



Co-Managing the Arctic Ocean and Coasts

How to Support Subsistence Uses in Coastal and
Marine Spatial Planning (CMSP)

April 2011



A Handbook that explains what CMSP is and how it may impact the Arctic, and identifies how Arctic communities can engage to ensure the process prioritizes their needs, concerns, and voices.

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Table of Contents

1. The Need for and Goals of this Handbook	1
What is the newly proposed ocean management system?.....	1
Is CMSP required?.....	1
How long will it take to develop new ocean management plans?	1
What is the goal of this Handbook?.....	2
2. Marine Management Challenges and Options	3
What does “managing the ocean” mean?.....	3
How are Arctic waters currently managed?	3
What are the weaknesses of the current systems for managing Arctic marine waters?.....	4
How can these weaknesses be fixed?.....	4
What is coastal and marine spatial planning?	5
3. The New U.S. National Ocean Policy and Framework for CMSP.....	8
Are there national efforts to integrate ocean and coastal management?	8
National Priority Objective: Changing Conditions in the Arctic	9
National Priority Objective: Coastal and Marine Spatial Planning	10
4. Participating in U.S. Coastal and Marine Spatial Planning	12
Why is CMSP important, and how can you participate?	12
The role and rights of tribes.....	12
The role and rights of local government.....	16
The role and rights of the marine mammal co-management bodies.....	18
Summary	21
5. Road Map for Engaging in the CMSP Process	22
Phase I (Dec. 2010 – Nov. 2011)	22
Phase II (Aug. 2011 – Nov. 2012)	24
Phase III (May 2012 – Nov. 2015)	27
 <i>Appendices</i>	
National Ocean Council and Governance Coordinating Committee Members (as of April 2011).....	i
Table of Abbreviations	ii
Glossary.....	iii
Further Reading	iv

1. The Need for and Goals of this Handbook

What is the newly proposed ocean management system?

In July 2010, President Obama created a new national ocean policy for the U.S. oceans, coasts, and Great Lakes. By executive order, he called for two actions that could affect management of ocean resources in the Arctic: **(1) the development of an Arctic strategic action plan; and (2) the development of coastal and marine spatial planning nationwide.**

First, in response to President Obama’s call, federal agencies are now developing an Arctic strategic action plan (Arctic SAP) along with eight other plans. The purpose of the Arctic SAP is to “[a]ddress environmental stewardship needs in the Arctic Ocean and adjacent coastal areas in the face of climate-induced and other environmental changes.”

Second, a national process has begun that aims to develop a new integrated system of ocean management with an approach called coastal and marine spatial planning (CMSP). The driving force behind CMSP is a widespread desire to make ocean management more efficient and effective. CMSP is founded on the principle that you need to look at the ecosystem as a whole in order to effectively manage and plan for all the uses and activities that take place within it. The goal is to reduce conflict among different users and ensure that the ocean can continue to support critical human uses, by figuring out the best times and places for different activities to occur.

A framework for developing and implementing CMSP was created by a federal body, the Interagency Ocean Policy Task Force (Task Force).

The basic structure for CMSP that the Task Force envisioned is that the federal government will oversee a planning process, and regional planning bodies will be in charge of implementation. The framework divides the United States into nine separate regional planning bodies, of which the Alaska body is one. There is the potential for the Alaska body to further divide into subregions early on in the process. For example, the Arctic region could be its own subregional planning area.

Is CMSP required?

Different people and parties have varying thoughts and perspectives on CMSP. Some are opposed, some are supportive. However, it is important to know that the Executive Order and the CMSP framework are binding on all federal agencies and entities. Thus, federal agencies involved in ocean management are obligated to go forward with this process – regardless of whether individual states, local governments, or others decide to support or participate in it—unless another presidential order or congressional act tells federal agencies otherwise.

How the federal agencies, and anyone else who participates in the process, will move forward is less certain.

How long will it take to develop new ocean management plans?

Although the process will go on for many years (the first round of planning will take up to five years), initial steps are being taken now—and they are very important steps. Among many other things, they

involve setting the overarching goals and objectives for the entire process, and identifying who will be involved in the process (such as who should be on the regional planning bodies) and when.

What is the goal of this Handbook?

As just described, the federal government is investing resources in developing an Arctic strategic action plan and developing and implementing a specific form of ocean management called CMSP. The goal of this Handbook is to provide:

- Information about the Arctic SAP and how communities and individuals can participate in its development;
- Information on why a new management system may benefit Arctic ocean and coastal ecosystems and communities;
- Information on the CMSP process and how it is being implemented in the United States; and

- A description of how CMSP may affect or interact with Alaska communities' rights and roles, and how individuals, community members, and community leaders can choose to get involved.

To help you as you read through the text, we have included a table of common abbreviations and glossary of key terms at the end of the Handbook. We have also included contact information for several people you can reach out to with questions. Finally, there is a list of additional reading materials if you want to learn more about the issues covered in this Handbook.

There is no legal advice in this Handbook. The Handbook does not advocate for or against CMSP in the Arctic; and while it contains legal and policy analysis, it does not offer any legal advice. Rather, it is meant to be an information resource for communities that will be directly affected by this process. We believe that, if CMSP is going to succeed and be useful, it must prioritize community voices and needs.

2. Marine Management Challenges and Options

Conditions are changing in the Arctic faster than anywhere else on Earth. Weather patterns are becoming less predictable, and the timing and thickness of the sea ice is changing. At the same time, more people are interested in developing industries in the Arctic. These new conditions and interests raise numerous questions about the best way to manage the Arctic ocean and coasts and the best way to protect the traditions, culture, and subsistence practices of the Arctic people.

What does “managing the ocean” mean?

Fundamentally, managing the ocean and coasts refers to managing the people who use and affect it. An effective management system makes sure that human uses and activities are ordered in a way that achieves regional goals and priorities. For example, if an area prioritizes a critical human use such as subsistence hunting, an effective system will first ensure that people are able to continue hunting now and into the future, and only then determine what other activities (such as oil and gas development) might co-exist with it.

To accomplish such management, managers and communities must first set visions and goals. Then they can figure out which activities support those visions and goals, over both the short and long term.

Such a management approach is based on a recognition that the ocean and its resources are not invincible or infinite: ocean resources can be depleted, and space can be filled. These limitations make it necessary to have an ocean management system that coordinates the

many uses and activities, so that the most important activities are not lost and the ecosystem remains healthy.

How are Arctic waters currently managed?

Today, multiple agencies and institutions manage the uses of and activities in Arctic waters and related on-shore activities in accordance with a variety of laws and policies, including:

Marine mammal co-management bodies manage subsistence uses and inform how other activities are managed. The marine mammal co-management bodies include, among others, the Alaska Eskimo Whaling Commission, Eskimo Walrus Commission, Alaska Beluga Whale Committee, Alaska Nanuq Commission, and Ice Seal Committee. These commissions and committees operate through delegated tribal authority, and in coordination with the federal government. Laws that drive this cooperation include the Marine Mammal Protection Act and the Endangered Species Act.

State and local government manage most activities from 0–3 miles from shore. The State of Alaska and Alaska’s coastal boroughs (such as the North Slope Borough and the Northwest Arctic Borough) manage development in coastal waters and on Alaska Native-owned lands. Alaska Native Regional Corporations (such as the Arctic Slope Regional Corporation or NANA Regional Corporation) manage the revenue from such development. The state, borough, and/or tribal governments manage onshore uses and policies that affect the Arctic coast, such as land use and economic policies on non-federal lands.

The federal government manages activities on the outer continental shelf, from 3–200 miles from shore, including oil and gas development and commercial fishing. The federal government also sets minimum water quality and air quality standards and regulations, which apply in both state and federal waters, and manages shipping and transportation. In addition, the federal government has ultimate authority for management of endangered, threatened, and marine mammal species in all ocean waters, whether federal or state.

What are the weaknesses of the current systems for managing Arctic marine waters?

The current management systems cover almost all marine uses and activities. The problem, however, is that these management systems are not well coordinated and integrated. For example, the same activity may be managed by entirely different entities depending on whether it occurs on shore (on land), near shore (in state coastal waters), or beyond 3 miles (in federal waters, which extend out to 200 miles). Further, each activity often must pass through multiple regulatory hurdles before approval.

In addition, the management systems rarely have explicit and transparent ways to handle potential or actual conflict – such as two user groups that both want to use the same area at the same time – or to figure out whether the combined effects of all activities in a specific area (or on a particular resource) are sustainable. Instead, each use, activity, or goal is managed in isolation, and no one is responsible for looking at the big picture and figuring out how all the different activities can co-exist.

How can these weaknesses be fixed?

The numerous management rules and systems are disconnected from each other like puzzle pieces that don't quite fit together. This problem has led to domestic and international efforts to create more comprehensive approaches to managing the ocean and coasts. The proposed alternatives vary in design, but typically share one key characteristic: they emphasize the importance of recognizing how all ocean uses, resources, and species are connected to and affected by each other. This is something Arctic communities have long known. In the U.S. national law and policy realm, this need for a connected, ecosystem approach is the foundation of an idea called “ecosystem-based management” (EBM).

EBM is a comprehensive and integrated management approach that considers the combined or cumulative impacts of all activities on an ecosystem. Its goal is to keep the society, the economy, and the ecosystem healthy, productive, and resilient, and to make sure the ecosystem can provide services that people depend on.¹ While this is a mouthful to say, it is even more difficult to figure out how to implement. One of the most common ways that people are now trying to implement ocean and coastal EBM is by undertaking a process called “marine spatial planning” or “coastal and marine spatial planning” (CMSP).

¹ Karen L. McLeod *et al.*, *Scientific Consensus Statement on Marine Ecosystem-Based Management* (Mar. 21, 2005), available at http://www.compassonline.org/sites/all/files/document_files/EBM_Consensus_Statement_v12.pdf.

What is coastal and marine spatial planning?

CMSP is a comprehensive process for planning all human activities in and on the ocean. It is designed to reduce conflict among ocean users by determining the times and locations for different activities. It specifically tries to reduce two types of conflict: conflict among multiple activities/actors, and conflict between activities and the needs of the ecosystem.² While some activities are easily compatible and may enhance other management goals, others may compete for available space, effectively precluding or negatively impacting one another.

CMSP is designed to build from local or regional goals and objectives. These goals then guide regional planners and decision-makers as they examine the existing and planned future uses of the ocean and coastal resources and make decisions about where (and when) each activity is best suited to occur.³ The idea is to balance human needs and development with marine ecosystem protection, to make sure that the marine ecosystem continues to support long-term human use and activities (like subsistence hunting). The process often results in better data management and sharing, and improved communication between stakeholders and agencies.

