

Ruminations on Marine Spatial Planning

(Also Known As Ocean Zoning)

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Introduction¹

Marine spatial planning (MSP) (also known as ocean zoning) is a hot new topic whose time has come, it is alleged,² and the Obama Administration's Interagency Ocean Policy Task Force (IOPTF) is off and running with the idea. In the IOPTF's September 10, 2009 Interim Report, one of the nine priority objectives "that our Nation should pursue" to implement a new ocean policy is briefly described as follows:

Coastal and Marine Spatial Planning: Implement comprehensive, integrated, ecosystem-based coastal and marine spatial planning and management in the United States...

The main focus of the Task Force, it is stated, is now on developing a framework for coastal and marine spatial planning. A June 12, 2009, Memorandum from President Obama called for a recommended framework that is "a comprehensive, integrated, ecosystem-based approach that addresses conservation, economic activity, user conflict, an sustainable use of ocean, coastal and Great Lakes resources, including customary international law as reflected in the 1982 United Nations Convention on Law of the Sea."³ The Interim Report mentions that the Task Force reviewed the 2004 Report of the U.S. Oceans Commission on Ocean Policy as a source document for its interim conclusions. However, that 522-page Report does not contain a single reference to the concept of MSP, although the Commissioners urged much more effective coordination among government regulators, better use of science, and a much greater commitment to gathering more refined and complete environmental information for decision-making.

The Task Force's Interim Report is about process, over-arching policy and guiding principles for future federal decision-making. It urges that action is now needed to reconstitute, or re-energize, efforts to address the Nation's ocean needs and problems, a recurrent theme ever since the prolific administrative and legislative implementation during the 1970s of various recommendations by the 1969 Stratton Commission. It appears that the IOPTF has already decided that MSP will, in fact, successfully address these needs and problems, at least in part. But what is MSP and does the concept have a probable likelihood of being implemented in a new piece of ocean policy legislation during the Obama Administration?

¹ Bud Walsh was hired in 1972 as Staff Counsel to the Subcommittee on Oceanography of the U.S. Senate Committee on Commerce, Science and Transportation and later became General Counsel to the Committee. The Chairman of the Committee was Senator Warren G. Magnuson (D.--Wash.). Bud also helped organize and was counsel to the Senate's National Ocean Policy Study and was a Congressional staff observer on the United States U.N. Law of the Sea Delegation and to various meetings of the International Maritime Organization concerning vessel and tanker safety. He was tasked by Senator Magnuson to implement the recommendations of the 1969 Stratton Commission on Marine Science, Engineering and Resources. From 1972-1977, he was responsible for handling all oceans, coastal and maritime legislation under the jurisdiction of the Committee, about 10-15 new laws each year. In 1978, President Jimmy Carter nominated Bud to be the Deputy Administrator of the National Oceanic and Atmospheric Administration, a position he held until July 1981. His practice emphasizes ocean resource issues.

² Charles Ehler, "Conclusions: Benefits, lessons learned, and future challenges of marine spatial planning," 32 Marine Policy 840-843 (2008). Mr. Ehler cites Victor Hugo and Winston Churchill in asserting that, inevitably, the "time has [now] come" for marine spatial planning.

³ Ratification of the 1982 United Nations Convention on Law of the Sea, despite uniform support among all affected interests, from the military to environmentalists, remains elusive. There is a constant rumor that the 67 votes necessary for the Senate to give advice and consent to the Convention are getting near. However, no vote has ever been scheduled. The fact that this centerpiece of U.S. Oceans Policy for almost four decades cannot win political approval may give insight as to whether legislation to create a comprehensive federal marine spatial planning program would pass the Congress.

Marine Spatial Planning: What the Heck is That?

