coordinate its MHK licensing process with MHK.

6. Effective Date of CMSP

The Task Force states that CMSP will not halt ongoing development, but at the same time, agencies are expected to take into account the national CMSP goals and principles, national policies, and any identified national and regional CMSP objectives in future decision-making to the extent possible under existing law. This creates additional regulatory uncertainty – for example, if an agency does not take CMSP goals into account (even before regional plans are certified), will its decision be vulnerable to challenge? And because renewable development is not a goal of the national ocean policy, could agencies potentially decline to move ahead on permits, in light of the fact that preservation, rather than renewable development, are national CMSP goals? Again, OREC will seek clarity in this regard.

7. The Precautionary Approach

The Task Force adopts the precautionary approach, over OREC's (and other group's objections). Under the precautionary approach:

“Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

OREC's concern regarding the precautionary approach, as defined by the Task Force, is how “threats of serious or irreversible damage” will be defined. For example, if there is a theoretical threat of damage to a species, but lack of full scientific certainty regarding that threat, will that suffice to trigger the need for cost effective mitigation? Any added costs to address speculative environmental effects can render fledgling marine renewables projects uneconomic. For that reason, adaptive management is the preferred approach to preemptive mitigation— adaptive management allows projects to move forward, and if monitoring shows unacceptable impacts, the project will need to modify or cease operation. The first Oceans Commission Report expressly identified adaptive management as a tool consistent with the precautionary approach, but the Task Force report does not, which is another concern.

III. Where We Go From Here

As CMSP moves forward, OREC will monitor new developments and attempt to ensure representation at the regional level. In addition, OREC will try to meet with FERC representatives over the next few months to gain a better understanding of FERC's role in the CMSP process.

Yet, even as CMSP moves ahead through the Executive Order, there are also provisions for CMSP in the Rahall CLEAR Act, and other ocean-related legislation currently on the Hill. OREC is working with Hill staff to obtain benefits for marine renewables in this legislation (such as a streamlined permitting process and a separate renewables office at BOEMRE, formerly MMS) and to ensure that CMSP provisions in the legislation do not conflict with, or add even another layer to the proposal described in the Executive Order.

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