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Submitted electronically via neoceanplanning.org & comment@neoceanplanning.org

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RE: Recommendations for the Draft Northeast Regional Ocean Plan

Dear Ms. Nicholson:

On behalf of Conservation Law Foundation (CLF) I am pleased to provide comments to the Northeast Regional Planning Body (RPB) regarding the *Draft Northeast Regional Ocean Plan* (Plan) released on May 25, 2016.¹

CLF supports the development and implementation of comprehensive ecosystem-based regional ocean plans as a vital mechanism for implementing the goals and priorities of the *National Ocean Policy*² and the *Final Recommendations of the Interagency Ocean Policy Task Force*.³ The ultimate goal of ocean planning in the northeast region, as called for by the *National Ocean Policy*, is to ensure that New Englanders and the nation can rely on the vital goods and services provided by a healthy and resilient ocean ecosystem, including food, transportation, recreation, clean renewable energy, and jobs, now and into the future. A healthy and resilient ocean ecosystem also provides many other essential ecosystem services including for example, climate regulation, storm protection and oxygen production.

CLF applauds the RPB on the release of the Plan, the first such regional ocean plan in the nation. The Plan is a significant achievement that builds on the Northeast's longstanding leadership in ocean planning, which began with the groundbreaking efforts of the Massachusetts and Rhode Island ocean plans. The Plan, when finalized and implemented, will bring a suite of new tools

¹ Available at <http://neoceanplanning.org/plan/> [hereinafter Plan].

² Exec. Order No. 13,547, 75 Fed. Reg. 43,021 (July 22, 2010), available at <https://www.whitehouse.gov/files/documents/2010stewardship-eo.pdf>.

³ WHITE HOUSE COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE (2010), available at http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf.

and cooperative state, federal, and tribal efforts that, with the continued engagement of the public and stakeholders, we hope will lead to a thriving and healthy ocean. The Northeast Ocean Data Portal (Portal),⁴ a remarkable accomplishment of the Plan, brings together in one place a vast array of detailed information about the ocean and how we use it along with associated maps on a publicly accessible web-based platform that will enable more informed decision-makers and stakeholders and better, more informed decisions about how we manage, use, and conserve our ocean. Agency commitments to work more effectively together and with New England states and tribes, along with much enhanced stakeholder engagement, holds promise to improve ocean management across all sectors. When completed, data products identifying and characterizing important ecological areas (IEAs), commercial and recreational fishing areas, transit routes, non-consumptive recreational use areas, and more will be significant contributions to ocean management in the region. An ambitious science and research agenda, if coordinated and adequately funded, will advance our understanding of the ocean and how best to sustainably manage its resources, particularly in the face of climate change and the dramatic impacts that it will continue to bring to ocean life and our communities. The Plan will not only be a valuable ocean management tool for New England but also serve as a model for ocean planning processes around the country. For these reasons, it is essential that the final version of the Plan be as strong, clear, and comprehensive as possible.

Much work is yet to be done to finalize this landmark Plan. As the RPB moves toward finalization of the Plan, we urge the RPB to strengthen the Plan by incorporating the following recommendations related to IEAs, Plan implementation, state and stakeholder engagement, and climate change.

I. Incorporate Robust Mechanisms to Conserve Important Ecological Areas.

A. Identify and Map IEAs, and Post to the Portal

We strongly support the identification of IEAs⁵ as a core component of the Plan. Ecosystem-based management (EBM) is the first of nine national priority objectives for ocean planning as well as “a foundational principle for the comprehensive management of the ocean.”⁶ The Interagency Ocean Policy Task Force (Task Force) affirmed that EBM “is intended to improve ecosystem health and services by planning human uses in concert with *conservation of important ecological areas* such as areas of high productivity and biological diversity, areas and key species that are critical to ecosystem function and resiliency; areas of spawning, breeding and feeding; areas of rare or functionally vulnerable marine resources and migratory corridors.”⁷

⁴ <http://www.northeastoceandata.org/>.

⁵ See Plan at 53.

⁶ WHITE HOUSE COUNCIL ON ENVTL. QUALITY, *supra* note 3, at 6.

⁷ *Id.* at 6, 44 (emphasis added).

Accordingly, the Task Force specifically calls for regional ocean plans to include “identification of important ecological areas.”⁸ In New England, members of the RPB, other regulators and resource managers, and stakeholders have long discussed the critical importance of identifying and conserving ecologically important areas of our ocean ecosystem as a key outcome of the regional ocean planning process.⁹

We are pleased that the RPB recognizes that the Plan should be built on a foundation of EBM. We commend the RPB for establishing an EBM Working Group of scientific and technical experts, and for including in the Plan a draft Important Ecological Area Framework (Framework) that describes how IEAs will be identified. The Framework identifies five components of IEAs:

- 1) areas of high productivity;
- 2) areas of high biodiversity;
- 3) areas of high species abundance;
- 4) areas of vulnerable marine resources; and
- 5) areas or rare marine resources.¹⁰

The development of the Framework is an important first step; however, the Plan leaves open for speculation most of the next steps that are to follow this initial Framework, and that uncertainty is driving significant concern among several sectors of stakeholders. Certainly, the RPB’s commitments related to IEAs can and must be much stronger. The Plan currently commits the RPB only to “illustrat[ing] one or two IEA components” in 2017.¹¹ Based on our engagement with the EBM Working Group and the Marine Life Data and Analysis Team, and our review of the Portal, we believe there is sufficient information available now to identify and map all five IEA components.

