

NICK J. RAHALL II, WV
CHAIRMAN
DALE E. KILDEE, MI
ENI F.H. FALEOMAVAEGA, AS
FRANK PALLONE, JR., NJ
GRACE F. NAPOLITANO, CA
RUSH D. HOLT, NJ
RAUL M. GRIJALVA, AZ
MADELINE Z. BORDALLO, GU
JIM COSTA, CA
DAN BOREN, OK
GREGORIO SABLAN, MP
MARTIN HEINRICH, NM
GEORGE MILLER, CA
EDWARD J. MARKEY, MA
PETER A. DEFazio, OR
MAURICE D. HINCHEY, NY
DONNA M. CHRISTENSEN, VI
DIANA DEGETTE, CO
RON KIND, WI
LOIS CAPPS, CA
JAY INSLEE, WA
JOE BACA, CA
STEPHANIE HERSETH SANDLIN, SD
JOHN P. SARBANES, MD
CAROL SHEA-PORTER, NH
NIKI TSONGAS, MA
FRANK KRATOVL, JR., MD
PEDRO R. PIERLUISI, PR
VACANCY

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

DOC HASTINGS, WA
RANKING REPUBLICAN MEMBER
DON YOUNG, AK
ELTON GALLEGLEY, CA
JOHN J. DUNCAN, JR., TN
JEFF FLAKE, AZ
HENRY E. BROWN, JR., SC
CATHY McMORRIS RODGERS, WA
LOUIE GOHMERT, TX
ROB BISHOP, UT
BILL SHUSTER, PA
DOUG LAMBORN, CO
ADRIAN SMITH, NE
ROBERT J. WITTMAN, VA
PAUL C. BROWN, GA
JOHN FLEMING, LA
MIKE COFFMAN, CO
JASON CHAFFETZ, UT
CYNTHIA M. LUMMIS, WY
TOM McCLINTOCK, CA
BILL CASSIDY, LA

TODD YOUNG
REPUBLICAN CHIEF OF STAFF

May 28, 2010

JAMES H. ZOIA
CHIEF OF STAFF

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear President Obama:

On June 12, 2009, you issued a presidential memorandum creating a temporary Interagency Ocean Policy Task Force (Task Force), to be led by the chair of the Council on Environmental Quality. You charged the Task Force to develop, within 90 days, recommendations on a national policy and a U.S. framework for policy coordination of efforts to improve stewardship of the oceans, our coasts, and the Great Lakes. In addition, you charged the Task Force to develop, with appropriate public input, within 180 days, a recommended framework for effective coastal and marine spatial planning. The Task Force issued its *Interim Report of the Interagency Ocean Policy Task Force* on September 10, 2009, and its *Interim Framework for Effective Coastal and Marine Spatial Planning* on December 9, 2009.

The need for a national ocean policy and a call for a comprehensive offshore management regime were raised by the U.S. Commission on Ocean Policy (Commission), a Commission authorized by Congress. The Commission released its recommendations in 2004 in its report *An Ocean Blueprint For The 21st Century*.

In response to the Commission's report, Congress passed a number of laws to implement Commission recommendations including: the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act, P.L. 109-479; the Marine Debris Research, Prevention and Reduction Act, P.L. 109-449; and Ocean Exploration, Ocean and Coastal Mapping, and Ocean Observation, P.L. 111-11. These legislative initiatives show Congressional support for increased federal coordination on ocean issues and improved data collection for better ocean management.

We certainly support the better use of federal funds through the reduction of duplication in federal activities. The Ocean and Coastal Mapping legislation urged better coordination in

surveying activities by federal agencies. We also support the ongoing, voluntary regional coordination efforts that have occurred on the West Coast, the Gulf of Mexico and other areas of the United States.

At the beginning of your Administration, Mr. President, you made a commitment to the American people for more transparency in government. In our view, the development of a new federal ocean policy and a framework for marine spatial planning, which could have far reaching effects on numerous ocean-related activities, should follow the most transparent process and involve all interested and affected stakeholders in the public comment process.

