CONFLICT RESOLUTION AND MULTIPLE-USE MANAGEMENT IN THE EXCLUSIVE ECONOMIC ZONE

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ABSTRACT

Good multiple-use management of the Exclusive Economic Zone (EEZ) requires better methods for reducing and resolving conflicts among single-purpose marine regulatory programs. As the first generation regulatory programs come of age, Congress and the administrative agencies should turn their attention to modifying existing programs to increase their compatibility and to establish mechanisms for resolving unavoidable conflicts. Rejecting the single-purpose regulatory systems in favor of a more comprehensive approach is neither feasible nor necessary.

INTRODUCTION

The principal importance of the Exclusive Economic Zone (EEZ) Proclamation lies in the realm of foreign policy and international marine affairs; from a domestic perspective, the Proclamation augments in only minor respects the existing authority of the United States to regulate activities in the EEZ.1 The Proclamation does, however, extend a general, area-wide claim of sovereign rights over economic activities in the EEZ, in contrast to the resource-specific claims extended by the United States over the past century. Conceptually, it is possible to view the EEZ Proclamation as providing an opportunity to fashion a managerial strategy for the EEZ that departs from the single purpose regulatory regimes that currently dominate the U.S. regulatory approach. This opportunity coincides with criticisms of the single-purpose regimes as inappropriate for managing the dynamic natural system of the oceans which ignores artificial regulatory distinctions.2

The central challenge posed by the Proclamation is to fashion a regulatory system that best manages the many uses of the EEZ. Do the older single-purpose regimes developed under a different jurisdictional framework suit the needs of effective multiple-use management, or should the single-purpose regimes give way to a more comprehensive managerial system? This paper will argue that the single-purpose regulatory regimes of the current U.S. approach provide an appropriate administrative setting to fulfill national objectives in marine affairs. Multiple-use management does not require the rejection of single-purpose regimes, but requires better mechanisms for resolving conflicts among those regimes. The development of an effective system for reconciling conflicts among the single-purpose regimes therefore constitutes the heart of multiple-use management. Further, the paper will argue that comprehensive management for the EEZ will not occur because there is not sufficient political support for such an approach, and because comprehensive management is neither necessary nor desirable.

The term "multiple-use management" is frequently heard in discussions of natural resource management, yet lacks clear definition. In this paper, multiple-use management will mean, simply, that system that manages many activities within a given geographic area effectively (producing the greatest good) and efficiently (at least cost). The term "single-purpose regime" refers to regulatory programs tailored to specific resources or activities, such as fishing, hydrocarbon development, ocean dumping, etc. "Comprehensive management" is intended to refer to a system...
of centralized decision-making applying to a variety of activities within a given geographical area using a unified set of objectives. This term envisions a unified regulatory umbrella over the EEZ, in contrast to single-purpose regimes.

PART I: PROSPECTS FOR COMPREHENSIVE MANAGEMENT

There is little likelihood that the United States will adopt a comprehensive management approach for the Exclusive Economic Zone because there is no direct political constituency for a comprehensive approach. Even if the comprehensive approach could be demonstrated to yield the greatest good, there are few groups that would, for that reason alone, support such an approach since it fails to appeal to self-interest. This first point is axiomatic is a laissez-faire system. Groups vie for the rules and processes that will benefit them: the fact that the result may yield the greatest overall good is a happy coincidence which is not of primary importance to the individual groups. Fishermen are not expected to fret about declining budgets for oceanographic research, nor are industrial dischargers to concern themselves with impediments to offshore leasing.

Absent direct political support for a comprehensive approach for its own sake, the development of such an approach will occur only through coalition politics whereby individual groups merge to achieve objectives of common interest not otherwise available to them individually. These coalitions frequently arise from several conditions. First, the existing system of legislative, administrative and judicial decision-making must be perceived as inadequate due to its failure to achieve desired objectives or due to unacceptably high costs for reaching those objectives.

Second, the dissatisfaction with the present system or the attraction of an alternative must generate support of a broad enough coalition to alter the status quo. As a corollary, individual groups must have sufficient power to block solutions tailored to the narrower interests of other groups. Some form of stalemate on a limited scale may be necessary to ensure that a sufficiently large sector calls for or will not oppose an alternative system.

Third, the interests at stake must be important enough to overcome inertia. The value of familiarity must not be underestimated. While individual groups may chafe under the existing system of rules, the unpredictability of untested alternatives weighs against change. Dissatisfaction with the existing system must therefore pass a certain threshold to counterbalance inertia.

