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February 11, 2010

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

Via Electronic Submission:

<http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans/interim-framework/submit>

Re: CEQ, “Interim Framework for Effective Coastal and Marine Spatial Planning”
(Dec. 9, 2009): Comments of California Coastkeeper Alliance

Dear Chair Sutley and Task Force Members:

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers spanning the coast from the Oregon border to San Diego, I welcome the opportunity to submit these comments on the “Interim Framework for Effective Coastal and Marine Spatial Planning” (CMSP Framework). CCKA was honored to provide oral testimony to the Task Force as an invited expert witness at the September 17th hearing; CCKA followed up with October 9th comments (attached) on the Task Force’s Interim Report. As we noted in those comments, we applaud the President and the Task Force for bringing coastal and marine issues to the forefront of national policymaking. We particularly welcome the proposed National Ocean Policy vision articulated in the Interim Report of “healthy and resilient, safe and productive, and understood and treasured” oceans and coasts. With this vision, the Task Force’s Interim Report generally moves us towards enhanced ecosystem health.¹

We commend the Task Force for its interest in improving oversight of the use of our coast and ocean. We believe that the Task Force’s focus on ensuring sound coastal and marine planning could be enhanced through several key steps. Most significant is the need to ensure that the CMSP Framework grounds itself in the Interim Report’s overarching commitment to “healthy and resilient, safe and productive, and understood and treasured” oceans and coasts. Environmental protection should be the Framework’s top priority; balancing of multiple competing human uses should occur consistent with that overarching goal. In brief, we recommend that the proposed CMSP Framework:

- articulate clearly an overarching goal of ensuring resilient, healthy, biodiverse ecosystems, with human uses planned for and managed consistent with that goal;
- evaluate the need for new laws, enforcement mechanisms and especially funding structures, at all levels of government, to implement the proposed CMSP;
- assess the potential for CMSP to create entitlements/property rights in approved uses; and
- discuss how the public and state/local decisionmakers can meaningfully be involved in the proposed national process.

¹ CCKA identified in its (attached) October 9th comments several areas of needed improvement to ensure that the Task Force achieves its Policy vision; a number of these comments apply to the CMSP Framework as well.

We describe these recommendations below in more detail. We also emphasize the importance of evaluating the benefits and challenges of CMSP development and implementation through carefully targeted, smaller-scale pilot projects around the country. We conclude by reiterating the recommendation in our October 9th comments with regard to the importance of explicitly incorporating the public trust doctrine into the overall ocean protection process.

THE CMSP FRAMEWORK SHOULD ARTICULATE CLEARLY AN OVERARCHING GOAL OF ENSURING RESILIENT, HEALTHY, BIODIVERSE ECOSYSTEMS, WITH HUMAN USES PLANNED FOR AND MANAGED CONSISTENT WITH THAT GOAL.

The nation's expanding population, its increasing use of the natural environment, climate change, and numerous other stressors are escalating pressure on the nation's sensitive marine and coastal ecosystems, their fish and wildlife inhabitants, and the human communities that depend upon them. For example, a June 2009 Biological Opinion by NOAA Fisheries found that excessive federal water withdrawals from California's Bay-Delta Estuary are jeopardizing the continued existence of killer whales, which rely on impacted Chinook salmon runs for food. Significant damage to the health and biodiversity of California's estuarine, coastal and marine ecosystems will very likely occur without swift, effective intervention.

The CMSP Framework is proposed as a potential solution to these and a range of other coastal and marine concerns. However, unlike the Interim Report, the Framework fails to clearly identify and prioritize the speedy reversal of marine and coastal ecosystem degradation as the top priority problem to be addressed by the proposed CMSP process. Similar to the proposed National Ocean Policy, the CMSP Framework should ground itself a vision and purpose of "healthy and resilient, safe and productive, and understood and treasured" oceans and coasts, and unambiguously commit to using Task Force talent and resources to ensuring resilient, healthy ecosystems as the Framework's top priority.

