

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

HEARING

BEFORE THE

COMMITTEE ON

MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

ON

H.R. 3842

**A BILL TO EXTEND THE TERRITORIAL SEA AND THE
CONTIGUOUS ZONE OF THE UNITED STATES, AND FOR
OTHER PURPOSES**

FEBRUARY 4, 1992

Serial No. 102-62

Printed for the use of the Committee on Merchant Marine and Fisheries



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TERRITORIAL SEA AND CONTIGUOUS ZONE EXTENSION AND ENFORCEMENT ACT OF 1991

TUESDAY, FEBRUARY 4, 1992

HOUSE OF REPRESENTATIVES,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, DC.

The committee met, pursuant to call, at 10 a.m., in Room 1334, Longworth House Office Building, Hon. Carroll Hubbard, Jr. pre-
siding.

Members present: Representatives Hubbard, Hughes, Tauzin, Hertel, Tallon, Ortiz, Bennett, Pickett, Hochbrueckner, Clement, Pallone, Laughlin, Taylor, Anderson, Lancaster, Lent, Fields, Bateman, Bentley, Coble, Goss, and Gilchrest.

Staff present: Edmund B. Welch, Chief Counsel; Tom Kitsos, Senior Policy Analyst; Mary Kitsos, Chief Clerk/Administrator; Sue Waldron, Press Secretary; Dan Ashe, Senior Professional Staff; Joan Bondareff, Senior Counsel; George Pence, Minority Staff Director/Chief Counsel; Margherita Woods, Chief Minority Clerk; Lisa Pittman, Minority Counsel; Kip Robinson, Minority Counsel; Linda L. Livingston, Staff; and Hoyt Wheeland, NOAA Fellow.

Mr. HUBBARD. The Committee on Merchant Marine and Fisheries will come to order for a hearing on House Bill 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991.

Our distinguished Chairman has a cold this morning and is running a little late. He will be here later. He has asked me to preside in his absence. We apologize to each of you for the hearing beginning 10 minutes late.

OPENING STATEMENT OF HON. WALTER B. JONES, A U.S. REPRESENTATIVE FROM NORTH CAROLINA, AND CHAIRMAN, COMMITTEE ON MERCHANT MARINE AND FISHERIES, AS READ BY MR. HUBBARD

Mr. HUBBARD. Today, the full committee on Merchant Marine and Fisheries will hear testimony on H.R. 3842, the Territorial and Contiguous Zone Extension and Enforcement Act of 1991.

Chairman Jones introduced this bill, along with other Members of this committee, last November.

The purpose of this 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 and State law. It is the

role of Congress, of course, to implement the proclamation through changes in Federal law.

H.R. 3842, introduced by Chairman Jones and others, has three principal purposes: one, 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 NOAA, 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 Chairman Jones' State of North Carolina, may have an interest in assuming additional responsibilities in the extended territorial sea. However, this 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.

The first witness is a distinguished Member of our committee. For many of us, we can say he is one of our favorite Members of Congress, the Honorable Charles E. Bennett from Jacksonville, Florida.

Charlie Bennett, we are glad to have you with us.

Forgive me, as you can tell, I am not being too polite to my Republican colleagues this morning, not intentionally. Before Congressman Bennett proceeds as the first witness, it would certainly be appropriate to have an opening statement from the Ranking Minority Member, Mr. Lent from New York.

Mr. LENT. I have a very laudatory statement about you, Mr. Chairman, but with your permission, I will ask unanimous consent to put it in the record without reading it.

Mr. HUBBARD. Without objection, it is so ordered.

[The statement follows:]

STATEMENT OF HON. NORMAN F. LENT, A U.S. REPRESENTATIVE FROM NEW YORK

Mr. Chairman, it is a pleasure to participate with you and the other Members of our committee in this hearing today on the legislation Chairman Jones introduced to extend the United States territorial sea and contiguous zone.

As most students of American history know, our current 3-mile territorial sea was originally established based on the distance that a shore batter could fire a cannon ball at the time of the founding of our Nation. While President Reagan did extend our territorial sea to 12 miles for certain international purposes, it is time for us to join the rest of the world and establish a 12-mile territorial sea for all Federal programs and activities.

This hearing is timely and we should proceed to develop legislation to give our Government the authority it needs to protect our national interests and the living and non-living resources found off our coasts.

There are numerous Federal laws on the books that will have to be modified to reflect this extension. At the same time, we need to understand the impact on American industry and various maritime interests that such an extension will have. We must also be very clear about the responsibilities of the coastal States and what their authorities will be under such a Federal extension.

I look forward to the testimony today and hope that the witnesses will provide us with specific comments and recommendations that will enable us to craft appropriate legislation.

Thank you, Mr. Chairman.

Mr. HUBBARD. It would also be appropriate for the Chairman to call upon other Members of the committee to have opening statements prior to our first witness.

[The statement of Mr. Hertel follows:]

STATEMENT OF HON. DENNIS M. HERTEL, A U.S. REPRESENTATIVE FROM MICHIGAN, AND CHAIRMAN, SUBCOMMITTEE ON OCEANOGRAPHY, GREAT LAKES AND THE OUTER CONTINENTAL SHELF

The full committee is considering testimony on H.R. 3842, relative to a number of statutes involving the territorial sea and contiguous zone. These statutes apply to different subject areas involving the jurisdiction of each of the various subcommittees.

It is also important to recognize that considerable ambiguity exists about the validity of a unilateral Presidential declaration extending our territorial sea to 12 miles. Action may be necessary to preserve a constitutional role for Congress on decision expanding U.S. territorial sovereignty. In addition, if an extended territorial sea is ratified, congressional action is necessary to make appropriate changes in our domestic laws.

In 1989, I convened a hearing before the Subcommittee on Oceanography, Great Lakes and the Outer Continental Shelf to examine the domestic implications of extending the territorial sea from 3 miles to 12 miles offshore. At that hearing, considerable concern was expressed about the potential impacts upon the operation and interpretation of countless domestic statutory schemes in the absence of congressional action. Many of those who testified expressed concern about the creation of an atmosphere of regulatory confusion and litigation raising issues of implied statutory modification. One of the most pressing concerns expressed at that time related to the definition and geographical scope of the "coastal zone" over which a State exercises the authority conferred by the Coastal Zone Management Act. This controversy has since been resolved separately with the reauthorization of the Coastal Zone Management Act in 1990.

The bill before us today is intended only to modify the operation of the statutes included specifically. In addition, the bill seeks to establish a uniform definition of the term "territorial sea" when that term is used in any future legislation. At today's hearing, we need to ensure that the statutes included in this bill are amended in a way that creates no unintended consequences so that implementation efforts may proceed in a fashion that is both expeditious and efficient.

Thank you, Chairman Jones, for your diligence in reviewing our Federal statutes to apply the new "territorial sea" definition in a thoughtful and practical manner in H.R. 3842.

Mr. HUBBARD. Congressman Tallon from South Carolina.

Mr. TALLON. I have no statement, Mr. Chairman. Thank you.

Mr. HUBBARD. Does anyone else have an opening statement?

Mr. Bateman.

Mr. BATEMAN. Thank you, Mr. Chairman. I have none. We have a long list of witnesses that I think we are anxious to hear. I am ready to proceed to hear them. Thank you.

Mr. HUBBARD. Congressman Pickett of Virginia.

Mr. PICKETT. No, I have no opening statement.

Mr. HUBBARD. Congressman Coble of Virginia.

Mr. COBLE. No.

Mr. HUBBARD. Mr. Lancaster of North Carolina, Mr. Taylor of Mississippi.

Mr. TAYLOR. I have no statement. Thank you, Mr. Chairman.

Mr. HUBBARD. Mr. Goss of Florida.

Mr. GOSS. No, thank you, Mr. Chairman.

Mr. HUBBARD. Are there any other Members who wish to make an opening statement?

Mr. GILCREST. No, Mr. Chairman. Mr. Lent, do you have anything else to say?

Mr. LENT. No, Mr. Chairman.

Mr. HUBBARD. Now, we call on Congressman Bennett for his statement.

**STATEMENT OF HON. CHARLES E. BENNETT, A U.S.
REPRESENTATIVE FROM FLORIDA**

Mr. BENNETT. Thank you for allowing me to come before your committee and for calling this hearing on this important issue of who controls the seaward boundaries of our nautical States. Since December 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 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 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 previ-

ously agreed expiration date or until they are canceled 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 their 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 and other legislation that affects this general area of operation.

Thank you, Mr. Chairman.

Mr. HUBBARD. Thank you, Congressman Bennett. Certainly I would like to commend you for your interest in this legislation. There are differing views on this, of course. We also want to compliment you and congratulate you on your efforts regarding the Shipwreck Act which you sponsored.

Mr. BENNETT. Thank you for your help.

Mr. HUBBARD. The Chair recognizes Congressman Norman Lent of New York for questions.

Mr. LENT. Thank you, Mr. Chairman.

I want to ask the gentleman one or two questions and ask that the record include, following Congressman Bennett's statement, a letter from the U.S. Department of State dated February 3, 1992, with enclosures, which in essence opposes this legislation, H.R. 536, introduced by the distinguished gentleman from Florida, Mr. Bennett.

One of the reasons that the U.S. Government gives for opposition to your bill is loss of revenues to the Federal Government that would significantly reduce the Federal revenue.

"Therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Act of 1990. That is, if the bill results in a deficit that is not fully offset, it must trigger a sequester. For these reasons, the Administration strongly opposes this legislation."

Do you have any response to that?

Mr. BENNETT. Well, I never saw that letter until about five minutes ago. We asked for their report months and months ago so it is very hard for me to respond in any great depth to it at this moment. Certainly, the arguments that they raised are questions that this committee has to address both by staff and by each

Member of the committee observing what he feels is the answer to it.

The logic of the legislation I introduced is irresistible. It is a good solid piece of legislation based on complete logic. As to whether it presents the Federal Government with an unacceptable financial situation is something the committee is going to have to weigh. Perhaps we cannot do all the things we would like to do in Mr. Jones' legislation at this point.

However, I felt that if I did not present the need for legislation like H.R. 536 and just let this general legislation slip by, it might be thought by some people that there was a commitment to do everything that would be done by the Jones bill in existing law without any consideration of the equities which are involved in the legislation I introduced.

So even though I received this only five minutes ago and it is dated today or yesterday, the response I have to it is that the arguments they raise are things that the committee will have to consider and the staff will have to consider them as well.

Basically, it does turn over assets to the States that the Federal Government otherwise could have. I cannot escape that.

Mr. LENT. The State Department points out—and incidentally, I only got the letter this morning myself—but it does point out that there will be a Federal loss in revenue as mining and oil and gas production leases expire under the terms of your legislation. As I understand it, existing leases would be grandfathered, but not renewals.

When these leases would ordinarily be renewed and the revenues continue to go into the General Treasury for the entire Nation, even the noncoastal States, under the terms of your bill, these Federal leases would not be eligible for further extension.

Mr. BENNETT. That is correct.

Mr. LENT. And the moneys could go to the State of Florida exclusively.

Mr. BENNETT. That is right. I don't think the State of Florida would have any leases because we are more interested in preserving the national treasury of the coral reefs and things of that type and we are more interested in flora and fauna in Florida than we are about oil.

I think the headlines this morning said we have about half a billion worth of red ink that has to be made up because of our Constitution which requires us to be in the black. Most States do. My guess is, having been a life-long resident of Florida and having observed what they have done with regard to underwater matters, the State of Florida would be very reluctant to have any leases off their coastal barrier.

Mr. LENT. When we have these leases off our coasts, the moneys that are derived from those leases, or at least 85 percent of them, find their way into the Land and Water Conservation Fund. That is 85 percent of the Fund is derived from outer continental shelf revenues.

This fund is utilized by all of the States. There has been some \$13 billion that has gone into that Land and Water Conservation Fund. A lot of that fund is used for environmental purposes. Also, the Historic Preservation Fund which is another good, big fund and

benefits all States' reserves, derives its moneys from outer continental shelf revenues.

So if we were to suddenly transfer these leases over to the individual States, the funding that the Land and Water Conservation Fund and the Historic Preservation Fund currently receives would be seriously impaired.

The gentleman would acknowledge that.

Mr. BENNETT. Well, realistically, I don't think very much money has come from the Florida waters for those programs. I think the programs are good programs. But I will acknowledge the fact that this does not allow the States to have authority over their own waters. That is what the purpose of the legislation is.

I think I would be remiss if I did not bring this to the attention of the committee, if I sat back and let the legislation pass on and say this is of no consequence to me. It is of consequence to me. This State has now been told by the Federal Government that it is going to extend the boundaries out to 12 miles.

It is my opinion that that should extend the authority of the State to 12 miles. That is a decision the committee has to make. It is not life or death. I have to present it because it is the right thing to do and every once in a while you have to do the right thing.

Mr. LENT. Well, speaking of the right thing, we just fought a war over in the Persian Gulf which in large part was founded on the necessity of keeping 25 or 30 percent of the world's oil resources out of the hands of a fellow named Saddam Hussein.

The President has come forward with, and the Senate is now considering, a national energy strategy to make America less dependent upon foreign sources of oil. That national energy strategy envisions that the outer continental shelf, in particular, natural gas and oil resources in the outer continental shelf, will play a major role in our domestic energy profile so that we will relieve ourselves of the necessity of depending on foreign sources of oil.

So that would be another reason, perhaps, why this legislation might not be the wisest course for us.

Mr. BENNETT. Well, it may not be. Of course, what we really ought to be doing about oil, we really ought not to be such gluttons about the consumption of oil. We use more oil, more gasoline than any other country in the world does and we do it at a rather cheap rate.

It is impurifying the air. It is costing our economy greatly and it is hurting our ecology. Something ought to be done toward slowing that up. It is a corporate glutton which I share. I drive every day, about 30 miles. I should be able to find another person to ride with or go on Metro.

Mr. HUBBARD. Thank you.

Would you call each Member's name because we have so many witnesses, does any Member have any questions for Congressman Bennett?

Mr. LAUGHLIN. I have one.

Mr. HUBBARD. Congressman Laughlin of Texas.

Mr. LAUGHLIN. My question is specific to my State. Does your legislation alter in any way the State ownership that we have that is unique to Texas because we were an independent country for 10

years? You know the struggle that takes place. We have ownership that extends beyond what most of the States have.

Mr. BENNETT. No, it does not.

Mr. LAUGHLIN. I understand this law will extend State ownership out beyond what your current State ownership is in our waters. Does your legislation take away any of the ownership rights the State of Texas currently has?

Mr. BENNETT. It does not.

Mr. LAUGHLIN. It does not?

Mr. BENNETT. No.

Mr. HUBBARD. Do other Members of the committee have questions for Congressman Bennett?

Mr. TAYLOR. I have questions, Mr. Chairman.

Mr. HUBBARD. Congressman Taylor of Mississippi.

Mr. TAYLOR. I am curious about some resources, I want to say mackerel, red drum, I think the Federal guidelines are stiffer than the State guidelines. I am curious how your legislation would affect that. In the case of king mackerel and redfish, I understand the Federal guidelines are tougher than the State guidelines in most States.

I am curious how your bill would affect that. Would that affect all fisheries management within that 12-mile limit as well?

Mr. BENNETT. I am not in a position to answer that question.

Mr. TAYLOR. Mr. Chairman, if you don't mind, I would like to have the staff at some point address that question before this measure is voted on, whether that would include for the purpose of fisheries management, whether at this point the boundary is moved out to 12 miles would all fisheries management such as mackerel, such as red drum fall under State control or remain under Federal control or both or how would this affect that.

The staff doesn't need to answer right now, but I want to know before I vote on this matter.

Mr. BENNETT. I do agree that is something the hearing should develop and the staff ought to work on that.

Mr. HUBBARD. I would agree. I am certain that each Member of the committee present would agree that the staff should give us this before mark-up. We ask that they do so.

[The information requested by Mr. Taylor follows:]

EFFECT OF TERRITORIAL SEA LEGISLATION ON FISHERIES MANAGEMENT

This memorandum responds to the question posed by Mr. Taylor at the February 4, 1992 hearing on H.R. 3842, the "Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991." At the hearing, we also took testimony on H.R. 536, the "Coastal States Extension Act of 1991," introduced by Mr. Bennett.

Mr. Taylor asked what effect the Bennett bill would have on fisheries management, now that certain Federal regulations (e.g., for redfish and king mackerel) are stricter than existing State regulations.

Mr. Bennett's bill would extend State seaward boundaries under the Submerged Lands Act from 3 to 12 miles. This would have the effect of extending State ownership and control of resources to 12 miles offshore. The Bennett bill also could implicitly repeal or supersede the Magnuson Fishery Conservation and Management Act (Magnuson Act) for those fisheries that lie between 3 and 12 miles offshore. Thus, unless we were to carve out an exception for the fisheries management, those fisheries which lie between 3 and 12 miles offshore and are now subject to Federal regulation and management under the Magnuson Act, would be subject to State regulation and control. Under this scenario, Federal regulations would no longer apply

in this zone and State regulation would. Therefore, Federal regulations for certain fisheries could be replaced by State controls.

In contrast, H.R. 3842 explicitly retains State seaward boundaries at their present limits under the Submerged Lands Act (see section 9 of H.R. 3842). These limits are set by the Submerged Lands Act at three miles (except in the case of Texas and the Gulf coast of Florida where they are three marine leagues or nine miles).

H.R. 3842 also contains a number of amendments to the Magnuson Act. However, these amendments are limited to extending the enforcement powers of the Federal Government in the territorial sea and do not alter present State seaward boundaries. Thus, under H.R. 3842, the current system of cooperative State/Federal regulation under the Magnuson Act is maintained.

EFFECT OF TERRITORIAL SEA LEGISLATION ON COASTWISE TRADE LAWS AND VESSELS ENGAGED IN FISHERIES

H.R. 3842, as introduced, amends the Towing Vessel Act (46 App. U.S.C. 316) and the Jones Act (46 App. U.S.C. 883) to extend their application out to 12 miles. The bill did not amend the Passenger Vessel Act (46 App. U.S.C. 289) to extend that law out to 12 miles. However, the Passenger Vessel Act will probably be extended under an amendment to be offered at the mark-up of this bill.

As a result of these changes, the coastwise trade laws will be extended out to 12 miles. Therefore, foreign-flag voyages-to-nowhere vessels will have to go beyond 12 miles at some point during their voyage or else they will be in violation of the law.

A class of U.S.-flag vessels will also be affected. Fish processing vessels often take fish from a catcher vessel, process the fish, and transport it to shore. Under the Nicholson Act (46 App. U.S.C. 251) only a U.S.-flag vessel may land fish in the United States. The vessel must be coastwise-qualified if it is transporting the fish from a point within the three-mile territorial sea. However, if the vessel is transporting the fish from a point beyond the three-mile limit it does not need to meet the coastwise requirements—i.e., 75 percent of its stock does not need to be owned by U.S. citizens. Additionally, the U.S.-build requirement for fish processing vessels was added in 1988. Therefore, there are foreign-built, U.S.-flag, fish processing vessels that are currently landing fish in the U.S. if they are transporting the fish from a point outside the current three-mile territorial sea. Since H.R. 3842 would extend the territorial sea to 12 miles, these U.S.-flag vessels would not be allowed to continue these operations.

An amendment will probably be offered at mark-up that will grandfather the current U.S.-flag vessels engaged in these operations so they can continue their current operations. However, if the vessel is sold, the new owners will have to meet the 75 percent stock ownership test of the coastwise trade laws.

Mr. HUBBARD. Are there any other questions of Congressman Bennett?

Thank you very much, Congressman Charlie Bennett. We hope you will join us now in the regular seats.

Mr. HUBBARD. At this point, the next witness is the Honorable Lorenzo De Leon Guerrero, Governor of the Commonwealth of the Northern Mariana Islands. Is he here? He is not here.

We will go on to the next panel, including David A. Colson, Deputy Assistant Secretary for Ocean and Fishery Affairs, Department of State; Thomas A. Campbell, General Counsel, National Oceanic and Atmospheric Administration; and Rear Admiral Paul E. Versaw, Chief Counsel, U.S. Coast Guard.

Without objection, the testimony of these three distinguished witnesses and the testimony of all of our witnesses today as presented by them in written form will be entered into the record.

We would request, if you would, to limit your individual remarks to 10 minutes each. If that is impossible, we will be lenient, but it is our hope that you could limit your remarks to 10 minutes each.

We now call on our first witness, Mr. David Colson.

STATEMENTS OF DAVID A. COLSON, DEPUTY ASSISTANT SECRETARY FOR OCEAN AND FISHERY AFFAIRS, DEPARTMENT OF STATE; THOMAS A. CAMPBELL, GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; AND REAR ADMIRAL PAUL E. VERSAW, CHIEF COUNSEL, U.S. COAST GUARD

STATEMENT OF DAVID A. COLSON

Mr. COLSON. Thank you, Mr. Chairman. I believe I can take less than 10 minutes and summarize a few points that we believe are important to stress. First, as we have just heard the discussion about Congressman Bennett's bill, it is important for me to underscore the strong opposition of the Administration to this bill, primarily because of the enormous financial implications that it would have for the Federal budget.

Turning to H.R. 3842, which is the principal item we are going to discuss today, we believe that this bill closely tracks what should be done in extending Federal laws to the new 12-mile limit as proclaimed by President Reagan in 1988.

The Chairman's bill is a case-by-case statutory review of what laws should be extended to that limit and what should not. From a foreign policy standpoint, the State Department has no objection to the bill.

We would like to underscore the importance that we see in the savings clause that is contained in section 9 and, in particular, the references to international law in section 9(c) which make clear that as a matter of U.S. domestic law, there would be no impairment of the international rights of innocent passage or the international right of transit passage in straits used for international navigation.

It is appropriate that our law does not address the matter of archipelagic sea lanes passage since the United States is not entitled to claim archipelagic status in international law.

I need to mention a few points about the contiguous zone.

Chairman Jones, in his Floor statement when he introduced this bill in November of last year, made reference to the problem that we encounter because the 1958 Convention on the Territorial Sea and the Contiguous Zone to which the United States is a party, places the outer limit of the contiguous zone at 12 nautical miles from the coast.

