

## **Chapter 10: Existing Statutes, Regulations, and Policies**

### **Table of Contents**

<b>1000 Introduction.....</b>	<b>2</b>
<b>1010 State and Federal Jurisdiction.....</b>	<b>3</b>
<b>1020 State Statutes, Regulations and Policies.....</b>	<b>5</b>
<b>1020.1 Coastal Resources Management Council State Authority .....</b>	<b>5</b>
<b>1020.2 CRMC CZMA Federal Consistency Review .....</b>	<b>5</b>
<b>1020.3 Rhode Island Endangered Species Act .....</b>	<b>6</b>
<b>1020.4 Rhode Island Aquaculture Regulations.....</b>	<b>6</b>
<b>1020.5 Fisheries Management.....</b>	<b>6</b>
<b>1020.6 Energy Facility Siting Act .....</b>	<b>6</b>
<b>1020.7 The Rhode Island Bays, Rivers and Watersheds Coordination Team .....</b>	<b>7</b>
<b>1030 Federal Statutes, Regulations and Policies .....</b>	<b>8</b>
<b>1030.1 Coastal Zone Management Act.....</b>	<b>8</b>
<b>1030.2 National Energy Policy Act.....</b>	<b>8</b>
<b>1030.3 Outer Continental Shelf Lands Act.....</b>	<b>9</b>
<b>1030.4 National Environmental Policy Act.....</b>	<b>9</b>
<b>1030.5 Marine Mammal Protection Act and Federal Endangered Species Act.....</b>	<b>10</b>
<b>1030.6 Rivers and Harbors Act and the Clean Water Act Section 404 .....</b>	<b>10</b>
<b>1030.7 Clean Water Act Section 401 Water Quality Certification.....</b>	<b>11</b>
<b>1030.8 Clean Air Act Air Pollution from Outer Continental Shelf Activities.....</b>	<b>11</b>
<b>1030.9 Federal Aviation Administration Authority.....</b>	<b>11</b>
<b>1030.10 U.S. Coast Guard Regulations .....</b>	<b>11</b>
<b>1030.11 Oil Pollution Act of 1990 .....</b>	<b>12</b>
<b>1030.12 Magnuson-Stevens Fishery Conservation and Management Act.....</b>	<b>2</b>
<b>1030.13 Migratory Bird Treaty Act .....</b>	<b>12</b>
<b>1030.14 Migratory Bird Executive Order 13186.....</b>	<b>12</b>
<b>1030.15 National Historic Preservation Act .....</b>	<b>13</b>
<b>1030.16 National Estuary Program .....</b>	<b>13</b>
<b>1030.17 Federal Power Act: Federal Energy Regulatory Commission .....</b>	<b>13</b>
<b>1030.18 Atlantic States Marine Fisheries Commission and Atlantic Coastal Fisheries Cooperative Management Act .....</b>	<b>14</b>

***Section 1000. Introduction***

1. A number of state statutes, regulations, and policies exist in Rhode Island which govern the uses of the areas contained within the Ocean SAMP. These Rhode Island statutes have associated regulatory provisions that provide policy direction for, and regulation and management of, these ocean resources and uses.
2. Additionally, there are a number of federal statutes, regulations and policies which govern the Ocean SAMP area. The federal authorities in some instances delegate authority to the state and in others reserve power for the federal government.
3. As will be set forth below, because the Ocean SAMP study area encompasses both state and federal waters a summary of the most pertinent federal and state authorities and regulatory provisions are detailed. This section is not a description of state enforceable policies for the RI Ocean SAMP, but is a description of the most relevant state and federal statutes and regulatory environment. Further, this overview is not an interpretation by the CRMC of any agency rule, regulation or statute but rather is a general overview of the statutory and regulatory environment.

