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NEWS & ANALYSIS

Ocean Law and Policy: An Update

Editors' Summary: On April 18, 2006, the Environmental Law Institute hosted the first seminar in a series exploring current ocean law and policy issues. After the moderator provided a short overview of the current state of ocean law and policy, the panelists shared their expertise on a variety of topics including: the activities that have resulted from the 2003 and 2004 release of reports from the Pew Oceans Commission and the U.S. Commission on Ocean Policy; the adequacy of current governance structures to meet ocean environmental and regulatory needs; current legal risks for marine environments and industries; and likely changes in federal ocean law and policy. Below is a transcript of the event.

Moderator:

Kathryn Mengerink, Research Fellow, Environmental Law Institute

Panelists:

Walter Cruickshank, Deputy Director, Minerals Management Service, U.S. Department of the Interior

Karen Hansen, Beveridge & Diamond, P.C.

Diane Regas, Director, Office of Wetlands Oceans & Watersheds, U.S. EPA

Roger Rufe,¹ President, The Ocean Conservancy

Kathryn Mengerink: Both the Pew Ocean Commission and the U.S. Ocean Commission began in 2000. . . . They were the first commission since the Stratton Commission in 1969² to examine U.S. oceans and what's needed in terms of regulation and what's needed in terms of education and research. Both commissions were comprised of a diverse group of members with experience in academia and science, in federal government, state government, [and] industry. While the commissions themselves had a somewhat different makeup, they came to similar conclusions, in many respects, and the number of recommendations that they made are pretty enormous. . . . For example, the U.S. Commission report³—the summary alone is a 50-page summary of recommendations, so I won't be reviewing all of the recommendations today. But briefly, both commissions made recommendations regarding governance: the Pew Commis-

sion⁴ recommended the creation of regional ocean ecosystem councils; the U.S. Commission recommended establishing a docking ecosystem-based management and that we should work together to develop a flexible involuntary process for the creation of regional ocean councils. The Pew Commission also examined U.S. fisheries, preserving the coast lines, dealing with the Clean Water Act⁵ but focusing on both nonpoint source pollution and point sources as well as invasive species and noise pollution, and behavior conditions about aquaculture, science, [and] education funding. Similarly, the U.S. Commission had made many recommendations about all of these issues, and it was . . . over 500 pages of work and recommendations, in addition to many appendices, so if you all haven't looked at them, I highly encourage you to take [a look at] all the materials that they produced.

So, in response to the U.S. Ocean Commission report, the Bush Administration created the U.S. Ocean Action Plan⁶ and also, by Executive Order, established the Committee on Ocean Policy⁷ in the Council on Environmental Quality. And also since the release of both reports by both commission, they have continued to work together. The commissioners have continued to work together under the Joint Ocean Commission Initiative, and so today we have two people who will be able to talk about that in much more detail: Diane Regas, who is a member of the Subcommittee on Integrated Management on Ocean Resources, which is a subcommittee of the Committee on Ocean Policy; and then Roger Rufe,⁸ who is a member of the Joint Ocean Commis-

Transcribed by HBR, INC. of Washington, D.C. The transcript has been lightly edited, and citations have been added, for ease of reading.

1. Roger Rufe is now Director of Operations, U.S. Department of Homeland Security.
2. COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION (1969), available at <http://www.lib.noaa.gov/edocs/stratton/>.
3. U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY (2004), available at http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf.

4. PEW OCEANS COMMISSION, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE (2003), available at http://www.pewtrusts.org/pdf/env_pew_oceans_final_report.pdf.

5. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

6. U.S. OCEAN ACTION PLAN: THE BUSH ADMINISTRATION'S RESPONSE TO THE U.S. COMMISSION ON OCEAN POLICY (2004), available at <http://ocean.ceq.gov/actionplan.pdf>.

7. Exec. Order No. 13366, 69 Fed. Reg. 76589 (Dec. 21, 2004).

8. See *supra* note 1.

sion Initiative and . . . also a member of the Pew Ocean Commission. I think I'll go ahead and introduce our speakers now, in a little bit more detail.

To my immediate left I have Karen Hansen. She is a director at Beveridge and Diamond and is involved in environmental law—water, land use, and oceans law—and she also co-chairs the firm's water law practice. She's practiced in both Washington, D.C., and in Minnesota, and she is a member of the D.C. bar, the Minnesota bar, and also the Texas bar. She received her law degree from the University of Texas and her B.A. in Business and Economics from Trinity University.

To the left of her, we have Walter Cruickshank. He's the Deputy Director of Minerals Management Service (MMS) in the U.S. Department of Interior. He's involved with the effective management of mineral resources on the outer continental shelf (OCS) and he'll be able to speak to us today in more detail about the Energy Policy Act of 2005⁹ and its implications on the management of and leasing for the OCS for both oil and gas and for alternative energy. He has a B.A. in Geological Sciences from Cornell University and a Ph.D. in Mineral Economics from Pennsylvania State University.

To the left of Walter is Diane Regas. She is the Director of the U.S. Environmental Protection Agency's (EPA's) Office of Wetlands, Oceans, and Watersheds. And as I said, she is the co-chair of the SIMOR Group, or the Subcommittee on Integrated Management of Ocean Resources, and she has also served as Deputy Assistant Administrator for the Office of Water at EPA. She had joined EPA in 1987 as an attorney advisor for the Office of General Counsel. Ms. Regas has a M.S. in Environmental Science and a J.D. from U.C. Berkeley. I think we both came from the same law firm.

Roger Rufe, at the end of the table, is a retired Vice Admiral of the U.S. Coast Guard and he is currently the President and CEO of The Ocean Conservancy. He spent 34 years in the Coast Guard and he represented the Coast Guard in both North Pacific and Mid-Atlantic Fisheries Management Councils. He was a member of the Pew Oceans Commission and he is also currently a member of The Joint Ocean Commission Initiative. Admiral Ruth has a Bachelor of Science in Engineering from the U.S. Coast Guard Academy and a Master's degree in Public Administration from the New York University. So we have a pretty amazing set of panelists here today.

The first two questions (I gave them a list of questions so that they could think about the issues that we're interested in in advance of this seminar and I told them I would take a first stab at the first two questions I was going to ask them), one being: What are the three most critical issues facing the marine environment? And the second being: Are the current government structures adequate to deal with ocean and environmental and regulatory needs? I think the second question I'll answer as a "No," and hopefully we can discuss that in more detail.

The first question, I . . . think that there are many more than three critical issues facing the marine environment, and it's really very hard to figure out what are the three most important, but it was a way for me to try to think about what people are mostly dealing with, or struggling with.

The three that I came up with was: climate change, because it's going to have such an enormous holistic change for the environment that included both the retreat of the ice shelf and how communities are going to need to respond to sea level rise, potential increases in storm intensity, shifting fish populations, and in terms of what we need to do, who is going to be responsible for how we shift people and locations, especially for small island developing nations.

And the second issue I thought of is overfishing. And there are recent estimates that we've lost over 90% of our pelagic predatory fish species . . . in terms of numbers, not in terms of species, but numbers. And that, you know, that many U.S. fisheries are overfished and are continuing to be overfished, that we have major problems with both habitat destruction and bycatch.

And the third one, I sort of struggled with, in terms of how broad it should be or what qualifies. The nutrient loading was my third choice. We have excess nutrients coming in the form of nitrogen and phosphorous and that's affecting the Gulf of Mexico. There's an annual dead zone there. There are coral reefs that are suffering from mortality, near sewage pipes and inlets, in both Florida and it's been demonstrated in the Caribbean recently. And also, harmful algal blooms are thought to be increasing due to nutrient loading. So those are my three and I will turn it over then to our panelists to discuss their thoughts on these issues. So, who wants to start. Karen?

Karen Hansen: I'll just pick one because, as Kathryn alluded to, there are hundreds and hundreds of recommendations and I think that what people see as most critical probably depends a lot on perspective. But just from an overarching point of view, I would say probably the most critical issue facing the marine environment and the sort of aftermath of activity from these two comprehensive reports is the lack of public awareness of the crisis. There's not a lack of crisis, we definitely have a crisis in the oceans, and I think the real problem that everybody working in all of these areas faces is there's no political momentum to move forward fast enough on some of these issues. So, that's my overarching problem.

Walter Cruickshank: I'll add a couple just to do something different because I don't think anybody should repeat anybody else's [be]cause there are far too many crucial issues. But one I would [emphasize is] those decisions we make on land are very critical to what happens in the oceans. Kathryn, you mentioned, in terms of what's running off into the ocean from onshore, in terms of the decisions we make on coastal development and how that affects natural processes, and also demands on use of the seabed and the oceans are going to grow to the extent that people aren't allowed to do things on land any more, making offshore sites more attractive simply because you don't have neighbors necessarily right there being as vocal about the ability to build things or do things. And a lot of the drive to place things offshore is simply because you can't put them on shore any more.

