



PO Box 3156, Fremont, CA 94539  
(510) 770 9764 [www.cacoastkeeper.org](http://www.cacoastkeeper.org)

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October 12, 2009

The Honorable Nancy Sutley, Chair and Members  
Interagency Ocean Policy Task Force

**VIA:** <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans/>

**Re:** Comments on CEQ, "Interim Report of the Interagency Ocean Policy Task Force"

Dear Chair Sutley and Task Force Members:

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers spanning the coast from the Oregon border to San Diego, I welcome the opportunity to submit these comments on the "Interim Report of The Interagency Ocean Policy Task Force" (Interim Report). In partnership with numerous other organizations, CCKA submitted detailed joint comments to the Task Force on September 3<sup>rd</sup>. CCKA also was honored to provide oral testimony to the Task Force as an expert witness at the September 17<sup>th</sup> hearing; a copy of this is attached. This letter provides comments on the Interim Report itself.

In brief, we applaud the efforts by the President and the Task Force to bring ocean issues to the forefront of national policymaking. As noted in the Interim Report, "America is intricately connected to and directly reliant on the ocean, our coasts and the Great Lakes," which are a "refuge for spiritual reflection and a powerhouse of excitement for educating students." We particularly support the vision of the Proposed National Policy of:

[a]n America whose stewardship ensures that the ocean, our coasts, and the Great Lakes are healthy and resilient, safe and productive, and understood and treasured so as to promote the well-being, prosperity, and security of present and future generations.

With this vision and many of its specific provisions, including support for the precautionary approach and ecosystem-based management, the Interim Report generally moves the nation on the path of improving the health of the nation's treasured coastal and marine ecosystems.

There are a number of areas, though, in which the Interim Report could be improved to ensure that its laudable vision is achieved swiftly and effectively. These include the following:

- Adopted policies and strategies should commit to mandated courses of action to prevent and remediate harm.
- The ocean governance structure must establish clear leadership roles/responsibilities.
- Accountability must be specifically ensured and should include citizen suit provisions.
- The Public Trust Doctrine should be an integral element of the Interim Report.

We urge the Task Force address these issues, discussed further below, in its final Report.

## **ADOPTED POLICIES AND STRATEGIES SHOULD COMMIT TO MANDATED COURSES OF ACTION TO PREVENT AND REMEDIATE HARM.**

The Interim Report discusses eloquently the many benefits of healthy coasts and oceans, as well as the myriad threats facing these ecosystems. These threats have been the subject of numerous years of discussion and attention, unfortunately to little overall effect. As the Interim Report finds, “ocean, coastal and Great Lakes ecosystems are experiencing an unprecedented rate of change due to human activities,” with their biodiversity in overall decline (pages 10-11). Swift, clear, decisive action – with mandates for achieving results – is needed to stop and reverse this unfortunate trend.

Though it does articulate as a “theme” the “need for a strong, clear, overarching policy mandate,” (page 6), the Interim Report does not clearly commit to mandated action. There are a number of areas in the Interim Report where more specific language could be used to demonstrate such commitment. Examples of these areas include, but are not limited to, the following:

- Pages 14-16, “Principles”
  - Para. 1.a.: As “responsible environmental stewards,” we must do far more than “seek[ing] to prevent or minimize adverse environmental impacts” or avoid “undermin[ing] efforts to protect, maintain, and restore” these ecosystems. These are actions we already are bound to take; we must go further. Our first duty as responsible environmental stewards instead should be to take immediate, affirmative actions to swiftly, measurably, and steadily reverse the decline of these ecosystems’ health – *i.e.*, rather than simply trying to avoid making things worse.
  - Para. 1.b.: Decision-making should be “directed,” not “guided,” by a precautionary approach.
  - Para. 1.c.: Actions taken to protect these ecosystems “must follow,” not “should endeavor to promote,” the principles that “environmental damage should be avoided” and that “environmental costs should be internalized.” Moreover, those who cause environmental damage “must,” not “should generally,” bear the cost of damage.
  - Para. 8.: U.S. policies, programs and activities that may impact coastal and marine ecosystems “must,” not “should,” be designed to meet measureable benchmarks in support of clear goals and objectives related to the stewardship of these ecosystems. Vague, uncommitted action will do nothing to advance the cause of healthy, diverse ocean and coastal ecosystems.
- Pages 28-38, “Planning” (Strategic Action Plans for Nine Priority Objectives).

