FISH AND FISH HABITAT PROTECTIONS

IN THE MID-ATLANTIC REGION

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INTRODUCTION

To assist in its efforts to protect fish and fish habitat, the American Littoral Society sought a professional comprehensive analysis of existing statutes and regulations that provide such protections. To further its work in marine spatial planning, the Society requested that the analysis address whether the fish and fish habitat protections will be enhanced or undermined through implementation of the Mid-Atlantic Regional Ocean Action Plan. This report addresses the Society's requests for information through the following components:

- An overview of the major federal statutes, their related regulations, policies and guidance that protect fish and fish habitat, including a discussion of the specific regulatory provisions that offer such protections and how they work;

- The identification of special provisions within the federal statutes that allow states to utilize their own statutes and programs to protect their fish and fish habitat and other natural resources from the adverse impacts of federal actions;

- Examples of each of the federal protections in action in the Mid-Atlantic Region to highlight certain provisions and demonstrate the circumstances under which they were applied successfully and unsuccessfully;

- An overview of the programs and policies of the five Mid-Atlantic Coastal States that can be utilized to protect their own resources from the adverse impacts of federal actions (New York, New Jersey, Delaware, Maryland and Virginia);

- The strengths and weaknesses of the federal protections, including those as applied by the states through their own programs, and recommendations for enhancing those protections;

- A ranking of the fish and fish habitat protections based on the level of protection they offer and their success in real world situations

- A discussion of the major components of the Mid-Atlantic Plan that may impact existing fish and fish habitat protections, both in a positive and negative way.

- The strengths and weaknesses of the Mid-Atlantic Plan, and recommendations for how to enhance and avoid undermining existing fish and fish habitat protections under the Plan.

Because the Society's interests lay in both the protection of fish and fish habitat and how those protections will operate through the Mid-Atlantic Plan, the examples of federal actions used throughout this report are those contemplated by the Plan, including the siting and construction of off-shore LNG facilities, energy pipelines, off-shore wind farms, sand mining and beach nourishment projects.

PART I - FEDERAL FISH AND FISH HABITAT PROTECTIONS

The federal statutes that offer the most protections to fish and fish habitat are:

- The Magnuson Stevens Fisheries and Conservation Act;
- The Coastal Zone Management Act, Consistency Provision;
- The Endangered Species Act;
- The National Environmental Policy Act;
- The Clean Water Act, Section 404 Discharges into Waters of the United States; and
- The Clean Water Act, Section 303 Water Quality Standards and 401 State Certification

For each of these statutes, a one-page overview of the basics is provided, followed by a more in-depth discussion of the fish and fish habitat protections they provide and examples of their application in the Mid-Atlantic Region. A few examples from other regions that better demonstrate a point are also included as indicated.

It is important to note that these protections are in jeopardy. On July 6, 2017, NOAA Fisheries and the National Ocean Service published a notice for a 45-day public comment period seeking input on existing regulations and processes that "may be outdated, unnecessary, ineffective; inhibit job creation and growth; and /or can be further streamlined…"[1] The notice was part of the ongoing efforts to implement the President's recent Executive Orders, including:

- EO 13766 - Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects;
- EO 13771 - Reducing Regulation and Controlling Regulatory Costs;
- EO13777 - Enforcing the Regulatory Reform Agenda;
- EO13783 - Promoting Energy Independence and Economic Growth; and
- EO13795 - Implementing an America-First Offshore Energy Strategy

In furtherance of these Executive Orders, NOAA specifically sought public comment "on the efficiency and effectiveness" of the current regulatory processes under the Magnuson Stevens Fishery Conservation and Management Act, the Coastal Zone Management Act, and the Endangered Species Act, as well as the National Marine Sanctuaries Act and the Federal Power Act.

The 45-day comment period for this review expired on or about August 14, 2017. Whether this process results in serious damage to the existing protections remains to be seen; however, based on the names of the Executive Orders and the desire to "streamline" these regulatory authorities, it seems likely.

[1] Email from Chris Oliver, Assistant Administrator of NOAA Fisheries to a List of Unidentified Recipients, July 6, 2017.

TABLE 1 – FEDERAL STATUTES THAT PROTECT FISH AND FISH HABITAT		
FEDERAL STATUTE	**PROTECTIVE MECHANISM/STANDARDS**	**AGENCY**
Magnuson Stevens Fisheries Conservation and Management Act	Fishery management plans (prepared by regional councils) must describe and identify essential fish habitat an minimize "to the extent practicable" adverse effects on habitat caused by fishing and identify other actions to "encourage" conservation and enhancement of habitat	NMFS MAFMC
Coastal Zone Management Act	State development and implementation of coastal management programs that "provide for the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs and fish and wildlife and their habitat within the coastal zone'; Consistency review provision allows states to review federal agency activities, including activities by applicants for a federal license or permit, to determine whether they are consistent with the enforceable policies of the state's coastal management program.	NOAA State Coastal Management
Endangered Species Act	Designation/"listing" of fish, wildlife and plants whose existence are endangered or threatened by economic growth and unchecked development; protection of listed species, including development of recovery plans and designation of critical habitat; requires federal agencies to consult with NMFS regarding any action authorized, funded or carried out by such agency that may impact any threatened or endangered species or result in the destruction or adverse modification of critical habitat.	NMFS FWS
National Environmental Policy Act	Requires all federal agencies to consider the environmental effects of "major federal actions" (including legislation) and alternatives to that action; requires disclosure of environmental effects to the public and solicitation of public comments; requires Environmental Assessments, "detailed" Environmental Impact Statements; established the Council on Environmental Quality within executive office of president to ensure agencies meet NEPA obligations,	Varies by Federal Action CEQ
Clean Water Act § 404	Dredge and fill section 404 permits undergo public interest review by ACOE; Also review under 404(b) guidelines developed by EPA. Enhanced protection for special aquatic sites. EPA can veto ACOE permit based on environmental impacts.	ACOE EPA (has veto power)
Clean Water Act § 303 and § 401	Establishment of water quality standards to assure that "wherever attainable" the quality of a water body provides for the protection and propagation of fish, shellfish and wildlife; Impaired water lists and TMDLs; National Estuary Program; Certification requirement allows states to have input into federal projects that may affect their waterways; discharge into navigable water must comply with state water quality standards.	NOAA State Coastal Management

STATUTE: Magnuson Stevens Fisheries Conservation and Management Act (MSA); The Sustainable Fisheries Act, 16 U.S.C.A. §§1801-1882

THE BASICS:

Purpose: To establish a national program for the conservation and management of U.S. fisheries to prevent overfishing, rebuild overfished stocks, insure conservation, facilitate long-term protection of essential fish habitats and to realize the full potential of the Nation's fishery resources.[2]

History: Originally adopted as the Fishery Conservation and Management Act in 1976; amended and reauthorized in 1996 through adoption of the Sustainable Fisheries Act; amended significantly in 2006 through the adoption of the Magnuson Stevens Fishery Conservation and Management Reauthorization Act.

Agency: U.S. Department of Commerce, National Oceanic and Atmospheric Association (NOAA), National Marine Fisheries Service (NMFS) and eight Regional Fishery Management Councils (RFMC) through the adoption and implementation of regional Fishery Management Plans (FMPs).

Regulations: 50 CFR Part 600.5-600.1610 (Subparts A-R), include establishment of RFMCs (Subpart B); membership of RFMCs (Subpart C); the National Standards (Subpart D); Essential Fish Habitat (Subpart J); and EFH Coordination, Consultation and Recommendations (Subpart K). MSA Regulations Link ; Related regulations 50 CFR Part 635.1-635.71, Atlantic Highly Migratory Species; 50 CFR 648.1 – 648.323, Fisheries of the Northeastern United States.

Geo-Scope: Fisheries and fishing activities between three miles and 200 (nautical) miles from shore, known as the Exclusive Economic Zone (EEZ).

Protections: National Standard 1 to prevent overfishing while achieving maximum yield; National Standard 2 to make fisheries management decisions based on the best available science; National Standard 9, to minimize bycatch and reduce mortality of bycatch that cannot be avoided; Identify and protect Essential Fish Habitat and Habitat Areas of Particular Concern; Require agency consultations for actions that may impact Essential Fish Habitat; Development and Implementation of Science-Based Fishery Management Plans to Accomplish the Purposes of the MSA.

[2] 16 U.S.C. S 1801 (a)(6)

MSA FISH AND FISH HABITAT PROTECTIONS

The National Standards

The National Standards put the MSA goals into action. Although there are ten National Standards, three of them – National Standards 1, 2 and 9 – most directly pertain to fish and fish habitat protections.

National Standard 1 This Standard provides that "Conservation and management measures shall prevent overfishing while achieving, on a continuous basis, the optimum yield from each fishery for the United States fishing industry."[3] The dual mandates to "prevent overfishing" while achieving "optimum yield" automatically set up a struggle between the ecological and economic goals of the MSA.

Initially, there was controversy over whether the term "shall" meant overfishing must end immediately or over some longer period of time. The 2006 MSA reauthorization resolved this issue by stating that the RFMC's had two years to incorporate management measures to end overfishing in the fisheries they oversee.[4] Another controversy regarding the effectiveness of RFMC-recommended management actions was addressed in a lawsuit. When an FMP included summer flounder conservation measures with only an 18% chance of success, the National Resources Defense Council sued, arguing that a mere 18% chance failed to comply with the MSA.[5] The court agreed and determined instead that management measures must have a greater than 50% chance of success.[6]

Despite these initial differences of opinion, the conservation community was in general agreement that efforts under National Standard 1 to protect fish stocks resulted in "laudable progress towards sustainable fisheries" and that this progress could continue despite persistent and emerging threats.[7] However, in 2015, the NMFS announced proposed changes to the National Standard 1 interpretive Guidelines that were strongly endorsed by the fishing community, but opposed by conservationists.[8] Among other things, opponents of the changes argued they would make it easier for managers to drop fish stocks out of the proven and effective management system required by the MSA and allow managers to stretch out the timelines to rebuild depleted fish populations for years, even decades, beyond what is currently allowed, a risky move particularly in the face of current challenges faced by fisheries.

Despite the efforts and strong opposition voiced by the conservation community and other stakeholders, the NMFS adopted the rule amending the National Standard 1 Guidelines, effective October 18, 2016.

National Standard 2 – This Standard provides that "Conservation and management measures shall be based on the best scientific information available."[9] Thus, when management measures

[3] Standard set forth in statute at 16 U.S.C.A. § 1851(a)(1) and regulations with Guidelines at 50 CFR § 600.310
[4] 16 U.S.C.A. § 1854(e)(3)
[5] Natural Resources Defense Council v. Daley, 209 F.3d 747 (D.C. Cir. 2000)
[6] Id.
[7] Letter dated June 30, 2015 from 38 conservation organizations to Dr. Wesley Patrick, NMFS Office of Sustainable Fisheries, opposing proposed changes to National Standard 1 Guidelines.
[8] Proposed Rule and Request for Comments, National Standards 1, 3 and 7 and General Section Guidelines, 80 Fed. Reg., 2,786 (January 20, 2015)
[9] 16 U.S.C.A. § 1851(a)(2); 50 CFR 600.315

developed in accordance with National Standard 1 are included in an FMP, they must be scientifically based.

National Standard 2 is the most litigated provision of the MSA. Courts have generally required challengers to an FMP to demonstrate that there was absolutely no scientific basis at all for the decision or action in question.[10] Despite this very high burden, challengers have occasionally prevailed, such as when a court determined that the NMFS decision to allocate a percentage of U.S. Pacific whiting catch to the Makah Indian Tribe was the "product of pure political compromise, and not scientific endeavor."[11] Other interpretations of this Standard are discussed in the "MSA in the Mid-Atlantic" section below.

National Standard 9 – This Standard recognizes the devastating effects that bycatch can have on a fishery, and states that conservation measures shall, to the extent practicable, minimize bycatch and, to the extent bycatch cannot be avoided, the associated mortality must be minimized.[12] The "to the extent practicable" language affords the RFMCs and the NMFS significant discretion in their decisions regarding bycatch reduction and often times insulates their decisions to reject conservation measures.

When courts have found violations of Standard 9, they often concluded that the violation was procedural rather than substantive in nature. For example, the NMFS rejected two bycatch reduction measures – higher landing limits and discard caps – as being "impracticable" without an accompanying observer program.[13] But the NMFS failed to take that extra step and consider whether these measures in combination with an observer program were practicable. Challengers to the rejection argued that this failure violated National Standard 9. The court agreed, noting that the agency did not "fully consider the practicability" of these measures but characterized the agency's action as "unreasoned decision making."[14] The court indicated that, had the NMFS simply considered the observer program as part of its decision, it would have then been free to dismiss both measures as impracticable.

Standardized Bycatch Reporting Methodology - Relevant to National Standard 9 are the methods by which bycatch is tracked, reported and assessed. The MSA requires that FMPs "establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery."[15] In February 2016, the NMFS published a proposed rule for a Standardized Bycatch Reporting Methodology (SBRM) that was rejected by the conservation community.[16] Noting that quantifying bycatch "is critical for the agency to fulfill its mandate under the MSA," 28 organizations objected to the proposed rule finding it failed to provide any guidance, or even a general requirement, that SBRMs produce statistically accurate, precise estimates of bycatch and would allow SBRMs to consider only the collection of bycatch data, not the assessment of that data.[17]

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[10] *Ocean and Coastal Law and Policy*, Bauer, Donald C, Eichenberg, Tim and Sutton, Michael, ABA Section of Environment, Energy and Resources, 2007, p. 287.

[11] Midwater Trawlers Cooperative v. Department of Commerce, 282 F.3d 710, 720-721 (9th Cir. 2002), although, after remand, and the NMFS providing additional support for its position, the allocation was upheld by a later court decision, Midwater Trawlers Cooperative v. Department of Commerce, 393 F.3d 994 (2004).

[12] 16 U.S.C.A. § 1851(a)(9); 50 CFR 600.350

[13] Pacific Marine Conservation Council v Evans, 200 F.Supp 2d 1194 (N.D. Cal. 2002)

[14] Id. at 1202.

[15] 16 U.S.C.A. . § 1853(a)(11).

[16] Proposed Rule and Request for Comments, NOAA NMFS Standardized Bycatch Reporting Methodology, 81 Fed. Reg. 9413 (February 25, 2016).

[17] Letter dated April 25, 2016 from 28 conservation organizations to Karen Abrams, NOAA Fisheries Service, opposing Standardized Bycatch Reporting Methodology Proposed Rule NOAA-NMFS-2016-0002

In summary, the objectors argued that the SBRM would not enable the NMFS to meet its legal obligations and was contrary to the plain reading of the MSA, Congressional intent and the findings of the courts.[18] Despite the efforts and strong opposition voiced by the conservation community and other stakeholders, the NMFS adopted the SBRM, effective January 19, 2017.[19]

Essential Fish Habitat

One significant purpose of the MSA is the protection EFH, defined as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity."[20] To carry out this mandate, RFMCs are directed to describe and identify EFH in their FMPs and to "minimize to the extent practicable adverse effects on such habitat caused by fishing." RFMCs must also "identify other actions to encourage the conservation and enhancement" of EFH in the FMPs.[21]

The identification of EFH and actions taken to protect it must be based on the "best available science" in accordance with National Standard 2. The term "adverse effects" is defined broadly to mean "any impact that reduces quality and/or quantity of EFH" and include direct or indirect physical, chemical, or biological alterations of the waters or substrate. In addition, adverse effects to EFH may result from actions occurring within or outside of EFH and include site-specific or habitat-wide individual, cumulative, or synergistic consequences of actions."[22]

Given the clear mandate to identify and protect EFH, combined with the broad definition of adverse effects, it would seem that EFH would be adequately protected. However, in drafting the EFH-related language, Congress once again used the ambiguous phrase "to the extent practicable" and did not define how to determine what is "practicable".

Habitat Areas of Particular Concern – A subset of EFH is a Habitat Area of Particular Concern (HAPC), which can be designated within EFH based on one or more of the following[23]:

- The importance of the ecological function provided by the habitat
- The sensitivity to human-induced environmental degradation
- The extent of threats posed by development to the habitat, or
- The rarity of the habitat type

The HAPC designation does not confer additional protections or restrictions, but can help prioritize conservation efforts.[24]

EFH Consultations - When a federal agency authorizes, funds, or undertakes an action that may adversely affect EFH, a consultation with NOAA Fisheries is required.[25]

[18] Id., p. 2
[19] 50 CFR§ 600.1600, et seq.
[20] 16 U.S.C.A. § 1801(a)(10); 16 U.S.C.A. 1802(10)
[21] 16 U.S.C.A. 1853(a)(7)
[22] 50 CFR 600.810
[23] 50 CFR § 600.815(a)(8)
[24] NOAA EFH Mapper Website, http://www.habitat.noaa.gov/protection/efh/efhmapper/index.html
[25] 16 U.S.C.A. § 1801(a)(6) and (10)

The agency must notify NOAA of the action, and submit a written EFH Assessment for review. If deemed necessary, NOAA will provide EFH conservation recommendations, including measures to be taken that will avoid, minimize or offset adverse effects, to the federal agency within 30-60 days.[26]

The federal agency must respond to NOAA's recommendations within 30 days and detail the measures it will take to avoid, mitigate, or offset the impact of the activity on EFH. If the response is inconsistent with any NMFS conservation recommendations, the agency must explain and provide scientific justification for not following the recommendations, including the basis for disagreements over the anticipated effects of the action or the necessity or efficacy of the conservation measures.[27] [28]

Information Available Regarding EFH – To further conservation of EFH, the NMFS has compiled information on the locations of EFH, including maps and/or narrative descriptions, and made it available to other federal and state agencies and the general public.[29] The NMFS EFH Mapper, which displays maps of EFH and HAPC, as well as EFH areas where protections are in place (e.g., anchoring restrictions, fishing gear modifications or restrictions) can be accessed here: EFH Mapper Link Narrative descriptions of EFH and related protections in the Mid-Atlantic and other regions can be accessed here: EFH Narrative Link EFH is also included in the Mid-Atlantic Ocean Data Portal.

Streamlined EFH Consultations – The MSA regulations encourage EFH consultations to be combined with other environmental review procedures, such as those performed under the National Environmental Policy Act and the Endangered Species Act.[30] In addition, if the proposed Federal action is similar to a previous action for which an EFH Assessment was prepared, the Federal agency may incorporate by reference the completed EFH Assessment and supplement it with relevant project specific information. If more than one Federal agency is responsible for a Federal action, then the consultation and EFH Assessment requirements may be fulfilled by a designated lead agency.[31]

THE MSA IN THE MID-ATLANTIC

1. **Whether Access Restrictions to Rebuild the Atlantic Sea Scallop Fishery Were Based on the Best Available Science.** (Mid-Atlantic and New England Regions 2011)

In response to concerns regarding overfishing of sea scallops, the New England Fishery Management Council (NEFMC) proposed Amendment 11 to the FMP that would limit the number of participants in the scallop fishery.[32] The amendment limited the amount of "open access general category" scalloping permits typically issued to small-scale scallop vessels and vessels that harvested scallops as incidental bycatch.

[26] 50 CFR § 600.920(h)(3)
[27] 50 CFR § 600.920(k)
[28] If the NMFS becomes aware of a federal action that would adversely affect EFH but for which a federal agency has not initiated an EFH consultation, the NMFS can request a consultation or act on its own to provide the agency with EFH conservation recommendations. The MSA does not require state agencies to consult with the NMFS regarding EFH. Nevertheless, the NMFS makes an effort to identify and provide conservation recommendations for state actions that may adversely affect EFH. 50 CFR § 600.925(c)(1). In addition, when an action that would adversely affect EFH is authorized, funded or undertaken by both federal and state agencies, the NMFS will provide the state agencies with the EFH conservation recommendations developed through the federal agency consultation. 50 CFR § 600.925(2)
[29] 16 U.S.C. § 1855(b) (a/k/a section 305(b)); 50 CFR § 600.915
[30] 50 CFR § 600.920(f).
[31] 50 CFR § 600.920(e)(5).
[32] General Category Scallop Fisherman v Secretary, U.S. Dept of Commerce, 635 F.3d 106, 109-110 (3rd Cir 2011).

The open access permits were replaced with "limited access" permits that would be available only to vessels that landed at least 1000 pounds of scallop meat in any fishing year between March 1, 2001 and November 1, 2004. The determination of whether a vessel met the 1000 pound threshold would be derived from NMFS landings data compiled from dealer reports, data that the fishing industry argued was significantly flawed and inappropriate.[33]

A group of New England and Mid-Atlantic scallop fishermen sued alleging that the NMFS's use of this data in the permit allocation criteria violated MSA National Standard 2, in that it did not constitute the use of the best available science. Further, they argued that the NMFS acted unreasonably by refusing to correct errors in the dealer reports by cross-checking the NMFS data against the fishermen's self-reported Vessel Trip Reports (VTRs) and the dealers own data sets.[34]

The court disagreed with the fishermen, and explained the legal standards associated with the term "best available science":

> "In deciding whether scientific information is the 'best available,' substantial deference is accorded to the [NMFS's] assessment of the quality of what is available…It is well settled that the [agency] can act when the available science is incomplete or imperfect, even where concerns have been raised about the accuracy of methods or models employed. During the development of Amendment 11, NMFS and the NEFMC recognized that flaws existed in all of the available data groups, but concluded that there were no practical or cost-effective means of correcting the many errors in both the VTR and dealer data sets."[35]

This case is both good and bad in that it demonstrates that the lack of perfect data will not bring efforts to protect fisheries to a halt, but at the same time highlights a significant point of public criticism and industry distrust over the data used to support those same efforts.

2. **Whether a Fishing-Industry Compromise Measure Incorporated Into An FMP Met the Best Available Science Standard.** (Mid-Atlantic Region 2003)

To protect the struggling tilefish fishery, the Mid-Atlantic Fishery Management Council (MAFMC) sought to place restrictions on the number of vessels that would have access to tilefish.[36] A plan to implement restrictions was developed for the MAFMC by a special Tilefish Committee that awarded the majority of full-time permits to vessels in Montauk, NY and the majority of part-time permits to Rhode Island and New Jersey vessels.[37] Other industry groups from New York and New Jersey objected to the plan arguing that it did not adequately represent their members. [38] In response, the Committee urged the groups to reach a compromise.[39]

The NY and NJ groups did come up with a compromise that split the full-time category into two tiers, with half the full-time permits going to Montauk, NY and half going to New Jersey and other parts of New York. The compromise also re-established the number of part-time permits and

[33] Id. at 111,115
[34] Id. at 115
[35] Id. , citing to the record for Amendment 11 (additional citations omitted).
[36] Hadaja, Inc. v. Evans, 263 F.Supp. 2d 346 (D.R.I. 2003)
[37] Id. at 349-350.
[38] Id. at 349-350.
[39] Id. at 350

incidental permits that would be issued as well as the qualifying criteria for those categories.[40] And although the Committee admitted that the permit eligibility criteria in the FMP were the direct result of the agreement reached by the NY and NJ industries, they were characterized in the FMP as being based upon the "best available science."[41]

A Rhode Island fishing interest that fared poorly in the new allocation scheme sued, alleging that the method of determining permit eligibility was not based on scientific evidence at all, but on an "industry group hallway compromise," in violation of MSA National Standard 2.[42] The court agreed, holding that "conclusory statements regarding the consideration of scientific data are not sufficient" and that, "the FMP must inform its audience of the actual scientific basis supporting it."[43]

3. **Whether Gear Restrictions to Protect Essential Fish Habitat for Tilefish Were Based on the Best Available Science.** (Mid-Atlantic Region 2003)

In addition to limiting access to the tilefish fishery through the permit restrictions discussed above, the MAFMC at the same time proposed gear restrictions that would protect the ocean-floor burrows that are EFH for tilefish. The draft revised FMP included prohibitions on the use of "bottom-tending mobile gear" also known as trawl gear. A vessel with a tilefish limited access permit could only utilize longline gear and could not even possess any other type of gear unless it was properly stowed away.[44]

In support of these measures, the draft FMP cited numerous studies demonstrating the negative impacts of trawl gear on other non-tilefish habitats, and from them, inferred that the same impacts were happening to the tilefish EFH. The draft FMP stated the following:

> "Based on the best available scientific information, it can be *inferred* that trawling is causing long-term physical adverse impacts to tilefish EFH. It is further *implied* that, in some cases those adverse impacts may be severe, at least locally."[45]

The MAFMC and NMFS received significant negative feedback on the draft FMP from the fishing community, including a lawsuit brought by commercial fishermen objecting to the trawl gear limits.[46] Once again, the issue was dependent upon the meaning of "best available science."

The court sided with the fishermen, finding that there was simply "no data to quantify trawling's impact on the tilefish fishery…" Acknowledging that "it is true that an FMP only needs to rely on the *best* information *available* when implementing its rules", the court pointed out that "there is a difference between relying on conflicting evidence and no evidence."[47] [48]

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[40] Id.
[41] Id. at 351.
[42] Id. at 353.
[43] Id at 354.
[44] Id at 348, 356.
[45] Natural Resources Defense Council v Evans, 254 F.Supp 2d 434, 436 (S.D. NY 2003). Emphasis in original.
[46] Hadaja v. Evans, supra, at 355-357
[47] Id. at 357.
[48] In a case brought by the NRDC while the fishermen's case was still pending, but after the final FMP was issued and, without explanation, omitted the trawl gear prohibitions, the court found that the NMFS reasonably found no evidence of a reduction in quality or quantity of essential fish habitat and deferred to the agencies expertise in its finding that trawl "door marks" in and around the tilefish burrows were not an identifiable adverse effect. Moreover, it held "an agency does not have a burden to explain a change in position from a proposed rule to the final rule, and a lack of an explanation for the change is not in itself evidence of arbitrariness."

4. **Whether the Relaxation of Restrictions on Access to a Fishery Violated the Requirement to Minimize Adverse Effects to the "Extent Practicable."** (New England 2014)

In 2013, the New England Fishery Management Council (NEFMC) made changes to the Northeast Multispecies FMP that regulates the region's "groundfish" fishery, including cod, haddock and flounder. The change removed strict prohibitions against commercial fishing in five areas that had all been designated EFH, and would allow local fishermen to apply for permission to enter and fish these areas.[49]

The Conservation Law Foundation (CLF) filed suit, arguing that opening up these EFH areas violated the MSA's requirement that FMPs "minimize to the extent practicable adverse effects on EFH caused by fishing."[50] The court used this very language to negate CLF's arguments, explaining the meaning of the term "practicable":

> "…CLF's argument runs aground on the express language of the MSA, which permits Defendants to take the actions that they did. The crucial statutory language is 'to the extent *practicable*,' which…does not mean 'to the extent *possible*.' Rather than require the Councils to do everything they can to protect essential fish habitat, by using the term 'practicable,' Congress intended rather to allow for the application of agency expertise and discretion in determining how best to manage fishery resources…In other words, just because Framework 48 allows some fishing in EFH does not mean that it violates the MSA…In sum, because the MSA permits Defendants to balance adverse effects on essential fish habitat against other potential gains, CLFs argument on this point gains no traction."[51]

[49] Conservation Law Foundation v. Pritzker, 37 F.Supp 3d 234, 238 (D D.C. 2014).
[50] Id. at 250-251.
[51] Id at 251, emphasis in original, additional citations omitted.

STATUTE: Coastal Zone Management Act, 16 U.S.C. §§ 1451-1466; Consistency Provision, 16 U.S.C. § 1456.

THE BASICS:

Purpose: To further the effective management, beneficial use, protection and development of the Nation's coastal resources by establishing a program to encourage states to exercise their full authority over the lands and waters in their coastal zones.[52]

History: Adopted in 1972; Amended in 1976 to enable energy facility citing in response to oil embargo and energy crisis; amended in 1980 to incorporate national interests in coastal planning; amended through the Coastal Management Reauthorization Act of 1985 to include new procedures for reviewing and amending state coastal programs; amended through the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) to clarify scope and application of the consistency provision, create the Coastal Zone Enhancement Grant Program to encourage states to improve their programs, and add Coastal Non-Point Pollution Control Program; Minor non-substantive amendments in 1996.[53]

Agency: Approval and continuous oversight of state Coastal Management Programs (CMPs) is the responsibility of the NOAA Office of Coastal Management (OCM). CMP development and implementation is typically carried out by the each coastal state's environmental agency or the Department of State.

Regulations: The CZMA regulations are part of the Ocean and Coastal Resource Management Regulations found at 15 CFR Subchapter B, § 921-930 and include the National Estuarine Research Reserve Regulations (§ 921.1-921.82), National Marine Sanctuary Program Regulations (§ 922.1-922.198), Coastal Zone Management Regulations (§ 923.1-923.135); and the Federal Consistency with Approved Coastal Management Programs (§930.1-930.157). CZMA Regulations Link

Geo-Scope: Actions both inside and outside of the state's coastal zone, including actions in another state, that will likely impact their coastal resources.[54]

Protections: The CZMA required CMP elements, the "enforceable policies" of each coastal state's CMP and the states' list of federal actions subject to CZMA Consistency review.

[52] 16 U.S.C. § 1451a) and (h)(i).
[53] Ocean and Coastal Law and Policy, Bauer, Donald C. , Eichenberg, Tim, Snusz, Georgia Hancock, and Sutton, Michael, ABA Section of Environment, Energy and Resources, Second Edition (2015), p. 183.
[54] 15 CFR § 930, et seq.

CZMA FISH AND FISH HABITAT PROTECTIONS

Required CMP Elements

The CZMA requires each state CMP to provide for the protection of natural resources, including "wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone."[55]

Review of Federal Actions

The CZMA's Consistency Provision is a powerful tool that gives states with approved CMPs the authority to review and object to federal projects both inside and outside of a state's coastal zone. Federal actions that will have reasonably foreseeable effects on the state's coastal resources must be consistent with the enforceable policies of each affected state's CMP.[56] Either the federal agency engaging in the activity or the applicant seeking a federal license or permit must conduct a consistency review and render a Consistency Determination stating whether or not the action it intends to take is consistent with the affected state's policies. The state must then determine whether it concurs with or objects to, the Consistency Determination. An objection means the activity cannot move forward unless it can be revised in such a way that meets the state's approval.

The applicability of the consistency provision, and the state's authority over federal actions, is dependent upon the federal action at issue; the resultant coastal effects; and, most important whether the affected state has an enforceable policy to protect its coastal resources against the potential effects.

Federal Actions - There are three types of federal actions subject to consistency review:

> Federal Agency Activities –Activities and development projects performed by a federal agency or a federal agency contractor for the benefit of the federal agency. A "development project" is defined as a project involving the planning, construction, modification or removal of public works facilities or other structures and includes the acquisition, use or disposal of any coastal use or resource.[57]
>
> Federal Licenses or Permitted Activities – Activities performed by a non-federal entity that require federal permits, licenses or other forms of federal approval.[58]
>
> Federal Assistance to State and Local Governments – State and local government projects that may impact the coastal zone for which federal financial assistance is provided.[59]

Interstate Activities - In 2001, the Federal Consistency Regulations were amended to include Federal Activities that have interstate coastal effects. The amendments give states with approved CMP's the authority to identify and review federal activities that will occur in another state but will

[55] 16 U.S.C. §1452(2)(A).
[56] 16 U.S.C. § 1456
[57] 15 CFR § 930.31(b)
[58] 15 CFR § 930.51
[59] 15 CFR § 930.91

affect the reviewing state's coastal resources.[60]

Coastal Effects - The key to the Consistency Provision is the "effects test." The CZMA requires that any federal agency activity, regardless of its location, is subject to the Consistency Provision if it will affect any natural resources, land uses, or water uses in the coastal zone. All federal agency activities that meet the "effects" test are subject to the consistency provision and that there are no exceptions, exclusions or categorical exemptions from this requirement.[61]

The effects test applies to activities and uses or resources outside a state's coastal zone, as long as the uses or resources affected are within the state's coastal zone. The farther away from a state's coastal zone the activity in question occurs, the greater the state's burden of demonstrating the effects upon the coastal resources or uses. The test is whether it is reasonably foreseeable that impacts occurring outside the coastal zone will affect uses and resources of the coastal zone.[62]

Enforceable Policies - Enforceable Policies are policies that are legally binding under state law, such as constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, and through which a state exerts control over private and public coastal uses and resources. Enforceable policies that states want to invoke under the Federal Consistency provision must be incorporated into the state's *federally approved* CMP. A state can add to its enforceable policies at any time*, but unless and until an enforceable policy is submitted to and approved by NOAA's OCM as part of the state's CMP, it simply does not count.*[63]

State Listed Activities - If a development project – meaning a project undertaken by a federal agency - is inside the state's coastal zone, it is presumed to have coastal effects, and a consistency determination must be performed and submitted to the CMP. However, for other types of federal activities, a consistency review is required *only if the state lists the activity and, in some cases, the geographic area involved, in their CZMA consistency list*. Activities and areas that must be listed are as follows:

- Federal agency activities (other than development projects) inside the coastal zone that may result in reasonably foreseeable coastal effects;
- Federal agency activities and development projects outside the coastal zone that may result in reasonable foreseeable coastal effects and the geographic locations, including other states, where listed activities would have such effects;
- All federally-licensed, federally permitted or other federally-authorized activities inside the coastal zone that may result in reasonably foreseeable effects

Unlisted Activities/Listed Activities with No Geographic Location – States can still review unlisted activities or listed activities that are outside of the coastal zone and for which a geographic location has not been described in the state's CMP. However, the state will not receive notification of these activities and must expend resources tracking them and ensuring that the appropriate deadlines are met. The state must notify the applicant, the relevant federal agency and the OCM

[60] 15 CFR § 930.
[61] CZMA Federal Consistency Overview, NOAA Office for Coastal Management, February 20, 2009, Revised January 4, 2016 (OCM Overview), p. 5. See also 15 CFR § 930.11(g).
[62] OCM Overview, p. 5.
[63] 15 CFR § 930.11(h)

of its intent to review such an activity *within 30 days* of receiving either actual or constructive notice of the activity, or it *waives the opportunity for a Consistency Review*. Further, the state's notification is actually a request that can be granted or denied by the OCM based on the OCM's determination as to whether the proposed activity will have reasonably foreseeable effects.[64] For these reasons, it is always better for a state to be over-inclusive in its list of activities subject to review.

Necessary Data and Information – For activities authorized by a federal license or permit, the applicant provides the consistency certification to both the federal agency and the state CMP. In addition, the applicant must provide the state with the "necessary data and information" required by the federal regulations, which specifically includes (i) a copy of the federal permit or license application; (ii) all material relevant to a state's CMP that was submitted to the federal agency in support of the application; (iii) a detailed description of the proposed activity and its coastal effects and any information relied upon by the applicant to make its consistency determination; and (iv) an evaluation and findings relating the potential coastal effects to the relevant enforceable policies of the CMP. [65]

State's may require additional "necessary data and information" but *only if it is included and identified in the state's federally-approved CMP* as "necessary data and information."[66] Additional information that is often critical to a consistency determination is an alternatives analysis. Statistics maintained by NOAA on appeals of state objections to federally-permitted activities reveal that the objections are almost always upheld by the Secretary when there is a reasonable alternative available. However, an alternative analysis is often not required for a federal permit so to ensure it is available for the state and the Secretary to consider on appeal, it must be included in the state's necessary data and information.

