

HEARING PROCEEDINGS ON
TERRITORIAL SEA AND CONTIGUOUS ZONE
BY
COMMITTEE ON MERCHANT MARINE AND FISHERIES

FEBRUARY 4, 1992

WITNESS LIST
COMMITTEE ON MERCHANT MARINE AND FISHERIES
HEARING ON H.R. 3842
TERRITORIAL SEA AND CONTIGUOUS ZONE
EXTENSION AND ENFORCEMENT ACT OF 1991

February 4, 1992

1. The Honorable Charles E. Bennett
Member of Congress
2. The Honorable Lorenzo Deleon Guerrero
Governor, Commonwealth of the Northern
Marianas Islands
3. Mr. David A. Colson
Deputy Assistant Secretary for
Ocean and Fishery Affairs
Department of State

Mr. Thomas A. Campbell
General Counsel, National Oceanic
and Atmospheric Administration

Rear Admiral Paul E. Versaw
Chief Counsel, U.S. Coast Guard
4. Mr. Paul Kelly, Vice President
Rowan Companies, on behalf of National
Ocean Industries Association
and American Petroleum Institute

Mr. Richard E. Gutting, Jr.
Vice President of Government Relations
National Fisheries Institute

Mr. Eric G. Scharf, Executive Director
National Association of Passenger
Vessel Owners
5. Mr. John Gissberg
Assistant Attorney General
Alaska Department of Law
State of Alaska

Dr. Michael K. Orbach
Chairman, North Carolina Ocean Affairs Council
accompanied by Ms. Donna Moffitt
North Carolina OCS Office

Mr. Jon Van Dyke
Professor of Law
Richardson School of Law
University of Hawaii at Manoa

Testimony of

LORENZO I. DELEON GUERRERO

Governor of the Commonwealth of the Northern Mariana Islands

on

H.R. 3842

THE TERRITORIAL SEA AND CONTIGUOUS ZONE
EXTENSION AND ENFORCEMENT ACT OF 1991

Before the
Committee on Merchant Marine & Fisheries
United States House of Representatives

February 4, 1992

Mr. Chairman, and honored members of the Committee, thank you for the privilege of appearing before you today to comment on H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act. I bring you greetings and Hafa Adai from the United States citizens of the Northern Mariana Islands, the newest member of the American political family.

Most Americans, of course, elect Senators and Representatives to protect and promote their interests by voting on the legislation taken up by the Congress. Our people are not blessed with that right -- so I feel it is my duty to make known to the Committee our view of the important legislation under consideration today.

Our people have always been ocean rich and land poor. For generations our people have counted on the bounty of the sea to sustain us. Our Commonwealth has only 176 square miles of dry land. One-third of our land is uninhabited, partly because recent volcanic activity has forced the evacuation of three islands. We have faith that control of our marine resources will be the foundation of our future economic development.

For four centuries, we were occupied by a succession of colonial rulers who took possession of our land for their own use. We only achieved control of our political destiny in 1976 when we entered into our Covenant with the United States. When we negotiated our political union with the United States, we insisted on two provisions in that Covenant that would free us from foreign domination. These were the guarantee of the right to govern ourselves, in Article I, and the return of title to our

ancestral lands, in Article VIII. During those negotiations, it was expressly agreed that all submerged lands, along with all other public lands, would return to Commonwealth ownership.

Under our Covenant, the United States retained no claim to real property or submerged lands in the Northern Mariana Islands, other than a leasehold interest in some 18,000 dry-land acres for defense uses. The United States denied any intention to acquire additional property and agreed, if it became necessary to do so, to acquire the minimum amount and interest necessary.

In 1979, one of our first acts of self-government was to set the boundary of our territorial sea at twelve miles. This is consistent with the United Nations Convention on the Law of the Sea and with President Reagan's Proclamation.

H.R. 3842 is intended to implement Presidential Proclamation 5928, which extended the territorial sea of the United States from 3 to 12 miles for international purposes. We strongly support the Proclamation of the 12-mile territorial sea. We understand that the bill is not intended to change the boundaries or jurisdiction of the Federal Government, the States or the insular areas. Where boundaries are settled and jurisdiction is clear, the bill may avoid unintended changes in the status quo.

Because of the unsettled nature of our relationship with the United States, however, we are concerned that the bill might be read to dramatically limit the boundaries and jurisdiction of the Commonwealth in its territorial sea and contiguous zone.

H.R. 3842 relies on the Submerged Lands Act to avoid jurisdictional confusion. Under that Act, the division of jurisdiction between the Federal Government and the States is quite clear. The Northern Mariana Islands, however, is not subject to either the Submerged Lands Act or the Outer Continental Shelf Lands Act. The division of jurisdiction between our Commonwealth and the United States must be determined by reference to our Covenant with the United States.

Unfortunately, so far, there has been little agreement between the Federal Government and the Commonwealth on this issue. At least one agency of the Federal Government, the State Department, asserts that the United States owns all submerged lands surrounding our islands, right up to the beach.

Pursuant to dispute-resolution mechanisms in Section 902 of the Covenant, we have tried, in good faith, to resolve the question of our submerged lands and other ocean jurisdiction. We raised these issues with a Special Representative of the

President of the United States in 1987. In 1990, after eight rounds of consultations, we reached agreement with the President's Representative for federal recognition of our territorial sea and submerged lands jurisdiction. Unfortunately, the agreement has yet to be implemented. The State Department insists that title to our submerged lands rests in the Federal Government.

Because of this dispute, for us H.R. 3842 is not jurisdictionally neutral. Sections 5 and 6 seem to be very broad expressions of Federal authority. Section 6 asserts the exclusive jurisdiction of the United States in the contiguous zone. This does not seem appropriate to our Commonwealth. The contiguous zone is a maritime zone in which the government can enforce its customs, fiscal, immigration and sanitary laws. Under our Covenant with the United States, our Commonwealth government has authority in these areas. We are outside the customs territory of the United States. We administer our own customs, immigration and tax systems. Section 6 could be read to leave us with responsibility for these functions but no authority to enforce our laws in the contiguous zone.

Section 5 says that the territorial sea is subject to the sovereignty and exclusive jurisdiction of the United States. We recognize that for international purposes, as notice to foreign nations, this language is appropriate. We fear, however the language might be read as asserting an entirely new source of federal jurisdiction over the Commonwealth's waters. Such an interpretation would strip our islands of their territorial sea and leave our people with no submerged lands. We doubt if the "savings provisions" of section 9 will save us when the "title, legal rights, interests, jurisdiction and boundaries of . . . the Commonwealth of the Northern Mariana Islands" are disputed by the United States Department of State.

Mr. Chairman and honorable members of the Committee, I am sure that this bill is carefully designed to begin implementation of the expanded territorial sea without upsetting the jurisdictional balance between the Federal Government and the States. In the case of our Commonwealth, however, the jurisdictional implications of the bill outweigh all other considerations.

You are all elected representatives of the people. Imagine trying to protect the interests of your constituents on this Committee without a vote. We believe that policy on the

resources and jurisdiction of our territorial sea should not be made without the consent of our people. We have in good faith followed the procedure set out in the Covenant to resolve these issues with the United States. Progress has been made at least with some Federal Agencies. I have asked my Special Representatives for the Covenant Section 902 Consultations to prepare a summary of those consultations to submit for the Committee's hearing record. If our union with the United States is to be a workable partnership, that procedure must be allowed to work. We respectfully request that the Commonwealth of the Northern Mariana Islands be removed from this bill until such time as the jurisdictional issues may be resolved by mutual consent.

Thank you.

WALTER B. JONES NORTH CAROLINA CHAIRMAN

GERRY E. STUDDS MASSACHUSETTS
 CARROLL HUBBARD JR. KENTUCKY
 WILLIAM J. HUGHES NEW JERSEY
 EARL HUTTO FLORIDA
 BILLY TAUZIN LOUISIANA
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 WAYNE T. GILCHREST MARYLAND
 JOHN T. DOOLITTLE CALIFORNIA
 RANDY DUKE CUNNINGHAM CALIFORNIA

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries

Room 1334, Longworth House Office Building
 Washington, DC 20515-6230

January 6, 1992

FULL COMMITTEE HEARING NOTICE

TO: Members, Merchant Marine & Fisheries Committee

FROM: Hon. Walter B. Jones, Chairman

DATE: Tuesday, February 4, 1992

TIME: 10:00 a.m.

PLACE: 1334 Longworth House Office Building

SUBJECT: H.R. 3842 - the Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991.

WITNESSES: The following have been invited to testify:
 Representatives from the Department of State,
 Department of Transportation, National Oceanic and
 Atmospheric Administration, state governments, and
 public witnesses.

CONTACT: Joan Bondareff, Counsel (202) 225-2535; or
 Mary Kitsos, Chief Clerk (202) 225-4047

102D CONGRESS
1ST SESSION

H. R. 536

To extend State jurisdiction over submerged lands and to allow States to grant mineral leases in the extended area.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 16, 1991

Mr. BENNETT introduced the following bill; which was referred jointly to the Committees on Interior and Insular Affairs, the Judiciary, and Merchant Marine and Fisheries

A BILL

To extend State jurisdiction over submerged lands and to allow States to grant mineral leases in the extended area.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Coastal States Extension
5 Act of 1991".

6 SEC. 2. FINDINGS.

7 The Congress finds as follows:

8 (1) In Executive Proclamation 5928, issued on
9 December 27, 1988, the President extended the bound-
10 aries of the territorial sea of the United States from 3

1 nautical miles to 12 nautical miles in accordance with
 2 international law. However, the Proclamation did not
 3 address the effect of the extension on the territorial ju-
 4 risdiction of the States.

5 (2) The coastal States have, with few exceptions,
 6 jurisdiction over the land, air, water, and resources
 7 within their boundaries, which in most cases extend
 8 out into the oceans 3 nautical miles.

9 (3) The Great Lake States have jurisdiction over
 10 the land, air, water, and resources of their offshore
 11 areas up to the border with Canada, which can range
 12 from 11 to 80 nautical miles from the coast line.

13 (4) Some Gulf of Mexico States have jurisdiction
 14 over the land, air, water, and resources of their off-
 15 shore areas out to 10.4 nautical miles from their coast
 16 line.

17 (5) The coastal States—

18 (A) have consistently demonstrated an ability
 19 to manage ocean resources within their jurisdic-
 20 tion in a manner consistent with the interests of
 21 both the Nation and the coastal States;

22 (B) have demonstrated both experience and
 23 skill at balancing protection, conservation, and
 24 utilization of the living and nonliving resources of
 25 the ocean; and

(C) are better equipped than the Federal Government, in terms of fiscal resources and administrative abilities, to manage fisheries, mineral, and oil and natural gas resources within 12 nautical miles of their coast line.

SEC. 3. EXTENSION OF STATE JURISDICTION OVER SUBMERGED LANDS.

The Submerged Lands Act is amended—

(1) in section 2(a)(2) (43 U.S.C. 1301(a)(2)) by striking out “three geographical miles” the first place it appears and all that follows through “beyond three geographical miles” and inserting in lieu thereof “12 nautical miles distant from the coast line of each such State”;

(2) in section 2(b) (43 U.S.C. 1301(b))—

(A) by striking out “they existed” and all that follows through “extended or” and inserting in lieu thereof “approved and”; and

(B) by striking out “three geographical” and all that follows through “Mexico” and inserting in lieu thereof “12 nautical miles or, in the case of the Great Lakes, to the international boundary”; and

(3) in section 4 (43 U.S.C. 1312)—

(A) by striking out "original coastal State" in the first sentence and inserting in lieu thereof "coastal State admitted to the Union before the date of enactment of the Coastal States Extension Act of 1991";

(B) by striking out "three geographical" in the first sentence and inserting in lieu thereof "12 nautical"; and

(C) by striking out "formation" in the second sentence and all that follows through the end of the section and inserting in lieu thereof "date of enactment of the Coastal States Extension Act of 1991 may assert its seaward boundaries to a line 12 nautical miles distant from its coast line."

SEC. 4. DISPOSITION OF CERTAIN MINERAL LEASES IN STATE SUBMERGED LANDS.

(a) IN GENERAL.—Any lease executed by the Secretary of the Interior under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 and following) that is in effect on the date of the enactment of this Act covering an area within lands transferred to States under section 3 shall remain in full force and effect until it expires pursuant to its terms or is cancelled pursuant to the Outer Continental Shelf Lands Act. Subject to subsection (b), upon the expiration or cancellation of such

1 a lease, the State in whose territory the leased area is situat-
2 ed shall have the authority to grant leases in such area.

3 (b) PROHIBITION ON USE OF LEASE PROCEEDS FOR
4 COASTAL ZONE DEVELOPMENT.—A State affected by sec-
5 tion 3 may not grant a lease in the area transferred to the
6 State under that section until the Secretary of Commerce
7 determines that the State has an approved program or is
8 making satisfactory progress in developing a program under
9 section 306 of the Coastal Zone Management Act of 1972
10 (16 U.S.C. 1455).

11 (c) DEFINITIONS.—As used in this section—

12 (1) the term “lease” has the meaning given that
13 term in section 2(c) of the Outer Continental Shelf
14 Lands Act (43 U.S.C. 1331(c)); and

15 (2) the term “coastal zone” has the meaning
16 given that term in section 304(1) of the Coastal Zone
17 Management Act of 1972 (16 U.S.C. 1453(1)).

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102D CONGRESS
1ST SESSION

H. R. 536

To extend State jurisdiction over submerged lands and to allow States to grant mineral leases in the extended area.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 16, 1991

Mr. BENNETT introduced the following bill; which was referred jointly to the Committees on Interior and Insular Affairs, the Judiciary, and Merchant Marine and Fisheries

A BILL

To extend State jurisdiction over submerged lands and to allow States to grant mineral leases in the extended area.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Coastal States Extension
5 Act of 1991".

6 **SEC. 2. FINDINGS.**

7 The Congress finds as follows:

8 (1) In Executive Proclamation 5928, issued on
9 December 27, 1988, the President extended the bound-
10 aries of the territorial sea of the United States from 3

1 nautical miles to 12 nautical miles in accordance with
2 international law. However, the Proclamation did not
3 address the effect of the extension on the territorial ju-
4 risdiction of the States.

5 (2) The coastal States have, with few exceptions,
6 jurisdiction over the land, air, water, and resources
7 within their boundaries, which in most cases extend
8 out into the oceans 3 nautical miles.

9 (3) The Great Lake States have jurisdiction over
10 the land, air, water, and resources of their offshore
11 areas up to the border with Canada, which can range
12 from 11 to 80 nautical miles from the coast line.

13 (4) Some Gulf of Mexico States have jurisdiction
14 over the land, air, water, and resources of their off-
15 shore areas out to 10.4 nautical miles from their coast
16 line.

17 (5) The coastal States—

18 (A) have consistently demonstrated an ability
19 to manage ocean resources within their jurisdic-
20 tion in a manner consistent with the interests of
21 both the Nation and the coastal States;

22 (B) have demonstrated both experience and
23 skill at balancing protection, conservation, and
24 utilization of the living and nonliving resources of
25 the ocean; and

1 (C) are better equipped than the Federal
2 Government, in terms of fiscal resources and ad-
3 ministrative abilities, to manage fisheries, mineral,
4 and oil and natural gas resources within 12 nauti-
5 cal miles of their coast line.

6 SEC. 3. EXTENSION OF STATE JURISDICTION OVER SUB-
7 MERGED LANDS.

8 The Submerged Lands Act is amended—

9 (1) in section 2(a)(2) (43 U.S.C. 1301(a)(2)) by
10 striking out "three geographical miles" the first place
11 it appears and all that follows through "beyond three
12 geographical miles" and inserting in lieu thereof "12
13 nautical miles distant from the coast line of each such
14 State";

15 (2) in section 2(b) (43 U.S.C. 1301(b))—

16 (A) by striking out "they existed" and all
17 that follows through "extended or" and inserting
18 in lieu thereof "approved and"; and

19 (B) by striking out "three geographical" and
20 all that follows through "Mexico" and inserting in
21 lieu thereof "12 nautical miles or, in the case of
22 the Great Lakes, to the international boundary";
23 and

24 (3) in section 4 (43 U.S.C. 1312)—

1 (A) by striking out "original coastal State"
2 in the first sentence and inserting in lieu thereof
3 "coastal State admitted to the Union before the
4 date of enactment of the Coastal States Extension
5 Act of 1991";

6 (B) by striking out "three geographical" in
7 the first sentence and inserting in lieu thereof "12
8 nautical"; and

9 (C) by striking out "formation" in the second
10 sentence and all that follows through the end of
11 the section and inserting in lieu thereof "date of
12 enactment of the Coastal States Extension Act of
13 1991 may assert its seaward boundaries to a line
14 12 nautical miles distant from its coast line."

15 SEC. 4. DISPOSITION OF CERTAIN MINERAL LEASES IN STATE
16 SUBMERGED LANDS.

17 (a) IN GENERAL.—Any lease executed by the Secretary
18 of the Interior under the Outer Continental Shelf Lands Act
19 (43 U.S.C. 1331 and following) that is in effect on the date of
20 the enactment of this Act covering an area within lands
21 transferred to States under section 3 shall remain in full force
22 and effect until it expires pursuant to its terms or is cancelled
23 pursuant to the Outer Continental Shelf Lands Act. Subject
24 to subsection (b), upon the expiration or cancellation of such

1 a lease, the State in whose territory the leased area is situat-
2 ed shall have the authority to grant leases in such area.

3 (b) PROHIBITION ON USE OF LEASE PROCEEDS FOR
4 COASTAL ZONE DEVELOPMENT.—A State affected by sec-
5 tion 3 may not grant a lease in the area transferred to the
6 State under that section until the Secretary of Commerce
7 determines that the State has an approved program or is
8 making satisfactory progress in developing a program under
9 section 306 of the Coastal Zone Management Act of 1972
10 (16 U.S.C. 1455).

11 (c) DEFINITIONS.—As used in this section—

12 (1) the term "lease" has the meaning given that
13 term in section 2(c) of the Outer Continental Shelf
14 Lands Act (43 U.S.C. 1331(c)); and

15 (2) the term "coastal zone" has the meaning
16 given that term in section 304(1) of the Coastal Zone
17 Management Act of 1972 (16 U.S.C. 1453(1)).

○

102D CONGRESS
1ST SESSION

H. R. 3842

To extend the territorial sea and the contiguous zone of the United States,
and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 21, 1991

Mr. JONES of North Carolina (for himself, Mr. DAVIS, Mr. STUDDS, Mr. HUGHES, Mr. TAUZIN, Mr. HUBBARD, and Mr. HERTEL) introduced the following bill; which was referred jointly to the Committees on Merchant Marine and Fisheries, Foreign Affairs, and the Judiciary

A BILL

To extend the territorial sea and the contiguous zone of
the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Territorial Sea and
5 Contiguous Zone Extension and Enforcement Act of
6 1991".

7 SEC. 2. FINDINGS.

8 The Congress finds that—

(1) by Presidential Proclamation 5928 of December 27, 1988, the President extended the territorial sea of the United States, and its territories and possessions, from 3 to 12 nautical miles for the primary purpose of advancing the national security interests of the United States;

(2) that proclamation did not extend or otherwise alter Federal or State law;

(3) under Article IV, section 3 of the Constitution, the Congress is responsible for making all needful rules and regulations respecting the territory of the United States, which includes the land and water of the territorial sea; and

(4) it is in the interest of the United States to extend its territorial sea to 12 nautical miles to protect offshore natural resources, to establish a contiguous zone of 24 nautical miles for the further protection of its territory, and to apply Federal law to the maritime zone between 3 and 12 nautical miles.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to extend the territorial sea of the United States to 12 nautical miles for the purpose of United States sovereignty;

(2) to establish the contiguous zone of the United States at 24 nautical miles for the purpose of international and certain Federal laws;

(3) to extend the application of certain Federal laws to these new maritime zones; and

(4) to authorize the conduct of a study of the adequacy of existing authorities for the management of living and nonliving resources in the extended territorial sea between 3 and 12 nautical miles.

SEC. 4. DEFINITIONS.

As used in this Act, the term—

(1) "contiguous zone" means a belt of sea contiguous to the outer limits of the territorial sea and extending 24 nautical miles seaward from the base lines from which the breadth of the territorial sea is measured;

(2) "territorial sea of the United States" means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988; and

(3) "United States" includes the States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all territories and possessions of the United States.

SEC. 5. THE TERRITORIAL SEA.

(a) SOVEREIGNTY.—The territorial sea of the United States is part of the United States and subject to its sovereignty.

(b) EXCLUSIVE JURISDICTION OF THE UNITED STATES.—Except as provided by other law, the territorial sea of the United States is subject to the exclusive jurisdiction of the United States.

(c) APPLICATION OF DOMESTIC LAWS.—Except as otherwise provided by law, the territorial sea of the United States shall be the territorial sea of the United States for the purpose of laws enacted after December 30, 1990.

SEC. 6. THE CONTIGUOUS ZONE.

(a) ESTABLISHMENT.—The contiguous zone of the United States consists of the belt of sea contiguous to the outer limits of the territorial sea of the United States and extending 24 nautical miles seaward from the baselines of the United States determined in accordance with international law.

(b) EXCLUSIVE JURISDICTION OF THE UNITED STATES.—Except as provided by other law, the contiguous zone of the United States is subject to the exclusive jurisdiction of the United States.

(c) APPLICATION TO DOMESTIC LAWS.—Except as otherwise provided by law, the contiguous zone of the United States, as described in subsection (a) of this sec-

tion, shall be the contiguous zone of the United States for the purpose of laws enacted after December 30, 1990.

SEC. 7. CONFORMING AMENDMENTS.

(a) FISHERIES AND WILDLIFE ENFORCEMENT.—(1)

Section 3 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362) is amended by adding at the end the following:

“(15) The term ‘import’ means to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, including the territorial sea of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

“(16) The term ‘territorial sea of the United States’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(2) Section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532) is amended—

(A) by adding at the end the following:

“(22) The term ‘territorial sea of the United States’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”; and

1 (B) in paragraph (10) by inserting "including
2 the territorial sea of the United States," after "ju-
3 risdiction of the United States,".

4 (3) Section 303 of the Antarctic Marine Living Re-
5 sources Convention Act (16 U.S.C. 2432) is amended—

6 (A) by adding at the end the following:

7 "(12) TERRITORIAL SEA OF THE UNITED
8 STATES.—The term 'territorial sea of the United
9 States' means the territorial sea of the United
10 States as described in Presidential Proclamation
11 5928 of December 27, 1988."; and

12 (B) in paragraph (7) by inserting "including
13 the territorial sea of the United States," after "ju-
14 risdiction of the United States,".

15 (4) Section 101 of Public Law 89-702, popularly
16 known as the Fur Seal Act of 1966 (16 U.S.C. 1151),
17 is amended—

18 (A) by adding at the end the following:

19 "(n) The term 'territorial sea of the United States'
20 means the territorial sea of the United States as described
21 in Presidential Proclamation 5928 of December 27,
22 1988."; and

23 (B) in subsection (e) by inserting "including
24 the territorial sea of the United States," after "ju-
25 risdiction of the United States,".

(5) Section 2 of the Lacey Act Amendments of 1981 (16 U.S.C. 3371) is amended—

(A) by adding at the end the following:

“(k) The term ‘territorial sea of the United States’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”; and

(B) in paragraph (b) by inserting “including the territorial sea of the United States,” after “subject to the jurisdiction of the United States,”.

(6) Section 2 of the Northern Pacific Halibut Act of 1982 (16 U.S.C. 773) is amended by adding at the end the following:

“(h) ‘Import’ means to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, including the territorial sea of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

“(i) ‘Territorial sea of the United States’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(7) Section 3 of the Magnuson Fishery Conservation and Management Act of 1976 (16 U.S.C. 1802) is amended by adding at the end the following:

“(33) ‘Import’ means to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, including the territorial sea of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

“(34) ‘Territorial sea of the United States’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(b) OCEAN RESEARCH AND MANAGEMENT.—(1) Section 203 of the National Sea Grant College Program Act (33 U.S.C. 1122) is amended by adding at the end the following:

“(16) The term ‘territorial sea of the United States’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(2) The Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.) is amended—

(A) in section 3 (33 U.S.C. 1402) by adding at the end the following:

“(n) ‘Territorial sea of the United States’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”;

(B) in section 101(b) (33 U.S.C. 1411(b)) by striking “twelve” and inserting “24”; and

(C) in section 302(3) (16 U.S.C. 1432) by inserting “including the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988,” after “jurisdiction,”.

(3) Section 4101 of the Shore Protection Act of 1988 (33 U.S.C. 2601) is amended by adding at the end the following:

“(S) ‘territorial sea of the United States’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(4)(A) Section 3 of the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9102) is amended—

(i) in paragraph (17) by striking “and” after the semicolon at the end;

(ii) in paragraph (18) by striking the period and inserting “; and”; and

(iii) by adding at the end the following:

“(19) The term ‘territorial sea of the United States’ means the territorial sea of the United

States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(B) Section 403(b)(2) of that Act (42 U.S.C. 9163(b)(2)) is amended by inserting “or within the area between 3 and 12 nautical miles from the baselines of the United States” after “the territorial sea”.

(c) COAST GUARD ENFORCEMENT AND VESSEL SAFETY.—(1) Section 10 of the Act of March 3, 1899 (popularly known as the Rivers and Harbors Appropriation Act of 1899; 33 U.S.C. 403), is amended by adding at the end the following: “For purposes of this section, each of the terms ‘waters of the United States’, ‘water of the United States’, and ‘navigable water of the United States’ includes all waters of the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(2) Section 7 of the Act of March 4, 1915 (popularly known as the Rivers and Harbors Appropriations Act of 1915; 33 U.S.C. 471) is amended by adding at the end the following: “For purposes of this section, the term ‘navigable waters of the United States’ includes all waters of the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(3) Section 3 of the Vessel Bridge-to-Bridge Radio-telephone Act (33 U.S.C. 1202) is amended—

1 (A) in paragraph (2) by striking "and" after
2 the semicolon at the end;

3 (B) in paragraph (3) by striking the period at
4 the end and inserting "; and"; and

5 (C) by adding at the end the following:

6 "(4) 'Navigable waters of the United States' in-
7 cludes all waters of the territorial sea of the United
8 States as described in Presidential Proclamation
9 5928 of December 27, 1988."

10 (4) Section 102 of the Ports and Waterways Safety
11 Act (33 U.S.C. 1222) is amended by adding at the end
12 the following:

13 "(5) 'Navigable waters of the United States' in-
14 cludes all waters of the territorial sea of the United
15 States as described in Presidential Proclamation
16 5928 of December 27, 1988."

17 (5) Section 3 of the Deepwater Port Act of 1974 (33
18 U.S.C. 1502) is amended—

19 (A) in paragraph (6) by inserting an opening
20 parenthesis before "including" the second place that
21 word appears;

22 (B) in paragraph (18) by striking "and" after
23 the semicolon at the end;

24 (C) in paragraph (19) by striking the period
25 and inserting "; and"; and

(D) by adding at the end the following:

“(20) ‘territorial sea of the United States’

means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988; and

“(21) ‘contiguous zone’ has the meaning that term has in the Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991.”.

(6) Section 2 of the International Navigational Rules Act of 1977 (33 U.S.C. 1601) is amended—

(A) in paragraph (1) by striking “and” after the semicolon at the end;

(B) in paragraph (2) by striking the period at the end and inserting “; and”; and

(C) by adding at the end the following:

“(3) ‘territorial sea’ means the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988.”.

(7) Section 2(a) of the Act to Prevent Pollution from Ships (33 U.S.C. 1901(a)) is amended—

(A) in paragraph (8) by striking “and” after the semicolon at the end;

(B) in paragraph (9) by striking the period at the end and inserting “; and”; and

(C) by adding at the end the following:

1 “(10) The term ‘navigable waters of the United
2 States’ includes all waters of the territorial sea of
3 the United States as described in Presidential Proc-
4 lamation 5928 of December 27, 1988.”.

5 (8) Section 1001(35) of the Oil Pollution Act of 1990
6 (33 U.S.C. 2701(35)) is amended by striking “3” and in-
7 serting “12 nautical”.

8 (9) Section 4370 of the Revised Statutes of the Unit-
9 ed States (46 App. U.S.C. 316(d)) is amended by adding
10 at the end the following: “For purposes of this subsection,
11 the term ‘territorial waters of the United States’ includes
12 all waters of the territorial sea of the United States as
13 described in Presidential Proclamation 5928 of December
14 27, 1988.”.

15 (10) Section 2301 of title 46, United States Code,
16 is amended by inserting “(including the territorial sea of
17 the United States as described in Presidential Proclama-
18 tion 5928 of December 27, 1988)” after “of the United
19 States”.

20 (11) Section 4102(e) of title 46, United States Code,
21 is amended by striking “on the high seas” and inserting
22 “beyond 3 nautical miles from the baselines from which
23 the territorial sea of the United States is measured deter-
24 mined in accordance with international law”.

1 (12) Section 4301 of title 46, United States Code
2 is amended by adding at the end the following:

3 “(d) For purposes of this chapter, the term ‘waters
4 subject to the jurisdiction of the United States’ includes
5 all waters of the territorial sea of the United States as
6 described in Presidential Proclamation 5928 of December
7 27, 1988.”.

8 (13) Section 4502(a)(7) of title 46, United States
9 Code, is amended by striking “on vessels that operate on
10 the high seas” and inserting “as required by regulations
11 prescribed under section 4102(e) of this title”.

12 (14) Section 4506(b) of title 46, United States Code,
13 is amended by striking paragraph (2) and inserting the
14 following:

15 “(2) is operating—

16 “(A) in internal waters of the United
17 States, or

18 “(B) within 3 nautical miles from the
19 baselines from which the territorial sea of the
20 United States is measured determined in ac-
21 cordance with international law.”.

22 (15) Section 8502(a)(3) of title 46, United States
23 Code, is amended by striking “on the high seas” and in-
24 serting: “beyond 3 nautical miles from the baselines from

1 which the territorial sea of the United States is measured
2 determined in accordance with international law.”.

3 (16) Section 8503(a)(2) of title 46, United States
4 Code, is amended by inserting before the period at the
5 end the following: “within 3 nautical miles from the base-
6 lines from which the territorial sea of the United States
7 is measured determined in accordance with international
8 law.”.

9 (17) Section 1 of title XIII of the Act of June 15,
10 1917 (50 U.S.C. 195), is amended—

11 (A) by inserting “(a)” before “The term”, and

12 (B) by adding at the end the following:

13 “(b) As used in this Act, each of the terms ‘territorial
14 waters of the United States’, ‘waters, continental or insu-
15 lar, subject to the jurisdiction of the United States’, and
16 ‘waters within the jurisdiction of the United States’ in-
17 cludes all waters of the territorial sea of the United States
18 as described in Presidential Proclamation 5928 of Decem-
19 ber 27, 1988.”.

20 (d) **MERCHANT MARINE LAWS.**—(1) Section 27 of
21 the Merchant Marine Act, 1920 (46 App. U.S.C. 883) is
22 amended by inserting after “in the United States,” the
23 first time it appears the following: “including points in
24 the territorial sea of the United States as described in

1 Presidential Proclamation 5928 of December 27, 1988,
2 and”.

3 (2) Section 27A of the Merchant Marine Act, 1920
4 (46 App. U.S.C. 883-1) is amended by inserting after
5 “between points in the United States,” the following: “in-
6 cluding points in the territorial sea of the United States
7 as described in Presidential Proclamation 5928 of Decem-
8 ber 27, 1988, and”.

9 (3) Section 2101 of title 46, United States Code, is
10 amended—

11 (A) by redesignating paragraph (17a) as para-
12 graph (17b); and

13 (B) by inserting after paragraph (17) the fol-
14 lowing:

15 “(17a) ‘navigable waters of the United States’
16 includes all waters of the territorial sea of the Unit-
17 ed States as described in Presidential Proclamation
18 5928 of December 27, 1988.”.

19 (4) The first section of the Shipping Act, 1916 (46
20 App. U.S.C. 801) is amended in the first full paragraph
21 (relating to the definition of the term “common carrier
22 by water in interstate commerce”)—

23 (A) by striking “on the high seas” and insert-
24 ing “beyond the territorial sea of the United States

1 as described in Presidential Proclamation 5928 of
2 December 27, 1988,"; and

3 (B) by inserting "on" before "the Great
4 Lakes".

5 (5) Section 511(a) of the Merchant Marine Act, 1936
6 (46 App. U.S.C. 1161(a)) is amended in clause (3)(A)—

7 (A) by striking "on the high seas" and insert-
8 ing "beyond the territorial sea of the United States
9 as defined in Presidential Proclamation 5928 of De-
10 cember 27, 1988,"; and

11 (B) by inserting "on the" before "Great
12 Lakes".

13 **SEC. 8. RESOURCE MANAGEMENT STUDY.**

14 (a) GRANT.—The Under Secretary of Commerce for
15 Oceans and Atmosphere, acting through the Director of
16 the National Sea Grant College Program, may award a
17 competitive grant in fiscal year 1992, in accordance with
18 section 204(a) of the National SEa Grant College Pro-
19 gram Act (33 U.S.C. 1124(a)) in the amount of \$100,000.
20 for the conduct of a study of the adequacy of existing Fed-
21 eral and State laws for the management of living and
22 nonliving resources within the territorial sea of the United
23 States between 3 and 12 nautical miles.

24 (b) MEETING.—To complete the study authorized in
25 subsection (a), the grantee under this section shall con-

1 vene at least one public meeting of representatives of in- 1
 2 terested Federal agencies, coastal States, the private sec- 2
 3 tor, and environmental organizations. 3

4 "(e) REPORT.—The grantee under this section shall 4
 5 complete a study with the grant authorized in subsection 5
 6 (a) and provide a report on the findings of the study to 6
 7 the Congress, the President, and, upon request, the public. 7
 8 not later than 12 months after the date of the award of 8
 9 the grant. 9

10 "(d) DEFINITION.—For purposes of this section, the 10
 11 term "coastal State" has the meaning that term has in 11
 12 section 304(4) of the Coastal Zone Management Act of 12
 13 1972 (16 U.S.C. 1453(4)). 13

14 SEC. 9. SAVINGS PROVISION. 14

15 "(a) IN GENERAL.—Sections 5 and 6 of this Act do 15
 16 not affect the title, legal rights, interests, jurisdiction, and
 17 boundaries of the States, the Commonwealth of Puerto
 18 Rico, the Commonwealth of the Northern Mariana Is-
 19 lands, or any other territory or possession of the United
 20 States.

21 "(b) EFFECT ON OTHER LAWS.—Except as provided 21
 22 by the amendments made by section 7, sections 5 and 6
 23 of this Act do not affect the authority of the Federal Gov-
 24 ernment and the States to manage living and nonliving
 25 resources within the territorial sea of the United States.

1 as such authority existed prior to the date of the enact-
2 ment of this Act.

3 “(c) INTERNATIONAL LAW.—Nothing in this Act
4 shall impair—

5 (1) the right of innocent passage through the
6 territorial sea of the United States or the right of
7 transit passage through or over international straits;
8 or

9 (2) the determination, in accordance with inter-
10 national law, of any maritime boundary with a for-
11 eign nation or a foreign jurisdiction.

12 SEC. 10. IMPLEMENTING REGULATIONS.

13 Each Federal agency that administers a law amended
14 by section 7 shall promptly promulgate all regulations nec-
15 essary to implement this Act.

○

OPENING STATEMENT OF THE HONORABLE WALTER B. JONES,
CHAIRMAN, COMMITTEE ON MERCHANT MARINE AND FISHERIES
AT A HEARING

ON

H.R. 3842

THE TERRITORIAL SEA AND CONTIGUOUS ZONE EXTENSION
AND ENFORCEMENT ACT OF 1991

TUESDAY, FEBRUARY 4, 1992

TODAY, THE FULL COMMITTEE ON MERCHANT MARINE AND FISHERIES HEARS TESTIMONY ON H.R. 3842, THE TERRITORIAL SEA AND CONTIGUOUS ZONE EXTENSION AND ENFORCEMENT ACT OF 1991. I INTRODUCED THIS BILL, ALONG WITH OTHER MEMBERS OF THIS COMMITTEE, LAST NOVEMBER.

THE PURPOSE OF MY LEGISLATION IS TO BEGIN TO FLESH OUT A PROCLAMATION PRESIDENT REAGAN ISSUED IN 1988. THE PROCLAMATION EXTENDED THE TERRITORIAL SEA OF THE UNITED STATES FROM 3 TO 12 MILES, PRIMARILY FOR INTERNATIONAL PURPOSES. AT THE SAME TIME, THE PRESIDENT DENIED ANY INTENT OF ALTERING FEDERAL OR STATE LAW. IT IS THE ROLE OF CONGRESS TO IMPLEMENT THE PROCLAMATION THROUGH CHANGES IN FEDERAL LAW.

H.R. 3842 HAS THREE PRINCIPAL PURPOSES: IT EXTENDS THE SOVEREIGNTY OF THE UNITED STATES OVER THE WATERS AND SEABED OF THE 12-MILE TERRITORIAL SEA; IT ESTABLISHES A 24-MILE CONTIGUOUS ZONE, AS INTERNATIONAL LAW ALLOWS; AND, FINALLY, IT AMENDS SOME 28 LAWS TO MAKE THEM APPLY WITHIN THE EXTENDED TERRITORIAL SEA.

THESE AMENDMENTS PROVIDE AGENCIES, SUCH AS THE COAST GUARD AND N.O.A.A., IMPORTANT NEW ENFORCEMENT POWERS OVER FOREIGN VESSELS AND PERSONS VIOLATING U.S. MARINE RESOURCE LAWS. THE BILL ALSO EXTENDS THE COASTWISE LAWS, PROVIDING ADDED BENEFITS TO THE U.S. MERCHANT MARINE.

THIS BILL IS A FIRST STEP IN IMPLEMENTING THE PRESIDENTIAL PROCLAMATION. DURING THE LEGISLATIVE PROCESS WE MAY FIND THAT OTHER LAWS SHOULD BE AMENDED AND SOME LAWS MAY NEED TO BE LEFT OUT. THESE ISSUES WILL BE CONSIDERED DURING TODAY'S TESTIMONY.

