Mid-Atlantic Ocean Policy: Protecting the Mid-Atlantic Ocean's Clean Ocean Economies and Ecosystems with Existing Tools and Innovative Legal Frameworks

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Abstract: The Mid-Atlantic Ocean, at the intersection of the Gulf Stream, Labrador Current, and some of the nation's oldest freshwater rivers, has a truly unique ecosystem. With centuries-old fishing, commerce, and recreational industries that anchor the region's coastal communities, the economy of the Mid-Atlantic is similarly unique. The focus of this paper is to take a brief look at the trends and trajectories of the management of these ecological and economic systems (past and present) under existing laws, the new national ocean policy, and innovative frameworks.

I. Introduction

The Mid-Atlantic Ocean (MAO) plays host to a unique confluence of economies, societies, and ecologies.[2] The MAO is home to centuries-old industries (onshore and at-sea), bordered by the most

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[2] For the purposes of this report, MAO will refer, generally unless stated otherwise, to the New York/New Jersey Bight, encompassing mainly the ocean and coastal waters off New York and New Jersey, and does not refer to any jurisdictional or legally established specific area.

densely populated stretch of U.S. coastline, and at the intersection of rich cold-water marine ecosystems and warm-water coastal ecosystems. Managing the MAO requires thorough implementation of existing laws and the development of new frameworks. Fortunately, there is no shortage of options for managers – at federal, state, and local levels – looking for tools to protect habitats, develop clean ocean economies, and adapt to changing climates.

One underlying theme driving the regionalization of ocean planning is the need to tailor management actions and policies to the local uses, users, threats, and values of the oceans. Along the Jersey Shore, South Shore of Long Island, and throughout the MAO, the confluence of population density and industry has forced a precarious balance between clean ocean economies (like fishing, surfing, swimming, and tourism) and ecological threats like coastal over-development, non-point source pollution, and ocean industrialization, such as offshore oil and gas activities or liquefied natural gas operations. These threats can lead to decreased fishery productivity, public health beach closures, and significant economic losses from displaced tourism.

On top of these threats, New Jersey and New York face a crisis of preparation. Hurricanes Sandy and Irene led to the literal redefinition of the habitability of MAO coastlines. With climate change, storms such as these will increase in severity and, when coupled with sea level rise, lead to more flooding, more damage, and more loss of life. Aging stormwater, wastewater, and energy systems in coastal watersheds were exposed in recent storms as overburdened and in need of billions of dollars of investment and repair. These vulnerabilities directly threaten the coastal ecosystems that coastal economies rely upon.

Overall, this Article explores the development of the National Ocean Policy (NOP) – why it came about and how it was built – and whether existing laws are sufficient to protect the economies and ecologies of the MAO. The Article also discusses how the NOP is being applied to the MAO and considers whether a citizen-developed piece of legislation called the Clean Ocean Zone or an Antiquities Act national monument designation could play a role in the management toolbox for the Mid-Atlantic. By activating existing regulatory programs and adopting new legal initiatives, the Mid-Atlantic Ocean's managers can support the clean ocean economies of today while protecting the coastal stakeholders of tomorrow.

II. A National Ocean Policy

A. History of At-Sea Boundary Creation

In discussing management of any ocean area, the bounds of what constitutes that ocean area must first be established. At the top of the list for any discussion of the management systems that govern the oceans is the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which entered into force in 1994.[3] While the U.S. has not yet ratified UNCLOS, it has come to recognize many aspects of the treaty as customary international law.[4] The jurisdictional boundaries created through UNCLOS, for

[3] United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].
[4] Sarei v. Rio Tinto PLC., 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

use throughout the world's coastlines, included an Exclusive Economic Zone (EEZ), an area of ocean extending "to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured"[5] and a 12 nm ribbon of ocean along the coast called the "territorial sea" wherein nations have near universal control over the ocean.[6] Outside of the territorial sea, but within the EEZ limits, a state has

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; [and] jurisdiction … with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment.[7]

Despite its failure to officially ratified UNCLOS, the U.S. has adopted many of the boundary mechanisms established therein. Under Presidential Proclamation No. 5030, President Reagan asserted authority over the U.S. EEZ.[8] With this declaration, the United States acceded to international customary legal control over the exploration, exploitation, conservation, and management of resources, living and non-living, within the EEZ.[9] Moving toward the coastline, Presidential Proclamation 5928 declared the U.S. intent to exercise sovereignty over the territorial sea.[10] This declaration gave the U.S. enhanced control over this approximately 22 million square kilometer area, subject only to the UNCLOS-driven right of innocent passage.[11]

The 1988 territorial sea proclamation did nothing, according to its own terms, to "alter" the rights and jurisdictions of states or federal programs in managing state waters and ocean resources.[12] Those jurisdictions were established over 30 years before the 1988 proclamation in the Submerged Lands Act (SLA) and the Outer Continental Shelf Lands Act (OCSLA). Enacted first, the SLA put to bed questions as to what authority states had over their coastal waterways. The SLA granted states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters" and gave states "right and power to manage, administer, lease, develop, and use" the resources and lands so granted.[13] This state authority extends

[5] Proclamation No. 5030, 48 Fed. Reg. 10605 (March 10, 1983).
[6] UNCLOS, *supra* note 3, at Art. 2. Control over the territorial sea is subject to, among some other limits, the right of innocent passage. *See id.* at Art. 17.
[7] *Id.* at Art. 56.
[8] Proclamation No. 5030, *supra* note 5.
[9] *Id*.
[10] Proclamation No. 5298, 54 Fed. Reg. 777 (Dec. 27, 1988).
[11] UNEP/GRID-ARENDAL, CONTINENTAL SHELF: THE LAST MARITIME ZONE 28 (2011), *available at* http://www.grida.no/_cms/OpenFile.aspx?s=1&id=1436.
[12] Proclamation No. 5298, *supra* note 10.
[13] 43 U.S.C. § 1311(a). Note that Congress retained authority for the federal government for "the purposes of navigation or flood control or the production of power…." 43 U.S.C. § 1311(d).

"three geographical miles distant" from the coastline, with some exceptions in the Gulf of Mexico and the Great Lakes.[14]

The OCSLA, which defined the outer continental shelf (OCS) as "all submerged lands lying seaward and outside of the" states' SLA jurisdictional control, was designed to make natural resources of the shelf "available for expeditious and orderly development, subject to environmental safeguards" and national interests.[15] This control over the continental shelf, and the resources therein, comports with one of the other main jurisdictional sections of UNCLOS. Under Article 77, UNCLOS grants coastal states "sovereign rights for the purpose of exploring [the continental shelf] and exploiting its natural resources."[16] The continental shelf, internationally, is defined as the "seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin."[17]

In establishing the lines in the sea for management and control, Congress recognized "the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments" through regulation by requiring federal OCS activities to consider and recognize the role of states in management of the OCS resources.[18] In this regard, the OCSLA both establishes marine jurisdictional boundaries and is one of the first laws to recognize the fact that establishing such zones cannot prevent pollution, exploitation, or adverse cumulative impacts from affecting multiple marine zones. This fundamental problem – that the use of part of the ocean can fit within geopolitical lines but the impacts cannot – later formed the basis of the National Ocean Policy.

From the EEZ and the OCSLA to the territorial sea and states' SLA authorities, the ocean is thoroughly demarcated. On the landward side of the water's edge, though, the situation becomes much more complicated. Jurisdictionally, land in the coastal zone is subject to a more complex and less uniform array of political boundaries as well as a series of issue-specific jurisdictional zones. Politically, in a state like New Jersey, there can be coastal areas subject to federal control (e.g., parks, recreation areas, Defense Department facilities, interstate highways and shipping lanes), state control (e.g., state parks, state highways, buildings, preserved open space, and inland waterways), county control (e.g., county parks, county roads and buildings), township control (e.g., boardwalks, roads, parks and, through zoning and planning, private houses). Furthermore, region-wide utility boards, federal commissions (e.g., Delaware River Basin Commission),[19] state authorities (e.g., the Highlands Council),[20] and public-private and bi-state authorities (e.g., the Port Authority of NY and NJ)[21] can all have separate geographic areas under their jurisdiction.

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[14] 43 U.S.C. § 1312. See also definition of coastline as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters" (43 U.S.C. § 1301(c)).
[15] 43 U.S.C. § 1332(3).
[16] UNCLOS, *supra* note 3, at Article 77(1).
[17] UNCLOS, *supra* note 3, at Article 76(1) (note, however, if a nation's shelf does not extend beyond 200 nm from shore, the jurisdictional "continental shelf" ends at the end of the 200 nm EEZ).
[18] 43 U.S.C. § 1332(5).
[19] *See* DELAWARE RIVER BASIN COMMISSION, http://www.state.nj.us/drbc/ (last visited July 9, 2013).
[20] *See* NEW JERSEY HIGHLANDS COUNCIL, http://www.highlands.state.nj.us/ (last visited July 9, 2013).
[21] *See* PORT AUTHORITY OF NEW YORK & NEW JERSEY, http://www.panynj.gov/ (last visited July 9, 2013).

