RESOLVED, that the American Bar Association urges the United States Government to improve the system of federal regulation of the United States’ ocean and coastal resources to better protect the integrity of the nation’s marine ecosystems and ensure ecologically sustainable use and development of the nation’s marine resources.

FURTHER RESOLVED, that the American Bar Association urges Congress and the President to ensure coordination of the national oceans policy and of federal regulatory authority over the United States’ ocean waters and resources by enacting an organic act for the National Oceanic and Atmospheric Administration (NOAA) or some other centralized federal oceans agency that:

(1) Articulates a national oceans policy to protect the integrity of the nation’s marine ecosystems and ensures ecologically sustainable use and development of the nation’s marine resources;

(2) Grants the coordinating agency sufficient discretion and authority, and imposes sufficient reporting requirements upon that agency regarding the state of the oceans and that agency's progress in improving their state, to enable the agency to address and be accountable for addressing marine ecosystem and resource issues currently within its jurisdiction and emerging marine issues not currently within the jurisdiction of any federal entity; and

(3) Provides for consolidation of additional ocean-related regulatory functions within that agency over time, consistent with its demonstrated capacity to effectively address issues within its jurisdiction.

FURTHER RESOLVED, that the American Bar Association urges Congress to enact legislation requiring a federal entity – whether NOAA, some other centralized federal oceans agency, or the Committee on Ocean Policy in the Executive Office of the President – to coordinate all federal department and agency planning and ocean-related activities to ensure proper implementation of the national oceans policy.
REPORT

I. INTRODUCTION

This American Bar Association resolution encourages Congress and the President to take specific legislative, regulatory, and other actions necessary to improve the structure of our country’s domestic management and regulation of its marine resources. As discussed more fully below, a consensus is emerging on the need to reform our national oceans policy. Many of the reforms being contemplated require adjustments of current laws and regulations or the creation of new laws and regulations. In keeping with its commitment to the rule of law, based on the expertise and experience of the Association and its members, the ABA can play a constructive role in identifying, evaluating, and proposing measures that hold particular promise for improving the nation’s oceans policy and regulatory schemes. This policy resolution offers such advice, as a first step in assisting efforts to develop and adopt such legal measures.

The Pew and U.S. Ocean Commissions, the Administration, members of Congress, and others have made many proposals for reform of national oceans policy. Comprehensive reform is an enormous undertaking. This resolution does not address every proposal in these recommendations that the ABA might consider productive. Instead, the resolution advocates as an important initial step – without limiting future ABA action – restructuring of the relevant federal agencies in order to better implement and coordinate a viable United States regulatory regime and policy program for the nation’s oceans.

II. THE NEED FOR CHANGE IN U.S. OCEAN POLICY

A. The Value of the Oceans and Threats They Face

The United States controls more than four million square miles of ocean, an area larger than the nation’s land mass. Resources found within these waters are critical to the nation’s economic well-being; they also contribute to its recreational diversity and aesthetic beauty. As the Senate committee noted in its proposed 2004 national oceans policy, “the oceans play a critical role in the global water cycle and in regulating climate, sustain a large part of Earth’s biodiversity, provide an important source of food and a wealth of other natural products, act as a frontier for scientific exploration, are critical to national and economic security, and provide a vital means of transportation. The coastal regions of the United States have remarkably high biological productivity and contribute approximately 50 percent of the gross domestic product of the United States.”

The U.S. Commission on Ocean Policy emphasized in 2004 that ocean-related activities provide direct benefits of $117 billion to the nation’s economy and create over two million jobs.

This resolution recognizes that human activities can have a profound, negative impact on marine resources and the economic benefits that they provide and that regulatory reforms are necessary

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1  S. 2647, 108th Cong., § 101(1) (as enrolled Nov. 10, 2004).
2  U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT, Executive Summary xxxii (Sept. 20, 2004).
to prevent unsustainable use of those resources and to restore already depleted marine resources. As the Pew Oceans Commission noted in 2003, “[w]e are now capable of altering the ocean’s chemistry, stripping it of fish and the many other organisms which comprise its rich biodiversity, exploding and bleaching away its coral nurseries, and even reprogramming the ocean’s delicate background noise.” The U.S. Commission on Ocean Policy agreed in 2004, explaining that:

Human ingenuity and ever-improving technologies have enabled us to exploit – and significantly alter – the ocean’s bounty to meet society’s escalating needs. Pollution runs off the land, degrading coastal waters and harming marine life. Many fish populations are declining and some of our ocean’s most majestic creatures have nearly disappeared. Along our coasts, habitats that are essential to fish and wildlife and provide valuable services to humanity continue to suffer significant losses. Non-native species are being introduced, both intentionally and accidentally, into distant areas, often resulting in significant economic costs, risks to human health, and ecological consequences that we are only beginning to comprehend.