SEVERAL STATES, INCLUDING MY STATE OF NORTH CAROLINA, MAY HAVE AN INTEREST IN ASSUMING ADDITIONAL RESPONSIBILITIES IN THE EXTENDED TERRITORIAL SEA. HOWEVER, MY BILL LEAVES STATE BOUNDARIES AT THEIR PRESENT 3-MILE LIMIT. BECAUSE THE EXTENSION OF STATE BOUNDARIES TO 12-MILES WOULD HAVE SERIOUS FINANCIAL CONSEQUENCES FOR THE FEDERAL GOVERNMENT AND SIGNIFICANT IMPLICATIONS FOR FISHERIES MANAGEMENT, THESE ISSUES NEED CAREFUL REVIEW BEFORE ANY CHANGE IS CONSIDERED. FOR THIS REASON, THE BILL AUTHORIZES A ONE YEAR SEA GRANT STUDY TO LOOK AT BOTH THESE ISSUES AS WELL AS WHETHER ANY ADDITIONAL CHANGES IN U.S. RESOURCE LAWS ARE NEEDED TO IMPLEMENT THE PROCLAMATION.

FOR NOW, I LOOK FORWARD TO HEARING TODAY'S WITNESSES.

**Statement by Rep. Charles Bennett of Florida
House Committee on Merchant Marine and Fisheries**

February 4, 1992

Mr. Chairman: Thank you for allowing me to come before your committee and for your calling this hearing on the important issue of who controls the seaward boundary of our coastal states outward of 3 nautical miles. Since December of 1988, when President Reagan by proclamation extended the boundaries of the territorial sea of the United States from 3 nautical miles to 12 nautical miles, there has been some ambiguity about the effect of the extension on the territorial jurisdiction of the states. I think it is important that full consideration for this issue be given and I appreciate the committee taking this action.

Many of you will remember my efforts to secure passage of the Abandoned Shipwreck Act in 1988. According to the House report on this legislation, before the Abandoned Shipwreck Act became law there was much "confusion over the ownership and authority to manage abandoned shipwrecks." States claimed title and regulatory authority over the wrecks, the Federal Admiralty Courts claimed jurisdiction, and the person locating the shipwreck claimed ownership under the "Law of Salvage." The Act articulated appropriate ownership, directed states to develop policies to protect those natural resources within its jurisdiction, and encouraged the states to create underwater parks so others could share in the enjoyment of these resources.

When given the authority and the responsibility for managing their natural resources, coastal states have consistently demonstrated an ability to carefully manage their ocean resources while balancing protection, conservation, and utilization of the living and nonliving resources of the ocean. I believe that the states have shown that they are better equipped than the federal government, in terms of fiscal resources and administrative abilities, to manage the important ocean resources within 12 nautical miles of their coastline. and should have the authority to do so.

My modest bill, H.R. 536, the Coastal States Extension Act," would extend state jurisdiction over submerged lands out to 12 nautical miles and allow states to grant mineral leases in this area. This act would allow the states to protect and manage the assets of more of the valuable shipwrecks off their coastline. It would also give states the authority to grant, or refuse to grant, future mineral, oil or natural gas leases. To minimize the impact to the federal treasury my bill provides a grandfather clause for existing mineral leases - they shall remain in full force and effect until the previously agreed expiration date or until they are cancelled pursuant to the Outer Continental Shelf Lands Act.

My modest bill does not address every reference to the "territorial sea" under current federal law, and I thank the Chairman for introducing H.R. 3842, the "Territorial Sea and Contiguous Zone Enforcement Act" which amends 28 laws under our Committee's jurisdiction which include a reference to the "territorial sea." I believe it is important to carefully scrutinize all federal laws impacted by the President's proclamation and by my bill and am encouraged that the Committee is taking such positive action in this regard.

I hope that as we consider this important issue we keep in mind the coastal states' important interests in their territorial sea and their long record of careful stewardship of the valuable resources covered by previous law and extended by this legislation. I also hope that our committee will move forward with a combination of the Jones bill and the Bennett bill so that full consideration is given to all of the important factors concerning this issue, so that our nation's laws are appropriately amended, and so that states are given the authority and the responsibility for managing thier offshore resources out to the full 12 nautical miles.

Again, thank you for allowing me to testify and I look forward to working closely with the committee on this important matter.

DAVID A. COLSON
DEPUTY ASSISTANT SECRETARY FOR OCEAN AND FISHERY AFFAIRS
BUREAU OF OCEANS, ENVIRONMENT AND INTERNATIONAL
SCIENTIFIC AFFAIRS
UNITED STATES DEPARTMENT OF STATE

FEBRUARY 4, 1992

BEFORE THE
HOUSE OF REPRESENTATIVES
COMMITTEE ON MERCHANT MARINE AND FISHERIES

It is a pleasure to appear before you today to provide the Administration's position on H.R. 3842, a bill to implement the Territorial Sea Proclamation of 1988 and to extend the contiguous zone from the current 3 to 12 nautical miles to a zone extending from twelve to twenty-four nautical miles. Also under consideration by your Committee is H.R. 536, known as the "Coastal State Extension Act of 1991".

H.R. 536 would propose sweeping changes to established Federal/State boundaries and authorities with far-reaching financial, energy and national security ramifications. Enactment of H.R. 536 would upset currently existing and carefully balanced Federal/State responsibilities for resource management. In addition, H.R. 536 would significantly reduce

federal revenue; and therefore is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. We have recently provided you with extensive comments on H.R. 536. For these reasons, the Administration strongly opposes this legislation.

Mr. Chairman, the other bill, H.R. 3842, which is the main focus today, avoids the pitfalls of H.R. 536 as it attempts to extend federal law, where appropriate. This is exactly the approach we favor and I commend the Chairman for this serious effort.

The territorial sea is an ocean zone adjacent to the coast over which the coastal state exercises sovereignty subject to the right of innocent passage of ships. Every coastal state has the right under international law to establish the breadth of the territorial sea up to 12 nautical miles from its coast.

The contiguous zone is a belt of sea, adjacent to the territorial sea, over which the coastal state exercises the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations. Every coastal state has the right under international law to establish the breadth of its contiguous zone up to 24 nautical miles from its coast.

As of this date the following number of territorial sea and contiguous zone claims have been made worldwide:

TERRITORIAL SEA

BREADTH OF MILES	NUMBER OF STATES
3	9
4	2
6	3
12	114
20	1
30	2
35	1
50	1
200	12
Rectangular	1

CONTIGUOUS ZONE

12 to 24 miles	40
Less than 12 miles	2
Over 24 miles	2

I would note that these figures do not reflect the rapidly changing situation now occurring in the Baltic States, Central Europe or in the former Soviet Union. We are hopeful that many of the republics of the former Soviet Union will take the position of the former Soviet Union broadly supporting customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea. We will continue to monitor this closely.

Extension of the United States territorial sea for particular purposes, and of the contiguous zone, could enhance the United States' national security and drug interdiction efforts by securing an extra measure of protection off the United States coasts.

The question before us is how best to achieve and maximize the benefits of extension. This is not an easy task. It is not a headline grabbing task. But it is an essential task. What is needed is a careful review of United States interests and United States law. In most cases, the issues are entirely in the domestic realm, and for these reasons, we will defer to our fellow agencies, who can better assess the cost and impacts associated with an extension. Suffice it to say that from a foreign policy standpoint, there are no objections to H.R. 3842.

However, there are a number of underlying legal and constitutional questions concerning portions of Section 5 (a) and (b) and 6 (b). These relate to the relative powers of the Executive and legislative branches. We defer to the judgement of the Justice Department, which is examining those questions and preparing a response to the Committee on this matter.

H.R. 3842 provides an important beginning to this review. We have been very appreciative of the Committee's sensitivity to the myriad of issues raised by adjusting federal law into

this new area. Timely and thorough technical reviews have been undertaken, contributing to accuracy in this complex legal area and consistency with prevailing terms of art.

We are pleased to see that H.R. 3842 refers not only to the right of innocent passage through and over the territorial sea, but also the right of transit passage through and over international straits. These are customary legal rights of great importance to the United States that we must encourage whenever possible in order to influence the practice of other straits states. By scrupulously including them in United States statutory authority, we openly and officially endorse their overriding validity and underscore them as sine qua non of any territorial sea extension.

A historical perspective might be helpful here. During the consideration of the 1988 Presidential Proclamation on the Territorial Sea, the principal concern was national security. The United States wanted to address the increase in surveillance occurring off its coast. Though we knew it would be difficult to extend our territorial sea for international purposes alone, we did not believe that difficulty should serve as an impediment to our action. On December 27, 1988 the Presidential Proclamation was signed.

At the time of the Presidential Proclamation, the United States had also planned to extend the United States contiguous

zone. However, reservations were expressed by the Justice Department, as the United States was a party to the 1958 Convention on the Territorial Sea and Contiguous Zone. That Convention only allowed for a contiguous zone extending to 12 miles.

Therefore the State Department undertook to determine whether the extension of contiguous zones to 24 miles had become an acceptable practice in the international community. All nations party to the 1958 Territorial Sea and Contiguous Zone Convention that had proclaimed contiguous zones broader than 12 miles were approached to determine whether any objections or protests were voiced when their extensions were made. None had occurred. That review resulted in a determination that indeed extension of a contiguous zone to 24 miles was now accepted in international practice. For this reason, the United States could support an extension of the contiguous zone to 24 miles. Conforming, technical amendments would be needed to insure that the Act specifically amends the definition of "Customs Waters" in Title 19 to ensure compatibility with the area covered by the new contiguous zone.

In any extension of the territorial sea or contiguous zone we would wish to make clear that in cases of overlap with the territorial sea or contiguous zone of another nation, the United States extension was without prejudice to a boundary determination. This would avoid unintended territorial or

jurisdictional disputes.

We would also recommend an amendment that defines the contiguous zone. It is clear that the definition in H.R. 3842 of territorial sea refers back to the Presidential Proclamation where the territorial sea is defined. But the definition of contiguous zone is not present in H.R. 3842. We recommend using the language of Article 33 of the 1982 United Nations Law of the Sea Convention.

We also note that once the contiguous zone is defined, Section 6(b) should either be deleted, or will have to be modified to indicate that the United States contiguous zone is subject to limited control, and not exclusive jurisdiction, of the United States.

We note that establishment of the contiguous zone would effectively revoke the Department of State Public Notice 358, published in 37 Federal Register 11906 of June 15, 1972, by which the United States first claimed a contiguous zone of 12 nautical miles.

Finally, Mr. Chairman, we question the need for the automatic prospective application of this bill found in Sections 5 and 6. We think the same principle that has governed the statute by statute review should continue and decisions on application of a 12 nautical mile territorial sea or a 12 to 24

nautical mile contiguous zone should be made on a case by case basis that takes into account the need, the cost and the possible conflicts with Federal laws which delegate federal authority to States, through State implementation plans and other important factors.

Thank you, Mr. Chairman, for this opportunity to testify.

TESTIMONY OF
THOMAS A. CAMPBELL
GENERAL COUNSEL
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

BEFORE THE
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 4, 1992

Mr. Chairman and Members of the Committee:

My name is Thomas Campbell. I serve as General Counsel to the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. On behalf of John Knauss, Under Secretary for Oceans and Atmosphere and Administrator of NOAA, I want to thank you for the opportunity to testify on H.R. 3842, the Territorial Sea and Contiguous Zone Extension Act of 1991.

H.R. 3842 has three primary goals: (1) to confirm the Presidential extension of the territorial sea of the United States to 12 nautical miles for various purposes, including the protection of offshore resources; (2) to establish a contiguous zone of 12-24 nautical miles for the further protection of United States territory; and, (3) to begin the process of extending application of certain Federal laws to the 12-mile territorial sea and contiguous zone. NOAA supports H.R. 3842 as it pertains to NOAA programs, with technical changes.

NOAA appreciates the recognition in H.R. 3842 that an extended territorial sea serves the United States' interest in protecting offshore resources. Under international law, a Nation exercises sovereign rights over the resources of its Exclusive Economic Zone and continental shelf, and jurisdiction for the protection of the marine environment. The sovereignty accorded a Nation in its territorial sea and internal waters under international law confers more extensive rights than it exercises in other maritime zones. In order to make full use of rights the United States is entitled to exercise under international law, Congressional consideration of legislation affecting natural resources and the marine environment should include a consideration of whether that legislation should apply in the 12-mile territorial sea.

We defer to the Department of State on international law questions regarding establishment and scope of jurisdiction in a 12-to-24-mile contiguous zone; and to the Department of Justice with respect to constitutional questions. From the perspective of programs administered by NOAA, there is no reason not to establish such a contiguous zone.

Turning to Federal laws which would be affected by H.R. 3842, NOAA generally supports the scope and content of the provisions affecting NOAA programs. The Committee provided NOAA, as well as other agencies, the opportunity to comment on earlier versions of the bill. Because of this and the capable work of

the Committee and its staff, many issues have already been addressed. NOAA's remaining technical comments are attached to my written testimony, and I request that they be included in the record. We would be pleased to work with the Committee to address them.

The primary impact of the conforming amendments in H.R. 3842 on NOAA programs will be to increase regulatory and enforcement capability in the 3-to-12-mile area. The bill would amend virtually all NOAA statutes containing import prohibitions to clarify that an illegal importation takes place at least at the 12-mile line, as opposed to the 3-mile line. The amendments referring to a 12-mile territorial sea, including the amendment to the Marine Protection, Research, and Sanctuaries Act, will clarify that NOAA has authority to undertake -- in the 3-to-12-mile area -- actions with regard to foreign persons and vessels consistent with territorial sea rights in international law.

We are pleased that H.R. 3842 will maintain the existing balance of responsibility for marine resources between the Federal government and coastal states, as established by Congress in such statutes as the Magnuson Fishery Conservation and Management Act and the Coastal Zone Management Act. This balance is maintained because the basic jurisdictional lines in these and other resource management statutes are linked to the seaward boundaries of states under the Submerged Lands Act, rather than to the seaward boundary of the territorial sea.

NOAA opposes any reallocation of these responsibilities. In our view, it is important that the management of resources located outside the existing seaward boundaries of the states continue to be for the benefit of the Nation as a whole, consistent with uniform policies and objectives expressed in existing legislation.

The appropriate balance of Federal and coastal state interests, for the purposes of the Coastal Zone Management program, was recently addressed by Congress in the Coastal Zone Management Act Reauthorization Amendments of 1990. In the Act, as amended, Congress recognizes the legitimate interest of coastal states in Federally regulated activities which have an effect on the resources of the coastal state by such requirements as the consistency provision. However, Congress also reaffirms the existing allocation of management responsibility under the Act by intentionally deleting the reference to the "territorial sea" in the definitions of the seaward boundary of the "coastal zone," and then including a specific reference to the Submerged Lands Act.

NOAA also supports the existing allocation of responsibility between the coastal states and the Federal government as embodied in the Magnuson Fishery Conservation and Management Act. The Magnuson Act provides for effective, cooperative conservation of fishery resources, and fair and equitable treatment of resource users. The Fishery Management Councils established by the Act

function to assure that the concerns of all states and other parties interested in a particular fishery (including recreational and commercial users from various states, as well as conservation, industry and other interests) have a meaningful opportunity to participate in the development of fishery management plans. Of the 32 fisheries managed under fishery management plans, 30 are interjurisdictional fisheries involving stocks of fish that migrate within waters adjacent to two or more states, and between state and Federal jurisdictions. Under the Magnuson Act, if state jurisdiction were extended to 12 miles, differing management regimes of the individual states would dominate about 19 of these interjurisdictional fisheries -- to the almost certain detriment of the resource. For these reasons, NOAA is opposed to expansion of state fisheries jurisdiction.

Continuation of Federal jurisdiction and control under the Magnuson Act provides the best avenue for managing these resources effectively because the Act requires that an individual stock of fish be managed as a unit throughout its range. Congressional recognition of the importance of this management approach is also reflected in other fishery statutes such as the recently reauthorized Atlantic Striped Bass Conservation Act of 1984. That Act provides for cooperative management of striped bass rather than the fragmented state management which was harming the resource.

We note that section 7(d)(1) would amend the Merchant Marine Act to prohibit transport of merchandise from one point to another in the 12-mile territorial sea by other than U.S.-documented vessels. We believe this amendment might affect activities of foreign vessels now permitted under the Magnuson Act to support U.S. harvest vessels in the 3- to 12-mile zone. If these activities were barred, joint ventures between U.S. harvesters and foreign processors could be adversely affected. A clarifying amendment to the Magnuson Act could correct this.

NOAA has a concern with section 5(c) of H.R. 3842. This provision would essentially establish that the term "territorial sea," as used in any legislation enacted subsequent to December 30, 1990, means 12-mile territorial sea, unless otherwise provided. Although NOAA understands the concern for clarity and uniformity of application, the implications of this provision require further consideration. For example, we see no basis for the retroactive application of this bill, and believe that such an application would create confusion. We defer to the Department of Justice with respect to the legal effect of this provision, but strongly recommend addition of a parallel provision that state boundaries remain as provided in the Submerged Lands Act unless otherwise specifically provided by statute.

Mr. Chairman, that concludes my comments on H.R. 3842. With the Committee's permission, NOAA will continue working with Committee staff on the few technical issues that remain. At this time, I would be pleased to answer any questions that you or other members of the Committee may have.

H.R. 3842 -- NOAA's Technical Comments**Section 4. DEFINITIONS.**

The definition of the contiguous zone [Page 3, line 12] should correspond with the description of the contiguous zone in section 6(a) of the bill [Page 4, line 14], and should incorporate the language of Article 33 of the United Nations Convention on Law of the Sea.

Section 5. THE TERRITORIAL SEA.

In section 5(c) [Page 4, line 10] substitute "statute" for "law" and add a reference either to Presidential Proclamation 5928 or to the definition in section 4(2).

Section 6. THE CONTIGUOUS ZONE.

We defer to the Department of State as to whether this provision comports with international law.

Section 7. CONFORMING AMENDMENTS

(1) Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801-1881.

Section 7(a)(7) of H.R. 3842 [Page 8, line 16] amends the Magnuson Act to add a new definition of "Territorial sea of the United States." While we agree with the addition of this definition, we note that, in order to avoid unintended results, four minor technical amendments to the Magnuson Act are needed.

First, amend the definition of "Continental Shelf" in 16 U.S.C. 1802(3) by deleting "outside the area of the territorial sea" and substituting "beyond the inner boundary of the Exclusive Economic Zone."

The purpose of this change is to avoid a gap in management authority over Continental Shelf fishery resources in the area between three and twelve miles.

Second, amend 16 U.S.C. 1824(a) by adding the following sentence: "Notwithstanding any other provision of law, a foreign fishing vessel with a valid permit on board may engage in activities authorized by the permit within the exclusive economic zone, including that portion of the territorial sea that is within the exclusive economic zone," as defined in the Act.

The purpose of this change is to allow foreign fishing vessels to continue to operate in the portion of the territorial sea beyond state boundaries.

Third, amend 16 U.S.C. 1856(a)(2)(A) by deleting "territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party" and substituting "inner boundary of the Exclusive Economic Zone of the United States."

The purpose of this change is to avoid inadvertently extending state jurisdiction to pockets of water seaward of the outer boundaries of state waters.

Fourth, amend 16 U.S.C. 1856 note by deleting "the outer boundary of the territorial sea" and substituting "the inner boundary of the Exclusive Economic Zone."

The purpose of this change is to avoid inadvertently extending part of Alaska's "internal waters" to the 12-mile line for the purpose of foreign processing of pink salmon. Pub. L. 99-509, Title V, Sec. 5004 (16 U.S.C. 1856 note) defines one portion of Alaska's internal waters by reference to the outer

boundary of the territorial sea. As above, this technical correction would avoid inadvertently extending authority to allow processing pink salmon by foreign vessels outside state waters.

(2) Ocean Thermal Energy Conversion Act (OTEC), 42 U.S.C. 9101.

Implementation of the OTEC Act depends in part on an underlying body of state law. If the territorial sea is defined in the Act to extend to 12 miles, a conforming change to section 403(b)(2) of the OTEC Act (42 U.S.C. 9163(b)(2)) appears to be necessary so that the paragraph reads as follows:

(2) the law of the nearest coastal state to which an ocean thermal energy conversion facility located beyond the territorial sea or within the area between 3 and 12 nautical miles from the baselines of the United States and licensed under this Act, is declared to be the law of the United States.

(3) We recommend the following additional conforming amendments should be added to section 7 of H.R. 3842:

(a) Atlantic Striped Bass Conservation Act, 16 U.S.C. 1851
note.

Add to the definition of "coastal waters" in § 3(3)(a)(ii) of the Atlantic Striped Bass Act after the words "economic zone" the phrase "as defined in the Magnuson Act 16 U.S.C. 1802(6)."

The purpose of this change is to clarify that the seaward boundary of "coastal waters" (i.e., the outer boundary of state waters) is the three-mile (or three-marine league) boundary provided in the Submerged Lands Act, as referenced in 16 U.S.C. 1802(6), rather than the 12-mile seaward boundary of the territorial sea.

(b) Pacific Salmon Treaty Act of 1985, 16 U.S.C. 3631-3644.

Add to 16 U.S.C. 3631 a definition of the Exclusive Economic Zone as follows: "The term 'exclusive economic zone' means the zone as defined in 16 U.S.C. 1802(6)."

The purpose of this addition is the same as for the Atlantic Striped Bass Act, to clarify that the inner boundary of the EEZ and outer boundary of state waters is as provided in the Submerged Lands Act via the Magnuson Act (three miles or three marine leagues) rather than at the seaward boundary of the territorial sea (12 miles).

(c) Atlantic Tunas Convention Act, 16 U.S.C. 971-971i.

Delete "contiguous to the territorial sea of the United States" in 16 U.S.C. 971(4). Delete "in the territorial sea of the United States" and substitute "within its seaward boundary" in 16 U.S.C. 971g(d).

The purpose of this change is to clarify that the inner boundary of the fishery zone is coextensive with the inner boundary of the EEZ and consistent with the Magnuson Act.

Add definitions of "import" and "territorial sea of the United States" to 16 U.S.C. 971 that are the same as the definitions added for the Magnuson Act.

The purpose of this addition is the same as that underlying amendment of the statutes such as the Magnuson Act that prohibit importations, to clarify that such importation takes place at least at the 12-mile rather than the 3-mile limit. This would avoid an inference that this statute is subject to different treatment.

(d) The North Pacific Fisheries Act, 16 U.S.C. 1021-1035, and the Whaling Convention Act, 16 U.S.C. 916-916l, also prohibit "import" of illegal product. Adding "import" and "territorial

sea" definitions such as those definitions added to the Magnuson Act and other statutes would avoid creating an inference that these two statutes were to be treated differently in this regard.

Testimony of

Paul L. Kelly

On Behalf of

The National Ocean Industries Association
The International Association of Drilling Contractors
and the
American Petroleum Institute

Before the

Committee on Merchant Marine and Fisheries
United States House of Representatives

Washington, D.C.

February 4, 1992

Mr. Chairman, thank you for the opportunity to testify before your Committee. My name is Paul Kelly and I am a Vice President with the Rowan Companies of Houston, Texas.

I am here today representing the National Ocean Industries Association, the International Association of Drilling Contractors, and the American Petroleum Insititute. NOIA represents more than 300 companies involved in all phases of the offshore oil and gas industry, IADC represents virtually all contractors who perform drilling services for oil companies worldwide, and API represents more than 250 companies involved in all aspects of the petroleum industry.

My task is to present you with our views on H.R. 3842, a bill to extend the territorial sea and the contiguous zone of the United States. We are pleased to be able to tell the Committee that we will not offer any criticisms of this legislation. The bill, as written, does not appear to interfere with the intent of Presidential Proclamation 5928 which extends the territorial sea of the United States, and its territories and possessions, from 3 to 12 nautical miles "...for the primary purpose of advancing the national security interests of the United States."

When President Reagan announced this proclamation, he explicitly stated that it was not his intent to alter the current division of federal/state authority over the coastal zone. It was the President's intent that the states' current authority, which extends to three nautical miles (or three marine leagues in the case of Texas and the west coast of Florida) would not be altered. We fully support the continuation of this relationship. We do not believe that there is any need to extend state authority over the management of the resources of our marine waters. Indeed, we believe that such an action would enormously complicate the management of federal marine resources.

Further, we believe that other legislation now before this Committee that would transfer ownership of marine resources, including oil and gas, from the federal government to coastal states should be rejected. Attempts to transfer ownership likely will result in a protracted debate in Congress, litigation and disruption of efforts to develop and protect the natural resources of federal marine waters. Transfer of ownership to the states also would result in a hodge podge of management programs designed to meet the peculiar needs of each coastal state. We believe it prudent to require that OCS resources remain subject to federal management to ensure, to the extent possible, that development of these resources is subject to a single regulatory regime.

This is not to say that coastal states should be denied a role in the management of these resources. Quite the contrary, states have a vested interest in the management of federally owned marine resources. However, the role of coastal states should not be far greater than inland states inasmuch as the inland states, and their citizens, also are owners of the resources located in federal waters. Coastal states already have more authority than non-coastal states over federal resources through the Coastal Zone Management Act. CZMA was created to ensure that federally permitted activities that "...have or are likely to have an effect on land and water uses in the coastal zone..." are consistent with the coastal management program of the affected state. In our view and experience, CZMA gives great power to coastal states and, while it does not give an absolute veto power over activities in federal waters, it often allows states to delay many projects that are in the national interest. That power should neither be increased nor extended. While, H.R. 3842 in its present form does not endow states with increased authority, we urge the Committee to ensure that the bill remains unamended and that state authority is not extended beyond current limits.

Thank you for your attention. I will be happy to answer any questions.

U.S. Department
of Transportation

United States
Coast Guard



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DEPARTMENT OF TRANSPORTATION

U. S. COAST GUARD

STATEMENT OF

REAR ADMIRAL PAUL E. VERSAW

CHIEF COUNSEL, UNITED STATES COAST GUARD

BEFORE THE

COMMITTEE ON MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

FEBRUARY 4, 1992



Rear Admiral Paul E. Versaw Chief, Office of Chief Counsel United States Coast Guard



Rear Admiral Paul E. Versaw became the 9th Chief Counsel of the United States Coast Guard on 1 June 1990. He assumed this position after serving as Assistant Superintendent, U.S. Coast Guard Academy since 15 August 1988.

Prior to his academy assignment Versaw commanded Coast Guard Group San Francisco, the largest such office in the Coast Guard's Pacific organization.

While in that position Versaw directed the seizure of the tug Intrepid Venture on May 23, 1988, which resulted in the largest hashish-marijuana confiscation in U.S. history.

Versaw's previous assignments include chief of the Coast Guard's international affairs branch, where he established working relations with foreign governments in maritime matters. He led numerous delegations which negotiated agreements concerning search and rescue, piracy and maritime terrorism. In preparation for this assignment, Versaw became the first Coast Guardsman to attend the U.S. State Department's Executive Seminar in National and International Affairs. The ten month foreign service institute is the most advanced educational program available to senior government officials.

A 1961 graduate of the Coast Guard Academy, he served aboard the Coast Guard Cutter's MACKINAC, ROCKAWAY, UNIMAK, and VENTUROUS. Assignments ashore include Marine Inspection and legal officer at Coast Guard Headquarters, Washington, D.C., the Coast Guard Yard in Baltimore, and the Thirteenth Coast Guard District in Seattle. Versaw obtained his juris doctorate from Catholic University in Washington, D.C.

His decorations include four Meritorious Service Medals, three Coast Guard Commendation Medals with "O" device, Commandant's Letter of Commendation Ribbon with "O" device, Coast Guard Unit Commendation Ribbon with "O" device, Coast Guard Meritorious Unit Commendation Ribbon with "O" device.

Rear Admiral Versaw is married to the former Marjorie Anne Rich of Tacoma, Wash. They have three children; Charles, David and Greg.



DEPARTMENT OF TRANSPORTATION
U. S. COAST GUARD
STATEMENT OF
REAR ADMIRAL PAUL E. VERSAW
CHIEF COUNSEL, UNITED STATES COAST GUARD
BEFORE THE
COMMITTEE ON MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES
FEBRUARY 4, 1992

Mr. Chairman and members of the Committee, I appreciate the opportunity to make this statement and to answer any questions you might have concerning the potential effects on the U.S. Coast Guard of H.R. 3842, a bill to extend the territorial sea and contiguous zone of the United States.

On December 27th, 1988, President Reagan extended the territorial sea of the U.S. from 3 to 12 nautical miles *for international purposes only*. That Proclamation did not change the 3 nautical mile territorial sea for purposes of domestic law. There was no extension of the geographic application of any domestic statutes beyond the 3 nautical mile territorial sea. H.R. 3842 has as its purpose the extension of the application of certain Federal laws to new maritime zones: one being the formal Congressional recognition of the 12 nautical mile territorial sea for purposes of U.S. sovereignty and domestic law applicability; and the second being the establishment of a 24 nautical mile contiguous zone for the purpose of international law and certain Federal laws.

The Coast Guard is intimately involved with, and responsible for, many ocean-related activities which take place in the "territorial sea." Title 14, U.S. Code, assigns to the Coast Guard primary duties of administering laws and promulgating and enforcing regulations in the maritime arena for matters involving maritime safety and navigation, smuggling and illicit drug interdiction, and marine environmental protection.

In the invitation soliciting testimony regarding this bill, you requested that a number of specific issues be addressed. I will focus on those issues which I feel competent to address as Chief Counsel of the Coast Guard. Article 2 of the 1982 United Nations Convention on Law of the Sea recognizes extension of coastal state sovereignty to the territorial sea. Under Articles 3 and 33 of the Convention, a coastal state may establish a territorial sea not to exceed 12 nautical miles, and a contiguous zone not to exceed 24 nautical miles, from baselines established in accordance with the Convention. Article 33 further authorizes the coastal state to exercise the control necessary to prevent the infringement of customs, fiscal, immigration, and sanitary laws and regulations within the contiguous zone. H.R. 3842, with its stated purposes and conforming amendments, is consistent with these customary international law principles. In fact, the Presidential Proclamation establishing the United States' current 12 nautical mile territorial sea is premised on the same principles.

One of the Coast Guard's concerns with the legislation has been the wholesale extension of all applicable domestic laws to a 12 nautical mile territorial sea limit when selective extension, based on the overall purpose for the affected statute, would be more appropriate. H.R. 3842 does recognize these potential problems in some statutes. For example, the Coast Guard specifically concurs in the proposed conforming amendments to 46 USC 4102(e), 46 USC 4502(a)(7) and 46 USC 4506(b). Those statutes, which deal with safety equipment, particularly Emergency Position Indicating Radio Beacons or EPIRBs, would retain the status quo of 3 nautical miles of geographic applicability. Without these amendments, alerting and locating equipment (including EPIRBs) would not be required unless an uninspected vessel operated beyond 12 nautical miles. Retaining the 3 nautical mile status quo is a sound legislative concession to search and rescue concerns and the ultimate safety of this class of vessel.

A number of statutes exist which do contain the phrase "territorial sea," "territorial waters," or "navigable waters of the United States" and have not been addressed by this legislation. Some examples are 8 USC 1357 (Powers of Immigration Officers), 26 USC 48 (Internal Revenue Code), 19 USC 1590 (Aviation Smuggling) and 28 USC 1603 (Foreign Sovereign Immunities Act). However, these statutes are beyond the general purview of the Coast Guard and I will defer comments on the appropriateness of their inclusion in this legislation to the

cognizant agencies and on constitutional matters to the Department of Justice.

You also asked for the Coast Guard's opinion as to the appropriate role of the coastal states in managing the resources of the territorial sea. As the primary Federal maritime law enforcement agency, the Coast Guard is often called on to enforce the provisions of various resource management programs within the U.S. territorial sea, contiguous zone and Exclusive Economic Zone (EEZ). The policy implications of coastal state resource management within these zones would be more appropriately addressed to those agencies charged with the administrative and regulatory responsibility over the resource in question.

This concludes my prepared statement. I appreciate the opportunity to appear before you today and will be happy to answer any questions you might have. Thank you.



NATIONAL FISHERIES INSTITUTE, INC.

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Testimony of the
National Fisheries Institute
On

H.R. 3842

before the

Committee on Merchant Marine and Fisheries
February 4, 1992

Good morning Mr. Chairman and members of the committee. I am Richard E. Gutting, Jr., Vice President of Government Relations for the National Fisheries Institute. The NFI is the largest organization representing the U.S. fish and seafood industry.

I am pleased to be here to present the views of the NFI on H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991. We appreciate the opportunity to testify because any change in the respective roles of the state and federal governments in the regulation of ocean harvests could profoundly impact our industry.

Fishery Management

Under present law the management and development of fishery resources is shared by the federal and state governments based primarily upon the present 3-mile boundary line of state jurisdiction. In contrast, the conservation of marine mammals and endangered species under the Marine Mammal Protection Act and Endangered Species Act is primarily a federal responsibility irrespective of the present 3-mile boundary.

While the President's proclamation does not purport to alter this state-federal relationship, the redefinition of the territorial sea under international law raises some possibility that present U.S. fishery management statutes would be interpreted in a way that could be disruptive of present programs.

Any seaward extension of state "boundaries" to the 12-mile line of the new territorial sea would profoundly alter present fishery management programs in the United States. In our view, such action would balkanize decisionmaking, disrupt the conservation of stocks which must be managed throughout their range, and undermine the many research and management efforts which have been initiated in the past two decades. NFI would oppose any such extension.

Section 9 of H.R. 3842 states that the bill is not intended to affect the present "boundaries of the States" and that with the exception of those changes expressly made in Section 7 of the bill, no change to present fishery management authority is intended. The result, under our reading of the bill, is that the existing balance of responsibilities between the state and federal governments in those laws governing the management and development of living marine resources would be maintained. We support this position.

Section 7 of H.R. 3842 would add definitions of the terms "territorial sea of the United States" and "import" in the Magnuson Act. These proposed changes raise several questions concerning the intended impact of the bill upon the Magnuson Act

and its fishery management program.

Under Section 102 of the Magnuson Act, the U.S. exercises "sovereign rights and exclusive fishery management authority" over all fishery resources in the "exclusive economic zone." This zone is defined in Section 3 with reference to "a line coterminous with the seaward boundary of each of the coastal States." Under Section 306(a), the jurisdiction and authority of a coastal State "within its boundaries" is maintained subject to certain exceptions having to do with fisheries located predominately seaward of state boundaries which are also located within state boundaries.

The legislative history of these provisions suggests that Congress intended that each state's seaward boundary would be the same as that established in the Submerged Lands Act of 1953. Thus, unless either the seaward boundary of the coastal states, or the baseline of the territorial sea are changed, the basic state-federal relationship as described in Sections 102 and 306 of the Magnuson Act would not appear to change. In this regard, we assume that the changes to the Magnuson Act in Section 7 of H.R. 3842 are the only changes intended to be made, and that the reference to the Magnuson Act in Section 7 should not be construed to change the boundaries of the States for purposes of defining their fishery management authority.

H.R. 3842, however, does raise several questions about the intended impact of the bill on the Magnuson Act. References, for example, are made to the "territorial sea of the United States" in the definition of the term "high seas" in Section 3 and the extension of state jurisdiction over certain pockets of water

in Section 306(a)(2)(A). Also, the term "territorial sea" is found in the definitions of "waters of a foreign nation" and "high seas" in Section 3 and the definition of "internal waters of a States" in Section 306 (c)(4).

The Magnuson Act has been amended many times since it was enacted and the Committee may want to examine whether or not the definition of "high seas" in Section 3 is needed. If it is no longer needed, the Committee may want to consider deleting it.

H.R. 3842 also would change Section 306(a)(1)(A) of the Magnuson Act. It would appear that as a result of H.R. 3842, it is possible that pockets of state jurisdiction would be created in the waters beyond 3 miles which are managed by the fishery management councils. Whether such pockets would be created, depends upon whether or not an expanded territorial sea would enclose pockets of water further than 12 miles from the baseline. If so, such pockets would become subject to state fishery jurisdiction even though they were surrounded by waters subject to federal fishery jurisdiction. Such result would make little sense from a fishery management perspective.

Finally, the Committee, as a matter of technical clarification, should consider modifying the term "territorial sea" in Section 306(c)(4)(B) to read "territorial sea of the United States."

References to the "territorial sea of the United States" are also found in the other laws regarding the conservation of marine mammals and fish listed in Section 7. These laws do not define what is meant by the territorial sea, nor do they indicate

whether Congress intended that the definition of the territorial sea be affected by an expanded claim of territorial sea under international law. While the phrase "territorial sea of the United States" in these laws would be defined by H.R. 3842, the bill would not appear to alter the basic state-federal relationships established by these laws.

Our review of fishery laws has not been exhaustive. Over 100 federal laws govern the management and development of living marine resources. A thorough review should be made of these statutes to identify where changes are warranted. In the meantime, we believe that it would be prudent to make clear that neither the President's action nor the proposed Act impacts the scope of present fishery laws as is provided for in Section 9.

Coastwise Trade

H.R. 3842 would extend the geographical scope of the coastwise trade restrictions seaward from three to twelve miles. The coastwise trade includes the carriage of fish or cargo from a point in the territorial sea to another such point, or to a U.S. port.

Because the vessel building and ownership requirements to operate in the coastwise trade differ from the requirements to operate in U.S. fisheries, all U.S. fishery vessels are not necessarily qualified to operate in the coastwise trade. There are U.S. fishery vessels, for example, which are authorized to receive fish from U.S. harvesting vessels in the exclusive economic zone, and land that fish in the United States, so long as the transfer of fish does not occur in the territorial sea. Under H.R. 3842, vessels such as these would no longer be able to

receive fish in the band of water from three to twelve miles offshore.

Several vessel operators have raised concerns that their vessels would be adversely impacted by the proposed extension of the geographical scope of the coastwise trade restrictions. These concerns are expressed in the letter from the American Factory Trawler Association which is enclosed.

Coast Guard Enforcement And Vessel Safety

H.R. 3842 also would amend several statutes regarding U.S. Coast Guard enforcement and vessel safety. In this regard, the NFI believes that the present emergency locating equipment requirements for uninspected fishery vessels, which apply only to vessels operating beyond three miles, should not be changed. This is the position which appears to be taken in the changes proposed to Sections 4102(e) and 4502(a)(7) of title 46, United States Code.