Another issue, I would mention, again overarching, is the continued need to conduct research on the whole host of scientific and socioeconomic issues related to the oceans and coasts—really fundamental information for making decisions in the future.

9. Energy Policy Act of 2005, Pub. L. No. 109-58, 2005 H.R. 6, 42 U.S.C.A. §15801 (2005).

Diane Regas: Let me first say that the comments I'm going to make today aren't necessarily EPA's positions.

Before picking the top three issues facing the oceans, I think you have to ask the question, not so much what is the threat to the marine environment or the oceans, but what are the issues for the values and resources that we want to exist in the oceans? If you ask the question, what are the threats to the values and resources, then the answer depends on what resource you're thinking about. So, whether it's resource extraction or weather regulation that the oceans do, or the existence of coral reefs, and biodiversity, whether it's ocean transportation or security or for fisheries, then the answer to the question of what are the threat[s] you are worried about becomes very different. That said, I'll still pick three.

Of the three that I would pick, the first would be climate change; and there are some components to that that are interesting and haven't gotten as much attention. Key issues include significant uncertainty, loss of important habitat from sea level rise, temperature change and pH change. Of course, the lack of our specific understanding of what's going to happen is big. But sea level rise and the impact on wetlands, particularly coastal wetlands, is one of the issues that has potentially dramatic effects on living marine resources. Estuaries and coastal wetlands are [a] very, very important part of sustaining . . . important species including about 75% of commercial fish species spend some portion of their life in estuaries. As sea level rises and you get an "armored coast," as people try to protect themselves from sea level rise, there may well be a significant loss of habitat for those species to reproduce and live. Temperature change—obviously, both for weather regulation but also for the protection of species like coral reefs. I'm a diver so I always bring up coral reefs, [be]cause that's one thing I really value. Temperature change for coral reefs is already causing issues. We're seeing huge impacts on coral reefs—every coral reef in the world is affected by bleaching. There's a lot of uncertainty as exactly how that's happening, but I think the expectation is that, as temperature rise, we will see huge die-offs in coral reefs. Some scientists don't believe the coral reefs will survive the next hundred years, which is kind of an astonishing idea. And one issue that I rarely hear talked about is the acidification of the ocean from climate change. The pH of the ocean has already gone down from 8.2 to 8.1, and for all the lawyers in the room like me, I'll remind you that's a logarithmic scale, which means 8.0 to 7.0 is a factor of 10. It's already gone down . . . from 8.2 to 8.1, [and] is expected to go down by 2050 to about 7.8. That is a huge change. By that time, in 2050, if all goes as predicted, the range of pH in the oceans will not have existed at all in . . . pre-industrial times, so there's always been a range, but we'll be below the entire range and the oceans will be below whatever has existed. So I would identify climate change as the first major threat to ocean resources.

The second issue I would mention is land-based sources of pollution: coastal growth and agriculture. I think that the facts are very clear. Over the next 15 years, we expect 27 million additional people to move into the coastal areas. The population density in the United States, in the 48 continental states, is already at 275 people per square mile. We expect it to go up to 325 people per square mile. Those people, as we live here and I live in the coastal area, cause increases in impervious surfaces. Because of habitat loss, we cause excess nutrification in key estuaries, already 80 of about 150 bays

and estuaries in the United States show signs of overnutrification. So there's a huge issue there. There's already a significant loss of coastal wetlands—32,000 acres of coastal wetlands were lost between 1998 and 2004, that's not counting the 100 square miles of coastal wetlands that were lost due to hurricane Katrina.

And the third area I would point to is the unsustainable use of living resources, and I think you mentioned that, that about 25% of the world's species are overfished. I put estimates up to 50% additional of commercial species are on the brink of being overfished.

I do think, focusing though, on what are the resources and what are the threats to those resources are a very important part of the conversation, [be]cause there's this tendency to say, "well, what are you doing about this recommendation or that recommendation," and we are trying to keep our eyes on how all the pieces fit together. We're not going to have a single governance model for the oceans; therefore, it is key to understand what's happening with respect to the individual issues that are of concern. And it's going to continue to be a challenge for all of us but an important one to step up to.

Roger Rufe: Nothing left to say. I can almost say ditto to everything everyone else has said so far. Picking three is difficult, but I would agree with kind of the consensus of the group here. Global climate change sort of dwarfs everything else. I mean, you can make the argument that if we don't address that, nothing else really matters, and obviously, it's an issue that affects not just the oceans, but it certainly affects the oceans very dramatically as Diane has just laid out for us. But it's not an area of expertise for me or for my organization. I'll talk a little bit about overfishing because that was identified, at least in the Pew Commission report, as the single greatest threat to the health of the oceans. And in the level of fishing, the ability of large industrial fleets to go anywhere in the world to target fish that couldn't be targeted before, to go to depths that could never be reached before, to use equipment that is remarkably destructive—not just in terms of the amount of targeted fish it takes, but the bycatch that it takes. Other species not targeted, juvenile species, that haven't yet reached maturity, other resources in the ocean—marine mammals and turtles and other wildlife and the destruction of bottom habitat. They are now going . . . to . . . mountains in the ocean, mountains underwater that are remote, full of endemic species that only reside on that mountaintop, and we're destroying creatures that we don't yet even know about. So, that's, I think, the major threat that I think we need to address, pretty directly, if we're going to get a handle on managing our oceans, managing people's activities, so that we protect our oceans into the future.

And then I guess, I'd just like to mention Karen's point—a source of great frustration to me and to my organization, that prides itself on being advocates for the ocean and trying to reach a wide constituency, we are utterly failing at that. We are not doing a good job and I don't know . . . we're looking at new ways to do that but to try to reach the general public with this issue in the midst of all the other issues that are so high on everybody's agenda and high on everybody's plate is very difficult. There was a very positive *New York Times* editorial, just last week, we've had great coverage, media coverage, but the issues just do not resonate with the public. They are distant, they're far away, they're not immediate, and I frankly don't have an answer

to that, but it's one we need to fix if we're going to make any progress.

Kathryn Mengerink: Okay. So, . . . are the current government structures adequate to deal with the ocean's environmental regulatory needs? If you all don't want to comment on that, we can move forward and talk about some things in more detail.

Roger Rufe: Well, we can talk about, maybe, some solutions to that. I mean, I think we're all in agreement that that is a major problem. Our governance for the oceans has grown up over the years as an attack on individual calamities that occur. You know, there's an *Exxon Valdez* spill and so you pass an Ocean Pollution Act.¹⁰ There is a loss of a species so you pass a law to approach that. And it's never been really harmonized, . . . The National Oceanic Atmospheric Administration [(NOAA)] was one of the positive results of the last commission, the Stratton Commission, but it was never . . . it's never been placed in law. It's operating under a 30-year-old Executive Order. So the major ocean agency in the nation doesn't have proper legislative authority to operate, and the array of laws and the array of federal and state agencies, the array of congressional committees that all are tasked with addressing these issues, is just an unbelievable mess that needs to be addressed through reform in governance and reform in some of our laws.

Diane Regas: Yes, I would add that . . . and now I'll stay away from fishery issues, because I'm a complete neophyte, and I'm glad you're here to be the expert. But I do think that instead of just thinking about a new governance structure we have to think about what is it about the existing structures that we want to do better. If you start to think about the individual issues—and nonpoint source pollution is a good one. Nonpoint source pollution from coastal development and agriculture up into the middle of the country is a huge issue for oceans and estuaries . . . for estuaries and for the marine resources that rely on estuaries. But an ocean agency or particular agency or even regional collaboration is never going to address that whole issue. There's always going to be overlap in environmental issue[s] because, as John Muir famously said, "when we try to pick out anything by itself, we find it hitched to everything else in the Universe." The issues are always interlocked and to some extent the government structures are going to have to have overlaps, and so to me, part of the question is how do we get that to work better. And how do we coordinate and have better understanding on the part of those who are participating in government, whether working for government inside or participating in government in other ways. And there's a couple of examples that I think are positive of the kinds of things that could help.

One is there's a document called [*Eco-Logical*], the Ecological Approach to Developing Infrastructure Projects put out recently by the [U.S.] Department of Transportation, that signed on to . . . by eight other agencies. I signed it, others . . . [the U.S. Army] Corps of Engineers, others signed it. . . . It was really developed to look at an ecosystem-based approach to putting infrastructure into place. And that's an example of how . . . to think about some of the decision-making processes and how to take an ecological approach

within existing structures. Not within existing structures as they are today, but with improved competence on the part of agencies and departments to think ecologically in making some of those decisions that are going to be made. Those decisions are made at federal, at state, at local levels, and thinking about what are the competencies we need from the people who are participating in government at all those levels, is I think, really worth doing and it's something that we're working [toward].