A good way to test an argument, a theme, or an approach to an issue is to ask one's regular acquaintances what they think of it. If MSP is mentioned, nearly the same response is elicited each time—a very quizzical facial expression and the query: what the heck is that? In a democracy, such a common reaction to a proposed new federal program that may impact everyone who lives within a few miles of the coast (and most of us do) should give federal policy-makers pause before going ahead with MSP. Although Senator Jay Rockefeller (D.--West. Va.), Chairman of the Senate Commerce Committee, recently expressed support for the concept, some may say that the views of the Senator from a land-locked state may not truly reflect the overall view of the American electorate.

The State of Massachusetts has adopted what is referred to as the first ocean zoning law in the country, called the Oceans Act of 2008. But this single-state law pales when compared to a federal “comprehensive, integrated, ecosystem-based approach” that addresses each and every major human activity in the navigable waters of the marine coastal zone of the United States out to 200 nautical miles.⁴ Are the nation's ocean needs and problems so dire that a new federal statute is required that would give a single federal agency, or group of agencies, the power to allocate ocean spaces along the coastal margin among various users, perhaps even where a coastal state has its own ideas for allocation of the same space? How big a change in current federal policy would thereby result for near-shore and offshore ocean users? Is there an ocean zoning czar in our future?⁵

Support for MSP as a way to solve the nation's ocean-related demands and conflicts and, in theory, to provide more effective federal management has built to a crescendo among ocean policy academics and environmental activists. An article, authored by several academic and environmental supporters of the concept, appeared in the August 4, 2006 edition of *Science* (Vol. 313, pp. 617-618) and the lead stated as follows:

Problems in ocean resource management derive from governance, not science. Ocean zoning would replace mismatched and fragmented approaches with integrated regulatory domains.

Too many laws (over 140 federal ocean-related statutes, creating separate “regimes”) and too many agencies (at least 20) are cited as a source of the problem, because decision-making is ad hoc and no one has clear authority to resolve conflicts across sectors or to deal with cumulative effects. The solution offered by the authors: comprehensive ocean zoning. But the authors, after diagnosing the disease, do not go the next step and define just how their theory can be converted into actual practice so as to provide the cure. For example, among many practical questions, what federal agency would have the final say and how would a federal ocean zoning program deal with a recalcitrant state? The authors do

⁴ The term “navigable waters” is very important in American constitutional law for it defines the extent of federal regulatory authority to advance national interests in marine waters over the interests of the individual states within state boundaries, e.g. typically out to three nautical miles. U.S. Const., Art.1, Sec. 8, cl. 3. “The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States...For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.” *United States v. Rands*, 389 U.S. 121 (1967).

⁵ The practice of naming White House staff as policy “czars” dates back many years, although recently, Members of Congress have called for greater responsiveness of these “czars” to Congress. Tony Romm, “Collins to Introduce Czar Amendment Again,” *The Hill*, Nov. 5, 2009. Senator Susan Collins (R.-Me) has sought legislation to require White Policy “czars” to regularly report to Congress and to testify at hearings, if requested.

admit that instituting MSP “will present a formidable challenge.” Other academics clearly suggest that “zoning requires enabling legislation.”⁶ It is notable that none of the authors are experienced in actually enacting legislation or administering complex federal programs. One gets the idea that they arrived at their MSP epiphany as the solution because, at least in their pessimistic view, nothing else seems to have succeeded very well.

But support for the concept is also found among several coastal states, notably Massachusetts, which already has a program, and Oregon, Washington and California, which sent a joint letter on July 23, 2009 endorsing the concept. The West Coast States also endorsed legislation that “strengthens and reauthorizes the Coastal Zone Management Act”⁷ but did not state that MSP should be added to that particular statute, which is based on the “carrot-of-federal money” approach rather than a top-down regulatory governance model.

A Manual developed by the U.N. Intergovernmental Oceanographic Commission defines marine spatial planning as a public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process. The characteristics of effective MSP are said to be the following: ecosystem-based, integrated, place- or area-based, adaptive, strategic and anticipatory, and participatory.⁸ Most of those who have written about MSP refer to the same themes and a similar conceptual definition.