Committee Questions

Our answers to the four questions asked by the Chairman in his letter inviting our testimony follow:

1. While many changes might improve the laws which govern the management of fisheries within 12 miles of the coastline, we believe that the basic legal system or structure is sound, with one exception.

The exception concerns the interaction of marine mammals and endangered or threatened species with fisheries. These protected animals are sometimes taken in fishing operations and they eat huge quantities of the fish or otherwise render them useless for

human consumption. Despite these interconnections, present fishery management programs are not integrated with those aimed at protecting animals.

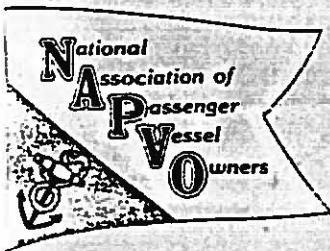
Significant problems have been avoided so far, but the potential for major trouble is growing and should be headed off by the Committee when the Marine Mammal Protection Act, Endangered Species Act and Magnuson Act are reauthorized.

2. We support maintaining the present boundary lines between state and federal fishery management authority.

3. We believe that a thorough study should be completed before additional laws are included.

4. The coastal states should be encouraged to take an active role in conserving and managing living marine resources. The federal preemption of state authority within state boundaries in the Endangered Species Act and Marine Mammal Protection Act has discouraged state involvement to the detriment of fishery resources.

Each fishery is unique with different opportunities and challenges. The best program for a fishery often requires an unique combination of state and federal effort. We believe that the Magnuson Act, with its emphasis on regional planning and inclusive and open decisionmaking, offers a useful way for state and federal officials to cooperate in the conservation and management of living marine resources.



The National Association of
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Statement
by the

National Association of Passenger Vessel Owners

before the

Committee on Merchant Marine and Fisheries

February 4, 1992

H. R. 3842 - A Bill to Extend the Territorial Sea and the
Contiguous Zone of the United States

Good Morning, Mr. Chairman. I am Eric Scharf, Executive Director of the National Association of Passenger Vessel Owners (NAPVO). We represent some 350 companies operating more than one thousand U.S. Coast Guard inspected vessels. Our vessels are American built, owned, operated, crewed and subject to the full safety oversight of the U.S. Coast Guard.

Our members operate throughout the country, providing the public with dinner cruises, sightseeing and tour excursions, car and passenger ferry services, charter vessel operations, casino gaming vessels, domestic overnight trips and other passenger carrying operations. Last year our combined membership carried more than 45 million people on safe, economical voyages. The operations of NAPVO members represent a diverse cross-section of offerings to the public.

We appreciate the opportunity to testify today on the subject of extending the "territorial sea of the United States" to the the twelve mile point as called for in Presidential Proclamation 5928 of December 27, 1988. Our interest in the legislation is limited to the effect the extension has on the foreign ships which operate in domestic service. We have no comment on other provisions of the bill that relate to fisheries and wildlife enforcement or ocean research and management. Given the short notice provided to prepare our testimony, we have not had an opportunity to fully analyze the provisions of the bill that relate to Coast Guard enforcement and vessel safety or merchant marine laws.

Our concerns that are effected by this proposed legislation is to seek further limitations on foreign-flagged vessel operators who operate cruises from one point in American waters and return to the original point. NAPVO's supports legislation that levels the playing field between foreign-flagged vessel operators and U. S. flagged operators.

Our reading of the proposed legislation indicates that the Passenger Ship Transportation Act has not been referenced. We recommend that the need for inclusion of this Act be researched and included if necessary to correct the problems we are concerned about.

Currently, the Passenger Ship Transportation Act provides that:

"No foreign vessel shall transport passengers between ports or places in the in the United States, either directly or by way of a foreign port, under a penalty of \$200 for each passenger so transported and landed."

Our concern is that the Customs Service, relying on Attorney General opinions dating back to 1900, has allowed a "loophole" to develop that permits a foreign-flagged vessel to leave a port, travel to international waters and return, with it not being considered a violation of law.

This "voyage to nowhere" loophole has allowed both unfair competition to develop between U.S. flagged and foreign flagged operators and introduced American passengers to potential safety problems because of inadequate safety provisions on short duration foreign flagged gaming vessels.

For many years, a number of foreign-flagged cruises have operated out of ports in the coastal areas, ostensibly for the purpose of conducting casino gaming operations. Because of the distinct advantages that these vessels have in operating under a foreign flag and the restriction placed on U.S. operators to conduct casino gaming these vessels have posed extreme unfair competition to the American passenger vessel operator operating nearby. Last year, one of our members testified before this committee that his company had been forced to close two locations and lay off close to 100 American workers since 1989 because they could not compete with these operations.

More recently a development in San Diego harbor is causing significant alarm to our industry. In anticipation of the America's Cup races an Australian vessel, the "Golden Swan" has begun operations in San Diego. This vessel is currently taking charter groups out for three to four hour "dinner" cruises in which the vessel proceeds briefly beyond the international boundary at some point during the cruise to legalize its extended trip within US waters. Our inquiries to the Custom Service have elicited the response that they do not see this as a violation of law which reserves domestic service to U.S. vessels.

NAPVO feels that lacking a change in the law that clearly and expressly forbids the "voyage to nowhere" type cruise that legislation, such as the extension of the territorial sea to twelve miles, that makes it more difficult for these operations to conduct business is in the public interest of the U.S. maritime industry.

In addition to the issue of unfair competition NAPVO has serious concerns about the safety issues presented by these vessels. NAPVO and its members first priority is to always ensure that its passengers have a safe voyage. We support federal efforts to regulate the passenger vessel industry, both through domestic vessel inspection and certification and the regulation of foreign ship activity in U. S. ports. We believe that the U. S. Coast Guard does an excellent job in ensuring the safety of U. S. passengers on U. S. vessels.

We have concerns about the safety of passengers on the foreign-flagged "voyages to nowhere". We, as all who derive their livelihood from the territorial seas and the international oceans, are concerned that those who seek pleasure from the sea be able to do so with safety for themselves and profit for the providers. The unique nature of the cruise business, as it is carried out

in this country, is that the means for cruising the oceans is almost exclusively foreign built, foreign owned, foreign operated, foreign crewed and subject to foreign interpretation of the international standards and another nation's safety regime. The U.S. Coast Guard exercises direct control only in limited circumstances such as a narrow accident investigation jurisdiction and, when absolutely necessary, in a court of last resort fashion carrying out intervention under the international conventions.

In the range of options, a U.S. passenger can choose between a short duration, close to home excursion by a U.S. vessel such as dinner cruises, excursions or sightseeing or at the other end of the scale, a deep sea adventure calling at foreign ports in a prolonged voyage. The choice is clear and rarely does one get something unexpected.

There is another segment of the on the water experience where the choices are not so clear, the safety regimes quite different and the consumer may indeed be getting something far different than what he expected. That is the "voyage to nowhere" by foreign operated, foreign supervised vessels that operate from U.S. ports, carrying U.S. passengers primarily on gambling cruises. These vessels are in direct competition with the domestic vessels but are not held to the same strict oversight. They, because of their gambling revenues can offer short, several hour trips featuring meals, entertainment and an on the water experience in direct competition with U.S. vessels and at giveaway prices.

These vessels have all of the foreign vessel problems cited in a NTSB report regarding cruise ship safety, which have substantially less oversight because they are intensive use, often obsolete ocean cruising vessels which probably never return to the jurisdiction of their flag yet they have the same shield

Five - Testimony by NAPVO on the Extension of the Territorial Sea - 2/4/92

that true international cruise vessels must have to operate between and through numerous port states. They, with their dedicated use involving only a single U.S. port do not deserve the deference accorded true international vessels. These vessels should be exposed to the full domestic control of the United States and its maritime safety organizations including inspection by the U.S. Coast Guard to our domestic regulations and the investigative oversight powers of the National Transportation Safety Board when appropriate.

The principle here is that if the owner of a vessel chooses to become in actuality, a domestic service carrying our nationals from and returning to the same port, then the vessel should not be accorded international rights whose purpose is to facilitate commerce amongst contracting governments with differing domestic standards. If they choose to become domestic use vessels and incidentally compete head to head for day or dinner cruise passengers, let them meet the same inspection and oversight standards that our domestic fleet meets.

I thank you for the opportunity to address this Committee on the issue of extension of the territorial sea. Mr. Chairman, I would be pleased to respond to any questions you or the members might have.

February 3, 1992
pubpol\gamble.8

STATEMENT
OF
THE STATE OF ALASKA

at the
Hearing
on
"Territorial Sea and Contiguous Zone Extension
and
Enforcement Act of 1991"
H. R. 3842

House Merchant Marine and Fisheries Committee
Honorable Walter B. Jones
Chairman

February 4, 1992
Washington, D.C.

STATEMENT OF STATE OF ALASKA¹

Hearing on
"Territorial Sea and Contiguous Zone Extension
and
Enforcement Act of 1991"
(H. R. 3842)

House Merchant Marine and Fisheries Committee

February 4, 1992

I. Introduction.

Chairman Jones and members of the House Merchant Marine and Fisheries Committee. Thank you for your January 3, 1992 letter to Governor Hickel inviting State participation in this hearing.

The State of Alaska supports legislation to implement the President's Territorial Sea Proclamation for domestic purposes.² However, the state, along with the Alaska State Legislature,³ urges that domestic legislation on the territorial sea affirm the same states' rights in the 12 mile limit that now exist to three miles.

Alaska has substantial interests in the territorial sea off the coastline of the state. With the exception of approximately six anomalous years from 1947 - 1953, the coastal states have owned the submerged lands and managed the resources of the territorial sea. The Submerged Lands Act of 1953 affirms the public interest in state responsibility over the territorial sea. This historic grant of title to the coastal states has assured ownership interest and

management responsibility by the governmental entity most affected by activities in the territorial sea.

Areas beyond the territorial sea have been subject to federal jurisdiction and control but not domain for purposes of fast title to the submerged lands. Though no governmental entity held title to the lands beyond three miles, for many purposes the states have exercised jurisdiction and control along with or in place of the United States. As a result, Alaska already has substantial experience in managing resources beyond three miles.

Therefore, Alaska submits it would be in the best public interest to affirm the same state rights in a 12 mile territorial sea that presently exist in three miles.

II. Alaska Has a Substantial Interest in Adjacent Coastal Lands and Waters.

The State of Alaska is keenly interested in laws affecting the state's offshore coastal zone. Alaska has a tidal coastline of approximately 15,132 miles.⁴ Under the Submerged Lands Act of 1953, 43 U.S.C. §1301 *et seq.*, Alaska owns approximately 50,000 square miles of submerged lands, and manages resources of that seabed and the superjacent water column from the coastline seaward to three geographic miles.⁵ Extension of the territorial sea off Alaska to 12 miles would increase the submerged lands under the territorial sea by an additional 150,000 square miles.⁶ Federal jurisdiction would remain in the 800,000 square miles comprising the Exclusive Economic Zone, as well as over submerged lands of the outer continental shelf to the limits of exploitability.⁷

At the present time, virtually all of the harvest of salmon and herring occurs within the three mile zone. Of other species⁸ taken in both state waters to three miles⁹ and in the current federal EEZ from three miles to 200 miles,¹⁰ the Alaska Department of Fish and Game estimates 97.4% are taken beyond three miles and 76.2% are harvested beyond 12 miles.¹¹

According to officials of the Alaska Department of Natural Resources, oil and gas production in Alaska's three mile zone is substantial. In 1990, 182 wells on 14 platforms in Cook Inlet produced 9,000,000 barrels of oil while 24 gas wells in Cook Inlet registered a production of 95 billion cubic feet of natural gas. Offshore production in the Beaufort Sea is currently centered on Endicott Causeway where 56 producing wells generated 38,000,000 barrels of oil in 1990. At the same time, there is zero production beyond three miles.

III. Alaska's Management Responsibilities Depend on a Nexus to the Resources, not a Three Mile Limit.

A. Fisheries

Alaska's interests and responsibilities in coastal areas are not limited to the waters within three miles. Lands, waters and the resources therein cannot be defined by an arbitrary line that is defined as a certain number of miles from the coastline. Instead, such resources aggregate in the marine environment in accordance with natural influences. It is therefore natural and administratively efficient that similar kinds of resources in the offshore waters be managed by a single regulatory body.¹²

Alaska's management authority over resources beyond three miles and in the water column above the outer continental shelf has been long recognized. For example, Alaska first promulgated regulations for harvest of king crab beyond three miles in 1969.¹³ The Magnuson Fishery Conservation and Management Act of 1977 (MFCMA), 16 U.S.C. §1801 et seq., did not alter the state's management authority beyond the territorial sea.¹⁴

Under the MFCMA, Alaska has a majority membership on the North Pacific Fishery Management Council (NPFMC) which recommends management regulations to the Secretary of Commerce for fisheries in the Exclusive Economic Zone from three to 200 miles. 16 U.S.C. § 1852(a)(7). Although most EEZ fisheries are now managed directly by the Secretary of Commerce upon recommendation from the NPFMC, the Secretary of Commerce has delegated authority to the Alaska Department of Fish and Game to manage the Bering Sea and Aleutian Islands king and Tanner crab fisheries in the EEZ.¹⁵ Parts of the Southeast Alaska demersal shelf groundfish fishery in the EEZ are also managed by the state. Further, since a small portion of the overall salmon harvest occurs in the EEZ, there is a Salmon Fishery Management Plan certifying state management authority for those parts of the fishery conducted in the EEZ. See 50 CFR Part 674.

B. Other resources

1. Mineral Resources

Alaska Statutes (AS) also provide comprehensive management schemes for exploration and development of nonliving resources in state waters. See AS 38.05.135(a) for mineral development;¹⁶ AS 38.05.140(c), prescribing acreage limits on oil and gas leases; AS 38.05.180(d), allowing adjustments in royalties when submerged lands are subject to state/federal title disputes; AS 38.05.140(d)(4), permitting state leases on lands adjacent to federal outer continental shelf leases; etc. All state development is closely coordinated with federal activities under the Outer Continental Shelf Lands Act of 1953. Since Alaska's coastline is constantly changing, such cooperation is essential to assure stable lease management programs to lessees whose activities might be subject to shifting jurisdiction as the state's seaward boundary changes due to natural and artificial causes.

2. Coastal Management

a. State Programs

Under the Alaska Coastal Management Act (ACMA), AS 46.40.010 et seq., the Alaska Coastal Policy Council, in coordination with local coastal districts, approves coastal management programs to ensure "the orderly, balanced utilization and protection of the resources of the coastal areas consistent with sound conservation and sustained yield principles." AS 46.40.020(3). These district programs and the states' own coastal management program form the Alaska Coastal Management Program (ACMP). Present activities being

conducted in compliance with the ACMA include exploration and development of minerals and oil and gas resources, sand and gravel extraction, fish processing, maritime transportation, etc.

Under the federal Coastal Zone Management Act (CZMA), 16 U.S.C. §1451 et seq., activities on the outer continental shelf that affect Alaska's coastal zone must comply with Alaska's Coastal Management Program. Pursuant to the CZMA, Alaska actively participates with the Minerals Management Service of the Department of the Interior in assuring this compliance and orderly development of outer continental shelf (OCS) lands. In particular, pursuant to the recent reauthorization of the CZMA, the state again is able to conduct consistency reviews of federal lease sales that affect state coastal areas, including affected inland territory. See 16 U.S.C. §1456(c)(3)(B).¹⁷ Recent consistency reviews of OCS projects include oil lease sales in the Navarin Basin, and the Chukchi and Beaufort Seas. In addition, the state has participated in consistency reviews for gravel sales in the Beaufort Sea and has reviewed oil spill contingency plans for tanker vessels. All these activities must, "to the maximum extent practicable," be consistent with the state's coastal management laws. 16 U.S.C. §1456(c)(1)(A).

IV. State Interests in the Adjacent Territorial Sea Depend upon a Nexus to the Coastal Activities, not upon a Mileage Formula.

The Submerged Lands Act of 1953, 43 U.S.C. §1301 et seq., grants to the State of Alaska title and ownership in submerged lands seaward of the coastline to three miles. The grant covers

the natural resources of the submerged lands and the superjacent water column. The Alaska Statehood Act, Pub. Law 85-508, §6(m), confirms the application of the Submerged Lands Act to Alaska as it entered the Union on "equal footing" with the other states. Pursuant to section 2 of the Act, the State of Alaska consists of the territorial land mass "together with the territorial waters appurtenant thereto." Under these authorities, Alaska has been exercising dominion and jurisdiction over those waters since January 3, 1959.

When enacted by Congress in 1953, the states' entitlements to the three mile boundary encompassed all submerged lands subject to fast title by the United States. The entitlement lands included virtually all resource development activities then possible. There was very little exploitation of living or nonliving resources beyond three miles. In practical effect, the Submerged Lands Act covered all submerged lands and all valuable ocean resources then subject to exploitation.¹⁸

The resource situation changed in the early 1960's when oil drilling technology permitted exploration and exploitation at and beyond the three mile limit.¹⁹ However, even as technological advances led to a thriving oil and gas development business beyond three miles, the United States never sought title over those lands. Instead, the United States' interests in the outer continental shelf are limited to lands "of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. §1331(a).²⁰

The distinction that the states hold fee simple to offshore lands continues today. Thus, when natural and artificial accretions cause ambulations to the coastline that alter the area of the submerged lands, the states acquire actual "title to and ownership of" those extensions even though, prior to the ambulation, the same submerged lands were not owned by the federal government.²¹ Instead, pursuant to 43 U.S.C. §1331, the same lands only "appertained" to the United States. With the exception of the odd years between California I and the Submerged Lands Act (1947 - 1953), the United States has never exercised general fee ownership rights over offshore lands.²² When offshore lands have been owned, they have been owned only by states. Thus, if the Congress is to establish any title at all in the new territorial sea lands from three to 12 miles, historical precedent endorses vesting that title in the neighboring coastal states and not the federal government.

Though the Presidential Proclamation on the Territorial Sea does not purport to create title in the United States over submerged lands from three to 12 miles, it and the bill now subject to review prevent the states from exercising their historical management responsibilities in the full extent of the territorial sea. Yet, the state's interests in today's 12 mile territorial sea are just as substantial as they were in the three mile territorial sea from 1776 - 1988. Indeed, the coastal states' connections to conservation, development and utilization of the resources of the coastal waters seaward to 12 miles are probably substantially more

significant than all such activities were in the three mile territorial sea in 1953.

All of these activities in the new territorial sea have significant effects on the coastal states. For example, a growing economy, increased fishing and resource exploitation, expanding reliance on oil, etc., in the last forty years have resulted in a great increase in offshore activity with major environmental, social and economic implications and responsibilities for coastal states.

As a result, modern circumstances give the coastal states the same degree of concern for the 12 mile territorial sea that existed for the three mile territorial sea in 1953 and in the 175 years prior to the Submerged Lands Act grants. Congress should continue to honor these state interests and confirm state ownership and management prerogatives in the territorial sea as it is defined time to time by the United States.

VI. Policy Considerations.

The extension of the territorial sea from three to 12 miles without a corresponding grant of authority to the states will unnecessarily add another seaward boundary to the complex array of seaward boundaries defined in many of the laws being addressed by the committee. The bill, as presently written, would find a coastal state boundary at three miles, a territorial sea at 12 miles, a contiguous zone at 24 miles, the exclusive economic zone at 200 miles and the edge of the continental shelf somewhere further

seaward to the limits of exploitability. The proliferation of seaward boundaries is potentially confusing to mariners and other users of the coastal zone. Thus, the concept of multiple coastlines for domestic and international purposes was discouraged by the U.S. Supreme Court in California II (1965) and for the first two centuries of the nation's existence, there has been but one coastal boundary - the territorial sea at three miles. It was not until 1947 that the U.S. Supreme Court ruled that the offshore submerged lands vested in the national government. U.S. v. California (California I), 332 U.S. 19 (1947). The voiding of the Supreme Court's ruling in California I by the Congress in the Submerged Lands Act of 1953 returned the state's seaward boundary to a line coterminous with the territorial sea. It did not permit a separate federal seaward boundary. California II is consistent with Congress' approach in the Submerged Lands Act and favors a single coastline from which the state's seaward boundary at three miles and international law boundaries beyond are measured. For most of the life of this Nation, the territorial sea limits and the states' seaward boundaries have been the same. They should remain so in 1992 as we prepare for the 21st century.

NOTES

1. Presented by John G. Gissberg, Chief, Natural Resources Section, Alaska Department of Law. Mr. Gissberg holds a law degree and a Ph.D. in fisheries from the University of Michigan. He specializes in offshore jurisdiction and handled the superior court trial and appeals to the state and U.S. supreme courts in E/V American Eagle v. State (1980) (extraterritorial application of state fisheries regulations). He is currently preparing for oral argument in U.S. v. Alaska, No. 118 (U.S. Supreme Court, original jurisdiction) concerning the validity of disclaimers to extensions of state submerged lands as condition for Corps of Engineers coastal construction permits. Dr. Gissberg was a member of the Ocean Policy Committee of the National Academy of Sciences from 1979 - 82.

2. See Attachment A - Letter of Governor Walter J. Hickel to Honorable Donald E. Young dated March 28, 1991.

3. See Attachment B - CS for House Joint Resolution No. 29 (Resources) in the Legislature of the State of Alaska, Sixteenth Legislature - Second Session, relating to state jurisdiction over the territorial sea out to 12 nautical miles and the air, water, submerged land, and resources found there, and to the transfer of title to submerged land of the territorial sea out to 12 nautical miles to the State of Alaska and the other coastal states.

4. These figures are based on a line constructed by connecting points three miles apart along the coastline. See, Shalowitz, A.L., Sea and Shore Boundaries, vol 2, U.S. Government Printing Office (Washington, D.C., 1962), p. 483; US DOC NOAA pamphlet on Coastline of the United States (undated).

5. See 43 U.S.C §§ 1311 and 1312 (Submerged Lands Act of 1953).

6. Alaska Department of Natural Resources preliminary estimates.

7. 43 U.S.C. §1331 defines the outer continental shelf as "all submerged lands laying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title . . ." The Submerged Lands Act of 1953 at 43 U.S.C. 1301(a)(2) defines those "navigable waters" to include "all lands . . . seaward to a line three geographical miles distant from the coast line of each State . . ." The seaward boundary of the outer continental shelf is defined in the U.N. Convention on the Continental Shelf at art. 1, as "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters

admits of the exploitation of the natural resources of the said areas." 409 U.N.T.S. 311, 15 U.S.T. 471 (in force for the United States on June 10, 1964).

8. E.g., halibut, Pacific cod, pollock, sablefish, etc.

9. "S 44.03.010(a) defines state jurisdiction as extending to "the marginal sea to its outermost limits as those limits are from time to time defined or recognized by the United States of America by treaty or otherwise."

10. For fisheries purposes, the inner boundary of the EEZ established in Presidential Proclamation No. 5030, dated March 10, 1983 is "a line coterminous with the seaward boundary of each of the coastal States." 16 U.S.C. §1802(6).

11. See Attachment B: draft materials on harvests in 0-3, 3-12 and 12-200 miles off Alaska.

12. A state's extraterritorial exercise of jurisdiction is based on a "nexus between its legitimate state interest and its regulation of certain extraterritorial conduct." Hjelle v. Brooks, 377 F.Supp.430, 441, 442 (D.C. Alaska 1974).

13. 5 AAC 07.100 created the Bering Sea Shellfish area that included waters "east of the U.S. - Russian convention line of 1867." See State v. Bundrant, 546 P.2d 530, 531 (Alaska 1976), appeal dismissed sub nom., Uri v. State, 429 U.S. 806 (1975).

14. See F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130 (1982); State v. F/V Baranof, 627 P.2d 1243 (Alaska 1984), cert. denied, 469 U.S. 823 (1984).

15. 54 Fed. Reg. 29080 (July 11, 1989).

16. "All [state] land, together with tide, submerged, or shoreland . . . may be obtained by permit or lease for the purpose of exploration, development, and the extraction of minerals."

17. The states assumed they had authority for such consistency reviews until the practice was invalidated in Secretary of Interior v. California, 464 U.S. 312 (1984).

18. The Submerged Lands Act codifies practice and custom that had continued from the first days of the Nation's existence until 1947 when the U. S. Supreme Court ruled that the national government, not the states, owned the submerged lands out to the then boundary of the territorial sea at three miles. U.S. v. California, 332 U.S. 19 (1947). The SLA returned the submerged lands to the states, along with all land reclamation that had taken place in tidewaters.

19. See U.S. v. California (California II), 381 U.S. 139, 149 (1965) ("By 1963, however, drilling techniques had improved sufficiently to revitalize the importance of the demarcation line between state and federal submerged lands.")

20. In contradistinction, the Submerged Lands Act granted the states "title to and ownership of the lands . . . and the natural resources within such lands and waters" (43 U.S.C. 1311(a)) to "a line three geographic miles from the coast line . . ." (43 U.S.C. § 1322).

21. California II at 176 - 177; United States v. California, 447 U.S. 1, 5-6 (1980).

22. Federal withdrawals, refuges, etc., may, of course, involve federal ownership of submerged lands.

ALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 28, 1991

The Honorable Donald E. Young
U.S. House of Representatives
2331 Rayburn House Office Building
Washington, D.C. 20515

Dear Don,

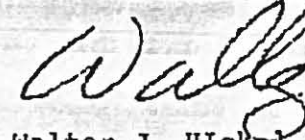
I am responding to your request for comments on Congressman Walter B. Jones' Territorial Sea and Contiguous Zone Extension Act of 1991.

This legislation would resolve many ambiguities under the current law. However, the legislation does not address changing the state's jurisdiction under the Submerged Lands Act and the Magnuson Fisheries Management and Conservation Act.

This legislation should be amended to provide for the extension of the state's jurisdiction to at least 12 miles under the Submerged Lands Act and the Magnuson Fisheries Management and Conservation Act, and to extend the state's ownership of submerged lands from 3 to 12 miles. The inclusion of such amendments would lead to Alaska's support for the bill. Without these amendments, the state at this time must oppose its passage.

I look forward to working with you on this matter.

With warmest regards,



Walter J. Hickel
Governor

Attachments

ATTACHMENT A

The Honorable Donald E. Young -2-

Mar. 28, 1991

cc: Senator Ted Stevens
Senator Frank Murkowski
Charles Cole, Attorney General
Harold Heinze, Commissioner of Natural Resources
Carl Rosier, Commissioner of Fish and Game
John Sandor, Commissioner of Environmental Conservation
Paul Rusanowski, Director of Governmental Coordination
John Katz, Special Counsel to the Governor

Appendix Table 1. Distribution of groundfish and halibut catch (million lbs. and %) from zones 0 - 3, 3 - 12 and 12 - 200 miles from shore in the Bering Sea/Aleutian Islands and Gulf of Alaska

YEAR	SPECIES	ZONE					
		0 - 3 miles		3 - 12 miles		12 - 200 miles	
		lbs	%	lbs	%	lbs	%
1988	PACIFIC COD	17.38	7.1	105.94	43.4	121.02	49.5
	POLLOCK	47.39	4.0	378.47	32.3	744.44	63.6
	SABLEFISH	6.62	7.5	14.86	16.8	66.87	75.7
	ROCKFISH	2.12	3.6	8.25	14.1	48.27	82.3
	FLATFISH	7.97	7.2	24.04	21.7	78.57	71.1
	ATKA MACKEREL	0.16	2.8	3.54	64.7	1.77	32.4
	HALIBUT	12.90	21.2	9.80	16.1	38.10	62.7
	TOTAL	94.53	5.4	544.90	31.3	1099.06	63.2
1989	PACIFIC COD	22.76	7.0	119.66	36.9	181.58	56.0
	POLLOCK	30.69	1.3	463.88	19.0	1948.35	79.8
	SABLEFISH	6.56	8.5	11.88	15.4	58.63	76.1
	ROCKFISH	1.51	2.1	10.99	15.2	59.67	82.7
	FLATFISH	6.95	5.6	31.68	25.7	84.67	68.7
	ATKA MACKEREL	0.15	0.4	16.28	46.6	18.51	53.0
	HALIBUT*	11.89	21.2	9.03	16.1	35.12	62.7
	TOTAL	80.51	2.6	663.40	21.2	2386.52	76.2

* Percent distribution of halibut catch among zones in 1989 was calculated using the same distribution estimated for 1988.

Offered: 3/2/90
Referred: Finance

6-0855E

Original sponsor(s): REP. DAVIDSON, Hoffman, Cotten, Gruessendorf, Menard
Navarre, Goll, Foster, MacLean, Brown, Larson, Cato, Boyer, M.Davis, Ellis,
Ulmer, Reponen, Jacko, Spohnholz, Boucher, Swackhammer, Furnace, Hudson,
Sharp, Martin, C.Davis, Hanley, Donley, Collins, Wallis, Miller, Barnes,
Pettyjohn, Zawacki, Lewan, Taylor, Phillips, Rieger, Shultz, Gruenberg,
Kubina, Finkelstein

1 IN THE HOUSE

BY THE RESOURCES COMMITTEE

2 CS FOR HOUSE JOINT RESOLUTION NO. 29 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 Relating to state jurisdiction over the
6 territorial sea out to 12 nautical miles
7 and the air, water, submerged land, and
8 resources found there and to the trans-
9 fer of title to submerged land of the
10 territorial sea out to 12 nautical miles
11 to the State of Alaska and the other
12 coastal states.

13 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

14 WHEREAS customary international law recognizes that the sovereignty of
15 coastal nations extends beyond its land territory and internal waters and,
16 in the case of archipelagic areas, its archipelagic waters, to an adjacent
17 belt of the sea known as the territorial sea; and

18 WHEREAS customary international law recognizes that this sovereignty
19 extends to the air space over the territorial sea as well as to the seabed
20 and subsoil below the territorial sea; and

21 WHEREAS customary international law recognizes that this sovereignty
22 includes sovereignty over both living and nonliving resources found in the
23 territorial sea, in the air space over the territorial sea, and on or in
24 the seabed and subsoil below the territorial sea; and

25 WHEREAS customary international law recognizes that each nation has
26 the right to establish the breadth of its territorial sea up to a limit not
27 exceeding 12 nautical miles, measured from baselines determined according
28 to customary international law; and

29 WHEREAS President Reagan issued an executive order on December 27.

HJR029B

-1-

CSHJR 29(Res)

ATTACHMENT B

1 1966, to extend the territorial sea of the United States from three nau-1-
2 cal miles to 12 nautical miles, consistent with customary international law
3 but failed to address its effect on the territorial jurisdiction of the
4 states; and

5 WHEREAS legal arguments and sound public policy both support the
6 conclusion that the extension of the territorial sea to 12 nautical miles
7 by the federal government also extends state jurisdiction to 12 nautical
8 miles; and

9 WHEREAS the United States Congress has defined the extent of state
10 jurisdiction by express reference to the term "territorial sea" in numerous
11 statutes in the United States Code; and

12 WHEREAS the Alaska Statehood Act provides that the State of Alaska
13 consists of the former Territory of Alaska, "together with the territorial
14 waters appurtenant thereto"; and

15 WHEREAS all coastal states currently have jurisdiction over the land,
16 air, water, and resources within their boundaries, which, at a minimum,
17 extend out to three nautical miles; and

18 WHEREAS the Great Lakes States currently have jurisdiction over the
19 land, air, water, and resources of their offshore areas, which range from
20 11 to 20 nautical miles and possibly more offshore; and

21 WHEREAS some Gulf of Mexico States currently have jurisdiction over
22 the land, air, water, and resources of offshore areas extending nine nauti-
23 cal miles offshore; and

24 WHEREAS Alaska and the other coastal states have consistently demon-
25 strated an ability to manage ocean resources in a manner consistent with
26 the interests of both the nation as a whole and the several coastal states;
27 and

28 WHEREAS Alaska and the other coastal states have demonstrated both
29 experience and skill at balancing protection, conservation, and utilization

1 of the living and nonliving resources of the ocean out to three nautical
2 miles and beyond; and

3 WHEREAS Alaska and the other coastal states are better equipped than
4 the federal government, in terms of fiscal resources and administrative
5 abilities, to manage fisheries, minerals, and oil and gas resources within
6 12 nautical miles of the coast line; and

7 WHEREAS it is not in the interest of the nation as a whole, nor in the
8 interest of the several coastal states, to leave for judicial resolution
9 the myriad questions regarding the effect on state jurisdiction of the
10 extension of the territorial sea to 12 nautical miles by the federal gov-
11 ernment; and

12 WHEREAS the United States Congress has the authority under the Com-
13 merce Clause (art. I, sec. 8, cl. 3), the Necessary and Proper Clause (art
14 I, sec. 8, cl. 18), and the Property Clause (art. IV, sec. 3, cl. 2) of the
15 United States Constitution to resolve these myriad questions in a manner
16 consistent with the interests of both the nation as a whole and the several
17 coastal states;

18 BE IT RESOLVED that the Alaska State Legislature respectfully urges
19 the United States Congress to address the myriad questions of the effect of
20 the extension of the territorial sea to 12 nautical miles by the federal
21 government on state jurisdiction and to resolve those questions in a manner
22 consistent with the interests of both the nation as a whole and the several
23 coastal states; and be it

24 FURTHER RESOLVED that the Alaska State Legislature respectfully re-
25 quests the United States Congress to

26 (1) recognize and confirm the sovereign jurisdiction of the State
27 of Alaska and the other coastal states over the territorial sea and air
28 space above the territorial sea, including sovereign jurisdiction over
29 living and nonliving resources found there, from the baseline from which

1 the territorial sea is measured out to 12 nautical miles; and

2 (2) transfer to, and confirm in, the State of Alaska and the
3 other coastal states title to the submerged land underlying the territorial
4 sea out to 12 nautical miles, and recognize and confirm the sovereign
5 jurisdiction of the State of Alaska and the other coastal states over that
6 submerged land and the living and nonliving resources on or in the seabed
7 and subsoil there.

8 COPIES of this resolution shall be sent to the Honorable George Bush,
9 President of the United States; the Honorable Dan Quayle, Vice-President of
10 the United States and President of the U.S. Senate; the Honorable Thomas S.
11 Foley, Speaker of the U.S. House of Representatives; the Honorable James A.
12 Baker, III, U.S. Secretary of State; the Honorable Robert A. Mosbacher,
13 Sr., U.S. Secretary of Commerce; the Honorable John Knauss, Administrator
14 of the National Oceanic and Atmospheric Administration; the Honorable James
15 W. Brennan, Assistant Administrator for Fisheries, National Marine Fisher-
16 ies Service; the Honorable Ernest F. Hollings, Chairman of the U.S. Senate
17 Committee on Commerce, Science, and Transportation; the Honorable J.
18 Bennett Johnston, Chairman of the U.S. Senate Committee on Energy and Natu-
19 ral Resources; the Honorable Quentin N. Burdick, Chairman of the U.S.
20 Senate Committee on Environment and Public Works; the Honorable Claiborne
21 Pell, Chairman of the U.S. Senate Committee on Foreign Relations; the
22 Honorable Dante B. Fascell, Chairman of the U.S. House of Representatives
23 Committee on Foreign Affairs; the Honorable John Conyers, Jr., Chairman of
24 the U.S. House of Representatives Committee on Government Operations; the
25 Honorable Morris K. Udall, Chairman of the U.S. House of Representatives
26 Committee on Interior and Insular Affairs; the Honorable Jack Brooks,
27 Chairman of the U.S. House of Representatives Committee on the Judiciary;
28 the Honorable Walter B. Jones, Chairman of the U.S. House of Representa-
29 tives Committee on Merchant Marine and Fisheries; the governor, president

- 1 of the senate, and speaker of the house of representatives of each of the
- 2 coastal states of the United States; and to the Honorable Ted Stevens and
- 3 the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young,
- 4 U.S. Representative, members of the Alaska delegation in Congress.

TESTIMONY OF DR. MICHAEL K. ORBACH, CHAIRMAN OF THE
NORTH CAROLINA OCEAN AFFAIRS COUNCIL, BEFORE THE
MERCHANT MARINE AND FISHERIES COMMITTEE OF THE
U.S. HOUSE OF REPRESENTATIVES
REGARDING HR 3842
FEBRUARY 4, 1992

GOOD MORNING, MY NAME IS MICHAEL K. ORBACH, CHAIR OF THE NORTH CAROLINA OCEAN AFFAIRS COUNCIL. I AM A PROFESSOR OF CULTURAL ANTHROPOLOGY AT EAST CAROLINA UNIVERSITY IN GREENVILLE, NORTH CAROLINA.

THANK YOU VERY MUCH FOR THE OPPORTUNITY TO APPEAR BEFORE YOU TO DISCUSS NORTH CAROLINA'S VIEWS ON HR 3842, THE "TERRITORIAL SEA AND CONTIGUOUS ZONE EXTENSION AND ENFORCEMENT ACT OF 1991." AT THE OUTSET, I WANT TO MAKE IT VERY CLEAR THAT NORTH CAROLINA SUPPORTS THIS BILL. WE BELIEVE IT IS NECESSARY TO FULLY IMPLEMENT PRESIDENTIAL PROCLAMATION 5928, AND TO REDUCE CONFUSION IN MANY FEDERAL LAWS WHENEVER THE TERM "TERRITORIAL SEA" IS USED.

CHAIRMAN JONES ASKED THAT, AT THE MINIMUM, WE ADDRESS THREE QUESTIONS. I WILL TAKE EACH ONE IN THE ORDER HE PRESENTED THEM. FIRST, ARE THERE SOME LAWS NOW INCLUDED IN HR 3842 WHICH SHOULD BE LIMITED IN GEOGRAPHIC SCOPE TO 3 MILES? IN OUR OPINION THERE ARE NONE, BUT WE DEFER TO YOUR LEGAL STAFF ON THIS QUESTION.

SECOND, ARE THERE OTHER LAWS THAT ARE NOT PRESENTLY INCLUDED IN HR 3842 BUT WHICH SHOULD BE INCLUDED? THERE ARE THOSE WHO WILL SAY THAT THE SUBMERGED LANDS ACT SHOULD BE INCLUDED, BUT WE DO NOT THINK SUCH INCLUSION WILL BENEFIT NORTH CAROLINA AT THE PRESENT TIME. I WILL GO INTO OUR RATIONALE IN JUST A MINUTE.