One of the common outputs of CMSP is a plan (“CMS plan”), which may geographically map the parties’ agreement. That is, it may show when and where the parties have agreed that particular uses and activities should take place. The plan or vision is then implemented by

the various actors responsible for ocean management through tools like voluntary agreements, regulations, and/or guidelines for relevant permitting or licensing processes.

The existing conflict avoidance agreement (CAA) between the oil and gas industry and the whaling communities provides a local example that has many CMSP elements. The CAA is designed to prevent oil and gas development from interfering with the bowhead whale migration through a science-based process that separates whales from oil and gas activities as the whales migrate across the Arctic waters. Like CMSP, the CAA is a place-based approach designed to reduce conflict between two human activities—subsistence harvest and oil and gas development. It also decreases human impact on the ecosystem.

On the next page, we have included three examples of CMSP in practice in order to show how CMSP might proceed and what it might accomplish. The first example, from Canada, covers the Beaufort Sea and resulted from structured stakeholder participation. The second example, from the East Coast of the United States, shows a glimpse of the benefits that may come from CMSP. Finally, the third example, from Norway, shows how CMSP can incorporate major industries such as oil and gas, fishing, and shipping.

² See Charles Ehler & Fanny Douvère, *Marine Spatial Planning: A Step-by-Step Approach Toward Ecosystem-based Management*, Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, IOC Manual and Guides No. 53, ICAM Dossier No. 6, at 18 (2009).

³ *Id.*

EXAMPLES OF CMSP IN PRACTICE

Integrated Planning in the Canadian Beaufort Sea

In 1996, the Canadian Parliament passed the Oceans Act, which established a “framework for modern ocean management.” Among other things, the Act requires the Department of Fisheries and Oceans (DFO), the primary federal Canadian agency in charge of ocean management, “to facilitate development and implementation of plans for the integrated management” of five priority ocean areas. One of these areas is the Canadian portion of the Beaufort Sea, covering over 1.1 million square kilometers.

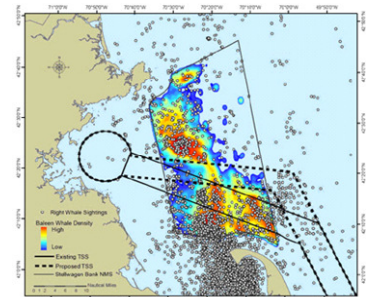
The integrated ocean plan for the Beaufort Sea is a multi-year strategic plan that “will provide long-term direction and a common basis for integrated, ecosystem-based and adaptive management of all marine activities.” It was developed through a collaborative process involving a regional Coordination Committee of federal agencies, territorial governments, and Inuvialuit organizations. It also includes the Beaufort Sea Partnership, a forum for public participation that involved regional representatives from stakeholder organizations.

Sources: DFO, Our Ocean, Our Future: Canada’s Oceans Strategy (2002), at v; DFO, Our Ocean, Our Future: Policy and Operational Framework for Integrated Management of Estuarine, Coastal and Marine Environments in Canada, 25 (2002); DFO, Integrated Ocean Management Plan for the Beaufort Sea: 2009 and Beyond (2009); Beaufort Sea Partnership, <http://www.beaufortseapartnership.ca>.

Reducing Vessel Collisions with Atlantic Right Whales through Mapping and Planning

The principles of CMSP have been used to reduce collisions between commercial ships and whales off the coast of Massachusetts. Based on a database of whale sightings, scientists determined that commercial shipping lanes crossed through areas with high numbers of whales. These commercial lanes were therefore shifted to areas with fewer whales (as shown in the figure), reducing the risk of collisions by an estimated 81% for all baleen whales and 58% for endangered right whales. Meanwhile, shipping transit times only increased by 9–22 minutes.

Sources: Stellwagen Bank National Marine Sanctuary, Science: Shifting the Boston Traffic Separation Scheme (TSS), at <http://stellwagen.noaa.gov/science/tss.html>; Council on Environmental Quality, Final Recommendations of the Interagency Ocean Policy Task Force (July 19, 2010).



*Council on Environmental Quality,
Final Recommendations of the
Interagency Ocean Policy Task Force
(July 19, 2010).*

3. The New U.S. National Ocean Policy and Framework for CMSP

Are there national efforts to integrate ocean and coastal management?

Like other nations and individual states in this country, the U.S. federal government is developing new integrated ocean and coastal management strategies. In June 2009, the President established an Interagency Ocean Policy Task Force (“Task Force”) to provide ocean management recommendations.⁴

After producing a draft and soliciting public input, the Task Force issued a set of final recommendations on July 19, 2010. That same day, the President issued an executive order based on those findings. In the order, the President established a national ocean policy for the country, which states that “it is the policy of the United States to . . . protect, maintain, and restore the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources.”⁵

More specifically, the Executive Order outlined nine national priority objectives. Briefly summarized, they are:

- 1) Adopt ecosystem-based management;
- 2) Implement coastal and marine spatial planning;

- 3) Increase knowledge to inform decisions and improve understanding;
- 4) Coordinate and support regional marine management;
- 5) Strengthen coastal resiliency and adaptation to climate change and ocean acidification;
- 6) Establish and implement integrated regional ecosystem protection and restoration;
- 7) Enhance water quality and sustainable practices on land;
- 8) Address changing conditions in the Arctic; and
- 9) Strengthen and integrate ocean, coastal, and Great Lakes observations, mapping, and infrastructure

A “Strategic Action Plan” (SAP) is being developed for each of these priority objectives. Two SAPs, in particular, may directly affect the Arctic, and these are described next.

Who is required to follow the Executive Order?

The Executive Order **is binding on all federal agencies**: all federal agencies are required to adhere to the Order and Task Force’s framework to the extent possible under existing law. The Executive Order **is not binding on non-federal actors** – including state, tribal, and local governments. Because the federal agencies are bound, however, these processes will proceed whether or not non-federal actors participate. It may be in a region’s best interest, then, to be involved in the planning, which is expected to take several years.

⁴ Memorandum of June 12, 2009, for the Heads of Executive Departments and Agencies on National Policy for the Oceans, Our Coasts, and the Great Lakes, 74 Fed. Reg. 28,591 (June 17, 2009).

⁵ *Stewardship of the Ocean, Our Coasts, and the Great Lakes*, Ex. Order 13,547 (July 19, 2010); Council on Environmental Quality, Final Recommendations of the Interagency Ocean Policy Task Force (July 19, 2010) [*hereinafter* CMSP Framework].

National Priority Objective: Changing Conditions in the Arctic

One National Priority Objective focuses on the “Changing Conditions of the Arctic.” Recognizing the disproportionate impacts of climate change on the region, it states that the nation must “[a]ddress environmental stewardship needs in the Arctic Ocean and adjacent coastal areas in the face of climate-induced and other environmental changes.”

To do this, federal agencies have been directed to develop an Arctic Strategic Action Plan (Arctic SAP), which is supposed to lead to “better ways to conserve, protect, and sustainably manage Arctic coastal and ocean resources.”

Specifically, the Arctic SAP is to address:

- Arctic ocean and coastal resource conservation, protection and sustainable management;
- Effective responses to risks to humans and ocean and coastal resources caused by environmental degradation;
- New collaborations and partnerships for improved environmental monitoring and assessment, including early warning and emergency response;
- Consistency and coordination with U.S. Arctic Regional Policy (including National Security Presidential Directive 66/Homeland Security Presidential Directive 25); and
- Improved scientific understanding of the Arctic system and how it is changing.

See CMSP Framework, at 39-40.

Federal agencies, through the National Ocean Council, are developing the Arctic SAP (along with other SAPs) right now. As it is being drafted, input from Arctic communities is critical to help ensure that the final plan supports communities’ needs and is based on the most reliable information. Not only do Arctic residents deeply understand the Arctic ecosystem and the plants and animals in it, but their traditions and lifestyles are the ones that will be most affected by the SAP. Many people outside of the region, like the oil and gas industry, shipping industry, and environmental organizations, are increasingly interested in working in and informing decisions that are made about the future of the Arctic. In the midst of all this, it is essential that the voices of Arctic people are heard to ensure proper management of Arctic resources and protection of subsistence rights and traditions.

You can participate in the following ways:

- You can comment on the draft Arctic SAP once it is released.
- You can attend and provide comments at public hearings or listening sessions. You can check the National Ocean Council website (www.whitehouse.gov/oceans) and local postings for upcoming meetings.

An outline of the Arctic SAP will be released in May or June 2011, at which point there will be public meetings and an opportunity to comment. The draft plan will then be published and opened for comment in September or October 2011. After that comment period closes, the plan will be finalized and published by early 2012.⁶

⁶ Cheryl Rosa, Remarks at Alaska Center for Climate Assessment & Policy webinar (April 19, 2011); *see also* White House Office of Science and Technology Policy,

National Priority Objective: Coastal and Marine Spatial Planning

The Executive Order and Task Force framework outline a process for developing and implementing CMSP across the United States. The CMSP framework divides the country into nine regions. Alaska is its own region, referred to as “Alaska/Arctic” (and called the Alaska region or Alaska CMSP in this Handbook, to distinguish it from the Arctic SAP discussed previously). Each region, including Alaska, may be divided into subregions, if the regional planning body (discussed below) chooses to do so.

The CMSP process has various milestones. One of the first steps, as with the Arctic priority objective, is to develop a CMSP Strategic Action Plan. Development of CMSP plans for all nine regions is expected to take five years (that is, until the end of the year 2015). The details of the steps and timelines are explained in Sections 4 and 5 of this Handbook. Overall, CMSP is meant to be a flexible and adaptive system that is tailored to fit the unique aspects of each region.

The Executive Order and Task Force recommendations envision a structure of federal oversight and regional implementation for the CMSP process.

