

2010

## Time For A Department Of The Environment

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### Recommended Citation

Alan B. Sielen, *Time For A Department Of The Environment*, 16 Ocean & Coastal L.J. (2010).

Available at: <http://digitalcommons.maine.edu/oclj/vol16/iss2/9>

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## TIME FOR A DEPARTMENT OF THE ENVIRONMENT

*Alan B. Sielen\**

### I. THE GULF OIL SPILL

The BP Deep Water Horizon Oil Spill (Gulf Oil Spill) in April 2010 resulted in eleven deaths and one of the largest environmental catastrophes in American history. At the time of the Gulf Oil Spill, the United States had entered a period of relative calm regarding the dangers of offshore oil and gas activities. Oil spills no longer commanded the attention they received in the early days of environmental activism when, in 1969, a major spill at an oil platform six miles off the coast of Santa Barbara, California galvanized public attention and led to the first Earth Day in 1970.

The Santa Barbara spill, along with a growing national environmental consciousness, led to a modest strengthening of national laws to guard against the hazards of offshore oil and gas exploration and development. However, these environmental initiatives, industry reassurances of the safety of its operations, and growing concern about other pollution sources all contributed to the growing complacency. Although the ecological effects of the chronic toxic dribs and drabs of offshore operations continued to trouble some experts, such effects received relatively little attention in contrast with the drama of a large spill<sup>1</sup>

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1. "Operational discharges in the offshore exploration for and extraction of oil and natural gas include operational wastes, such as drilling fluids/drilling muds, produced formation waters and formation cuttings, and machinery space discharges." *Operational*

When a major accident made headlines—such as the blowout of an exploratory well at the Bay of Campeche in the Gulf of Mexico in 1979<sup>2</sup>—it was generally seen as an aberration; not something symptomatic of larger, systemic problems relating to the environmental management of offshore drilling. In just a few years, drilling disasters had fallen from the covers of national magazines to a relatively low place on most environmental agendas.

In 2004, the U.S. Commission on Ocean Policy concluded that, “[s]ince the 1969 Santa Barbara blowout, the U.S. oil industry’s environmental and safety record has improved significantly, as has the regulatory regime of [Department of the Interior]. Today, safety stipulations are more stringent, technologies are vastly improved, inspections are regular and frequent, and oil spill response capabilities are in place.”<sup>3</sup> In addition, deferred action on then President George W. Bush’s proposal to drill for oil in the Arctic National Wildlife Refuge also helped turned down the heat on a once inflammatory topic.

Even major oil tanker accidents such as the *Exxon Valdez* spill in Alaska’s Prince William Sound in 1989, and the environmentally catastrophic accident of the tanker *Prestige* off the coast of Spain in 2002, receded from the public mind. By the time of President Obama’s election in 2008, climate change and other environmental issues had, for some time, replaced oil pollution in the hierarchy of environmental concerns. Several weeks before the Gulf Oil Spill, the Obama administration felt comfortable enough with the public acceptance of offshore drilling—despite some local opposition—to announce plans for opening large areas along the Atlantic coastline, the eastern Gulf of Mexico, and the north coast of Alaska, to oil and natural gas drilling.<sup>4</sup>

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*Discharges of Oil*, GLOBAL MARINE OIL POLLUTION INFO. GATEWAY, <http://oils.gpa.unep.org/facts/operational.htm> (last visited Apr. 4, 2011).

2. *Incident News*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://www.incidentnews.gov/famous> (last visited Apr. 2, 2011). The two-mile deep exploratory well, Ixtoc I, blew out on June 3, 1979 in the Bay of Campeche off Ciudad del Carmen, Mexico. *Id.* “The water depth at the wellhead site was about fifty meters.” *Id.* By the time the well was brought under control in March 1980, an estimated 140 million gallons of oil had spilled into the bay. *Id.*

3. U.S. COMM’N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 361 (2004). The report also noted that there remain numerous environmental issues associated with the development and production of oil from the outer continental shelf. *Id.* Additionally, the report states that more than 95 percent of U.S. offshore oil and gas production takes place in the western and central Gulf of Mexico, where there is an established infrastructure and general public acceptability. *Id.* at 357.

4. See John M. Broder, *Obama to Open Offshore Areas to Oil Drilling for First Time*, N.Y. TIMES, Mar. 31, 2010, <http://www.nytimes.com/2010/03/31/science/earth/>

The Gulf Oil Spill would change all this. Soon, the discrepancy between the perceived low risk of offshore drilling operations and the reality of the Gulf Oil Spill would raise probing questions about the safety of offshore activities and the role of government and industry in preventing and responding to accidents. Of particular concern was the reliability of the oil industry and government regulators in assessing and communicating to the public the safety and environmental risks of offshore drilling.<sup>5</sup> The fact that government and industry officials had not been content to simply state that exploration at the Deepwater Horizon site was within the boundaries of acceptable risk (a dubious proposition in itself events would demonstrate), but, instead, insisted that such activities were “fail-safe” did not go unnoticed.<sup>6</sup>

In May 2010, President Obama created the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (the Commission) to study the causes of the disaster and to recommend needed reforms to make offshore energy production safer.<sup>7</sup> The non-partisan Commission was co-chaired by former Senator Bob Graham and William K. Reilly, the U.S. Environmental Protection Agency (EPA) Administrator under President George H.W. Bush.<sup>8</sup>

In examining the industry culture, poor judgment, and systemic failures leading to the blowout, the Commission concluded that the Gulf Oil Spill was more than an environmental catastrophe whose ecological and human consequences were still not fully understood.<sup>9</sup> According to the Commission, “the disaster in the Gulf undermined public faith in the

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31energy.html; see also Steve Caldwell, *Finding the Sweet Spot for Offshore Drilling*, PEW CENTER ON GLOBAL CLIMATE CHANGE (Apr. 6, 2010), <http://www.pewclimate.org/blog/caldwells/finding-sweet-spot-offshore-drilling>.

5. See Richard Simon & Jim Tankersley, *Oil Executives Trade Blame in Senate Grilling*, L.A. TIMES, May 12, 2010, <http://articles.latimes.com/2010/may/12/nation/la-na-oil-spill-20100512>.

6. See, e.g., *id.*

7. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* vi (2011), available at [http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER\\_ReporttothePresident\\_FINAL.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf) [hereinafter FINAL REPORT].

8. *Id.* at iv.

9. Among the many environmental unknowns being investigated by research scientists is whether recent occurrences of young dolphin calves washing up on Gulf of Mexico shores is somehow related to the Gulf Oil Spill. Brian Vastag, *Dolphin Cold Case: Investigators Say that Cause of Calf Die-off May Never Be Known*, WASH POST, Feb. 26, 2011, [http://www.washingtonpost.com/wp-dyn/content/article/2011/02/25/AR2011022506750\\_2.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/02/25/AR2011022506750_2.html).

energy industry, government regulators, and even our capability as a nation to respond to crises . . . . There is much at stake, not only for the people directly affected in the Gulf region, but for the American people at large.”<sup>10</sup>

As painstakingly detailed in the Commission report, the Gulf Oil Spill was a preventable accident. The failure by industry and by government regulators to take the necessary steps to prevent the blowout goes beyond individual lapses of judgment. Rather, it indicts an entire culture of industry and governmental interaction in which a regulated industry was allowed, for all practical purposes, to police itself. The Commission report emphasizes the “systematic” failures “in both industry practices and government policies” that contributed to the disaster and that, without significant reform will likely occur again.<sup>11</sup> U.S. Coast Guard findings in April 2011 as part of the Deepwater Horizon Joint Investigation Team also underscore flaws in emergency training and equipment and a poor safety culture.<sup>12</sup> According to investigations, the drill rig operator Transocean has a culture that can be described as “running it until it breaks,” “only if it’s convenient,” and “going through the motions.”<sup>13</sup>

Likewise, the Gulf Oil Spill underscored some of the weaknesses inherent in the nation’s approach to environmental research. The Commission report concluded that, “[s]cientific understanding of environmental conditions in sensitive environments in deep Gulf waters, along the region’s coastal habitats, and in areas proposed for more drilling, such as the Arctic, is inadequate. The same is true of the human and natural impacts of oil spills.”<sup>14</sup> Ultimately, the Commission recommended that “[t]he Department of the Interior should reduce risk to the environment from [outer continental shelf] oil and gas activities by

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10. *Id.* at viii.

11. *Id.* at 122; *see also id.* at 260 (noting that “[t]he adequacy of the existing regulatory regime to assure the environmental safety of offshore drilling (as distinct from worker or occupational safety) has come under a great deal of scrutiny since the *Deepwater Horizon* incident.”); *see also id.* at vii (noting that “[f]undamental reform will be needed in both the structure of those in charge of regulatory oversight and their internal decision making process to ensure political autonomy, technical expertise and their full consideration of environmental concerns.”).

12. Joel Achenbach, *Coast Guard Report Skewers Transocean over BP Oil Spill*, WASH. POST, Apr. 23, 2011, at A3.

13. *Id.*

14. FINAL REPORT, *supra* note 7, at vii.

strengthening science and interagency consultation in the [outer continental shelf] oil and gas decision making process.”<sup>15</sup>

In the aftermath of the Gulf Oil Spill, the Department of the Interior—whose Minerals Management Service oversaw the operations at the Deepwater Horizon well—responded to the Commission recommendations with some cautious steps.<sup>16</sup> Perhaps the most important of these was the decision by Secretary Ken Salazar to separate energy development and safety functions within the Department of the Interior by creating two new agencies.<sup>17</sup> The Secretary also announced plans for a new advisory committee of academics, industry representatives, and citizens groups to recommend safety measures.<sup>18</sup>

These steps appear to offer improvements over the previous system if carried out faithfully and in combination with other needed reforms. When looking at the problem from a broader perspective, however, the new measures fall short of the mark. They perpetuate a system in which important development and regulatory decisions are still located within a conflicted Department of the Interior with an ambivalent environmental mission.

In addition to their questionable effectiveness in moderating the outsized influence of developmental interests at the Department of the Interior, the internal changes point to a wider problem concerning environmental regulation and management in the United States: many of the underlying systemic failures that contributed to the Gulf Oil Spill can also be found in the workings of other federal departments and agencies with environmental responsibilities.<sup>19</sup>

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15. *Id.* at 263.

16. Press Release, U.S. Dep’t of the Interior, Salazar, Bromwich Announce Next Steps in Overhaul of Offshore Energy Oversight and Management (Jan. 19, 2011), available at <http://www.doi.gov/news/pressreleases/Salazar-Bromwich-Announce-Next-Steps-In-Overhaul-of-Offshore-Energy-Oversight-and-Management.cfm>.