AND, THIRD, WHAT IS THE APPROPRIATE ROLE OF THE COASTAL STATES IN MANAGING THE RESOURCES OF THE TERRITORIAL SEA AS DEFINED IN THE PROCLAMATION? THIS IS THE MOST PROVOCATIVE QUESTION FOR NORTH CAROLINA, BECAUSE IT IS A QUESTION WE HAVE BEEN GRAPPLING WITH SINCE OUR 1984 REPORT, "NORTH CAROLINA AND THE SEA: AN OCEAN POLICY ANALYSIS."

NORTH CAROLINA HAS BEEN A STRONG SUPPORTER OF SHARED GOVERNANCE, NOT ONLY IN THE 12-MILE TERRITORIAL SEA BUT ALSO IN THE ENTIRE EEZ OFF OUR COAST. THE USE AND EXPLOITATION OF OCEAN RESOURCES WILL ALMOST ALWAYS HAVE SOME TYPE OF IMPACT ON THE COASTAL ZONE OF THE ADJACENT STATE WHETHER THAT USE OCCURS THREE MILES, TWELVE MILES, OR FIFTY MILES OFFSHORE, AND REGARDLESS OF WHO IS CONDUCTING THE ACTIVITY. THEREFORE, A JOINT APPROACH TO MANAGING THE TERRITORIAL SEA AND EEZ SEEMS LOGICAL.

STRESSES ON NORTH CAROLINA'S MARINE ENVIRONMENT ARE STEADILY INCREASING AND INCLUDE: POLLUTION AND WATER QUALITY DEGRADATION, HABITAT DEGRADATION, OVERFISHING, AND TRAWL MORTALITIES TO SEA TURTLES. ADDITIONAL STRESSES IN THE FUTURE COULD RESULT FROM OIL AND GAS EXPLORATION AND PRODUCTION, TRANSPORTATION ACCIDENTS AND OIL SPILLS,

HARD MINERALS MINING AND WASTE DISPOSAL. THERE ARE ALSO CURRENT OR POTENTIAL CONFLICTS AMONG VARIOUS OCEAN USES, INCLUDING SWIMMING, BOATING, SAILING, JET SKIING, COMMERCIAL AND RECREATIONAL FISHING, RESEARCH AND MILITARY DEFENSE ACTIVITIES.

ALTHOUGH RESOURCES OF THE ATLANTIC OCEAN ARE VITAL TO NORTH CAROLINA'S ECONOMIC INTERESTS, EFFORTS TO DEVELOP COORDINATED STATE POLICIES AND PROGRAMS FOR OCEAN RESOURCES HAVE BEEN LIMITED. VARIOUS STATE AND FEDERAL AGENCIES ARE INVOLVED IN OCEAN-RELATED ACTIVITIES--SOMETIMES WITH CONFLICTING MANDATES. THERE IS A NEED TO MORE CLEARLY DEFINE OCEAN MANAGEMENT GOALS AND POLICIES, AND TO IMPROVE STATE AND FEDERAL AGENCY COORDINATION.

THERE IS ALSO A NEED TO GATHER AND ANALYZE SPECIFIC INFORMATION ON OCEAN RESOURCES TO PROVIDE A CLEARER UNDERSTANDING OF THE LOCATION AND FUNCTIONS OF IMPORTANT AND SENSITIVE RESOURCES AND HOW THEY MAY BE BETTER MANAGED. IMPORTANT OCEAN RESOURCES, USES AND CONDITIONS SHOULD BE IDENTIFIED AND INCORPORATED INTO STATE AND FEDERAL GEOGRAPHIC INFORMATION SYSTEMS (GIS). THE GIS MAPPING WILL, IN TURN, PROVIDE INFORMATION FOR OCEAN MANAGEMENT POLICIES AND DECISIONS WITHIN STATE OFFSHORE JURISDICTION, IN THE U.S. TERRITORIAL SEA, AND EVEN INTO THE EEZ. OVER THE NEXT FEW YEARS, THE NORTH CAROLINA OCEAN AFFAIRS COUNCIL WILL BE DEVELOPING AN OCEAN RESOURCES INVENTORY AND AN OCEAN RESOURCES MANAGEMENT PLAN. THIS WILL BE DONE UNDER THE COUNCIL'S STATUTORY MANDATE AND IN ACCORDANCE WITH SECTION 309 OF THE COASTAL ZONE ACT REAUTHORIZATION AMENDMENTS OF 1990. WE WELCOME THE ADVICE

AND ASSISTANCE OF CONGRESS AND FEDERAL AGENCIES IN THE DEVELOPMENT OF NORTH CAROLINA'S PLAN.

I WILL NOW TURN BACK TO THE ISSUE OF AMENDING THE SUBMERGED LANDS ACT. AT THE PRESENT TIME, NORTH CAROLINA HAS SEVERAL CONCERNS ABOUT EXTENDING STATE JURISDICTION OUT TO 12 MILES. FOREMOST IS THE FEAR THAT THE PROGRESS TOWARDS OCS REVENUE SHARING THAT HAS FINALLY DEVELOPED AMONG COASTAL STATES, CONGRESS, THE FEDERAL GOVERNMENT AND INDUSTRY COULD BE JEOPARDIZED. SOME ANALYSTS HAVE PREDICTED THAT 25% OF UNLEASED OIL AND 20% OF UNLEASED NATURAL GAS WOULD BE TRANSFERRED TO CERTAIN COASTAL STATES IF STATE JURISDICTION IS EXTENDED OUT TO 12 MILES. BETWEEN \$10 AND \$20 BILLION IN POTENTIAL REVENUE WOULD BE LOST FROM THE FEDERAL TREASURY AND TRANSFERRED TO A SMALL NUMBER OF COASTAL STATES -- CLEARLY A CONTROVERSIAL ACTION. NORTH CAROLINA HAS BEEN REVIEWING THE VARIOUS REVENUE SHARING PROPOSALS AND WOULD LIKE TO SEE LEGISLATION REFLECTING THE BROADEST POSSIBLE PARTNERSHIP BETWEEN THE STATES AND THE FEDERAL GOVERNMENT FOR OCEAN RESOURCE MANAGEMENT, AND FOR THE DISTRIBUTION OF BENEFITS FROM THOSE RESOURCES. REP. TAUZIN'S BILL, HR 4068, TAKES POSITIVE STEPS IN THIS DIRECTION.

TO OWN AND PROPERLY MANAGE OUT TO 12 MILES, A COASTAL STATE WOULD HAVE TO HAVE AN ADEQUATE LEGAL FRAMEWORK, MANAGEMENT PLANNING CAPABILITY AND ADEQUATE SCIENTIFIC, ADMINISTRATIVE AND ENFORCEMENT SUPPORT. ALL OF THESE WOULD REQUIRE RESOURCES IN EXCESS OF THOSE CURRENTLY AVAILABLE TO MOST COASTAL STATES, NOR DO MOST STATES HAVE RESOURCES SUCH AS OIL AND GAS BETWEEN THREE AND 12 MILES THAT CAN GENERATE IMMEDIATE REVENUES.

FOR THEM, THE BENEFITS OF A SIMPLE EXTENSION OF JURISDICTION ARE UNCLEAR.

INSTEAD OF A SINGLE-STROKE, "ONE SIZE FITS ALL" 12-MILE STATE TERRITORIAL SEA, WE WOULD SUGGEST A REGIME THAT ACKNOWLEDGES THE UNIQUE RESOURCES AND UNIQUE CAPABILITIES EACH COASTAL STATE HAS TO SHARE REGULATION AND MANAGEMENT OF SPECIFIC ACTIVITIES. THE NEW OCS CLEAN AIR ACT PROVISIONS, WHICH AUTHORIZE STATE ENFORCEMENT OUT TO 28 MILES (SECTION 328(a)(3)), IS AN EXAMPLE OF SUCH A REGIME.

FOR SOME ACTIVITIES, REGULATION BY THE STATES OUT TO 12 MILES IS THE ONLY COST-EFFECTIVE ALTERNATIVE. FOR OTHERS, FEDERAL REGULATION WOULD BE MOST EFFECTIVE; FOR STILL OTHERS, SOME SORT OF FEDERAL-STATE PARTNERSHIP WILL RESULT IN THE BEST USE AND PROTECTION OF THE RESOURCES. EVEN STATE MANAGEMENT OF OIL AND GAS ACTIVITIES BETWEEN THREE AND 12 MILES IS CONCEIVABLE.

IN NORTH CAROLINA, FOR EXAMPLE, WE ARE APPROACHING THE TIME WHEN WE WOULD LIKE TO TAKE ON ADDITIONAL FISHERIES MANAGEMENT RESPONSIBILITY. WE HAVE STRONG COMMERCIAL AND RECREATIONAL FISHERIES THAT ARE VITAL TO THE STATE'S ECONOMY. WE HAVE A CLEAR HISTORY OF PROTECTING THE ECOSYSTEM THAT SUPPORTS THESE FISHERIES. PROTECTION OF THESE RESOURCES IS A PRIORITY IN NORTH CAROLINA AND IT IS IMPORTANT THAT STATE AND FEDERAL POLICIES COMPLEMENT EACH OTHER.

FINALLY, WE SUPPORT THE RESOURCE MANAGEMENT STUDY AS SPECIFIED IN SECTION 8 OF THE BILL. THIS IS A VERY IMPORTANT START TO THE CONCEPT

OF SHARED GOVERNANCE OF NOT ONLY THE TERRITORIAL SEA BUT ALSO THE ENTIRE EEZ. WE HOPE THAT THE STUDY WILL ENCOMPASS THE ISSUE OF GENERAL REVENUE SHARING FOR ALL EEZ RESOURCES, SINCE THE COASTAL STATES BEAR THE PRINCIPAL EFFECTS OF THE USE AND EXPLOITATION OF VIRTUALLY ANY RESOURCE OF THE EEZ, AND THAT THE STUDY WILL INVOLVE THE COASTAL STATES THEMSELVES IN ITS ANALYSIS.

IN CLOSING, I WANT TO EMPHASIZE THAT NORTH CAROLINA SUPPORTS HR 3842. WE LOOK FORWARD TO WORKING WITH CONGRESS AND THE FEDERAL GOVERNMENT TO IDENTIFY AREAS AND ACTIVITIES WHERE NORTH CAROLINA HAS THE INTEREST AND CAPABILITY TO SHARE JURISDICTION AND MANAGEMENT IN THE EXPANDED U.S. TERRITORIAL SEA. THANK YOU FOR THE OPPORTUNITY TO PRESENT OUR VIEWS. I WILL BE HAPPY TO TAKE ANY QUESTIONS.

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON MERCHANT MARINE AND FISHERIES

HEARING ON H.R. 3842
"THE TERRITORIAL SEA AND CONTIGUOUS ZONE
EXTENSION AND ENFORCEMENT ACT OF 1991"

FEBRUARY 4, 1992

TESTIMONY OF
PROFESSOR JON M. VAN DYKE
WILLIAM S. RICHARDSON SCHOOL OF LAW
UNIVERSITY OF HAWAII AT MANOA
2515 DOLE STREET
HONOLULU, HAWAII 96822

This testimony is submitted in response to a request from The Honorable Walter B. Jones, Chairman of the Committee, to address the following questions:

- (1) What role does Congress have in asserting the sovereignty of the United States over the extended territorial sea?
- (2) What laws are affected by the extension of the territorial sea and how should Congress amend these laws to implement the extended territorial sea?
- (3) Is it appropriate for Congress to extend the contiguous zone of the United States to 24 miles?
- (4) Are there some laws now included in H.R. 3842 which should, in your opinion, be limited in geographic scope to 3 miles (the extent of the previous territorial sea)? If so, please identify these laws.
- (5) Are there other laws that are not presently included in H.R. 3842 but which, in your opinion, should be included? If so, please identify these laws.
- (6) What, in your opinion, is the appropriate role of the coastal States in managing the resources of the territorial sea as defined in the Proclamation?

The paper which follows, which I co-authored with David M. Forman and M. Casey Jarman (and which will be published in Volume 2 of the Territorial Sea Journal), has been written to address these issues.

- (1) We conclude at pages 4-19 that Congress should participate fully in the decision to extend the sovereignty of the United States to 12 nautical miles, and that the President's unilateral assertion of sovereignty in his December 1988

proclamation is of doubtful validity under U.S. law. The present situation is ambiguous, and Congress should confirm the extension of U.S. territory in a timely fashion to clear up the constitutional questions and preserve Congress's role with regard to future acquisitions of territory. In the present draft of H.R. 3842, the "territorial sea" is defined with a reference to the "Presidential Proclamation 5928 of December 27, 1988" and many of the proposed amendments to statutes (such as the Endangered Species Act) also include this reference. In my judgment, this reference shows too much deference to the President's unilateral action. Congress in this statute will be giving legitimacy to the expansion of the U.S. territorial sea, and therefore this statute (rather than the Presidential Proclamation) should establish the new definition, and other statutes should refer to this Act rather than to the President's Proclamation.

(2) Pages 19 through 39 discuss in detail many of the statutes that need to be revised with the reasons for the revisions. H.R. 3842 includes amendments for many of the statutes discussed, as well as several others, but a few of those we discuss are not included in this bill (see below in paragraph (5)).

(3) The contiguous zone is not discussed in any detail in our paper, but it is clear that Congress should extend the contiguous zone of the United States to 24 miles. International law permits this extension, and it would facilitate enforcement of U.S. laws.

(4) No laws need to be limited in geographic scope to three nautical miles, but the coastal states and territories should participate with regard to the regulation in the 3-12 mile zone of the living and nonliving resources, as explained in the second half of this paper.

(5) As mentioned above, the paper does identify several statutes that should also be amended to avoid ambiguities, but which do not appear to be mentioned in H.R. 3842. These include the National Transportation and Safety Board Act, 49 U.S.C. sec. 1903 (discussed on page 24 of our paper); the Vessels in United States Territorial Waters Act, 50 U.S.C. secs. 191-95 (pages 23-24 of our paper); the Foreign Sovereign Immunities Act, 28 U.S.C. sec. 1603(c) (page 25); the Travel Control of Citizens and Aliens During War or National Emergency, 8 U.S.C. sec. 1185 (pages 26-27); the Tariff Act of 1930, 19 U.S.C. secs. 1402 et seq. (page 27); and the Outer Continental Shelf Lands Act, 43 U.S.C. secs. 1331-48 (pages 29-30).

(6) The coastal states and island territories should play an active role in managing the resources in the territorial sea (and in the exclusive economic zone beyond), as explained in the

second half of the paper.

We hope that this contribution will be of assistance to the Committee in its deliberations on these important questions. As explained fully in the accompanying paper, it would be very useful for Congress to clear up the constitutional and statutory ambiguities and to authorize a greater role for the coastal states and territories in the management of the offshore resources.

WALTER B. JONES NORTH CAROLINA CHAIRMAN

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U.S. House of Representatives
 Committee on
 Merchant Marine and Fisheries

Room 1334, Longworth House Office Building
 Washington, DC 20515-6230

January 30, 1992

BACKGROUND MEMORANDUM

TO: Members, Committee on Merchant Marine and Fisheries
 FROM: Committee on Merchant Marine and Fisheries Staff
 SUBJ: Implementation of the Territorial Sea Proclamation

On Tuesday, February 4, 1992, at 10:00 a.m. in Room 1334 Longworth House Office Building, the Committee on Merchant Marine and Fisheries will conduct a hearing on H.R. 3842, the "Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991." H.R. 3842 was introduced by Chairman Walter B. Jones, and other sponsors, on November 21, 1991, and referred jointly to the Committees on Merchant Marine and Fisheries, Foreign Affairs, and Judiciary.

The hearing will include witnesses from the Administration (the State Department, the National Oceanic and Atmospheric Administration (NOAA); and the Coast Guard); affected groups (including the fishing, oil and gas, and maritime industries); the states; and academic experts.

BACKGROUND

The Territorial Sea Proclamation

On December 27, 1988, President Reagan issued Presidential Proclamation No. 5928, extending the territorial sea of the United States from 3 to 12 nautical miles, for international purposes only. (A copy of the Proclamation is Attachment A.) The territorial sea is a maritime zone adjacent to the coast over which the United States exercises both sovereignty and jurisdiction, including over its airspace, seabed and subsoil. (Attachment B is a description of maritime zones in international law.) The President also declared that, consistent with international law, the United States will grant the ships of all countries the right of innocent passage through the territorial sea and transit passage through any international straits.

The President stated that the reason for the Proclamation was to advance the national security interests of the United States. According to White House press releases at the time, the extension was motivated by the desire to keep Soviet intelligence gathering vessels nine miles farther from the United States coastline.

International Custom

The assertion of a 12-mile territorial sea is consistent with the practice of other nations. More than 110 nations now claim a 12-mile territorial sea. The concept of a 12-mile territorial sea is also recognized in the Law of the Sea (LOS) Convention. The United States did not sign the LOS Convention because of its deep seabed mining provisions, but considers the Convention's maritime provisions to be reflective of customary international law.

Similarly, the international community now recognizes a 24-mile contiguous zone. In the contiguous zone, a coastal nation has the right to protect itself against infringement of its customs, fiscal, immigration, or sanitary (health) regulations committed within its territory or territorial sea.

Presidential Authority and Contiguous Zone

Before the Proclamation was issued, the Justice Department examined the question of the President's individual authority to extend the territorial sea of the United States. The question arose because in modern international law the territorial sea is the virtual equivalent of land territory. This was not the case when then Secretary of State Thomas Jefferson in 1793 first established a defense perimeter of three miles for the United States during European maritime hostilities off our Atlantic coast. From 1793 to 1988, the United States had a 3-mile territorial sea.

The Justice Department concluded that the President did have the authority to extend the sovereignty of the United States¹ over the 12-mile territorial sea, although the matter was not without some doubt. In the past, major acquisitions of new United States territory have been done with the participation and approval of the Congress. For example, under the treaty-making power, the United States has acquired the Louisiana Purchase, the Gadsden Purchase, the Oregon Territory, California, Alaska, the Panama Canal Zone, and the Virgin Islands; in each case, the applicable treaty was submitted to the Senate for ratification. Acting pursuant to its power to admit new states into the Union, the Congress passed legislation acquiring Texas and Hawaii and

¹ The key difference between an assertion of sovereignty and an assertion of jurisdiction, according to the Justice Department, is that an assertion of sovereignty means that the territorial sea would be considered a part of the territory of the United States -- as much a part as a piece of land.

making them States. To remove all doubt of the legal character of the territorial sea, and to assert its prerogatives regarding extensions of national sovereignty, Congress could act to extend the sovereignty of the United States over the territorial sea.

The President also considered extending the contiguous zone of the United States from 12 to 24 nautical miles, in accordance with current international law. The President did not extend the contiguous zone, however, because to do so would be inconsistent with current United States treaty obligations under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, which limits the breadth of the contiguous zone to 12 miles. However, the LOS Convention recognizes a 24-mile contiguous zone, and 31 nations have since declared a 24-mile contiguous zone.

EFFECT OF THE PROCLAMATION ON FEDERAL AND STATE LAW

The Proclamation itself provides that nothing in the Proclamation extends or otherwise alters existing federal or state law. The President's intent was to extend the territorial sea for international and national security purposes without changing or extending any state or Federal authority. It is axiomatic that the President has no authority to change or alter federal law; to change federal law requires Congressional action.

The Justice Department was initially concerned that the Proclamation might inadvertently extend the seaward boundary of the states' coastal zones under the Coastal Zone Management Act of 1972 (CZMA). Under the original CZMA, the states' coastal zone boundary extended seaward to the "outer limit of the United States territorial sea". Arguably, this could have meant 12 miles under the Proclamation. The Coastal Zone Act Reauthorization Amendments of 1990 resolved this matter by limiting the seaward extent of the coastal zone to the seaward limit of the states' boundaries under the Submerged Lands Act (SLA).² The SLA provides the major dividing line between state and federal responsibility for offshore resource management, and is unchanged by the Proclamation.

NECESSITY FOR IMPLEMENTING LEGISLATION

In addition to the original CZMA, there are more than 75 federal statutes which use the term "territorial sea" or related terms (e.g., "navigable waters of the United States," "territorial waters") which depend for their meaning on the territorial sea limits of the United States. These laws run the gamut from fisheries to Coast Guard to merchant marine to oceanography issues, and also include many laws beyond the jurisdiction of the Merchant Marine and Fisheries Committee.

² Under the SLA, the states' seaward boundaries are generally set at three miles, except in the cases of Texas and the west coast of Florida where the boundaries, for historic reasons, are three marine leagues or nine miles.

Until Congress acts, these statutes are limited in geographic scope and effect to the old 3-mile territorial sea. The effect is to limit the reach of numerous federal management and enforcement statutes as well as to cause confusion about the extent of the U.S. territorial sea under international and domestic law.

There are precedents to guide Congress' actions. In 1945, President Truman issued a proclamation asserting United States jurisdiction over the natural resources of the subsoil and seabed of the outer Continental Shelf (OCS). Subsequently, Congress, in 1953, enacted the SLA and the OCS Lands Act (OCSLA) to establish state and federal jurisdiction over these resources. Congress also played a significant role in the establishment of the 200-mile fishery conservation zone, the predecessor to the 200-mile exclusive economic zone, by passing the Magnuson Fishery Conservation and Management Act in 1976.

TERRITORIAL SEA RESOURCES AND STATE INTERESTS

Within the region of the new territorial sea (between 3 and 12 miles) lie major offshore fishery resources and major attainable deposits of oil and gas on the OCS. According to statistics from NOAA, nearly 90% by weight and 70% by value of our fishery resources are caught within 12 miles of the coast. According to the Minerals Management Service (MMS), approximately 25 percent of unleased oil resources (2-4 billion barrels) and 20 percent of unleased gas resources (9-18 trillion cubic feet) lie within the extended territorial sea (3-12 miles). For this reason, some states (e.g., Alaska and Hawaii) have expressed an interest in extending their seaward boundaries to the limit of the new territorial sea. Yet other states (e.g., North Carolina) have questioned whether the costs of administering this new area would outweigh the benefits to their states.

The resources of the extended territorial sea are currently managed by the federal government under two principal regimes -- the OCSLA for oil and gas and the Magnuson Act for fishery resources. The premises of these management regimes and the potential loss of revenues to the federal government from OCS development would have to be examined carefully before any fundamental change is made in state-federal boundaries. MMS estimates that transferring additional submerged lands to the states (from 3-12 miles) would result in losses to the federal government of \$2-4 billion (cash bonuses), \$8-16 billion (royalties), and \$58-116 billion (gross market value).

DESCRIPTION OF PENDING LEGISLATION

On November 21, 1991, Chairman Jones, along with Representatives Davis, Studds, Hughes, Tauzin, Hubbard, and Hertel, introduced H.R. 3842, a bill to extend the territorial sea and the contiguous zone of the United States. The bill declares the sovereignty of the United States over the new territorial sea; establishes a 24-mile contiguous zone for the United States; amends 28 federal statutes which refer to or rely

on the phrase "territorial sea of the United States" and related terms; maintains current state-federal boundaries; and authorizes Sea Grant to conduct a study of the resources of the extended territorial sea and make recommendations to the Congress on the adequacy of existing state and federal laws. (Attachment C contains a list of the statutes amended by H.R. 3842.)

H.R. 536, the "Coastal States Extension Act of 1991," was introduced by Congressman Bennett on January 16, 1991. The bill amends the SLA by granting state jurisdiction over submerged lands to 12 miles. H.R. 536 was referred to the Committees on Interior and Insular Affairs, Judiciary, and Merchant Marine and Fisheries. Within the Merchant Marine and Fisheries Committee, H.R. 536 was referred to the Subcommittee on Oceanography, Great Lakes, and the Outer Continental Shelf.

ISSUES

- o Are any provisions of H.R. 3842 inconsistent with international law?
- o Is there any good reason the United States should not establish a 24-mile contiguous zone?
- o Are there some laws now included in H.R. 3842 which should be limited in geographic scope to three miles (the extent of the previous territorial sea)?
- o Which other laws that are not included in H.R. 3842 should be amended to clarify the extent of the territorial sea?
- o Can the United States implement the Territorial Sea Proclamation without amending its laws to conform to the Proclamation?
- o Will U.S. resources (e.g., marine sanctuaries) be better protected from foreign vessel violations if the territorial sea is extended to 12 miles?
- o Is Sea Grant the appropriate institution to conduct the study of the resources of the extended territorial sea?
- o What role should the coastal states play in managing the resources of the extended territorial sea?

Attachments A, B, C

1990]

Proclamation 5928 of December 27, 1988

ix

Territorial Sea of the United States of America

54 F.R. 777

By the President of the United States of America

A Proclamation

International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.

The territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.

Nothing in this Proclamation:

(a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or

(b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

MARITIME ZONES ¹Territorial Sea

A belt of sea that may not exceed 12 nautical miles, measured from a baseline that is either the low-water line along the coast or the seaward limit of the internal waters of the coastal nation. The coastal nation exercises complete sovereignty in the territorial sea, subject to the right of innocent passage for foreign (commercial and military) vessels.

Contiguous Zone

A belt of sea contiguous to the territorial sea, which may not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. Within the contiguous zone, a nation may protect itself against infringements of its customs, fiscal, immigration, or sanitary regulations committed within its territory or territorial sea. The coastal nation may stop a foreign ship in its contiguous zone for the purpose of investigation or arrest in connection with any infringement of the above-mentioned regulations, and may impose punishment.

Continental Shelf

The seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of the nation's land territory to the outer edge of the continental margin, or to a distance of 200 miles from the baseline from which the breadth of the territorial sea is measured. In its continental shelf, a nation exercises sovereignty only for the purpose of exploring and exploiting its natural resources, both living and non-living.

Exclusive Economic Zone

A belt of sea beyond the territorial sea that may not exceed 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. Within the EEZ, a nation has sovereign rights for the purpose of exploring and exploiting, conserving and managing its natural resources, living or non-living, as well as with regard to other activities for economic exploitation and exploration, such as the production of energy from the water, currents and winds.

¹ Derived from the Restatement (Third) of the Foreign Relations Law of the United States.

LIST OF LAWS AMENDED BY H.R. 3842

Marine Mammal Protection Act of 1972 (16 U.S.C. 1362)
Endangered Species Act of 1973 (16 U.S.C. 1532)
Antarctic Marine Living Resources Convention Act (16 U.S.C. 2432)
Fur Seal Act of 1966 (16 U.S.C. 1151)
Lacey Act Amendments of 1981 (16 U.S.C. 3371)
Northern Pacific Halibut Act of 1982 (16 U.S.C. 773)
Magnuson Fishery Conservation & Management Act of 1976 (16 U.S.C. 1802)
National Sea Grant College Program Act (33 U.S.C. 1122)
Marine Protection, Research, and Sanctuaries Act (titles I and III) (33 U.S.C. 1401; 16 U.S.C. 1431)
Shore Protection Act of 1988 (33 U.S.C. 2601)
Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9102)
Rivers & Harbors Appropriation Act of 1899 (33 U.S.C. 403, 471)
Vessel Bridge-to-Bridge Radiotelephone Act (33 U.S.C. 1202)
Ports & Waterways Safety Act (33 U.S.C. 1222)
Deepwater Port Act of 1974 (33 U.S.C. 1502)
International Navigational Rules Act of 1977 (33 U.S.C. 1601)
Act to Prevent Pollution from Ships (33 U.S.C. 1901)
Oil Pollution Act of 1990 (33 U.S.C. 2701)
Various provisions in title 46, U.S.C., concerning vessel safety, vessel salvage operations, and regulation of pilotage (46 App. U.S.C. 316(d); 46 U.S.C. 2301; 46 U.S.C. 4102(e); 46 U.S.C. 4301; 46 U.S.C. 4502; 46 U.S.C. 4506; 46 U.S.C. 8502-8503)
Captain of the Port (50 U.S.C. 195)
Sections 27 and 27A of the Merchant Marine Act, 1920 (46 App. U.S.C. 883 - 883-1) (the Jones Act)
Shipping Act of 1916 (46 App. U.S.C. 801)
Merchant Marine Act of 1936 (46 App. U.S.C. 1161)

SECTION-BY-SECTION ANALYSIS OF H.R. 3842

TERRITORIAL SEA AND CONTIGUOUS ZONE EXTENSION AND ENFORCEMENT ACT OF 1991

Section 1-Short Title

This section contains the short title of the bill, the "Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991."

Section 2-Findings

Section 2 sets forth Congress' reasons for enacting this legislation. These include Presidential Proclamation 5928 of December 27, 1988, which extended the territorial sea of the United States from 3 to 12 miles for international purposes only, and the preservation of Congress' Constitutional authority to make laws and regulations respecting territory of the United States, which includes the 12-mile territorial sea.

Section 3-Purposes

Section 3 summarizes the four principal purposes of the legislation. These are: to extend the sovereignty of the United States to the 12-mile territorial sea; to establish a contiguous zone of 24 miles; to extend certain federal laws to the new territorial sea and contiguous zone; and to authorize a study by Sea Grant of the adequacy of existing laws to manage the resources of the extended territorial sea.

Section 4-Definitions

Section 4 provides definitions of "contiguous zone," "territorial sea of the United States," and "United States."

Section 5-The Territorial Sea

Section 5 declares that the territorial sea of the United States is part of the United States and subject to its sovereignty. This is intended to resolve any question about the legal character of the 12-mile territorial sea, which, in international law, is virtually the equivalent of land territory of the United States. The section also provides that, except as provided by other law, the 12-mile territorial sea is subject to the exclusive jurisdiction of the United States. Finally, section 5 establishes that for laws enacted after December 30,

1990, references to the territorial sea of the United States shall mean the 12-mile territorial sea of the United States as defined in Presidential Proclamation 5928.

Section 6-The Contiguous Zone

Section 6 establishes the contiguous zone of the United States at 24 nautical miles seaward from the baseline of the United States. Within the contiguous zone, a nation has the authority to protect itself against infringements of its customs, fiscal, immigration, or sanitary regulations committed within its territory or territorial sea. A coastal nation can stop a foreign ship in the contiguous zone for the purpose of investigation or arrest in connection with any infringement of the above-mentioned regulations.

A 24-mile contiguous zone is consistent with customary international law as reflected in Article 33 of the United Nations Convention on the Law of the Sea. Some 31 nations now assert a 24-mile contiguous zone. The Congress, acting in concert with the President, has the authority to establish a 24-mile contiguous zone for the United States. As with section 5, the contiguous zone is subject to the exclusive jurisdiction of the United States and, for the purpose of laws enacted after December 30, 1990, references to the contiguous zone will be 24 miles.

Section 7-Conforming Amendments

Section 7 contains conforming amendments to selected federal statutes which refer to the "territorial sea of the United States" or the "contiguous zone of the United States." Because the 1988 Proclamation disclaims any effect on federal law, it is necessary for Congress to amend federal laws to clarify that these laws now refer to the 12-mile territorial sea and the 24-mile contiguous zone. A description of the specific amendments follows.

Subsection (a) amends various fisheries and wildlife laws. Paragraph (1) adds two new definitions to the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362) -- "import" and "territorial sea of the United States." The amendments will expand the federal government's enforcement authority by allowing seizures of illegal imports of marine mammals and marine mammal products in the 12-mile territorial sea of the United States.

Paragraph (2) amends the Endangered Species Act of 1973 (16 U.S.C. 1532) by adding a definition of the "territorial sea of the United States." As with the amendments to the Marine Mammal Protection Act, this will enable seizures of illegally imported endangered species and products upon entry into the 12-mile territorial sea of the United States.

Paragraph (3) of subsection (a) adds a new definition of the "territorial sea of the United States" to the definition section of the Antarctic Marine Living Resources Convention Act (16 U.S.C. 2432). This will enable seizures of illegally taken Antarctic marine living resources upon entry into the 12-mile territorial sea of the United States.

Paragraph (4) amends the Fur Seal Act of 1966 (16 U.S.C. 1151) by adding a new definition of the "territorial sea of the United States." This amendment enhances enforcement of the Fur Seal Act by defining the seaward extent of the U.S. territorial sea at 12 miles.

Paragraph (5) amends the Lacey Act (16 U.S.C. 3371) by adding a new definition of the "territorial sea of the United States." The amendment increases the enforcement authority of the federal government in the case of illegally taken fish or wildlife imported into the 12-mile territorial sea of the United States.

Paragraph (6) adds two new definitions to the Northern Pacific Halibut Act of 1982 (16 U.S.C. 773), "import" and "territorial sea of the United States," to make clear that the United States can enforce the restrictions of this fishery law within the limits of its extended territorial sea.

Paragraph (7) adds two new terms to the definition section of the Magnuson Fishery Conservation and Management Act of 1976 (16 U.S.C. 1802), "import" and "territorial sea of the United States." This will enhance the United States ability to enforce the management measures of this major fishery law to the limits of the 12-mile territorial sea. No change has been made to existing federal-state boundaries, which define the extent of federal and state jurisdiction for fisheries.

Subsection (b) of section 7 amends various ocean research and management laws to conform to the extension of the territorial sea. Paragraph (1) amends the National Sea Grant College Program Act (33 U.S.C. 1122) by adding a new definition of "territorial sea of the United States." This is done for technical purposes only and has no measurable effect on the administration of the Act.

Paragraph (2) contains three amendments to titles I and III of the Marine Protection, Research, and Sanctuaries Act (MPRSA, 33 U.S.C. 1401 et seq.; 16 U.S.C. 1431 et seq.). The amendment to title I will result in prohibiting dumping in the 12-mile territorial sea and in the 24-mile contiguous zone without a permit. The amendment to title III clarifies that the 12-mile territorial sea is part of the "marine environment" within which area marine sanctuaries can be designated. The amendments have the effect of enhancing enforcement of prohibitions against

illegal dumping in U.S. waters and violations of marine sanctuary regulations in the 12-mile territorial sea, particularly by foreign vessels. No changes are made to current federal-state boundaries under the MPRSA.

Paragraph (3) amends the Shore Protection Act of 1988 (33 U.S.C. 2601) by adding a new definition of "territorial sea of the United States" in conformity with the new 12-mile limit. This amendment will provide additional protections to U.S. territorial waters from illegal discharges of garbage from vessels in U.S. coastal waters.

Paragraph (4) amends the Ocean Thermal Energy Conversion (OTEC) Act of 1980 (42 U.S.C. 9102) by adding a new definition of the "territorial sea of the United States" in conformity with the new 12-mile limit, and by expanding the Act's licensing provisions to OTEC facilities located within the 12-mile territorial sea, thereby eliminating any potential gap in OTEC licensing authority. No other changes are intended in the Act or its federal-state boundary provisions.

Subsection (c) of section 7 amends a number of vessel safety and navigation laws administered by the Army Corps of Engineers and the Coast Guard. Paragraph (1) makes clear that various navigational terms included in section 10 of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. 403) encompass all waters of the new territorial sea of the United States. By regulation, these terms are now limited to three miles. The amendments expand the areas where obstructions to navigation are prohibited and enhance the ability of the Army Corps of Engineers to remove obstructions in these areas.

Paragraph (2) amends section 7 of the Rivers and Harbors Appropriation Act of 1915 (33 U.S.C. 471) by including within the term "navigable waters of the United States" all waters of the 12-mile territorial sea of the United States. This will expand the authority of the Secretary of Transportation, acting through the Coast Guard, to establish anchorage grounds for U.S. and foreign vessels to all waters of the 12-mile territorial sea.

Paragraph (3) adds a new definition of "navigable waters of the United States" to the Vessel Bridge-to-Bridge Radiotelephone Act (33 U.S.C. 1202). The amendment will enable the Coast Guard to require radiotelephones on all covered vessels within the 12-mile territorial sea of the United States, thereby enhancing navigational safety.

Paragraph (4) adds a new definition of "navigable waters of the United States" to the Ports and Waterways Safety Act (33 U.S.C. 1222). This amendment will enable the Coast Guard to

establish vessel operating requirements, including vessel traffic controls, for all U.S. and foreign vessels within the 12-mile territorial sea.

Paragraph (5) adds two new definitions to the Deepwater Port Act 1974 (33 U.S.C. 1502), "territorial sea of the United States" and "contiguous zone", to conform to the new 12-mile territorial sea and 24-mile contiguous zone. The amendments have no practical effect since the only deepwater port is located beyond 12 miles.

Paragraph (6) amends section 2 of the International Navigational Rules Act of 1977 (33 U.S.C. 1601) by adding a new definition of "territorial sea" to conform to the Presidential Proclamation. The amendment clarifies that the 12-mile territorial sea is not included within the term "high seas" for purposes of the application of international regulations for preventing collisions at sea.

Paragraph (7) amends section 2 of the Act to Prevent Pollution from Ships (APPS, 33 U.S.C. 1901(a)) by adding a new definition of "navigable waters of the United States" to include all waters of the new 12-mile territorial sea of the United States. The amendment enhances the ability of the Coast Guard to enforce APPS, particularly the requirements of Annex V (disposal of plastics at sea), and to regulate terminals located in the navigable waters of the U.S.

Paragraph (8) amends the definition of "territorial seas" of the United States in section 1001(35) of the Oil Pollution Act of 1990 (33 U.S.C. 2701(35)) to conform to the Presidential Proclamation. The amendment will provide additional protection to waters of the United States from oil spills caused by foreign vessels.

Paragraph (9) amends section 4370 of the Revised Statutes of the United States (46 App. U.S.C. 316(d)) by including within a definition of "territorial waters of the United States" all waters of the extended territorial sea of the United States. This amendment prevents foreign vessels from engaging in salvaging operations in U.S. territorial waters, including the 12-mile territorial sea, except in accordance with a treaty with the United States.

Paragraph (10) amends section 2301 of title 46, U.S.C., by clarifying that "waters subject to the jurisdiction of the United States" include all waters of the 12-mile territorial sea of the United States. This amendment expands the authority of the Coast Guard to control and assess penalties against foreign vessels operating negligently in U.S. waters.

Paragraph (11) amends section 4102(e) of title 46, U.S.C., to ensure that Coast Guard regulations for manned uninspected vessels, including the number and type of emergency locating equipment, will continue to apply beyond three miles from the baseline of the United States, an area which is no longer considered high seas.

