

OCEAN LAW INITIATIVES WILL AFFECT SOME TRADITIONAL WATER QUALITY ISSUES AND WETLANDS DEVELOPMENT PROJECTS, AND PRESENT A NEW FRONTIER OF WATER USE OPPORTUNITIES

Over the last two years, two blue-ribbon commissions on oceans policy—the U.S. Commission on Oceans Policy and the Pew Oceans Commission—have issued extensive reports detailing the environmental and ecological problems facing our ocean and coastal resources. The commission reports each recommend a series of significant and subtle policy and regulatory changes to capitalize on the opportunities and challenges that accompany these well-documented problems. Both commissions found that the federal laws governing much of current oceans policy are fragmented, confusing and even “Byzantine.” The commissions also emphasized that roughly 80 percent of the pollution problems affecting our oceans are from land-based activities. The implications of the policy initiatives arising out of these ocean reports for traditional water quality and use issues are the focus of this summary.

Ocean Pollution from Nonpoint Sources, Wetlands and Ecosystem Development

Given the commissions’ findings, it is not surprising, then, that the areas targeted in these reports for significant attention include non-point source storm water and agricultural pollution, wetlands protection and mitigation, preservation and restoration of coastal ecosystems, and airborne deposition of pollutants to surface waters. Many of the recommendations for updating our nation’s oceans policies could affect traditional water-quality regulatory and planning programs under laws such as the Clean Water Act (CWA) and the Coastal Zone Management Act (CZMA). Several recommendations would also expand nascent efforts under these and other laws to develop ecosystem-based and watershed-based permitting, regulatory and enforcement programs. Many of the changes envisioned by the commission reports represent progressive enhancements to clarify and expand existing programs—changes that many affected participants in these programs might well welcome as improvements over the *status quo*.

In the year since the commissions each reported their findings to the Bush Administration, Congress and the public, there has been quiet progress in some areas of the recommended actions. For example, the newly-established Committee on Ocean Policy, housed within the Council on Environmental Quality, has been organizing and setting forth publicly the administration’s objectives, actions and initiatives in a new Ocean Action Plan. This plan describes new and renewed efforts to be made in several important areas, such as oceans science and education, international treaties, and fisheries law. Initial efforts have focused on organizing and improving the internal workings and coordination of the 11 cabinet-level departments and four independent agencies that each have significant jurisdiction over one or more oceans-related laws or programs. Furthermore, legislation has been introduced in Congress to provide the National Oceanic and Atmospheric Administration (NOAA), currently a division within the Department of Commerce, with organic statutory authority. The legislation, which mirrors aspects of the commissions’ recommendations, would articulate a new, cohesive and forward-looking national oceans policy based on ecosystem and adaptive management and sustainability principles, among others.

Recent Initiatives to Catalyze Changes in Oceans Legal and Policy Framework

For most water law and policy practitioners, these far-reaching oceans policy recommendations and behind-the-scenes organizational efforts have had little impact thus far. Affected stakeholders, including state and regional governments, ports and wastewater treatment authorities, environmental and conservation organizations, and industry, are beginning to formulate advocacy strategies for those aspects of the oceans policy recommendations that are of greatest interest. In addition, two recent initiatives may cause these follow-up activities to the oceans commissions’ work to take on greater visibility in some water law arenas during 2006.

Joint Commissions Initiative: Four Areas of Focus

First, several former members of the two commissions launched a bipartisan effort called the Joint Oceans Commission Initiative during 2005. This initiative, co-chaired by the former chairs of the respective oceans commissions, the Hon. Admiral James D. Watkins (Ret.) and the Hon. Leon Panetta, was expressly formed to prevent the recommendations of the commissions from languishing. As such, the Initiative intends to push for visible short-term changes in four focused policy areas where progress is seen as attainable—namely, U.S. accession to the United Nations Convention on the Law of the Sea, reform of federal and regional governance structures, fisheries reform, and oceans funding. The changes being pursued in these four areas could, in turn, affect current laws governing off-shore resource development activities such as aquaculture, wind power, and oil and gas production, as well as lead to more robust protection and mitigation standards for coastal and upland wetlands, estuaries, and watersheds that are impacted by existing land uses and new development projects.

Environmental Crimes Initiatives on Oceans Issues

A second recent development that promises to result in practical consequences stems from the announced priorities of the U.S. Department of Justice Environmental Crimes Division (ECD). In particular, two of the top enforcement priorities are vessel and ship discharges and violations of fisheries management requirements. The first of these enforcement priorities, vessel pollution, reportedly entails a more aggressive crackdown on falsification of records and dumping practices for oil and sewage discharges under a variety of federal environmental and transportation laws, following a string of visible prosecutions of such issues during the past fiscal cycle. This federal criminal enforcement effort also comes at a time when more and more states are enacting or considering new legal requirements to regulate what is seen as a void

in federal law on so-called “gray water” and ballast discharges from ships. Although criminal prosecution of fisheries management violations represents enforcement under laws other than traditional water-focused laws, the effort is significant in sending a signal that the federal government is starting to look at offshore water use conflicts as fodder for criminal and civil environmental enforcement efforts.

Conclusion and Implications

The importance of these developments for water practitioners is two-fold. First, the unavoidable thrust of the ocean commissions’ policy recommendations is that land-based activities that have been and are subject to traditional water regulatory programs must do more to prevent pollution and to mitigate adverse effects on ocean and coastal resources. These broad concepts have received overwhelming nonpartisan consensus and should be expected to add impetus to current efforts designed to better address and control nonpoint sources of pollution that ultimately flow to our coasts and oceans. Reorganizing certain federal and regional agencies and programs, and increasing their funding, will be critical first steps in support of this overarching goal.

Second, use conflicts, and the past detrimental effects of the allowed uses of our coastal areas and oceans, have been largely invisible to those not directly involved in fisheries management, vessel pollution, or seasonal beach closings. The degradation of the oceans is largely underwater, and literally not seen by the millions of us who, by living, recreating and making our livelihoods from coastal and ocean resources, are contributing to “loving our oceans to death.” This, too, is changing. As water and resource use conflicts on and in our oceans and coasts become increasingly visible and better understood, the laws and policies employed in the past to address (or ignore) such conflicts will become increasingly familiar to water practitioners. These laws, as well as traditional water quality tools, are likely to undergo significant reforms in the coming years to more effectively and progressively address these modern challenges. (RSD/KMH)

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