

June 16, 2009

The Honorable Madeleine Z. Bordallo
Chair, Subcommittee on Insular Affairs, Oceans & Wildlife
Committee on Natural Resources
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Henry E. Brown
Ranking Member, Subcommittee on Insular Affairs, Oceans & Wildlife
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Dear Madam Chair and Ranking Member Brown:

The National Marine Manufacturers Association (NMMA), the nation's leading recreational marine industry trade association, and the Personal Watercraft Industry Association (PWIA) are pleased to continue the dialogue regarding H.R. 21, the "Ocean Conservation, Education, and National Strategy for the 21st Century Act." Our organization appreciates the Committee holding this hearing on H.R. 21 and we acknowledge and appreciate the many positive changes that have been made to the legislation since its original introduction.

NMMA represents nearly 1,700 boat builders, engine manufacturers, and marine accessory manufacturers. NMMA members collectively produce more than 80 percent of all recreational marine products made in the United States. With an estimated 70 million boaters nationwide and over 13 million registered boats, the recreational boating industry is a major consumer goods industry with total retail expenditures on recreational marine products and services of over \$33.5 billion in 2008 alone and over 300,000 boating industry jobs nationwide.

Given the economic, cultural, and environmental importance of recreational boating and sport fishing in the United States, we strongly urge the Committee to offer support these activities in the bill as part of a national policy to encourage outdoor recreation and the public's enjoyment of their natural resources. Specifically, our organizations would urge that the legislative language provide that it is the policy of the federal government to preserve and enhance public access to and enjoyment of the marine environment. It has been a longstanding federal policy, through a range of legislative and statutory authorities, to encourage environmentally responsible, compatible uses on public lands and waters, such as boating and angling.

NMMA and PWIA continue to support the very laudable goals of H.R. 21 and many of its provisions related to enhancing and defining national ocean governance, such as Title II, an Organic Act for NOAA, and provisions related to improving the coordination of federal, state and local actions on oceans management. Although significant revisions to the legislation have been made, we continue to have some concerns related to the many vague and potentially onerous provisions in the bill. We offer the following observations for your consideration:

- **"Marine Ecosystem Health" Standard.** NMMA is concerned that the definition of "marine ecosystem health" in §4(11) of the legislation remains overbroad and sets an unattainable mark as a result of a lack of a measurable or identifiable scientific standard. A strict requirement of "abundance" for a "complete diversity" of all species in an ecosystem per §4(11)(B) would

appear to be in some tension with other considerations recognized in a wide range of federal laws, such as the socio-economic and cultural importance of public access to the natural resources held in their trust. Per the first National Ocean Policy principle, H.R. 21 would require federal agencies to rewrite their regulations to ensure they do not “undermine” marine ecosystem health—are federal agencies capable of meeting that standard? Or more pointedly, it raises the prospect of litigation in instances of conflicting federal regulations.

- **Definition of “Federal Agency” is Broad.** H.R. 21 expansively defines in § 4(9) “Federal agency” as “any department, agency, or instrumentality of the United States.” In contrast, the Administrative Procedures Act (APA) defines a federal agency narrowly as “each authority of the Government of the United States . . . but does not include” Congress, the courts, the military and a broad range of other exclusions. What is an “instrumentality of the United States?” What does this expansive definition mean for the scope and reach of the legislation, if enacted?
- **Title I Raises Concerns Regarding Legal Ambiguity & Litigation.** While the National Ocean Policy as outlined in the legislation is well-intentioned, its broad scope exposes federal agencies to a high risk of litigation over its interpretation and specific application. §101(b)(1) requires “to the fullest extent possible and to the extent not inconsistent with other laws, each Federal agency shall interpret and administer policies, regulations and laws in accordance with the National Ocean Policy.” “Within 2 years . . . each Federal agency shall issue new or revised regulations as necessary to ensure consistency with the National Ocean Policy for actions undertaken, authorized, or funded by the agency that may significantly affect ocean waters, coastal waters, or ocean resources. (§101(c)(1)(A)). This language raises several concerns.