B. History of the National Ocean Policy

"Our oceans are in crisis, threatening coastal communities as well as key pillars of the U.S. economy," said the Honorable William Ruckelshaus, co-chair of the Joint Ocean Commission Initiative, former Director of the Federal Bureau of Investigation, and the first (and later, fifth) Administrator of the Environmental Protection Agency (EPA), on June 7, 2011; "when the oceans are unhealthy, fishermen, business owners, and the U.S. economy at large feel the impact."[22]

In the first comprehensive review of ocean policy to be released in the United States, the Pew Oceans Commission's *America's Living Oceans: Charting a Course for Sea Change* report stated in 2003 that "America's oceans are in crisis and the stakes could not be higher."[23] One year later, in September 2004, the U.S. Commission on Ocean Policy (USCOP) submitted *An Ocean Blueprint for the 21st Century* to President Bush as mandated by the Oceans Act of 2000. Developed with significant nationwide stakeholder and community input, the *Ocean Blueprint* concludes that "[t]he message from both experts and the public alike was clear: our oceans, coasts, and Great Lakes are in trouble and major changes are urgently needed in the way we manage them."[24]

Fast-forwarding to 2011, President Barack Obama proclaimed June to be National Oceans Month in order to "celebrate the value of our oceans to American life and recognize the critical role they continue to play in our economic progress, national security, and natural heritage."[25] This celebration of the ocean came a year after the President issued his Executive Order on the Stewardship of the Ocean wherein he tied our ocean's greatest single pollution event to the need to protect marine resources and promote a clean ocean economy.

> The *Deepwater Horizon* oil spill in the Gulf of Mexico and resulting environmental crisis is a stark reminder of how vulnerable our marine environments are, and how much communities and the Nation rely on healthy and resilient ocean and coastal ecosystems. America's stewardship of the ocean, our coasts, and the Great Lakes is intrinsically linked to environmental sustainability, human health and well-being, national prosperity, adaptation to climate and other environmental changes, social justice, international diplomacy, and national and homeland security.[26]

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[22] Joint Ocean Commission Initiative, Press Release, *Coastal Economies Depend on National Ocean Policy: New Report Calls for Effective Implementation of National Ocean Policy to Protect the Livelihoods of Millions of Americans,* June 7, 2011, *available at* http://www.jointoceancommission.org/news-room/news-releases/2011-06-07_America%27s_Ocean_Future.pdf.

[23] PEW OCEANS COMMISSION, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE V (2003), *available at* http://www.pewtrusts.org/our_work_report_detail.aspx?id=30009.

[24] U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT 4 (2004), *available at* http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/welcome.html [hereinafter OCEAN BLUEPRINT].

[25] Press Release, The White House, Presidential Proclamation—National Oceans Month (June 2,m 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/06/02/presidential-proclamation-national-oceans-month.

[26] Executive Order on the Stewardship of the Ocean, Our Coasts, and the Great Lakes, Exec. Order No. 13547, 75 Fed. Reg. 43023 (July 19, 2010), *available at* http://www.whitehouse.gov/files/documents/2010stewardship-eo.pdf.

The National Ocean Policy, borne of discussions like the one above engaged in at varied levels of governance, changing tides of ocean pollution threats, and disasters like the *Deepwater Horizon*, was written to take the management of the oceans into the twenty-first century.

C. The National Ocean Policy

On July 19, 2010, President Obama signed an Executive Order adopting the Final Recommendations of the Interagency Ocean Policy Task Force and establishing a National Policy for the Stewardship of the Ocean, Coasts, and Great Lakes.[27] The stated purpose of the new National Ocean Policy (NOP) is to:

> ensure the protection, maintenance, and restoration of the health of ocean, coastal, and Great Lakes ecosystems and resources, enhance the sustainability of ocean and coastal economies, preserve our maritime heritage, support sustainable uses and access, provide for adaptive management to enhance our understanding of and capacity to respond to climate change and ocean acidification, and coordinate with our national security and foreign policy interests.[28]

The President's Executive Order established the National Ocean Council (NOC) and charged it with providing "appropriate direction to ensure that executive departments', agencies', or offices' decisions and actions affecting the ocean, our coasts, and the Great Lakes will be guided by the stewardship principles and national priority objectives set forth in the Final Recommendations, to the extent consistent with applicable law."[29] The NOP is implemented by the NOC at the national level and by regional planning bodies across the nation.

Regional Planning Bodies (RPBs), made up of federal, state, and tribal representatives, are charged in the Final Recommendations with developing regional Coastal and Marine Spatial Plans, engaging state and tribal partners, and acting as the formal mechanism for consultation with Regional Fishery Management Councils.[30] In carrying out the directive to implement the conclusions of the Final Recommendations, the NOC coordinated the development of a NOP and a NOP Implementation Plan (the Plan). According to the cover letter announcing the finalization of the NOP Implementation Plan, the Plan "represents specific actions Federal agencies will take to bolster our ocean economy, improve ocean health, support local communities, strengthen our security, and provide better science and information to improve decision-making."[31]

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[27] *See generally* NATIONAL OCEAN COUNCIL, NATIONAL OCEAN POLICY FINAL IMPLEMENTATION PLAN (2013), *available at* http://www.whitehouse.gov//sites/default/files/national_ocean_policy_implementation_plan.pdf [hereinafter NOP IMPLEMENTATION PLAN].

[28] Exec. Order No. 13,547, *supra* note 26.

[29] *Id.* at 5(b).

[30] COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE OCEAN POLICY TASK FORCE 52-53 (2010), *available at* http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf [hereinafter OPTF FINAL RECOMMENDATIONS].

[31] NOP IMPLEMENTATION PLAN, *supra* note 27, at ii.

Regional coastal and marine spatial plans and maps developed by the RPBs are designed to "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."[32] Together, the integration of science in decision-making, enhanced coordination and communication among agencies, and initiatives to preserve sustainable uses, promote marine heritage, and respond to climate change are laudable goals. As with any plan, however, the details greatly affect the efficacy of overarching policies and goals.

D. Federal Scope, Regional Flexibility

Regional waterbodies, with unique stressors, unique jurisdictional boundaries, and unique economies, ecologies, and histories, should be afforded unique, tailored protections. As the U.S. Commission on Ocean Policy stated:

> [t]here is a growing awareness that regional approaches can benefit each of the nation's ocean and coastal regions. Focusing efforts within whole ecosystems, rather than arbitrary political boundaries, provides an opportunity for decision makers at all levels to coordinate their activities, reduce duplication of efforts, minimize conflicts, and maximize limited resources. It also promotes a sense of stewardship among government, private interests, and the public by encouraging a shared feeling of connection to a specific area.[33]

The USCOP highlights several regional approaches, including the Chesapeake Bay Program, the Delaware River Basin Commission, the California Bay-Delta Authority, the Gulf of Mexico Program, and the Great Lakes Program, each of which have "taken different approaches to address pressing regional issues, although a hallmark of most efforts is the establishment of measurable goals and clear implementation strategies for achieving healthier regional ecosystems."[34]

In recognizing that localities have different policy goals and management needs, the Implementation Plan focuses about 10% of its milestone action targets on supporting what the plan calls "local choices." According to the Plan, there are already "myriad tribal, State, regional, and local efforts to support and grow marine economies, protect and conserve the environment that supports quality of life, and sustain unique social and cultural identities."[35] The NOC, tasked in the Plan with providing "tools and services that support and build on" local initiatives, is less a director of local action, but rather a facilitator of existing programs.[36] In this sense, the NOC dictates that federal agencies will be providing data, analyses, and reports where more information is needed, and providing logistical and partnership-based support for regional ocean partnership activities and programs already underway.

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[32] Exec. Order No. 13,547, *supra* note 26.
[33] OCEAN BLUEPRINT, *supra* note 24, at 87.
[34] *Id.* at 88, box 5.1.
[35] NOP IMPLEMENTATION PLAN, *supra* note 27, at 19.
[36] *Id*.

Most significantly, the Plan emphasizes the NOC's intent to support locally chosen priorities through regional marine planning. The goal of marine planning would be to "provide a more coordinated and responsive Federal presence and the opportunity for all coastal and ocean interests in a region to share information and coordinate activities."[37] Built on existing programs and partnerships, marine planning is supposed to be "defined by the regions themselves, to solve problems that regions care about in ways that reflect their unique interests, capacity to participate, and ways of doing business," yet the NOC notes that "[i]n turn, regional actions will support national objectives to grow the ocean economy, increase regulatory efficiency and consistency, and reduce adverse impacts to environmentally sensitive areas."[38] This countervailing pressure to conform to the overall goals of the NOP leads to some questions as to whether local priorities could ever define the bounds of federal agency policy. If states (such as those of the MAO) choose to use existing partnerships and policies to limit uses like oil and gas activities, which are included in the federal definition of "ocean economy," – would federal agencies follow suit?

Given that the NOP "does not create new regulations, supersede current regulations, or modify any agency's established mission, jurisdiction, or authority," it is likely that if a region like the MAO were to move to preclude something like oil and gas activities on the OCS, federal agencies would still be bound by the OCSLA – and, essentially, required to move ahead under Congressionally determined policy.[39] Next, this Article turns to local application of the NOP, as well as other existing, innovative, or emerging tools for ocean management.

III. The MAO, NY/NJ Bight, and Charting a Way Forward

A. Current State of the MAO's Environment and Economy

On June 4, 2009, the Governors from New York, New Jersey, Maryland, Virginia, and Delaware signed the "Mid-Atlantic Governors' Agreement on Ocean Conservation" (MARCO) with the intent of fostering a cooperative and constructive relationship among the States to manage their ocean and coastal resources. The States' interest in managing their ocean and coastal resources is in part rooted in their need to protect and conserve the ecosystem and in part to further the States' economy. The tourism industry relies heavily on states' coastal resources as visitor destinations; in 2012, the State of New Jersey generated nearly $40 billion in revenue from tourism, directly supporting 318,500 jobs (10% of total employment).[40] The State estimates that coastal tourism, fishing, and recreation (and the indirect economies derived therefrom) at the Jersey Shore drives over 60% of the State's economy.

