SIX FLAGS REVISITED: COASTAL ZONE MANAGEMENT OR MARINE SPATIAL PLANNING FOR LAKE CHAMPLAIN?

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INTRODUCTION

In a previous paper, I noted that six national, sub-national, and international regimes assert jurisdiction over Lake Champlain.[1] I described the statutory, regulatory, and other instruments through which they assert jurisdiction and their efforts to coordinate measures affecting the

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* Professor of Law and Director, Land Use Institute, Vermont Law School. The author wishes to thank the students in his spring semester 2011 course, "Regulating the Marine Environment," upon whom he inflicted the question posed in this article as a final examination and whose insights illuminated his understanding if they did not provide the answer. The author also wishes to express his gratitude to Briana Collier and Patrick Donoghue, both JD VLS 2011, and Vanessa Brown, JD VLS 2012, whose research papers provided useful information and insights on particular issues. CORRECTION: This article reflects changes made since the original print publication.

1. L.Kinvin Wroth, *Six Flags over Champlain: Starting Points for a Comparative Analysis*, 38 J. OF GREAT LAKES RES. (SUPP. 1) 167 (2012) (this article provides the foundation upon which this introduction and Part I below are based).

environment of the Lake.[2] In the present paper, I ask whether the federal Coastal Zone Management Act or the Obama Administration's recent Coastal Marine Spatial Planning Initiative could apply to Lake Champlain and, if so, whether their application would advance the efforts of these measures. In the process, I hope to suggest some broader insights into each.

Lake Champlain, 120 miles long, with depths to 400 feet and widths ranging from a few hundred yards to twelve miles, is bounded on the east by Vermont, on the west by New York, and on the north by the Province of Québec.[3] As a result, it is subject to the sometimes conflicting legal systems, not only of those three jurisdictions, but of the United States, Canada, and the regime of international law. Each of these six jurisdictions has a significant stake in the environmental quality of the Lake and its watershed. Vermont constitutes fifty-six percent of the land area of the Lake Champlain Basin and is home to sixty-eight percent of its population; New York has thirty-seven percent of the land area and twenty-seven percent of the population; and Québec has seven percent of the land area and five percent of the population.[4] Of the ten major tributaries which flow into the Lake, five enter from Vermont, four from New York, and one, the Pike River, directly from Québec. [5] The Lake is part of the navigable waters of the United States and Canada and is an international water way.

Yet, the relatively modest size and remoteness of Lake Champlain mean that, despite continuing efforts, no overarching structure is in place to assure coordinated planning and regulation that would address the environmental, economic, and cultural issues that confront the Lake and its Basin. The roots of the situation lie in history: The common origin of the legal polity of the U.S. and Canada in Great Britain's 18th-century North American empire; the military, and ultimately constitutional, American Revolution, which rejected Britain's imperial framework in favor of a government of separated powers presiding over a federal union of states; Canada's two-century evolution within the imperial framework to achieve national sovereignty as a confederation of provinces under a limited federal government, with legislative and executive powers still wielded by the

2. *Id.*

3. *Quick Facts About the Basin*, LAKE CHAMPLAIN BASIN PROGRAM, http://plan.lcbp.org/quick-basin-facts (last updated Feb. 2, 2012) [hereinafter *Quick Facts*]; LAKE CHAMPLAIN BASIN PROGRAM, FACT SHEET SERIES NUMBER 3: THE BASIN 2 (2006), *available at* http://www.lcbp.org/factsht/basinfs2006.pdf.

4. *Quick Facts*, *supra* note 3; LAKE CHAMPLAIN BASIN PROGRAM, *supra* note 3.

5. LAKE CHAMPLAIN BASIN PROGRAM, *supra* note 3; J. Deslandes, *et al*., *Use of GIS and Remote Sensing to Develop Indicators of Phosphorus Nonpoint Source Pollution in the Pike River Basin*, *in* T. Manley, P. Manley, T. Mihuc, LAKE CHAMPLAIN: PARTNERSHIP AND RESEARCH IN THE NEW MILLENIUM 271 (2004).

same hands; and the survival of the Civil Code as the private law of Québec in sharp contrast to the principles and methods of the common-law heritage of the other Canadian provinces, as well as most of the United States, including New York and Vermont.[6] The result is that the watershed and waters of Lake Champlain are subject to the potentially conflicting statutes, regulations, and court decisions of the U.S., Canada, New York, Vermont, and Québec (with their underlying structural differences). They are also subject to the International Joint Commission (IJC) and other international bodies created by treaties and agreements designed to manage issues concerning the extensive border shared by these two largely peaceable and friendly neighbors.[7]

I. EFFORTS TO DATE

Since the 1980s, recognition of shared interests has led to the creation of a quasi-governmental bi-national structure for planning and development of cooperative approaches to the problems of the Champlain Basin. Cooperative bi-national management began with a Memorandum of Understanding (MOU) signed on August 23, 1988, and renewed most recently in March 2010, by the governors of New York and Vermont and the Premier of Québec.[8] Under the MOU, the two states and the province agreed to develop a joint approach to protecting the environment of the Lake and its Basin.[9] Amendments to the federal Clean Water Act (CWA) in 1991 and 2002 established the Lake Champlain Basin Program (LCBP) in the U.S.[10] The LCBP is charged with developing and updating a management plan for the Lake, channeling federal and other funding to projects implementing the Plan, and coordinating activities of federal agencies, state and provincial agencies, the International Joint Commission, and various NGOs.[11] LCBP's 1996 Plan, *Opportunities for Action*, was updated in 2010 and endorsed by the governors of New York and Vermont,

6. Wroth, *supra* note 1, at 167-68, 170-71.

7. *Id.* at 170–71.

8. Memorandum of Understanding on Environmental Cooperation on the Management of Lake Champlain, N.Y.-V.T.-Que. (Mar. 11, 2010), *available at* http://www.lcbp.org/PDFs/LC-MOU-2010-en.pdf; Memorandum of Understanding on Environmental Cooperation on the Management of Lake Champlain, N.Y.-V.T.-Que. (Aug. 23, 1988).

9. Memorandum of Understanding on Environmental Cooperation on the Management of Lake Champlain, N.Y.-V.T.-Que. (Aug. 23, 1988).

10. Clean Water Act, 33 U.S.C. § 1270 (2012), enacted by P.L. 101-596, § 303, 104 Stat. 3006 (1990), as amended by P.L. 107-303, § 202, 116 Stat. 2358 (2002).

11. *Id.*

the premier of Québec, and the administrators of the Environmental Protection Agency's (EPA) Regions One and Two.[12]

The Plan covers various environmental issues, as well as economic and cultural concerns. In recent years, however, joint efforts have focused on the Plan's highest priority among its substantive goals—reduction of excess phosphorus loading from point and nonpoint sources. Phosphorus loading affects the Lake's water quality[13]—a concern exacerbated and complemented by the continuing effects of the unprecedented flooding of the Lake and its watershed in both the U.S. and Canada in 2011. The principal effort to reduce phosphorus began in 2002, following a 1996 agreement and EPA-funded studies. New York and Vermont, as required by section 303(d) of the CWA for waters for which existing wastewater effluent limitations do not meet EPA-approved state water quality standards, adopted a jointly prepared Lake Champlain Phosphorus Total Maximum Daily Load (TMDL) with targets representing a thirty percent reduction from the total watershed load estimated in 1991.[14] The EPA's Region One office approved Vermont's TMDL, and Region Two approved New York's.[15] Also in 2002, consistent with the TMDL, Québec and Vermont agreed to establish shared phosphorus load targets for Missisquoi Bay and apportion them between Vermont (sixty percent) and Québec (forty percent).[16] The parties are free to choose appropriate point and nonpoint source controls to achieve the targets.[17] In 2010, the Vermont Agency of Natural Resources (ANR), as directed by the Legislature, submitted a revision of the Vermont portion of the TMDL, proposing a ten-step

12. OPPORTUNITIES FOR ACTION: AN EVOLVING PLAN FOR THE FUTURE OF THE LAKE CHAMPLAIN BASIN, LAKE CHAMPLAIN STEERING COMMITTEE 2–6 (2010), *available at* http://www.lcbp.org/PDFs/OpportunitiesForAction2010.pdf [hereinafter OPPORTUNITIES FOR ACTION].