First, subsequent to the issuance of guidance for federal agencies by the newly-established National Oceans Advisor, each federal agency would be required, within one year, to review all “existing policies, regulations, and laws that apply to the agency.” It is highly unlikely that such a massive review could occur within one year. Since federal agencies must already comply with the National Environmental Policy Act (NEPA) and other federal statutes requiring environmental assessments, such a requirement, particularly if retroactive, seems unduly burdensome.

Second, the requirement that each federal agency issue new or revised regulations for all actions that “significantly” affect the oceans would be duplicative and frustrate the purposes of NEPA and other current laws requiring environmental impact assessments. The requirement to develop new or revised regulations for each federal agency action would bring federal action to a standstill and spur widespread litigation. The resulting agency paralysis would not seem consistent with robust, efficient ocean protection. Additionally, this requirement would clearly include any and all decisions made by the National Marine Fisheries Service (NMFS), which calls into the question the authorities of the Magnuson-Stevens Act, the prevailing authority for the federal management of U.S. fisheries.

Third, should federal agencies fail to complete (or simply be incapable of completing) both the review of all of their actions and revisions of their existing regulations in the limited amount of time provided in the bill, they will be subject to litigation. We fail to see how this would be productive for our ocean and coastal resources.

- **Scientific Uncertainty Should not be Codified.** Our organizations strongly support sound, meaningful science. Inclusion of this language in the legislation goes against the grain of one of NOAA’s chief missions as a scientific agency. While scientific certainty is not always attainable, robust and sound scientific evidence is and should remain the fundamental underpinning of federal agencies such as NOAA. This is especially true for regulatory actions. Strong science

enables rather than inhibits the proper management of our ocean marine resources, and our organizations strongly urge the support of sound science as being peer reviewed, methodologically transparent, and fully inclusive of relevant stakeholders through an equitable and meaningful process.


Without a full scientific understanding of the issues contributing to environmental degradation, it is imprecise and difficult to implement effective and appropriate response strategies. The policies to ensure sound decision-making in Magnuson-Stevens, the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA) currently provide appropriate, inclusive, process-oriented decision-making benchmarks and requirements.

- ***Lack of Savings Clause Causes Concern*** . Much confusion about the legislation arises because it is not clear what effect it will have on existing federal laws. The absence of a savings clause in Title I exacerbates confusion about the scope and intent of the bill. Although §305 provides that H.R. 21 does not supersede or diminish the authorities of other laws, this section only applies only to Title III. At a minimum, Title I should specifically provide that H.R. 21 does not affect or preempt MSA, NEPA, the Coastal Zone Management Act, the National Invasive Species Act, the Clean Water Act, and others. The absence of a savings clause will lead to substantial confusion among federal agencies and the regulated community and create serious incentives for litigation.
- ***Intent of Establishing of “Important Ecological Areas” Unclear***. In §303(a)(2), H.R. 21 would require an ocean threat assessment that would itself entail the designation of “important ecological areas.” It is unclear what an “important ecological area” would be and with what criteria one would be identified. The definition in §4 provides no clarity. Also unclear is what effect the designation of such “important ecological areas” would have on the public’s ability to access a resource, or what such a designation would mean legally. Would this designation differ from that of a Marine Sanctuary; would this impact existing or future energy extraction interests? What if any Congressional review will occur?

Just as our organizations supported many of the recommendations of the U.S. Committee on Ocean Policy, we support many of the provisions in H.R. 21. However, many questions about the legislation remain. We strongly believe that the proper management of marine ecosystems and fisheries requires an efficient, rather than overburdened, governmental apparatus that enables timely, effective decisions.

We appreciate the opportunity to again submit our views to you on H.R. 21 and we look forward to continuing to work with you to improve the management of our oceans and coasts. Please do not hesitate to contact me at 202-737-9760; mdunn@nmma.org if we can be of any additional assistance.

Respectfully,



Mathew P. Dunn
Legislative Director, NMMA



Maureen A. Healey
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