While the memorandum creating the Task Force charged that it “shall develop, **with appropriate public input**, a recommended framework for effective coastal and marine spatial planning,” it is apparent from reading the Interim Report and the Interim Framework that the views of all stakeholders have not been taken into consideration. The Task Force boasts in the Interim Report about conducting twenty-four roundtable sessions featuring a myriad of stakeholders that yielded “robust participation” and “many valuable comments and perspectives for its consideration,” and states that “a valuable and wide diversity of interests were represented” through the roundtable discussions, public meetings, and public comments. The documents, however, lack diversity of thought and perspective. It concerns us that many stakeholders were limited in their ability to participate in these meetings due in part to their invitation-only nature. Furthermore, it is not possible to solicit informed public input when the Interim Report and Interim Framework are so vague with respect to the policy being considered and recommended to you by the Task Force.

We also have concerns that there is no provision for public notice and comment as relates to the National Ocean Council’s establishment of national objectives, outcome-based performance measures, and guidance to promote national consistency in the development and implementation of coastal and marine spatial plans. We believe that if the coastal and marine spatial plans are to be reviewed for consistency with national objectives and guidance as developed by the National Ocean Council, then the Administration, at the very least, must provide formal public notice and comment. It should also work with Congress to ensure that its actions are consistent with existing statutes and propose statutory changes as needed.

There is also no indication that formal public notice and comment rulemaking will occur between the submission of the final coastal and marine spatial plans and certification. While the National Ocean Council is charged with reviewing each coastal and marine spatial plan for “national consistency” prior to certification, the public should be given an opportunity to comment on the document at this stage. Additionally, the Interim Framework points out that the coastal and marine spatial plans are “iterative” and subject to modification and alteration. However, no mention is made of a corresponding public notice and comment period upon such

modifications. We would urge that these processes be consistent with the requirements of the Administrative Procedure Act.

Overall, there has been a severe lack of openness and transparency throughout this process. While a website was established to accept public comments, it is highly inadequate. For example, some of the comments are not viewable, and most are not readable in a user-friendly format. In addition, while there is a listing of thirty-eight "expert briefings" that took place between July 1, 2009, and October 29, 2009, there is no listing of the specific participants or any transcript or documentation providing information on the content of those briefings.

While the Commission recognized the value of America's oceans and coasts, it also acknowledged the economic needs of the nation and the need for balancing conservation and economic interests. The Task Force, however, rather than demonstrating any acknowledgment and appreciation for the economic and societal contributions of commercial, recreational, and industrial activities to the livelihood of the American people, takes every opportunity to portray such sectors as inherently incompatible with a sustainable ecosystem. The Task Force seems to have taken the view that there is an inherent conflict between human activities and healthy oceans and coastal waters.

The Task Force recommends an implementation strategy that identifies nine priority objectives that the nation should pursue to implement the national ocean policy. Included in the implementation strategy is the recommendation to adopt ecosystem-based management and coastal and marine spatial planning. While such ideals might look good on paper, if we do not have the appropriate science to implement these measures, such an approach could potentially restrict recreation, fishing, boating, energy production and other ocean and coastal uses, in addition to land-based activities including agriculture, construction, and manufacturing.

It is important to point out that an official in your Administration has noted the lack of information available. On May 19, 2009, NOAA Administrator Dr. Jane Lubchenco spoke at a meeting of the regional fishery management council chairmen and said this about ecosystem-based management, "*We talk a lot about managing on an ecosystem basis, but we really don't have the fundamental understanding of ecosystem-based science to really underpin those decisions. There is a huge amount that we don't know about oceans that is desperately needed to inform the kinds of management decisions, especially in light of the dual challenges posed by climate change and ocean acidification.*"

When making decisions regarding oceans and ecosystem policy, it is critical to ensure that the decision makers are working with a comprehensive knowledge of the ocean environment. As an example, this knowledge must include an updated, modern understanding of the subsurface mineral resources in the Outer Continental Shelf to ensure that our decisions are

guided by up-to-date science. Data collection programs such as ocean exploration, ocean and coastal mapping, and ocean observation can provide much needed data to decision makers.