New Jersey coastal counties (Atlantic, Cape May, Ocean, and Monmouth) are home to over 1.5 million residents.[41] With New York City's harbor population and coastal Long Island, the northern half

[37] *Id*. at 21.
[38] *Id*.
[39] *Id.* at 2.
[40] PowerPoint Presentation, Tourism Economics, The Economic Impact of Tourism in New Jersey (2012) http://www.visitnj.org/sites/visitnj.org/files/2012-nj-tourism-ei-state-counties-v0701.ppt.
[41] Data drawn from Table 1 in U.S. CENSUS BUREAU, NEW JERSEY: 2010: SUMMARY POPULATION AND HOUSING CHARACTERISTICS (2012), *available at* http://www.census.gov/prod/www/decennial.html.

of the MAO is home to an additional 9.6 million people.[42] Millions of tourists from inland New York, New Jersey, vacationers from the rest of the nation, and millions of people from all over the world also travel to the shores of the MAO for business, pleasure, or both.

The coasts of New York and New Jersey along with the edge of the continental shelf slope break create a wedge within the MAO; this wedge is an area of water officially known as the New York Bight ("the Bight").[43] According to the US Fish and Wildlife Service, the Bight, and the greater MAO, "is vital to migratory birds, anadromous fish, and several species protected by the federal and State endangered species laws."[44] This biodiversity – 38 stocks of marine mammals and 5 species of sea turtles – includes several endangered and threatened species.[45] On top of these species of concern, the Bight is home to over 300 species of fish and nearly 350 species of birds. The coastal wetlands and shoreline habitats from Cape May to Montauk are attractive stopover points for countless species of migratory fish and birds.

Economically, the MAO is a powerhouse of activity, driving the region's commerce through trade, tourism, and resource development. The largest port on the U.S. east coast and the third-largest port in the nation, the Port of New York and New Jersey is at the apex of the MAO and moved over $208 billion in cargo in 2011.[46] The Port handled over 5.5 million cargo containers in 2011, bringing over 86 million tons of goods into and out of the Port.[47] The Port Authority, which manages the Port, estimates that the Port's economic impact supports over 279,000 jobs in the region.[48]

With all of this commerce, and because of the millions of people that live and travel to the MAO each year, the tourism industry is similarly robust – bringing in billions of dollars to the economies of New York and New Jersey. The hotels, motels, cabins, and resorts; the surfing, cycling, fishing, boating, and swimming businesses; and the restaurants, food carts, beach bars, and shops of the Bight all depend on a clean ocean and clean beaches.

Beyond commerce and tourism, the MAO also sustains multi-billion dollar commercial and recreational fisheries. In 2011, in New York State, the "recreational fishing industry generated $369 million in sales, contributed $212 million to gross state product, and supported 3,000 jobs across the broader state economy."[49] The commercial fishery, also in 2011, "generated $5 billion in sales,

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[42] *Id.*

[43] J.B. Pearce, *The New York Bight*, 41 MARINE POLLUTION BULLETIN 44-55 (2000).

[44] U.S. Fish and Wildlife Service, Hudson River-New York Bight Ecosystem Team 1 (2005), *available at* http://www.fws.gov/northeast/nyfo/hot/HudsonRiverNYBight.pdf.

[45] National Oceanic and Atmospheric Administration, Notice of Availability, Marine Mammal Stock Assessment Reports, 78 Fed. Reg. 19,446 (April 1, 2013). Table 1, which contains a summary of Atlantic Marine Mammal Stock Assessment Reports, is available at http://www.nmfs.noaa.gov/pr/sars/pdf/ao2012_summary.pdf.

[46] The Port Authority of NY & NJ, Trade Statistics of the Port of New York and New Jersey 1 (2011), *available at* http://www.panynj.gov/port/pdf/port-trade-statistics-bar-C2c-2011.pdf.

[47] *Id*.

[48] *Regional Economic Benefits of the Port Authority of NY & NJ*, THE PORT AUTHORITY OF NY & NJ, http://www.panynj.gov/port/regional-economic-benefits.html (last visited July 11, 2013).

[49] NOAA FISHERIES, REGIONAL IMPACT EVALUATION: AN INITIAL ASSESSMENT OF THE ECONOMIC IMPACTS OF SANDY ON NEW JERSEY AND NEW YORK COMMERCIAL AND RECREATIONAL FISHING SECTORS 1-2 (2013), *available at* http://www.st.nmfs.noaa.gov/Assets/economics/documents/sandy/Final_Report_Sandy_Regional_Impact_Evaluation_MSA.pdf.

contributed $1.8 billion to gross state product, and supported 42,000 jobs across the broader economy."[50]

In New Jersey, the fisheries impacts are even larger – owing to both the higher number of recreational fishing opportunities as well as the larger quantity of fish landed commercially. In 2011, "the commercial fishing industry generated $6.6 billion in sales, contributed $2.4 billion to gross state product and supported 44,000 jobs across the broader state economy."[51] Recreational fisheries "generated $1.7 billion in sales, contributed $871 million to gross state product and supported 10,000 jobs."[52] Among the 28 official "fishing communities" of New York and New Jersey are four of the nation's most economically valuable fishing ports (Point Pleasant Beach, Cape May, Montauk, and Barnegat Light).[53] Commercially and recreationally, the MAO's fishery value is unquestionable.

The MAO, and the Bight within it, is unique – economically and environmentally. Fed by the cold Labrador Current from the north, the Gulf Stream from the south, and the freshwater inputs from the Hudson River to the northwest, the region is a confluence of different species, ocean chemistries, and stresses. With mud flats, reefs, underwater canyons, shipwrecks, and hundreds of miles of beach, there is ample habitat diversity in the region. The fertile waters of the MAO need unique forms of protection that go beyond pollution prevention and control. When commerce, fisheries, robust tourism, and the most densely populated coastline in the nation mix, there are a host of overlapping jurisdictions and programs with interests in the outcome of NOP planning and policy development.

B. Jurisdictional Lines in the Waves

Environmentally (and therefore economically) there is a complex array of overlapping jurisdiction on the landward side of the coastline. From Clean Water Act (CWA) areas subject to Environmental Protection Agency (EPA) or Army Corps of Engineers (Corps) control to Coastal Zone Management Act (CZMA) program areas and endangered species habitats, the activities allowed even within one political area like a federal park are regularly subject to a variety of different issue-based jurisdictions. Beyond the overlaps in legal jurisdiction, the MAO is home to many administratively inconsistent program delineations. Agency jurisdictions for energy production, fisheries, and Liquefied Natural Gas ports and facilities, throughout the MAO, are misaligned.

At the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE), formerly the Minerals Management Service (MMS), New York and New Jersey are located within the Atlantic OCS region (one of four: Atlantic, Gulf, Pacific, and Alaska (though the agencies only have offices in the latter three)),[54] and, more specifically, the North Atlantic OCS planning

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] NATIONAL MARINE FISHERIES SERVICE OFFICE OF SCIENCE AND TECHNOLOGY, FISHERIES OF THE UNITED STATES: 2011 at 9 (2012), *available at* http://www.st.nmfs.noaa.gov/st1/fus/fus11/FUS_2011.pdf; *see also Mid-Atlantic Fishing Communities Profiles*, MID-ATLANTIC FISHERY MANAGEMENT COUNCIL, http://www.mafmc.org/fishing-communities (last visited July 11, 2013).
[54] *See BOEM Regions*, BUREAU OF OCEAN ENERGY MANAGEMENT, http://www.boem.gov/About-BOEM/BOEM-Regions/Index.aspx; *see also BSEE Regions*, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, http://bsee.gov/About-BSEE/BSEE-Regions/BSEE-Regions.aspx (last visited July 10, 2013).

area.[55] Based on a 2006 MMS rulemaking, every coastal state also has its own regulation-defined OCS adjacent coastal state area.[56]

Governed by the Magnuson-Stevens Fishery Conservation and Management Act (MSA), fisheries of the U.S. have a slightly different jurisdictional structure. Like mineral resources on the OCS are claimed under the OCSLA, jurisdiction over fisheries of the U.S. continental shelf and EEZ, with some limited exceptions for highly migratory species, is claimed pursuant to the MSA.[57] While states, under the Submerged Lands Act, can manage their own fisheries (within state waters), the MSA allows the National Oceanic and Atmospheric Administration (NOAA) fisheries agency, the National Marine Fisheries Service (NMFS, or NOAA Fisheries) to manage fisheries within state waters if a state's action or inaction affects a fishery that has a federal fishery management plan.[58]

For the fishery management decisions, there are three sets of maps and managers relevant to the MAO. First, NMFS's northeast regional office (NERO) is the agency's hub. Northeast regional science centers are coordinated from NERO, as are habitat, endangered species, budgets, and funding systems. NERO's geographic scope encompasses the MAO – it oversees NMFS's interests from the Gulf of Maine to North Carolina, as well as inland water states around the Great Lakes.[59] Second, unlike the administratively built NERO, eight regional Fishery Management Councils (FMCs) were statutorily created in 1976.[60] These FMCs have a variety of functions, from developing annual catch limits to interacting with the public.[61] The Mid-Atlantic FMC's geographic jurisdiction spans from New York to North Carolina.[62] Third, the Atlantic States Marine Fisheries Commission (ASMFC) has jurisdiction over a host of fisheries, solely or in conjunction with the Mid-Atlantic FMC, from Maine to Florida, including Washington, DC.[63] Added to shipping and commerce areas, energy areas, dumpsites, wrecks, reefs, and sand borrow pits, the MAO is replete with inconsistent and overlapping jurisdictions.

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[55] *See* Bureau of Ocean Energy Management, OCS Oil and Gas Leasing Program 2012-2017 Lower 48 State Planning Areas (2012), *available at* http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-2017/Program_Area_Maps/Lower%2048%20State%20Planning%20Area.pdf .