The Interim Report appears to rely on the development of Strategic Action Plans to implement the identified nine policy objectives (pages 28-29). The Interim Report outlines the elements of each of these nine Plans, which fortunately include: “specific and measurable . . . actions, with appropriate milestones, performance measures, and outcomes,” as well as requirements to “[e]xplicitly identify key lead and participating agencies” and include “enforcement as a critical component.” We support such language in the Interim Report. We also suggest that the impacts of such language could be enhanced considerably by carrying it through to the specific discussions of each of the nine future Strategic Actions Plans (pages 29-38). These Plans could

benefit significantly from reiteration of such language, as well as inclusion of illustrative specific actions that could be taken. Examples include, but are not limited to, the following:

- Page 30 (EBM): The outline of Plan activities should include examples of specific actions needed to ensure that ecosystem-based management (EBM) is implemented, such as formally incorporating EBM into NEPA project reviews.
- Pages 34-35 (Climate Change): Climate change adaptation must begin immediately. The Plan accordingly should include specific actions that could be taken now, such as (again) incorporating climate change considerations into NEPA reviews, and modifying any existing subsidies (such as insurance) that encourage inappropriate coastal development in impacted areas.
- Page 36 (Water Quality): The impacts of nonpoint runoff on coastal and marine ecosystems have been well-documented; there has been similarly comprehensive documentation of associated best management practices. The Strategic Action Plans should move beyond these activities and call for specific preventative and restorative actions, such as control in the Clean Water Act of unaddressed polluted runoff (similar to controls on stormwater runoff currently in place under the Act), and mandated cleanup of all waterways contaminated by such runoff.

Finally, commitments to mandated courses of action necessarily require accountability mechanisms that ensure that those commitments are fulfilled. Accountability mechanisms are in fact almost completely absent from the Interim Report, despite being a specific request from the President. This critical issue is discussed further below.

Support for healthy coasts and oceans, no matter how strong or well-connected, will in the end fail to translate to actual improvements in the health of these ecosystems without a clear commitment to a coordinated, transparent, accountable suite of actions that implement this support on the ground, and in the water. We strongly request that the Task Force carefully review the Interim Report for instances where this commitment is lacking or unclear, and make the necessary modifications to address such gaps.

### **THE NATIONAL OCEAN GOVERNANCE STRUCTURE MUST ESTABLISH CLEAR LEADERSHIP ROLES/RESPONSIBILITIES.**

Related to the need for a clear commitment to action is a clear sense of leadership within the ocean and coastal governance community. The Interim Report appropriately identifies an unmet “need for high-level direction and policy guidance from a *clearly designated and identifiable authority*” (page 6, emphasis added). A lack of coordination among the myriad agencies with ocean and coastal responsibilities has regularly been identified as one of the major stumbling blocks in implementing effective policies that protect the health of these invaluable ecosystems. However, the Interim Report inexplicably continues this problematic trend by failing to identify a single leader with the authority, responsibility and overarching accountability for implementing adopted policies. Instead, it proposes regulation by committee through the new National Ocean Council (page 18), additionally proposing Co-Chairs rather than a single head to lead the Council’s charge (page 19). This structure fails to meet the Report’s own call for a “clearly designated and identifiable authority” in charge of ocean and coastal management. While

coordination is important, so too is decisionmaking and enforcement authority, as well as a single entity responsible for accountability purposes.

We strongly urge the Task Force to revisit this recommendation and establish only one chair, or lead, on this effort. If selecting a single agency for chair is problematic, then the chair could be rotated every two to three years as needed. One clear leader, however, is essential to create the specific governance authority that is needed to ensure that policy and strategy recommendations are implemented swiftly and effectively.

We also request that the National Ocean Council as well as the Governance Advisory Committee include tribal representative(s) as full members. As the Task Force has seen in its public meetings to date, the participation and voice of tribal representatives is invaluable to the development and implementation of effective governance policies and programs.