Walter Cruickshank: And I would add something to Diane, and I also want to . . . repeat a caveat, I'm often speaking for myself, and not my agency. But to me while it's . . . government structures can be improved, it's less about the structure than it is about . . . the priorities that are placed within whatever structure is there. . . . If you have a decision to try and attack an issue, and you have competent and motivated leadership, you can get things done regardless of the government structure, and no matter what structure you have, if you don't have the right leadership, and the right management competencies running it, it's not going to work.

Karen Hansen: Just to pick up on some of that, I mean, for people who may not be as familiar with the Pew and U.S. Ocean Commissions reports, in the materials that I have prepared¹¹ there are some examples, but if you were to ask where do I find the law on "habitat conservation?" you'll find that there is "habitat law" housed in five or six different federal agencies just as a starting point. If you want to say, I want to look at "coastal development," you're going to begin with a law called "CZMA" (Coastal Zone Management Act), but you're going to find yourself going in a lot of different places. And so I think one of the things to understand about why there's been so many recommendations and critiques about the governance structure is that the big pieces of oceans policy and oceans law have been formulated in response to crises, in response to an event that motivated a particular part of oceans policy and the rest of it has come along with little pieces being handed to EPA, another piece going to NOAA, and so on. The commissions, when they talked about the governance structures and the legal frameworks, used words like "hodge-podge" and "Byzantine" to reflect the conclusion that there's so many laws and so many programs housed in hundreds of different places, and there is no overarching policy. This is illustrated by what happened with NOAA. NOAA was created 30 years ago, and it was always intended to be an independent, oceans-based version of [the National Aeronautics and Space Administration (NASA)]. The average American probably doesn't know what NOAA stands for and the average American certainly knows NASA.

To pick up on Diane's point about nonpoint source pollution in terms of what's really missing, I mean, the same problem that nonpoint source pollution is causing in the oceans, that's documented in the reports, is the same problem that's been documented under traditional environment programs like the Clean Water Act, so it's the same problem, different legal gaps. You know there are those who point to agricultural runoff and the unregulated runoff in our country and say, "if we could amend the Clean Water Act to regulate the sources in ways that are more affirmative than some of

10. 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001.

11. Available on the Internet at <http://www.elr.org> [to be completed or deleted].

the voluntary programs that are currently in place, we would sweep up the vast majority of unregulated water quality pollution in this country.” And the same argument could be made using a lot of the same data but different laws, which is why this issue is also identified as a big gap in oceans policy. So, if you read the reports at all, and you’re in the agricultural industry, you’ve got a target on your forehead. But that’s not different than, you know, the [total maximum daily loads (TMDLs)] debate and some of the other debates that have occurred under the Clean Water Act. I think, that the recommendations to give NOAA an organic statute to really reconcile and move these pieces around, those are huge challenges, even if everybody across the political spectrum was all on the same page. And so, I don’t know that we’re going to see any real dramatic pieces. I think there are going to be dozens and hundreds of incremental changes made and that’s where we’re going to see improvements. I think it’s going to be difficult to pull out a major statutory overhaul, at least in the short term.

Audience member: Is it okay to ask a question?

Kathryn Mengerink: Sure.

Audience member: There’s a big difference in my mind between lack of discretionary authority to take an action and lack of mandatory duty to take an action on the part of agencies. Several people have alluded to polluted runoff as an area where you actually may have a gap in legal authority, at least at the federal level, to regulate an important source of . . . most critical problems. But I’m curious to ask the panelists, how many of the issues that have been identified as critical are ones where the problem really is a lack of any authority, discretionary or otherwise, to take an action . . . a gap, a legal authority gap specifically, versus areas where better coordination and cooperation among agencies could actually be brought to bear to solve the problem? You just sort of ran into something that one agency has done to probably, I haven’t seen it, but look at existing legal authorities and consider how they might be better deployed. And I want to tell you why I’m asking this question. I recall when there was an effort made to give EPA cabinet level status through legislation. EPA is functioning in the absence of a mandate like that—also, that was an enormous swirling vortex of energy consumption that did result in legislation that might perhaps have been better devoted to focusing on specific legal authorities that were needed if there’s only a limited amount of energy out there. So, I guess I’m asking, you know, where are the real specific absences of legal authority to act, and what do you think about this idea . . . , rather than overarching legislation, to create organization out of chaos might not be a better use of those authorities?

Diane Regas: Well, I’ll comment from the experience of having lived at EPA during the time where there was an interest in . . . what did you call it . . . a swirling vortex? I was in that swirling vortex. And I do think that getting major environmental legislation passed, last decade and this decade, has been incredibly difficult and unusual to see it happen. I was very involved, as you were, not just in those two debates but in the Clean Water Act reauthorization debates, and there just are some very significant differences in point of view and political philosophy that make it very difficult to

pass very sweeping environmental legislation. And the EPA cabinet bill ended up with so many specifics, “well, you got to do this, and you got to do this, and you got to do this, this way, and you got to do that that way” and . . . every time a new piece got added it just got out heavier and heavier until it fell of its own weight. I don’t suppose that’s the official position but that’s what happened.

And the TMDLs—for those of you who may not know what those are, total maximum daily loads, they’re a pollution budget for every stream and water that’s impaired in the country (and we’ve done almost 20,000 of them now in the last . . . just over five years and have a continuing multiplying number to do) [and] those budgets lay out what nonpoint sources would have to do to meet basic water standards—and the question, I think, that is in front of us, historically speaking, is are the nonpoint sources going to do that? In some places they are and some places they aren’t. And so the question of whether you need legislation to target those issues, or whether improved implementation of what we’ve got is going to make the difference, I think, is yet to be seen. I think there’s certainly a big debate about whether and what kind of legislation would be needed and I suspect that there’s at least as many opinions about that as there are people in this room.

Karen Hansen: From a perspective of representing industry and land-based activities in the environmental area, that the U.S. Commission report begins with an economic analysis of the value of our oceans, and its huge. I mean, just the component that Diane was describing of how many people work and recreate and make a living within regional coastal watersheds, it’s 80% of our population, and that’s a statistic that is repeated worldwide, so that’s not unique to our country.

Some of the recommendations about legal structure and changes that are needed flow from looking at where the United States has fallen behind other parts of the world in developing certain industries. Aquaculture is a good example of this. We have laws in this country that address the aquaculture industry. There is shared jurisdiction with EPA and [the U.S.] Department of Agriculture (USDA). There are rules out there—there’s a federal law that predates these reports—so why is aquaculture in the oceans not developed as an industry in this country whereas there’s land-based catfish farms and some salmon farming. And one of the answers is that when you are an investor or a company and you want to develop an offshore use, you come to a firm like mine and say, how do we do it, how long is it going take, what’s it going to cost, what permits do we need? And the answer likely comes back, well, it’s a little unclear. You probably need something from EPA under the Rivers and Harbors Act, which was enacted in 1899.¹² You may need something from the Corps of Engineers if you’re going to obstruct navigation. You might need to go through [the National Environmental Policy Act]¹³ but it’s unclear, and maybe you need to go talk to Walter’s shop because they have jurisdiction over oil and gas and maybe not anything else (at least historically), but we should probably at least have a conversation with them. So, part of the legal gap issue is that if you want to do research in the oceans and access the

12. 33 U.S.C. §403.

13. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

sea floor, or the minerals beneath it, or living resources, it's not entirely clear how you get permission from the proper authorities to do that, and it has to do with lack of laws, unclear laws, and question about who owns what. There's a picture in my materials of jurisdictional lines and as you move offshore, who has jurisdiction is conflicting. This is in part because the various statutes use different terminology and definitions. So, legal clarity is a clear gap from the investment community perspective because they don't see the certainty that they need to actually go invest in activities in the oceans, and recently, [the U.S.] Congress actually has done something about that, at least with respect to non-oil and gas resources.

Kathryn Mengerink: So, maybe this would be a good time to [let] Walter, Diane, and Roger . . . talk a little bit about what they've been doing . . . in the recent couple of years, in terms of, you know, the Minerals Management Service and SIMOR Group and also the Joint Ocean Commission, so you all get a sense of the types of activities and the efforts that are underway to try to integrate and to organize what's going on in the ocean. Walter do you want to start . . . ?

Walter Cruickshank: Sure. . . . At the Minerals Management Service . . . , our authorities are fairly narrow and they have to do with energy and minerals on the OCS. Typically, oil and gas and other minerals, but more recently, renewable energy and the like. For those of you who are not familiar with the program, we have about 47 million acres of the OCS under lease right now for oil and gas, it produces about 30% of the oil and over 20% of the natural gas produced in this country. MMS oversees about 4,000 fixed facilities on the OCS and about 33,000 miles of pipeline, and it generates \$5 to \$8 billion a year in revenues for the treasury. I do want to comment briefly on the Commission's ocean policy report, it's pointed to the oil and gas program as something it called . . . "while institutionalized, and reasonably comprehensive management regime" and said it could be a "model for the management of a wide variety of offshore activities."