[56] U.S. Mineral Management Service, Federal Outer Continental Shelf (OCS) Administrative Boundaries Extending from the Submerged Lands Act Boundary seaward to the Limit of the United States Outer Continental Shelf, 71 Fed. Reg. 127, 129 (Jan. 3, 2006).

[57] 16 U.S.C. § 1811(a). *See also* 16 U.S.C. § 1812 on highly migratory species jurisdiction.

[58] *Id.* § 1856(b).

[59] *See NOAA Fisheries Northeast Regional Office*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, http://www.nero.noaa.gov/nero/links/div.htm (last visited Sept. 13, 2013).

[60] 16 U.S.C. § 1852(a)(1).

[61] *Id.* § 1852(h).

[62] *Id.* § 1852(a)(1)(B).

[63] *See id.* §§ 5101 – 5108.

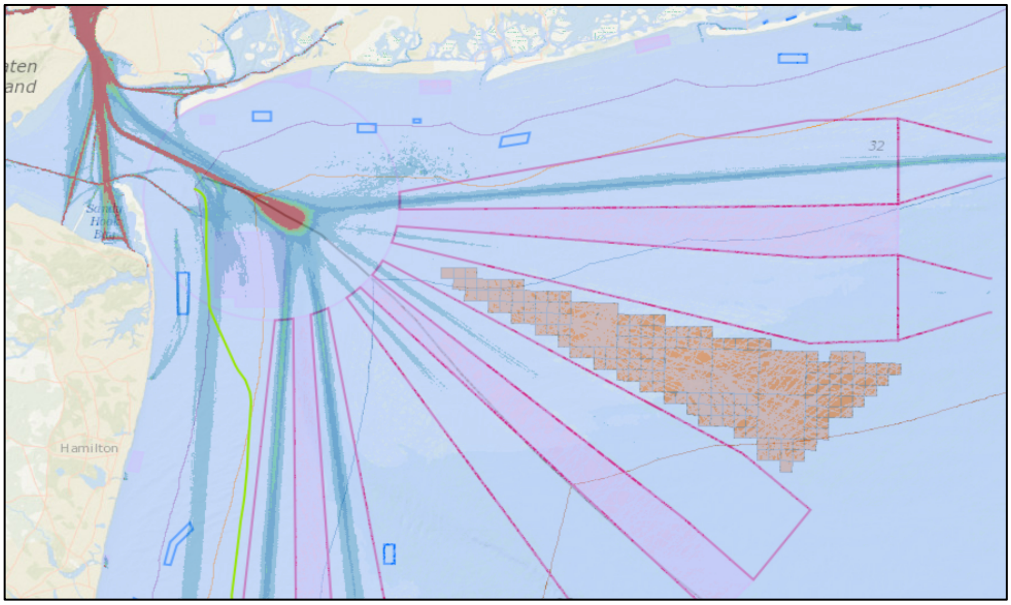

Figure 1. Map of overlapping jurisdictions in the MAO, showing shipping lanes, territorial seas, contiguous zone, AIS vessel tracking data, dumpsites and reefs, and offshore wind leasing areas (Source: MARCO Data Portal, 2013).

Defining "adjacent" (for the purposes of a states' involvement) is also inconsistent among federal programs. As noted above, under OCSLA and BOEM/BSEE regulations, coastal states have specifically defined adjacent ocean areas. Under the federal Deepwater Port Act (DPA), which governs the licensing of oil, gas, and Liquefied Natural Gas ports on the OCS, being declared an adjacent coastal state gives a coastal governor significant authority and input in federal decision-making. Unfortunately, unlike OCSLA rules, there are no regular maps of what is an adjacent coastal state; that determination is made on a case-by-case basis.[64] Under the Coastal Zone Management Act (CZMA), a federal "activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."[65] The "coastal zone" referenced in the CZMA is defined as the SLA state waters (the ocean out to three nautical miles) and onshore lands that "have a direct and significant impact on" such coastal ocean waters.[66] Because the consistency trigger depends on the effect of a project on a state's waters, much like the DPA, whether a state is adjacent to a project for CZMA review requires a case-by-case analysis.

Thus, even something as simple as determining which states' resources are affected (OCSLA, MSA), which governors get enhanced access to decisionmaking (DWPA), and which programs must be adhered to (CZMA), is inconsistently determined across federal agencies. While the jurisdictions

[64] 33 U.S.C § 1508. An adjacent coastal state is "any coastal State which (A) would be directly connected by pipeline to a deepwater port as proposed in an application, or (B) would be located within 15 miles of any such proposed deepwater port." *Id*. at § 1508 (a)(1).
[65] 16 U.S.C. § 1456(c)(1)(A).
[66] *Id.* § 1453(1).

present a checkerboard on a map of areas of influence, the authorities are very real. In examining what those tools are, a more fluid picture can be painted of the current MAO management system.

C. Federal Tools for Managing the MAO

Overall, environmental impacts to the MAO come from a variety of sources and the pollution control laws built to address those sources are similarly varied. From the CWA's beaches program amendments to new coal air rules, there are any number of ways pollution control laws can impact the MAO ecology and economy.

1. Clean Air Act

The Clean Air Act's (CAA) purpose statement includes the protection and enhancement of the Nation's air resources and the provision of assistance for the development and operation of regional air pollution prevention and control programs.[67] The basic structure of the CAA includes: (1) a harm-based approach (Title I) that relies on federal air quality standards to protect public health (NAAQSs – National Ambient Air Quality Standards) and state regulation of stationary air pollution, (2) a technology-based approach that requires "best available technology" for new stationary source performance standards or "maximum available control technology" for regulation of hazardous air pollutants, (3) technology-forcing (Title II) standards for reductions of automobile and truck tailpipe emissions, and (4) a market-enlisting (Title IV) emissions trading program, primarily for sulfur dioxide.[68] In terms of managing coastal ecosystems, and the oceans in particular, attention should focus on the harm-based approach, or NAAQSs. Currently, NAAQSs have been developed for the following pollutants: sulfur dioxides, nitrogen oxides, particulate matter, carbon monoxide, ozone, and lead.

On first impression, the CAA would not be considered an environmental statute utilized to manage coastal ecosystems and oceans, but due to climate change the CAA can play an important role in ocean management. Carbon dioxide (CO_2), one type of greenhouse gas, plays a critical role in climate change. Carbon dioxide is absorbed from the atmosphere into the ocean at a rate of 22 million tons each day.[69] The impact of increased CO_2 on the ocean results from the interaction of CO_2 with salt water causing the water to become more acidic.[70] Ocean acidification harms marine life and the wider ecosystem. Harms include the decline of coral reef growth, inhibiting the calcification of certain marine invertebrates (crabs, mussels), and additional stress to marine life increasing their susceptibility to disease and pollution.[71]

Carbon dioxide, however, is not a pollutant currently regulated under the NAAQS classification. In *Massachusetts v. EPA*, the Supreme Court held that the CAA authorizes EPA to regulate greenhouse gas emissions from new motor vehicles if the emissions contribute to climate change; and EPA must

[67] CAA § 101(b)(1)-(4), 42 U.S.C. § 7401(b)(1)-(4).
[68] ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 465-66 (4th ed. 2010).
[69] Miyoko Sakashita, *Harnessing the Potential of the Clean Water Act to Address Ocean Acidification*, 36 ECOLOGY L. CURRENTS 239 (2009).
[70] *Id.*
[71] *Id.*

take regulatory action unless it determines that greenhouse gases do not contribute to climate change or provide a reasonable explanation as to why it cannot or will not exercise its authority.[72] On December 7, 2009, EPA announced that greenhouse gases threaten the health and welfare of Americans and that greenhouse gases that contribute to climate change can be regulated under the CAA.[73] The announcement that greenhouse gases threaten the health and welfare of humans and the Supreme Court's holding in *Massachusetts v. EPA* provide a foundation for the potential development of NAAQSs for greenhouse gases, including carbon dioxide. Armed with these tools for combating climate change, the EPA can tackle the cause of many of the problems facing the MAO, from coastal pollution to fisheries phenology shifts.

Over the short-term, CAA regulations should generate at least one water quality improvement in the MAO. In addition to carbon dioxide regulation under the CAA, Congress passed CAA Amendments on November 15, 1990 to impose a cap and trade approach to reduce sulfur dioxide emissions from power plants in order to reduce acid rain.[74] Most recently, EPA issued Mercury and Air Toxic Standards on December 21, 2011 to limit mercury and toxic air pollution (arsenic, acid gas, nickel, selenium, and cyanide) from coal- and oil-fired power plant emissions.[75] These pollutants can make their way into inland freshwater systems (rivers, streams, lakes) and interconnect with coastal water through bays and tidal salt marshes along the entire MAO coastline. Given that all water flows downhill, pollution from freshwater and brackish water systems affects the oceans and coasts, and reductions in the deposition of airborne toxic substances will lead to reductions of pollutants at sea.

2. Clean Water Act

The CWA stands as a model for water quality protection – one of the tenets of the NOP – and was drafted "to restore and maintain the chemical, physical, and biological integrity of the nation's water."[76] In order to meet this objective, the CWA requires permits for discharging any pollutant from a point source into waters of the United States. The "Waters of the United States" includes navigable waters, territorial seas, the contiguous zone, and the ocean.[77] Specifically within the MAO, advances in ocean water quality protection were made in February 2009, when EPA regulation exempting incidental vessel discharges from the permitting requirements of the CWA was vacated.[78] Discharges of sewage from vessels, effluent from marine engines, laundry, shower, galley sink wastes, and other discharges incidental to the normal operation of a vessel must now obtain a CWA permit prior to discharge in the ocean.[79] These permits are statutorily required (though this is not always achieved in practice) to gradually reduce the level of effluent permitted. Over time, permitted sources of pollution that affect the ocean should, as the result of the CWA, pose less and less of a problem to the marine ecosystem.