A report funded by the National Oceanic and Atmospheric Administration (NOAA) entitled Ocean Zoning for the Gulf of Maine offered the following explanation:

*Ocean zoning refers to a scheme for dividing a marine area into districts and within those districts regulating uses to achieve specified purposes. It has two components. One, a map that depicts the zones and two, a set of regulations or standards applicable to each type of zone created. For some zones the regulations might be very protective of marine resources or habitat by allowing a very few compatible uses, and excluding any use that would undermine the goal of resource protection. In other zones where protection is less of a priority, more intensive uses might be allowed based, presumably, on the suitability of the areas for such uses. The term and concept are borrowed from the regulation of land use, where zoning is the most common land use control.*⁹

No doubt the IOPTF will come up with its own definition of MSP. Presumably, the Task Force’s analysis of the issue will review existing federal laws and programs that address these same issues as well as the efforts of the Office of Management and Budget to coordinate these programs across agency lines. Presumably, any recommended new ocean policy will not simply be in the form of one or more Executive Orders, which do not have the force of law, but will be a recommendation for new legislation.

⁶ Eagle, et al., “Ocean Zoning and Spatial Access Privileges: Rewriting the Tragedy of the Regulated Ocean,” 17 N.Y.U. Environ. L.J. 646-668 (2008), at 665.

⁷ 33 U.S.C. §§ 1451-1466.

⁸ Marine Spatial Planning: A Step-by-Step Approach toward Ecosystem-based Management, Intergovernmental Oceanographic Commission, Manual and Guides No. 53, ICAM Dossier No. 6 (May 2009). This report is very thoughtfully done and quite readable.

⁹ Prepared for the Gulf of Maine Council for the Marine Environment by Courtney and Wiggin, January 2003.

Old Wine; New Bottle?

It is an understatement to say that creating a statute-based new comprehensive federal MSP program will be “a formidable challenge.” In such matters, the past is usually prologue when judging the “real-politik” possibility of such legislation. Just as Henry Kissinger was adept at analyzing what actually could be done on the world stage, the leaders of the Obama Administration should be careful to assess what actually is politically possible with respect to their vision of MSP. The notion of ocean zoning raises fundamental questions about government planning and regulation (more government; less private sector discretion?); about the state/federal balance of power in the coastal zone (will the feds override state interests?); about existing legislative directives as to ocean issues (no longer relevant?); about the relative power and authority between and among federal agencies (imagine the Defense Department versus the Environmental Protection Agency); about which federal official should be in charge or have the final say (will the President or Vice President have time?); and about the respective jurisdictions of the various authorizing committees in the U.S. Senate and House of Representatives (what committees gain jurisdiction over the new ocean zoning program?). Recent history tells us that addressing each of these issues generates considerable political pulling and shoving, often without resolution or resolution only through compromise.

None of the academic literature on MSP has revisited the failure in the 1970s to create the National Land Use Policy Act, a piece of legislation remarkably similar in concept, and rationale, to MSP and ocean zoning. The sponsor of that Act was a formidable legislator, Senator Henry M. Jackson (D.—Wash.), the author of the National Environmental Policy Act.¹⁰ Senator Jackson came to many of the same conclusions as the new MSP devotees by using the example of the Florida Everglades, an area greatly needing greater environmental protection and suffering from uncoordinated ad hoc federal decisions. One federal agency, he noted, would build an airport at the edge of the area, another would create a recreational park, and another would address flood control, without a holistic view. Enactment of the National Environmental Policy Act¹¹ addressed part of the problem but Senator Jackson wanted something that was more comprehensive and integrated to provide a broader balance to land use decisions. The proposed land use bill was based on incentives to the states, such as planning grants, and the development of a national land use data base. State plans would be developed and those plans would have to respect federal and interstate objectives. The bill did not pass. Arguably, the nation’s land use problems and needs were much greater then, and are now, than those with respect to coastal navigable waters.

