WASHINGTON DEPARTMENT OF FISH AND WILDLIFE REPORT FOR THE MARINE PLANNING UPDATE – OVERVIEW OF WASHINGTON'S MARINE SPATIAL PLAN

Hearing the concerns over the potential for offshore development on the West Coast at the Council's September and November 2020 meetings, we asked our colleagues at the Washington Department of Ecology (Ecology) to prepare the outreach materials that accompany this cover report. We thank Casey Dennehy and Teressa Pucylowski for obliging. We provide the cover report to add some background and some perspectives from our agency.

Background on the Plan

The Marine Spatial Plan for Washington's Pacific Coast (the MSP) was called for by the Washington State Legislature in 2010 and adopted in 2018.[1] Without an active project proposal off Washington, the state has not requested the same degree of engagement from the Bureau of Ocean Energy Management (BOEM) that Oregon and California have. At the same time, the state and BOEM have been in communication on the MSP via the West Coast Ocean Alliance and its predecessor the West Coast Regional Planning Body. The expectation is that the MSP will influence the evaluation of projects proposed off Washington in both state and federal waters.

The MSP was developed by an interagency team led by Ecology but which also included staff from our agency whose main roles involve engaging with the Council process. The Washington Coastal Marine Advisory Council advised the team and provide an additional forum for public engagement. As for tribal involvement, it is a state plan that recognizes the government-to-government relationship the tribes have with the state and federal governments as well as the central importance that the MSP Study Area holds for the Washington coastal treaty tribes. The MSP is expected to aid coordination with tribal governments and their own marine planning efforts if and when projects are proposed.

Effects of Offshore Development on Fishing—Mandate, Data, and Analyses

The discussions around the Council last fall highlighted concern over how development, and wind energy in particular, could close off access to fishing grounds and cause economic harm. Those same concerns were a major driver in the creation and development of the MSP. We asked Ecology to provide outreach materials believing that the state's approach to the issue would be of interest to the Council and its advisory bodies.

That approach originates in a legislative mandate to minimize negative impacts from new uses on commercial and recreational fishing and to "accord substantial weight to recommendation's from" our Director on how to do so.[2] In following this mandate, the interagency team produced maps of state and federal fisheries in the MSP Study Area. We also mapped habitat and ecosystem features, with the maps and analyses produced for the Council's last five-year review of groundfish essential fish habitat greatly

[1] Chapter 43.372 of the Revised Code of Washington (RCW).
[2] RCW 43.372.040(8). The state's Ocean Resources Management Act also applies and requires "all reasonable steps are taken to avoid and minimize adverse social and economic impacts, including impacts on . . . recreational, commercial, and tribal fishing." RCW 43.143.030(2)(e).

enhancing our ability to do so. These maps of fishing and ecologically important areas and those of other existing uses of the ocean were then compared against suitability maps and development scenarios for various wind energy developments and other potential new uses in a "Use Analysis" that employed the Marxan tool and spatial overlay analysis.[3] The analysis was directed at the legislative mandate to produce maps that summarized available data on "appropriate locations with high potential for renewable energy production with minimal potential for conflicts with other existing uses or sensitive environments."[4]

Key Conclusions

In light of the Use Analysis and other information, the state concluded that nowhere within the MSP Study Area could be predetermined to have minimal potential for conflict. The conclusion was instead that all projects would require case by case evaluation, supported by a robust, public consultation process, and with project proponents likely needing to fill data gaps. In addition, and while still open to case by case evaluation, the MSP also concluded that the data and analysis were sufficient to create a presumption against industrial scale alternative energy projects in state waters. The high degree of conflict with fisheries such projects would likely cause was a major reason behind that conclusion.

While much of the MSP's content would be of interest to the Council and its advisors, we would draw particular attention to the MSP's Fisheries Use Protection Standards. Those standards would play a central role in any case by case evaluation. The standards apply in state waters, but as outlined by our colleagues from Ecology below, also stand to influence projects in federal waters through the Coastal Zone Management Act. We believe the standards add a new and important factor that would improve decision-making.[5] The MSP also created Important, Sensitive, and Unique Areas (ISUs) Protection Standards, which are similar to the Council's essential fish habitat policies yet may also extend protections beyond those provided by the Magnuson-Stevens Act.

