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Before the Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs Regarding National Ocean Policy

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Mr. Chairman and distinguished members of this Subcommittee, I am pleased to be here today. I was privileged to serve as Counsel to this Subcommittee for eight years prior to becoming the Chief Counsel and Staff Director for the Republican members of the House Merchant Marine and Fisheries Committee before it was merged into the Committee on Natural Resources. During my years with the Subcommittee and Committee, and since that time, I have worked on numerous ocean policy issues. I am testifying today in my individual capacity and not on behalf of any client or of my firm, Nossaman LLP, although one of our associates, Audrey Huang, has worked with me on this testimony.

Executive Order 13547 and the Final Recommendations of the Interagency Ocean Policy Task Force

The Final Recommendations of the Interagency Ocean Policy Task Force dated July 19, 2010 ("Task Force Report") establish a National Ocean Council of at least 23 members. Task Force Report at 20. The National Ocean Council is awarded the overall responsibility for developing a national ocean conservation program, including specific action plans. *Id.* at 20-21. The priority ocean conservation objectives include: (1) ecosystem protection and restoration, (2) enhancing ocean water quality by implementing sustainable practices on land, and (3) coastal and marine spatial plans. *Id.* at 6, 28.

The Task Force Report provides that National Ocean Council members, which include the Secretary of the Interior, the Secretary of Commerce, and the Administrator of the Environmental Protection Agency, will "adhere" to the conservation plan developed by the National Ocean Council, including the coastal and marine spatial plans. *Id.* at 29-31, 65, 77. The Task Force Report then establishes a mechanism to "ensure execution" of the National Ocean Plan developed by the National Ocean Council and to "ensure implementation" of the coastal and marine spatial plans. *Id.* at 21.

Executive Order 13547, signed by President Obama on July 19, 2010 "adopts the recommendations of the Interagency Ocean Policy Task Force ... and directs executive agencies to implement those recommendations ...." Executive Order 13547 at §1. The Executive Order states its purpose is to "ensure" that federal agencies implement the National Ocean Plan "to the extent consistent with applicable law." *Id.* at §5(b). Lest there be any doubt, the Executive Order directs that all federal departments and agencies "shall, to the fullest extent consistent with applicable law" implement the National Ocean Plan. *Id.* at §6(a).

The Impact of the National Ocean Plan on Existing Laws

Assume an ocean resource management plan is properly developed pursuant to an existing Public Law. Assume further that the plan is presented to an agency decisionmaker for final approval. If the ocean resource management plan conflicts with the National Ocean Policy and Plan, is the agency decisionmaker required to disapprove the duly prepared resource management plan?

Consider, for example, the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §1801, *et seq.*, which establishes eight Regional Fishery Management Councils ("Councils") charged with the responsibility of developing fishery management plans ("FMPs") in their areas of geographic responsibility. The process by which a Council develops an FMP is one full of analyses by expert Council and agency staff. There are multiple opportunities for public testimony and input. The process can consume years. The Magnuson-Stevens Act provides that after this process is complete and an FMP is approved by a Council, the FMP must be reviewed by the Secretary of Commerce. The Secretary of Commerce must approve the FMP if it is consistent with ten National Standards set forth in the Magnuson-Stevens Act and with applicable law. 16 U.S.C. §1854.

Let us assume for a moment that a Council has completed its FMP development process and the resulting FMP allows commercial and/or recreational fishing in a specific ocean area. Let us also assume the National Ocean Plan has been completed and it closes the same area to all fishing. The question is what does the Secretary do when reviewing the Council-approved FMP.

I asked that precise question of representatives of the Council on Environmental Quality. In fact, I asked the question three times. The first two were greeted with variations of the response that developing the National Ocean Plan will be a multi-year process with full public input. My third attempt to secure an answer stipulated there had been a full public process and the final ocean plan closed the area to commercial and recreational fishing. In that fact pattern, would the National Ocean Plan trump the Council's decision and require the Secretary of Commerce to disapprove the FMP? The final answer was yes. The National Ocean Plan would require the Secretary to disapprove the Council approved FMP because the FMP was inconsistent with the National Ocean Plan developed by the National Ocean Council.

Allow me to use another example. I am currently involved in a lawsuit defending a fishery management plan amendment against allegations that the Secretary of Commerce, acting through the National Marine Fisheries Service ("NMFS"), approved harvest levels that failed to leave an adequate amount of forage fish in the ocean. The Plaintiff cites with approval studies that, according to the Plaintiff, argue for the position that "fishery managers set catch limits that leave most, if not all, of the forage species' virgin biomass (the level of biomass that would exist without any fishing) in the ecosystem to ... maintain ecosystem health." A virgin biomass equates to no fishing, particularly when virtually every species is forage to another species.