However, we have analyzed this matter extensively within the Administration and reviewed with our international partners to the 1958 convention as to whether there would be any objection if parties to that convention extended their contiguous zone to 24 nautical miles.

We are in a position to say today that we do not feel that we are constrained by the 1958 convention on this particular point and we would hope as this bill moves forward to work with the committee staff to place some language in the record that would explain this point so as not to appear that our domestic legislation goes beyond an international treaty obligation.

I would also like to note one particular point in the bill. It is section 6(b) which refers to the exclusive jurisdiction of the United States in the 24-mile contiguous zone. While that jurisdiction is certainly exclusive as between the United States and any other coun-

try, our rights in that zone are not plenary rights. They are limited for certain customs, immigration, and sanitary purposes.

We would hope that the definition of the jurisdiction that the United States would exercise in the 24-mile contiguous zone would more carefully reflect the rights the United States may exercise under international law.

It falls on me to note as well that the Justice Department does have a few questions of a constitutional character which they will be transmitting to this committee shortly.

[A response from the Department of Justice can be found on page 335.]

Mr. COLSON. Finally, one other point. We remain concerned about the prospective and retrospective application of this law and the effect that might have on other laws of the United States. We believe that it would be better if we could look at the extension of various domestic statutes on a case-by-case basis and not create a result which simply would indicate that all prospective acts of Congress would have an effect out to the 12- or 24-mile limit as the case may be.

Finally, we would like to congratulate the Chairman on his initiative in this respect and express our appreciation for the close working relationship that we have had with the committee staff as we have gone through a difficult task in trying to identify the laws of the United States that need to be modified to fully implement a 12-mile territorial sea for the United States.

Thank you very much, Mr. Chairman.

Mr. HUBBARD. Thank you, Mr. Colson.

[The prepared statement of Mr. Colson can be found at the end of the hearing.]

Mr. HUBBARD. We now call on Mr. Thomas A. Campbell.

STATEMENT OF THOMAS A. CAMPBELL

Mr. CAMPBELL. Thank you, Mr. Chairman, for the opportunity to address the committee on H.R. 3842. We also at NOAA are very supportive of the legislation to the extent that it is supportive of existing programs and to the extent that it is a very careful statute-by-statute analysis of existing authorities. What the legislation does is preserve the current balance of authorities and powers that are established in existing legislation.

Specifically with regard to the Magnuson Act, we have some 32 fisheries that are currently under fisheries management plans. Of those 32 fisheries, the large majority of those fisheries are in fact interjurisdictional, that go between at least one or two or more States and between Federal and State jurisdictions.

The Magnuson Act takes careful note of the fact that these resources are a unit and they are not confined by artificial boundaries and jurisdictions. And the only way you can effectively manage these resources is throughout their range.

This bill takes the Magnuson Act and allows it to continue in its scope and authority and allows fisheries management councils, which have representatives from each of the affected States represented on the councils, and gives them an opportunity to sit down together with other industries, environmental and other affected

groups and determine what the best management regime for the fishery is throughout the range.

In fact in the testimony we point out a couple of instances when the fishery has been largely inshore and how that State management regime has not been totally effective because of the way it is divided up between various State jurisdictions.

A good example of that is Atlantic striped bass where we had a crash in that species because of the inability of differing States to get together and regulate uniformly the taking of striped bass.

What happened, the Congress passed the Atlantic Striped Bass Act and in the last year we have begun to see significant rebounds of that overall stock.

On the other side of NOAA dealing with the Coastal Zone Management Act there is substantial authority given to the States to have a say in activities that affect their coastal zone. Recently we rendered an opinion in a case off the coast of California where the proposal was to place a drilling rig outside of the territorial sea, outside of the three-mile limits but certainly its emissions, air emissions in this instance, would travel into the territorial sea and into the coastal zone.

The State's coastal zone management commission made a decision where they in fact felt that that proposal was inconsistent with their coastal zone plan and that determination in fact was appealed to the Commerce Department. Our determination was that since the activity outside the coastal zone had an effect on the coastal zone, the State had the authority to have a say in those activities and in fact the decision of the California Coastal Commission was sustained.

My point here is that there is a careful balance that has been established in a case-by-case basis over a number of years that cannot wholesale be disturbed. The good thing about H.R. 3842 is that it takes that into consideration. It preserves the existing balances that exist, whereas the other legislation that has been presented, in fact, goes in and makes wholesale changes that I think may in some cases be appropriate, probably not, but taken in a short-term context would certainly not be appropriate.

Even this legislation calls for further study and looking carefully on a case-by-case basis. Specifically section 8 has Sea Grant going in and studying the implications and studying what decisions might be needed by the States in the newly established territorial sea.

We concur with the State Department in terms of retroactive application of the legislation. We are uncertain as to what the retroactive ramifications of that would be. We believe a date certain would be a more appropriate date to take. We want to congratulate the Chairman on the submission of this carefully thought through legislation and in addition to that, the staff.

Our sincere thanks for the significant cooperation and input that has been allowed throughout this process.

Thank you very much, Mr. Chairman.

Mr. HUBBARD. Thank you, Mr. Campbell. We appreciate your testimony.

[The prepared statement of Mr. Campbell can be found at the end of the hearing.]

Mr. HUBBARD. Our final witness on this panel is Rear Admiral Paul E. Versaw, Chief Counsel for the U.S. Coast Guard. We welcome you.

STATEMENT OF REAR ADMIRAL PAUL E. VERSAW

Admiral VERSAW. Thank you, sir.

Mr. Chairman and Members of the committee, this being the first opportunity that I have had to appear before you, I appreciate the opportunity to make this statement and answer any questions that you might have concerning the potential effects on the Coast Guard of H.R. 3842.

As you have requested, Mr. Chairman, we have provided copies of all of our testimony and I understand that they will be included in the record. I think I will just accept that and answer any questions that the committee has for me.

Thank you.

Mr. HUBBARD. My, this is your first time before a congressional committee. You will be invited back, however. You will be a very popular witness.

[The prepared statement of Admiral Versaw can be found at the end of the hearing.]

Mr. HUBBARD. I guess we should start off with you, Admiral Versaw since you have entered your statement in the record. We will just ask you this: We take it from your testimony, Admiral Versaw, that the Coast Guard has no objection to H.R. 3842 and does in fact support the approach taken of a case-by-case review of laws with the term "territorial sea."

Admiral VERSAW. Yes, sir, we don't object to the bill and we support the careful case-by-case review of the amendments. From the standpoint that we are not sure at this time of the workload which will follow and the regulations that will be required to be modified as a result of these changes.

As you are well aware and Members of this committee are well aware, with the immense number of regulations that the Coast Guard promulgates as a result of the statutes that are issued, if we don't go on a case-by-case basis we could be totally overloaded and unable to be responsive to the needs and statutes that are being enacted or proposed to be enacted.

Mr. HUBBARD. What advantages to navigational safety and to the protection of our living marine resources does the Coast Guard see in the amendments to the various Coast Guard laws included in Chairman Jones' legislation?

Admiral VERSAW. It is my opinion that improvements in vessel traffic services and traffic separation schemes—extending such services beyond three nautical miles—are examples of advantages to navigation safety.

Even more advantageous is this committee's retention of the status quo of 3 nautical miles for safety devices, particularly Electronic Positioning-Indicating Radio Beacons, or EPIRBs. Their extension to 12 miles would be detrimental to safety because we would not have that means of locating people in distress between 3 and 12 miles offshore.

Mr. HUBBARD. Admiral Versaw, have you identified other laws which have been identified by the Coast Guard which should be included in this legislation?

Admiral VERSAW. I have not identified other laws within the Coast Guard's purview that should be included in this legislation. Other statutes which the Coast Guard may be called upon to enforce may, in the future, be appropriate to be discussed within the 12-nautical mile sea, but as I said earlier on the case-by-case approach, I am concerned about the regulation workload should too many statutes be included in one initiative.

As many Members of this committee are well aware, we are deeply involved in the Oil Pollution Act of 1990 (OPA 90) and promulgating those regulations.

Mr. HUBBARD. What effect, if any, will this bill have on Coast Guard resources?

Admiral VERSAW. I am not certain, Mr. Chairman, what impact it is going to have on Coast Guard resources in the field.

We will continue to enforce the laws of the United States to the best of our abilities with the resources that we have available to us.

Again, I am at this time more concerned in attempting to focus on the workload that is going to result in promulgating the existing regulations that might be necessary.

Mr. HUBBARD. Now for Mr. Colson of the State Department, I take it from the State Department's point of view that this bill, H.R. 3842, is consistent with international law and is a reasonable way to proceed to implement a 12-mile territorial sea and 24-mile contiguous zone.

Mr. COLSON. Yes, sir.

We would like to see that modified language in paragraph six to more carefully reflect the jurisdiction the United States is entitled to exercise in the contiguous zone.

Mr. HUBBARD. I am curious about the legal questions the Justice Department is looking at. I understand the Justice Department looked at the President's authority to extend U.S. sovereignty over the 12-mile territorial sea before the 1988 proclamation was issued.

At that time they concluded there was some doubt about the matter and recommended implementing legislation. Why is it revisiting this question? Didn't the Justice Department also recently recommend that a declaration of sovereignty over the territorial sea be added to the Crime Bill?

Mr. COLSON. Yes, sir. On the first point I don't believe there was ever any question that the President had the power to extend the territorial sea of the United States to 12 miles. Their concern related to what effect that would have on domestic legislation. Justice in 1988 recommended that a bill be enacted to make clear that domestic legislation was not affected by the presidential proclamation.

What they are looking at right now is the constitutional question with respect to the contiguous zone. With respect to your question about the Crime Bill, it is my understanding that Justice has recommended such an amendment to the Crime Bill basically to take account of United States obligations with respect to the new terrorism convention.

Mr. HUBBARD. Mr. Colson, can you expand on the Administration's objections to House Bill 536, which is the Coastal State's Extension Act of 1991?

Mr. COLSON. As was noted earlier, Mr. Chairman, I believe by Congressman Lent, the Administration has sent to the committee a letter dated yesterday outlining in some detail the various concerns that we have.

I would note specifically that the effect of H.R. 536 would be to transfer approximately 25 percent of the unleased oil resources on the entire outer continental shelf to the States and approximately 20 percent of the unleased gas resources on the outer continental shelf to the States.

This would—the dollar estimates are somewhat general but the numbers used in our letter indicate a \$2 to \$4 billion loss in cash bonuses and \$8 to \$6 billion loss in royalties to the Federal Government in regards to this legislation.

Mr. HUBBARD. You recommended an amendment to the bill that defines the contiguous zone. There is an amendment of the term "contiguous zone" in House Bill 3842.

Do I understand that what you mean is adding a definition that refers to the rights and obligations of nations within a contiguous zone?

Mr. COLSON. That is correct, sir.

I have alluded to that several times. We believe the words of the United States' control in that area should be limited to the words we use in international law. Basically the customs, fiscal, immigration, and sanitary laws of the United States.

Mr. HUBBARD. These questions are for Mr. Campbell, the general counsel of the NOAA. You testified that amending the Marine Protection, Research and Sanctuaries Act will give NOAA additional authority in the 3- to 12-mile area. Can you give us examples where this will be helpful for the protection of national marine sanctuaries?

Mr. CAMPBELL. Yes, Mr. Chairman.

In Florida, in the Looe Key Sanctuary, which will become part of the Florida Keys Sanctuary, we had a grounding of the ship *Elpis*. Once it freed itself, it attempted to leave the jurisdiction. This legislation would make it very clear what our authority would be out to the 12-mile area and therefore would make enforcement issues such as seizure of foreign vessels much more easily conducted.

Mr. HUBBARD. Mr. Campbell, your testimony indicates that NOAA would oppose any retroactivity in this bill. I agree, we have to consider the date where references to the territorial sea would automatically mean 12 miles.

Would you support the date of enactment of this legislation?

Mr. CAMPBELL. Yes.

Mr. HUBBARD. You testified it is important to define the responsibilities of the State and Federal Government under the Magnuson Act. Can you tell us how the movement of the boundary line could harm fishery resources?

Mr. CAMPBELL. So many of the fisheries resources we are attempting to manage are transitory in nature, and travel between jurisdictions. Fish don't know the difference between State lines. They need to be managed as a unit throughout their range. Creat-

ing artificial divisions that create disparity among enforcement regimes from State-to-State creates enforcement problems.

In addition, different States adopt different standards. There is a natural tendency for everyone to gravitate to the least onerous enforcement regime allowing their State's fishermen to take as much fish as possible. So for that reason, there is a need for unified conservation measures to be put in place.

H.R. 3842 does in fact allow that to continue to take place.

Mr. HUBBARD. I have one more question before we go to other Members.

You refer to the amendments we added to the Coastal Zone Management Act of 1990 on consistency. Could you tell the committee Members whether these amendments to the consistency amendments to the CZMA are working well and whether they allow the States to review matters that affect their coastal zones.

Mr. CAMPBELL. Yes. The example I cited in my testimony was of a pre-reauthorization action that we took that, in fact, very carefully took into consideration the effects of actions occurring outside of the three-mile limit that had an effect on the coastal zone and what has happened as a result of the amendment to the Coastal Zone Management Act has been a codification of actions previously taken, a re-enforcement of those actions.

So at this point in time the States have a great deal to say as to what Federally-permitted activities do occur in their coastal zone.

Mr. HUBBARD. Congressman Lent for questions.

Mr. LENT. Thank you.

Mr. Campbell I heard you say so many nice things about H.R. 3842 and the things that it would do. Does that mean that your agency is in support of it?

Mr. CAMPBELL. Yes. NOAA supports H.R. 3842 as it pertains to its programs.

Mr. LENT. Fine.

Mr. Colson, perhaps this is unfair because you don't represent the Department of Justice—but when can we expect a response from the Justice Department on the constitutional issues raised by sections 5 and 6 of the bill?

You indicated we would receive it shortly. The fact is that Justice has had this legislation since November 1991, and we haven't heard from them yet.

Mr. COLSON. Anticipating that I might get a question of this nature, we asked Justice yesterday about this and they said, in a few weeks, sir. That is about the best I can do.

Mr. LENT. Fine.

Mr. Campbell, I wanted to ask you, I have a particular interest in the *Monitor* Marine Sanctuary which I think is located not within the proposed territorial sea but within the proposed contiguous zone, about 23 miles offshore. Is that your understanding?

Mr. CAMPBELL. That is my understanding.

Mr. LENT. Some people I represent on Long Island who are sport divers have been waiting for a long time for a management plan on the *Monitor* Sanctuary to come out of NOAA. Is this in your shop anywhere?

Mr. CAMPBELL. I am uncertain as to whether or not it is in our shop at this particular point in time. It is either in our shop or it is

within the NOAA Corps which deals with diving safety issues, and that is essentially the concern, because the *Monitor*, I think, is about 220 feet, and there are safety concerns on diving to that level regarding oxygen.

But, Congressman, let me get back to you and your staff—

Mr. LENT. Is safety a concern of NOAA? In other words, these sport divers are pretty much their own men. They think they can handle this, and they are somewhat concerned that you should be worried about whether they have the right safety equipment and the capability of making these dives. They are fully aware that it is dangerous, and they assume this risk.

Mr. CAMPBELL. Safety concerns for people who, in fact, visit our sanctuaries have, in fact, been part of our regulatory regime for some years, and I think a certain amount of assumption of the risk is appropriate. But diving to 220 feet on oxygen is a very dangerous exercise, and we do have some, I think, legitimate concerns about public safety, visiting a sanctuary, as the Park Service would have with regard to people visiting a national park.

Mr. LENT. Just let me tell you, when a delegation visited my office on Saturday in Long Island, they wanted me to introduce legislation to transfer jurisdiction from NOAA over to the National Park Service. I would rather not have to do that, but on the other hand, it would be better if you folks down at NOAA could get your act together and come forward with this management plan.

I was given letters signed by a woman in NOAA saying that this management plan would be ready in January of this year. And we are now into February, and they have been waiting a long time.

So I would ask you to take a look at that and see if it can be moved forward. There really is a problem, and I may ask for a hearing on what has been the problem with NOAA taking so long to issue a management plan on the *Monitor* Marine Sanctuary. I would like to avoid that.

Mr. CAMPBELL. I will, in fact, look into that very carefully and be back with your staff by the end of the week.

[The following was received in response to Mr. Lent's request:]

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
Washington, DC, February 7, 1992.

Honorable Norman F. Lent,
House of Representatives, Washington, DC.

DEAR MR. LENT: I am responding to your inquiries regarding the status of revisions to the *Monitor* National Marine Sanctuary. During the past year the National Oceanic and Atmospheric Administration (NOAA) has been preparing a revision to the management plan for the *Monitor*. The existing plan is being updated to incorporate NOAA's accomplishments at this sanctuary since 1983 and to revisit various management options. This will include consideration of preserving the *Monitor* at its present location by cathodic protection and physical stabilization of the armor belt.

As you know, under current management, physical access to the *Monitor* is limited to scientific research and broader access to *Monitor* artifacts and information is accomplished through museums and educational efforts. The revisions will update these research, education and management options. Upon completion of the recovery of the *Monitor* artifacts and the archaeological information at the site, a management option providing for access to the *Monitor* for recreational diving will also be considered.

The proposed revisions are currently in their final review stage. The draft of the revised management plan is scheduled to be published in March 1992. The public

comment period will be 90 days and NOAA is encouraging the public to provide comments and suggestions.

I have instructed the Sanctuaries and Reserves Division of NOAA to provide your office with a copy upon publication.

Sincerely,

THOMAS A. CAMPBELL,
General Counsel.

Mr. LENT. No further questions, Mr. Chairman.

Mr. HUBBARD. Thank you.

Congressman Laughlin of Texas.

Mr. LAUGHLIN. Mr. Colson, I want to direct my inquiries to you. I appreciate your viewpoints on H.R. 3842 and the impact of that language on the territorial rights that the State of Texas has in the Gulf of Mexico, because, as I am sure you are aware, when the Republic of Texas joined the Union as a State, we retained ownership of all our public lands and have ownership in the territorial waters that are beyond what the other States have. I understand perhaps Florida and Puerto Rico may have unique relationships also.

But I would like to know what your viewpoint is as to whether any of the language alters my State's ownership in any way. Because when you go to extend, you may be taking something away, and that is what I want to know from the State Department.

Mr. COLSON. Congressman, it is Congressman Jones' bill, and it is certainly my understanding of section 9(a), the savings provision that is in his bill, that it is intended not to affect the boundaries of the States. So I would say it is not intended to affect the boundaries of the State of Texas.

Mr. LAUGHLIN. I would, and I know you didn't come here prepared to answer that question, but out of an abundance of caution, since I represent the Gulf of Mexico coastline in Texas and on behalf of the other two colleagues I share the coastline with, I would appreciate a letter interpreting that from someone on your staff. Could you do that?

Mr. COLSON. Yes, sir.

Mr. LAUGHLIN. And what I would really appreciate is a copy of that letter addressed to the Chairman of this committee, and a carbon copy to me would be sufficient. But it is an item of interest, and if you study the political history of Texas, there were a number of people in the 1950's that won or lost political office because of the interpretation language, and many attribute the success President Eisenhower had in his campaign in Texas to his interpretation that the State did, in fact, own these lands.

So with that little historical recitation, I think you will understand why this is important, and your letter would be very much appreciated.

Mr. COLSON. We will do it, Congressman.

Mr. LAUGHLIN. Thank you very much.

That is all I have, Mr. Chairman.

[The following was received in response to Mr. Laughlin's request:]

U.S. DEPARTMENT OF STATE,
Washington, DC.

Hon. Walter B. Jones,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: At the committee hearing on February 4, 1992, on H.R. 3842, Congressman Greg Laughlin asked Deputy Assistant Secretary Colson if H.R. 3842 would affect the seaward boundary of the State of Texas. Ambassador Colson noted that it was the understanding of the Administration that H.R. 3842 would not affect the seaward boundary of any State, and specifically that it was our understanding that the purpose of section 9(a) of the bill was to make this point clear.

Congressman Laughlin requested that this point be confirmed in writing, which is the purpose of this letter.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

Mr. HUBBARD. Thank you.

Congressman Bateman of Virginia.

Mr. BATEMAN. Thank you very much, Mr. Chairman.

I have been listening while reading, and I have heard and read more than I am immediately able to absorb, so I want to try to get a feel for what we are talking about when we say territorial sea, 12 miles, and the contiguous zone; and where these stand in the context of whether or not the bill should be amended to make the territorial sea all the way out to 24 miles. Or is the bill structured so that the territorial sea is 12, but the contiguous zone is another 12, for a total of 24? Would you address those areas for me, Mr. Colson?

Mr. COLSON. Certainly, sir. The bill is properly structured in the way that the United States looks at the rights of States—"States" meaning nations—in the waters off of their coast. And this bill would affirm the proclamation of President Reagan that the United States would have a 12-mile territorial sea.

Since the first days of our Republic, we had just claimed a 3-mile territorial sea. A 12-mile territorial sea extends the sovereignty of the United States to 12 miles, and in that 12-mile area the rights of the rest of the world are simply limited to the right of innocent passage of ships navigating through the area or the right-of-transit passage in any straits.

Mr. BATEMAN. The bill would extend the territorial sea, the sovereignty of the United States, to 12 miles. Presently it is 3, except to the effect of the Presidential proclamation.

Doing that by statute would then give to the United States the same authority to regulate and control the resources, the disposition, the ownership, everything from the 3-mile to the 12-mile limit to be exclusively Federal controlled, except to the extent Congress might deign to do otherwise by specific legislation. Is that a fair statement?

Mr. COLSON. Yes.

Mr. BATEMAN. Now, could this bill go beyond the 12 miles to, say, 24 miles, as the territorial waters of the United States?

Mr. COLSON. If the bill went and declared a 24-mile territorial sea, the Administration would be here opposing the bill, because that is not what the United States is entitled to claim in international law. But in that belt between 12 and 24, we are entitled to

certain controls that relate to immigration, customs rules, and things like that, to prohibit, basically, smuggling.

The contiguous zone that has been proposed by this bill is consistent with those purposes. We would have a limited jurisdiction in that 12- to 24-mile area where immigration, customs laws could be applied to vessels in that area that we might think were trying to violate laws of the United States.