Lastly, in developing the MSP it also became apparent what many knew beforehand—even the best maps of important fishing areas are insufficient on their own for determining impacts on a fishery. For one, as we often hear, fish move. A particular fishing area may not be important in all years and yet be highly important in some. Moreover, uncertainty and variability in the data are expected to increase as the climate changes. For these and other reasons, complying with the Fisheries Use Protection Standards will require constructively engaging with fishery participants with the local, on-the-water knowledge of fishing grounds and operations. Specific and localized information will be key to determining how or whether a major wind energy development can avoid and minimize adverse impacts on fisheries.

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[3] The Use Analysis is summarized in Section 3.3 of the MSP.

[4] RCW 43.72.040(6)(c).

[5] BOEM may also be subject to similar requirements. A December 14, 2020 letter from the Solicitor of the Interior concluded that section 8(p)(1) of the Outer Continental Shelf Lands Act (OCSLA) requires the Secretary of the Interior "to prevent interference with reasonable uses in a way that errs on the side of less interference rather than more interference." The interpretation leaves open questions about the meaning of "unreasonable interference" vs. *"de minimis* or reasonable interference," with the latter possibly permissible and the former not. With fishing as the reasonable use at focus, the letter advised the Secretary that wind energy activity that "would bar access to, or greatly impact fishing activity . . . would rise to the level of unreasonableness."

Marine Spatial Planning Basics

Overview of Washington's Marine Spatial Plan

The Marine Spatial Plan (MSP) for Washington's Pacific Coast is a living management document written to address the complex issue of managing a growing number of potential new ocean uses – a situation that is further complicated by multiple overlapping jurisdictions offshore. The MSP uses a planning strategy and a coordinated decision-making process to address this challenge and anticipate future needs. It provides a framework for state agencies and local governments to evaluate new proposed ocean uses and identifies wide-ranging data that can help inform ocean resource management decisions for various parties.

The MSP framework:

- Assists governing agencies and others in efficiently evaluating proposals, by pointing to the different authorizations that the project may be required to obtain and by outlining steps to ensure compliance with the Ocean Resources Management Act (ORMA) [RCW 43.143].
- Acts as a guide for new ocean use applicants to ensure a more coordinated and efficient process.

The data and information contained in the MSP:

- Detail current and future socioeconomic and environmental conditions.
- Can be used as a tool to protect ocean resources, identify ways in which impacts to the environment and existing uses can be minimized, and understand the potential use conflicts associated with a new proposal.

The MSP also contains two new enforceable policies as defined under federal regulations related to Washington's Coastal Zone Management Program (WCZMP):

1. Important, Sensitive, & Unique areas (ISUs)
2. Fisheries Use Protection Standards

The MSP does not:

- Create zoning for various uses
- Promote renewable energy development, or any other specific new use
- Prohibit any specific type of use
- Create any new regulations
- Supersede existing federal, state, or local authorities

The MSP does:

- Protect existing uses and resources such as recreation, fisheries, and historical sites
- Require state and local agencies to make decisions consistent with the final MSP under the marine planning law
- Create two new enforceable policies for the state's CZMP
- Provide recommendations for protecting resources through new policies and standards

When is the MSP triggered?

The MSP applies to a proposed project only if it: a) occurs within the geographic boundaries of the MSP study area; b) will adversely impact renewable resources or existing ocean uses; and c) is a 'new use', as defined by the MSP. All three criteria must be met in order to trigger the MSP. More information on each of these criteria is provided below.

a) Geographic Location

The Marine Spatial Plan study area includes:

- State and federal marine waters along the Pacific Ocean from ordinary high water on the shoreward side out to a depth of 700 fathoms (or 4,200 ft.), which lies between 35-55 nautical miles (nm) offshore.
- The coast from Cape Flattery on the north of the Olympic Peninsula south to Cape Disappointment at the mouth of the Columbia River.
- The two large estuaries on the Pacific Coast: Grays Harbor and Willapa Bay.
- This does NOT include the Strait of Juan de Fuca, the Puget Sound, and the Columbia River.

The dotted line in Figure 1 represents the boundaries of the MSP study area. The green area is the Olympic Coast National Marine Sanctuary (OCNMS), and the area between the solid brown line and the shoreline delineates state jurisdiction out to 3nm. The MSP boundary was chosen due to the number of high intensity uses in this area, hence there is a wide range of data and information regarding these resources and uses that was gathered during the marine spatial planning process.