17. *Id.*

18. *Id.*

19. For example, the deficit of reliable science noted by the Commission in relation to offshore activities is a feature of some EPA programs. Protracted regulatory paralysis at EPA on the health effects of endocrine disrupting chemicals—which are suspects in cancer, developmental and reproductive disorders—has been enabled by over-reliance on industry studies that minimize the risks of these chemicals. See, e.g. Memorandum from Bergeson & Campbell, P.C., on Hearings of the House Committee on Energy Subcommittee on Energy and the Environment on Endocrine Disrupting Chemicals in Drinking Water, 2010-M.16, available at <http://www.lawbc.com/news/docs/2010/03/030110-endo.htm>. Recent scientific study on chemical safety has further underscored the need for more and better science on this complex topic. Scientists are now calling attention to the importance of relying on a

## II. THE PROBLEM

The environmental movement of the early 1970s emphasized the importance of consolidating federal environmental responsibilities into a single governmental agency.<sup>20</sup> Indeed, President Richard M. Nixon's Reorganization Plan No. 3, which created the EPA, brought greater focus and rationality to environmental regulation and management.<sup>21</sup> Pulling together, under the organizational umbrella of EPA, disparate environmental programs spread throughout the federal government and creating new ones where necessary has paid significant dividends. These benefits can be measured by improvements in public health, conservation of natural resources, and the emergence of a true national environmental consciousness.

However, the job was never completed. Despite EPA's major responsibilities for administering the nation's environmental laws such as the Clean Air Act amendments and the Clean Water Act,<sup>22</sup> the agency has never been given full cabinet status. Moreover, a number of important federal environmental responsibilities remain splintered among a group of often competing departments and agencies, including the Department of the Interior, the Department of Agriculture, the Department of Commerce, the Department of Defense, and most recently, the Department of Homeland Security.<sup>23</sup> In January 2003, the

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broad range of scientific and clinical disciplines, including genetics, developmental and reproductive biology, and endocrinology, to improve methods of assessing risks posed by common chemicals. See The American Society of Human Genetics, the American Society for Reproductive Medicine, the Endocrine Society, the Genetics Society of America, the Society for Developmental Biology, the Society for Pediatric Urology, the Society for the Study of Reproduction, the Society for Gynecologic Investigation, Letter to the Editor, *Assessing Chemical Risk: Societies Offer Expertise*, 331 SCI. 1136, 1136 (2011).

20. See Jack Lewis, *The Birth of EPA*, EPA J., Nov. 1985, <http://www.epa.gov/history/topics/epa/15c.htm>.

21. For a discussion of the reorganization, including the transfer to EPA of certain programs from the Department of the Interior, the Department of Agriculture, the Department of Health, Education and Welfare, the Atomic Energy Commission, and other agencies, see *History*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/history> (last visited Feb. 25, 2011).

22. Clean Air Act, 42 U.S.C. §§ 7401-7671q; Clean Water Act, 33 U.S.C. §§ 1251-1387. For discussion of environmental laws administered by EPA, see *Laws and Regulations*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/lawsregs> (last visited Feb. 25, 2011).

23. The Department of Homeland Security was formed in 2002 in response to the September 11, 2001 terrorist attacks on the United States. The Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142 (2002).

National Commission on the Public Service, chaired by Paul A. Volcker, observed that government expansion on an issue by issue basis has resulted in a “virtually unmanageable tangle of government activities” that negatively affects program performance.<sup>24</sup> “With 541 clean air, water, and waste programs in 29 agencies, no one in the federal government can effectively manage the application of federal resources devoted to these goals.”<sup>25</sup>

While not a full-fledged member of the cabinet, the Administrator of EPA is accorded “cabinet rank” along with five other administration positions and is included in cabinet meetings.<sup>26</sup> Though varying from administration to administration, cabinet rank generally does not carry the same institutional weight as full membership in the Cabinet (which can mean, among other things, added leverage in dealings with Congress and with other federal agencies.)

Poor environmental management of offshore drilling is only one part of this legacy of unfinished business. The decision made as part of the 1970 reorganizations<sup>27</sup> to place the new National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce has at times prevented the federal government from putting its best environmental foot forward. Having to filter major environmental decisions through the Secretary of Commerce tends to weaken NOAA’s conservation mandate. Moreover, the raw political dynamic which apparently accounted for the decision to place NOAA under the political umbrella of Commerce dispels any notion that environmental considerations were a serious factor.<sup>28</sup> As recently as the Gulf Oil Spill,

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24. THE NAT’L COMM’N ON THE PUBLIC SERVICE, URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 36 (2003) [hereinafter VOLCKER COMMISSION].

25. *Id.* at 15.

26. The five other positions are: White House Chief of Staff, Director Office of Management and Budget, U.S. Trade Representative, U.S. Ambassador to the United Nations, and Chair Council of Economic Advisors. See *The Cabinet*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/cabinet> (last visited Apr. 4, 2011).

27. On July 9, 1970, President Nixon submitted to Congress Reorganization Plans Nos. 3 and 4 of 1970 to establish an Environmental Protection Agency and a National Oceanic and Atmospheric Administration. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO REORGANIZATION PLANS NOS. 3 AND 4 OF 1970, H.R. DOC. NO. 91-366 (1970).

28. At the time, NOAA was expected to be established within the DOI. Government insiders have long maintained that this option vanished when then “Interior Secretary Walter Hickel publically criticized the Nixon administration’s Vietnam War policy . . . .” PETER BORRELLI, STELLWAGEN: THE MAKING AND UNMAKING OF THE NATIONAL MARINE SANCTUARY 31 (2009). In retaliation, President Nixon gave NOAA to the Commerce

critics have questioned the scientific advice provided by NOAA to the White House.<sup>29</sup>

To further illustrate, President Obama, in his 2011 State of the Union address, called attention to the incongruity of having the Department of the Interior in charge of the regulation of salmon when they are in fresh water and the Commerce Department responsible when they are in saltwater.<sup>30</sup>

The U.S. Coast Guard—which has been in the forefront of the government’s response to the Gulf Oil Spill and is also the agency responsible for several major marine safety and pollution prevention programs—is part of the Department of Homeland Security as a result of a decision made by President George W. Bush in the aftermath of the September 11, 2001 terrorist attacks on the United States.<sup>31</sup> Only a small part of the Department of Homeland Security’s budget is devoted to the environment, thus shortchanging the Coast Guard’s critical environmental missions.<sup>32</sup> In the wake of September 11th, the EPA also assumed substantial new responsibilities for homeland security at the

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Department, and in November 1970 he fired Hickel. *Id.* This account has been corroborated by the author’s discussions with people familiar with the decision at the time.

29. See, e.g., Justin Gillis, *Scientist Fault Lack of Studies Over Gulf Oil Spill*, N.Y. TIMES, May 19, 2010, <http://www.nytimes.com/2010/05/20/science/earth/20noaa.html>; Jennifer A. Dlouhy, *White House Takes Criticism Over Handing of Gulf Oil Spill*, HOUS. CHRON., Oct. 6, 2010, <http://www.chron.com/disp/story.mpl/business/energy/723524.html>.

30. President Barack H. Obama, 2011 State of the Union Address (Jan. 25, 2011) (webcast available at <http://www.whitehouse.gov/state-of-the-union-2011>).

31. Press Release, U.S. Coast Guard, Transfer of Coast Guard to DHS (Feb. 25, 2003), available at [http://www.cgvi.uscg.mil/media/main.php?g2\\_itemId=87188](http://www.cgvi.uscg.mil/media/main.php?g2_itemId=87188).

32. The U.S. Coast Guard has major environmental responsibilities including protecting the marine environment from oil and chemical spills, enforcement and educational activities. JONATHAN L. RAMSEUR, CRS REPORT FOR CONGRESS: ENVIRONMENTAL ACTIVITIES OF THE U.S. COAST GUARD 1 (2008), available at <http://www.fas.org/sgp/crs/misc/RS22145.pdf>. An important component is “inspection of U.S. and foreign-flagged ships to ensure compliance with U.S. laws and international agreements.” *Id.* “Marine environmental protection is one of six ‘non-homeland security missions’ specified in the Homeland Security Act of 2002.” *Id.* The Department of Homeland Security budget in FY 2009 was estimated at \$50.5 billion dollars. Of that total, approximately \$9.3 billion went to the Coast Guard. *Id.* at 2. In turn, \$359 million of the Coast Guard budget went to marine environmental protection—that is about 3.8 percent of the total Coast Guard budget. *Id.* For a discussion of the Fiscal Year 2012 Coast Guard budget, see Admiral Bob Papp, *Coast Guard Commandant’s Message on the FY 2012 Budget*, THE COAST GUARD NEWS (Feb. 16, 2011), <http://coastguardnews.com/coast-guard-commandants-message-on-the-fy-2012-budget>.

expense of more conventional environmental priorities.<sup>33</sup> These duties include: “(1) critical infrastructure protection; (2) preparedness, response and recovery; (3) communication and information; (4) protection of EPA personnel and infrastructure.”<sup>34</sup>

The Food and Drug Administration (FDA), EPA, and the Department of Agriculture share the responsibility for ensuring that residues of pesticides (including insecticides, fungicides, herbicides, and other agricultural chemicals) in foods are not present in levels which pose a danger to health.<sup>35</sup> The administration of the nation’s national parks, fish and wildlife resources, and major water resources is the responsibility of the Department of the Interior. The Department of Agriculture has important conservation duties with respect to national forests and grasslands. Farm policies emanating from the Department of Agriculture have very significant implications for the environmental quality of the nation’s streams, rivers, lakes, and coasts. In recent years it has been rare to hear the head of either the Department of the Interior or the Department of Agriculture make a strong, unequivocal case for protection and conservation on controversial matters affecting their department’s powerful economic constituents.

Historically, the Department of Defense (DOD) has attempted to retain as much regulatory control as possible over its own activities, including those that have environmental impacts. The Office of the Secretary of Defense, the Army Corps of Engineers, the Navy, the Air Force, and other organizations, all manage environmental programs. Many of these have made important contributions to environmental quality in the United States and overseas. One does not have to question their commitment to a healthy environment to reach the conclusion that their core national security missions will usually take precedence over consideration of public health and the environment. It is unavoidable that environmental decisions will be influenced and in some cases severely compromised by other interests. At worst, boundaries can be blurred between expedience and what is vital to the national security. Conflict between DOD and environmental agencies, like EPA, over the implementation of U.S. environmental laws has played out on many fronts in recent years.

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33. See U.S. ENVTL. PROT. AGENCY, 2003-2008 EPA STRATEGIC PLAN: DIRECTION FOR THE FUTURE 161-167 (2003).

34. *Id.*

35. *Pesticides*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Pesticides/default.htm> (last updated Mar. 17, 2011).

For example, DOD's refusal to sign enforcement agreements with EPA to effectuate the clean up of Superfund national priorities list sites has raised public concern about the safety of drinking water supplies in some areas.<sup>36</sup> DOD has also "failed to disclose some contamination to EPA and to the public in a timely fashion . . . delaying clean up and putting human health at risk."<sup>37</sup> In 2008, the process for assessing the toxicity of chemicals to be added to EPAs Integrated Risk Information System (IRIS) was revised to allow OMB, DOD and other agencies to have more influence over the assessment process.<sup>38</sup> Strong disagreement over the adverse health and environmental effects of the chemical perchlorate, an ingredient in rocket fuel, has also pitted EPA and DOD against each other.<sup>39</sup>

Defining true threats to national security has been addressed in court recently over concerns by environmentalists that sonar used by the Navy in training exercises may harm whales and other marine mammals. *Winter v. NRDC, Inc.*,<sup>40</sup> a Supreme Court decision in 2008,<sup>41</sup> which

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36. MMadia, *Pentagon Refuses EPA's Pollution Cleanup Order*, OMB WATCH (July 8, 2008), <http://www.ombwatch.org/print/3730> [hereinafter OMB WATCH].

37. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-348, SUPERFUND: INTERAGENCY AGREEMENTS AND IMPROVED PROJECT MANAGEMENT NEEDED TO ACHIEVE CLEANUP PROGRESS AT KEY DEFENSE INSTALLATIONS i (2010).

38. OMB WATCH, *supra* note 36.

39. "Perchlorate is both a naturally occurring and man-made chemical that is used to produce rocket fuel, flares and explosives." *Perchlorate*, U.S. ENVTL. PROTECTION AGENCY (Mar. 17, 2011), <http://water.epa.gov/drink/contaminants/unregulated/perchlorate.cfm>. It can also be "present in bleach and in some fertilizers." *Id.* "Perchlorate may have adverse health effects because scientific research indicates that this contaminant can disrupt the thyroid's ability to produce hormones needed for normal growth and development." *Id.* EPA recently "decided to regulate perchlorate under the Safe Drinking Water Act (SDWA)." *Id.*; see MARY TIEMANN, CONGRESSIONAL RESEARCH SERVICE: PERCHLORATE CONTAMINATION OF DRINKING WATER: REGULATORY ISSUES AND LEGISLATIVE (2009) (provides additional information on controversy leading to the EPA decision); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-462, PERCHLORATE: A SYSTEM TO TRACK SAMPLING AND CLEANUP RESULTS IS NEEDED (2005).

40. 129 S.Ct. 365 (2008).

41. In 2008, the U.S. Supreme Court ruled in favor of the Navy's claim that restrictions on the use of sonar during training activities off the coast of southern California would jeopardize the safety of the fleet. *Winter*, 129 S.Ct. at 370, 378. An injunction in January 2008 by U.S. District Judge Florence-Marie Cooper in Los Angeles—sought by the Natural Resources Defense Council (NRDC) and other groups—created a twelve-mile no-sonar zone along the coast and ordered the Navy to shut off all sonar use within 2,200 yards of a marine mammal (expanded from the Navy's previous 220 yard rule). *NRDC, Inc. v. Winter*, 530 F.Supp. 2d. 1110, 1118-1121 (C.D. Cal. 2008). In February, the Ninth U.S. Circuit Court of Appeals upheld the lower court decision.

overturned lower court decisions placing restrictions on the Navy's use of sonar for training activities in southern California when whales are nearby, was generally viewed as a setback by ocean conservationists, although some remain cautiously optimistic.<sup>42</sup> The legal and public relations battle continues and has shifted to the Florida coast.<sup>43</sup> DOD, NOAA, and other agencies also continue to work on mitigation measures applicable to the use of sonar and on a comprehensive sound budget for the oceans.<sup>44</sup> DOD must be careful not to overplay its hand. Opposing reasonable precautionary measures to save whales and dolphins has potential for driving a wedge between the military and ordinary citizens concerned about the health and safety of whales, dolphins and other marine mammals. It also runs the risk of eroding DOD's credibility for an occasion when latitude in complying with environmental laws may be more clearly warranted.

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NRDC, Inc. v. Winter, 518 F.3d 658, 663 (9th Cir. 2008). "However, while the litigation was underway the appeals court gave the Navy permission" to use sonar closer than the restrictions allow during critical maneuvers. *High Court to Review Ninth Ruling on Navy Sonar Use*, METROPOLITAN NEWS-ENTERPRISE, June 24, 2008, <http://www.metnews.com/articles/2088/wint062408.htm>.

42. The Supreme Court ruling was limited by the Navy's decision to challenge only two of the six restrictions on sonar use that the lower courts imposed. *Winter*, 129 S.Ct. at 373. The Court also limited its ruling to the particular circumstances surrounding the training exercises in southern California, leaving open the possibility that national security claims would not necessarily trump environmental concerns in the future. *See id.* at 381. In addition, the Court did not address the legality of an order by President Bush in January 2008 seeking to remove all legal restrictions on sonar use during training exercises in southern California by exempting the Navy from environmental laws during emergencies that may pose harm to national security. *Id.* at 373; *see* Linda Greenhouse, *Justices Take Case on Navy Use of Sonar*, N.Y. TIMES, June 24, 2008, <http://www.nytimes.com/2008/06/24/washington/24scotus.html>. "Justice David Souter ridiculed the idea that the Bush administration could declare an emergency to try to get around complying with environmental laws," noting that the Navy decided not to conduct a full environmental impact statement "before beginning the long-planned exercises" in southern California. Mark Sherman, *Court Wrestles with Case on Navy Sonar, Whales*, ASSOCIATED PRESS, Oct. 8, 2008, [http://www.seattlepi.com/local/382322\\_sonar09.html](http://www.seattlepi.com/local/382322_sonar09.html).

43. Clifford Krauss, *Navy vs. Environmentalists Off Florida Coast*, A BLOG ABOUT ENERGY AND THE ENV'T (July 12, 2009, 9:12 AM), <http://green.blogs.nytimes.com/2009/07/02/navy-vs-environmentalists>.

44. NOAA is now considering limiting the Navy's sonar tests in certain marine mammal "hot spots," and has called for estimating the "comprehensive sound budget for the oceans" which should help reduce human sources of noise—vessel traffic, sonar, construction activities—that degrade the environment in which sound sensitive species communicate. Letter from Jane Lubchenco, Under Sec'y of Commerce for Oceans and Atmosphere, to Nancy Sutley, Chair, Council on Env'tl. Quality (Jan. 19, 2010), *available at* <http://www.nrdc.org/media/docs/100119.pdf>.

Conflicts between national security and environmental protection have not been uncommon over the years. The attempt by the Bush administration during the southern California whales controversy to obtain a blanket national security exemption from environmental laws by declaring an emergency seems to have turned up the heat. A more measured approach by DOD that shows greater respect for legitimate environmental concerns could help defuse unnecessary controversy. It would also better reflect the DOD's own stated interest in environmental stewardship.

EPA's unequivocal mission to protect human health and the environment<sup>45</sup> avoids many of the structural conflicts experienced at other federal agencies (although it does not make the agency immune from pressure by regulated industries and other outside groups). Present EPA Administrator Lisa Jackson has shown a great deal of leadership in pursuing a strong, forward looking environmental agenda. Decisions on the regulation of greenhouse gas emissions<sup>46</sup> in the absence of Congressional action, the clean-up of the Chesapeake Bay,<sup>47</sup> and the development of new regulations for toxic chemicals<sup>48</sup> have shown a forceful, engaged agency.

Aspiration, however, is not to be confused with execution. The quality of EPA's carrying out its ambitious agenda will depend on a number of political and practical considerations, not the least of which is the vision, standing, and resources required to do its job effectively. Relegating EPA to second class status among cabinet level agencies

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45. To accomplish its mission, EPA develops and enforces regulations; gives grants to state environmental programs, non-profits, educational institutions, and others; studies environmental issues at laboratories throughout the country; sponsors partnerships with business, non-profit organizations, and state and local governments; teaches people about the environment; and publishes information about its activities. *Our Mission and What We Do*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/aboutepa/whatwedo.html> (last updated Feb. 25, 2011). Some environmental problems may be the "responsibility of other federal, tribal, state or local agencies." *Id.* "For example, the Endangered Species Act is managed primarily by the Fish and Wildlife Service" of the Department of the Interior and "the Department of Energy's Office of Civilian Radioactive Waste Management addresses the problem of nuclear waste." *Id.*

46. Press Release, Env'tl. Prot. Agency, EPA Formally Announces Phase-in of Clean Air Act Permitting for Greenhouse Gases/Agency reiterates no stationary source requirements until 2011, (Mar. 29, 2010); Press Release, Env'tl. Prot. Agency, DOT, EPA Set Aggressive National Standards for Fuel Economy and First Ever Greenhouse Gas Emission Levels for Passenger Cars and Light Trucks, (Apr. 1, 2010).

47. Press Release, Env'tl. Prot. Agency, EPA Establishes Landmark Chesapeake Bay Pollution Diet, (Dec. 29, 2010).

48. Press Release, Env'tl. Prot. Agency, EPA to Develop Regulation for Perchlorate and Toxic Chemicals in Drinking Water, (Feb. 2, 2011).

forces the EPA Administrator to work with one hand tied behind her back and puts off the day when a clean environment can compete on a level playing field with other important national interests.

### III. THE BENEFITS OF A DEPARTMENT OF THE ENVIRONMENT

Creating a cabinet level Department of the Environment by bringing all major federal environmental programs, including climate change, together under one roof would be an important step in correcting these structural and organizational deficiencies and in setting the country on the right environmental path. The practical and symbolic benefits resulting from creation of the new department would likely be felt immediately by the American public, within our government, and internationally.<sup>49</sup>

#### *A. Cost Efficiencies and Savings*

Full-fledged cabinet departments are in a stronger position to command necessary resources and to pursue a broad strategic vision than their junior partners in government. By eliminating or substantially reducing duplication, organizational fragmentation, and other inefficiencies, a Department of the Environment would save money. By controlling a larger share of the overall federal budget dedicated to the environment than the present EPA does, the Department of the Environment could more efficiently apportion and mobilize resources for high priority areas.

#### *B. Communicating the Message*

A Secretary of the Environment would be a visible symbol and champion for environmental improvement. Though the Secretary will not win every battle, she would be expected to make the case within the government and to the American people for a healthy and sustainable environment. In much the same way that the Secretary of Defense or the

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49. The many groups that do business with the EPA would benefit from the creation of a new Department of the Environment. For example, state and local governments, business and industry; all of whom complain about the difficulty of working with widely dispersed authorities that are often at odds with one another. In EPA's case, its present structure of ten regional offices as well as a number of laboratories and research centers spread throughout the country has helped it better understand and respond to the particular problems of different localities. *See About EPA*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/aboutepa/index.html> (last visited Apr. 8, 2011).

Secretary of State, at their best, convey a steady, coherent vision of national security and international cooperation, a Secretary of the Environment would project the unwavering march forward to a clean energy future, environmental sustainability, and a better quality of life for all Americans.

EPA's first Administrator, William Ruckelshaus, understood the power of his office. Much of the agency's success in subsequent years can be attributed to his leadership and skill in setting the right tone at the outset. Commentators noted that "[b]y promising to enforce 'reasonable standards of air quality,' and acting on his promises, 'Ruckelshaus positioned himself as the government advocate of environmental progress, not merely a mediator between industry and the public.'<sup>50</sup> In addition, "[i]t was not long before the media were portraying William Ruckelshaus as a knight in shining armor charging out to do battle with the wicked polluters of America. By adopting an aggressive stance toward a wide variety of environmental problems, EPA's new Administrator managed to gain headlines for his infant agency almost from the day of its birth."<sup>51</sup>

Environmental advocates have not always done a good job in explaining how environmental quality affects people's daily lives. Environmental protection is often marginalized in national discourse. Americans must better understand that environment is not a 'boutique' issue—a luxury that the nation cannot afford at the moment.<sup>52</sup> Rather,

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50. Lewis, *supra* note 20.

