

An Eye On Offshore Energy Development

Law360, New York (October 06, 2010) -- This July, a little over two months after the Deepwater Horizon oil spill in the Gulf of Mexico, President Barack Obama issued Executive Order 13547, creating a new national ocean policy and federal National Ocean Council (NOC) that will potentially change the face of offshore renewable energy development and oil and gas production.[1]

The executive order aims to create a framework for stewardship of the nation's waters and underwater lands integrating planning across federal agencies and through state, regional and local coordination.



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Importantly for the energy sector, E.O. 13547 embraces the novel concept of “spatial planning” to formulate an ecosystem-based zoning plan for managing mixed-use rights in ocean and coastal waters.

Whether spatial planning will streamline government approval of offshore renewable energy development and conventional energy production to allow the U.S. to remain a global economic leader, or conversely, become bogged down in bureaucratic complexity and agency infighting, is a critical question.

By adopting the recommendations of the Interagency Ocean Policy Task Force initially constituted in June 2009,[2] the president has created an extensive oversight and planning apparatus, which at bottom forces the development of regional offshore development through a regional stakeholder process, but with significant federal oversight and approval authority.

The new planning process applies to the U.S.'s 95,000 miles of coastline out to the limits of the Exclusive Economic Zone (the largest in the world), which encompasses some two billion acres of the outer continental shelf, and in some situations may extend landward to inland bays and estuarine areas that impact coastal waters.

The policy embraces a sweeping policy mandate, beginning with the goal to “protect, maintain and restore the health and biological diversity of ocean, coastal and Great Lakes ecosystems and resources,” and expanding to sustainable uses of ocean resources, best available science, public access to waters, maritime heritage, duties under international law, scientific understanding, adaptation to climate change and public understanding of the values of water ecosystems.[3]

The new structure is headed by the NOC, co-chaired by Nancy Sutley of the White House Council on Environmental Quality and White House Office of Science and Technology adviser John Holdren; and populated by the heads of an array of federal agencies including the U.S. Environmental Protection Agency; the U.S. Department of Energy; the National Oceanic and Atmospheric Administration and the

U.S. Department of Commerce; the U.S. Department of the Interior (and presumably its recently reconstituted Bureau of Ocean Energy Management)[4]; the U.S. Department of Transportation; and others.

Interestingly, the Federal Energy Regulatory Commission, which plays a key role in approval of offshore renewable energy development, is not a formal member of the NOC but is invited to participate “to the extent consistent with the commission’s statutory authorities and legal obligations.”[5]

The executive order, through the task force recommendations, requires the NOC to develop strategic action plans to support nine express national priority objectives: 1) ecosystem management of ocean lands, coasts and the Great Lakes; 2) marine spatial planning; 3) increasing knowledge and education; 4) regional management and intergovernmental coordination; 5) strengthening resiliency and adaptation; 6) an integrated ecosystem protection and restoration strategy; 7) enhancement of water quality by regulating sustainable land use practices; 8) stewardship of the Arctic; and 9) mapping and data collection.

The national ocean policy expressly binds itself to the precautionary principle articulated in the 1992 international Rio Declaration which states that “full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”[6]

The national ocean policy is implemented through a new regional planning process, which emphasizes conservation of natural resources, ecosystem health and sustainable use. A system of nine regional planning areas is created, with planning bodies for each respective region constituted for the Northeast, Mid-Atlantic, South Atlantic, Great Lakes, Caribbean, Gulf of Mexico, West Coast, Pacific Islands (including Hawaii) and Alaska/Arctic regions.

Key to the regional planning system is a concept resembling land use zoning, dubbed “coastal and marine spatial planning” (CMS). The spatial planning process is described as “a new, comprehensive, integrated, regionally-based approach to planning and managing uses and activities”[7] involving ocean and subsea uses, and is linked to its own seven goals, summarized in condensed fashion as follows:

- 1) “Support sustainable, safe, secure, efficient and productive uses of the ocean, our coasts, and the Great Lakes”;
- 2) “protect, maintain and restore the nation’s ocean, coastal and Great Lakes resources”;
- 3) provide public access;
- 4) promote compatibility of uses and resolve user conflicts;
- 5) foster better decision-making;
- 6) provide certainty for investment;
- and 7) enhance intergovernmental cooperation.[8]

Each regional planning body, composed of federal, state, tribal and local authorities from the 30 states with affected coastlines, has the power to develop a coastal and marine spatial plan (CMS Plan) to guide or govern development of coastal and offshore resources; however, each regional plan ultimately must be approved by the NOC.

Is the new oceans policy a great leap forward in the Chinese sense that will allow government to work in an integrated fashion to advance national goals and facilitate public and private investment, or is it just more layered bureaucracy dressed up with fancy aspirational language hiding Soviet-style economic micro-management that will quickly devolve into infighting and dysfunction?

Unfortunately, the new oceans policy raises many questions. For example, will the spatial planning process create a land rush to earmark entitlements to the seafloor and coastal areas designated for development, and will the regional process thwart or advance offshore development?