Procedural Requirements and Deadlines

Of great importance to a state's use of the consistency provision to review federally licensed or permitted activities are the procedural requirements and deadlines that must be met:

- The state has *six months* to review and object to the proposed activity. *State concurrence is presumed if this deadline is not met.*

- Once an applicant submits a Consistency Certification and supporting information, the state has 30 days to notify the applicant and the federal agency that the submission does not include all of the "necessary data and information." If the state does not provide such notification or request for additional information within the 30 day period, the six month review period is deemed to have commenced on the date the Certification and initial supporting information was submitted.

- The applicant and the state may agree to stay the six month period, the agreement must be in writing. If the state objects to an applicant's Consistency Certification in a timely manner, the federal agency cannot authorize the activity to commence

- The applicant may appeal the state's objection to the Secretary within 30 days of the state's objection. If the Secretary overrides the state's objection, the federal agency may

[64] 15 CFR § 930.54 (a)(1)
[65] 15 CFR §§ 930.58(a)(1) and (3).
[66] 15 CFR S 930.58(a)(2),

authorize commencement of the activity. If the Secretary does not override the objection, the project cannot commence. The Secretary's decision is considered to be a final agency action, meaning the next venue for appeal is the federal courts.

Overrides of State Consistency Determinations

While a state's Consistency Determination carries considerable weight, it is by no means the final word. Under certain circumstances, a decision to override a state Consistency Determination can be made, or it can be determined that a specific project is exempt from compliance. The use of these mechanisms depends upon the type of federal action proposed.

Federal Agency Activities - Consistent to the Maximum Extent Practicable - A state's Consistency Determination regarding a federal agency activity may be countered by a determination that the activity is "consistent to the maximum extent practicable" with the state's Enforceable Policies, meaning it is "fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the federal agency."[67] Thus, priority is given to federal legal obligations to ensure that federal mandates are met even if the state's Enforceable Policies are not. This provision applies only to federal agency activities, and cannot be invoked for activities proposed by non- federal applicants for a federal license or permit.[68] [69]

Federal Agency Activities – The Presidential Exemption - The President may exempt a federal agency activity that is inconsistent with a state's Enforceable Policies, even if the inconsistent determination comes from a final judgment or order of a federal court. To do so, the President must determine that the activity is in the paramount interest of the United States. Again, this exemption applies only to federal agency activities and cannot be invoked on behalf of non-federal applicants seeking a federal license or permit. [70] The Presidential Exemption was added to the CZMA in 1990 and, to date, has been used only once.

Non-Federal Applicants - Overrides by the Secretary of Commerce - Non-federal applicants for federal licenses or permits and state and local government applicants for federal financial assistance may appeal a state's objection to the Secretary, who may override a state's objection if he makes *either* of the following findings:

(1) The activity is "consistent with the objectives or purposes of the CZMA"; *or*

(2) The activity is "otherwise necessary in the interest of national security."[71]

An activity is "necessary to the interests of national security" if a national defense or other national security interest would be significantly impaired if the activity did not go forward.[72] The secretary can be aided by information from the Department of Defense or other interested federal agencies.

[67] 15 CFR § 930.32(a)(1)
[68] NOAA does not keep a data base of states' objections to federal agency activities and there is no data or statistics available quantifying the number of times a federal agency has proceeded over a state's objection based on a finding that the activity was "consistent to the maximum extent practicable." However, a Senior Policy Analyst of the OCM advised that, with respect to federal agency actions "it is rare when a federal agency does proceed over a state's objection."
[69] Email exchange between Susan M. Kennedy and David Kaiser, Senior Policy Analyst, Office of Ocean and Coastal Resource Management (now OCM), NOAA, Silver Spring Maryland, December 20, 2011.
[70] 16 U.S.C. § 1456(c)(1)(B).
[71] 16 U.S.C. §1456(c)(3)(A)
[72] Id. at 6, citing to 15 CFR § 930.121(a)-(c).

The views of these agencies, "while not binding, shall be given considerable weight by the Secretary."[73]

If the Secretary overrides the state's objection, the federal agency issuing the permit or license may authorize the commencement of the activity. This avenue is open only to non-federal applicants.

CZMA Consistency Outcomes

Since the first CMP was approved in 1978, thousands of federal license or permit activities and federal assistance activities have been reviewed for consistency. States have found approximately 95% of them to be consistent with their CMPs. However, during this same period, the following consistency results relating to project applicants' appeals of state consistency decisions have been recorded:

- 143 consistency appeals have been brought by applicants before the Secretary.
- Of the 143 appeals, 45 were actually reviewed on substantive grounds (with the others being dismissed or settled), 14 of which resulted in a decision by the Secretary to override a state's objections and 31 resulted in a decision not to override the state's objections.

THE CZMA CONSISTENCY PROVISION IN THE MID-ATLANTIC REGION

1. How Many Appeals Have Been Brought from Mid-Atlantic State Consistency Objections, and What Was the Outcome?

Several of the appeals discussed above were related to federal activities proposed for the Mid-Atlantic region. A summary table of those appeals is set forth below, followed by a discussion of a few that highlight reasons why the State's objections were either upheld or overridden.

Appellant, Project, Federal Agency	State	Appeal Date	Decision Date	Disposition
Long Island Lighting Co, wetland fill for nuclear plant, ACOE	NY	11/19/86	2/26/88	Overrode state objection National interest outweighs effects
J.K. DeLyser, Dock & Boathouse, ACOE	NY	1/6/87	2/26/88	Did not override state objection Does not further CZMA objectives
John Bianchi, restaurant Pier, ACOE	NY	9/5/85	1/25/89	Did not override state objection Alternative available
Exxon Service Station, wetland fill, ACOE	NJ	1/7/87	6/14/89	Did not override state objection Effects outweigh National Interest
M/P/ Gagliano, wetland fill, ACOE	NY	7/14/88	10/29/90	Did not override state objection Effects outweigh National Interest
Claire Pappas, restaurant deck, ACOE	NY	3/13/90	10/26/92	Did not override state objection Alternative available
Robert Harris, 75 foot boat dock, 18 slips, ACOE	NY	10/26/90	12/2/92	Did not override state objection

[73] 15 CFR 930.122

				Effects outweigh National Interest and alternative available
Millennium Pipeline Co., natural gas pipeline, ACOE and FERC	NY	6/7/02	12/12/03	Did not override state objection Reasonable alternative available
AES Sparrows Point LNG, LLC, LNG terminal, ACOE and FERC	MD	08/08/07	06/26/08	Overrode state objections National interest outweighs effects & No alternative available
Broadwater LNG LLC, LNG terminal, ACOE and FERC	NY	06/06/08	04/13/09	Did not override state objections Effects outweigh National interest
Mark Smolinski, Lake Ontario, ACOE	NY	08/21/13	04/14/14	Did not override state objections. Does not further national interest; Not necessary to national security

2. Whether New Jersey's Consistency Objection to Barge Shipments of Nuclear Fuel Rods in State Waters Was Successful (New Jersey I993)

To decommission the Shoreham Nuclear Power Station in Wading River, NY, the Long Island Power Company (LIPA) needed to dispose of more than 560 unused nuclear fuel rods.[74] Given the fuel rods' nearly-new status, the Limerick Generating Plant in Pennsylvania agreed to take them, and LIPA determined it would transport them to that facility through 33 barge shipments. The barges would travel south from Long Island through the Atlantic Ocean coming within 15 miles of the New Jersey Coast at several points, then travel around Cape May through New Jersey waters and into the Delaware River, docking at Eddystone, Pennsylvania.[75]

Concerned about the project, the NJDEP notified the Coast Guard, LIPA and NOAA that the CZMA required LIPA to submit a Consistency Certification demonstrating compliance with the New Jersey CMP.[76] The NJDEP claimed that LIPA's submission of its operations and transport plan to the Coast Guard for approval constituted an application for a required federal license or permit, triggering the CZMA's consistency review requirements.[77] To demonstrate the activity was reviewable by an enforceable policy in the state's CMP, the NJDEP pointed to its Federal Consistency Handbook, which included "permits and authorizations for the handling of dangerous cargo by vessels in U.S. Ports."

Ignoring the NJDEP's demands, Coast Guard granted LIPA the necessary permissions, LIPA failed to submit the Consistency Certification and the barge shipments commenced. The NJDEP filed a lawsuit against LIPA seeking to stop the shipments.[78]

The court disagreed with NJDEP's arguments, finding that the Coast Guard approval did not fall within a category of licenses listed in New Jersey's coastal zone management program as requiring consistency review.[79] First, the court noted that the activity NJDEP pointed to in its Consistency Handbook pertained to such activities in U.S. Ports, and no New Jersey port was involved in the barge shipments at issue. The court further determined that, even if such a port was involved, the Handbook was not part of NJDEP's approved CMP: NJDEP never consulted

[74] New Jersey Department of Environmental Protection v. Long Island Power Authority, 30 F.3d 403, 406 (3rd Cir. 1994).
[75] Id. at 407.
[76] Id.
[77] Id. at 419.
[78] Id.
[79] Id. at 420

with NOAA about the Handbook and it was never approved by NOAA, as was required for the document to become an approved and enforceable policy of its CMP. As such, the permits were not officially listed by the NJDEP for consistency certification and the State had no authority to object.[80]

3. Whether Maryland's Consistency Objection to an LNG Facility in its Chesapeake Bay Environmental Critical Areas was Appropriate and Successful (MD 2008)

AES Sparrows Point, LLC, a private energy company, proposed the construction of a Liquid Natural Gas (LNG) import terminal and related transmission pipelines at Sparrows Point, a heavily industrialized coastal area on the Chesapeake Bay. It applied to the Federal Regulatory Energy Commission (FERC) for authorization, and, as part of the extensive pre-filing process, FERC consulted with various Maryland state agencies regarding the project. [81]

In response to public opposition to the project, the Baltimore County Council adopted Bill 9-07 which amended the County's zoning regulations to include LNG terminals to the list of prohibited uses in the "Chesapeake Bay Critical Area." The zoning amendment prevented AES from constructing the LNG facility at Sparrows Point.[82] The County then requested Maryland's Critical Area Commission for the Chesapeake and Atlantic Coastal Bays to amend its Chesapeake and Atlantic Coastal Bays Critical Area Protection Program (CAPP) to include Bill 9-07. The CAPP was adopted by the Maryland legislature and is one of 50 state laws that comprise the state's NOAA-approved CMP. The Critical Area Commission obliged and approved the adoption of Bill 9-07 as part of the CAPP. However, *this change was never presented to NOAA for review and approval*, as is required by the CZMA's implementing regulations.[83]

AES filed suit against the County seeking a declaration that Bill 9-07 was unlawful and sought injunctive relief to prevent it from being used to prevent the terminal construction. It based its argument on the "preemption clause" of the Natural Gas Act (NGA) that provides that FERC "shall have the exclusive authority to approve or deny an application for the siting, construction, expansion or operation of an LNG terminal."[84] In response, the County pointed to the "savings clause" of the NGA that states "nothing in the [NGA] affects the rights of the States under the Coastal Zone Management Act…"[85]

The court agreed with the county's interpretation of the NGA's savings clause, finding that the savings clause "exempts the rights of states under the CZMA from the preemptive force of FERC's exclusive authority to site LNG terminals."[86] However, the court also reminded the County that the mechanism the CZMA provides for the exercise of those rights is a *federally-approved* CMP and, contrary to the CZMA regulations, Bill 9-07 was never presented to NOAA for approval.[87] Unless and until Maryland did so, Bill 9-07 "is not part of Maryland's CMP and cannot be saved from preemption by the NGA's savings clause." Because of this procedural failure, Bill 9-07 was preempted by the exclusive rights granted FERC under the NGA to approve applications for LNG

[80] Id. at 420
[81] AES Sparrows Point LNG, LLV v Smith, 557 F.3d 120, 123-124 (4th Cir. 2008).
[82] Id.
[83] Id. at 124-125; 15 CFR § 930.11(h)
[84] 15 U.S.C. 717b(e)(1).
[85] 15 U.S.C. 717b(d)(1).
[86] AES Sparrows at 126.
[87] Id.

terminals, and could not be enforced to prevent the construction of the LNG terminal at Sparrows Point.[88]

4. Whether New York's Consistency Objection to and LNG Floating Storage Facility and Pipeline in Long Island Sound was Appropriate and Successful (NY, 2009)

Broadwater Energy LLC sought authorization from FERC to construct a floating LNG storage and regasification terminal in 90 feet of water in the middle of Long Island Sound. The proposed terminal would be located 9 miles from the nearest Long Island shore and would require the construction of a 21.7-mile long 30-inch diameter subsea lateral pipeline that would tie into the existing Iroquois Gas Transmission System.[89]

New York State reviewed the project pursuant to the CZMA consistency provision, and objected to the project, finding that it was inconsistent with the enforceable policies of the Long Island Sound Coastal Management Program (LICMP). Broadwater filed a timely notice of appeal, requesting that the Secretary of Commerce override New York's objection.[90]

In considering the appeal, the Secretary first determined that New York's objections were properly based on the enforceable policies of its federally-approved CMP. Then, he considered whether the activity was consistent with the objectives or purposes of the CZM, a question that if answered affirmatively, would allow an override of New York's objections.[91] In an effort to demonstrate that the activity was not consistent with the CZMA, New York identified the adverse coastal effects it would cause, and argued that they outweighed any national interest promoted by the project. The adverse effects were numerous, and included:

- Adverse coastal effects on the scenic and aesthetic enjoyment of Long Island Sound.[92]
- Adverse coastal effects from the entrainment and impingement of aquatic organisms caused by the withdrawal of approximately 28.2 million gallons of water daily for terminal ballast and cooling water.
- Adverse coastal effects on benthic habitat and EFH caused by the digging of a trench and other construction activities associated with the placement of the 21.7 mile pipe on the sea floor.
- Adverse coastal effects on both commercial and recreational vessel traffic caused by the 1.5 square mile Coastguard-required safety and security zones around both the LNG terminal and the tankers transiting in the Sound.
- Adverse coastal effects on the commercial fishing and lobster industries caused by the safety and security zones

[88] Id. at 127.
[89] Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC from an objection by the State of New York, April 13, 2009 (Broadwater Appeal), p.1
[90] Id.
[91] Id. at 6, citing to 15 CFR § 930.121(a)-(c).
[92] Id. at 20

- Adverse coastal effects on endangered species in the Sound, including loggerhead, leatherback, Kemp's ridley and green sea turtles, as well as right whales, humpback whales, and fin whales.[93]

The Secretary determined that the project did further several CZMA objectives, including that it was a major coastal-dependent energy facility; its location 9 miles off shore would protect nearshore resources; and its promotion of natural gas, generally recognized as a cleaner burning fuel, would to some degree preserve and protect the nation's coastal resources.[94] In addition, the project furthered the national interest in both a "significant and substantial" way, as defined in the CZMA, because it has economic implications beyond the immediate locality and makes an important contribution to the nation's interests in meeting future energy requirements.[95]

With the exception of effects on the scenic and aesthetic enjoyment of the Sound, *the Secretary rejected every single adverse coastal effect identified and supported by New York* in its objection to Broadwater's consistency certification. The Secretary concluded that these effects would be minimal or would be mitigated by conservation and other measures agreed to by the applicant. Significant to this determination was the fact that "none of the resource agencies that have commented on this appeal have stated that effects resulting from the pipeline construction would be unacceptable."[96]

However, the Secretary ultimately agreed with New York that the national interest furthered by the project did not outweigh the adverse scenic and aesthetic coastal effects caused by the project.[97] In so finding, the Secretary acknowledged that, "as the positions of the parties make clear, there is room for debate on whether the scenic and aesthetic effects to the Sound are significant" and characterized the issue as a dispute with an "inherently subjective nature." Nevertheless, the Secretary determined that, although these impacts might carry less weight if the project was located elsewhere, "they are highly significant when occurring in an area that is nationally prized for its unspoiled scenic beauty *and has been carefully managed for decades by federal, state and local governments in a manner calculated to protect its unique scenic and aesthetic character*.[98] He stated further:

> "In the end, however, the decades of past efforts to protect the Sound objectively and persuasively demonstrate both the importance of this characteristic and the significant adverse effect the Project would impose. While other effects that would result from the Project are, for the most part, minor and limited in scope, they take on greater weight in the aggregate and also further tip this balance."[99]

For all of these reasons, the Secretary determined that "New York's objection to the Project *operates as a bar under the CZMA to federal agencies issuing licenses or permits necessary for the construction or operation of the Project*."[100]

[93] Id. at 30.
[94] Id. at 10.
[95] Id. at 11;
[96] Id. at 23
[97] Id. at 13.
[98] Id. at 20 (emphasis added)
[99] Id at 36
[100] Id. at 37, emphasis added

STATUTE: Endangered Species Act, 16 U.S.C.A. §§ 1531-1544

THE BASICS:

Purpose: To conserve the ecosystems endangered and threatened species depend on, provide a program for the conservation of threatened and endangered species and facilitate adherence to international treaties intended to protect species from extinction.[101]

History: Preceded by the Endangered Species Preservation Act of 1966; Amended in 1969 to prohibit the import and sale of species in danger of extinction; In 1973, the ESA was adopted to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); Amendments to the ESA occurred in 1978, 1982, 1984 and 2004, although the overall framework remains intact.[102]

Agency: Jointly administered by the Secretary of the Interior through the U.S. Fish and Wildlife Service (FWS) and the Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA) National Marine Fishery Service (NMFS). Generally, the FWS is responsible for avian, terrestrial and wildlife species as well as marine turtles when they are nesting on beaches. The NMFS is responsible for marine and anadromous species and marine turtles when they are in the ocean.

Regulations: The joint regulations are found at 50 CFR § 400-453 and include provisions for Interagency Cooperation in Implementing the ESA (Section 402), Factors for Listing, Delisting or Reclassifying Species (Section 424.11), Criteria for Designating Critical Habitat (Section 424.12); and the Endangered Species Exemption Process (Section 450). ESA regulations developed and implemented by the NMFS for marine species are found at 50 CFR § 200 – 216. ESA Regulations Link ;

Geo-Scope: Listed and endangered fish species and their critical habitat in U.S. waters, including the EEZ (between three miles and 200 (nautical) miles from shore) as well as in state waters when a state's regulations or actions interfere with or are less protective than the ESA protections.

Protections: Species listed as endangered or threatened; critical habitat of listed species; habitat protection plans; recovery plan requirements; agency consultations

[101] 16 U.S.C. § 1531(b).
[102] U.S. Fish and Wildlife Service Endangered Species Program website, History of the Endangered Species Act, https://www.fws.gov/endangered/laws-policies/esa-history.html.

ESA FISH AND FISH HABITAT PROTECTIONS

Listing of Threatened and Endangered Species

In order for a species to be protected under the ESA, it must be formally listed as threatened or endangered. An endangered species is one that is in danger of extinction throughout all or a significant portion of its range.[103] A threatened species is one that is likely to become an endangered species within the foreseeable future.[104]

Listing of a species is initiated by filing a petition with either the FWS or the NMFS, and can be initiated by those agencies or by "any interested person."[105] Notification of the petition must be provided to the state agency responsible for the management of the species identified in the petition in each state where the species occurs.[106] This same process is utilized to delist or reclassify a species. The Secretary of the Interior administers the list, but for the marine and anadromous species under his or her jurisdiction, the Secretary of Commerce determines whether a species should be listed or removed from the list.[107]

A decision to list a species must be made "solely on the basis of the best available scientific and commercial information" regarding a species status, without consideration of or reference to the economic or other impacts of the determination.[108] A determination that a species is endangered or threatened is based on any of the following five factors:

- The present threatened destruction, modification or curtailment of the species' habitat range;
- Overutilization of the species for commercial, recreational, scientific or educational purposes;
- Disease or predation;
- The inadequacy of existing regulatory mechanisms; or
- Other natural or manmade factors affecting its continued existence.[109]

The ESA allows for the listing of "Distinct Population Segments" (DPS), which is a portion of a species' or subspecies' population or range. The DPS is described geographically instead of biologically and allows the ESA's protections to be applied only to the deteriorating portion of a species' range. Threats can then be addressed in that specific (and smaller) area instead of waiting until the entire species has declined to the point that the entire species is endangered throughout its range.[110]

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[103] 16 U.S.C. §1532(6)
[104] 16 U.S.C. §1532(20)
[105] 50 CFR § 424.14 (a)
[106] 50 CFR § 424.14 (b)
[107] 16 U.S.C. § 1533(a)(2)
[108] 16 U.S.C. § 1533(a)(3)(b)(1)(A); 50 CFR § 424.11(b)
[109] 16 U.S.C. § 1533(a)(1)
[110] See, Little Known But Important Features of the Endangered Species Act, U.S. FWS (Pacific) website, https://www.fws.gov/pacific/news/grizzly/esafacts.htm

Only two coastal marine fish species are listed as endangered in the Mid-Atlantic region: the Atlantic Sturgeon and the Shortnose sturgeon. Both are anadromous species, meaning they hatch in rivers, migrate to the ocean and then return to the river to spawn.

In 2012, the Atlantic Sturgeon (Atlantic subspecies, *Acipenser oxyrinchus oxyrinchus) was listed as endangered in two Mid-Atlantic DPS's:*

- *The Chesapeake Bay DPS, which includes the Bay and its tributary, the James River;*
- *The New York Bight DPS, which includes portions of both New York and New Jersey waters and two of its tributaries, the Hudson River and the Delaware River.*

The Shortnose sturgeon was listed as endangered in 1967 and remains on the endangered list throughout its entire range along the east coast of North America from Florida to Canada.[111]

Designation of Critical Habitat

For each species listed, the Secretary must designate any habitat that is considered critical for that species.[112] Critical habitat refers to the specific areas occupied by the species that contains biological or physical features essential to the conservation of the species and that might require special management considerations or protections.[113] Critical Habitat can also include areas outside the geographical area occupied by the species, if such areas are deemed essential for the conservation of the species.[114]

Designations of critical habitat must be based on the best scientific data available" but unlike a species listing, must also take into consideration the "economic impact, and any other relevant impact" it will have.[115] The Secretary can exclude any area from critical habitat if the benefits of the exclusion outweigh the benefits of including the area, unless the failure to include the area as critical habitat will result in the extinction of the species.[116]
The ESA states that critical habitat should be designated concurrent with the species listing, but in actuality, the habitat is usually designated after – sometimes many years after – the listing. For example, the DPSs of Atlantic sturgeon were listed as endangered in 2012, and, even though DPSs listings are based on geography, no critical habitat associated with those listings was designated at that time. Critical habitat for the New York Bight, Chesapeake Bay and another Gulf of Maine DPS was proposed through the publication of a draft rule on June 3, 2016. Public comments were solicited and reviewed and the final rule designating the critical habitat was just issued on August 15, 2017, five years after the species listing.

Protections of Listed Species and Designated Critical Habitat

Once a species is listed, the ESA mandates that "all federal departments and agencies shall seek to conserve" that species and "shall utilize their authorities in furtherance of [this] purpose."[117]

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[111] See, Endangered and Threatened Marine Species Under NMFS Jurisdiction, NOAA Fisheries website, http://www.nmfs.noaa.gov/pr/species/esa/listed.htm#fish
[112] 16 U.S.C. § 1533(a)(3)(A).
[113] 16 U.S.C. § 1532(5)
[114] Id.
[115] 16 U..S.C. § 1533(b)(2).
[116] Id.
[117] 16 U.S.C. § 1531(c)(1)

The goal is to facilitate recovery of the listed species to the point where ESA protections are no longer required and it can be removed from the list.[118]

Recovery Plans – For each species listed, the Secretary is required to develop a recovery plan that will promote the conservation for the species, unless it is found that such a plan will not promote the species' conservation.[119] Each recovery plan must incorporate:

- A description of site specific management actions necessary to for conservation and survival of the species;
- Objective, measurable criteria which will result in a determination that the species can be removed from the list; and
- Estimates of the time required and the cost to carry out those measures.[120]

Prior to approval of a new or revised recovery plan, the public must be given the opportunity to review and comment on the plan, and all information provided during the public comment period must be considered prior to approval.[121]

Section 7 Consultations – The ESA directs federal agencies to insure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or modification of critical habitat.[122] Each federal agency must consult with the Secretary prior to undertaking any such action and the Secretary then has 90 days (or longer if extended)) to issue a written statement setting forth his opinion regarding the impacts of the action. If the Secretary finds jeopardy to the species or adverse modification or destruction to critical habitat, the statement must also suggest "reasonable and prudent" alternatives that can be taken by the agency and applicant in implementing the action.[123]

The agency taking or permitting the action can reject the Secretary's determination, but this is extremely rare. If the Secretary's determination is rejected, and an alternative approach that will avoid the harm the identified is not developed, the agency must seek an exemption from the ESA restrictions from the Endangered Species Committee, a cabinet-level entity created by the ESA.[124] To date, the exemption procedures have been rarely invoked.[125]

Biological Assessment – As part of the Section 7 Consultation, each agency must request information from the Secretary regarding whether any species listed or proposed for listing is present in the area of the proposed action. If the Secretary advises that such a species is present, the agency must conduct a biological assessment to identify any endangered or threatened species that are likely to be affected by the action.[126] The results of the Biological Assessment will inform the Section 7 Consultation process and the Secretary's statement.

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[118] 16 U.S.C. § 1532(3)
[119] 16 U.S.C. § 1533(f)
[120] 16 U.S.C.§ 1533(f)(1)(B)
[121] Id.
[122] 16 U.S.C. § 1536(a)(2).
[123] 16 U.S.C. § 1536
[124] 16 U.S.C. § 1536(e) and (g).
[125] Ocean and Coastal Law and Policy, supra note 6, at p. 564.
[126] 16 U.S.C. § 1536(c)

Prohibitions Against Take of Endangered Fish and Wildlife – The ESA makes it unlawful for anyone to "take" members of an endangered species within the U.S. or its territorial sea, and upon the high seas by persons subject to U.S. jurisdiction.[127] The term "take" is defined as "to harass, harm, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[128] To assist in implementation and enforcement of this provision, the USFWS and NMFS ESA regulations further define the terms "harass" and "harm" as they are used in the definition of "take".

Harass means "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns, which include but are not limited to breeding, feeding, or sheltering."[129]

Harm means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.[130]

Cooperation with States – The ESA encourages cooperation between the federal government and states to conserve and protect listed species, and authorizes the Secretary to enter into cooperative agreements with any state that establishes a program for the conservation of endangered and threatened species.[131] States that enter into cooperative agreements are eligible for federal financial assistance to help administer its program, an incentive intended to encourage states to develop their own programs. All five Mid-Atlantic states discussed in this report have entered into cooperative agreements with the NMFS, with the first being New York (1992), followed by Maryland (1998), New Jersey (2004), Delaware (2007) and Virginia (2009). The agreements identify the marine mammals, turtles and reptiles that, in addition to the fish species, have been listed as endangered or threaten.

THE ESA IN THE MID-ATLANTIC REGION

1. Whether the FWS's Response to a Petition to List a Species as Endangered Was Timely (New Jersey, Delaware 2005).

In the summer of 2005, several conservation organizations, including the American Bird Conservancy, the American Littoral Society, Defenders of Wildlife, the Delaware and New Jersey chapters of the Audubon Society and the Delaware Riverkeeper Network (the Stakeholders), petitioned the U.S. FWS (FWS) to list the red knot as endangered on an emergency basis.[132] Documents in support of the petition demonstrated that the number of red knots observed in the Delaware Bay area over several decades had dwindled from a high of approximately 95,000 down to 14,000. This decline occurred despite the fact that restrictions on harvesting of horseshoe crabs – a major food source for the birds and a significant contributing factor to their decline - had been in place since 1999.

The FWS declined to review the petition on an emergency basis, but stated it would review it in a non-emergency context. In June 2006, nearly a year after the petition had been filed, the FWS had not yet responded to the petition, prompting the Stakeholders to file an action in the

[127] 16 U.S.C. § 1538(a)(1).
[128] 16 U.S.C. § 1532(19)
[129] 50 CFR §17.3
[130] 50 CFR § 222.102
[131] 16 U.S.C. § 1535 (c)
[132] American Bird Conservancy v Kempthorne, 559 F.3d 184, 185 (3rd Cir. 2009).

Federal District Court of NJ. They alleged that the agency's failure to consider the petition on an emergency basis violated the ESA and that the ESA was further violated by the FWS's failure to issue timely findings on the petition.[133]

In September 2006, while the District Court action was pending, the FWS issued its final determination on the non-emergent red knot petition, finding that listing of the red knot was warranted, but was precluded by other higher-priority listings. Specifically, the FWS found that the threats to the viability of the red knot were of a high magnitude and that the species was at High risk", especially due to the modification of habitat through harvesting of horseshoe crabs. Nevertheless the agency determined that the threats were "non-imminent" because of additional restrictions on the harvesting of horseshoe crabs implemented by the States of New Jersey and Delaware.[134] The FWS assigned the listing of the red knot a priority of 6 on a scale of 1 to 12, with 1 being the highest priority. The FWS published its findings as a Candidate Notice of Review (CNOR) in the Federal Register.[135]

The Groups amended their claims before the District Court to remove the timeliness argument, but continued to assert that an emergency listing of the species was warranted. The District Court, and, on appeal, the 3rd Circuit Court of Appeals, dismissed the Groups' emergency listing claim as "moot", finding that it was adequately addressed by the FWS's CNOR leaving no issues for the court to address.[136]

A final rule to list the red knot as threatened under the ESA was published by the FWS more than eight years later, on December 11, 2014, with an effective date of January 12, 2015. The species was listed as endangered by the State of New Jersey in 2006.

2. **Whether (i) Drastic Unexplained Changes to a FWS Biological Assessment can Withstand ESA Scrutiny and (ii) Mitigation Measures to Protect a Listed Species Require a Reasonable Certainty of Success** (New York 2014).

Throughout 2013 and 2014, the USACE developed plans for a proposed dune and beach construction project on Fire Island, New York, to address shoreline erosion that occurred as a result of Hurricane Sandy.[137] Because the project areas is a known nesting site for piping plover, a federally threatened and New York State endangered species, the ACOE consulted the FWS. The FWS determined that the project would include dune or beach construction along 19 miles, or 63%, of Fire Island's coastline and would impact 100% of the existing overwash habitat used by piping plover.[138]

In accordance with ESA requirements, the FWS prepared a draft Biological Opinion and determined that the project "would adversely affect breeding populations of plovers and their habitat."[139] The Biological Opinion also included the following FWS conclusion:

> "[T]he effects of the proposed action, taken together with the status of the species, the environmental baseline and the cumulative effects, *are likely to appreciably*

[133] Id.
[134] Id. at 187.
[135] Id.
[136] Id. at 188.
[137] National Audubon Society v U.S. Fish and Wildlife Service, 55 F. Supp 3d 316, 322 (E.D. NY 2014).
[138] Id. at 324-325.
[139] Id. at 325.

> *reduce the likelihood of both the survival and recovery of the piping plover in the wild by reducing its reproduction, abundance and distribution*."[140]

After review and comment and intense pressure from the ACOE and other interests, the FWS issued a final Biological Opinion from which its previous conclusions had been removed. This time the Biological Opinion stated that the level of anticipated take of piping plover over the life of the project would approximate 11 pairs, and concluded that this loss *was not likely to appreciably reduce the likelihood of survival and recovery of the species in the wild*.[141] The FWS issued a "no jeopardy" determination, allowing the project to move forward. In support of this determination, the Biological Opinion relied heavily upon conservation and mitigation measures that the ACOE stated it would incorporate into the project.[142]

In a lawsuit against the FWS and ACOE, the National Audubon Society questioned the stark difference between the first and final Biological Opinions, and argued the final no jeopardy determination was arbitrary and capricious and contrary to the biological facts actually cited in the final Biological Opinion. The Society also challenged the FWS's reliance on "vague and uncertain conservation measures" to justify its no jeopardy opinion, noting that some of the measures are experimental and unproven and were actually described in the Biological Opinion *as unlikely to succeed*. [143]

The court disagreed with the Society, finding that the FWS was entitled to change its mind and that, among other things, the Society failed to demonstrate that the "no jeopardy determination is *so implausible that it cannot be ascribed to a difference of opinion*." [144]

The court also found that the FWS's reliance upon the ACOE's proposed conservation measures to issue its no jeopardy finding was proper, and dismissed the Society's claims that they were experimental or unlikely to succeed. Significantly, the court supported this conclusion with the following rationale:

> "While the proposed mitigation measures must ensure against jeopardy to the protected species if they work as intended, while there must be a rational reason to expect them to work as intended and while they must in fact be possible to implement, *there is no requirement for the FWS to ensure the overall success of the plan*. In other words, *it is the implementation of the proposed conservation or mitigation measures themselves, and not the anticipated results of such measures, that must be certain to occur*..[It's enough that] there is at least a rational reason to expect them to work as intended; there is no requirement for the FWS to ensure the overall success of the plan."[145]

[140] Id at 354 (Emphasis added)
[141] Id.
[142] Id. at 355
[143] Id. at 353, 354.
[144] Id. at 354.
[145] Id at 355, emphasis added because I can hardly believe a court really said these words.

STATUTE: National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4370-d (NEPA)

THE BASICS:

Purpose: To ensure federal actions and programs account for and provide full and fair discussion of significant environmental impacts; to inform decision makers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.[146]

History: Adopted in 1969; Amended periodically to clarify and continue funding the Council on Environmental Quality (CEQ) administration. Over the past decade, has faced numerous efforts to weaken its provisions, including excluding certain federal actions from the EIS requirements.

Agency: NEPA established the CEQ in the Executive Office of the President and authorized CEQ to develop regulations. Each federal agency is required to adopt its own regulations to supplement CEQ's and ensure their respective programs meet NEPA requirements.[147]

Regulations: CEQ regulations are found at 40 CFR §§ 1500-1518 (Chapter V) and include the Purpose, Policy and Mandate of NEPA (§ 1500); NEPA and Agency Planning, i.e., requirements for agencies to Integrate NEPA into their programs (§ 1501); Environmental Impact Statements (§ 1502); Requirements for agencies to adopt their own NEPA decision-making procedures (§1505); and Public Involvement (§1506) CEQ NEPA Regulations Link

Geo-Scope: Applies in all areas under exclusive U.S. control, including the EEZ[148] and United States Trust Territories. Also applies in other countries when the U.S. has control over the project or action[149] or where the effects of the action will occur in the U.S.[150]

Protections: Requires Consideration of Environmental Impacts of all Major Federal Actions with Significant Effects on the Environment; Requirements apply to all Federal Agencies; Preparation of Environmental Impact Statements and Environmental Assessments; Finding of No Significant Interest to support a determination that no EIS is required; Supplemental EIS required when action or project has changed or environmental conditions have changed.

[146] 40 CFR § 1502.1
[147] 40 CFR § 1507.3
[148] Natural Resources Defense Council v. U.S. Department of the Navy, 2002 WL 32095131 (C.D. Cal. 2002). The court determined that the decision making regarding the sonar tests at issue occurred in the U.S. and that the U.S. has "substantial, if not exclusive legislative control of the EEZ."
[149] Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978), finding NEPA applies to construction of highway from Columbia to Panama when U.S. has control over the construction and bears two-thirds of the financial responsibility.
[150] National Organization for the Reform of Marijuana Laws v. Department of State, 452 F.Supp.1226 (D.D.C. 1978).

Requires public participation in EIS process, including review and comment of draft and final EIS.