Without such a clearly stated, priority commitment to the environment, there is some danger that the CMSP could move the nation backward, not forward, in setting policy that ensures the good health of the coast and ocean for both current and future uses. As now written, the CMSP Framework appears to focus more on providing predictability for economic investments in light of competing uses and activities, rather than on ensuring environmental protection. For example, the Framework introduces "competing uses" of the coast and ocean as "commercial, recreational, cultural, energy, scientific, *conservation*, and homeland and national security activities." (Framework, p. 2, emphasis added.) In a similar example, only one conservation-related outcome ("Biodiversity Maintenance") is mentioned among 13 other competing ocean "uses" in the Framework (Framework, p. 3).

As the mounting impacts associated with climate change and other regional, national and global stressors are increasingly demonstrating, the continued health of the environment on which we all depend must be first and foremost; human uses must be balanced out consistent with achieving that overarching goal. Relegating conservation far down on the list of competing "use" considerations, particularly in the context of a fast-track, top-down, national process, significantly minimizes the chance that the environment's needs will be met, to the detriment of all uses over time.

Accordingly, we urge the Task Force to: clearly adopt the National Ocean Policy’s vision of “healthy and resilient, safe and productive, and understood and treasured” oceans and coasts; specifically articulate the achievement and maintenance of resilient, healthy, biodiverse oceans and coasts as the top priority problem to be addressed by any CMSP effort; and commit to evaluating human uses of the oceans and coasts consistent with that overarching goal.

We also ask that the Task Force re-examine their choice of precautionary criteria to further ensure that this overarching goal of ecosystem protection is met. The Framework adopts Rio Declaration’s precautionary “approach,” which limits preventative measures until there are “threats of serious or irreversible damage.” A more protective option is the Wingspread Declaration’s precautionary “principle,” which states that:

[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties.²

Not only does the Wingspread Declaration focus its attention on preventing damage to the health of human beings and the environment, it also makes important observations on the burden of proof and the need for open processes,³ observations that would significantly benefit any future application of CMSP. Burden of proof in particular can be an enormously powerful environmental protection tool. Clearly placing the burden of proof on the user or the project proponent to demonstrate the suitability of the human use, as noted in the Wingspread Declaration, could be an additional, important deterrent to further marine degradation and a critical check in the overall planning system.

THE CMSP FRAMEWORK SHOULD EVALUATE THE NEED FOR NEW LAWS, ENFORCEMENT MECHANISMS AND FUNDING STRUCTURES AT ALL LEVELS OF GOVERNMENT TO ENSURE EFFECTIVE IMPLEMENTATION OF NEW CMSP INITIATIVES.

As noted in our October 9th comments, the Task Force’s Interim Report appropriately identifies an unmet “need for high-level direction and policy guidance from a *clearly designated and identifiable authority*” (Interim Report, p. 6, emphasis added). A lack of coordination among the myriad agencies with ocean and coastal responsibilities has regularly been identified as one of the major stumbling blocks in implementing effective policies that protect the health of these invaluable ecosystems. However, as we noted in our earlier comments, the Interim Report proposes regulation by committee instead, through the new National Ocean Council. It then proposes Co-Chairs for the Council, rather than a single head to lead the charge (Interim Report, pp. 18-19). This structure fails to meet the Report’s own call for a “clearly designated and identifiable authority” in charge of ocean and coastal management. While coordination is important, so too is decisionmaking and enforcement authority, with one entity clearly responsible for accountability purposes.

² Wingspread Statement on the Precautionary Principle, Jan. 1998. See, e.g., Tom Lougheed, “Understanding the Role of Science in Regulation,” *Environmental Health Perspectives*, vol. 117, no. 3, (March 2009).

³ The need for open, readily accessible processes is discussed in more detail below.