**Section 1010. State and Federal Jurisdiction**

1. Jurisdiction over tidal waters in the United States, is divided between the federal government and the states. The Submerged Lands Act (SLA) of 1953 (43 U.S.C. §§ 1301-1315) gives states jurisdiction from the mean high tide line out to three (3) nautical miles.<sup>1</sup> The SLA grants coastal states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters." Although the federal government retains "the power to regulate commerce, navigation, power generation, national defense, and international affairs throughout state waters" (2004 U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century* at 71), Section 1314 of the SLA underscores the fact that the federal government does not have "the rights of management, administration, leasing, use and development of the lands and natural resources which are specifically recognized, confirmed, established, and vesting in and assigned to the respective States and others by...this Act."
2. The federal waters of the United States contain three (3) primary zones: the federal territorial sea, the contiguous zone, and the Exclusive Economic Zone (EEZ). Established by Presidential Proclamation, these zones are consistent with customary international law as codified by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The zones are measured from a baseline that marks the boundary dividing land from sea, and is generally located at the "low-water line along the coast as marked on large-scale charts" (UNCLOS, Article 5).
3. The federal territorial sea extends seaward from the baseline out to twelve (12) nautical miles. When President Reagan proclaimed this zone, he did so "in accordance with international law" acknowledging that international law recognized coastal nations' authority to "exercise sovereignty and jurisdiction over their territorial seas." In the territorial seas the federal government can adopt laws pertaining to navigation, protection of cables and pipelines, fisheries, conservation of living resources and the environment, pollution, scientific research (UNCLOS, Article 21). In the contiguous zone, which extends from twelve (12) to twenty-four (24) nautical miles, the United States exercises its control over customs, fiscal, immigration, and sanitary laws (UNCLOS, Article 33).
4. The third zone, the EEZ, overlaps with the contiguous zone and extends from twelve (12) nautical miles seaward to two-hundred (200) nautical miles. In the EEZ the United States has extensive rights over natural resources. With the current movement to site new energy facilities offshore, it is important to note that international law recognizes coastal nations' "sovereign rights" for the "economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds" and "jurisdiction" with regard to "the establishment and use of...installations and structures" and marine scientific research and the protection and preservation of the marine environment (UNCLOS, Article 56).
5. The United States also claims jurisdiction over its continental shelf. The 1945 Truman Proclamation extended the federal government's jurisdiction to include the "natural

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<sup>1</sup> In Texas, Puerto Rico, and the West Coast of Florida, states have jurisdiction out to nine nautical miles.

resources of the subsoil and sea bed of the continental shelf." The Outer Continental Shelf Lands Act (OSCLA) of 1953 (43 U.S.C. §§ 1331-1356) defines the outer continental shelf (OCS) as lands lying seaward of state waters. On OCS lands the Secretary of the Interior has authority to oversee mineral exploration and development, the power to grant leases of OCS lands on a competitive basis, and the right to formulate regulations to carry out the provisions of the Act. As amended by the 2005 Energy Policy Act. (P.L. 109-58), the OCSLA also gives the Secretary the power to authorize alternative energy projects on the OCS.

**Section 1020. State Statutes, Regulations and Policies**

1020.1 Coastal Resources Management Council State Authority

1. The Coastal Resources Management Council's enabling act, R.I.G.L. §§ 46-23-1 *et seq.* declares that the coastal resources of Rhode Island are a rich variety of natural, commercial, industrial, recreational and aesthetic assets which are of immediate and potential value to the present and future development of the state. It is the policy of the state to "preserve, protect, develop, and, where possible, restore" the coastal resources of the state (R.I.G.L. § 46-23-1(2)).
2. Under Article I, §17, the submerged lands of the state are impressed with a public trust and the state is responsible for the protection of the public's interest in these lands. The state maintains title in fee to all soil within its boundaries that lies below the high water mark, and it holds that land in trust for the use of the public. In benefiting the public, the state preserves certain public rights which include, but are not limited to, fishery, commerce, and navigation in these waters and the submerged lands that they cover.
3. The CRMC is the principal mechanism for management of the state's coastal resources. The state preserves certain public rights, which include, but are not limited to, fishery, commerce and navigation in tidal waters and the submerged lands that they cover. CRMC is delegated the sole and exclusive authority for the leasing of submerged and filled lands and giving licenses for the use of that land.
4. The primary responsibility of the CRMC is the continuing planning for and management of the resources of the state's coastal region. The Council is charged with identifying the state's coastal resources and formulating plans and programs for the management of each resource, identifying permitted uses, locations, and protection measures. The CRMC is charged with the authority for coordination of state, federal, local and private activities. Using both state and federal authorities the Council is authorized to adopt special area management plans ("SAMP's"), as necessary, to integrate and coordinate the protection of natural resources and promote of reasonable coastal-dependent economic growth.