Assume arguendo that the final National Ocean Plan requires a fixed percentage of forage fish to be set aside for purposes of proper ecosystem management given that ecosystem management is one of the priority objectives of the National Ocean Plan. According to Executive Order 13547 and the Task Force Report, the National Ocean Plan would then govern

how the Secretary of Commerce and NMFS exercise discretion in determining if a Council approved FMP meets the requirements of the Magnuson-Stevens Act. In short, the National Ocean Plan could regulate harvest levels by directing how the Secretary of Commerce and NMFS are to implement their approval authority under the Magnuson-Stevens Act. In fact, it would appear that under this interpretation of the Executive Order, the Order would be considered the equivalent of other applicable law with which FMPs must be consistent.

In both examples above, it does not matter if the National Ocean Plan is viewed as a required interpretation of the Magnuson-Stevens Act National Standards or as applicable law with which the Council approved FMP must be consistent. The result is the same. The National Ocean Plan, once fully implemented, effectively amends the Magnuson-Stevens Act by establishing new standards that govern what is or is not acceptable in an FMP.

There is another aspect of this issue that is equally important. Congress, through the Magnuson-Stevens Act, created a process by which FMPs are developed and fishery conservation and management decisions are made. That process is through the Regional Fishery Management Councils and the legislative history of the Magnuson-Stevens Act is clear that the Councils have primary authority. The net effect of the National Ocean Plan could well be to amend or repeal that statutory Council-driven process, replacing it with the National Ocean Policy process and requirements.

The legal issue associated with all of these examples is that the Constitution vests the power to enact and to amend laws with the Congress. Advocates of the National Ocean Policy, no matter how well meaning, cannot by Executive Order or policy statement amend a Public Law to create new statutory standards. That is a power reserved to the Congress by Article 1, §1 of the U.S. Constitution which provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The Executive Order and The National Ocean Policy Report Present a Serious Constitutional Issue

As one legal scholar noted: "An Executive Order is a Presidential directive that the government and/or private parties act in a prescribed way. Although such orders come cloaked with the prestige and aura of that high office, unless some constitutional or statutory authority supports the directive, it has no legal effect." Morton Rosenberg, Presidential Control of Agency Rulemaking: An Analysis Of Constitutional Issues That May Be Raised By Executive Order 12,291, 23 Ariz. Law Review 1199 (1981), at 1205, *citing Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). In that case, the Supreme Court also stated:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he things wise and the vetoing of laws he thinks bad.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

In a subsequent case, the Supreme Court returned to the separation of powers issue stating:

> [I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another. [Citations omitted.] ... [T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its duties.... Article I's precise rules of representation ... make Congress the branch most capable of responsible and deliberative lawmaking. [Citations omitted.] Ill suited to that task [is] the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers....

Loving v. United States, 517 U.S. 748, 575-58 (1996).

Executive Order 13547 begins by stating "By the authority vested in me as President by the Constitution ... of the United States of America, it is hereby ordered...." Executive Order 13547. As noted above, the Constitution does not vest the legislative power with the Executive Branch. The authority for the Executive Branch to effectively amend the Public Laws of the United States cannot be found in the Constitution. The Constitution does not provide the necessary legal authority for the Executive Order or the National Ocean Policy and Plan.

That said, it is unquestionably correct that the Executive Branch has the power to implement and, in doing so, to interpret, statutes. However, the source of that interpretive authority, the authority to issue regulations implementing statutes, is found in the Congressional delegation of its legislative authority. Executive Order 13547 cites the laws of the United States as the second basis for its legal standing. The Executive Order states: "By the power vested in me as President by ... the laws of the United States of America, it is hereby ordered ...." *Id.* However, this legal theory provides no more support for Executive Order 13547 than the U.S. Constitution for at least three reasons.

First, the authority given to the National Ocean Council by the Executive Order to create and to then implement an ocean policy with which every Public Law must be consistent is not found in any Congressionally passed statute.

Second, when legislative authority is delegated to the Executive Branch by the Congress, it is often done with language providing for judicial review of agency decisions. Where such review is not explicitly provided, it is imputed pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §§702, 704, and 706 ("APA"). Pursuant to the APA, agency rulemaking can be challenged as inconsistent with a duly enacted statute. However, Executive Order 13547 states that actions taken pursuant to the Executive Order, actions taken to implement the National Ocean Policy, are not subject to judicial review. Executive Order 13547 at §9(d). In other words, disapproval by the Secretary of Commerce of a Council-prepared FMP because of its inconsistency with the National Ocean Policy is claimed to be beyond judicial review. This, in fact, violates the laws of the United States embodied in the APA.