Finally, the Interim Report should be clear in its governance structure with regard to lines of implementation and enforcement. In other words, the agencies that are part of the national ocean governance policymaking structure must be able to directly implement and enforce – or ensure the implementation and enforcement of – adopted ocean and coastal policies and strategies. The Interim Report should make clear how the established governance structure will ensure that such implementation and enforcement will occur, and how the public can take action if it does not (this is discussed further below). The Report is currently vague on these details, which are essential to the success of the overall effort.

#### **ACCOUNTABILITY MUST BE SPECIFICALLY DISCUSSED AND SHOULD INCLUDE CITIZEN SUIT PROVISIONS.**

Related to the need for a clear governance structure with unambiguous lines of implementation and enforcement authority is the need for transparent accountability procedures. The President's June 2009 memorandum<sup>1</sup> instituting this effort appropriately calls on the Task Force to develop recommendations for a national policy that "ensur[es] accountability for all of our actions affecting ocean, coastal and Great Lakes resources." The Interim Report only fleetingly touches on the need for a "reporting and accountability mechanism" in an interagency planning framework (page 17). It does mention that the Co-Chairs of the National Ocean Council would be responsible for "accountability" – but *only* in the context of "document preparation" (page 20). The Interim Report is otherwise starkly silent on the issue of accountability. Without a thorough discussion on the process for "ensuring accountability," the Interim Report fails to implement the President's vision and direction.

As referenced above, this accountability discussion should describe the agency line authority for implementation and enforcement of the ocean, coast and Great Lakes policies and strategies that will be developed. Direct line authority, as well as models such as the formal U.S. EPA-Army Corps of Engineers partnership on water, could both be part of this structure. The accountability discussion also should provide for regular reporting to the public of the agencies'

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<sup>1</sup> The White House, Memorandum for the Heads of Executive Departments and Agencies, "National Policy for the Oceans, Our Coasts, and the Great Lakes" (June 12, 2009), *available at*: [http://www.whitehouse.gov/assets/documents/2009ocean\\_mem\\_rel.pdf](http://www.whitehouse.gov/assets/documents/2009ocean_mem_rel.pdf).

progress on these efforts, including user-friendly summaries and maps of ecosystem health, agency enforcement efforts, and regulated entity compliance rates.

Finally, this accountability discussion should include mechanisms for the public to take action in the event that agencies fail to meet the mandates assigned to them. Citizen suit provisions, implemented to significant positive effect under the Clean Water Act for decades, should be one of these tools. The government has a responsibility to protect the health of the oceans, coasts and Great Lakes in stewardship for the public, and the public in turn has the right to ensure that this occurs. Citizen suits are one of the most direct and effective ways to hold the government accountable; we urge that they be specifically included as recommended actions in the final Report to the President, along with recommendations for any legislative changes needed.

### **THE PUBLIC TRUST DOCTRINE SHOULD BE AN INTEGRAL ELEMENT OF THE INTERIM REPORT.**

As described in a detailed memorandum prepared by the California State Lands Commission,<sup>2</sup> the public trust doctrine can be a valuable tool in ensuring healthy, resilient coastal and ocean ecosystems. The origins of the public trust doctrine are traceable to Roman law concepts of common property. Under Roman law, the air, the rivers, the sea and the seashore were incapable of private ownership; they were dedicated to the use of the public.<sup>3</sup> Under English common law, this principle evolved into the public trust doctrine, under which the sovereign held the navigable waterways and submerged lands “as trustee of a public trust for the benefit of the people” for uses such as commerce, navigation and fishing.<sup>4</sup> After the American Revolution, each of the original states succeeded to this sovereign right and duty and became trustee of the tide and submerged lands within its boundaries for the common use of the people.<sup>5</sup> Subsequently admitted states, like California, possess the same sovereign rights over their tide and submerged lands under the equal-footing doctrine.<sup>6</sup> That is, title to lands under navigable waters up to the high water mark is held by the state in trust for the people. These lands are not alienable, in that all of the public’s interest in them cannot be extinguished.<sup>7</sup>

Today the public trust doctrine creates a duty for states to protect the common heritage of their coastal lands and waters for preservation and public use. The California Supreme Court has specified that the public trust doctrine protects a wide variety of environmental and recreational uses in addition to the traditional navigation, commerce and fishing uses.<sup>8</sup> These include “the preservation of those lands *in their natural state*, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and

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<sup>2</sup> [http://www.slc.ca.gov/policy\\_statements/public\\_trust/public\\_trust\\_doctrine.pdf](http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf); see also Memorandum from Will Travis and Tim Eichenberg, BCDC to BCDC Commissioners, “Using the Public Trust Doctrine to Adapt to Climate Change in San Francisco Bay” (Feb. 27, 2009), available at: [http://www.bcdc.ca.gov/meetings/commission/2009/03-05\\_Public\\_Trust\\_Climate.pdf](http://www.bcdc.ca.gov/meetings/commission/2009/03-05_Public_Trust_Climate.pdf).