NEPA FISH AND FISH HABITAT PROTECTIONS

Environmental Impacts of Major Federal Actions

Members of the U.S. Senate articulated the need for and importance of NEPA as follows: "One of the major factors contributing to environmental abuse and deterioration is that actions – often actions having irreversible consequences – are undertaken without adequate consideration of, or knowledge about, their impact on the environment."[151] NEPA sought to remedy this situation by requiring federal agencies to consider the impacts to the environment that would be caused by every major decision made in all of their programs.

NEPA requires the preparation of a detailed Environmental Impact Statement for all "major federal actions significantly affecting the quality of the human environment."[152] The CEQ regulations define the terms used in this threshold determination, and provide examples of major federal actions.

Major Federal Actions – Such actions include those "with effects that may be major and which are potentially subject to Federal control and responsibility." The term "actions" includes an agency's failure to act and is among the actions that are reviewable by a court or administrative tribunal.[153]

Relevant actions tend to fall into one of the following categories[154]:

- Adoption of official policy, such as rules, regulations and interpretations; treaties and international conventions or agreements; formal documents establishing an agency's policies which create or substantially alter agency programs;
- Adoption of formal plans;
- Adoption of programs; and
- Approval of specific projects

Thus, NEPA applies not only to specific agency actions, such as the establishment of annual catch limits for a fishery, but to the overall management program or FMP developed for that fishery.

Effects - The term "effects" includes direct effects, which are caused by the action and occur at the same time and place; indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable; and cumulative impacts,

[151] Senate Report No. 91-296, (1969), p. 4, quoted by *Ocean and Coastal Law and Policy*, Bauer, Donald C. , Eichenberg, Tim, Snusz, Georgia Hancock, and Sutton, Michael, ABA Section of Environment, Energy and Resources, Second Edition (2015), p. 181.
[152] 42 U.S.C. §4332(C).
[153] 40 CFR § 1508.18
[154] 40 CFR § 1508.18

meaning the impacts on the environment when added to other past, present and reasonably foreseeable future actions, regardless of what agency (federal or non-federal) or person undertakes such actions.[155]

Significant Effects – As used in NEPA, whether an effect is significant "requires consideration of both context and intensity." Context requires analysis of the impacts on society as a whole, the affected region, and the specific locality and varies with the site of the proposed action. Intensity requires the consideration of a host of factors – the regulations list ten – including the degree to which the action affects public health and safety; the degree to which the effects on the environment are highly controversial, highly uncertain, or involve unique or unknown risks; and the unique characteristics of the area such as proximity to wetlands or ecologically critical areas.[156]

The NOAA document, "Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities" demonstrates how NOAA evaluates whether the potential environmental effects of an action are significant.[157] In addition to evaluating the context and intensity of effects, NOAA considers the degree to which the action may adversely affect:

- Stocks of marine mammals as defined in the Marine Mammals Protection Act
- Managed fish species
- Essential fish habitat as defined by the MSA
- Vulnerable marine or coastal ecosystems, including, but not limited to, deep coral ecosystems;
- Biodiversity or ecosystem functioning, such as benthic productivity, predator-prey relationships; and
- Whether the action may result in the introduction or spread of invasive species.

Human Environment – This term is to be interpreted "comprehensively to include the natural and physical environment and the relationship of people with that environment."[158] This means that economic or social effects do not by themselves require an EIS, but when an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, then the EIS will discuss these effects on the human environment.[159]

Environmental Assessment

An Environmental Assessment (EA) is the initial analysis that determines whether the significant effects threshold is met and a more comprehensive Environmental Impact Assessment is required. It should be a "concise public document" that "briefly" discusses the need, the environmental impacts and alternatives to the proposed action, as well as the other agencies and

[155] 40 CFR § 1508.8; 40 CFR §1408.7
[156] 40 CFR § 1508.27
[157] Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities, Companion Manual for NOAA Administrative Order 216-6A, January 13, 2017, p. 14
[158] 40 CFR § 1508.14
[159] Id.

persons consulted.[160] It must also "provide sufficient evidence and analysis" for determining whether to prepare an EIS or to support a "Finding of No Significant Impact" (FONSI).[161] In other words, if an EA supports a FONSI, than an EIS is not required. Conversely, if an EA indicates an action will have significant effects, an EIS must be prepared.[162] This is where the importance of the term "significantly" comes into play, which is one of the most litigated issues under NEPA.[163]

Environmental Impact Statements

The EIS is the mechanism through which the intent of NEPA is implemented, and is described by the CEQ regulations as follows:

> "The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused in the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment….Statements shall be concise, clear and to the point, and shall be supported by evidence that the agency has made the necessary environmental analysis. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions."[164]

The regulations suggest a specific format, with detailed descriptions of some of the more important and required elements to be included, such as a detailed discussion of the environmental consequences of the proposed action and a thorough alternatives analysis that includes the environmental impacts of each alternative as well as a "no action" alternative.[165] All methodologies used by the federal agencies preparing the EIS must be identified in the document and scientific and other sources relied upon for conclusions in the EIS must be explicitly referenced.[166]

Public Engagement Requirements

NEPA requires federal agencies to "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" and, as a result, the opportunity for public engagement exists at several points in the process.[167] With regard to the EA process, agencies have discretion as to how and when to involve the public. As a result, some agencies provide an opportunity for public review and comment of an EA before a FONSI is issued while others do not.[168] In instances where stakeholders have sued to gain access to the EA process, courts have generally held that the public must be involved in some way.[169]

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[160] 40 CFR § 1508.9
[161] Id.
[162] 40 CFR § 1501.4(e); 40 CFR § 1508.9
[163] Ocean and Coastal Law and Policy, supra., note 6, at p. 184.
[164] 40 CFR § 1502.1, Purpose of EIS.
[165] 40 CFR §§ 1502..10 – 24.
[166] 40 CFR § 1502.25
[167] 40 CFR §1506.6
[168] A Citizens Guide to the NEPA – Having Your Voice Heard, Council on Environmental Quality Executive Office of the President, December 2007, p. 21 noting "it depends on the agency."
[169] Ocean and Coastal Law and Policy, supra note 6, at p. 214.

With regard to the EIS process, NEPA requires public involvement in several stages:

- The "scoping" process, during which the agency must publish a Notice of Intent in the Federal Register, to allow public review and comment on the scope of issues to be addressed, to identify and eliminate issues that are not significant, as well as the range of actions, alternatives and impacts to be considered in the EIS.[170]

- The draft EIS, for which the agency must "request comments from the public, affirmatively soliciting comments from those persons or organizations who might be interested or affected."[171]

- The final EIS, in which the agency's response to the comments received regarding the draft EIS must be included, with possible responses being to modify alternatives; develop and evaluate alternatives not previously considered; supplement, improve or modify its analysis; make factual corrections; or explain why comments do not warrant further agency response with citations to supporting sources, authorities or reasons.[172]

Record of Decision

The EIS process is completed when the agency issues a Record of Decision (ROD) that describes the alternative chosen and identifies the most environmentally preferred alternative. The ROD must state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.[173] For any mitigation recommended, an environmental enforcement and monitoring program must be adopted and summarized in the ROD.[174]

Programmatic Environmental Impact Statements and Tiering

NEPA allows agencies to develop programmatic EISs to cover more wide-reaching and continuous agency actions, such as the development and adoption of formal plans that will guide future actions, or the adoption of new agency programs or regulations.[175] Agencies with programmatic EISs can engage in "tiering," meaning the preparation of a broad EIS to cover general matters followed by the preparation of subsequent narrower EISs concentrating solely on the subsequent issues at hand. This allows agencies "to focus on the issues that are ripe for consideration and exclude from consideration issues already decided or not yet ripe."[176]

An example of a programmatic EIS and tiering in the fisheries context would be a programmatic EIS for the initial adoption of a fishery management plan, with subsequent EISs prepared for significant changes to that plan.

[170] 40 CFR 1508.25
[171] 40 CFR 1503.1(a)(4)
[172] 40 CFR § 1503.4(a)(1)-(5)
[173] 40 CFR § 1502(c).
[174] Id.
[175] 40 CFR § 1500.4(i).
[176] 40 CFR §1508.28 (a) and (b).

Collaborative Review/Simultaneous Review of other Environmental Laws

NEPA contemplates and provides for the circumstance where a NEPA analysis will involve multiple agencies due to their concurrent jurisdiction and responsibilities. The CEQ regulations require the agencies involved to designate in writing a lead agency that will supervise the preparation of the EIS, with the others designated as cooperating agencies.[177] If the agencies cannot agree on which should be the lead agency, they can request a determination from the CEQ.

NEPA also requires that, "to the fullest extent possible," agencies conduct their NEPA review "concurrently with and integrated with other environmental review laws," such as those required under the Endangered Species Act.[178] As a result, in analyzing the environmental consequences of an action, the NEPA EA or EIS will typically include an analysis of all applicable environmental statutes and regulations as part of the NEPA process.[179]

Duty to Supplement Existing Environmental Impact Statements

Agencies are required to supplement an EIS if it makes "substantial changes to the proposed action that are relevant to environmental concerns", or "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[180]

This requirement was an effective mechanism in the fisheries context when conservation groups successfully challenged the continued authorization of the North Pacific groundfish fisheries program.[181] The challengers alleged that the FMPs governing the federal fisheries off the coast of Alaska were subject to NEPA and that the nearly 20-year old EIS supporting the management plans were inadequate. The court agreed and required the NMFS to prepare a supplemental programmatic EIS.[182]

Categorical Exclusions

The CEQ regulations enable agencies to identify activities that do not individually or cumulatively have a significant effect on the human environment and for which neither an EA nor an EIS is required.[183] Known as categorical exclusions, agencies are required to adopt and follow procedures for making such a determination.[184] To avoid the tendency to over-classify actions as categorical exclusions, the procedures must "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect" and under which NEPA environmental review would be required.[185] Despite this requirement, the use of categorical

[177] 40 CFR § 1501.5
[178] 40 CFR § 1502.25
[179] The NOAA document, "Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities" demonstrates that NOAA incorporates into its NEPA process the review of potential adverse effects upon species or habitats protected by the MSA, the ESA, the Marine Mammal Protection Act, the National Marine Sanctuaries Act, and the Migratory Bird Treaty Act; the adverse effects on National Monuments designated through the Antiquities Act of 1906; and other federal, state or local law requirements imposed for protection of the environment. NOAA NEPA Policy and Procedures Manual, supra note 12, p. 4-5.
[180] 40 CFR § 1502.9
[181] Greenpeace v National Marine Fisheries Service, 55 F. Supp. 2d 1248 (W.D. Wash 1999).
[182] Id/
[183] 40 CFR § 1508.4
[184] 40 CFR § 1507.3(b)(2)(ii)
[185] 40 CFR § 1508.4

exclusions has risen steadily for decades.[186] The CEQ has expressed concern, noting that "categorical exclusions are the most frequently employed method of complying with NEPA."[187]

By way of example, categorical exclusions formally designated by NOAA in the fisheries context include the following:

- A technical correction or change to a fishery management action, plan or regulations which does not result in a substantial change in fishing location, timing, effort, authorized gear types or harvest levels.

- Preparation of a recovery plan pursuant to the ESA; however, implementation of specific tasks under a recovery plan may require an EA or ESI.

- Temporary fishery closures or extensions of closures authorized by the MSA to ensure public health and safety, such as due to an oil spill, harmful algal bloom or declared disasters.

- Updates to National Estuarine Research Reserve management plans (does not apply to new NERR plans or specific actions to support the updated NERR management plan).

- Review and approval of changes to state coastal management programs under the CZMA and related NOAA regulations.[188]

The Army Corps of Engineers categorical exclusions include the following:

- Activities at completed Corps projects which carry out the authorized project purposes, such as replacement of existing buildings, roads, levees, groins and utilities.

- Minor maintenance dredging using existing disposal sites.

- Removal of sand, gravel, rock and other material from existing borrow areas.[189]

As stated in the Corps regulations, "even though an EA or EIS is not indicated for a Federal action because of a 'categorical exclusion', that fact does not exempt the action from compliance with any other Federal Law."[190]

Efforts to Weaken NEPA

Perhaps the success and importance of NEPA as an environmental protection tool can be measure by the numerous legislative efforts to rewrite certain NEPA provisions and to limit its applicability to other laws and actions including:

- The 109th Congress House NEPA Task Force issued a report in 2006 recommending amendments to NEPA that would limit the scope of reasonable alternatives considered,

[186] Ocean and Coastal Law and Policy, supra note 6, at p. 216.
[187] Memorandum from Nancy Sutley, Chair, Council on Environmental Quality to Heads of Federal Departments and Agencies on Establishing, Applying and Revising Categorical Exclusions Under NEPA, November 23, 2010.
[188] NOAA NEPA Policy and Procedures Manual, supra note 12, Appendix E – NOAA's List of Categorical Exclusions.
[189] 33 CFR § 230.9, Corps of Engineer, Department of the Army, DOD, Categorical Exclusions
[190] Id.

impose time limits for the completion of EAs and EISs, give more weight to comments from local interests than other interests, and limit who could initiate a NEPA challenge. Congress chose not to implement the recommendations.

- Early versions of the 2007 Magnuson Stevens Reauthorization Act contained language that would exempt MSA actions from NEPA review. Congress rejected this language.

- A bill named the Roadmap for America's Energy Future sought to weaken NEPA's applicability to offshore oil and gas activities by legislatively approving the final EIS for the OCSLA Leasing Program, creating new categories of categorical exclusions, excluding exploration plans from EIS requirements, limiting consideration of alternatives and placing limits on judicial review. The bill has not been passed.

- Another bill, the Restarting American Offshore Leasing Now Act specifically targeted several areas for immediate drilling approval, including parts of the Atlantic Ocean, with no environmental review or public input. The bill passed the House in May 2011, but was never acted upon by the Senate.

NEPA IN THE MID-ATLANTIC REGION

1. Whether and SEIS Was Required for a Channel Deepening Project Occurring 17 Years After the Initial EIS Was Prepared. (Delaware and NJ, 2011)

In 1983, based on the increase in commercial vessel size, Congress directed the ACOE to determine whether it was in the national interest to deepen the channel of the Delaware River.[191] In furtherance of that directive, the ACOE issued a Final Interim Feasibility Report and Environmental Impact Statement (EIS) in 1992 recommending that the channel be deepened five feet, from 40 to 45 feet. Congress accepted these recommendations, directed the ACOE to deepen a 102-mile stretch of the Delaware River from the Philadelphia and Camden Ports to the Atlantic Ocean and provided significant funding for the project.

After additional coordination with various federal agencies, the ACOE addressed other environmental issues raised by them in a 1997 Supplemental Environmental Impact Statement (SEIS).[192] It wasn't until 2009 – 17 years after the EIS was prepared and ten years after the SEIS was prepared – that the ACOE began moving forward with the project. In 2008, in anticipation of the project's commencement, the ACOE prepared an EA discussing project changes and new environmental information, offered a month-long public comment period for the EA and issued a final EA in 2009.[193]

The NJDEP and several other interested parties believed that, due to new environmental concerns that had developed in the many years since the EIS and SEIS were prepared, an EA was not sufficient and a new SEIS was required. Among the new environmental concerns was a 263,000 gallon oil spill that occurred in 2004 when a tanker struck a submerged anchor in the Rive, and a marked increase in Shortnose Sturgeon in the River, a federal and state

[191] NJ Department of Environmental Protection v. U.S. Army Corps of Engineers, 2011 Westlaw 115878 (D.N.J. 2011), p. 2.
[192] Id.
[193] Id.

endangered species. The NJDEP also argued that the ACOE violated NEPA by failing to issue a FONSI which NEPA requires to support an agency's determination that an EIS is not warranted, failing to provide public notice of the 2009 EA and by addressing comments only after the final EA was issued.[194]

The ACOE rejected these arguments, asserting its reliance on a Draft Damage Assessment and Restoration and EA prepared by NOAA that analyzed the impacts of the 2004 spill on the human environment as required by NEPA. Based on sediment samples collected from the River, that report concluded that pre-spill conditions were reached 14 months after the spill.[195] From this, the ACOE concluded that there was no significant change in the project environment since the EIS and SEIS were prepared. The ACOE also argued that the increase in Shortnose Sturgeon in the project area was not a significant change to the quality of the environment because the 1997 SEIS took the species into consideration and established dredging windows and prohibitions.[196]

The Court agreed with the ACOE, noting that "*there are no NEPA regulations in place that prescribe a specific process to determine whether to supplement an existing EIS*."[197] Citing the U.S. Supreme Court's language in a previous case, the court said that, when an agency is determining whether to supplement an EIS, the question to answer is whether "the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered."[198] This, the court concluded, the ACOE had sufficiently answered. Similarly, the court concluded, the public notice requirements plaintiffs raised apply only when an agency is evaluating whether to prepare an EIS, and not whether to supplement and existing EIS.[199]

Following this same reasoning, the court held that the FONSI issue raised by the plaintiffs had no merit because the FONSI is required when an agency is making an initial determination as to whether to prepare an EIS. Noting that the ACOE had already prepared an EIS in 1992 and an SEIS in 1997, it issued its 2009 EA "not to determine whether to prepare an EIS, but rather to assess project changes and new information and to determine whether the existing EIS and SEIS required supplementation."

2. Whether an ACOE EA that Failed to Consider Alternatives Proposed by the FWS to Protect Endangered Species Negated the ACOE's Decision to Issue a FONSI (New York 2014).

In 2014, the USACE released plans for a proposed dune and beach construction project on Fire Island, New York, to address shoreline erosion that occurred as a result of Hurricane Sandy.[200] Because the project area is a known nesting site for piping plover, a federally endangered species, the ACOE consulted the U.S Fish and Wildlife Service (FWS). The FWS determined that the

[194] Id. at 6
[195] Id. at 7.
[196] Id. at 8.
[197] Id. at 6.
[198] Id. at 6, citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989)
[199] Id. at 6.
[200] National Audubon Society v U.S. Fish and Wildlife Service, 55 F. Supp 3d 316, 322 (E.D. NY 2014).

project would include dune or beach construction along 19 miles, or 63%, of Fire Island's coastline and would impact 100% of the existing overwash habitat of piping plover.[201]

The FWS provided recommendations to the ACOE that would avoid or minimize the impacts to the species and their habitat, including four different alternatives to the ACOE's dune alignment proposal: a staggered dune approach, a break in the dunes in certain areas, excluding dunes in certain specific overwash areas, and a "berm only" design. The FWS also recommended sediment texture compatibility measures and changes to vegetation density.[202]

Pursuant to NEPA, the ACOE conducted an EA in which it considered only two alternatives: (i) the project as originally proposed by the ACOE; and (ii) the "no action" alternative, meaning no work at the site at all. The EA did not include the four alternatives proposed by the FWS. The ACOE determined that the project "would result in no significant adverse environmental impacts" and that its proposed project "is the alternative that represents sound engineering practices and meets environmental standards."[203] Based on the conclusions in the EA, the ACOE determined that the preparation of an EIS for the project was unnecessary, and issued a FONSI.

The National Audubon Society filed suit against the ACOE and the FWS alleging that the failure of the ACOE to consider all of the alternatives proposed by the FWS and its issuance of a FONSI and failure to prepare an EIS were violations of NEPA.[204] The court disagreed with all of the plaintiff's contentions, and upheld the ACOE's NEPA determinations.

At the outset, the court explained that NEPA imposes only procedural requirements to ensure that an agency will carefully consider detailed information regarding the significant environmental impacts. However, the Act "does not mandate that agencies achieve particular substantive environmental results."[205] Quoting a U.S. Supreme Court decision, the court stated: "Significantly, if the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[206] In other words, as long as the agency identifies and considers the environmental impacts, it is free to disregard them under NEPA.

With regard to the project alternatives, the Court dismissed plaintiff's argument that the ACOE failed to consider the reasonable alternatives proposed by the FWS finding that, to the contrary, the ACOE did consider the alternatives it considered "reasonable", meaning the project as proposed by the ACOE and the no action alternative, and no more was required.[207]

With regard to the FONSI and decision not to prepare and EIS, the court held that the determination of whether an agency action will have a "significant" impact on the environment is a "substantive question left to the informed discretion of the agency proposing the action" as is the decision not to prepare an EIS.[208] Further, it is the plaintiff's burden to show that the project will significantly affect the environment and that the ACOE's decision was arbitrary and capricious, a burden the Audubon Society failed to meet.[209]

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[201] Id. at 324-325.
[202] Id. at 322, 323.
[203] Id. at 347.
[204] Id. at 357-364
[205] Id. at 358.
[206] Id, quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).
[207] Id.
[208] Id.
[209] Id.

3. Whether the Sale and Issuance of a BOEM Lease for the Development of a Wind Energy Facility in the Atlantic Ocean Required an EIS Considering the Impacts of the Facility on Fish, Fish Habitat and other Environmental Resources (NY, NJ, RI and MA 2017).

In 2011, a consortium of energy companies proposed the development of an off-shore wind energy facility on 127 square miles off the coast of New York (wind farm). The Bureau of Ocean Energy Management (BOEM) issued a Request for Interest to determine if there was any competitive interest in such a project. Finding that interest existed, BOEM published another notice seeking applications from companies interested in leasing the area and to get public input on site conditions, resources and existing uses of the area proposed for lease.[210]

BOEM prepared a draft EA which considered the impacts associated with issuing a lease and the activity that the lease would prompt; however, the EA limited its review to activities that would immediately follow issuance of the lease, such as site characterization surveys and the installation of meteorological towers or buoys for site assessment.[211] The EA did not consider the environmental impacts associated with the actual construction or operation of the wind farm.

BOEM published the draft EA for public comment in June 2016, and several commercial fishing organizations responded describing how a wind facility at the proposed location would harm their fishing interests and important marine habitat. On October 3, 2016, BOEM published a Revised EA and a FONSI concluding that no EIS was necessary. On December 16, 2016, BOEM conducted an online auction for the lease and named Statoil, with a bid of $45 million, the provisional winner.

Nine commercial fishing organizations from New York, New Jersey, Rhode Island and Massachusetts filed suit against BOEM seeking a preliminary injunction to prevent the issuance of the lease. The commercial fishing plaintiffs, all of whom fish for scallop and squid in the proposed lease area, were joined by three municipalities – Barnegat Light, NJ, Narragansett, RI and New Bedford, MA –asserting economic and natural resources interests in the proposed project site. The plaintiffs argued that BOEM and the DOI violated NEPA by failing to consider the significant impacts a wind farm would cause to fish, fish habitat and fishing industries, and that the significant impacts rendered a FONSI inappropriate and required the preparation of an EIS.

BOEM disagreed asserting that plaintiffs' arguments were premature because the issuance of the lease would initially only allow Statoil to develop and submit a Site Assessment Plan (SAP) detailing how it would engage in site assessment activities, such as conducting surveys and using towers or buoys to evaluate wind resources in the area. The SAP, if accepted by BOEM, would allow Statoil to conduct site assessment activities for up to five years. Thus, the issuance of the lease itself did not deny fishing access or allow for construction activities that might damage the marine environment.

BOEM further argued that it was not until six months prior to the end of that five-year period that Statoil was required to submit a Construction Operations Plan (COP) that includes all the data and information to support the wind facility, as well as ways to minimize environmental impacts. It was not at that point that BOEM would be required to conduct a NEPA analysis regarding the impacts the wind facility would have on the environment, which could include an EIS.

[210] Fisheries Survival Fund v. Jewell
[211] Id.

The plaintiffs countered this argument by pointing out that, once the lease was issued, Statoil will have made a significant financial investment in the project's development – a $45 million investment, to be exact – and will have obtained some "property rights" in the leased area. This would change the balance of the harms that must be considered if plaintiffs seek an injunction later in the case, i.e., the harms that the plaintiffs will suffer if the project moves forward versus the hardship that will occur to Statoil if it does not.

The court agreed with BOEM and Statoil, reiterating other courts' findings that NEPA sets procedural requirements, but does not mandate outcomes. Quoting the blunt language of the U.S. Supreme Court, the court stated that NEPA's purpose is to ensure "a fully informed and well considered decision, not necessarily the best decision."[212] The court agreed that it was only if and when the COP was approved that Statoil could begin to construct a wind facility in the lease area, and that the court would maintain its authority to ultimate enjoin the lease if litigation at that time warrants such an outcome. Moreover, Statoil's decision to invest in this lease was made with full awareness that its proposal for a wind facility may be rejected and that it may never construct or operate such a facility. Ultimately the court concluded that Statoil's risk does not establish imminent harm for the plaintiffs.

[212] Id, quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

STATUTE: Clean Water Act, 33 U.S.C §§ 1288-1369; Permits for Dredge and Fill of Waters of the U.S. including Wetlands, 33 U.S.C. § 1344 (Section 404).

THE BASICS:

Purpose: The overall goal of the CWA is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. Section 404 furthers this goal by regulating the disposal of dredged and fill materials into U.S. waters and wetlands.

History: The Federal Water Pollution Control Act was adopted in 1948 and was the first major U.S. law to address water pollution; Sweeping amendments adopted in 1972 that established controls and permit requirements for discharges into U.S. waters, funded sewage treatment facilities and recognized planning needs for nonpoint source pollution. The amended law is known as the Clean Water Act.

Agency: Section 404 discharges into navigable waters or wetlands are overseen by ACOE and cannot occur without an ACOE permit. The criteria for discharges were developed and are implemented by both the EPA and ACOE.

Regulations: EPA Regulations, Restrictions on Discharges, are found at 40 CFR § 230, Section 404(b)(1) Guidelines for identification of disposal sites disposal of dredged or fill materials, and § 231, Section 404 Procedures; ACOE Regulations are found at 33 CFR § 320, General Procedures, § 323 Permits for discharges of dredged and fill materials, § 328, definition of waters of the United States, and § 329 (definition of navigable waters). EPA CWA 404(b)(1) Link ; ACOE CWA 404 Link

Geo-Scope: Applies in U.S. federal waters, state waters, navigable waters and waters of the United States including wetlands, as defined by the regulations.

Protections: EPA regulations consider the filling of special aquatic sites such as wetlands to be "among the most severe environmental impacts" covered by its 404 review guidelines.[213] Both EPA and ACOE regulations require the review of impacts of proposed disposal activities on wildlife, including fish and wildlife habitat.[214] Provides presumption that alternatives exist for non-water dependent projects with discharges into special aquatic sites, including wetlands, mud flats and vegetated shallows; EPA can veto ACOE decision based on environmental impacts; EPA anti-degradation policy; ACOE public interest review; discharges cannot violate state Water Quality Standards.

[213] 40 CFR 230.1(d).
[214] See, e.g., ACOE regulation 33 CFR § 320.4(b)(2)(i) regarding wetlands that serve as general habitat and nesting, spawning, rearing and resting sites for aquatic or land species.

CWA SECTION 404 FISH AND FISH HABITAT PROTECTIONS

Section 404 Wetland Protection through Dredge and Fill Permits

Under section 404 of the Clean Water Act, any person seeking to dispose of dredge or fill material into a navigable water must obtain a permit from the Army Corps of Engineers (ACOE).[215] "Navigable waters" is defined by the Act as meaning "waters of the United States," a term which has historically been interpreted expansively to include nearly every waterbody and wetland in existence.[216] However, several court decisions have altered this expansive view, including the U.S. Supreme Court's determination that the ACOE's authority under the CWA does not extend to isolated, non-navigable and wholly intrastate wetlands used by migratory birds.[217]

To exert its jurisdiction under the Act, the ACOE adopted regulations that define the term "waters of the United States" to include "waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce…"[218] The regulations further define waters of the United States to include "all interstate waters including interstate wetlands" and "wetlands adjacent to waters otherwise defined as waters of the United States." [219]

The regulations also give specific examples of activities that the ACOE has determined could affect interstate commerce and, in doing so, bring the waters in question under the jurisdiction of section 404.[220] Such activities include use of waters by interstate or foreign travelers for recreational purposes; the taking of fish or shellfish from waters and later selling them in interstate or foreign commerce; and the use or potential for use of waters for industrial purposes by industries in interstate commerce.[221]

EPA's 404(b) (1) Review Criteria - Although the ACOE has the lead role in reviewing and issuing 404 permits, EPA also has a significant role. Section 404(b)(1) of the CWA required EPA, in consultation with the ACOE, to develop the criteria that would be applied to every 404 permit application. Known as the 404(b) (1) Guidelines, they provide that a permit shall not be issued "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[222] The Guidelines *create a presumption* that there are practical alternatives to discharges into wetlands and other "special aquatic sites" when the proposed activity for which the permit is sought is not water dependent."[223]

The 404(b)(1) Guidelines prohibit the issuance of a permit when the proposed activity will cause or contribute to significant degradation of waters of the United States.[224] Significant adverse effects contributing to such degradation include those related to human health and welfare, such

[215] 33 U.S.C. § 1344
[216] The Clean Water Act Handbook, Second Edition, Edited by Mark A. Ryan, Chapter 6, Wetlands: Section 404, p. 97.
[217] Ibid., citing to Solid Waste Agency of Northern Cook County v. U.S. ACOE, 531 U.S. 159 (2001).
[218] 33 C.F.R. 328.3(a)(3)
[219] 33 C.F.R. 328.3
[220] 33 C.F.R. 328.3(a).
[221] 33 C.F.R. 328.3
[222] 40 CFR § 230.10(a)
[223] 40 CFR § 230.10(a)(3); 40 CFR § 230.41. Other special aquatic sites include sanctuaries and refuges, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. 40 CFR § 230.40 – § 230.45
[224] 40 CFR § 230.10(c).

as effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites. They also include effects on aquatic ecosystem diversity, productivity, and stability, such as loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy.[225]

Discharge permits are also prohibited by the Guidelines when issuance would violate any state Water Quality Standard, would violate federal marine sanctuary protection requirements, would jeopardize a species designated as threatened or endangered under the ESA, or would result in the destruction or adverse modification of areas designated as critical habitat under the ESA.[226]

The ACOE Public Interest Review – In addition to reviewing the application under the EPA-developed 404(b)(1) Guidelines, the ACOE conducts its own public interest review. The review is extensive, and is performed for all ACOE permit applications, including for permits to transport and discharge dredged material into the ocean under the Ocean Dumping Act, and for the construction of dikes or dams or any other structure or work in or over navigable waters under the Rivers and Harbors Act.[227]

The decision whether to issue a permit is based on an evaluation of the probable impacts of the proposed activity, including cumulative impacts, on the public interest.[228] The determination requires a balancing of the reasonably expected benefits of the project against its reasonably foreseeable detriments, and should reflect the national concern for both the protection and utilization of important resources.[229] The list of factors relevant to the determination is long, and includes "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."[230]

Despite, or perhaps because of this long list, the ACOE regulations are clear that "a permit will be granted unless the district engineer determines that it would be contrary to the public interest."[231]

Effect on Wetlands – In addition to the public interest review, the ACOE must give separate consideration to the project's effects on wetlands. The ACOE regulations state that most wetlands constitute a productive and valuable public resource, and their "unnecessary" alteration or destruction should be discouraged as contrary to the public interest. [232] The regulations also describe wetlands that are considered to be important to the public interest, including those that serve as general habitat and nesting, spawning, rearing or resting sites; set aside for the study of the aquatic environment or as sanctuaries or refuges; significant in shielding areas from wave action, erosion or storm damage (e.g. wetlands associated with barrier beaches, islands, reefs and bars); serve as groundwater discharge areas and are prime

[225] 40 CFR § 230.10(c)(1) and (2).
[226] 40 CFR §230.10(b)(1) and (3)
[227] 33 CFR §320.2, ACOE Authorities to Issue Permits.
[228] 33 CFR § 320/4(a).
[229] Id.
[230] 33 CFR § 320.4(a)(1)
[231] Id.
[232] 33 CFR § 320.4(b)(1)

natural recharge areas; and those which are unique in nature or scarce in quantity to the region or local area.[233]

EPA Veto Authority – Section 404(c) of the CWA is significant, in that it gives EPA the authority to veto ACOE decisions to permit the discharge of dredged materials in an area when it determines that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[234] This authority includes the ability of EPA to prohibit or *withdraw* the specification of a disposal area, with the term "withdraw" indicating EPA can assert a veto even after the ACOE has issued a permit and work under the permit has begun.[235] The EPA has exercised its veto authority only 13 times in the history of the CWA, only two of which were in the Mid-Atlantic Region. See, EPA Table of 404(c) Vetoes.

State Assumption of Responsibility - States can assume responsibility for the 404 program in certain non-navigable waters and their adjacent wetlands, but only after developing a wetlands permit program similar to the federal program and submitting it, along with an application to the EPA for review and approval.[236] To date, only New Jersey and Michigan have their own 404 programs.[237] Based on these considerations, as well as the EPA 404(b)(1) Guidelines, "no permit will be granted that involves the alteration of wetlands identified as important…unless the district engineer concludes…that the benefits of the proposed alteration outweigh the damage to the wetlands resource."[238]

CWA SECTION 404 IN THE MID-ATLANTIC REGION

1. Whether the ACOE CWA § 404 Public Interest Review Must Give Priority to Environmental Impacts of a Proposed Action (Maryland 2007).

The Maryland State Highway Authority (SHA) sought numerous federal permits to construct the Intercounty Connector, a new highway that would connect I-95 and U.S. 1 in Prince George's County with I-270 in Montgomery County. The project was subject to numerous environmental reviews, including the preparation of a NEPA EIS that concluded that the development alternative selected would impact 43,705 linear feet of streams, 44.5 acres of wetlands and 1.8 acres of ponds. Despite these impacts, the ACOE issued a CWA § 404 discharge permit, and several environmental organizations, including the Audubon Society, Environmental Defense Fund and the Sierra Club, sued. [239]

Among other things, the environmental plaintiffs' challenged the way the ACOE conducted the CWA Public Interest Review and its determination that the project was in the public interest. They argued that the ACOE improperly discredited the substantial adverse impacts the project would have based solely upon mitigation measures proposed by the SHA..[240]

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[233] 33 CFR § 320.4(b)(2).
[234] 33 U.S.C. § 1344(c).
[235] Id;, 40 CFR § 231.1(a) and (b); Mingo Logan Coal Company v U.S. EPA, 714 F.3d 608 (D.C. Cir. 2013), petition for cert. denied, U.S. Sup. Ct. No 13-599, (March 24, 2014).

[236] State or Tribal Assumption of the Section 404 Permit Program, U.S. EPA Office of Water, Wetlands, Oceans and Watersheds – Wetlands Fact Sheets, http://www.epa.gov/OWOW/wetlands/facts/fact23.html
[237] Op. Cit., Clean Water Act Handbook, p. 130.
[238] 33 CFR § 320.4(b)(4)
[239] Audubon Naturalist Society of the Central Atlantic States v. U.S. Department of Transportation, 524 F.Supp. 2d, 642 (U.S.D.C. MD 2007), p. 656, 690.
[240] Id. at 690.

The court rejected the plaintiffs' claims, explaining that in conducting the Public Interest Review, the focus of the ACOE's evaluation is not the aquatic resources, but is instead an examination of the entire project in light of the general public interest. The court also held that the ACOE is the party in the best position to determine which impacts are relevant to the balance of the benefits versus the detriments, and to determine the specific weight given to each factor.[241] The court found it significant that the plaintiffs disagreed with *how* the Corps struck the balance of the relevant factors, but were not claiming that the Corps *failed to consider* the factors.