[72] Massachusetts v. EPA, 127 S. Ct. 1438 (2007).
[73] *Milestones in EPA and Environmental History*, U.S. ENVIRONMENTAL PROTECTION AGENCY, http://www2.epa.gov/aboutepa/epa-history (last visited July 10, 2013) [hereinafter *EPA Milestones*].
[74] *Id.*
[75] *Id.*
[76] CWA § 101(a), 33 U.S.C. § 1251(a).
[77] *Id.* § 1362(7)-(10).
[78] U.S. v. Adam Bros. Farming, Inc., 369 F. Supp. 2d 1166, 1174 (C.D. Cal. 2003).
[79] *Id.*

The problem with this idealistic statutory goal is that over-development leads to more and more point sources and more and more unregulated non-point sources, cumulatively affecting water quality. To date, especially in the over-developed MAO region, the CWA has not provided an answer to this problem.

The MAO can also be managed through national-level policymaking within the EPA's National Estuary Program.[80] Congress established the National Estuary Program in 1987 to improve the quality of estuaries of national importance. Pursuant to CWA § 320, the EPA can designate estuaries and develop management plans upon the determination "that the attainment or maintenance of that water quality in an estuary which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife and allows recreational activities, in and on water, requires that control of point and nonpoint sources of pollution to supplement existing controls of pollution."[81] Several states participate in the National Estuary Program (NEP), in which each designated estuary must develop a Comprehensive Conservation and Management Plan.[82] Along the MAO's coasts, there are three NEPs: the New York-New Jersey Harbor Estuary Program, the Barnegat Bay Partnership, and the Delaware Center for the Inland Bays. Without authority to issue permits, take enforcement action, or hold states accountable for violations, these programs are statutorily limited. They have, however, provided a wealth of information and serve as a springboard for collaboration between local, state, and federal partners. In this capacity, NEPs have critical roles to play in NOP implementation.

In 2000, the CWA was augmented through the Beaches Environmental Assessment and Coastal Health (BEACH) Act which was designed "to improve the quality of coastal recreation waters."[83] The MAO's population and land cover contributes to the environmental stress of the coastal region. During rainfall events runoff from the land enters the streams and rivers. The streams and rivers flow into to coastal areas. For instance, agricultural and urban runoff leads to increased nutrients (nitrogen and phosphorus) and pathogens in coastal waters. In particular, pathogens (fecal coliforms, *E. coli*, and *Enterococci spp.*) are monitored at beaches to ensure public health and unsafe levels will result in beach closures.

The BEACH Act program provides grants to states to monitor water quality at beaches and to notify the public when contamination levels exceed national criteria, which are set based on mandated studies of poor water quality impacts to public health.[84] While the program was authorized to distribute up to $30 million per year to states with approved sampling, notification, and protection programs, Congress has only usually appropriated around $10 million.[85] This program could be used to drive sewage infrastructure repair (after tracking down sources of sewage which lead to impairments), to protect coastal tourism (by protecting swimmers), and to encourage collaboration, informed decision-making,

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[80] *Estuaries and Coastal Watersheds*, U.S. ENVIRONMENTAL PROTECTION AGENCY, http://water.epa.gov/type/oceb/nep/index.cfm (last visited Sept. 13, 2013).
[81] 33 U.S.C. § 1330(2)(A).
[82] For more information on Comprehensive Coastal Management Plans for each National Estuary Program, *see* http://water.epa.gov/type/oceb/nep/index.cfm#tabs-2.
[83] P.L. 106-284 (2000).
[84] *Id.* at §§ 2-4.
[85] *Id.* at § 4.

and technology transfers among states and federal agencies. Recently, budget proposals from both the White House and Congress have proposed to zero out funding for this program, which would mean that states would be free to set public health standards below those deemed safe for swimming by the EPA.[86]

3. Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as "Superfund") imposes retroactive liability on a broad group of individuals/entities, known as "responsible parties," to secure prompt environmental cleanups of hazardous substance releases into the environment. Responsible parties include owners and operators (past and present) of hazardous waste facilities, arrangers (persons who arrange for the disposal of hazardous waste), transporters, and insurers. CERCLA is based on the polluter-pays principle (PPP) meaning that costs of environmental harm be imposed on those whose actions caused the harm.[87] Under CERCLA, Congress acted to preserve offshore lands pursuant to natural resources liability and designation of public trustees of natural resources.[88] For instance, in *United States v. Montrose Chemical Corporation of California,* the United States and California were able to bring a lawsuit under CERCLA against ten owners and operators of manufacturing plants that released hazardous substances, such as DDT and PCBs, into offshore lands through county wastewater treatment systems.[89] Unfortunately, in the MAO, despite the numerous Superfund sites bordering the ocean, very few at-sea CERCLA-based actions have been brought to address water quality issues, though there are many river and estuary CERCLA actions.

One common scenario in which CERCLA provides protection to the oceans occurs during transport of hazardous waste by boat. Obviously if a hazardous waste spill occurs into the ocean during transport the transporter may be held liable. The same is true even if the hazardous waste "spill" into the ocean occurs through the loss of barrels of materials. The shipped containers/barrels holding the hazardous material are considered "facilities" within the meaning of CERCLA.[90] However, one limitation to CERCLA results from its exclusion of petroleum and its distillates from coverage.[91] Oil spills that occur, such as the BP *Deepwater Horizon* oil disaster, are regulated under the CWA and Oil Pollution Act.

4. Marine Protection, Research, and Sanctuaries Act

In 1972, Congress enacted the Marine Protection, Research, and Sanctuaries Act (or Ocean Dumping Act) to reduce pollution in the ocean.[92] Due to some of the highest coastal population density

[86] *See* OFFICE OF MANAGEMENT AND BUDGET, WHITE HOUSE, FY2013 Proposed EPA Budget 180 (2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/environmental.pdf.
[87] PLATER, *supra* note 68.
[88] CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) .
[89] U.S. v. Montrose Chemical Corp. of Cal., 835 F. Supp. 534 (C.D. Cal. 1993).
[90] U.S. v. M/V Santa Clara I, 887 F. Supp. 825 (S.C. Dist. Ct. 1995).
[91] 42 U.S.C. § 9601(14).
[92] *EPA Milestones, supra* note 73.

in the nation, the MAO's ecosystem and productivity is continually diminished by present and historical pollution and industrialization activities. The waters of the MAO had been used as a dumping ground since at least the 1800s and were the ocean dumping "Capital of the World" in the mid-1980s. With acid, medical waste, sewage sludge, and dredged material dumpsites literally littering the seascape, fisheries, diving, and tourism activities significantly decreased in the NY/NJ Bight. The Ocean Dumping Act requires a permit for any dumping of material into the ocean (beyond state waters).[93] Amendments made to the Act in 1988 prohibited the issuance of permits (by the EPA or the Army Corps of Engineers) for the dumping of industrial waste or sewage sludge.[94]

In the MAO, the former ocean dumping capital of the world, home of the largest port on the east coast, and near the oldest, most densely populated urban area of the nation, the Ocean Dumping Act has a vital role to play in federal management of the ocean. From special New York Bight protections[95] to dumping bans brought about by citizen action,[96] the Act was a key component of the fisheries, tourism, and recreation economic remediation in the MAO. Under the Act, the historic "mud dump" site, which had seen decades of dredged material disposal, was closed to dumping by the Army Corps and EPA in the 1990s, although it was later reopened as a remediation site called the "Historic Area Remediation Site." Because the site is no longer for "dumping" (it is a remediation site), the transport of material for dumping at sea does not violate the 1988 ban on new dumping authorizations. Technically, new dump sites could be allowed in parts of the MAO for a restricted number of types of materials. Ironically, the Ocean Dumping Act, long an example of the federal government stopping – and then remediating – pollution problems in the MAO, could still be used to burden the MAO with new sources of pollution.

Overall, these federal pollution statutes have two things in common. First, the cumulative effects of all of these sources of pollution are not adequately measured. Proposals like the Clean Ocean Zone (discussed below) attempt to address this, while initiatives like the NOP explicitly stay clear of generating new authorities or regulations. Second, decisions made under these laws (with respect to permits, permit conditions, regulations, standards, etc.) can all be taken back or weakened by changes in statutorily driven policy or by Congressional mandates. Without a system in place that sets clear standards for water, air, and ecosystem quality, ***and*** a system for following through on implementation, federal pollution control mechanisms cannot, by themselves, fulfill the goals of the people and industries of the MAO.