The MSP jurisdiction includes areas seaward of ordinary high water. Thus, projects that trigger the MSP will primarily be in-water uses – although related infrastructure may come ashore. This differs from the jurisdiction of the Ocean Resources Management Act (ORMA) and the Shoreline Management Act (SMA) which includes areas 200ft from the ordinary high water mark in any direction, including upland areas.

b) Adverse Impacts to Existing Resources and Uses

The MSP is built upon the project and review criteria in ORMA [RCW 43.143.030] and uses the Ocean Management Guidelines [WAC 173-26-360] in its implementation. Thus if the MSP is triggered, ORMA has already been triggered. ORMA is triggered when a proposed project "contains uses or activities that will adversely impact renewable resources or existing coastal or ocean uses" [RCW 43.143.030(2)]. Therefore, adverse impacts from a potential project are one of the three criteria needed to trigger the MSP.

c) New Ocean Use

The Marine Spatial Plan only applies to *new* ocean uses. The term "new use" is intended to distinguish future ocean use proposals from those uses that are currently permitted or that were undergoing permitting prior to the adoption of the final Marine Spatial Plan [MSP; Appendix B, p. B-4]. Chapter 2.10 in the MSP describes a list of potential new uses in Washington's ocean and coastal waters, including, but not limited to: renewable energy; offshore aquaculture; dredging and dredged material disposal; marine product extraction; sand and gravel mining; and gas hydrate mining.

Figure 1. Map of the MSP Study Area. (Developed using the MSP Mapping Application.)

Federal Consistency

Federal Consistency and the MSP

In general, the MSP - namely the Management Framework in Chapter 4 – should be used in state waters for new ocean uses that trigger ORMA. If the federal consistency provisions of the Coastal Zone Management Act (CZMA) come into play, then other applications of the MSP are possible. Federal consistency allows states with approved Coastal Zone Management Programs to review *federal actions* that have foreseeable coastal effects. Federal actions are: either those projects that are *federal activities or developments* or issuing a *federal license or permit* for a proposed project. When a project is subject to federal consistency, in some situations the MSP's enforceable policies could apply to waters outside Washington's coastal zone (3nm offshore). Federal consistency allows states a role in reviewing federal actions and enhances coordination and cooperation between states, federal agencies, and applicants.

If federal consistency applies through a federal action, and ORMA applies to the project and the project is a new ocean use, then the MSP's enforceable policies will apply. Federal agency project proponents (i.e. *federal activities*) and those holding a federal license or permit will need to demonstrate consistency with the MSP's enforceable policies. Enforceable policies are laws, regulations, or standards identified in Washington's Coastal Zone Management Program that federal projects must be consistent with.

Enforceable Policies of the MSP

The MSP contains two enforceable policies relating to protecting both Important, Sensitive, & Unique Areas and State Fisheries:

Important, Sensitive & Unique Areas (ISUs)

ISUs are defined by meeting one or more of the following criteria in:

a) Areas that are environmentally sensitive, or contain unique or sensitive species or biological communities that must be conserved and warrant protective measures;
b) Areas with known sensitivity and where the best available science indicates the potential for offshore development to cause irreparable harm to the habitats, species, or cultural resources;
c) Areas with features that have limited, fixed, and known occurrence;
d) Areas with inherent risk or infrastructure incompatibilities (e.g. buoys or cables)

There are two types of ISUs:

1) Ecological:
   i) Biogenic habitats: aquatic vegetation, corals, and sponges.
   ii) Rocky reefs.
   iii) Seabird colonies: islands and rocks used for foraging and nesting by seabirds.
   iv) Pinniped haul-outs.
   v) Forage fish spawning areas: intertidal areas used for spawning by herring, smelt or other forage fish.
2) Historic, cultural, and infrastructure:
   i) Historic and archaeological sites: structures or sites over 45-years old that are listed or eligible for listing in local, state or national preservation registers (e.g. shipwrecks or lighthouses); or

artifacts or other material evidence of tribal or historic use or occupation (e.g. burials, village sites, or middens).

ii) Buoys and submarine cables: fixed infrastructure such as navigation or monitoring buoys, fiber optic cables, electrical transmission cables, other fixed monitoring equipment in the marine environment (e.g. hydrophones), and any associated mooring lines,anchors or other equipment.