Paragraph (12) amends section 4301 of title 46, U.S.C., by including within a new definition of "waters subject to the jurisdiction of the United States" all waters of the 12-mile territorial sea. The amendment enhances the authority of the Coast Guard to regulate recreational vessel safety in U.S. waters.

Paragraph (13) amends section 4502(a)(7) of title 46, U.S.C., by striking "on the high seas" and inserting "as required by regulations prescribed [by the Secretary of Transportation] under section 4102(e) of [title 46]." The amendment enables the Coast Guard to continue to require emergency position indicating radio beacons on vessels that operate in internal waters of the United States and within three nautical miles from the baseline from which the territorial sea is measured.

Paragraph (14) amends section 4506(b) of title 46, U.S.C., by inserting new language to clarify that commercial fishing vessels are only exempt from Coast Guard regulations under this chapter if they are operating in internal waters of the United States or within three nautical miles from the baseline of the United States, but are not exempt if they are operating between 3 and 12 nautical miles, formerly but no longer an area of high seas.

Paragraph (15) amends section 8502(a)(3) of title 46, U.S.C., by clarifying that the requirement for federal pilots on coastwise seagoing vessels continues to apply to vessels operating within three nautical miles from the baseline of the United States.

Paragraph (16) amends section 8503(a)(2) of title 46, U.S.C. It clarifies that the Coast Guard may continue to require a federal pilot on a self-propelled vessel if a pilot is not required by state law and the vessel is operating within three nautical miles from the baseline of the United States.

Paragraph (17) amends section 1 of title XIII of the Act of June 15, 1917 (50 U.S.C. 195) to include within various jurisdictional terms in that Act all waters of the 12-mile territorial sea of the United States. This amendment will enable the Coast Guard to regulate anchorage and movement of foreign vessels within the 12-mile territorial sea during emergencies and otherwise, for the protection of U.S. ports, harbors, and waterfront facilities.

Subsection (d) of section 7 amends various merchant marine laws to conform to the new territorial sea limits.

Paragraph (1) amends section 27 of the Merchant Marine Act of 1920 (46 App. U.S.C. 883) by including within "points in the United States" points in the 12-mile territorial sea of the United States. The amendment has the effect of extending the requirements of the Jones Act to all coastwise trade within the new territorial sea of the United States.

Paragraph (2) makes a conforming amendment to section 27A of the Merchant Marine Act of 1920 (46 App. U.S.C. 883-1) to extend the requirements of the Jones Act to fisheries and transportation of merchandise or passengers between points in the extended territorial sea of the United States.

Paragraph (3) inserts a new definition of "navigable waters of the United States" in the general definitions section, section 2101 of title 46, United States Code. As amended, the term will include all waters of the 12-mile territorial sea of the United States.

Paragraph (4) amends the first definition in the first section of the Shipping Act of 1916 (46 App. U.S.C. 801) by striking "high seas" and inserting "beyond the territorial sea of the United States." The effect of the amendment is to clarify that regulation of common carriers by water in interstate commerce only applies to carriers operating beyond the 12-mile territorial sea of the United States.

Paragraph (5) amends section 511(a) of the Merchant Marine Act of 1936 (46 App. U.S.C. 1161(a)) by substituting for the phrase "high seas" the phrase "beyond the territorial sea of the United States." The effect of the amendment is to limit federal financial assistance, if available, to the construction or acquisition of vessels suitable for use on the high seas, which now begin seaward of the 12-mile territorial sea.

Section 8-Resource Management Study

Section 8 authorizes the Under Secretary of Commerce for Oceans and Atmosphere, acting through the National Sea Grant College Program, to award a competitive \$100,000 grant to study the adequacy of existing federal and state laws for the management of living and nonliving resources within the territorial sea between 3 and 12 miles. The grantee(s) is to convene at least one public meeting of interested federal, state, and private sector representatives. Within one year from the award of the grant, the grantee must report to the Congress and the President.

The purpose of the study is to determine whether any regulatory gaps exist for the management of natural resources in the newly extended territorial sea. The area between the baseline of the United States and three miles is now subject to state ownership and jurisdiction under the Submerged Lands Act; the area beyond three miles is now generally subject to federal management and jurisdiction. Two principal laws that rely on this boundary line are the Magnuson Fishery Conservation and Management Act and the Outer Continental Shelf Lands Act, which authorize federal management of fisheries and OCS oil and gas resources, respectively. The issue for the study is whether, in light of the Presidential Proclamation and the extension of the territorial sea of the United States, this dividing line continues to be appropriate, these laws provide adequate authority for the management of resources that lie between 3 and 12 miles off our coasts, and any changes to existing law or new laws are necessary.

Section 9-Savings Provision

Subsection (a) of section 9 provides that nothing in this legislation affects the title, jurisdiction, or boundaries of the various states and territories of the United States. This legislation does not alter the seaward boundaries of the coastal states and Great Lakes that are established in the Submerged Lands Act and related laws that grant submerged lands to U.S. territories, such as the Act of March 2, 1917 (48 U.S.C. 749) which conveyed submerged lands to the Commonwealth of Puerto Rico.

Subsection (b) provides that, except as provided by the conforming amendments made by section 7, nothing in the legislation affects any other federal or state law that refers to the territorial sea or contiguous zone of the United States. Until Congress amends a specific law to conform to the new 12-mile and 24-mile limits, as a general rule the law will only apply within the previous 3-mile and 12-mile zones. This approach was taken to avoid any unintended consequences that a more sweeping approach might entail. The legislation could be amended during the Congressional process to include other laws besides those amended in section 7 as they are identified during the consideration of this bill.

Subsection (c) disclaims any intent of the legislation to eliminate any rights that foreign nations have under international law to transit the territorial sea of the United States in innocent passage.

Section 10-Implementing Regulations

Section 10 requires each federal agency that administers a law amended by section 7 to promulgate regulations to implement this provision. For example, the Coast Guard should revise its definitions of various jurisdictional terms in 33 CFR Subpart 2.05 to conform to these amendments.

FILLING IN A JURISDICTIONAL VOID:
THE NEW U.S. TERRITORIAL SEA

by David M. Forman,* M. Casey Jarman,**
and Jon M. Van Dyke***

I. INTRODUCTION

On December 27, 1988, President Ronald Reagan issued a Proclamation extending the U.S. territorial sea from three to twelve nautical miles for international purposes.¹ Reagan was advised by the Department of Justice that, by virtue of his role as the sole representative of the United States in foreign affairs,²

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¹Proclamation No. 5928, 54 Fed. Reg. 777 (1989) (hereinafter Territorial Sea Proclamation).

²Kmiec, Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 1 TERR. SEA J. 1, 16 (1990), a reprint of a memorandum prepared for Abraham D. Sofaer, Legal Adviser, Department of State, from the Office of Legal Counsel, U.S. Department of Justice (October 4, 1988).

he had the power to acquire sovereignty over this territory, despite the absence of any express constitutional or statutory authority. In his analysis of the impact of this proclamation on federal statutes regulating offshore waters and federal-state jurisdictional divisions, Mr. Kmiec of the Department of Justice recognized that intent of Congress is the key factor in determining whether domestic statutes would be affected by this territorial sea extension. In relation to the Coastal Zone Management Act³ (CZMA), he concluded that the expansion of the territorial sea would not extend the Act's coverage.⁴ In an apparent attempt to prevent the proclamation from expanding coastal state jurisdiction, former President Reagan included a proviso stating that "[n]othing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom...."⁵

The constitutionality of this Proclamation has come under fire from several commentators⁶ who argue that acquisition of territory is a legislative rather than a presidential power. Others have argued that even if the President had the authority to assert sovereignty over an extended territorial sea, the

³16 U.S.C. §§ 1451-64 (1988).

⁴Kmiec, supra note 2, at 37.

⁵Territorial Sea Proclamation, supra note 1.

⁶See infra notes 22-57 and accompanying text.

proviso quoted above is ineffective absent express congressional approval.⁷

These contrasting views illustrate the ambiguous nature of the ocean management regime now governing the territorial sea. The Proclamation has created a zone without clear jurisdictional authority, where a case-by-case analysis is needed to determine the rights, duties, and responsibilities of citizens, the government, and foreign nationals and nations. This situation is not only inefficient, but absurd. Although Congress recently legislated that the territorial sea expansion does not apply to the CZMA,⁸ questions remain, for instance, whether jurisdiction is conferred under the Endangered Species Act in the 3-12 mile

⁷See infra notes 24, 28, 31, 45-48, 54, 57, and accompanying text. Congress did not expressly give effect to the proviso in either of the sessions of the 101st Congress; H.R. 1405 (Section 4) would have made it clear that:

[each state's] jurisdiction or authority ... shall not [be] extend[ed] beyond ... [the] previous geographical limits by the extension of the territorial sea of the United States.

⁸The 1990 Coastal Zone Management Act Amendments struck references to "the United States territorial sea" (16 U.S.C. § 1453(1)), and inserted in lieu thereof "the outer limit of State title and ownership under the Submerged Lands Act ..."

Furthermore, § 1456(c)(3)(B) was amended to require that any area leased under OCSLA ... affecting any [land use or water use in] land or water use or natural resource of the coastal zone of the state ... must be consistent ... [with] the enforceable policies of the coastal state's management plan. This amendment effectively overturned *Secretary of the Interior v. California*, 464 U.S. 312 (1984) (holding that the act does not apply to oil and gas leases) because of the undeniable impact leasing will have on the natural resources of the coastal zone.

Section 1456(d) was also amended to clarify the Act's application to federal activities whether "in or outside of the coastal zone" which affect any land or water use or natural resource of the coastal zone.

zone or if several other protectionary measures⁹ can be applied throughout a 12-nautical-mile territorial sea.

This paper examines these constitutional and statutory ambiguities, considers historical and current federal-state tensions surrounding the management of nonliving and living resources, and suggests several alternative approaches Congress could take to produce a comprehensive ocean management regime for the United States. It asserts that affirmative Congressional action is preferable to resorting to the judicial process and is the best way to resolve these problems. Thus it is in the best interests of coastal states to push for legislation that would clarify the nature of this zone.

II. THE CONSTITUTIONALITY OF THE UNILATERAL PRESIDENTIAL EXTENSION OF THE U.S. TERRITORIAL SEA TO 12-NAUTICAL-MILES

A. Introduction

Several commentators have examined the constitutionality of President Reagan's unilateral executive action in extending the U.S. territorial sea.¹⁰ Their analyses raise questions

⁹Among other statutes made ambiguous by the Proclamation are the Ocean Dumping Act; the Deep Water Ports Act; the International Regulations for Preventing Collisions at Sea; the Prevention of Pollution from Ships; Shore Protection from Municipal or Commercial Waste; and the Independent Safety Board Act. See infra notes 61-161 and accompanying text.

¹⁰See e.g., Kmiec, supra, note 2; Archer & Bondareff, The Role of Congress in Establishing U.S. Sovereignty Over the Expanded Territorial Sea, 1 TERR. SEA J. 117 (1990); Richard E. Burns, A Discussion of the Constitutional Issues Raised by Executive Extension of the Territorial Sea Limit (unpublished student paper prepared for Second-year Seminar at the University

regarding the President's authority to exercise power in this fashion. This section summarizes the arguments supporting unilateral acquisition of territory by the President, and contrasts these with the arguments for a more restrictive interpretation of Presidential powers.

B. Sources of Presidential Power

1. Foreign Affairs Power

Although the most legally secure method of extending the territorial sea would be by treaty, the President's authority to act alone through a Presidential Proclamation has been justified by virtue of the President's constitutional role as the sole representative of the United States in foreign relations.¹¹

Although the Constitution does not specifically address the power to acquire territory on behalf of the United States, the Supreme Court in Mormon Church v. United States¹² stated that the powers of the several branches of government to make war, to make treaties, and to govern the territory of the union provide the necessary authority. The Justice Department focused on practical considerations to support the President's authority to assert

of Hawaii, William S. Richardson School of Law, April, 1990).

¹¹Kmiec, supra note 2.

¹²136 U.S. 1, 42 (1890); see also American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828) ("The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty").

sovereignty: "As our representative in foreign affairs, the President is best situated to announce to other nations that the United States asserts sovereignty over territory previously unclaimed by another nation."¹³

The same constitutionally derived authority that arguably allows the President to acquire territory by discovery and occupation could conceivably be cited as additional justification of Presidential power to proclaim sovereignty over an extended territorial sea. This power was judicially recognized in Louisiana II,¹⁴ where the Court stated that the President has the power "to determine how far this country will claim territorial rights in the marginal sea as against other nations."¹⁵ United States v. Curtiss-Wright Export Corp.¹⁶ also seems to authorize Presidential assertion of sovereignty in the absence of a specifically enumerated constitutional power.¹⁷

¹³Kmiec, supra note 2, at 16.

¹⁴U.S. v. Louisiana, 363 U.S. 1 (1960).

¹⁵363 U.S. at 34.

¹⁶299 U.S. 304 (1935).

¹⁷The President's foreign relations power arises from both "the inherent sovereign authority over foreign relations [obtained] when [the United States] secured its independence from Great Britain" (Curtiss-Wright, 299 U.S. at 318), and the fact the President exercises many of the powers formerly vested in the British crown that are not enumerated in the Constitution as belonging to Congress. See Kmiec, supra note 2, at 6 n.16.

In Curtiss-Wright, the court stated that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." 299 U.S. at 318.

The only definitive Constitutionally-based power authorizing Congress to acquire territory, on the other hand, derives from the constitutional power of Congress to admit new states into the union. Congress has never asserted jurisdiction or sovereignty over the territorial sea on behalf of the United States.¹⁸ Congressional assertions of jurisdiction or sovereignty in areas of the ocean¹⁹ were all enacted after initial Presidential proclamations on behalf of the United States.²⁰ The Justice Department argues that this history illustrates the operation of constitutional restraints on the power of Congress to proclaim jurisdiction or sovereignty over offshore areas.²¹

The propriety of a President's unilateral assertion of "sovereignty" (as opposed to claiming "jurisdiction" alone) over this area is, however, not free from doubt.²² One commentator has argued that neither express nor implied constitutional authority for unilateral executive extension of the United States' territorial sea exists.²³ Under this view, the

¹⁸Kmiec, supra note 2, at 18.

¹⁹Specifically, the Neutrality Act of 1794, 51 U.S.C. § 6 (1988); other federal statutes relating to customs authority, 14 U.S.C. § 89 (1988); and 19 U.S.C. § 1581 (1988); and the OCSLA, 43 U.S.C. §§ 1331-56 (1988).

²⁰Kmiec, supra note 2, at 18 n.54.

²¹Id. at 18 (at least for international purposes).

²²The advocates of Presidential authority acknowledge this doubt themselves. Id. at 36.

²³See, e.g., Burns, supra note 10, at 1.

extension of the territorial sea limit can be properly achieved only by congressional action, whether or not in conjunction with an executive initiative. The broad language used by Justice Sutherland in Curtiss-Wright relating to Presidential powers can be characterized as dicta because the facts of the case reveal that Congress gave the President the power to ban the sale of arms to certain countries.²⁴ Curtiss-Wright cannot be cited as holding that the President has authority to exercise foreign affairs initiatives, such as asserting sovereignty over new territory, in the absence of specifically enumerated constitutional power. The implied powers justifying unilateral acquisition of territory by the President simply do not apply to the territorial sea.²⁵

The need for caution, secrecy, swift action, and specialized information in the negotiation process (better accomplished by the President than by Congress) generally justifies expansive foreign relations powers for the President. One critic has found

²⁴Curtiss-Wright, 299 U.S. at 319-20.

²⁵Other possible modes of acquiring territory are clearly inapplicable to the present territorial sea extension. The most usual method of acquiring territory is through a treaty, but that approach requires participation of the Senate. Purchase and cession are typically accomplished through a treaty. Conquest cannot be relied upon because the necessary factors are not present; in The American Insurance Co. v. Canter, 26 U.S. 511, 542-43 (1828), the court found the holding of conquered territory to be only a temporary military occupation until a treaty is entered into. Furthermore, in Fleming & Marshall v. Page, 9 Howard 603, 614 (1849), the Court held that extension of the boundaries of the United States can be accomplished only through the treaty-making power or by legislative authority. Annexation has never been exercised by the President alone, but has been utilized by Congress twice. Burns, supra note 10, at 4-7.

these concerns "simply inapplicable to the territorial sea issue," however, because "[t]here is no need for secrecy, swift action or specialized information in extending the territorial sea."²⁶ He further asserts that whether the President is best situated to announce the assertion of U.S. sovereignty²⁷ is also irrelevant to the question of how territory is actually acquired because the President could satisfy his role in foreign affairs by simply announcing previously-made Congressional decisions to the world.²⁸ If Presidential power is to be relied upon, therefore, it must be found in other parts of our Constitutional structure.

2. Commander-in-Chief

The apparent purpose of the territorial sea extension was to provide a greater defense perimeter for the United States, specifically to keep foreign intelligence-gathering and naval vessels farther off the coast of the United States.²⁹ Because the U.S. Constitution places control of the nation's defenses in the Chief Executive, unilateral Presidential action appears to be justified at first glance. The Territorial Sea Proclamation, however, goes beyond merely establishing new boundaries

²⁶Burns, supra note 10, at 11.

²⁷Kmiec, supra note 2, at 16.

²⁸Burns, supra note 10, at 16.

²⁹Archer and Bondareff, supra note 10, at 117. See also U.S. Naval War College, International Law Situation and Documents 603-604 (1957) (listing defensive sea areas established by the President pursuant to 18 U.S.C. § 2152), cited in Kmiec, supra note 2, at 11 n.32.

necessitated by modern technology.— Although it might be argued that the President's assertion of sovereignty over an extended territorial sea was not intended to intrude into legislative affairs,³⁰ the President's powers as Commander-in-Chief do not automatically confer authority to act without participation by Congress.³¹

3. Congressional Acquiescence

In the face of Congressional acquiescence, the Territorial Sea Proclamation might be defensible as a valid executive

³⁰See Kmiec, supra note 2. The Department of Justice's interpretation of the effect of the Presidential Proclamation on the Coastal Zone Management Act may not necessarily have been crucial to the President's designs.

One commentator has stated that the language of the Proclamation prohibiting domestic impact "... avoids the awkward domestic political and legal consequences that would follow a unilateral Presidential attempt to modify Congressional allocation of authority between federal and state governments concerning the coastal zone." See John E. Noyes, United States of America Presidential Proclamation No. 5928: A Twelve-Mile Territorial Sea, 4 INT'L. J. ESTUARINE & COASTAL L. 142, 146 (1989).

Similarly, in the ABA's Law of the Sea Committee Newsletter, vol. 3, no. 2 (1989), Donald Carr stated that the President "recognized that the domestic legislative consequences involved the authority of Congress" (at 10) and that common sense suggested that each of the statutes should be considered separately. According to Carr, therefore, the proclamation was merely an exercise of the President's foreign affairs authority, leaving domestic legislation unchanged.

On the other hand, the Coastal States Organization has interpreted the President's attempted limitation on domestic statute as going farther than the Justice Department was willing to go. Extension of the Territorial Sea: Hearings on H.R. 1405 Before the Subcommittee on Oceanography and Great Lakes of the House Committee on Merchant Marine and Fisheries, 101st Cong., 1st Sess. 64, 70 (1989) (statement of Chris Shafer, Chair, Coastal States Organization).

³¹But see infra note 39 and preceding text for a potential argument to the contrary based on implied "Nuclear Age" powers.

acquisition of territory. The question becomes whether Congressional action has been sufficient and timely. For example, the initial assertion of jurisdiction over the territorial sea by Secretary of State Thomas Jefferson in 1793 ripened into a claim of sovereignty over time, even though such rights were not clear when the executive branch made its original unilateral claim.³² It has been noted, however, that Congress acted quickly to affirm the Jefferson claim by passing the Neutrality Act of 1794.³³ Passage of the Submerged Lands Act in 1953 also suggests that Congress has not deferred to the executive with regard to the territorial sea. Other historical events show that Congress has not previously acquiesced in unilateral executive acquisition of territory. Most United States acquisitions have been accomplished by treaty. Congress has twice asserted its own authority to acquire territory by annexing Texas and Hawaii. Congress displayed an intention to

³²See Archer and Bondareff, supra note 10, at 126: "It is not clear whether Jefferson and the Washington administration intended to assert U.S. jurisdiction to one sea league for defensive purposes only or to acquire new territory subject to U.S. sovereignty three miles seaward." (Emphasis added.) See also Kmiec, supra note 2, at 9-10 nn.24-25 and accompanying text: "The extent of Territorial Sea jurisdiction at Sea, has not yet been fixed." Compare with Kmiec, supra note 2, at 17 n.51:

There may be an argument that President Washington's unilateral assertion of sovereignty over the original territorial sea is now underpinned by longstanding congressional acquiescence. ...[T]here is at least arguable recognition by the legislature of the President's power in its explicit desire that the United States exercise full sovereignty over the territorial sea claimed by our first president.

³³51 U.S.C. § 6 (1988).

participate in the acquisition of territory through the Guano Islands Act of 1856. And the Senate has voted to cut off funds for construction of military bases overseas as a means of protesting the President's acquisition of those bases by executive agreement rather than by treaty.³⁴

Similarly, it does not appear that Congress has yielded to Presidential authority as exercised in 1988. One commentator notes that the Territorial Sea Proclamation is "in legal limbo until such time as Congress either passes legislation to give it effect or fails to act, in which case their acquiescence would soon be interpreted as impliedly authorizing the Proclamation to take effect."³⁵ Congressional failure to act in the near future may lead to an interpretation of implied authorization of executive power by acquiescence.³⁶ The necessary time period for congressional action is "probably very short."³⁷ Although

³⁴Burns, supra note 10. See also, Protocol of a Conference Held at the Foreign Office, Dec. 9, 1850, 18 Stat. (Part 2) 325-26:

There is a third example of unilateral acquisition by the President by executive agreement. In this regard, President Filmore entered into an executive agreement in 1850 in which Great Britain "cede[d] to the United States such portion of the Horseshoe Reef as may be found requisite" for a lighthouse in Lake Erie near Buffalo[;]

5 Treaties and Other International Acts of the United States of America 905-28 (H. Miller ed. 1937) (describing the acquisition of Horseshoe Reef), reprinted in Kmiec, supra note 2, at 15 n.44.

³⁵Burns, supra note 10, at 32.

³⁶Id. at 22.

³⁷Id.

Congress has yet to pass legislation implementing the Proclamation, its recent attention to this issue suggests that it does not intend to acquiesce.³⁸

4. Nuclear Age Powers

In the nuclear age, the imminent and unpredictable threat to national security interests suggests the need for broad Presidential authority in the defense of our country. The President must be allowed to take swift action in response to nuclear attack, because in such situations insufficient time will be available for Congress to deliberate. This power cannot be cited as a source for unilateral Presidential action, however, because no such immediate need exists for an extension of the territorial sea. The Territorial Sea Proclamation is instead, a "momentous break with tradition [that should have] require[d] lengthy debate at the highest levels of government."³⁹

C. The Separation of Powers Issue

The Constitutional structure on the foreign affairs power suggests that neither the executive nor legislative branch was intended to have exclusive authority. Uncertainty concerning the proper source of authority for asserting sovereignty over an extended territorial sea creates a "classic separation of powers

³⁸See supra note 8. The Coastal Zone Management Act reauthorization amendments illustrate the fact Congress has not yielded authority to legislate with regard to domestic jurisdiction in the U.S. territorial sea.

³⁹Burns, supra note 10, at 1.

conflict."⁴⁰ The quintessential separation of powers case, Youngstown Sheet & Tube Co. v. Sawyer,⁴¹ although primarily a domestic affairs case, can be validly used to examine separation of powers conflicts in foreign affairs.⁴²

Under the Youngstown framework, the President's unilateral extension of the territorial sea falls in a twilight zone where he can rely only upon his independent powers. Once in this zone, either (i) congressional inertia, indifference or acquiescence, or (ii) a consistent administrative policy can be said to authorize executive action.⁴³ The potential argument that the original territorial sea claim represents a consistent administrative policy is not dispositive. The real issue is the executive policy toward unilateral acquisition of territory. Proper consideration of this issue necessitates an analysis of historical examples of U.S. territorial acquisitions.

D. Historical Examples of Territorial Acquisition

1. Executive Acquisitions

The executive branch acted without participation by Congress in asserting the original claim to the three-nautical-mile territorial sea in 1793 by President Washington and Secretary of

⁴⁰Id. at 9.

⁴¹343 U.S. 579 (1952) (The Steel Seizure Case).

⁴²See, e.g., G. Stone, L. Seidman, C. Sunstein, & M. Tushnet, Constitutional Law 414 (1986).

⁴³See e.g., Kent v. Dulles, 357 U.S. 116 (1958); Zemel v. Rusk, 381 U.S. 1 (1965); and Haig v. Agee, 453 U.S. 280 (1980).

State Jefferson.⁴⁴ Sovereignty is the "indispensable concomitant" of a nation's territorial sea, however, and therefore prevents the extension of the territorial sea (without changing the definition of "territorial sea" itself) for jurisdictional purposes only.⁴⁵

Two examples of Presidential acquisition are Midway Islands and Wake Island, both arguably accomplished by discovery and occupation.⁴⁶ Such claims are not dispositive of the issue,

⁴⁴See supra note 32; Archer and Bondareff, supra note 10, at 124; and Burns, supra note 10, at 17. Archer and Bondareff acknowledge the independent claim of territorial sea jurisdiction by the executive branch, but qualify its precedential value by reference to its limited purposes: (1) to preserve U.S. neutrality, and (2) to provide "territorial protection." These authors also note that Congress acted quickly to affirm the Jefferson claim by enacting the Neutrality Act of 1794. Burns also acknowledges the lack of Congressional participation in the 1793 claim. He feels, however, that Jefferson's reference to "Territorial jurisdiction at Sea" was not meant to be an assertion of sovereignty. (Emphasis added.)

⁴⁵Burns, supra note 10, at 11.

⁴⁶The precedential value of Wake Island is unclear because of a continuing controversy over true ownership of the three atolls that make up Wake Island. See Heine & Anderson, Enen-Kio: Island of the Kio Flower, 19 MICRONESIAN REPORTER 34 (1971). Although the claim was dormant from 1885-1986, the Marshall Islands claim the atolls as Enen-Kio, by virtue of discovery and traditional use centuries prior to U.S. occupation. The Marshalls have no written ancient history with which to support their claim, but Enen-Kio is claimed by one of their chiefs. The long, hard voyage to Enen-Kio was motivated by fear, because Marshallese custom called for human sacrifice to provide bones to be used in the tattooing process. Potential victims' lives were spared only if they could provide a substitute bone as strong as a human bone. The wing of a large sea bird found on Enen-Kio was thus their only way to escape death. The Marshallese apparently stopped going to Enen-Kio after the arrival of Christianity, but still feel strongly that the atolls will forever be theirs.

Cf. D. Leff, Uncle Sam's Pacific Islets (1940); and Pacific Islands Yearbook (J. Carter ed., 14th ed. 1981). The United States attempted to take formal possession of Wake Island on

however. The Midway Islands claim was acted upon by Congress after the annexation of Hawaii; thus the acquisition is traceable through the Republic of Hawaii rather than to a claim based on discovery and occupation. Similarly, the 1899 claim to Wake Island was acted upon by Congress, but not until 1934.⁴⁷ Wake Island appears to be the only clear instance⁴⁸ when the Executive has asserted a right to acquire and govern territory without some color of legislative approval. Nonetheless, some scholars argue that the discovery and occupation of relatively small atolls and islands in the Pacific in the nineteenth century is irrelevant to the unilateral Presidential extension of the territorial sea.⁴⁹ Even if unilateral executive action were assumed in these cases, their precedential value is diminished substantially by analogy to the much more significant acquisitions of territory by Congress of every other piece of

January 17, 1899, through the claim of Commander Edward D. Taussig of the U.S.S. Bennington. In a 1923 scientific expedition, the only sign of life found was an abandoned Japanese feather gatherer's living site. In 1934 Wake Island was formally placed under Navy Department jurisdiction and is now the responsibility of the Air Force, which requires permission of its Hawaii office before any aircraft may land on the island. Currently about 400 people live at Wake. A weather station and a branch of the National Oceanographic and Atmospheric Administration are located there.

⁴⁷See Lawson Reno, The Power of the President to Acquire and Govern Territory, 9 GEO. WASH. L. REV. 251, 255-75 (1941). Reno states that apparent executive assertion of sovereignty over Midway and Wake was actually gained by virtue of the annexation of Hawaii by Congress.

⁴⁸But see supra note 46.

⁴⁹Archer and Bondareff, supra note 10, at 130.

territory in America;⁵⁰ at most, "acquisition of the islands represents nothing more than an exception to the rule."⁵¹

2. Congressional Acquisition⁵²

The historical precedents of treaty acquisitions,⁵³ the annexations of Texas and Hawaii, and the Guano Islands Act

⁵⁰See supra notes 52-56 and accompanying text.

⁵¹Burns, supra note 10, at 16.

⁵²See supra notes 18-20 and accompanying text.

⁵³See Treaty Between the United States and the French Republic, Apr. 30, 1803, art. 1, 8 Stat. 200, 201, T.S. No. 86 (Louisiana Purchase); Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Feb. 22, 1819, art. 2, 8 Stat. 252, 253 (cession of Florida by Spain); Treaty with Great Britain, June 15, 1846, art. 1, 9 Stat. 869, T.S. No. 120 (Oregon Compromise); Treaty of Peace, Friendship, Limits and Settlement Between the United States of America and the Mexican Republic, Feb. 2, 1838, art. 5, 9 Stat. 922, 926-27, T.S. No. 207 (cession of California by Mexico); Treaty with Mexico, Dec. 30, 1853, art. 1, 10 Stat. 1031, 1032, T.S. No. 208 (Gadsden Purchase); Treaty with Russia, March 30, 1867, art. 1, 15 Stat. 539, T.S. No. 301 (cession of Alaska by Russia); Treaty of Paris Between the United States and Spain, done Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343; Isthmian Canal Convention, Nov. 18, 1903, arts. 2 & 3, 33 Stat. 2234, 2234-35, T.S. No. 431 (cession of Panama Canal Zone by Panama); Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug. 4, 1916, art. 1, 39 Stat. 1706, T.S. No. 629 (purchase of the Virgin Islands from Denmark).

See also Cession of Tutuila and Aunuu, Chief of Tutuila to United States Government, April 17, 1900, reprinted in American Samoa Code Annotated 2 (1981), and Arnold H. Leibowitz, American Samoa: Decline of a Culture, 10 Cal. Western Int'l L.J. 220, 229-30 n. 76 (1980); the Manua Islands were ceded in a separate document in July 1904, reprinted in American Samoa Code 9-11 (1973). Congress did not formally accept this cession until 1929, 43 Stat. 1253 (Feb. 20, 1929), now codified in 48 U.S.C. sec. 1431. Swains Islands became a part of American Samoa by joint resolution of Congress, approved on March 4, 1925. H.R.J. Res. 244, 68th Cong., 2d Sess., 43 Stat. 1357 (1925); Guam was acquired by the United States through a treaty of cession concluding the war with Spain. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, art. II, 30 Stat. 1754, T.S. No. 343.

illustrate the existence of a congressional role in the acquisition of new territory by the United States. The U.S. Constitution expressly gives Congress the power to admit new states into the Union. That power was clearly exercised in the annexation of Texas. The precedential value of the annexation of Hawaii, on the other hand, is inconclusive because Hawaii was not annexed as a state but as a territory.

Perfunctory dismissal by the Justice Department of the impact of the Guano Islands Act,⁵⁴ through the bare statement that "[the Act] does not appear to be an explicit claim of territory by Congress,"⁵⁵ is not warranted. The Act clearly provides a mechanism for legitimizing territorial claims entered by U.S. citizens on behalf of the U.S. government. According to Justice Sutherland, "[n]o action or lack of action on the part of the President could destroy [the] potentiality...[of an existing law]. Congress alone could do that."⁵⁶

E. Conclusions

The U.S. expanded territorial sea is a direct result of evolutionary changes in international law.⁵⁷ No closely analogous historical acquisition of territory exists. Although

⁵⁴48 U.S.C. § 1411 (1988).

⁵⁵Kmiec, supra note 2, at n.65, 21.

⁵⁶Archer & Bondareff, supra note 10, at 136, citing Curtiss-Wright, 299 U.S. at 322. See also Argentine Republic v. Amerada Hess Shipping Corp, 488 U.S. 428, 441 n.8 (1989), in which the Supreme Court suggests that extension of the U.S. territorial sea to twelve miles may affect how domestic laws are interpreted.

⁵⁷Archer & Bondareff, supra note 10, at 130.

failure of Congress to act in the near future likely will not create a Constitutional crisis, the dangers of individualized judicial assessment of each federal statute referring to the territorial sea should be heeded.⁵⁸ Congress need not accommodate the Justice Department's suggestion that legislation be passed negating the expansion of domestic coverage. Rather, a thoughtful analysis of domestic law affected by the Proclamation should be undertaken, followed by passage of well-coordinated amendments that reflect a comprehensive national oceans policy with a minimum of intergovernmental resource conflicts. The next section presents a survey of statutes impacted by the Territorial Sea Proclamation.

II. A SURVEY OF STATUTES REFERRING TO THE TERRITORIAL SEA

Introduction

This section examines provisions in federal statutes that refer to the territorial sea and evaluates the ambiguities in their interpretation engendered by President Reagan's Territorial Sea Proclamation.⁵⁹ Some statutes specifically limit the extent of their applicability to a three-mile territorial sea;

⁵⁸See supra note 9 and accompanying text.

⁵⁹Territorial Sea Proclamation, supra, note 1. A computer search of all references to territorial seas or territorial waters in the United States Code was done to identify ambiguities. Included in the analysis are statutes using "coastal waters" or similar terms when they appear to refer to the territorial sea.

others do not address the width of the territorial sea at all. Our research found relatively few serious ambiguities. The statutes discussed below are classified in three ways: serious ambiguities, minor ambiguities, and no ambiguities.

Serious Ambiguities

a. Endangered Species Act⁶⁰

The Endangered Species Act prohibits the taking, possessing, selling, delivering, carrying, transporting and shipping of listed threatened and endangered species "within the United States or the territorial sea of the United States."⁶¹ Because Congress did not define the territorial sea in the Act, its provisions may be unenforceable in the 3-12-nautical-mile zone.⁶² The ambiguity particularly effects the protection of non-mammals such as turtles and seabirds (compare the Marine Mammal Protection Act, discussed below).

b. Ocean Dumping Act⁶³

The Ocean Dumping Act regulates the intentional dumping of

⁶⁰16 U.S.C. §§ 1531-1543 (1988).

⁶¹16 U.S.C. § 1538(a)(1).

⁶²Although it is the policy of the National Marine Fisheries Service to enforce the Act in the 3-12 mile zone (and further to the limits of the United States' exclusive economic zone), that authority is not expressly granted by the text of the Act. (Telephone interview with Gene Witham, NMFS enforcement agent in Honolulu, November 20, 1990).

⁶³33 U.S.C. §§ 1401-1445 (1988).

materials into the ocean.⁶⁴ Before dumping material transported from outside the United States into the U.S. territorial sea or contiguous zone, one must obtain a permit from the Environmental Protection Agency.⁶⁵ The EPA must deny a permit request if the disposition of the material, except for dredged material, would unreasonably impair navigation in the territorial sea of the United States.⁶⁶ The Territorial Sea Proclamation creates three interesting problems. First, can the EPA cite adverse impacts on navigation in the 3-12 zone as a reason to deny a permit? Second, under the Act, the contiguous zone is defined such that it is defacto co-extensive with the 12 mile territorial sea. Within this zone, a permit from EPA is required if the dumping "may affect the territorial sea or the territory of the United States."⁶⁷ Even if the words "territorial sea" in this phrase reflect the 3 mile limit, the "territory of the United States" could nonetheless include the 12 mile territorial sea as the Proclamation was clearly intended to expand the seaward boundary, and thus the territory, of the United States. If so, permits are now required for dumping that affects the 3-12 mile zone. Third, the Proclamation is silent in regards to extension of the U.S.

⁶⁴"'Ocean waters' means those waters of the open seas lying seaward of the baseline from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and Contiguous Zone." 33 U.S.C. § 1402(b).

⁶⁵33 U.S.C. § 1411(b).

⁶⁶33 U.S.C. § 1416(c).

⁶⁷33 U.S.C. § 1411(b).

contiguous zone from 12 to 24 miles. Should such an extension occur, Congress should consider whether to amend the Ocean Dumping Act to reflect the extension. c. Deepwater Ports Act⁶⁸

The Deepwater Ports Act controls the ownership, construction and operation of deepwater ports. For purposes of the Act, deepwater ports are defined as certain structures located beyond the territorial sea.⁶⁹ It is unlikely that the Proclamation divests Congress of authority over deepwater ports located within the 3-12 mile zone. However, to prevent challenges to the Secretary of Transportation's authority and to ensure existing and future ports meet federal criteria for licensing, Congress should amend the Act to clarify when a license is required.

d. Prevention of Pollution From Ships⁷⁰

The International Convention for the Prevention of Pollution from Ships (MARPOL), codified domestically as the Act to Prevent Pollution from ships, is designed to reduce intentional and negligent marine pollution incidents through regulation of ships' operating procedures.⁷¹ Congress adopted separate

⁶⁸33 U.S.C. §§ 1501-1524 (1988).

⁶⁹"[D]eepwater port' means any fixed or floating manmade structures other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States . . ." 33 U.S.C. § 1502(10).

⁷⁰33 U.S.C. §§ 1901-1911 (1988).

⁷¹Convention for the Prevention of Pollution From Ships, done November 2, 1973, T.I.A.S. 10561, 12 I.L.M. 1319 (1973); Protocol to the Convention with Annexes, done February 17, 1978, 17 I.L.M. 546 (1978).

jurisdictional standards for applicability of Annex V and Annexes I and II. Regulations under Annex V apply to ships of any MARPOL country while in the navigable waters or EEZ of the United States⁷²; Annexes I and II apply only in U.S. navigable waters.⁷³ Because Congress failed to define "navigable waters" and that term has several meanings in U.S. law, Annexes I and II might not apply in the 3-12 mile zone. Annex V clearly does as it encompasses the EEZ.