Given the critical role that IEAs play in ocean ecosystem functioning and resilience, it is essential that available scientific information and understanding about IEAs be incorporated into agency decision-making as soon as possible. We therefore urge the RPB in the final Plan to clearly articulate and commit to an open, transparent, and science-based process and timeline for identifying IEAs with the goals of (1) identifying and posting initial data synthesis layers of each IEA component on the Portal by the end of 2016; and (2) updating data layers and providing a composite map of IEAs (synthesizing all five components as appropriate), and posting associated maps and other information on the Portal by the end of 2017 and periodically thereafter as new information becomes available. The Plan must articulate associated agency commitments to ensure that ocean management decisions conserve the ecosystem values and functions that the IEAs provide. Further, we urge the RPB to clearly articulate in the Plan the ecosystem values

⁸ *Id.* at 59.

⁹ *See, e.g.*, SEAPLAN, NORTHEAST REGIONAL OCEAN PLAN: OPTIONS FOR EFFECTIVE DECISION MAKING 4 (2014).

¹⁰ Plan at 188-89.

¹¹ *Id.* at 55.

and functions associated with IEAs to ensure both agencies and stakeholders understand the importance of these areas and the value in conserving them.

B. Develop Best Management Practices and Other Provisions to Ensure That Ocean Management Decisions Conserve IEAs and the Ecosystem Values and Functions They Provide

Protecting ecologically valuable areas of our ocean ecosystems should be a best practice. The final Plan should include clear agency commitments to developing best management practices and other provisions that provide strong protections for the ecosystem values and functions of the IEAs and that are implementable within the agencies' existing authorities. We strongly urge the RPB to include the following best practice among the intergovernmental coordination best practices discussed in Chapter 4:

Federal agencies, when faced with decisions regarding proposed activities or approvals in an IEA or that may affect an IEA, shall utilize data, maps, and other information pertaining to IEAs to give increased scrutiny to proposed activities or approvals, and shall conserve IEAs and the ecosystem values and functions they provide to the fullest extent consistent with applicable law.

C. Convene a Work Group by the End of 2016 to Evaluate How IEAs Should Be Incorporated into Federal Agency Decision-Making.

In the absence of guidance about how IEAs will be specifically incorporated into existing regulatory regimes, the Framework cannot be utilized to its full potential, and this uncertainty will continue to generate concerns among some stakeholders. We therefore urge the RPB to commit in the Plan to convening an IEA Policy Work Group by the end of 2016 to evaluate how IEAs can be most effectively integrated into federal agency decision-making processes under existing statutes. Creating this work group will be a first step to fulfilling the Plan's Science and Research Priority No. 6, which includes "continuing work to develop the IEA Framework and explore options for its use within federal law."¹² The IEA Policy Work Group should, with input from the EBM Working Group, recommend a suite of management measures that federal agencies can employ under existing statutory authorities to avoid incompatible uses and mitigate adverse impacts to IEAs to the fullest extent consistent with applicable law.

In particular, the RPB should direct the IEA Policy Work Group to explore the creation of agency guidance documents and memoranda of agreement (MOAs) that describe specifically how consideration of IEAs will be incorporated into National Environmental Policy Act (NEPA) review and U.S. Army Corps of Engineers permitting under the Clean Water Act and/or Rivers and Harbors Act, as well as associated federal consultations required under other federal statutes, such as the Endangered Species Act and Magnuson-Stevens Fishery Conservation and

¹² Plan at 173 (emphasis added).

Management Act. Specifically, the RPB should direct the IEA Policy Work Group to evaluate programmatic approaches to NEPA review that systematically and comprehensively incorporate consideration and conservation of IEAs into agency decision-making processes through the development of programmatic environmental impact statements (PEISs).¹³

Accurate public communication is critical to building stakeholder support for the effective conservation of IEAs. As the RPB moves forward on identifying IEAs, it should be noted that calling for the development of IEAs does not automatically generate “no go zones” where all activities are discouraged; we believe that multiple uses may occur within an IEA as long as these uses are compatible with the ecosystem values and function of the IEA. Such compatibility must be analyzed deliberately.¹⁴ We urge you to clearly articulate this in the Plan to enhance understanding and to provide ample opportunity for stakeholders to engage in further discussion.

D. Provide More Details About IEA-Related Research, and Commit to Further Assessment of At Least One Pilot IEA.

We do not expect that the newly defined IEA boundaries will be perfect, and we recognize that additional data gathering, particularly in light of a rapidly changing climate, can and will be incorporated into IEA models as new data becomes available. To that end, we support the RPB’s decision to prioritize additional research on IEAs.¹⁵ The Plan should further describe who will fill identified data gaps, what methods will be utilized, and a projected research timeline.

