

**Written Testimony of
Joshua G. Eagle
Assistant Professor of Law
University of South Carolina School of Law**

**Hearing on
Energy Development on the Continental Shelf and
the Future of the Oceans**

**Before the
Committee on Natural Resources
Subcommittee on Insular Affairs, Oceans, and Wildlife and
Subcommittee on Energy and Mineral Resources
U.S. House of Representatives**

March 24, 2009

Madam Chairwoman, Mr. Chairman, and members of both subcommittees, thank you for the opportunity to appear here today. My name is Josh Eagle, and I am an Assistant Professor of Law at the University of South Carolina School of Law in Columbia, South Carolina. You have asked me to discuss the potential benefits of marine spatial planning as it relates to the development of offshore energy projects. I have extensive experience in this area, having written and co-written numerous papers on the topic, and I am happy to provide you with my views and to answer your questions. I am testifying today in my individual capacity.

1. Introduction

The term “marine spatial planning” refers to a process that governments can use to allocate limited ocean resources to various defined uses, such as oil and gas development, wind farms, recreational fishing, commercial fishing, and marine conservation. The benefit of spatial allocation -- that is, the allocation of defined areas to defined uses -- is that it allows incompatible uses to be physically separated and synergistic uses to be co-located. The process of marine spatial planning ultimately produces a two- or three-dimensional map on which specified ocean areas would be designated for particular uses.

Marine spatial planning is often linked to the concept of “ocean zoning.” That term refers to the system of laws or regulations that would govern the use of each area that is established through the marine spatial planning process. These laws or regulations would, among other things, specify the types of resource uses allowed or not allowed in given zones, as well as standards and procedures for permitting allowable

uses within those zones. The application of marine spatial planning without the implementation mechanism of ocean zoning is theoretically possible, but probably is not desirable. For this reason, and for the sake of brevity, I will hereinafter refer to the combination of marine spatial planning and ocean zoning as “marine planning and zoning.”

While the idea of marine planning and zoning is a relatively new one, the use of planning and zoning in other contexts dates back nearly one hundred years. In 1916, New York City became the first city in the United States to adopt a comprehensive municipal zoning ordinance. Today, nearly all cities and towns with over 10,000 residents have zoning ordinances in place. Pursuant to state zoning enabling acts, these municipal ordinances must be “in accordance with a general plan,” that is, a plan for current and future land use within the relevant jurisdictional boundaries.

As it supplies a useful analogy, it is worth briefly noting the purposes of municipal planning and zoning. It has three primary functions:

- First, the planning process provides an opportunity for elected officials and voters to assess available public and private resources, to consider options for alternate development patterns, and to decide – through a highly democratic process – what kind of city they wish to build. While some towns may, for example, desire to preserve their historic character, others may prefer to encourage redevelopment of older neighborhoods.
- Second, the use of planning and zoning helps to prevent costly conflicts between neighboring landowners. Allowing a hog farm to be built in the midst of a residential neighborhood benefits neither the farm nor the neighborhood and would likely lead to litigation. Planning and zoning is meant to preempt this type of dispute.
- Third, planning and zoning can provide security and certainty to current landowners and potential investors. Zones established by a municipal ordinance pursuant to a comprehensive plan will generally specify whether a particular land use is presumptively permitted or prohibited. These presumptions create a relatively stable legal environment. Predictability is extremely valuable to both commercial landowners and homeowners.

Each of these three rationales is even more compelling in the marine context than it is in the municipal context. In other words, if planning and zoning makes sense in the municipal context, it makes even more sense as a tool for rational development of the United States’ marine resources.

2. Rationales Supporting Marine Planning and Zoning

A. *Planning: Science, Values, and Democracy*

The value of planning is particularly high in the context of marine resource development because marine resources are public resources that government holds in trust for its citizens. The government's trustee responsibility for these resources mandates that it make fully informed, rational decisions. Such decisions can only be made after a thorough scientific and economic assessment of ocean resources. This kind of thorough scientific and economic assessment is at the core of any comprehensive planning effort. The alternative to planning, that is, *ad hoc* permitting in a multiple-use system, leads only to the generation of information regarding the project for which a permit is being sought. A decision made on the basis of project-specific information is likely not to be optimal, mainly because it will not take into account a broad range of alternatives to the proposed action.

Furthermore, as beneficiaries of the "ocean trust," citizens should be provided with the most democratic, transparent means of input into government decisions on resource use. Because it would take into consideration all potential uses of ocean resources, and because the basis for it is scientific and economic information, a comprehensive planning process would create ideal conditions for quality public input.

Because many of the important decisions regarding allocation of marine resources would be made during the temporally compact initial planning phase, interest groups of varying political strength and economic resources would be placed on a relatively equal footing. Groups with fewer resources and less influence typically do not fare well in *ad hoc* permitting systems, because such systems require frequent, long-term, and expensive participation. The inability to participate on a regular basis in administrative processes can lead to the use of litigation as a tool for intervention. This may not be the most efficient means of providing input into resource allocation decisions.

With the best available scientific and economic information in hand, government can fulfill its responsibilities to allocate marine resources efficiently and through as fair a process as possible. A transparent, democratic process ensures that the public will have a powerful voice in deciding how its oceans will be used in the future.