- ***What happens at the federal level?*** The President created a National Ocean Council (referred to as the “NOC” or “Council”) to oversee implementation. The NOC is made up of approximately

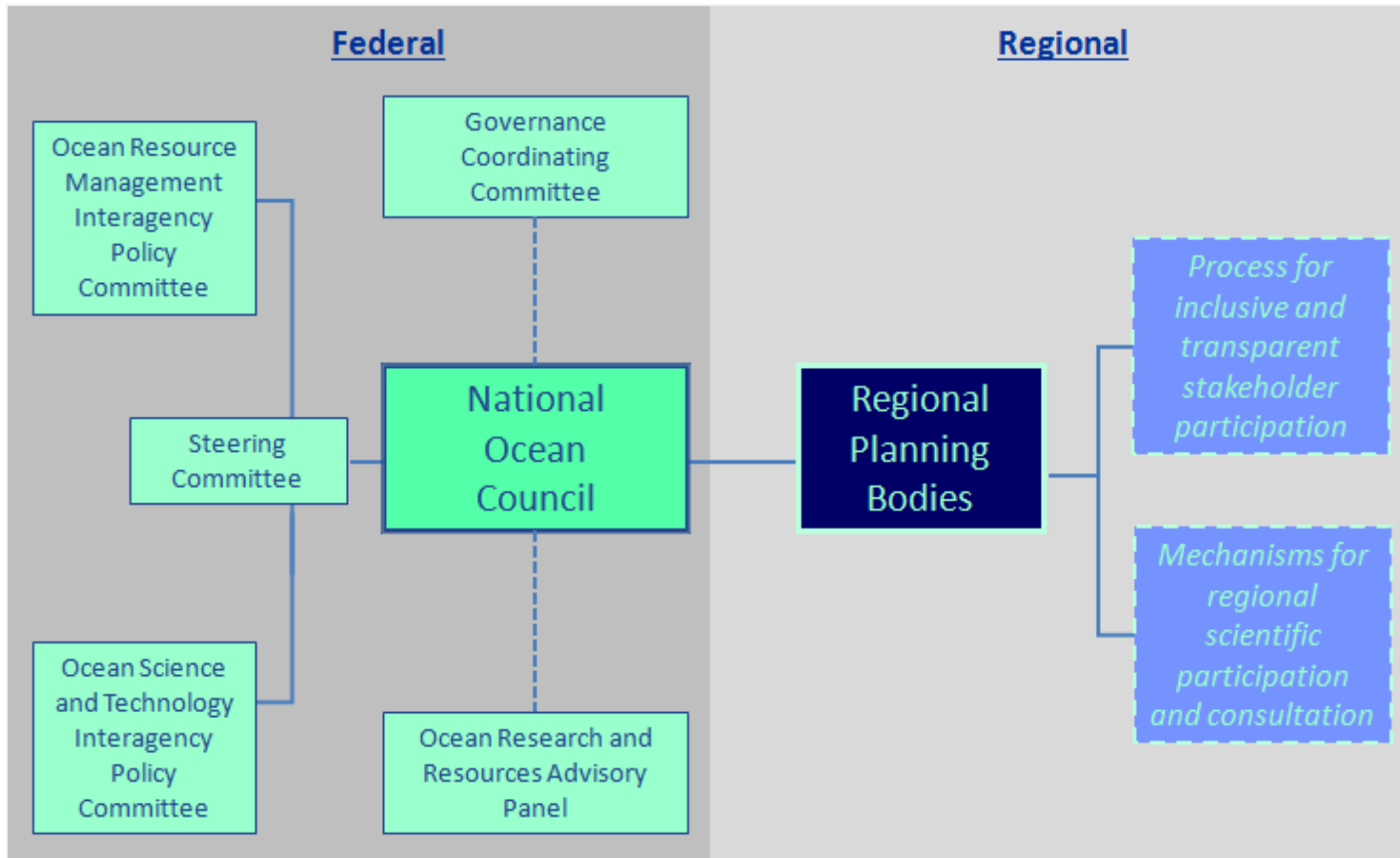
two dozen principal and deputy-level staff from federal agencies and institutions (e.g., the Secretary of the Department of the Interior and the Administrator of the National Oceanic and Atmospheric Administration). The Council is required to work with several different committees and regionally-based entities (see Figure 1). Its first meeting was held on November 12, 2010.

- ***What will the NOC do?*** Among other things, the NOC will oversee the development and implementation of CMSP; develop the nine Strategic Action Plans; and oversee the design and creation of the national information system.
- ***Who will the NOC consult?*** The NOC will consult with numerous different entities. This includes the Governance Coordinating Committee (GCC), which consists of 18 state, tribal, and local government representatives. Each representative serves a two-year term. (Current GCC members are listed at the back of the Handbook.)
- ***What happens at the regional level?*** The CMSP process will be led by regional planning bodies (RPBs). Each RPB will consist of “Federal, State, and tribal authorities relevant to CMSP for that region (e.g., resource management, including coastal zone management and fisheries management, science, homeland and national security, transportation, and public health).”⁷ Since Alaska is one of the nine U.S. regions, this means that there will be an Alaska RPB. The NOC is currently working with states and tribes (including Alaska Native villages) to create these bodies.

National Ocean Council; Development of Strategic Action Plans for the National Policy for the Stewardship of the Ocean, Our Coasts, and the Great Lakes, 76 Fed. Reg. 4139 (Jan. 24, 2011); CMSP Framework, at 70.

⁷ CMSP Framework, at 52.

Figure 1. Federal and regional structure for the national ocean policy and CMSP



4. Participating in U.S. Coastal and Marine Spatial Planning

Why is CMSP important, and how can you participate?

By shifting from sector-based to comprehensive ocean management, CMSP has the potential to change how decisions are made about resources and uses in the Arctic and throughout the country. Arctic communities may want to participate in the planning process to make sure the final plan appropriately considers community priorities, objectives, needs, and knowledge.

As described in the previous section, the Interagency Ocean Policy Task Force recommended (and the President adopted) a process and framework for CMSP (for convenience, from here on we will refer to it as the “CMSP Framework”). This section explains the variety of ways that tribes, local governments, and marine mammal co-management bodies can participate in CMSP. The opportunities range from high-level participation (such as membership on a regional planning body) to broad participation opportunities open to any community member (such as the right to comment on draft plans).

While describing these opportunities, this section also reviews some of the existing legal rights that tribes, local governments, and marine mammal co-management bodies have that may be relevant to the CMSP process. CMSP will not change these rights. However, done right, CMSP could help support these rights and the decisions and activities that flow from them.

The role and rights of tribes

What is the role of tribes in CMSP?

The CMSP process creates various ways that Alaska Native tribes can participate:

- In the future, an Alaska Native tribal representative could have one of the three tribal spots on the Governance Coordinating Committee (GCC) that includes representatives from across the United States (current members have already been chosen).
- Several Alaska Native tribal representatives will serve as members of the Alaska regional planning body, and one tribal representative will act as co-lead. In addition, there may be a possibility of representatives serving on sub-regional or other supporting bodies.
- In addition to these explicit roles, the CMSP Framework requires that mechanisms be put in place to allow Alaska Native tribes and other indigenous organizations to participate in the process. These roles are spelled out in more detail below.

Who can be a member of the Governance Coordinating Committee?

An Alaska Native tribal representative could become a member of the GCC. As described earlier, the GCC is a formal body within the national ocean governance structure that provides a forum for state, tribal, and local governments to discuss and coordinate among themselves

and with the National Ocean Council on issues related to the national policy on the ocean, coasts, and Great Lakes.⁸

The GCC consists of 18 members, including “three at-large tribal representatives chosen in consultation with tribal councils, national and regional tribal organizations (e.g., the National Congress of American Indians).”⁹ It is important to point out that, although the GCC includes tribal representatives, the existence of the GCC will “not replace Government-to-Government consultations with tribes under existing authorities.”¹⁰

The current members of the GCC are listed at the back of the Handbook, and will serve staggered two-year terms. At present, none of the three tribal representatives is an Alaska Native. However, it is possible that an Alaska Native representative may be chosen as a GCC member in future selection processes, and if so, he or she would have a direct role in advising the National Ocean Council. This is, however, a very limited opportunity, as it is likely that—at most—there would only be one Alaska Native representative at any one time.

Who can participate on the Alaska Regional Planning Body? Alaska Native tribes may also participate in the CMSP process as a member of the Alaska regional planning body, which will be in charge of developing the Alaska CMS plan. The CMSP Framework indicates that the National Ocean Council will “work with States and federally-recognized tribes, including Alaska Native Villages, to create regional

⁸ CMSP Framework, at 27.

⁹ *Id.* at 26.

¹⁰ *Id.*, 27; see also Letter from NOC co-chairs to United South and Eastern Tribes, dated Sept. 15, 2010, available at http://usetinc.org/Libraries/meeting_page_documents/SCAN2614_000.sflb.ashx.

planning bodies.”¹¹ Each regional planning body will include members from federal, state, and tribal authorities, with one federal, one state, and – as appropriate – one tribal co-lead. These co-leads will be “responsible for guiding and facilitating the timely progress of the CMSP process, but [will] not have final decision-making authority.”¹²

In short, representatives from Alaska Native tribes will be chosen as members of the Alaska regional planning body, and one of these representatives may, in turn, be chosen as a co-lead. This would provide some members of Alaska Native tribes a direct role in the development of the regional CMS plan.

It is important to note that, while the CMSP Framework contemplates one overarching CMS plan for all of Alaska (despite the significant differences in geography, ecosystems, and cultures across the state), it also notes that sub-regional CMS plans may be developed and mentions the Arctic region as one place where this might be especially appropriate.¹³ The regional planning body will make this decision. If sub-regions are established, presumably additional members of Alaska Native tribes will be selected to represent the different sub-regions.

What are the other opportunities? In addition to these explicit roles, the CMSP Framework also requires that mechanisms be put in place to allow Alaska Native tribes to participate in the CMSP process. For example, the CMSP Framework states that regional planning bodies will establish mechanisms to engage “indigenous community representatives with jurisdictional responsibilities or interests

¹¹ CMSP Framework, at 52.

¹² *Id.* at 52, n.9.

¹³ *Id.* at 54.

relevant to CMSP.”¹⁴ At the same time, the CMSP Framework also indicates that, during the final phase of the CMSP process, regional planning bodies will (in coordination with the NOC) develop a mechanism for providing feedback and status reports to the “appropriate...tribal leadership to share lessons learned, best practices, and ensure routine and frequent communication...”¹⁵ These mechanisms should therefore provide Alaska Native tribes with opportunities to participate in the CMSP process.

What are the existing tribal rights?

It is important to keep in mind that, in addition to the role carved out for Alaska Native tribes under the CMSP Framework, tribes continue to have all of their existing rights under the law.

According to the Department of the Interior, there are 225 “federally recognized native entities in Alaska,” which include Alaska Native villages and communities.¹⁶ As federally recognized entities, these villages and communities are eligible for federal services and funding from the Bureau of Indian Affairs. They are also eligible to participate in the CMSP process as described in the previous section.