Third, the National Ocean Policy is not an interpretation of the provisions of existing statutes. It is, in fact, the creation of a new law and regulatory regime. I recognize Executive Order 13547 states the National Ocean Policy is to be implemented "to the extent consistent with applicable law." *Id.* at §5(b). However, this so-called "savings clause" does not save the Executive Order. The reason, as already noted, is that the National Ocean Policy will create a new legal requirement with which all existing Public Laws must conform. It is not the interpretation of existing authority. It is the *de facto* enactment of a new Public Law.

I have already discussed how the National Ocean Policy can operate to replace the Council based FMP development process established in the Magnuson-Stevens Act. However, the Magnuson-Stevens Act is not the only statute that may be impacted. A few examples suggest the breadth of the National Ocean Policy. The Outer Continental Shelf Lands Act ("OCSLA") authorizes the Secretary of the Interior to lease outer continental shelf submerged lands for oil and gas development. 43 U.S.C. §§1337 and 1344. Pursuant to that law, the Secretary of the Interior identifies areas that are to be leased. Because submerged lands would be subject to the coastal and marine spatial plans developed under the National Ocean Policy, these spatial plans will govern and control the areas available for leasing. Congress has by statute established standards and a process by which areas subject to leasing shall be identified. Congress did not establish as a standard that such leases are to be specified in accordance with the National Ocean Policy and its coastal and marine spatial plans. The practical effect of the National Ocean Policy is to amend the OCSLA by grafting onto it a new standard with which the Secretary of the Interior is to comply.

As the members of this Subcommittee know, in the recent past, Congress grappled with the issue of clean air legislation. Those discussions did not result in the passage of new legislation. However, under the rubric of preventing or otherwise regulating ocean warming and/or ocean acidification, the National Ocean Policy could set standards and policies that bind federal agencies to promulgate new air emission standards or requirements that are asserted to be beyond judicial review pursuant to the Executive Order.

Similarly, persons who apply for discharge permits or dredge and fill permits under Sections 402 and 404 of the Clean Water Act could find themselves subject to a new set of standards contained in the National Ocean Policy. Section 404, for example, provides that permits are issued only after a finding that permit issuance will not have an unacceptable adverse impact on navigable waters. 33 U.S.C. §1344(c). The National Ocean Policy could define what constitutes such an impact given that navigable waters ultimately flow into the oceans. Similarly, section 402 discharge permits cannot be issued if they adversely affect the quality of navigable waters. 33 U.S.C. §1342(a). Again, the National Ocean Policy is, in practical effect, a statutory overlay controlling the definition of an adverse effect.

Within the next few weeks, the House of Representatives will be considering a surface transportation bill. Although there is disagreement about what should be in that legislation, Members on both sides of the aisle agree that transportation infrastructure is important and maintaining that infrastructure will create jobs. Since highways generate runoff that often flows into navigable waters that flow to oceans, it would not be unexpected that the new National Ocean Policy could create the equivalent of new statutory standards with which all surface transportation projects must be consistent.

Advocates of the National Ocean Policy will assert that the Executive Branch could promulgate regulations under its existing delegated authority to do some or all of these things. That may or may not be the case, but Executive Order 13547 does not take that approach. Instead, it creates, via the National Ocean Policy, a new set of requirements with which existing statutes are to be consistent, and then places these new standards beyond judicial review. This effectively constitutes the enactment of new legislation that violates the separation of powers set forth in the U.S. Constitution.

Moreover, when Congress has delegated legislative authority, it has done so to specific departments and agencies. Executive Order 13547, and its National Ocean Policy, effectively amend each of these statutes by changing the Congressional delegation of authority from an individual department or agency to a collective of at least 23 departments and agencies.

Conclusion

Mr. Chairman, the National Ocean Policy put forward by the Administration will inevitably lead to constitutional challenges that may require the attention of the Supreme Court. I am not saying the National Ocean Policy is a good or a bad idea. That is for you to decide. What I am saying is that there are very serious questions about whether the Administration can do it without your passing legislation giving them the authority. Without such legislation, it is quite possible that Executive Order 13547 and its National Ocean Policy will be found to violate the separation of powers set forth in the U.S. Constitution.