Additionally, the RPB should commit in the Plan to assessing in detail at least one “pilot” IEA. We emphasize that the Mid-Atlantic Regional Planning Body has committed to conducting at least one such pilot, which underscores the reasonableness and achievability of a similar pilot IEA in the northeast region.¹⁶ As outlined in the DRAFT MID-ATLANTIC REGIONAL OCEAN ACTION PLAN, the pilot IEA assessment should include:

¹³ See generally 40 C.F.R. §§ 1502.4(b)-(c) (requiring PEISs for review of “broad actions,” and which are “relevant to policy and . . . timed to coincide with meaningful points in agency planning and decision-making”). See also WHITE HOUSE COUNCIL ON ENVTL. QUALITY, FINAL GUIDANCE FOR EFFECTIVE USE OF PROGRAMMATIC NEPA REVIEWS 15 (2014), available at <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/programmatic-reviews> (recommending that “agencies give particular consideration to preparing a . . . PEIS when: (1) initiating or revising a national or regional rulemaking, policy, plan, or program; (2) adopting a plan for managing a range of resources; or (3) making decisions on common elements or aspects of a series or suite of closely related projects”).

¹⁴ In general, we support continuation and expansion of the RPB’s efforts to identify ocean uses that are compatible with one another, such as offshore renewable energy and aquaculture (*see* Plan at 114), and conflicting uses, such as large scale nearshore projects and recreation (*id.* at 101).

¹⁵ See Plan at 55, 166, 172-73.

¹⁶ See DRAFT MID-ATLANTIC REGIONAL OCEAN ACTION PLAN 38 (2016), available at <http://www.boem.gov/Ocean-Action-Plan/>.

- 1) identifying human uses in that pilot area through consultation with stakeholders, applying sufficient existing human use data as appropriate;
- 2) characterizing the marine ecology and ecological functions of the pilot area, including observed changes or trends of key species; and
- 3) summarizing key authorities and current management practices related to that pilot area.¹⁷

Furthermore, the pilot area can also be useful in exploring and developing best practices for conserving IEAs. The RPB should commit in the Plan to “compil[ing] all information collected for the pilot area into a comprehensive factual report to inform management authorities in decision-making, particularly regarding decisions that may affect those areas,” and to “evaluat[ing] use of the pilot report in informing decision making, and mak[ing] any necessary improvements to the process of identifying and assessing [IEAs].”¹⁸

II. Strengthen and Clarify Agency Commitments to Facilitate Plan Implementation.

A. Clarify Agency Commitments Using Strong Language.

We are pleased to see that Chapter 3 of the Plan identifies regulatory and management actions that federal agencies will take to advance EBM and interagency coordination in accordance with the mandates of the *National Ocean Policy*.¹⁹ The regulatory and management actions outlined in the Plan in many ways represent a significant improvement over existing ocean management and, if implemented to the fullest extent consistent with applicable law, would bolster the health and resilience of our valuable ocean ecosystems.

We are dismayed, however, by the general lack of clarity and firmness in agency commitments throughout Chapter 3. Many regulatory and management actions are phrased in weak, vague, or overbroad language that fails to fulfill agency obligations under the *National Ocean Policy*.²⁰ The lack of clarity inhibits agencies’ capacity to successfully implement the regulatory and management actions. Furthermore, vague language fails to inform the public about how exactly agency processes will change and to what benefit. In numerous instances, it would be near impossible for the RPB and stakeholders to evaluate whether or not agencies have implemented the regulatory and management actions.

We strongly urge the RPB to remove caveats such as “to the extent practicable,” “if practical,” “as appropriate,” and similar language from any and all regulatory and management actions in Chapter 3. Instead, if a limiting principle is absolutely necessary, the Plan should state that the

¹⁷ *Id.*

¹⁸ *Id.* at 38-39.

¹⁹ See *supra* note 2.

²⁰ See *id.* at § 6 (“All . . . agencies . . . shall, to the fullest extent consistent with applicable law: . . . take such action as necessary to implement the [National Ocean Policy] . . .”).

relevant federal agency “shall” take the regulatory and management action “to the fullest extent consistent with applicable law.” This phrasing is consistent with the agency responsibilities outlined in the *National Ocean Policy* and more clearly communicates federal responsibilities to agency actors and stakeholders.²¹ In any instance where it is absolutely necessary to describe an agency’s commitment to a regulatory and management action in more limited language, the Plan should identify the particular legal, financial, technical, or other hurdles to achieving the action that the RPB foresees. This additional context will not only better inform stakeholders about the realistic challenges confronting ocean managers, but also inform Plan monitoring and evaluation, research priorities, and future Plan updates to the benefit of the RPB.

B. Commit Federal Agencies to Implementing the Plan through Memoranda of Agreement, Guidance Documents, and Other Updated Policies.

The Plan has the potential to be an extraordinarily valuable management tool; but its impact will be limited if the agency commitments described therein are not memorialized in the policies and practices that guide agencies’ day-to-day administration of existing federal statutes. As such, advisory groups have called upon the RPB to develop implementing guidance documents, MOAs, templates, and other memoranda to inform agency practice on the ground.²² We reiterate these recommendations in the strongest terms.

We urge the RPB to clarify in the Plan, as affirmed in the Federal Register notice accompanying the draft Plan,²³ that each federal RPB member agency shall update existing guidance documents, internal policies, templates, and other memoranda to incorporate the regulatory and management actions, best practices, research priorities, and other actions and goals outlined in the Plan and to describe how agencies will implement the Plan through their administration of existing statutory programs. Additionally, where regulatory and management actions, best practices, or research priorities call for or implicate intergovernmental coordination, the Plan should state that relevant federal agencies shall seek to develop an MOA(s) that memorializes agreement among government entities about how they will implement the Plan through their

²¹ *Id.* at § 6.