Proposed oceans legislation in the U.S. Senate similarly acknowledged that, “[t]he oceans and the atmosphere, and related earth systems, are susceptible to change as a direct and indirect result of human activities, and such changes can significantly impact the ability of the oceans and atmosphere to provide the benefits upon which the Nation depends.”

**B. Assessing the Need for Regulatory Reform – The Pew and US Oceans Commission Reports**

In this resolution, the ABA champions restructuring of the United States’ current domestic regulatory regime for the oceans, because the current regime often serves cross-purposes and fails to adequately coordinate federal planning and federal agency actions. The United States has recognized since the 1960s that regulating marine resources requires sound law, regulation, and policy. In the mid-1960s, Congress appointed the Stratton Commission to comprehensively review the nation’s marine resources and to report on recommended changes in the law. The Commission’s report, issued in January 1969, led to the creation of the National Oceanic and Atmospheric Administration (NOAA) by Congress in 1970.

Three decades later, the time has come for a fresh look at the means by which the federal government regulates the nation’s marine resources. Recognizing the need for a comprehensive review of the nation’s marine laws, regulations, and policies, Congress enacted the Oceans Act of 2000. Pursuant to this Act, on June 15, 2001, President George W. Bush appointed 16 members to the U.S. Commission on Ocean Policy. Under its statutory mandate, the Commission was charged with recommending changes to the nation’s existing ocean and coastal

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5 S. 2647, 108th Cong., § 101(2) (as enrolled Nov. 10, 2004).
legal and regulatory regimes that would result in a “coordinated and comprehensive national ocean policy . . . .”

On September 20, 2004, the U.S. Commission on Ocean Policy issued its final report to Congress and the President, entitled An Ocean Blueprint for the 21st Century. The Report recommends several changes in the structure of the federal government and the coordinated implementation of a national oceans policy in order to better protect the nation’s marine resources.

In the non-governmental public interest sector, in June 2000 the Pew Charitable Trusts brought together a 16-person commission, the Pew Oceans Commission, to complete “the first national review of ocean policies in more than thirty years.” Under the leadership of its Chair, Leon E. Panetta, the Commission issued its Report, America’s Living Oceans, in May 2003. As the title suggests, the Pew Oceans Commission was focused on living marine resources, a narrower focus than the U.S. Commission on Ocean Policy took. Nevertheless, in reviewing the current legal regimes relating to such resources, the Pew Oceans Commission stressed the “fragmented nature – institutionally, legislatively, and geographically” – of the current federal regulatory regime.

Consistent with the views of these Commissions, this ABA resolution recommends one major change to the current U.S. ocean regulatory regime – namely, that Congress improve the nation’s ocean governance to create better integration and coordination of federal regulatory authority.

III. ACHIEVING BETTER INTEGRATION AND COORDINATION OF FEDERAL REGULATORY AUTHORITY

A. The Need for Improved Coordination of Marine Resource Regulation

In order to adequately regulate and safeguard our nation’s marine resources, the federal government’s regulatory authority needs to be better coordinated and integrated and needs to take an ecosystem approach to marine resource management. Restructuring is necessary because current federal regulatory authority is fragmented and uncoordinated. For example, the U.S. Commission on Ocean Policy noted in its Report to Congress that “[a]t the federal level, eleven of fifteen cabinet-level departments and four independent agencies play important roles in the development of ocean and coastal policy. These agencies interact with one another and with state, territorial, tribal, and local authorities in sometimes haphazard ways. Improved communication and coordination would greatly enhance the effectiveness of the nation’s ocean policy.” Even with its more limited focus on living marine resources, the Pew Oceans Commission similarly characterized the current U.S. ocean governance regime as “[n]ot a system at all,” but rather “a hodgepodge of individual laws that has grown by accretion over the years, often in response to crisis. More than 140 federal laws pertain to the oceans and coasts.

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7 Id. at 2.
8 Id. at 15-16.
Collectively, these statutes involve at least six departments of the federal government and dozens of federal agencies in the day-to-day management of our ocean and coastal resources.”