51. *Id.* Ruckelshaus has tended to downplay the significance of EPA's first years, noting that the agency made many mistakes. *Id.* In any case, this view does not nullify the point that his personal leadership had an enormous impact on the agency and the environmental movement generally in raising the environmental consciousness of the nation. Ruckelshaus' successor in 1973, Russell Train, who chaired the U.S. delegation to the historic United Nations Conference on the Human Environment (the Stockholm Conference) in 1972 while heading the President's new Council on Environmental Quality (CEQ), was held in similar high regard by EPA employees and by his counterparts in government. Interview by Dr. Michael Gorn with William D. Ruckelshaus, EPA Adm'r (Jan. 1993), *available at* <http://www.epa.gov/history/publications/print/ruck.htm>. Ruckelshaus would return to serve a second term as EPA Administrator from 1983-85. *Id.* He is widely credited for having rescued the agency from its disastrous start under EPA Administrator Anne Gorsuch Burford and Secretary of the Interior James Watt early in the Reagan administration.

52. *See, e.g., Environment Falls as Priority for Americans – Pew*, ENV'T FORUM (Jan. 22, 2009, 3:54 PM), <http://blogs.reuters.com/environment/2009/01/22/environment-falls-as-priority-for-americans-pew/>; *see also Economy, Jobs Trump all other Policy Priorities in 2009: Environment, Immigration, Health Care Slip Down on the List*, PEW RES. CENTER (Jan. 22, 2009), <http://people-press.org/2009/01/22/economy-jobs>.

environmental protection goes to the heart of who we are as a country. Economic prosperity, national security, and public health are directly linked to the state of the environment. Terrestrial and marine ecosystems provide the global economy tens of trillions of dollars annually in services.<sup>53</sup> The most recent U.S. Department of Defense Quadrennial Defense Review, which sets “a long-term course for DOD as it assesses the threats and challenges that the nation faces,”<sup>54</sup> makes clear how degraded environmental systems result in political conflict and instability in much of the world.<sup>55</sup> In addition, preventive environmental policies provide enormous savings in health care costs.<sup>56</sup>

Climate change heads most lists of environmental priorities, as it should. But the national debate needs to be much broader. EPA studies show the poor condition of many U.S. coastal waters.<sup>57</sup> The ecological health of the Chesapeake Bay, a national treasure, has sharply declined in recent years.<sup>58</sup> Air pollution from ships and trucks in Los Angeles harbor causes serious health problems for children in the region.<sup>59</sup> Mountain-top mining in West Virginia is leaving a legacy of environmental

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53. See generally Robert Costanza et al., *The Value of the World's Ecosystem Services and National Capital*, 387 NATURE 253 (1997); see also MILLENNIUM ECOSYSTEM ASSESSMENT BOARD, ECOSYSTEMS AND HUMAN WELL-BEING (2005); see also NAT'L RESEARCH COUNCIL, VALUING ECOSYSTEM SERVICES: TOWARD BETTER ENVIRONMENTAL DECISION-MAKING (2005); see also Charles Perrings et al., *The Biodiversity and Ecosystem Services Science-Policy Interface*, 331 SCI. 1139 (2011).

54. *Quadrennial Defense Review*, U.S. DEPARTMENT OF DEF. <http://www.defense.gov/qdr/> (last visited Apr. 24, 2011).

55. U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 84-89 (2010), available at [http://www.defense.gov/qdr/images/QDR\\_as\\_of\\_12Feb10\\_1000.pdf](http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf). “Assessments conducted by the intelligence community indicate that climate change could have significant geopolitical impacts around the world, including increased poverty, environmental degradation, and the further weakening of fragile governments. Climate change will contribute to food and water scarcity, increase the spread of disease, and may spur or exacerbate mass migration.” *Id.* at 85; see also Alan B. Sielen, *An Oceans Manifesto: The Present Global Crisis*, 32:1 FLETCHER F. WORLD AFF. 39, 44-46 (2008) (provides consideration of this issue in the context of ocean degradation).

56. See, e.g., SAFER CHEMICALS, HEALTHY FAMILIES COALITION, THE HEALTH CASE FOR REFORMING THE TOXIC SUBSTANCES CONTROL ACT (2010), available at [http://www.healthreport.saferchemicals.org/PDFs/The\\_Health\\_Case\\_for\\_Reforming\\_the\\_Toxic\\_Substances\\_Control\\_Act.pdf](http://www.healthreport.saferchemicals.org/PDFs/The_Health_Case_for_Reforming_the_Toxic_Substances_Control_Act.pdf).

57. ENVTL. PROTECT. AGENCY, NATIONAL COASTAL CONDITION REPORT 30 (2001); ENVTL. PROTECT. AGENCY, NATIONAL COASTAL CONDITION REPORT II 26 (2005); ENVTL. PROTECT. AGENCY, NATIONAL COASTAL CONDITION REPORT III 38 (2007).

58. PEW OCEANS COMM'N, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 29-30 (2003).

59. See, e.g., *Air Quality*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/SoCal/air/> (last updated Feb. 11, 2011).

destruction.<sup>60</sup> The majesty of the southern Utah wilderness is under attack.<sup>61</sup> The ubiquitous presence of pesticides and toxic chemicals in our lives calls into question the safety of many ordinary consumer products, food and water.<sup>62</sup> By expanding the national environmental debate to the health of families, communities and natural wonders today, the Secretary of the Environment could be a persuasive voice in getting many more people to “tune-in.”

### *C. A Strong Voice Within the Government*

How well the federal government carries out its environmental responsibilities depends to a large extent on the effectiveness of agencies like EPA. Providing a solid institutional foundation to study and act on the full range of environmental issues and their interrelationships would help the President and Congress bring the full force of their power to the nation’s environmental problems.

EPA does not operate in a vacuum. It works closely with a wide range of private and public “stakeholders” and partners including other federal agencies, state and local governments, business, industry, citizens groups, and academia. Getting from point A to point B usually requires a great deal of discussion, persuasion, and compromise. Nowhere is this more apparent than in EPA’s relationship with other federal agencies.

#### 1. The Federal Inter-agency Process

The administrator of the EPA is appointed by the President and confirmed by the Senate.<sup>63</sup> The agency, as a result, is a political entity in much the same sense as cabinet departments despite the often mistaken assumption that the EPA is an independent regulatory agency. The level of environmental leadership provided by the head of the EPA has varied widely with different administrations. In the course of its history, the

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60. See, e.g., David A. Fahrenthold, *EPA Moves to Stop West Virginia Coal Mine that was Issued Federal Permit*, WASH. POST, Mar. 27, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/03/26/AR2010032603080.html>.

61. See, e.g., S. UTAH WILDERNESS ALLIANCE, <http://www.suwa.org/> (last visited May 1, 2011).

62. See, e.g., *Pesticides Found in Streams Across the United States*, ENV’T. NEWS SERVICE, Mar. 6, 2006, <http://www.ens-newswire.com/ens/mar2006/2006-03-06-01.html>.

63. See, e.g., Press Release, U.S. Senator Barbara Boxer, Boxer Statement on Confirmation of EPA Administrator and CEQ Chair (Jan. 23, 2009), available at <http://boxer.senate.gov/en/press/releases/012309b.cfm>.

agency's environmental vigor has not correlated well with particular political parties. Federal agencies have their own internal procedures for developing positions on policy. Policy development typically involves experts from a variety of professional disciplines: scientists, lawyers, engineers, economists, managers, and others. Depending on the nature and importance of a particular issue, proposed actions by an executive agency may be run through an inter-agency process chaired by a lead agency, like the EPA, the President's Council on Environmental Quality (CEQ), or an appropriate White House official.

Interagency groups can be convened at a relatively low level among staff or escalate all the way to the President and his cabinet depending on the importance of the matter at hand. Though imperfect—and at times short-circuited by administration players flexing political or bureaucratic muscle—the process generally helps ensure that major decisions are aired openly within the administration and that those departments and agencies with a stake in a particular outcome have the opportunity to make their views known. From the President's perspective the usual desired outcome of this process is consensus within his administration.

Certain Departments—such as State, Defense, and Treasury—can, at times, be more equal than others: a reality that not only serves their core department interests well, but also often places them in a favorable position to block or modify decisions by other agencies. Taken to an extreme, this can result in a political environment like that experienced under President George W. Bush in which the DOD could for all practical purposes “veto” many of the EPA's environmental actions mandated by law at military bases or other defense facilities.<sup>64</sup> One or more economic agencies objecting to a particular environmental action can also provide a formidable obstacle to sound, science-based environmental decisions. Much of the negotiation, compromise, or obstruction among agencies takes place hidden from public view either by the design of interested parties or by default through sometimes impenetrable federal rule making procedures.

Some past EPA administrators have dutifully made the point that it is not necessary, given sufficient support by the President, for EPA to become a full member of the cabinet because the agency can function

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64. For example, the U.S. Government Accountability Office (GAO) noted that as of February 2009, after ten or more years on EPA's National Priorities List (NPL) of worst contaminated sites, “eleven DOD installations had still not signed the required interagency agreements (IAGs) to guide cleanup with EPA.” U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37, at i. In its understated fashion, the GAO went on to note that DOD's persistent failure to enter IAGs has made “managing site cleanup and addressing routine matters challenging at these installations.” *Id.*

effectively under existing arrangements. In fact, some EPA administrators have had a very strong relationship with the White House. During the Carter administration, EPA officials, under the leadership of Administrator Douglas Costle, persuaded Ambassador-at-Large and Special Representative of the President for the Law of the Sea, Elliot Richardson, to seek substantial improvements in the marine protection negotiating text of the Law of the Sea Convention.<sup>65</sup> President George H.W. Bush looked to Administrator William K. Reilly (co-chair of the Gulf Oil Spill commission) for advice and leadership to an exceptional degree, especially on global environmental issues.<sup>66</sup> During the Clinton administration, the close collaboration between EPA Administrator Carol Browner and Vice-President Al Gore was an asset in advancing environmental issues through the federal bureaucracy.<sup>67</sup>

Not all Presidents, however, have been inclined to support a strong EPA. And even in the best of times, the day-to-day realities of governance often surmount even a very high level of personal leadership. Also, a great deal of important work at these agencies takes place below the political radar screen. A low level official labors under some of the

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65. See, e.g., Letter from Barbara Blum, Deputy Administrator, EPA, to the Honorable Elliot L. Richardson (Mar. 15, 1978) (on file with author) (“I cannot overemphasize the importance of seeking improvements in the draft pollution text while the opportunity still exists.”). The letter encloses recommendations for specific amendments to the Informal Composite Negotiating Text (ICNT).