With respect to mitigation, the court pointed out that there is no regulatory requirement that the environmental impacts are completely offset by the proposed mitigation; instead, the regulations require only that "appropriate and practicable steps" are undertaken to minimize adverse impacts.[242] The court summed up its conclusions as follows:

> "The Court must not read, as plaintiffs seem to suggest at times, that the statute and implementing regulations would require that nothing ever be allowed to be discharged into the waters of the United States. Such a narrow and closed-off reading is unacceptable. Plaintiffs would simply strike the balance the other way, which in this case, does not amount to a violation by the Corps, nor is that enough to render their decision invalid under the law."[243]

2. Whether an EPA Decision to Veto an ACOE CWA 404 Permit Can Be Based Entirely on the Environmental Harms (Virginia 1993)

In 1988, the ACOE granted a CWA section 404 permit to James County, Virginia for the construction of a dam across Ware Creek to create a reservoir to add to the community's public water supply.[244] Ware Creek is a tributary of the York River, which, in turn, flows into the Chesapeake Bay. The ACOE determined that the project was in the public interest. However, in its review of the permit, the EPA determined that construction of the Ware Creek impoundment would have unacceptable adverse effects on the York River and the Chesapeake Bay, and vetoed the permit pursuant to its authority under CWA section 404(c). In its decision, the EPA also stated that there were practicable, less environmentally damaging alternatives available to the County that would provide a sufficient water supply for its projected needs.[245]

The County sued, and, finding that there was not enough evidence to support the EPA's finding that the County had practicable alternatives, the District Court ordered the ACOE to issue the permit. The EPA appealed the District Court's order arguing that, under the CWA, the unacceptable adverse environmental impacts associated with the project alone justified the veto, and that consideration of the County's need for water was not required.[246]

The Appellate Court agreed with the EPA. It noted that the CWA regulations clearly require the ACOE to consider many factors, including the availability of practicable alternatives as well as environmental impacts when it conducts its Public Interest Review. However, the court

[241] Id.
[242] Id. at 691, citing to 40 CFR 230.10(d).
[243] Id. at 692.
[244] James City County Virginia v U.S. EPA, 12 F.3d. 1330, 1331-1332 (4th Cir. 1993).
[245] Id. at 1333.
[246] Id. at 1332.

also noted that, in enacting the CWA, Congress recognized the EPA's expertise and concentrated concern with environmental matters, and gave EPA the authority to make the final permit decision.[247]

The court then looked to the statutory language to determine what EPA was required to consider when making a veto decision.[248] The Court found that the EPA's "authority to veto to protect the environment is practically unadorned" and that the agency "is simply directed to veto when it finds that the discharge 'will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas, wildlife, or recreational areas.'"[249]

Based on the statutory language and the "broad grant of power to the EPA focus[ed] only on the agency's assigned function of assuring pure water" the Court determined that the EPA's consideration of environmental impacts alone supported its veto of the permit.[250]

3. Whether the CWA 401(b) Guidelines Were Properly Applied to Determine if A Less Environmentally Damaging Alternative Exists (New York 2017)

The Hudson River Park (the Park) consists of waterfront property, portions of the Hudson River, a landfill and a number of usable and unusable piers between Battery Park City and 59th Street in New York City.[251] It was established in 1988 by the New York Hudson River Park Act, legislation that also designated the Hudson River within the Park as the Hudson River Park Estuarine Sanctuary (the Sanctuary). The Act states that the Sanctuary is to be managed to provide for (1) conservation of the area's marine resources; (2) environmental education and research; (3) public recreational use of the water; (4) authorized commercial maritime uses; and (5) other water dependent uses.[252]

In 2015, the Hudson River Park Trust (the Trust) filed an application for a CWA § 404 permit to pour approximately 411 square feet of flowable concrete into tubular piles to be placed in the Hudson River. The purpose of these activities was to create Pier 55, a new 2.75-acre elevated structure consisting of green space and performance venues to replace the now defunct Pier 54. The ACOE published notice of the proposed project, and the plaintiffs, the City Club of New York, submitted comments objecting to the project, noting that because the project would be located in a "special aquatic site" it was subject to greater scrutiny and protections under the CWA.[253]

Specifically, pursuant to the CWA 404(b)(1) Guidelines, if a project is located in a "special aquatic site" including a sanctuary or refuge, and the project is not water-dependent, a presumption exists that there are practical alternatives to the proposed project in less environmentally sensitive areas. The burden then shifts to the permit applicant to "clearly demonstrate" that a practicable alternative is not available through the presentation of "detailed, clear and convincing information *proving* that an alternative with less adverse impact is impracticable."[254]

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[247] Id. at 1335-1336.
[248] Id. at 1336.
[249] Id, quoting CWA §404(c), 33 U.S.C. § 1344(c)
[250] Id. at 1336.
[251] The City Club of New York v U.S. ACOE, 2017 WL 1102667, May 23, 2107, p. 1.
[252] Id.
[253] Id.
[254] Id. at 4, quoting Sierra Club v. Van Antwerp, 362 Fed Appx. 100, 106 (11th Cir. 2010)(Emphasis in original)

The ACOE disagreed with City Club's comments, concluding instead that the Estuarine Sanctuary is not a special aquatic site within the meaning of the EPA Guidelines. It based its conclusion on the fact that the Sanctuary is intended to serve five different purposes, rather than being managed "principally for the preservation of fish and use of fish and wildlife resources" as is required by the 401(b) Guidelines.[255] In addition, the ACOE concluded that the project was "water dependent" meaning it required access to or siting in water.

These two conclusions by the ACOE drastically altered its review of the project, and particularly its scrutiny of the existence of alternative project designs and locations. The ACOE evaluated six alternatives presented by the applicant, all of which involved the construction of a pier in the Hudson River in or near the proposed location of Pier 55. The ACOE determined that, based on their cost, none of the alternatives were practicable. The ACOE also found that, because the project was providing open space parkland to allow for educational opportunities and low cost entertainment for the public, it was in the public interest, and issued the permit.[256] The City Club filed a lawsuit challenging the ACOE's permit.

The court disagreed with both the ACOE's determination that the Sanctuary was not a special aquatic site and that the project was water dependent.

First, the court noted that, just because the Sanctuary was not managed *exclusively* for the preservation of fish and wildlife resources did not mean it was not managed *principally* for those reasons. The Hudson River Park Act required that all other uses of the Sanctuary must be compatible with resource preservation, demonstrating that the primary goal of the Sanctuary was protection of the area's marine resources. Further, the ACOE's exclusion of multi-use sanctuaries from the definition of special aquatic sites would exclude nearly all federally-created sanctuaries and refuges within the National Wildlife Refuge and Marine Sanctuary Systems from the CWA's protections.[257]

With regard to the project's water dependence, the court referred to the ACOE's stated purpose of the project, which was "to provide a vegetated pier platform within Hudson River State Park with an amphitheater and public restrooms, and to continue to provide safe public access pier structures within the Hudson River State Park."

The court found this description to be so narrow that it made the project's water dependency a foregone conclusion.[258] Contrary to the ACOE's description, the administrative record and the applicant consistently stated that the primary purpose of the project was to provide additional public park and performance space. Based on this broader and more accurate description, the project was not water dependent, regardless of whether the Trust preferred to build it on a pier.[259] The court concluded that, because the ACOE improperly determined that the project was not in a special aquatic site and that it was water dependent, it failed to apply the proper presumptions regarding the availability and environmental effects of alternatives. As a result the permit was contrary to 401(b) Guidelines of the CWA and was vacated.[260] The Trust has filed an appeal of the court's decision seeking to have the permit reinstated.

[255] 40 CFR 230.40(a)
[256] City Club v ACOE at 2.
[257] Id. at 5-6.
[258] Id. at 8.
[259] Id.
[260] Id. at 8, 10.

STATUTE: Clean Water Act (CWA), 33 U.S.C §§ 1288-1369; Water Quality Standards, 33 U.S.C. § 1313 (Section 303); State Certification of Federal Permits, 33 U.S.C. § 1341 (Section 401)

THE BASICS:

Purpose: The overall goal of the CWA is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. The purpose of Sections 303 and 401 are to give states some control over ensuring this goal is met in their respective state waters by allowing states to (i) adopt Water Quality Standards that will maintain and restore the integrity of their waters and (ii) ensure that activities requiring a federal permit or license do not violate those Water Quality Standards.

History: The Federal Water Pollution Control Act was adopted in 1948 and was the first major U.S. law to address water pollution; Major amendments occurred in 1972 and established what is known today as the Clean Water Act

Agency: The Water Quality Standards program is overseen by EPA. Water Quality Standards are developed and implemented by State environmental agencies but must be reviewed and approved by EPA; The Section 401 Certification programs are developed and overseen by state environmental agencies.

Regulations: For Water Quality Standards, the EPA Regulations are found at 40 CFR § 131 and include Minimum WQS Requirements (§131.6); Establishment of WQS (§ 131.10-15); State Review and Revision of WQS (§131.20); and EPA Review and Approval of WQS (§131.21); EPA Regulations for State Certification of Activities Requiring a Federal License or Permit are at 40 CFR § 121. CWA WQS Regulations Link; CWA 401 Regulations Link

Geo-Scope: Federal actions that impact state waters, meaning waters within three miles of the shoreline, and wetlands.

Protections: Identification of Designated Uses of State Waterways; Development of Water Quality Standards and Total Maximum Daily Loads to provide for the protection and propagation of fish, shellfish and wildlife; State review and certification of activities requiring a federal permit or license to ensure those activities to not violate state Water Quality Standards.

CWA SECTIONS 303 AND 401 FISH AND FISH HABITAT PROTECTIONS:

Section 303(c) – Water Quality Standards

A water quality standard defines the water quality goals of a water body by designating the uses of that water body and then setting the criteria that protect the designated uses. [261] Wherever attainable, water quality standards should provide for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the water.[262] The CWA requires states to establish water quality standards for the waters within their jurisdiction. However, if a state fails to do so or the EPA disapproves of the standard established, the EPA must step in and establish the standard. Significantly, states can develop water quality standards that are more stringent than those required by the CWA and its associated regulations.[263]

There are three essential components to a water quality standard: (i) the designated use or uses for the water in question, such as public water supply, recreation, or protection and propagation of wildlife; (ii) the water quality criteria specifying the amount of various pollutants that may be present in that water and still achieve the designated uses; and (iii) an anti-degradation policy designed to protect existing uses and waters of high quality.[264]

Designated Uses - The CWA distinguishes between "designated uses" and "existing uses." Existing uses are those uses actually attained in the water body whether or not they are included in the water quality standards.[265] Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are currently being attained.[266]

Water Quality Criteria - The water quality criteria are themselves comprised of two components – numerical criteria and narrative criteria.[267] The numerical criteria are specific concentrations of various pollutants that can exist in a water body based upon the designated and existing uses of that water body. The narrative criteria recognize and articulate the biological impacts that pollutants can have on the ecology of a water body, and protect the aesthetics and biological health of a water body against things such as objectionable algal densities, nuisance aquatic vegetation, abnormal diurnal fluctuations in dissolved oxygen or pH, changes to the composition of aquatic ecosystems, or anything that renders the water unsuitable for its designated uses.[268]

Anti-Degradation Policy - The anti-degradation policy applies to waters that states have designated as high-quality waters, and must meet the following requirements:

- Be designed to maintain and protect existing water uses;
- Maintain and protect existing water quality even where that quality exceeds levels necessary to support the propagation of fish, shellfish, wildlife and recreation in and on the water; and

[261] 40 CFR 131.2
[262] 33 U.S.C. § 1251(a)(2); 33 U.S.C. 1313 § (c)
[263] 33 U.S.C. § 1370 (CWA § 510); 40 CFR § 131.4(a)
[264] 33 U.S.C. § 1313(c)(2); 40 C.F.R. 131.12
[265] 40 C.F.R. 131.3(e)
[266] 40 C.F.R. 131.3(f)
[267] 40 C.F.R. 131.11.
[268] See, e.g., New Jersey narrative criteria for phosphorus in freshwaters at N.J.A.C. 7:9B-1.5(g).

- Maintain and protect the water quality of waters that constitute an outstanding national resource, such as waters of national and state parks, wildlife refuges and waters of exceptional recreational or ecological significance.

In cases of potential water quality impairment due to thermal discharge, the state's anti-degradation policy must be consistent with the thermal discharge policy set forth in section 316 of the Clean Water Act, which requires the discharger to assure the "protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife" in and on that body of water.[269]

Bioassessments and Biocriteria - More recently, in addition to what are traditionally thought to be water quality criteria, the EPA has determined that the best means to provide direct and accurate information about the health of a specific water body and to therefore meet the goals of the CWA is to conduct a biological assessment, also known as a bioassessment.[270]

A bioassessment involves the identification and study of the presence, condition and numbers of types of fish, algae, plants, benthic and other organisms that exist in a waterbody.[271] The data collected from the bioassessment is then used to derive the biocriteria, which are numerical values and/or narrative criteria that are adopted as water quality standards and that describe the desired condition for the aquatic life in those waters.[272]

Section 303(d) – Impaired Water Lists and TMDLs

Under section 303(d) of the CWA, states are required to develop lists of impaired waters, meaning waters that do not meet the state water quality standards despite the use of pollution control technology for point sources of pollution.[273] Section 303(d) also requires that states establish priority rankings for waters on the list and develop Total Maximum Daily Loads, or TMDLs, for these waters.[274] TMDLs represent the numerical measurement of the ability of a water body to assimilate a particular pollutant while taking into account point and non-point sources of pollution and natural background levels.[275] It is the maximum amount of a pollutant that a water body can receive and still be considered healthy.[276] The development of a TMDL requires the identification of the contributors to surface water quality impacts and sets goals for the reduction of specific pollutants as necessary to ensure that the waterbody eventually meets the established water quality standards.[277]

Section 401 – State Certification of Federal Activities

Section 401 of the CWA gives states the authority to ensure that all federally-authorized projects are in compliance with their state water quality standards. It requires all applicants seeking a

[269] 40 C.F.R. 131.12; 33 U.S.C. § 1326.
[270] Biological Assessments and Criteria: Crucial Components of Water Quality Programs, U.S. EPA, Summer 2006,www.epa.gov/waterscience/biocriteria/technical/brochure.pdf; See, also Biocriteria Basics, U.S. EPA, www.epa.gov/waterscience/biocriteria/basics.html.
[271] Ibid.
[272] Ibid.
[273] Federal Clean Water Act, 33 U.S.C. § 303(d).
[274] 33 U.S.C. §1313(d).
[275] The Long Island Sound - Frequently Asked Questions, Connecticut Department of Environmental Protection, April 2001, Connecticut's Nitrogen Control Program,
www.ct.gov/dep/lib/dep/water/lis_water_quality/nitrogen_control_program/tmdlfaq.pdf
[276] Ibid.
[277] Total Maximum Daily Loads, New Jersey Department of Environmental Protection,
www.state.nj.us/dep/watershedmgt/tmdl.htm.

Federal license or permit for an activity which may result in a discharge to a navigable water to obtain a certification from the state where the discharge originates confirming that the discharge is in compliance with that state's water quality standards.[278] Significantly, this provision allows states to not only have input into federal projects that may affect their waterways, but to actually prevent activities that may impact state waters. A federal agency cannot issue a permit if the state denies the 401 certification.[279]

The certification can impose any effluent or other limitations upon the applicant necessary to ensure that the permit complies with the state's programs and water quality standards adopted under the CWA, and any other regulations or programs the state has implemented to protect the quality of its waters. These limitations must be incorporated into the federal permit.

The certification requirement applies to a variety of federal permits, including section 404 dredge and fill permits, section 402 National Pollution Discharge Elimination System permits, Federal Energy Regulatory Commission permits, permits for construction activities under the Rivers and Harbors Act, Coast Guard Permits and permits sought by the Nuclear Regulatory Commission. The state must grant, deny, or waive §401 certification for a project before a federal permit or license can be issued.

THE CLEAN WATER ACT SECTION 303 AND 401 IN THE MID-ATLANTIC REGION

1. Whether a Water Quality Standard Can Impose Restrictions on Upstream States in the Same Watershed (Mid-Atlantic States 2013)

The Chesapeake Bay is approximately 200 miles long, between four and forty miles wide and covers more than 2,500 square miles in Maryland, Delaware, Virginia and Washington, D.C. [280] The Chesapeake Bay watershed covers 64,000 square miles and, in addition to these states and the district, includes parts of Pennsylvania, New York and West Virginia, collectively known as the seven Bay watershed jurisdictions.[281]

In 2010, after many years of negotiations, disagreements and litigation, the EPA established a nitrogen, phosphorus and sediment TMDL for the Bay and its tributaries. The TMDL was developed pursuant to an agreement entered into by the agency and the seven Bay watershed jurisdictions which, for their part, would prepare Watershed Implementation Plans detailing how they would reduce their nutrient loads into the watershed over time. Soon after the TMDL was adopted, the American Farm Bureau Federation, the Fertilizer Institute, the National Pork Producers and a variety of other farming industry groups filed suit against the EPA raising numerous arguments as to why EPA's actions, and the TMDL, were unlawful.[282]

Among those arguments was the contention that EPA did not have the authority to adopt a TMDL for the "upstream states" of New York, Pennsylvania and West Virginia.[283] The industry plaintiffs reasoned as follows: The EPA's authority to establish water quality standards and TMDLs is derivative of the state's authority under section 303 of the CWA. Because states have no authority to establish TMDLs for water bodies and sources outside of their jurisdictional boundaries, EPA similarly lacks the authority to do so. Therefore, while the EPA could adopt a

[278] 33 U.S.C. § 1341(a)(1)
[279] Id.
[280] American Farm Bureau Federation v U.S. EPA, 984 F.Supp 2d 289, 299 (2013).
[281] Id. at 298
[282] Id at 306-307
[283] Id. at 329

TMDL for the tidal states in which the Bay existed, meaning Maryland, Virginia, Delaware and D.C. – it could not adopt a TMDL for the headwater jurisdictions of Pennsylvania, New York and West Virginia. To find otherwise would create "an untenable precedent" whereby a downstream state, such as Louisiana, could establish a TMDL for the Mississippi River that included discharge/load allocations for the other 31 upstream states in the Mississippi River Basin.[284]

The court acknowledged that the CWA does not expressly address what happens when a multi-state water body is impaired, and that there was a genuine question whether EPA has the authority to issue allocations not only to the tidal states, but to the upstream states as well.[285] Nevertheless, the court ultimately rejected the plaintiffs' argument and found the EPA did have such authority, finding support for "the holistic, watershed approach" in the CWA, its implementing regulations, its legislative history, and in Supreme Court precedent. The court also found the EPA and seven Bay watershed jurisdictions' approach to be fully consistent with the requirements of the CWA, noting that, on a practical level, to expect the tidal states of Maryland, Virginia and Delaware to reduce their pollutant loadings to achieve water quality standards without the additional efforts of Pennsylvania, which was responsible for 44% of the total nitrogen loads into the Bay, "would not only be inequitable, but also impractical and likely impossible."[286] The court's decision was upheld on appeal.[287]

2. Whether the Denial of a Section 401 Certification Due to Potential Violations of a Dissolved Oxygen Water Quality Standard Could Prevent the Construction of an LNG Facility (Maryland 2009)

AES, a private company, proposed the construction of a liquefied natural gas (LNG) marine import terminal at Sparrows Point, a heavily industrialized area adjacent to Maryland's Baltimore Harbor. Pursuant to the Natural Gas Act, AES sought approval for the project from the Federal Energy Regulatory Commission (FERC). In addition, AES sought a CWA Section 404 permit from the ACOE for the dredging and discharge associated with the project.[288]

As the lead agency, FERC oversaw and coordinated with various federal agencies for the development of an EIS under NEPA, and also consulted with state and local agencies regarding the project. One such agency was the Maryland Department of Environmental Protection (MD DEP) which, pursuant to the CWA 401 Certification provision, conducted a review of the 404 dredging and discharge permit application for the project.[289]

After reviewing the project, including additional information requested of AES during the review process, the MD DEP denied AES' request for a Water Quality Certification finding "it was unable to conclude that the project will be carried out in compliance with Maryland water quality standards."[290] It found, among other things, that the dredging of a 118-acre turning basin and a 45-foot deep approach channel within Baltimore Harbor required by the project would cause dissolved oxygen levels in the deep channel areas to drop below Maryland's water quality standards.[291] Specifically, MD DEP concluded that the channel dredging would cause a 29%

[284] Id. at 329
[285] Id. at 330.
[286] Id/ at 330
[287] American Farm Bureau v EPA, 792 F.3d 281 (3rd Cir 2015).
[288] AES Sparrows Point LNG v Wilson, 589 F.3d 721, 723-725 (4th Cir 2009).
[289] Id., at p. 724-725
[290] Id. at p. 726.
[291] Id. at p. 724

increase in the total volume of anoxic/hypoxic water in the area and that the habitat that currently exists, which was admittedly impaired, "will simply cease to exist in its entirety."[292]

AES challenged MD DEP's denial in court, but the court found that MD DEP's action was fully supported by the statutory authority granted to it by the CWA.[293] It also found that the denial was not "arbitrary and capricious" – the court's standard of review of agency actions – but instead that Maryland had examined the pertinent data pertaining to the project's effect on water quality, "and articulated a satisfactory explanation for its denial on that basis, including a rational connection between the facts find and the choice made…"[294]

3. Whether a Nation Wide Permit Must Incorporate the 401 Certification Conditions of All Impacted States (Multi-State/New York 2011)

In 2008, to assist in administration of the CWA's permit requirements, the EPA developed a Nationwide General Permit for Discharges Incidental to Normal Operation of a Vessel (VGP) which would cover discharges from approximately 61,000 domestic and 8,000 foreign vessels operating in U.S. waters.[295] The draft VGP was published that included all EPA-mandated conditions for vessel discharges, and established a 45-day public comment period. The EPA simultaneously sought CWA section 401 certifications from each of the states, which meant that none of the certification conditions to be imposed by the states were included in the draft VGP.[296]

More than 170 comments were submitted, most of them from shipping interests arguing that, because state water quality standards differ, the 401 certifications would result in conflicting permit conditions would overburden vessels attempting to comply as they moved through the different state's waters. Others commented that a single uniform set of standards was required to minimize the burden on interstate commerce.[297]

The EPA acknowledged the comments, but explained that the CWA required certifications by the states in which the discharges would occur and mandated that the EPA attach to the permit any conditions the states deemed necessary to meet their specific water quality standards.[298] The EPA also explained that, under the CWA, it could not alter the certification conditions imposed by the states.[299] Twenty-five states issued 401 certifications and attached state-specific conditions, while others certified without conditions or waived their right to certify. The final VPG became effective with all of the state conditions incorporated.

Several trade associations representing commercial ship owners sought judicial review of the VPG, and argued that the EPA's decision to issue the permit with the state certification conditions failed to take into account the problems, both in implementation and cost, it would cause vessels. They also argued that the failure to provide notice and opportunity for public comment on the final VPG, which included the state 401 conditions that were not included in the draft, rendered the permit invalid.

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[292] Id. at p. 732
[293] Id. at 731-732
[294] Id.. at 733.
[295] Lake Carriers Association v EPA, 652 F.3d 1, 4 (U.S.C.A. D.C 2011)
[296] Id. at 4.
[297] Id. at 4-5.
[298] Id. at 5
[299] Id.

EPA, along with several amicus curiae including the State of New York, again argued that it did not have the authority to modify the state certification conditions and that, under the CWA "it is not possible to have a 'single nationwide system' that does not accommodate the states' ability to include state-specific requirements to implement their own water quality standards and requirements." [300] The court agreed, and held that EPA "did not have the ability to amend or reject conditions in state's CWA 401 certification." For this same reason, an opportunity for comment on the state certifications would have served no purpose, "and we decline to remand to require EPA to do a futile thing."[301]

4. Whether an Applicant's Refusal to Address Impacts to Water Resources in a Meaningful Way, Including By Analyzing Alternatives With Less Impacts, Can Serve as the Basis for the Denial of a Section 401 Certification for a FERC-Approved Gas Pipeline (New York 2016)

On April 7**,** 2015, the Constitution Pipeline Company, LLC received approval from FERC for the construction of a multi-state gas pipeline conditioned upon the company's receipt of all other approvals. Additional approvals required for the project included a CWA section 401 certification from the State of New York. The project was controversial for many reasons, including the fact that it would transport natural gas through New York that was obtained through fracking in Pennsylvania, a practice that is banned in New York State.[302]

The project proposed a 124-mile long underground pipeline that would originate in northeastern Pennsylvania's Susquehanna County, pass through four New York counties and terminate at the existing Wright Compressor Station in Schoharie County, New York. [303] Instead of co-locating a significant portion of the pipeline on an existing New York State DOT Interstate access area, the project proposed a new right-of-way (ROW) requiring the construction of approximately 99 miles of new 30-inch diameter pipeline, temporary and permanent access roads and additional ancillary facilities.[304]

On April 22, 2016, the NY Department of Environmental Conservation (NY DEC) denied the CWA section 401 certification, advising the company in a Notice of Denial that "the application fails in a meaningful way to address the significant water resource impacts that could occur from this project and has failed to provide sufficient information to demonstrate compliance with New York State water quality standards."[305] Information that the NYDEC requested, and that the applicant failed to provide, included:

- Site-specific information for each of the 251 stream crossings impacted by the project, including specific locations of access road and temporary stream crossing bridges; details of temporary bridges, including depth of abutments in stream banks; details regarding proposed blasting; and the location of temporary coffer dams for stream crossings.

[300] Id. at 11.
[301] Id at 10.
[302] NY Environmentalists Call on Governor Cuomo to Use Clean Water Act Power to Kill Gas Pipeline, Wolfe Notes, August 15, 2015.
[303] Id.
[304] Notice of Denial dated April 22, 2016 from John Ferguson, NY DEC Chief Permit Administrator, to Lynda Schumberg, PMP, Project Manager, Constitution Pipeline Company, LLC, p 2-3
[305] Id. at 1.

- Additional information regarding the feasibility of trenchless stream crossings versus open trenches which will impact numerous State water quality standards including turbidity and thermal impacts.

NY DEC admonished the applicant, noting that "although the Department repeatedly asked Constitution to analyze alternative routes that could have avoided or minimized impacts to an extensive group of water resources, as well as to address other potential impacts to these resources, Constitution failed to substantively address these concerns."[306]

Some of the issues identified by the NY DEC are worth noting, and relate to the failure of the Constitution Pipeline Company to analyze alternative routes that could have avoided or minimized impacts to water resource:

> "Constitution's failure to adequately address these concerns limited the Department's ability to assess the impacts and conclude that the project will comply with the water quality standards. Project construction would impact a total of 251 streams, 87 of which support trout or trout spawning. Cumulatively, construction would include disturbance to 3,161 linear feet of streams resulting in a total of 5.09 acres of stream disturbance impacts. Furthermore, proposed project construction would cumulatively impact 85.5 acres of freshwater wetlands and result in impacts to regulated wetland adjacent areas totaling 4,768 feet for crossings, 9.70 acres for construction and 4.08 acres for project operation. Due to the large amount of ROW construction, the project would also directly impact almost 500 acres of valuable interior forest. Cumulatively, within such areas, as well as the ROW generally, impacts to both small and large steams from the construction and operation of the project can be profound and could include loss of valuable water body habitat, changes in thermal conditions, increased erosion, and creation of stream instability and turbidity."[307]

A lawsuit by the Constitution Pipeline Company requesting judicial review of NY DEC's denial of the CWA section 401 Water Quality Certificate was filed in 2016. On August 18, 2017, the U.S. Court of Appeals determined that NYDEC's actions were within its statutory authority, and upheld its denial of the CWA section 401 certification.[308]

RANKING OF FISH AND FISH HABITAT PROTECTIONS

The rank of the federal statutes that protect fish and fish habitat is based on (1) the extent of fish and fish habitat that each statute protects combined with (2) the likelihood that attempts to enforce the protections against major federal actions and projects will be successful. The success rate is based on a review of relevant case law involving each statute and its specific implementing regulations and, as Table 2 indicates, may have a lot to do with who is attempting to enforce them. The rankings are from 1 to 6 with 1 being most protective.

[306] Id at 3.
[307] Id. at p. 3
[308] Constitution Pipeline v New York State Department of Environmental Conservation, 2017 WL 3568086 (2d Cir. 2017).

TABLE 2 RANK OF FISH AND FISH HABITAT PROTECTIONS		
RANK	**STATUTE**	**BASIS for RANK**
1	CZMA Consistency	**1**. Provides the broadest protections by allowing states to review proposed federal activities in light of **all enforceable policies of a state's CMP**, including state protections for fish and fish habitat, threatened and endangered species and related critical habitat, wetlands and tidelands and other special coastal areas, as well as any federal protections that are incorporated into the CMP. The strength and breadth of the state consistency review authority is limited only by the strength and breadth of the state's CMP, the agency actions and locations it identifies as subject to review, information identified by the state as necessary to that review (e.g., alternatives analysis) and the state's will to invoke the authority. **2**. The consistency review authority is invoked and applied by the state agency charged with protection the state's natural resources, and litigation involving a consistency determination is typically brought or defended by the state, although third parties can weigh in as amicus curiae. When the procedural requirements of the consistency provision are met, states have been very successful in enforcing this provision. A state's success can be aided by federal resource agency support of its adverse impact allegations and when the state can demonstrate its own historical efforts to protect the resource at issue.
2	CWA 401 Certification	**1**. Provides protections for all state waterways for which designated uses and water quality standards have been determined. Enables states to identify waters that are important to fish and/or their natural functions and life stages, such as spawning, breeding, nursery grounds, feeding, migration, and to develop the water quality standards that will support them. **All federal actions requiring a federal permit or license** that may result in a discharge to state waters **must receive a certification** from the state that the action complies with state water quality standards. If a state denies the certification, the federal agency cannot issue the permit. States can attach conditions to the federal permit to ensure the activity meets water quality standards. The EPA, which oversees the program, does not have the authority to change state permit conditions. Water quality standards include levels of specific contaminants, but also the characteristics of waters that are typically impacted by off-shore and coastal federal actions, such as temperature, dissolved oxygen, sedimentation, turbidity and nutrients. **2**. The 401 certification determination is made by the state agency charged with protecting water quality and/or natural resources. States have been very successful in stopping or requiring changes to federally authorized projects through the 401 certification process. Third parties can weigh in as amicus curiae in a state's defense of a 401 certification decision.
3	MSA	**1**. Provides protections to federally-managed species and to habitat identified as EFH through comprehensive FMPs. The FMPs are designed to manage entire fisheries and are, in that context, broad in their reach. However, the protections afforded the fisheries and EFH are not absolute. Actions with potential impacts to EFH are often allowed to move forward with management or mitigation measures viewed as inadequate or with minimal chance of success. **2**. Most efforts to enforce or contest management measures and the protection of EFH are brought by third party conservation organizations against the NMFS. These are difficult battles to win because the NMFS and the RFMCs are given wide discretion to implement the MSA and their actions or inaction will not be reversed unless it is proven to be "arbitrary and capricious," a very high burden to meet. In addition, the commercial and recreational fishing interests often mount strong opposition to management measures in an effort to protect their economic interests, and are often supported by state officials and state and federal lawmakers.
4	CWA 404 Discharge	**1**. The 404(b)(1) guidelines provide significant protections to special aquatic sites, such as wetlands, sanctuaries and refuges, mudflats, vegetated shallows and a legal presumption that there are practicable alternatives to projects seeking to discharge into these areas. However, the presumption only applies when the proposed project is not water dependent. The guidelines also give EPA veto authority over ACOE 404 permit decisions, and, unlike the ACOE's "public

		interest review," the EPA veto can be based entirely on environmental grounds with no consideration to other project benefits. **2**. Efforts to enforce the protections of special aquatic sites are often brought by third parties that must overcome the significant discretion afforded the ACOE and EPA and demonstrate that the decision was "arbitrary and capricious." This is possible when the decision was based on a clear violation of the regulations (e.g., the ACOE characterization of a project as water dependent was incorrect) but not when the agency follows the rules and reaches a conclusion the third party disagrees with. The veto provision is only as strong as EPA's desire to invoke it, but when it is utilized, third parties can support its use as amicus curiae.
5	ESA	**1**. The protections that can be extended to threatened and endangered species and their associated critical habitats through the ESA consultation requirements are strong. In other words, when the NMFS or the FWS provides an agency or applicant with a jeopardy determination and/or conservation recommendations that must be implemented to protect a species, they are rarely formally contested by the consulting agency. However, the content and strength of the recommended protections is left to the discretion of the NMFS and FWS and their will to see them through. In addition, the protections are limited to federally listed species and to the critical habitat formally designated for those species under the ESA, which are both difficult and long-term efforts made more difficult by a lack of agency resources, a significant backlog of species on the waiting list, and a significant lag time between species listing and critical habitat designation. Species on the candidate species waiting list receive no protection. **2**. The listing of species can be initiated by third parties, but it can take from 4 to 12 years for a species that warrants protections to be listed. Efforts to enforce protections for listed species are often brought by third parties that must overcome the great discretion afforded the NMFS and FWS and demonstrate that the conservation recommendations or other species or habitat related decision was "arbitrary and capricious."
6	NEPA	**1**. NEPA's reach is very broad, and when the triggering factors are present (major federal action with significant environmental impacts) applies in all areas under the exclusive U.S. control, including the EEZ, as well as other countries when the U.S. has control over the action or the impacts will occur in the U.S. In addition, NEPA applies to all federal agencies. However, the "protections" it affords are viewed as procedural and not substantive. Although NEPA is very powerful in its requirements that impacts be detailed and publicly disseminated and *considered* by federal agencies, it has no action forcing provisions and does not mandate a particular result. If the environmental effects of an action are adequately identified and evaluated by an agency, the agency is not constrained by NEPA from deciding other benefits outweigh the environmental costs. **2**. Efforts to enforce NEPA, i.e., to challenge an agency's decision not to prepare an EIS or a Supplemental EIS, are difficult when faced with the significant discretion afforded the federal agency that made the decision, and are often unsuccessful. This is the case even when the challenger is a state agency and not just a third party.

PART II - MID-ATLANTIC STATE FISH AND FISH HABITAT PROTECTIONS

Fish and fish habitat protections occur through the implementation of several state programs, most notably their respective CZMA Coastal Management Programs (CMPs), through which states identify and adopt regulations and policies to protect their coastal resources; their CZMA Consistency Review programs, through which states identify and review the federal actions that have the potential to impact their coastal resources and determine whether those actions are consistent with the enforceable policies of their CMPs; and their CWA 401 Certification Programs, which require states to review or affirmatively waive their right to review federal actions and determine whether those actions are in compliance with their state water quality standards.

The statutes and regulations each state adopts under its CMP comprise the enforceable polices that serve as the basis for the CZMA consistency review. They are the policies with which the federal actions must be deemed consistent before they can proceed. Therefore, the strength of a state's consistency review is only as strong as its enforceable policies. The CMP of each Mid-Atlantic state and the regulations they have adopted that protect or have the potential to protect fish and fish habitat are summarized below. The regulations discussed represent just a small portion of the overall CMP programs, but they are most pertinent to the protection of fish and fish habitat.

Following this discussion is an overview and comparison of the CZMA Consistency Programs and of the CWA Water Quality Standard Programs of the five Mid-Atlantic States.