D. State Control over MAO Marine Activities

In the MAO, there are two statutes that give states direct control over federal activities in the MAO, the Coastal Zone Management Act and the Deepwater Port Act. "Within 50 nautical miles of the shore from New York to Virginia, there are roughly 410 gigawatts of wind energy potential covering an area

[93] 33 U.S.C. § 1411(a).
[94] *Id.* § 1414b(a).
[95] *Id.* § 1414a(a).
[96] *Id.* § 1414b(a).

of 82,000 square kilometers."[97] This potential recently led MARCO, the coalition of MAO governors, to take a hard look at their Coastal Zone Management Act (CZMA) policies to ensure that offshore wind development, and other offshore uses, were examined for consistency with state programs. As mentioned above, under the CZMA, "any federal activity, including authorized uses of federal waters, that may affect the uses or resources of a state's coastal zone must be consistent with that state's enforceable coastal management policies: federally leased or permitted activities must be fully consistent with the enforceable policies, while direct federal agency actions must be consistent with enforceable state coastal policies 'to the maximum extent practicable."[98]

According to MARCO, the coastal resources of the MAO states, including "beaches and dunes, fish, marine mammals, sea turtles, birds, critical habitats and migratory pathways, high quality air and water, scenic viewsheds, and areas of historical and archeological significance," are vital to the region's economy.[99] The "enforceable policies" common to all the MAO states, which govern activities like wind development or offshore LNG ports (to name two issues facing the region), are broadly summarized as:

- For submerged lands and wetlands, "minimizing and mitigating wetland degradation, preserving beaches and dunes, preventing erosion, and limiting the impact on submerged aquatic vegetation and terrestrial land uses and vegetation;"

- For habitat protection and migratory species, it is the position of the states "to minimize adverse impacts on significant fish and wildlife habitat, including areas important for reproduction, spawning, and migration," with policies that "protect water quality for fish and wildlife production, restrict dredging in and near sensitive habitat areas, and prohibit development that adversely affects shellfish habitat or impairs movement of designated species along migratory pathways;"

- For commercial and recreational fishing, the states prioritize protecting "water quality for aquatic life and recreational use, including limiting the introduction of pollutants that bioaccumulate in fish," such as mercury, discussed above under the CAA, while also requiring "electrical facilities to be sited and planned in a manner that protects access to and the productivity of areas valued for fishing, crabbing, and the gathering of other marine life useful in food production;" and

- For shipping, "the states commonly require electrical facilities to be sited and planned in a manner that minimizes adverse impacts on navigation and commerce, including addressing effects on ports and shipping uses."[100]

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[97] ENVIRONMENTAL LAW INSTITUTE, A GUIDE TO STATE MANAGEMENT OF OFFSHORE WIND ENERGY IN THE MID-ATLANTIC REGION 1 (2013), *available at* http://www.midatlanticocean.org/owe_April2013.pdf [hereinafter OWE GUIDE].
[98] *Id.* at i (citing 16 U.S.C. § 1456; 15 C.F.R. § 930).
[99] *Id*.
[100] *Id*. at ii.

Using these policies, the states can exert some control over federal agency decisions. There are significant limits, however, in practice and as the result of politics. Inconsistency is not often declared, and, even when declared, such a declaration is not always successful in blocking a project. Under the CZMA, an applicant for a license can appeal an inconsistency determination to the Secretary of Commerce.[101] Appeals seek a determination from the Secretary of Commerce that a license is consistent with the CZMA's goals or is necessary for national security; if either is found, the Secretary can overrule the state's inconsistency determination.[102] The placement of this condition on coastal zoning planning is very similar to the NOP caveat of support for local decisions – federal agencies will support local efforts wherever possible, given that those local outcomes help further the national agenda.

Despite the risk of Secretarial override, the CZMA can be used by states to control the outcome of federal agency decision-making. One example of a project blocked by a state under the CZMA was Broadwater LNG, a proposed FERC-licensed Liquefied Natural Gas (LNG) terminal which would have been located in Long Island Sound. The State of New York, during FERC review of the terminal, declared the facility to be inconsistent with the Long Island Sound Coastal Management Program – a finding that was supported, after appeal, by the Secretary of Commerce.[103]

The Deepwater Port Act (DPA), [104] enacted to provide for the licensing of oil and natural gas (as LNG) facilities located at sea beyond state waters, provides one of the clearest examples of state-level control over federal decision-making. Under the DPA, governors of states deemed "adjacent coastal states" are given the authority to entirely close the door on a license for a deepwater port. Adjacent Coastal States (ACS) are defined as those states that are within 15 miles of a deepwater port proposed location, or are directly connected to a port.[105] If a state is not declared an ACS upon the project's official public notice of application, a Governor can request such status.[106] The Secretary of Transportation then has 45 days to decide if "there is a risk of damage to the coastal environment of such State equal to or greater than the risk posed to" the declared ACSs.[107] Once declared, an ACS governor has the power to disapprove of a license – subject to one procedural backstop and one substantive limitation.[108] First, procedurally, a governor cannot "pocket veto" a deepwater port license by withholding approval. According to the DPA, "[i]f the Governor fails to transmit his approval or disapproval to the Secretary not later than 45 days after the last public hearing on applications for a particular application area, such approval shall be conclusively presumed."[109] This means that governors can approve a port, disapprove ("veto") a port, or let their decision be made for them by letting the statutory clock expire. Second, substantively, if a governor vetoes a port solely because it would not be

[101] 16 U.S.C. § 1456(c)(3).
[102] *Id*.
[103] Press Release, NOAA, Department of Commerce Upholds NY State Objection to Broadwater LNG Project (Apr. 13, 2009), *available at* http://www.noaanews.noaa.gov/stories2009/20090413_broadwater.html.
[104] *See* 33 U.S.C. §§ 1501-1524.
[105] *Id.* § 1508(a)(1).
[106] *Id*. § 1508(a)(2).
[107] *Id*.
[108] *Id.* § 1508(b)(1) ("The Secretary shall not issue a license without the approval of the Governor of each adjacent coastal State.").
[109] *Id*.

consistent with "programs relating to environmental protection, land and water use, and coastal zone management, the Secretary shall condition the license granted so as to make it consistent with such State programs."[110] In this case, the DPA has a loophole for LNG ports that the CZMA (see discussion of the Broadwater LNG terminal, above), did not; for at-sea LNG facilities, coastal zone inconsistency is not the last word. Nonetheless, under the DPA, if a governor decides that a proposal is not in the interests of a state, the state can tell the federal agencies "no" – a bottom-up veto not regularly seen in federal environmental laws.

The limitation of both of these state-level checks on federal agency decision-making in the MAO is that if a state prohibits an action under the CZMA or the DPA, the applicant for that permit, license, or authorization can always re-apply, triggering new review. In the MAO, over the past few decades, political control of the state governments of places like New York and New Jersey has run in cycles. If applicants, turned away by one administration, can re-start federal permit processes once a new state administration takes control, management of the ocean will forever be locked in a case-by-case series of analyses.

E. Implementation of the NOP in the MAO

Returning to the idea of NOP implementation in the MAO, it is important to reiterate that the NOC's mission is "to achieve greater efficiency and effectiveness, with a focus on reduced bureaucracy, improved coordination and integration, and fiscal responsibility" – not to re-write regulations or change statutorily mandated programs.[111] In the MAO, with a series of federal pollution prevention laws establishing minimum levels of pollution and two laws giving states some control over federal permits, licenses, and authorizations, the NOP's focus on existing partnerships and existing programs allows ocean managers to fill in the gaps.

If there are programs in place at the state level that NOC implementation activities can or should support, and these areas do not conflict with stated federal interests in building ocean economies (or do not conflict with existing federal programs like oil and gas development), there might be room for collaboration. In comparing the policies and priorities of MARCO and the NOP, there are many similarities (see Table 1, below). Both programs concede the connection between healthy ecosystems and healthy economies, the need for coordination, and the value in adapting to changing circumstances for future generations. Both sets of policies also agree that ecosystem-based management is the ideal basis for decision-making. Superficially, then, the NOP tracks well with local MAO policy. When examining priorities, the NOP also mirrors local MARCO priorities in areas of water quality, habitat protection, and acknowledgement of a changing climate. One important distinction is subtly made in the two priority lists: the issue of energy. Specifically, where MARCO emphasizes sustainable renewable energy development, the NOP supports all offshore energy development that provides positive economic return – without defining what that positive economic return will be measured as, or measured against.

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[110] *Id*.

[111] NOP IMPLEMENTATION PLAN, *supra* note 27, at 2.

Table 1. Comparison of policies and priorities of MARCO and the NOP.[112]

	MARCO	NOP Final Implementation Plan
Policies	The Mid-Atlantic region's resources and people are intrinsically linked components of larger ecosystems.	A healthy marine environment feeds our Nation, fuels our economy, supports our cultures, provides and creates jobs, gives mobility to our Armed Forces, enables safe movement of goods, and provides places for recreation.
	The Mid-Atlantic region faces a new generation of challenges and opportunities that require a commitment to an ecosystem-based management approach.	The goal of ecosystem-based management supported by [the NOP] is to maintain a healthy, productive, and resilient ocean that can continue to provide the benefits and resources humans want and need.
	The States within the Mid-Atlantic region desire to protect and conserve our ocean resources for current and future generations.	[The NOP] is designed to be adaptive to new information or changing conditions, and will be updated periodically … as the Nation continually strives to improve the stewardship of the ocean, coasts, and Great Lakes for the benefit of current and future generations.
	Partnership with federal and external stakeholders is critical to success.	The [NOP] highlights our responsibility to improve and maintain the health of the ocean, coasts, and Great Lakes and recognizes the importance of working with States [and tribes] to tackle key challenges through common sense, science-based solutions.
	Coordination is essential to successful management at the regional level.	The [NOP] coordinates … the ocean-related activities of Federal agencies to achieve greater efficiency and effectiveness, with a focus on reduced bureaucracy, improved coordination and integration, and fiscal responsibility.
Priorities	Coordinate protection of important habitats and sensitive and unique offshore areas on a regional scale.	The health and integrity of coastal habitats—such as coral reefs, wetlands, mangroves, salt marshes, and sea grass beds—are key to sustaining our Nation's valuable coastal and ocean ecosystems and the wealth of benefits they provide to us.
	Promote improvements in the region's coastal water quality as a necessary focal point for regional action.	Improve and preserve our Nation's coastal and estuarine water quality to provide clean water for healthier waterways, communities, and ecosystems.
	Collaborate on a regional approach to support the sustainable development of renewable energy in offshore areas.	Offshore energy industries will benefit from better data and information to identify potential development sites, more efficient leasing and permitting processes, and planning that facilitates safe access, safe operations, and reduced conflicts with other uses.
	Prepare the region's coastal communities for the impacts of climate change on ocean and coastal resources.	Assess the vulnerability of communities and ocean environments to climate change and ocean acidification and support and implement adaptation strategies to promote informed decisions.