1020.2 CRMC Coastal Zone Management Act Federal Consistency Review

1. Pursuant to the Federal Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 *et seq.* and the implementing regulations, states review federal actions (federal agency activities or federal license or permit activities) to ensure that such actions meet enforceable policies articulated in the state's federally-approved coastal zone management plan through a process called federal consistency review. R.I.G.L. § 46-23-15 delegates authority to the CRMC to administer land and water use regulations as necessary to fulfill its responsibilities under the CZMA.
2. Therefore, in Rhode Island a federal consistency decision by CRMC is required for projects that have reasonably foreseeable effects on any land or water use or natural resource of the Rhode Island coastal zone, regardless of whether the project or effect is within or outside the coastal zone.

### 1020.3 Rhode Island Endangered Species Act

1. R.I.G.L. §§ 20-37-1 *et seq.* prohibits the importation, sale, transportation, storage, traffic, ownership, or other possession or use of any animal or plant listed under the federal Endangered Species Act (ESA) (R.I.G.L. § 20-37-1). Under the state ESA, the Director of DEM may declare animal and plants endangered (R.I.G.L. § 20-37-2). The Director of DEM may acquire or control land within the state for the purpose of protecting, conserving, cultivating, or propagating any species of wildlife, plant or animals as provided by R.I.G.L. § 20-18-1.

### 1020.4 Rhode Island Aquaculture Regulations

1. Under R.I.G.L. §§ 20-10-1 *et seq.* applications for aquaculture permits are submitted to CRMC. After CRMC notifies the Director of DEM and the Marine Fisheries Council (MFC), the Director reviews applications to ensure that resulting aquaculture activities will not substantially effect marine life or indigenous fisheries of the state and are consistent with competing uses engaged in the exploitation of the marine fisheries (R.I.G.L. § 20-10-5). CRMC has authority to lease submerged lands of the state to applicants who have been granted aquaculture permits (R.I.G.L. § 20-10-6).

### 1020.5 Fisheries Management

1. The Rhode Island DEM has authority over fish and wildlife in the state (R.I.G.L. § 20-1-2). The Director of DEM is further authorized to promulgate, adopt, and enforce rules and regulations necessary to plan, manage, and regulate the marine fisheries of the state. (R.I.G.L. §§ 20-1-4, 20-1-5) and, in that capacity, the Director is charged with the obligation to promulgate and enforce regulations required to implement at the State level any fisheries management plans governing marine species developed by regional marine councils or commissions pursuant to the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Coastal Fisheries Cooperative Management Act. (See *infra* Sections 1030.12 and 130.18.)

### 1020.6 Energy Facility Siting Act

1. The Rhode Island Energy Facility Siting Act (R.I.G.L. §§ 42-98-1 *et seq.*) consolidates the licensing and regulatory authority over major energy facilities into a single body. The Act establishes a three-member siting board with licensing and permitting authority for "major energy facilities," which are defined to include, facilities designed or capable of operating at a gross capacity of forty (40) megawatts or more and facilities with transmission lines of sixty-nine (69) Kv or over. (R.I.G.L. § 42-98-3). The board has power to promulgate regulations to further define "major energy facility" as necessary to carry out the purpose of the Act. The board is directed to give preference to energy projects based on eight criteria including the use of renewable fuels, maximization of efficiency, production of low levels of harmful air emissions and wastewater discharge, using low levels of high quality water, using the existing energy-generation facilities and sites, and having dual fuel capacity. (R.I.G.L. § 42-98-2). The authority of the DEM pursuant to R.I.G.L. §§ 2-1-1 *et seq.* and the CRMC under R.I.G.L. §§ 42-23-1 *et seq.* to issue licenses and permits remains with those agencies. (R.I.G.L. § 43-98-7).

1020.7 The Rhode Island Bays, Rivers, and Watersheds Coordination Team

1. The Rhode Island Bays, Rivers, and Watersheds Coordination Team (BRWCT) is a state interagency commission established in 2004 comprised of the RI Coastal Resources Management Council, the RI Department of Environmental Management, The RI Division of Planning, the RI Economic Development Corporation, the RI Water Resources Board, the Narragansett Bay Commission, and the RI Rivers Council. Its mandate is to coordinate executive agency functions, programs, and regulations for the management, restoration, and sustainable utilization of Rhode Island's fresh and marine waters and watersheds. It pursues this broad mandate via collaborative strategic planning and application of ecosystem-based management principles.
2. The BRWCT issued the Rhode Island Bays, Rivers, and Watersheds Systems-Level Plan (SLP) in July 2008 as a statement of the "overall goals and priorities for the management, preservation, and restoration of Rhode Island's bays, rivers, and watersheds and the promotion of sustainable economic development of the water cluster." The BRWCT assesses and evaluates how executive actions and programs at the state, federal, and local level are advancing toward SLP priorities, and funds projects and initiatives that advance SLP priorities.