The rights of Alaska Natives include those maintained under the Alaska Native Claims Settlement Act (ANCSA). Passed in 1971, ANCSA extinguished Alaska Natives’ claims to the land and resources, including aboriginal hunting and fishing rights, in Alaska (excluding outer continental shelf areas).¹⁷ In return, ANCSA provided Alaska

Native regional and village corporations with \$962.5 million and over 40 million acres of land.¹⁸

Even though ANCSA extinguished aboriginal hunting and fishing rights in Alaska, Congress expected subsistence rights would be protected.¹⁹ Indeed, a Joint Statement from the Conference Committee for ANCSA noted that the Committee believed that the Secretary of the Interior “can and will” protect subsistence rights through the exercise of his existing authority, and “expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.”²⁰

Specific subsistence protections were, however, never put into place.²¹ Therefore in 1980 Congress enacted subsistence management and use provisions under the Alaska National Interest Lands

(June 2008) [hereinafter “Business Organizations”]. ANCSA did not extinguish aboriginal title in outer continental shelf areas. *See, e.g.,* Andrew P. Richards, *Notes & Comments: Aboriginal Title or the Paramountcy Doctrine? Johnson v McIntosh Flounders in Federal Waters Off Alaska in Native Village of Eyak v. Trawler Diane Marie, Inc.*, 78 Wash. L. Rev. 939, 956-60 (2003); *Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989).

¹⁸ *Id.* at 109; *see also* 43 U.S.C. § 1603; *see also* Gigi Berardi, *The Alaska Native Claims Settlement Act (ANCSA) – Whose Settlement Was It? An Overview of Salient Issues*, 25 J. LAND RESOURCES & ENVTL L. 131 (2005); *see also* David S. Case, *Commentary on Sovereignty: The Other Alaska Native Claim*, 25 J. LAND RESOURCES & ENVTL L. 149 (2005); *see also* Business Organizations, at 122.

¹⁹ *See, e.g.,* Sophie Thériault *et al.*, *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 Alaska L. Rev. 35, 40-1 (June 2005) [hereinafter “Legal Protection”].

²⁰ Joint Statement of the Committee of Conference, H. CONF. REP. NO. 746, 92d Cong., 1st Sess. 37 (1971), *reprinted in* 1971 U.S.C.A.N. 2247 at 2250, *quoted in* Business Organizations, *supra* note 17 at n.89.

²¹ Joris Naiman, *ANILCA Section 810: An Undervalued Protection for Alaskan Villagers’ Subsistence*, 7 Fordham Envtl. Law J. 211, 236-7 [hereinafter “ANILCA Section 810”]; *see also* Legal Protection, *supra* note 19 at 40-1.

¹⁴ *Id.* at 52, 54.

¹⁵ *Id.* at 74.

¹⁶ Federally Recognized Native Entities of Alaska, 67 Fed. Reg. 46327 (2002).

¹⁷ Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 Alaska L. Rev. 107, 107

Conservation Act (ANILCA).²² ANILCA prioritizes the taking of fish and wildlife for subsistence uses over other uses on public lands.²³ This priority is applied based on the consideration of three factors: customary and direct dependence on the resource as the mainstay of livelihood; local residency; and the availability of alternative resources.²⁴ This provides legal support for prioritizing Alaska Native subsistence uses under any CMS plan that relates to federal public lands.²⁵ However, ANILCA does not apply to state public lands or outer continental shelf areas.²⁶

²² ANILCA Section 810, *supra* note 21 at 217-8.

²³ 16 U.S.C. § 3114. It is important to note that “subsistence use” is defined under ANILCA to mean “the customary and traditional uses by rural Alaska residents of wild, renewable resources” for certain purposes set forth under the act. *Id.* at § 3113 (emphasis added). In addition, the term “public lands” is defined to mean any land in Alaska to which the United States has title after December 2, 1980. The definition expressly excludes any land that is (a) validly selected by or granted to the State of Alaska under the Alaska Statehood Act or federal law; (b) selected by but not conveyed to a Native Corporation under ANCSA; and (c) acquired by a Village Corporation under ANCSA § 19(b). *Id.* § 3102(3).

²⁴ *Id.* at § 3114.

²⁵ It should be noted that the priority under ANILCA would only apply to those Alaska Natives whose activities fall within the scope of the term “subsistence use” as defined under ANILCA (see *supra* note 23).

²⁶ See *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). It should be noted that Article VIII of the Constitution of the State of Alaska governs subsistence on state and private lands. This article provides, among other things, that “fish, wildlife, and waters [occurring in their natural state] are reserved to the people for common use.” This means that, unlike ANILCA, the state cannot distinguish between rural and non-rural Alaskans in regards to these natural resources. Nonetheless, “subsistence use by all Alaskans [generally] has priority over commercial and sport uses.” This priority does not apply, however, during Tier I/II hunts (which is how the state “manages game hunts in poor allocation periods”). A subsistence user is any “individual who has maintained permanent residency in Alaska for twelve months.” See Jennifer T. Miller, Master’s Thesis, *Policy Changes to the Federal and State Management of Subsistence Hunting and Fishing in Alaska* (University of Denver University College, May 24, 2010), at 10,16, 24, 25-6, 27, 28.

In addition to establishing a priority for subsistence uses, ANILCA also requires federal agencies to evaluate how the use of public lands will affect subsistence.²⁷ Specifically, ANILCA requires federal agencies to evaluate three factors before allowing public lands to be used: the effect of the use on subsistence; availability of other lands; and other alternatives that would reduce or eliminate the use of the public lands needed for subsistence. If it is determined that the use of the public lands would “significantly restrict” subsistence, a federal agency can only proceed if it provides proper notice and a hearing, and determines that:²⁸

- The use is necessary and consistent with sound management principles;
- The use will involve the minimal amount of public land; and
- Reasonable steps will be taken to minimize the impacts on subsistence.

While the language of this provision seems to provide broad protection for subsistence, in practice, the provision has been applied fairly narrowly.²⁹

²⁷ *Id.* § 3120(a).

²⁸ *Id.*

²⁹ See generally Joris Naiman, *ANILCA Section 810: An Undervalued Protection for Alaskan Villagers’ Subsistence*, 7 *Fordham Env’tl. Law J.* 211 (Spring 1996).

The role and rights of local government

What is the role of local government in CMSP?

The CMSP Framework carves out an explicit role for local governments like the North Slope and Northwest Arctic Boroughs. First, in addition to a state representative from Alaska, the GCC also includes “three local government representatives from coastal States (i.e., two mayors and one county official), chosen in consultation with the U.S. Conference of Mayors, the National League of Cities, and the National Association of Counties.”³⁰ All GCC representatives play an important role in advising the National Ocean Council.

Right now, the Alaska state representative on the GCC is Mark Robbins, Associate Director, Office of the Governor of Alaska. The three local government representatives are from Florida, California, and Illinois. An Alaskan local government representative may, however, be chosen in subsequent selection processes.

At the same time, while local governments are not specifically included as members of the regional planning bodies, the CMSP Framework requires mechanisms to be put in place for regional planning bodies to “coordinate with appropriate local authorities throughout the CMSP process.”³¹

What are the existing rights of local governments?

Without changes in federal or state laws or regulations, CMSP will not alter the rights that local governments have under existing laws. This includes the rights of local governments to manage coastal resources

³⁰ CMSP Framework, at 26.

³¹ *Id.* at 53-54.

and uses under the Alaska Coastal Management Act (along with its federal counterpart, the Coastal Zone Management Act), as well as under planning and zoning authorities. These rights could support Arctic communities’ participation in the CMSP process and ability to ensure compliance with the resulting CMS plan.

The Coastal Zone Management Act (CZMA) is a federal law that provides incentives to coastal states to develop and implement coastal zone management programs.³² The Alaska Coastal Management Program (ACMP), which was first approved by the federal government in 1979,³³ requires each local district to develop and adopt coastal plans with enforceable policies that guide public and private land and water uses within its jurisdiction.³⁴ Currently, although both the North Slope Borough and the Northwest Arctic Borough have draft Coastal Management Plans, neither of these plans has been approved.³⁵

It should be noted that Alaska amended its coastal management laws and regulations in 2003-2004. The amendments altered what a district could include in its enforceable policies. When evaluating a district’s enforceable policies, the Alaska Department of Natural Resources will not approve a plan if it addresses “a matter regulated

³² See 16 U.S.C. §§ 1453(1), 1455(a), 1455b(f), 1456(c)-(d).

³³ NOAA, *Final Evaluation Findings: Alaska Coastal Management Program October 2002-August 2007*, 4 (June 2008), available at <http://dnr.alaska.gov/coastal/acmp/OCRM/AlaskaCMP2008.pdf>.

³⁴ 46 AS § 40.030, 40.210(7).

³⁵ See Alaska Coastal Management Program, *District Enforceable Policies*, available at <http://www.alaskacoast.state.ak.us/Explore/alldistEPS.html> (last visited May 18, 2010).

or authorized by state or federal law unless the enforceable policies relate specifically to a matter of local concern.”³⁶

The ACMP is set to expire on June 30, 2011.³⁷ If it is reauthorized in its current form, the ACMP may provide local governments with authorities relevant to the CMSP process. These authorities are discussed below. It should be noted, however, that – as this Handbook was going to print – the Alaska legislature was deliberating changes to the ACMP, including these authorities.

In its current form, the ACMP and related regulations provide a means to consider impacts to subsistence uses. Specifically, one of the standards that the state and local districts must use when carrying out their ACMP duties is a subsistence use standard that applies to areas designated as “subsistence use areas.”³⁸ The state or local district may designate an area as a subsistence use area where “subsistence use is an important use of coastal resources.”³⁹ After such a designation, any

activity that takes place in that area must “avoid or minimize impacts to subsistence uses of coastal resources.” In addition, any proponent of the activity must submit an analysis of its “reasonably foreseeable adverse impacts” as part of any required consistency review.⁴⁰

“Consistency review” is the name given to the process where the state determines whether a proposed activity is consistent with the state’s or local district’s enforceable coastal policies. If a federal action is being proposed, this process is required by the CZMA. A federal action, which includes both activities by a federal agency and projects licensed, permitted, approved, or funded by a federal entity, is subject to consistency review if it will have “reasonably foreseeable effects” on the uses and resources covered by a state’s coastal management program.⁴¹

If a non-federal activity is proposed, the ACMP also requires a “project consistency review.” This review begins with the action applicant

³⁶ 46 AS 46.40.070(a); Alaska Department of Natural Resources, Program Description of the Alaska Coastal Management Program, at A53 (June 2005), available at http://alaskacoast.state.ak.us/Clawhome/handbook/pdf/ACMP_as_amended.pdf. As noted below, the Alaska legislature was deliberating changes to the ACMP as this Handbook was going to print. These changes could affect various aspects of the ACMP, including this standard.