Under Article 5 of MARPOL, both the flag state and a coastal state in which a violation occurs may proceed against an offending vessel. Although some ambiguity exists on the international level, a clear trend is emerging that favors preventing the ocean from becoming an unrestricted reservoir for human waste materials.⁷⁴ As a matter of sound ocean policy, the Act should be made applicable to a ship from a MARPOL country that illegally dumps waste in the 3-12 mile zone.

e. Death on the High Seas by Wrongful Act⁷⁵

The fundamental question of the domestic impact of the Territorial Sea Proclamation is raised under the Death on the High Seas by Wrongful Act legislation. Section 767 explicitly

⁷²33 U.S.C. § 1902(a)(3) (1988).

⁷³33 U.S.C. § 1902(a)(1).

⁷⁴M. Casey Jarman, Disposal of Waste and Right of Passage 15 (paper presented at the 24th Annual Conference of the Law of the Sea Institute, Tokyo, Japan, July, 1990 (publication forthcoming)).

⁷⁵46 U.S.C. App. §§ 761-768 (1988)

excludes "waters within the territorial limits of any state"⁷⁶ from the Act's requirements. An argument might be made that the reference to state limits manifests congressional intent to limit application of the act to state jurisdiction as it existed when the act was passed (under the Submerged Lands Act). On the other hand, if the Presidential Proclamation did not succeed in limiting its effect to the international arena, then the territorial boundary of the states may have been extended to 12 nautical miles.

f. National Transportation and Safety Board Act ⁷⁷

This Act authorizes an independent National Transportation and Safety Board to investigate major marine casualties involving private vessels "on the navigable waters or territorial seas of the United States."⁷⁸ Absent further definition, the geographic extent of the Board's jurisdiction beyond three miles is in doubt.

g. Vessels in United States Territorial Waters⁷⁹

Under this Act, the President is granted emergency powers to regulate anchorage and movement of vessels in the territorial waters of the United States during national emergencies.⁸⁰ Because the Territorial Sea Proclamation's purpose was to claim a

⁷⁶46 U.S.C. App. § 767.

⁷⁷49 U.S.C. App. §§ 1901-1905 (1988).

⁷⁸Id. § 1903(a)(1)(E).

⁷⁹50 U.S.C. §§ 191-198 (1988).

⁸⁰Id. § 191.

broadened territorial sea for national defense purposes, and this Act is directed towards protection of our national security, Congress likely intended this Act to apply to the U.S.

territorial sea, at whatever distance. However, the critical nature of the powers granted necessitates Congressional action to clarify the ambiguity.

h. Foreign Sovereign Immunities Act⁸¹

The Foreign Sovereign Immunities Act authorizes federal and state courts to decide claims of foreign states to sovereign immunity. Immunity is waived for actions based upon commercial activities carried on in the United States⁸² or involving property present in the United States.⁸³ The United States is defined to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States."⁸⁴ Absent further guidance from Congress, it is unclear whether waiver of immunity can be asserted for activities in the 3-12 nautical mile zone.

i. Ocean Thermal Energy Conversion Act⁸⁵

The Territorial Sea Proclamation raises an interesting problem under the Ocean Thermal Energy Conversion Act (OTECA).

⁸¹28 U.S.C. §§ 1602-1611 (1988). See also 47 U.S.C. § 33 (1988).

⁸²Id. § 1605(a)(2).

⁸³Id. § 1605(a)(3).

⁸⁴Id. § 1603(c).

⁸⁵42 U.S.C. §§ 9101 - 9168 (1988 & Supp. 1989).

OTECA provides for regulation of the construction, location, ownership and operation of ocean thermal energy conversion (OTEC) facilities.⁸⁶ For facilities owned by American citizens, OTECA clearly applies within the 3-12 mile zone.⁸⁷ For foreign-owned OTEC facilities, however, OTECA jurisdiction extends to only those facilities "connected to the United States by pipeline or cable or located in whole or in part between the high water mark and the seaward boundary of the territorial sea of the United States."⁸⁸ Therefore, owners of foreign-owned OTEC facilities, unless the facility is a vessel⁸⁹, may not be subject to OTECA in the 3-12 mile zone.

Other Ambiguities Needing Clarification

- a. Travel Control of Citizens and Aliens During War or National Emergency -- Restrictions and Prohibitions on Aliens⁹⁰

This law restricts the entering and departing of aliens from the United States during times of war or other national

⁸⁶Id. § 9101 (1988).

⁸⁷Id. § 9111(a).

⁸⁸Id. § 9101(a).

⁸⁹Arguably, an OTEC vessel could not operate in the 3-12 mile zone as the innocent passage regime is applicable to foreign vessels in the extended territorial sea. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/Conf. 62/122, reprinted in 21 I.L.M. 1261 (1982), arts. 17-32. Carrying on OTEC activities falls outside the definition of innocent passage and is therefore precluded. Id., art. ____.

⁹⁰8 U.S.C. § 1185 (1988).

emergency.⁹¹ The United States is defined to include "all territory and waters, continental and insular, subject to the jurisdiction of the United States."⁹² While not much of practical significance may be at stake here, both the Territorial Sea and Exclusive Economic Zone Proclamations⁹³ would permit Congress to expand authority under this Act out to 200 miles. Whether it does so automatically is unclear.

b. Tariff Act of 1930⁹⁴

Ambiguity under this Act is raised in relation to civil penalties for aviation smuggling. Certain penalties apply to enumerated acts "performed within 250 miles of the territorial sea of the United States."⁹⁵ Without Congressional clarification, application of this section will extend either 253 or 262 miles seaward of the coast, depending on the definition of the territorial sea.

c. Deep Seabed Hard Mineral Resources Act⁹⁶

The continental shelf in this law is defined in reference to the territorial sea:

"Continental Shelf" means -- (A) the seabed and subsoil of the submarine areas adjacent to the coast, but

⁹¹Id. § 1185(a).

⁹²Id. § 1185(c).

⁹³Territorial Sea Proclamation, supra note 1; Presidential Proclamation No. 5030, 48 Fed. Reg. 10605 (1983).

⁹⁴19 U.S.C. §§ 1401 - 1677k (1988).

⁹⁵Id. § 1590(g).

⁹⁶30 U.S.C. §§ 1401 - 1473 (1988).

outside of the area of the territorial sea . . . to a depth of exploitability.⁹⁷

The statute contains no language similar to the Submerged Lands Act⁹⁸ specifically defining the territorial sea according to Congressional grant, thereby creating an ambiguity. No serious problem exists, however, because it is clear that Congress intended this act to apply to mining beyond the continental shelf.

d. International Navigational Rules Act⁹⁹

By statute, Congress has authorized the President to adopt the International Regulations For Preventing Collisions at Sea.¹⁰⁰ However, vessels "while in the waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States"¹⁰¹ are not subject to international regulations. "High seas" is defined in the law to mean "all parts of the sea that are not included in the territorial sea or in the internal waters of any nation."¹⁰² Because the demarcation lines are already drawn,¹⁰³ the ambiguity is largely

⁹⁷Id. § 1403(2).

⁹⁸See discussion, pp. __ supra.

⁹⁹33 U.S.C. §§ 1601-1608 (1988).

¹⁰⁰Id. § 1602.

¹⁰¹Id. § 1604(a).

¹⁰²Id. § 1601(2).

¹⁰³See 33 C.F.R. part 80 (1990).

irrelevant.

e. Merchant Marine Act of 1920¹⁰⁴

Under the Merchant Marine Act, it is illegal to transport merchandise by water or by land and water "between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws . . ."¹⁰⁵ Despite the absence of a specific reference to the territorial sea, the boundary issue could arise in the context of the language quoted above if, for example, an artificial island located six miles offshore were used as a transshipment point. The answer depends upon whether the Proclamation is a constitutionally valid acquisition of territory that conferred U.S. sovereignty over the 3-12 nautical mile zone.

f. Outer Continental Shelf Lands Act¹⁰⁶

The Outer Continental Shelf Lands Act establishes a system for leasing minerals on the U.S. outer continental shelf. For purposes of the Act, federal jurisdiction over resources on the continental shelf begins at the seaward boundary of the coastal states as defined by the Submerged Lands Act.¹⁰⁷ Among the purposes of the Act are provisions for federal assistance to states to ameliorate adverse affects to their coastal zones and for state participation in policy and planning decisions

¹⁰⁴46 U.S.C. App. §§ 861-889 (1988 & Supp. 1989).

¹⁰⁵Id. § 883. See also id. §§ 801, 883-1, and 5101.

¹⁰⁶43 U.S.C. §§ 1331-1348 (1988).

¹⁰⁷Id. § 1331.

regarding development of outer continental shelf mineral resources.¹⁰⁸ The term "coastal zone" is defined as extending "seaward to the outer limit of the United States territorial sea."¹⁰⁹ Monies to assist the state are to come from § 8(g) revenues.¹¹⁰ Although not a major problem, a question exists as to whether states can apply for 8(g) monies to use in projects in the 3-12 mile zone.

No Apparent Ambiguity

a. Tariff Act of 1930¹¹¹

Vessels receiving merchandise while in customs waters beyond the United States territorial sea are subject to arrival, reporting and entry requirements under the Tariff Act.¹¹² For foreign vessels subject to treaty or other negotiated arrangement, customs waters are those defined in the treaty or agreement.¹¹³ For all other foreign vessels, customs waters extend to four leagues from the U.S. coast.¹¹⁴ Because four leagues are equivalent to 12 nautical miles, no practical problem exists.

¹⁰⁸Id. § 1332(4)(A), (B).

¹⁰⁹Id. § 1331(e).

¹¹⁰Id. §§ 1332(4), 1337(g).

¹¹¹19 U.S.C. §§ 1401 to 1677k (1988).

¹¹²Id. § 1401(k).

¹¹³Id. § 1401(j).

¹¹⁴Id.

b. Atlantic Striped Bass Conservation Act¹¹⁵

State authority under the Atlantic Striped Bass Conservation Act extends to "any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States. . ."¹¹⁶ Because no new pockets would be created by the extension of the territorial sea from three to twelve miles, this statute does not need amendment. The second use of territorial sea in the Act is not impacted by the Proclamation because it is referenced to the baseline rather than the seaward limit.¹¹⁷

c. Shore Protection Act of 1988¹¹⁸

This law prohibits the transport of municipal or commercial waste in coastal waters without a permit.¹¹⁹ Because "coastal waters" are defined to include both the territorial sea and the EEZ¹²⁰, the Proclamation does not affect jurisdiction under this Act.

d. Longshore and Harbor Workers' Compensation Act¹²¹

This Act provides coverage for personal injuries occurring on the navigable waters of the United States. The term "United

¹¹⁵16 U.S.C. §§ 1851 (Historical and Statutory Notes) (1988).

¹¹⁶Id. § 1856(2).

¹¹⁷Id. § 1851 (Historical and Statutory Notes).

¹¹⁸33 U.S.C. §§ 2601 - 2623 (1988).

¹¹⁹Id. § 2602(a).

¹²⁰Id. § 2601(2).

¹²¹33 U.S.C. §§ 901-950 (1988).

States" is defined to include the territorial waters of the coastal states, the territories and the District of Columbia.¹²² Courts have construed the term "navigable waters" broadly to include both state waters and high seas areas beyond 12 miles.¹²³ Therefore, no practical ambiguity has resulted.

e. Oil Pollution Act of 1990¹²⁴

The Oil Pollution Act of 1990 governs liability for removal costs and damages associated with oil discharged from vessels or facilities into navigable waters, the adjacent shoreline, or the EEZ. Because the territorial sea is defined in the Act to extend seaward to a limit of three miles¹²⁵, no ambiguity exists.

f. Atlantic Tunas Convention¹²⁶

For purposes of implementing the Atlantic Tunas Convention, Congress has defined fisheries zones to include "the waters included within a zone contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, . . . [to] two hundred nautical miles. . . ."¹²⁷ Here the territorial sea is equated with the seaward boundary of each coastal state, which is

¹²²Id. § 902(a).

¹²³St. Julien v. Deamond M. Dulley, 403 F. Supp. 1256 (E.D. La. 1975); Reynolds v. Ingalls Shipbuilding Division, Litton System, Inc., 788 F. 2d 264 (5th Cir. 1986).

¹²⁴33 U.S.C. §§ 2701-2761 (1988).

¹²⁵Id. § 2701(35).

¹²⁶16 U.S.C. §§ 971 - 971i (1988).

¹²⁷Id. § 971(4).

determined under the Submerged Lands Act. SLA boundaries are not affected by the territorial sea proclamation, so no ambiguity is created here.

g. Jellyfish . . . , Pests, and Seaweed . . . Elimination¹²⁸

This Act authorizes the Secretary of Commerce to assist states in controlling and eliminating jellyfish in coastal waters.¹²⁹ Absence of a definition of coastal waters makes it unclear whether the Secretary can assist state efforts in the 3-12 nautical mile zone. The broad purpose of the Act, however, suggests that such authority extends into the ocean as far as necessary.

h. Comprehensive Environmental Response and Civil Liability Act (CERCLA)¹³⁰

This Act establishes a complex system for financing the cleaning up of hazardous waste sites. It applies both on land and in the navigable waters of the United States, which are defined as including the territorial sea.¹³¹ The territorial sea is defined in reference to the Submerged Lands Act¹³², thereby negating any potential ambiguity raised by the Proclamation.

¹²⁸16 U.S.C. §§ 1201 - 1205 (1988).

¹²⁹Id. § 1201.

¹³⁰42 U.S.C. §§ 9601 - 9675 (1988).

¹³¹Id. § 9601(15).

¹³²Id. § 9601(30).

i. General Navigation Rules¹³³

This law authorizes the Coast Guard to differentiate between inland waters and the high seas for a variety of purposes. The boundary is to be located within 12 nautical miles from the baseline from which the territorial sea is measured.¹³⁴ On its face, this provision does not reflect any ambiguity as the Coast Guard's authority is not tied to the seaward boundary of the territorial sea. However, because "high seas", "territorial seas" and "inland waters" have specific meanings in the context of international law, it would be helpful if Congress would attempt to follow more closely the international definitions. For example, application of the term "high seas" to what are clearly waters of the territorial sea should be abandoned.

j. Eastern Pacific Tuna Fishing¹³⁵

This law refers to the territorial sea only in the context of its association with the baseline from which it is measured. ". . . but the Agreement Area does not include the zones within twelve nautical miles of the baseline from which the breadth of the territorial sea is measured . . ."¹³⁶ Therefore, no ambiguity exists.

k. Marine Mammal Protection Act¹³⁷

¹³³33 U.S.C. § 151 (1988).

¹³⁴Id. § 151(b).

¹³⁵16 U.S.C. §§ 972-972(h) (1988).

¹³⁶Id. § 972(2).

¹³⁷16 U.S.C. §§ 1361 through 1407 (1988).

The Marine Mammal Protection Act (MMPA) regulates the exploitation of marine mammals in U.S. waters. Waters under the jurisdiction of the United States for purposes of the MMPA include both the territorial sea and the EEZ.¹³⁸ This broad definition renders the 12-mile extension irrelevant to jurisdiction under the Act.

1. North Atlantic Salmon Fishing Act¹³⁹

This Act refers to the territorial sea in relation to the land rather than seaward boundary;¹⁴⁰ therefore the Proclamation does not affect it.

m. International Narcotics Control Act¹⁴¹

This Act states that "[w]ith the agreement of a foreign country, [prohibition of an officer or employee of the United States making an arrest as part of any foreign police action] does not apply with respect to maritime law enforcement operations in the territorial sea of that country."¹⁴² Although reflective of the United States' willingness to recognize other nations' 12-nautical-mile territorial seas, the United States' territorial sea is not at issue here.

¹⁸⁵See supra, Section III "Statutory Ambiguities."

¹⁸⁶Leeper, supra note 182, at 65. In one case, a state provided input at each stage of the process, filing over 500 pages of comments to the Interior Department's draft environmental impact statement. The comments did not cause a single change to Interior's planning.

¹⁸⁷See e.g., §§ 110-113 of Pub. L. 100-446, 102 Stat. 1774, 1801 (1988) (moratorium on offshore federal oil and gas leasing included in appropriation measure).

n. Sea Grant Act¹⁴³

The Sea Grant Act establishes a nationwide, university based marine research program. The marine environment includes the ocean, coastal and Great Lakes resources, including those of the coastal zone (as defined in the Coastal Zone Management Act), the Great Lakes, territorial sea, EEZ, OCS and high seas.¹⁴⁴ The broad definition in this Act encompasses the 12 nautical mile zone.

o. Ports and Waterways Safety Act¹⁴⁵

Among other things, the Ports and Waterways Safety Act authorizes the designation of traffic separation schemes for vessels operating in the U.S. territorial sea and high seas approaches to ports.¹⁴⁶ When reasonable and necessary, the Secretary of Transportation can mandate the use of traffic separation schemes for certain categories of vessels operating in the territorial sea of the United states and on the high seas beyond the territorial sea.¹⁴⁷ No problem is presented here under domestic law because the traffic separation schemes are to be created wherever needed, without regard to the status of the waters.

p. Federal Water Pollution Control Act (FWPCA or Clean Water

¹⁸⁸But see Lowry, Jarman & Maehara, *infra* notes 244-246 and accompanying text. This study could be interpreted to show that consultancy has been effective in some circumstances. In 1983, only 432 (or six percent) of the federal consistency reviews were

Act)¹⁴⁸

The Clean Water Act regulates the discharges of pollutants into the navigable waters of the United States, which include the territorial sea.¹⁴⁹ The territorial sea is defined in the Act as extending seaward for three nautical miles.¹⁵⁰ Therefore, the Proclamation does not affect federal or state agency authority under the Clean Water Act.

q. National Ocean Pollution Planning Act¹⁵¹

The Ocean Pollution Research and Development and Monitoring Planning Act directs preparation of a plan for pollution research and monitoring of the marine environment. By definition, the marine environment encompasses the territorial sea, EEZ, OCS and high seas.¹⁵² Because application of the Act is so broad, the extension of the territorial sea to 12 nautical miles should have no impact.

¹⁴⁸Cooperative Agreement Between the Department of the Interior and the State of Hawaii for Marine Mineral Joint Planning and Review (JPA) (1988).

¹⁴⁹464 U.S. 312 (1984).

¹⁵¹16 U.S.C. § 1453(1) (1988).

¹⁵²Attempts by Congress to date have been unsuccessful. See e.g. S.B. 341 (Title VIII, Impact Assistance) introduced by Senator Johnston; S.B. 49 (Coastal Resources Enhancement) introduced by Senator Stevens; H.R. 94 (Revenue Sharing) introduced by Representative Fields. 37

r. Vessel Documentation Act¹⁵³

Congress has set out vessel documentation requirements that are prerequisites for employing vessels in certain trades.¹⁵⁴ Certificates of documentation may be endorsed with a registry endorsement that designates the trade the vessel is authorized to engage in.¹⁵⁵ A fishery endorsement is needed to fish in the territorial sea and fishery conservation zones adjacent to Guam, American Samoa, and the Northern Mariana Islands.¹⁵⁶ The breadth of the fishery conservation zone makes the distinction between a 3 and 12 mile territorial sea irrelevant.

s. Maritime Drug Law Enforcement Act¹⁵⁷

No ambiguity is present in this statute since it refers only to the territorial seas of foreign nations.¹⁵⁸

Conclusion

The above discussion points out the need for Congressional action to clarify ambiguities in domestic laws that implicate the territorial sea. The diverse nature of the problems created

into account Louisiana's argument regarding the possibility of a state's lands being devalued as a result of unsuccessful adjacent federal exploration.

¹⁹⁴Id., pursuant to the Mineral Leasing Act of 1920.

¹⁹⁵Littleton, Coastal States, Inland States and a 12-Mile Territorial Sea, 17 J. MAR. L. AND COMM. 539 (1986).

¹⁹⁶See supra, note 189. The isolation of the Hawaiian islands eliminates conflicts that otherwise exist between adjacent states. The distance from the continental U.S. also presents a problem of overextension for federal management agencies, thereby providing an incentive to seek cooperation from the state.

¹⁹⁷16 U.S.C. § 1452(1) (1988).

¹⁹⁸Keeney, Impact of Extended Territorial Sea on NOAA's Marine Resource Responsibilities, in Proceedings: National Conference on the States and an Extended Territorial Sea [hereinafter Proceedings] 73, 75 (Lauriston R. King and Amy

militates against a Congressional approach that would apply one definition to all references in current law to the territorial sea. The preceding review and the discussion that follows also demonstrate the need for Congressional flexibility in dealing with federal-state relationships in the marine waters adjacent to the United States.

IV. MANAGEMENT OF NONLIVING RESOURCES IN THE EXTENDED TERRITORIAL SEA

Introduction

Historically, both the federal and state governments have made competing claims to ownership (dominium) and regulatory authority (imperium) over resources in offshore areas. Initially, lack of assertion of authority by the federal government left management of offshore mineral resources in the hands of the adjacent states. President Truman's 1945 claim of ¹⁵⁹Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (September 28, 1945) of jurisdiction and control over the resources of the subsoil and seabed of the continental shelf¹⁵⁹ set the stage for federal encroachment. Even though a press release accompanying the 1945 Proclamation stated that the policy established United States jurisdiction "from an international standpoint" and did not "touch upon the question of Federal versus State

control,"¹⁶⁰ the federal government soon asserted claims against states with valuable offshore mineral resources, suggesting that the Proclamation served a dual purpose: establishing an international claim and altering the balance of state/federal relations.¹⁶¹ Although the Submerged Lands Act (SLA)¹⁶² specifically granted title to the submerged lands adjacent to coastal states out to a certain distance¹⁶³ (and thus not to the extent of an expanding U.S. territorial sea),¹⁶⁴ the history of competing federal-state claims suggests the possibility of renewed state claims beyond the three-nautical-mile limit.

Previous Federal-State Conflicts

¹⁶⁰White House Press Release, September 28, 1945, reprinted in 13 DEP'T. ST. BULL. 484 (1945).

¹⁶¹Nicol, Hawaii's Territorial Sea and Exclusive Economic Zone: Analysis and Assessment of the State's Right to Manage Resources in Extended Ocean Zones 11 (unpublished student paper prepared for Second Year Seminar, University of Hawaii Law School, April 1987).

¹⁶²43 U.S.C. §§ 1301 - 1315 (1988)

¹⁶³43 U.S.C. §§ 1301(a), 1311.

¹⁶⁴It is not clear whether the SLA grants to states ownership of the water column and water surface. The language of U.S.C. § 1314(a) reserving federal rights refers to the navigable waters, but the language granting state ownership, use, and management rights speaks only of "lands and natural resources." Section 1311(d) expressly preserves federal authority over navigation, flood control, and production of power; the awareness of Ocean Thermal Energy efforts at that time suggests that Congress considered water column uses, but that inference is not convincing in light of the Act's focus on development of the energy resources of the seabed.

Resolution of this uncertainty would have a direct impact upon the interpretation of statutory ambiguities, discussed supra in Section III.

In the landmark case of United States v. California,¹⁶⁵ the U.S. Supreme Court held that the federal government, through its foreign policy power as sovereign, has paramount rights in the submerged lands. The Court was persuaded that no previous case decided conflicting claims between a state and the federal government to the three-mile belt in a way that required extension of the Pollard's Lessee v. Hagan¹⁶⁶ inland-water rule to the ocean area.¹⁶⁷ The Supreme Court also rejected the State of California's historical claim to the three-mile marginal sea because the concept of the territorial sea was not settled in the international community at that time. The original U.S. territorial sea claim was made by Secretary of State Thomas Jefferson after the formation of the union; therefore, none of the original 13 states ever owned the submerged lands of the marginal sea (and consequently neither did California).

In United States v. Texas,¹⁶⁸ the U.S. Supreme Court maintained that the "national external sovereignty" rationale of California was compelling, despite strong historical claims of dominium resulting from Texas's prior status as an independent nation. It held that where property interests are so

¹⁶⁵332 U.S. 19 (1947).

¹⁶⁶44 U.S. (3 How.) 212 (1845) (holding that the states owned the inland navigable tidewaters in trust for their people, and that because Alabama was admitted to the union on an equal footing with the other states it thereby became owner of the tidelands within its boundaries).

¹⁶⁷California I, 332 U.S. at 31.

¹⁶⁸339 U.S. 707 (1950).

subordinated to the rights of sovereignty, as here, they will follow sovereignty. Furthermore, consistency with California, Louisiana,¹⁶⁹ and the equal footing doctrine required the national government to prevail.¹⁷⁰

Initial Congressional Response Failed to Resolve Conflict

In 1953, the SLA overturned the California, Louisiana, and Texas decisions, giving coastal states exclusive rights to the resources of the seabed within three miles of their coasts.¹⁷¹

¹⁶⁹United States v. Louisiana, 339 U.S. 699 (1950).

¹⁷⁰Texas, 339 U.S. at 719.

¹⁷¹43 U.S.C. § 1311(a) (1988):

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States....

Section 1311(b):

(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources....

Section 1311(d):

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or

In addition, states bordering the Gulf of Mexico were provided the opportunity to extend boundaries to three marine leagues (nine nautical miles) if they could prove that such a boundary was either previously approved by Congress or existed prior to admission to the union.¹⁷² The federal government's resistance to Gulf State claims of submerged lands beyond three miles from shore prompted suits by Louisiana, Texas, Mississippi, Alabama,¹⁷³ and Florida.¹⁷⁴ Only Texas and Florida succeeded in persuading the court to recognize three-marine-league boundaries.

The ambiguity of the SLA with respect to inland boundaries has also sparked litigation. The SLA grant contains the

to provide for flood control, or the production of power.

¹⁷²43 U.S.C. § 1312 (1988):

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

¹⁷³United States v. Louisiana, 363 U.S. 1 (1960).

¹⁷⁴United States v. Florida, 363 U.S. 121 (1960).

following limiting language: "in no event...[t]o be interpreted as extending from the coast line more than three geographical miles...."¹⁷⁵ The "coast line" was defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."¹⁷⁶ The term "inland waters," however, was not defined in the Act. In United States v. California¹⁷⁷ (California II), the Court defined inland waters by reference to standards found in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. This Convention allows either a) straight baselines or b) baselines determined by the arcs and circles method. Accepting the federal government's position that application of straight baselines, a method the United States was opposing internationally, would hurt its international posturing, the Court applied the arcs and circles test. The California II decision has been criticized for abandoning the consideration of historical evidence that had guided the Court in California I and for maintaining the "fiction" of national external sovereignty.¹⁷⁸ In the opinion of Professor Milner S. Ball, the protection of national interests would be best achieved by state ownership with a concurrent federal government interest in those rights as outlined in the Constitution--power over commerce,

¹⁷⁵43 U.S.C. § 1301(b) (1988) (emphasis added).

¹⁷⁶43 U.S.C. § 1301(c) (1988).

¹⁷⁷381 U.S. 139 (1965).

¹⁷⁸Ball, Good Old American Permits, 12 ENV. L. J. 623 (1982).

navigation, national defense, and international affairs.¹⁷⁹

President Reagan's Territorial Sea Proclamation appears to have eliminated the security interests behind the federal government's claim to control the offshore waters beyond three miles, thus undercutting the rationale of earlier Court decisions. Coastal state control of areas in the 3-12 nautical-mile zone would not now present any significant problems for national security. A strong argument can be made, therefore, that the states should now have substantial powers over the 3-12 mile area.

Secondary Response Also Ineffective

State opposition to federal offshore development activities prompted 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA) that make numerous references to federal-state cooperation.¹⁸⁰ Read with their accompanying rules, the OCSLA

¹⁷⁹Id. at 635. Consider also 43 U.S.C. § 1314(a) (1988):

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by § 1311 of this title.

¹⁸⁰43 U.S.C. § 1332(4)(C) (1988):

such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production

of, minerals of the outer Continental Shelf. (Emphasis added.)

43 U.S.C. § 1332(5):

the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized. (Emphasis added.)

43 U.S.C. § 1344(c)(1):

During the preparation of any proposed leasing program under this section, the Secretary shall invite and consider suggestions for such program from any interested Federal agency, including the Attorney General, in consultation with the Federal Trade Commission, and from the Governor of any State which may become an affected State under such proposed program. The Secretary may also invite or consider any suggestions from the executive of any affected local government in such an affected State, which have been previously submitted to the Governor of such State, and from any other person. (Emphasis added.)

43 U.S.C. § 1345(a):

Any Governor of any affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan....

43 U.S.C. § 1345(e):

The Secretary is authorized to enter into cooperative agreements with affected States for purposes which are consistent with this chapter and other applicable Federal law. Such agreements may include, but need not be limited to, the sharing of information (in accordance with the provisions of section 1352 of this title), the joint utilization of available expertise, the facilitating of permitting procedures, joint planning and review, and the formation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws, regulations, and stipulations relevant to outer Continental Shelf operations both onshore and offshore. (Emphasis added.)

43 U.S.C. § 1346(c):

amendments obviously were intended to give the states an opportunity to participate more extensively in federal offshore decisions. For example, section 8(g)¹⁸¹ requires the Department of Interior to consult with the governor of a state adjacent to a proposed lease of submerged lands where a possibility of common pools or fields exists (recognizing the problem of drainage of hydrocarbons from beneath state lands through wells located in the federal outer continental shelf). Disagreeing with the Interior Department's position that it is not required to act on the governor's recommendations, the states of Louisiana and Texas each brought suits to enjoin certain offshore lease sales by the Interior Department.¹⁸² This action represented a drastic step for Louisiana, a producing state whose economy is directly linked to oil and gas revenues. The federal government won the suit and proceeded with the sale of the contested lease, but all monies received from 8(g) common pools (as part of the lease) were placed in escrow by court order. Congress responded to the drawn-out litigation with 1986 amendments to the OCSLA¹⁸³ providing for lump sum payment of \$1.4 billion from the Section

The Secretary shall, by regulation, establish procedures for carrying out his duties under this section, and shall plan and carry out such duties in cooperation with affected States.... (Emphasis added.)

¹⁸¹43 U.S.C. § 1337(g)(1)(B) and (D) (1988).

¹⁸²Leeper, Offshore Oil and Gas, in Proceedings: National Conference on the States and an Extended Territorial Sea 58, 62 (Lauriston R. King and Amy Broussard, eds. 1987).

¹⁸³Pub. L. No. 99-272, 100 Stat. 148, 150 (1986), codified at 43 U.S.C. § 1337(g).

8(g) fund to the coastal states.

Uncertainties regarding Congressional intent and statutory interpretation have had a detrimental effect upon the already tense federal-state relations in other states as well.¹⁸⁴ The history of federal-state conflicts illustrates the willingness of the states to fight for their rights in the marginal sea. It is likely, therefore, that the territorial sea extension will lead to renewed litigation of both regulatory (particularly with respect to federal-state cooperation) and proprietary issues. Potential impacts upon other legislation¹⁸⁵ present even further prospects for litigation. These inconsistencies could be addressed through the process of statutory construction, but a much better solution would be for Congress to resolve the uncertainties through establishing a comprehensive and comprehensible national ocean policy.

Equities Favoring Coastal State Control

The Territorial Sea Proclamation has arguably tilted the balance of offshore resource interests toward the states. If accepted, this view provides a rational basis for extending state ocean boundaries. At the very least, the Proclamation provides an opportunity to reevaluate the balance of power in offshore

¹⁸⁴See, e.g., Note, The Seaweed Rebellion: Federal-State Conflicts over Offshore Oil and Gas Development, 18 WILLAMETTE L. REV. 535 (1982); Note, The Seaweed Rebellion Revisited: Continuing Federal-State Conflicts in OCS Oil and Gas Leasing, 20 WILLAMETTE L. REV. 83 (1984); Secretary of Interior v. California, 464 U.S. 312 (1984).

¹⁸⁵See supra, Section III "Statutory Ambiguities."

resource management. Notions of equity favor such reconsideration. For example, coastal states not only must supply sites and facilities for construction, transportation, processing, and storage but also must bear the environmental burden of these support industries. In addition, the coastal state must provide a governmental and social infrastructure for the offshore workers, a costly undertaking.

Congress should also consider the practical effectiveness of the OCSLA's Section 8(g) and consultation provisions. Evidence suggests that these provisions have not sufficiently protected state interests. Throughout years of contention with the federal government, state frustration has been compounded by the Interior Department's apparent refusal to adequately address state concerns. Despite diligently following the cooperative provisions of the OCSLA, states sometimes have received a mere paragraph in response from the Interior Department stating that their concerns were noted but rejected.¹⁸⁶

The Department of the Interior's lack of responsiveness created such political pressure from the State of California that Congress has established a moratorium on federal leases off the California coast.¹⁸⁷ In addition to affecting oil and gas

¹⁸⁶Leeper, supra note 182, at 65. In one case, a state provided input at each stage of the process, filing over 500 pages of comments to the Interior Department's draft environmental impact statement. The comments did not cause a single change to Interior's planning.

¹⁸⁷See e.g., §§ 110-113 of Pub. L. 100-446, 102 Stat. 1774, 1801 (1988) (moratorium on offshore federal oil and gas leasing included in appropriation measure).

development, the shutdown has retarded ocean mining efforts, with a likely continuing negative impact on future mining efforts in the area. The mechanisms in place are ineffective. Without a meaningful right to consultation for states,¹⁸⁸ the federal government has little incentive to act in a manner that takes into account state interests and concerns.

Political and economical advantages are to be gained by making concessions to the coastal states. For example, the Interior Department and the State of Hawaii have entered into a Joint Planning Agreement over offshore hard mineral mining in the

¹⁸⁸But see Lowry, Jarman & Maehara, *infra* notes 244-246 and accompanying text. This study could be interpreted to show that consultancy has been effective in some circumstances. In 1983, only 432 (or six percent) of the federal consistency reviews were objected to by the states; six percent of the consistency reviews in states responding to a 1988 survey were objected to. *Id.* at 6.

The 1983 and 1988 surveys indicate that state and federal agency officials do resolve many disputes through informal negotiation. Disposition of formal appeals between 1983 and 1991 show that the Secretary of Commerce is reluctant to override state decisions. Of 75 filed appeals, six state objections were overridden and eight upheld; one has been stayed pending further negotiations; twenty-six were withdrawn by mutual consent; sixteen are currently pending approval; and eighteen have been dismissed for good cause. *Id.* at 14. This apparent evenhandedness, however, may be misleading. In five of the six cases in which a state agency has sought mediation, the federal agency has refused to participate (the sixth case led to litigation, *Secretary of the Interior v. California*). *Id.* at 13. The Secretary's written opinions on formal appeals have construed "competing national interest" broadly against the states, finding that the national interest benefits of OCS energy development outweigh potential adverse environmental impacts. *Id.* at n.2, 14, citing Eichenberg & Archer, The Federal Consistency Doctrine: Coastal Zone Management and 'New Federalism' 14 ECOL. L. Q. 9, 41-46 (1987).

EEZ surrounding Hawaii.¹⁸⁹ Interior's willingness to give Hawaii a substantial role in the preparation of the environmental impact statement and subsequent decision-making has paved the way for future mining efforts. This experience provides a stark contrast to California's experience with offshore oil and gas leasing. Interior's reticence to cooperate fully under the Coastal Zone Management Act created additional political and economic costs, further exacerbating federal-state tension in the offshore area. Interior's refusal to provide consistency certification for oil and gas leases offshore California led to protracted litigation that ultimately reached the U.S. Supreme Court.¹⁹⁰ In Secretary of the Interior v. California,¹⁹¹ the Court agreed with Interior. Although the case vindicated the Interior's legal position, it did nothing to alleviate the political problems. Moratoria continue in waters off California and at the end of its 1990 session, Congress overturned the Supreme Court by extending the CZMA's consistency provision to activities within and outside the coastal zone, including oil and gas leases.

The SLA, OCSLA, and CZMA all recognize the significance of state interests in offshore mineral resource decision-making. Interior's continual ignoring of these interests, coupled with

¹⁸⁹Cooperative Agreement Between the Department of the Interior and the State of Hawaii for Marine Mineral Joint Planning and Review (JPA) (1988).

¹⁹⁰464 U.S. 312 (1984).

¹⁹¹16 U.S.C. § 1453(1) (1988).

diminished federal security interests in the zone, suggest the need for re-ordering of decision-making in the extended territorial sea.

Prospects for Cooperation -- Revenue-Sharing

Should the federal government be unwilling to relinquish its control over nonliving resources in the 3-12 mile zone, several other options can be pursued. One remedy is for Congress to implement some form of revenue-sharing between the state and federal governments.¹⁹² Coastal states would be more supportive of offshore development if they had the financial wherewithal effectively to research, plan, manage, and propose mitigation measures concerning OCS leasing impacts, and particularly if they had a positive financial stake in OCS development. The costs of revenue-sharing would be offset by the increased federal receipts that would flow from a more orderly leasing process. More than simply correcting long-standing inequities, revenue-sharing represents a small, but critical investment that will ensure timely production and a sound marine/coastal resource management scheme.

In support of their claim¹⁹³ for a 50% share of section

¹⁹²Attempts by Congress to date have been unsuccessful. See e.g. S.B. 341 (Title VIII, Impact Assistance) introduced by Senator Johnston; S.B. 49 (Coastal Resources Enhancement) introduced by Senator Stevens; H.R. 94 (Revenue Sharing) introduced by Representative Fields.

¹⁹³Leeper, supra note 182, at 63. Texas was ultimately successful in obtaining a 50% share where the state was the original lessor, reserves were proven, and the federal lease brought a significantly higher bid as a result of the information obtained from state leasing. The court did not, however, take

8(g) common pool revenues, coastal states analogized their situation to that of states that receive 50% of all revenues derived from mineral leasing of federal lands within their borders. Coastal states, therefore, should receive comparable payment for the inclusive federal leasing of the states' (common oil field) submerged lands.¹⁹⁴

To counter foreseeable opposition by land-locked inland states, Richard Littleton has proposed a modified revenue-sharing plan.¹⁹⁵ He believes that unified support for coastal state expansion, via sharing with all 50 states, would increase the chances for a veto override in the Senate, if necessary. The states could be convinced by the argument that coastal resource money going directly into state treasuries would be more secure than federal appropriations. The federal interests in Congress could be appeased by stressing that the proposal changes none of the established rights and duties of the states and the federal government vis-a-vis each other; rather, the proposal is merely a reallocation of revenues. And it creates an added benefit: increased ocean awareness. A nation-wide move to institute stronger resource and energy conservation measures would develop naturally out of the realization by inland states that wasteful

into account Louisiana's argument regarding the possibility of a state's lands being devalued as a result of unsuccessful adjacent federal exploration.

