

Comments of the Ocean Renewable Energy Coalition (OREC) to the Ocean Policy Task Force's Proposed Interim Framework for Coastal and Marine Spatial Planning

I. OVERVIEW

The Ocean Renewable Energy Coalition (OREC) appreciates this opportunity to submit comments to the Ocean Policy Task Force on the Ocean Policy Task Force's Interim Framework for Effective Coastal and Marine Spatial Planning. We acknowledge the Ocean Policy Task Force's continued work on the daunting task of development of policies that protect our nation's oceans while balancing the needs of all users.

OREC endorses the national goals of coastal and marine spatial planning (CMSP) identified by Task Force in Part IV of the Framework. Encouraging sustainable use of our oceans, coasts and the Great Lakes, promoting compatible use, reducing conflicts and environmental impacts, streamlining regulatory processes, increasing certainty in planning and enhancing agency and governmental communication and collaboration are important goals that the marine renewables industry supports, and that OREC has actively promoted as part of our organization's legislative and regulatory agenda.

Nonetheless, the Framework requires certain changes to accomplish the intended goals. OREC proposes the following modifications, which are discussed at length in our comments:

- **The Framework must prioritize the central role of marine renewables in CMSP and their role in combating the effects of climate change.**
- **The Framework should encourage streamlining siting for marine renewables and describe how CMSP will accommodate test centers, demonstration projects and other infrastructure necessary to support emerging technologies.**

- **The Framework should reject the “precautionary approach” as adopted from the Rio Accords because it will stymie innovation, expose marine developers to enormous costs and give rise to regulatory uncertainty. Instead, the Framework should incorporate principles of proportionality and adaptive management to address uncertainty and to match the amount and type of mitigation to actual impacts.**
- **The Framework will identify gaps in data but neither authorizes nor provides for funding for data gathering which could inform decisions by marine energy developers, resource agencies and other ocean users.**
- **The Framework should clarify how it relates to existing laws like the Coastal Zone Management Act which already authorizes similar planning functions and describe how to avoid duplication of effort.**
- **The Framework states that regulatory agencies must “take into account” the principles and goals of the proposed Framework, which could delay ongoing or pending projects by subjecting them to new requirements.**
- **Rather than attempt to reinvent the wheel, the Framework should evaluate more closely the first Oceans Commission Report and the recent efforts at marine spatial planning in the United Kingdom and globally before moving ahead with a hastily devised program.**

II. COMMENTS

A. **Overview of Interim Framework for Effective Coastal and Marine Spatial Planning**

The Interim Framework for Effective Coastal and Marine Spatial Planning (CMSP) grew out of a June 12, 2009 memorandum by President Obama creating a Task Force, to be lead by the Council on Environmental Quality (CEQ) to address environmental challenges for responsible ocean management including water pollution, habitat loss, fishing impacts and climate change. The President’s memo directed the Task force to prepare an Interim Report on ocean management within 90 days and to develop, with public input, a “comprehensive, integrated eco-system based approach” for coastal and marine spatial planning within 180 days. The Task Force held multiple meetings with

ocean users, including the offshore renewables industry. OREC representatives participated in these meetings at the invitation of the Task Force.

1. Interim report and proposed National Ocean Council

In September 2009, the Task Force released the Interim Report on ocean policy. The Report recommended creation of an interagency National Ocean Council (NOC) that would be lead by CEQ and the Office of Science and Technology Policy. The NOC would have responsibility for advising the President on national policy for stewardship of the oceans, development of implementation plans and coordinating development of a budget on ocean priorities.

2. Interim Framework for CMSP

a. Goals and Guiding Principles

On December 9, 2010, the Task Force released the Interim Framework for Effective Coastal and Marine Spatial Planning (CMSP Framework), with a comment deadline of February 12, 2010.¹ The CMSP Framework sets forth goals to be accomplished through CMSP and establishes Guiding Principles that will guide planning efforts.

b. A regional approach to implementation of CMSP, subject to Guiding Principles and oversight and review by the NOC

In addition, the Framework outlines the process for development and implementation of CMSP. Under the Framework, CMSP would take place regionally, with nine regional planning bodies assigned responsibility for development of a CMS plan for their respective regions. The regional planning

¹ Due to last week's snow closings, OREC is submitting these comments a few days late.

bodies would prepare a CMS, following engagement with stakeholders, scientists, resource agencies and the public to analyze data, uses and impacts. Regional planning bodies will have some flexibility to tailor a CMS plans that matches the needs of their respective region, but at the same time, the regional planning bodies must apply the Framework's Guiding Principles when developing a CMS.