³⁷ See, e.g., Alaska State Legislature, Legislative Budget and Audit Committee, Department of Natural Resources Alaska Coastal Management Program, Part I (Nov. 26, 2010), available at http://alaskacoast.state.ak.us/Current_News/2011_Leg_Session/Part1_report.pdf.

³⁸ See 11 AAC 112.020(a). This standard may change under a reauthorization of the ACMP.

³⁹ *Id.* at §§ 112.270, 114.250(g). It should be noted that, unlike § 114.250(g), § 112.270 requires the state to show that “subsistence use is an important use of coastal resources as shown by local usage.” Before making such a designation, the state and the local districts must consult with one another, with federally recognized Indian tribes, with Native corporations, and with other appropriate persons or groups.

Areas specifically identified as non-subsistence areas cannot be designated as a subsistence use area. *Id.*

⁴⁰ *Id.* at § 112.270.

⁴¹ Preamble to 2006 Fed. Consistency Regulations at 792 (citing H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 968-975, 971; 136 Cong. Rec. H 8076 (Sept. 26, 1990); and 65 FR 77125 (Dec. 8, 2000)); see also Federal Consistency Overview at 5. See, e.g., CZMA § 307(c)(1) (“Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs”). It should be noted that a plan or rulemaking would only be subject to consistency review if it (1) would have foreseeable coastal effects; and (2) would “result in a plan to take action” or an “action or directive.” Preamble to 2006 Fed. Consistency Regulations at 792.

completing a Coastal Project Questionnaire administered by the Alaska Department of Natural Resources.⁴²

At the same time, a district may designate an “area which merits special attention” under the ACMP.⁴³ This term is defined to mean a “delineated geographic area within the coastal area” that is (1) sensitive to change or alteration; and (2) warrants special management attention due to certain factors identified in the statute or should be identified for planning, protection, or acquisition because of its value to the general public.⁴⁴ As noted in the regulations, this would include “an area important for subsistence uses” as well as “coastal resources important to subsistence uses.”⁴⁵ A district is authorized to develop a plan for these areas.⁴⁶

Local and state government could use these authorities under the ACMP in support of CMSP development and to ensure compliance with a resulting CMSP plan.⁴⁷

⁴² Alaska Coastal Management Program, CPQ Instructions, <http://dnr.alaska.gov/coastal/acmp/Projects/pcpq.html> (last visited Dec. 8, 2010).

⁴³ See, e.g., 46 AS § 40.030.

⁴⁴ 46 AS § 40.210.

⁴⁵ 11 AAC § 114.410(b)(1),(2).

⁴⁶ See *id.* at § 114.410(a).

⁴⁷ The ability to do so will likely depend on a number of factors including: (1) **Whether the CMSP instrument is a direct federal action or a federally authorized action:** A state’s ability to oppose proposed federal actions is stronger when it’s not the federal agency itself acting, but rather another party acting under federal agency authorization (e.g. through a permit or license, or with federal funding); (2) **What aspects of CMSP the state would want to influence:** Under the CZMA, the state government is responsible for conducting federal consistency review. Thus the ability of Alaska Native communities to influence federal CMSP instruments or actions will largely depend on whether the Alaskan state government wants to do so; and (3) **Whether a CMSP instrument or implementation action is in an area designated as a subsistence use area:** The subsistence use standard only applies to areas explicitly

Aside from the ACMP, local governments may be able to use their planning and zoning authority to implement CMSP. More particularly, the “home rule” provisions under title 29 of the Alaska Statutes provide that “home rule municipalities” have “all legislative powers not prohibited by law or charter.”⁴⁸ Home rule municipalities, like the North Slope and Northwest Arctic Boroughs, are therefore able to implement land use controls that are not otherwise withheld by the state or their charter. Currently, both of these boroughs use this authority to plan for marine waters within their boundaries.⁴⁹ This authority may therefore provide them with the power to implement CMSP out to the three-mile limit.

The role and rights of the marine mammal co-management bodies

What is the role of marine mammal co-management bodies in CMSP?

There is no explicit role carved out for marine mammal co-management bodies under the CMSP Framework. Alaska Native tribes could, however, choose members of the co-management bodies as their representatives in the process. In addition, the CMSP Framework calls for regional planning bodies to establish mechanisms to engage “indigenous community representatives with jurisdictional

designated as subsistence use areas. That is, the federal government only needs to ensure that CMSP instruments or actions “avoid or minimize impacts to subsistence uses of coastal resources” and submit an analysis of its reasonably foreseeable adverse impacts in designated subsistence use areas.

⁴⁸ 29 AAC § 04.010.

⁴⁹ Personal communication with Glenn Gray, Glenn Gray & Associates (April 2011).

responsibilities or interests relevant to CMSP.”⁵⁰ This should provide an opportunity for marine mammal co-management bodies to meaningfully participate in the process. The marine management co-management bodies will also have all of the rights that the public will have to participate. These rights are discussed in more detail in the next section.

What are the existing rights of marine mammal co-management bodies?

CMSP does not alter the rights that the marine mammal co-management bodies have, and more broadly the rights of Alaska Natives to engage in subsistence activities, under existing laws. This includes Alaska Native rights established under the Marine Mammal Protection Act (MMPA).

The MMPA was enacted to protect marine mammals from the “danger of extinction or depletion as a result of man’s activities.”⁵¹ In general, the MMPA prohibits the taking and importation of marine mammals and marine mammal products, with the term “take” broadly defined to mean to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.⁵²

⁵⁰ CMSP Framework, at 52-53. The Framework also notes that each regional work plan should specify a “mechanism to engage the indigenous community representatives.” *Id.* at 54.

⁵¹ MMPA, 16 U.S.C. § 1361(1). A “marine mammal” is defined under the MMPA as “any mammal which [(1)] is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea), or [(2)] primarily inhabits the marine environment (such as the polar bear)...” *Id.* § 1362(6). This definition includes any part of a marine mammal, such as the raw, dressed or dyed fur or skin of such mammal. *See id.*

⁵² *Id.* § 1362(13).

Exempted from this prohibition is the taking of marine mammals for subsistence purposes.⁵³ Specifically, any Alaska Native may take marine mammals if that taking is for subsistence *or* for purposes of creating and selling authentic Native articles of handicrafts and clothing *and*, in either case, the take is not wasteful.⁵⁴ The MMPA does not regulate the number of marine mammals that may be taken under this exception—unless it has been determined that a species is “depleted” for purposes of the MMPA, or “threatened” or “endangered” under the Endangered Species Act.⁵⁵

The MMPA contains provisions that help Arctic communities protect their subsistence resources and activities.

For one, the MMPA allows—but does not require—the federal government to enter into cooperative agreements with Alaska Native organizations to co-manage subsistence marine mammals.⁵⁶ Several Alaska Native organizations have done this. An important feature of these agreements is that, because they are negotiated with the federal government, they apply in all ocean waters—state and federal.

⁵³ *Id.* § 1371(b).

⁵⁴ *Id.*. The Act specifies that this provision applies to any Indian, Aleut, or Eskimo who resides in Alaska and dwells on the coast of the North Pacific Ocean or the Arctic Ocean. *Id.*

⁵⁵ Jamie M. Woolsey, *A Survey of Agreements and Federal Legislation Protecting Polar Bears in the United States*, 1 J. Animal Law 73, 78 (2005); Testimony of Marshall Jones.

⁵⁶ 16 U.S.C. § 1388(a). These agreements may include grants to Alaska Native organizations to, among other things, collect and analyze data on marine mammal populations; engage in marine mammal research; monitor subsistence harvests; and develop co-management structures with the state and federal government. *Id.* § 1388(b).

In 1999, the Alaska Beluga Whale Committee (ABWC) entered into an agreement with the federal government to co-manage the Western Alaska beluga population. Under the agreement, the ABWC “manage[s] the beluga whale subsistence harvest conducted by all member beluga whale subsistence hunting villages within the State of Alaska who hunt from the Western Alaska population of beluga whales.” The agreement requires the ABWC and the federal government to consult with one another on an “as-needed basis” in regard to management of the Western Alaska beluga population, including any matter that could potentially affect the subsistence hunt. The federal government provides funding to the ABWC for its co-management responsibilities.

Source: Agreement between the NMFS and ABWC for Co-Management of the Western Alaska Beluga Whale Population.

By their terms, co-management agreements can require the supervising agency to consult with the Alaska Native co-management organization on any federal decision potentially affecting the subsistence resource that is the subject of the agreement.

The MMPA exempts Alaska Native subsistence takes of marine mammals from the general prohibition on taking.⁵⁷ The statute provides limited exceptions for other forms of takes, such as incidental (but not intentional) takings or takings by harassment of a small number of marine mammals by US citizens engaged in other

⁵⁷ 16 U.S.C. § 1371(b).

activities – e.g. oil and gas exploration.⁵⁸ To qualify for this exception, the overseeing service (NMFS or FWS) must determine that the taking does not have “an unmitigable adverse impact” on the availability of the marine mammal for subsistence uses.⁵⁹ Federal agencies must demonstrate that determinations of whether there are unmitigable adverse impacts to subsistence hunting are “supported by substantial evidence on the basis of the record as a whole.”⁶⁰

For over two decades, the Alaska Eskimo Whaling Commission (AEWC) has negotiated an annual Open Water Season Conflict Avoidance Agreement (CAA) with offshore oil and gas operators for the purpose of developing mitigation measures to protect the bowhead whale and to ensure no adverse impact to the bowhead whale subsistence hunt. As described previously, the CAA seeks to reduce conflict between oil and gas development and subsistence whaling by outlining what industry must do to prevent offshore oil and gas activities from interfering with subsistence resources and the subsistence livelihood. This includes mitigating noise impacts, managing vessel traffic, and providing for real-time communications between industry vessels and the hunters. The content of the agreement is based on subsistence hunters’ observations of the marine ecosystem and on western science.⁶¹

⁵⁸ 16 U.S.C. § 1371(a)(5)(A)(i), (a)(5)(D)(i).

⁵⁹ *Id.* § 1371(a)(5)(A)(i)(I).

⁶⁰ *Id.* § 1371(b).

⁶¹ 2010 Open Water Season Programmatic Conflict Avoidance Agreement (2010); personal communications with Jessica Lefevre, Counsel, Alaska Eskimo Whaling Commission (2010–2011).