Mr. BATEMAN. So the bill speaks in terms of 12 miles territorial sea over which the United States Government would be the sovereign?

Mr. COLSON. Yes, sir.

Mr. BATEMAN. A 24-mile contiguous zone.

Now, what is there in international law that says that our territorial sea can only extend 12 miles?

Mr. COLSON. The 1982 Law of the Sea Convention, which the United States is not a party to but to which we have generally subscribed to, and which was the foundation of President Reagan's ocean policy statement in 1983, said that we would act in accordance with the balance of interests that are reflected in that convention, and that convention provides for a 12-mile territorial sea for all States, all nations, and an additional 12-mile contiguous zone.

Mr. BATEMAN. That is where we get these parameters of 12 and 12?

Mr. COLSON. Yes.

Mr. BATEMAN. Mr. Campbell, in your testimony you stated that what was intended to become operative was the least onerous, in the context of fisheries regulations, and I got the impression that you thought that, therefore, that was bad.

Now, in terms of a value scheme, is it better to be least onerous or is it better to be most onerous? And are you seeking the opportunity to be more onerous?

Mr. CAMPBELL. I think the opportunity is to be consistent. If, in fact, you have all of the States, for example, on the Eastern Seaboard exercising a variety of different enforcement regimes, it will be very difficult for fishermen to fish jurisdiction-to-jurisdiction. We will have multiple permitting requirements. They will have different enforcement requirements; they will be required to learn the laws of three or four different States.

And then looking at it from the resources perspective, multiple regimes on the resource is less effective in conserving the resource. It is better to look at the resource as a unit and apply a unified regime to it. And that may be more onerous and it may be less onerous.

Mr. BATEMAN. May I say that I asked the question in order to give you the opportunity to say what I had hoped I would hear you say, rather than following some blind notion that the more onerous regulations, the better they are, as opposed to any necessary conclusion that the less onerous they are, the better they are. So that is helpful, and I thank you for the answer.

One parting observation, Mr. Chairman, for my time is up.

Mr. Colson, you indicated that the Department of Justice would comment on this legislation sometime in the next few or several weeks. Would you, in your channels of communication with Justice, perhaps suggest to them that earlier would be a great deal

better in terms of what I understand is the desire of the Chairman to move forward with this legislation within the next few weeks? It would be a lot more desirable to have their input before the committee and the Congress or the House has acted rather than for it to happen afterwards.

Mr. COLSON. I will certainly do that, sir.

Mr. BATEMAN. Thank you.

Mr. HUBBARD. Congressman Billy Tauzin of Louisiana.

Mr. TAUZIN. I am not sure which of you gentlemen can help me with this, but I find something very confusing about these boundaries. I am sure you are all aware that each State has a different State boundary. Louisiana, for example, has three miles out, I think, and Texas is something like nine. I can't imagine why the difference, but I think it has something to do with the court's determination of how they came into the Union and under what conditions they came into the Union.

This three-mile territorial waters, where does it begin? Let's use Louisiana and Texas as—it may be a good example of how it works.

Texas waters extend out nine miles from their defined coastline. Louisiana waters extend out three miles from our defined coastline, defined by the Supreme Court, I understand.

Where does the three-mile territorial sea begin? Anybody want to handle that?

Mr. COLSON. Congressman, our territorial sea is measured from something that is called the baseline. And the baseline the United States uses is the low water line along our coast. So all of our measurements, whether it is for 3 miles or 12 miles or 200 miles, begin with the measurement from the low water line along our coastal areas.

Mr. TAUZIN. So that in Louisiana, along our coast, assuming that the baseline you use for territorial sea purposes is the same as the Supreme Court baseline—I am making an assumption here, I see some heads shaking—then the territorial sea corresponds to the State waters, three miles; is that right?

Mr. COLSON. Yes, sir. When we are talking about a three-mile State boundary and a three-mile territorial sea.

Mr. TAUZIN. In the case of Texas, if the baseline is the same as the Texas baseline, then the territorial sea only extends for one-third of the State of Texas waters, that Texas has a bigger jurisdiction in the territorial sea?

Explain that to me. I knew things were big in Texas, but—

Mr. COLSON. That is the way the laws of the United States have worked out over the course of our history. Up until President Reagan's proclamation, we had a situation where State boundaries of the State of Texas and Florida in the Gulf extended beyond the territorial sea of the United States, which was limited to three miles from the coast. But we would have asserted in that context that any exercise of jurisdiction by those States in what was then the three- to nine-mile area, had to be consistent with the rights of the United States under international law.

Mr. TAUZIN. But now, since President Reagan's proclamation, the territorial sea extended to 12 miles would, of course, embrace more than any State jurisdiction of waters. In fact, in Texas, it would extend three miles beyond the State waters.

What is the legal implication of that? What does that change in regards to the States' legal rights in regard to those waters?

Mr. COLSON. The President's proclamation, and as I understand the bill that the Chairman has introduced, neither of those acts is intended to change the States' jurisdiction.

President Reagan declared a 12-mile territorial sea for international law purposes for the purpose of excluding foreign vessels that were close to our coast, that were engaged in intelligence-gathering operations that we didn't want close to our coast, and we were able to push them outside of 12 nautical miles.

Mr. TAUZIN. Those are our former enemies, I take it?

Mr. COLSON. Yes, sir.

Mr. TAUZIN. That was the genesis of the Reagan proclamation?

Mr. COLSON. Yes, sir.

Mr. TAUZIN. It had to do with foreign intelligence and our ability to restrict that foreign intelligence, or, I suppose, foreign submarines with nuclear capacity close to our shores?

Mr. CAMPBELL. It was both the genesis and the effect. The effect of the extension of territorial sea is not as broad in its scope as the current legislation.

Mr. TAUZIN. So the current legislation is broader. What is the difference between the current legislation and the effect of the proclamation?

Mr. CAMPBELL. The legislation is an expansion of the definition of territorial sea, as used in selected domestic statutes, to the full extent allowed under international law.

Mr. TAUZIN. Give me an example of what that means in practical lay terms. What will that expansive definition give to the Federal Government under international law that the Reagan proclamation did not?

Mr. CAMPBELL. For example, we had the grounding of the *Elpis*, which was a vessel that grounded in the Florida Keys sanctuary. There is some question whether in international law—when they fled the jurisdiction, so to speak, they got out beyond the three-mile area—there is some question as to whether or not we could seize the vessel.

By this bill being enacted, the question of seizure of the vessel in U.S. territory would not be at all controversial. It would be clearly an action to which we would be entitled.

Mr. TAUZIN. Under the legislation but not necessarily under the proclamation?

Mr. CAMPBELL. That is correct.

Mr. TAUZIN. That is one example. I suppose you could give us a whole series of similar examples, right?

I think it would be useful—you don't have to do it today—but it would be useful if you would be kind enough to submit to the committee a whole list of examples under the various laws where this broader definitional treatment of territorial sea would increase the Federal legal rights, if you will, in those extra nine miles of water.

[The information follows:]

INCREASED LEGAL AUTHORITY PROVIDED BY H.R. 3842

The committee has requested examples which illustrate how H.R. 3842 would help NOAA carry out its responsibilities. The following items respond to this request.

1. Title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA) provides that marine sanctuary regulations shall be applied to foreign persons in accordance with generally recognized principles of international law. H.R. 3842 would codify NOAA's view that the generally recognized rights of a coastal nation in its territorial sea—as reflected in the 1982 Law of the Sea Convention—apply in the 3- to 12-mile area for purposes of the MPRSA. NOAA could apply, to foreign persons and vessels, a broader range of requirements and enforcement measures than would be available in the Exclusive Economic Zone (EEZ), for purposes of pollution prevention and protection and preservation of the marine environment, including—in coordination with the Coast Guard—requirements relating to navigational safety and maritime traffic.

NOAA and the Coast Guard would also have clear authority to seize a foreign vessel leaving the 12-mile territorial sea after committing an act of willful and serious pollution in violation of sanctuary regulations. In contrast, were the same sanctuary located in the EEZ, there is a question whether seizure would be available as an enforcement measure unless there were clear objective evidence of a violation of an international standard and a resulting discharge causing major damage to sanctuary resources.

2. The Endangered Species Act, like a number of other marine resource statutes, prohibits certain activities, such as taking endangered species. While the act's prohibitions may apply to U.S. nationals both inside and outside the boundary of the territorial sea, those prohibitions would only apply to foreign nationals to the extent of our jurisdiction over them. Extending the territorial sea boundary to 12 miles for the purpose of the Endangered Species Act (and other such statutes) makes clear that foreign nationals are also prohibited from taking endangered species within this 12-mile area. This will strengthen our ability to protect our marine resources.

3. Under various statutes such as the Lacey Act and the Endangered Species Act, importations occur when an item is brought within our territorial jurisdiction (i.e., crosses the seaward boundary of the territorial sea). H.R. 3842 would clarify that this occurs at the 12-mile, rather than the 3-mile, limit. This would provide needed clarification for enforcement purposes.

Mr. TAUZIN. If I can turn to you, Admiral Versaw, and that is, you, of course, are aware of my particular concern about the effects upon the Coast Guard. And my staff is actively exploring the effects on the Coast Guard in this change as it would affect so many of the statutes that are going to be amended.

I know you have testified about the fact that safety concerns would probably still be limited to three miles. Are you doing an economic analysis of what extra cost the Coast Guard will have in enforcing the various changes in all these laws that a broader definition of territorial sea will impose upon you?

Admiral VERSAW. At this time, Mr. Congressman, we are not. What we are looking at is, what is the potential impact on the operational requirements as well as, particularly, our concern right now for the focus of the regulatory requirements, changes that would be necessary.

Mr. TAUZIN. Well, obviously, if your duties are going to increase threefold in some cases in terms of area coverage, there is obviously going to be some real cost to the Coast Guard.

Admiral VERSAW. Yes, sir.

Mr. TAUZIN. In regulating all of these various areas in a much broader area. And I take it we are talking about some major differences.

It would be very helpful at some point if you would at least supply to this Member, as Chairman of the Coast Guard Subcommittee, some sort of analysis of what extra cost you are going to

incur as you are required to enforce these various laws as amended to this 12-mile regime as opposed to the 3-mile regime.

Admiral VERSAW. I would be happy to, sir.

[A response from the Coast Guard can be found on page 347.]

Mr. TAUZIN. Other than the safety concerns, I am looking at a large list of laws that are amended by the change. Can you cite to me one or two other major problem areas that you know you are going to experience as you look at them now?

Admiral VERSAW. Well, the first thing, of course, is how are we going to do this with the resources that we have. Included within my testimony is the statement to the effect that we will provide and do whatever enforcement is within the bounds of our resources. Maybe that appears to be a way of ducking the question, but it really isn't.

I can't tell you or sit here, nor would I testify to you, that it is going to take X number more of this or that for any extension to these particular acts; because we fall into the circumstances, as the General Counsel of NOAA has testified to, of the impact of a vessel on a reef.

Now, as you well know, we have tremendous law enforcement authority and responsibilities, and we coordinate amongst all of the agencies to assist them in getting out to the scene and providing the assets that are necessary to assist them in enforcing their responsibilities, as well as those of the States.

How much more is that going to task us? That is a guess.

Mr. TAUZIN. Let me perhaps share with you my concern, and then perhaps your response can be in writing at a later date.

My concern is that as this legislation progresses, it may be necessary to include amending language to clarify any concern about amendments in the act that is going to cause you particular difficulties. I don't want to see you closing SAR stations because you had to reallocate so many of your resources in an area that wasn't really necessary except that the change in the law required it of you, if in fact a SAR station operating is more important.

It would be very important to me and Members of this committee that we knew that going in, that we could include any amending language regarding any one of these acts, so as not to require any one of you to do things that would simply be bureaucratic rather than necessary in terms of your ongoing activities on behalf of safety and the regulations of the marine and fishing industries in the waters of the United States.

Finally, if I can ask one other thing, how will this change in territorial sea definition affect what is obviously one of the Coast Guard's biggest problems today, and that is the illegal immigrants and the problems you are having along the Florida coast?

Admiral VERSAW. What it basically will require, sir, is that interception will have to occur outside of 12 miles if this is applied to the immigration laws, because if interception occurs inside of 12, then all the due process procedures apply, and the immigrants would be brought ashore.

Mr. TAUZIN. Let me emphasize that point for the committee, because this may be an area where we want to have some special treatment.

What I understand the Admiral to say is that if we extend the U.S. territorial sea definition to 12 miles, all the current interdiction activities now occurring outside three miles will now be pushed back an additional nine miles out to sea. And I suspect that is going to cause some not only practical problems in terms of you are in deeper waters and a lot more territory to cover out there, but it is going to cause some extra cost and expense in terms of operations, and some more difficulties in terms of coverage. So that the problems that the Coast Guard is experiencing in dealing with this very tough situation in Florida, I suspect, will be dramatically exaggerated by a change in this territorial sea definition.

That is the kind of thing, Admiral, that I will be looking for. If you can get your staff to examine the other statutes and your other activities, kind of highlight for us those things which are going to cause us special problems that we ought to be thinking about before we amend the statute.

[The information can be found at the end of the hearing in questions and answers that were submitted by the Coast Guard.]

Admiral VERSAW. I don't see, Congressman, that the aspects or problems regarding immigration are presently included in the statutes as listed. And, that is why I think all of us here have testified on the importance of going on a case-by-case basis so we can carefully look at what the impact is going to be and appropriately advise the Members of the resource requirements—so we can practically do what you are asking us to do.

Mr. TAUZIN. Thank you very much.

Thank you, Mr. Chairman.

Mr. HUBBARD. Thank you, Congressman Tauzin.

At this point, Congressman Taylor.

Mr. TAYLOR. If you don't mind, Mr. Chairman, Admiral, I am curious in the case of the Haitian boat refugees, right now they are picked out, brought to our Naval station in Guantanamo, they are cared for by the United States Army, the United States Marines, the United States Coast Guard.

I am curious, though, getting back to Congressman Tauzin's question, what would be the big difference? We are footing the bill now. We would be footing the bill if they were picked up at 12 miles, 3 miles, one mile, whatever.

Is the question whether they would go to Guantanamo or a Coast Guard station in Michigan?

Admiral VERSAW. No, sir. The question is, if they get inside—if migrants get inside territorial waters of the United States, the due process requirements involves going through a lot of legal proceedings which are attached to the individual. If they are intercepted outside of the territorial waters, those same rights do not apply.

What you are talking about from a practical aspect, for anyone who gets inside of three miles, it takes approximately one year to go through the whole process before a final decision is made concerning who is entitled to asylum, who is entitled to stay, and who goes back. Now, that falls on another agency, of course.

Mr. TAYLOR. Could you for the benefit of this committee and Chairman Tauzin, when you answer Chairman Tauzin's questions, give us a breakdown of the percentages of Haitians that were

picked up inside 12 miles of the mainland and outside 12 miles of the mainland?

I think we would find that the vast majority of them were actually picked up way outside the 12-mile limit, but I sure would like to see the breakdown of that.

Admiral VERSAW. I would be happy to supply that information. [The information follows:]

ENFORCEMENT DATA ON HAITIAN INTERDICTIONS, 10/1/81-12/31/91

Coast Guard enforcement data on Haitian interdictions for the period of 1 October 1981 thru 31 December 1991 indicate that seven percent, approximately 2,400 Haitian migrants, were interdicted within 12 nautical miles of the U.S. and 93 percent, approximately 30,500 Haitian migrants were interdicted outside 12 nautical miles of the U.S.

Mr. HUBBARD. Congressman Gilchrest from Maryland.

Mr. GILCHREST. Thank you, Mr. Chairman.

Mr. CAMPBELL. I just want to clarify something in my own mind. In your opening statement you made reference to a number of things, the Magnuson Act, and I agree with you 100 percent about the management of fish that flow throughout our coastal waters and the delicate balance between that and States' rights and coastal zone management activities and things of that nature.

You made a statement about—it was either an oil derrick or natural gas, just outside the three-mile territorial limit that was bringing some air pollution, I think you said, into California.

Mr. CAMPBELL. That is correct.

Mr. GILCHREST. And it was shut down because it violated the coastal zone management of that particular State.

Mr. CAMPBELL. It was a proposed activity that was not allowed to go forward.

Mr. GILCHREST. Now, if that was within the three-mile limit, would the State have the same authority?

Mr. CAMPBELL. Essentially, yes.

Mr. GILCHREST. So, in other words, if it extends out to 12 miles, the territorial waters will now be—if this bill passes—will be 12 miles.

Could a State, for example, if some leases were opened up, let's say, off Maryland, and Maryland's coastal zone management said that that would be in violation of their coastal region, under this bill, could Maryland not allow oil drilling within that 12-mile territorial limit? If the leases were basically leased by the Federal Government?

Mr. CAMPBELL. What you are saying is an activity that occurred outside of the 12-mile limit or within the 12-mile limit?

Mr. GILCHREST. Let's say this activity is within the 12-mile limit.

Mr. CAMPBELL. If, in fact, it affected the coastal zone, the State would have the right to render a decision as to any Federally-permitted activity occurring in their coastal zone or outside of their coastal zone that had an effect on the resources of their coastal zone.

So if, in fact, you extend State boundaries to the 12-mile limit—as is done by H.R. 536, but not by H.R. 3842—that extends the coastal zone, and arguably extends the area in which an effect could occur. So, yes, it could have—it could serve to expand—

Mr. GILCHREST. The States'—

Mr. CAMPBELL. The States' power in terms of affecting activities occurring in deeper waters.

Mr. TAUZIN. If the gentleman will yield for a second, the gentleman's question also relates to the amendments to the Clean Air Act Congress recently adopted. In the Clean Air Act, we gave those States outside of an area in the Gulf, from Alabama to Texas, authority to regulate emissions on those platforms as they relate to emission controls on shore. So you already have a lot of that authority.

But I would be interested in learning more about changes that is going to mean in coastal zone laws. I would appreciate more on that as we go along.

Mr. CAMPBELL. Congressman Tauzin's point is an excellent one. This decision was pre-passage of the Clean Air Act. We are talking rather theoretically about effects within and without.

[The information follows:]

STATE AUTHORITY TO CONTROL OCS AIR EMISSIONS

At the February 4, 1992, hearing on territorial sea legislation, the question was raised of the State's authority to review air emissions from OCS activities, and what effect, if any, pending legislation would have on this authority.

The States have two vehicles for reviewing the effects of OCS air emissions on their coastal zone. One is the Federal consistency provisions of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 *et seq.*). The other is section 328 of the Clean Air Act, as amended in 1990 (42 U.S.C. 7627). Both authorities would be preserved under H.R. 3842.

Pursuant to section 307(c)(3)(B) of the CZMA, any person who submits a plan for the exploration or development of any area leased under the Outer Continental Shelf Lands Act, which affects any land use or water use or natural resource of the coastal zone, must certify to the affected State that the plan complies with the enforceable policies of such State's federally approved coastal management program. No Federal official may approve the plan unless the State concurs in the certification, concurrence of the State is presumed (by its failure to file a timely objection), or the Secretary of Commerce "overrides" the State's objection on national interest or national security grounds.

If an OCS plan of exploration or development will produce air emissions affecting any land, water, or natural resource of the coastal zone, the applicant must certify the consistency of this activity with the enforceable policies of the State's coastal management program. For example, the applicant may certify that air emissions from an OCS platform will not harm the fish and wildlife of the State's coastal region. If the State objects to the certification of consistency, the activity may not be federally-permitted, except in accordance with the exceptions outlined above. This section of the CZMA provides considerable authority to the State to protect its coastal zone from harmful OCS emissions.

New protections for States from OCS emissions were also enacted as part of the Clean Air Act Amendments of 1990 (Public Law 101-549). Under section 328 of the amended Clean Air Act, the Administrator of the Environmental Protection Agency (EPA) was granted new authority to establish requirements to control air pollution from OCS sources located offshore of the States along the Pacific, Arctic, and Atlantic coasts. These requirements must ensure that OCS sources meet and maintain Federal and State ambient air quality standards. For sources within 25 miles of the seaward boundary of such States, the requirements are to be identical to the requirements the States would impose on identical onshore sources. The amendments also allow EPA to delegate enforcement authority to any State whose regulations EPA finds adequate to implement this section.

On December 5, 1991, EPA issued a notice of proposed rulemaking in the Federal Register (56 FR 63774-63795) to carry out section 328 of the Clean Air Act. The proposed rule covers platform and drill ship exploration, construction, development, production, processing, and transportation. In addition, emissions from any vessel servicing or associated with an OCS source will be treated as emissions from stationary OCS sources if the vessel is docked at or traveling to or from the source and is

within 25 miles of it. These rules will mainly apply to OCS sources which are currently operating off California and Alaska.

The CZMA's Federal consistency provisions and the Clean Air Act Amendments are not affected by H.R. 3842. Both authorities can be used by coastal States to protect against the effects of harmful OCS air emissions.

Mr. GILCHREST. Thank you, Mr. Chairman.

Mr. HUBBARD. Thank you, Congressman Gilchrest.

At this point, we call on Congressman Hochbrueckner of New York.

Mr. HOCHBRUECKNER. No questions, Mr. Chairman.

Mr. HUBBARD. Congressman Taylor again.

Congressman Bill Hughes of New Jersey.

Mr. HUGHES. Thank you, Mr. Chairman. No questions.

Mr. HUBBARD. We did have other questions, but we will submit them in writing, if you would, because of the time of day and the other witnesses coming up.

Thank you very much, panel one, Admiral Versaw, Mr. Colson, Mr. Campbell.

At this point we will call on the Honorable—

Mr. LANCASTER. Mr. Chairman, before Mr. Campbell leaves, I had a question for him, and I had to leave the room and have just returned.

Mr. HUBBARD. Forgive me. I didn't see you. I didn't see Congressman Lancaster sitting there.

Mr. LANCASTER. I am sorry, Mr. Campbell, that I had to leave, and I am only getting back.

Mr. CAMPBELL. I thought I had escaped.

Mr. LANCASTER. Mr. Campbell, in your testimony, you referred to the importance of consistency authorities granted to coastal States under the Coastal Zone Management Act. Is it your agency's interpretation that the consistency authority is applied to projects physically located in one State but which will adversely affect coastal zone resources in an adjacent State?