13. *Id.* at 51.

14. VT. DEP'T ENVTL. CONSERVATION & N.Y. DEP'T ENVTL. CONSERVATION, LAKE CHAMPLAIN PHOSPHORUS TMDL 1415 (2002), *available at* http://www.anr.state.vt.us/dec/waterq/lakes/docs/lp_lctmdl-report.pdf. *See generally* Lara D. Guercio, *The Struggle between Man and Nature—Agriculture, Nonpoint Source Pollution, and Clean Water: How to Implement the State of Vermont's Phosphorus TMDL within the Lake Champlain Basin*, 12 VT. J. ENVTL. L. 455, 487–88 (2011); 33 U.S.C. § 1313(d) (2006).

15. *See* Guercio, *supra* note 14 (discussing Vermont and New York submission and the EPA's approval of the joint TMDL).

16. AGREEMENT BETWEEN THE GOUVERNEMENT DU QUÉBEC AND THE GOVERNMENT OF THE STATE OF VERMONT CONCERNING PHOSPHORUS REDUCTION IN MISSISQUOI BAY (2002), *available at* http://www.lcbp.org/PDFs/missbay_agreeEN.pdf.

17. *Id.*

phosphorus reduction plan at a projected 15-year cost of $500-800 million.[18]

In 2005, the IJC noted that Missisquoi Bay's phosphorus loads greatly exceeded the target levels set by the two states and Québec, and recommended that the U.S. and Canada take joint action to address the situation.[19] In August 2008, at the request of Canada and the United States, the IJC established the International Missisquoi Study Board to gather data identifying critical areas that contribute disproportionately to phosphorus loading in the Bay.[20] In coordination with the Board, the LCBP undertook a study to identify and rank critical source areas for phosphorus pollutants in the Missisquoi Bay Basin.[21] The study, which identified numerous ways to prioritize and implement land treatment measures at major sub-watershed, sub-basin, and field scales, was released on January 3, 2012, and will be considered by the Study Board in preparing its report to the IJC.[22]

Despite the willingness and continuing efforts of the six regimes to address a common problem through the LCBP with cooperative approaches, recent legal proceedings show that more needs to be done to make coordinated action effective. In 2008, the Conservation Law Foundation (CLF) sued the U.S. EPA in federal court in Vermont, claiming that the agency had violated the CWA in 2002 when it approved the Vermont portion of the Lake Champlain Phosphorus TMDL.[23] CLF asked that the approval be set aside and that, as provided in the CWA, EPA be directed to establish a new TMDL that would satisfy section 303(d) of the

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18. VT. AGENCY OF NATURAL RES., REVISED IMPLEMENTATION PLAN LAKE CHAMPLAIN PHOSPHOROUS TMDL 3–5, 12, 19–21 (2010), *available at* http://www.leg.state.vt.us/reports/2010ExternalReports/252919.pdf. The plan was required by Act 130 of 2007 (Adj. Sess.), § 2, codified as 10 V.S.A., § 1386; *see* Guercio, *supra* note 14, at 491–92 (criticizing the plan for failing to integrate its strategies with existing statewide and local water quality planning and regulation, and for its significant cost).

19. STONE ENVTL., INC., IDENTIFICATION OF CRITICAL SOURCE AREAS OF PHOSPHORUS WITHIN THE VERMONT SECTOR OF THE MISSISQUOI BAY BASIN 2 (2011); *Missisquoi Bay Basin Project: Identification of Critical Source Areas of Phosphorous Pollution*, LAKE CHAMPLAIN BASIN PROGRAM, http://www.lcbp.org/ijc.htm (last visited Nov. 10, 2012).

20. *International Missisquoi Bay Study Board*, INT'L JOINT COMM'N, http://www.ijc.org/conseil_board/missisquoi_2008/en/missisquoi_2008_home_accueil.htm (last updated Dec. 22, 2011).

21. STONE ENVTL., INC., *supra* note 19 at xvi.

22. *See id.* (identifying ways local agencies organize and implement land treatment plans); LAKE CHAMPLAIN BASIN PROGRAM, NEWS ANNOUNCEMENT: LAKE CHAMPLAIN CRITICAL SOURCE AREA REPORT FOR MISSISQUOI BAY RELEASED (2012), *available at* http://www.lcbp.org/PDFs/press/PR_MissisquoiBay_CSA_Report.pdf.

23. Complaint, Conservation Law Found. v. EPA, No. 2-08-cv-00238. (D. Vt. Oct. 28, 2008), ECF No. 1.

Act,[24] Although Vermont, as intervenor, moved to dismiss the action because CLF had failed to challenge the entire Lake Champlain TMDL and to join New York as a party, the court granted EPA a stay to reconsider its approval of the TMDL.[25] The court held, in effect, that the CWA required separate analysis, and therefore separate evaluation, of the New York and Vermont components of the TMDL.[26] In January 2011, EPA issued a determination disapproving the Vermont portion of the 2002 TMDL on the ground that portions of it did not comply with the CWA.[27] CLF consequently withdrew its action.[28] EPA has now begun the process of establishing a new TMDL in collaboration with Vermont's ANR.[29]

This case epitomizes the difficulties of developing a constructive approach to a critical environmental problem like phosphorus in Lake Champlain amidst different legal structures that control and sometimes conflict. EPA took a compartmented approach under a strict reading of the CWA in approving the TMDL in separate decisions. This approach, which also did not take into account Québec's role, led to the narrow focus of CLF's action. Acceptance of CLF's focus by EPA—perhaps willing to move toward reconsideration under a new administration—further supported the court's rejection of Vermont's argument for recognition of New York's interest, which ANR undermined with the 2010 proposed TMDL revision.

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24. *Id.*; *see* 33 U.S.C. § 1313 (d)(2) (EPA to establish TMDL if it does not approve state TMDL).

25. Memorandum and Order, Conservation Law Found. v. EPA, No. 2-08-cv-00238 (D. Vt. Aug. 26, 2010), ECF No. 51.

26. *Id.*

27. *See* Letter from H. Curtis Spalding, Regional Administrator, U.S. E.P.A., to Deborah Markowitz, Secretary, Agency of Natural Resources (Jan. 24, 2011) *available at* http://www.epa.gov/region1/eco/tmdl/pdfs/vt/LakeChamplainTMDLDisapprovalDecision.pdf (reconsidering the 2002 approval of Vermont's Lake Champlain Phosphorus TMDL and disapproving the Vermont portion of the TMDL); *see also id.* at 2 n.3 (noting that in the EPA's Reconsideration and Determination, CLF had not challenged New York's portion of the joint TMDL, and that, regardless, the statute of limitations had run on a possible challenge to Region 2's approval of the New York portion of the joint TMDL).