The NOC would play a supervisory role in the CMS process; resolving any disputes that arise during the regional development process and reviewing the regional bodies' work plans, time frames and milestones for preparing the CMS plan. The NOC is also required to approve the final CMS plan developed by each regional body.

B. OREC supports the goals set forth in the Interim Framework for CMSP

The CMSP Interim Framework opens with a list of goals. These include:

- Supporting sustainable safe, secure and productive uses of oceans;
- Protect and restore nation's coastal resources
- Promote compatibility among users
- Streamline and improve the rigor and consistency of decision making and regulatory processes
- Enhance interagency and intergovernmental collaboration

OREC supports these goals. As an emerging technology, marine renewables developers are disproportionately impacted by lengthy, costly regulatory processes designed for behemoth, conventional energy plants rather than small, modular wave or tidal units. For example, deployment of a one megawatt tidal project may involve a minimum of two years of baseline

environmental studies at a cost of \$1.4 million, a license application process of a year or more and compliance with close to a dozen statutory requirements administered by nearly as many agencies.² A streamlined regulatory process would expedite the ability of new marine renewables technology to get in the water.

Likewise, OREC also endorses the goal of identifying opportunities for compatible use. Most marine renewables projects are comprised of small units – turbines, buoys with relatively benign impacts. Therefore, they are compatible with other ocean uses. OREC much prefers an approach that optimizes multiple compatible use, rather than rigid zoning, which would exclude current and future technology that might co-exist with, and potentially even benefit other uses – for example, by offering tourist opportunities, serving as artificial reefs or barriers to shoreline erosion.

However, the CMPS Framework omits one significant goal – mitigation of climate change and its effects on oceans -- that was the impetus for the President’s creation of the ocean policy task force. As OREC has emphasized throughout this process, development of offshore renewables will reduce global warming and mitigate the effects of climate change on our oceans. In short, mitigating climate change should be included as a goal of CMSP and any national ocean policy.

² See Snohomish Public Utility District Draft Application, Puget Sound Tidal Energy Pilot Project (December 29, 2009) (available on FERC Website e-library).

C. Proposed Improvements to CMSP Interim Framework

1. **The Framework must prioritize the central role of marine renewables in CMSP and their role in combating the effects of climate change.**

One of the Administration's motivations for creating an Ocean Energy Task Force and developing a CMSP program was to combat the adverse effects of climate change on our nation's oceans. Offshore renewables – wave, tidal and offshore wind – all play a key role in mitigating the impacts of global warming. As such, both the Interim Framework and any CMSP program must identify marine renewables as a national priority. Here, the CMSP Framework falls short.

The CMSP Framework mentions marine renewables only once. By contract, the United Kingdom's recently enacted Marine Bill specifically recognizes marine renewable energy projects as an activity that will reduce climate change.³ And while the CMSP Framework leaves regional councils flexibility to develop a CMS plan that may prioritize marine renewables, regional efforts without national guidance will not suffice to build a robust marine renewables industry.

Regional standards and planning requirements for marine renewables may potentially lead to inconsistent regulatory practices. Currently, most marine renewables technologies – either wave, tidal, OTEC or offshore wind – are subject to federal regulation though they must comply with certain state requirements. The absence of uniform application of federal policy gives rise to regulatory uncertainty that complicates the development process and deters private investment.

³ See Summary of Concessions for House of Lords (May 10, 2009) at 1 (online at <http://www.defra.gov.uk/environment/marine/legislation/mcaa/index.htm>).

To cure these problems that may interfere with marine renewables development, the Framework's Guiding Principles must expressly acknowledge the importance of encouraging and facilitating development of marine renewables to the goal of sustainability, and direct the regional councils to make marine renewables a central component of their CMS plans.

2. The Framework should focus on streamlining siting for marine renewables and how CMSP will accommodate test centers, demonstration projects and other infrastructure necessary to support emerging technologies.

In comments on the Interim Framework, OREC emphasized the need for a streamlined process for marine renewables. The CMSP Framework identifies "streamlining regulatory decision making" as a goal, but does not include any details or guidance for streamlining. If anything, as discussed in the next section, the CMSP as currently devised may add yet another level or regulatory requirements to an already complex process.

By contrast, the United Kingdom's recently enacted Marine and Coastal Access Bill, widely regarded as the UK's approach to MSP, makes streamlining the regulatory process a central feature. The Marine and Coastal Bill includes a streamlined regulatory process which commits to a six month permitting process for marine renewables.

Nor does the CMSP Framework discuss the role of test centers or demonstration projects. To ensure the success of the marine renewables industry, CMSP must be flexible enough to accommodate test centers and demonstration projects.