Fourth, the stalemate must be perceived as lasting. In the flux of public policymaking, conflicts are won and lost with regularity; today's success may well disappear tomorrow, only to resurface in the future as the marketplace, public moods, judicial trends and political strengths shift. The inability of the system to produce minimally acceptable results must be perceived as sufficiently permanent to reduce the probability that the normal flux of events will produce better times.

It is unlikely that present deficiencies in the single-purpose regulatory regimes will generate a sufficient coalition to support a comprehensive management approach. Existing conflicts have not generated broad enough dissatisfaction to support alternatives. While individual groups may fail to secure satisfactory results from time to time, this failure is by and large local and case specific. The problems that occur tend to be expressed in a specific context and resolved in that context, reinforcing the existing organizational structure. Further, groups are most likely to favor decision-making systems focused narrowly on their objectives; that is, on single purpose regimes. Each group prefers a narrow regulatory regime free from other, secondary considerations that might sidetrack their primary objectives or diminish their clout. Finally, the organizational characteristics of Congress decrease the probability that a comprehensive management regime will develop. A unified approach to the EEZ would require the numerous committees in both chambers that share jurisdiction over marine affairs to relinquish their autonomy. In a system where jurisdiction and autonomy is an important element of political power, congressional committees will only cede their legislative authority in the face of substantial public pressure wholly lacking in this instance. Similar considerations apply to administrative agencies, where agency relations are frequently characterized by competition for increased
budgets and authority.

Prospects for a comprehensive management approach to the EEZ are poor not only because the approach lacks the necessary direct or indirect support, but also because it is not needed. The majority of decisions under single-purpose regulatory regimes do not entail substantial spill-over effects on activities outside that regime. For instance, the majority of decisions under the Magnuson Fishery Conservation and Management Act probably affect fishermen alone and don’t affect shippers or other users in any significant way. Similarly, the majority of decisions under the Ocean Dumping Act have little effect on, say, oil and gas development on the outer Continental Shelf. Moreover, these decisions would likely remain unaffected by a comprehensive regulatory regime since the very purpose of that regime would be to target and improve the narrower class of decisions that do, in fact, result in substantial effects. The relative autonomy of the majority of decisions under the single-purpose regimes argues for retaining those regimes and undercuts support for more comprehensive management.

PART II: CONFLICT RESOLUTION WITHIN THE EEZ

The primary challenge for good multiple-use management lies not in the easy cases of benign activities, but in the more limited instances where decisions under one regulatory regime result in substantial effects on another activity outside that regime. A major failing of the single-purpose regulatory approach lies in its inability to account adequately for these "spillover" effects and to reconcile them with its primary mission. The success of multiple use management in the EEZ therefore depends upon the success with which these conflicts are reconciled.

Reconciling conflicts is the business of government and the central function of lawyaking. In enacting laws, Congress articulates the basic objectives and standards that are to govern conduct, and serves as the central forum for resolving basic social conflicts. However, the technically complex legislative problems relating to natural resource management, public health and environmental protection have taxed the expertise of elected representatives and posed tough political choices for them. In responding, Congress has increasingly relied upon the agencies to do whatever is right by granting them very broad mandates of limited substantive guidance. Thus, Congress directs the Secretary of Commerce to regulate fishing to achieve the greatest overall benefit for the nation, or the Environmental Protection Agency to protect the oceans from unreasonable degradation. In doing so, Congress has relinquished a portion of its role as the arbiter of fundamental social conflicts. It has transferred to the agencies substantial lawmaking responsibilities and has, in the process, transformed the basic character of the agencies.

The traditional New Deal model of federal executive agencies depicted the agencies as neutral technocratic experts that could and would decide what was in the public interest. This model depended on very broad statutory mandates, agencies that were free from political manipulation, and a judiciary that refrained from second-guessing expert administrative decisions. Outside groups would provide information to the agencies during the decision-making process, but did not enjoy sufficient breadth of perspective or expertise to compete with the agencies.

This traditional role has given way to a more complex one whereby the agencies serve primarily as umpires in conflicts among organized, sophisticated combatants. In deciding what constitutes the greatest benefit for the nation, or what is reasonable degradation, the agencies engage in a political process which has been transferred to them from the Congressional arena by open-ended statutory mandates. Rule-making has become a form of administrative legislating. Their character as experts is retained, but vanished is their freedom from political influences.

The open-ended character of Congressional mandates stems in part from the difficult task of legislating in detail on subjects that are technically complex and that require difficult choices based on scant information. The necessity to enact broad mandates ensures that the administrative agencies will continue to play central roles in reconciling conflicts. The more fundamental the conflict, the more appropriate is its resolution by Congress. Conversely, the more localized or specific the conflict, the more appropriate is its resolution by the administrative process.