Kicking off this discussion is Table 3, which presents an overview of the specific protective mechanisms identified in the both the federal and state statutes, regulations and programs. This table demonstrates how these mechanisms work and, most important, how the federal and state protections work together and enable states to apply their policies to federal actions through the CZMA consistency provision and the CWA certification provision.

. Mid-Atlantic Coast

TABLE 3
FEDERAL AND STATE FISH AND FISH HABITAT PROTECTION MECHANISMS

FEDERAL STATUTE	PROTECTIVE MECHANISM	HOW IT WORKS
Magnuson Stevens Fisheries Conservation and Management Act	Essential Fish Habitat	Federal agencies engaged in actions that may adversely affect EFH must consult with NMFS and adopt measures to avoid or minimize effects.
	Habitat Area of Particular Concern	A subset of EFH that does not confer additional protections or restrictions, but can help prioritize conservation efforts through the consultation process.
Coastal Zone Management Act	State Consistency Provision	Allows states to review federal actions that will impact state coastal resources to determine if the action and impacts are consistent with the enforceable policies of the state Coastal Management Program.
New York	Significant Coastal Fish and Wildlife Habitat	Designation of and protections for SCFWH are enforceable policies of NY CMP.
New Jersey	Prime Fishing Areas	Designation of and protections for PFA are enforceable policies of NJ CMP.
Delaware	Habitat of Conservation Concern	Designation of and protections for HCC are enforceable policies of DE CMP.
Maryland	Critical Areas	Designation of and protections for Critical Areas are enforceable policies in MD CMP.
Virginia	Geographic Areas of Particular Concern	Designation of and protections for GAPC are enforceable policies of VA CMP.
Endangered Species Act	Critical Wildlife Habitat	Federal action that may jeopardize threatened or endangered species through modification or destruction of critical habitat must consult with NMFS or FWS and consider project alternatives
National Environmental Policy Act	Significant Effects on Environment including on: ● Managed Fish Species ● Essential Fish Habitat ● Vulnerable Marine & Coastal Ecosystems ● Benthic Productivity ● Predator-Prey Relationships	Requires preparation of detailed EIS for major federal actions with significant effects on environment. NMFS NEPA regulations require consideration of effects on these factions. Main benefit is to provide information to states so they have information to invoke CZMA consistency review and CWA water quality certification authorities.
Clean Water Act § 404	Special Aquatic Sites ● Wetlands ● Mud Flats ● Vegetated Shallows ● Coral Reefs ● Sanctuaries and Refuges ● Riffle and Pool Complexes	Creates a presumption that there are practicable alternatives to proposed discharges into special aquatic sites that would have less adverse impacts on the aquatic ecosystem when the activity associated with the discharge is not water dependent. Shifts burden to applicant to clearly demonstrate through clear and convincing information proving an alternative with less impact is impracticable.
Clean Water Act § 303 and § 401 All States	Protection/Propagation of Fish, Shellfish, Wildlife through Water Quality Standards: ● pH ● Dissolved Oxygen ● Temperature ● Turbidity ● Suspended Solids/Sedimentation ● Nutrients (nitrogen, phosphorus ● Chemicals/ Hazardous Substances	Requires states to assign designated uses and develop associated water quality standards for all state waterways. Allows states to review and deny federal projects (including 404 discharge permits) with impacts that will violate state water quality standards.

NEW YORK FISH AND FISH HABITAT PROTECTIONS

Coastal Management Program Overview

New York's coastal area boundary varies, but generally extends 1,000 feet from the shoreline in non-urbanized areas. In urban and other developed locations such as New York City, the boundary is generally 500 feet or less from the shoreline, but extends inland as much as 10,000 feet in specific locations to encompass significant coastal resources. Examples include portions of Staten Island and along major tributaries, such as the Bronx River, Newtown Creek and Flushing Creek.[309] In the Long Island region, the coastal area includes all barrier and other islands and extends several thousand feet inland at major tributaries and headlands. Along the Long Island Sound Coast of Westchester County, the boundary extends from 1,000 to 8,000 feet inland.[310]

The Department of State serves as the lead agency for the NY CMP and is responsible for administering the program and coordinating activities of other agencies essential to the CMP.[311] The New York Department of Environmental Conservation (NYDEC) also plays a major role in the CMP as the agency responsible for protecting the State's natural resources. The NYDEC carries out its responsibilities through its wetlands and air and water quality permitting authority and its authority to protect coastal erosion hazard areas.[312] Through the permitting process, the NYDEC reviews most activities that have the potential to impact coastal resources.[313]

Coastal Policies

Numerous statutes provide the authority and basis for NY's CMP and its Coastal Policies, the two most prevalent being the Waterfront Revitalization of Coastal Areas and Inland Waterways Law (WRCA) and the State Environmental Quality Review Act (SEQRA). The WRCA provides NY with the authority to establish a coastal program, develop coastal policies, define the coastal boundaries and establish the state CZMA consistency review requirements. It also provides the mechanism for coordinating all State actions affecting the coastal area and enables the CMP to advocate for specific actions in the coastal area, such as the protection of fish and wildlife habitats.[314]

SEQRA incorporates a comprehensive review process that applies to all actions of State and local agencies that may have a significant effect on the environment. Like a state version of NEPA, if an agency finds an action will have significant adverse effects, an environmental impact statement must be prepared.[315]

The NY CMP is comprised of 44 policies that promote the beneficial use of coastal resources, prevent resource impairments or address activities that can substantially impact resources. The policies described below are most relevant to the protection of fish and fish habitat.

Coastal Policy 7: **Significant Coastal Fish and Wildlife Habitats** - This policy provides that "significant coastal fish and wildlife habitats will be protected, preserved and where practical

[309] New York State Coastal Management Program and Final Environmental Impact Statement, NY Department of State, incorporating all routine program changes from 1982-2017., § II-3, p.4
[310] Id.
[311] Id. at § II-4, p. 2.
[312] Id. at § II-4, p.3
[313] Id.
[314] Id. at § I, p.2-3.
[315] Id. at § II-4, p. 8.

restored so as to maintain their viability as habitats."[316] It acknowledges that certain habitats are fundamental to assuring the survival of fish and wildlife populations, and merit special protection. Significant Coastal Fish and Wildlife Habitat (SCFWH) exhibits one or more of the following characteristics:

- Essential to the survival of a large portion of a particular fish or wildlife population, e.g. feeding grounds, nursery areas;
- Support populations of rare and endangered species;
- Support fish and wildlife populations having significant commercial and/or recreational value; and/or
- Would be difficult or impossible to replace.

Under this Policy, land, water uses or development that destroys or significantly impairs the viability of an area as a habitat *shall not be undertaken*. A significant impairment includes any action that significantly reduces a vital resource such as food, shelter or living space, or changes environmental conditions, such as temperature, substrate or salinity, beyond the tolerance range of an organism. The Policy also identifies activities that are most likely to affect SCFWH including, but not limited to:

- Draining wetlands or ponds;
- Filling wetlands or shallow areas of streams, lakes, bays, estuaries;
- Grading land;
- Clear cutting;
- Dredging or excavation;
- Dredge spoil disposal;
- Physical alteration of shore areas through channelization or construction of shore structures; and
- Introduction, storage or disposal of pollutants[317]

Policy 7 also generally describes the range of physical, biological and chemical parameters that should be considered in determining whether an activity will significantly impair critical habitat.

To implement Policy 7, the NYDEC in cooperation with the NY CMP developed a methodology for identifying and rating fish and wildlife habitats in NY's coastal area.[318] The resultant "Technical Memorandum: Procedures Used to Identify, Evaluate and Recommend Areas for Designation as 'Significant Coastal Fish and Wildlife Habitats'" established the criteria for evaluating potential SCFWH, and a methodology for calculating and scoring each potential habitat to determine if it meets the threshold requirements. It also sets forth the administrative procedures for NYDEC to

[316] Id. at § II-6, p. 22.
Id. at § II-6, p. 22-23.
[317] Id. at § II-6, p. 23
[318] Technical Memorandum: Procedures Used to Identify, Evaluate and Recommend Areas for Designation as 'Significant Coastal Fish and Wildlife Habitats, NY State Department of Environmental Conservation, Bureau of Wildlife, Division of Fish and Wildlife, July 24, 1984.

review potential SCFWH, including requirements for public hearings and other stakeholder participation.[319]

To date, this process has been utilized to designate over 250 SCFWHs throughout NY. For each SCFWH site, a habitat map and a narrative has been created to provide site-specific information, and, along with the Technical Memorandum, can be accessed here: SCFWH Link. The habitat narrative presents the basis for the SCFWH's designation and provides specific information regarding the fish and wildlife resources that depend on the area. General information is also provided to assist in evaluating impacts of proposed activities on characteristics of the habitat which are essential to the habitat's values. Most important, each SCFWH is rated in terms of its ecosystem rarity (one-of-a-kind to not rare), species vulnerability (endangered to not vulnerable), significant commercial or recreational uses (worldwide, U.S., regional, state, local) concentration of species population (worldwide, U.S., regional, state, local) and replaceability (irreplaceable to no active management necessary).

The narrative and numerical rankings give those seeking to engage in development activities, conservationists and other interested persons specific information about each SCFWH, its ecological importance and the level of protection they will be afforded. Activities that will impact SCFWH are subject to extra scrutiny, oftentimes during the CZMA Consistency Review process.

Coastal Policy 8: Protect Fish and Wildlife from Pollutants – This policy requires the CMP to "protect fish and wildlife resources in the coastal area from the introduction of hazardous wastes and other pollutants which bioaccumulate in the food chain or which cause significant sublethal or lethal effect on resources."[320] The storage, treatment, transport and disposal of hazardous wastes are strictly controlled to prevent their entry into the state's lands and waters and to minimize possible contamination of and bioaccumulation in NY's coastal fish and wildlife "at levels that cause mortality or create physiological and behavioral disorders."[321] The CMP identifies 18 different State statutory and regulatory authorities that allow NY to control hazardous waste and other pollutants including the 401 CWA Certification Program.[322]

Coastal Policy 9: Recreational Use of Fish and Wildlife Resources – This policy requires the CMP to "expand recreational uses of fish and wildlife resources in coastal areas by increasing access to existing resources, supplementing existing stocks and developing new resources."[323] Any efforts to increase recreational resources must be done in a manner that ensures the protection of marine and freshwater fish and wildlife resources and must also consider other activities dependent on these resources. Such efforts must be in accordance with "sound resource management considerations" including biology of the species, carrying capacity, public demand and available technology.[324]

Coastal Policy 9 also sets forth guidelines for state and federal agencies to consider in their CZMA consistency reviews and determinations:

- Whether an action will impede existing or future utilization of the State's recreational fish and wildlife resources.

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[319]

[320] NY CMP Document, § 11-6, p. 27.
[321] Id.
[322] Id. at p. 28.
[323] Id. at p. 31.
[324] Id.

- Efforts to increase access to recreational fish and wildlife resources should not lead to overutilization of that resource or cause impairment of the habitat. This includes impairment that is more subtle than actual physical damage, such as increased human presence which can deter animals from using the habitat area.

- The impacts of increasing access to resources should be determined on a case-by-case basis, consulting the SCFWH narrative developed under Coastal Policy 7 and/or conferring with a trained fish and wildlife biologist.

- Any public or private sector initiatives to supplement existing stocks (e.g., stocking streams with fish reared in a hatchery) or to develop new resources (e.g. creating private fee-fishing facilities) must be done in accordance with NY law.[325]

The CMP cites to the "general duties and powers of the Department of Environmental Conservation" under the State Environmental Conservation Law as the authority for implementing Coastal Policy 9.[326]

NEW JERSEY FISH AND FISH HABITAT PROTECTIONS

Coastal Management Program Overview

New Jersey has 1,792 mile of coastline and a densely-packed coastal population of approximately 7,575,546.[327] New Jersey's coastal area extends across eight counties and 126 municipalities.[328] In regulatory terms, the Coastal Area encompasses the CAFRA area, which is the area expressly covered by the State Coastal Area Facility Review Act, the Meadowlands District, which is managed under its own set of regulations, and a narrow band of uplands that is beyond the CAFRA area and that is regulated by the State Waterfront Development Law.[329]

NJ's CMP is comprised of several programs overseen by the New Jersey Department of Environmental Protection (NJDEP) that share responsibility for the protection and enhancement of New Jersey's coastal resources. These programs include the Division of Land Use Regulation (DLUR), which reviews coastal permit applications submitted to DEP under CAFRA, the Waterfront Development Law and the Wetlands Act of 1970;[330] the Office of Policy Implementation (OPI), which develops and promulgates the rules and regulations that govern the DLUR; the Office of Coastal and Land Use Planning (OCLUP), that administers the planning and enhancement aspects of the CMP; the Bureau of Tidelands Management, which operates within the Land Use Regulation Program and provides staff and technical support to the Tidelands Resource Council; and the Bureau of Coastal and Land Use Compliance and Enforcement, which investigates potential coastal and wetlands infractions and ensures compliance with wetlands permits issued for projects throughout the coastal area.[331]

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[325] Id.
[326] Id.
[327] United States Government Accountability Office (U.S. GAO), Report to the Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard, Committee on Commerce, Science and Transportation, U.S. Senate, Coastal Zone Management, September 2008, Appendix II, p. 38-40.
[328] New Jersey Department of Environmental Protection, Coastal Management Program, http://www.state.nj.us/dep/cmp/czm_program.html
[329] Ibid.
[330] N.J.S.A. 13:19-1, et seq.; N.J.S.A. 12:5-3, et. seq.; N.J.S.A. 13:9A-1, et seq.
[331] www.nj.gov/dep/cmp/czm_program.html.

Coastal Policies

New Jersey's coastal area is managed by the NJDEP under the authority of CAFRA, the Waterfront Development Law, the Wetlands Act of 1970 and the Tidelands Act as well as the Coastal Rules designed to implement these statutes.[332]

CAFRA – Adopted in 1973, CAFRA requires that development in the coastal zone occurs:

> "…within the framework of a comprehensive environmental design strategy which preserves the most ecologically sensitive and fragile areas from inappropriate development and provides adequate environmental safeguards for the construction of any developments in the coastal area."[333]

The statute divides the CAFRA area into zones and regulates different types of development in each zone. Generally, the closer a proposed development project is to the water, the more likely it is that it will be subject to restrictions.[334] Almost all residential, commercial and industrial development is regulated under CAFRA, including construction, relocation and enlargement of buildings or structures, and all related work, such as excavation, grading, shore protection structures and site preparation.[335]

The Waterfront Development Law – Passed in 1914, this law seeks to limit problems that new development could cause for existing navigation channels, marinas, moorings, and the environment.[336] Development proposed in a tidally-flowed waterway anywhere in New Jersey requires a Waterfront Development Permit.[337] Projects regulated by this law include the construction of docks, piers, pilings, bulkheads, marinas, bridges, pipelines, cables and dredging.[338]

The Wetlands Act of 1970 – Pursuant to this statute, activities in tidal and estuarine wetlands cannot commence without a permit.[339] The wetlands subject to this Act's jurisdiction have been delineated and mapped by the NJDEP, and the maps are available online on the agency's GeoWeb and at each county clerk's office.[340] A coastal wetlands permit must be obtained in order to excavate, dredge, fill or place a structure on any coastal wetland shown on the maps.[341]

The Tidelands Act – Tidelands, also known as riparian lands, are lands that are currently or formerly flowed by the tide of a natural waterway. In order to use tidelands for development or other purposes, a license (short term), lease (long term) or grant (deed) must be obtained from the Tidelands Resource Council, a board of 12 governor-appointed volunteers.

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[332] N.J.S.A. 13:19; N.J.S.A. 12:5-3; N.J.S.A. 13:9A; and N.J.S.A. 12:3.
[333] N.J.S.A. 13:19-2.
[334] Op. Cit., DEP Coastal Management Program, http://www.state.nj.us/dep/cmp/czm_program.html
[335] Ibid.
[336] New Jersey Department of Environmental Protection Coastal Permits Program Presentation, http://envirostewards.rutgers.edu/LectureResourcePages/CoastalProgramsPresentation-NotesForm.pdf
[337] Ibid.
[338] Ibid.
[339] N.J.S.A. 13:9A-1.1, et seq.; N.J.A.C. 7:7E-1.1, et seq.
[340] http://www.state.nj.us/dep/cmp/czm_enforcepolicies.html; http://www.nj.gov/dep/landuse/coast.html
[341] Ibid.

The Coastal Rules - The Coastal Rules are the substantive regulations that govern the use, protection and development of New Jersey's coastal resources. They provide the standards by which the DEP's Land Use Regulation Program reviews permit applications as well as requests for CWA Water Quality Certifications and CZMA Consistency Determinations.

Key to the Coastal Rules is their identification of "Special Areas," which are areas that are "so naturally valuable, important for human use, hazardous, sensitive to impact, or particular in their planning requirements" that they merit focused attention and special management rules.[342] In these areas, development is for the most part either "prohibited," meaning that a proposed use of coastal resources is unacceptable and the NJDEP will use its legal authority to reject or deny the proposal, or "discouraged," meaning that a proposed use in such areas is likely to be rejected as the NJDEP has determined that uses of these coastal resources should be deterred.[343] However, there are numerous exceptions to these provisions that are enumerated in the rules.

Coastal Rules that pertain to the protection of fish and fish habitat include the following, all of which are Special Area Rules:

Prime Fishing Areas Rule - Prime fishing areas include tidal water areas and water's edge areas which have a demonstrable history of supporting "a significant local intensity of recreational or commercial fishing activity," and include coastal jetties, groins, public fishing piers or docks and artificial reefs.[344] These areas can be used for recreational and commercial fishing and shellfishing, scuba diving, and other water related activities. Prohibited uses of these areas include "sand or gravel submarine mining which would alter existing bathymetry to a significant degree so as to reduce the high fishery productivity of these areas."[345]

Finfish Migratory Pathways Rule - Finfish migratory pathways are rivers, streams, creeks, bays and inlets that serve as passageways for diadromous fish to or from seasonal spawning areas.[346] Development such as dams, dikes, spillways, channels, tide gates and intake pipes which creates a physical barrier to the movement of fish along the pathway is prohibited unless acceptable mitigating measures are used, such as fish ladders, erosion control and oxygenation.[347] Development which would lower water quality to the extent that it interferes with the movement of finfish along migratory pathways or violates state water quality standards is prohibited.[348]

The Critical Wildlife Habitats Rule - The Critical Wildlife Habitats Rule applies to specific areas known to serve an essential role in maintaining wildlife, particularly through the protection of essential activities such as wintering, breeding, and migrating.[349] Formal designations and maps of critical wildlife habitats are currently available only for colonial waterbird habitat.[350] However, additional sites are considered on a case-by-case- basis by the Division of Fish and Wildlife.

Development that would directly or through secondary impacts on the relevant site or surrounding region adversely affect critical wildlife habitats is discouraged.[351] Development might be allowed

[342] N.J.A.C. 7:7-9.1(a).
[343] N.J.A.C. 7:7-1.5
[344] N.J.A.C. 7:7-9.4(a).
[345] N.J.A.C. 7:7-9.4(b).
[346] N.J.A.C. 7:7-9.5(a).
[347] N.J.A.C. 7:7-9.5(b).
[348] N.J.A.C. 7:7-9.5(c).
[349] N.J.A.C. 7:7-9.37
[350] N.J.A.C. 7:7-9.37 (a)(3).
[351] N.J.A.C. 7:7-9.37(b).

to proceed, however, if the applicant can demonstrate (i) minimal feasible interference with the habitat; (ii) there is no prudent or feasible alternative location for the development; and (iii) the proposal includes appropriate mitigation measures.[352]

The Endangered and Threatened Wildlife or Plant Species Habitats Rule – This rule states that development of endangered or threatened wildlife or plant species habitat is prohibited unless it can be demonstrated that the habitat would not, directly or through secondary impacts on the site or the surrounding area, be adversely affected.[353] Such a demonstration must be made through an Endangered or Threatened Wildlife or Plant Species Habitat Impact Assessment, a formal assessment for which the criteria, standards and substance are mandated by the Coastal Rules.

An applicant may also attempt to demonstrate that the proposed site is not endangered or threatened wildlife species habitat, and that the Habitat Rule therefore does not apply. Such a demonstration must be made through an Endangered or Threatened Wildlife Species Habitat Evaluation, a formal evaluation for which the criteria, standards and substance are also mandated by the Coastal Rules. This option exists only for wildlife species habitat and not for plant species habitat.

Submerged Vegetation Habitat Rule - Submerged vegetation habitats are water areas supporting, or documented as previously supporting, rooted submerged vascular plants such as widgeon grass, sago pondweed, and eelgrass and less prevalent species such as water weed.[354] Maps detailing the distribution of applicable species are available from the NJDEP in the New Jersey Submerged Aquatic Vegetation Distribution Atlas, Final Report, 1980 and on Eelgrass Inventory Maps prepared by the Division of Fish and Wildlife.[355] Subject to a list of at least seven exceptions, development in submerged vegetation habitat is prohibited.[356] However, if an applicant can demonstrate through clear and convincing evidence that part of the mapped habitat lacks the physical characteristics to support the documented submerged vegetation species, the site will be excluded from the definition of such habitat and the Rule will not apply.[357]

Protection of Fish and Fish Habitats through Other Coastal Rules
Other Coastal Rules provide additional protections to fish and fish habitat, including the Shellfish Habitat Rule, the Surf Clam Areas Rule, the Wetlands Rule, the Wetlands Buffer Rule, the Riparian Zones Rule, the Flood Hazard Rule, the Intermittent Stream Corridors Rule and the Public Open Space Rule.[358]

CAFRA Section 10 Findings - CAFRA utilizes a two-step process for determining whether development in the coastal zone is appropriate: First, the proposed development must meet all of the applicable Coastal Rules; and second, CAFRA mandates that, even if the proposed project meets all of the Coastal Rules, NJDEP cannot issue a development permit unless and until it finds that the proposed development:

- Would cause minimal feasible interference with the natural functioning of plant, animal, fish, and human life processes at the site and within the surrounding region

[352] N.J.A.C. 7:7-9.37(b).
[353] N.J.A.C. 7:7-9.36(b).
[354] N.J.A.C. 7:7-9.6(a).
[355] Id.
[356] N.J.A.C. 7:7-9.6(b).
[357] N.J.A.C. 7:7-9.6(a).
[358] N.J.A.C. 7:7E-3.27, -3.28, -3.25, -3.26, -3.32 and -3.40

- Conforms with all applicable water emission and effluent standards and all applicable water quality criteria;

- Prevents water effluents in excess of the existing dilution, assimilative and recovery capacities of the water environments at the site and within the surrounding region.[359]

The CAFRA Section 10 Findings are a powerful tool that enables the NJDEP to enhance the protections of coastal resources provided by the Coastal Rules and ensure the overall goals of the CMP are met.

DELAWARE FISH AND FISH HABITAT PROTECTIONS

Coastal Management Program Overview

With a shoreline of approximately 260 miles and no part of the State being more than eight miles from tidal waters, the entire State of Delaware is designated as the coastal zone and managed under programs designed to meet the requirements of the CZMA.[360] Delaware differentiates between the "coastal zone" and the "coastal strip" in its CMP, with the latter representing an approximately 4-mile wide band of land that parallels the entire State coastline.[361] The Coastal Strip contains the State's most important and sensitive coastal resources. The CMP is overseen by the state's Department of Natural Resources and Environmental Control, Division of Soil and Water Conservation (DNREC).

Coastal Policies

Development Prohibited in the Coastal Strip – The coastal strip was initially defined in the Delaware State Coastal Zone Act of 1971, the primary authority for regulating heavy industry, manufacturing and bulk transfer facilities within the State. The Coastal Zone Act prohibits the development of all new heavy industry in the Coastal Strip, finding such development incompatible with the protection of the natural environment in this area.[362] Bulk transfer facilities are also prohibited because of the significant danger of pollution they pose and the pressure they generate for the construction of industrial plants. [363] All other development in the Coastal Strip requires a Coastal Zone Permit.[364]

In August 2017, new legislation was passed that relaxes the Coastal Zone Act's prohibitions against new heavy industry and bulk transfer activities on 14 specific sites in the Coastal Strip. Other than these sites, heavy industry and bulk transfer operations remain prohibited in the Coastal Strip, and other manufacturing operations in the Coastal Zone must still obtain a Coastal Zone Permit.[365]

Coastal Zone Permits - A Coastal Zone Permit is required for changes to existing non-conforming uses already in the Coastal Zone and for new manufacturing uses proposed within the Coastal Zone. Each application for a Coastal Zone Permit must include an environmental

[359] N.J.S.A. 13:19-10
[360] Ibid.
[361] Ibid; 7 Del. C. 1953, § 7001, et seq.
[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] Legislators Relax Coastal Zone Act Restrictions, Lauria, Maddy for the Cape Gazette. August 8, 2017.

impact statement that presents an assessment of the project's likely impact on a variety of factors, including wetlands, flora and fauna; surface and ground water resources, and state or federal threatened or endangered species.[366] In addition, the DNREC must consider each project's potential impact under the Delaware CMP Policies. The CMP Policies that protect fish and fish habitat are discussed below.

Wetlands Policy - Activities that may impact wetlands require State approval, for which the and the following factors will be considered: environmental impact; the number and type of supporting facilities and their impact; effects on neighboring land uses; any State and local comprehensive plans; the economic impact on jobs, taxes and land area; the aesthetic impact; alternative methods of construction; and cumulative impacts.[367] Channel dredging through wetlands of certain depths or that interfere with tide flows are strictly prohibited.[368]

Coastal Waters Policy – Coastal waters must be protected and conserved to assure their continued availability for public recreation and for the conservation of aquatic life and wildlife. Protections focus on the designated uses and the surface water quality standards adopted under the CWA and require that:[369]

- All surface waters in the State shall be free from substances attributable to industrial, municipal, agricultural, or other human-induced waste (including chemical, thermal, solids, sediments).[370]

- Discharge mixing zones shall not impinge upon areas of special importance, including nursery areas for aquatic life or waterfowl, approved or conditional shellfish areas and shall not be located in an area that interferes with the passage of fish or other organisms.[371]

- Designated waters of exceptional recreational or ecological significant are subject to a higher level of protection and monitoring and are recognized as special natural assets that must be protected and enhanced for future generations.[372]

- Discharges of oil from a vessel, truck, pipeline, storage tank or tank car which causes or poses a threat of making a film, emulsion or sludge in or beneath state waters or its shoreline are prohibited.[373]

- No activity that may cause or contribute to the discharge of a pollutant into any surface or ground water may be undertaken without a permit from the DNREC. Similarly, the construction, maintenance or operation of a pipeline system, including any

[366] Regulations Governing Delaware's Coastal Zone, Section H.2, Environmental Impact Statement, and H.3, Application Review Process.
[367] Delaware CMP Policy 5.1.10; 7 Del C. § 6604; 7 Del. Admin Code 7502; Delaware Executive Order 43.
[368] Delaware CMP Policy 5.1.12; 7 Del. C. 7502 §7
[369] DE CMP Policy 5.3.1.4; 5,.3.1.5
[370] DE CMP Policy 5.3.1.10
[371] DE CMP Policy 5.3.1.11
[372] DE CMP Policy 5.3.1.13
[373] DE CMP Policy 5.3.1.15

appurtenances such as a storage tank or pump station, or the construction of a water facility may not commence without a permit.[374]

Living Resources Policy – Under this Policy, no activity shall have an adverse environmental effect on living resources, and that analysis must include consideration of the effect of site preparation and the activity on wetlands values, including the effects on:

- Tidal ebb and flow;
- Production value to adjacent estuaries and coastal waters which serve as breeding areas for fish and shellfish;
- Effect on estuarine waters; and
- Habitat value for resident species, including invertebrates and fish; for migratory species including birds, finfish and shrimp; rearing, nesting and breeding grounds; plants or animals known to be rare generally or unique to a particular location; plants or animals near the limits of their territorial range; and unique geological or wetlands features.[375]

Fish and Wildlife Policy – This Policy requires all forms of protected wildlife to be managed and protected from negative impacts. In addition, State shellfish resources must be protected from further impairment and when possible, improved.

Nongame and Endangered Species – This Policy declares that nongame and endangered species are in need of active, protective management to preserve and enhance them and that this will be accomplished through the protection of the habitat, natural areas, and areas of unusual scientific significance important to their survival.[376] Endangered marine species in Delaware are the Atlantic Sturgeon and Shortnose Sturgeon, the same as those which are federally designated.[377] It is not known what is meant by "areas of unusual scientific significance" as this phrase is not defined nor are the areas identified in the Delaware regulations or CMP program documents.

Additional Advisory Policy for Fish and Wildlife – Under this Policy, all actions which may interfere with or otherwise adversely affect fish and wildlife in Delaware cannot be approved until there has been a "careful consultation" with the DNREC's Division of Fish and Wildlife (DFW) and after alternatives less damaging to fish and wildlife have been explored.[378] Such a consultation would include any potential impacts to the areas designated by the DFW as Habitat of Conservation Concern (HCC). HCC are rare habitats, habitats that have special significance in Delaware, are particularly sensitive to disturbance, and/or have a high diversity of rare plants. Because of these factors, they are known or expected to harbor species that are in the greatest need of conservation. Estuarine HCC in Delaware, including in Delaware Bay, are listed below along with some of the species of concern that depend on them:

[374] CMP 5.3.1.19
[375] CMP 5.11
[376] CMP 5.11.3
[377] DNREC Division of Fish and Wildlife, Wildlife Species and Conservation Program, http://www.dnrec.delaware.gov/fw/NHESP/information/Pages/Endangered.aspx
[378] CMP 5.11.4

- Tubeworm reefs –56 additional wildlife species have been determined to be associated with this habitat.

- Oyster Beds – American oystercatcher, oyster toadfish, black sea bass, red drum and many others.

- Estuarine Submerged Aquatic Vegetation – Critical nursery cover for numerous juvenile and adult fish, juvenile sea turtles and estuarine waterfowl.

- Mussel Reef – Tautog, greater and lesser scaup, surf scoter, and long-tailed duck.

- Hard Clam Beds – Atlantic sturgeon, scup, black sea bass, Atlantic croaker, red drum, and knobbed whelk. [379]

Fish and Fish habitat are also protected through additional Delaware regulations, including the following:

Subaqueous Lands Regulations - These regulations require owners of private subaqueous lands to obtain a permit before undertaking any activity on such lands that, as determined by DNREC, may have an adverse impact upon or destroy aquatic habitats.[380] Every application submitted must include a map showing the exact location of all wetlands and aquatic habitats.[381] In addition, before issuing a permit, the DNREC must consider the impact on the environment, including:

- Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats; and

- Any loss of natural aquatic habitat.[382]

The Subaqueous Lands Regulations also set forth specific siting conditions for boat docking facilities, and require that such structures be located away from critical habitats and are built with minimal impact on aquatic vegetation and wetlands.[383] With respect to the installation and use of shoreline erosion control measures, applicants must utilize methods in their design that satisfy the following elements:

- Protection of aquatic biota, wetlands and nearshore shallow water habitat;

- Adequate flow and circulation necessary to support the functional value of adjacent wetlands or aquatic habitat.[384]

Marina Regulations - Like the Wetlands and Subaqueous Lands Regulations, the Marina Regulations give the DNREC another opportunity to protect wildlife habitat. The Marina Regulations prohibit the construction of marinas at sites that are recognized as critical habitats,

[379] Delaware Wildlife Action Plan, Chapter 2, Delaware's Wildlife Habitats, Part 3: Habitat Descriptions, Condition and Extent, p. 2-164 to 2-168.
[380] 7504 Del. Reg. 2.3.1
[381] 7504 Del. Reg. 3.1.2.2.4
[382] 7504 Del. Reg. 4.7.1.3
[383] 7504 Del. Reg. 4.9.2.3
[384] 7504 Del. Reg. 4.10.1.6.4

which are habitats identified by the DNREC as serving an essential role in the maintenance of sensitive species.[385] The intent of this policy is to ensure no net loss of aquatic habitat productivity.[386]

Consultations with Division of Fish and Wildlife - Although the DNREC's Division of Fish and Wildlife does not have specific regulations in place for the protection of fish and fish habitat, it exercises its expertise over all projects and proposals that may impact these resources through requests for consultation by the Division of Soil and Water Conservation and the Division of Water Resources.[387]

MARYLAND FISH AND FISH HABITAT PROTECTIONS

Coastal Management Program Overview

Maryland's coastal zone extends from the inland boundary of the counties bordering the Atlantic Ocean, the Chesapeake Bay, and the Potomac River to the municipal limits of Washington D.C. It includes 16 of the state's 23 counties and Baltimore City, encompasses two-thirds of the State's land area and is home to almost 70% of Maryland's residents.[388] Within the coastal zone Maryland has designated the Chesapeake and Atlantic Coastal Bays Critical Area (Critical Area). The Critical Area encompasses all lands within 1000 feet of the edge of tidal waters or from the landward edge of adjacent tidal wetlands, and all tidal waters and lands under those waters and wetlands.[389]

Maryland's CMP is a networked program implemented by the Department of Natural Resources (DNR) Chesapeake & Coastal Service (CCS), a partnership among local, regional and state agencies that also collaborates with private organizations, including local land trusts and economic development groups. No one agency or department is responsible for the entire coast; instead, all CCS partners help ensure its proper management.[390] The CCS is organized into six divisions:

1. Restoration Finance and Policy Division that coordinates and implements innovative financing strategies to accelerate the restoration of natural resources;

2. Habitat Restoration and Conservation Division that provides the restoration science and services the state and local partners need to meet their water quality and habitat restoration policies.

3. Coastal and Marine Assessment Division that helps state and local partners make effective decisions, plan for future development, conserve and restore coastal resources and reduce vulnerability to storms, shoreline changes and sea level rise. It is within this Division that the CMP program resides.

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[385] 7501 Del. Reg. 11.3.8; 2.3.1
[386] 7501 Del. Reg. 11.3.8. Maps or written descriptions of critical habitat designated by DNREC have not been identified on any of the agency webpages, the regulations or the CMP program documents.
[387] Personal communication with Karen Bennett, Delaware Department of Natural Resources and Environmental Control, Division of Fish and Wildlife, October 7, 2009.
[388] Maryland Department of Natural Resources Coastal Zone webpage, http://dnr.maryland.gov/ccs/Pages/md-coastal-zone.aspx; Maryland § 309 Assessment and Strategy, July 1, 2006, Introduction.
[389] Bay Smart: A Citizen's Guide to Maryland's Critical Area Program, p. 14.
[390] Maryland Chesapeake and Coastal Service webpage, "About Us."

4. Conservation Education and Stewardship Division that provides leadership in the DNR's efforts to enhance the natural resources stewardship ethic of Maryland's citizens.

5. Geospatial Information and Analysis providing GIS data and tools for analysis and decision-making related to Chesapeake, coastal and ocean planning and management.

6. Management Services that fosters integration and strategic management among the CCS resources, provides training and provides guidance on performance management.

Coastal Policies

Maryland's Coastal Policies are established in the Maryland Code (statutes) and the Code of Maryland Regulations (COMAR) (implementing regulations). They are not incorporated in one specific section of the Code or Regulations, but are located throughout in accordance with their specific subject matter or the department or division that implements them. In 2011, to make its Coastal Policies known and available to interested parties, including federal agencies engaged in consistency reviews, Maryland compiled all of its CMP enforceable policies in one document, which was reviewed and approved by NOAA.[391]

The following portions of the Maryland Coastal Policies relate to the protection of fish and fish habitat and are enforced through the permit and license application review processes associated with activities proposed for the Coastal Zone.