66. See, e.g., Interview by Dr. Dennis Williams with William K. Reilly, former EPA Adm’r (July 26, 1993), available at <http://www.epa.gov/history/publications/print/reilly.htm>. The evolution of U.S. policy on mineral exploration and exploitation in Antarctica provides another good example of the difference that high level environmental leadership can make. During the President George H.W. Bush administration, EPA Administrator Reilly set in motion a chain of events reversing U.S. Antarctic minerals policy, and eventually leading to adoption by Antarctic Treaty parties in 1991 of “The Protocol on Environmental Protection to the Antarctic Treaty” (Madrid Protocol). The Protocol on Environmental Protection to the Antarctic Treaty, *opened for signature* Oct. 4, 1991, 30 I.L.M. 1455 (entered into force 1998). The Madrid Protocol contains, among other strong environmental provisions, a fifty-year moratorium on “any activity relating to mineral resources, other than scientific research . . . .” *Id.* art. 7; see Letter from William K. Reilly, EPA Adm’r, to the Honorable James A. Baker III, Sec’y of State (Apr. 12, 1990) (on file with author) (concerning EPA proposal for a “25-year moratorium on mineral prospecting, exploration and development linked with comprehensive measures to strengthen the overall environmental protection regime in Antarctica.”). This particular letter was an early volley in protracted administration and international negotiations resulting in the Madrid Protocol.

67. See, e.g., *Carol M. Browner: Biography*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/history/admin/agency/browner.htm> (last updated Apr. 14, 2011).

same bureaucratic handicaps in her world as the head of an agency does in their's.

Mission clarity, organizational cohesion, adequate resources, and bureaucratic clout can make a big difference. The Gulf Oil Spill brought home that point dramatically in our own time. President Obama selected a strong team to lead his administration's environmental work. In particular, EPA Administrator Lisa Jackson, NOAA Administrator Jane Lubchenko, and Secretary of the Interior Ken Salazar all come from impressive environmental backgrounds and share the President's environmental vision.<sup>68</sup> Nevertheless, the Gulf Oil Spill happened on their watch. One would like to think that given more time in a new administration, these and other key officials would have collectively taken the steps necessary to prevent the Gulf Oil Spill. The government-industry culture, systemic failures, and organizational fragmentation detailed in the Commission report underscore how difficult that would have been.<sup>69</sup>

Secretary of Defense, Robert Gates, had it exactly right when he observed that, "One of the benefits of being secretary of defense is that you never have to elbow your way to the table."<sup>70</sup> Getting heard on environmental issues, let alone prevailing, can be a rough business. Historically, the EPA Administrator has often had to elbow their way to the table—even on critical issues affecting public health and the environment. In Washington - better to be at the helm of a battleship than a patrol boat.

#### D. International Leadership

The creation of a Department of the Environment would also help restore U.S. leadership on the world stage. Many Americans do not appreciate how important climate change and other global environmental issues are to our economic partners, friends, and allies. The failure of the

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68. *Administrator Lisa P. Jackson*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/aboutepa/administrator.html> (last updated Apr. 15, 2011); *NOAA Leadership*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.noaa.gov/lubchenco.html> (last visited Apr. 24, 2011); *About Secretary Salazar*, U.S. DEPARTMENT OF THE INTERIOR, <http://www.doi.gov/whoware/secretarysalazar.cfm> (last visited Apr. 24, 2011).

69. See FINAL REPORT, *supra* note 7. The National Commission report highlighted the need for greater "interagency consultation to improve decision-making." *Id.* at 260.

70. David Ignatius, Op-Ed., *Gates: The Pentagon's Accountability Cop*, WASH. POST, Sept. 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/08/AR2010090805703.html>.

United States—with 4 percent of the world's population and about 20 percent of global carbon dioxide emissions each year—to enact domestic climate change legislation has placed the United States on the environmental defensive with many countries.<sup>71</sup> This is in stark contrast with the days when the United States could be counted on to provide needed environmental leadership globally.<sup>72</sup>

The United States remains the only major industrialized country in the world that does not have a ministry level department dedicated to the environment. In addition, the United States has not ratified several international agreements with important protections for the global environment, such as the 1982 United Nations Convention on the Law of the Sea, the 2001 Stockholm Convention on Persistent Organic Pollutants (the POPs convention), the 1992 Convention on Biological Diversity, and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 1972.<sup>73</sup> The practical and symbolic ramifications of these omissions are significant.

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71. *The World Factbook*, U.S. CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/index.html> (last visited Apr. 24, 2011); U.S. ENERGY INFO. ADMIN., EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 2009 8 (2011), available at [http://www.eia.gov/environment/emissions/ghg\\_report/pdf/0573\(2009\).pdf](http://www.eia.gov/environment/emissions/ghg_report/pdf/0573(2009).pdf); see, e.g., James Kanter, *An Air of Frustration for Europe at Climate Talks*, N. Y. TIMES, Dec 20, 2009, <http://www.nytimes.com/2009/12/21/world/europe/21scene.html> (discussing European frustration with the United States in regard to the Copenhagen Accord); Joby Warrick, *Clinton: U.S. Losing Global Public Relations Battle – to 'Baywatch' and Wrestling*, WASH. POST, Mar. 3, 2011, [http://www.washingtonpost.com/world/clinton-us-losing-global-public-relations-battle--to-baywatch-and-wrestling/2011/03/02/ABdox7M\\_story.html](http://www.washingtonpost.com/world/clinton-us-losing-global-public-relations-battle--to-baywatch-and-wrestling/2011/03/02/ABdox7M_story.html) (discussing popular misconceptions about the United States).

72. Even during the height of the Vietnam War, widespread unrest on college campuses, the Watergate scandal, and the energy crisis and economic problems of the late 1970s, the country found a way to present a strong and unified front in combating global environmental problems. U.S. leadership at the 1972 Stockholm Conference, for example, resulted in major initiatives to protect the oceans. In the 1980s, during the Reagan administration, republicans and democrats alike understood the environmental and economic imperative to guard against further depletion of the stratospheric ozone layer, resulting in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, an important international environmental agreement.

73. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 14, 1994); Stockholm Convention on Persistent Organic Pollutants, *opened for signature* May 22, 2001, 40 I.L.M. 532 (entered into force May 17, 2004); Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 9, 1993); 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 1972, *opened for signature* Nov. 7, 1996, 36 I.L.M. 1 (entered into force Mar. 24, 2006).

To many observers, such omissions convey a certain disdain for international cooperation, or multilateral diplomacy, generally as well as the message that environmental protection is not a high priority for the United States.<sup>74</sup>

With respect to offshore mineral activities, emerging issues such as Arctic hydrocarbon development will require redoubled international cooperation.<sup>75</sup> The Coast Guard Deepwater Horizon Joint Investigation Team report points to the need for a careful examination of inspections at foreign-flagged drilling rigs. According to the report, the Republic of the Marshall Islands (where the rig was registered) “effectively abdicated its vessel inspection responsibilities.”<sup>76</sup> The international harmonization of environmental rules where appropriate for the protection of offshore areas from deep water drilling will also require such cooperation.<sup>77</sup> The United States can learn a great deal from the experience of other countries like Norway which has been a leader in finding both practical and environmentally responsible ways to apply precautions at particular offshore drill sites.<sup>78</sup> International organizations like the International Civil Aviation Organization (ICAO) and U.S. agencies such as the Federal Aviation Administration (FAA) can provide valuable lessons and experiences in preventing disasters.<sup>79</sup> EPA’s clear mandate has enabled it to bring other country’s ‘best practices’ in a wide range of

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74. See Kanter, *supra* note 71.

75. See generally John R. Cook, *Contemporary Practice of the United States Relating to International Law: Comprehensive New Statement of U.S. Arctic Policy*, 103 A.J.I.L. 342, 348 (2009).

76. Michal Kunzelman, *Report: Transocean Contributed to Gulf Disaster*, ASSOCIATED PRESS, Apr. 22, 2011, available at [http://news.yahoo.com/s/ap/20110422/ap\\_on\\_re\\_us/us\\_gulf\\_oil\\_spill](http://news.yahoo.com/s/ap/20110422/ap_on_re_us/us_gulf_oil_spill).

77. See, e.g., Julia L. Huff, *Using the Tools We Have: An Integrated Approach to Protect the Sea of Okhotsk*, 20 PACE ENVTL. L. REV. 693, 728-729 (2003) (arguing for the need for states to cooperate to enforce multilateral treaties in the defense of oceans).

78. See Joe Conason, *Why Norway’s Offshore Drilling is Safer*, SALON (May 3, 2010 5:30 PM), [www.salon.com/news/opinion/joe\\_conason/2010/05/03/norway](http://www.salon.com/news/opinion/joe_conason/2010/05/03/norway).

79. See Communication from Thomas Anthony, Dir., Aviation Safety and Security program, Viterbi School of Engineering, University of Southern California, to Alan Sielen, Mar. 17, 2011 (on file with author). Correspondence discusses the ICAO’s hazard identification requirements and FAA’s proposed rules requiring the establishment of Comprehensive Safety Management Systems to identify hazards before they can result in accidents. Such a system is designed to operate in any organization that operates in hazardous conditions. See Thomas R. Anthony, *TEM’s Unspoken Language*, FLIGHT SAFETY FOUND., <http://flightsafety.org/aerosafety-world-magazine/march-2011/tems-unspoken-language>, (last visited May 27, 2011) (discussing aviation safety threat and error management processes).

environmental areas to the United States. A Department of the Environment would likely have an even greater impact.

The creation of a Department of the Environment would also support the growing interest at the DOD and State Department in ‘civilian diplomacy’ as a means to advance U.S. interests abroad.<sup>80</sup> The EPA and the State Department, especially its Bureau of Oceans and International Environmental and Scientific Affairs (OES), have worked closely over the years to advance environmental interests regionally and globally.

During the administrations of George H.W. Bush and Bill Clinton, the State Department often looked to EPA for leadership at international meetings on the environment.<sup>81</sup> This collaboration helped cement important environmental gains in such areas as the negotiation of an international ban on the sea disposal of nuclear and other toxic wastes.<sup>82</sup> It also helped advance U.S. trade policy by reducing non-tariff barriers to trade through the international harmonization of chemical testing guidelines.<sup>83</sup>

Leadership from agencies like EPA, with strong scientific and technical expertise, also help keep important international environmental consultations focused on sound science—including at international forums that become easily politicized. This kind of productive

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80. See John J. Kruzal, *Gates Highlights Role of Diplomacy, Development in U.S. Foreign Policy*, AMERICAN FORCES PRESS SERVICE (July 16, 2008) <http://www.defense.gov/news/newsarticle.aspx?id=50518> (quoting Defense Secretary Robert Gates as saying that problems can be “avoided by putting in place the right leadership, adequate funding of civilian agencies, effective coordination on the ground, and a clear understanding of the authorities, roles, and missions of military versus civilian efforts, and how they are able, or unable, to fit together”) (emphasis added); THE DEP’T OF STATE, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW (2010) available at <http://www.state.gov/documents/organization/153635.pdf> [hereinafter QDDR].

81. See, e.g., Letter from Frank R. Provyn, Managing Dir., Office of International Conferences, Bureau of International Organizational Affairs to Alan Sielen, Deputy Assistant Adm’r for International Activities, Env’tl Prot. Agency (Mar. 26, 1997) (on file with the author) (expressing appreciation for “willingness to serve as head of the United States Delegation to the OECD Environment Policy Committee,” and enclosing basic guidelines on the work of U.S. delegations).