We are concerned that there are many important, unresolved legal issues surrounding the development and implementation of the proposed national ocean policy. In addition, the legal authorities that are being relied upon in establishing a National Ocean Council, with the power to effectively zone our nation's oceans, coasts, Great Lakes, inland, and perhaps upland areas as well, are questionable. The Task Force states that federal, state, and tribal governments would "[a]dhere[]" to coastal and marine spatial plans by "incorporating CMS Plans into their pre-planning, planning, and permitting processes, *to the extent consistent with existing laws and regulations.*" As regards the authority of the heads of federal agencies and departments, this presents a serious infringement on the authority granted to those individual officers under existing statutes.

Under the Outer Continental Shelf Lands Act (OCSLA), for example, the Secretary of the Interior has been granted certain prescriptive authorities, one of which is to issue oil and gas as well as other mineral leases for submerged lands of the Outer Continental Shelf. In addition, the Secretary has been granted certain discretionary authorities under the OCSLA. According to the proposed framework, in instances where a coastal and marine spatial plan involves discretionary powers granted under an existing statute, the Secretary would be forced to follow the coastal and marine spatial plan because discretionary powers authorize rather than command certain actions. Therefore, in instances involving discretionary powers, the coastal and marine spatial plan would always control because it would be "consistent with existing laws and regulations."

Furthermore, there are many laws already in place to guide decision makers in the use of ocean and coastal resources. In addition to statutes such as the Marine Mammal Protection Act, Magnuson-Stevens Fishery Conservation and Management Act, and Endangered Species Act, the Interim Framework itself refers to the Coastal Zone Management Act, Clean Water Act, and Clean Air Act, and says that "[i]t is the intent of the CMSP process to better understand how current mandates and programs interact towards the common goals of CMSP and, in so doing, to better coordinate and where appropriate, strengthen their collective benefits." Before adding a new layer of bureaucracy, we strongly urge you to consider the legal implications, current mandates and programs at your disposal, and the potential for the new policy to interfere with existing statutory and regulatory requirements and authorizations. In addition, given the potential impact of such a sweeping policy, whether or not legally required at this stage, we strongly encourage the Administration to move forward with an environmental and economic analysis under the National Environmental Protection Act and the Regulatory Flexibility Act.

The Task Force's recommendation to effectively force federal agencies and departments to adopt the precautionary principle in implementing coastal and marine spatial plans only adds to the concern. Under this approach, "[w]here there are threats of serious or irreversible damage,

lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” As highlighted by Dr. Lubchenco, if we don’t have the science to underpin the management recommendations, actions that were once authorized may now be prohibited. Due to this uncertainty, one can only imagine the amount of litigation that will be filed to challenge decisions under such a stringent standard.

The new bureaucracy the Interim Framework would create through the creation of mandatory regional bodies also raise concerns that these entities will not be held to existing legislative standards which require transparency and public participation. In addition, these entities will develop coastal and marine spatial plans, which are certified by the National Ocean Council, for their regions and require member states to implement the measures. This implementation requirement could result in discretionary provisions in existing laws being overruled by these regional bodies.

In addition, the implementation process could override expert agency actions through the requirement that a federal agency or department “adhere” to coastal and marine spatial plans as developed by regional bodies and certified by the National Ocean Council. Under the Appointments Clause, federal agencies can only be bound by decisions made by appointed federal officials. By extending participation in the regional bodies to non-federal officials, the bodies lose the ability to issue any decision binding upon a federal agency.