Water Quality Policies – Under these Policies, all waters of the State must support water contact recreation and protect fish and other aquatic life and wildlife. The discharge of any pollutant which will accumulate to toxic amounts during the expected life of aquatic organisms or produce deleterious behavioral effects on aquatic organisms is prohibited.

Tidal Wetland Policies - Any action which alters the natural character of tidal wetlands, tidal marshes and tidal waters cannot commence without a permit. The permit application must include a description of the impacts upon:

- Habitat for finfish, crustaceans, mollusks and wildlife of significant economic or ecologic value;

- Potential habitat areas such as spawning and nursery grounds for anadromous and semi-anadromous fisheries species and shallow water areas suitable to support populations of submerged aquatic vegetation; and

- Natural water flow, water temperature, water quality and natural tidal circulation.

Non-Tidal Wetland Policies – The removal, excavation, grading, dredging, dumping, discharging or filling of a non-tidal wetland with materials of any kind; changing existing drainage characteristics, sediment or flow patterns or flood retention characteristics; disturbance of water level or water table, or removing or destroying of plant life that would alter the character of a non-tidal wetland is prohibited unless the permit applicant can demonstrate:

[391] Maryland Enforceable Policies, Effective April 8, 2011, http://dnr.maryland.gov/ccs/Documents/mecp.pdf

- The proposed project has no **practicable** alternative;

- Adverse impacts are first avoided and then minimized based on consideration of existing topography, vegetation, fish and wildlife resources, and hydrologic conditions; and

- The proposed project does not cause or contribute to an individual or cumulative effect that degrades aquatic ecosystem diversity, productivity and stability; plankton, fish, shellfish and wildlife; and surface water quality.

Living Aquatic Resources Policies – Anyone proposing to engage in an activity that may impact living aquatic resources must comply with all of the following:

- Unless authorized by an Incidental Take Permit, no one may take a state listed endangered or threatened species of fish or wildlife.

- Fisheries shall be sustainably harvested.

- Any land or water resource acquired by the state to protect, propagate, or manage fish shall not be damaged.

- No activity will be permitted that impedes or prevents the free passage of any finfish, migratory or resident, up or down stream.

- Projects that may adversely affect anadromous fish spawning areas are prohibited in non-tidal waters from March 15 through June 15.

- Projects in or adjacent to non-tidal waters shall not adversely affect aquatic or terrestrial habitat unless there is no reasonable alternative and mitigation is provided

Chesapeake and Atlantic Coastal Bays Critical Area - In addition to all of the other relevant Coastal Policies, the following additional protections for fish and fish habitat apply in the Critical Area:

- Physical alterations to streams in the Critical Area shall not affect the movement of fish.

- The installation or modification of concrete riprap or other artificial surfaces onto the bottom of natural streams in the Critical Area is prohibited unless the water quality and fisheries habitat will be improved.

- The installation or placement of dams or other structures in the Critical Area that would interfere with or prevent the movement of spawning fish or larval forms in streams is prohibited.

- Roads, bridges or utilities may not be constructed in any areas designated to protect habitat, including buffers, in the Critical Area unless there is no feasible alternative and the structure is designed, constructed and maintained in a way that minimizes negative impacts to wildlife, aquatic life and their habitats and maintains the hydrologic processes and quality of waters.

In addition to the policies related to the protection of specific natural resources, Maryland's CMP also incorporates policies for specific activities or "coastal uses" in the Coastal Zone. Those that include protections for fish and fish habitat include:

Mineral Extraction (coal prospecting and surface mining): When engaging in this activity, all of the following are applicable:

- Habitats of unique value for fish, wildlife and other related environmental values shall be identified prior to commencing activities and shall be protected during those activities.

- Surface mining activities must not have an unduly adverse effect on wildlife or freshwater, estuarine, or marine fisheries.

- Surface mining activities shall use the best available technology to minimize disturbances and adverse impacts on fish, wildlife and related environmental values and shall achieve enhancement of the resources when practicable.

- Transportation facilities constructed for surface coal mining purposes shall be located, designed, constructed or reconstructed and maintained in a manner that prevents damage to fish, wildlife or their habitats and related environmental values.

Electrical Generation and Transmission - Power plants must be sited, constructed and operated in a manner which minimizes their impacts on tidal wetlands, aquatic resources, terrestrial resources, significant wildlife habitat, public open space, recreation and natural areas and air and water quality.

Tidal Shore Erosion Control - Structural erosion control measures must use materials designed to minimize impacts to water quality and plant, fish and wildlife habitat. Tidal shore erosion control projects cannot be implemented when existing tidal wetlands are adequately serving as a buffer against erosion or when threatened or endangered species or species in need of conservation (as designated in Delaware's Wildlife Action Plan) may be adversely affected by the project.

Oil and Natural Gas Facilities – Such facilities must ensure the following protective measures are implemented:

- To detect and control oil spills, all private tank vessels transporting oil in the state must either have a cargo level monitoring system, double hulls, a plan for inspecting load lines approved by the Maryland Department of the Environment, or be accompanied by an all-weather escort vessel to continuously check for evidence of an oil discharge

- Through bond or other form of security, private tank vessels transporting more than 25 barrels of oil must prove the financial ability to cover the cost of oil cleanup and recovery before entering the waters of the state

Dredging and Disposal of Dredged Material – The following protective measures apply to all dredge and dredge material disposal activities:

- The alignment of a channel must first avoid and then minimize impacts to shellfish beds, submerged aquatic vegetation and vegetated tidelands. The channel alignment must be located the maximum distance feasible from these natural features.

- Dredging is prohibited from March 1 through June 15 in areas where important finfish species have been documented to spawn.

- Dredged material cannot be redeposited into the water or bottomland of the Chesapeake Bay or the tidewater portion of any of its tributaries except to restore islands or underwater grasses, stabilize eroding shorelines or create or restore wetlands or fish and shellfish habitats.

Navigation - New or expanded facilities for the mooring, docking or storing of more than 10 vessels on tidal navigable waters may not be located when any of the following will be adversely affected: aquatic vegetation, productive macroinvertebrate communities, shellfish beds, fish spawning or nursery areas, rare, threatened or endangered species, species in need of conservation, or historic waterfowl staging areas.

Development - Development must avoid and then minimize the alteration or impairment of tidal and non-tidal wetlands and minimize damage to water quality and natural habitats.

VIRGINIA FISH AND FISH HABITAT PROTECTIONS

Coastal Management Program Overview

Virginia's coastal zone covers 29% of the state's total land area, and incorporates all of Virginia's Atlantic Coast watershed; parts of the Chesapeake Bay and Albemarle/Pamlico Sound watersheds; 5,000 miles of shoreline; and four tidal rivers reaching as far as 100 miles inland (Potomac, Rhappahannock, York and James Rivers).[392] The CMP is a "networked" program, meaning it utilizes existing programs, agencies, regulations and laws to manage its coastal resources pursuant to a gubernatorial Executive Order that binds all of the agencies to the CMP policies.[393] A Coastal Policy Team (CPT) facilitates the coordination and cooperation among the agencies, with members of the CPT representing all of Virginia's networked agencies and coastal management partners.[394]

Coastal Policies

Coastal Policy Goals - Each state agency engaged in the management of coastal resources must ensure its programs and activities promote the CMP's Coastal Policy Goals, several of which pertain to coastal resource protection, including fish and fish habitat:

- To protect and restore coastal resources, habitats and species including, but not limited to, wetlands, subaqueous lands and vegetation, beaches, dunes, barrier islands, underwater or maritime cultural resources, riparian forested buffers and endangered and threatened species.

- To restore and maintain the quality of all coastal waters for human and ecosystem health through the protection from adverse effects of excess nutrients, toxics, pathogens and sedimentation.

[392] Virginia Department of Environmental Quality webpage "What is the Virginia Coastal Management Program?"
[393] Final Evaluation Findings, Virginia Coastal Zone Management Program, 2003-2006, NOAA Office of Ocean and Coastal Resource Management, p. 5.
[394] Id.

- To reduce or prevent losses of coastal habitat, life and property caused by shoreline erosion, storms, sea level rise and other coastal hazards.[395]

Tidal Wetlands Management - Administered by the Virginia Marine Resources Commission (MRC), the tidal wetlands program is intended to preserve tidal wetlands, prevent their despoliation and accommodate development in a manner consistent with wetlands preservation. Activities that may impact wetlands are controlled through a permit system that is administered by the MRC, or, if a local city, town or county wants oversight of wetlands permits in its own jurisdiction, it can establish a wetlands board. The board must be formally adopt the model wetlands zoning ordinance developed by the MRC and set forth in the Virginia Code, which is "the only wetlands zoning ordinance under which any wetlands board is authorized to operate."[396]

The wetlands zoning ordinance defines terms such as "non-vegetated wetland" and "vegetated wetland", as well as the geographic boundaries of certain locations known for their important wetlands habitat, such as the "back bay and its tributaries" and the "North Landing River and its tributaries." It also identifies uses of and activities in wetlands that can occur without a permit if otherwise permitted by law, (e.g., cultivation or harvesting of shellfish, outdoor recreational activities including hiking, boating, trapping and fishing) as long as they don't impair the natural functions or contour of the wetland. [397] All other activities require a permit from the MRC or the local wetlands board.

In reviewing permit applications, the board, as required by statute, "shall preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development in a manner consistent with wetlands preservation."[398] This balance is accomplished by following guidelines developed by the MRC that consider:

- the unique character of tidal wetlands which are essential for the production of marine and inland wildlife, waterfowl, finfish, shellfish and flora.

- whether they serve as a valuable protective barrier against floods, tidal storms and the erosion of the Commonwealth's shores and soil.

- whether they are important for the absorption of silt and pollutants.

- whether they are important for recreational and aesthetic enjoyment of the people and for the promotion of tourism, navigation and commerce.

The guidelines for evaluating permit applications were developed by the MRC's Habitat Management Division in collaboration with the Department of Wetlands Ecology, Virginia Institute of Marine Science of the College of William and Mary. The guidelines are extensive and detailed and, among other things, identify the varied, unique and important communities of wetlands found throughout Virginia, the criteria for classifying wetlands into 5 categories based upon their

[395] Virginia Coastal Zone Management Program webpage, http://deq.state.va.us/Programs/CoastalZoneManagement/Laws,Regulations,Guidance.aspx
[396] VA Code 28.2-1302
[397] VA Code 28.2-1302 § 3
[398] VA Codes 28.2-1302 § 9

estimated environmental value, and the criteria for evaluating the impacts of alterations of wetlands.[399]

Fisheries Management - Marine commercial and recreational fishing is overseen by the MRC. Limits upon and protections to fisheries are accomplished through regulations governing recreational fishing licenses, commercial fishing and mandatory harvest reporting requirements, gear use and restrictions, crabbing and harvesting of clams, and the establishment of restricted/protected areas.[400] The regulations also include provisions to ensure compliance with existing FMPs.[401]

Submerged Lands Management - This program is also administered by the MRC and establishes conditions for granting or denying permits for the use of state-owned bottomlands. In evaluating permits, consideration is given to the potential effects on marine and fisheries resources, wetlands, submerged aquatic vegetation and water quality standards established by the Virginia Department of Environmental Quality pursuant to the CWA.

Advisory Policies for Geographic Areas of Particular Concern – The Virginia CMP established advisory policies for geographic areas of particular concern, which are described as "recommendations" that should be considered by federal agencies and others proposing projects. Among these areas of particular concern are "coastal natural resource areas" which are "vital to estuarine and marine ecosystems" and receive "special attention" from the CMP because of their conservation, recreational, ecological, and aesthetic values. Although a reference to geographic areas of particular concern cannot be found in any of the other CMP resources or reports, and it is not known what "special attention" entails, they are broadly stated to include wetlands, aquatic spawning, nursery and feeding grounds, significant wildlife and habitat areas.[402]

OVERVIEW AND COMPARISON OF THE MID-ATLANTIC STATES' CZMA CONSISTENCY REVIEW PROGRAMS

As indicated above, the CZMA Consistency Provision is only as strong as the state program designed to enforce it. In addition to having comprehensive enforceable policies, the strength of a program depends on its other aspects, such as the lists of agency permits, licenses and other federal authorizations, actions and funding sources that a state must identify if it wants to review them; the identification of specific geographic locations outside of the coastal zone and in other states that may adversely impact state coastal resources that must be identified or state review is excluded; and any additional necessary data and Information that a state can require a federal agency or applicant to submit as part of the consistency review. For example, an analysis of appeals of state consistency denials demonstrates that the Secretary will rarely override a state determination when there is a reasonable less environmentally damaging alternative available. States can therefore insulate themselves against overrides by including a thorough alternatives analysis in their list of necessary data and information required for a consistency review.

States can review some federal actions that are not included on its consistency list. However, instead of being notified by the federal agency or applicant that a consistency review is required, the state must spend time and resources tracking and identifying such actions and must request

[399] Wetland Guidelines, prepared by the Department of Wetlands Ecology, Virginia Institute of Marine Science, College of William and Mary and the Habitat Management Division, Virginia Marine Sciences Resource Commission., http://www.mrc.virginia.gov/regulations/wetlands_guidelines.pdf
[400] See, Virginia Admninistrative Code, 4 VCA 20, Chapter 10 - 1320
[401] E.G., see 4 VAC 20-1270-10, to comply with the Interstate Fishery Management Plan for Atlantic menhaden.
[402] Virginia Department of Environmental Quality Federal Consistency Information Package, p. 5-6;

the opportunity for review in a timely manner. The procedural aspects and deadlines of the Consistency Provision can be problematic and can result in inadvertent waiver of a state's opportunity to review a federal action or to contest an appeal of its consistency determination. Therefore, it is better for a state to be over-inclusive in its consistency lists to ensure no significant projects slip through the cracks.

Table 4 compares the critical aspects of the five Mid-Atlantic State's consistency lists, looking at the number of federal activities, federal agencies, permits and licenses and federal funding sources listed; whether interstate activities, meaning activities in other states that might impact their coastal resources, are listed; whether the geographic locations associated with interstate activities are identified; whether the listed activities include the adoption of or amendment to FMPs; and whether additional data or information required for review is identified, including specifically an alternatives analysis.

As Table 4 demonstrates, there is quite a bit of variation between the Mid-Atlantic State Consistency Programs. New York identifies 33 specific federal activities and 82 sources of federal funding on its list, while Delaware does not list any activities or funds. New York, Maryland and Virginia identify actions involving FMPs as activities subject to review, but New Jersey and Delaware do not include FMPs or the NMFS on their lists. Only three states – New York, Delaware and Maryland - identify additional data and information for their reviews, although Delaware and Maryland's is minimal. New York is the only state to request an alternatives analysis. All of the states identify outer continental shelf activities, and New York and New Jersey identify BOEM and ACOE beach nourishment projects. New York, New Jersey and Delaware identify other states where activities that impact their coastal resources and appropriately identify the geographic locations where those activities would occur. Maryland and Virginia do not include any interstate activities or impacts.

TABLE 4

COMPARISON OF KEY COMPONENTS OF MID-ATLANTIC STATE CZMA CONSISTENCY PROGRAMS

	Fed Agencies	Fed Activities	Permits/ Licenses	Fed Funds	Inter state	Geo	FMPs	Beach Nourish.	OCS	Data & Info	Alterna-tives
NY	**12**	**33**	**32**	**82**	**YES**[403]	**YES**	**YES**	**YES**	**YES**	**YES**	**YES**
NJ	**11**	**21**	**22**	**19**	**YES**[404]	**YES**	**NO**	**YES**	**YES**	**NO**	**NO**
DE	**8**	**0**	**27**	**0**	**YES**[405]	**YES**	**NO**	**NO**	**YES**	**YES**	**NO**
MD	**5**	**15**	**8**	**75**	**NO**	**NO**	**YES**	**NO**	**YES**	**NO**	**NO**
VA	**10**	**17**	**21**	**6**	**NO**	**NO**	**YES**	**NO**	**YES**	**YES**	**NO**

[403] New York lists Connecticut as a state where activities have the potential to impact New York's coastal resources.
[404] New Jersey lists Delaware and Pennsylvania as states where activities have the potential to impact New Jersey's coastal resources.
[405] Delaware lists New Jersey, Pennsylvania, Maryland and Virginia as states where activities have the potential to impact Delaware's coastal resources.

OVERVIEW AND COMPARISON OF THE MID-ATLANTIC STATES' CWA DESIGNATED USES AND SELECT WATER QUALITY STANDARDS

State water quality standards and the programs to implement them are complex, varied and massive, as they incorporate every waterway within the state's jurisdictional boundaries. However, there are some key components that give insight as to how fish and fish habitat can be protected.

Designated Uses

Key to a state's water quality standards are the designated uses assigned to each of its waterways. A designated use refers not to the use of the water body today, but to the higher quality uses that the waters could support if they were free from pollutants. The water quality standards are the standards that will both prevent degradation of the waters' existing quality and enable the waters to reach their aspired-to designated uses.

There are no criteria in the CWA regulations regarding how a state assigns or manages its designated use categories, and every state does it differently. Understanding each state's system for doing so is necessary to understand which water quality standards apply. For example, if a water's designated use is a public water supply, the water quality standards for pH, total dissolved solids and salinity will be much different than a water designated for the support of fish and wildlife. Each state maintains lists of their waters and classifications on their respective state agency websites. This allows you to search for a specific waterway, identify its designated use and, based on that use, identify the water quality standards that apply to that water.

The designated use water classification systems for the coastal waters for the five Mid-Atlantic States are set forth below in the format and language used by each state, and demonstrate the differences between the state programs. For example, New York and New Jersey have separate categories for their saline estuarine and marine coastal waters that are then subcategorized by their designated uses. Delaware, Maryland and Virginia do not distinguish between fresh and saline waters, and categorize their waters by their high-level uses first, and then subcategorize them according to the addition uses they will support. Because the CWA requires that, wherever attainable, water quality standards should provide for the protection and propagation of fish, shellfish and wildlife, a variation of this occurs throughout each of the state's designated use classifications.

NEW YORK

Class SA Saline Surface Waters: The best usages of Class SA waters are shellfishing for market purposes, primary and secondary contact recreation and fishing. These waters shall be suitable for fish, shellfish and wildlife propagation and survival.

Class SB Saline Surface Waters: The best usages of Class SB waters are primary and secondary contact recreation and fishing. These waters shall be suitable for fish, shellfish and wildlife propagation and survival.

Class SC Saline Surface Waters: The best usage of Class SC waters is fishing. These waters shall be suitable for fish, shellfish and wildlife propagation and survival. The water quality shall be suitable for primary and secondary contact recreation, although other factors may limit the use for these purposes.

Class I Saline Surface Waters: The best usages of Class I waters are secondary contact recreation and fishing. These waters shall be suitable for fish, shellfish, and wildlife propagation and survival. In addition, the water quality shall be suitable for primary contact recreation, although other factors may limit the use for this purpose.

Class SD Saline Surface Waters: the best usage of Class SD waters is fishing. These waters shall be suitable for fish, shellfish, and wildlife survival. In addition, the water quality shall be suitable for primary and secondary contact recreation, although other factors may limit the use for this purpose. This classification may be given to those waters that, because of natural or man-made conditions, cannot meet the requirements for fish propagation. [406]

NEW JERSEY

Saline Estuarine SE1 Waters: In all SE1 waters the designated uses are:
1. Shellfish harvesting;
2. Maintenance, migration and propagation of the natural established biota;
3. Primary contact recreation; and
4. Any other reasonable uses.

Saline Estuarine SE2 Waters: In all SE 2 waters the designated uses are:
1. Maintenance, migration and propagation of the natural established biota;
2. Migration of diadromous fish;
3. Maintenance of wildlife;
4. Secondary contact recreation; and
5. Any other reasonable uses.

Saline Estuarine SE3 Waters: In all SE3 waters the designated uses are:
1. Secondary contact recreation;
2. Maintenance and migration of fish populations;
3. Migration of diadromous fish;
4. Maintenance of wildlife; and
5. Any other reasonable uses.

Saline Coastal SC Waters: In all SC waters the designated uses are:
1. Shellfish harvesting;
2. Primary contact recreation;
3. Maintenance, migration and propagation of the natural established biota; and
4. Any other reasonable uses.[407]

DELAWARE

Primary Contact Recreation: Any water-based form or recreation, the practice of which has a high probability for total body immersion or ingestion of water (examples include but are not limited to swimming and water skiing).

[406] 6 CRR-NY § 701.10 – 701.14
[407] N.J.A.C. 7:9B-1.12 (d) – (g)

Secondary Contact Recreation: A water-based form of recreation, the practice of which has a low probability for total body immersion or ingestion of water (examples include but are not limited to wading, boating and fishing).

Fish, Aquatic Life & Wildlife: All animal and plant life found in Delaware, either indigenous or migratory, regardless of life stage or economic importance.

Cold Water Fish (Put-and Take): Protection of fish species (such as from the species Salmonidea) and other flora and fauna indigenous to a cold water habitat.

Harvestable Shellfish Waters (includes shellfish propagation): Waters from which shellfish may be taken and consumed; such waters are approved for shellfish harvesting by the [State DNREC.][408]

MARYLAND

Use Class I: Water Contact Recreation, and Protection of Nontidal Warmwater Aquatic Life
Use Class I-P: Water Contact Recreation, Protection of Aquatic Life and Public Water Supply
Use Class II: Support of Estuarine and Marine Aquatic Life and Shellfish Harvesting

- Shellfish Harvesting Subcategory
- Seasonal Migratory Fish Spawning and Nursery Subcategory (Chesapeake Bay Only)
- Seasonal Shallow-Water Submerged Aquatic Vegetation Subcategory (Chesapeake Bay Only)
- Open-Water Fish and Shellfish Subcategory (Chesapeake Bay Only)
- Seasonal Deep-Water Fish and Shellfish Subcategory (Chesapeake Bay Only)
- Seasonal Deep-Channel Refuge Use(Chesapeake Bay Only)

Use Class III: Nontidal Cold Water
Use Class III-P: Nontidal Cold Water and Public Water Supply
Use Class IV: Recreational Trout Waters
Use Class IV-P: Recreational Trout Waters and Public Water Supply[409]

VIRGINIA

A. All state waters, including wetlands, are designated for the following uses: Recreational uses, e.g. swimming and boating; the propagation and growth of a balanced indigenous population of aquatic life, including game fish, which might reasonably be expected to inhabit them; wildlife; and the production of edible and marketable natural resources, e.g., fish and shellfish.

B. Subcategories of the propagation and growth of a balanced indigenous population of aquatic life, including game fish designated uses for waters in the Chesapeake Bay and its tidal tributaries are:

    1. Migratory Fish Spawning and Nursery Designated Use
    2. Shallow-water Submerged Aquatic Vegetation Designated Use
    3. Open Water Aquatic Life Designated Use

[408] 14 DE Reg. 312;
[409] COMAR § 26.08.02.02

4. Deep Water Aquatic Life Designated Use
5. Deep Channel Seasonal Refuge Designated Use[410]

Classification of Waters for Certain Numerical Water Quality Criteria:

Class I: Open Ocean
Class II: Tidal Waters in the Chowan Basin and Atlantic Ocean Basin; and Tidal Waters in the Chesapeake Bay and its Tidal Tributaries
Class III: Nontidal Waters (Coastal and Piedmont Zones)
Class IV: Mountainous Zone Waters
Class V: Stockable Trout Waters
Class VI: Natural Trout Waters[411]
Class VII: Swamp Waters

Overview and Comparison of Select Water Quality Standards

Although the way in which states implement the CWA's designated use categories vary widely, their water quality standards are remarkably similar. Table 5 below is a comparison of select water quality standards established by the states for their marine and estuarine waters, all of which are designated for the support, protection and propagation of fish and wildlife. These specific criteria were selected because they are the criteria that will always be relevant to most coastal and off-shore major federal actions. For example, it was the increased levels of dissolved oxygen and resultant hypoxic conditions for fish and fish habitat that enabled Maryland to successfully deny a CWA 401 certification for construction of the Sparrows Point LNG gas facility. Similarly, it was the potential for increased thermal conditions, sedimentation and turbidity that caused New York to deny a CWA 401 certification for the Constitution Gas Pipeline project, a denial that was recently upheld by the U.S. Court of Appeals.

[410] 9 VAC § 25-260.10
[411] 9 VAC § 25-260.50

TABLE 5 - COMPARISON OF SELECT WATER QUALITY CRITERIA OF MID-ATLANTIC STATES

	New York	New Jersey	Delaware	Maryland	Virginia
PH	All Waters: Normal range shall not be exceeded by > 0.1 of a pH unit	All SE: 6.5-8.5 SC: Natural conditions prevail	All Waters: Between 6.5 and 8.5 unless outside range due to natural conditions, in which case cannot be lowered or raised more than 0.3 standard units	**Class I and II: May not be less than 6.5 or greater than 8.5**	Open Ocean: Minimum 5.0, range 6.0-9.0 Tidal Waters: Minimum 4.0, daily avg 5.0, range 6.0-9.0
Dissolved Oxygen	SA and SC Waters: Daily avg. not < 4.8 mg/L (chronic) Not < 3.0 mg/L at any time (acute)	SE1: 4 hr avg not < 5.0 SE1, SE2: Not < 4.0 at any time SE3: Not < 3.0 at any time	Marine Waters: Daily average not less than 5.0 mg/L Instantaneous minimum not less than 4.0 mg/L	Class I and II: May not be less than5 mg/L at any time. Seasonal and Migratory Fish Spawning and Nursery: No less than 6 mg/L weekly avg Feb – May	MFSN: 7 day mean no less than 6 mg/L, instantaneous minimum no less than 5 mg/L Open Water Tidal Habitats: 30 day mean no less than 5.5 mg/L, 7 day mean no less than 4 mg/L, instantaneous min. no less than 4.3 mg/L
Temperature	Coastal: Shall not be raised more than 4 F from Oct-June or 1.5 F from July – Sept over normal temp Estuary: Waters at surface may not be raised to more than 90 F ; cross section temp not to exceed 85 F	SE: No thermal alterations that would cause temp to exceed 85 F (summer avg) SC: No thermal alterations that would cause temp to exceed 80 F (summer avg)	Marine Waters: Max increase of 4 F Oct-May; No human induced increase of daily mean above 84 F and daily max of 87 F June – Sept.	Class I and II: Maximum temperature may not exceed 90 F or the ambient temperature of the surface water, whichever is greater	No max temp for Open Ocean or tidal waters; for non-tidal waters in coastal and piedmont zone, max temp = 89.6 F
Turbidity	SA, SB, SC: No increase that will cause a substantial visible contrast to natural conditions	SE1, SE2: Maximum 30-day avg. 15 NTU, maximum of 50 NTU at any time. SC: Maximum 30 day 10 NTU; maximum any time 30 NTU	All Waters: Shall not exceed natural levels by more than 10 units (NTU or FTU)	Class I and II: May not exceed levels detrimental to aquatic life; from discharge, no more than 150 NTU at any time or 50 NTU monthly avg. For Shallow SAV: Specific criteria based on Secchi-Depth Equivalents	Shallow SAV waters, percent light through water range 13% to 22%.
Suspended Solids/ Sediment	SA, SB, SC: None that will cause deposition or impair waters for their best uses.	All SE, SC: None of which would render water unsuitable for designated uses.	All Waters: Shall be free from settleable solids, sediments, sludge or suspended particles that may coat or cover submerged surfaces, create nuisance condition, or interfere with attainment and maintenance of designated uses	N/A	N/A
Nutrients	None in amounts that result in the growths of algae, weeds and slimes that will impair the waters for their best usages.	All waters: no concentrations that render waters unsuitable for existing or designated uses due to algae, nuisance vegetation, diurnal fluctuations of pH, DO, or other indicators	For tidal portions of Indian River, Rehoboth Bay and Little Assawoman Bay, avg. .0.14 mg/L of N, 0.01 mg/L of P, total suspended solids of 20 mg/L Other areas: measures to reduce nutrients on case by case basis	N/A	Protects waters from nutrients and suspended sediment through DO, water clarity and Chlorophyll a levels; Developed Chlorphyll a criteria for Chesapeake Bay, and tidal tributaries

PART III. FEDERAL FISH AND FISH HABITAT PROTECTION STRENGTHS, WEAKNESSES AND RECOMMENDATIONS

The strengths and weaknesses of the federal protections are found in the statutory and regulatory language and in the way that language has been applied by the federal agencies and interpreted by the courts. Some provisions are both strengths and weaknesses, depending upon how they are utilized.

Recommendations include actions that can be taken now and those that are worth preparing for but should not be implemented until the next Presidential Administration. For example, efforts to strengthen federal regulations or statutes through the rulemaking or legislative processes under the current Administration would render the existing protections vulnerable. Nevertheless, efforts to garner scientific, political and stakeholder support for such measures would be time well spent in the interim.

THE MAGNUSON STEVENS ACT

Strengths:

- The MSA requires RFMCs to identify EFH and to ensure that adverse effects to EFH are minimized. Once EFH is identified, federal agencies that authorize or engage in an action that may adversely impact EFH must consult with the NMFS. The NMFS will recommend mitigation measures to avoid, minimize or offset any adverse impacts.

- MSA National Standard 2 requires management decisions to be based on the "best scientific information available." This Standard is helpful in maintaining the scientific integrity of fisheries management and guarding against wholly political or compromise decisions that are less protective.

- The National Standard 2 best available science requirement has been interpreted by the NMFS and the courts to include scientific data that is less than perfect or incomplete. This ensures that the lack of perfect data will not bring efforts to protect fisheries to a halt and allows protections to be put in place while the science and data evolves. However, there are limits to this leeway. For example, scientific data demonstrating harm caused by fishing methods to one species cannot be used to infer that the same harm is occurring in another species.

- It is the general consensus in the conservation and scientific communities that the efforts under the National Standards to protect fish stocks have been working, that laudable progress has been made and this progress can continue despite persistent and emerging threats to fisheries.

Weaknesses:

- The obligation for an agency to ensure its actions will not impact EFH is not absolute. The regulations require the agency to consider NMFS conservation recommendations, but allow the agency to respond with alternative measures or to explain why it will not adopt the NMFS recommendations at all.

- The Habitat Areas of Particular Concern designation is an administrative designation only and does not confer additional protections or restrictions for these areas. Nevertheless, this designation is often strongly resisted by industry interests who equate HAPC with closures and other restrictions. This may be one reason that a recent study determined that the MAFMC "has made limited use of the HAPC designation to date."[412]

- The ability of the NMFS to rely on data that is imperfect or incomplete to meet the best available science standard in its management decisions is a significant source of criticism from the fishing industry and other stakeholders.

- The EFH protections in the MSA and its implementing regulations are tempered by the use of the term "to the extent practicable," as in RFMCs must "minimize to the extent practicable adverse effects on [EFH] caused by fishing." Neither the MSA nor its regulations define the term "practicable" leaving it to the courts. One significant court decision explained that "to the extent *practicable* does not mean to the extent *possible*" and does not require the NMFS or RFMCs to do everything they can to protect EFH; rather, this is a matter of their discretion and expertise that allows a balance of the adverse effects on EFH against other potential gains.

- The laudable progress achieved by the National Standards is being undermined by amendments proposed and recently adopted by the NMFS.

    - Amendments to National Standard 1, effective October 18, 2016, make it easier for fish stocks to be dropped from the current management system, allow managers to make decisions based on data that is averaged over three years thus allowing overfishing to occur in individual years, and enable managers to stretch out the timelines to rebuild depleted fish stocks for years beyond what was previously allowed.

    - The adoption of a Standardized Bycatch Reporting Methodology (SBRM) under National Standard 9, effective January 19, 2017, fails to provide guidance or even the general requirement that SBRMs produce accurate, precise estimates of bycatch; allows SBRMs to consider only the collection of bycatch data and not its actual assessment; lacks any form of standardization across fisheries or regions; and creates a loopholes allowing development of SBRMs to be constrained by impermissible factors such as funding.

- Despite the best available science required by National Standard 1 and the discretion afforded the expertise of the NMFS and the regional fisheries councils, management decisions are not insulated from the intense political and industry pressure they often incite. Once recent example is the failure of NOAA and the Secretary of Commerce to adopt the fluke/summer flounder coast-wide reduction and size limits approved by the ASMFC in favor of a NJDEP proposal that was less protective of the fishery. Despite the ASFMC's rejection of New Jersey's proposal, strong lobbying by the NJDEP Commissioner, the recreational fishing industry and various New Jersey Congressmen resulted in or strongly influenced NOAA's decision to choose the NJDEP proposal.[413]

[412] Regional Use of the Habitat Area of Particular Concern (HAPC) Designation, Fisheries Leadership and Sustainability Forum for the Mid-Atlantic Regional Fishery Management Council, May 2016, p. 18.
[413] See, N.J. Fluke Season Saved After U.S. Secretary Approves Regulations, Radel, Dan, Asbury Park Press, July 13, 2017.

Recommendations:

1. **Remain/Become Involved in Application of Revised Guidelines**: Stakeholders must remain or become involved in the application of the revised National Standard 1 Guidelines and the new SBRM. Viewed by the conservation community as weakening the current and potential protections of fisheries under the MSA, the manner in which the NMFS and the MAFMC actually apply these changes remains to be seen. Stakeholders must look for and weigh in on management actions by an RFMC, including changes to FMPs, that rely upon or implicate the revised Guidelines and the SBRM. If necessary, joint litigation by a wide range of stakeholders should be launched to demonstrate how these changes fail to carry out the clear intent of the MSA.

2. **Support Development of the Best Available Science**: Continued development of the best available science to support desired management actions is imperative. Scientific gaps that are preventing the adoption of management actions are likely well known, and others should be identified, as should the scientists currently engaged in or most likely to establish the science needed. Although the MSA has been interpreted to allow protections based on less than perfect or incomplete science, this is a major source of criticism and mistrust of the intended management outcomes.

3. **Attempt to Correct Problematic Precedents** – A lack of precise definitions in statutes and regulations may be well intentioned to allow for flexibility in their application. However, this flexibility can lead to confusion or an inability to carry out the very purpose of the statute or regulation. The failure of Congress and the NMFS to define key components of the MSA has forced stakeholders on numerous occasions to attempt to resolve important issues in the courts. For example, the MSA is silent on the quality of management measures that are utilized to protect a species and leaves it to the discretion of the NMFS. Faced with NMFS-approved conservation measures with only an 18% chance of success, conservationists sued arguing that the MSA requires more. The court agreed, but determined that a 50% chance of success was acceptable.

   The requirement that adverse effects must be minimized to the "extent practicable" without defining the term "practicable" has led to additional court battles. In once case, the court determined that "to the extent practicable does not mean to the extent possible" and held that the NMFS has very wide latitude in deciding how much protection is enough. This no-limits interpretation leaves the door open for decisions to be based on political and commercial pressures rather than science.

   An effort should be made to (i) identify the regulatory provisions that lack clarity and are applied with seemingly unlimited discretion and (ii) work with the NMFS and MAFMC to more appropriately define them *as they are used in specific FMPs and/or to protect certain fisheries* (instead of attempting to do so through changes to the regulations that would open up the regulations to further attack). For example, the term "practicable" implies that the consideration of feasibility is involved. What is feasible for one species may not be feasible for another, but there may be enough information about certain species to define these limits accordingly and in accordance with the better messaging recommendation below (MSA Recommendation 5).