In essence, we have a statute for oil and gas in particular that really covers the gamut from cradle to grave of the sorts of things that need to be considered in making decisions, the sorts of people that need to be consulted with and worked with in moving forward. In that program right now, of course, what I'd like to point out, I'm talking about the Commission on Ocean Policy, they talked about a management regime that works well where it's allowed to work, but of course, for most of the OCS, the decisionmaking is outside of the statute and is done through appropriations riders. We are currently developing our next five-year program for the years 2007 to 2012. We just completed a comment period for the first of three proposed programs that are put out for review, and we are continuing to maintain our focus in the Central and Western Gulf of Mexico and in the North Slope of Alaska, but there's also some steps being taken based on dialogue around the country to look at some additional areas, moving a little farther east than the Gulf of Mexico. Virginia has indicated some interest in learning more about the resources off their coast, so we're including some of these areas in the environmental reviews that we're doing on a five-year program to develop more information to contribute to the dialogue. Another part of our program is not as well known We manage the non-energy minerals as

well, and we have cooperative agreements with 14 states for identifying sand resources for beach restoration and renourishment and barrier island restoration. It's been frequently used—Maryland, Virginia, Florida—and we expect it to be used more and more now in the Gulf of Mexico, as a lot of restoration work post-hurricane is done down there. But . . . for our newest programs, and perhaps of greatest interest to folks in the oceans arena, are the ones that have come out of the Energy Policy Act after 2005, and there's a couple that I would like to mention.

One Karen already talked about, which is our new authority over renewable energy and alternative uses of the OCS. This has been in response to the basic issue that a number of people have identified, that really, when it comes to the sea bed, the difference between offshore and onshore is that onshore you can go to any acre and there's somebody responsible for it. You can find out if it's a private owner or a particular state, local, or federal agency that has management responsibility, you know where to start, you know who has some decisionmaking authority there. Offshore you don't have that, no one, with the exception of marine sanctuaries, a couple of national parks, and ocean refuges. . . . You don't have those sorts of boundaries, if you will. No one has authority over particular acreage on the sea bed, but they do have authority over particular uses and in some cases . . . those are spelled out very specifically, in some cases they're fairly generic and were written before people really envisioned the sorts of activities that are going on [today]. So, as Karen said, when people want to try and do something, they're not always sure where to start. And the authority we got was to try and deal with one of those areas of concern, which is renewable energy offshore—wind energy, wave energy, current energy—where folks wanted to go out and do something but they really weren't quite sure who they needed to talk to and what the process was going to be. And the Energy Policy Act has given that authority to the Department of Interior, who delegated it down to the Minerals Management Service. And right now what we're trying to do is get a program in place. We put out an advanced notice of proposed rulemaking in late December and the comment period just closed on that.¹⁴ We really just asked a bunch of questions, raised issues, asked questions, didn't propose anything but wanted to get as much input as we could, grouped around a set of issues related to access to the sea bed and continental shelf, what should the mechanism be, what sort of rights would be conveyed, what environmental information should be required, what should the environmental management approach be, oversight of operational activities, payments for use of the sea bed and the resources, and the consultation and coordination mechanisms. And we received a lot of comments—some of them multivolume comments that we are working through with the idea of trying to put a straw man proposal on the street by the end of the year to get some more comments on how we should build a program. And what we're really interested in here is building a program that will allow us to do the sort of coordination, not just with other federal agencies, but with state agencies, local government, to really try and find a way to look at these sorts of issues more holistically than one has typically done when they just have authority over a single use and don't necessarily have to consider what other folks might be inter-

14. 70 Fed. Reg. 77345 (Dec. 30, 2005).

ested in doing. So I am sure a number of people here will have probably commented on what we put out before and will comment on the next round, but we're really looking for innovative ideas on how to structure a program that can work and try and take into account all the sorts of issues we're talking about today.

Another piece of that authority is one that we're trying to build up and build upon is a decisionmaking tool for all federal agencies and other folks who want to operate in the oceans, and that's to build something called the "Marine Cadastre" and that's the real estate map for offshore, if you will. There's a lot of folks that have mapping authorities for the various physical properties, whether it be water depth or currents or the geology or what have you, but this is more the real estate map. What's out there and where is it and who put it there. Anything from where boundaries have been drawn, like sanctuaries or essential fish habitat or critical habitats to actual sites that are used for things, whether it be hazardous material dump sites, military testing areas, proposed wind farms, pipelines, FCC cables, oil and gas leases, what have you. We're in the process of trying to gather that information. It's an interagency coordination challenge, if you will, to really understand what everybody has got and where it is and properly identify it. But the idea is, over time, to build a visual map that will allow a sort of overlay so you can see what's out there, what the concerns are, perhaps take a look and if you're interested in doing something offshore, see what the potential conflicts are, what areas seem to be less busy than others, if you will. So, that's something that will take a while to build but we're working with all the other various federal agencies that have information to try and put this together.

And then the final piece I would mention from the Energy Policy Act is the coastal impact assistance program, the billion-dollar program over four years focused on six states proximate to oil and gas production, to provide money for a variety of resources or uses. But most of it will be going to wetlands restoration and coastal conservation-type programs. So that's something else we're putting in place now as well. Now, I would just sort of mention, those are sort of the bigger picture items of things we're working on now. We're also actively engaged in the activities under SIMOR and under the Joint Subcommittee on Ocean Science and Technology and participating in all of those programs. Again, our overall goal with our sister agencies that are active in the oceans—[U.S.] Geological Survey, Fish and Wildlife Service, [National] Park Service—is really to try and develop a partnership to try and further the effectiveness of managing ocean resources.

Diane Regas: I think Walter was right. We're going from focusing what one department or agency is doing to a little broader [focus]. . . . I was asked to talk a little bit about the interagency structures and actions on implementation of the Ocean Action Plan, so I'm not going to talk about the EPA actions, as much as I'd like to talk about our new ship and all kinds of other things. And I'm going to violate a rule that I usually have when I speak, which is, I am going to use acronyms. And I'm going to talk about bureaucratic structure on the thought that folks here might actually want to know that, rather than just what we're doing, because who's doing it is important. But I don't usually stop to describe the bureau-

crat structure because I start to see people going like this [yawns], but I will do that today.

The Ocean Action Plan, as you all know, was released in December of 2004. It created a new structure for interagency coordination. (It also identified a number of actions that each individual agency would take.) The interagency coordination is focused on those actions, that require more than one agency's participation, so we don't sit around and talk about, "Okay, EPA, what have you done?," and ask other individual agencies, "what have you done?" We talk about those actions that really require more than one department or agency. There's the Committee on Ocean Policy, the COP, that is the cabinet level group. That is the actual . . . the secretaries of the various departments and agencies who are involved, and . . . cabinet secretaries meeting together is a major feat. Maybe we'll have another meeting of that. That group, the COP really chartered and approved the work that the other groups proposed. And so, we're off and running based on that approval. To support the Committee on Ocean Policy, there's something called the Interagency on Ocean Science and Resource Management Integration, affectionately known as The Aqua Box, also known as the ICOSRMI. (It's Aqua Box because on one of the briefing packages, the box that had the minutes was aqua colored.) That is made up of the assistant administrators from agencies, in some cases deputy secretaries, assistant secretaries, so it's usually . . . presidentially appointed, Senate confirmed members, they meet every other month. They talk about issues related to the Ocean Action Plan and they're chaired by the Council on Environmental Quality (CEQ) and the Office of Science and Technology Policy, which are both White House offices. It gets very good attendance and has really worked through a number of the issues that you may have seen or heard about, issues like legislation, that affect more than one agency, etc.

The Aqua Box, in turn, is supported by two subcommittees, one of which is a policy group, that's the SIMOR Group, Subcommittee on Integrated Management of Ocean Resources. That group is co-chaired by four of us. I'm one of the co-chairs. Mary Glackin at NOAA is another co-chair, Chris Kearney, Department of Interior, is a co-chair, and Gerhard Kuska at CEQ is the fourth co-chair. That group meets every month. . . . And we have a work plan, which I'll talk a little bit about what we're doing. Also supporting Aqua Box is a science group the JSOST, as it's known, Joint Subcommittee on Ocean Science and Technology, and the JSOST is co-chaired by NOAA along with [the National Science Foundation and the Office of Science and Technology Policy]. So, that has three co-chairs. The JSOST is actually hosting a meeting this week in Denver. One of their primary charges is to develop a research plan and implementation strategy for that research priority plan. It's really nationwide, it's not just federal.