Just as importantly, the Task Force appears to be attempting to make fundamental changes in oceans governance through a myriad of Executive actions that impact the jurisdictions of several federal departments and agencies as directed by numerous federal statutes. To make such sweeping changes without clear statutory direction will create confusion and invite endless legal challenges that will ultimately undermine the policy initiatives. Such uncertainty will be damaging to states, federal agencies and the millions of Americans who use the oceans, Great Lakes, coastal, and “related” inland areas for commercial and recreational purposes. These policy initiatives should be pursued through legislative action so that it is clear that such authorities exist under the law. In addition, issuing a blanket withdrawal of discretionary authority across federal agencies that is not based on the facts of a particular case raises serious constitutional doubt.

We also have significant questions about the impacts that the National Ocean Council and the coastal and marine spatial plans will have on the constitutional authority of states and the authorities of states over their submerged lands and adjacent waters and coastal areas under existing statutes. The proposed geographic scope of the coastal and marine spatial plan is defined to extend landward to the mean high-water line, includes inland bays and estuaries, and may include additional inland areas as “deem[ed] appropriate.” The Interim Framework states that “State and Federal authorities with programs relevant to the CMS Plan would review and modify programs as appropriate to ensure their respective activities, including discretionary spending

(e.g. grants and cooperative agreements), adhere to the coastal and marine spatial plan, to the extent possible.” The coastal and marine spatial plan proposes to become, in fact, the overarching authority to the exclusion of individual state authorities. The Task Force appears to ignore the fact that states have certain sovereign authorities under the Constitution and other existing law, such as ownership of most lands offshore to their seaward boundary, as well as many regulatory authorities in these coastal waters. However, it is not clear to us by what authority a coastal and marine spatial plan presumes to override or require the state to amend its existing laws. On the other hand, the Supreme Court has been very clear that states cannot be compelled to implement federal regulatory programs.

The idea of a national ocean policy, which better coordinates federal activities, is a goal we all can support. It is the implementation of such a policy that could become divisive. We would urge that the coastal and marine spatial planning framework be limited to developing a general policy for current and anticipated uses. The framework also should not be used to restrict activities, but rather indicate opportunities and areas for new activities. Expert agencies, with existing legislative authorities, should maintain autonomy in decision-making for activities under their jurisdiction. Administration recommendations which involve modifications to current laws should be sent to Congress as proposed draft legislation.

Finally, it is imperative that the national ocean policy and framework for coastal and plans continue to balance conservation with economic and sustainable use of ocean and coastal resources. The suggestion of an inherent conflict and the failure to fully recognize the economic and societal benefits of human activities that take place in or affect the oceans, coasts, and Great Lakes poses a substantial risk that a policy will be developed that is detrimental to the economy of our country as well as our national security. Instead, we should be taking actions to increase employment, boost overall economic conditions, and secure our nation while we pursue conservation efforts.

We respectfully request that your staff provide us with the following items:

1. Digital media containing a set of all written and oral comments received through May 28, 2010, including name, organization (if applicable), and content submitted.
2. List of all meetings, briefings, and discussions, both formal and informal, held by the Task Force, its staff, and its representatives, both internal and external, including date, time, subject, participants, and content. Provide transcripts and all videos of such activities. To the extent that a recorded transcript or video is not available, please explain why, and in such case provide any related written and electronic communications in possession of the Task Force, its staff, or its representatives related to such meetings, briefings, and discussions.

President Obama
May 28, 2010
Page 7

3. A list of each policy item under consideration by the Task Force in both the Interim Report and Interim Framework, the specific legal authorities for each item, and the specific objective(s) that each proposed policy item seeks to address.

We look forward to receiving a response at your earliest convenience.

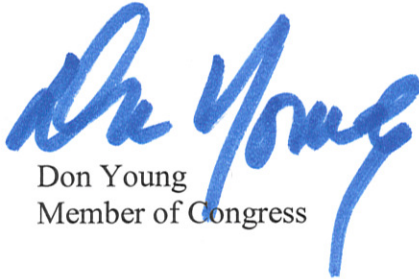
Sincerely,



Doc Hastings
Ranking Member
Committee on Natural Resources



Doug Lamborn
Ranking Member
Subcommittee on Energy and
Mineral Resources



Don Young
Member of Congress



Bill Cassidy
Member of Congress