The most logical way to address this regulatory fragmentation is to increasingly concentrate federal marine regulatory programs in a single federal oceans agency and to subject all federal actions that can affect marine resources to an overarching national oceans policy, with additional coordination of all federal planning to ensure coordinated implementation of that national oceans policy. The recommendations of both Commissions support such action. Both Commissions agreed that the United States needs a single federal agency in which the nation’s ocean-related programs are concentrated. They also concurred that U.S. ocean policy should be ecosystem-based and focused on sustainability of marine resources. Finally, both recommended that there be an entity to advise the President on ocean-related matters and to help coordinate all federal agency actions and planning that could affect marine resources.

B. Congress Should Enact an Organic Act for NOAA or Some Other Centralized Federal Oceans Agency

The United States needs a more centralized and coordinated lead ocean agency in the federal government. Since 1970, the principal federal agency for marine-related affairs has been NOAA, and a retooling of NOAA would be one means of better coordinating and centralizing the federal ocean-related programs. Alternatively, Congress could create a new central federal oceans agency free of NOAA’s historical entanglements. As noted, both the U.S. Commission on Ocean Policy and the Pew Oceans Commission recommended that the United States have a central coordinating agency for U.S. oceans policy, and both Commissions suggested that it could be NOAA.

Either way, the lead ocean agency will require new organic legislation to implement more effectively comprehensive and coordinated regulation of marine resources – a step that the current Administration appears willing to support. In December 2004, President George W. Bush released an Executive Order and an U.S. Ocean Action Plan in response to the U.S. Commission’s report. The Ocean Action Plan emphasized nine specific actions that the Administration would take in response to the U.S. Commission’s report, including passage of an organic act for NOAA. Specifically, the Administration announced its intent to seek passage of a NOAA Organic Act during the 109th Congress, an effort it began in the 108th Congress by introducing legislation into the House in 2004 (in the form of H.R. 4607). Moreover, like both Commissions’ Reports, the Action Plan emphasized improved governance in its first set of planned actions, and “[t]he Administration supports the need for enhanced coordination . . . .”

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11 Id. at 21-23; U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT, Executive Summary 7, XX (Sept. 20, 2004).
13 Id. at 6.
14 Id. at 6.
NOAA’s, or any other ocean agency’s, ability to coordinate ocean regulation will require that that agency and all of its marine programs be subject to a single, overarching oceans policy instead of – as is currently the case – myriad statutory missions. Currently, these multiple statutory objectives often are poorly coordinated and often work at cross-purposes. For example, the Marine Mammal Protection Act and the marine aspects of the federal Endangered Species Act both work to protect imperiled marine species, but they often clash with the largely pro-fishing policies written into the Magnuson-Stevens Fishery Conservation and Management Act. No overarching national oceans policy currently guides NOAA’s implementation and coordination of these often-conflicting statutory goals, hampering conflict resolution and effectively encouraging potentially unsustainable use of ocean resources. In addition, all three of these statutes address ocean resources primarily on a species-by-species basis, effectively discouraging comprehensive and coordinated regulation of marine resources, especially because none of the legislation that NOAA currently implements provides for complete protection of ocean ecosystems and their resources.

An overarching oceans policy also would structure the discretion that NOAA, or any other centralized federal oceans agency, will need to have and thus would help to ensure that the agency responds to new issues and problems in coordination with its other programs and through means that promote the overall sustainable use of all marine resources and preservation of marine ecosystems. The ABA recognizes that, in order for oceans regulation to remain centralized, coordinated, and effective, NOAA or some other centralized federal ocean agency will need sufficient regulatory flexibility to provide efficient, effective solutions to existing issues and to address new issues and problems that it identifies as knowledge of the ocean and its processes increases. For example, the Pew Oceans Commission recognized the need for a flexible framework of governance to address emerging and nontraditional sources of pollution, such as invasive marine species and the new industry of marine aquaculture. The U.S. Commission on Ocean Policy also noted the emerging problem of marine invasive species.

However, unfettered discretion in NOAA or any other central federal oceans agency risks regeneration of the current uncoordinated and fragmented marine regulatory regime, especially if that agency seeks to resolve emerging problems in isolation. To ensure the availability and viability of the nation’s marine resources for future generations as well as the current one, this overarching oceans policy should be based on the principle of sustainable use and should take an ecosystem-based approach to marine resource management. As a practical matter, therefore, this new national oceans policy also would redress existing concerns regarding NOAA’s commitment to sustainable use of marine resources, should Congress choose to redesign NOAA as the centralized federal oceans agency.

At the same time, NOAA’s commitment to that overarching policy could be strengthened by giving NOAA greater autonomy within the Department of Commerce. To effectively commit

16. Id. at 28.
to and carry out the recommended national oceans policy, NOAA will need a perspective that is distinct from the Department’s primary mission of improving commerce and trade. In particular, increased autonomy from the Department would allow NOAA to give greater weight to non-commercial considerations in the implementation of ocean-related programs, as the ecosystem-based national oceans policy would require.