4. **Encourage Mid-Atlantic States to Incorporate MSA-Related Provisions in their CMPs**: The CZMA Consistency Provision is a powerful tool that enables states to review

and, if necessary, reject or require changes to federal projects that will impact their coastal resources and are not consistent with the enforceable policies of their CMPs. Such federal actions include decisions made by the NMFS or an RFMC that may impact state resources both inside and outside of their coastal areas, including in other states. When it comes to the MSA, some states are not utilizing this opportunity to its full advantage. For example, in their lists of federal actions and agencies over which they wish to exert consistency review, Delaware and New Jersey do not include the NMFS or FMPs. Although New York, Maryland and Virginia do list the NMFS and FMPs, there are additional opportunities for all of the Mid-Atlantic states to go even farther to ensure their resources are protected. Specifically, they can:

- Incorporate EFH identified in or outside of their coastal areas and in other states that, when adversely impacted, would result in impacts to their own fishery resources (commercial, recreational, and tourism). Identify the federal actions with potential to impact EFH, such as sand mining, dredging and dumping, oil and gas drilling or exploration, siting and construction of LNG facilities, amendments to FMPs or the application of new or revised National Guidelines and SBRMs. Identify the geographic locations outside of their coastal zones where such actions would likely impact state resources. This would enable states to review such actions under their own CMP enforceable policies.

- Incorporate into the enforceable policies of their CMPs more precise or protective definitions of terms and standards to be applied to fisheries resources, such as "practicable" and "feasible."

- Incorporate into their CMP policies criteria that management and mitigation measures must meet to be deemed acceptable; e.g., an acceptable resource management measure must have a 75% or 85% of success.

- Fill in the gaps to protect EFH that is not protected under the MSA. For example, the ASFMC has designated EFH for the 14 stocks of non-federally managed species. States could incorporate these designations into their CMPs and review any federal activities that might impact them through their CZMA consistency review authority.[414]

5. **Craft a Message that is Better Received by Stakeholder Communities:** Recent polling commissioned by a national environmental organization provides important insight into public attitudes about fisheries issues in key coastal states. Intended to help refine messaging and outreach strategies about fisheries management, and to demonstrate to the media and decision makers the existence of public support for ecosystem based management reforms, major findings from the research include the following[415]:

   - There is overwhelming support for comprehensive fisheries management and specific policies that foster this approach (e.g., forage fish, habitat, bycatch, precautionary approach, fishery ecosystem plans). Factors such as geography or party affiliation had very little impact on this view.

[414] To distinguish its EFH from that designated by the RFMCs, the ASFMC refers to its EFH as HAPC. Beach Nourishment: A Review of the Biological and Physical Impacts, Atlantic States Marine Fisheries Council, Habitat Management Series #7, November 2002, Appendix C, Fish Habitat, p. 120.

[415] Views of Comprehensive Fisheries Management Among Voters, Summary Presentation, Weigel, Laurie, Pew Charitable Trusts, 2016.

- A majority of commercial fisherman support these reforms, but less so than sport anglers.

- Any change or reforms to current law should build on the existing structure, and should not involve new or bigger bureaucracies ("evolution, not revolution").

- Messaging that was **found to be most compelling** included:

    - Legacy based arguments for reforms, i.e., that future generations will benefit from changes we make now that promote comprehensive fisheries management.

    - Technological advances, i.e., due to improvements in technology we know more about our oceans and the fish that inhabit them than ever before, providing a rationale for why the MSA needs to be updated.

    - Demonstration of the economic benefits associated with reforms.

- Messaging that was found to be **least compelling focused on climate change**.

- The messenger matters; messages from familiar public agencies and institutions like NOAA, state agencies as well as biologists from state universities, were the strongest and best received.

THE COASTAL ZONE MANAGEMENT ACT CONSISTENCY PROVISION

Strengths:

- The CZMA's Federal Consistency Provision allows states to review and determine whether federal actions are consistent with the enforceable policies of their state CMPs. ***This is the most powerful tool available to coastal states to protect their coastal resources***.

- The reach of the Consistency Provision is broad, and allows states to review and reject not only federal activities that occur within their coastal zone, but activities that occur outside of their coastal zone and even in other states that may cause adverse effects to their state coastal resources.

- It is up to the state to determine what makes up the enforceable policies under which federal actions will be reviewed, and a state can add to its enforceable policies at any time. However, unless and until a provision is reviewed and approved by NOAA, it is not considered to be an "enforceable policy" and cannot be used in a consistency review.

- There is no limit on the type of legally-binding provisions that make up a state's enforceable policies; they can include Constitutional provisions, state laws, regulations, programs, land use and other plans, ordinances and judicial or administrative decisions.

- The Consistency Provision can be used effectively by states to enhance the protections of federal statutes that they find under-protective or under-enforced. For example, a state

could incorporate into its enforceable policies all EFH designations within its coastal zone, as well as EFH outside of its coastal zone including in other states that if adversely impacted would cause adverse effects to its own fishery resources. If the NMFS EFH conservation recommendations for a particular federal action were inadequate or the federal agency at issue chose not to adopt the conservation recommendations, the coastal state could protect the EFH by applying its own enforceable policies through its consistency review authority.

- Despite the opportunity for an applicant to appeal and seek an override of a state consistency decision, a careful review of the circumstances under which overrides were granted and denied provide the information necessary for states to develop or adjust their enforceable policies accordingly. For example, the Secretary typically will not override a state determination when there is a reasonable less environmentally damaging alternative available. States can therefore insulate themselves against overrides by including a thorough alternatives analysis in their list of Necessary Data and Information required for a consistency review.

- The strength of the Consistency Provision has been demonstrated through its use by states even in the face of conflicting federal law. For example, the Consistency Provision has been found to "exempt the rights of states under the CZMA from the preemptive force of FERC's exclusive authority [under the Natural Gas Act] to site LNG terminals."[416]

Weaknesses:

- The CZMA Consistency Provision is only as strong as the state program designed to enforce it. It is entirely dependent upon a state's body of enforceable policies and the extent and specificity of its list of agencies and actions over which it will exert consistency authority, its identification of the geographic locations outside of the coastal zone where such activities might occur and the identification of necessary data and information it needs for a full review.

- The procedural aspects of the Consistency Provision can be problematic and can result in the inadvertent waiver of a state's opportunity to review a federal action or to contest an appeal of its consistency determination. Overrides of a state's determination have occurred due to untimely objections by the state; the state's failure to include the information it was demanding of the applicant on its list of Necessary Data and Information; the license or permit activity at issue was not on the state's consistency list; the state's consistency list was not specific enough to cover a certain activity; and the state's additional review time rendered its decision untimely because it was based on an invalid stay agreement.

- Even though a state can add to its enforceable policies at any time, persistent and long-term efforts by a state to protect particular resources are important. For example, the Secretary upheld New York State's negative Consistency Determination for the Broadwater LNG facility in Long Island Sound based on the adverse impacts it would have on the scenic and aesthetic resources of the Sound. Noting that the value of these resources were "inherently subjective in nature" and left "room for debate," the Secretary upheld New York's objections anyway because the Sound "had been carefully managed

[416] AES Sparrows Point LNG v. Smith, 557 F.3e 120, 123-124 (4th Cir. 2008).

for decades by federal, state and local governments in a manner calculated to protect its unique scenic and aesthetic character." The Secretary found these long-term persistent efforts to "objectively and persuasively demonstrate both the importance of this characteristic and the significant adverse effect the Project would impose."

- In determining whether or not the potential adverse impacts alleged by a state are "significant," the Secretary has looked to comments made by other resource agencies, such as the FWS and the NMFS. In the Broadwater appeal, the Secretary rejected a long list of adverse effects identified by New York, based in part on the fact that "none of the resource agencies that have commented on this appeal have stated that effects resulting from the pipeline construction would be unacceptable." Thus, the Secretary indicated that it was not enough for such resource agencies to be silent or neutral on the matter, they needed to affirmatively state that the effects would be unacceptable.

Recommendations:

1. **Include all Federal and State Fish and Fish Habitat Protections in State CMPs**: Ensure fish and fish habitat protections established pursuant to the various federal and state authorities are incorporated into the enforceable policies of each state CMP. This includes all of the following that are either located in state coastal areas, or for which impacts to these resources outside of the state's coastal area will adversely affect state resources, including:

    - EFH and HAPC designated under the MSA
    - EFH designated by the ASFMC for species not covered by the MSA
    - Critical Habitat designated under the ESA
    - Special Aquatic Areas designated under the CWA § 404(b)
    - Waters of Exceptional Recreational or Ecological Significance (ERES) designated under CWA § 303
    - Critical Habitat designated under each state threatened and endangered species program
    - Species of Greatest Conservation Need and related habitat designated under state Wildlife Action Plans
    - Other important habitat identified by the Mid-Atlantic states:
        - NY Significant Coastal Fish and Wildlife Habitat
        - NJ Prime Fishing Areas
        - DE Habitat of Conservation Concern
        - MD Critical Areas
        - VA Geographic Areas of Particular Concern
        - Critical Habitat for State Threatened and Endangered Species

2. **Ensure State CMP Policies and Standards are Unambiguous:** States should review the fish and fish habitat and other natural resource protections in their CMPs and ensure

the language is strong and unambiguous. Prohibitions or limits against certain activities or against activities in specific locations should be clear, as should any exceptions, circumstances and related criteria that might negate them.

3. **Full Inclusion of all Programs, Policies and Regulations in CMP**: All statutory and regulatory review standards, guidelines and guidance documents that the state may want to apply to a Consistency Review must be fully set forth and included into its federally approved CMP. Statutes, regulations and other authorities **incorporated by reference are not considered to be "Enforceable Policies**" and cannot be applied during a Consistency Review.

4. **Approval by NOAA to be Considered "Enforceable Policies"**: All statutory and regulatory review standards, guidelines and guidance documents that the state may want to apply to a Consistency Review must be reviewed and approved by NOAA before it is considered an "enforceable policy." A failure to obtain NOAA approval means the policy cannot be applied to a consistency review.

5. **Detailed, Inclusive Lists of Federal Agency Activities**. States must develop a detailed and specific list of federal licenses, permits and other authorizations and activities over which they may want to exert their consistency review authority. In accordance with the regulations, the federal license or permit activities "shall be described in terms of the specific licenses or permits involved" e.g., Corps of Engineers 404 Permits; Coast Guard authorization for vessels or barges carrying hazardous waste. For fish and fish habitat protections, states should include the following on their lists:

    - NMFS ESA Biological Opinions and Jeopardy/No Jeopardy determinations;
    - NMFS approval of FMPs or amendments to FMPs.
    - NMFS changes to National Standards or associated Guidelines.
    - BOEME and ACOE plans and proposals for sand mining or dredging associated with shore protection and beach nourishment projects, and amendments to existing plans including the addition of new sand mining locations.
    - BOEM lease sales or permits for mineral mining, off-shore wind farm and other energy project or facilities, oil and gas drilling and exploration.
    - New or revised NEPA Categorical Exclusions established by all federal Departments and agencies (list them).

6. **Activities and Geographic Locations Outside the Coastal Area**: The list of activities over which a state may exert its Consistency Review authority should include activities that occur *outside* of the state coastal area, including in another state, that may nevertheless cause adverse effects on resources *within* the coastal area. Examples include, but are not limited to, the citing of LNG facilities or off-shore wind farms; oil and gas drilling or exploration. In addition, the CMP should describe the geographic locations outside of the coastal zone where the occurrence of these activities will cause reasonably foreseeable coastal effects.

7. **Necessary Data and Information**: A specific description of all "necessary data and information" that the state may need to determine whether or not a project is consistent with its CMP must be developed and should specifically require the submission of a thorough alternatives analysis. A review of the outcome of various appeals demonstrated that, even when the activity was a major energy-related project deemed to further the national interest, the Secretary would not override a state's objection when a reasonable alternative was identified

8. **A Fool Proof Tickler System**: States should utilize a system to log in the date each Consistency Certification and all "necessary data and information" was received from the applicant and that will automatically notify the appropriate state personnel in advance of pending regulatory deadlines, including, but not limited to, the date the 60-day review period was triggered and when it expires for listed activities, and the date the 30-day notice period was triggered and expires for unlisted activities.

9. **Coordination and Support from Federal Resource Agencies**: States should routinely coordinate with other federal agencies to document and support a state's finding of adverse coastal effects. A review of consistency appeals demonstrated that a state has a better chance of success in having an objection to a project upheld by being specific in its identification of adverse coastal effects that will occur from the project and getting support for these conclusions from other agencies, such as the U.S. FWS or the NMFS. Obtaining letters or reports or studies from such agencies in advance of a consistency review documenting the adverse impacts specific types of activities would have on state resources should also be sought.

10. **Compliant Stay Agreements**: States should designate personnel familiar with the applicable regulations to negotiate or conduct final review of any stays agreed to by the state and an applicant during the Consistency Review process and/or utilize a designated stay "form" that provides spaces for the five important dates that must be incorporated for the stay to be valid, i.e., (1) the date the state's 6 month review period commenced; (2) the date the 6 month period was due to end; (3) the date during the 6 month period that the stay commenced; (4) the date the stay ends; and (5) the date the state's decision is due.

11. **States Must Identify, Make Known and Protect "Subjective" Resources**: Coastal resources that a state wants to protect, but for which the adverse impacts upon them might seem "subjective" such as the impacts to the scenic and aesthetic resources of Long Island Sound in the example above, must be identified and made known in state plans and programs and must be vigilantly protected by the state's own efforts. Such efforts carry significant weight in a Consistency Appeal.

12. **System for Tracking Unlisted Activities**: States should utilize a reliable system to coordinate with federal agencies to monitor unlisted federal license or permit activities. Examples of methods of coordinated review provided by the consistency regulations include the programs established and utilized for the review of NEPA documents and/or the review of Federal Register notices.

THE ENDANGERED SPECIES ACT

Strengths:

- Petitions for species listings are not limited to federal or state agencies and can be initiated by "any interested persons." Interested persons petitions have been successful, including the petition submitted by the American Littoral Society for the declining red knot population.

- A decision to list a species must be made 'solely on the basis of the best available scientific and commercial information" regarding a species status and cannot consider or refer to the economic or other impacts of the determination.

- Distinct Population Segments (DPSs) of a species can be listed, allowing the ESA's protections to apply to a deteriorating portion of a species range before the entire species has declined to the point that it is endangered or threatened throughout its entire range.

- Recommendations to a federal agency or applicant made by the NMFS or FWS resulting from an ESA consultation carry considerable weight. Although the ESA does incorporate procedures for an agency or permit applicant to reject the determination that the project will jeopardize a species or harm critical habitat, such instances are extremely rare.

- Critical habitat can include areas outside of the geographical areas occupied by the species, if such areas are deemed essential for the conservation of the species (e.g., is habitat for a critical food source of a threatened or endangered species).

- The prohibitions against the take of endangered species are based upon a broad definition of the term "take" that includes not just the killing or trapping of an animal, but harassing, harming, wounding, capturing, collecting or even attempting to engage in any such conduct towards an animal. Additional protection is provided by the definition of the term "harass" which means any intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns. Normal behavior patterns include, but are not limited to, breeding, feeding or sheltering.

Weaknesses:

- The process for listing a species is incredibly slow. It took more than a year for the FWS to respond to the initial ALS red knot petition, and seven years from the filing of that petition to actually list the red knot as endangered. A lack of resources for the reviewing agencies has resulted in a backlog of "candidate species," meaning those that warrant federal protection but are placed on a waiting list and prioritized according to the imminence of the threats to their continued existence. There is an even longer list of species waiting for placement on the candidate species list.[417] The Center for Biological Diversity estimates that it takes an average of 12 years for a species to be listed from the time a petition is first filed.

[417] See, https://www.biologicaldiversity.org/news/press_releases/2015/endangered-species-act-12-23-2015.html Center for Biological Diversity, Press Release, December 23, 2015.

- It appears as if emergency efforts by states to protect a species while it awaits federal listing can actually slow the process down. For example, approximately 25 months after ALS filed its red knot petition, the FWS agreed that the shore bird warranted federal protection, finding that threats to the species were of a "high magnitude" and that the species was at "high risk." Nevertheless, the agency determined that the threats were "non-imminent" because of additional emergent restrictions on the harvesting of horseshoe crabs implemented by the States of New Jersey and Delaware. Based on this determination, the FWS assigned the red knot a listing priority of 6 on scale of 1 to 12, and it took approximately five more years for the listing to occur.

- The designation of critical habitat under the ESA is supposed to occur simultaneous with the listing of a species, but this is often not the case. For example, several Distinct Population Segments (DPSs) of Atlantic Sturgeon were listed as endangered in 2012. Even though DPSs are based on the geography of a species sub-population, the critical habitat designation for the Atlantic Sturgeon was not final until August 15, 2017.

- Disagreements with or challenges to a Secretary's "no jeopardy" determination or a determination that critical habitat will not be destroyed or modified have had little success. This was true even when the FWS determined that a project would "appreciably reduce the likelihood of both the survival and recovery of the piping plover" but then inexplicably changed this to the complete opposite finding that the takings of piping plover caused by the project "would *not* appreciably reduce the survival or recovery" of the species. The court determined that the FWS was "entitled to change its mind", and that the challenger had failed to meet its burden of demonstrating that the no jeopardy determination was "so implausible that it cannot be ascribed to a difference of opinion."

- Mitigation measures proposed for projects as a means to avoid a jeopardy determination are often successful, even when such measures are unproven or unlikely to succeed. As one court bluntly stated, "it is the implementation of the proposed conservation or mitigation measures themselves, and not the anticipated results of such measures, that must be certain to occur."

- The goal of the ESA is to facilitate the recovery/rebounding of the listed species to the point where ESA protections are no longer required and it can be delisted. Therefore, the delisting of a species can be viewed as a measure of the ESA's success. However, delisting is often controversial. Anyone can submit a petition for delisting and, although the decision is supposed to be based on the best available science, it is often based on political pressures and influence instead. For example, in 2011, Congress removed protections for wolves in Idaho and Montana by attaching an 11th hour rider to the federal budget bill, a must-pass measure that had nothing to do with wolves. The rider, which also bars any legal challenges to the delisting, was introduced by two state lawmakers and was fully supported by ranchers and hunters and various state officials. The bill with the rider attached was fast tracked and passed with no discussion about the delisting.[418] This was the first time a species was ever delisted through legislation and is a great source of concern, particularly for listed species in coastal and energy-rich states where

[418] Living With Wolves – The Political Debate, https://www.livingwithwolves.org/wolf-issues/the-political-debate/

pressures for oil drilling and exploration are mounting.[419] This concern is heightened today given the mindset of the current Administration and Congress.

Recommendations:

1. **Initiate Federal Petitions for Endangered and Threatened Species**: Despite the backlog of candidate species waiting for final ESA listing and for species waiting to be placed on the candidate species list, stakeholder organizations should persist in the submission of petitions to the FWS or the NMFS to gain federal protection for threatened and endangered species. While it is unlikely that species will be added under the current Administration, at the very least, the process will be initiated and well underway when a more receptive Administration is in place.

2. **Encourage Greater State Protections of State Listed Species**: States should take greater initiative in strengthening their own threatened and endangered species programs, including by ensuring that critical habitat for their listed species has been identified and mapped. States should also ensure that existing CMPs and other regulatory programs and policies are appropriately protective of critical habitat and, most significant, are consistently enforced. An example of greater state protections is currently underway in New Jersey. The NJDEP has recently proposed a rule that would continue to protect habitat that federal and state threatened and endangered species are critically dependent upon, even after those species are removed from the federal and/or state lists.

3. **Update State Lists to Include Additional Species In Need of Protection**: States should review their current lists of threatened and endangered species as well as losses to species and critical habitat over the past decade to determine if additional species and habitat should be included. In addition to their National Heritage Programs, a source of valuable information for the identification of species in need of protection is the state Wildlife Action Plans. Each of the five Mid-Atlantic States discussed in this report has a well-developed Wildlife Action Plan with species of greatest conservation concern (SGCN) and, in most cases, the associated critical habitat, identified.

4. **Include State Protections in Enforceable Polices of CMP**: States should include protections for state threatened and endangered species in the enforceable policies of their CMPs and the appropriate listing of federal actions that could impact these species in their Consistency Review lists. This will enable the states to review and reject federal actions that will impact state listed species and their associated critical habitat.

5. **Include Wildlife Action Plans and SGCN in CMPs**: Inclusion of Wildlife Action Plans and the SGCN identified therein into state CMPs and making them subject to the protection of CMP policies would allow states to review and, if warranted, reject federal actions that impact species that are imperiled but for which the data necessary for their inclusion on the state or federal threatened and endangered list is still under development.

   By way of example, Maryland's Tidal Shore Erosion Control Policy provides that "tidal shore erosion control projects cannot be implemented when…threatened or endangered species or species in need of conservation may be adversely affected by the project." Maryland's Wildlife Action Plan identifies as SGCN three Atlantic coastal fishes – the

[419] Budget's Wolf Delisting Opens Pandora's Box of Species Attacks, Enviro Group Warns, Taylor, Phil, New York Times, April 13, 2011.

thorny skate, barndoor skate, and smooth skate[420] – and the Spotfin killifish, a species found within the intertidal shallows along brackish marshes.[421] Because this regulation is part of the enforceable policies of Maryland's CMP, Maryland can review federal projects that may cause adverse impacts to these species under its Consistency Review authority.

6. **Provide Continued Protection for Delisted Species:** Strong state programs can also provide greater protections for federally-listed species than are provided by the ESA. For example, on July 17, 2017, the NJDEP published proposed amendments to its Coastal Rules that require development and other activities in the coastal zone to comply with (i) any applicable management plan for protection of state and federally listed threatened or endangered species; (ii) the State Coastal Rule that protects threatened or endangered species; and (iii) the State Coastal Rule that protects Critical Wildlife Habitat, as applicable. As a result of this three-pronged approach, if a threatened or endangered species is removed from the federal or state endangered species list but is still critically dependent upon certain areas of the coastal zone, the critical habitat will still be protected.

THE NATIONAL ENVIRONMENTAL POLICY ACT

Strengths:

- The reach of NEPA is broad, and includes all areas under exclusive control of the United States including the EEZ and U.S. Trust Territories (Guam, Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands). NEPA also applies in other countries when the U.S. has control over the project or action, or where the effects of the project or action will occur in the U.S.

- One of NEPA's fundamental purposes is to ensure public understanding and participation in the decision making process for proposed federal actions that have the potential to significantly impact the environment. NEPA accomplishes this by requiring opportunities for public review and comment at several stages of the NEPA process, including during EIS scoping, when the issues an EIS will address is determined. Public review, comment and hearings are required for the draft EIS, and both the Final EIS and the Record of Decision are subject to public review and comment.

- Another significant purpose of NEPA is for decision makers and the public to be informed of and have the opportunity to consider reasonable alternatives that would avoid or minimize adverse effects. Each EIS must include a thorough alternatives analysis that includes the environmental impacts associated with each alternative for comparative purposes, including the project as originally proposed and the "no action" alternative.

- NEPA allows for the development of a long-term or programmatic EIS for projects or other agency actions that will continue over long periods of time. However, NEPA also recognizes that an EIS does not last forever. If an agency makes substantial changes to a proposed or ongoing action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns, a Supplemental EIS must be prepared. This provision has been successfully utilized to

[420] Id. p. 59, 63-64.

[421] Id. p. 64.

render a 20-year old EIS prepared for the implementation of a FMP obsolete, and to require the NMFS to prepare a supplemental programmatic EIS for that fishery.

- NEPA is a powerful mechanism for stakeholders to obtain detailed information about a proposed project, including the potential environmental impacts, the expert opinions of other federal and state agencies, whether viable alternatives are available and the true interests that other stakeholders have in the project. It also provides an opportunity for stakeholders to voice their concerns over or support a project or project alternative.

- If the success and strength of a statute can be measured by the efforts to undermine it, then NEPA is a very successful statute. Efforts to exclude and limit its applicability include the following:

    - A 2006 Congressional NEPA Task Force that sought to limit the scope of reasonable alternatives considered, impose time limits for the completion of EAs and EISs, give greater weight to comments from local interests, and limit the parties that could initiate a NEPA challenge.

    - Early versions of the 2007 MSA reauthorization legislation that sought to exclude MSA actions from NEPA review.

    - A 2011 bill, the Roadmap for America's Energy Future, that sought to weaken NEPA's applicability to offshore oil and gas activities by incorporating legislative approval of the final OCSLA Leasing Program EIS, excluding exploration plans from ES requirements, limiting consideration of alternatives and placing limits on judicial review.

    - Another 2011 bill, Restarting America Offshore Leasing Now Act, that tried to designate several areas for immediate drilling approval including in the Atlantic Ocean, without environmental review or input.

Weaknesses:

- Despite its public participation requirements, NEPA does not require public involvement in the development of an EA, the critical initial analysis that determines whether a federal action will have significant impacts on the environment and whether an EIS must be prepared. Nevertheless, when stakeholders have sued to gain access to the EA process, courts have generally held that the public must be involved in some way.

- The CEQ regulations allow agencies to identify activities that do not individually or cumulatively have a significant effect on the environment and that are eligible for categorical exclusions from NEPA. Despite efforts to limit the use of categorical exclusions, the CEQ has expressed concern that they are the most frequently used method of complying with NEPA.

- The NEPA regulations relating to the preparation of a Supplemental EIS are woefully inadequate. There are no regulations in place dictating when a Supplemental EIS is required and no requirement for public involvement in this process. As a result, the determination of whether there is new information or circumstances that were not considered in the original EIS and that warrant a Supplemental EIS is left to the discretion

of the agency. Similarly, there is no requirement that an agency prepare a FONSI when it determines not to prepare a Supplemental EIS. These requirements only apply to an agency's decision to prepare an EIS in the first instance**.**

- Courts have overwhelmingly viewed NEPA as establishing procedural requirements, and not as a statute that directs or even anticipates a particular substantive outcome. The U.S. Supreme Court held that "if adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." In another decision, the Court was even more blunt about NEPA's limitations, holding that the statute's purpose was to ensure "a fully informed and well considered decision, not necessarily the best decision."

- The efforts over the past decade to undermine NEPA by restricting its applicability to certain laws or activities and carving out exclusions are extremely concerning, particularly given the mindset of the current Administration and Congress.

Recommendations:

Other than remaining vigilant and warding off additional efforts to undermine NEPA, the Recommendations for NEPA are all regulatory in nature. As such, the strategy and timing for initiating these Recommendations must be assessed in light of the current Administration and political climate. Planning and establishing support for the Recommendations could begin now, with attempts to implement them on hold for a more opportune time.

1. **Adopt Standards to Determine When an SEIS is Required**: The CEQ NEPA regulations should be amended to give guidance regarding the type or extent of changes to an action that are "substantial" and the new environmental circumstances or information that would be considered "significant" and "relevant" and that would warrant the preparation of a Supplemental EIS. Examples of substantial changes to an action might include a larger project footprint, a changed project location, or different construction or development methodologies. Examples of new and significant environmental circumstances might include the passage of time, the identification of threatened or endangered species in the project area, an intervening event such as a storm or an oil spill, or new or more accurate data. The amended regulations should also allow for public involvement in this process.

2. **Require a FONSI for a Determination that an SEIS is Not Warranted**: The CEQ NEPA regulations should be amended to require the preparation of a FONSI to support an agency's determination that a Supplemental EIS is not warranted. The opportunity for public involvement in this process should also be added.

3. **Require EA Public Participation**: The CEQ regulations should be amended to require an opportunity for public participation in the EA process.

4. **Reduce Categorical Exclusions**: The CEQ regulations should be amended to reduce the opportunity for agencies to utilize categorical exclusions as a means of avoiding NEPA requirements.

5. **State Adoption of a SEPA (Mini-NEPA)**: States can adopt State Environmental Policy Acts, or mini-NEPAs, to require EISs for the review of state and local projects that will affect the environment. The advantages of a SEPA include:

- The SEPA can incorporate the NEPA requirement that applicants prepare a thorough alternatives analysis that details the environmental impacts associated with each alternative, including the "no action" alternative and the project as proposed.

- The state can determine what sort of action triggers the EIS process. Some, like NEPA, require an EIS in the event of a "major" action that "may" or "will" have a "significant" impact on the environment. Others establish EIS requirements for specific activities or for activities in specific areas.

- Several states have adopted a SEPA that, unlike NEPA, have "action forcing" or substantive provisions that require a certain decision or outcome based on the information about impacts developed in the EIS process. Examples are California, Washington, Minnesota, New York and the District of Columbia.

- If a state makes the SEPA part of the enforceable policies of its CMP, it can utilize the SEPA in its Consistency Review of federal actions.

THE CLEAN WATER ACT – SECTION 404 WATER AND WETLAND PROTECTIONS

Strengths:

- The CWA 404(b)(1) Guidelines, developed by the EPA and that, in addition to the ACOE Public Interest Review, must be considered in permit decisions add another layer of protection to the Nation's waters and wetlands.

- The 404(b)(1) Guidelines *create a legal presumption* that there are practical alternatives to discharges into wetlands and other "special aquatic sites" when the proposed activity for which the permit is sought is not water dependent. In addition to wetlands, special aquatic sites include sanctuaries and refuges, mud flats, vegetated shallows, coral reefs and riffle and pool complexes.

- A 404 permit is prohibited when the discharge will cause "significant adverse effects," to a water of the United States, with the term significant adverse effects defined to include effects on shellfish, wildlife and special aquatic sites, as well as effects on aquatic diversity, productivity and stability. These latter effects are further defined to include loss of fish and wildlife habitat, or the loss of capacity of a wetland to assimilate nutrients, purify water or reduce wave energy.

- The CWA gives EPA the authority to veto ACOE decisions to issue discharge permits when EPA determines that the discharge will have an unacceptable adverse effect on shellfish beds and fishery areas, including spawning and breeding areas, or on wildlife, recreational areas or water supplies. This provision allows EPA to veto a permit even after it has been issued and after work on the project has commenced. In addition, the veto can be based entirely on environmental concerns, without consideration of other project benefits.

Weaknesses:

- Court decisions have determined that, in conducting the Public Interest Review, the ACOE's focus is not necessarily on the water or wetland resources at issue, but requires an examination of the entire project in light of the general public interest. When balancing the reasonably expected benefits of the project against the reasonably foreseeable detriments, the ACOE is in the best position to decide what factors to weigh as well as the weight to be given to each factor. This interpretation of the ACOE's decision-making process heightens the need for the EPA veto provision.

- Even the EPA veto provision cannot save important natural resources from the current Administration. A proposed mineral mining project in Alaska serves as a warning of things to come. In February 2014, after consulting with the ACOE before it issued a permit, EPA Region 10 initiated the veto process to review the Pebble Mine Project proposed for Alaska's Bristol Bay Watershed. In addition to its receipt of more than 850,000 public comments asking it to protect Bristol Bay from the project, EPA itself determined that the adverse impacts and losses to productive waters and wetlands would be unprecedented in the history of the Clean Water Act Section 404 regulatory program not only in the Bristol Bay region, but in the *entire Nation.* Such losses include 94 miles of streams and 4900 acres of wetlands, lakes and ponds, many of which have documented significant anadromous fish occurrence.

  The mining company filed suit against the EPA before the agency had issued its decision. The EPA was successful in the defense of its position, including winning the dismissal of the suit. The mining company appealed, and while the appeal was pending, the new Administration, including EPA Administrator Scott Pruitt, took over. Within a matter of months, EPA reversed its opinion on the project, Mr. Pruitt announced that the lawsuit had been settled and encouraged the mining company to move forward with its ACOE 404 permit application.

Recommendations:

1. **Designate Special Aquatic Sites**: States should review the regulatory definition of the types of "special aquatic sites" set forth in the 404(b)(1) Guidelines at 40 CFR § 230.40-230.45, and formally identify such sites in their coastal areas. This will ensure that the protective presumption that alternatives are available will be applied in the review of non-water dependent 404 permit applications proposed for these areas.

2. **System for Engaging EPA Veto Analysis:** States can set up the criteria and procedures for enlisting EPA in a potential veto analysis of ACOE 404 permit applications. Criteria or triggering events can be based upon the proposed location of the discharge, e.g., special aquatic sites, or in or near certain other high value resources. This review could be incorporated into each state's CWA 401 Certification process.

3. **Gauge the Profile and Perceived National Import of the Project and Act Accordingly**: The Pebble Mine project and EPA Administrator Pruitt's interference in Region 10's process serves as a warning for when, how and whether to engage EPA in high profile projects.

THE CLEAN WATER ACT SECTION 303 (C) WATER QUALITY STANDARD AND 401 STATE CERTIFICATION PROVISIONS

Strengths:

- The combination of the 303(c) water quality standard provisions, requiring states to develop standards to protect the quality and uses of waters within their jurisdiction, and the 401(c) certification provision, authorizing states to review and reject federal actions that do not meet those water quality standards, add up to a powerful tool that enables states to protect their own water resources and the species that depend on them.

- The CWA requires that water quality standards, wherever attainable, should provide for the protection and propagation of fish, shellfish and wildlife.

- States can develop water quality standards that are more stringent than those required by the CWA and its associated regulations.

- The EPA encourages the use of bioassesssments that identify and take into account the presence of fish, algae, plants, benthic and other organisms when developing water quality standards.

- States can work together to develop water quality standards for multi-state waters. Such standards can include allocations and discharge limitations for states that discharge directly into the waterway as well as “upstream states” that discharge into the same watershed.

- The 401 certification provision applies to any federally licensed or permitted activity that may result in a discharge to a navigable water. Activities for which a state certification is required include those that require a CWA 404 dredge and fill permit, 402 National Pollution Discharge Elimination System Permit, Federal Energy Regulatory Commission permits and licenses, construction activities under the Rivers and Harbors Act, and permits sought from the Nuclear Regulatory Commission and Coast Guard.

- The State must grant, deny or waive the 401 certification before a federal permit or license can be issued. If the state denies the 401 certification, the federal agency cannot issue the license or permit.

- The state certification can impose any effluent or other limitations upon the applicant necessary to ensure the permitted activity complies with the state’s water quality standards.

- The EPA does not have the authority to modify state certification conditions, including for a Nationwide Permit where every impacted state has the opportunity to attach state-specific conditions.

- Water Quality Standards that can serve as the basis for a state’s denial of a 401 certification are not limited to numerical standards developed for specific hazardous or other pollutants. To the contrary, some of the most important water quality standards are those developed for turbidity, pH, temperature, dissolved oxygen and sedimentation.

Weaknesses:

- Like the CZMA consistency provision, the 401 certification provision is only as strong as the state water quality programs it enforces. If a state has not fully or accurately defined the designated uses for its coastal waterways or has not fully or accurately developed appropriate water quality standards to protect those waters, the power given to states through the 401 certification program will be of little use.

Recommendations:

1. **Review Existing Designated Uses and WQS:** Separate and distinct from the Integrated Reports that states must regularly prepare and submit to EPA describing their CWA progress, states should engage in their own analysis to ensure the designated uses and water quality standards for their waterways are appropriate. This should be a multi-step process that will ensure their most important water resources and the species that depend upon them are protected. States should:

    - Identify the waterways that are most important to the protection of fish and fish habitat, including breeding, nursery and spawning areas as well as migratory pathways;

    - In addition to recurring activities, identify new or expanded activities that are proposed or being considered for the region. Examples include:

        - Potential off-shore wind facilities, sand mining locations, mineral mining locations, or oil and gas drilling or exploration sites. BOEM designated lease areas are available on the Portal.