Mr. CAMPBELL. That is a question that we have had to grapple with. If, in fact, an activity occurs in one State and the effects of that activity are felt in other States, it is our view that that is covered by the Coastal Zone Management Act.

It does create a very complex set of legal problems that, in fact, are being dealt with in a current case. I am reluctant to deal with the issue today.

Mr. LANCASTER. The existing regulations recognize the consistency provisions to the extent of those interstate projects?

Mr. CAMPBELL. The existing regulations may or may not. The reauthorization amendments appear to.

Mr. LANCASTER. How about former legal memoranda that may have been prepared by NOAA? Are there such memoranda which have been prepared which state the conclusion that those rights do exist?

Mr. CAMPBELL. There is an opinion of the General Counsel of some years ago that does in fact indicate such an opinion.

Mr. LANCASTER. And this legislation would not change that?

Mr. CAMPBELL. No. This legislation would have no effect on that.

Mr. LANCASTER. Thank you, Mr. Chairman.

Mr. HUBBARD. Thank you, Congressman Lancaster.

Once again, thank you, Mr. Campbell.

Mr. HUBBARD. Now we call on Governor Lorenzo De Leon Guerrero, Governor of the Commonwealth of the Northern Mariana Islands.

Good to have you with us. We must now have 51 Governors in Washington, D.C. We look forward to your testimony, Governor.

STATEMENT OF HON. LORENZO DE LEON GUERRERO, GOVERNOR, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS; ACCOMPANIED BY DON WOODWORTH AND TIM BRUCE

Governor GUERRERO. Thank you, Mr. Chairman.

Mr. Chairman, let me introduce the two gentlemen that are accompanying me for this hearing. To my left I have Mr. Don Woodworth, and on my right is Mr. Tim Bruce.

Mr. HUBBARD. We welcome them also.

Governor GUERRERO. Mr. Chairman and honored Members of this 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.

Mr. Chairman, 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 the 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 and interest necessary.

In 1979, one of our first acts of self-government was to set the boundary of our territorial sea at 12 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, has asserted 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 questions of our submerged lands and other ocean jurisdiction. We raised this issue with a special representative of the President of the United States in 1987.

In 1990, after eight rounds of consultations, we reached an 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 this 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 our 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. Mr. Chairman and honorable Members of this committee, I thank you very much for the opportunity to allow me to speak before you this morning. Thank you.

[The prepared statement of Governor Guerrero can be found at the end of the hearing.]

Mr. HUBBARD. Governor, it is a pleasure to have you with us. We realize you have taken time from your busy schedule to appear on an issue that we realize is important to your Commonwealth. We understand you are here for the National Governors' Association meeting, and you have taken time to be a witness before our committee.

Let me assure you that the information I have from staff is that the Chairman's bill, Chairman Jones' bill, House Bill 3842, does not have any effect on your Commonwealth's boundaries, but we will be glad to work with you as a committee to ensure that is the case.

The coastal States—Texas, New Jersey, California, et cetera—now have a 3-mile boundary. In the kindest way I know how, Governor, why do you think the Commonwealth should have a 12-mile boundary? The States, the coastal States now have a 3-mile boundary. Why would the Northern Mariana Islands need or want a 12-mile boundary?

Governor GUERRERO. Well, Mr. Chairman, as I stated earlier, we have our own Marine Sovereignty Act which was adopted and became law in the Commonwealth of Northern Mariana in 1980; and therefore we feel that should this particular bill is intended to include within the Federal jurisdiction the so-called 12-mile territorial sea, then that certainly has a direct effect on the Commonwealth. That is the reason—

Mr. HUBBARD. The United States State Department, of course, disagrees on your claim of a 12-mile territorial sea; is that correct?

Governor GUERRERO. Well, as I stated, yes. They are taking a different position, sir.

Mr. HUBBARD. Are you in a situation of negotiations with the State Department?

Governor GUERRERO. As I stated, Mr. Chairman, there is a special Presidential representative, as created in the Covenant Section 902, with a special representative appointed by the Governor of the Commonwealth to consult on issues where we have differences in interpretation on sections in our Covenant. And this is one of the issues that is an ongoing discussion with this representative, Mr. Chairman.

Mr. HUBBARD. Your last sentence, I am sure, is the crux of your remarks. "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."

I understand you are not in the bill in the first place. But we will continue to work with you, Governor. We realize that you don't have a voting Representative in Congress, and certainly, we are glad you are here as the Governor of the Commonwealth.

You have enlightened me today. We appreciate your being here. Questions? Congressman Hughes.

Mr. HUGHES. No questions, Mr. Chairman.

I just want to welcome the Governor and thank him for his testimony today. It has been very enlightening.

Thank you, Mr. Chairman.

Mr. HUBBARD. Congressman Lancaster has a question.

Mr. LANCASTER. Governor, I wish to welcome you as well. I wonder if the other island Commonwealths, Puerto Rico, the Virgin Islands, and American Samoa, have similar concerns to yours that should be addressed in any sort of exemption from this legislation, and if they intend to present testimony either now or in the future on this issue.

[A letter from Mr. Jones to Mr. Lancaster follows:]

HOUSE OF REPRESENTATIVES,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, DC, March 20, 1992.

Hon. H. Martin Lancaster,
Member, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, DC.

DEAR MARTIN: At the February 4, 1992, hearing on my territorial sea bill, H.R. 3842, the Governor of the Commonwealth of the Northern Mariana Islands (NMI) testified about an "agreement" that the Commonwealth has with the United States Government with respect to ownership of submerged lands. Governor Guerrero suggested that H.R. 3842 affects the title and jurisdiction of the Commonwealth over a

12-mile territorial sea and 24-mile contiguous zone as recognized by this "agreement." You also inquired whether other territories have the same problem.

I am writing to place the "agreement" in context and to confirm that my legislation has no effect on the legal rights of the Commonwealth under its Covenant with the United States, or on any other U.S. territory or possession.

By way of background, on February 15, 1975, the NMI entered into a covenant with the United States to establish a self-governing commonwealth within the American political system. The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America was approved by the U.S. Congress on March 24, 1976 (90 Stat. 263, 48 USCA sec. 1681 note). Under section 101 of the Covenant, the NMI ceded sovereignty to the United States in exchange for the benefits of U.S. citizenship and other attributes of commonwealth status. Title to "real property" in the Islands was, at the same time, ceded to the Commonwealth under section 801 of the Covenant.

However, the Covenant makes no reference to the status and ownership of submerged lands adjacent to the NMI. It is the position of the United States Government that title to these lands remains in the United States until they are specifically ceded to the NMI. (See enclosure #1, June 21, 1990, letter from Deputy Assistant Secretary of State Edward Wolfe to Timothy Glidden, Special Interim Representative of the President for the Covenant 902 Consultations.) The State Department contrasts the NMI Covenant with the cases of American Samoa, Guam, and the Virgin Islands, where specific legislation was enacted to grant these territories title to adjacent submerged lands (48 U.S.C. 1705).

Under section 902 of the Covenant, the Governor of the NMI and a Special Representative of the President meet regularly to discuss matters affecting their relationship. As a result of one such meeting, on April 12, 1990, the Special Representative of the President entered into a Memorandum of Agreement with the Governor on Ocean Rights and Resources. It is this Memorandum of Agreement (enclosure #2) to which the Governor referred in his testimony. In this Agreement, the President's Special Representative agreed to support the Commonwealth's proposal that the "authority and jurisdiction of the Commonwealth of the Northern Mariana Islands be recognized and confirmed by the United States to include the sovereign right to ownership and jurisdiction of the waters and seabed surrounding the Northern Mariana Islands."

The Special Representative agreed to the submission of the Agreement to the President, but as the Representative subsequently made clear (enclosure #3), he lacked the authority to commit the United States on this matter. In fact, the Agreement was rejected by the State Department as inconsistent with the Covenant and exceeding the authority granted to any other territory or possession of the United States. In effect, the Memorandum of Agreement, if implemented, would have granted the NMI the status of an independent nation and certainly more autonomy than any other U.S. territory or commonwealth exercises.

As a result of our hearing, I understand that the State Department is now considering whether to propose legislation granting the NMI clear title to its adjacent submerged lands consistent with that granted to American Samoa, Guam, and the Virgin Islands. If the Administration does support this proposal, I anticipate the legislation would be referred to the Committees on Interior and Insular Affairs and Judiciary, among others, but would not necessarily come to the Committee on Merchant Marine and Fisheries. I think these are the appropriate committees to address the question of the NMI's ownership of its offshore lands.

In the meantime, I have done what I can to ensure that H.R. 3842 does not interfere with the existing legal rights and interests of the NMI. Section 9 of H.R. 3842, as introduced, provides that

[s]ections 5 [extension of the territorial sea] and 6 [extension of the contiguous zone] of this Act do not affect the title, legal rights, interests, jurisdiction, and boundaries of the States . . . the Commonwealth of the Northern Mariana Islands, or any other territory or possession of the United States.

This section explicitly preserves whatever legal rights and interests the NMI may have in its offshore lands under its Covenant with the United States. I also plan to offer an amendment, at mark-up of H.R. 3842, to refer explicitly to the Covenant. I will also offer an amendment to modify the language in section 6 on the contiguous zone, which will clarify the nature of the United States' jurisdiction over this area, again to allay the NMI's concerns that this provision may interfere with any legitimate authority of the NMI over customs and immigration.

In conclusion, the basic problem, as I see it, is the disagreement between the United States and the NMI over the ownership of offshore lands. To resolve this

difference of opinion, separate legislation granting title to these lands to the NMI, similar to what American Samoa, Guam, and the Virgin Islands were granted, is probably required. This legislation will need to be developed separately from my territorial sea bill and considered by the committees of jurisdiction.

I have written this lengthy response to provide you and other Members of the Merchant Marine and Fisheries Committee assurance that H.R. 3842 treats the NMI the same as other territories and possessions, that its rights under the Covenant with the United States are fully protected, and that specific and separate legislation may be required to resolve the NMI's dispute with the Federal Government over title to offshore lands.

With warm personal regards, I am
Sincerely,

WALTER B. JONES
Chairman

Governor GUERRERO. Well, Congressman, I do know that, of course, they have, through our own negotiations or through meetings of the Pacific Basin Development Council, which the respective governors and perhaps the offshore governors from Puerto Rico would include. They have expressed their interest as well, but as I said, we have a Covenant.

We have agreed, based on the sections of this Covenant. And the Covenant sections, as I pointed out, Section 902 allows us to consult with the special representative appointed by the President of the United States, so we can work out areas that we have some reservations or areas that need to be clarified and amicably agreed upon.

The direct answer of your question is, I am sure, that they may have an equal interest.

Thank you.

Mr. LANCASTER. Thank you.

Mr. HUBBARD. Congressman Coble of North Carolina.

Mr. COBLE. I apologize, Mr. Chairman, for being in and out. No questions. Thank you.

Mr. HUBBARD. We are glad you are here.

Congressman Billy Tauzin.

Mr. TAUZIN. Thank you, Mr. Chairman.

Governor, I wish to also welcome you. I am confused by one of your comments. Perhaps you can clarify it for me.

You indicate that in 1990, the President's special representative and your own negotiators reached agreement.

Governor GUERRERO. That is correct, sir.

Mr. TAUZIN. You indicated that agreement covered both Federal recognition of the Commonwealth's territorial sea and of its submerged lands jurisdiction. And then you say that the State Department nevertheless still insists that the submerged lands' title is invested in the Federal Government. Is title to submerged lands not part of the agreement agreed upon in 1990?

Governor GUERRERO. I am sure that the agreement that was reached between the special representative, as I state in my statement, is all-inclusive. However, like I said, the State Department came out with a different opinion of what they claim is within the authority of the Federal Government.

Mr. TAUZIN. Is the agreement that was reached in 1990 in writing?

Governor GUERRERO. Yes, sir.

Mr. TAUZIN. Would you be kind enough perhaps to send us a copy so we might look at it. I would be interested to see if the President's representative has agreed to one thing and the Secretary of State is still insisting on something else. It sounds strange.

Governor GUERRERO. I would be very happy to supply you with all pertinent additional information and documents regarding our concern on this particular bill.

Mr. TAUZIN. Thank you, Governor. As a representative of a coastal State that every now and then feels like we make some deals that are not carried out, we sympathize with your understanding here. I would love to read your agreement to see whether or not you are being similarly treated.

Governor GUERRERO. Thank you.

Mr. HUBBARD. Congressman Gilchrest.

Mr. GILCHREST. Thank you. We hold representative government very precious here in the United States. So when you speak of the fact that you don't have a vote and you don't have the same type of representation that we do, I think it behooves us to look very closely at the agreement that was signed or not signed or not implemented from 1990 and your suggestions for us to take a longer look at your relationship with this bill.

Thank you for coming, Governor.

Governor GUERRERO. Thank you very much, Congressman.

Mr. HUBBARD. Congressman Gene Taylor.

Mr. TAYLOR. Governor, I want to welcome you and apologize for my absence. I had a couple of other meetings scheduled. We want to welcome you and certainly try to honor your requests.

Governor GUERRERO. Thank you.

Mr. HUBBARD. Governor, I think your time has been well spent. We appreciate your testimony. It is good to know you and know more about the Northern Mariana Islands. Thank you very much.

Governor GUERRERO. Thank you very much, Mr. Chairman.

Mr. HUBBARD. The next panel is 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; and Mr. Eric G. Scharf, Executive Director, National Association of Passenger Vessel Owners.

Mr. Kelly, would you be first?

STATEMENTS OF PAUL L. KELLY, VICE PRESIDENT, ROWAN COMPANIES, INC., ON BEHALF OF NATIONAL OCEAN INDUSTRIES ASSOCIATION, INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS, AND AMERICAN PETROLEUM INSTITUTE; RICHARD E. GUTTING, JR., VICE PRESIDENT OF GOVERNMENT RELATIONS, NATIONAL FISHERIES INSTITUTE; AND ERIC G. SCHARF, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF PASSENGER VESSEL OWNERS

STATEMENT OF PAUL L. KELLY

Mr. KELLY. Thank you very much, Mr. Chairman. It is a pleasure to be back before this committee. During the past 20 years, I have appeared before this committee or subcommittees of the committee some 30 times now. I am beginning to feel at home.

Mr. HUBBARD. You are from Houston, Texas?

Mr. KELLY. That is correct.

Mr. HUBBARD. It is good to see you again.

Mr. KELLY. My name is Paul Kelly. I am vice president of the Rowan Companies, Inc. which is based in Houston and provides contract drilling and aviation support services on America's outer continental shelf.

I am here today representing the National Ocean Industries Association (NOIA), the International Association of Drilling Contractors (IADC), and the American Petroleum Institute (API). 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 hodgepodge of management programs designed to meet the peculiar needs of each coastal State. We believe it prudent to require that outer continental shelf 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 noncoastal 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 interest. I will be glad to answer any questions and perhaps get back to comment on some of the dialog that went on between Congressman Bennett and Congressman Lent earlier in the hearing, if I may be permitted, after the other witnesses in this panel testify.

Mr. HUBBARD. Thank you very much, Mr. Kelly.

[The prepared statement of Mr. Kelly can be found at the end of the hearing.]

Mr. HUBBARD. Mr. Richard Gutting.

STATEMENT OF RICHARD E. GUTTING, JR.

Mr. GUTTING. Thank you, Mr. Chairman.

I am Richard Gutting from the National Fisheries Institute which is the largest association representing the U.S. fish and seafood industries.

Our membership consists of 1,000 U.S. companies which are engaged in all aspects of the industry, including harvesting, processing, and marketing. They operate vessels in virtually every major U.S. fishery along each of our coastlines. We are very appreciative of the opportunity to testify today because any change in the jurisdictional framework in which fisheries are managed in the United States would drastically impact our industry.

I will be very brief and not read my testimony, but to summarize, under our reading of the bill, this basic framework of State and Federal jurisdiction would not be altered under H.R. 3842. We support this position. We do not believe there should be any fundamental change.

The reasons why our fisheries have been so successful, we believe, is because the leadership of this committee in Congress in setting forth a cooperative Federal program under the Magnuson Act. That cooperative program would be maintained.

Having said that, I would have to say that the Magnuson Act is an extremely complex piece of legislation which has been amended several times. Within it are several references to the territorial sea.

We have made reference to these in our written statement and suggested that the committee may need to make a few technical changes or at least consider the impact of changing the definition of territorial sea insofar as it impacts the Magnuson Act. But, most importantly, H.R. 3842 maintains the fundamental relationship which we think is so important for all the reasons stated by Mr. Tom Campbell from NOAA who I think stated it very well for us.

The other aspect of the bill which is of concern to us concerns the bill's proposed extension of the coastwise trade privileges from 3 miles to 12 miles. There are a variety of vessels in our industry, fishing vessels, fish tender vessels, and fish processing vessels which operate under a different set of rules with respect to how they are built and what their ownership requirements are.

These ownership and building requirements differ from those applicable to the coastwise trade. The result of these differences is that under present law, fishery vessels may go outside of the territorial sea and pick up fish and bring it back and land it without having a coastwise trade license.

If you were to extend the coastwise laws from 3 to 12 miles, these vessels which are currently operating under fisheries licenses would have to get a coastwise license. For many vessels, they would not be able to do so either because the vessels have been built overseas or at some point in their chain of title have been owned by a foreign entity.

Significant investments in our industry have been made over the years. We have expanded our fleets dramatically in the last 20 years as our fishery laws were extended and we moved further offshore. The extension of the coastwise trade from 3 to 12 could disrupt significantly present operations upsetting the expectations of investors who built or purchased vessels believing they did not need a coastwise trade license.

Also, extension of the coastwise trade restrictions would probably add cost if a significant number of vessels were unable to continue their operations. That, of course, would add cost to seafood consumers as well as to our industry.

Now, to try to anticipate questions, we do not know in the Institute how many of these vessels would be impacted. There are literally thousands of vessels operating in our industry, the exact ownership pattern and building history of these vessels is unknown.

I did circulate a copy of the bill to some 100 trade associations in our industry and got back numerous expressions of concern. Some of these concerns are set forth in a letter from the American Factory Trawler Association which is attached to my testimony.

So while I can say people are concerned, I am not in a position today to quantify the number of vessels or the impact, but I want to bring to your attention that any extension of the coastwise trade could significantly impact my industry.

A final point. We are pleased to see that in H.R. 3842 there is no change to the safety requirements insofar as they would apply to fishery vessels. The Congress took this issue up several years ago and came forward with a very comprehensive program which is maintained in this act and we support that.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Gutting can be found at the end of the hearing.]

Mr. HUBBARD. Thank you Dick Gutting for your excellent testimony. You did hear Tom Campbell with the National Oceanic and Atmospheric Administration say that he had concern with the effect of the joint fishing ventures and suggested a technical amendment to the Magnuson Act. Did you hear him say that?

Mr. GUTTING. I have heard his testimony, but I did not have a chance to see what specific suggestion he was making so I cannot comment.

Mr. HUBBARD. Would you do so and give us your expert advice on that suggestion?

Mr. GUTTING. I would be pleased to.

Mr. HUBBARD. The committee would be pleased with your getting back to us with your recommendations as to the suggestions by Tom Campbell.

Now, our third witness on this panel, Mr. Eric Scharf, Executive Director, National Association of Passenger Vessel Owners.

STATEMENT OF ERIC G. SCHARF

Mr. SCHARF. Thank you, Mr. Chairman.

As you may be aware, we represent some 350 companies that operate throughout the United States, that operate more than 1,000 U.S. Coast Guard inspected vessels. These operations include 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 12-mile point. Our interest in the legislation is limited to the effect the extension has had 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 we were provided to prepare our testimony, we have not had an opportunity to fully analyze the provisions of the bill that relate to the Coast Guard enforcement and vessel safety or merchant marine laws.

We would like to submit some further comments on those.

I want to say today, our concerns that are affected 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 supports a variety of 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.

I think you are probably aware of the provisions of that law. We have had an ongoing concern that the Customs Service, relying on Attorney's General opinions dating back to 1900 have allowed a loophole to develop that allows foreign-flagged vessels to leave U.S. ports, travel in international waters, and return to the original port with that not being considered a violation of law.

In the past, we have testified about our concern about the gaming ships that operate off the coastal areas ostensibly for the purpose of conducting casino gaming. These vessels have distinct advantages because of some unfair competition issues that are presented—the fact that they are not coming under U.S. jurisdiction.

Last year one of our members testified before this committee that his company on the east coast of Florida has been forced to close two locations and lay off nearly 100 American workers since 1989.

More recently, there has been a development in San Diego Harbor that is alarming our industry. In anticipation of the America's Cup Races, an Australian vessel called the *Golden Swan* has begun operations in that harbor. They are taking charter groups out for three- or four-hour dinner cruises in which the vessel proceeds briefly beyond the international boundary and continues its cruise in U.S. waters.

This is necessary because the international waters off San Diego are too rough for a 149-passenger vessel to operate safely. I have a letter that one of my members in San Diego sent to me indicating that he anticipates a loss of at least \$150,000 in business this year because of that vessel.

Our inquiries and his inquiries to the Customs Service have elicited the response that they do not see this as a violation of the law which reserves domestic service to the U.S. vessel. We see this as violating the law that legislation such as the extension of the territorial sea to 12 miles would make it more difficult for these operations to conduct business and is in the public interest and the maritime industry.

In addition to these issues of unfair competition, we have had a traditional concern about the safety issues presented by the operation of foreign-flag cruise vessels, the short duration vessels, we are not referring to the vessels that go out for several days. Our testimony goes into some length about those concerns which I know you all have a copy of.

We do support the U.S. Coast Guard's effort to regulate our industry and feel that it does a tremendous job in insuring the public safety.

I want to thank you today for the opportunity to address the committee on these issues and I welcome the opportunity to answer any questions.

[The prepared statement of Mr. Scharf can be found at the end of the hearing.]

Mr. HUBBARD. Thank you very much, to all three of you for your testimony regarding House Bill 3842. Hopefully, we can also hear more views regarding House Bill 536 introduced by Congressman Bennett.