28. Stipulated Motion to Dismiss, Conservation Law Found. v. EPA, No. 2-08-cv-00238 (D. Vt. Feb. 3, 2011), ECF No. 52; Order Granting Stipulated Motion to Dismiss, Conservation Law Found. v. EPA, No. 2-08-cv-00238 (D. Vt. Feb. 4, 2011), ECF No. 53; Judgment Granting Stipulated Motion to Dismiss, Conservation Law Found. v. EPA, No. 2-08-cv-00238 (D. Vt. Feb. 7, 2011), ECF No. 54.

29. *The Vermont Lake Champlain Phosphorous TMDL being Developed by EPA*, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (Oct. 12, 2011), http://www.epa.gov/region1/eco/tmdl/lakechamplain.html; *Lake Champlain Phosphorus TMDL*, WATERSHED MGMT. DIV. (DEC. 2012), http://www.anr.state.vt.us/dec/waterq/lakes/htm/lp_phosphorus.htm.

II. A NEW FRAMEWORK

In light of the geography and economy of the Lake Champlain Basin, and the more than two decades of joint efforts to address the problem of phosphorus, *CLF v. EPA* illustrates the need to view the problems of the Basin as a whole—as suggested in the 2010 revision of *Opportunities for Action*.[30] Much U.S. federal environmental legislation delegates considerable authority and responsibility to the states. In Canada, the constitutional balance of power gives the provinces significant authority and responsibility for environmental matters.[31] Of the nine segments of the Lake identified for separate analysis and treatment by the 2002 TMDL, and the studies on which it was based, five are shared by New York and Vermont, one is shared by Vermont and Québec, and three are solely in Vermont's jurisdiction.[32] The tributaries that arise in all three jurisdictions and form the Lake's watershed, to some degree, affect all the waters of the Lake. These three primary state and provincial jurisdictions operate within the overarching framework of U.S., Canadian, and international law, but the preceding section demonstrates that the framework lacks a focal point that can promote smooth and enforceable coordination among the six regimes.

The federal Coastal Zone Management Act (CZMA) and the Obama Administration's Coastal marine spatial planning initiative (CMSP) provide two approaches to establishing such a framework. The CZMA was developed and implemented over nearly thirty years, whereas the CMSP was developed on a theoretical basis but is still largely untried. The purpose of considering their application to Lake Champlain is twofold: to examine their potential effect on the real problems of the Lake, and to use the issues raised by applying them as a means of reflecting more generally on their scope and effectiveness. The remainder of this paper will summarize the operating provisions of each and how they might apply to Lake Champlain, existing bodies of law, and an ecosystem divided by state and international boundaries. The paper concludes with a summary of conditions under which adoption of both measures would be a good solution to the issues confronting the Lake.

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30. OPPORTUNITIES FOR ACTION, *supra* note 12.

31. Wroth, *supra* note 1, at 2–3.

32. VT. DEP'T ENVTL. CONSERVATION & N.Y. DEP'T ENVTL. CONSERVATION, *supra* note 14, at 1–6.

A. The Coastal Zone Management Act

The Coastal Zone Management Act of 1972, as amended,[33] is an example of cooperative federalism. Though originally enacted with a broad purpose to protect marine ecosystems, its actual implementation has focused on economic and social sectors rather than ecosystems, and its real emphasis is on sustainability rather than ecosystem-based management.[34] This is evidenced by its state-by-state planning approach, its local land-use orientation, and the increasing emphasis, in subsequent amendments, on accommodating commercial and industrial uses, and managing energy and climate issues.[35] The Act provides that the Secretary of Commerce (acting through the National Oceanic and Atmospheric Administration (NOAA) pursuant to regulation) may approve a coastal management program submitted by a "coastal state" if the program meets specific and strict standards pertaining to both content and process, including development of a nonpoint source pollution control program.[36] A "coastal state" is a state "in or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes."[37] Currently, thirty-five U.S. states and territories have approved programs.[38]

There are two major incentives for state participation: (1) A state with an approved management program is eligible for grants (of diminishing value) for administering the program, and for specific coastal resource and enhancement and other programs;[39] and (2) federal activities and federally permitted activities, including offshore energy production, within, or affecting, a state's coastal zone, must be consistent "to the maximum extent practicable" with the state's management plan, unless exempted on a finding by the President that the federal activity "is in the paramount

33. The Coastal Zone Management Act, 16 U.S.C. §§ 1451–65 (2012).

34. *See* Richard O. Brooks, *Making the 'Mediterranean of the Western Hemisphere a Sustainable Community: the Connecticut Coastal Management Act and the Long Island Sounds*, 13 VT. J. ENVTL. L. 453 (2012) (providing guidance on the impact of the 1972 CZMA as amended).

35. *Id.*

36. 16 U.S.C. §§ 1454, 1455(d), 1455b; s*ee also* Coastal Zone Management Program Regulations, 15 C.F.R. Part 923 (2011) (implementing the CZMA).

37. 16 U.S.C. § 1453(4) (including "Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa").

38. *States and Territories Working on Ocean and Coastal Management*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/mystate/welcome.html (last updated July, 20, 2012).

39. 16 U.S.C. §§ 1455(a)–(c), 1455a, 1456b, 1461; *see also* Coastal Zone Management Program Regulations, 15 C.F.R. Part 923 (2011) (implementing the CZMA).

interest of the United States," unless the state concurs in the grant of a permit, or unless the Secretary finds on appeal from a state's non-concurrence that the permitted activity "is consistent with the objectives [of the Act], or is otherwise necessary in the interest of national security."[40]

Under the Act, a state may set the inland boundaries of its coastal zone "to the extent necessary to control shorelands" that may affect coastal waters or be vulnerable to sea-level rise.[41] The seaward boundary extends to the outer limits of the state's territorial sea, or in the Great Lakes to the international boundary.[42] A state may implement its plan by establishing state standards for local implementation, by adopting direct state land use planning and regulatory legislation, by providing state administrative review of all local plans, projects, and regulations, or by a combination of these methods.[43]

B. Coastal Marine Spatial Planning

Coastal Marine Spatial Planning is best understood as an implementation strategy for developing ecosystem-based management (EBM) in the context of a marine environment necessarily impacted by existing and projected human activity and development.[44] The term is employed as the key component of the Obama Administration's July 2010 National Ocean Policy initiative set forth in Executive Order No. 13,547.[45] The Policy is designed to assure the health and productivity of the oceans, coasts, and Great Lakes by encouraging sustainable land uses; "using best available science"; supporting access and a variety of traditional maritime

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40. 16 U.S.C. §§ 1456, 1465; *see also* Federal Consistency with Approved Coastal Management Programs, 15 C.F.R. Part 930 (2011) (implementing the consistency requirement).

41. 16 U.S.C. § 1453(1).

42. *Id.*

43. *Id.* § 1455(d)(11).

44. CHARLES EHLER & FANNY DOUVERE, UNITED NATIONS EDUC., SCIENTIFIC CULTURAL ORG., MARINE SPATIAL PLANNING: A STEP-BY-STEP APPROACH TOWARD ECOSYSTEM-BASED MANAGEMENT 18 (Rachel Dahl ed., 2009), *available at* http://www.unesco-ioc-marinesp.be/uploads/documentenbank/d87c0c421da4593fd93bbee1898e1d51.pdf; s*ee also* TUNDI AGARDY ET AL., UNITED NATIONS ENV'T PROGRAMME, TAKING STEPS TOWARD MARINE AND COASTAL ECOSYSTEM-BASED MANAGEMENT: AN INTRODUCTORY GUIDE 10 (2011), *available at* http://www.unep.org/pdf/ebm_manual_r15_final.pdf; *see also* Aldo Chircop & Ryan O'Leary, *Legal Frameworks for Integrated Coastal and Ocean Management in Canada and the EU: Some Insights from Comparative Analysis*, 13 VT. J. ENVTL L. 425 (2012); *see also* Patrick A. Parenteau, et al., *Legal Authorities for Ecosystem-Based Management in U.S. Coastal and Ocean Areas, in* OCEAN AND COASTAL LAW AND POL'Y 597 (Donald C. Baur et al. eds., 2008) (providing a definition of Coastal Marine Spatial Planning).