²² *See, e.g.*, SEAPLAN, *supra* note 9, at 12-20. *See also generally* NAT’L OCEAN COUNCIL, LEGAL AUTHORITIES RELATING TO THE IMPLEMENTATION OF COASTAL AND MARINE SPATIAL PLANNING (2011), available at https://www.whitehouse.gov/sites/default/files/microsites/ceq/cmsp_legal_compndium_2-14-11.pdf.

²³ *See* 81 Fed. Reg. 33,213, 33,214 (May 25, 2016) (“[E]ach Federal NE RPB member will incorporate the final NE Ocean Plan into their planning processes and internal agency documents, and use the NE Ocean Plan to guide and inform their decisions and actions, consistent with applicable law. Federal NE RPB members with regulatory responsibilities will incorporate the final NE Ocean Plan into their pre-planning, planning, and permitting to guide and inform Federal agency internal and external permitting decisions, environmental compliance, resource management plans, and other actions taken pursuant to existing statutory and regulatory authorities. These agencies will ensure their scientists, managers, decision-makers, and analysts align their actions with the NE Ocean Plan to the fullest extent possible under existing statutory and regulatory authorities.”).

administration of existing statutory programs. External guidance and MOAs would provide transparency and predictably to agencies and stakeholders alike about how the Plan will be implemented. We highlight that such documents fall well within agencies' authority under existing federal statutes and will go a long way toward ensuring that the Plan's goals are achieved.

C. Commit Federal Agencies to Exploring Programmatic NEPA Approaches Where Appropriate.

The Plan rightly recognizes that "NEPA is a central, common component of the general federal regulatory and management structure for managing human activities in the ocean."²⁴ As such, the RPB should fully explore opportunities to harness NEPA as a vehicle for Plan implementation. As noted above, programmatic approaches to NEPA represent a potentially valuable tool to implement broad ocean management objectives. According to the Council on Environmental Quality, programmatic NEPA approaches can improve efficiency, better integrate environmental considerations into agency decision-making processes, promote meaningful public participation, and facilitate intergovernmental coordination.²⁵ Programmatic NEPA approaches are particularly well aligned with comprehensive agency policies or programs that incorporate multiple coordinated actions or approvals, such as outer continental shelf leasing programs.²⁶

To ensure that agencies fully explore the potential value of programmatic NEPA approaches in institutionalizing Plan priorities, the RPB should clarify in appropriate subsections of Chapter 3 that relevant federal agencies shall explore programmatic NEPA approaches as a vehicle to implement the regulatory and management actions, research priorities, and best practices identified in the Plan to the fullest extent consistent with applicable law. We suggest the RPB consider energy and infrastructure, aquaculture, and offshore sand resources, in particular, as ocean resources and activities for which a programmatic NEPA approach may be a useful vehicle for Plan implementation.

D. Harmonize Chapter 3 Subsections on Ocean Resources and Activities

There is an apparent discordance across the various sections of Chapter 3 in terms of the sections' coverage and depth. For instance, regulatory and management actions regarding implementation of NEPA and the Endangered Species Act differ across sections, and actions related to universal objectives such as broad stakeholder identification and public education are not included in every section. Each of the ten Chapter 3 sections should be harmonized in terms

²⁴ Plan at 34.

²⁵ See WHITE HOUSE COUNCIL ON ENVTL. QUALITY, *supra* note 13, at 4.

²⁶ Cf. SOLAR ENERGY DEVELOPMENT PROGRAMMATIC EIS, <http://solareis.anl.gov/eis/index.cfm>; WIND ENERGY DEVELOPMENT PROGRAMMATIC EIS, <http://windeis.anl.gov/>. See also *supra* note 13.

of tone, scope, and depth and should include subsections explicitly addressing EBM, interagency and intergovernmental coordination, stakeholder engagement, and compatibility. Calling these out clearly in subsections will better inform agencies and stakeholders about Plan implementation, and facilitate achievement of Plan goals.

We emphasize in particular the need for the Plan to more thoroughly address compatibility. The discussion of compatibility is not uniform across the various Chapter 3 sections. To facilitate effective ocean decision-making, it is essential that stakeholders, regulators, and managers know which ocean activities and uses are compatible with one another (e.g., wind energy development and commercial fishing) and which activities are compatible with natural resource conservation, and under what conditions. We urge the RPB to include a compatibility subsection within each of the Chapter 3 sections. Within these subsections, and/or elsewhere in the Plan, we urge the RPB to include a compatibility “matrix” that would serve as a quick and easy reference for stakeholders about which ocean activities, uses, and resources may or may not be compatible. We recognize this is a significant undertaking; if the RPB is unable to incorporate more robust treatment of compatibility into the final Plan, we urge the RPB at least to include in the Plan a commitment to develop a compatibility guide by a date certain as part of Plan implementation next steps.

In general, in harmonizing the ten sections within Chapter 3, the RPB should ensure specifically that the Plan clearly identifies cross-cutting regulatory and management actions that apply to management of all ocean resources and activities. For instance, we highlight that the following uses of the Portal apply to management of many, if not all, ocean resources and activities:

- use the Portal to identify stakeholders potentially affected by a decision;
- use the Portal to describe baseline conditions;
- use the Portal to screen for potential use conflicts or questions associated with a proposed project or management action;
- use the Portal to improve project scoping;
- use the Portal to determine whether tribal consultation is needed;
- use the Portal to inform interagency consultations under federal statutes;
- use the Portal to inform the development of mitigation conditions in a permit;
- encourage project proponents to use the Portal when developing materials to be submitted to a reviewing agency;
- use the Portal to facilitate enforcement;
- revise agency guidance for authorizing statutes to incorporate use of the Portal;
- use the Portal to revise conservation, management, and recovery plans;
- use the Portal to identify the potential impacts of a lease or permit;
- use the Portal to conduct cumulative impact analyses; and
- use the Portal to inform siting decisions.