There is no process outlined for permitting individual projects by the regionally planning bodies, and the interaction between the NOC and individual agencies with permitting functions such as the Department of the Interior’s outer-continental-shelf leasing program is opaque.

According to the executive order, individual agencies must “comply” with NOC-certified spatial plans developed under the national ocean policy and regional planning process.[9] However, no funding is identified for undertaking any of the functions required by the national ocean policy, either at the federal or local level.

Will it come from permit fees, royalties, general revenue or not at all? Without the “carrot” of federal funding incentives to induce state, tribal and local participation, it is unclear how the CMS plans will be implemented or whether subnational governments will participate productively in the process.

Compounding concerns, the NOC itself is bound to make decisions by “consensus,” which with 27 administrative agency members, seems like a recipe for paralysis.

Although internal deadlock can be referred to the president for decision, the president's docket tends toward full these days.

Similarly, the new ocean policy ostensibly does not create any private enforceable rights, which begs the question of how developers can deal with delays or interference that could affect individual project approvals.

Because of these ambiguities, the ocean policy may invite a host of litigation disputes. Notably, the entire structure of the NOC and spatial planning process is created by executive order, which lacks legislative authorization.

Query whether developers faced with resistance from the process will hesitate to challenge the existence and authority of the NOC and regional councils in much the same scenario as electric utilities recently threatened to invalidate the Regional Greenhouse Gas Initiative interstate compact, which in some states was implemented primarily through executive action.

Conversely, projects may be subject to challenge by disgruntled civil-society stakeholders who may be dissatisfied with the outcome of the regional planning process; although other planning systems such as the Federal-Aid Highway program contain a litigation bar, it is unclear to what extent special interest groups will be able to hijack the planning process with threats of litigation.

Similarly, the application of the ocean policy to inland areas evokes the current battles raging around the issue of federal jurisdiction over navigable waters and wetlands under the Clean Water Act.

And as noted above, a conflict between the NOC policies and other permitting authorities may test the executive order's limits, which by its own terms shall not “impair or otherwise affect ... authority granted by law to an executive department or agency.”[10]

Similarly, many questions are raised with regard to the planning function of the oceans policy. The regional oceans planning process was justified by the Interagency Ocean Policy Task Force as a necessary tool for evaluating cumulative effects and environmental impacts of coastal and ocean development, yet little explanation was given of the overlap or interaction with National Environmental Policy Act (NEPA) review or environmental impact assessments under other existing statutory programs.[11]

Indeed, it is fundamentally unclear how far the spatial planning process will be taken and whether reasonable limits on the process exist — according to the task force recommendations, spatial planning extends to myriad objectives as attenuated as “spiritual cultural services.”[12]

The regional planning process echoes the existing transportation planning process under the Federal-Aid Highway Program and to a lesser extent state implementation plans under the federal Clean Air Act.

However, there does not seem to be a clear acknowledgment of the central limitation of these planning models, namely the paralyzing effect of the tension between preserving local control and decision-making versus providing strong, cohesive leadership that can move infrastructure and other investments forward by providing a single locus of decision to cut through disputes and balance competing stakeholder concerns.

It is unclear whether the national ocean policy's regional planning bodies, spatial planning process and regional plans will have the tools or ability to navigate successfully through the shoals of these challenges.

The regional planning process itself could self-perpetuate an even more unwieldy permitting process by empowering interest groups and communities that were previously uninterested or marginalized.

At bottom, it may be naive to believe that spatial zoning is a magic formula for a single process for governing multiple uses, given the multiplicity of existing legal authorities, state jurisdiction over shorelines and territorial waters, the NEPA process and coordinate (or competing) jurisdiction of the FERC and the Bureau of Ocean Energy Management.

What is clear, however, is that private investment and project developers will be forced into active involvement in the planning process in order to advance their interests and claims to uses and activities falling within our new national ocean policy.

Industry and private investment may want to seek appointment to the federal advisory committees created at the regional level by Section 8 of the executive order,[13] and to track closely the implementation of this critical new initiative.

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The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.

[1] Executive Order 13547, Stewardship of the Ocean, Our Coasts, and the Great Lakes, 75 Fed. Reg. 43023 (July 22, 2010).

[2] White House Council on Environmental Quality, Final Recommendations of the Interagency Ocean Policy Task Force (July 19, 2010) ("Recommendations"), adopted by E.O. 13547.

[3] Recommendations at 3.

[4] Formerly the Minerals Management Service.

[5] E.O. 13547, 75 Fed. Reg. at 43025.

[6] Recommendations at 16.

[7] Recommendations at 7. The Recommendations and executive order also emphasize the concepts of adaptive management and ecosystem planning with the spatial planning process. See 75 Fed. Reg. at 43024.

[8] Recommendations at 7.

[9] E.O. 13547, 75 Fed. Reg. at 43026.

[10] E.O. 13547, 75 Fed. Reg. at 43026.

[11] Indeed, the 77-page Recommendations document is open to criticism for its numerous unsubstantiated claims of faster project implementation and lack of authoritative references.

[12] Recommendations at 44.

[13] E.O. 13547, 75 Fed. Reg. at 43026.

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