Summary

In this section, the goal was to provide a general understanding of the roles and rights created by and implicated in (although not altered by) the CMSP process. To achieve this, the section outlined the various formal and informal roles that have been designated for tribes, local governments, and marine mammal co-management bodies in the CMSP process. This section also outlined the rights of each of these groups under existing laws, which may provide sound footing for Arctic communities to participate in the CMSP process.

5. Road Map for Engaging in the CMSP Process

In addition to carving out an explicit role for certain actors, the CMSP Framework requires that mechanisms be put in place to enable the general public to participate in the CMSP process throughout the three phases of its five-year development period. This section lays out the steps that will be taken during each of the three phases, and highlights possible places for Arctic communities to participate. A timeline of these opportunities is summarized at the end of this section in Figure 3.

It is up to community members themselves to consider whether, when, and how they want to engage—and what they may want to achieve through their participation.

Phase I (Dec. 2010 – Nov. 2011)

The first phase of the CMSP process is intended to establish a framework for CMSP at both the national and regional levels. The first meeting of the NOC took place in November 2010, which started the flexible timeline outlined in the CMSP Framework.

Organize NOC and Begin Strategic Action Plan Development (Dec. 2010 – Aug. 2011)

The first step in the CMSP process is developing a foundation for national CMSP efforts.⁶² This started with determining the NOC's internal organization. (A list of the principal and deputy-level members of the NOC is contained in the back of this Handbook.) For

⁶² CMSP Framework, at 69.

example, the NOC must determine how to incorporate CMSP into its governance structure, how federal agencies will help in implementing CMSP, and its resource needs.⁶³

To stay on track with its timeline, the NOC has until August 2011 to develop and release its CMSP Strategic Action Plan, and until November 2011 to develop and release its Arctic Strategic Action Plan (as well as plans for the rest of the nine priority objectives). Two of the NOC's committees—the Ocean Resource Management Interagency Policy Committee and the Ocean Science and Technology Interagency Policy Committee—are leading the development of the Strategic Action Plans.⁶⁴

- **CMSP Strategic Action Plan** – The CMSP plan will include national objectives for CMSP; guidance for developing a national data management system; an analysis of whether the federal statutory framework will support CMSP; a mechanism for resolving disputes; and any additional CMSP guidance.⁶⁵
- **Arctic Strategic Action Plan** – As discussed previously, the Arctic plan will address better ways to manage and safeguard Arctic marine resources; collaborations and partnerships for improved environmental monitoring and assessment; coordination with

⁶³ *Id.* at 70

⁶⁴ *Id.* For a list of the nine priority objectives, *see supra*, p.8. *Id.* at 24, 25-6.

⁶⁵ *Id.* at 70-1.

other U.S. Arctic policies; and improved scientific understanding of the Arctic and impacts of climate change.⁶⁶

The CMSP Framework states that there will be “substantial opportunity” for the public to participate in the development of the Strategic Action Plans, as well as in the CMSP process more generally.⁶⁷ This participation will occur through public hearings, public comment periods, and other similar processes. Public notice (for example, an announcement in a local newspaper, or an email to community leaders) will be given to make people aware of such opportunities. The CMSP Framework emphasizes that public participation should focus on those who may be most impacted by the CMSP process and those communities that have been underserved.⁶⁸ For these reasons, Arctic communities should expect that they will have opportunities to be involved throughout the CMSP process.

Although the time to provide general input into the development of the Strategic Action Plans has now passed, you will still be able to comment on drafts of the plans once they are released. Drafts of the plans are expected to be released sometime around summer 2011, and then the final CMSP SAP should be published by the end of 2011 while the rest of the SAPs should be published in early 2012.

Convene and Organize Federal Agency Representatives in the Regions (Dec. 2010 – Jan. 2011)

Before the regional planning bodies are formed, the federal government is required to organize its own efforts and agencies. To

this end, federal agency representatives at the national and regional levels have been discussing ways to communicate and share information, and determine how best to work with state and tribal partners. There is limited or no public participation in this step.

Develop Model Agreement (Dec. 2010 – Feb. 2011)

The NOC is currently working on developing a model development agreement. This process will involve limited or no public participation. After this agreement is developed, it will be given to the regional planning bodies, which will tailor the agreement to fit the specific needs of the region. The agreement will be used by the region to, among other things, set forth their commitment to develop a CMS plan, define ground rules and identify representatives.⁶⁹

Organize and Convene a National Workshop and CMSP Simulation Exercise (Tentative Date: June 2011)

The NOC is currently organizing a national workshop. The workshop and planning exercise will include “potential regional planning body representatives” from the states and tribes, and may include the general public and stakeholders for at least part of the workshop. For those who do attend, it will provide an overview of CMSP and the national framework and will include a planning exercise to test how this framework will work in practice. The workshop will also provide a forum for federal, state and tribal representatives to discuss and develop strategies for implementing CMSP.⁷⁰

⁶⁶ *Id.* at 39-40.

⁶⁷ *Id.*

⁶⁸ *Id.* at 56.

⁶⁹ *Id.* at 72.

⁷⁰ *Id.*

Determine Composition of and Establish Regional Planning Bodies (Mar. 2011 – ?)

After the workshops are held, the regional planning bodies will be established. The states and tribes, with guidance from the NOC, will determine the appropriate state and tribal representatives to serve on the bodies.⁷¹ Each regional planning body will then enter into a development agreement.⁷²

Capacity Assessment and Identification of Initial Regional Steps (July 2011 – Nov. 2011)

Once the regional planning bodies have been established, they will conduct a CMSP capacity assessment.⁷³ This assessment is intended to evaluate the financial and technical resources of the region, as well as identify the initial steps for the region to take. After the assessment is complete, the NOC will work with the regional bodies to determine how best to meet the needs of the region and support the region's initial steps.⁷⁴

⁷¹ *Id.* at 52.

⁷² *Id.* at 72.

⁷³ *Id.*

⁷⁴ *Id.*

Develop Stakeholder and Scientific Participation Process (May 2011 – May 2012)

One of the final steps of Phase I is for each regional planning body to begin to identify the key stakeholders, scientific and technical experts, NGOs and other partners who should participate in the CMSP process.

Each regional planning body will establish a mechanism to ensure that the input from these individuals will be taken into account, as well to ensure that there is transparency and participation in the planning process. This could occur through public hearings, public comment periods and other similar processes.⁷⁵

Phase II (Aug. 2011 – Nov. 2012)

The second phase of the CMSP process will focus on building capacity in the regions: it allows the regions to test certain issues and elements of the process, providing the regions with experience and knowledge.⁷⁶

Initial Regional Steps (Aug. 2011 – May 2012) and Work Plan Development (Nov. 2011 – Nov. 2012)

In the beginning stages of Phase II, each region will be able to focus on the highest priority regional issues that were identified in Phase I.⁷⁷ It should be noted that, while it is not yet clear how CMSP efforts will be funded, the CMSP Framework sets out four initial "Priorities for Financial and Other Support." These priorities include support for initial regional CMSP processes, as well as support for a national

⁷⁵ *Id.* at 73; *see also* text surrounding note 68 [public participation in Phase I].

⁷⁶ CMSP Framework, at 73.

⁷⁷ *Id.*

information management system and development of science and information needs.⁷⁸ Funding may be made available for these priorities in the future.

The CMSP Framework notes that each region will likely focus on different issues. For example, one region may want to focus on identifying regional objectives.⁷⁹ Such objectives are intended to serve as a guide for the planning process and the eventual development of a CMS plan.

Given that regional objectives are intended to guide the entire CMSP process, Arctic communities could provide guidance on local objectives. To ensure their voices are effectively heard, communities could identify and prioritize local objectives prior to regional development.

To identify and prioritize Arctic communities' objectives, Arctic community leaders like the Inuit Circumpolar Council – Alaska or the Alaska Federation of Natives could **organize events** (e.g. community meetings), where community members could express objectives that are important to them, and **compile** a list of these objectives. Once a preliminary list is developed, the leaders could **establish a process** for community members to review it and, ultimately, reach a consensus on the number and priority of the objectives. This sort of process could help Arctic communities speak with a unified, clear voice and increase the effectiveness of their participation.

⁷⁸ *Id.* at 74-76.

⁷⁹ *Id.*

Instead of focusing on identifying regional objectives, a region may want to focus on organizing, gathering, and analyzing data.⁸⁰ Such data could include:

- The ecological conditions and relative importance of areas within the region;
- The relationships and links within and among regions;
- Current and emerging regional uses of the ocean and coast; and
- Contributions of existing place-based management measures and authorities.⁸¹

The CMSP Framework states that the planning bodies must “consult scientists, technical experts and **those with traditional knowledge of**” coastal and marine sciences and other relevant fields.⁸² The planning bodies must also establish regional scientific participation and consultation mechanisms in order to ensure that the best available information is received.⁸³ As noted above, these mechanisms will be established during Phase I.

Traditional knowledge could greatly contribute to the CMSP process, particularly where there are gaps in current scientific understanding of the ecosystem or when the experience and knowledge of Arctic community members differs from western science.

At this stage, Arctic communities could inform the CMSP process through their observations and experience.

⁸⁰ *Id.*

⁸¹ *Id.* at 57.

⁸² *Id.* at 56.

⁸³ *Id.*

The communities' traditional knowledge will be critical to ensuring the CMSP process is based on accurate information. This information will ultimately be used to understand the ecosystem and identify the range of different uses in the region, which will then form the foundation of the CMS plan itself. Arctic communities' knowledge is vital to ensuring that the marine uses, activities, and resources that are most important to them are adequately known and considered during the data-gathering stages.

In the past, local and traditional knowledge has informed science in numerous situations. These include:

- **Estimating bowhead numbers.** Bowhead population estimates used to be based on counts of whales in the open water near the shore. Then whaling captains told scientists that “bowhead whales migrate under sea ice, often traveling far out to sea.” Using the captains' knowledge, scientists developed techniques such as using aerial surveys and hydrophones to track whales underwater, increasing the accuracy of bowhead population estimates.⁸⁴ This has been central to the AEWC's efforts to obtain quotas that meet community subsistence needs.⁸⁵
- **Effect of noise on bowheads.** Whaling captains told scientists that the noise from seismic testing and ships caused migrating bowheads to change their course. Based on this, scientists studied

the effects of noise on migration routes, confirming the captains' observations.⁸⁶

- **Bowheads' sense of smell.** In the past, even though the Inupiat had long observed that bowheads were sensitive to odors, Western scientists thought that the whales had no sense of smell. After studying bowhead brains, scientists confirmed that bowheads have large and complex olfactory bulbs.⁸⁷

Once a region has started to take its initial steps, the regional planning body will begin to develop a work plan. At this stage, the regional planning body is tasked with building upon lessons learned from its own and other regions' initial steps, as well as existing efforts in the region. These efforts may include region-specific, state-focused, site-specific and issue-specific efforts.⁸⁸

Building from existing approaches provides Arctic communities with an opportunity to incorporate work that has already been done in the region – such as the work of the various marine mammal co-management bodies.