First, Paul Kelly, our friend who has been here over 30 times to testify, I think you find most of the Members of the committee are

supportive of the Chairman's bill. As much respect as we have for our distinguished colleague from Florida and understand his duty to his constituents in his area, we do have a concern about his bill which would expand State jurisdictions beyond the three-mile limit.

As I said in the opening statement, "because the extension to State boundaries to 12 miles would have serious financial consequences for the Federal Government and significant implication for fisheries management, these issues need careful review before any change is considered."

Now, Paul, you wanted to expand on the comments and the dialogue between Mr. Lent and Mr. Bennett?

Mr. KELLY. Yes. I wish to point out, Mr. Chairman, that in his remarks on H.R. 536, Mr. Bennett said that the State of Florida is interested in protected flora and fauna only and that once the Federal outer continental shelf mineral leases that would be grandfathered under his legislation have expired (normally after a period of five years), there would be no further leasing off the coast of Florida because of the State's perception of the priorities and uses of the ocean.

Throughout the history of this committee, in its dealing with such laws as the Outer Continental Shelf Lands Act, as amended, the Coastal Zone Management Act, and other marine laws under the jurisdiction of this committee, the committee has always placed emphasis on multiple use of ocean resources.

The committee has always been interested in the question, how can we maximize the benefits to be gained from the ocean for all the people. It has attempted to take a balanced approach in determining how we can develop the bounty of our oceans, including fishery resources, minerals and oil and gas, along with the need to protect the marine and coastal environment and provide for recreational uses of the ocean.

Mr. Bennett's bill goes against that tradition in the committee and I do not believe it would be in the best interests of the development and use of our ocean resources.

Mr. HUBBARD. You, of course, are emphasizing to us the importance for the Federal Government to retain the responsibility for developing the oil and gas resources of the outer continental shelf?

Mr. KELLY. I am. When you look at the history of the Outer Continental Shelf Lands Act and the Coastal Zone Management Act, in particular, it becomes clear from both legislative history and from cases litigated in the courts that, while due regard is given for the interests of the States, Federal interests must be paramount. I think the committee should keep that in mind as you deal with the pending legislation.

Mr. HUBBARD. A little over a year ago, Congress amended and reauthorized the Coastal Zone Management Act. As part of the reauthorization, we strengthened the Federal consistency provision, overturning the Supreme Court's 1984 decision on consistency for the outer continental shelf lease sales.

How are these provisions working, Paul?

Mr. KELLY. As you are well aware, the petroleum industry and the petroleum services industry fought that amendment for many years. We thought the matter had been resolved in the best nation-

al interest by the Supreme Court ruling which held that lease sales themselves were not subject to consistency.

Since the CZMA amendment was enacted, the States do seem to be dealing with consistency in the Gulf Coast States on a fairly routine basis and in some of the other States as well.

However, the most telling evidence is that exploration and development on the outer continental shelf today is at its lowest level in memory. Consistency determinations of the States and the added cost that State controls have brought to the outer continental shelf exploration and development processes in the United States is a major contributing factor to the decline in outer continental shelf activity. Lower national gas prices and the perceived higher regulatory costs of operating on the U.S. outer continental shelf, compared to the cost of operating on other outer continental shelf areas, are both contributing to a dramatic decline in drilling activity even in the Gulf of Mexico.

During the last downturn in U.S. petroleum activity in the period 1982 to 1986, there were some 300,000 jobs lost directly and indirectly as a result of petroleum industry layoffs.

The first estimates that I have seen of job losses resulting from the current downturn in U.S. activity would increase that number to about 700,000 jobs. We are finding that major international companies that have always been major players in U.S. outer continental shelf activities are undergoing a massive reallocation of capital to foreign areas.

One of the reasons they are doing this is their inability to gain access to frontier outer continental shelf lands and to conduct exploration and development activities. Two projects in particular have provided a major incentive for this movement. One is the inability of Chevron and Phillips and their partners to bring production from the Point Arguello Field offshore California on stream more expeditiously.

Apparently, the losses experienced in that project, in terms of the time value of money, has brought into question the whole economic justification for the project, thus setting a bad example for others in the industry. The other project is the Manteo project off the coast of North Carolina where Mobil and its partners have been blocked by the State from drilling a highly prospective natural gas well.

Our observation as a contractor dealing with these companies and their priorities is that those two projects, which involve the Coastal Zone Management Act and consistency determinations to a great extent, have served as a strong disincentive factor to U.S. industry.

As if to highlight this point, when I return to Houston this evening, I will be attending a reception for the Secretary for Energy from Great Britain who will participate in a seminar tomorrow at which the Government and British producers will outline to American industry the incentives and advantages to operating in the North Sea.

Today, the rig count in the Gulf of Mexico is 74, down from a high of 250 operating rigs in 1982. For the first time in history, the rig count in the North Sea is higher than the rig count in the Gulf

of Mexico. This will only contribute further to the rapid decline in domestic oil and gas production.

Mr. HUBBARD. Thank you very much, Paul Kelly.

Dick Gutting, you have testified that expanding State boundaries beyond the present three-mile limit can seriously affect the management of fisheries beyond three miles. Can you give me some specific examples of how it can interfere with the fisheries management and research programs?

Mr. GUTTING. The only true test would be if we did it and watched what happened. Another way would be to go back before the Magnuson Act when we did not have a cooperative State/Federal program, or to look at the management of stocks of fish within State jurisdiction such as striped bass.

As Tom Campbell pointed out, in instances such as this where you must, particularly along the east coast, gain the cooperation of every single State with respect to management measures, very often it is time consuming, frustrating, and ultimately impossible.

Who suffers are the fish, of course, because we do not have effective controls put in place in a timely way, and the fishermen, who often have to meet conflicting requirements, or in some cases, discriminatory requirements when they move from State to State.

So it is more of a hypothetical or theoretical answer to your question, Mr. Chairman, because fortunately in the last 15 years we have enjoyed the benefits of the Magnuson Act which were specifically designed to bring together the States and the Federal Government and the industry and concerned citizens in a management system that works.

Quite frankly, we don't see a compelling reason to change that structure which has served us so well.

Mr. HUBBARD. John Gissberg, the Assistant Attorney General for the Alaska Department of Law, will testify shortly that support of extending State boundaries to 12 miles for all purposes would be a good thing, including fisheries management.

What reactions does your organization have to this proposal?

Mr. GUTTING. John and I have known each other for many years. I would certainly agree with him that the State of Alaska, in some instances, is the best qualified agency to manage a fishery. The beauty of the Magnuson Act, Mr. Chairman, is that it allows for States to manage fisheries when circumstances warrant it. Under the Magnuson Act these decisions are made on a fishery-by-fishery basis. When it makes sense for a State to take over management, that is, in fact, what happens.

We have seen this happen in crab fisheries. The point is that these decisions on who should take over and who is best qualified, who has made the most investment, should be made on a fishery-by-fishery basis. What we are objecting to is not the State of Alaska management of a particular fishery. What we are objecting to is an across-the-board transfer of jurisdiction throughout the country for all fisheries for no apparent good reason.

Mr. HUBBARD. The States have an important role, of course, in fisheries management under the present structure of the Magnuson Act. Can you explain for the record, Mr. Gutting, how the States are now involved in fisheries management under the Mag-

nuson Act and whether you see any need to change or expand their current level of involvement under this Act.

Mr. GUTTING. Books have been written about the Magnuson Act and how it operates. In brief, the States participate on the councils, the coastal States. Typically, the State fishery director is there and is a full participant in the development of management measures.

More importantly, much of the information about what fish is being landed, the size of the fleet, the activities in the fishery is gathered by State scientists and statisticians.

There are innumerable contracts, grants, and other arrangements by which the Federal Government and the State government work together to find the funding to put together the science and statistics that are the underlying basis for the fishery management decisions.

It is a full partnership across both the science and management.

Mr. HUBBARD. Congressman Gene Taylor.

Mr. TAYLOR. Mr. Chairman, thank you for yielding. I have a follow-up question for Mr. Gutting.

Mr. Gutting, who comprises the NFI? I am curious when you say, we, the NFI, are you boat owners, boat builders, are you shore-side processors, offshore or possibly foreign-owned processors? Who does your organization represent?

Mr. GUTTING. All of the above. We run the gamut from individual vessel operators, fleet operators, processors, secondary processors, importers, exporters, wholesalers, retailers, restaurant chains and then the service organizations that supply them, the boat builders, the gear equipment manufacturers, the accountants, lawyers, and insurance companies.

It is amalgam of companies, 1,000 companies spread out geographically throughout the country. We do have within our membership many companies that have operations overseas. We have companies that are owned by foreign companies. It would be every one in the industry.

Mr. TAYLOR. I am curious, Mr. Gutting, about your remarks about limiting the ability of a vessel to go offshore, purchase produce and bring it back on shore would be restricted by the extension of the State boundaries.

I do know of one conflict that is occurring now in the State of Alaska where we have domestic onshore processors who are very much concerned about the fact of being hurt in their pocketbook by foreign-made and foreign-owned processors operating in what they consider to be their turf.

Looking at my knowledge of the Gulf case, Alaska, Mississippi, and Louisiana, quite honestly I cannot think of a single fisherman who goes elsewhere to purchase his products and bring it back. I can think of many who catch their product and bring it onshore for processing.

I am curious where your opinion that this would be harmful comes from. I can certainly understand in the case of oil revenues. I can certainly understand where the Admiral was coming from with the increased responsibilities with the Coast Guard.

But I am curious where the NFI position is coming from.

Mr. GUTTING. With respect to the onshore/offshore position in Alaska, within our membership are both the onshore and offshore

processors—in fact, our current president is the president of one of the major onshore processing companies—but one of our past presidents is president of one of the offshore factory trawler companies.

So we have both sides. With respect to the concern, take an example in the Gulf of Mexico. In the Gulf of Mexico, there are several fleets of fishing vessels that go out, harvest their fish and bring it back.

They have a fishery license. Some of these vessels in the chain of ownership at some point may have been owned by a foreign company. They are U.S.-built but at one point they might have been sold foreign and then bought back and now operate under U.S. flag as a U.S. fishing vessel as they are perfectly entitled to do so.

Now, a vessel such as this might go fishing; perhaps it has a poor day. It is with another group of vessels who have fish. They could transfer that fish into the hold of the vessel provided it was qualified as a fish tender vessel and bring that back, provided the transfer occurred outside the territorial sea. If the transfer occurred within the territorial sea, within three miles, then the carriage of the fish from that point to the port would be coastwise trade and the vessel could not operate in the coastwise trade without a coastwise license.

Mr. TAYLOR. But realistically, we have in the State of Mississippi and I believe Louisiana and Alabama, a separate license for a freight boat that operates in addition to being a trawler. But I cannot think of a single instance where the Federal Government ever bothered to enforce that so-called coastwise reason.

Mr. GUTTING. I cannot comment on enforcement. I am here to express concern that there are companies in the Gulf who would be interested in maintaining the opportunity to operate their, in effect, fish tender vessels, that is the official classification when those vessels may or may not be able to qualify for the coastwise trade. That is the concern. If you extend it out to 12 miles in some fisheries, it is no longer practical to have these kinds of transfers take place.

These operators would then have to find a vessel qualified for the coastwise trade which may or may not be easy for them to do.

Mr. TAYLOR. Mr. Chairman, Mr. Gutting has raised an interesting question. I would like to ask the committee staffer to see what is the position of the Federal Government. To my knowledge they are not even enforcing the coastwise trade as far as one vessel transferring catch to another to let him bring it in as being a freight boat.

I don't think this is unique to the Gulf of Mexico. I would like to know the position of the Government nationwide as to whether they have the resources or the will to enforce such a coastwise trade law.

Mr. HUBBARD. Did you have any other questions? I did not hear the last comments you made.

Mr. TAYLOR. As long as the staffer got the message.

Mr. HUBBARD. The staff will cooperate.

Thank you, Mr. Gutting. Mr. Scharf, Eric Scharf with the National Association of Passenger Vessel Owners, what benefit do your members see from House Bill 3842?

Mr. SCHARF. Primarily to address the issue of foreign-flag ships operating out of U.S. ports, we see the extension of the territorial sea would be an opportunity to require them to go out that much further before it became legal for them to come right back in and immediately conduct cruises in the U.S. waters and either/or the gaming cruises would have to stay out 12 miles as opposed to 3 miles.

It makes it more difficult. It does not forbid them from their operations but it makes it more difficult for them to undertake them.

Mr. HUBBARD. Are there other laws you would like to see included in this legislation?

Mr. SCHARF. Not at this time, other than the possibility that the Passenger Ship Transportation Act may be effected but we have not been able to determine that. We have asked the committee staff to help us research that.

Mr. HUBBARD. Do the amendments to the Jones Act give opportunities to your members, and if so, what are they?

Mr. SCHARF. We have not been able to determine any effects the extension of the Jones Act would have on our members. It is the Passenger Ship Transportation Act that affects our members and not the Jones Act.

Mr. HUBBARD. Now that we have amended the gambling laws to put U.S. and foreign vessels on an equal footing, are there other laws we have to address to get equal footing for the U.S. passenger ship owners?

Mr. SCHARF. We are not certain that legislation that has been put forth will resolve all the issues that reflect the gaming ship problems because of the ongoing issues of unfair competition. The legislation, as I understand it, that was recently passed and is on its way to being signed really only affects directly the transportation of gaming equipment. It does not get into the issue of ownership of a gaming ship.

I think there are a number of other issues outstanding there before we fix that problem. I think the new problem that has arisen is the potential that a foreign-flag ship had it is a small yacht for a medium-sized dinner boat could come into American waters and take dinner cruises out in competition to an American operator.

We have said all along that requires a fix of the Passenger Ship Transportation Act but there has been reluctance in the past to do that.

Mr. HUBBARD. Paul Kelly, Dick Gutting, do you have anything else you want to add?

Excuse me, I apologize, I am not that prejudiced against Republicans. My grandfather was one, life-long.

Howard Coble, do you have questions?

Mr. COBLE. I have been not unlike a jack-in-the-box this morning going from meeting to meeting so the concerns I will express may have already been kicked around. If so, I can study the transcript to get the answers to my questions.

I want to mention three or four questions that concern me. You members of the panel may or may not be able to respond. If so, that will be fine. I am interested in knowing if there is a need to

study the adequacy of existing laws to manage resources in the extended territorial sea. This has probably already been answered.

Number two, I am concerned about the possible and probable additional cost. This would mean primarily to NOAA, in updating its nautical and air nautical charts to reflect the new territorial sea and contiguous zone.

Three, and Mr. Gutting, as you said earlier, we may not know the answer to this until after it is in place but I am concerned about the increased costs again primarily to NOAA of enforcing the fisheries laws affected by H.R. 3842 and finally I am interested in determining whether or not there may be existing marine safety laws which should, in fact, not be extended to the full breadth of the 12-mile territorial sea.

If you all want to get into that potpourri, I would be glad to hear from you.

Mr. GUTTING. I hope my answer is responsive to at least some of your concerns.

The Chairman in his letter of invitation asked similar questions. We have responded in writing in my prepared testimony. While we are supportive of maintaining the present jurisdictional relationship between the Federal Government and the State government in the area of managing living marine resources, we have deep concerns that the present program of the Federal Government in fisheries, marine mammals and endangered species is a hodgepodge and not integrated into a single program.

Some of the reasons for that are explained in my statement. This committee will be taking up these three laws, the Endangered Species Act, the Marine Mammal Protection Act, and the Magnuson Act in reauthorization hearings this year and next and we will be coming forward as a commercial industry with numerous suggestions on how these laws can be better integrated together and we hope significant cost savings achieved by just plain old better management.

Mr. KELLY. Mr. Coble, I am not a fisheries expert or an expert on NOAA mapping. Obviously there will be some costs involved in redoing NOAA's maps which NOAA can address better than I. Regarding the study you mentioned, as you know, the pending legislation provides for a \$100,000 study by a Sea Grant institution of different laws and regulations that may be impacted by the extension of the territorial sea. That study is probably a good idea.

It may be open to some question whether Federal agencies should do that study in preference to having it done on an outside basis, so to speak. In any event, it would be advisable to examine all the consequences of the proclamation and what statutes are going to be affected.

Everyone needs to keep in mind that the whole question of the territorial limits of the United States has a rich history going back to the Truman Declaration in 1945, involving the Submerged Lands Act and the battle of the States to gain control over mineral resources underlying our submerged lands.

As Congressman Laughlin pointed out, debate over submerged lands in the 1950's actually caused the Democratic leadership in the State of Texas to bolt to Eisenhower. This history should be re-

spected and is not something that can be dealt with in a matter of a few weeks.

The study is going to take a long time. It is really up to the committee how to decide how it should be conducted.

Mr. COBLE. I thank the gentleman. Thank you, Mr. Chairman.

Mr. Scharf, did you have anything to say?

Mr. SCHARF. No, Mr. Coble.

Mr. TAYLOR [presiding]. I have a question on the cruise ship bill which was passed and is now on the President's desk. We tried to let Americans participate and then go back to what our founding fathers had in mind when they passed the laws in the 1700's for the American-made, American-owned, American-crewed vessels. You raise a very interesting point.

I think this is the first time your organization has experienced some intrusion into the economic turf with the Australian vessel. Certainly the Australians have a similar wage rate and standard of living. It probably cost about the same to build a large ship in Australia as it does in the United States. Certainly your organization could understand the gross disadvantage you would be at if someone showed up with a vessel that had been made, say, in Korea with a crew of Sri Lankans who were working for their meals and their meals only.

I am curious if you would like to go back to the cabotage laws on the base between the shore line and American waters for American-made and American-crewed vessels?

Mr. SCHARF. I am not sure I fully understand your question. The current laws would provide for that.

Mr. TAYLOR. You mentioned the "cruise-to-nowhere" people are escaping the intent of the cabotage laws, where they are going out to open waters and returning.

Mr. SCHARF. I think it is the interpretation. We would certainly like to. We have tried to work with Customs to try to seek a reinterpretation of the law and how it is being applied.

Customs, as I indicated, is sticking to some very, very ancient Attorney's General opinions that permit that. We feel there are some changes that need to be made to the language.

We have provided language to the committee that would do that, that would make it very, very clear that a foreign vessel could not leave U.S. waters and return from point one to point one. I think that is the concern.

Mr. TAYLOR. Do you feel like the Jones bill as introduced solves the problem of your industry?

Mr. SCHARF. It does not solve the problem. It only makes it more difficult for these operations to do what they are doing by making them go out 12 miles instead of 3 but it does not solve the ultimate problem.

Mr. TAYLOR. But you would be willing to provide some language?

Mr. SCHARF. Surely.

Mr. TAYLOR. What would be the stance of the NFI if suddenly a Korean-owned, Sri Lankan-crewed ship turned out in the harbor and then shrimped all day and came back to the Port of Biloxi that night, how do you think the American people would feel about that?

Mr. GUTTING. In fisheries we have had for many decades the Nicholson Act which prohibits any foreign-flag vessel from landing catch in the United States no matter where it is caught. So in that respect, U.S. commercial fishing operations have been protected from foreign competition.

I would be dumbfounded if there were any significant interest in changing that law.

Mr. TAYLOR. Gentlemen, if you have a further statement, we would welcome it at this time. If not, we want to thank you for appearing before the committee.

The Chairman now calls hopefully the last panel, but we would welcome others.

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; and Mr. Jon Van Dyke, Professor of Law, University of Hawaii at Manoa.

STATEMENTS OF 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; AND JON VAN DYKE, PROFESSOR OF LAW, RICHARDSON SCHOOL OF LAW, UNIVERSITY OF HAWAII AT MANOA

Mr. TAYLOR. For the benefit of our incoming panel, we would like to remind you that your statements will be included for the record, should you choose to abbreviate them. But then again, we are here at your disposal as long as you would like.

The Chair recognizes Mr. Gissberg, Assistant Attorney General of the Alaska Department of Law.

STATEMENT OF JOHN GISSBERG

Mr. GISSBERG. Thank you, Mr. Chairman.

The State of Alaska appreciates the opportunity to be present at this hearing. In the interest of time we will summarize very quickly the written comments, although my watch says it is not even 9 a.m. yet but I realize we are on a different schedule here.

We think it is a wise idea and commend the committee for moving forward to define and clarify the application of domestic law within the territorial sea zone declared by the President. One of the practical complications is that we don't even know what to call the three miles that has been left behind. Maybe we can start at that point.

The State of Alaska, like many of our States, has had considerable experience already in managing resources beyond three miles seaward. The State of Texas, the State of Florida on the Gulf side already have authority out to nine miles. In the Great Lakes States, the range may go as far as 72 miles. For a variety of reasons, Alaska has the same kind of experience in managing resources well beyond three miles and to the extent that the committee would take that into account, we would urge that.

There are good reasons for this. That is because Alaska is a resource producing and exporting State. The resources in the offshore zones are the crown jewels of that resource well of the State of Alaska. One of the witnesses acknowledged that the States have peculiar needs. That is no more true anywhere than Alaska. We are a noncontiguous State and we rely on the resources of our coastal zones.

We have much more stringent environmental laws than other States and we aim to protect our resources for perpetuity, for the benefit of the public interest. We find that some of the peculiarities in Alaska's environment may involve oil and gas development in ice conditions. That is simply not addressed anywhere else. We find there are many instances where pollution from passenger vessels and other kinds of vessels occurs beyond three miles. We have stringent laws that don't apply to them because of the present three-mile limit.

We had hoped that some application of State laws might apply beyond three miles in these cases.

Mr. Chairman, a final point is that whenever there has been a territorial sea in the United States law, the States have owned or managed the lands or resources within the territorial sea.

We have the experience to do it and I think in many cases it would be appropriate to allow the States to continue to exercise some of those responsibilities.

Thank you.

Mr. TAYLOR. Thank you, Mr. Gissberg.

[The prepared statement of Mr. Gissberg can be found at the end of the hearing.]

STATEMENT OF DR. MICHAEL K. ORBACH, CHAIRMAN, NORTH CAROLINA OCEAN AFFAIRS COUNCIL; ACCOMPANIED BY DONNA MOFFITT

Mr. TAYLOR. The Chair now recognizes Dr. Michael Orbach, Chairman of the North Carolina Ocean Affairs Council.

Dr. ORBACH. Thank you, Mr. Chairman.