82. See Alan Sielen, *The New International Rules on Ocean Dumping: Promise and Performance*, 21 GEO. INT’L. ENVTL. L. REV. 495, 530-531 (2009) (discussing amendments to the Convention on the Prevention of More Pollution by Dumping of Waste and Other Matter, 1972). The author chaired the London Dumping Convention meetings of contracting parties from 1997-2000.

83. See Karen Kornbluh, U.S. Ambassador to the OECD, Remarks on USOECD Priorities at a Meeting with the American Chamber of Commerce (May 7, 2010), [http://usoecd.usmission.gov/american\\_chamber\\_commerce\\_remarks](http://usoecd.usmission.gov/american_chamber_commerce_remarks).

cooperation between federal agencies, however, cannot be taken for granted. Elevating the institutional profile of environment in the United States would help ensure that such positive efforts become more the rule than the exception.

Implementation of the State Department's first Quadrennial Diplomacy and Development Review (QDDR),<sup>84</sup> completed in 2010, holds promise for strengthening important links between State and other government agencies. Its emphasis on better management "by turning to the expertise of other federal agencies where appropriate,"<sup>85</sup> could mean a larger role in carrying out environmental diplomacy by agencies such as EPA, NOAA, and the Coast Guard. The QDDR creates a new Under Secretary for Economic Growth, Energy and the Environment "to enhance our effectiveness on . . . interconnected global issues."<sup>86</sup>

Time will tell how effective these organizational changes at the State Department will be in delivering better environmental results. There is an excellent opportunity to use this welcome rethinking of diplomacy and development to meet new environmental challenges. On the other hand, environmental issues like climate change, ocean protection, and transboundary pollution from toxic chemicals could become submerged beneath the more visible and politically popular themes of economic growth and energy development.

#### IV. WHAT WOULD A DEPARTMENT OF THE ENVIRONMENT LOOK LIKE?

It is not difficult to envisage what the new Department of the Environment would look like. Indeed, there have been many proposals going back to President Herbert Hoover for better management at the cabinet level of the nation's natural resources.<sup>87</sup> Several administrations have proposed reorganizations or consolidations of federal environmental responsibilities.<sup>88</sup> Since EPA's creation in 1970, there have been proposals to bring EPA into the cabinet.<sup>89</sup> Some of these proposals would have simply elevated EPA to full cabinet status; others entailed varying degrees of reorganization and restructuring at EPA and at other federal agencies. In light of today's highly partisan political discourse on the environment, what is surprising is the marked degree of

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84. QDDR, *supra* note 80.

85. *Id.* at vi.

86. *Id.*

87. Robert L. Fishman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L. Q.* 457, 614 n.853 (2002).

88. *See id.*

89. *See, e.g.*, Department of the Environment Act S.B. 171, 103rd Cong. (1993).

bi-partisan support for these plans from the past. President H.W. Bush, with strong support from the Congress, proposed elevating EPA to cabinet level without a major reorganization and expansion of the agency.<sup>90</sup> The desire by some in Congress for an independent statistics gathering agency within a new environment department contributed ultimately to its defeat.<sup>91</sup>

President Clinton, early in his administration, envisaged creating a new federal environment department; at one point a bill was expected to pass without controversy.<sup>92</sup> In 2002, Governor Christine Todd Whitman, Administrator of EPA, testified before Congress in support of the elevation of EPA to cabinet status.<sup>93</sup> This nano-burst of environmental ardor in the early days of the Bush administration would prove to be short lived; the agency would soon reconsider many of its environmental policies, especially on climate change.

Today, especially in light of the lessons learned from the Gulf Oil Spill, three basic principles would serve as a good point of departure for creating a Department of the Environment: (1) separation of developmental and regulatory responsibilities; (2) consolidation of programs dispersed throughout the government; and (3) a strong commitment to effectiveness, efficiency, and accountability.

The Department would retain the present EPA at its center, augmented by other agencies and programs with significant environmental responsibilities. These agencies would include NOAA, possibly the Coast Guard, and relevant parts of the Department of Agriculture, the Department of the Interior, and other agencies.<sup>94</sup> Careful

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90. Phillip Shabecoff, *House Votes to Elevate E.P.A. to Cabinet Level*, N. Y. TIMES, Mar 29, 1990, <http://query.nytimes.com/gst/fullpage.html?res=9C0CE2DD1E3DF93AA15750C0A966958260>.

91. *Id.*

92. *Meet the New Administrator*, EPA J., Jan-Mar., 1993, <http://www.epa.gov/history/admin/agency/br01.htm> (discussing potential obstacles that such a plan might face). EPA would soon eliminate the award winning EPA Journal – considered by many environmentalists at the time to be one of the most effective voices for environmental education in the country.

93. *EPA Cabinet Elevation: Before House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the Committee on Government Reform*, 107th Cong. (2002) (statement of Governor Christine Todd Whitman, Administrator of the EPA).

94. Candidates for incorporation into a Department of the Environment might include all or parts of the National Park Service, the U.S. Fish and Wildlife Service, the U.S. Geological Survey, the Forest Service, the Natural Resources Conservation Service, the Food Safety, Inspection Service, and the Food and Drug Administration. Additionally,

attention would also have to be given to the disposition of many DOD environmental activities now spread throughout a wide range of military and civilian defense programs. These include such tasks as land management and natural resource protection, compliance with environmental laws, pollution prevention, and environmental restoration. DOD redundancy is nothing new; a recent GAO report identifying the costs associated with duplicative federal programs noted, in particular, costly inefficiencies associated with individual military services as well as the costs savings resulting from realignment and consolidation.<sup>95</sup>

In making decisions on the transfer of particular programs to the new Department, special attention should be given to the individual agency's mission, and whether that mission has allowed the agency to be an effective voice for the protection of public health and the environment. In that respect, an examination of the mission statements of several federal agencies with major environmental responsibilities is instructive:

- The mission of the Environmental Protection Agency is “to protect human health and the environment.”<sup>96</sup>
- The Department of Commerce’s “mission is to help make American businesses more innovative at home and more competitive abroad.”<sup>97</sup>
- The Department of the Interior’s mission is to “protect[] America’s great outdoors and power[] our future.”<sup>98</sup>
- The Department of Agriculture “provide[s] leadership on food, agriculture, natural resources, and related issues.”<sup>99</sup>

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the Department of Energy’s responsibilities for radioactive waste management should be examined.

95. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-318SP, REPORT TO CONGRESSIONAL ADDRESSEES: OPPORTUNITIES TO REDUCE POTENTIAL DUPLICATION IN GOVERNMENT PROGRAMS, SAVE TAX DOLLARS, AND ENHANCE REVENUE (2011). “This is GAO’s first annual report to Congress in response to a new statutory requirement that GAO identify federal programs, agencies, offices, and initiatives, either within departments or government-wide, which have duplicative goals or activities.” *Id.* at 1. In addition to the DOD inefficiencies noted, the report identifies inefficient use of resources throughout the federal government including fragmented federal efforts to meet water needs in the U.S.-Mexico border region, which involves EPA as well as the Departments of Agriculture, Commerce, Interior, HHS, HUD, and the Army Corps of Engineers. *Id.* at 52-54.

96. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/aboutepa/> (last visited Apr. 2, 2011).

97. COMMERCE.GOV, <http://www.commerce.gov> (last visited Apr. 2, 2011).

98. U.S. DEPARTMENT OF THE INTERIOR, <http://www.doi.gov> (last visited Apr. 2, 2011).

- The mission of the Department of Energy is “to ensure America’s security and prosperity by addressing its energy, environmental, and nuclear challenges through transformative science and technology solutions.”<sup>100</sup>
- The Department of Homeland Security’s mission is “to ensure a homeland that is safe, secure, and resilient against terrorism and other hazards.”<sup>101</sup>
- The mission of the Department of Defense is “to provide the military forces needed to deter war and to protect the security of the country.”<sup>102</sup>

These are admittedly simplistic descriptions of what these organizations do. Nevertheless, reducing the work of major federal agencies to a few words can be a useful—and refreshing—exercise for a public weary of dysfunction and obfuscation in Washington. It can also help crystallize marked contrasts in the missions of various agencies; and perhaps suggest a way forward where there are obvious conflicts. This might include, for example, at least a rough understanding that the DOD does not instruct EPA on protecting the environment. (EPA has never presumed to tell DOD how to fight wars.) Such a bureaucratic *entente* would seem to serve the broad spectrum of U.S. interests well and would also produce the financial efficiencies necessitated by present economic conditions.

Concerning EPA, President Nixon understood the importance of “a strong, independent agency.”<sup>103</sup> At first reluctant to propose setting up a new agency, President Nixon became convinced that placing growing federal responsibilities for protection of public health and the environment in an existing department would be a mistake.<sup>104</sup> The President acknowledged that “almost every part of government is concerned with the environment in some way, and affects it in some

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99. *About USDA*, UNITED STATES DEPARTMENT OF AGRICULTURE, [http://www.usda.gov/wps/portal/usda/usdahome?navid=MISSION\\_STATEMENT](http://www.usda.gov/wps/portal/usda/usdahome?navid=MISSION_STATEMENT) (last visited June 5, 2011).

100. *About the Department of Energy*, ENERGY.GOV, <http://www.energy.gov/about/index.htm> (last visited Apr. 10, 2011).

101. *Department of Homeland Mission and Responsibilities*, U.S. DEPARTMENT OF HOMELAND SECURITY, <http://www.dhs.gov/xabout/responsibilities.shtm> (last visited Apr. 10, 2011).

102. *About the Department of Defense*, U.S. DEPARTMENT OF DEFENSE [http://www.defense.gov/about/#mission&id=main\\_menu\\_Mission](http://www.defense.gov/about/#mission&id=main_menu_Mission) (last visited Apr. 10, 2011).

103. Lewis, *supra* note 20.

104. *Id.*

way.”<sup>105</sup> He also understood that “each [existing] department also has its own primary mission – such as resource development, transportation, health, defense, urban growth or agriculture – which necessarily affects its own view of environmental questions”;<sup>106</sup> and that its own objectivity as an impartial arbiter as an environmental “standard-setting” body could be called into question.<sup>107</sup> President Nixon’s intent in establishing a strong and independent EPA was echoed by the person he chose to lead the agency, William Ruckelshaus, who noted that the EPA was starting with “no obligation to promote commerce or agriculture.”<sup>108</sup>

A generation later, the Volcker Commission—speaking in a much broader context—reaffirmed the Nixon administration vision by calling for the federal government to be reorganized into a limited number of mission-related executive departments.<sup>109</sup> The Volcker Commission cited several reasons: the need “for enhanced mission coherence and role clarification,” “[f]ederal agencies that share closely related missions should be administered by the same organizational entity”;<sup>110</sup> “redundancy and overlap between organizations, as well as greatly diffused lines of authority, responsibility and accountability generally point to ‘gaps and seams’ . . . [which] generally lead to . . . the migration of functions and power to different organizations that would seem to lie outside their traditional core competencies”;<sup>111</sup> and “agencies with similar or related missions should be combined in large departments that encourage cooperation, achieve economies of scale in management, and facilitate responsiveness to political leadership.”<sup>112</sup>

Leadership on climate change would be an important part of the new Department of the Environment’s responsibilities. Some observers have called for the establishment of a separate new agency devoted to climate change.<sup>113</sup> Similarly, others have advocated the creation of an

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105. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO REORGANIZATION PLANS NOS. 3 AND 4 OF 1970, *supra* note 27, at 5.