¹⁹⁴Id., pursuant to the Mineral Leasing Act of 1920.

¹⁹⁵Littleton, Coastal States, Inland States and a 12-Mile Territorial Sea, 17 J. MAR. L. AND COMM. 539 (1986).

or careless production procedures reduce the amount of revenues flowing to their individual states.

Prospects for Cooperation -- Joint Partnerships

The Joint Planning Agreement between Hawaii and the Department of the Interior mentioned earlier demonstrates that a mutually acceptable agreement that accounts for respective interests of states and the federal government can be reached. Although this example may not work in other areas,¹⁹⁶ it is a model for successful federal-state interaction. The state and federal governments had identical interests in this situation; where environmental concerns produce conflict between the two divisions of government, similar cooperative efforts will be less likely to succeed.

Conclusions

Ownership of submerged lands out to three miles was granted by the SLA to all coastal states, with the exception of Texas and Florida who have three leagues in the Gulf of Mexico. The federal government argues that the December 1988 Proclamation extending the territorial sea has no legal impact on the proprietary status of submerged lands beyond those boundaries. However, uncertainty regarding the status of this new U.S. territory presents a compelling opportunity for a comprehensive

¹⁹⁶See supra, note 189. The isolation of the Hawaiian islands eliminates conflicts that otherwise exist between adjacent states. The distance from the continental U.S. also presents a problem of overextension for federal management agencies, thereby providing an incentive to seek cooperation from the state.

re-examination of federal ocean policy and for reconsideration of the states' role in territorial sea management. These important policy matters should not continue to be accomplished in piecemeal fashion or by default, but in an integrated manner. As Congress has already recognized in the CZMA, "the increasing and competing demands upon the lands and waters of our coastal zone ... have resulted in ... permanent and adverse changes to ecological systems."¹⁹⁷ Mere consultative rights, which are often ignored anyway, do not prevent the coastal states from being subjected to the whims of the federal government. Although no single geographic definition will satisfy the needs of all coastal states, a new functional approach to resource management is needed.

V. MANAGEMENT OF LIVING RESOURCES IN THE EXTENDED TERRITORIAL SEA

Introduction

Proper management of living resources in United States waters is clearly a matter of crucial importance. Nearly 90% by weight and 70% by value of our fishery resources are caught within 12 miles of the coast.¹⁹⁸ Technological advances over the years have improved the efficiency of the fishing industry,

¹⁹⁷16 U.S.C. § 1452(1) (1988).

¹⁹⁸Keeney, Impact of Extended Territorial Sea on NOAA's Marine Resource Responsibilities, in Proceedings: National Conference on the States and an Extended Territorial Sea [hereinafter Proceedings] 73, 75 (Lauriston R. King and Amy Broussard, eds. 1987).

but have also decimated our finite and nonexpanding fishery resources. Contrary to the guiding principles of prior fisheries management efforts, the collapse of some of our managed fisheries have taught us that we have no "under-utilized" species.¹⁹⁹ Consequently, existing management theories must be restructured to incorporate higher conservation standards and encourage the development of enhancement programs. Any proposed alternative approach to living resource management must acknowledge present confusion regarding regulatory authority in the 3-12 nautical mile zone.

Sources of Conflict, Past and Potential

Under existing statutory arrangements, states have jurisdiction over the resources in the first three miles offshore,²⁰⁰ but a state can effectively exercise jurisdiction beyond this area with federal acquiescence.²⁰¹ Conversely, the federal government can preempt state authority in the territorial sea in exceptional cases involving fisheries found predominantly outside the territorial sea. This action has been taken only

¹⁹⁹Squires, Existing and Potential Resources in Offshore Waters of the United States, in Proceedings, supra note 198, at 27.

²⁰⁰See e.g. Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1861 (1988); Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988).

²⁰¹See e.g., Bundrandt, 546 P.2d 530 (Alaska, 1976); Skiriotes, 212 U.S. 69 (1941). See also, Ballweber & Hildreth, "Summary of Fishery Management Implications of the Territorial Sea Extension" (Draft for Comment, May 31, 1989).

twice since 1976,²⁰² indicating that relations between the states and the federal government under the Magnuson Act have been generally successful.²⁰³

Problems Arising From Exclusive State Control

Any proposed management alternative must be carefully considered as resolution of federal-state conflicts by granting coastal states control of the 12-nautical-mile territorial sea could create its own problems. The MFCMA Regional Councils are concerned that their authority will be limited if states are granted jurisdiction over the three to 12 mile zone. Similarly, commercial fishers are afraid that states will use the extended coastal zone to exclude nonresident commercial fishers from state waters. Federal officials have warned that the grant of full fishery management authority to the states would prompt a return to interstate "beggar-thy-neighbor" squabbles.²⁰⁴ Cooperative interstate management efforts prior to the MFCMA failed largely

²⁰²See Ball, The States and the Territorial Sea, in Proceedings, supra note 198, at 11, citing the following two cases for the proposition that the line drawn on water at three miles is not an effective division between state and federal interests:

- 1) Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (a federal statute was found to prevent Virginia from enforcing certain of its fishing laws); and
- 2) California v. Zook, 336 U.S. 725 (1979) (holding that where there is a need for national uniformity, federal interests prevail; where there is a need for diversity and local approaches, then state interests should dominate).

²⁰³Keeney, supra note 198, at 75.

²⁰⁴Id.

because each state sought to protect its own fishing industry at the expense of its neighbors. The clear danger is that narrow-minded and uncoordinated management efforts could have a devastating impact on the operation of sound conservation programs.

Problems Arising From Preemptive Federal Control

The problems foreseen in the previous paragraph are not necessarily determinative. Leniency of the federal government has been a cause of major problems in the management of living resources.²⁰⁵ The Baldrige cases²⁰⁶ showed that as long as federal regulations allow the use of gear prohibited by state law, the state will be unable to enforce its own prohibition unless actual use of prohibited gear in state waters is observed. In Baldrige, a suit was brought by the State of Florida against the U.S. Department of Commerce seeking to prevent implementation of parts of the federal management plans addressing mackerel and grouper fisheries in the Gulf and Atlantic. Florida's claim was based on the fact that the federal plans were in direct conflict with Florida law (which prohibits the use of purse seines and fishtraps to take fish); therefore, the Department of Commerce was in direct violation of the consistency provisions of the CZMA.²⁰⁷ The obstruction of preventive measures resulted in the collapse of the particular fishery involved in the Baldrige

²⁰⁵McCoy, Observations on a Twelve-Mile State Fisheries Jurisdiction, in Proceedings, supra note 198, at 48.

²⁰⁶Id. at 47, originally filed as Florida v. Department of Commerce (cite not provided).

²⁰⁷16 U.S.C. § 1456 (1988).

cases, dramatically illustrating the practical effect of divergent management approaches.²⁰⁸ Clarification of the federal consistency requirement through the 1990 CZMA reauthorization²⁰⁹ should reduce the likelihood of Baldrige-type conflicts.²¹⁰ Amendments to federal statutes could remove some of the difficulties inherent in pre-emption by declaring that the federal law out to 12 miles is the same as the law that would apply within the adjacent state's territorial waters. An even better option would be to apply minimum federal standards to state and federal waters and allow the more restrictive state regulations to apply in federal waters as well. This approach would enable coastal states to manage their migratory resources more effectively; consistency would at least require federal prohibition of fishing gear prohibited by state law, effectively eliminating the problems encountered Baldrige.

²⁰⁸McCoy, supra note 205, at 47.

²⁰⁹See supra note 8.

²¹⁰Another example of conflict between federal and state management of living resources involves the Tortugas Shrimp Bed off the coast of Florida. More permissive federal regulations allowing certain kinds of fishing gear that state regulations prohibit have hampered state law enforcement. State officers can only enforce state law when it can be shown that the offensive fishing gear was used in state waters because the less restrictive federal regulations justify mere possession (the fishers need only say that they are headed for federal or unregulated waters). Extension of Florida's jurisdiction to 12 miles would resolve some of the existing confusion by narrowing (but not eliminating) the band of unregulated waters sandwiched between Florida territorial waters and the northwestern corner of the federal marine sanctuary boundary. A 12-mile limit would certainly be more uniform than the three and nine-mile limits currently in place.

The Legal Regime of High Seas Living Resource Management

The conflicts discussed above do not reflect the norm for management of living ocean resources. For the most part, absence of federal regulatory efforts permits states to exercise jurisdiction beyond three miles from shore. This authority was established in Skiriotes v. Florida,²¹¹ a case where the state prosecuted some of its citizens for violating Florida's prohibition on shrimping, despite the fact that the act was committed outside state waters. The United States Supreme Court found ". . . no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters which the State has a legitimate interest and where there is no conflict with acts of Congress."²¹² Later, the Alaska Supreme Court, in State v. Bundrant,²¹³ interpreted the Outer Continental Shelf Lands Act (OCSLA) to create an intended distinction between the inorganic resources of the subsoil and seabed (principally oil), which were within the exclusive domain of the federal government, and the living marine resources, which were not affected by the act.²¹⁴ The court thus permitted the State of Alaska to regulate the taking of Alaskan King Crab beyond its territorial waters.

The federal government typically acquiesces where a state

²¹¹212 U.S. 69 (1941).

²¹²Id. at 77.

²¹³546 P.2d 530 (Alaska, 1976).

²¹⁴Id. at 546.

has a legitimate stake in the specific resource involved and shows through the investment of money and talent that it is willing to manage the resource with some sophistication and care. For example, the Alaskan government in particular has made significant expenditures to regulate fishery resources.²¹⁵ As a result of these efforts, the interests of both the federal and state governments have been advanced through the state's salmon management and enhancement program. At the same time, the two governments have avoided rivalries regarding jurisdictional limits. Alaska also has had success regulating crabbing far beyond the three mile limit and into the high seas.

Advantages of Increased State Control

The state is the most logical administrator of these resources as the entity most directly affected by management efforts and closest to the resource. The federal government, however, maintains a significant role in negotiating treaties with foreign nations and by exercising primary responsibility for administration of the MFCMA. The impact on foreign relations must be considered in evaluating any proposal for altering fishing rights in the exclusive economic zone (EEZ). Although little foreign fishing occurs within 3 to 12 miles from shore, some important factors need to be weighed. Amendment of the MFCMA to prohibit foreign fishing throughout the extended territorial sea will destroy the potential for foreign-

²¹⁵See infra, Section VI, notes 236-237 and accompanying text.

processing/domestic-harvesting joint ventures in the 3-12 mile zone. Additionally, the symbolic effect of further reducing the area within the U.S. EEZ in which foreign nationals may harvest surplus stock must also be considered.²¹⁶

In the final analysis, however, the more compelling state interests predominate. The direct impact of management efforts on state lands, waters, and inhabitants, and the proximity to the area make the state the most logical administrator. The state has much greater interests at stake and is, therefore, more likely to enforce appropriate regulations.

Modification of other living resource management regulations would be less controversial. An extension of state authority from three to 12 miles would be an effective way to promote the purposes of the Endangered Species Act,²¹⁷ because state regulations are often more protective than their federal counterparts. Similarly, an extension of state jurisdiction could enhance the protection provided by the Marine Mammal Protection Act,²¹⁸ particularly if a renewed interest in the return of marine mammal management authority is pursued by states like Alaska, Oregon and California.

The remaining living resource, highly migratory species, may also present a problem now that the federal government has

²¹⁶Ballweber & Hildreth, supra note 201.

²¹⁷16 U.S.C. §§ 1531-1543 (1988). See supra, notes 60 - 62 and accompanying text.

²¹⁸16 U.S.C. §§ 1361-1407 (1988). See supra, Section III(D).

changed its position; Congress recently amended the MFMCA to bring highly migratory species under its regulatory authority, effective January 1, 1992.²¹⁹

Increased state control should be seriously considered, especially in light of the Department of Commerce's past determination that the issuance of uniform federal fishing regulations applicable beyond state territorial waters would not be appropriate.²²⁰ The substantial differences in both the kinds of fish caught and the different fishing methods employed throughout the states²²¹ undoubtedly present a significant challenge to federal regulatory efforts. Those states with the ability to manage living resources effectively should, therefore, be given the opportunity to adopt regulatory measures appropriate for their special circumstances.

Conclusion

Federal-state conflicts can be successfully addressed by applying minimum federal standards to state and federal waters while allowing more restrictive state regulations to extend into federal waters. In those states where the capacity, interest, and commitment necessary for efficient management of living resources is apparent, there is no need to divide the territorial

²¹⁹Pub. L. No. 101-627, 104 Stat. 4436 (1990), codified at 16 U.S.C. § 1801(b)(1).

²²⁰See Bundrant, 546 P.2d 530 (Alaska, 1976), citing to a 1974 report by the Department of Commerce.

²²¹Van Dyke, Bennett, Storch, & Turbeville, The Legal Regime Governing Alaskan Salmon 40 (A Report to the University of Alaska Sea Grant Program, June 1988).

sea into two zones (0-3 and 3-12 nautical miles offshore). These states will be able to implement management policies, carefully tailored to their own special needs and circumstances, through laws that are necessarily more stringent than the federal minimums. The arbitrariness of the three-mile limit, on the other hand, would be appropriate where a coastal state lacked the resources needed for designing and implementing rational management of the area. Minimum federal standards would protect fragile resources in the entire 12-mile zone without unduly infringing upon state sovereignty. Granting states authority in the entire territorial sea, to twelve miles, would eliminate many of the conservation problems that have occurred in the past. At the same time, minimum federal standards would provide protection in those areas where the adjacent state is unable or unwilling to act, as well as insuring against exploitation of resources by greedy state fishing industries.

VI. CONGRESSIONAL ALTERNATIVES FOR ADDRESSING OCEAN RESOURCE MANAGEMENT IN AN EXTENDED TERRITORIAL SEA

Earlier sections of this paper identified constitutional and statutory ambiguities created by the President's Proclamation unilaterally extending the U.S. territorial sea. Investigation of these uncertainties revealed intergovernmental and interagency conflicts that will require important policy decisions. In formulating an appropriate management regime, the legislative branch must consider the following issues: equity, political

feasibility, management capability, technical merit, and administrative complexity.²²²

Under the heading of equitable considerations, it is important to note that 180,000 square miles of new "stateless" U.S. territory (approximately the size of Texas) was created by the Territorial Sea Proclamation.²²³ Nearly all previous expansions of United States territory have led to statehood or incorporation into existing states. The five current exceptions are island communities that have local governments as authorized by Congress, either as a commonwealth (Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico) or a territory (Guam, Virgin Islands, American Samoa). In only a few instances has federally acquired territory remained totally in federal hands. Midway, Johnston, and Wake Islands are administered by the Department of Defense; these sites are exceptional because they are quite small, resources are not being developed there, and they are of tremendous national security value. The uninhabited guano islands of Navassa, Swan, Howland, Baker and Jarvis can also be distinguished because of their relative isolation. These islands lack an obvious administrative

²²²See, e.g., letter from Robert W. Knecht to Marc Hershman et al., regarding a Western States Territorial Sea Study, March 11, 1989.

²²³See Extension of the Territorial Sea: Hearings on H.R. 1405 Before the Subcommittee on Oceanography and Great Lakes of the House Merchant Marine and Fisheries Committee, 101st Cong., 1st Sess. 64, 65 (March 21, 1989) (Statement of Chris A. Shafer, Chairman, Coastal States Organization) [hereinafter CSO Testimony].

body other than the federal government; the same can be said for Palmyra and Kingman Reef. The extended territorial sea is very different from these situations.

Several commentators have argued convincingly that control over the extended territorial sea is now a purely domestic question, despite the fact that national security interests prompted President Reagan to expand the U.S. territorial sea to twelve miles.²²⁴ The extended territorial sea is undeniably linked to the adjacent coastal states. These states have direct and inherent interests in the management of adjacent seas. The impacts of ocean development affect these states on ecological, social, economic and political levels. Under the current regulatory scheme, the burdens of development appear to be falling disproportionately upon the coastal states.

²²⁴Although the following two statements were made with regard to the 200-mile exclusive economic zone, they apply a fortiori to the extended territorial sea.

In a study prepared by the Coastal States Organization, Coastal States and the U.S. Exclusive Economic Zone [hereinafter CSO Study] (April 1987), it was stated that the question of how to manage the resources of the EEZ is an internationally recognized sovereign (i.e. domestic) matter. "In terms of U.S. federal law, this is a fundamental change with potentially profound domestic consequences," Id. at 14.

In Harlow & Grunwalt, Recognition of Hawaiian Jurisdiction and Control Over the Resources in its Exclusive Economic Zone: Challenge and Opportunity (Report to the State of Hawaii, January 1986 [hereinafter Harlow Report]), the authors argue that the delinkage of the EEZ resource regime from other rights recognized in the international community has invalidated the premise upon which federal dominance was founded.

Also, in Fitzgerald, The Tidelands Controversy Revisited, 19 ENV. L. 209, 253 (1988), it was noted that international considerations were irrelevant to the domestic purposes of the Submerged Lands Act. Resource management that does not conflict with the rights of other nations is, therefore, a wholly internal matter.

A proper consideration of political feasibility and administrative complexity must first acknowledge existing inadequacies in federal ocean management. Present inefficiencies in coastal and ocean management have produced conflicts that have delayed the orderly survey and development of promising ocean resources. According to Biliiana Cicin-Sain and Robert Knecht, this growing intergovernmental complexity and conflict exists because priorities have not been established.²²⁵ The polarized efforts of development and conservation interest groups have created a disjointed approach to management that lacks both clearly articulated over-arching policies and coordination among the several agencies with planning and management responsibilities.²²⁶ The problem of clashing legal mandates was well-illustrated when local governments seeking to enforce air quality standards onshore under the Clean Air Act²²⁷ were unable to control air emissions from offshore oil and gas projects that are solely regulated by Interior under the OCSLA.²²⁸

²²⁵Cicin-Sain & Knecht, The Problem of Governance of U.S. Ocean Resources and the New Exclusive Economic Zone, 15 OCEAN DEV. & INT'L. L. 289, 301 (1985).

²²⁶Noyes, United States of America Presidential Proclamation No. 5928: A 12-Mile Territorial Sea, 4 INT'L. J. ESTUARINE & COASTAL L. 142 (1989), citing Knecht, Cicin-Sain & Archer, infra note 228, para. 2.

²²⁷42 U.S.C. §§ 7401-7626 (1988).

²²⁸43 U.S.C. §§ 1331-1357 (1988). See generally, Knecht, Cicin-Sain & Archer, National Ocean Policy: A Window of Opportunity, 19 OCEAN DEV. & INT'L. L. 113, 122 (1988). The authors cite the Secretary of Commerce's Findings and Decisions in the Matter of the Appeal by Exxon Co., USA to the Consistency Objection by the California Coastal Commission to EXXON's

Knecht, Cicin-Sain, and Archer,²²⁹ warn that undue delay, or outright failure to act, will prolong existing confusion and undermine the effectiveness of existing federal ocean law. Similarly, the American Bar Association's Law of the Sea Committee presented a unified call for congressional action in order to ensure the orderly, uniform implementation of the territorial sea extension.²³⁰ In other words, the state of national ocean policy requires that some form of change be implemented. The question is which of several approaches should be taken?

The technical merit and management capability of the different proposals for ocean resource management are evaluated in the remainder of this paper. The political feasibility and administrative complexity of each approach are also addressed, where appropriate.

A. Coastal State Control

"It is neither feasible nor desirable for the national government to attempt to represent all of the public interests in ocean activities beyond the territorial sea."²³¹ This position,

Proposed Development of the Santa Ynez Unit by Means of Development Option A (February 18, 1984).

²²⁹Id. at 125.

²³⁰Law of the Sea Committee Newsletter: Section of International Law and Practice, vol. 3, no. 2 (American Bar Association, Summer 1989).

²³¹From a Policy Statement of the Coastal States, appended to CSO Testimony, supra note 224.

adopted by the Coastal States Organization (CSO), is tied directly to its interpretation of the following Executive Order on Federalism issued by President Reagan: "In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states.

Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level."²³² Although the CSO tempered its recommendation to include the possibility of an equal federal-state partnership, it implicitly considered primary state control to be the way to govern the extended territorial sea for the broadest and best public good.²³³

The demonstrated competence of coastal states in managing both living and nonliving resources in the adjoining ocean justifies extension of state authority to 12 miles. In its testimony to Congress, the CSO provided a lengthy account of the coastal states' wide-ranging experience in ocean resource management.²³⁴ The testimony mentioned several areas of

²³²CSO Testimony, supra note 224, at 73, referring to Executive Order No. 12612 (October 26, 1987).

²³³Id. at 14.

²³⁴Id. at 11-12:

[A]ll states bordering the territorial sea have statutes governing mineral exploration and mining on State lands.... Ten States are currently participating with the Interior Department in joint federal-state task forces.... The Governors of American Samoa, Guam, the Commonwealth of Northern Marianas Islands and Hawaii have completed an assessment of the importance of the resources in the 200 mile Exclusive Economic

demonstrated coastal state ability, including ocean mining,

Zone (EEZ) off their shores, and are in the process of establishing an EEZ Coordinating Council. For the last twelve years the coastal States have cooperated with the federal government and the private sector ... [under] the Magnuson Fishery and Conservation and Management Act.

Some coastal States have long-standing laws for the development of oil and gas resources within their coastal and territorial waters, ... long-standing expertise in a variety of pollution programs, ... coastal or ocean sanctuary programs, ... [29] States, and possibly 30 by next year, have federally approved coastal zone management programs. Historic shipwrecks have been managed by many coastal states for years, and under the Historic Shipwreck Act of 1988 all coastal States are now managing these "national treasures."

Several states have developed specific ocean resource policy or management initiatives. For example, North Carolina in 1984 completed a comprehensive ocean policy analysis, and is presently preparing a report on the economic feasibility of mining phosphate deposits.... Oregon is in the midst of preparing an ocean resources management plan.... Hawaii has legislatively authorized ... implementation of an updated Ocean Resources Management Plan..., has also initiated a program to evaluate potential impacts of marine mining industry, and has prepared an environmental impact statement on ocean mining for the recovery of cobalt-rich manganese crusts off its shores. Legislation is pending in the legislatures of Alaska and California to inventory ocean resources and establish state ocean Management programs.

Since entering the Union the Great Lakes States have had exclusive management authority over extensive areas of water and submerged lands, and the aquatic resources found there ... the shortest State territorial water boundary is 21 miles offshore of Pennsylvania in Lake Erie ... Michigan ... manages resources out, in some locations, more than 72 miles ... [and] alone owns 37,500 square miles of submerged lands.

Thus from the perspective of Great Lakes States, States can and have managed aquatic resources very successfully over areas extending far beyond 12 miles. Further, we have done so in concert with a foreign country ... the international institutions created by the Great Lakes States and Canada are testimony to our ability to manage our own resources.

fisheries management, joint federal-state task forces, pollution control, sanctuary programs, and coastal zone management.

"[F]rom the perspective of Great Lakes States, States can and have managed aquatic resources very successfully over areas extending far beyond 12 miles."²³⁵

Suzanne Iudicello testified before the House Committee on Oceanography and Great Lakes that the State of Alaska has demonstrated particular competence in balancing the goals of protection, conservation, and utilization through joint efforts with the U.S. State Department to reduce foreign interception of salmon; through exclusive management of shelf commercial rockfish, king and tanner crab, and troll salmon in federal waters (spending ten times the outlay of the federal government in the management of its regional fisheries); and through accumulated negotiation experience with other states and foreign nations with regard to anadromous species.²³⁶ Further testimony indicated that the management capability of the Alaskan government has also been superior to that of the federal government in some instances. The Alaskan government has issued nine active and 200 prospective ocean mining leases off the Alaskan coast; the federal government has not issued any. The Alaskan government also has a two-to-three year waiting period

²³⁵Id. at 12.

²³⁶Extension of the Territorial Sea: Hearings on H.R. 1405 Before the House Committee on Oceanography and Great Lakes of the House Merchant Marine and Fisheries Committee, 101st Cong., 1st Sess. 82, 85 (March 21, 1989) (Statement by Suzanne Iudicello, Associate Director for Fisheries and the Environment for Alaska).

for a predictable and consistent leasing schedule, while it takes five years for an oil and gas lease sale to be issued in the 3-12 mile zone. In addition to reducing administrative complexity (to the benefit of oil companies), Alaskan management incorporates better environmental protection of the area. With regard to oil and gas development, "Alaska can more efficiently and competently manage this resource in the three to 12 mile zone than can the federal government."²³⁷

Alaska also cites, through Iudicello, the sound policy behind the 1953 Submerged Lands Act grant, stating that state ownership of the extended territorial sea is equally valid. Furthermore, unified jurisdiction and ownership of the 0-12 mile zone makes sense for the coherent exercise of police power. Otherwise enforcement can be complicated by the cross-purposes of federal and state agencies. To avoid the problems of interstate squabbles, where each state seeks to protect its own resources at the expense of other states, minimum federal standards could be developed. If these standards were also required to be consistent with state law, enforcement would be greatly enhanced.²³⁸

B. Coastal States As Equal Managing Partners

²³⁷Id. at 5.

²³⁸See McCoy, Observations on a Twelve-Mile State Fisheries Jurisdiction, in Proceedings, National Conference on the States and an Extended Territorial Sea 46 (Lauriston R. King and Amy Broussard, eds., Texas A&M Sea Grant College Program, 1987).

As noted above, many coastal states have been willing to devote money and talent to ocean resource management; the success of their efforts illustrates that some states are quite competent to manage the vast resources of an extended territorial sea. The variation in need among the coastal states, however, might warrant legislation providing for optional participation by states in the planning and management of the 3-12 mile zone.²³⁹ Optional participation by a state that has demonstrated ocean management capacity would be consistent with the principles of the Coastal Zone Management Act. For coastal states like Hawaii, Alaska, Oregon, Washington, Louisiana, and Texas, and for territories like American Samoa and Guam, the existence of important resources and interests highlights the need to develop a management program. Coastal states with few resources or uses of immediate interest, however, may not have a compelling need for altering the present arrangements.

Governor John Waihee of Hawaii has stated his belief that the two portions of the territorial sea should be part of an integrated management process that is guided by a single comprehensive set of coastal policies. A necessary element of state control would be the elimination of the existing regime's

²³⁹Ocean Issues: Hearings on Reauthorization of the Coastal Zone Management Act, Hard Mineral Resources in the Exclusive Economic Zone, Fisheries Issues, and Extension of the Territorial Sea Before the House Committee on Merchant Marine and Fisheries, 101st Cong., 2nd Session 86, 92 (Honolulu, January 8, 1990) (Statement of John Waihee, Governor, State of Hawaii) [hereinafter Waihee Statement].

arbitrary (three mile) jurisdictional boundaries.²⁴⁰ Waihee reports several examples of Hawaii's leadership role in integrating ocean development to support the state's position: the existing local partnership between the state and its counties, an agreement signed with the Secretary of Interior initiating the nation's first joint federal-state management program regarding mineral resources in the EEZ, and the cooperation between state/federal governments and the private sector in the development of ocean science and technology at the Natural Energy Laboratory on the Island of Hawaii.²⁴¹

On equitable grounds, the people of Hawaii feel that culturally, historically, and economically, the ocean is theirs to value, respect, and nurture. National security and international navigational interests are recognized, but these interests are consistent with Hawaii's legitimate concerns: the proper stewardship of renewable resources, a fair return on the use of the ocean and its resources, the regulation of ocean activities to protect public health and welfare, and planning for future use of ocean resources and the growth of Hawaii's economy.²⁴² There is no need to bind security and navigation to other interests in the ocean which can be more effectively managed by the state that is most directly affected by them. In any event, "without effective local participation in the

²⁴⁰Id. at 92.

²⁴¹Id. at 89.

²⁴²Id. at 88.

decision-making process, no amount of 'national interest' justification is likely to overcome local opposition."²⁴³

Other studies indicate that participation is not an impossible goal. A study of federal consistency under the CZMA²⁴⁴ noted that the requirement of federal-state cooperation in coastal management has resulted in states concurring with 97% of all federal consistency applications.²⁴⁵ The figures presented provide reason to be optimistic about the potential for increased federal-state cooperation. Nonetheless, the authors concluded that the consistency requirement "should not be viewed as a general bromide for dealing with the fragmentation of management authority," but rather as a modest experiment in mandating interagency and intergovernmental coordination.²⁴⁶ The approach should be seen simply as leading to more specific analysis of the conditions and techniques that result in genuine collaboration.

Criticism by the federal government of undue administrative complexity and inconvenience, created by increased state participation, will be outweighed by the environmentally sound decisions that result from increased review. The interactions

²⁴³Knecht, The Coastal States and the U.S. Exclusive Economic Zone 15 (CSO, Washington, D.C. 1987).

²⁴⁴Lowry, Jarman, & Maehara, Federal-State Cooperation in Coastal Management: An Assessment of the Federal Consistency Provision of the Coastal Zone Management Act (Draft), forthcoming in OCEAN AND SHORELINE MANAGEMENT.

²⁴⁵Id. at 38.

²⁴⁶Id. at 39.

between coastal states and their adjacent oceans clearly demand a prominent state role in management of the extended territorial sea. Governor Waihee of Hawaii suggests the creation of a "federal ocean resources council" consisting of the key ocean agencies, such as the National Oceanic and Atmospheric Association, the Environmental Protection Agency, the Department of Interior, and the Department of Defense.²⁴⁷ The council would be convened by NOAA as needed to assist states in the development of management programs for the extended territorial sea. The operation of this council would improve coordination at the federal level, the lack of which has made it difficult for states to work with the federal government on ocean and coastal matters in the past.

In the Coastal States Organization study mentioned previously, the Deepwater Ports Act²⁴⁸ and the Ocean Thermal Energy Act²⁴⁹ are cited as setting the precedent for shared decision-making.²⁵⁰ The concept of "shore-linked" impacts of ocean development provides the basis for gauging the roles of the state and federal governments in ocean management. In the past, the interests of the states and local communities have usually been projected from the shoreland seaward, and terminated arbitrarily at the boundary of state ocean waters. A more

²⁴⁷Waihee Statement, supra note 239, at 93.

²⁴⁸33 U.S.C. §§ 1501-24 (1988).

²⁴⁹42 U.S.C. §§ 9101-67 (1988).

²⁵⁰CSO Study, supra note 224, para. 2, at 20.

appropriate approach, however, is to start from the location of the activities and project the effects and impacts shoreward to the state coastal zone and shorelands. Long-term commitments for the exclusive use of ocean space, and the resultant long-term commitment of the shoreside support facilities require the concurrent approval of both the federal government and the involved coastal states.²⁵¹

C. Regional Management

A modified alternative to federal-state cooperation is the formation of new, and the expansion of existing, regional management schemes. A blue-ribbon panel review of the MFCMA resulted in a recommendation that cooperative management through regional councils be retained, but proposed separate fishery conservation and allocation determinations.²⁵² Under the modified scheme, conservation determinations would be made by NOAA and allocation decisions by the regional councils. By counteracting the administration's refusal to share decision-making authority with coastal states, increased participation would significantly reduce tension between the federal government and the states. The policy stalemate in oil and gas development might have been avoided if the coastal states were given greater authority.²⁵³

²⁵¹Id. at 21.

²⁵²Knecht, Cicin-Sain & Archer, supra note 228, at 126.

²⁵³Id. at 125-26.

Efforts to implement regional cooperation should be carefully formulated to avoid compounding the already fragmented ocean management regime. Information sharing and coordination must be promoted. In attempting to balance national and regional interests, including the costs and benefits of ocean activities, the management framework should also have the capability of ranking specific uses and resources when necessary.²⁵⁴

D. Multiple-Use Approach

The complex nature of the ocean as an interdependent ecological system provides much of the reasoning behind a third alternative, multiple-use management. The multiple use approach requires the establishment of clear legislative guidelines, possibly even priorities, to govern ocean management. For example, Oregon has crafted an integrated regime for nearshore ocean management that includes legislatively-set priorities, favoring living over nonliving marine resources in cases where multiple use conflicts occur.²⁵⁵ Possibilities on the national level include creation of a multiple-use federal oceans agency

²⁵⁴Cicin-Sain & Knecht, supra note 225, at 315. See Alexander & Hanson, Regionalizing Exclusive Economic Zone Management, in Proceedings of Oceans, 1984 (Marine Technology Society, 1984), and Gather, A Public Authority to Manage the Atlantic Outer Continental Shelf, 2 COASTAL ZONE MANAGEMENT JOURNAL 59-64 (1975) for other versions of the regional approach.

²⁵⁵Knecht, Cicin-Sain & Archer, supra note 228, at 133, citing Good & Hildreth, Nearshore Ocean Management in Oregon (Oregon Department of Land, Conservation and Management, draft 1986).

(or federal regional commissions) for ocean management.²⁵⁶ This entity would have plenary authority analogous to that of the Corps of Engineers in the Coastal Decision Framework.²⁵⁷ It would provide the forum for integrating the preferences of many special purpose agencies and interests.²⁵⁸

Ocean resources and processes are highly fluid, mobile, and intertwine over great distances. It is clear that a mismatch currently exists between the realities of the ocean system and the government's sectoral approach to its management. Instances of split or shared authority persist. For example, the Department of the Interior has jurisdiction over sea turtles while on land, but NOAA has jurisdiction over them in the ocean.²⁵⁹ Because many of the most important ocean activities traverse or impact all three jurisdictions (local, state and federal governments), complexity is added to the planning and management of these activities. Furthermore, the benefits and costs of ocean resources exploitation frequently fall

²⁵⁶Cicin-Sain & Knecht, supra note 225, at 312, Table 2.

²⁵⁷The structure of the coastal decision framework involves decisionmaking at all three levels of government and involves multiple agencies within each level. Certain agencies have primary power over certain aspects of a decision, but only a secondary role in other aspects of the decision. The Army Corps of Engineers provides the balance of power as the ultimate decision authority. Over the years, the coastal decision process has developed norms to guide decisions based on Constitutional, public trust and environmental principles reflecting the prevalent societal values of the times.

²⁵⁸Hershman, The Coastal Decision Making Framework as a Model for Ocean Management, in Proceedings, supra note 198, at 92, 99.

²⁵⁹Cicin-Sain & Knecht, supra note 225, at 299.

disproportionately on different jurisdictions, exacerbating inter-jurisdictional frictions.²⁶⁰

The lack of a plenary law for ocean decision-making creates an organizational vacuum in the ocean arena. An important policy objective should be to fill this vacuum; the Corps of Engineers' public interest review process is the best model we have.²⁶¹ The Corps of Engineers has general jurisdiction over coastal waters, and reviews all discharges of dredged or filled materials.²⁶² The public interest review process requires consideration of diverse factors, applying a balancing test to assure that the benefits of a proposed action outweigh the foreseeable detriments. The process is open to all public and private organizations and individuals. By law the Corps must integrate the objectives of a wide range of federal and state laws.²⁶³ The Corps acts as a clearinghouse to ensure that conflicts are identified and resolved among the real parties in interest, requiring participants to try to resolve their differences through negotiation and project modification.²⁶⁴ The mutual education and trading of information often facilitates trade-offs or at least the establishment of guidelines for

²⁶⁰Knecht, Cicin-Sain & Archer, supra note 228, at 134.

²⁶¹Hershman, supra note 258, at 96.

²⁶²Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers, 63 VA. L. REV. 503, 547 (1977).

²⁶³Hershman, supra note 258, at 94-95.

²⁶⁴Cicin-Sain & Knecht, supra note 225, at 302-05.

addressing problems that may arise in the future. A general and flexible system will allow regional experimentation and trial and error that will lead to a system that arises out of real decisions and real circumstances.²⁶⁵

In addition to the problems of split and shared authority, numerous other faults in the present ocean management system can be recited. Examination of consequences to proposed ocean uses is biased toward protection or development depending upon the particular law in question. Decisionmakers have few opportunities to debate overall priorities or to make trade-off decisions. No one has jurisdiction over conflicts among different sectors (e.g., controversies surrounding the Santa Barbara Channel, the Beaufort Sea, and the Georges Bank). Litigation addresses only actual rather than potential conflict, often excludes crucial viewpoints because of narrowly defined rules of evidence, and involves damaging delays. Decisionmakers are not encouraged to conduct advanced ocean planning. And finally, the difficulty of estimating the impact of long-range activities often leads to the preclusion of some uses and species from the ocean management regime.²⁶⁶

In addition to the need to address organizational defects, the United States needs to understand better the interactions between marine ecosystems and the impacts of certain ocean activities, and also of the cumulative impacts resulting from

²⁶⁵Hershman, supra note 258, at 96.

²⁶⁶Cicin-Sain & Knecht, supra note 225, at 302-305.

multiple ocean uses. At the very least, appropriations should be made to support the pursuit of such knowledge. Meanwhile, to minimize the uncertainty caused by the complexity of ocean processes, operationally-linked monitoring programs could be used for new and existing ocean uses. After performing baseline studies, agreement should be reached among the potentially affected interests on thresholds that trigger pre-agreed changes in the operation of an activity. This approach would eliminate the problems caused by the inflexibility inherent in earlier governmental management procedures.²⁶⁷

The multiple-use approach will not be easy to implement and will take time to become fully operational. It has been recommended, therefore, that realistic field testing of regional approaches (discussed supra) might serve as a stepping stone toward the greater goal of multiple-use ocean management.²⁶⁸ This approach may not reduce complexity in ocean management, but it may reflect all that we can expect in a pluralistic society and under a federalist system of government, where democratic principles prevail.²⁶⁹

E. Revenue Sharing

Another way to placate coastal state opposition to federal management of the extended territorial sea is to share the

²⁶⁷CSO Study, supra note 224, para. 2, at 21.

²⁶⁸Cicin-Sain & Knecht, supra note 225, at 315.

²⁶⁹Hershman, supra note 258, at 99.

revenues obtained from resource exploitation in the area. A proposal by Richard Littleton calls for sharing with all 50 states.²⁷⁰ Reallocation of resources would not change fundamental federal-state rights and duties, and a consequential increase of ocean awareness will necessarily result in better monitoring of oil and gas production. This approach would provide an immediate and more concrete mechanism for organizing the coastal zone than an abstract framework for future federal-state cooperation. Establishing a single decisionmaker out to 12 miles could directly resolve some federal-state tensions, while reducing the intensity of other disputes by moving the focus of tension 12 miles from shore.