<sup>3</sup> Institutes of Justinian 2.1.1.

<sup>4</sup> *Colberg, Inc. v. State of California ex rel. Dept. Pub. Works* 67 Cal.2d 408, 416 (1967).

<sup>5</sup> *Martin v. Waddel*, 141 U.S. (16 Pet.) 367, 410 (1842).

<sup>6</sup> *Pollard’s Lessee v. Hagen*, 44 U.S. 212, 228-29 (1845).

<sup>7</sup> *People v. California Fish Co.*, 166 Cal. 576, 597-99 (1913); *City of Berkeley v. Superior Court* 26 Cal.3d 515, 524-25 (1980).

<sup>8</sup> *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983).

marine life, and which favorably affect the scenery and *climate* of the area (emphasis added).”<sup>9</sup> Even where it no longer owns tidelands and submerged lands, a state’s retained public trust easement allows it to protect public trust uses.

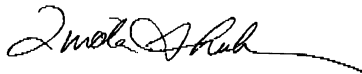
The federal government also has a potentially significant role to play in the use of the public trust doctrine. An April 2009 analysis by Duke University’s Nicholas School of the Environment argues that the clear establishment of a public trust doctrine for federal waters would be an effective solution to potential ocean management conflicts that protect both fish populations and ecosystems.<sup>10</sup> The researchers also determined that a clear public trust doctrine for U.S. federal waters would provide a “critical foundation” and “framework” for agency coordination efforts on ocean policy, and would be a “policy backstop for [participating] agencies to enforce the public trust against infringing parties.” The researchers suggested several ways to clearly delineate trust responsibilities in ocean matters; these include: an Executive Order directing all federal ocean agencies to apply their resources toward cooperatively and sustainably managing the ocean public trust, judicial interpretation consistent with state courts, and/or new legislation unambiguously writing the doctrine into federal oceans law.

Given the importance of the public trust doctrine in ensuring stewardship over and accountability for the use of public trust resources, the Interim Report’s failure to even mention the doctrine is a significant gap. We urge the Task Force to specifically include a discussion of how the federal government will implement the doctrine in federal waters to protect and enhance the health of the nation’s oceans. The Report should also address how federal agencies will work with the states to ensure coordinated implementation of the doctrine within states’ jurisdictions.

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As the Interim Report observes, “[t]he importance of ocean, coastal and Great Lakes ecosystems cannot be overstated; simply put, we need them to survive” (page 10). The Task Force has a unique opportunity now to take a strong leadership role in establishing and implementing new strategies essential to ensuring the health of our coastal and marine ecosystems, and the people who depend on them. We respectfully request that the Interim Report be revised to address the above recommendations, in order to achieve the Task Force’s strong vision of a “healthy and resilient, safe and productive, and understood and treasured” coast and ocean. Thank you.

Best regards,



Linda Sheehan, Executive Director

attachment

cc: The Honorable Mike Chrisman, Chair, California Ocean Protection Council, and Members

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<sup>9</sup> *Marks v. Whitney*, 6 Cal. 3d, 251, 259-60 (1971).

<sup>10</sup> Turnipseed, Mary *et al.*, “Oceans: Legal Bedrock for Rebuilding America’s Ocean Ecosystems,” *Science*, Vol. 324, No. 5924, pp. 183 – 184 (April 10, 2009), available at <http://www.sciencemag.org/cgi/content/full/sci:324/5924/183> (AAAS Members and subscribers).

# ATTACHMENT

## OCEAN POLICY TASK FORCE REMARKS

Linda Sheehan, Executive Director, California Coastkeeper Alliance

lsheehan@cacoastkeeper.org

San Francisco, CA

September 17, 2009

Good afternoon Chair Sutley and distinguished Task Force members, and thank you for the opportunity to speak before you today on water quality. We commend your work to implement the President's vision of "healthy, resilient, and sustainable oceans, coasts, and Great Lakes."