The NC Ocean Affairs Council is the major advisory body to the governor and to some extent the legislature of the State. I am also an anthropologist at East Carolina University. Sometimes that needs explanation, why an anthropologist is involved in this. Like any other resource, this is a question of the management of people so that is a social science question as well as the biologic question.

I would like to recognize Donna Moffitt who is director of the North Carolina OCS Office.

We appreciate the opportunity to comment on H.R. 3842. North Carolina supports this legislation. We believe it is necessary to fully implement Presidential Proclamation 5928, and to reduce confusion in many Federal laws about that term "territorial sea."

We have a written statement which I will summarize. Chairman Jones asked that we address three questions. First, are there laws that should be limited in scope to three miles included in H.R. 3842? In our opinion there are none but we would defer to your legal staff for technical details.

Second, are there laws included that should be? We feel it is not appropriate to amend the Submerged Lands Act at this time. I will go into that more in a minute.

Third, what is the appropriate role of the coastal States in managing the resources of the territorial sea? This is the most interesting question for us. It is one in which we have been involved since the early 1980's when we issued a report on "North Carolina and the Sea" and our policies. We have been a strong supporter of what we call shared governance of partnership not only in the 3 miles but also the 200-mile EEZ as well.

The use of ocean resources will have a principal impact on the adjacent State. Whether it occurs 3, 12, or 50 miles off the coastal State, it is the coastal States that bear the brunt of the activity while in many cases someone else gets the major benefits as in the case of offshore oil.

As the gentleman from Alaska said, we have many stresses on our marine environment. Though all of those issues are important, and the resources we depend on are important—efforts to develop coordinated State/Federal policies have not always been as fruitful as we might have liked. There are conflicting mandates and those goals and mandates need to be clearly defined.

Also we need more information. In North Carolina we are developing our geographical information systems in the 200-mile zone. We will also be developing our ocean affairs council over the next two years and the management plan for ocean resources which we hope will go even further than the studies by Hawaii and Oregon in that vein.

This will be done by the council in accordance with section 309 of the CZMA reauthorization. We look forward to working with your committee on that task.

Let me turn back to extending the territorial sea and the Submerged Lands Act. We have certain fears about that. The progress toward outer continental shelf revenue sharing that has finally developed among the coastal States and the Federal Government and industry might be somehow jeopardized by this potential change.

You have heard the figures earlier about the percentages of outer continental shelf oil and gas in that area and the large amount of potential revenues that could be lost in the transfer to coastal States. That is controversial. North Carolina has been reviewing the various legislative proposals. We would like to see legislation that reflects the broadest possible relationship between the States and the Federal Government.

Representative Tauzin's bill, H.R. 4068, takes some fine steps toward that. To properly own and manage out to 12 miles, we the States would have to have an adequate scientific, administrative, and enforcement organization. Administrative, scientific resources, all of these things would require for most coastal States, North Carolina included, resources far in excess of those presently available to us.

Most States don't have nearshore oil and gas resources that they can depend on to generate the revenues to help them do this. In the case of some resources, it may be most appropriate for the coastal State to manage them completely and in other cases the

Federal Government completely and in some others shared resources.

The situation is uneven among the coastal States. So instead of a single system 12-mile territorial sea extension, we would suggest a regime similar to what many others have commented on today, that recognizes the innate abilities of each coastal State. The new Clean Air Act outer continental shelf provisions which also have been mentioned earlier we think are an example of such a regime.

That is a creative partnership in some of the resource management areas. We are approaching the time in North Carolina where we would like to see some extended responsibility for fisheries. We have strong commercial and recreational fisheries in our State. They are highly valuable. We depend on them and protection of those resources is a priority for us. But it would be very difficult for us to consider that without some more resources to work with to help us in that endeavor.

Finally, we support the resource management study as outlined in the bill. This is a very important beginning with the shared governance exercise. There is a lot that needs to be known, in particular, the different opinions in the States need to be known and made specific for your committee's consideration and the rest of the Congress.

We encourage that the study encompass the general issue of revenue sharing as well and that the coastal States themselves be involved in the conduct and analysis in that study. We think that is very important.

In closing I want to emphasize that North Carolina is in strong support of H.R. 3842. We look forward to working with you on the shared jurisdiction and management of all these resources and we will be happy to answer questions.

Mr. TAYLOR. Thank you, Dr. Orbach.

[The prepared statement of Dr. Orbach can be found at the end of the hearing.]

STATEMENT OF PROFESSOR JON VAN DYKE

Mr. TAYLOR. Our next witness is Mr. Jon Van Dyke of the Richardson School of Law at the University of Hawaii. I understand Mr. Van Dyke flew up from Hawaii for this hearing. For that we are very grateful. We apologize that because of the timing of this hearing, that several Members had to be in different places. But we do want you to know the real decisionmakers are here, I am talking about the staff, not myself.

Every bit of your testimony will be included for the record.

Mr. VAN DYKE. Thank you, Mr. Chairman.

It is a great honor to come here from Honolulu to meet with the committee and staff and work on this important project. I want to thank the University of Hawaii Sea Grant College Program for assisting with the expenses to enable me to come.

The Chairman's letter inviting me to come posed six difficult questions about the bills before the committee. I have submitted an 86-page paper in response which I assume you do not want me to read here today. But I would like to comment on several of the

questions in a little detail because of the interesting and difficult legal issues they raise.

As you know, we are brought to this inquiry because of President Reagan's December 1988 proclamation in which he expanded the U.S. territorial sea, but added in an awkward and unusual "proviso" that no Federal or State law or any jurisdiction, rights, legal interests, or obligations are to be affected by this proclamation.

This language creates what can only be described as a jurisdictional void in this 3- to 12-mile area, where one does not know what laws apply in many respects. It also raises interesting and challenging questions about whether or not the President had the authority to do what he purported to do.

In our paper, we go into some detail on the question of whether the President can unilaterally expand U.S. territory. The Constitution itself does not say how additional territory is to be acquired by the United States. But we do have 200 years of history. In every significant instance, Congress has joined with the President in the decision to acquire additional territory.

There is no precedent for the President to act unilaterally. There are a couple of tiny islands, like Wake, which the President purported to acquire title to unilaterally, but even with regard to Wake, Congress participated through the acquisition of Hawaii. And in any event with regard to Wake the assertion of U.S. jurisdiction is under challenge by the Republic of the Marshall Islands.

The President has argued that he has inherent constitutional power to acquire territory, but there is no part of the President's executive authority that serves as a solid basis for this. Because of this ambiguity, I would urge Congress to participate in the process of expanding the U.S. territorial sea by asserting sovereignty over this 12-nautical mile zone.

The current bill, H.R. 3842, is a proper vehicle to assert this jurisdiction. The Omnibus Crime Bill under consideration last year would have been another appropriate vehicle. In taking action on this subject, it should be clear that Congress is asserting its own prerogative and is not simply acquiescing to the President.

With regard to the phrasing in H.R. 3842, I do have a suggestion. In many of the proposed amendments to existing bills, the territorial sea is defined with reference to the President's December 1988 proclamation. That is a very awkward way to take action, because it appears to acknowledge the President's authority. In my judgment, Congress itself should define what the new territorial sea is to be and then use its own definition with regard to all the bills that are to be amended.

What Is This Zone? It is very interesting to try to contemplate what exactly this 3- to 12-mile zone is. We have very few examples of Federal land or Federal territory that are not connected with a State. We have five territories and Commonwealths, which are in somewhat of a unique category—American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Every other part of the United States is connected with a State with only some very minor exceptions, Johnston Atoll, Palmyra Island, Midway, Wake, and a few other uninhabited islands in the Pacific.

Is it possible for the United States to have territory—here we are talking about territory the size of Texas—that is not connected with any State whatsoever? Logically the adjacent States should have some connection with this large area, at least in a residual sense.

There are several different ways of thinking of this. One analogy is to have Federal lands within States—Federal bases and national parks. The Federal Government has almost exclusive control over these areas but they are still part of the State. Then we have lands that are concurrently managed by the State and Federal Government together. Then, of course, we have many areas that are exclusively under State control.

In my judgment, the idea that these 3- to 12-mile areas could remain unconnected with the adjacent States forever would be odd, would be inconsistent with the way we organize our Government. I do not mean to be impertinent, but I was surprised that the State Department was representing the Federal Government at this hearing today because their presence infers that we are dealing with matters connected with foreign policy. In fact, we are dealing with property that is part of the United States, so we should be hearing from agencies that deal with U.S. territory rather than the agency that deals with U.S. foreign affairs.

The other thing that is important about the December 1988 Proclamation is that it changes the Federal/State equation. Previously, the reason that the States had jurisdiction only over the first three miles offshore was in large part because of the important foreign policy implications for everything beyond three miles.

Now those foreign policy implications are almost nonexistent. If the President's proclamation is valid, the United States now *owns* the territory out to 12 miles. Therefore, we can reopen all the Federal/State questions, and in my judgment we should.

The second set of questions that the Chairman asked were what pieces of legislation were not included in the House Bill 3842. I have summarized in the cover sheet some of the bills that we found in our research that are not covered in this bill. These include the National Transportation and Safety Board Act, the Vessels in United States Territorial Waters Act, the Foreign Sovereign Immunity Act, the Travel Control of Citizens and Aliens During War and National Emergency Act, the Tariff Act of 1930, and the Outer Continental Shelf Lands Act.

Each of these acts is now ambiguous when they refer to the territory of the United States, as to whether or not the 3- to 12-mile area is to be included. If you take President Reagan's "proviso" literally then none of these acts change, and the territory of the United States only goes out to three miles for the purposes of these statutes. That produces a silly result. In my judgment, they all should be modified to extend their reach to 12 miles, as have the acts that are listed in H.R. 3842.

The final question that the Chair posed has to do with the appropriate role of the coastal States in managing the resources of the territorial sea as defined in the proclamation.

At the present time, we have what can only be described as a mish-mash of policy on the offshore areas. We do not have coherent policy. It is very hard to find out who has responsibility for what,

producing inefficiency. If we turn back to the values of federalism that guide our Nation, I think we have to conclude that the States should play a greater role in the management of the offshore resources than they presently do.

As Professor Michael Orbach stated, the States bear the burden of offshore developments. They must supply sites, processing plants, laborers, infrastructure, and so on for any offshore activity. The coastal States should therefore receive greater benefits than they now do. The people in the coastal States have greater interests in these matters and will pay greater attention to ensure that the environment is protected properly.

It is also worth re-enforcing the position of the five U.S. island territories and commonwealths. Special laws and obligations both domestically and internationally govern the relationship between the United States and these five island communities, which require us to look at their situations separately and develop a different equation as to how they should share in their offshore resources.

We need a new management approach. It may involve grouping States together in regional management organizations. We have a number of analogies of joint Federal/State arrangements. In Hawaii, we have had a joint Federal/State task force on hard mineral development. If we are going to focus more on hard mineral development, we will need comprehensive planning. We will need to focus more on revenue sharing.

We should see the resource-sharing and revenue-sharing issues as distinct questions. We could recognize that this 12-mile area is part of the adjacent State and yet the Federal Government could retain a trust responsibility for this area and perhaps the noncoastal States should have the opportunity to share in the offshore resources as well.

These are serious questions that require further study. I am working with other academic colleagues in a group we call the "Ocean Governance Study Group" which has been established to focus in on these questions with the assistance of our Sea Grant College Programs. I was of course glad to see that section 8 of H.R. 3842 contains a proposal to fund further study of these questions and I would certainly support that.

I am not sure that \$100,000 is adequate in light of the complexity of these issues but certainly it would be a start in allowing researchers to address some of the very complicated questions that need to be answered to ensure proper management of the U.S. offshore areas.

Thank you very much. I will be happy to answer any questions.

Mr. TAYLOR. Thank you, Mr. Van Dyke.

[The prepared statement of Mr. Van Dyke can be found at the end of the hearing.]

Mr. TAYLOR. My first question is for Mr. Gissberg. Mr. Gissberg, Alaska proposes to assume responsibility for managing all the offshore area between the shoreline and 12 miles as the States own the submerged land between the shore and three miles.

Why do you think the States can do a better job of managing this area than the Federal Government is presently doing?

Mr. GISSBERG. I think for the State of Alaska that is true. We can do a better job. We have much stricter environmental control

laws than the Federal Government does. We have a much greater interest in what is going on in those offshore waters. As an example, my testimony shows that from zero to three miles, which is presently controlled by the submerged lands of the State of Alaska we have a rather active oil and gas development program.

However, beyond three miles there is no production now taking place. I expect that there are some resources out there that probably some people from the private sector might have mentioned that would be worthy of utilization. I think that our experience in fisheries, in oil and gas, coastal zone management compared to what the Federal Government has been able to do shows we can do an adequate job.

I think with the right resources the Federal Government might be able to do an appropriate job but, as Mr. Gutting said, there is such a hodgepodge of Federal laws it is extremely confusing to have a coordinated program in those waters.

The State could coordinate those programs much better and should go out to 12 miles.

Mr. TAYLOR. Do you think that more or less oil and gas would be produced on the outer continental shelf if Alaska and other States were asked to extend their boundaries to 12 miles?

Mr. GISSBERG. In Alaska's case, there would be more in some areas. I am not too sure about the North Slope area and the Beaufort Sea because we are extremely concerned about the distant offshore development which is done in thick ice conditions, very difficult.

In some areas I think there would be a very active program. The Federal Government has a moratorium on development for most States. I suspect to the extent that that would be relieved that we would also expect more development in other coastal States.

Mr. TAYLOR. Mr. Gissberg, you are probably one of two wrong people, the others would be from Hawaii, to ask this question of, since you have no contiguous States; but we will ask you in theory if Alaska and other States take over fisheries management out to 12 miles, how can Congress insure that the fishing interest of adjacent States are protected since so many of the fish populations tend to travel along coastlines?

Mr. GISSBERG. It is probably a good question for Alaska, because even though the fish may not travel between adjacent States, the fishermen certainly do, and the fairness to the out-of-State fishermen has been of concern in this committee and other forums.

In Alaska's case, I am only aware of one instance where there has been any unfairness charged on the basis of Alaska's State laws as they apply to nonresident fishermen. That happens to be a case from Alaska's Superior Court that I am handling.

In that case a nonresident, a Bristol Bay fisherman, said the \$750 fee was violative of the Constitution. State fishermen are only charged \$250.

Even though each of the boats that goes there lands more than \$100,000 of product in the short season, I guess the \$750 fee seemed high to the fishermen.

The court said that if the State's contribution to the management and fishery program was more than what the license fees would be attributed to, then the differential can be charged to non-

resident fishermen so that they can pay their fair share to compensate the State for their subsidy. That is all the State is doing in that case.

I am not aware of any instance in which there has been unfair actions.

I think that the U.S. Constitution, and in Alaska's case, we have a unique constitution which has a special article for conservation of natural resources. I think everyone is adequately protected.

Mr. TAYLOR. What was the name of that decision?

Mr. GISSBERG. It is called, "Carlson versus the State of Alaska." It went up to the State Supreme Court in 1990.

The citation is 798 P.2d 1269 (Alaska 1990).

We just had oral argument in the Superior Court on a remand.

Mr. TAYLOR. Did you say it has gone on remand to the United States Supreme Court?

Mr. GISSBERG. No, to the State Supreme Court. It sent it back for more information on the amount of the license fee.

The reason is that resident fishermen pay \$250. The State in addition, pumps in about \$20 million for fisheries.

The residents pay \$250. Nonresidents pay about \$200,000.

That difference balances out what the contribution from each fisherman is.

Mr. TAYLOR. That is not unique to Alaska. Mississippians and Louisianians are almost at gunpoint over a very similar situation. That is why I was curious about the decision.

Mr. Van Dyke, I am curious if you are familiar with any other Supreme Court rulings along the lines of the vast disparity in fees between one State and another, whether or not the Supreme Court has ever ruled on those fishing licenses between residents and nonresidents.

Mr. VAN DYKE. The Supreme Court has held that with regard to commercial activities, a State cannot charge nonresidents more than residents unless the State can justify the differential in terms of services it is providing to the nonresidents. With regard to a recreational activity, on the other hand, a State can charge nonresidents more.

In the Alaskan situation just discussed, Alaska should win because the disparity is certainly justified by the kind of energy and resources the State of Alaska has invested.

If I could just comment on your question—

Mr. TAYLOR. Surely.

Mr. VAN DYKE. In our paper we acknowledge the problem that may occur with States being competitive with each other and not being open to their neighbors. Our suggestion is to have regional councils to bring together State officials so these problems can be worked out cooperatively. The Gulf Coast States, for instance, should be working together, and the Atlantic Coast States should be working together on the cooperative problems shared by this region.

There should be mutual advantages to cooperate so no State would turn against its neighbors.

Mr. TAYLOR. I will open this up to the committee, because Mr. Gissberg raised an interesting question: Could this not complicate existing disputes between States because of the resident and non-

resident license fees, like where there are contiguous States like Louisiana, Alabama, Florida?

Mr. VAN DYKE. In my judgment, because of the Supreme Court's rulings on the privileges and immunity clause, a State would not be permitted to charge draconian fees to nonresidents. A State can charge greater fees only if it can justify them in relation to services it is actually providing.

Mr. TAYLOR. Dr. Orbach, you suggested that North Carolina is interested in a partnership arrangement with the Federal Government to manage our offshore resources. One important tool the States can use in protecting the resources is the authority of the Coastal Zone Management Act.

These provisions were strengthened in the 1990 amendments to the CZMA.

Don't these new requirements provide that all offshore activities that affect the State's coastal zone are consistent with the State's coastal zone management program?

Dr. ORBACH. They are certainly an improvement. They have helped us, in many cases, to work closely with the Federal Government. On the other hand, it is our feeling that they certainly don't go as far as we would like to see in terms of a true share of government arrangements for two reasons:

One, it is a situation where the Federal Government takes the initiative and the State is asked to judge its consistency or nonconsistency somewhere down the program.

Second, the decision lies with the Federal Government in finding something valid or invalid for consistent activities. So we certainly applaud those amendments and we feel they have helped. We think they are a good idea.

They go in the right direction. We would like to see some further creative arrangements considered.

Mr. TAYLOR. Unlike Alaska, North Carolina has decided the potential cost to the States from extending its seaward boundaries to 12 miles outweigh the benefits. Can you explain why you have reached this conclusion?

Dr. ORBACH. One of the major factors involved there is the amount of resources that would be available to implement any authority and responsibility that the State would be undertaking. As I mentioned in my testimony, there is a big difference between the States with offshore oil revenues and the States without.

Alaska, as Mr. Gissberg pointed out, has been able to take advantage of some of those resources along with the Federal Government. The Native Claims Settlement claims in Alaska was paid by revenues from the offshore resources.

Most States don't have that revenue, North Carolina in particular. We are concerned with better management of the marine resources off our coast, but you have to have the tools to do it.

We are concerned that it may not be effective to give States more responsibility and authority without giving them more resources to do things creatively.

Mr. TAYLOR. Dr. Orbach, I also come from a coastal State that hopefully would benefit from this act if oil and natural gas were found offshore in that 12-mile radius. If it were the will of the people, as expressed through Congress, to give you the additional

territory but not the mineral rights, would the costs then outweigh the benefits, if you were not given the additional revenues from the minerals or gas found in that space?

Dr. ORBACH. For North Carolina, of course, it would make no difference because we don't have recognized resources in that zone. My presumption, and I don't mean to speak for other coastal States, is that they may have somewhat lessened interest if they were not to get that additional revenue source because they would then be in the same position that we are.

Mr. TAYLOR. Mr. Gissberg.

Mr. GISSBERG. I could not give you a balance of the figures but the State of Alaska would have a keen interest in the responsibility out to 12 miles.

Mr. TAYLOR. Even without the oil revenues?

Mr. GISSBERG. Yes.

Mr. TAYLOR. Mr. Van Dyke.

Mr. VAN DYKE. I cannot speak officially for the State of Hawaii, but this question has come up many times in discussions in our State. My strong impression is that the State officials of Hawaii want to exercise control out to 12 miles as soon as possible and in as many different ways as possible. They feel that it is simply proper for the State to exercise such control and that the State can manage the resources better, even though there is an understanding that the resource costs will be high. The people of Hawaii are, I think, prepared to take on these additional costs.

Mr. TAYLOR. Mr. Van Dyke, the Justice Department is apparently raising questions about Congress' authority to extend the contiguous zone. As a legal expert, do you have any problem with Congress passing this type of law and the President signing it? Would this not cure any constitutional defect?

Mr. VAN DYKE. Does this question focus on the contiguous zone?

Mr. TAYLOR. Yes.

Mr. VAN DYKE. In my judgment, the Congress has the authority to extend the contiguous zone. It is a natural and appropriate exercise of congressional power to permit greater enforcement of existing U.S. laws.

The current 12-mile contiguous zone was established by treaty, which the Congress participated in through Senate ratification. Because of the passage of time and the development of customary international law, that 1958 treaty is now viewed as being outmoded. Customary international law now permits a nation to extend its contiguous zone to 24 nautical miles and it would be appropriate for Congress, in my view, to take this action.

Mr. TAYLOR. In my State of Mississippi, the greatest resources would be seafood and forestry industries. When I look at forestry, I see a very active U.S. Forestry Service working with a State Forestry Service. When I look offshore and in particular the potential for the oyster industries in Mississippi, which was once an oyster industry, I don't see much help in that line because of the coastal and inland fights that have gone on for a number of years, I don't see much help coming out of the State capitol either.

I am curious for your opinion looking at each of your home States, if the activity of giving the States from the shoreline the 12 miles would prevent any possible help down the road from the Fed-

eral Government on a national oyster program. We know we can improve on nature if we just put some efforts into it.

Dr. ORBACH. The reason we have focused on the language between the extension of territory and the revenue-sharing exercises is that in order to develop all the offshore resources, and North Carolina has offshore shellfish beds, not as extensive as some in the Gulf, but extensive as well. We have an aquaculture policy to promote it.

We are interested in seeing enhancement of resources. As you point out, with the present Federal and fiscal constraints it is difficult to support initiatives in these areas. I would think that the simple extension of territory with respect to the question you just raised really by itself would not make that much difference.

It is the larger context of the sharing of governance and sharing of benefits that would make the kinds of things that you are raising possible.