B. Avoiding Conflicts Among Competing Public User Groups

There are a wide range of competing uses for limited marine resources and ocean space. In many cases, proposed uses of particular areas will directly conflict. The same square mile of ocean space cannot, for example, be used for both seabed mining and marine conservation. In other cases, two proposed uses could conflict by virtue of the fact that they were sited in close proximity. Nearby mining activities may, for example, lessen the effectiveness of a conservation-oriented marine protected area.

Marine planning and zoning allows for some areas of the ocean to be dedicated to uses that are not compatible with any other uses. This ensures that public user groups who desire or depend upon the availability of that use will indeed be provided for. At the same time, planning and zoning provides a mechanism whereby competing, conflicting uses may be located geographically far enough apart so that they do not impose negative externalities on one another. So, for example, planning and zoning make it possible to locate oil and gas production facilities at a safe distance from important commercial fishing grounds.

The use of planning and zoning to avoid user group conflicts is even more important in the ocean context than it is in the municipal context. Where private land is involved, as it is in municipal planning and zoning, landowners who are not protected from externalities by a zoning ordinance have the option of defending their property interests through the court system and common law nuisance actions. In lieu of landowners, the political landscape of the ocean features a range of interest groups, each of which represents a segment of the American public, each of which has differing ideas on how ocean resources should be used, and none of which has a private property interest in the resources themselves. Without property interests to support a nuisance action, and without comprehensive planning and zoning, citizens who value ocean space for one particular use – commercial fishermen, recreational fishermen, the oil and gas industry, wind farmers, marine conservationists – have little to no power to ensure that other uses do not infringe.

It should also be noted that planning and zoning creates the opportunity not only to separate incompatible uses, but to locate zones so as to maximize synergies. There is evidence, for example, that recreational fishermen receive significant benefits from being allowed to fish along the boundaries of marine protected areas. The placement of these two types of areas adjacent to one another would thus benefit not only recreational fishermen, by providing them with more and more valuable fishing opportunities, but would also benefit marine conservation by generating political support for better management and enforcement within the protected area.

C. Security and Certainty

As noted above, the alternative to comprehensive marine planning and zoning is *ad hoc* permitting. In addition to requiring an extensive and expensive public process for each specific new proposed project, an *ad hoc* approach creates a great deal of uncertainty.

Certainty is particularly important in the marine context. Many desired uses of marine resources require substantial capital investment. Each new oil platform, for example, costs billions of dollars to construct and install. The end result of a comprehensive planning process would be that certain ocean areas would be

presumptively dedicated to specific uses. Such presumptions, which would be set out in the laws governing permit processing, would create a great deal more certainty than laws mandating *ad hoc* approvals. Certainty could be increased even further if both Federal and state waters were included in the planning process.

The certainty provided by planning and zoning would also benefit other types of interest groups, such as conservationists and recreational fishing groups, that do not make large financial investments. To the extent that such groups are allocated a fair amount of ocean space, the certainty provided by zoning would mean that they could expend fewer resources in opposing permitting processes in other areas, confident in the knowledge that some areas of the ocean had been presumptively dedicated to their preferred uses.

There are several examples from around the world that illustrate that commercial ocean users respond positively to the planning and zoning of public space, owing to the certainty it creates. In New Zealand, for example, some members of the fishing industry welcomed the creation of marine conservation zones because their creation was accompanied by a legal presumption that commercial fishing would be allowed in areas outside the conservation zones. Similarly, in Canada, the timber industry agreed several years ago to the creation of large forest reserves in exchange for the presumptive right to log other nearby lands.

3. Is Planning and Zoning Likely to Be Expensive? Will it Slow Development?

Any assessment of the costs of planning and zoning, including the costs of potential delays in project development, must compare the costs of planning and zoning against the costs of an *ad hoc* permitting system.

It is true that planning and zoning would likely require a several year study period, during which time the planning body – likely a Congressionally-chartered commission – would gather information, conduct public hearings, consult with experts, and develop its final plan. Once Congress considered and adopted the plan and implementing legislation, however, costs and delays associated with project development should be far less than they would be under an *ad hoc* system.

The reasons for this are three-fold:

- First, *ad hoc* systems require public process in connection with each new permit considered. While permits for individual projects would still be required within the context of a planned and zoned system, the process associated with such projects would likely be more abbreviated.
- Second, agencies implementing zone rules will have a much simpler task processing applications because of the specific legislative guidance inherent in

such rules.

- Finally, interest groups' judicial challenges to agency actions under a presumptive-use system should be less frequent and more easily resolved. This should be true not only because the presumptive rules would make it more unappealing to sue over the granting of a permit for a presumptively-permitted activity. It should also be true because the groups likely to object to permits will have already been centrally involved in the initial planning process. During that process, they will have conceded that some areas could be used for what they consider to be undesirable projects in exchange for the dedication of other areas to their own preferred uses. In other words, the negotiation would take place through the planning process and not on an *ad hoc* basis through the court system.

4. Conclusion

There are three strong rationales for employing marine planning and zoning as a framework for developing the United States' offshore marine resources:

- First, the planning process would lead to better and more transparent decisions and to more and better public participation.
- Second, planning and zoning allows for the separation of incompatible uses and the co-location of synergistic uses; each of these would promote more efficient use of resources.
- Third, planning and zoning reduces uncertainty for both commercial and non-commercial interests.

Each of these rationales supports the use of marine planning and zoning and illustrate why it would be superior to existing or proposed *ad hoc* decision-making systems.