45. Exec. Order No. 13,547; 75 C.F.R. 43,023 § 1 (July 19, 2010).

uses; complying with the international law of the sea; furthering scientific understanding of ecosystems and the impact on them of changing environmental conditions and human activity; and fostering public understanding of the value of the oceans.[46]

In this context, the Executive Order defines CMSP as "a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas,"[47] that:

> [I]dentifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives" [and is] "a public policy process for society to better determine how the ocean, our coasts, and Great Lakes are sustainably used and protected—now and for future generations.[48]

The Order, by incorporating the Task Force report on which it was based ("the *Final Recommendations*"), makes clear that it builds on past efforts to develop a system of ocean governance based on ecosystem-based management and makes EBM and CMSP the highest priorities in implementing the National Ocean Policy.[49] The definition indicates that CMSP, like the CZMA, focuses on sustainability rather than on ecosystem management. In this respect, the definition, though more explicit, is comparable to the formulation in UNESCO's *Marine Spatial Planning: A Step-by-Step Approach toward Ecosystem-based Management* and to Canadian and EU approaches to integrated coastal and ocean management.[50] CMSP, as described in the *Final Recommendations*, seeks to embody ecosystem-based management principles.[51] The Order also calls for

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46. *Id.* § 2.

47. *Id.* § 3(b).

48. *Id.*

49. *Id.* § 5(b); FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE, WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY 32 (July 19, 2010), *available at* www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf [hereinafter FINAL RECOMMENDATIONS].

50. *See* EHLER & DOUVERE, *supra* note 44; Parenteau, et al., *supra* note 44; Chircop, *supra* note 44.

51. FINAL RECOMMENDATIONS, *supra* note 49.

use and management of the best available scientific data, public education and participation, and widespread stakeholder involvement.[52]

The Executive Order establishes the National Ocean Council (NOC), co-chaired by the chair of the Council on Environmental Quality and the director of the Office of Science and Technology Policy.[53] Other members of the NOC include: the administrators of the EPA, NOAA, and NASA; the directors of the Office of Management and Budget, National Science Foundation, and National Intelligence; the chairman of the Joint Chiefs of Staff; other advisors and assistants to the President; a federal employee designated by the Vice President; and other federal employees whom the co-chairs may designate.[54] The NOC is charged to carry out The National Ocean Policy through coastal and marine spatial plans to be developed and implemented through separate initiatives of nine Regional Planning Bodies that are established in the *Final Recommendations*.[55] The Council is also charged with seeing that relevant federal executive agencies act in accordance with the National Ocean Policy and participate in the regional planning process.[56] The Council is also required to establish a Governance Coordinating Committee consisting of "18 officials from State, tribal, and local governments,"[57] "to deliberate and coordinate with the NOC on issues of inter-jurisdictional collaboration and cooperation on the National Policy and related matters."[58]

Regional plans are to be approved by the National Ocean Council if consistent with the National Ocean Policy and the *Final Recommendations*.[59] When a plan has been certified as approved, a regional participant or federal agency is to incorporate components of the plan into its regulations or processes and must justify deviations from the plan.[60] The *Final Recommendations* propose a five-year timeline for completion and certification of the regional plans.[61] In the period since adoption of the Executive Order, NOC has been engaged in the development of a draft implementation plan, which was published for a final comment period that

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52. Exec. Order No. 13,547, *supra* note 45.
53. *Id.* § 4(b)(i).
54. *Id.* § 4(b)(ii).
55. FINAL RECOMMENDATIONS, *supra* note 49, at 52.
56. Exec. Order No. 13,547, *supra* note 45, § 1.
57. *Id.* § 7.
58. FINAL RECOMMENDATIONS, *supra* note 41, at 27.
59. *See* Exec. Order No. 13,547, *supra* note 45, § 1 (stating the purposes and general authority of the National Ocean Council).
60. FINAL RECOMMENDATIONS, *supra* note 49, at 65.
61. *Id.* at 60.

closed on March 28, 2012.[62] The draft plan, developed after an extensive public comment and education process, sets forth the nine priority goals previously set forth in the *Final Recommendations*.[63] The priority goals span "adopt[ing] ecosystem-based management as a foundational principle" to "implement[ing] comprehensive, integrated, ecosystem-based coastal and marine spatial planning and management in the United States."[64] The Governance Coordinating Council has been established, preliminary discussions and training sessions concerning the establishment of Regional Planning Bodies have taken place, and the process of forming and setting in motion those bodies has begun.[65]

C. The Integration of CZMA and CMSP.

The Executive Order provides that each executive agency or office involved in the NOC or the activities of which affect the oceans, coasts, or Great Lakes must "(i) take such action as necessary to implement" the National Ocean Policy and the principles and policies set forth in the *Final Recommendations* as elaborated by the NOC, and "(ii) participate in the process for coastal and marine spatial planning and comply with Council certified coastal and marine spatial plans, as described in the *Final Recommendations* and subsequent guidance from the Council."[66] The *Final Recommendations* note that CMS Plans approved by the NOC are not intended to have regulatory and binding effect, but are nevertheless to be participated in and adhered to by relevant federal agencies as appropriate.[67]

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62. NATIONAL OCEAN COUNCIL, DRAFT NATIONAL OCEAN POLICY IMPLEMENTATION PLAN 95 (2011) *available at* http://www.whitehouse.gov/sites/default/files/microsites/ceq/national_ocean_policy_draft_implementation_plan_01-12-12.pdf; *see National Ocean Policy Draft Implementation Plan*, THE WHITE HOUSE.GOV, http://www.whitehouse.gov/administration/eop/oceans/implementationplan (last visited Nov. 10, 2012) (providing comment period).

63. DRAFT NATIONAL OCEAN POLICY IMPLEMENTATION PLAN, *supra* note, 62 at 8.

64. *Id.*

65. *See About the National Ocean Council*, THE WHITE HOUSE.GOV, http://www.whitehouse.gov/administration/eop/oceans/about (last visited Nov. 10, 2012) (discussing the Governance Coordinating Committee); *National Coastal and Marine Spatial Planning Workshop*, THE WHITE HOUSE.GOV http://www.whitehouse.gov/administration/eop/oceans/cmsp-workshop (noting that discussions have begun); Northeast RPB initial meeting agenda, Nov. 19–20, 2012, http://northeastoceancouncil.com/wp-content/uploads/2012/10/Agenda-Northeast-RPB-Meeting-DRAFT-10-12-2012.pdf (last visited Nov. 10, 2012); *see* Northeast Ocean Council, *Northeast Regional Planning Body Membership*, (Oct. 1, 2012) http://northeastoceancouncil.com/wp-content/uploads/2012/10/Northeast-Regional-Planning-Body-Membership_10-12.pdf (listing members in the Northeast Regional Planning Body).