**Section 1030. Federal Statutes, Regulations and Policies**

1. Many federal authorities affect the management of ocean uses and resources. The authorities listed below, however, are the most particularly pertinent for the Ocean SAMP.

1030.1 Coastal Zone Management Act

1. The CZMA (16 U.S.C. § 1452) establishes authority for states to prepare special area management plans ("SAMP's"). The CZMA states that it is the nation's policy:

"to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, including those areas likely to be affected by land subsidence, sea level rise, or fluctuating water levels of the Great lakes, and improved predictability in governmental decision making."

2. Under 16 U.S.C. § 1456 and 15 CFR 930, states review federal actions (federal agency activities or federal license or permit activities) to ensure that such actions meet enforceable policies articulated in the state's federally-approved coastal zone management plan through a process called federal consistency review. Federal consistency review is required for projects that have reasonably foreseeable effects on any land or water use or natural resource of the Rhode Island coastal zone, regardless of whether the project or effect is within or outside the coastal zone.
3. For renewable energy projects sited in Federal waters as authorized by 30 CFR Part 285, the U.S. Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) (formerly the Minerals Management Service) will prepare a consistency determination for the lease sale and site assessment activities for commercial leases issued competitively (30 CFR 285.612). For commercial leases issued by BOEMRE on a noncompetitive basis, consistency will be determined by 15 CFR 930, Subpart D, whereby the applicant must furnish the required consistency certification and associated documentation to CRMC and BOEMRE concurrently.

1030.2 National Energy Policy Act

1. Section 388 of the Energy Policy Act of 2005 (EPAAct) (Pub. L. 109-58) amended the Outer Continental Shelf Lands Act, giving the Secretary of the Interior, via BOEMRE, authority to issue leases, easements, or rights-of-way on the OCS for activities including those that "produce or support production, transportation, or transmission of energy from sources other than oil and gas." Leases should be issued on a competitive basis where there is demand unless it is determined there is no competitive interest.
2. Agency jurisdiction was clarified in a signed Memorandum of Understanding in April 2009, which established a streamlined process through which BOEMRE and the Federal Energy Regulatory Commission (FERC) will lease, license, and regulate renewable



energy activities on the OCS. The agreement gives BOEMRE exclusive jurisdiction over the production, transportation, or transmission of energy from non-hydrokinetic renewable energy projects. FERC meanwhile, has exclusive jurisdiction to issue licenses for hydrokinetic projects after a BOEMRE lease is obtained.

3. The EPAct also called for the Secretary to issue regulations necessary to carry out section 388. Following the agreement discussed above, BOEMRE issued a final renewable energy framework in the Federal Register on April 22, 2009 (30 CFR Parts 250, 285, and 290). The BOEMRE regulations establish a program to issue leases for the siting and construction of renewable energy projects on the OCS. The program takes a "cradle to grave approach," considering from an initial leasing stage through the decommissioning stage at the project's end. The regulations state that BOEMRE may issue commercial and limited leases. Commercial leases "would convey the access and operational rights necessary to produce, sell and deliver power." Limited leases "will convey access and operational rights for activities on the OCS that support the production of energy, but do not result in the production of electricity or other energy project for sale, distribution, or other commercial use exceeding a limit specified in the lease." Leases will be issued on a competitive basis unless it has been determined that there is no competitive interest.
4. BOEMRE will also grant right-of-use and easement (RUE) and right-of-way (ROW) grants. RUE grants authorize the "use of a designated portion of the OCS to support renewable energy activities on a lease or other approval" while ROW grants "allow for the construction and use of a cable or pipeline for the purpose of gathering, transmitting, distributing, or otherwise transporting electricity or other energy product generated or produced from renewable energy not generated on a lease issued under this part."
5. During the life of a project the BOEMRE program details site assessment, construction and operations, general activities plans and their approval, and environmental and safety monitoring.