[112] Comparisons drawn from two documents: the Mid-Atlantic Governors' Agreement on Ocean Conservation (2009), *available at* http://www.midatlanticocean.org/agreement.pdf and the NOP FINAL IMPLEMENTATION PLAN, *supra* note 27.

On paper, then, there is one major misalignment between the national interests and the local. In practice, there are a few more. In the MAO, two phases of NOP implementation have begun, and each phase has generated question about the effectiveness of the NOP at addressing the region's problems.

First, the Mid-Atlantic Regional Planning Body (RPB) has been organized and is beginning to work to fulfill its mandates (enabling better management and stewardship and developing spatial plans that fulfill the NOP goals). The Mid-Atlantic RPB is led by the Bureau of Ocean Energy Management (BOEM), the agency in charge of offshore minerals (oil and gas), wind, and energy development, which has announced the Mid-Atlantic RPB's intention to carry out its RPB functions without including coastal and estuarine areas in the planning process. In the Final Recommendations of the Task Force, which the NOC and RPBs are charged with implementing, the Task Force states that "[e]ffective management of environmental health and services, maritime economies, commerce, national and homeland security interests, and public access necessitate connecting land-based planning efforts with ocean, coastal, and Great Lakes planning."[113] Successful implementation of the NOP "would ultimately depend upon a better integration of coastal planning that considers influences from, and activities within, coastal watersheds and other contributing land areas."[114]

The Task Force in its Final Recommendations clearly states that "[l]and-based watershed planning efforts (e.g., components of the Great Lakes Restoration Initiative Action Plan) should inform and influence [spatial planning] within each region."[115] In the MAO, coastal development, aging water infrastructure, and non-point source pollution lead to significant environmental and economic problems and should not be excluded from NOP planning.

Second, the Final Implementation Plan has been released. The National Ocean Council, as noted above, is charged with making sure that the Plan, and the NOP in general, is implemented by all agencies, departments, and offices, within the bounds of existing law. The Plan's appendix contains specific "planned actions … [which] will produce benefits in the short-term that respond to immediate needs of communities, ocean stakeholders, and the public" and "create building blocks to support key outcomes in the medium- to long-term."[116] The Plan contains 213 planned actions, called milestones, detailing the actions that over 40 federal agencies, workgroups, and task forces are supposed to complete to implement the NOP.[117] These milestones encompass all of the federal government's plans for moving the "Nation ahead toward resolving the most pressing challenges facing the ocean, our coasts, and the Great Lakes, and benefitting the people, communities, and businesses that rely on them."[118]

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[113] OPTF FINAL RECOMMENDATIONS, *supra* note 30, at 50.
[114] *Id*.
[115] *Id*.
[116] NOP IMPLEMENTATION PLAN, *supra* note 27, at 4.
[117] *See* NATIONAL OCEAN COUNCIL, NATIONAL OCEAN POLICY IMPLEMENTATION PLAN APPENDIX (2013), *available at* http://www.whitehouse.gov//sites/default/files/national_ocean_policy_ip_appendix.pdf [hereinafter IMPLEMENTATION PLAN APPENDIX].
[118] NOP IMPLEMENTATION PLAN, *supra* note 27, at 4.

Over the past six years, four LNG ports, governed by the Deepwater Port Act, have been proposed within the Bight.[119] Licenses for deepwater LNG ports are granted by the Maritime Administration and the U.S. Coast Guard, yet within the Plan's milestones list, the Maritime Administration is not responsible for any NOP implementation objectives, and none of the Coast Guard's actions are related to the deepwater ports program.[120] The Coast Guard is tasked with over 19 milestones (solely or in part), covering data sharing, coastal hazard resilience, marine debris management, vessel pollution reduction, shipping lane studies, several Arctic Ocean studies and projects, aquaculture, and international ocean information sharing.[121] The Federal Energy Regulatory Commission (FERC), which is in charge of permitting land- and state water-based LNG facilities, similarly escapes inclusion in the NOP by being assigned only one task: determining the benefits of aquaculture, renewable energy, and biotechnology for coastal communities (along with five other agencies and federal Departments).[122] With 12 existing LNG import/export terminals, 6 approved, and 23 proposed or potential facilities across the nation, this industrial use of the ocean presents security, economic, and environmental threats yet is entirely left out of the NOP.[123]

Oil and gas exploration, managed under the OCSLA by BOEM, is another fossil fuel-related ocean industrialization proposal left out of the Plan and the milestones list. In early 2012, BOEM issued a Draft Programmatic Environmental Impact Statement (DPEIS) for geological and geophysical ("seismic") activities off the Mid-Atlantic and South Atlantic coasts.[124] These seismic surveys, which consist of firing underwater air-gun arrays to generate sound blasts louder than any non-explosive man-made source, are used in pinpointing oil and gas deposits below the seafloor for future extraction.[125] In the NOP Plan, BOEM has one responsibility – to "[i]nitiate interagency research and integration of data to improve models for spill trajectory, oil fate, and weathering, and natural resource maps based on Arctic conditions in order to feed scenario development and risk assessment."[126] The Bureau of Safety and Environmental Enforcement (BSEE), the "sister" agency of BOEM, has four milestone responsibilities which are also confined to the Arctic Ocean.[127] Thus, while the Plan's milestones for implementation are supposed to lead to short-term benefits and long-term changes, BOEM, like FERC, MARAD, and the Coast Guard, seems to be free to carry on with its permitting activities outside of the NOP process.

Beyond LNG facilities and offshore oil activities, the MAO and the Bight are bounded by numerous National Parks, yet the National Park Service only has three milestone responsibilities, and they all

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[119] Atlantic Sea Island Group's Safe Harbor Energy (*see* docket USCG-2007-28535), ExxonMobil's *BlueOcean Energy* (*see* Jad Mouawad, *Wary of Protests, Exxon Plans Natural Gas Terminal in the Atlantic*, THE NEW YORK TIMES, Dec. 12, 2007, *available at* http://www.nytimes.com/2007/12/12/business/12exxon.html?_r=1), and one proposal by Liberty Natural Gas, submitted twice (*see* dockets USCG-2010-0993 and USCG-2013-0363). The U.S. Coast Guard dockets can be accessed at http://www.regulations.gov/.

[120] *See generally,* IMPLEMENTATION PLAN APPENDIX, *supra* note 116.

[121] *Id*.

[122] *Id*.

[123] *See LNG*, Federal Energy Regulatory Commission, http://ferc.gov/industries/gas/indus-act/lng.asp (last visited July 11, 2013).

[124] Bureau of Ocean and Energy Mgmt., Geological and Geophysical Exploration on the Atlantic Outer Continental Shelf (OCS), 77 Fed. Reg. 19,321 (Mar. 30, 2012).

[125] *See generally* NATIONAL RESEARCH COUNCIL, OCEAN NOISE AND MARINE MAMMALS (2003).

[126] *See* IMPLEMENTATION PLAN APPENDIX, *supra* note 116

[127] *Id*.

pertain to the Chesapeake Bay.[128] These areas provide significant ecological benefits to the MAO's ecosystem, and, as such, the agency managing these parks should have developed MAO objectives and goals as part of the NOP Plan.

The laudable goals of the NOP clearly overlook, during implementation, issues important for the MAO region. Without FERC, MARAD, and Coast Guard input related to Mid-Atlantic LNG ports, without National Park Service input on MAO coastal protected areas, and with an RPB lead whose only NOP actions pertain to the Arctic Ocean, there are gaps in the Plan which leave the communities and economies of the MAO vulnerable. Without inclusion of state waters and estuaries, the MAO regional spatial planning process will be ignoring land-based sources of pollution and coastal over-development; two issues which lead to a majority of the region's historic and present environmental problems.

For the MAO, the NOP was introduced as something that would help collaboratively support existing programs. While this will likely occur for the many programs where there is NOP/MARCO overlap, there are gaps. The first was identified in the policies – that there would be federal energy interests beyond simply renewable energy. In leaving Atlantic Ocean activities out of NOP milestones and in allowing short-term oil and gas seismic surveys to progress toward approval, federal agencies are already occupying this gap. The second gap was identified at the regional planning level when land-based pollution and coastal habitats and water quality were left out of MAO federal planning. Of the four main MARCO priorities, one is excluded from NOP planning consideration (coastal water quality) and one is undercut (only at-sea habitat will be included).

This analysis is not meant to portray the NOP as disconnected from the needs of the economies and ecologies of the MAO – the NOP is indeed a refreshing federal commitment of the time, effort, and focus that the oceans need for their long-term sustainability. In applying the NOP, though, there are certain policies which federal agencies will be statutorily bound to pursue (i.e., OCS energy development) and certain limitations on the extent to which ocean planning can affect positive change (i.e., federal ocean agencies cannot change coastal land use development patterns that affect wetland loss). As such, this Article next explores the innovative options, beyond the NOP, which give agencies the flexibility to make MAO-specific decisions but which also rigidly hold federal decisions to locally determined regimes.

IV. Innovative Options for MAO Management

A. The Clean Ocean Zone Initiative

Given the polluted history of the Bight, and the turnaround that was achieved through pollution reduction and prevention, a coalition of organizations throughout the NY and NJ coastal zone came together with members of Congress to develop and propose a "Clean Ocean Zone" (COZ) initiative. The COZ would be, if enacted, in effect the nation's first pollution- and industry-free zone of the ocean, and it would be built on strong bipartisan, multi-user-group support.