3. The Framework should reject the "precautionary approach" as adopted from the Rio Declaration.

One of the most troubling features of the CMSP Framework is the proposed adoption of the “precautionary approach” from Principle 15 of the Rio Declaration. The Precautionary Approach, as defined in the Rio Declaration notes that:

in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁴

The problem with the precautionary approach, as described above, is that it runs counter to the precautionary approach, as defined in the first Oceans Commission Report as well as generally accepted legal and regulatory standards for environmental analysis in the United States. Introduction of a new standard can give rise to grave uncertainty over how agencies will apply existing law.

The first Oceans Commission Report discussed the potential applicability of the precautionary approach. (Ocean Commissions Report at 103). However, the Report emphasized that management plans based on the precautionary approach should include scientific assessment, monitoring and periodic reviews of any restrictions. In many ways, the Oceans Commissions’ recommendation resembles adaptive management, which is also the MHK industry’s preferred approach to dealing with uncertainty.

The Federal Energy Regulatory Commission (FERC), the agency with primary responsibility for licensing MHK projects also supports the adaptive management approach. Adaptive management allows developers to devise

⁴ See http://en.wikipedia.org/wiki/Precautionary_approach.

mitigation that will address observed problems rather than forcing them to implement costly measures in anticipation of hypothetical or speculative harms. Adaptive management also builds in monitoring and requires that any action that has an unacceptable impact must cease until mitigated.

The precautionary approach as described in the CMSP Framework would require marine renewables developers to implement costly mitigation measures based on speculation or scant claims of irreparable damage will shut the industry down. To the extent that the Task Force seeks to include the precautionary approach as a goal rather than the preferred adaptive management approach, the Task Force should clarify how much evidence of potential harm must be presented before mitigation must be implemented.

4. **The Framework will identify gaps in data but neither authorizes nor provides for funding for data gathering which could inform decisions by marine energy developers, resource agencies and other ocean users.**

OREC had hoped that CMSP would facilitate development because the process would generate data that would inform decision-making. The CMS Plans developed by the regional bodies would identify data gaps – but instead of collecting data to fill the gaps, would make decisions and assumptions based on existing information. *See* CMSP Framework at 15 (directing regional groups to explain assumptions made to “compensate” for lack of data and information). Because so little is presently known about MHK technologies and how they operate, decisions that may adversely impact the industry could be made on the basis of assumption rather than sound information.

The proposed CMSP Framework represents a departure from the protocol recommended in UNESCO’s MSP Report (May 2009). The UNESCO Report

stresses the importance of data collection, and also the importance of providing sufficient funding for data collection. The proposed CMSP Interim Framework does neither.

5. The Framework should clarify how it relates to, or differs from other laws.

In many ways, the CMS regional plans resemble existing Coastal Zone Management Act plans or MMS Five Year planning process. The Framework does not discuss the relationship between the CMS regional plans and existing planning measures like CZMA or the MMS planning process. Failure to coordinate these processes can lead to duplication of effort

To the extent that CMS will address aspects covered by other laws it should do so in a way that increases efficiencies. For example, if an agency is able to state with certainty that certain activities do not adversely impact a particular resource within the agency's jurisdiction, that finding should be incorporated into the CMSP and be allowed within a given area. If a developer later seeks to site a project in an area that has already been vetted and where an activity is allowed, the agency should not later be allowed to constrain the project through site-specific permitting requirements.

In addition, when regional plans are developed, the regional bodies should try to adopt and incorporate existing standards rather than recreating the wheel. For example, in areas like Massachusetts or Rhode Island, where widespread coastal planning is underway, the regional councils should incorporate these programs rather than begin again from the ground up.

6. **The Framework states that regulatory agencies must “take into account” the principles and goals of the proposed Framework, which could delay ongoing or pending projects by subjecting them to new requirements.**

The Framework says that CMSP is “not *meant* to delay or halt existing projects” (p. 20, emphasis added). At the same time, it requires that decision-makers must take the national goals and principles into account to the extent allowed under existing law. In order for federal agencies to implement the CMSP, they will need to, at a minimum, examine its compatibility with existing statutes and either adopt new regulations or policy pronouncements. Agencies may therefore be reluctant to move forward with permitting before they have officially decided how to implement the goals of the CMSP. They may also require MHK developers to design a project to CMS plans that are still in development, which would not only be legally premature but would require developers to design to a changing standard. Thus, as a practical matter, delays will ensue. At a minimum, the CMSP should specify that agencies are not required to incorporate any goals or abide by any principles until such time as the regional plans are adopted and certified by the NOC.

III. CONCLUSION

Again, OREC thanks the Task Force for its work on the important issue of ocean management. OREC stands ready to participate in this process and looks forward to development of policies that will serve all ocean users while mitigating the impacts of climate change on our nation's oceans and advancing development of offshore renewables.

Respectfully submitted,

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