#### 1030.3 Outer Continental Shelf Lands Act

1. The Outer Continental Shelf Lands Act (OCSLA) (Pub. L. 83-212; 43 U.S.C. §§ 1331-1356) as amended by the 2005 EPAct and previous amendments, gives the U.S. Department of the Interior, through BOEMRE, the authority to lease offshore tracts on a competitive basis, collect royalties on production of oil and natural gas, and consider economic, social and environmental values of renewable and nonrenewable resources in managing the Outer Continental Shelf (OCS). In 2005, Congress amended the OCSLA to grant primary authority to BOEMRE to authorize alternative energy projects on the OCS.

#### 1030.4 National Environmental Policy Act

1. The National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4321-4370) establishes environmental protection as a national policy goal and directs all federal agencies to consider, and disclose, the environmental consequences of their projects and permitting actions. NEPA sets up a system for formal evaluation of environmental impacts of the actions of federal agencies, the centerpiece of which is the Environmental Impact

Statement (EIS). The Council on Environmental Quality (CEQ) regulations for implementing NEPA state that federal agencies shall integrate the NEPA process at the earliest possible time to ensure that the agency makes informed permitting decisions to avoid delays in the process and to head off potential conflicts. Typically, a federal agency with an action on a project will first prepare an Environmental Assessment (EA). Following publication in the Federal Register and a comment period, the agency will either issue a Finding of No Significant Impact ("FONSI") or will decide to prepare an EIS to more fully examine alternatives, impacts and mitigation. One federal agency is usually designated as the "lead" agency, and this agency will prepare the EIS. Other federal and state agencies may play an official role in preparation by becoming "cooperating" agencies. At the completion of the EIS process, the lead agency issues a Record of Decision making environmental findings. NEPA does not direct an agency to choose any particular course of action; the only purpose of an EIS is to ensure that environmental consequences are considered.

#### 1030.5 Marine Mammal Protection Act and Federal Endangered Species Act

1. The primary federal legislation that provides for the protection and management of marine mammals is the Marine Mammal Protection Act (MMPA) of 1972 (16 U.S.C. §§ 1361-1421). The MMPA prohibits, with certain exceptions, the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas, as well as the importation of marine mammals and marine mammal products into the United States. Under the MMPA, the National Oceanic and Atmospheric Administration (NOAA) has responsibility for ensuring the protection of cetaceans (whales, porpoises, and dolphins) and pinnipeds (seals and sea lions), except walruses. The federal Endangered Species Act (ESA) (16 U.S.C. §§ 1531-1544, 50 CFR 17.00) prohibits any person, including private entities, from "taking" a "listed" species. "Take" is broadly defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct" (16 U.S.C. § 1532(19)).

#### 1030.6 Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act

1. Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401-413) prohibits the unauthorized obstruction or alteration of any navigable water of the U.S. The construction of any structure in or over any navigable water of the U.S., the excavating from or depositing of dredged material or refuse in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful without prior approval from the United States Army Corps of Engineers (USACE). The legislative authority to prevent inappropriate obstructions to navigation was extended to installations and devices located on the seabed to the seaward limit of the OCS by Section 4(e) of the OSCLA of 1953, as amended.
2. Section 404 of the CWA (33 CFR 323) prohibits discharges of dredged or fill material into waters of the United States, including wetlands without a permit from the USACE. Waters of the United States include those waters and their tributaries, adjacent wetlands, and other waters or wetlands where degradation or destruction could affect interstate or foreign commerce. Section 404 of the CWA defines the landward limit of jurisdiction as the high tide line in tidal waters and the ordinary high water mark in non-tidal waters.

When adjacent wetlands are present, the limit of jurisdiction extends to the limit of the wetland. Coincident with the state's jurisdictional limit, USACE regulates section 404 activities seaward to 3 miles.

#### 1030.7 Clean Water Act Section 401 Water Quality Certification

1. The federal Clean Water Act (CWA) Section 401 (33 U.S.C. § 1341 *et seq.* and R.I.G.L. §§ 46-12-1 *et seq.*) process is administered by the Rhode Island Department of Environmental Management (DEM) Office of Water Resources. Water Quality Certification is required for projects proposing dredging, filling, water withdrawals, or site disturbances in the state's inland and coastal waters. This certifies that a project avoids, minimizes, or mitigates impacts to areas subject to 401 and complies with Rhode Island Water Quality Regulations, which establish water quality standards for the state's surface waters. Section 401 applies to any project that is subject to federal regulation under the CWA. DEM coordinates Water Quality Certification permit reviews within the Agency and with the Division of Fish and Wildlife and the Office of Waste Management.

