

Written Remarks of Eric S. Laschever, Preston Gates & Ellis LLP
President's Ocean Commission
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Public Hearing

Chairman Watkins and members of the Commission, thank you for the opportunity to present these remarks to the US Commission on Ocean Policy. These written remarks provide background on my perspective on a number of key issues regarding ocean management.

I am currently an attorney in private practice in the area of land use and environmental law and have practiced in this area for the last 12 years. My practice deals extensively in issues involving the federal Coastal Zone Management Act, Clean Water Act, and Endangered Species and state laws such as the Shoreline Management Act, and Growth Management. My work focuses both on planning efforts being conducted by state and local agencies and the development of public and private projects by clients that include Port Districts, Bechtel Corporation, Intel and Microsoft. I have also served as a consultant to the State of Washington on integrating its growth management and environmental laws and in a volunteer capacity in state efforts to better integrate laws such as our Washington Shoreline Management Act (a component of the Federal Coastal Zone Management Program) and state growth management laws.

I would like to emphasize the following major themes in my presentation:

- the role that federal law plays in shaping regional and local issues,
- the role of science in the decision making process,
- the large expenditure of our collective resources on transaction costs and managing liability, rather than on the ground (or in the water) solutions, and
- the value in taking a comprehensive look at the federal statutory regime that governs ocean use.

Role of Federal Law in Shaping State and Regional Issues

The Pacific Northwest is experiencing- to a perhaps unprecedented degree- the pervasive influence of federal law as it affects the regional economy, development and resource management. This results from a listing of salmon under the Federal Endangered Species Act. Attached to these remarks is an article that I wrote several years after the listing that talks about the role that the Endangered Species Act is playing in the State of Washington's efforts to manage its growth under its State Growth Management Act.

Although three years have elapsed since this article was written, there is still a strong perception that "Salmon R Us". In other words, salmon, and the impact of development in our region on salmon, is the central issue that drives much of the analysis and much of the schedule for responding to growth in the Pacific Northwest. This analysis is implicated in any major infrastructure project, such as work in the Columbia River or on commuter infrastructure. It also pervades much smaller decisions involving federal funds or approvals. Unfortunately, as discussed below, much of the effort is imposing costs that I believe will not have a significant benefit to salmon.

The point is that the federal statutory framework is having a profound effect on individuals and our region on a daily basis.

The Role of Science in Decision Making

The salmon issue has highlighted the need for basic understandings of large scale ecosystem functions. This need to understand physical and biological processes, however, extends far beyond salmon and the Endangered Species Act. Even routine maintenance activities for navigation purposes seem to generate questions unrelated to ESA including impacts to other species and fundamental coastal processes.

These questions become bound up- through federal law, including the National Environmental Policy Act, the Coastal Zone Management Act, Clean Water Act, and Endangered species Act- in the ability to address other fundamental needs of the region. It is common for federal and state resource agencies to look to proponents of large projects to fund what is really basic research. Developing our basic understanding of important physical

spent in areas that likely have little benefit to the ultimate goal of the ESA- recovery of the species. There is a real opportunity in our implementation of federal, state and local laws to look at those aspects of these regimes that impose high transaction costs (e.g., vague requirements or inconsistent or conflicting requirements) and to revise them to better target investments likely to have the most value from a resource perspective.

The Value of a Comprehensive Review of the Ocean Statutory Regime.

The above points highlight that the system of environmental and resource management laws that apply to the ocean- many of which were enacted over a quarter of century ago- would benefit from a thorough look. Key issues include: how the laws interact with one another, the extent to which they impose conflicting requirements that result in high transaction costs, and recommendation on how to best direct scarce resources into achieving effectiveness in resource management.

Commission Member Ruckelshaus has long been involved in major reviews of federal law and environmental law in the search for making the laws both more effective and more efficient. These efforts typically raise the question of whether the focus should be on incremental reform, rather than a major or whole-sale revision of statutes. Mr. Ruckelshaus has used the analogy of using stepping stones to cross a creek as opposed to trying to jump the creek in a single leap. Past efforts have typically opted for the stepping stone approach because of the complexities of whole-sale change and the strong constituencies among stake holder groups for specific statutes.

In the State of Washington there is a cyclical call for a "Consolidated Land Use Code". Such a code would, in one place try, and consolidate and re-write the laws that have evolved over the last quarter century. Washington has had some success with incremental changes, consistent with the stepping stone model. The grand leap of a Consolidated Code has remained beyond our collective abilities.

The Ocean Commission is in a unique position to direct such an undertaking at the federal level given the directive in Section (f)(2)(C) of the Commission's authorizing statute to "review the cumulative effect of Federal laws and regulations on ocean uses and activities." In this regard, I encourage the Commission to use the report to conceptualize a "Unified Ocean

processes in response to or at the expense of specific proposals creates difficulty for the resource agencies and the project proponent. Thus, a key task for the Ocean Commission is to focus on our nation's need for the understanding of ocean processes and how to collect and disseminate such information in a manner that can inform, rather than hinder decision making and in a manner that fairly spreads the burden.

A second aspect of the role that science plays that deserves the Commission's attention is how our laws direct us to use science. For example, federal and state laws employ the concept of "best available science." What constitutes best available science, and the implications of such requirements for decision makers, has significant implications and has led to the unintended rise in the demand for the "best available lawyer."

By way of illustration, Washington law now requires local governments to base their management of critical areas on "best available science." To respond to this requirement regulations and models have sometimes been drafted that use the scientific information developed in one context (such as the relatively undeveloped upper reaches of watersheds) for making management decisions in entirely different contexts (such as in the urban estuary where the functions of values and basic physical processes are fundamentally different). This misapplication of science runs the risk of imposing restrictions and extremely high costs on the use of land in urban areas to protect functions and values that simply do not exist there.

Thus, there is a need for a thoughtful review of way that our laws approach the use of science in the regulatory process.

Transaction Costs vs. Recovery Costs

The federal Superfund law has focused attention in recent years on the extent to which federal laws that impose liability to address significant environmental issues are successful in ultimately resolving the issue. Much of the attention on Superfund has focused on the imbalance between money spent on cleanup and that spent on transaction costs involved in addressing liability issues.

The listing of salmon in the Northwest highlights similar issues. Because of the liability issues surrounding the "take" of listed species, as well as the need to comply with other provisions of the Endangered Species Act, large sums are being spent and will continue to be

Code” that seeks to reframe the ocean regime in a grand leap, as well as more incremental approaches to redirecting our efforts in the Ocean.

Thank you again for the opportunity to present these remarks to the Commission.