Let me talk a little bit about what's SIMOR (The Subcommittee on Integrated Management of Ocean Resources) has been doing and give you a couple of examples. There's a work plan that lays out our current priorities, and what we're thinking about that has been posted on CEQ's ocean website. So that if you're interested in . . . seeing the working details, you can go there.

I've got a copy of the Ocean Commission report on my desk. But if I come into work in the morning, I want to know, what do I do today, I can't turn to page 157 and say, "okay,

let's do that today." The work plan is really down into those weeds. SIMOR asked, given the resources that we've got, given what we've heard about the priorities, given what we can figure out how to do, what is it we're actually going to do on interagency basis. And that information is public at this point, it's a living document, [and] we might take on additional projects or decide certain projects are not workable, so it's not something that went to the *Federal Register* and goes through a whole comment process to be finalized. We are interacting with folks on it and making presentations at various conferences so that we can have a chance to hear folks' thinking.

A couple of the actions that the work plan focuses on, one is, advancing regional collaborations. Regional collaborations are a high priority for EPA as well as for a number of other agencies, in really looking at, on a regional basis, . . . what is the federal family doing and how can we support [it], particularly groups of states who want to come together to look at ocean and coastal issues. The Gulf Alliance, which is . . . for the first time, the five Gulf states have gotten together in an alliance, essentially started pre-Katrina, they were supposed to finish their work plan in about October. That got put on hold while folks tried to respond to and recover from the hurricanes from last year. But earlier this month or last month they released their work plan and there's a federal plan that goes with it that says, these state agencies have gotten together and they said, this is what they want to do, they have a set of five key priorities. And then there's a complimentary set of federal actions based on the federal agencies asking "okay, what do you want us to do differently?" And we worked with the states to make project level commitments, and there's a plan and it's in the midst of being implemented, not just for the states to get together on a regional collaborative effort on their priorities for the Gulf, but also for the [federal government] to make sure that our work is driven, in part, by the priorities of the states. So, one of SIMOR's responsibilities is supporting those kinds of regional collaborations. We hope to run the traps for the Gulf Coast Alliance, provide them support. There's interest in other parts of the country for doing similar sorts of things and I don't know whether that will come to fruition. From our perspective, there's already a good collaboration in the Chesapeake Bay, there's already a good collaboration in the Great Lakes, which has been a priority from EPA's perspective. Puget Sound, the New England states, and even the mid-Atlantic have all, to my knowledge, had meetings. Also, Alaska, for some of the outer islands, has had a similar kind of meeting. It's not an interstate collaboration, but in this case, they have brought together the federal agencies to say, How can we help drive the agendas of these federal agencies so it makes sense from the perspective of protecting that particular resource?

Another area of fairly intensive work for SIMOR has been to think about the science/management interface. In its most simplistic terms, science is figuring out what's going on with the science, the management is figuring out what to do, and maybe the two ought to talk to each other. But managers need to tell the scientists what we need so that we can make better decisions. And the scientists need to tell the managers, "what's the science so that managers can make better decisions?" So, we've been working on trying to make some incremental improvements in how that system works. And as part of the JSOST effort to come up with the

research priorities plan, we put together a nationwide task team of state and federal managers from different walks of life—they might have been in state water quality, a federal wildlife refugee manager, a few others—to really give input into the scientific process of setting priorities, and saying as managers—these are people who have got to make decisions every day; "what . . . should be the priorities from our perspective?" "What are the things that are really pressing for us?" And that group has delivered recommendations to the JSOST, and we hope they'll continue to be involved as that set of priorities go forward. So, it's really an explicit effort to make sure that the folks who need to make decisions are part of the process of helping to identify what research gets done. Another area that we've focused on on the science/management interface is the Ocean Action Plan, [which] called for design of a water-quality monitoring network and gave about a year for that to happen. There's a group called the . . . ACWI, Advisory Committee on Water Information, that was charged with developing this network. This exciting design lays out how you would go about having a much better understanding on the water quality issues from the delivery of loads to the coast, to what's going on in the estuaries, to what's going on offshore. The question in front of us now is, how can we . . . or can we implement the design that the scientists and others came up with? About 80 people from all interested stakeholders, participated in developing that design, ACWI voted on it and approved it, [and] so that also is a public document if you're interested.

And [the] last thing I'll mention is that we're working on something called an ecosystem technical qualification. The idea is that people like me and people like Walter probably ought to have some basic background in ecosystem-based management if we're going to move toward federal agencies thinking more in an ecosystem context. And so the first step is to define, what do we mean by that? If we want our senior leaders to have that kind of experience and understanding, what do [we] mean by that? So, . . . we're starting a project to define an ecosystem technical qualification. It's not something that's been done before, so it will probably take a little while to figure out how to do it and how to get it approved. But those are the kinds of things we're working on. The work plan gets down into the guts of the everyday work for federal departments and agencies and so it's not sort of the headline-grabbing stuff. But there's a fair amount going on in an interagency basis to try to move some of the ideas forward at the very fundamental levels that were in both of the ocean reports. There's a fair amount of other things that I haven't and I won't talk about. There's an interagency dredging team, there's a committee on marine transportation, there's a number of other things that are happening to try . . . to make the agencies and departments work better together.

Roger Rufe: Okay. My turn. I'm going to talk about the Joint Ocean Commission Initiative, not the Ocean Conservancy. But let me give some background on that first and then I'll tell you what we've been doing and what the future, I think, looks like. I was [a] member of the Pew Oceans Commission, and you may know as the name implies it was funded by the Pew Charitable Trust, made up of . . . it's almost described as Noah's ark of commissions, two of everything—two sitting governors, two environmentalists, you

know, two scientists, two fishermen. But it was a pretty . . . diverse group and a pretty effective group that worked together with good staff support. Jessica Landman is here, who provided part of that for us. And we issued a report. Almost in parallel with that, slightly behind us, was the U.S. Commission on Ocean Policy, which was a creature of the Oceans Act,¹⁵ which was passed in the latter part of the [William J.] Clinton Administration, but it was purposefully set up in the legislation so that the appointment of that Commission would take place in the next administration, not knowing who that would be. And of course, it turned out to be President Bush and immediately folks started thinking, well, you've got this left wing funded Commission on one side and you've got a President Bush Commission, which is heavily represented by industry on the other side. There's no way these two are going to come out with anything near similar conclusions. And the amazing [thing] . . . to many, but not to me (because I thought the conclusions were so obvious), was that the conclusions were remarkably the same. And the recommendations were remarkably the same. And that was a very good news story I think, which as I mentioned a moment ago, was picked up by a lot of the media. And then shortly after that, the Oceans Action Plan was announced, that Diane and Walter have alluded to, that the president put out. Once the Ocean Action Plan was out there, there was a concern by the members of the two commissions that the two commission reports would simply drift away and not be responded to and there needed to be some way to keep some momentum behind the recommendations. So, Admiral Watkins, who headed the U.S. Commission, and Leon Panetta, who headed the Pew Commission, came together and decided to put a task force together to keep the two commissions moving forward in lock step to try to keep them alive and keep pressure on decisionmakers to move forward on the recommendations of the two commissions. There is a task force, now made up of 10 commissioners. I'm one of those, . . . the Joint Ocean Commission Initiative, that's tasked to do that. And I think we're doing pretty well. I think the good news of that is that it takes kind of an advocacy for these recommendations, beyond just an organization like mine, The Ocean Conservancy, that's going to do it because that's what we do for a living. And it embraces and keeps alive people [that] would have arguably more broad credibility than we have—people like Jim Watkins and Leon Panetta that can go on the Hill and can meet with members and can speak publicly and keep this thing moving forward, and I think they've been very engaged in that and pretty effective.

One thing we did as a one-year anniversary of the two commission reports, excuse me, of the President's Ocean Action Plan, was to put out a report card, which some of you may have seen.¹⁶ It got some press, both Jim Watkins and Leon Panetta were at a press event at the Press Club to release this report, and the Joint Ocean Commission Initiative has focused on just a handful of major areas of the two reports that they feel are, first, most opportunistic to move ahead on in the near future and ones that are arguably the most important to make progress on. And so the report card was sort of built around those baskets of areas that the two

commissions agreed to work collectively on. So, I'll just run down that, for you, very quickly to tell you what the report card showed. Before I do that, it was not a report card on the Administration, it wasn't a report card on the Congress, it was a report card on "progress made" because there's plenty of blame or credit to be shared across this whole thing.