Arctic communities could put together a list of existing Arctic efforts that could support Alaska CMSP.

⁸⁴ Henry P. Huntington & María E. Fernández-Giménez, *Indigenous Knowledge in the Arctic: A Review of Research and Applications*, 7 *Indigenous Knowledge & Development Monitor* 11, 12 (1999); see also Presentation of Dr. Craig George, *Session 2: A Unique People and a Unique Region Requires a Unique Approach*, available at http://www.eli.org/Seminars/past_event.cfm?eventid=539.

⁸⁵ Personal communications with Jessica Lefevre, Counsel, Alaska Eskimo Whaling Commission (2010–2011).

⁸⁶ Presentation of Dr. Craig George, *supra* note 84.

⁸⁷ *Id.*

⁸⁸ CMSP Framework, at 56.

Work Plan Submittal and Planning Process Preparation (May 2012 – Nov. 2012)

When it is completed, each regional planning body will submit its proposed work plan to the NOC. The NOC will then review it in order to determine how best to support the region in implementing CMSP.⁸⁹

Phase III (May 2012 – Nov. 2015)

During the third and final phase of CMSP implementation, regional CMS plans will be developed in accordance with the work plans and implemented.⁹⁰

Develop and Implement CMSP and Provide Feedback from Initial Regional Steps (May 2012 onwards)

Building on the foundation from the first two phases, each regional planning body will develop a CMS plan.⁹¹ Each planning body will provide status updates and feedback to NOC, as well as to the appropriate state and tribal representatives.

The public will be given the chance to comment on the draft plan, and the supporting environmental impact analysis, before it is finalized.⁹² This will be the last opportunity for the public to voice

Arctic communities may want to be involved in reviewing and providing their input on the draft CMS plan.

their opinions before the plan is finalized. After it is finalized, there will be at least a 30-day public notice period before the NOC will certify the plan.⁹³

Although the CMSP Framework indicates that the timeline for completing the CMSP process is flexible, regional planning bodies are encouraged to complete their final CMS plan within three years. Regions are also encouraged to have their plans certified and implemented by mid-2015.⁹⁴

After the CMS plan is implemented, the plan will continue to be monitored and assessed to ensure that it is effective. The plan will be adapted accordingly. New data and scientific findings may also lead to changes in the plan. Given these inputs, it is important that Arctic communities monitor what changes, if any, occur after the CMS plan has been put into place.

If the plan is not achieving its objectives, Arctic communities could engage the relevant regional and federal agencies to ensure that the CMS plan is modified.

⁸⁹ *Id.* at 73.

⁹⁰ *Id.* at 74.

⁹¹ *Id.*

⁹² *Id.* at 57-8.

⁹³ *Id.* at 58.

⁹⁴ *Id.* at 74.

Figure 3. Five-year flexible CMSP timeline, as outlined in the CMSP Framework and adjusted in practice (last updated April 2011)

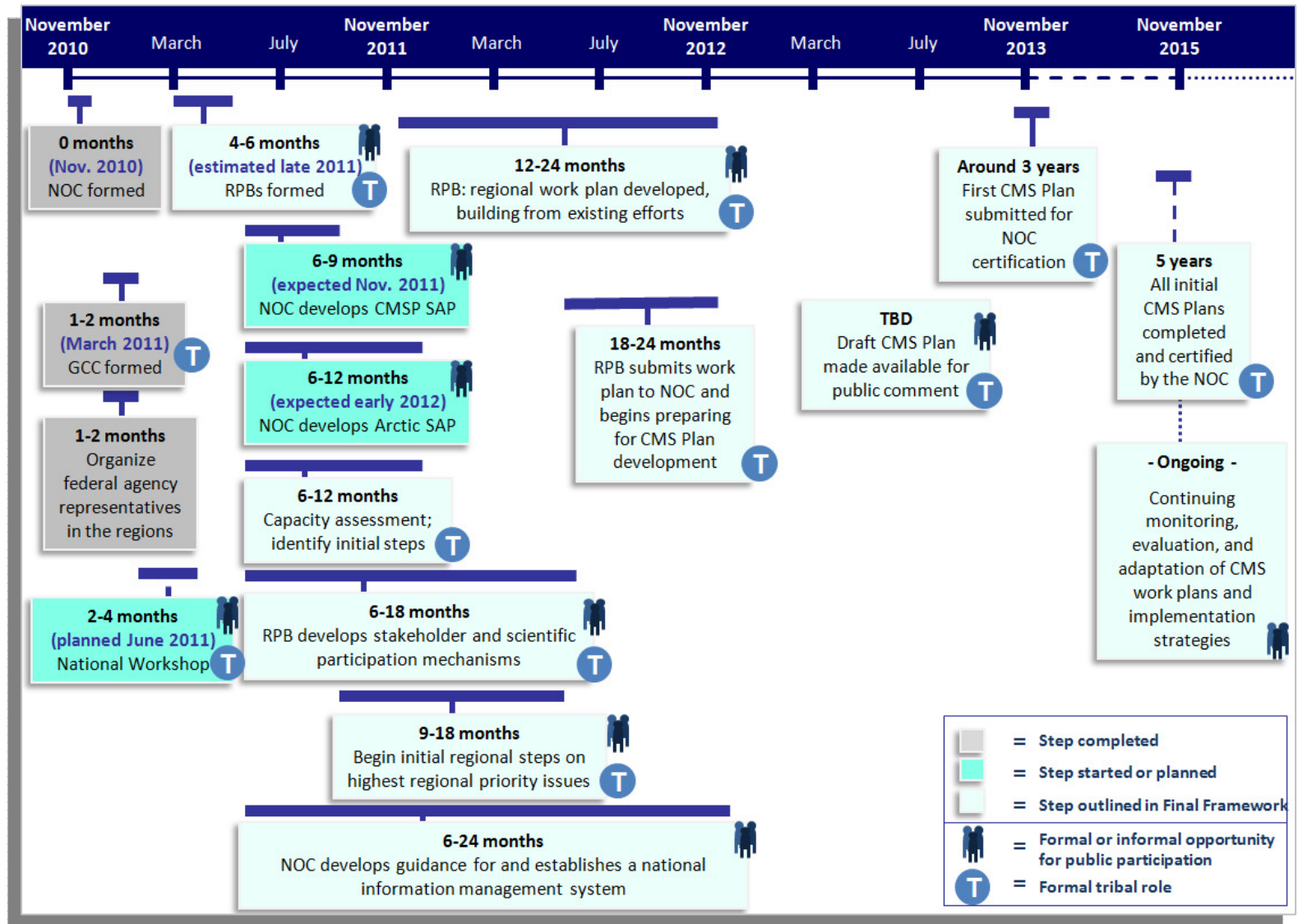
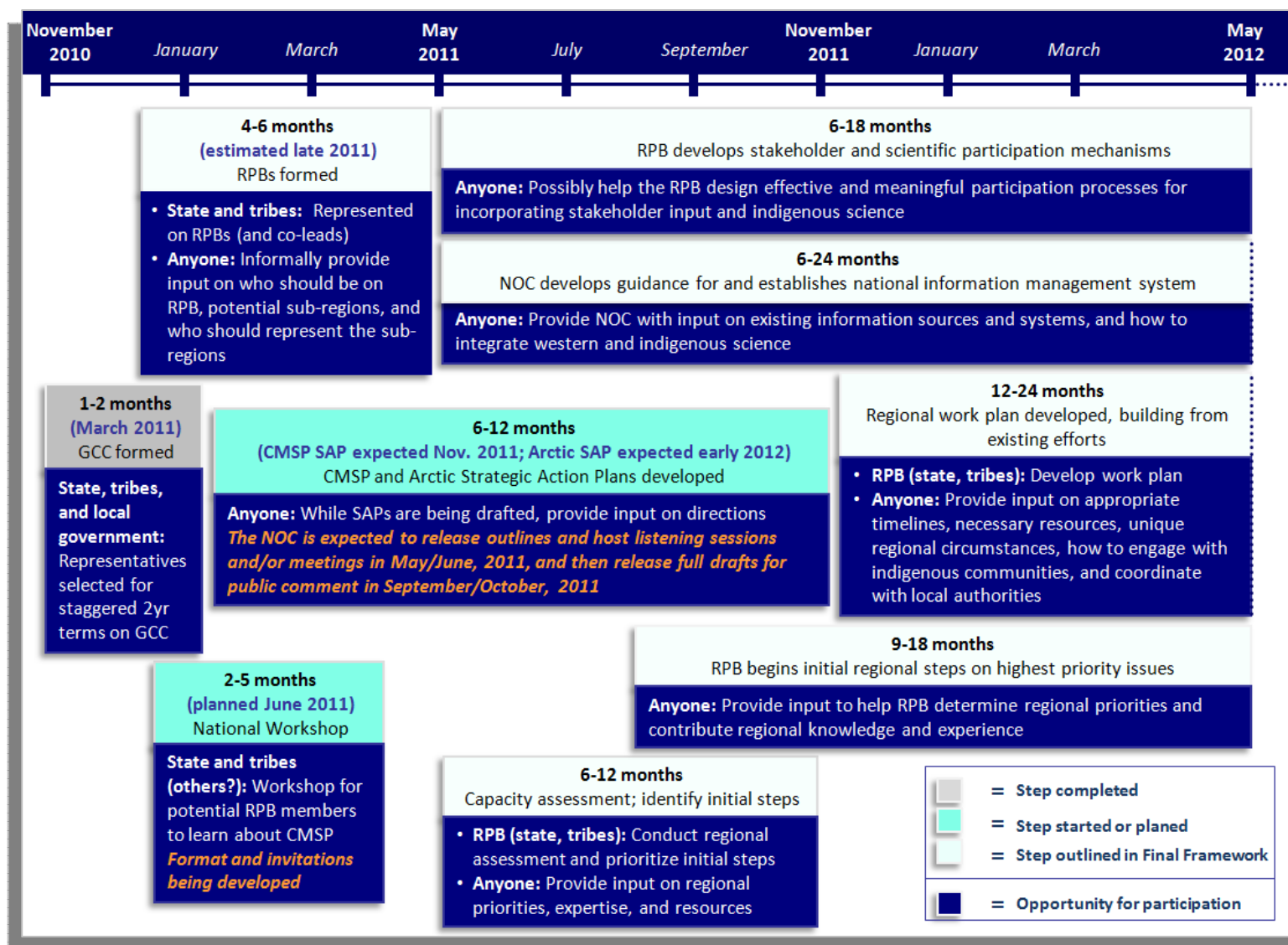


Figure 4. 18-month flexible CMSP timeline, as outlined in the CMSP Framework and adjusted in practice, noting opportunities for public participation (last updated April 2011)



6. Conclusion

CMSP is a comprehensive approach to marine management that has the potential to significantly reduce conflict among the various uses of the ocean. The plans that will be developed through this process have the potential to change the overall approach to managing U.S. ocean and coastal resources and uses.