66. Exec. Order No. 13,547, *supra* note 45, § 6(i)–(ii).

67. FINAL RECOMMENDATIONS, *supra* note 49, at 51–74; App. C at VIII.

In particular, collaboration between the states and federal agencies in development of regional CMS plans should result in provisions in those plans that blend state and federal policies and designs to achieve consistency without the need for formal CZMA consistency review.[68]

A recent memorandum prepared by NOAA's Office of Ocean and Coastal Resource Management (OCRM) identifies a number of specific ways in which CZMA provisions and requirements could provide a medium for state involvement in the development of regional CMS plans.[69] Existing state coastal management plans approved under CZMA, including recently approved state ocean management plans, could serve as a starting point for the development of regional CMS plans, and CZMA implementation and enhancement grants to states could provide partial funding.[70] CMS plans cannot contain enforceable mandates or policies that could supersede legal obligations of federal agencies.[71] Nevertheless, federal agencies are required by the Executive Order to participate in the regional planning process, and state involvement in the process would allow state policies to be addressed in federal waters within the region, thus reducing or eliminating federal-state conflicts that would otherwise have to be addressed through formal consistency proceedings, including interstate consistency.[72] Though the CMS plans would not be enforceable, a state could incorporate its region's plan into its coastal management program to show the state's acceptance of the plan and provide a clear channel for the state to receive benefits from the plan.[73] Finally, CMS plans could contain provisions establishing consistency on key points in advance and states could modify their coastal management policies for consistency with the plan.[74] NOAA and the NOC are working to determine whether CZMA's federal consistency provisions can provide a framework for establishing consistency between a state's coastal management policies and an approved or certified regional CMS plan.[75]

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68. *Id.* at 61.

69. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, STATE JURISDICTION AND FEDERAL WATERS: STATE COASTAL MANAGEMENT PROGRAMS, OCEAN MANAGEMENT AND COASTAL AND MARINE SPATIAL PLANNING 3–11 (2011), *available at* http://seagrant.gso.uri.edu/coast/cmsp_material/state_fed-waters.pdf [hereinafter NOAA MEMO].

70. *Id.* at 8.

71. *Id.* at 9.

72. *Id.*

73. *Id.* at 10.

74. *Id.* at 10–11.

75. NOAA MEMO, *supra* note 69, at 10. *See also* Environmental Law Institute and Center for Ocean Solutions, COASTAL AND MARINE SPATIAL PLANNING: LEGAL CONSIDERATIONS 55–75 (2010)

D. CZMA and CMSP in the Great Lakes

The status of CZMA and CMSP in the Great Lakes may provide some guidance for assessing their potential for Lake Champlain. The five Great Lakes are bounded by eight states—Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin—and the Province of Ontario.[76] Only Lake Michigan lies entirely within the United States.[77] The Canada-U.S. boundary divides the other four lakes.[78] Significant progress in eliminating toxics and other contaminants from the waters of the Lakes has been made since the adoption of the Great Lakes Water Quality Agreement by the U.S. and Canada in 1978.[79] After negotiations that began in 2008, the two countries, on September 7, 2012, signed a significantly amended version of the Agreement, committing them to address issues such as the nearshore environment, aquatic invasive species, habitat degradation, the effects of climate change, and existing threats to health and the environment.[80] The amended Agreement also assigns responsibilities to the International Joint Commission, which, in its January 2011 biennial report on Great Lakes Water Quality, noted that—particularly in the nearshore zone—there are grave water quality problems caused by excessive phosphorus loading resulting from urban and agricultural nonpoint source pollution and from inadequately regulated chemical components in common products found in the wastewater stream.[81] The report offered

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recognizing advantages of CZMA-CSMP integration, including potential benefits from CZMA consistency provisions but noting as disadvantages (1) cumbersome CZMA structure and different priorities, (2) voluntary nature of CZMA plan amendments, (3) limit of state coastal zone to territorial waters, (4) no complementary federal coastal zone responsibilities).

76. *See The Great Lakes*, U.S. EPA, http://www.epa.gov/oar/oaqps/gr8water/xbrochure/lakes.html (last visited Mar. 3, 2012) (outlining the ecosystem and geography of the Great Lakes).

77. *Id.*

78. *Id.*

79. *See Successes and Challenges for the Great Lakes Water Quality Agreement*, INT'L JOINT COMM'N, http://www.ijc.org/en/activities/consultations/glwqa/guide_5.php (last updated Mar. 3, 2012) (stating that "[b]oth countries have made considerable progress in reversing the impacts of chemical, physical, and biological damage to the Great Lakes and St. Lawrence River ecosystem."); *see also The Great Lakes Water Quality Agreement*, INT'L JOINT COMM'N, http://www.ijc.org/en/activities/consultations/glwqa/agreement.php (last updated July 3, 2012).

80. *Great Lakes Water Quality Agreement of 2012*, http://www.epa.gov/glnpo/glwqa/20120907-Canada-USA_GLWQA_FINAL.pdf (last visited Nov. 6, 2012). For the prior negotiations, *see Amending the Great Lakes Water Quality Agreement*, BINATIONAL.NET, http://binational.net/glwqa_2011_e.html (last visited Mar. 3, 2012) (stating that both U.S. and Canadian officials recognize the earlier agreement is outdated and is in need of reform).

81. *See* INTERNATIONAL JOINT COMMISSION, 15TH BIENNIAL REPORT ON GREAT LAKES WATER QUALITY 2 (2011), *available at* http://www.ijc.org/rel/boards/watershed/15biennial_report_web-

thirty-two recommendations for revision or more effective implementation of the Agreement.[82]

A plethora of governmental and nongovernmental agencies have assumed interconnecting and sometimes overlapping responsibilities for Great Lakes water quality issues. The Great Lakes Commission, established under the Great Lakes Compact entered into by the eight Great Lakes States in 1955 and approved by Congress in 1968, with Québec and Ontario added subsequently as associate members, focuses on public communication and education, policy research, and advocacy.[83] The Council of Great Lakes Governors established in 1983 includes the governors of all eight states.[84] Though the Council pursues the economic interests of the region, its initial focus and present major concern is water quality and security.[85] The premiers of Ontario and Québec are associate members of the Council.[86] The Council created the Great Lakes Charter in 1985, with a 2001 annex, to provide a management structure for water issues.[87] Québec and Ontario were signatories.[88] In 2005, the Council adopted the *Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement*, under which the Great Lakes states, Ontario, and Québec sought to ban most new diversions of water from the Basin, develop standards for review of proposed water uses, provide for collection and sharing of data, and balance water use with economic development.[89] The agreement was to be implemented through the *Great Lakes-St. Lawrence River Basin Water Resources Compact* adopted by the Great Lakes states and by Congress in

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final.pdf (illustrating various sources of phosphorus loading into the lake and the problems associated with the nutrient).

82. *Id.* at 7.

83. *About the Great Lakes Commission*, GREAT LAKES COMMISSION, http://www.glc.org/about/ (last updated Oct. 20, 2010).

84. *History*, COUNCIL OF GREAT LAKES GOVERNORS, http://www.cglg.org/Overview/History.asp (last visited Mar. 3, 2012) [hereinafter *History*].

85. *Id.*

86. *Id.*

87. *Id.*; *Great Lakes Water Management Initiative*, COUNCIL OF GREAT LAKES GOVERNORS, http://www.cglg.org/projects/water/legal.asp (last visited Mar. 3, 2012); *see The Great Lakes Charter* (Feb. 11, 1985), http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf; *see also The Great Lakes Charter Annex* (June 18, 2001), http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf.

88. *Id*.

89. *Great Lakes Water Management Initiative*, *supra* note 87; *see Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement*, (Dec. 13, 2005) http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf.