Beyond centralizing marine regulatory programs in a single agency and subjecting that agency to an overarching national oceans policy, the organic act for NOAA or any other centralized federal oceans agency should include requirements for the agency to report both on the state of the oceans and on the progress of its efforts to address critical concerns within its jurisdiction. Such reports would help Congress and the Administration assess the effectiveness of current actions and the need for further regulatory action. Such reports would also enable Congress and the Administration to assess the capacity of NOAA both to take on additional oceans management responsibilities, including responsibilities currently assigned to other federal entities, and to become increasingly autonomous – both processes that could require a period of years to accomplish.

C. Congress Should Ensure that Some Federal Entity Has the Statutory Responsibility to Oversee, Coordinate and Assess Federal Oceans-Related Activities and Planning

Even if Congress centralizes federal marine programs in a single federal agency, other federal agencies will continue to take actions and to implement programs that will have at least the potential to affect our country’s oceans and marine resources. For example, the U.S. Environmental Protection Agency currently implements the Clean Water Act, supervising permit programs for discharges of pollutants into both fresh waters and the oceans. The latter discharges directly affect ocean water quality, but upstream water pollution also runs downstream into the seas.

As a result, coordination of federal agency activities and planning with regard to the national oceans policy will remain necessary for the foreseeable future. As ocean-related program responsibilities are transferred to NOAA or another centralized federal oceans agency, the need for coordination with other agencies may be reduced over time. Nevertheless, during that transition, a coordinating body would help ensure that the various federal entities currently responsible for activities that directly and indirectly affect the oceans are aware of each other’s activities, collaborate as appropriate, and avoid inconsistent efforts.

However, longer term, pre-decisional coordination and planning among federal agencies currently would be achieved best through regular planning and coordination discussion in the Executive Office of the President. Indeed, both the U.S. Commission on Ocean Policy and the Pew Oceans Commission recommended in their reports that there be a body to advise the President on oceans policy and oceans issues within the Executive Office of the President. As part of his response to the U.S. Commission, moreover, through a December 2004 Executive Order, President Bush established a Committee on Ocean Policy. Adopting as official policy that the United States should “coordinate the activities of executive departments and agencies” to advance the environmental and economic interests of both present and future generations,” the Executive Order requires the Committee to gather information and advise the President on better
means of coordination and implementation of U.S. ocean policy.\textsuperscript{19} Moreover, the Administration’s \textit{U.S. Ocean Action Plan} indicates that the Committee will convene in early 2005 and “develop an 18-month work plan to address a number of the [U.S. Commission on Ocean Policy’s] recommendations, including further actions on ocean, coastal, and Great Lakes issues that address governance principles, filling gaps in legislative authority, and streamlining unnecessary overlapping authorities.”\textsuperscript{20}

Nevertheless, if Congress chooses the existing Committee on Ocean Policy as the entity to ensure uniform implementation of United States national oceans policy, that Committee needs statutory authorization and duties. Otherwise, as a creature of an Executive Order, the Committee is subject to modification or dissolution at any time, potentially disrupting continuity in the coordination of ocean resource management.

In addition, the Committee requires continued, adequate congressional funding to properly coordinate information and federal agency actions. Currently, the Committee is funded through the Council on Environmental Quality,\textsuperscript{21} and President Bush has suggested that he may significantly reduce the Committee’s funding as part of the 2005 budget process.

Regardless of which coordinating entity Congress authorizes, Congress should both grant that entity sufficient authority to obtain the necessary information and establish a duty for it to report to Congress on a regular basis. For example, one option for achieving pan-federal coordination would be to have the coordinating entity certify that the activities of other federal agencies comply with the national oceans policy. This option could be effective in ensuring coordination when federal agency plans and activities reach the action stage and would also supply the coordinating entity with much of the information necessary for its reports.