        - Potential channel-deepening, widening or relocation projects or channel dredging locations

        - Federal and State transportation initiatives, such as new or replacement highways, bridges and related structures.

    - Identify the likely adverse impacts to waters and wetlands from these activities, such as increased turbidity, suspended solids or temperature, decreased oxygen levels, increased sedimentation, and the potential discharge of hazardous substances (oil, gas, and related compounds), and identify which waterways they will directly or indirectly affect.

    - Determine whether the existing designated uses, water quality standards and TMDLs are sufficient to protect the waterways from the potential impacts identified.

    - Amend/upgrade the designated uses and water quality standards accordingly.

    - Determine what mitigation measures, if any, or effluent or other limitations can negate or satisfactorily limit the adverse impacts. Identify typical or common mitigation measures that will not negate or satisfactorily limit the adverse impacts. Be prepared to use this information to deny water quality certifications or to develop and attach 401 certification conditions to permits as appropriate.

2. **Identify Multi-State Water Quality Opportunities:** States can identify opportunities for the development of multi-state water quality plans and standards, such as those developed by Maryland, Virginia, Delaware, D.C., Pennsylvania, New York and Pennsylvania for the Chesapeake Bay. Participants in the process and/or subject to the standards developed can include not just the states in which the waterway is located, but "upstream" states in the same watershed that contribute to decreased water quality.

3. **Ensure 401 Certification Procedures Are In Place**: Make sure the state 401 Certification Programs have the appropriate level of structural and procedural integrity so opportunities to protect state water resources are not missed. This includes ensuring that the reviews are conducted by the agencies and personnel with the appropriate expertise for the activity and discharge location for which the permit is sought, the potential adverse impacts and the water resources and related fish, wildlife and habitat implicated.

PART IV - THE IMPACT OF THE MID-ATLANTIC REGIONAL OCEAN ACTION PLAN ON FISH AND FISH HABITAT PROTECTIONS.

PLAN PROVISIONS RELEVANT TO FISH AND FISH HABITAT

In its current state, the Mid-Atlantic Regional Ocean Action Plan (the Plan) has no impact on existing fish and fish habitat protections. However, through its implementation, the Plan does have the potential to impact those protections in both a positive and negative way. It provides both an opportunity for states to gain additional protections for their important natural resources, but also requires states and other stakeholders, such as conservation organizations and fishing interests, to not only stay involved, but to remain vigilant in their efforts to influence the manner in which the Plan is implemented and ensure that existing protections are not undermined. The opportunities and potential pitfalls associated with the Plan are discussed as they relate to existing or future Plan components.

The Purposes of the Plan

The Final Recommendations of the Interagency Ocean Policy Task Force (IOPTF) establish the blueprint for the development of the regional ocean plans. However, there is a significant discrepancy between the goals of the National Ocean Policy as stated in the Final Recommendations and the goals as stated in the Plan. The Final Recommendations set forth the top two National Goals of coastal and marine spatial planning as follows:

1. *Support* sustainable, safe, secure, efficient and productive uses of the ocean, our coasts and Great Lakes, including those that contribute to the economy, commerce, recreation, conservation, homeland and national security, human health, safety and welfare;

2. *Protect, maintain and restore* the Nation's ocean, coastal and Great Lakes resources and ensure resilient ecosystems and their ability to provide sustained delivery of ecosystem services.

The Plan has reworded these goals to place greater importance and certainty on ocean uses than is placed upon resource protections:

> Framework Goal 1: *Promote* ocean ecosystem health, functionality, and integrity through conservation, protection, enhancement and restoration.

> Framework Goal 2: *Plan and provide for* existing and emerging ocean uses in a sustainable manner that minimizes conflicts, improves effectiveness and regulatory predictability, and supports economic growth.

The Final Recommendations did not state that the Plans should "promote" protection of ocean and coastal resources; they definitively state it was the National Goal to "protect" these resources. It is telling that the Mid-Atlantic RPB chose to retain this language, even after it was objected to by stakeholders at the public meetings and in their written comments.[422] The difference between "promote" and "plan and provide for" is unmistakable and intentional and should serve as a warning.

The Plan Has No Force of Law; Implemented Under "Existing Authorities"

The Plan is to be implemented under "existing authorities," it contains no legal mandates and does not create any right or benefit enforceable by law against the Plan signatories,[423] Instead, it is intended to provide a framework for the application of existing authorities that will lead to better and more efficient decisions.[424] These important concepts are emphasized throughout the document and are consistent with the IOPTF Final Recommendations.[425]

Existing Resource Protection Authorities Are Under Attack

The statements throughout the Plan that it will be implemented in accordance with "existing authorities" were reassuring in 2010 when the Final Recommendations were released and even in 2016, when the Plan was adopted. However, they provide little comfort in today's political climate, *as all of the existing authorities that provide protection for ocean and coastal resources are under attack by the new Administration*.

On July 6, 2017, NOAA Fisheries and the National Ocean Service published a notice for a 45-day public comment period seeking input on existing regulations and processes that "may be outdated, unnecessary, ineffective; inhibit job creation and growth; and/or can be further streamlined…"[426] The notice was part of the ongoing efforts to implement the President's recent Executive Orders, including:

- EO 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects;
- EO 13771 - Reducing Regulation and Controlling Regulatory Costs
- EO13777 - Enforcing the Regulatory Reform Agenda
- EO13783 - Promoting Energy Independence and Economic Growth; and

[422] Environmental leaders clearly pointed out the "promote" versus "plan and provide for" language at the public meeting held at Monmouth University in July 2016.

[423] Plan, p. 27

[424] Plan, p. 17.

[425] Final Recommendations, p. 62.

[426] Email from Chris Oliver, Assistant Administrator of NOAA Fisheries to a List of Unidentified Recipients, July 6, 2017.

- EO13795 - Implementing an America-First Offshore Energy Strategy

In furtherance of these Executive Orders, NOAA specifically sought public comment "on the efficiency and effectiveness" of the current regulatory processes under the Magnuson Stevens Fishery Conservation and Management Act, the Coastal Zone Management Act, and the Endangered Species Act, as well as the National Marine Sanctuaries Act and the Federal Power Act.

The 45-day comment period for this review expired on or about August 14, 2017. Whether this process results in serious damage to the existing protections remains to be seen but, based upon the intent of the Executive Orders and the Administration's stated desire to "streamline" these regulatory authorities, it seems likely.

The Final Recommendations Contemplate Changes to Existing Authorities

In addition to the review of existing authorities already underway as a result of the President's Executive Orders, the Final Recommendations are replete with language demonstrating that, if necessary, state and federal programs as well as state and federal law, *will be changed to ensure Plan implementation*. Examples of such statements taken directly from the Final Recommendations include the following:

- "CMSP is intended to provide a better framework for the application of existing laws, but it is not intended to supersede them. Where *pre-existing legal constraints, either procedural or substantive* are identified for any federal agency, the NOC would work with the agency *to evaluate the appropriate legislative solutions or changes to regulations to address the constraints*."[427]

- "While CMSP should help resolve many use conflicts, it is not realistic to expect that all such conflicts would be resolved. Further, partners might agree not to resolve certain issues in a CMS Plan at a particular time, but rather to acknowledge these issues and indicate how the parties would continue to work on them as part of the iterative CMSP process. Such issues may be resolved as data gaps are filled, new information is developed, *or as State or Federal legal authorities are enacted, changed or updated*."[428]

- State and federal authorities with programs relevant to the CMS Plan would in a timely manner *review and modify programs as appropriate to ensure their respective activities adhere to the CMS Plan* to the extent possible. Where existing regulatory or statutory requirements impose constraints on the ability of an agency to fully implement the CMS Plan, *the agency would seek, as appropriate, regulatory or legislative changes to fully implement the CMS Plan*.[429]

Most concerning is the manner in which the Final Recommendations' specifically address the CZMA Consistency Provision – the single most important tool that the states have to protect their coastal resources against unwanted federal actions:

[427] Final Recommendations, p. 47

[428] Final Recommendations, p. 60.

[429] Final Recommendations, p. 61-62

> One example of the potential relationship between CMSP and existing authorities is the application of CZMA Federal Consistency. Since there will be multiple federal agencies and States involved in any one CMSP Plan, *the federal agencies would need to determine how CZMA review would occur as federal agencies adopt the plan*. For example, if a state works with the federal agencies to develop a CMS Plan, *the CMS Plan could include measures to ensure that it is consistent to the maximum extent practicable with the enforceable policies of a state's CZMA program*. *The relevant state could consider potential changes to the state's enforceable policies to achieve agreed upon regional CMSP objectives*. Also, a CMSP Plan might include *CZMA federal consistency administrative efficiencies so that CZMA review would not be needed for some activities*. Finally*, if a state incorporates a CMS Plan into its federally approved CZMA program, then it is likely that the CMS Plan would not need a consistency review*.[430]

Breaking this language down, the Final Recommendations present several means of changing the existing Consistency Review process:

- The Plan could include measures to ensure it is consistent with the enforceable policies of the participating states' CMPs;
- States could consider changes to their enforceable policies of their CMPs to achieve agreed upon regional objectives;
- The Plan could include CZMA federal consistency "administrative efficiencies" so that consistency review would not be needed for certain activities; or
- States could incorporate the Plan into its federally-approved CMP rendering it likely that the Plan, and activities taken pursuant to the Plan, would not need a consistency review.

This warrants continuous monitoring and participation by the states and other stakeholders to ensure the states' authority under the CZMA Consistency Provision is not undermined or negated entirely for actions and projects implemented under the Plan.

The Mid-Atlantic Data Portal

The Mid-Atlantic Data Portal is described by the Plan as "an online, publicly available toolkit and resource center that consolidates *available data* and enables regional ocean planners and ocean users to visualize and analyze ocean resources and human use information."[431] (Emphasis added). It is a remarkable source of information and is a good example of what can be accomplished when federal and state agencies and a diverse group of stakeholders work together. However, it is not without its issues, most of which are perception problems created by the lack of precise information about the data it contains.

[430] Final Recommendations, p. 62-63.

[431] Plan, p. 17.

The Portal contains "available data," meaning data that was already in existence when the Plan was developed. In other words, the Portal shows where activities are already occurring and have been occurring for some time; it does not depict ocean use locations that were developed specifically for the Plan and that the RPB and other stakeholders agreed upon as part of the planning process. This is a critical point and one that should be stated more clearly both in the Plan and on the Portal.

In addition, the information provided by the Portal is of mixed regulatory significance. Some of the data depicts uses and areas that have been established by law and carry with them certain regulatory responsibilities and obligations. Others have no such authority and, without a disclaimer stating as such, could cause confusion for those that review and utilize the data, as is encouraged by the Plan.

For example, the Portal contains maps of EFH designated through the MSA regulatory process and incorporated into the relevant FMPs. Any projects conducted under federal authority that may impact EFH require a consultation with the NMFS to ensure those impacts are avoided or minimized.[432] Conversely, the Portal also identifies BOEM wind-project planning areas and renewable energy lease areas. While these areas have been designated by BOEM as *potential* sites for these activities, they have not been formally designated as such and have not been subject to the required environmental reviews that must occur before any projects in these areas can occur, including NEPA, the ESA, the MSA, the CWA section 401 State certification process or the CZMA state consistency review.[433] Inclusion of these areas in the Portal without an explanation may give the distinct but incorrect impression that the RPB and other partners and stakeholders have selected and sanctioned these areas for wind farms and other energy-related activities.

Alternative Future Spatial Management Scenarios and Tradeoffs

The IOPTF Final Recommendations identify the development of "Alternative Future Spatial Management Scenarios and Tradeoffs" (Alternative Scenarios) as an essential element of the regional planning process.[434] The Alternative Scenarios are to be identified by the RPB based upon information gathered on current, emerging and proposed human uses, ecosystem conditions and ecosystem services. The RPB would then engage in comparative analyses of the Alternative Scenarios to assess, forecast, and analyze the tradeoffs and cumulative effects and benefits associated with each alternative. According to the Final Recommendations, the Alternative Scenarios and the supporting analysis are supposed to "provide the basis for the draft CMS Plan."[435]

Development and analysis of the Alternative Scenarios is the heart of the Regional Plans and is the process that asks and answers the tough questions associated with any regional planning exercise: What uses do we want in the region, where do we want them and what tradeoffs are we

[432] 16 U.S.C.A. § 1801(a)(6) and (10)

[433] In fact, as discussed in the NEPA section of this paper, in a proverbial cart-before-the-horse method of doing business, these reviews are not required during the lease bidding process or even after a lease is bought and paid for, but only five years later, after the leaseholder engages in pre-construction survey and installation activities and submits a Construction and Operations Plan. Fisheries Survival Fund v. Jewell, Case No. 16-cv-2409 (TSC), U.S. District Court for the District of Columbia, Memorandum Opinion, February 15, 2017.

[434] Final Recommendations, p. 55.

[435] Final Recommendations, p. 55, 57.

willing to accept to have them? The natural corollaries to these questions are equally important: What uses pose too great a risk for the region, what areas are off limits to certain uses, and how do we prevent them from happening?

The Mid-Atlantic RPB did not engage in the Alternative Scenario analysis and, as a result, the current Plan does not answer any of these important questions. This means the hard work is still ahead. Unfortunately, at least two proposals for major activities in the Mid-Atlantic are moving forward with no connection to the goals or principles of the Plan and present precisely the type of activities and conflicts that the Alternative Scenarios are supposed to address: The Statoil off-shore wind farm proposed for 127 square miles of ocean area off the coast of New York, which has already resulted in litigation brought by commercial and recreational fishermen and several coastal municipalities; and the BOEM-ACOE sand-mining proposal that targets the Manasquan Ridge, an important fishing ground and habitat off the coast of New Jersey.[436]

The Dispute Resolution Process

The Final Recommendations set forth the Essential Elements of the CMS Plan, one of which is the "incorporation of the Dispute Resolution Process."[437] The Dispute Resolution Process was to be developed by the National Ocean Council's (NOC) Governance Coordinating Committee to ensure there was consistency across regions. It was to be designed to ensure that most disputes are resolved at the regional level, but would also provide procedures to elevate the dispute to the NOC in the event resolution cannot be reached by the RPB.[438]

To date, it appears as if the NOC has yet to develop the Dispute Resolution Process. Nevertheless, the NOC Marine Planning Handbook Model Charter for RPBs gives guidance on collaborative decision making, what constitutes a dispute and how disputes can be resolved during the development, interpretation and implementation of the Regional Plans:

- General concurrence is consensus, but unanimous concurrence is not required;
- General concurrence is the absence of express disagreement by an RPB member on a particular issue;
- A member can register concern about a proposed course of action either verbally or in writing that does not rise to the level of express disagreement without preventing consensus from being reached;
- A dispute is the inability of the members to reach consensus; specifically, express disagreement by a single member on a particular issue which prevents general concurrence is sufficient to constitute a dispute;
- In the event consensus cannot be reached, the RPB co-leads shall work to achieve consensus by providing more information, modifying a proposed action, or developing a new approach to address the issue; and

[436] Although the Final Recommendations state that the Regional Plans are not meant to delay or halt existing or pending plans and projects, those responsible for making the decisions regarding such plans and projects should take into account the any identified Plan objectives.

[437] Final Recommendations, p. 58

[438] Final Recommendations, p. 54

- If an issue between federal agencies prevents consensus, and discussion at the RPB level cannot resolve it, then the issue can be raised to the NOC for resolution.[439]

The Model Charter also clearly articulates what the Dispute Resolution Process cannot do:

- It does not constitute the delegation of state, tribal or local government decision-making authority to the RPB, the NOC or any other entity; and

- It in no way alters, undermines or supersedes non-federal legal authority, including jurisdiction or decision making over a matter. If a dispute is elevated to the NOC, the NOC will fully respect and act consistently with any relevant non-federal jurisdictional or decision-making authority over the disputed matter.

Significantly, the Model Charter states that RPBs may develop additional rules or procedures to facilitate collaborative decision making and dispute resolution.[440] This provides the opportunity for the RPB to ensure that all stakeholders, and not just the RPB, are involved in this process.

The entire Mid-Atlantic consensus/dispute process is set forth in the following paragraph of the Charter for the Mid-Atlantic RPB under the heading "Decision Making":

> Regional planning bodies may make decisions on marine spatial planning. Decisions of the regional planning body are not made by vote, but through discussion and agreement – general consensus – among the members. General Consensus means the absence of express disagreement by member representatives, but does not require unanimous support, but instead has the support of each RPB member representative to agree to move forward with the decision. This approach ensures that all members have an equal voice in RPB decision making to guide the process of marine spatial planning.[441]

Although the Mid-Atlantic RPB did not adopt the NOC Model Charter language, it did include the critical language that allows an objection by a single RPB member to negate consensus on an issue and prevent that action from moving forward. It is important to note that consensus means "the absence of express disagreement." As such, silence by an RPB member equals consensus; to prevent the RPB from moving forward with an action, the RPB member must expressly disagree.

Ecologically Rich Areas

ERA Criteria: The main component of the Plan's Actions to Promote a Healthy Ocean Ecosystem is the identification of ecologically rich areas (ERAs) in the Mid-Atlantic Region and "increase understanding of those areas to foster more informed decision making."[442] ERAs will be designated based on five components characterized by their ecological features. An ERA can

[439] Marine Planning Handbook, National Ocean Council, July 2013, p. 20-21.

[440] Marine Planning Handbook, p. 21.

[441] Final Charter for the Mid-Atlantic Regional Planning Body, Updated June 20, 2016, p. 7.

[442] Plan, p. 40.

meet one or more of the five components, but all are not necessary for an area to qualify as an ERA. The five components are:

1. Areas of high productivity;

2. Areas of high biodiversity;

3. Areas of high species abundance including areas of spawning, breeding, feeding and migratory routes;

4. Areas of vulnerable marine resources (e.g., that support ecological functions important for marine survival and are particularly vulnerable to natural and human disturbances); and

5. Areas of rare marine resources (e.g., distribution and core abundance areas of federal and state ESA listed species, listed species of concern and candidate species).

A draft framework for identifying ERAs was included as Appendix 4 to the Plan, and a workgroup of federal and state agency members was established to continue this effort post-Plan approval. The framework was recently finalized and will be utilized, along with additional criteria currently under development, to select a pilot ERA that will be subject to the in-depth review and analysis contemplated by the Plan. The results will be compiled in a comprehensive factual report to determine how ERAs can inform management decisions that may affect them.

ERA Timeline: At a June 20, 2017 RPB Public Meeting, the ERA workgroup advised that the pilot selection criteria will not be finalized until December 2017, and that the pilot ERA will be selected sometime during the first quarter of 2018.[443] Additional input from the RPB and other stakeholders will be solicited from May through November 2018 as the pilot ERA report is written.[444]

ERA Purpose: Although the Plan states that identification of ERAs is part of the effort to implement the overarching goal of "protecting and conserving our ocean and coastal resources" it does not state how the ERAs will be protected or whether they will be subject to any special management measures.[445] In fact, the Plan is clear that the RPB does not have the authority to make such determinations:

> It is important to clarify at the outset that the RPB does not have the authority to identify discrete areas of the ocean for specific management objectives. Instead, identification of the ERAs and their constituent components through data products shared publicly through the Data Portal and the factual reports are intended to inform management decisions under existing authorities.[446]

ERA Concerns: Stakeholders focused on natural resource protections are concerned that the designation of ERAs will take too long and that while this process is ongoing, major actions in the Mid-Atlantic, such as the Statoil wind farm and the Manasquan Ridge sand mining project, are moving forward. Some suspect the pilot process is a means to slow down efforts to protect off-

[443] Work Plan, p. 5

[444] Mid-Atlantic Regional Ocean Action Plan 2017 Draft Annual Work Plan and Progress Report, June 2017, p. 4-5.

[445] Plan, p. 124 (Appendix 4).

[446] Plan, p. 40.

shore resources and, despite the significant amount of time and effort that will be spent on the pilot project, there is no understanding of how the ERAs will be utilized in Plan implementation and project approval. There is also concern that some ecologically significant areas may not be designated as ERAs and that their exclusion will be interpreted to mean they are automatically deemed appropriate for ocean uses and development.

Stakeholders focused on ocean uses are concerned that the designation of ERAs is going to place another road block in front of their efforts to engage in projects in the region, such as improvements to navigation channels and off-shore energy development. They anticipate that the ERAs will carve out swaths of ocean real estate that will be off limits and will not allow the region to engage in activities necessary to remain competitive and sustain the ocean economy.

Unfortunately, the conflict between the stakeholder groups creates a circumstance where it is in the best interest of those that want to develop ocean resources to move quickly before the ERAs are established. The length of time necessary for the ERA pilot project provides them the perfect opportunity to do so, with the potential result being the exact opposite of what was intended by the regional planning process.

Existing Significant Ecological Areas: It is not fully understood whether the ERA designation process will incorporate the significant ecological areas already designated under existing federal and state authorities, and if not, why not. Examples of such areas that are directly relevant to the protection of fish and fish habitat include, but are not limited to EFH and HAPC designated under the MSA; Critical Habitat designated under the ESA; and Special Aquatic Areas designated under the CWA 404(b)(1) guidelines.

STRENGTHS OF THE PLAN

- **Opportunity for Reasoned Decision Making and Desired Outcome**: The Plan provides an opportunity to avoid the catastrophic piece-meal project-by-project development of the region's off-shore resources at a time when pressure to exploit these resources is at an all-time high. Through the Alternative Scenarios, the hard questions will be addressed up front. In light of the new Administration's efforts to "streamline" existing environmental protections and increase off-shore energy development, including the potential for oil and gas exploration in the Mid-Atlantic, the opportunity for regional stakeholders to make our own decisions regarding what is best for the region – i.e., keep decisions "in house" - takes on additional significance.

- **Ability to Act Deliberately and In the Best Interests of the Region**: The Plan does not change existing statutory or regulatory authorities and does not create any enforceable rights or benefits against the signatories to the Plan. This allows participants to move forward deliberately in the best interest of the region without the fear of creating or being subject to unforeseen adverse legal consequences.

- **Protection of Ocean Resources is a National Policy Priority**: The IOPTF Final Recommendations that serve as the blueprint for the Regional Ocean Planning initiative make it clear that the protection, maintenance and restoration of ocean and coastal resources is an unequivocal goal of the NOP and the Regional Ocean Plans.

- **RPB Members on Equal Footing**: By allowing an objection by one RPB member to negate consensus on an issue and prevent that action from moving forward, the RPB's decision

making process places all RPB members on equal footing. This provides autonomy for the member states, which is critical under the current Administration.

- **Opportunities for Additional Public Input:** The NOC Model Charter encourages RPBs to adopt their own rules or procedures to facilitate collaborative decision making and dispute resolution. This allows the RPB to incorporate stakeholder/public input into these processes.

- **Portal Demonstrates Collaborative Effort:** The Data Portal is a remarkable one-stop source of information that demonstrates what can be accomplished when federal, state, commercial, conservation and public stakeholders work together towards a common goal.

WEAKNESSES OF THE PLAN

- **Stated Goals Not in Accordance with NOP**: Instead of adopting the language of the NOP, the RPB chose language that appears to place a greater importance and certainty upon ocean uses than it does for resource protections.

- **Ocean Uses versus Ocean Resources**: The Plan presents two main objectives: (1) ocean uses and (2) resource protection/restoration. This pits the objectives against each other in a scenario of perpetual competition. The better means of accomplishing these goals would be to place them on equal footing by characterizing the resource protections as another ocean use that is equally critical to the economy, security, health and well-being of the region.

- **Plan Implementation May Seek Changes to Existing Authorities**: The Final Recommendations state that *changes to existing federal and state statutes and regulations will be sought to implement the Plan*. Most alarming is the singling out of the states' CZMA consistency review authority as a source for such changes and presenting examples that would negate or seriously limit this critical state tool.

- **Significant Element of Plan Missing**: The Alternative Scenarios process has yet to occur. This means the very heart of the Plan – the determination of what activities should occur in the Mid-Atlantic Regions, where they should occur and where they should be restricted or prohibited – does not exist.

- **Source and Weight of Information in Data Portal Unclear**: Although the Plan encourages the use of the Data Portal, neither the Plan nor the Data Portal make it clear that it contains data that was already in existence and does not depict ocean use activities or locations that were specifically developed for or sanctioned by the Plan. In addition, data that depicts *potential* locations for activities that have not been selected or subject to any of the required federal and state environmental reviews, such as the BOEM lease areas, are not identified as such.

- **Purpose and Timeline for Pilot ERAs Suspect:** The ERA pilot process is scheduled to continue through the end of 2018 and it can be presumed that the designation of additional ERAs are years away. In addition, how the pilot ERA and any other ERA will be used in the planning process is unknown, leaving room for negative speculation by both pro-development and pro-resource protection stakeholders. This sets up a situation where it is in the best interest for applicants to push development projects forward before the ERA process is completed.

- **Establishment of ERAs Reinventing the Wheel**: It is unclear whether the designation of ERAs will include the important resource areas that have already been identified under existing federal and state authorities. Such areas include, but are not limited to EFH and HAPC designated under the MSA; Critical Wildlife Habitat designated under the ESA; and Special Aquatic Areas designated under the CWA 404(b)(1) guidelines.

- **Plan Implementation Is Occurring at a Difficult Time**: The current Administration has demonstrated a blatant disregard for resource protections and made its intent to open up protected areas to mining and energy exploration known. The President's recent Executive Orders and the resultant NOAA review to "streamline" the federal regulations is an attack on the very authorities that are supposed to protect natural resources during Plan implementation. This colossal misfortune of timing is exacerbated by the fact that the Alternative Scenarios process has not yet occurred in the Mid-Atlantic Region. There is some risk in engaging in a process that may draw unwanted attention to the effort and trigger the involvement of the Administration. As such, it is critical that Plan implementation remains, in the truest sense of the word, a "regional" effort.

RECOMMENDATIONS TO MAINTAIN OR ENHANCE FISH AND FISH HABITAT PROTECTIONS THROUGH PLAN IMPLEMENTATION

1. **States Must Not Agree to Changes to the States' Consistency Review Authority**. States must ensure that the authority granted to them under the CZMA Consistency Provision is not undermined during Plan implementation. To do that, ***States must not agree to any of the changes to this authority suggested in the Final Recommendations.*** Specifically, states **should not**:

    - Agree to measures in the Plan intended to ensure the Plan is consistent with the enforceable policies of the participating states' CMPs;

    - Make changes to the enforceable policies of their CMPs to achieve agreed upon regional objectives of the Plan;

    - Agree to include CZMA federal consistency "administrative efficiencies" so that consistency review would not be needed for certain activities; or

    - Incorporate the Plan into its federally-approved CMP rendering it likely that the Plan, and activities taken pursuant to the Plan, would not need a consistency review.

    All of these suggestions will negate or considerably limit the most powerful tool states have to protect their natural resources against the adverse impacts of federal actions. The current Plan is missing critical components, such as the Alternative Scenarios that will determine the activities and associated locations that are acceptable and unacceptable in the region; a fully-developed decision making or dispute resolution process that includes opportunities for meaningful public involvement; and the designation and uses of ERAs or other means of protecting natural resources. To pre-authorize the Plan as being consistent with the state CMPS with so many substantive and procedural questions

unanswered could be disastrous for resource protection efforts. Even if all of these components were completed and included in the Plan, this would still pose a significant risk as the Plan does not have the force of law, is an evolving document and can be changed any time. *The better course of action is to complete and implement the Plan in such a way that the Mid-Atlantic states will choose not to exercise their consistency authority when a planned-for project commences.*

2. **Develop a Formal Decision-Making and Dispute Resolution Process that Includes Meaningful Public Participation:** In accordance with the NOC Model Charter, the Mid-Atlantic RPB should develop a formal process to facilitate collaborative decision making and full and fair dispute resolution. As part of this process, the RPB should adopt additional rules or procedures as encouraged by the Model Charter to ensure meaningful public participation. The development of a decision making/dispute resolution process is imperative now that Plan implementation will begin and must precede the important decisions and conflicts that will arise through the ERA designations and the Alternative Future Scenarios.

3. **Retain the RPB's Current Definition of "General Consensus"**: As Plan implementation moves forward the RPB's current definition of General Consensus should be retained. By allowing an objection by one RPB member to negate consensus on an issue and prevent that action from moving forward, the RPB's decision making process places all RPB members on equal footing. This provides autonomy for the member states, which is critical under the current Administration. At the same time, it is important that all RPB members understand that consensus means "the absence of express disagreement." As such, silence by an RPB member equals consensus and to prevent an action from moving forward, the RPB member must expressly disagree.

4. **Keep Plan Implementation Decisions and Conflicts "In House"**: The Final Recommendations contemplate development of a dispute resolution process that would ensure most disputes are resolved at the regional level, but would also provide procedures to elevate the dispute to the NOC if resolution could not be reached by the RPB. It is unclear whether the NOC still exists and, even if it does, Plan implementation should avoid triggering any National interest or creating any opportunity for the Federal Administration to become involved. The decision making and dispute resolution process must ensure that all conflicts are resolved on a regional level, even if that means appointing a "Special Master" or mediator to handle conflicts the RPB cannot resolve

5. **Encourage the RPB to Commence the Alternative Future Spatial Management Scenarios and Tradeoffs.** The presentation and consideration of Alternative Scenarios is critical to the regional planning effort. It is through this process that the hard questions will be asked and hopefully answered, such as what activities are desirable in the Mid-Atlantic Region, where should they occur, are there alternative locations more suited to these activities, and what areas and resources do we want to restrict and protect from these activities? The Alternative Scenarios is the very mechanism that will facilitate the planned, appropriately-located and sustainable uses of ocean resources, including resource conservation, and avoid piecemeal development for which the cumulative impacts will be unknown until they occur. The following specific considerations and recommendations should be part of this effort:

    - This is the Plan component that will lead to major conflicts that must be appropriately resolved for the overall goals of the Plan to be realized. It is

imperative that a formal and workable decision making and dispute resolution process is in place before commencement of the Alternative Scenarios.

- Determine if other regions have begun or completed their Alternative Scenarios and discuss with them the pros and cons of their experience, things they would do differently and any successes or failures realized through the process.

- According to the Final Recommendations, the Alternative Scenarios are supposed to serve as the very basis of the Draft Regional Plans. In that the development of Draft Regional Plans was subject to public participation, the RPB should make it clear that public participation will also be a critical element of the Alternative Scenarios.

- Two major projects proposed in the region involve precisely the type of activities and conflicts the Alternative Scenarios are supposed to address: The Statoil off-shore wind farm and the BOEM-ACOE sand-mining proposal. The significance of these projects, their potential for adverse impacts and their timing render them suitable for consideration as RPB Alternative Scenarios. The RPB should be encouraged to seize this opportunity to immediately commence the Mid-Atlantic Alternative Future Spatial Management Scenarios and Tradeoffs process.

6. **Clarify the Origins and Purpose of Information in the Data Portal**: Both the Plan and the Data Portal should make it clear that the data and maps do not depict ocean uses and locations that were developed specifically for the Plan and, instead, represent activities that were already occurring when the Plan was initiated. In addition, the Portal should identify data layers that were established by law and carry with them certain regulatory responsibilities, such as the designation of EFH, and those they may look like they do, but have yet to undergo the required legal and environmental review, such as the potential BOEM leasing sites.

7. **Participate in the ERA Process and Encourage the Immediate Use of Existing Significant Ecological Areas in Management Decisions** – Stakeholders and states should engage in the ERA development process. However, it should be determined what role significant ecological areas already designated under existing federal and state authorities will play in those designations. In the interim, the states should identify all such existing ecological areas under their jurisdiction and incorporate them into the enforceable policies of their CMPs to be utilized in their CZMA Consistency Review of Federal actions. This is especially warranted in light of the current review and proposed ‘”streamlining” of the federal environmental statutes and their implementing regulations. In addition, all of these existing significant ecological areas should be mapped on the Data Portal and to ensure they are utilized immediately (as interim ERAs) in regional management decisions. Existing significant ecological areas include, but are not limited to, the following::

   - Essential Fish Habitat (EFH) under the MSA

   - Habitat of Particular Concern (HAPC) under the MSA

   - Critical Habitat under the ESA

   - Special Aquatic Areas under the CWA § 404(b)

- Protection and propagation of fish, shellfish and wildlife under the CWA § 303
- Waters of Exceptional Recreational or Ecological Significance under the CWA § 303
- Significant Coastal Fish and Wildlife Habitat under the New York CMP
- Prime Fishing Areas under the New Jersey CMP
- Habitat of Conservation Concern under the Delaware CMP
- Critical Areas under the Maryland CMP
- Geographic Areas of Particular Concern under the Virginia CMP
- Critical Habitat for State Threatened and Endangered Species
- Species of Greatest Conservation Need (SGCN) and related habitat under federally-funded State Wildlife Action Plans

8. **Review and Enhance State CMPs** – The MSA, the CZMA, the ESA and other Federal statutes and regulations established to protect natural resources, including fish and fish habitat, are currently subject to a "streamlining" effort by the Administration. This is yet another reason for states to thoroughly review and enhance to the fullest extent possible their CZMA Consistency Review Programs. Such a review should include an analysis of the regulations in their CMPs designed to protect natural resources to ensure that their prohibitions or limits against certain activities are unambiguous, and any exceptions to the regulations are narrow and well defined. In addition, the "consistency lists" of federal agencies, permits, licenses, activities and funding over which the states can exercise consistency review should be updated and enhanced, as should the lists of additional data and information required from each applicant for that review. While it is concerning that NOAA, the very agency that has requested review of the federal statutes and regulations to comply with the President's Executive Orders is the same agency that must review and approve state CMPs, it is important for states to make an effort to bolster state protections and programs to their maximum potential.

9. **Demand Fulfillment of NOP Goals** – Stakeholders must continue to participate in ongoing planning efforts and Plan implementation and ensure that resource protections, including for fish and fish habitat, are not characterized or evaluated as "constraints" to ocean uses. Demand that the RPB honor the NOP goal to "protect, maintain and restore the Nation's ocean and coastal resources" as opposed to just "promoting" those protections. Engage experts that can quantify and clearly present resource protections as another desirable ocean use that is critical to our economy, security, health and well-being.

10. **Engage in Plan Implementation with Eyes Wide Open**: The existing environmental authorities that are supposed to guide Plan implementation are currently under attack and the extent of the Administration's effort to "streamline" these statutory programs remains to be seen. This may make this the perfect time to engage in regional planning; a time when stakeholders need to step up and make the hard decisions about ocean uses that are best for the region and to gain agreed-upon resource protections before existing protections are undermined. On the other hand, this could be the worst time for regional decision making,

as is evidenced by the Administration's recent interference in other important regional efforts. One such example is the Administration's reversal of Region 10's denial of discharge permits for the Pebble Bay Mining project, a project that will subject Alaska's Bristol Bay Watershed to adverse impacts *unprecedented in the nation since the inception of the CWA 404 permit program* and for which Region 10 received 850,000 public comments asking the agency to protect the Bay. If Mid-Atlantic Plan implementation moves forward, regional conservation leaders and stakeholders must fully participate and drive the effort towards meaningful gains in resource protections. At the same time, participants must keep their efforts, and particularly any conflicts that arise, off of the new Administrations radar, a delicate but important balance.