The Plan should discuss these and similar actions as general uses of the Portal across sectors. Alternatively, the RPB should harmonize mention of these and similar actions across Chapter 3's ten sections. Likewise there are other actions related to stakeholder engagement, federal, state and tribal coordination and scientific research that should be harmonized as appropriate.

E. Provide Greater Specificity on Intergovernmental Coordination Best Practices and Their Implementation.

The intergovernmental coordination best practices outlined in Chapter 4 represent a key RPB achievement.²⁷ We commend the RPB for its attention to this core component of the regional ocean planning process and for its continued commitment to working across agencies to improve ocean management and decision-making. Improved intergovernmental coordination is critical to EBM, efficient and effective environmental review, meaningful stakeholder engagement, and overall Plan success. Thus, the RPB should ensure that intergovernmental coordination best practices are as strong and clear as possible.

The intergovernmental coordination best practices as currently phrased are a useful start; but we are concerned that the language describing the best practices is too broad and discretionary to guide agency action on the ground. For example:

- The best practices section states in the context of NEPA review, that “[t]he lead federal agency should ensure that all agencies, federally recognized tribes, the [New England Fishery Management Council] . . . and states with potential interests in a proposed project or activity receive notice of, and an opportunity to participate in, agency coordination meetings.”²⁸ Yet the section provides no further detail on when, how, or in what form agencies will give such notice. There no firm commitment by agencies to give such notice or provide such opportunity to participate in agency coordination meetings as the Plan uses “should” instead of “shall, to the fullest extent consistent with applicable law.” Furthermore, as highlighted above, there is no mention of how agencies will formalize their commitment to this best practice through amended guidance documents, MOAs, or other memoranda.
- The best practices section assures that “agencies should . . . [w]here possible, identify measures to avoid and minimize adverse impacts to resources and uses, in accordance with existing authorities.”²⁹ This best practice provides little direction beyond the legal requirements already set forth in NEPA and agencies’ authorizing statutes. The RPB does not identify examples of measures and approaches that

²⁷ See Plan at 142-49.

²⁸ *Id.* at 142.

²⁹ *Id.*

agencies might find useful to minimize impacts, nor does the RPB outline mechanisms by which agencies will incorporate identified measures into their existing regulatory programs. The best practices section further fails to describe the roles of the Portal and IEA Framework in facilitating this best practice.

- The best practices section states that “*RPB agencies . . . should engage in early coordination with the Northeast states as a general practice.*”³⁰ As presently worded, this best practice is discretionary and vague, offering no information about when, how, in what contexts, or in what form federal agencies will reach out to states. The RPB does not identify relevant northeast state officers or offices that should be notified for particular types of projects. Further, there is no mention of management tools that might facilitate early coordination, such as an e-mail listserv and/or MOA.³¹

The above examples are illustrative of a broad lack of strong, clear language throughout the best practices section of Chapter 4. The Plan should detail, as clearly as possible, how agencies will implement the best practices in the course of their administration of existing statutory programs. We urge the RPB to amend the intergovernmental coordination best practices in the following respects:

- include details regarding the operation of each best practice at a level of specificity that will enable the RPB and public to monitor and evaluate agency progress;
- describe the best practice’s connection to a critical need or problem and a defined outcome;
- mention legal authorities relating to the implementation of the best practice;
- remove discretionary and voluntary language (e.g., replace “should” with “shall, to the fullest extent constituent with applicable law”);³² and
- describe how RPB agencies will institutionalize the best practices within their administration of existing statutory programs—e.g., through updated guidance documents, amended regulations, and/or development of an interagency MOA.

³⁰ *Id.* at 148.

³¹ See KAISER, *supra* note 38, at 9-11.

³² It is essential to Plan success that the intergovernmental coordination best practices be framed as firm agency commitments or mandates rather than exhortations. As the RPB astutely recognizes, effective ocean management “requires . . . processes for government agencies to improve communication and collaboration regarding the management of each ocean resource and activity.” Plan at 31. Best practices should be defined as action items, similar to the regulatory and management actions outlined in Chapter 3.

Further, to demonstrate how best practices would be employed, it would be useful in Chapter 4 to provide a hypothetical example of a proposed new project and to describe how the best practices would be operationalized in project review and permitting. These enhancements would both provide clarity to agencies about their implementation responsibilities and facilitate monitoring and evaluation.

F. Include a Schedule of Activities Detailing Implementation Actions.

There is a variety of regulatory, management, and implementation action items scattered across the Plan, leaving it rather unclear who is responsible for next steps and when exactly those next steps will occur. The final Plan should include a comprehensive, compiled schedule spanning the next year and a half (i.e., through the end of 2017) that lists implementation actions, expected Portal updates, steps toward identifying and mapping IEAs, further research, work group meetings, and other key actions and next steps that will occur by the end of 2017 in relation to the Plan. The schedule should detail who is responsible for completing each action item and include a deadline by which each action item will be completed. Compiling all of these actions in one schedule will enable agencies and stakeholders to better understand Plan implementation processes and will facilitate monitoring and evaluation of progress in achieving Plan goals.