2008 and through the laws of the two provinces.[90] The Agreement and Compact both gave the bodies established to administer them discretion to establish a secretariat or other executive arm; The Governor's Council has taken on that role.[91]

In 2004, a federal Great Lakes interagency task force created by executive order of President Bush developed a framework for the Great Lakes Regional Collaboration, which includes as principal partners, the Council of Great Lakes Governors, the Great Lakes and St. Lawrence Cities Initiative, the Great Lakes Congressional Task Force, the Great Lakes Indian Fish and Wildlife Commission, and the U.S. EPA Great Lakes National Program Office.[92] The Collaboration has developed a strategy for the restoration and protection of the Great Lakes and several specific plans to implement it.[93]

The International Joint Commission's *15th Biennial Report* recognized that these "jurisdictions and institutions are not aligned with the hydrological boundaries of the Great Lakes basin."[94] The lack of alignment creates complications that "lake circulation patterns may result in adverse impacts from a pollution source in the nearshore area of one jurisdiction to the nearshore area of another (and also to offshore waters)" and that "water flows along watershed boundaries make it difficult to manage the flow of stressors, such as sediments, nutrients, and toxic substances, which are carried in the water as they flow downstream and cross over jurisdictional boundaries."[95] In addition, "Canada and the United States have diverse legislative, programmatic and policy tools for addressing water-quality problems in nearshore waters of the Great Lakes at the federal, state and provincial levels, and municipalities have their own set of programs and

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90. *Great Lakes Water Management Initiative*, *supra* note 87. *See* also *Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement supra* note 89; *see generally* Council of Great Lakes Governors, *Great Lakes–St. Lawrence River Basin Water Resources Compact Implementation*, http://www.cglg.org/projects/water/CompactImplementation.asp (last visited Nov. 10, 2012).

91. *History*, *supra* note 84; *Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement*, *supra* note 89, at art.401(2); Compact, *supra* note 90, §§ 2.5, 2.6.

92. *See The Great Lakes Regional Collaboration*, GREAT LAKES REG'L COLLABORATION, http://www.glrc.us/ (last updated June 24, 2009) (presenting the history, membership, and strategy implementation plans of the Collaboration); *Great Lakes Interagency Task Force*, U.S. EPA, http://www.epa.gov/grtlakes/iatf/index.html (last updated Apr. 7, 2009).

93. *The Great Lakes Regional Collaboration*, *supra* note 92; U.S. EPA, THE GREAT LAKES INTERAGENCY TASK FORCE AND GREAT LAKES REGIONAL COLLABORATION: BUILDING ON SUCCESS (2009), *available at* http://www.epa.gov/grtlakes/iatf/building_on_success.pdf.

94. INTERNATIONAL JOINT COMMISSION, *supra* note 81 at 17.

95. *Id.*

policies that potentially can influence the quality of nearshore waters."[96] Further resources include binational institutions and arrangements such as the IJC itself, the Lakewide Management Plan (LaMP) adopted for each of the Great Lakes, and the "many environmental non-governmental and watershed associations that make key contributions to protecting the Great Lakes and share an active involvement in nearshore issues."[97] Accordingly, the *Report* rejected the idea of a single entity to manage the Great Lakes water quality and called for new processes for collaboration and coordination of "plans, programs, and activities."[98]

Among the regulatory and planning overlays are the coastal management plans of all eight Great Lakes states approved by NOAA under the CZMA.[99] In general, these plans address coastal and nearshore issues local to each state, and there are few instances of interstate cooperation.[100] The Great Lakes Commission and Great Lakes Regional Collaboration are supportive of state CZMA activities and funding opportunities and give some indication of support for interstate efforts that would have a broader ecosystem impact.[101] Within the context of their coastal management plans, Michigan and Ohio, responding to potential wind energy projects, have taken a marine spatial planning approach by developing mapping and other tools for analyzing a variety of ecological factors in determining favorability of project sites.[102] The *Final Recommendations*, on which Executive Order 13,547 is based, contrast the particular jurisdictional setting of the Great Lakes with that of the other regions and note that:

> CMSP efforts in the Great Lakes would be complementary to and closely coordinated with the GLWQA and other Great Lakes initiatives and authorities, such as the

96. *Id.*

97. *Id.* at 17–18.

98. *Id.* at 18.

99. *Id.*; *States and Territories*, *supra* note 38.

100. Great Lakes Dredging Team, *Case Studies—Conneaut Harbor, Ohio on Lake Erie*, GREAT LAKES DREDGING TEAM, http://www.glc.org/dredging/case-conneaut.html (last visited Mar. 3, 2012).

101. *See* GREAT LAKES COMM'N, RESOLUTION: COASTAL ZONE MANAGEMENT ACT REAUTHORIZATION: AN OPPORTUNITY TO FUND AND IMPLEMENT THE GREAT LAKES REGIONAL COLLABORATION STRATEGY AND ADDRESS CLIMATE CHANGE (2009), *available at* http://www.glc.org/about/resolutions/09/pdf/CZMA_Resolution.pdf (describing Great Lakes Commission support for CZMA reauthorization); *see also Joint Project Agreement between GLC and NOAA Coastal Services Center*, GREAT LAKES COMM'N, http://www.glc.org/noaaglcproject (last updated Aug. 21, 2009) (citing cooperative programs with NOAA regarding study of coastal community smart growth, data gathering, and habitat protection).

102. EASTERN RESEARCH GROUP, INC., MARINE SPATIAL PLANNING STAKEHOLDER ANALYSIS 18–19 (2010), *available at* http://www.csc.noaa.gov/publications/MSP_Stakeholder_Analysis.pdf.

> President's Great Lakes Restoration Initiative and Executive Order 13340, which established a cabinet-level Great Lakes Interagency Task Force, its Regional Working Group, and a multi-stakeholder Great Lakes Regional Collaboration.[103]

The stately pace of the development of CMSP described above, means that there has been no development of a regional planning body for the Great Lakes Region. Given the position of the IJC described above and apparent negative attitudes toward the CMSP Framework in the region, it is unclear when and whether the existing agencies will be brought into the process.[104] In particular, it should be noted that the Great Lakes Region presents, in the extreme, a problem inherent in the Executive Order's articulation of CMSP. Namely, the boundaries of the region, as indicated in the IJC *Report*, stop at the international boundary, while the ecosystem or ecosystems to be managed are not so delimited. A Great Lakes Regional Planning Body, like the existing Great Lakes regional entities described above, can be constructed to include representatives of Environment Canada and Ontario, but the question of a binational mechanism that will lead to the kind of interagency cooperation envisioned by the Executive Order and the *Final Recommendations* remains. Perhaps, despite the misgivings of the IJC, this question should be on the table after the recent renegotiation of the binational Great Lakes Water Quality Agreement.

III. THE CZMA, CMSP, AND LAKE CHAMPLAIN

This section examines issues and opportunities that arise in considering the application of the Coastal Zone Management Act and Coastal Marine Spatial Planning to Lake Champlain.

A. Political and Legal Issues

The first problem to be addressed is that neither the CZMA nor CMSP specifically applies to Lake Champlain.

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103. FINAL RECOMMENDATIONS, *supra* note 49, at 50.

104. EASTERN RESEARCH GROUP, INC., *supra* note 104, at 20. As a possible step, David Naftzger, executive director of the Council of Great Lakes Governors, was recently elected vice chair of NOC's Governance Coordinating Committee, to which he had earlier been appointed by the President. *Ocean Panel Elects Naftzger as Vice Chair*, THE COMPASS 3 (Dec. 2011), *available at* http://www.cglg.org/news/TheCompass/Compass-2011-Issue4.pdf.