106. *Id.*

107. *Id.*

108. Lewis, *supra* note 20.

109. VOLCKER COMMISSION, *supra* note 24, at 14.

110. *Id.*

111. *Id.* at 15.

112. *Id.* at 16.

113. The Obama administration has gone partway toward that goal by calling for a new Climate Service in NOAA which would bring together existing widely dispersed climate capabilities under a single line office management structure. *A Climate Service in NOAA*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://www.noaa.gov/climate.html> (last visited Apr. 24, 2011). While improving efficiencies at NOAA, it does not satisfactorily address the wide dispersion of climate responsibilities within the federal

independent oceans agency within the federal government.<sup>114</sup> Both of these scenarios, however, ignore major reasons for placing all federal environmental programs into one department: the substantive need for integrated environmental study, management, and regulation, and the efficiencies this would bring.<sup>115</sup> Such integration reflects a growing scientific interest in studying the health and environmental effects of human activities and natural processes on ecosystems of varying scale, rather than focusing on just the individual components of ecosystems.<sup>116</sup> The serious decline in the health of ocean ecosystems such as coral reefs, for example, cannot be fully understood and acted on effectively without regard to the role of climate change in increasing ocean acidification.

From a policy perspective, this evolving scientific understanding has been accompanied by new management tools, such as ecosystem-based approaches to environmental management.<sup>117</sup> However, despite the rapidly changing scientific landscape, environmental managers and

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government. For example, thirteen departments and agencies participate in the U.S. Climate Change Science Program (the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, Interior, State, and Transportation; and AID, EPA, NASA, NSF, and the Smithsonian Institution. Several other executive offices also participate in the CCSP interagency committee. *Our Changing Planet: The U.S. Climate Change Science Program for Fiscal Year 2009*, USGCRP, <http://www.usgcrp.gov/usgcrp/Library/ocp2009> (last visited Apr. 24, 2011).

114. See U.S. COMM'N ON OCEAN POLICY, *supra* note 3, at 108-118.

115. Interestingly, President Nixon also understood this in his original conception of EPA by insisting upon the importance of viewing "the environment as a whole." Lewis, *supra* note 17. President Nixon's charge to the first EPA Administrator was to treat "air pollution, water pollution and solid wastes as different forms of a single problem." *Id.*

116. This interest is being increasingly expanded to ecosystem services. See, e.g., *Study in Progress: Upcoming Report*, THE NAT'L ACADEMIES, <http://dels.nas.edu/Study-In-Progress/Effects-Deepwater-Horizon-Mississippi/DELS-OSB-10-02> (last visited Apr. 24, 2011).

In order to evaluate the loss of ecosystem services in the Gulf of Mexico Large Marine Ecosystem due to the Deepwater Horizon Mississippi Canyon-252 spill, it is necessary not only to collect and analyze information related to specific types of services, but also to identify relationships among the lost ecosystem services and assess interdependencies

*Id.*

117. See, e.g., INT'L UNION FOR THE CONSERVATION OF NATURE & NATURAL RES. DEF. COUNCIL, WORKSHOP REPORT: IUCN/NRDC WORKSHOP ON ECOSYSTEM-BASED MANAGEMENT IN THE ARCTIC MARINE ENVIRONMENT 19 (2010) (which defines Ecosystem-Based Management (EBM) as "the inter-relationships among living and non-living components of an ecosystem to coordinate/manage the cumulative impacts of human activity on the ecosystem. Decision makers use EBM to restore or maintain ecosystem integrity"), *available at* [http://cmsdata.iucn.org/downloads/arctic\\_workshop\\_final.pdf](http://cmsdata.iucn.org/downloads/arctic_workshop_final.pdf).

regulators have been slow to apply these tools to their decisions. In practice, the fragmented organization of federal environmental responsibilities has tended to exacerbate a separation between science and policy. Individual organizations tend to look at environmental performance in terms of their own narrow missions and interests rather than in relation to broader national goals. Accordingly, the success of ecosystem-based management approaches is often impeded by often divergent government programs. Most recently, the chain of events leading to the Gulf Oil Spill demonstrated a disconnect between scientists and policymakers. Similar conflicts of mission and structure at the Department of Agriculture have made it nearly impossible to implement effective measures to substantially reduce nutrient run-off from farms whose overall contribution to pollution cuts a wide swath including coastal and marine areas far downstream. Recently, the American farm lobby has launched a campaign in court and in the media to prevent the EPA from establishing a 'pollution diet' for the Chesapeake Bay. Of particular concern to the American Farm Bureau is the "precedent for similar Washington-directed schemes in watersheds throughout the United States."<sup>118</sup>

To remedy this situation, changes in the entire government-industry culture are necessary. Among these changes must be renewed purpose in finding collaborative solutions rather than blocking or ignoring anything a particular industry does not find congenial to its interests. That is exceedingly difficult to achieve when major decisions affecting environmental quality continue to reside in the Department of Agriculture, a department unenthusiastic about the environmental regulation of farming yet unable to provide *effective* alternatives.<sup>119</sup>

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118. Bonner R. Cohen, *American Farm Bureau Sues EPA Over Chesapeake Bay*, THE HEARTLAND INST. (Mar. 14, 2011), [http://www.heartland.org/article/29540/American\\_Farm\\_Bureau\\_Sues\\_EPA](http://www.heartland.org/article/29540/American_Farm_Bureau_Sues_EPA).

119. Agricultural activities that cause non-point source pollution (e.g., from nutrients) include poorly located or managed animal feeding operations; overgrazing; plowing too often or at the wrong time; and improper, excessive or poorly timed application of pesticides, irrigation water and fertilizer. For discussion of agricultural pollution, especially from runoff, see *Protecting Water Quality from Agricultural Runoff*, U.S. ENVTL. PROTECTION AGENCY, [http://water.epa.gov/polwaste/nps/upload/2005\\_4\\_29\\_nps\\_Ag\\_Runoff\\_Fact\\_Sheet.pdf](http://water.epa.gov/polwaste/nps/upload/2005_4_29_nps_Ag_Runoff_Fact_Sheet.pdf) (last modified Mar. 2005). For discussion of regulatory failures that allowed unauthorized releases of genetically engineered crops into food, animal feed, or the environment beyond farm fields, see U.S. GOV'T ACCOUNTABILITY OFFICE, GENETICALLY ENGINEERED CROPS: AGENCIES ARE PROPOSING CHANGES TO IMPROVE OVERSIGHT, BUT COULD TAKE ADDITIONAL STEPS TO ENHANCE COORDINATION AND MONITORING (2008), available at <http://www.gao.gov/new.items/d0960.pdf>.

EPA's partners in the federal government administer many worthwhile environmental programs. The idea is not to strip these agencies of their involvement in environmental protection altogether; to do so would be self-defeating. The fact that substantive environmental protection has begun to permeate the day-to-day operations of organizations throughout the government is a welcome development and is reflected in many parts of the private sector as well. Not only are federal agencies "greening" their own operations, they are also contributing to more responsible behavior on the part of their constituents such as farmers, energy producers, and chemical manufacturers. Scientific and technical exchanges, training, education, and the development, demonstration, and validation of innovative technologies and procedures have all helped the nation move a bit closer to a clean and sustainable future. Water quality, conservation of forests and grasslands, remediation at hazardous waste sites, climate change, and any number of other environmental areas benefit from the cooperative environmental ventures now seen sprouting up in many organizations.

There is a big difference, however, between an agency's involvement in environmental cooperation and outreach in ways and in areas that generally stand outside major controversy and the often tough decisions mandated by law regarding regulation, enforcement, and science. Most experts can reach a tolerable level of understanding among themselves on, for example, the sources and effects of nutrient pollution<sup>120</sup> or on transformative ways to encourage sustainable agricultural practices.<sup>121</sup> Actual large scale environmental improvements, however, usually require something more. Targeting pollution sources for specific reductions and making sure that the targets are met elevates the debate to an entirely different level and calls for the enhanced leadership and authority that a Department of the Environment could provide.

*A. An Area for Special Attention: Accountability and Return on Investment*

Consolidation and restructuring of federal environmental programs would likely include expansion in some areas and retrenchment in others.

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120. A 2000 National Academies report called nutrient pollution the most pervasive and troubling pollution problem currently facing U.S. coastal waters. NAT'L RESEARCH COUNCIL, CLEAN COASTAL WATERS: UNDERSTANDING AND REDUCING THE EFFECTS OF NUTRIENT POLLUTION 2-4 (2000).

121. See, e.g., NAT'L RESEARCH COUNCIL, TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS IN THE 21ST CENTURY (2010).

Channeling savings to create a special—fully funded— agency within the Department of the Environment responsible for environmental performance and accountability would bring benefits to all department programs. It would also be a valuable tool to promote greater government and public understanding of decisions affecting public health and environmental quality.

Government accountability for its spending—whether on national security, environment, agriculture, energy, or any number of other areas—does not get the attention it merits. Even in the best of economic times, citizens deserve to understand exactly how their tax dollars are being spent and what return on investment they can expect to achieve from a particular expenditure. Large budget deficits, a growing national debt, and the need to bring more science and less political vitriol to important government decisions make governmental accountability for spending in all areas especially urgent today. Facile public and political subscription to this common sense proposition has not been enough to make it a reality. The present federal budget, for example, slashes funding for valuable tools, like the Electronic Government Fund, to promote transparency, measure how tax dollars flow toward government expenditures, and produce potentially substantial savings for the American taxpayer.<sup>122</sup>

Better government performance was an early goal of the Obama administration. In naming the country's first Chief Performance Officer in January 2009, the president-elect noted that our economic problem is “not just a deficit of dollars. It's a deficit of accountability . . . a deficit of trust.”<sup>123</sup> Without reliable information, regulatory and policy decisions are highly vulnerable to inchoate attack often based more on political slogan and abstraction than good science and governance. The dearth of information in both the social and natural sciences is especially unfortunate in analyzing the true costs and benefits of environmental protection.

History has vividly shown why government intervention is frequently necessary to safeguard public health, safety, and the environment: market forces and voluntary measures alone have been inadequate. In today's ideologically charged debate, it is easy to forget

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122. Ed O'Keefe, *Budget Cuts Could Close Door On Obama's "Open Government" Goal*, WASH. POST, Apr. 18, 2011, [http://www.washingtonpost.com/politics/budget-could-close-the-door-on-open-government/2011/04/14/AF9fxPwD\\_story.html](http://www.washingtonpost.com/politics/budget-could-close-the-door-on-open-government/2011/04/14/AF9fxPwD_story.html).