G. Enhance Monitoring and Evaluation Components.

The Plan must be periodically updated to adapt to the changing ocean environment and our evolving understanding of ocean ecosystems, human uses, and the impacts of human uses on the ocean environment. Thus, we support the RPB's commitment to convene, at the very least, biannually to assess progress in achieving Plan goals, consider updates to the Plan, and coordinate progress on science and research priorities.³³ Tracking both agency performance and ocean ecosystem health more broadly will be essential to inform future Plan updates.

The Plan states that the RPB will form a Monitoring and Evaluation (M&E) Work Group in late 2016 to develop and implement Plan performance M&E.³⁴ We support the formation of a M&E Work Group, and urge the RPB to provide additional details to guide its work. Given the critical importance of M&E to Plan success, the RPB, working with the M&E Work Group and the EBM Work Group, should commit in the Plan to finalizing by the spring of 2017: 1) a set of indicators for tracking Plan implementation, 2) a M&E plan that describes how indicators will be systematically tracked, evaluated, and published, and 3) and protocol for using the indicators to adapt the Plan. For each and every action item listed in Chapter 3 and intergovernmental coordination best practice included in Chapter 4, the M&E plan should identify:

- a corresponding measurable indicator(s);

³³ See Plan at 139.

³⁴ *Id.* at 159.

- a timeline for accomplishing the action item; and
- the entity or individual(s) responsible for accomplishing the action item.

The identification of such indicators and timelines will aid the RPB and stakeholders in attributing management successes to the RPB’s concerted efforts, and if necessary, hold agencies accountable to their commitments to improved management of our ocean resources. The RPB should explicitly confirm in the Plan that the public will have opportunities to provide meaningful input on the selection of indicators and the content of the M&E plan. Additionally, the Plan should identify funding and other committed resources to support Plan M&E going forward.

In terms of monitoring ocean ecosystem health more broadly, we support the RPB’s identification of the Ocean Health Index (OHI) as a valuable tool. We urge the RPB to include in the Plan additional details about how the RPB will “refine the OHI approach . . . beginning in 2016” and “implement the OHI throughout 2017.”³⁵ For instance, the RPB should more specifically describe stakeholders’ role in refining and implementing the OHI approach, mechanisms by which agencies will commit to supporting and using the OHI, and how preliminary results of OHI implementation will be incorporated into Plan M&E and Plan updates.

We also support the RPB’s stated commitment to coordinate with the Integrated Sentinel Monitoring Network (ISMN).³⁶ The Plan should describe more specifically who will be responsible for coordinating with the ISMN to identify areas of common interest and potential next steps, and on what timeline.

III. Preserve and Enhance States’ Roles in Federal Decision-Making Processes Regarding Ocean Resources.

A. Provide More Details About Notice Mechanisms.

Coastal states play a critical role in safeguarding ocean resources and ensuring that federal actions and approvals are in harmony with local priorities. We strongly support the RPB’s goal of improving federal-state coordination by enhancing federal notice to states and establishing a federal-state work group to explore applications of the Plan and Portal.³⁷ Earlier notice of proposed federal actions and approvals results in a more effective consistency review process under the Coastal Zone Management Act (CZMA). Additionally, automatic notice mechanisms

³⁵ *Id.*

³⁶ *See id.*

³⁷ Plan at 148-49.

would help resolve some of the outstanding uncertainty concerning what constitutes notice.³⁸ Thus, we are pleased that the Plan commits state and federal agencies to continued consideration of innovative mechanisms to automatically convey notice to states using technology such as the Portal and e-mail.³⁹

We reiterate earlier calls for the Plan to detail how any notification mechanism would operate in practice.⁴⁰ For instance, the Plan should identify who will be responsible for: funding development of the notification system, ensuring that the notification mechanism is properly used, and maintaining up-to-date contact lists.

B. Explore Opportunities for More Efficient Consistency Review Without Categorically Excluding Any Federal Activities from Review.

We also support the Plan's commitment to establishing a federal-state work group that will explore how state and federal agencies might use the Plan and the Portal to more efficiently and predictably determine whether a proposed federal activity has reasonably foreseeable effects on a state's coastal uses or resources.⁴¹ We anticipate that the Portal will facilitate states' efforts to demonstrate a causal connection between a proposed federal activity and effects on state uses or resources, while also better informing federal agencies and project applicants about how proposed activities may intersect with state uses or resources.⁴²

We oppose, however, any efforts by the federal-state work group to exclude certain federal actions from CZMA federal consistency review, or to establish thresholds or conditions for federal consistency review.⁴³ While we recognize the value to federal agencies of efficient and predictable consistency review, we believe the risk of limiting states' important roles in ocean decision-making outweighs potential benefits. Federal consistency review is a vital safeguard for local stakeholders whose interests are affected by federal decision-making about the ocean. The authority to review federal activities for consistency with state coastal policies is also the primary incentive for states to develop state coastal management programs. Constraining states' authority to perform federal consistency reviews could inhibit and disincentivize effective management of state coastal and ocean resources.

³⁸ See DAVID KAISER, THE COASTAL ZONE MANAGEMENT ACT AND REGIONAL OCEAN PLANS—A DISCUSSION PAPER 10 (2015).