Mr. GISSBERG. Mr. Chairman, in response to that question, we have a great deal of regard for our Federal counterparts, but saying that, once we get out of the substance of managing these resources, the jurisdictional issues consume so much of the time that would otherwise be well-spent working together, that my answer is that it would be much better for the State to have authority out to the full extent of 12 miles simply to avoid the jurisdictional questions that overwhelm the issues that should be being addressed by both of the parties.

Mr. TAYLOR. Mr. Van Dyke.

Mr. VAN DYKE. Yes, as I said earlier, I think one should separate the question of sovereignty, on the one hand, from those questions dealing with resource allocation, on the other hand. I do not think it is logical for the United States to have offshore territory that is part of the United States but not part of the adjacent State.

As a matter of logic and history, the full territorial sea should be part of the adjacent coastal State. But how we deal with the resources there is a much more complicated question.

In general, there should be a partnership between the Federal Government and the adjacent States. The Federal Government should be, to use your example, assisting with the oyster industry, just as it should be assisting with a lot of other industries to help our people prosper, without regard to who has sovereignty or jurisdiction over the waters.

Mr. TAYLOR. My last question would be to Mr. Van Dyke. If you recall the testimony of the gentleman from the NFI with regard to if a fisherman chooses to bring the catch of another fisherman back home and the laws change to extend the territorial limit of each State out to 12 miles, I don't see that as a big problem. I have not seen it to be a problem in the past.

Do you foresee the legal entanglements that he saw in that area as far as bringing these vessels under the coast trade or something that will be handled by the Congress?

Mr. VAN DYKE. Was he talking about the foreign fishing?

Mr. TAYLOR. First he said foreign, and then he said domestic catch within that area between 3 to 12 miles.

Mr. VAN DYKE. Many States will want to promote joint venture relationships with foreign fishing interests and should have the

freedom and flexibility to do so. The legal issues are not ones of great complexity. We deal with these now in the three-nautical-mile territorial sea.

If we extend jurisdiction out to 12 nautical miles, the legal issues do not become any more complicated.

Mr. TAYLOR. Do you gentlemen have any additional statements?

Mr. GISSBERG.

Mr. GISSBERG. No. Thank you for the opportunity.

We will submit a copy of the Carlson decision for your reviews. [The information can be found at the end of the hearing.]

Mr. TAYLOR. For the record, I have questions from Mr. Bateman, Mr. Coble.

If you gentlemen have any additional statements or questions, I am sure that the committee would be more than happy to address that?

[Additional questions and answers can be found at the end of the hearing.]

Mr. TAYLOR. On behalf of the committee, I would like to thank you for the great distances you have traveled for your efforts today.

Dr. ORBACH. Thank you.

Mr. TAYLOR. The hearing is adjourned.

[Whereupon, at 1:40 p.m., the committee adjourned, subject to the call of the Chair; and the following was submitted for the record:]

[illegible][illegible]

BACKGROUND MEMORANDUM

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.

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 authority 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). 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 10 percent of unleased gas resources (9.10 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), \$0.16 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

Attachment A

1990

Proclamation 5828 of December 27, 1988

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 thirtieth.

Ronald Reagan

Attachment BMARITIME ZONES¹Territorial 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.

Attachment CLIST 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.

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.

1 SEC. 5. THE TERRITORIAL SEA.

2 (a) SOVEREIGNTY.—The territorial sea of the United
3 States is part of the United States and subject to its sov-
4 ereignty.

5 (b) EXCLUSIVE JURISDICTION OF THE UNITED
6 STATES.—Except as provided by other law, the territorial
7 sea of the United States is subject to the exclusive juris-
8 diction of the United States.

9 (c) APPLICATION OF DOMESTIC LAWS.—Except as
10 otherwise provided by law, the territorial sea of the United
11 States shall be the territorial sea of the United States for
12 the purpose of laws enacted after December 30, 1990.
13 SEC. 6. THE CONTIGUOUS ZONE.

14 (a) ESTABLISHMENT.—The contiguous zone of the
15 United States consists of the belt of sea contiguous to the
16 outer limits of the territorial sea of the United States and
17 extending 24 nautical miles seaward from the baselines
18 of the United States determined in accordance with inter-
19 national law.

20 (b) EXCLUSIVE JURISDICTION OF THE UNITED
21 STATES.—Except as provided by other law, the contiguous
22 zone of the United States is subject to the exclusive juris-
23 diction of the United States.

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

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

3 SEC. 7. CONFORMING AMENDMENTS.

4 (a) FISHERIES AND WILDLIFE ENFORCEMENT.—(1)
5 Section 3 of the Marine Mammal Protection Act of 1972
6 (16 U.S.C. 1362) is amended by adding at the end the
7 following:

8 “(15) The term ‘import’ means to land on,
9 bring into, or introduce into, any place subject to the
10 jurisdiction of the United States, including the terri-
11 torial sea of the United States, whether or not such
12 landing, bringing, or introduction constitutes an im-
13 portation within the meaning of the customs laws of
14 the United States.

15 “(16) The term ‘territorial sea of the United
16 States’ means the territorial sea of the United
17 States as described in Presidential Proclamation
18 5928 of December 27, 1988.”.

19 (2) Section 3 of the Endangered Species Act of 1973
20 (16 U.S.C. 1532) is amended—

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

22 “(22) The term ‘territorial sea of the United
23 States’ means the territorial sea of the United
24 States as described in Presidential Proclamation
25 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,".

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

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

4 "(k) The term 'territorial sea of the United States'
5 means the territorial sea of the United States as described
6 in Presidential Proclamation 5928 of December 27,
7 1988."; and

8 (B) in paragraph (b) by inserting "including
9 the territorial sea of the United States," after "sub-
10 ject to the jurisdiction of the United States,".

11 (6) Section 2 of the Northern Pacific Halibut Act of
12 1982 (16 U.S.C. 773) is amended by adding at the end
13 the following:

14 "(h) 'Import' means to land on, bring into, or intro-
15 duce into, any place subject to the jurisdiction of the Unit-
16 ed States, including the territorial sea of the United
17 States, whether or not such landing, bringing, or introduc-
18 tion constitutes an importation within the meaning of the
19 customs laws of the United States.

20 "(i) 'Territorial sea of the United States' means the
21 territorial sea of the United States as described in Presi-
22 dential Proclamation 5928 of December 27, 1988.".

23 (7) Section 3 of the Magnuson Fishery Conservation
24 and Management Act of 1976 (16 U.S.C. 1802) is amend-
25 ed 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:

“(8) ‘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

1 States as described in Presidential Proclamation
2 5928 of December 27, 1988.”.

3 (B) Section 403(b)(2) of that Act (42 U.S.C.
4 9163(b)(2)) is amended by inserting “or within the area
5 between 3 and 12 nautical miles from the baselines of the
6 United States” after “the territorial sea”.

7 (c) COAST GUARD ENFORCEMENT AND VESSEL
8 SAFETY.—(1) Section 10 of the Act of March 3, 1899
9 (popularly known as the Rivers and Harbors Appropria-
10 tion Act of 1899; 33 U.S.C. 403), is amended by adding
11 at the end the following: “For purposes of this section,
12 each of the terms ‘waters of the United States’, ‘water
13 of the United States’, and ‘navigable water of the United
14 States’ includes all waters of the territorial sea of the
15 United States as described in Presidential Proclamation
16 5928 of December 27, 1988.”.

17 (2) Section 7 of the Act of March 4, 1915 (popularly
18 known as the Rivers and Harbors Appropriations Act of
19 1915; 33 U.S.C. 471) is amended by adding at the end
20 the following: “For purposes of this section, the term ‘nav-
21 igable waters of the United States’ includes all waters of
22 the territorial sea of the United States as described in
23 Presidential Proclamation 5928 of December 27, 1988.”.

24 (3) Section 3 of the Vessel Bridge-to-Bridge Radio-
25 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:

“(10) 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.”.

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

(9) Section 4370 of the Revised Statutes of the United States (46 App. U.S.C. 316(d)) is amended by adding at the end the following: “For purposes of this subsection, the term ‘territorial 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.”.

(10) Section 2301 of title 46, United States Code, is amended by inserting “(including the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988)” after “of the United States”.

(11) Section 4102(e) of title 46, United States Code, is amended by striking “on the high seas” and inserting “beyond 3 nautical miles from the baselines from which the territorial sea of the United States is measured determined 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-
2 terested Federal agencies, coastal States, the private sec-
3 tor, and environmental organizations.

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

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

14 **SEC. 9. SAVINGS PROVISION.**

15 “(a) IN GENERAL.—Sections 5 and 6 of this Act do
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
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.

O



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.

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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.

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. 1631-1644.

Add to 16 U.S.C. 1631 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.

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.

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.

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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

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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.

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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

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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.

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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

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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.

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 Institute. 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.

Paul L. Kelly

Page 2.

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.



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 Passenger Vessel Owners

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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 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 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 been 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 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
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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 F/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 lying 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." 499 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. AS 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." Helle 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 (1976).

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, 677 P.2d 1245 (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.

WALTER 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,

Wally
Walter J. Hickel
Governor

Attachments

ATTACHMENT A

The Honorable Donald B. Young -2-

Mar. 28, 1991

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

Offered: 3/2/90
 Referred: Finance

6-08338

Original sponsor(s): REP. DAVIDSON, Hoffman, Cotten, Grussendorf, Menard
 Navarro, Goll, Foster, MacLean, Brown, Larson, Cato, Boyer, H. Davis, Ellis,
 Ulmer, Kopenen, Jacko, Speinhels, 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-

CSJR 29(Res)

ATTACHMENT B

1 1988, to extend the territorial sea of the United States from three nauti-
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. Mombacher,
 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 M. 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 th. 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.

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	46.5	18.51	53.0
	HALIBUT	11.88	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.

ATTACHMENT C

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. TAUJIN'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.

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 he had the power to acquire sovereignty over this

* Law Student, William S. Richardson School of Law, University of Hawaii. He was a 1991 National Sea Grant Fellow serving on the Legislative Staff of Senator John Breaux.

** Associate Professor of Law, William S. Richardson School of Law, University of Hawaii.

*** Professor of Law, William S. Richardson School of Law, University of Hawaii.

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

²Douglas W. Kmiec, 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).

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. secs. 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. Section 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.

§ 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; Jack H. Archer & Joan M. 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

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

the University 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. sec. 6; other federal statutes relating to customs authority, 14 U.S.C. sec. 89 and 19 U.S.C. sec. 1581; and the OCSLA, 43 U.S.C. secs. 1331-56.

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), it was held that the holding of conquered territory is 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.

²⁷Kniec, *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 Kniec, *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 Kniec, *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 (1991).

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, at ____ nn.80-83. 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 Fillmore 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.

³⁶*Id.* at 22.

³⁷*Id.*

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

⁴⁰*Id.* 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 Dwight Heine & Jon A. Anderson, *Enen-Kio: Island of the Kio Flower*, 19 *Micronesian Reporter* 34 (1971). Although the claim has been 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

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

States attempted to take formal possession of Wake Island on January 17, 1899, through the claim of Commander Edward D. Taussig of the U.S.S. Bennington. In a 1923 scientific expedition, the only signs of life found was an abandoned Japanese feather gatherers 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. There are currently about 400 people living at Wake in a variety of facilities for recreation and living quarters. 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). Lawson 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. sec. 1411 (1988).

⁵⁵Kniec, *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. Amerasia 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 (1991).

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. (Phone interview with Gene Witham, NMFS enforcement agent, November 20, 1990.)

⁶³33 U.S.C. secs. 1401-1445 (1991).

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. sec. 1402(b).

⁶⁵33 U.S.C. sec. 1411(b).

⁶⁶33 U.S.C. sec. 1416(c).

⁶⁷33 U.S.C. sec. 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 (1991).

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 (1991).

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).

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 (1991)

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 (1991).

⁷⁸Id. § 1903(a)(1)(E).

⁷⁹50 U.S.C. §§ 191-198 (1991).

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 (1991). See also 47 U.S.C. § 33 (1991).

⁸²Id. § 1605(a)(2).

⁸³Id. § 1605(a)(3).

⁸⁴Id. § 1603(c).

⁸⁵42 U.S.C. §§ 9101 - 9168 (1991).

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.

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 (1991).

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

⁹¹Id. § 1185(a).

⁹²Id. § 1185(c).

⁹³Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (1989); Presidential Proclamation No. 5030, 48 Fed. Reg. 10605 (1983).

⁹⁴19 U.S.C. §§ 1401 - 1677k (1991).

⁹⁵Id. § 1590(g).

⁹⁶30 U.S.C. §§ 1401 - 1473 (1991).

of the submarine areas adjacent to the coast, but 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 (1991).

¹⁰⁰Id. § 1602.

¹⁰¹Id. § 1604(a).

¹⁰²Id. § 1601(2).

¹⁰³See 33 CFR 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 (1991).

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

¹⁰⁶43 U.S.C. §§ 1331-1348 (1991).

¹⁰⁷*Id.* § 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.

¹⁰⁸*Id.* § 1332(4)(A), (B).

¹⁰⁹*Id.* § 1331(e).

¹¹⁰*Id.* §§ 1332(4), 1337(g).

¹¹¹19 U.S.C. §§ 1401 to 1677k (1991).

¹¹²*Id.* § 1401(k).

¹¹³*Id.* § 1401(j).

¹¹⁴*Id.*

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) (1991).

¹¹⁶*Id.* § 1856(2).

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

¹¹⁸33 U.S.C. §§ 2601 - 2623 (1991).

¹¹⁹*Id.* § 2602(a).

¹²⁰*Id.* § 2601(2).

¹²¹33 U.S.C. §§ 901-950 (1991).

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

¹²²*Id.* § 902(a).

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

¹²⁴33 U.S.C. § 2701-2761 (1991).

¹²⁵*Id.* § 2701(35).

¹²⁶16 U.S.C. §§ 971 - 9711 (1991).

¹²⁷*Id.* § 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 (1991).

¹²⁹*Id.* § 1201.

¹³⁰42 U.S.C. §§ 9601 - 9675 (1991).

¹³¹*Id.* § 9601(15).

¹³²*Id.* § 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 (1991).

¹³⁴*Id.* § 151(b).

¹³⁵16 U.S.C. §§ 972-972(h) (1991).

¹³⁶*Id.* § 972(2).

¹³⁷16 U.S.C. §§ 1361 through 1407 (1991).

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.

¹³⁸Id. § 1362(14).

¹³⁹16 U.S.C. §§ 3601 - 3608 (1991).

¹⁴⁰Id. § 3606(a). "It is unlawful for any person, or any vessel, subject to the jurisdiction of the United States-- (1) to conduct directed fishing for salmon in waters seaward of twelve miles from the baselines from which the breadths of the territorial seas are measured . . ." Id.

¹⁴¹22 U.S.C. §§ 2291 (1991).

¹⁴²Id. § 2291(c)(4),

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

¹⁴³33 U.S.C. §§ 1121-1131 (1991).

¹⁴⁴Id. § 1122(6).

¹⁴⁵33 U.S.C. §§ 1221-1236 (1991).

¹⁴⁶Id. § 1223(c)(1).

¹⁴⁷Id. § 1223(c)(5)(B).

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.

¹⁴⁸33 U.S.C. §§ 1251-1387 (1991).

¹⁴⁹Several sections apply to the territorial sea: § 1311(h) refers to the discharge of effluents from publicly owned treatment works into the territorial sea; § 1343(a) requires a National Pollution Discharge Elimination Permit for discharges into the territorial sea; § 1344 sets up permit system for disposal of dredge and fill materials into navigable waters, including the territorial sea; and § 1362(7) includes the territorial sea in the definition of navigable waters of the United States.

¹⁵⁰*Id.* § 1362(8).

¹⁵¹33 U.S.C. §§ 1701 - 1709 (1991).

¹⁵²*Id.* § 1702(4).

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

¹⁵³46 U.S.C. §§ 12101 - 12122 (1991).

¹⁵⁴*Id.* § 12103.

¹⁵⁵*Id.* § 12110.

¹⁵⁶*Id.* § 12108(c).

¹⁵⁷46 U.S.C. App. 1901 - 1904 (1991).

¹⁵⁸46 U.S.C. App. § 1903(c)(1) states: a "vessel subject to the jurisdiction of the United States" includes . . . (D) a vessel located in the customs waters of the United States, and (E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States.

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 United States 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

¹⁵⁹Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (September 28, 1945).

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).

¹⁶¹Carolyn Nicol, 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 (19--)

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. Section 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

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

¹⁷²43 U.S.C. Section 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).

has also sparked litigation. The SLA grant contains the 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

¹⁷⁵43 U.S.C. Section 1301(b) (1988) (emphasis added).

¹⁷⁶43 U.S.C. Section 1301(c) (1988).

¹⁷⁷381 U.S. 139 (1965).

¹⁷⁸Milner S. Ball, Good Old American Permits, 12 Env. L. J. 623 (1982).

ownership with a concurrent federal government interest in those rights as outlined in the Constitution--power over commerce, 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

¹⁷⁹Id. at 635. Consider also 43 U.S.C. Section 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 section 1311 of this title.

operation.¹⁸⁰ Read with their accompanying rules, the OCSLA

¹⁸⁰43 U.S.C. Section 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. Section 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. Section 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. Section 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. Section 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

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

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. Section 1346(c):

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. Section 1337(g)(1)(B) and (D) (1988).

¹⁸²Mary Ellen Leeper, 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).

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 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

¹⁸³Pub. L. No. 99-272, 100 Stat. 148, 150 (1986), codified at 43 U.S.C. § 1337(g).

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."

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 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

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.

Congress has established a moratorium on federal leases off the California coast.¹⁸⁷ In addition to affecting oil and gas 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

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

¹⁸⁸But see Lowry, Jarman & Maehara, *infra* notes ___ - ___ 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).

Interior Department and the State of Hawaii have entered into a Joint Planning Agreement over offshore hard mineral mining in the 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

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).

state interests in offshore mineral resource decision-making. Interior's continual ignoring of these interests, coupled with 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.

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.

In support of their claim¹⁹³ for a 50% share of section 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:

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 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.

¹⁹⁵Richard K. Littleton, Coastal States, Inland States and a 12-Mile Territorial Sea, 17 J. Mar. L. and Comm. 539 (1986).

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 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

¹⁹⁶See supra, note 182. 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.

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 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.

¹⁹⁷16 U.S.C. § 1452(1) (1988).

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, 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

¹⁹⁸Thomas R.E. Keeney, 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).

¹⁹⁹Donald F. Squires, Existing and Potential Resources in Offshore Waters of the United States, in Proceedings, *supra* note 198, at 27.

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 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

²⁰⁰See S.G. Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1861 (1988); Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988).

²⁰¹See S.G. Bundrandt, 546 P.2d 530 (Alaska, 1976); Skiriotes, 212 U.S. 69 (1941). See also, Jeff Ballweber & Richard Hildreth, "Summary of Fishery Management Implications of the Territorial Sea Extension" (Draft for Comment, May 31, 1989).

²⁰²See Milner S. 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.

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 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

²⁰⁴Keeney, supra note 198, at 75.

²⁰⁵Charles R. McCoy, Observations on a Twelve-Mile State Fisheries Jurisdiction, in Proceedings, supra note 198, at page 48.

²⁰⁶Id. at 47, originally filed as Florida v. Department of Commerce (cite not provided).

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 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

²⁰⁷16 U.S.C. § 1456 (1988).

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

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.

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

(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.

²¹¹212 U.S. 69 (1941).

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 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

²¹²Id., at 77.

²¹³546 P.2d 530 (Alaska, 1976).

²¹⁴Id., at 546.

²¹⁵See infra, Section VI, notes 229-30 and accompanying text.

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 5 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-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

²¹⁶Ballweber & Hildreth, supra note 201.

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 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

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).

²¹⁹Pub. L. No. 101-627, 104 Stat. 4436 (1990), codified at 16 U.S.C. Section 1801(b)(1).

²²⁰See *Bundrant*, 546 P.2d 530 (Alaska, 1976), citing to a 1974 report by the Department of Commerce.

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 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

²²¹Van Dyke, Bennett, Storch, & Turbeville, *The Legal Regime Governing Alaskan Salmon* 40 (A Report to the University of Alaska Sea Grant Program, June 1988).

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

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].

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 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

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

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.

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 Biliana 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

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 Bruce A. Harlow & Richard J. 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 Edward A. 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.

²²⁵Biliana Cicin-Sain & Robert 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).

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

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

²²⁶John E. Noyes, 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 227, para. 2.

²²⁷42 U.S.C. §§ 7401-7626 (1988).

²²⁸43 U.S.C. §§ 1331-1357 (1988). *See generally*, Robert Knecht, Biliana Cicin-Sain & Jack H. 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 Proposed Development of the Santa Ynez Unit by Means of Development Option A (February 18, 1984).

²²⁹*Id.*, at 125.

²³⁰Law of the Sea Committee Newsletter: Section of International Law and Practice, vol. 3, no. 2 (American Bar Association, Summer 1989).

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, 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

²³¹From a Policy Statement of the Coastal States, appended to CSO Testimony, *supra* note 224.

²³²CSO Testimony, *supra* note 224, at 73, referring to Executive Order No. 12612 (October 26, 1987).

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

²³³*Id.*, at 14.

²³⁴*Id.*, 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 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....

demonstrated coastal state ability, including ocean mining, 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

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.

²³⁵Id., at 12.

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 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.

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).

²³⁷Id., at 5.

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

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

²³⁸See Charles R. 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).

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].

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 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

²⁴⁰*Id.*, at 92.

²⁴¹*Id.*, at 89.

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 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

²⁴²*Id.*, at 88.

²⁴³Robert Knecht, The Coastal States and the U.S. Exclusive Economic Zone 15 (CSO, Washington, D.C. 1987).

²⁴⁴Kam Lowry, M. Casey Jarman, & Susan 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.

²⁴⁵*Id.*, at 38.

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 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

²⁴⁶*Id.*, at 39.

²⁴⁷Waihee Statement, supra note 239, at 93.

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 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

²⁴⁸33 U.S.C. §§ 1501-24 (1988).

²⁴⁹42 U.S.C. §§ 9101-67 (1988).

²⁵⁰CSO Study, *supra* note 224, para. 2, at 20.