The underlying premise behind the COZ initiative is that laws like the Clean Water Act or the OCSLA cannot sufficiently *proactively* protect the waters of the MAO. Under the Clean Water Act, point

[128] *Id.*

sources of pollution receive permits that fail to drive discharges to zero (as mandated in the CWA) and new ocean dumpsites for contaminated materials are regularly proposed. OCSLA rules and regulations do not allow BOEM to proactively close regions of the ocean to oil drilling if such drilling can be shown to be in the public interest. These sources of pollution each at one time had a foothold in the MAO, but were expelled over the course of several decades. In order to make the clean ocean trajectory of the MAO permanent, the COZ initiative was launched. Recently, a version of a bill implementing the COZ goals was introduced in the 110th Congress.[129]

As proposed, the COZ initiative is split into three themes: reducing pollution, protecting ecosystems, and supporting clean ocean uses.[130] For pollution reduction within the Bight, the COZ bill first declares that neither federal nor state agencies "may issue a permit for ocean dumping, nor designate or establish any new disposal site, within the [Bight]."[131] In addition, any existing disposal sites (approved by the EPA or the Army Corps of Engineers) would be congressionally closed.[132] Second, the COZ bill prohibits the "discharge of a pollutant into the [Bight] from a point source constructed or put into use after the date of enactment;" closing the door to new point source discharges like direct-to-ocean sewer pipeline outfalls or other industrial discharges.[133] This point source control section also prohibits point sources from increasing discharge capacity or weakening effluent limitations.[134]

The COZ would be an innovative adjustment to existing tools. The CWA already regulates point sources, but often cannot achieve (through permit issuance or guidance) the protections needed for an ocean ecosystem. The COZ bill, therefore, adjusts the language of the CWA, closes permits, and prohibits actions that would worsen the MAO's ecological health.

The second theme of the COZ initiative is to protect and promote marine ecosystems through strict control of the natural and energy resources of the region. To accomplish this goal, the COZ bill prohibits "the permanent extraction of any nonrenewable natural resource from the [Bight] for commercial or industrial use is prohibited."[135] There are exceptions allowed for "such removal … undertaken for the primary purpose of maintaining or establishing navigation channels," or for "beach replenishment activities, flood control activities, erosion control activities, or habitat restoration projects on or along the shores of the [Bight]."[136] Overall, fossil fuel industries, as well as the appurtenant facilities that come along with those industries, would be prohibited from accessing any resources within the Bight's clean ocean zone.[137]

Third, the COZ bill sets promotion of clean ocean economies and uses as a major theme of the initiative. According to the bill as proposed, nothing in the bill could be used to limit underwater

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[129] H.R. 2854, 110th Cong. (1st Sess. 2007), *available at* http://beta.congress.gov/bill/110th-congress/house-bill/2854/text.

[130] *See Clean Ocean Zone Bill*, CLEANOCEANZONE.ORG, http://cleanocean.wordpress.com/cleanoceanzone/cozbill/ [hereinafter *COZ Bill*].

[131] *See COZ Bill*, § 4(a)(1).

[132] *Id*.

[133] *Id*. at § 4(b)(1).

[134] *Id*. at § 4(b)(2).

[135] *Id*. at § 4(c)(1).

[136] *Id*. at § 4(c)(1)-(2).

[137] *Id.* at § 4(d), on nonrenewable energy facilities.

research and exploration, recreational uses (e.g., fishing, swimming, surfing), or commercial uses (e.g., commercial fishing, artificial reefs, boating).[138]

As a whole, the COZ initiative is built so that the Bight would be treated very much like a national marine monument (see discussion of the Antiquities Act below); uses and users can be spelled out quite specifically and management measures built around those sets of rules. Under the COZ, unlike the NOP, Antiquities Act, or the Marine Sanctuaries program, there would be no new authority created – the laws governing where and when an agency can grant a permit would simply be amended to reflect the new priorities of the MAO region and the pollution reduction trends of the last few decades. Like the NOP, the COZ looks to create a plan of use rules in the ocean whereby polluters cannot pollute but users may use. Like the Antiquities Act, the COZ results in a series of unique protections and management rules designed for the people of the region, oftentimes by the people of the region.

B. Marine Monuments

Use of the authority granted in the Act for the Preservation of American Antiquities (Antiquities Act) to create a national monument of the waters of the MAO or the Bight would allow the President substantial latitude in addressing the problems facing the region. Under the Antiquities Act, the President is authorized to declare "objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."[139] The unique scientific, ecological, historic, and national interest values of the MAO self-evidently make this region a perfect candidate for national monument protection. Congress, it is important to note, could also form an Antiquities Act monument. This, in effect, is what the "Clean Ocean Zone" proposal would achieve if Congress amends laws like the CWA or OCSLA with respect to the Bight or the greater MAO.

According to a 2010 Congressional Research Service (CRS) report, "the overriding management goal of all monuments is protection of the objects described in the proclamation."[140] The President, in such a proclamation, could tailor management of an area like the MAO in any way deemed appropriate for protecting the MAO's resources. Aside from the Antiquities Act reservation that monuments must only encompass "the smallest area compatible with the proper care and management of the objects to be protected," there are no other limitations or statutory guidelines for how to apply the Act.[141] Federal courts have ruled that the judiciary does have jurisdiction to review Presidential action with respect to this minimum-area measure, but not to the designation itself.[142] In fact, Antiquities Act monument authority is not only very difficult to review in the courts, it does not trigger National Environmental Policy Act review. [143]

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[138] *Id*. at § 5.
[139] 16 U.S.C. § 431.
[140] CAROL HARDY VINCENT & KRISTINA ALEXANDER, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT, CONG. RESEARCH SERV. R41330 (2010), *available at* http:// www.fas.org/sgp/crs/misc/R41330.pdf.
[141] 16 U.S.C. § 431; *See also* 16 U.S.C. § 431a (barring monuments in Wyoming), 16 U.S.C. § 3213 (subjecting monuments greater than 5,000 acres in Alaska to be subject to Congressional approval).
[142] Tulare County v. Bush, 306 F.3d 1138, 1142 (D.C. Cir. 2002).
[143] *See* Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978).

While the only legal action needed to create a national monument is a Presidential Proclamation, the long-term protection and management of a monument depends on several factors. According to the conclusions of another CRS report on marine protected areas, applying the Antiquities Act to marine areas "will still require 'negotiation, education, and consensus-building' including congressional funding commitments and involvement of local committees representing interested and affected parties."[144] For the Papahānaumokuākea Marine National Monument (Northwestern Hawaiian Islands Marine Monument), the CRS report concludes that the broad financial and political support for the monument was made possible because "the public had already been involved during earlier consideration of the area as a national marine sanctuary."[145]

Within the MAO, there is already robust public and political support for many management ideals; generally, supporting fisheries economies, tourism, and pollution prevention. Within the Bight itself, there is support for a wider range of prohibitions and protections – including bipartisan opposition to offshore oil and gas extraction, and bipartisan support for BEACH Act funding.

Both of these initiatives address the goals of MARCO – habitats can be protected, economically valuable fisheries can be promoted and protected, and water quality would likely improve. Both programs would be flexible enough to support sustainable renewable energy, and both would be amendable and adaptable to future conditions – supporting coastal and ocean resources for future generations. A Clean Ocean Zone or a national monument would lock-in support for the economy and ideal-ecology of the MAO in exactly the manner proposed by the policies and priorities of MARCO.

Similarly, both of these initiatives would comport with the NOP. First and foremost, they are both forms of ocean planning. A Clean Ocean Zone is a planning system built on pollution prevention whereas a monument is a planning system that defines specific management goals and sets specific uses. These are both existing authorities that would redefine how the ocean is managed in the MAO, potentially reducing inefficiencies and saving money. These initiatives, however, would require the establishment of some new authorities and regulations. The NOP specifically disavows anything beyond utilization of existing authority. Overall, either a new pollution control system like the COZ or a national monument would be a workable component of a regional MAO ocean policy (supporting the improvements that the MARCO states, citizens groups, and businesses have made over the last few decades), or a unique substitute for NOP regional marine spatial plans (focusing on pollution abatement or management systems developed from the ground-up).

V. Conclusions

Taken together, when looking to manage the MAO, the Bight, or the nearshore waters of a state's ocean, the strategies discussed in this Article provide agencies, the public, and the states with tools to address many short- and long-term threats. All tools, however, are not equally applicable. The need for robust, efficient, coordinated, and collaborative ocean policy development and marine planning is clear. There are many ocean uses that support many ocean economies, but with climate change and an

[144] HAROLD F. UPTON & EUGENE H. BUCK, MARINE PROTECTED AREAS: AN OVERVIEW, CONG. RESEARCH SERV. RL32154, at 1 (2010) (*quoting* Jeff Brax, *Zoning the Ocean: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 ECOLOGY LAW QUARTERLY 71 (2002)).
[145] *Id*.

expanding population, overcrowding is to be expected. The NOP, therefore, was developed to support local choices for local ocean economies while promoting certain national interests.

Care should be taken in the MAO to ensure, however, that the NOP is implemented in a way consistent with local needs and expectations; federal agencies have no new mandates, no new laws, and no new authorities under the NOP, so they are still bound by their statutory mandates – whether or not those are in line with the goals of the MAO. In some cases states have little say over federal decisions; in others there is robust authority to guide or even decide federal outcomes. In the end, whether through the National Ocean Policy's support of existing regional partnerships or through innovative strategies like the Clean Ocean Zone, the MAO is a unique environment that is home to centuries-old, billion-dollar economies deserving of our full attention.