123. Press Release, Office of the President-elect, President-elect Obama Names Nancy Killefer as Chief Performance Officer, Jan. 7, 2009, [http://change.gov/newsroom/entry/president-elect\\_obama\\_names\\_nancy\\_killefer\\_as\\_chief\\_performance\\_officer/](http://change.gov/newsroom/entry/president-elect_obama_names_nancy_killefer_as_chief_performance_officer/) (last visited Mar. 14, 2011).

that improvements in the nation's air quality brought about by clean air legislation were set in motion not by briefs for "big government"; but because people in Los Angeles and Pittsburg were dying.<sup>124</sup> Citizens and public officials believed that without effective government regulation and enforcement things would get worse.<sup>125</sup> Similarly, in the 1970s, substantial reductions in ocean pollution from oil tanker operations were triggered not by any particular affection for international diplomacy but because political and industry leaders understood that the United Nations system provided the best opportunity for reaching widespread agreement on the tanker segregated ballast systems needed to bring about the environmental and economic results everyone was looking for.<sup>126</sup>

Highlighting these, or many similar, success stories is not meant as license for reckless government intervention but for a sober look at the role of government and free enterprise in our lives and the most productive way to harness the benefits of both. Nor is it to deny that the "command and control" strategies of the past may not be appropriate for many of today's complex environmental problems; or that a new generation of environmental protection will require stronger collaboration among government, business, and industry.

Real environmental improvements consistent with full employment, a strong economy, and protection of long-cherished freedoms will mean understanding and acting on a variety of scientific, technical, legal, and policy prescriptions. Among these are: market-based environmental regulation like cap-and-trade systems and pollution taxes (e.g., a gas tax);<sup>127</sup> traditional command and control strategies based on technology or performance standards; ecosystem-based approaches to environmental research and management; and technological and organizational innovation. More and better scientific and technical information is critical to the effective deployment of all these tools and strategies. How we choose among them will depend on their effectiveness in particular circumstances and the return on investment they bring to a broad array of societal interests and values.

A special agency within the Department would gather, analyze, and communicate information on environmental performance. It would

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124. Lewis, *supra* note 20 (regarding clean air legislation).

125. *See id.*

126. See Alan B. Sielen & Robert J. McManus, *IMCO and the Politics of Ship Pollution*, in ENVIRONMENTAL PROTECTION: THE INTERNATIONAL DIMENSION 140 (David A. Kay & Harold K. Jacobson eds., 1983).

127. For a discussion of the use of economic incentives to curb activities that reduce environmental quality, see Ted Gayer, *Pricing Pollution*, BROOKINGS (Mar. 27, 2011), <http://www.brookings.edu/articles/2011/01>.

evaluate the efficiency of the Department's own operations; assess the effectiveness of specific programs; recommend changes including any redirection of Department resources; and communicate its findings to the President, the Congress, and the American people. It could also begin the difficult task of evaluating the nation's overall investment in environmental protection.

The history of strained relations between EPA and the DOD on cleanup of Superfund sites provides an example of the benefits that could result from improved collection and management of data and other information. Because "EPA and DOD use different terms and metrics to report clean-up progress, the status of clean-up at" defense facilities is often unclear.<sup>128</sup> EPA recently reported, for example, that clean-up "at [ ] three installations is in the early investigative phases, while DOD's data suggest that clean-up is further along and, in some cases, in mature stages. EPA and DOD have differing interpretations of cleanup progress because they describe and assess cleanup differently."<sup>129</sup> Further, where DOD does "not obtain EPA's approval for key cleanup decisions, EPA does not recognize them. Unless key cleanup decisions are justified, documented, and available to the public for review and comment, they are not sufficient under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)"; and in some instances "cleanup may have to be redone."<sup>130</sup>

Public policy is replete with other examples. Better environmental economics including improved national income accounting systems will help to establish the value of a healthy, sustainable environment as "capital," that is its ability to produce income in the future. Hard data linking the economy's health to the ocean's health, for example, will not only demonstrate the serious consequences of ineffective environmental policies but will also give environmental advocates a powerful tool for presenting their case to the public and to their elected representatives.<sup>131</sup>

The U.S. Government Accountability Office (GAO)—an arm of Congress—performs some of these tasks now on a very limited basis.<sup>132</sup> In addition, most government agencies have small analytical and investigative programs dedicated to improving efficiency. However, these programs are usually not suited to carrying out the regular

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128. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37, at i.

129. *Id.*

130. *Id.*

131. *See, e.g.,* Sielen, *supra* note 55, at 49 (discussing the benefits of regarding "oceans as 'capital'").

132. *See About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about> (last visited Apr. 10, 2011).

systematic assessments needed to guide and improve an agency's operations and budget decisions over the long term. Nor are they generally used to educate and inform the public.<sup>133</sup> They also generally avoid the kinds of questions that could lead to the transformative changes of culture and structure noted in the report of the President's Commission on the Gulf Oil Spill.<sup>134</sup>

Embedded in the DNA of many, if not most, organizations is a strong aversion to transparency and accountability to anyone on the outside. Among many examples in today's federal government, the GAO recently reported on concerns about the independence and effectiveness of the State Department Office of Inspector General which has critical responsibilities "in preventing and detecting fraud, waste, abuse, and mismanagement; and in providing independent audits and investigations of the department's programs and operations."<sup>135</sup> Of

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133. For example, the EPA Office of the Chief Financial Officer (OCFO) is responsible for budget, planning, analysis and accountability, financial management and services, and information management. *About the Office of Chief Financial Officer*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/aboutepa/ocfo.html> (last visited Mar. 27, 2011). In addition, the EPA Office of Inspector General (OIG), through the Office of Audit, "performs audits to improve the economy, efficiency, and effectiveness of Agency programs and prevent fraud, waste and mismanagement." *About the Office of the Inspector General (OIG)*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/aboutepa/oig> (last visited Mar. 27, 2011).

134. The degree of independence accorded any new organization responsible for such accountability functions is a potentially sensitive issue. For example, President George H.W. Bush's plan to elevate EPA to full cabinet status ran into problems when members of Congress wanted to include an "independent Bureau of Environmental Statistics within the E.P.A. that would be exempt from oversight by the White House Office of Management and Budget [OMB] and by the Secretary of the new department." Shabecoff, *supra* note 90. Concerned about interference by OMB in policy and information issued by EPA, supporters of an independent unit said it was "needed to assure the public that data on pollution issues are not manipulated for political purposes." *Id.* The administration objected to such a provision saying "it would infringe on the President's authority." *Id.* Administration officials at the time also noted that "[a]lthough there are other quasi-independent Federal statistical agencies, including the Labor Department's Bureau of Labor Statistics and the Energy Department's Energy Information Agency, neither are set up in ways that infringe on the President's constitutional authority." *Id.*

135. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-382T, TESTIMONY BEFORE THE COMMITTEE ON FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, STATE DEPARTMENT INSPECTOR GENERAL: ACTIONS TO ADDRESS INDEPENDENCE AND EFFECTIVENESS CONCERNS ARE UNDER WAY i (2011).

particular concern are accountability for spending in the Middle East and other U.S. outposts around the globe.<sup>136</sup>

By devoting a certain percentage of its overall budget, taxing individual programs if necessary, to the creation of an environmental accountability agency, the Department of the Environment could break new ground in ensuring effective and efficient operations, communicating what works and does not work to the public, and giving members of the executive branch and Congress the information needed to spend the public's money wisely. Such action could also serve as a precedent and testing ground for other departments and agencies at the federal, state, and local level.

The magnitude of the Gulf oil spill has brought home the importance of a healthy marine environment for the lives of people living in the Gulf region and beyond. The Obama administration, through its ocean policy task force, developed a thoughtful and strategic approach to the protection, use, and management of the nation's coasts, oceans, and Great Lakes.<sup>137</sup> The policies, goals, and implementation strategies in the administration's new national ocean policy set the foundation for better environmental performance across the spectrum of coastal and marine interests. Examining whether the new ocean policy lives up to its promise would be a good empirical test for a Department of the Environment.

#### V. POLITICAL REALITIES: OPPORTUNITIES FOR LEADERSHIP

Some would say that proposing a Department of the Environment at a time when members of Congress and others are recommending large reductions in EPA's budget or its elimination entirely is counter-intuitive if not politically opaque.<sup>138</sup> However, political calculus changes, sometimes rapidly. The best reason to create a Department of the Environment is that the nation needs one—not just to address today's mounting environmental problems, but for what lies ahead. The air, land,

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136. R. Jeffrey Smith, *State Department Vacancy Sparks Criticism*, WASH. POST, Apr. 26, 2011, at A15.

137. See Nat'l Ocean Council, *National Ocean Policy* (Mar. 27, 2011, 6:30 PM), <http://www.whitehouse.gov/administration/eop/oceans>.

138. See, e.g., Gabriel Nelson, *EPA Budget Deal Slams State, Regional Programs*, N.Y. TIMES, Apr. 13, 2011, <http://www.nytimes.com/gwire/2011/04/13/13greenwire-epa-budget-deal-slams-state-regional-programs-26003.html?scp=1&sq=EPA%20Budget%20Deal%20Slams&st=cse>; *Gingrich: End of the EPA*, WALL ST. J., Jan. 25, 2011, <http://blogs.wsj.com/washwire/2011/01/25/gingrich-end-the-epa/tab/>.

and water in many parts of the United States are undergoing a transformation that, without urgent action, will leave future generations with a country bearing little resemblance to the America we would like to think will always exist.

Among the formidable obstacles to change is the current social and political climate where unblinking acceptance of oil industry claims of “fail-safe” operations in the Gulf of Mexico resulted in one of the worst environmental catastrophes in American history.

Climate change has presented particular difficulties, as the country stands on one side of a deep chasm of self-absorption, deciding whether it can summon the courage to cross the divide and help fight a signal problem of our time. The world looks for any evidence that the United States will rise to the occasion—as the human, economic, environmental, and national security consequences of its inaction mount each day.

The response from polluters, bureaucratic interests threatened by change, and elected officials not wanting to take on another controversial issue is predictable—and will provide some of the best reasons for moving forward. Some people favorably inclined to such a Department will say that the time is not right. But to think that the nation will get to climate change and other pressing environmental problems once it turns the corner on today’s headlines is delusional. The time will never be exactly right and, as we have seen, the solutions leading to a strong economy and enhanced national security depend on a healthy environment.

Victory need not be measured by immediate success. Actual fruition would likely take time. However, by presenting a well-reasoned case, and placing a Department of the Environment in the larger context of his bold vision for a clean energy future and a healthy sustainable economy, the President could begin to bring together the building blocks for a better environmental future. In addition to the “top-down” institutional changes discussed here, this will require engagement from the “bottom-up” by ordinary citizens in their homes and communities and in their efforts to demand results from their elected representatives, business and industry.

Greater citizen immersion in environmental issues should have the salutary effect of reminding people that clean air, water, land, and healthy communities are too important to let crumble under the weight of partisan politics. Today’s frequently sterile dialogue on the environmental future of the country asks very little of its participants. Forcing the issue and asking the public to probe above the easy conventions of rote political argument would be a sign of faith in the innate good sense of the American people. True leadership means being

able to see through the clouds to the clear sky beyond. The opportunity is there for the nation's leaders to build an environmental legacy that would touch all Americans today and would be recognized by future generations in ways that most of us can barely fathom.