ISU Protection standards

An applicant proposing a new ocean use involving offshore "development", as defined in the Shoreline Management Act must demonstrate that the project will have no adverse effects on an ISU located at the project site or on potentially affected off-site ISUs.

An applicant may overcome the ISU protection standard using site-specific surveys, scientific data, and analysis, which demonstrate either:

i) The current ISU maps do not accurately characterize the resource or use, or the project area (mapped or not mapped) does not contain an ISU resource or use; or
ii) The weight of scientific evidence clearly indicates that the project will cause no adverse effects to the resources of the ISU.

Adverse effects standards for ecological ISUs

Adverse effects for ecological ISUs is defined as either:

i) Degradation of ecosystem function and integrity, including, but not limited to, direct habitat damage, burial of habitat, habitat erosion, and reduction in biological diversity.
ii) Degradation of living marine organisms, including, but not limited to, abundance, individual growth, density, species diversity, and species behavior.

Adverse effects standards for historic, cultural or fixed-infrastructure ISUs

Adverse effects for historic, cultural or fixed-infrastructure ISUs are defined as any of the following:

i) Direct impact by dredging, drilling, dumping, or filling.
ii) Alteration, destruction, or defacement of historic, archaeological, or cultural artifacts.
iii) Direct impacts from placement or maintenance of new, temporary or permanent structures in areas with existing infrastructure or historic, archaeological, or cultural artifacts.

Fisheries Use Protection Standards

Protection standards for fisheries

Applicants proposing new ocean uses involving offshore development, as defined in the SMA, must demonstrate that their projects meet the following standards to protect fisheries located at the project site and nearby:

i) There are no likely long-term significant adverse effects to fisheries.
ii) All reasonable steps are taken to avoid and minimize social and economic impacts to fishing.

Additionally, other factors must be taken into consideration when assessing adverse effects on commercial and recreational fisheries and whether all reasonable steps have been taken to avoid and minimize such effects.

Definition of adverse effect for fisheries

Adverse effects can be direct, indirect, or cumulative. Adverse effects for commercial or recreational fisheries are defined as any of the following:

i) A significant reduction in the ability of commercial or recreational fisheries to access the resource used by any fishery or fishing community (ies).
ii) A significant increase in the risk to entangle fishing gear.
iii) A significant reduction in navigational safety for commercial and recreational fisheries.
iv) Environmental harm that significantly reduces quality or quantity of marine resources available for harvest.

Necessary Data & Information

When federal consistency is triggered through a *federal permit or license* and not through a *federal agency activity*, the state may identify additional 'Necessary Data and Information' that the state believes is needed to start the CZMA six-month review period under 15 C.F.R part 930, subpart D, 930.58.

The following Necessary Data and Information is required for projects in order to demonstrate consistency with the MSP:

a) A copy of the notice provided to the Washington Coastal Marine Advisory Council (WCMAC) chair and membership (see Section 4.2.1.3(a)(ii))
   - Applicant shall provide a pre-application notice to WCMAC once a federal application has been submitted to ensure effective communication and coordination with coastal stakeholder interests
b) A copy of the sign-in and summary from a meeting with WDFW and affected fisheries stakeholders (see Section 4.2.1.4(c)).
   - Applicants will notify the WDFW Intergovernmental Ocean Policy office regarding a potential project proposal as early as possible, including likely location(s) of the project.

WDFW will then provide timely notice to the affected stakeholders, which may include established fishing advisory groups and license holders, for potentially affected commercial and recreational fisheries.

Case Study: Federal Consistency

Hypothetical Situation:

Federal permits and/or licenses are issued to a company that has proposed an *activity in federal waters* - a native salmon farm 5nm offshore and within the MSP Study Area (white dotted line). The project has reasonably foreseeable effects to existing uses and resources (such as pollution from fish waste) and is also considered a new use under the MSP. Therefore, federal consistency and the MSP apply. Because the project requires *federal permits or licenses* and is outside of state waters (brown line), the entire MSP does not apply, only its two enforceable policies. Thus the project proponent must demonstrate consistency with those policies (as well as all other appropriate enforceable policies).

Photo credit: Fix.com article *The Environmental Impact of Fish Farming*