It is noteworthy that we are having this conversation on the fortieth anniversary of the two seminal coastal pollution events that prompted both the first Earth Day and the federal Clean Water Act. It was in 1969 that 200,000 gallons of crude oil spread over an 800 square mile slick off the coast of Santa Barbara. It was also in 1969 that the Cuyahoga River caught fire off Lake Erie and sent images around the country of firefighters trying to put out the water. From these events we created what - at the time - was a truly innovative suite of environmental laws reflecting our collective commitment to cleaning up pollution.

With forty years of experience behind us, we can begin to see our successes, and where we need to shift our approach. First and foremost, we need to implement and enforce our current laws fully. The *New York Times* reported this week that the Clean Water Act has been violated more than a half a million times since 2004, and the number of violations has been growing. These violations have real impacts on ecosystem and public health. Researchers have found that health care costs from beach-related illnesses in just Los Angeles and Orange counties total tens to hundreds of millions of dollars each year. So we strongly support the President's call for "accountability," particularly when it comes to enforcing our water quality laws.

But even more than implementing our existing laws fully, we also need to acknowledge that our regulatory structures are mismatched with the environment they are supposed to protect. We set up our current laws and regulatory agencies to keep water quality separate from water flows, and from air, and from wildlife... when of course in reality they are all connected. As Muir famously said, "[w]hen we try to pick out anything by itself, we find it hitched to everything else in the universe." The President has called repeatedly for ecosystem-based approaches in his ocean policies, and we applaud that direction. But this has to be more than simply increased coordination across siloed agency structures. We must forge a better way of regulating our relationship with the environment, just as our predecessors did forty years ago. We need to develop "institutional ecosystems" that better reflect the natural ecosystems being protected.

I would like to highlight a couple of examples of why such a new way of doing business is needed. Climate change is the classic example - our current, single-stressor laws simply did not envision that we could change whole ecosystems with pollution, let alone on a global scale. Ocean acidification is just one subset of these impacts - air pollution from power plants and other

sources changes water quality in the ocean, which affects marine life at the base of the food chain, triggering a cascade of other potential impacts. Our air, water, and fish and wildlife laws are struggling to keep up.

Another example: a NOAA Fisheries Biological Opinion issued in June found that a lack of sufficient, clean water in California's Central Valley is jeopardizing the existence of Southern Resident killer whales, which rely on disappearing Chinook salmon runs for food. When we think about how to protect killer whales in the Pacific Northwest, how many of us think "restore clean water flows in California's Central Valley"? Our single-stressor laws constrain not only our actions, but in many cases our imagination. We need thoughtful, ecosystem-based oversight to protect marine and anadromous species *before* they are on the brink.

Even within a single regulatory agency, we need to change how business is done to reflect the integrated nature of our environment. Studies by NOAA, Washington State and others report that commonly used pesticides act synergistically in mixtures to kill salmon. In other words, *even if* current pesticide standards are implemented fully, they will fail to protect aquatic life because they are based on chemical-by-chemical analyses that do not reflect the actual, integrated environment.

Clean, abundant water is the lifeblood of our coast and ocean. Focusing on water quality is important, but looking at the environment holistically, and building regulatory and restoration programs that reflect natural ecosystems, is essential. So what do we need to do? We need to revisit our forty year-old, single-stressor environmental laws and create integrated regulatory systems that better reflect natural ecosystems. We also need to recognize explicitly in our laws the inherent rights of all of us to have a fighting chance to thrive and evolve – including ecosystems and their inhabitants, to which we are inextricably bound.

This is a tall order, but we can and must envision the natural endpoint of our work and take progressive action in that direction. There are tools we can use to move us toward ecosystem-based management, while we make the necessary foundational changes in our legal structures. These include cross-cut budgets, MOUs, consistency determinations, staff sharing, jointly administered grants, and other actions. And again, we must immediately increase enforcement of existing pollution laws, and expand them as needed to address new and underestimated threats.

In closing, climate change is *our* Santa Barbara oil spill and Cuyahoga River fire. I urge the Task Force to heed its warning, and commit to developing the seminal changes in law and policy needed to safeguard the natural world, and our place within it. Thank you.