³⁹ Plan at 149.

⁴⁰ See KAISER, *supra* note 38, at 9-11.

⁴¹ Plan at 149.

⁴² See KAISER, *supra* note 38, at 12.

⁴³ See Plan at 149.

C. Commit to Developing a Memorandum of Agreement on Best Practices for Coordinated Environmental Impact Review.

We note that in comparison to the Plan’s detailed discussion of federal-state coordination in the context of the CZMA, the Plan’s treatment of coordinated environmental impact review under NEPA and corollary state environmental review statutes is vague. The Plan states that “lead federal agencies should work with state(s) to identify opportunities for a coordinated approach to NEPA and state review,” but offers little additional detail on how to improve intergovernmental coordination.⁴⁴

We urge the RPB to include within the Plan a commitment to advance federal-state coordination in the conduct of environmental impact review through development of a memorandum of agreement (MOA) that formalizes best practices for coordination, project scoping, stakeholder consultation, scheduling, and other key aspects of NEPA review. At the very least, the Plan should commit the federal-state work group to developing a “pilot” MOA relevant to a particular category of projects or ocean uses, such as offshore aquaculture.⁴⁵

IV. Enhance Stakeholder Engagement to Support and Inform Plan Implementation.

A. Establish a Standing Regional Stakeholder Liaison Task Force.

We value the RPB’s commitment to collaborating across agencies and with stakeholders to develop solutions to improve ocean decision-making processes. Across the region, diverse voices from a variety of sectors have a critical and often personal stake in ocean management decisions. Throughout the drafting process, the RPB held occasional forums and workshops to engage with ocean stakeholders; however, this engagement did not go far enough in ensuring that people whose lives and livelihoods are most closely to the ocean were equal partners in the planning process. Ocean users, along with federal entities, states, and tribes should have a more formal seat at the decision-making table.

Stakeholder engagement will be essential to Plan implementation and monitoring. To ensure that the RPB consistently and meaningfully engages stakeholders during implementation and the ongoing evolution of the Plan, we urge the RPB to create a standing regional Stakeholder Liaison Task Force (SLTF) as soon as possible—by fall of 2016 at the latest—to support and inform the Plan. The SLTF should remain active over the course of Plan implementation to inform future updates and other RPB decision-making, and evaluate progress in achieving the Plan’s goals. The SLTF would provide the opportunity for ongoing regional dialogue and information-sharing among diverse stakeholders and the RPB. The SLTF also would serve as a Plan monitoring

⁴⁴ *Id.* at 148.

⁴⁵ *Accord SEAPLAN*, *supra* note 9, at 14.

mechanism and help assure the public that the RPB is truly invested in improving stakeholder consultation.

It is critical that the SLTF be institutionalized through the Plan. Chapter 4 should:

- Include a strong commitment to establish the SLTF by the end of 2016.
- Detail an open and transparent process for selection of diverse SLTF members, including representatives from the range of traditional, current and nascent ocean user groups in New England. These may include but should not be limited to representatives from the commercial fishing and shell fishing industries, varied recreational user groups, charter and for-hire businesses, the aquaculture industry, offshore renewable energy industry, electric and telecommunication companies, commercial shipping and transportation industries, nature education and interpretation centers, museums and aquariums, and conservation organizations.
- Describe specifically how the SLTF will participate in Plan finalization, implementation, monitoring, and updating, including maintenance and updating of the Portal.

We emphasize that the SLTF is not a substitute for broad stakeholder consultation; the SLTF should be complemented by early and regular engagement with a broader array of stakeholders and researchers through mechanisms such as workshops, forums, opportunities for public comment at RRB meetings and an on-line public comment portal.

We urge the RPB to provide language within the Plan's performance and monitoring section⁴⁶ describing a formalized mechanism intended to further allow stakeholders to address immediate ocean management issues as they arise with RPB members. The RPB is singular in that it hosts a diversity of ocean stakeholders and governmental entities, and is an ideal forum to effectively discuss and address emergent and challenging ocean issues. Furthermore, in accordance with an adaptive management approach, the Plan will also require revisions as best practices are implemented and put into practice, a process that must be fully stakeholder-inclusive. As the Plan is intended to be a dynamic, "living" document, stakeholders must have a formal mechanism through which they can flag emerging issues in ocean management—issues that may not necessarily be addressed within the current Plan. We ask that such a mechanism include:

- 1) opportunities for formal comment by stakeholders;
- 2) regular RPB forums held to discuss whether or not to take up the issue; and
- 3) if accepted for discussion, a public RPB forum to discuss how the Plan can be updated to effectively address the emergent issue.

⁴⁶ See Plan at 157-59

B. Develop Best Practices for Robust Stakeholder Consultation.

It is important that stakeholders have a meaningful opportunity to engage in decision-making and have a local voice in permitting decisions for ocean use near their communities. Local knowledge can lead to more successful ocean management and enhance the legitimacy of agency decision-making. Chapter 3 of the Plan contains a number of stakeholder engagement components, and Chapter 4 further emphasizes that the RPB will engage the public in Plan implementation and future Plan updates.⁴⁷ These components are valuable, but insufficient. Because commitments to improved stakeholder engagement are scattered throughout Chapter 3 and differ across the various subsections within Chapter 3, it is difficult for agencies and the public to understand exactly how stakeholder engagement will improve under the Plan.⁴⁸

We urge the RPB to articulate strong, clear best practices for stakeholder consultation that broadly apply to Plan implementation, with a particular focus on improving pre-application consultation regarding newly proposed projects.⁴⁹ Best practices for stakeholder consultation should be summarized and incorporated into Chapter 4, as a parallel to the best practices for intergovernmental coordination. Clearly identifying stakeholder consultation best practices in Chapter 4 will help alert agencies, states, tribal nations, project developers, industries, and other stakeholders to their responsibilities and opportunities for engagement.