But the grades were not that good. On national ocean governance reform, the grade given was a D+. Despite the Commission on Ocean Policy being initiated by the president, there was a sense that activity toward moving governance reform at the national level was not moving at a pace that it ought to. Despite some legislation introduced into Congress, there wasn't a lot of progress being made. And too, I think, Diane made the point of trying to attack some of these issues in too large a way, you know, trying to get your arms around too big a basket of the problems. I think that's been part of the problem on the Hill. There were two pieces of legislation for this, one in the House and one in the Senate in the last Congress and in this Congress. Oceans-21¹⁷ in the House, which was the House Oceans Caucus Bill, and then the [Barbara] Boxer (D-Cal.) bill in the Senate,¹⁸ both of which were arguably very comprehensive, very visionary, but weren't going to go anywhere. And so I think, to Diane's point, you know, if you're going to make progress you have to be a little more focused on what you can achieve because once it gets that big, too many people get involved and you're never going to move anything. So, that's the D+.

Regional and state ocean governance reform has gotten . . .

Audience member: We appreciate the "Plus."

Roger Rufe: . . . Plus, yeah, we talked about it being a kind of nice sign of encouragement.

Regional and state ocean governance reform got a B-. I think that was the best grade, as I recall. Yeah, that was the best one. And that's because a number of the things that Diane mentioned are pretty positive at the regional level. Interestingly enough, to show you this is not a partisan issue, the states, where the most progress is being made, are states where there's a Republican governor in charge—California, Massachusetts, [and] Florida are making pretty good progress—and it is a place where we think that by activities . . . bubbling up from the grassroots and the state level it could drive, hopefully, some progress at the national level.

International leadership got an F. And that was primarily due to the great frustration that we have not been able to accede to the Convention on Law of the Sea,¹⁹ despite the fact, that if you poll the Senate today, you'd probably get 98 senators who would say, "Yes." It's just a mind-boggling, unbelievable . . . We thought once Jesse Helms (R-N.C.) left we'd get it through, but it just hasn't moved, and it ought to move, because it does rob us of our international leadership when every other nation in the world has signed on to it.

Research, science, and education got a D. There's a strong feeling that we ought to be doubling the . . . ocean research budget in the government and increasing some research, sci-

15. Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644 (2000).

16. JOINT OCEAN COMMISSION INITIATIVE, U.S. OCEAN POLICY REPORT CARD (2006), available at http://www.jointoceancommission.org/press/press/release0203_assets/ReportCard%200206.pdf.

17. Oceans Conservation, Education, and National Strategy for the 21st Century Act, H.R. 2939, 109th Cong. (2005).

18. National Oceans Protection Act of 2005, S. 1224, 109th Cong. (2005).

19. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. No. A/CONF.62/122, reprinted in 21 I.L.M. 1261 (1982).

ence, and education. Both of those are fundamental to improving our understanding of the oceans and have not gotten the kind of support that we think they need to get. Funding for any kind of program outside of war in Iraq is pretty tough to get money for, [other than] our responding to natural disasters, so that's just where we are. Nevertheless, there ought to be more money going to oceans, we believe. . . . By the way, I'll add . . . another piece related to that was just new funding for oceans policies and programs in general. Aside from the research and education budget, this is really funding for NOAA . . . and the basic services they provide. And instead of increasing their budget, they're going in the wrong direction. So, we're really very much supportive of a \$4.5 billion budget for NOAA this year, and it's about a half billion shy of that right now, and needs to move up, at least to that level. That will still put it at about 25%, I think, of what NASA [will] get, to make the comparison that Karen made.

And then, finally, one of my favorites, fisheries management reform. That's actually doing reasonably well. We gave that a C+, acknowledging the fact that the Administration has a pretty good bill that they sent up. [Sen.] Ted Stevens (R-Alaska) has a pretty good bill.²⁰ Both need to be improved. . . . Both commission's reports strongly supported that we needed more science, more adherence to science, in deciding fisheries catch levels, and more adherence to those levels once they're set. And both of these bills, we feel, can be strengthened in that area. Nevertheless, they're pretty good bills and could have gone in the wrong direction. There are some troublesome bills in the House, particularly one by Richard Pombo (R-Cal.) that does go in the wrong direction.²¹ So, it's a mixed bag. But we feel with Stevens kind of leading the charge, he's the guy who's name is on the current piece of legislation, he's a pretty strong horse to ride on this issue and despite the fact that he's not our friend on a lot of environmental issues, on fisheries, he's generally, pretty decent.

So, those are the areas that the Joint Commission Initiative decided to issue a report card on, and I think, it, in one sense, has been pretty beneficial because shortly thereafter we got a letter from a number of members of the Senate asking for the Joint Commission Initiative to give them a list of the priorities for action by the Congress and needed legislation for them to move on to advance the two commission reports. And it was a bipartisan letter—about eight or 10, I think, Senators signed it. . . . It was a good signal from the Senate that they really do want to do something here, they want to hear from the commissions, directly, and we're in the process now of developing those recommendations. It should have them to the Senate by early next month. Another good sign is, the Senate Commerce Committee, as they work their way through the Magnuson-Stevens [Fisheries Conservation and Management Act] reauthorization . . . this year, have indicated that they very much want to have the support and the endorsement of the Joint Ocean Commission Initiative. They feel like it's important for them to be able to say that their bill has met our standard, our gold

standard. And we're hopeful that they'll make the improvements we think that need to be made . . . so that we can give them that endorsement.

Kathryn Mengerink: Okay. Thank you all. I think that I'll stick a couple of questions in, and one of the things that I think is of interest, especially to folks who don't spend their days thinking about oceans, necessarily, is to understand first of all, . . . how [is] ocean law and policy similar to environmental, classical environmental law policy. I think we've talked about this quite a bit in terms of nonpoint source pollution and it's a problem on land as well as it's a problem for the oceans. And also as part of that, it would be good to hear from you all on what the common goals and objectives are. I mean, are there things that we all can agree on in terms of industry, government, NGOs [nongovernmental organizations], . . . on how we should be acting or what goals and objectives we have that we all agree upon. And I'd like to start with Karen, to give her an opportunity, especially to comment on this from a private practice perspective.

Karen Hansen: Sure. We've talked a lot about the governance issues. I think there are similarities as well as differences between oceans law and environmental law. Let me start with some of the differences. Environmental law is, I think, is a well-understood concept, at a minimum, a reference to all of the major federal statutes that govern the control of pollution into various media—the air, the water, the ground—and it's segmented in the sense that it's divided into media that way, but the common theme in environmental law is that it all has to do with what land-based activities in our countries can emit materials in some form to the environment and in placing regulatory controls on that.

Oceans law and policy is very sector based. And so you have the Magnuson-Stevens Act that deals with fisheries and doesn't deal with pollution issues or water quality issues per se. You have the Clean Water Act and the controls that it places on point sources and the management programs that it has for nonpoint sources, which may or may not be effective in controlling pollution to many water bodies including ocean and coastal water bodies. So, it's a very sector-based approach and oceans law lawyers and practitioners are well-versed in their specialty areas, whether it's fisheries or aquaculture or marine mammal protection, but there's not an integrated bar like there is with environmental law. And I think one of the directions that the commission reports recommended (and you see this . . . internationally as well because many countries have also grown up with these sector-based approaches to oceans law and policy) is how do we take what's there and begin to look at it in more of an umbrella way as one body of law that's going to help us manage on an ecosystems basis. So, what is oceans law? Well, it's a lot of different things. People traditionally think of admiralty and marine law, and I think one of the challenges that ELI is trying to help all of us with is how do you bridge the laws that we're all familiar with on the environmental law side with some of these programs that we may all be less familiar with but are critical to this watery resource called the ocean. One way of illustrating these differences: we all know what the coast looks like, what the surface of the water at the beach looks like, but a lot of what we're talking about here is what goes on below the surface that's not visible. That connection—between what we see and experience and

20. Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2005, S. 2012, 109th Cong. (2005). *See also* Magnuson-Stevens Fishery Conservation and Management Amendments Act of 2006, H.R. 5051, 109th Cong. (2006).

21. American Fisheries Management and Marine Life Enhancement Act, H.R. 5018, 109th Cong. (2006).

the problems that we don't see—is still being built for the oceans. Some of the similarities we've touched on; many of the major ocean programs were developed in response to crises, real or perceived, just as *Silent Spring*, I think, is widely recognized as the genesis for a lot of environmental laws.²² So, there are overlaps and differences, but I think oceans laws and policies are just much more segmented than environmental laws.