1. THE CZMA

The key language defining the scope of the CZMA is the definition of "coastal state" as "a state of the United States [and enumerated territories] in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes."[105] The case has been made both academically and politically that Lake Champlain, as the nation's sixth largest international lake with many other similarities to the Great Lakes, should be included in the CZMA, but to no avail.[106] In fact, in a piece of political theater, Vermont's Senator Leahy caused legislation to be enacted and signed by President Clinton in 1998 that would have changed the definition of "Great Lakes" for purposes of National Sea Grant Program funding to include Lake Champlain, later apocryphally described as "a pretty great lake."[107] The resulting furor raised by Midwestern colleagues led to Senator Leahy agreeing that Champlain should be "the cousin instead of a little brother" of the Great Lakes and to immediate repeal amid laughter on Capitol Hill.[108] The best explanation for the presence of the Great Lakes and the absence of Champlain in the Act is a combination of longstanding recognition of the Great Lakes' importance as both recreational and economic assets, and the assiduous labors of members of Congress from districts bordering the Lakes for a number of years.[109] If sound policy would be served and current politics will permit,

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105. 16 U.S.C. § 1453(4). Special provisions exist for the Great Lakes in other sections. *See, e.g.*, *id.* §§ 1452(3), 1453(1), (3).

106. Michael J. Straub, *The West Coast of New England: A Case for the Inclusion of Lake Champlain in the Federal Coastal Zone Management Program*, 16 VT. L. REV. 749, 750–51 (1992); *see also* Jack Archer et al., A Proposed Lake Champlain Coastal Management Program (Summer 1992) (unpublished manuscript) (on file with the Vermont Law School Library) (providing extensive evidence for Lake Champlain's inclusion within the meaning of the CZMA); Guercio, *supra* note 14, at 67.

107. *Champlain Becomes The Sixth Great Lake*, N.Y. TIMES, Mar. 7, 1998, http://www.nytimes.com/1998/03/07/us/champlain-becomes-the-sixth-great-lake.html?scp=1&sq=lake%20Champlain%20March%207%201998&st=cse. *Cf.* http://articles.mcall.com/1998-05-31/news/3197099_1_whitehall-lake-champlain-antique (noting that despite the "silly" name-change attempt, Lake Champlain "remains a pretty great lake").

108. Katherine Q. Seelye, *Lakes are Born Great, 5 Sniff, so Upstart is Ousted*, N.Y. TIMES (Mar. 25, 1998), *available at* http://www.nytimes.com/1998/03/25/us/lakes-are-born-great-5-sniff-so-upstart-is-ousted.html?scp=1&sq=March%2025%201998%20great%20lakes&st=cse; *see* 105 CONG. REC. S2460 (daily ed. Mar. 24, 1998) (statement of Sen. Patrick Leahy), *available at* http://www.gpo.gov/fdsys/pkg/CREC-1998-03-24/pdf/CREC-1998-03-24-pt1-PgS2452-3.pdf#page=10

109. *See* Straub, *supra* note 106, at 756-60 (citing Zigurds L. Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972*, 1 COASTAL ZONE MGMT. J. 235 (1974)) (Outlining the economic, recreational, and Congressional rationales for including the Great Lakes states as coastal states under the Coastal Zone Management Act). Senator Leahy has successfully secured funding for Lake Champlain by less controversial means, including direct support for the UVM Sea Grant program and the Clean Water Act amendments, *see* Clean Water Act, *supra* note 10, that

the addition of Lake Champlain to the CZMA would be a simple matter. The regional pride evoked by Senator Leahy's effort to expand the historic notion of "the Great Lakes" could be avoided by simply adding "or Lake Champlain" to the CZMA language quoted above and elsewhere in the Act where the phrase "the Great Lakes" appears.[110]

2. CMSP

There is no direct history to overcome with the administration's CMSP initiative, though Executive Order No. 13,547 and the *Final Recommendations* that it incorporates specifically include "the Great Lakes" Regional Planning Area as one of the nine areas through which CMSP is to be developed and implemented.[111] New York is included in both the Great Lakes and Mid-Atlantic regions, and Vermont is in the Northeast Region with the other New England states, all of which have sea coasts.[112] Express inclusion of Lake Champlain under the existing or a modified Executive Order would not involve the hurdles required for legislative change. The regional planning bodies are given considerable discretion in developing their plans. The National Ocean Council established by the order and charged with administering it has discretion to modify the order for the purpose of improving "its effectiveness and efficiency in furthering the policy."[113] It could be argued that because the Great Lakes are connected to Lake Champlain by canal and river, improving the health and productivity of Lake Champlain would have that effect. Inclusion of Lake Champlain could be effected by moving Vermont to the Great Lakes Region, including New York and Vermont's Lake Champlain interests in the regional planning body, and making clear that its charge include development of CMSP for the Lake.

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established the Lake Champlain Basin Program. Lake Champlain is included, along with the Great Lakes and Chesapeake Bay, in the EPA's Great Waters Program pursuant to § 112(m) of the 1990 amendments to the Clean Air Act, codified as 42 U.S.C. § 7412(m), to control air pollutant deposition in the subject waters. *See The Great Waters Program*, U.S. EPA, http://www.epa.gov/oar/oaqps/gr8water (last updated July 22, 2011).

110. *See* 16 U.S.C. § 1453(4) (setting forth the current definition of a coastal state under the CZMA).

111. Exec. Order No. 13,547, *supra* note 45.

112. FINAL RECOMMENDATIONS, *supra* note 49, at 53. For the Northeast RPB, *see supra* note 65.

113. Exec. Order No. 13,547, *supra* note 38, § 5.

B. The CZMA and Lake Champlain

If Lake Champlain were eligible under the CZMA, the first step for Vermont would be to prepare and submit for approval a coastal management plan—a task that would presumably fall within the responsibilities of the State Agency of Natural Resources. Vermont's coastal zone would be bounded by the New York state boundary on the west and the international boundary to the north. The inland boundaries to the south and east could extend to the Massachusetts border and the spine of the Green Mountains respectively, if appropriate studies indicate that these extended boundaries are necessary to achieve the goal of protecting the water quality of the Lake. The nature of Vermont's state and local land use planning and regulation laws suggests that implementation would be most effective with a combination of specific provisions added to Act 250 (the statewide land use regulatory scheme)[114] and mandatory standards incorporated in the state land use planning and regulation enabling act.[115] New York would have to amend its present coastal management plan through a process similar to initial approval procedures required to embrace its Lake Champlain "coast." That process would be made easier because the existing New York coastal management plan designates the Department of State as the responsible agency and contains the necessary infrastructure to permit amendment. In addition, New York has designated Lake Champlain and other inland water bodies as "inland waterways" on which towns and counties can plan for waterfront revitalization in a process parallel to that for coastal areas.[116] The Town of Essex, other New York Lake Champlain communities, and Essex and Clinton counties have already engaged in this process.[117]

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114. State Land Use and Development Plans, VT. STAT. ANN. tit. 10 § 6001 (2012).

115. Vermont Planning and Development Act, VT. STAT. ANN. 24 §§ 4301-4498 (2012).

116. NEW YORK STATE DEP'T OF STATE, ESSEX AND CLINTON COUNTIES WATERFRONT PLAN 91 (2010), *available at* http://www.nyswaterfronts.com/downloads/pdfs/Essex_Clinton_Waterfront_Plan.pdf [hereinafter ESSEX AND CLINTON COUNTIES WATERFRONT PLAN]; N.Y. COASTAL MANAGEMENT PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT, NOAA OFFICE OF COASTAL ZONE MANAGEMENT (2006) http://www.nyswaterfronts.com/downloads/pdfs/Coastal%20Program/NYS%20Coastal%20Management%20Program2010.pdf [hereinafter N.Y. COASTAL MANAGEMENT PLAN].