As with NOAA’s reporting requirements, the reporting requirement for the coordinating entity would be among the most important actions Congress could take to make the entity an effective body for coordinating regulatory implementation of the national oceans policy throughout the federal government. The entity should have the duty to report to Congress regularly on: (1) the effectiveness of efforts to coordinate protection of the nation’s marine ecosystems and to ensure ecologically sustainable use and development of its marine resources: and (2) the need for legislative action to enable more effective federal efforts, including adjustments to budgetary allocations. Such information will allow Congress and the Administration to monitor federal efforts to implement the national oceans policy and assess how to adjust those efforts to better ensure the proper management of ocean resources. In the 1990s, NMFS and NOAA chose, of their own volition, to report on the state of the United States’ living marine resources every two years,\textsuperscript{22} and a biannual reporting duty seems a reasonable frequency for the coordinating agency, as well.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{19} President George W. Bush, \textit{Executive Order: Committee on Ocean Policy} §§ 1(a), 4 (Dec. 17, 2004).
\item \textsuperscript{20} President George W. Bush, \textit{U.S. OCEAN ACTION PLAN} 4 (Dec. 4, 2004); see also id. at 6-9 (describing the functions and sub-committees of the Committee in more detail).
\item \textsuperscript{21} President George W. Bush, \textit{Executive Order: Committee on Ocean Policy} § 4(e) (Dec. 17, 2004).
\item \textsuperscript{22} National Marine Fisheries Service, National Oceanic and Atmospheric Administration, \textit{Our Living Oceans: Report on the Status of U.S. Living Marine Resources} v (1999) (noting that this was the fifth such report since 1991).
\end{itemize}
\end{footnotesize}
IV. CONCLUSION

The ABA, like the U.S. Commission on Ocean Policy and the Pew Oceans Commission, considers restructuring of the federal agency structure for ocean management to be a necessary first step in attaining sustainable use of the nation’s marine resources for present and future generations of Americans. Critical aspects of the necessary restructuring are increased centralization of ocean programs within a single federal agency, an overarching national oceans policy that will inform and guide all of those programs, and better coordination among all federal agencies whose programs and activities can affect marine resources. Enactment of the recommendations in this resolution would thus be an effective beginning to the improvement of the United States’ regulatory regime for the oceans.
GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Standing Committee on Environmental Law

Submitted By: R. Kinnan Golemon, Chair

1. **Summary of Recommendation(s).** Encourages Congress and the President to take specific legislative, regulatory, and other actions necessary to improve the structure of our country’s domestic management and regulation of its marine resources in order to better protect the integrity of its marine ecosystems and to ensure ecologically sustainable use and development of its marine resources. Recommended measures include coordination of national oceans policy and federal regulatory authority over U.S. ocean waters and resources within one centralized federal oceans agency that will articulate a national oceans policy, hold sufficient discretion and authority, and carry reporting requirements, and enactment of legislation requiring a federal entity – whether NOAA or the Committee on Ocean Policy in the Executive Office of the President – to coordinate all federal department and agency planning and ocean-related activities to ensure proper implementation of the national oceans policy.

2. **Approval by Submitting Entity.** Approved by the Committee in May 2005.

3. **Has this or a similar recommendation been submitted to the House or Board previously?** No. In 1967, the ABA adopted policy enabling two ABA Sections to assist the National Council on Marine Resources and Engineering Development in developing recommendations of a plan for an adequate national oceanographic program. The government agency referenced in that resolution no longer exists, and both the issues and the governmental regulatory structure have changed since then.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?** In August 1991, the ABA adopted policy urging the U.N. and all nations to adopt and implement measures to ensure that activities within their jurisdiction or control will be conducted in a manner that accounts for the interests of present and future generations, to generate plans promoting conservation and efficient use of natural resources, and to cooperate with other nations. The present proposal is consistent with that general goal, now specifically urging federal regulatory steps that will ensure sustainable use and development of the oceans.

5. **What urgency exists which requires action at this meeting of the House?** Two commission reports have issued, one by legislative mandate, reviewing critical oceans issues and presenting recommendations for change. In addition, the Administration has offered an Action Plan to address some of the recommendations. Last year, several bills were introduced in Congress to legislate oceans protections, and Administration sources advise of plans to introduce new legislation this session. The oceans are in a critical state. The proposed ABA recommendations allow the ABA to speak out on these very important issues, including commenting on legislation that inevitably will be introduced.
6. **Status of Legislation.** (If applicable.)
   Several bills were introduced in the last Congress. Administration sources report plans to propose legislation in this congressional session.

7. **Cost to the Association.** (Both direct and indirect costs.)
   None

8. **Disclosure of Interest.** (If applicable.)
   None

9. **Referrals.**
   The recommendations were drafted with the input of several ABA Sections. The resultant documents are being referred to all ABA Sections in May 2005, and also will be circulated to the state bar associations of California, Connecticut, Delaware, Florida, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas, Virginia, Washington, and the District of Columbia, among others, and to the Maritime Law Association of the U.S.

10. **Contact Person.** (Prior to the meeting.)
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11. **Contact Person.** (Who will present the report to the House.)
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