In the 1970s, Congress addressed similar issues when it enacted the National Marine Sanctuaries Act,¹² which proved to be controversial even in a much more sympathetic Congress.¹³ An effort in the Carter Administration to expand marine sanctuaries in the coastal area was only partially successful in creating

¹⁰ See, John R. Nolan, “National Land Use Planning: Revisiting Senator Jackson’s 1970 Policy Act,” *Land Use L. and Zoning Dig.*, May 1996.

¹¹ 42 U.S.C. §§ 4321-4370d.

¹² 16 U.S.C. §§ 1431-1445c.

¹³ See, Chandler and Gillelan, “The History and Evolution of the National Marine Sanctuaries Act,” 34 *E.L.R.* 10505-10563 (2004).

“sanctuary” space in the nation’s coastal marine waters. In 1977, NOAA transferred the sanctuary program to a new Office of Ocean Management, which implied something comparable to MSP in areas outside established sanctuaries.¹⁴ The outcry against the implications of this Office, from inside and outside the Administration, led to its closure and the transfer of the marine sanctuaries program back to the Office of Coastal Zone Management.

The description of, and rationale given for, MSP harkens back to these earlier efforts to create comprehensive, forwarding-looking federal plans for land use and ocean use management. However, the new devotees to this old idea have not really identified (1) why today’s conditions are far worse and require a new attempt to legislate the concept, or (2) how Congress and the American electorate are now more willing to accept the concept and allow creation of new federal powers in this regard. None of the recent literature addresses these points in anything but the most superficial way and ignores the pedestrian “details” of creating a new administrative system that would in fact be enacted into law and work in practice. That apparently will be the job of the IOPTC, with little time available to complete the task given the President’s deadline of December 2009.

Prospects and Hope

For those in the Obama Administration who wish to lead in the ocean policy realm, the danger is investing enormous amounts of time, energy and political capital in attempting to create a new federal MSP program for which no stakeholder group has expressed support, other than academics, environmental organizations (and their private trust fund backers), and a few state government leaders. The chance of failure, based on past efforts when Congress was more accepting, is quite high.

President Carter had proposed the idea of a Department of Natural Resources during the late 1970s and an interagency task force created a rationale and plan for reorganizing federal natural resource agencies for more cohesive and comprehensive management of the nation’s resources. However, the task force failed to get an advance, tentative vote count in Congress to plumb support for the new Department and, after all the work was done, the idea was quickly dropped when it was clear no such support existed.

With respect to MSP, it may be more advisable for the IOPTF to tone down the academic rhetoric; identify a few practical programs that might in fact work (siting ocean wind and wave energy facilities, for example); prepare some meaningful interagency cooperation directives that will be sustained; garner much greater support among leading Members of Congress; and find allies in important stakeholder groups that might otherwise be opposed to the idea. Playing to the President’s ocean policy “base” will not suffice, particularly those who offer only theory and enthusiasm but lack practical political know-how in the legislative realm. Issuing a think–piece report or a Presidential Executive Order is no substitute for preparing a well-crafted statute that would garner the support of those likely to be affected and that addresses the issues previously identified by the U.S. Oceans Commission. Perhaps the IOPTF should examine more closely the work of the first woman to win a Nobel Prize for Economics, Professor Elinor Ostrom, who makes a strong case that those who have a stake in the management of natural resources might hold the key to improved management, if given the proper tools and incentives.

¹⁴ 34 E.L.R. at 10530.

Improvement in the national ocean policy and management programs has always been a work in process, if only to get turf-oriented departments and administrations to work with each other and to follow common leadership goals. But the IOPTF needs to be realistic about what is possible politically and should not jettison the many existing separate laws and programs that may only need improvement. Marine spatial planning may not be a product ready for the legislative marketplace.

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