Following the presidential order and the recommendations of the Interagency Ocean Policy Task Force, the federal government is moving forward with development and implementation of regionally-based CMSP across the country. State, local, and tribal entities are not bound by the Executive Order that calls for CMSP, and may choose not to participate in the process. But federal agencies must follow the Executive Order to the extent possible under existing law—therefore the CMSP process will continue, with or without the participation of state, local, and tribal entities.

Nonetheless, the success or failure of CMSP will largely be determined by the participation of the relevant governmental parties, nongovernmental stakeholders, and communities. CMSP is meant to be a consensus-based approach to marine management, where regional parties establish objectives and priorities and then make decisions accordingly. If not all affected parties are represented or involved in the process, important considerations, needs, and concerns may be left out of the process. Arctic communities may therefore want to participate in the process to make sure their voices are heard, their knowledge is incorporated, and their needs and concerns are prioritized.

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National Ocean Council and Governance Coordinating Committee Members (as of April 2011)

Members of the National Ocean Council (NOC)

The Council is co-chaired by the Chair of the Council on Environmental Quality (CEQ), Nancy Sutley, and the Director of the Office of Science and Technology Policy (OSTP), currently John Holdren.

The co-chairs of the Deputies Committee of the National Ocean Council are currently Shere Abott (Office of Science and Technology Policy) and Mike Boots (Council on Environmental Quality).

The dual principal- and deputy-level council includes:

- The Secretaries of: State, Defense, the Interior, Agriculture, Health and Human Services, Commerce, Labor, Transportation, Energy, and Homeland Security
- The Attorney General
- The Administrators of: the Environmental Protection Agency and the National Aeronautics and Space Administration
- The Chairs of: the Council on Environmental Quality, the Federal Energy Regulatory Commission, and the Joint Chiefs of Staff
- The Directors of: the Office of Management and Budget, National Intelligence, the Office of Science and Technology Policy, and the National Science Foundation
- The Assistants to: the President for National Security Affairs, Homeland Security and Counterterrorism, Domestic Policy, Economic Policy, and Energy and Climate Change
- A U.S. employee designated by the Vice President
- The NOAA Administrator

Members of the Governance Coordinating Committee (GCC)

- Brian Baird (West Coast Region) – Assistant Sec. for Ocean and Coastal Policy, California Natural Resources Agency
- Kathleen Leyden (Northeast Region) – Director of Maine's CZMP
- David Naftzger (Great Lakes Region) – Executive Director, Great Lakes-St. Lawrence River Basin Water Resources Council, IL
- Lelei Peau (Pacific Islands Region) – Deputy Director, Dep't of Commerce for the American Samoa Government
- Mark Robbins (Alaska Region) – Associate Director, Office of the Governor, AK
- Paige Rothenberger (Caribbean Region) – Coral Reef Initiative Coordinator, USVI Dept. of Planning & Natural Resources, VI
- George Stafford (Mid-Atlantic Region) – Deputy Sec. of State, NY
- Bill Walker (Gulf of Mexico Region) – Chair, Gulf of Mexico Alliance Management Team; Executive Director, MS Dep't of Marine Resources
- Steve Crawford (Tribal Rep.) – Environmental Director, Passamaquoddy Tribe of Pleasant Point, ME
- Jacque Hostler (Tribal Rep.) – Chief Executive Officer and Director of the Transportation and Land-Use Department, Cher-Ae Heights Indian Community of the Trinidad Rancheria, CA
- Micah McCarty (Tribal Rep.) – Tribal Chairman & Marine Policy & Fisheries Advisor, Makah Tribal Council, WA
- Kristin Jacobs (Local Government Rep.) – County Commissioner - District 2, Broward County, FL
- Geraldine Knatz (Local Government Rep.) – Executive Director, Port of Los Angeles, CA
- Joan Murphy (Local Government Rep.) – Cook County Commissioner, 6th District, IL
- Kevin Ranker (State Legislative Rep.) – Washington State Senator

Table of Abbreviations

Commonly Used Terms

CEQ	Council on Environmental Quality
CMSP	Coastal and marine spatial planning
CMS Plan	Coastal and marine spatial plan
EBM	Ecosystem-based management
GCC	Governance Coordinating Committee
NOAA	National Oceanic and Atmospheric Administration
NOC	National Ocean Council
RPB	Regional Planning Body
SAP	Strategic Action Plan

Laws and Programs

ACMP	Alaska Coastal Management Program
ANCSA	Alaska Native Claims Settlement Act
ANILCA	Alaska National Interest Lands Conservation Act
CZMA	Coastal Zone Management Act
ESA	Endangered Species Act
MMPA	Marine Mammal Protection Act

Glossary

Coastal and marine spatial planning (CMSP)

Coastal and marine spatial planning (CMSP) is an approach to ocean and coastal management that aims to reduce user conflicts and preserve important ecosystem services. CMSP involves a public process during which human uses of the marine environment are analyzed and allocated across space and time to achieve specified goals. The economic, environmental, and/or social goals are determined by the planning region.

Coastal and marine spatial plan (CMS Plan)

CMSP may result in numerous outputs. The most common output is a coastal and marine spatial plan (CMS Plan). A CMS Plan identifies when and where different marine uses and activities should occur, according to the agreement reached by the various parties involved in the process.

Ecosystem-based management (EBM)

Ocean and coastal EBM is a comprehensive and integrated approach to ocean governance. It considers ecosystem thresholds and looks at all marine activities in a region, recognizing the interconnections between different systems and users. The goal is to preserve ecosystem health, productivity, and resilience, so that the ocean continues to sustain human uses and services.

National Ocean Council (NOC)

The National Ocean Council (NOC) was established by President Obama's Executive Order in July 2010. The NOC will oversee development and implementation of CMSP in the United States. The NOC met for the first time in November 2011.

Regional Planning Body (RPB)

Regional planning bodies (RPBs) are being established in all the regions of the United States (of which Alaska/Arctic is one) to lead CMSP development and implementation in each region. The RPBs will be established by May 2011.

Arctic Strategic Action Plan (Arctic SAP)

The National Ocean Council is developing Strategic Action Plans to achieve nine priority objectives. One of the priority objectives is addressing changing conditions in the Arctic. The Arctic Strategic Action Plan (Arctic SAP) will be finalized by November 2011.

Further Reading

If you are interested in learning more about the concepts and frameworks described in this Handbook, here are some additional resources:

Marine Spatial Planning (General Overview)

1. Charles Ehler & Fanny Douvère, *Marine Spatial Planning: A Step-by-Step Approach toward Ecosystem-Based Management* (2009), available at http://www.unesco-ioc-marinesp.be/msp_guide.

Marine Spatial Planning (United States)

2. *Stewardship of the Ocean, Our Coasts, and the Great Lakes*, Ex. Order 13,547 (July 19, 2010), available at <http://www.whitehouse.gov/administration/eop/oceans> (click on link for “Executive Order Establishing the National Ocean Council”).
3. Council on Environmental Quality, *Final Recommendations of the Interagency Ocean Policy Task Force* (July 19, 2010), available at <http://www.whitehouse.gov/administration/eop/oceans>.
4. Environmental Law Institute, *Marine Spatial Planning in US Waters: An Assessment and Analysis of Existing Legal Mechanisms, Anticipated Barriers, and Future Opportunities* (2009), available at http://www.elistore.org/reports_detail.asp?ID=11377 (note: this was written prior to publication of the CMSP Framework).
5. Environmental Law Institute & Center for Ocean Solutions, *Coastal and Marine Spatial Planning: Legal Considerations* (2010), available at http://www.eli.org/pdf/cmstp_legal_workshop_background_paper.pdf.

Marine Spatial Planning (Around the World)

6. For information on Canada’s Integrated Ocean Management Plan for the Beaufort Sea, go to <http://www.beafortseapartnership.ca>.
7. For information on Norway’s Integrated Management Plan of the Barents Sea, go to <http://www.regjeringen.no/en/dep/md/Selected-topics/hav--og-vannforvaltning/integrated-management-of-the-barents-sea.html>.

Arctic Policy and Science

8. Arctic Region Policy, National Security Presidential Directive 66 and Homeland Security Presidential Directive 25 (Jan. 9, 2009), available at <http://www.fas.org/irp/offdocs/nspd/nspd-66.htm>.
9. NOAA’s Arctic Vision and Strategy (2011), available at http://www.arctic.noaa.gov/docs/arctic_strat_2010.pdf.
10. J. Richter-Menge & J.E. Overland, Eds., *Arctic Report Card: Update for 2010* (2010), available at <http://www.arctic.noaa.gov/reportcard>.

Alaska Native Rights

11. William C. Canby Jr., *American Indian Law in a Nutshell* (5th ed. 2009).

The Environmental Law Institute (ELI) is an

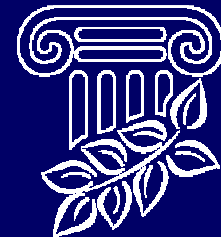
internationally recognized independent research and education center known for solving problems related to environmental law and policy and designing fair, creative, and sustainable approaches to implementation.

The Institute delivers timely, insightful, impartial analysis to opinion makers,

including government officials, environmental and business leaders, academics, members of the environmental bar, and journalists. ELI serves as a clearinghouse and a town hall, providing common ground for debate on important environmental issues. We train lawyers, judges, and others about how environmental laws work and how they can be used in innovative ways to achieve management objectives. We work all over the world with local partners to

support communities and help governments realize environmentally sound policies and practices.

ELI does not litigate, lobby, or advocate. The Institute's board of directors represents a balanced mix of leaders within the environmental profession. Support for ELI comes from individuals, foundations, government, corporations, law firms, and other sources.



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