The best practices for stakeholder consultation should incorporate the following components:

- Prior to the submittal stage of an ocean development project, the best practices should guide project developers, agencies, and other entities on how to develop community engagement strategies and incorporate local knowledge into the proposal.
- The best practices should describe how comprehensive stakeholder engagement will continue through the implementation stage of a project.
- The best practices should encourage developers, community members, and agencies to work collaboratively to develop a shared understanding of the relative benefits and impacts of a project, both to the local community and the ocean ecosystem.
- The best practices should describe how the RPB will invest in human-centered social science research and communication within communities to enhance our understanding of coastal communities' relationships to the ocean and how various activities and management actions impact coastal communities and the ecosystem. Research methods may include surveys, interviews, or focus groups. We expect this research will contribute

⁴⁷ See Plan at 151-153.

⁴⁸ For example, stakeholder identification is listed as an action item in some, but not all, subsections of Chapter 3.

⁴⁹ *Accord SEAPLAN*, *supra* note 9, at 13 (calling for the Plan to include “[c]ommitment by agencies to standardize the practice of pre-application consultations as a normal course of doing business”).

to better decision-making regarding sustainable ocean management and ultimately a stronger more successful ocean economy.

The RPB should specify in the Plan that execution of the best practices for stakeholder consultation will be a priority during the first year of Plan implementation.

V. Prioritize Research on, And Responses to, the Impacts of Climate Change on Ocean Resources.

A. Build a Comprehensive Climate Change Information Base as a Theme Component of the Portal.

A comprehensive understanding of the vulnerability of our regional ocean ecosystems to climate change is imperative to the Plan’s success. The Plan has the potential to galvanize broad regional collaboration to improve our understanding of the impacts of climate change on the ocean, gather and make available related scientific data on the Portal, and enable more informed decisions about the management of the ocean in the face of climate change. Therefore, we support Science and Research Priority No. 5: *Characterize changing conditions and resulting impacts to existing resources and uses.*⁵⁰

The Plan rightly recognizes that the results of such research “should be incorporated into the Portal to supplement current ocean resource and activity data.”⁵¹ We strongly urge the RPB to commit firmly in the Plan to developing and incorporating into the Portal as soon as possible—and by the end of 2017 at the latest—a comprehensive information base regarding the vulnerability of our regional ocean ecosystems to climate change. This information base should include, inter alia, maps of shifts in: temperature, pH, dissolved oxygen, water column stratification, sea-level, and species abundance and distribution.

B. Commit to Engaging Ocean Users and Convening an Annual Meeting on Regional Climate Vulnerability.

A comprehensive understanding of the vulnerability of our region’s ocean ecosystems to climate change is imperative to successfully meeting the Plan’s goals. Therefore, we recommend that the RPB include in Chapter 5, under Science and Research Priority No. 5, a provision for annual public meetings, hosted by the RPB, to convene research, stakeholder, and resource-management communities to discuss new data on the impacts of climate change in the Northeast regional ocean planning area.

⁵⁰ See Plan at 171.

⁵¹ See *id.*

We further recommend that the RPB explicitly state in Chapter 5 the need to tap fishermen, non-consumptive ocean recreational users, tribal nations, and other ocean users for their on-the-water knowledge and observations in building understanding about climate change impacts. Such consultation could be accomplished initially by including dedicated sessions on stakeholder observations and data collection during the annual meeting recommended above, as well as through engagement of the SLTF described above.

C. Include Climate Change Adaptation within the Chapter 4 Best Practices.

The Plan is a forward-looking document that seeks to improve ocean decision-making and ecosystem health for years to come. Without discussion of climate change adaptation, however, the Plan lacks a keystone element of adaptive ocean management. Incorporating climate change adaptation and resilience into ocean management should be a best practice. We urge the RPB to include the following best practice among the intergovernmental coordination best practices discussed in Chapter 4:

Federal agencies shall explore adaptive management principles and tools—such as standard permit conditions that trigger permit review in the event of changing ocean conditions and protocols that require monitoring of changing ocean conditions and relationship to the project or activity—as well as options for incorporating adaptive management principles and tools into federal agency decision-making and regulatory processes to the fullest extent consistent with applicable law.

* * *

We reiterate our appreciation for the RPB's great dedication to the northeast regional ocean planning process. The Plan is a significant achievement. We urge the RPB to seize this opportunity to further enhance the Plan by incorporating the foregoing recommendations related to IEAs, Plan implementation, state and stakeholder engagement, and climate change. Strengthening these critical Plan components as detailed above will facilitate achievement of the *National Ocean Policy* goals and help ensure that New England's ocean ecosystem is healthy, resilient, and productive for present and future generations.

Thank you for your consideration of these comments. We look forward to supporting implementation of the Plan for years to come.

Sincerely,

Prisilla M. Books



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