In general, the states are clearly capable of managing the area. Extended management is practiced by the Great Lakes states, Alaska, Florida, Texas, and Puerto Rico. Active state participation in the administration of the oceans, coupled with a positive program to mobilize coastal states' industrial bases--which facilitates the recovery and processing of offshore resources--could provide the basis for equitable federal-state sharing of revenues.²⁷¹ Hawaii's Governor John Waihee has advocated a 50/50 division between the federal government and the adjacent state for oil and gas development as well as hard minerals.²⁷² The fundamental role of the coastal state in such

²⁷⁰See Littleton, supra note 195 and accompanying text.

²⁷¹Harlow Report, supra note 224, para. 3, at 91.

²⁷²Waihee Statement, supra note 239, at 94.

an arrangement would be to provide a cost-effective and reasonably flexible regulatory scheme that reduces the multiple permit burden to a minimum.²⁷³ This reduction in administrative complexity alone might be enough to rally the support of industry and allow the states to present a unified proposal for congressional action.

F. Statutory Modification and Other Action

The National Governors Association and Western Governors have issued resolutions suggesting that Congress mandate that each federal ocean agency analyze the legislation governing its programs and make a determination as to the extent to which this legislation should be interpreted to extend to the 12-nautical-mile limit of the territorial sea.²⁷⁴ Congress could then either accept and confirm executive branch interpretations or modify the particular pieces of legislation to conform to Congressional intentions. See also Section III of this paper entitled "A Survey of Statutes Referring to the Territorial Sea" for suggested modifications.

Other issues identified²⁷⁵ as topics requiring attention include the removal of gaps in the regulatory schemes involving hard minerals and ocean incineration; providing for the

²⁷³Harlow Report, supra note 224, para. 3, at 96.

²⁷⁴Waihee Statement, supra note 239.

²⁷⁵Cicin-Sain & Knecht, supra note 225, generally; and Knecht, Cicin-Sain & Archer, supra note 228, generally.

identification of potential conflict; establishment of NOAA as an independent agency; amendment of the OCSLA to provide greater protection for marine and coastal resources and uses; and the incorporation of conflict resolution, negotiation and joint planning procedures.'

Conclusion

The resolution of intergovernmental and interagency conflicts is crucial to the goal of efficient management of ocean resources. Although our understanding of ocean processes is still far from complete, it is clear that our first generation approach to management has become overloaded. The Territorial Sea Proclamation provides a compelling opportunity to address the need for reform. Equitable considerations require that the federal government share with the states the decision-making authority it has assumed in the extended territorial sea.

The possible approaches to improving our national ocean management effort presented in this paper are as follows:

(A) increase state control to 12 miles--state ownership would be subject only to the federal navigational servitude and for the constitutional purposes of commerce, navigation, national defense, and international affairs;

(B) create a partnership between the federal government and the willing and capable coastal states;

(C) promote regional cooperative management schemes--analogous to the MFCMA regional councils;

(D) pursue a multiple use approach--where competing values are balanced by a federal oceans agency with plenary authority over U.S. waters;

(E) develop a revenue-sharing scheme in which federal dominion would be maintained and the states would be placated with a secure source of funds; and

(F) modify statutes individually, but comprehensively.

The individual policy approaches listed above are not meant to be exhaustive, nor mutually exclusive. They are recommendations to be considered in formulating an appropriate response to the territorial sea extension. Until some comprehensive action of this sort is taken, the potential for development of this important area will never be achieved.



United States Department of State

Washington, D.C. 20520

FEB - 3 1992

Dear Mr. Chairman:

Thank you for the opportunity to comment on H.R. 536, the "Coastal States Extension Act of 1991". The bill would amend the Submerged Lands Act to extend the seaward boundaries of coastal States from three nautical miles (or three marine leagues for certain Gulf coast boundaries) to twelve nautical miles. The bill would also allow States to grant mineral leases in these extended areas, with the caveat that existing Federal leases within the 12 nautical mile area would be excluded from State jurisdiction until they expire or are cancelled.

H.R. 536 proposes sweeping changes to established Federal/State boundaries and authorities with far-reaching financial, energy and national security ramifications. By amending the Submerged Lands Act, the bill also would extend direct State control for coastal zone management purposes from three geographical miles (and in certain cases, 3 marine leagues) to 12 nautical miles. Furthermore, the bill would adversely affect the balance of Federal and State interests established by Congress in the Magnuson Fishery Conservation and Management Act.

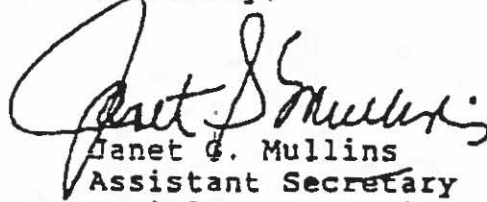
Enactment of this bill would upset currently existing and carefully balanced Federal/State responsibilities for resource management. In addition, H.R. 536 would significantly reduce federal revenue; therefore it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. That is, if a bill results in an increase in the deficit that is not fully offset, it must trigger a sequester. For these reasons, the Administration strongly opposes this legislation.

The Honorable
Walter B. Jones,
Chairman,
Committee on Merchant Marine and Fisheries,
House of Representatives.

The Administration's concerns with H.R. 536 are contained in an enclosure to this letter.

The Office of Management and Budget advises that there is no objection to submission of this report to the Congress from the standpoint of the Administration's program.

Sincerely,



Janet G. Mullins
Assistant Secretary
Legislative Affairs

Enclosure:
As stated.

"Coastal States Extension Act of 1991"

Presidential Proclamation No. 5928, extending the United States territorial sea to twelve nautical miles for international purposes, did not alter the existing domestic law allocation of responsibility for marine resources between the Federal government and the coastal States: The Administration does not support such a reallocation. The Administration considers it most appropriate that management of resources located outside State seaward boundaries continue to be managed for the benefit of the Nation as a whole, consistent with uniform policies and objectives expressed in existing legislation. Federal policies also recognize the legitimate interest of coastal States in Federally-regulated activities which have an effect on resources of the coastal States.

The Submerged Lands Act ("SLA") conveys to States title to and ownership of lands beneath navigable waters within their boundaries, as well as the natural resources within such lands and waters and the right to manage these lands and resources. (43 U.S.C. 1311.) Section 3 of H.R. 536 amends the SLA to extend the seaward boundaries of coastal States from 3 miles (or three marine leagues) to twelve nautical miles.

Areas of Major Concern

Oil and Gas Resource Losses and Financial Implications

The bill proposes to redistribute the rights to offshore oil, gas, and other minerals in areas up to 12 nautical miles offshore. Most coastal States currently retain these rights only in areas within 3 geographical miles from shore (except for Texas and the western portion of Florida where the present State seaward boundary is 9 nautical miles).

If H.R. 536 were enacted, it would reduce Federal government revenues in the short-term and more significantly over the long-term. For example, assuming that only unleased resources would be subject to a change in ownership, it is estimated that, in the aggregate, H.R. 536 would transfer approximately 25 percent of the unleased oil resources on the Outer Continental Shelf (OCS) (2-4 billion barrels) and 20 percent of the unleased natural gas resources on the OCS (9-18 trillion cubic feet) from Federal to State ownership. These resources are estimated to generate \$2-4 billion in cash bonuses and \$8-16 billion in royalties to the Federal Treasury and have a gross market value of \$58-116 billion.

Regarding short-term budgetary impacts through 1995, it would be difficult to estimate the extent to which this legislation, if enacted, could affect upcoming OCS lease sales scheduled for this time frame since the Department of the Interior is still in the process of developing an OCS 5-year program for 1992-1997. However, based on tentative lease sales scheduled for the 1992-1995 time frame (as reflected in the August 1991 proposed OCS 5 Year Program), revenue losses of \$30-45 million a year may be expected during this time frame from foregone bonuses.

This reflects the numerous sales scheduled for the Gulf of Mexico and Alaska regions during the next five years, and many of their most prospective areas lie 3 to 12 miles offshore. Any revenue losses resulting from States assuming ownership of Federal property scheduled for lease sales during the time frame covered by the Omnibus Budget Reconciliation Act of 1990 must be offset, consistent with the terms of the Act or a sequester must be triggered.

Beyond 1995 the revenue loss to the federal government will continue and perhaps even increase. As current federal leases expire throughout the OCS in the expanded state zone, under H.R. 536, these leases would not be eligible for further leasing by the federal government, but by an individual state, thus denying the federal government additional revenues.

It is important to remember that the majority of revenues from OCS oil and gas leasing activities are currently a source of revenue to the entire Nation since they are deposited into the General Fund of the United States Treasury. A significant portion of these revenues have been, and will continue to be, derived from leasing and operations within 12 nautical miles from shore.

Therefore, the benefits that accrue to the Nation as a whole will diminish if the jurisdiction of States over coastal areas is extended as proposed by H.R. 536. While several coastal States would directly benefit from this change, the majority of States would be adversely affected by the proposed transfer of jurisdiction since the total amount of OCS revenues deposited into the General Treasury would be greatly reduced. As a result, Federal grants and loans utilized by non-coastal States and local governments to help provide an array of services could be reduced, thus further constraining State government services.

Special funds that receive a portion of the OCS revenues will be adversely affected by H.R. 536. For example, approximately

85 percent of the Land and Water Conservation Fund is derived from OCS revenues. This fund is utilized by all States and, so far, the fund has received more than \$13 billion. Of this total, approximately \$11 billion has come from monies received from OCS activities. In addition, the Historic Preservation Fund, which also benefits all States, receives all its monies from OCS revenues.

Finally, it is also important to remember that coastal States already enjoy direct monetary benefits from OCS leasing and development. Section 8(g) of the OCS Lands Act gives coastal States 27 percent of all revenues generated from tracts in the first 3 miles of Federal waters adjacent to their coasts. In addition, the Administration has proposed legislation to Congress to provide impact assistance to coastal States and communities located near federal offshore natural gas and oil operations. The bill would set the level of assistance at a rate of 12.5 percent of new royalties. Half of each state's share would go to the state government and the remainder would be distributed among eligible counties, parishes, or boroughs.

National Energy Production Implications

The Administration's "National Energy Strategy" recognizes the important role which the OCS program can play in helping to meet the Nation's energy needs in an environmentally responsible manner. Since the early 1950's the OCS has supplied over 87 trillion cubic feet of natural gas and 8.5 billion barrels of oil. Currently, the OCS supplies nearly 11 percent of the Nation's domestic oil production and over 24 percent of its domestic gas production. The National Energy Strategy envisions that the OCS, and in particular its natural gas resources, will continue to play a major role in our domestic energy profile well into the early part of the 21st century.

However, extending State jurisdiction out to 12 nautical miles could jeopardize attainment of the goals envisioned in the "National Energy Strategy." First and foremost, many coastal States have demonstrated an unwillingness to permit energy exploration, development and production off their coasts (both within areas under their current jurisdiction as well as OCS areas adjacent to their coasts). Transferring these resources to States is unlikely to increase their willingness to develop the resource. In all likelihood, extending State jurisdiction will further restrict the Nation's ability to reduce our dependence on foreign oil. Thus, H.R. 536 would result in a loss of valuable energy resources to the Nation as a whole.

In addition, if the legislation is enacted OCS leasing and development could be significantly limited seaward of the areas of extended State jurisdiction since, in certain areas such as California, Washington and Oregon, the outer Continental Shelf is narrow and drops off steeply in nearshore areas. Therefore, any State-imposed prohibitions on energy activity within 12 nautical miles could likewise impose severe economic or technological limitations with respect to developing areas outside extended State boundaries. For this reason, this legislation has the potential to negatively impact energy exploration and production on other parts of the OCS as well as the area proposed for extension of State boundaries.

National Security Implications

The national security interests of the United States are closely associated with its energy supplies. Legislation which diminishes our Nation's capability to produce domestic energy supplies, such as H.R. 536, will have both direct and indirect ramifications on our national security interests as well.

In addition, our Nation's national security interest in OCS oil and gas resources is recognized in the OCS Lands Act. This careful balancing of expeditious development with environmental protection helps ensure access to domestic supplies of energy and, thus, increases our national security. However, if H.R. 536 were enacted, this balance would, instead, be replaced by a myriad of State decisions which do not take into account the national interest.

Overlapping State and Federal Jurisdictions

As H.R. 536 is written, current federal OCS leases within the expanded state zone would not be affected by the legislation until the lease expires or is cancelled. However, areas within the zone which are not currently under lease can potentially be leased, drilled, and developed under the laws and regulations of the adjacent state. Such an arrangement would set up a patchwork of producing leases in the zone governed by either federal or state laws and regulations. Such an arrangement could create a great deal of confusion, for both the government entities and the operating companies.

Submerged Lands Act (SLA) Implications

H.R. 536 would amend the SLA to extend the seaward boundaries of coastal states from three miles (or three marine leagues for certain Gulf coast boundaries) to twelve nautical miles.

Several other statutes also would be affected by H.R. 536 as well by this extension, because the SLA line is used in these statutes as a demarcation line in allocation of primary management responsibility between the Federal government and the coastal states. The Administration is strongly opposed to any alteration of that existing balance.

Coastal Zone Management Act (CZMA) Implications

The appropriate balance between Federal and State interests in management of ocean resources located beyond three miles (or three marine leagues) of our Nation's coasts was reaffirmed by Congress, for purposes of the coastal zone management program, in the Coastal Zone Act Reauthorization Amendments of 1990. (P. L. 101-508). As part of those amendments, Congress specifically addressed the issue of the seaward boundary of a State's coastal zone by amending the term "coastal zone" to drop the reference to the term "territorial sea" and, instead, to include a specific reference to the SLA. By deliberately tying State seaward boundaries to the SLA, the Congress reaffirmed its intent that State seaward boundaries were to be limited to 3 geographical miles or 3 marine leagues for coastal zone management purposes. The Administration believes the intent of Congress is clear on this issue and strongly opposes language that would modify that intent.

Finally, a comment of a technical nature. The definition of "coastal zone" in Section 4(c)(2) should be changed to conform with the most recent definition of the term which is found in P.L. 101-508 (Coastal Zone Reauthorization Amendments).

Magnuson Fishery Conservation and Management Act Implications

H.R. 536 adversely affects the balance of Federal and State interests in fisheries management established by Congress in the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801-1882, "Magnuson Act"). The Magnuson Act is a better vehicle for effective, cooperative conservation of fishery resources, and fair and equitable treatment of users, than is an expansion of management by fragmented jurisdictions - with differing objectives and priorities - lacking established mechanisms to ensure balanced interjurisdictional decision making and effective enforcement.

Generally speaking, the inner boundary of Federal fishery jurisdiction, as defined in the Magnuson Act, is the seaward boundary of States as established by the SLA. Passage of H.R. 536 would thus have the effect of extending coastal States fisheries jurisdiction to twelve miles from the coastline, and

correspondingly reducing the area of competence under the Magnuson Act. Some of the major anticipated impacts are outlined below:

1. Decrease in fishery resources managed under Fishery Management Plans. Enactment of H.R. 536 would increase to approximately two-thirds the portion of the U.S. commercial harvest (both finfish and shellfish, excluding tuna in international waters) taken in state waters, both in terms of pounds and value. Of the 32 fisheries managed under fishery management plans, 30 are interjurisdictional fisheries whose species migrate either between waters of two or more States, or between State and Federal jurisdictions. If State waters extended to twelve miles, approximately 19 of these fisheries (all interjurisdictional) would be conducted predominantly in State waters.

With such a significant portion of the fishery resources of the Nation coming under the purview of the coastal States, the Administration anticipates a significant decrease in activities under the Magnuson Act, and consequent derogation of the Act's objectives of coordinated conservation and management, including associated research. No alternative mechanism is provided to assure common goals and coordinated participation by all affected governmental entities in the conservation and management of interjurisdictional fisheries.

2. Inconsistency with the principles of the Magnuson Act. One of the guiding standards of the Magnuson Act, by which all management plans are judged, is that an individual stock of fish shall be managed as a unit throughout its range. Enactment of the legislation would likely hurt efforts by State and Federal management programs to satisfy this management principle as prescribed by Congress. States have been able to work cooperatively to manage fishery resources in some cases. However, there are numerous instances in which an inability to agree on a unified management program for conservation has caused management measures to be unenforceable and has led to adverse consequences for the resource.

Some States, for example, have failed to enact cooperative management programs for the bluefish fishery, resulting in an ineffective program and a possible withdrawal of the bluefish management plan. In New England, failure of the States to adopt compatible legislation caused withdrawal of the herring management plan, and the current reluctance of States to adopt compatible measures is causing the American lobster plan to be less effective. There are also many instances in which Federal

closure of waters, in areas under its jurisdiction, have not been matched by closure in State waters, leading to incompatible management efforts and a heightened potential for overfishing. An extension of State jurisdiction would further erode management of the Nation's valuable fisheries resources and would result in increased pressure on many stocks which are already in a weakened position.

3. Potential loss of effectiveness of Fishery Management Councils. The Fishery Management Councils established by the Magnuson Act function to assure that the concerns of all States and other parties interested in a particular fishery (including recreational and commercial users from various States, as well as conservation, industry and other interests) have a meaningful opportunity to participate in the development of fishery management plans. It is likely that a significant decrease in management activity under the Magnuson Act will adversely affect the effectiveness of the Fishery Management Councils. Again, alternative interstate mechanisms to assure broad participation, and a balanced approach to consensual management objectives, are not now available but would be necessary given the provisions of the bill.

4. Adverse impacts on joint venture activities. The Magnuson Act prohibits directed foreign fishing, processing and other foreign fishing support activities, including those in support of joint venture operations, within state boundaries. There is an exception for certain operations approved by a governor in the internal waters of a State.

Extending State waters to twelve miles would cause a reduction in joint venture operations because foreign joint venture vessels would be prohibited in the 3 to 12-mile zone (as well the 0 to 3-mile zone), and U.S. catcher vessels would have a great deal of difficulty delivering to foreign processors outside the 12-mile line. Because many joint venture catching vessels do not have the capacity to bring the net on board, the extension to 12 miles would often require the net to be towed several miles before being transferred to the foreign vessel. This towing would result in severe damage to the fish, and is likely to make them unusable. While the number of joint ventures has decreased in the past several years, the effect of the inefficient situation would be a severe loss of income to any U.S. fleets operating in a joint venture. The extension may also cause an increase in foreign applications to State governors for internal waters joint ventures, with potential implications for national security interests.

Critical Issues Not Addressed in H.R. 536

In addition to our major concerns with the proposed bill, there are several attendant issues relative to extending State boundaries which are not addressed in the legislation. These are as follows:

- o The jurisdiction, responsibilities, and authorities of Federal agencies not tied to the SLA would not be changed by the proposed bill. The U.S. Army Corps of Engineers, U.S. Coast Guard, National Marine Fisheries Service, and the U.S. Fish and Wildlife Service all have responsibility for managing certain resources or activities offshore. Consequently, extending State boundaries could increase the potential for conflict with these other authorities, thus complicating rather than simplifying the management of offshore resources.
- o The proposed bill is silent concerning current section 8(g) of the OCS Land Act. Absent modification of section 8(g), it appears an additional 3 mile zone could be created seaward of 12 nautical miles with all the attendant historical problems revisited. In addition, this bill as proposed does not address the effects of section 8(g) on existing leases within 12 nautical miles that are currently considered 8(g) leases and which are providing the benefit of 27 percent revenue sharing with the adjacent State. Further, the offshore extension of State jurisdictional boundaries out to 12 nautical miles will likely result in lateral seaward boundary disputes between Louisiana, Mississippi and Alabama since the proposed legislation fails to provide a mechanism for the settling of such disputes.
- o Section 6004 of the Oil Pollution Act of 1990 (P.L. 101-380) charged the Secretary of the Department of the Interior with the responsibility to prevent, through cooperative development of Federal/State leases, the harmful effects of competitive production of hydrocarbons from common hydrocarbon-bearing areas. H.R. 536 makes complying with this requirement more difficult by allowing existing Federal leases within the 12 nautical mile area to potentially coexist adjacent to, or in close proximity to, any new State leases.

Other Statutes.

Other statutes which would be affected by H.R. 536 include Title III of the Marine Protection, Research and Sanctuaries

Act (16 U.S.C. 1431-1445; MPRSA) and the Abandoned Shipwreck Act of 1987 (43 U.S.C. 2101 et seq.). Both of these statutes use the SLA line as the boundary between State and Federal jurisdiction. The effect on the MPRSA would be to increase the complexity of management of those marine sanctuaries whose boundaries include waters between 3 and 12 miles. There is also the possibility that new designations which include areas between three and twelve miles could be precluded, as to those areas, by exercise of a Governor's "veto" under the Act. Similarly, title to abandoned shipwrecks in the area between three and twelve miles would be transferred to the State, raising concerns about differing State and Federal objectives with regard to shipwrecks located in marine sanctuaries.

Strait of Juan de Fuca

The question of the extent of the waters of the State of Washington in Puget Sound and the Strait of Juan de Fuca has been the subject of inquiry from the Government of Canada. Section 3 of this draft legislation would appear to eliminate any claim the State of Washington may have to ownership of the waters and seabed of the Strait of Juan de Fuca and Puget Sound between the outer limit of the U.S. territorial sea and the international boundary with Canada.

AMERICAN FACTORY TRAWLER ASSOCIATION



January 30, 1992

The Honorable Walter B. Jones
Chairman
Committee on Merchant Marine and Fisheries
1334 Longworth House Office Bldg.
Washington, DC 20515

RE: H.R. 3842, Extending the U.S. Territorial Sea

Dear Chairman Jones:

The American Factory Trawler Association (AFTA) submits the following comments on H.R. 3842, a bill extending the U.S. territorial sea from three to twelve miles. AFTA is a trade association comprised of sixteen member companies operating U.S. fishing vessels that catch and/or process fish in the North Pacific and off the West Coast.

The provisions of H.R. 3842 affecting coastwise trade laws are of primary concern to AFTA. Under current law, only coastwise-qualified vessels are permitted to engage in the transport of merchandise between any points in the U.S. The territorial sea is included in the definition of points in the U.S. The legislation extends the application of coastwise laws from vessel activities occurring within three miles to those within twelve miles.

Some fisheries activities fall within the scope of coastwise trade. For example, if a fish processing vessel operating within three miles, is receiving fish from a harvesting vessel, processing that catch, and landing it in a U.S. port, then the processing vessel must be coastwise-qualified. If that activity occurs beyond the three-mile limit, coastwise laws do not apply.

Vessels documented for U.S. fisheries are not necessarily coastwise-qualified. Indeed, many are not. The U.S.-citizen ownership requirements are more restrictive for vessels qualifying for coastwise privileges, than for those engaged in U.S. fisheries. Also, a U.S.-built vessel that at any time carried a foreign documentation permanently loses its eligibility to participate in U.S. coastwise trade, but is not barred from acquiring U.S. fisheries documentation. Finally, prior to passage of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, fish processing and tender vessels could be built overseas and fishing vessels re-built in foreign shipyards without a loss of

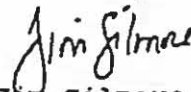
The Honorable Walter B. Jones
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U.S. fishing privileges. A number of vessels are "grandfathered" under the Anti-Reflagging Act and continue to engage in fisheries in the U.S. None of these vessels, however, meet coastwise eligibility standards.

Owners of fishing vessels without coastwise privileges made these investments anticipating that their business activities might be limited within three miles. H.R. 3842 extends the prohibition on certain fishing activities out to twelve miles. This change would be disruptive, and possibly calamitous, since a great deal of fishing activity occurs within three to twelve miles offshore.

AFTA appreciates the opportunity to bring this matter to the Committee's attention and to submit these comments for the record. We also appreciate the Committee's willingness to work with us to ensure that H.R. 3842 poses no hardship on the at-sea processing sector of the U.S. fishing industry. Thank you.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jim Gilmore". The signature is fluid and cursive, with the first name "Jim" being more prominent than the last name "Gilmore".

Jim Gilmore
Washington Representative

Joint Statement
of the
COASTAL STATES ORGANIZATION
and the
WESTERN GOVERNORS' ASSOCIATION

Before the
House Merchant Marine and Fisheries Committee

February 4, 1992

**Extension of the United States Territorial Sea and Contiguous Zone
And Related Issues**

The Coastal States Organization is a non-profit, nonpartisan representative association of the Governors of the 35 coastal States, Commonwealths and Territories. Established in 1970, CSO serves as a forum for debate, review and assessment of ocean and coastal management practices, problems and progress.

The Western Governors' Association is an independent nonpartisan organization of the Governors from 17 western states, two Pacific territories and a commonwealth. WGA assists these Governors in developing strategies for tackling long-term issues facing the West as well as the region's immediate needs.

Statement

of the

COASTAL STATES ORGANIZATION
and the
WESTERN GOVERNORS' ASSOCIATION

Before the
House Merchant Marine and Fisheries Committee

February 4, 1992

Extension of the United States Territorial Sea and Contiguous Zone
And Related Issues

The Coastal States Organization and the Western Governors' Association welcomes the opportunity to address this Committee on the topic of the extending the U.S. Territorial Sea and Contiguous Zone, as well as H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991. The extension of the U.S. Territorial Sea by President Reagan's Proclamation #5928 *for international purposes only* raised fundamental questions of law and policy to the U.S. Congress. We believe it is fully appropriate for Congress to now legislatively affirm the *domestic interests* in this newly annexed territory.

State Interest

Coastal States, because of their proximity to, and reliance upon, the sea, and the extent to which development of these coastal and marine resources will affect their economy and environment, have direct and inherent rights and responsibilities pertaining to the protection,

conservation and development of the living and non-living coastal and marine resources. We believe that it is neither feasible nor desirable for the national government to attempt to represent all of the public interests in ocean activities within the territorial sea. As general purpose governments, the coastal States are directly responsible for acting on behalf of the ocean interests of their citizens, and the citizens of the country as a whole. The present statutorily created dividing line between State and federal jurisdiction in the ocean -- the three mile seaward limit of the territorial sea -- depicts only the current division in the management authority over the ocean resources. The coastal States' interests, rights and responsibilities extend well beyond this statutorily created, yet arbitrary, limit.

Coastal States possess many years of expertise and experience in the management of coastal and offshore resources, whether they be oil and gas, sand and gravel, hard minerals, fisheries, water quality or other resources. Through their federally-approved coastal management programs, the coastal States have a multiple-use management regime in place. On the other hand, the single-resource management approach now employed by the federal government has generated conflicts rather than resolving them.

State Goals

Both the Coastal States Organization (CSO) and the Western Governors' Association (WGA) have addressed the legal and policy questions raised by the extension of the territorial sea out to 12 miles. Together, the CSO and WGA have clearly framed the reasons why coastal States seek extension of management authority, if not seaward boundaries, out to 12 nautical miles.

The WGA has adopted as its primary goal that the Submerged Lands Act should be amended "to incorporate the new ocean territory into state and territorial boundaries."¹ This position is based upon the recognition that "the history, tradition, and legal foundations of our nation as a confederation of sovereign states requires that this new territory, like virtually all earlier new territory, ultimately be incorporated into state, commonwealth, and territorial governments." Further, as a matter of equity and fairness, the western governors believe that "jurisdiction and management control over the new territory should accrue to the governmental entities most directly exposed to the risk of inappropriate development or accident in the new area -- i.e., the adjacent coastal states, commonwealths, and territories."²

The Coastal States Organization takes the position that the States should be the primary managers of the resources within the extended 12 mile territorial sea, exactly as they are today in the 3 mile territorial sea. This position is based upon the recognition "of historical precedence, the coastal States' interests, rights and expertise in the management of these offshore resources, and constitutional principles."³ At a minimum, CSO holds that the States "should be equal managing partners over these resources."⁴ The WGA also believes that, at a minimum, a series of short-term studies, joint interim State-Federal management arrangements, requests for information or data, or other actions" must be taken that can reasonably be expected to lead to an amendment of the Submerged Lands Act in the foreseeable future.

The CSO and WGA have reviewed H.R. 3842 and existing law in light of our policy positions.

H.R. 3842: Questions and Concerns

1. H.R. 3842 IS APPROPRIATE, BUT NOT FULLY ADEQUATE.

The Coastal States Organization has previously pointed out that throughout the 50 titles of the United States Code, the term "territorial sea" is used over 70 times.⁵ Notably, however, to our best knowledge, only twice is this term defined as a 3 mile zone: in the Comprehensive Environmental Resources Compensation and Liability Act (CERCLA), 42 U.S.C. §9601(30), and the Clean Water Act, 33 U.S.C. §1362(8). In all other usages of the term no definition is provided. Thus, each time that the term is used, any person operating under, or relying upon, such legislation since Proclamation N°5928 is confronted with the interpretational question: What is meant, a 3 mile or 12 mile territorial sea? Further, the term "territorial sea" in turn defines other terms used throughout the U.S. Code, such as "high seas," "navigable waters," "continental shelf," "waters of the United States," and "in the United States." The federal tax code alone uses the phrase "in the United States" over 2,000 times.⁶ It is obviously in the interest of good government for Congress to act to clarify this situation and avoid the interpretational problems that will undoubtedly continue to arise.

For this reason, the WGA and CSO view H.R. 3842 as an entirely appropriate measure. H.R. 3842 would begin to eliminate the confusing patchwork of federal laws that pertain to the territorial sea. But we believe that it does not go far enough in addressing all of the pertinent federal legislation, especially those of primary interest to the coastal States.

2. IMPORTANT FEDERAL LAWS REMAIN UNADDRESSED.

Without considering the question of whether State seaward boundaries should be extended, we note that several key pieces of federal legislation remain unaddressed by H.R. 3842. These are the Clean Water Act, the Coastal Zone Management Act, the Clean Air Act, C.E.R.C.L.A., as well as the entire U.S. Tax Code (title 26, U.S.C.). Two of these statutes are the only two that specifically define the term "territorial sea" as meaning 3 miles from the coastline.⁷ Thus, if H.R. 3842 were signed into law, confusion would continue to occur because every pertinent federal law except the Clean Water Act and C.E.R.C.L.A. would be understood to refer to a 12 mile territorial sea. Because these important federal statutes are not addressed by HR 3842, problems of interpretation will continue to exist. HR 3842 does not fully resolve this interpretational problem.

3. H.R. 3842 DOES NOT ADDRESS THE COASTAL STATES' KEY CONCERNS.

Both the Coastal States Organization and the Western Governors' Association recognize that the coastal States' key concerns are with the preservation, conservation, and management of coastal and marine resources.⁸ As provided in WGA Resolution N° 91-022, the coastal States have strong interest in extending their seaward boundary. But, in addition to the other four statutes listed immediately above, H.R. 3842 does not address the Submerged Lands Act nor the Outer Continental Shelf Lands Act. H.R. 3842 falls far short of the goals of the WGA and CSO.

Background & Discussion

1. ROUGH ESTIMATES OF FUTURE FEDERAL OIL AND GAS REVENUES IN THE 3 TO 12 MILE BELT

Preliminary, rough, and unverifiable estimates from the Department of the Interior suggest that about 25% of unleased offshore oil resources (2 - 4 billion barrels) and 20% of unleased offshore gas resources (9-18 trillion ft³) exist within 3 to 12 miles offshore. These oil and gas resources represent, again according to these unpublished estimates, between \$58 billion and \$116 billion in market value. Extrapolating these figures, the Department of the Interior estimates that between \$2 billion and \$4 billion of cash bonuses, and \$8 billion to \$16 billion in royalties would be lost from the Federal treasury if the States' seaward boundary were extended from 3 to 12 miles.⁹

These preliminary figures certainly merit additional verification. But assuming they are reasonably sound, it appears that the total future revenues that would be lost to the federal treasury would total somewhere between \$10 billion and \$20 billion. Because these estimates were not derived for any fixed time-period into the future, but rather were open-ended, it is difficult to determine how much of a loss this would be for any individual year. If the time period under consideration were greater than 20 years, these estimates suggest that the loss would average less than \$1 billion per year.

The point has been raised that because of these losses to the federal treasury, it would not be possible to amend the Submerged Lands Act because of the current federal budget agreement. We question, however, whether these alleged lost federal revenues would even be covered by the budget agreement. Even assuming they are, the budget agreement only pertains to the next three fiscal years. What exactly would be the total amount of lost federal revenue over the next three years?

Assuming even further that these preliminary estimates demonstrate that it is infeasible to extend the States' seaward boundaries out to 12 miles because of the federal deficit and current budget agreement, the policy questions remain unanswered. The issue of whether the coastal States' seaward boundaries should be extended to 12 miles is one that encompasses much more than budgetary concerns.

2. STATE OCEAN RESOURCE MANAGEMENT AUTHORITY MUST BE EXTENDED

Possible federal budget concerns do not alter the position of CSO and WGA that the coastal States should be the primary managers of the resources within the newly extended 12 mile territorial sea, exactly as they are today in the 3 mile territorial sea. Federal budget concerns pertaining to offshore oil and gas revenues should not act to bar coastal State management authority over other resources being extended out to 12 miles.

Interim Steps

If, however, budgetary concerns make it impossible to address all pertinent federal legislation and coastal State concerns, a series of interim steps can nonetheless be taken. A new federal law could be enacted that would delegate to coastal States certain management authorities over living and non-living resources within the extended 12 mile territorial sea. Models currently exist in the Clean Water Act, the Endangered Species Act, the Coastal Zone Management Act and the Marine Mammal Protection Act whereby management authority is delegated to the State. After managing the resources successfully for a set length of time, the legislation could provide for a transition from

management authority to full ownership out to 12 miles for State desiring to own out to 12 miles.

This could be accomplished by taking the following steps:

1. Establish a voluntary regime for extended State regulatory and management authority out to 12 miles.
2. Design the voluntary extended regulatory regime after existing federal resource management legislation.
3. Provide federal grants upon the federal approval of coastal State "extended resource management plans" to be matched with State funds at 80/20 for the first year, dropping to 50/50 over a course of years.

Several coastal States are discussing the prospects of pilot projects that would authorize them to develop model joint management programs to address one or more resource concerns within the 12 mile extended territorial sea.

3. FURTHER POLICY REVIEW?

At the same time, we recognize that many policy questions may need to be addressed further when considering extending State ocean resource management authority out 12 nautical miles.

The issue of extending the territorial sea has been previously addressed by Congress. In the 100th Congress, a bill was introduced that would have created a National Ocean Policy Commission charged with proposing to the President and the Congress a comprehensive national

oceans policy associated with extending the territorial sea out 12 nautical miles.¹⁰ This commission was charged with delivering its report within 2 years, and was authorized to spend \$2 million. Subsequent legislation that was introduced would have established a Territorial Sea Commission, with a similar mandate. Both of these commissions would have consisted of members appointed by the President from a pool of nominees selected by the leaders of Congress. Both measures failed to get passed by Congress.

H.R. 3842 calls for a "study of the adequacy of existing Federal and State laws for the management of living and nonliving resources within the territorial sea of the United States between 3 and 12 nautical miles" offshore.¹¹ This study, to be conducted by the National Seagrass College Program, would address the "adequacy of existing Federal and State laws for the management of living and nonliving resources within the territorial sea of the United States between 3 and 12 nautical miles."¹² The study would be funded with \$100,000.

Although we could support the concept of such a study, we believe the lack of participation in the study by coastal State representatives, and the insufficiency of funding, are severe shortcomings of the study as provided in H.R. 3842. Further, it is not clear that the scope of the study -- Federal and State resource management laws for living and nonliving resources -- would even include the Submerged Lands Act. The Submerged Lands Act certainly vests the States with regulatory and management authority, but is a "quiet title" act, not a resource management act. Any study should clearly include the question of amending the Submerged Lands Act within its mandate.

Conclusion

The Coastal States Organization and the Western Governors' Association clearly recognize that, because of their proximity to, and reliance upon, the sea, and the extent to which development of these coastal and marine resources will affect their economy and environment, the coastal States have direct and inherent rights, responsibilities and interests pertaining to the protection, conservation and development of the living and non-living coastal and marine resources. None of these inherent rights, responsibilities or interests are addressed by HR 3842.

The WGA and CSO view H.R. 3842 as an entirely appropriate measure. H.R. 3842 would begin to eliminate the confusing patchwork of federal laws that pertain to the territorial sea. But we believe that it does not go far enough in addressing all of the pertinent federal legislation, especially those of primary interest to the coastal States. Nor do we believe that budget concerns pertaining to federal offshore oil and gas revenues should act to bar coastal State management authority over other resources being extended out to 12 miles.

If, however, budgetary concerns make it impossible to address all pertinent federal legislation and coastal State concerns, a series of interim steps can nonetheless be taken. A new federal law could be enacted that would delegate to coastal States certain management authorities over living and non-living resources within the extended 12 mile territorial sea. Policy questions raised by extending State management authority out 12 nautical miles certainly should be studied further. We believe, however, that the lack of participation in the study by coastal State representatives, and the insufficiency of funding, are severe shortcomings of the study as provided in H.R. 3842.

We appreciate the opportunity to submit our remarks for the record. We look forward to working with the Committee on legislation that addresses the concerns of the coastal States.

ENDNOTES

1. Western Governors' Association Resolution 91-022, adopted Nov. 22, 1991.
2. *Id.*
3. Testimony Chris A. Shafer, Chairman of the Coastal States Organization, before the Subcommittee on Oceanography and Great Lakes, House Merchant Marine and Fisheries Committee, March 21, 1989.
4. *Id.*
5. *Id.*
6. *Id.*
7. See 42 U.S.C. §9601(30), and 33 U.S.C. §1362(8).
8. See testimony of Chris A. Shafer, *supra*, note 3. See also *Coastal States and the Exclusive Economic Zone*, Coastal States Organization, April 1987; Western Governors' Association, Resolution 91-022, adopted Nov. 22, 1991.
9. Unpublished information from U.S. Department of the Interior, Mineral Management Service.
10. H.R. 5069, the *Territorial Sea and Contiguous Zone Extension Act of 1988*, 100th CONG., 2d SESSION.
11. H.R. 3842, §8.
12. H.R.3842, §8(a).