Diane Regas: Okay. I would respectfully challenge a little bit of that framing because I don't think there is a universal body of environmental law that applies if you want to put a refinery or even a house on land. You have to deal with local laws, you have to deal with state laws, and in some cases, like when I recently built a dock on my property, I had to deal with federal laws as well. So, it's not that uncommon on land to have a number of different laws that apply to different components of your activity, and of course, eco-activity might only be regulated by one environmental law but oftentimes activities are regulated by different environmental laws. And I think the same is true in the ocean. The Clean Water Act has been regulating discharges into the ocean since 1972 when oil platforms got [national pollutant discharge elimination system] permits. . . . We've been regulating discharges from vessels . . . and there are Clean Air Act rules that apply to vessels. So there's lots of things that apply within the current environmental structure. And in some ways, to me, the patchwork issue that you're raising is something that cuts across all environmental law policy, and perhaps it's because you have to draw a line somewhere to be able to wrestle with the issue. Perhaps it's because some of us were reactive to a particular crisis. I don't think that all the environmental laws were enacted just in response to crises. I do think that there's a lot less understanding how the laws apply. Now, I keep encountering people who don't know the Clean Water Act applies to aqua-culture in the EEZ [exclusive economic zone] but it does, and there's even the regulation, laying out what the technologies are supposed to be. I do think there are differences, I'm not saying that there aren't. In the oceans you don't have local government, you don't have visible boundaries. I think, at a very more fundamental way, I think Walter referred to this earlier, you don't have the stakeholders . . . local people who live right next to whatever you're going to do. And I think that has pros and cons. If you don't get the NIMBY [not in my backyard] kind of concerns, you also don't have the sort of community-based decisionmaking that has become a very important part of environmental law. So . . . I think there are differences. The international components are different obviously, different flagged vessels, and very few vessels are American-flagged vessels, so there's always international laws that apply. And there's, of course, a number of different protocols international agreements that apply to what folks are doing in the ocean. So there are important differences between the laws on land and in the ocean. But it's not quite as much a contrast where everything's pretty straightforward on land with a unified body of law and everything's really patchwork in the oceans. There's a lot of overlap from different jurisdictions and laws that apply to different aspects of activities in all fields of environmental law.

Kathryn Mengerink: Okay, okay. A question for all of you is that, are there goals and objectives where we can all come together as a community and agree on, or are there things that . . . everybody agrees on and we just haven't implemented a certain law, or is there still enough conflict around certain topics that we can't come together as, you know, industry and government and NGOs? My guess is that there's a lot that we agree on and . . . for some reason, we're not getting there, maybe we're starting to get there now, but . . .

Roger Rufe: Just for me, I'll say that, the Joint Commission Initiative is made up of a variety of people: industry, we've got representative Paul Kelly from the drilling industry who is one of the commissioners; you've got an environmentalist; you've got a scientist, Jane Lubchenco, I see her picture right out there. And so you've got a variety of, I think, representatives of fishermen. So all the stakeholders are pretty well represented on the task force of the 10 commissioners. And we found a great degree of harmony on the areas that we're trying to . . . that I mentioned earlier, that fill out the report card, that we feel that there's not much daylight at all between any of us on what reforms ought to take place. And you know, both commission reports were supported by their respective commission members; there were no minority reports. So, I do think it does reflect the two commission reports, at least, represent a pretty good consensus among all the stakeholders—I think there's a lot of opportunity there.

Kathryn Mengerink: And is it just a matter of timing then? We just haven't gotten there yet, in terms of implementation?

Roger Rufe: I think timing is part of it, I think Karen's issue is an important one. You know, Congress moves to the beat of the drum of their constituents and their constituents aren't beating this drum right now, and until we do that, that's our job, all collectively. Our job is to get the Republican to engage; unless we do, there is probably going to be less enthusiasm going forward. You know, Congress moves great when, you know One of the issues we took on and we never got to in our commission report was, should we have a Department of the Oceans? And the general consensus was, "man, trying to reorganize government like that is impossible, we'll never do that." And how long did it take to create the behemoth (. . . is that the right word?) of the Department of Homeland Security? Like a New York minute, because we had this great catastrophe called 9/11. That's the way the public responds. They respond to the catastrophe of the minute and unfortunately, our catastrophe, in many ways, is just as dramatic, but it's small, it's out there, it . . . doesn't have the NIMBY quality to it, and it's hard to get the stakeholders rallied around it, so I think that's the source of it not moving as rapidly as we would like.

Kathryn Mengerink: Is there agreement on that?

Walter Cruickshank: Yeah. I think I would just add though, I think that's very true, on the global perspective. The larger the issue you're looking at, the more consensus there is about the sorts of things that need to happen. As you become more narrowly focused, I think consensus starts to break down because the closer you get to a particular issue, a particular project, the more likely you are to gore somebody's ox. And the consensus breaks down. I think that

22. RACHEL CARSON, *SILENT SPRING* (1962).

when you talk about general goals, about having better governance, having better decisionmaking processes, having better information for decisions, there's no doubt there's a consensus, but once you start to make decisions, the . . . consensus goes away.

Roger Rufe: Zoning the ocean is really going to drive the future, and I think Walter's map is going to be helpful to see what's being used now, and where it's being used. But unlike the land, the oceans are held in trust for all of us. There are really no individual, private ownership rights there, so it's a different animal, and we have to figure out how we're going to manage that for the benefit for all of us, humans as well as, the creatures that live in the ocean for the benefit of the future that we all want to have. And ocean zoning is going to be part of that, whatever you call it. We have to figure out how we de-conflict these competing uses in the future, and it's going to be a tough, tough thing to do but Walter is exactly right. That's where the rubber meets the road and that's where you're going to have the problems, but it's one we're going to have to address at some point.

[Nods and agreements from the audience and panel]

Roger Rufe: And that's why . . . I disagree a little bit with the argument that you can take these disparate groups of government agencies, bring them together in some kind of a joint committee, and they'll all sing "Kumbaya" . . .

[Laughter]

. . . Unless you have somebody in charge, and somebody to make a decision, who is tasked with making that decision, decisions don't get made, and that's certainly a problem in government. I was in the Coast Guard for many years and one of the things we did was drug law enforcement, and the big solution to that was going to be: We'll have a drug czar, we'll appoint this guy to drug czar, he'll bring together [the Drug Enforcement Agency] and the Coast Guard and [the Federal Bureau of Investigations] and all the agencies working on this issue and we'll solve the issue. Well, guess what, if you've got somebody with a title like that who has no control over the agencies [and] has no budget authority, it's not any better than if you had nothing at all. So I'm a little bit skeptical and jaundiced in that view. I think you've got to have somebody. That's why I advocate, actually, a very strong NOAA with a clear mandate, clear authority to be the decisionmaker on how we manage our oceans in the future. And I think if you leave it to the hodge-podge—is that the word?—that Byzantine system we have now, and hoping that these disparate agencies will come together in the committees and subcommittees, I just have to be skeptical. I've worked in those things when I was in government and I tried as hard as I could, and I think everybody that does that tries as hard as they can, but without a decisionmaker it doesn't get done.

Karen Hansen: I think from the perspective of the regulated community, people in industry who look at the commission reports, as a citizen, and even in their role within their organization, whether it's a university or a chemical company or a pharmaceutical, I think people look at the report and it absolutely makes common sense. It's not difficult

to read the reports and conclude that our oceans are in dire straights. And from that perspective, people look at the reports and say, "that's all great, I hope everything that's been recommended here happens and Congress gets on top of this and the White House pushes it through." And there's a level of consensus on that broad agenda that has been pointed out here. But to illustrate my point about the segmentation, you asked, "did industry have a position on the Ocean Commission reports," and beyond that sort of high level "makes a lot of sense, really good work has been done, etc.," you have to begin to break it down into how is a particular industry going to be affected, and that's where the discussion begins to turn [to] reflect the piecemeal legal framework that's in place. So, if I'm a port authority, there's a lot in the commission reports that can impact, good and bad, the way that I'm going to operate and construct my port over time. Do I have anything in common with a wind energy producer? It is difficult to discern that without digging into the substance of the report more deeply. And so I think one of the challenges is that there are aspects of the report where you can build consensus across industries to provide the kind of political support that Roger has been referring to, and that's, I think, a challenge for the people who care about the work that has been done.

On another level, getting to Walter's point about the devil is in the details. In response to the advance notice of proposed rulemaking for the new authority that MMS has for offshore alternative energy and alternative uses development, there's already a wide range of opinion if you look at just the industry comments to the rule, depending on who it is and what new or expanded use of OCS the industry has in question. You've already got differences of opinion reflected in those comments about how MMS should establish access. Whether the MMS should be proactive in designating areas for use or merely responsive to proposals. What about paying the federal government some sort of royalty or fee for the use of the ocean? How encumbered do you make the permitting process at the outset, while new uses are perhaps still in the exploratory or the research and development phase? Many commenters noted that if MMS overburdens the new access program with a lot of process and fees, the development of alternative energy uses on the OCS is not going to ever get off the ground. The wind industry comments pointed out the differences between how the economics of their industry work in capturing wind energy in the oceans versus traditional oil and gas, and they were very strong in saying to MMS, "don't treat us the same," because the economics of these two industries are vastly different. So, if you think of the ocean floor as real estate, as Walter's group is starting to do, and you're going to map it out, you've got shipping lanes, you've got oil and gas drilling platforms, you've got telecommunications cables laid, you've got fisheries, and so on. There's already a lot of potential for use conflict underneath the surface of the water that we don't see when we go to the beach or go out on a cruise. But it's there, and I think one of the things that both reports tried to anticipate is, as we look to expanding our access to and sustainable use of those resources, we've got to be smart about how we provide authorizations and deal with conflicts.