The CMSP Framework similarly prioritizes coordination over accountability by proposing nine regional planning bodies made up of federal, state and tribal authorities, holding an undefined “appropriate level of responsibility within their respective governing body to make decisions and commitments.” (Framework, p. 12.) It then charges these bodies, without a clear source of funding or assessment of the scope and efficacy of their actual legal authorities, with essentially all implementation and enforcement tasks for the Framework (Framework, p. 20). There are no funded mandates or monetary incentives for state and local agencies who would be implementing the CMSP to adjust their authorities as needed to ensure effective implementation and enforcement. Instead, the CMSP states that agencies “*should consider* whether to seek regulatory or legislative changes to fully implement” the regional CMSP where legal constraints exist (*id.*, emphasis added). The Framework does call for the National Ocean Council to initially “oversee efforts to identify gaps and conflicts in *Federal* authorities, and recommend potential steps to reconcile them,” but there are no proposed reviews of state and local authorities, which will be the linchpin of successful implementation and enforcement of any future CMSP initiatives (Framework, p. 28, emphasis added).

California provides a current example of the reasons that such considerations are critical. The California Ocean Protection Council is a groundbreaking model of cooperative, inter-agency action on behalf of the coast and ocean. The Council members are the top leaders in the state on these issues, and are clearly committed to the Council’s success. California’s Governor has strongly supported the Council, and helped ensure its success with funding even in the face of serious state shortfalls. Yet, the Council’s ability to make meaningful, systemic, sustainable changes on the ground (and in the water) for the benefit of the coast and ocean has been hobbled by a lack of direct authority on the ground to make swift changes. The Council’s successes have in large part resulted instead from targeted use of bond and other funding to achieve specified goals. Without further funding, and/or without legislative changes that significantly enhance the Council’s direct line authority on the ground, it is unclear how California would take on the important implementation and enforcement tasks that would be associated with CMSP without again spreading those tasks among myriad state agencies.

We strongly recommend that the Task Force carefully consider such examples of existing constraints, and then make specific recommendations on how to address them in advance of commencing the planning process. In particular, regional, state and local agencies cannot be expected to move around their funding to ensure implementation. Specifically, the Framework correctly recognizes the “reality of the limited availability of new resources”; but rather than ensure new funding, it instead proposes that agencies “re-evaluate how resources are allocated in light of their statutory and regulatory mandates” in order to develop and implement CMSP (Framework, p. 31). Environmental agencies are operating with bare-bones and still-dwindling budgets; moving around virtually nonexistent resources to fund a significant new task will be extremely difficult. California in particular is in a severe funding crisis, and marine and coastal issues have traditionally been under-funded even when the economy has been sound. Without a clear, ongoing source of adequate federal funding, proposed planning efforts are unlikely to be implemented as desired. We urge the Task Force to consider options for needed, long-term, sustainable funding for state and local implementation and enforcement efforts, and make specific recommendation in that regard in the final Framework.

THE FRAMEWORK SHOULD DISCUSS THE POTENTIAL FOR CMSP TO CREATE POTENTIAL ENTITLEMENTS OR PROPERTY RIGHTS IN APPROVED COASTAL AND MARINE USES.

The CMSP Framework presciently notes in footnote 1 that “Nothing in this document is intended to create private rights of action or other enforceable individual legal rights.” In fact, similar, terrestrial planning challenges and laws increasingly favor private ownership over the public’s rights and interests. The fact that the Task Force felt it necessary to include this qualifier immediately raises the question of whether it is in fact an issue.

The history of planning and zoning on land is instructive in this regard. For example, land ownership was in large part an anathema to Native Americans; land and water were generally viewed as resources to be shared, rather than held to the exclusion of others. Subsequent application of European property laws turned that paradigm on its head. Expanding the nation’s modern terrestrial planning concepts to the ocean could result in similar investment-backed and other expectations of rights (property and otherwise) being created, with uncertain consequences. We recommend that the Task Force further evaluate this issue in the final Framework, to ensure that all stakeholders are well-informed and can participate thoughtfully in the review process with this important consideration in mind.

THE FRAMEWORK MUST PROVIDE MEANINGFUL OPPORTUNITIES FOR PUBLIC AND STATE/LOCAL DECISIONMAKER INVOLVEMENT.