#### 1030.8 Clean Air Act Air Pollution from Outer Continental Shelf Activities

1. The Clean Air Act (CAA) Section 328 (42 U.S.C. § 7627) regulates air pollution from OCS activities. The EPA is required to control air pollution from OCS sources in order to maintain Federal and State ambient air quality standards. The CAA provides that within 25 miles of a state's seaward boundary, state and local emission control requirements for emission controls, limitations, offsets, permitting, monitoring, testing, and reporting must be followed. Under CAA Section 328 emissions from any vessel servicing or associated with an OCS source, are considered direct emissions from the OCS source. The Office of Air Resources within DEM administers the Rhode Island CAA (R.I.G.L. §§ 23-23-1 *et seq.*).

#### 1030.9 Federal Aviation Administration Authority

1. 49 U.S.C. § 44718 gives the Federal Aviation Administration (FAA) authority to promote safe and efficient use of the navigable airspace. To protect aircraft from encountering unexpected structures, the Objects Affecting Navigable Airspace (15 CFR 77) was adopted. It establishes notice criteria for proposed construction or alteration of structures. Vertical structures greater than 200 feet (61 meters) in height must have FAA approval to avoid or minimize obstruction to navigable airspace, and includes structures located within a state's territorial waters.

#### 1030.10 U.S. Coast Guard Regulations

1. Pursuant to 33 CFR 66.01 and under provisions of 46 U.S.C. and 33 U.S.C. § 30, the United States Coast Guard (USCG) has safety and regulatory jurisdiction over projects located in navigable waters of the United States and is responsible for granting permits for private aids to navigation.

1030.11 Oil Pollution Act of 1990

1. The Oil Pollution Act of 1990 (OPA) (33 U.S.C. §§ 2701-2761) amended the CWA and created a comprehensive prevention, response, liability, and compensation regime to deal with vessel-caused and facility-caused oil pollution in navigable waters of the United States. The OPA requires oil storage facilities and vessels submit, to the authorizing federal agency, plans detailing how they will respond to their worst case discharge, and requires the development of Area Contingency Plans to prepare and plan for oil spill response on a regional scale. Oil Spill Response Plans must also comply with BOEMRE regulations (30 CFR 254), which require owners and operators of oil handling, storage, or transportation facilities located seaward of the coastline to submit a spill response plan to BOEMRE for approval prior to facility operation.

1030.12 Magnuson-Stevens Fishery Conservation and Management Act

1. The purposes of the Magnuson-Stevens Act (16 U.S.C. §§ 1801-1881) are to conserve and manage the fishery resources of the United States; manage the U.S. anadromous species and continental shelf fishery resources; support the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species; promote domestic, commercial and recreational fishing under sound conservation and management principles; provide for preparation and implementation of fishery management plans to achieve and maintain the optimum yield of each fishery on a continuing basis; establish Regional Fishery Management Councils to protect fishery resources through preparation, monitoring, and revision of plans that allow for participation of states, fishing industry, consumer and environmental organizations; encourage the development of underutilized U.S. fisheries and promote the protection of essential fish habitat (EFH). To promote the protection of EFH, federal agencies are required to consult on activities that may adversely affect designated EFH. The responsible agency is NOAA Fisheries.

1030.13 Migratory Bird Treaty Act

1. The Migratory Bird Treaty Act (16 U.S.C. §§ 703-712) is a domestic law that implements the United States' commitment to international conventions with Canada, Mexico, Japan, and Russia for protection of shared migratory bird resources. The Act generally prohibits the taking, killing, possession, transportation of, trafficking in, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. The Act has no provision allowing for an unauthorized take.