In sum, it's difficult to pull out of these very comprehensive reports a single industry position. And once you begin to break down the discussion and recommendations in the reports along the lines of what the real interest is, there's not

necessarily a lot of conflict, but there's not necessarily a lot of commonality either.

Kathryn Mengerink: Great. Well, I think that with the remaining few minutes I'll turn it over to the audience to ask any questions that they might have.

Audience member: I still have a [difficult time connecting], for example, how [the seminar] began, talking about threats that we face and the dire straights of our fisheries and global climate change, conflicts over offshore drilling, and then the subsequent discussion about . . . well, government reform and the various committees and commissions working together and so forth. And I really heard very little about how do you actually address any one of those problems. I mean, take overfishing, which may be a lot simpler than global climate change. You have marine fisheries commissions that are largely comprised of representatives of fishing industries that have historically been opposed to a lot of limits on fisheries. We still have dramatic declines in certain fisheries that are left unaddressed. Where you have an issue as clear or appears to be as clear as the declines of fisheries, how do you propose to address even that, let alone global climate change or the problems of integrating sustainable land use with its impacts on estuaries and the oceans generally?

Karen Hansen: One of the things that comes out of both reports is how fisheries decisions are made and really enforcing the science in those decisions. One point of view is to develop aquaculture in our country to provide an alternative to overfishing, so we can still supply the fish needed for consumption. There's a lot that government can do. And you're right. I think one of the frustrations of the regulated community is a lot of what Diane, in particular, was describing as very intragovernment—intergovernment activity. If industry is interested in being part of the debate on one or more issues, where can it plug in? While I think the government is doing a lot of important things among the federal agencies to try to work together better, those efforts are not especially visible or immediately of impact outside of the agencies that are doing the work.

On fisheries, Unilever, many years ago, started a sustainable fishery certification program because it wanted, for business reasons, to have sustainable fisheries for the species that it produces for food consumption. And it started a program, it's a third-party certified program, that's, I think, based out of the [United Kingdom]. About a month ago, not quite a month ago, WalMart signed on to start developing its own program to use only certified fisheries by a future date they selected. If you're involved in a food production business, then, you can conclude you have no role in the management of fisheries per se, but still explore what other ways are available to contribute to replenishment of species and the reversal of overfishing of species to the extent that that's possible. But I hear your frustration. I think it's difficult to point to progress, which probably is part of what led to the report card and the grades that were articulated on the report card.

Kathryn Mengerink: And I'd just like to weigh in briefly and say that, one of the reasons that this [seminar's focus] has been [broad], instead of targeted at specific issues, [is

because it is being used] as a starting point for this seminar series. And so we actually are going to have two seminars on fisheries specifically to address those issues, and that's one reason why we haven't targeted any specific issue within this conversation. We've tried to keep it "big picture," but hopefully as we have these conversations over the next several months, we can focus specifically on fisheries issues or how energy development is going to take place on the OCS or what the conflicts are and what the shipping industry is going [to] face and how that affects the environment.

Diane Regas: Just out of curiosity—and a really good question is one that probably doesn't get asked often enough in enough places, you know—how do the solutions fit the problems? And I guess I would go back to what I tried to articulate in the beginning, but in some cases the issue is what is the resource that we want to have or use in the ocean? By "have" I don't mean "own," I mean, "have it exist." And . . . climate change is a good example. There's a big national debate, there's been worldwide debate, about how to address climate change. The effects on the oceans are . . . one of the reasons that you would come to the table and say, we need to address climate change at this speed or that speed, with this set of institutions or that set of institutions." And similarly, land-based sources of pollution are . . . there are near-field and far-field effects. When you think about a farmer in Iowa—and I've talked to a lot of them, you know—the question of who gets to decide how much excess fertilizer can run off a person's property. Is it the property owner because it's his property? After all, he needs to make a living as a farmer. Is it the state because it is their waters? Is it the USDA because they are the experts in working with agriculture? Is it EPA because we're the ones who understand what can go into the water and still be safe and healthy? Is it NOAA because it all goes into the estuaries and NOAA ought to be the ones deciding what's okay for the oceans and estuaries? So any one of these issues brings all the complexity of all the environmental policy that's come before us. And so to me, the only way to address it is to look at which piece of it can we work on, what are the things that can and should happen to address this piece, and if your point is that there's not enough happening to fully solve these issues, then I think all of us would have to agree.

Audience member: Okay. Following up on . . . [the] inter-environmental structure that you described and all the activity that is going on, what does that structure do [with respect to climate change]?

Diane Regas: That structure is not the structure that has the mandate to address climate change. There's a whole other inter-agency structure on climate change, which I'm not an expert in. But I can tell you that they're in the process of developing, I think, 21 different reports on the potential impacts and adaptations in climate change that I think that are due to be all done and peer reviewed and everything by the end of 2007. It's just as I described an inter-agency structure on . . . oceans. And acknowledge that individual agencies have projects, programs. There's a whole similar talk that someone could give about what's happening on climate change . . .

Walter Cruickshank: On the question of overfishing, as the example that you raised a while ago, assuming that we

could all agree that the folks that make the management decisions regarding fishing are making mistakes, we know they've been exempted from conflict of interest rules—you know, they can vote on their own fisheries if they want to vote, and they're fishermen, right? And so there are simple fixes that are consistent with existing government laws and structures. But I guess this sort of interagency effort is what's needed to figure those connections out, according to the administration, because as Roger points out, we don't have the public willpower to push legislation from the other end, right now. I mean, none of the bills that are pending to reauthorize the Magnuson-Stevens [Act] fix conflict of interest in the fisheries management councils. We're not going to get there, if it doesn't appear, this time around, and it has to do with this fundamental lack of will power. Even if we know what the problem is, we know what the solution is, . . . how do you get there? This is what we don't know.

Kathryn Mengerink: Any more questions?

Audience member: [I was] going to ask [about] the international component. There was some discussion of the person who wish[es] to do things in the ocean [in] different jurisdictions, the ocean, federal stage, territorial sea, beyond the [EEZ]. But how much would any of you want to comment on what needs to be done with other countries and what the [United States] can do to promote, for example, the [international] fisheries through international government structures.

Roger Rufe: Well, . . . I'd just give you a quick answer. It's not a complete answer by any means, but certainly, you know, if we're going to address the issue protecting the oceans, it has to be a worldwide effort, it's not just the [United States]. In the case of the Pew Oceans Commission, we decided to kind of duck that issue because it was too tough an issue to take on, and we felt like we had plenty of, not only opportunity, but cause to attack . . . try to attack, the issue of how we manage our own EEZ first, for two reasons. One is it's the largest EEZ in the world, it's an area that's 20% larger than our land, it's a pretty big area of the ocean to

take on, and it has many problems of its own. And if we can solve those, . . . we've done an awful lot towards beginning to solve the issues that are plaguing our oceans. And secondly, then we can assert some kind of an international leadership position, which we can't very well now, not having signed on to the international treaty that governs the oceans or our own behavior. You know, how can you say . . . how can you talk to third-world nations about their overfishing problem when they have people that are using very destructive practices to feed a population that is starving, . . . when we, who are the most affluent country in the world, aren't much better in terms of the fishing practices that we employ? So, it's a big problem and it's too long and it's not . . . the opportunity to give the answer, but that's the reason we kind of duck it in the Pew Commission and we thought we had plenty to do just addressing our own issues.

Karen Hansen: You're absolutely right, the fish move around and they don't necessarily stay in our jurisdictional waters. The problem of overfishing is a worldwide problem, it's not limited to the United States. There are international legal structures in place to try to regulate some of that. They're clearly not working in a lot of areas. All you have to do is see a couple of slides of deep sea bed trolling to understand Diane's point about the devastation of coral reefs along with a lot of other living resources, in addition to the fish species that's being targeted with those practices. And I would echo Roger's point that he's made a couple times today, that when the Stratton Commission did its work back in the 60s, our goal was to be an international leader in oceans education research and resource development. And that was sort of the banner objective of the programs that they put in place at that time. Without the United States acceding to the Law of the Sea, some countries see our credibility and leadership eroding. The United States does a lot, as a country, and we're doing a lot in the fisheries internationally. I don't mean to say we don't have credibility, but it would go a long way, I think, in exhibiting real leadership and influence if we officially were part of the Law of the Sea.

Kathryn Mengerink: So, I'd like to thank our speakers and our panelists and thank you all for coming.