The Framework proposes a five-year schedule for all regional entities to complete and certify the Initial CMS Plans nationwide. While public and stakeholder engagement is cited as important, the actual process recommended, in our experience, will not allow for the level of public – or state and local decisionmaker – involvement that is essential to the success of any CMSP effort. The proposed regional approach also raises concerns about how affected local communities can participate in a meaningful way.

California has had intimate experience over the last several years with the issue of public involvement in one type of ocean planning: the development of a network of marine protected areas pursuant to the state’s Marine Life Protection Act (MLPA). CCKA, an active participant in the MLPA process since its inception, has found that a locally focused approach, with extensive public outreach and transparency, is essential to a sustainable, supportable outcome; it is also critical to successful implementation and enforcement of the resulting marine protected area network. With this commitment to needed public outreach, the MLPA process alone will necessarily take longer to complete statewide than the entire CMSP process is proposed to take nationwide. The California Fish and Game Commission received a public briefing on February 3rd from NOAA staff on the CMSP; state Commissioner Richard Rogers cautioned at the briefing that MLPA has taught California that “process is critical,” that engaging the stakeholders in a meaningful way is essential, and that the CMSP’s “aggressive timeline” may work against its proponents as a result. Given that certifying CMP Plans nationwide to cover all uses will be an exponentially more difficult and costly task than California’s MLPA, we urge the Task Force to more thoroughly evaluate the need for appropriate public involvement in the process, and to budget time and funds accordingly.⁴

⁴ See <http://www.dfg.ca.gov/mlpa/> for more information on the implementation of California’s MLPA process.

This recommendation applies as well to allowing for the full involvement of state and local agencies and lawmakers. If state and local governments are expected to be the implementers of this effort, they must be closely involved in its development, and an active part of the CMSP decisionmaking process.

RECOMMENDATIONS FOR NEXT STEPS

In summary, CCKA respectfully requests the Task Force to take the following recommended actions:

- Clearly define the vision of CMSP as supporting “healthy and resilient, safe and productive, and understood and treasured” oceans and coasts.
- Specifically articulate the top priority problem to be addressed by any CMSP effort as being the achievement and maintenance of healthy, resilient, biodiverse oceans and coasts; commit to evaluating human uses of the oceans and coasts consistent with that priority goal.
- Reconsider the selection of precautionary methods to achieve this vision and goal, and adopt a “burden of proof” requirement that will ensure that sustainable uses are prioritized.
- Identify clear, sustainable, long-term funding sources to ensure that the regional, state and local entities that are called upon to implement and enforce planning efforts have the financial ability to do so.
- More thoroughly assess the issue raised in footnote 1 regarding the potential for CMSP to create investment-based or other expectations (including property rights), which could run counter to an overarching goal of ecosystem health, biodiversity and resilience.
- Ensure that sufficient funding, staff and time are built into to the CMSP process to allow for adequate public input and buy-in; incorporate specific roles for state and local decisionmakers in the CMSP development and adoption process.
- Develop and implement, as appropriate, of a range of smaller pilot efforts in narrowly-defined areas around the country to test CMSP assessments and assumptions. The data from these efforts could then be used to refine a path to CMSP that best achieves the above-described vision and priority goal.
- Adopt and implement the public trust doctrine in federal waters as a complement to planning efforts.

As to the last point, our attached October 9th comments describe in more detail the potentially significant and complementary coastal and ocean protection tools that the federal government could develop through expanded use of the public trust doctrine. A 2009 analysis by Duke University’s Nicholas School of the Environment argues that the clear establishment of a public trust doctrine for federal waters would be an effective solution to potential ocean management conflicts, one that protects fish and ecosystems.⁵ The researchers determined that a

⁵ Turnipseed, Mary *et al.*, “Oceans: Legal Bedrock for Rebuilding America's Ocean Ecosystems,” *Science*, Vol. 324, No. 5924, pp. 183 – 184 (April 10, 2009), available at <http://www.sciencemag.org/cgi/content/full/sci:324/5924/183> (AAAS Members and subscribers).

clear public trust doctrine for U.S. federal waters would provide a “critical foundation” and “framework” for agency coordination efforts on ocean policy, and would be a “policy backstop for [participating] agencies to enforce the public trust against infringing parties.” The researchers suggested at least three ways to clearly delineate trust responsibilities in ocean matters: an Executive Order directing all federal ocean agencies to apply their resources toward cooperatively and sustainably managing the ocean public trust, judicial interpretation consistent with state courts, and/or new legislation unambiguously writing the doctrine into federal oceans law.