1030.14 Migratory Bird Executive Order 13186

1. The "Responsibilities of Federal Agencies to Protect Migratory Birds" Executive Order (EO) was designed to create a more comprehensive strategy for migratory bird conservation by the Federal government. The EO requires any federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations to develop and implement, within two years a Memorandum of Understanding (MOU) with the U.S. Fish and Wildlife Service that shall promote the conservation of migratory bird populations. The MOU shall support the conservation of

migratory birds by integrating bird conservation principles, measures and practices into agency activities and by avoiding or minimizing the impacts of activities on migratory birds. In addition, it shall restore and enhance the habitat of migratory birds, as practicable; prevent or minimize the pollution or destruction of the environment for the benefit of migratory birds; design migratory bird habitat and population conservation principles, measures and practices into agency plans and planning processes; ensure environmental analyses of federal actions or other environmental review processes; evaluate the effects of actions on migratory birds; and promote research and information exchange related to the conservation of migratory birds. Even before completion of a MOU federal agencies are encouraged to immediately begin implementing migratory bird conservation measures.

#### 1030.15 National Historic Preservation Act

1. The goal of the National Historic Preservation Act (NHPA) (16 U.S.C. §§ 470-470-1) is to have Federal agencies act as responsible stewards for our nation's resources when their actions affect historic properties, including tribal historic and cultural resources. Section 106 of the NHPA requires federal agencies, including BOEMRE, to take into account the effects of their undertakings, including issuance of leases, on historic and cultural properties and resources and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on such undertakings, including consultation with State Historic Preservation Officers and Tribal Historic Preservation Officers.

#### 1030.16 National Estuary Program

1. The Narragansett Bay Estuary Program is part of the National Estuary Program (NEP) and receives base funding and federal oversight from the EPA. The cornerstone of the NEP is the development and implementation of a Comprehensive Conservation and Management Plan (CCMP) to identify actions that should be taken to maintain and improve the ecological integrity of the environmental resources within the bays and their surrounding watersheds and meet the goals of Section 320 of the CWA. The Narragansett Bay CCMP was accepted as part of the Rhode Island State Guide Plan, which requires state agency and municipal plan consistency with the CCMP. The program has limited relationship to the Ocean SAMP because the predominant focus of the SAMP is on activities that occur outside the Narragansett Bay CCMP planning area.

#### 1030.17 Federal Power Act: Federal Energy Regulatory Commission

1. The Federal Energy Regulatory Commission (“FERC”) was created under the Federal Power Act and has jurisdiction to issue licenses for up to fifty years to construct, maintain, and operate hydroelectric plants, electric “transmission lines, or other project works . . . for the development, transmission, and utilization of power across, . . . or in any of the streams or other bodies of water over which Congress has jurisdiction,” and the FERC exercises regulatory powers over licensees for such projects (16 U.S.C. § 797(e), § 799). Accordingly, in the Rhode Island territorial seas extending three (3) nautical miles from the coastal low-water line, the FERC maintains authority to license hydrokinetic power generation facilities and electric transmission lines from any energy project passing through those waters. However, the FERC’s jurisdiction over projects

three miles or further from shore, on the outer continental shelf (“OCS”), is limited by an agreement with BOEMRE to issuing licenses and exemptions for hydrokinetic projects, while BOEMRE retains exclusive jurisdiction not only to lease OCS lands and rights-of-way for energy projects, but over energy production and transmission from non-hydrokinetic projects (DOI-FERC MOU, April 9, 2009).

1030.18 Atlantic States Marine Fisheries Commission and Atlantic Coastal Fisheries Cooperative Management Act

1. The Atlantic States Marine Fisheries Commission (“ASMFC”) was established by an interstate compact approved by Congress “to promote better utilization of the fisheries, marine, shell and anadromous, of the Atlantic” by developing “a joint program to promote, ... protect,” and prevent waste of such fisheries (Pub. L. 77-539). The ASMFC is comprised of the Atlantic coastal states from Maine to Florida, plus Pennsylvania, and each member-state appoints three commissioners. Congress also enacted the Atlantic Coastal Fisheries Cooperative Management Act requiring the ASMFC to adopt coastal fishery management plans (“FMPs”) for any fishery that moves among, or is broadly distributed across two or more states’ waters, and for fisheries moving between one state’s waters and the EEZ (16 U.S.C. § 5104(a)(1)). The ASMFC through Regional Councils will consult with and complement state plans in preparing FMPs for fisheries moving between state waters and the EEZ. (Id.). States are responsible for implementing and enforcing FMP measures, and failure can result in the Secretary of Commerce declaring a moratorium on fishing for the affected species in the noncompliant state (16 U.S.C. § 5106(c)).