117. ESSEX AND CLINTON COUNTIES WATERFRONT PLAN, *supra* note 123; N.Y. COASTAL MANAGEMENT PLAN, *supra* note 123; N.Y. Exec Law, Art. 42, §§ 910–22; NEW YORK STATE DEP'T OF STATE, TOWN OF ESSEX LOCAL WATERFRONT REVITALIZATION PROGRAM (2003), *available at* http://www.nyswaterfronts.com/LWRP/Town%20of%20Essex/Town%20of%20Essex%20Final%20LWRP.pdf.

The CZMA requires an approved plan to show that the state has coordinated with applicable "local, area-wide, and interstate plans," but does not offer much guidance on the means or scope of coordination.[118] Given the history of interstate cooperation discussed above, New York and Vermont may be able to achieve a higher and more stable degree of coordination than has been previously possible by coordinating the development of their respective plans for Lake Champlain. Through such coordination, the states should be able to incorporate provisions responding to energy and climate change concerns. Further, they could avoid the issues that have arisen from the application of the CZMA consistency requirement to federal activities or permits in one state that affect the coastal zone program of another state.[119] The CZMA has even less to say about issues involving international waters. Again, the history of participation by Québec and the International Joint Commission in the Lake Champlain Basin Program, discussed above, should lead New York and Vermont to address coordination with international partners in their coastal management plans.

C. CMSP and Lake Champlain

If New York and Vermont participate in an appropriate regional planning body for Lake Champlain, existing planning efforts would benefit from the coordination and prioritization of federal funding that Executive Order No. 13,547 is intended to establish for certified regional plans. Joint participation by New York and Vermont would also facilitate consideration of Lake Champlain as an ecosystem—an objective of the Lake Champlain Basin Program's planning efforts—and improve incorporation of ecosystem-based management in the development of coordinated state management plans under the CZMA. As previously noted, coordination with federal agencies and other states in the process of developing the CMS

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118. 16 U.S.C. § 1455(d)(3).

119. *See, e.g.*, Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co. from an Objection by the N.C. Dep't of Env't, Health and Natural Res., (Dep't of Commerce May 19, 1994), *available at* http://www.ogc.doc.gov/czma.nsf/5919824A383F4C5585256C8E00712833/$File/vepc.pdf?OpenElement (The Secretary of Commerce held that Virginia Electric and Power Company pipeline permit to withdraw water from Lake Gaston on the Virginia/North Carolina border "foster[ed] development of the coastal zone and coastal zone resources" and its contribution to national interests outweighed its adverse effects to the North Carolina coastal zone under the CZMA. Thus, the Secretary overruled the objection of the North Carolina Department of Environment, Health and Natural Resources to Virginia Electric and Power Company's federal permit to construct the pipeline);15 C.F.R. § 930.150 (2011).

plan would tend to simplify, if not eliminate, CZMA consistency issues.[120] The Executive Order and *Final Recommendations* call for U.S. cooperation and leadership at the international level.[121] They also call for the exercise of rights and duties under applicable provisions of customary international law and international treaties and agreements, which would include the International Joint Commission.[122] These provisions should lend support for full participation by Québec and the IJC in the more robust planning process provided by CMSP.[123] The *Final Recommendations* recognizes that the different circumstances of the Great Lakes as a regional planning area stemming from its fresh-water status, and the history of joint planning efforts in the region, may lead to different approaches to CMSP.[124] The discussion above of the effect of CMSP in the Great Lakes region suggests numerous structural problems with its implementation. However, implementation of a CMSP for Lake Champlain would likely be easier, because the region's organization is not as complex and has a long history of cooperated and coordinated management. In fact, the 2010 Lake Champlain Basin Program's *Opportunities for Action* demonstrates that Lake Champlain has already developed an ecosystem-based marine spatial plan that could be the foundation for a plan to be developed and approved by the regional planning body and NOC.[125] Further, the *Final Recommendations* leaves open the possibility of developing sub-regional plans in particular regions, which might be appropriate for Lake Champlain.[126]

120. FINAL RECOMMENDATIONS, *supra* note 49, at 35–36.

121. *Id.* at 65; Exec. Order No. 13,547, *supra* note 45, § 2(vii)

122. FINAL RECOMMENDATIONS, *supra* note 49, at 65; Exec. Order No. 13,547, *supra* note 45, § 2(vii).

123. Further support for international participation may come from the 1989 designation of Lake Champlain as part of the Champlain-Adirondack Biosphere Reserve under the UNESCO Man and Biosphere Programme. *See Biosphere Reserves—Learning Sites for Sustainable Development*, UNESCO.COM, http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves (last visited Nov. 4, 2012); *but see* Peter J. Lagrasse, *The Meaning of the Champlain-Adirondack Biosphere Reserve*, PROPERTY RIGHTS FOUNDATION OF AMERICA (Oct. 17, 2009), http://prfamerica.org/speeches/13th/Champlain-AdirondackBiosphereReserve.html (program part of state plan to eliminate all population in New York's Adirondack Park).

124. FINAL RECOMMENDATIONS, *supra* note 49, at 51.

125. OPPORTUNITIES FOR ACTION, *supra* note 12.

126. FINAL RECOMMENDATIONS, *supra* note 49, at 54.

CONCLUSION

In conclusion, were they available, Lake Champlain would benefit from the adoption of both CZMA and CMSP, provided that the process of adoption took advantage of lessons learned in other states and regions and applied those lessons to the specific context of the Lake Champlain Basin.

Professor Brooks' history of the CZMA in Connecticut shows us that, for a body of water surrounded by land and heavily impacted by well-developed shore-side uses, management of the marine ecosystem cannot be isolated from the planning and regulatory regime that governs its surrounding coastal regions. This type of region is a "place"—an "ecosystem" that includes the dominating structure of human enterprise and society—that must be managed. The goal of management must be sustainability of that larger ecosystem, to preserve the balance of the natural and the human environments for future generations. Further, the management must be "adaptive," i.e., a continuing evolution of planning and regulation methods based on both experience and changing conditions.[127] Professor Chircop and Mr. O'Leary suggest that in a federal system, ecosystem-based management and spatial planning are best developed as principles by the central government that can be applied only at the sub-federal level, and only if the concepts are accepted there.[128] The current CMSP initiative makes clear that it incorporates the ideas of both with its focus on sustainability and devolution to the regional level for implementation—though the fragility of its future is evident from the organizational difficulties yet to be identified and surmounted.

Lake Champlain, like Long Island Sound, is a confined body of water heavily—though not as heavily—impacted by agriculture, forestry, industry, and human habitation. If we view the Lake Champlain Basin, with both its human and natural components, as the "ecosystem," CZMA and CMSP, applied in light of the lessons learned elsewhere, present the opportunity to unify the present array of planning and regulation in a proactive way to address the Lake's issues. The history of cooperation among New York, Vermont, and Québec on those issues would serve as a foundation. In the process of preparing CZMA management plans for approval, Vermont and New York could work in parallel to develop identical plans that would address the kinds of issues that undermined

127. Brooks, *supra* note 34.
128. Chircop, *supra* note 44.

Connecticut's planning and would provide for an adaptive approach to change. The plans could harmonize differences in the states' existing planning and regulatory systems with a set of common goals and practices based on a shared understanding of the watershed and its problems; and could expressly provide for joint consultation and administration and a role for Québec. Approval of the plans would also make available CZMA funding and the benefits of the consistency requirement. The regional plan developed under CMSP could involve Québec and the IJC as partners, and could draw heavily on not only planning and regulatory joint ventures of the past, but on the new framework created under the CZMA. The regional plan, if certified, could give new priority to Lake Champlain's needs, and expressly link Lake Champlain's issues and solutions to planning for the five Great Lakes. This new framework would fulfill the promise of Lake Champlain as "a pretty great lake"—one entitled to the same recognition and support as the Great Lakes, its cousins that lie to the west.