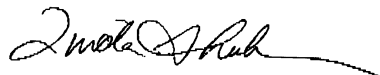
Given the significance of the public trust doctrine in ensuring stewardship over, and accountability for, the use of public trust resources, we again urge the Task Force to specifically investigate and make recommendations on the methods that the federal government should take to implement the public trust doctrine in federal waters to protect and enhance the health of the nation’s oceans. The Task Force should also address how federal agencies will work with the states to ensure coordinated implementation of the doctrine within states’ jurisdictions.

* * *

As CCKA noted in our October 9th comments, the Task Force’s Interim Report correctly observes that “[t]he importance of ocean, coastal and Great Lakes ecosystems cannot be overstated; simply put, we need them to survive.” The Task Force has a unique opportunity under President Obama’s leadership to develop and implement new strategies to ensure the health of our coastal and marine ecosystems, and to support the people who depend on them. We respectfully request that the Task Force consider the above recommendations as it develops its final Framework.

Thank you for the opportunity to provide these comments. If you have any questions, please do not hesitate to contact us.

Best regards,



Linda Sheehan
Executive Director

lsheehan@cacoastkeeper.org

Attachment: Comments of CCKA to Ocean Policy Task Force (Oct. 9, 2009)

APPENDIX:

**OCTOBER 9, 2009 CCKA COMMENTS TO CEQ:
“INTERIM REPORT OF THE INTERAGENCY
OCEAN POLICY TASK FORCE”**



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October 12, 2009

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

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

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

Dear Chair Sutley and Task Force Members:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related to the need for a clear governance structure with unambiguous lines of implementation and enforcement authority is the need for transparent accountability procedures. The President’s June 2009 memorandum¹ instituting this effort appropriately calls on the Task Force to develop recommendations for a national policy that “ensur[es] accountability for all of our actions affecting ocean, coastal and Great Lakes resources.” The Interim Report only fleetingly touches on the need for a “reporting and accountability mechanism” in an interagency planning framework (page 17). It does mention that the Co-Chairs of the National Ocean Council would be responsible for “accountability” – but *only* in the context of “document preparation” (page 20). The Interim Report is otherwise starkly silent on the issue of accountability. Without a thorough discussion on the process for “ensuring accountability,” the Interim Report fails to implement the President’s vision and direction.

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

¹ The White House, Memorandum for the Heads of Executive Departments and Agencies, “National Policy for the Oceans, Our Coasts, and the Great Lakes” (June 12, 2009), *available at*: http://www.whitehouse.gov/assets/documents/2009ocean_mem_rel.pdf.

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

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

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

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

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

² http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf; see also Memorandum from Will Travis and Tim Eichenberg, BCDC to BCDC Commissioners, “Using the Public Trust Doctrine to Adapt to Climate Change in San Francisco Bay” (Feb. 27, 2009), available at: http://www.bcdc.ca.gov/meetings/commission/2009/03-05_Public_Trust_Climate.pdf.

³ Institutes of Justinian 2.1.1.

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

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

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

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

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

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

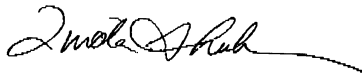
The federal government also has a potentially significant role to play in the use of the public trust doctrine. An April 2009 analysis by Duke University’s Nicholas School of the Environment argues that the clear establishment of a public trust doctrine for federal waters would be an effective solution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

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

* * *

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

Best regards,



Linda Sheehan, Executive Director

attachment

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

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

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

ATTACHMENT

OCEAN POLICY TASK FORCE REMARKS

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San Francisco, CA

September 17, 2009

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

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

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

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

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

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

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

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

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

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

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