The success of multiple-use management will therefore depend largely on the success with which Congress and the agencies are able to reconcile con-
conflicts. With the first generation of single-purpose regulatory systems now coming of age, Congress and the administrative agencies should turn their attention to increasing the compatibility of marine programs and to resolving unavoidable conflicts among those programs. Congress should review and revise the major substantive mandates of the existing regulatory programs to accomplish this end and should assist the administrative agencies in improving interagency functions by fashioning appropriate procedural directives. In doing so, Congress should assume more political responsibility for governing in the EEZ by legislating in greater detail and making the difficult choices where trade-offs are unavoidable.

The call for greater specificity is not without risks. The Congressional style of legislating that prevailed during the last two decades reflected a preference for very broad delegation of substantive mandates and attention to procedural detail, relying on procedural provisions when it would not address substance. Several of the major marine mandates enacted during this period reflect this style. Detailed statutory directives, however, inhibit flexibility in administrative actions and decrease the ability of the agencies to respond to circumstances unforeseen by Congress. Judgements of administrative agencies must also meet certain standards of reasonableness, whereas Congressional judgements are constrained only by constitutional limits and the political process. Nevertheless, the increase in due process protections that flow from the accessibility of the legislative process and the increased political accountability for the decisions justify the risks.

Similarly, the agencies should also turn their attention to increasing the compatibility among programs and reconciling conflicts that are unavoidable. The present system for reconciling conflicts requires revision. The principal mechanisms for resolving conflicts publicly is the opportunity to exchange comments during the informal rulemaking under the Administrative Procedures Act (APA) and during the development of environmental impact statements under the National Environmental Policy Act (NEPA). The basic shortcoming with the these mechanisms is their advisory character, ensuring that they may carry little weight with the lead agency that is charged with a specific mission. Therefore:

1. Congress should revise the objectives for single-purpose regimes. Several of the major objectives governing important marine activities should be revised to provide executive agencies with meaningful guidance in making decisions. Congress should reassert its position as the principal policymaker by stating policy objectives with greater detail. Further, Congress should reforge its mandates to increase the compatibility among the major single-purpose regimes, and to provide greater legislative guidance on reconciling areas of incompatibility. Where complexity prohibits statements of policy, the Congress should ensure that it identifies the desired objectives in a useful manner.

2. Congress should specify the procedures that agencies are to use in resolving conflicts. Procedures for identifying and resolving conflicts require strengthening. The APA and NEPA provide important opportunities for on the record comments, but little direction on how the comments are to be used. The strengthening of standards for decision-making and for judicial review in the case of substantial conflicts among regulatory regimes should be examined to improve the quality of administrative performance. On the record explanations of administrative decisions should be credible and thorough. Congress should also exercise its oversight responsibilities more vigorously to provide incentives for better integration of marine programs at the administrative level.

3. Administrative agencies should improve interagency mechanisms. The administrative agencies should develop methods for identifying areas of potential conflict between agency actions and for resolving those conflicts early. The call for greater coordination is often heard, yet the task falls prey to inter-agency rivalries and more pressing priorities. Moreover, proper resolution of conflicts depend as well on good information. The administrative agencies should improve the sharing of information in those areas where substantial spill-over effects could be anticipated.

4. Administrative agencies should review their mandates and recommend modifications to Congress. As the principal entities charged with implementing Congressional mandates, the agencies are frequently in excellent positions to recognize deficiencies in those mandates. Frequently the agencies
remain silent because they fear the unpredictability of Congressional actions, the loss of authority in legislative revisions that could ensue, or political criticism from the Administration or Congress. The agencies should nonetheless review their marine mandates to determine if federal statutes taken as a whole best promote multiple-use management in the EEZ and provide its recommendations to Congress.

CONCLUSION

Effective multiple-use management in the EEZ does not require the rejection of the single-purpose regulatory regimes, but requires increased compatibility among those regimes and improved methods for resolving unavoidable conflicts. As the single-purpose regulatory programs come of age, both Congress and the administrative agencies should examine methods to avoid unnecessary conflicts and to improve trade-offs where conflicts are unavoidable. Congress should revise its legislative mandates, articulate with greater detail the desired objectives within and among programs and recapture the legislative responsibility for making the difficult policy choices. The administrative agencies should improve mechanisms for generating and sharing information, for identifying potential conflicts among marine programs and for resolving those conflicts.

FOOTNOTES

1. The Proclamation augments existing U.S. claims by extending sovereign rights over the seabed that lies beyond the continental shelf but within two hundred miles, by expanding in limited respects the authority to prescribe rules for protecting the marine environment and the authority to enforce international standards, and by establishing a blanket claim over all economic uses of the EEZ, including the more speculative activities not now in practice, such as harnessing wind and wave energy.