²⁵¹*Id.*, at 21.

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

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

²⁵²Knecht, Cicin-Sain & Archer, *supra* note 228, at 126.

²⁵³*Id.*, at 125-26.

²⁵⁴Cicin-Sain & Knecht, *supra* note 225, at 315. See Lew Alexander & Lynne Hanson, Regionalizing Exclusive Economic Zone Management, in Proceedings of Oceans, 1984 (Marine Technology Society, 1984), and William S. 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.

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 (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

²⁵⁵Knecht, Cicin-Sain & Archer, *supra* note 228, at 133, citing J. Good & R. Hildreth, *Nearshore Ocean Management in Oregon* (Oregon Department of Land, Conservation and Management, draft 1986).

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.

²⁵⁸Marc J. Hershman, *The Coastal Decision Making Framework as a Model for Ocean Management*, in *Proceedings*, *supra* note 198, at 92, 99.

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 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

²⁵⁹Cicin-Sain & Knecht, *supra* note 225, at 299.

²⁶⁰Knecht, Cicin-Sain & Archer, *supra* note 228, at 134.

²⁶¹Hershman, *supra* note 258, at 96.

²⁶²G. Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 Va. L. Rev. 503, 547 (1977).

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 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).

²⁶³Hershman, *supra* note 258, at 94-95.

²⁶⁴Cicin-Sain & Knecht, *supra* note 225, at 302-05.

²⁶⁵Hershman, *supra* note 258, at 96.

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 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

²⁶⁶Cicin-Sain & Knecht, *supra* note 225, at 302-305.

²⁶⁷CSO Study, *supra* note 224, para. 2, at 21.

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 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

²⁶⁸Cicin-Sain & Knecht, *supra* note 225, at 315.

²⁶⁹Herhman, *supra* note 258, at 99.

²⁷⁰See Littleton, *supra* note 193 and accompanying text.

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 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-

²⁷¹Harlow Report, *supra* note 224, para. 3, at 91.

²⁷²Waihee Statement, *supra* note 239, at 94.

²⁷³Harlow Report, *supra* note 224, para. 3, at 96.

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 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

²⁷⁴Waihee Statement, *supra* note 239.

²⁷⁵Cicin-Sain & Knecht, *supra* note 225, generally; and Knecht, Cicin-Sain & Archer, *supra* note 228, generally.

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 MPCMA 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.



Coastal States Organization

In alliance of the Coastal States, Commonwealths, and Territories providing an effective voice in the formulation, development, and implementation of national marine and coastal resource programs and policies

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February 4, 1992

The Honorable Walter Jones
Chairman,
House Merchant Marine and Fisheries Committee
1334 Longworth House Office Building
Washington, D.C.
20515

Dear Mr. Chairman:

The Coastal States Organization is pleased to join with the Western Governors' Association in submitting testimony on H.R. 3842, a bill to extend the territorial sea and the contiguous zone of the United States. We believe that the time is right to seriously look at an extension of coastal States regulatory and management authority out 12 nautical miles as an interim step towards eventually amending the Submerged Lands Act to extend the States' seaward boundary to be coterminous with the seaward boundary of the U.S. Territorial Sea.

We appreciate the opportunity to voice the interests of the coastal States on this important topic. We look forward to working with the Committee.

Sincerely,

David C. Stade
Executive Director

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January 31, 1992

The Honorable Walter Jones
Chairman,
House Merchant Marine and Fisheries Committee
1334 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The Western Governors' Association is pleased to join the Coastal States Organization in submitting testimony on H.R. 3842, a bill to extend the territorial sea and the contiguous zone of the United States. Before the committee closes its hearing record, WGA plans to supplement its testimony. The supplement will recommend and describe a pilot program which the governors would like the committee to add to HR 3842 if it decides at this time to not extend state jurisdiction from 3 to 12 miles. The pilot program would authorize coastal and island states and territories to develop model joint management programs which would address one or more resource concerns within the 12 mile extended territorial sea.

Improving governance and finding new solutions to resource management questions are major priorities for the western governors. The governors have initiated eight pilot projects in which they are working with federal agencies, other levels of government, tribes, non-government organizations, and the private sector to make our government systems work better and get problems solved. The initiative is based upon the idea that government is best when it provides direction and vision. Thank you for considering these views.

Sincerely,

James M. Souby

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).

Oceanrawl

STATEMENT OF AMBASSADOR EDWARD WOLFE
OCEANRAWL INC.

ON

H.R. 3842, A BILL TO EXTEND THE
U.S. TERRITORIAL SEA

COMMITTEE ON MERCHANT MARINE AND FISHERIES

U.S. HOUSE OF REPRESENTATIVES

MARCH 9, 1992

Oceanrawl

Mr. Chairman:

I am Edward Wolfe, former U.S. Fisheries Ambassador and Deputy Assistant Secretary of State, and presently Director of Governmental and International Affairs for the Oceanrawl group of companies. I appreciate the opportunity to present this statement on H.R. 3842, a bill to extend the territorial sea and contiguous zone of the United States. I was involved in the preparation of the Presidential Proclamation in 1988 and recognize the complexity and difficulty of preparing this implementing legislation. The Committee and its staff should be commended for its dedicated efforts in moving this legislation forward.

In the interest of brevity, I will focus on two specific issues today: (1) the extension of coastwise trade requirements to the twelve-mile limit and (2) the possible extension of state jurisdiction over living resource management, since these two issues could have a substantial impact on our business and investment. We will monitor the bill and work with your staff on these issues.

The Oceanrawl companies are one of the largest fishing and processing operations in the United States' fisheries. We own and operate three state-of-the-art factory trawlers, and employ over 650 people in Alaska and Washington State. Oceanrawl is a majority U.S.-owned group of companies and has been a pioneer in Americanizing the groundfish fisheries of Alaska and the West Coast. We recently began our first foreign venture by fishing in the Russian Exclusive Economic Zone, using our U.S.-flag vessels and American crews. Almost all of our product is exported to foreign markets, creating U.S. income and helping to lower our international trade deficit.

COASTWISE TRADE ISSUES

We urge the inclusion of a provision that would grandfather vessels currently qualified for documentation under U.S. law with a fishery endorsement. The provision should apply coastwise trade requirements to those vessels only within the existing three-mile limit.

In 1985, Oceanrawl completed a marketing agreement with a major foreign buyer and began the acquisition of a fleet of three factory trawlers. The company moved forward by acquiring three U.S.-built vessels that were subsequently rebuilt in Norway and Germany pursuant to the U.S. laws then in effect. The company has invested approximately \$140 million in these three vessels, which are 340 feet in length and produce mostly surimi for foreign markets.

Oceanrawl

Oceanrawl representatives were active in working with the Committee in 1987 on the legislation which became the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1988. Since we had made our investments and signed vessel purchase and shipyard contracts in reliance on previous law, we wanted to ensure that our investments were protected. The Committee and the Congress provided grandfather clauses that protected the interests of companies such as ours.

Since our vessels were rebuilt abroad, they are not qualified for the U.S. coastwise trade. Consequently, certain operations cannot be carried out within the three-mile territorial sea. As the industry has become more sophisticated, more activities occur at sea to provide maximum efficiency of operations. Processing vessels receive fish catches from catcher boats, process the fish, and then deliver them to port for transshipment. Fish cargoes are offloaded at sea for export. These and other activities are important in providing flexibility of operations.

If the coastwise trade requirements are extended to 12 miles without the necessary grandfather provision, our vessels will be excluded from certain types of operations, limiting our flexibility and undermining our investments. We see no reason for this impact on our company and urge inclusion of a grandfather provision. Our at-sea activities do not compete with commercial carriers and are limited to fisheries operations. The implementation of the Anti-Reflagging Act has already eliminated the possibility of more foreign-rebuilt vessels being documented for the fisheries under U.S. law. I note that the Department of State and the National Oceanic and Atmospheric Administration both support an amendment that would allow foreign-flag vessels to continue fishery support operations in the 3-12 mile area. We believe the Committee should include similar provisions for U.S.-flag vessels.

STATE JURISDICTION

H.R. 3842, as drafted, does not extend state jurisdiction over living resources beyond the current three-mile limit, but would authorize a study of the issue. We strongly urge that state jurisdiction not be further extended.

The Americanization of our fisheries has occurred through investment and entrepreneurial talent from many parts of the United States. Our company alone has offices on both the east and west coasts, employees from several states, vessel operations off the coasts of four states and abroad, and sales in both the United States and abroad. Americanization of our

Oceanrawl

fisheries has been successful because it has been a national effort.

The living resources of the U.S. Exclusive Economic Zone are vast and include, by some estimates, as much as 15% of the marine living resources of the world. These resources have been, and should continue to be, managed for the benefit of the nation as a whole. The Magnuson Fishery Conservation and Management Act recognized the importance of our fishery resources to the nation and the Congress wisely built a federal management system. Those benefits should continue to flow to the nation as a whole.

The current U.S. fisheries management system provides the states of each region with substantial influence through seats on the regional council that develops fishery management plans. As foreign fleets have departed, even that system has shown strains as decisions must be made between American user groups. Many battles are being fought between local interests and those interests perceived as outsiders in a particular fishery. State resource managers necessarily respond to the local interests of their state citizens. Those constituents demand management decisions that favor their interests.

The expansion of state management jurisdiction to the 12-mile area would inevitably increase the friction and produce more battles. The nation would receive fewer benefits and many user groups would be excluded from operating in large areas. The complexity and confusion of management would be exacerbated since many more stocks and species would be subject to both state and federal management. We support the retention of state jurisdiction at the three-mile limit and the sharing of the benefits from our fishery resources with all Americans.

Mr. Chairman, thank you for the opportunity to present our testimony to the Committee on this very important issue.

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March 2, 1992

The Honorable Walter B. Jones
Chairman, Committee on Merchant
Marine and Fisheries
Room 1334, Longworth House Office
Building
Washington, D.C. 20515-6230

Attention: Ms. Joan Bondareff

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

Dear Chairman Jones:

On behalf of Lorenzo I. De Leon Guerrero, Governor of the
Commonwealth of the Northern Mariana Islands, and Lieutenant
Governor Benjamin T. Manglona, Chairman of the Governor's Special
Representatives for the Covenant Section 902 Consultations, we
are pleased to forward to you the enclosed statement
supplementing the Governor's testimony at the February 4, 1992,
hearing on the above-referenced bill.

Sincerely,


Donald C. Woodward

Enclosure, as noted

Statement of
Lorenzo I. De Leon Guerrero, Governor
Commonwealth of the Northern Mariana Islands
and
Benjamin T. Manglona, Lieutenant Governor
and Chairman of
The Special Representatives
of the Governor for
Covenant Section 902 Consultations
onH.R. 3842
THE TERRITORIAL SEA AND CONTIGUOUS ZONE
EXTENSION AND ENFORCEMENT ACT OF 1991Before the
Committee on Merchant Marine & Fisheries
United States House of Representatives

February 4, 1992

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EXECUTIVE SUMMARY

On February 4, 1992, this Committee conducted a hearing on H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act. At that hearing, Lorenzo I. De Leon Guerrero, Governor of the Commonwealth of the Northern Mariana Islands, appeared and testified against enactment of the bill, as it applies to the Commonwealth. The Governor outlined the history of Consultations between the United States and the Northern Mariana Islands pursuant to Section 902 of the Covenant on this subject and set out reasons why the bill, in its current form, would be contrary to the interests of the people of the Northern Mariana Islands.

Application of H.R. 3842 to the Northern Mariana Islands would prejudice good faith resolution of the territorial sea issue under Covenant Section 902. On April 12, 1990, the Northern Mariana Islands entered into an agreement with Special Representative of the President Timothy W. Glidden whereby the Northern Mariana Islands' ownership of its territorial sea, submerged land and other ocean resource jurisdiction would be recognized and confirmed by the United States. The agreement is based, in part, on the clear promise during the negotiation of the Covenant that the United States would return the Marianas

submerged lands to the people of the islands along with all other public lands held in trust by the United States. The 1990 agreement has yet to be implemented. An issue of this importance should be resolved, as intended by the Covenant, with the mutual consent of the parties.

The Commonwealth takes the position that its boundaries and submerged lands jurisdiction should be recognized to the full extent permitted under international law. This would include a territorial sea and submerged lands jurisdiction to 12 nautical miles and a contiguous zone of 24 nautical miles as established under the Covenant by Commonwealth law. The Commonwealth points out that its people have a long tradition of use and ownership of submerged lands well beyond the 12-mile limit. The Commonwealth's position is well within the jurisdiction recognized under the 1982 United Nations Convention on the Law of the Sea and international common law. The Commonwealth also believes that its rights should be determined by its Covenant because it is not admitted to the Union and is without representation in the Congress of the United States.

Until the issue of the boundaries and jurisdiction of Commonwealth of the Northern Mariana Islands in its territorial sea are resolved, it is difficult to see how H.R. 3842 may be

viewed as jurisdictionally neutral in its application to the Northern Mariana Islands. For this reason, we respectfully request that the Commonwealth of the Northern Mariana Islands be removed from the application of the Territorial Sea and Contiguous Zone Extension and Enforcement Act until such time as the issues are resolved by mutual agreement.

INTRODUCTION

The Commonwealth of the Northern Mariana Islands is the newest member of the American political family. It is an island archipelago stretching north of Guam toward Japan at the western edge of the Pacific ocean. It consists of 14 islands, with a population of about 43,000. It is home to two groups of islanders, Chamorros and Carolinians.

Prior to World War II, the islands were governed by Japan under a United Nations mandate. The islands were invaded and occupied by the United States in some of the bloodiest island fighting of the Pacific campaign. Nearly 4,000 Americans gave their lives in the battles for Saipan and Tinian. Some 35,000 Japanese perished in the fighting. At the same time, nearly ten percent of the islander population died.

Alone among the people occupied and liberated by the United States during World War II, the people of the Northern Mariana Islands sought a political union with the United States. The Marianas people sought and obtained the status of a United States Commonwealth, and became American citizens in 1986. As a result of the negotiated Covenant between the United States and the Northern Mariana Islands, the Commonwealth is the only foreign territory occupied during World War II where the United States flag still flies.

The Covenant was approved by the people of the Northern Mariana Islands in a plebescite vote June 17, 1975 and by the United States in 1976. It was proclaimed fully implemented by President Reagan on November 3, 1986. Since 1986 the Commonwealth has been engaged in formal consultations with the White House to reach agreement on certain issues left unresolved by the Covenant. One of these issues is the nature and extent of the Commonwealth's jurisdiction of its territorial sea and submerged lands. The Commonwealth has reached agreement with a Special Representative of the President of the United States as to how this issue should be resolved. That agreement has yet to be implemented.

On February 4, 1992, this Committee conducted a hearing on H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act. At that hearing, Lorenzo I. De Leon Guerrero, Governor of the Commonwealth of the Northern Mariana Islands, appeared and testified against enactment of the bill, as it applies to the Commonwealth. The Governor outlined the history of Consultations between the United States and the Northern Mariana Islands pursuant to Section 902 of the Covenant¹ on this subject and set out reasons why the bill, in its current form, would be contrary to the interests of the people of the Northern Mariana Islands.

Governor Guerrero and Lieutenant Governor Benjamin T. Manglona, Chairman of the Governor's Special Representatives for the Covenant Section 902 Consultations, comment further on the bill in this written statement. This statement supplements Governor Guerrero's testimony before the Committee by summarizing the Covenant Section 902 Consultations on this issue for the hearing record, by setting out some recent history relevant to

¹ The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975). The Covenant was approved for the United States by Public Law 94-241, 90 Stat. 263 (1976).

the issue and by responding to several questions raised by Members during the hearing.

OCEAN RIGHTS OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

The Trusteeship period: submerged public lands held in trust. The United States acquired the authority to administer the Northern Mariana Islands after World War II, pursuant to the United Nations Trusteeship Agreement for the Former Japanese Mandated Islands.² The United States had no sovereignty pursuant to this agreement. Instead, it administered our islands in trust for the benefit of our people. As trustee of this international trust, the United States was expressly obliged to promote the development of our people "toward self-government or independence."³ It was also required to protect our people "against the loss of their lands and resources."⁴ The Marianas people share the Pacific tradition of high seas navigation and have a long

² T.I.A.S. No. 1665, 8 U.N.T.S. 189, 61 Stat. 3301 (1947).

³ Id., Art. 6(1).

⁴ Id., Art. 6(2).

history of ownership and control of the submerged lands offshore their islands.⁵ These rights extend not only to the waters immediately adjacent to land. Frequently they extend far beyond the horizon from land.⁶

At the time the Covenant was negotiated and approved, the United States made no claim to the submerged lands or marine resources offshore the Northern Mariana Islands. To do so would have been contrary to the United States fiduciary obligations as

⁵ Throughout Micronesia "paramount rights in the sea and its resources generally belong to the nearest island or atoll." M. Nakayama and F. Ramp, Micronesian Navigation, Island Empires and Traditional Concepts of Ownership of the Sea, 78 (Congress of Micronesia 1974).

⁶ "The most distant submerged reefs considered owned by Micronesians are found in the Mariana Islands. Paralleling the chain of mountains forming the Marianas is another chain located about 200 miles to the west. None of these mountains break the surface of the ocean. Among them are many submerged reefs which are considered to be the property of the people of the Marianas. For example, about 175 miles west of Pagan are two reefs together called "Fanupweiletal" traditionally owned by the inhabitants of Anatahan. About 150 miles west of Anatahan is Pathfinder Reef which, together with the reef to the north and one to the east, is called "ochensoufanachik" and owned by the Soufanachik clan. There are many reefs closer to land in the Marianas such as "Ochopengek" east of Saipan and "Maenmetin" north of Saipan. These are considered owned by a clan or island as well." Id., at 89.

administering authority of the Trusteeship.⁷ As a result, title to public lands in the Trust Territory was not vested in the United States at all. Rather, it was vested in the Government of the Trust Territory.⁸ The interest of the United States in land, including submerged land, in the Northern Marianas has always been an administrative, fiduciary interest, not a sovereign interest.⁹

No federal marine resource laws applied to the waters, submerged lands or resources offshore the Northern Mariana Islands at the time the Covenant was signed.¹⁰ The Magnuson

⁷ Welcoming America's Newest Commonwealth: the Second Interim Report of the Northern Mariana Islands Commission on Federal Laws 175 (1985).

⁸ 67 Trust Territory Code, secs. 1, 2.

⁹ United Nations Trusteeship Agreement for the Former Japanese Mandated Islands, Article 6(2); People of Saipan v. United States Department of the Interior, 502 F. 2d 90, 95 (9th Cir. 1974).

¹⁰ The Covenant was signed on February 15, 1975. It was approved by the people of the Northern Mariana Islands by a 78.8% vote in a plebiscite vote on June 15, 1975. It was approved by the United States by Public Law 94-241 on March 24, 1976.

Fishery Conservation and Management Act did not exist.¹¹ Neither the Submerged Lands Act¹² nor the Outer Continental Shelf Lands Act¹³ applied to the Northern Mariana Islands.

The Covenant negotiations: returning Micronesian public lands. In performing its trust obligations, the United States negotiated a new political status with our people, that of a Commonwealth of the United States. That status is set forth in the Covenant. The Covenant governs "relations between the Northern Mariana Islands and the United States" and is the "supreme law of the Northern Mariana Islands."¹⁴ It is this

¹¹ The Magnuson Fishery Conservation and Management Act, Public Law 94-265, became law on April 13, 1976. As originally enacted, the Magnuson Act did not apply to the Northern Mariana Islands which were exempted as part of the Trust Territory of the Pacific Islands. The Act was amended to apply to the Northern Mariana Islands by Public Law 97-453 on January 12, 1983.

¹² The federal Submerged Lands Act was enacted in 1953 and conveyed title to submerged lands only to the States "of the Union." 43 U.S.C. sec. 1301(g).

¹³ The Outer Continental Shelf Lands Act established federal authority over the outer continental shelf, which it defined as all lands seaward of the submerged lands granted to the States under the Submerged Lands Act. 43 U.S.C. sec. 1331(a). As the Submerged Lands Act confined its application to States of the Union, federal authority under the Outer Continental Shelf Lands Act is similarly confined.

¹⁴ Covenant, supra, note 1, Art. I, Sec. 102.

Covenant that governs issues, such as the ownership and extent of the Commonwealth's territorial sea, submerged lands, and contiguous zone that arise between the Northern Mariana Islands and the United States.

The first statement by the people of the Northern Mariana Islands at the first session of the Marianas Political Status Negotiations emphasized the need to affirm the people's sovereignty and ownership of their islands and public lands.¹⁵ The United States responded that, "public lands, including military retention lands, must be returned to the people of the Marianas. The question to be discussed is . . . to whom the public lands are to be returned and when."¹⁶ From the beginning, submerged lands were considered to be public lands and were included among those lands to be returned to the islanders: "[s]o

¹⁵ Edward DLG Pangelinan, Chairman of the Marianas Political Status Commission, said, in his opening statement, it would "be appropriate for all military retention and public land to be turned over to the Government of the Mariana Islands. This will properly recognize the sovereignty of the people of the Marianas Islands over their land." Statement of Edward DLG Pangelinan, Marianas Political Status Negotiations, Opening Round, Saipan, December 13 - 14, 1972 (Office of Micronesian Status Negotiations), at 7.

¹⁶ Presentation by Mr. James M. Wilson, Jr., U.S. Deputy Representative for Micronesian Status Negotiations, May 10, 1973, at 7.

far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new agreement, as in the case of the states of the United States and other territories."¹⁷ On June 4, 1973, the parties jointly announced that "the United States reiterated its prior commitment to return to the people of the Marianas the land now held in trust just as soon as questions of a legal, administrative and timing nature can be resolved."¹⁸

-- The United States Policy for the Return of Micronesian Public Lands. As a result of these negotiations and the demands of other Micronesians for the return of public lands held by the Trust Territory of the Pacific Islands,¹⁹ F. Haydn Williams, the

¹⁷ Id. at p. 7.

¹⁸ Joint Communique of the President's Personal Representative, F. Haydn Williams and the Marianas Political Status Commission, June 4, 1973; Record of Marianas Political Status Negotiations, Second Session, Office of Micronesian Status Negotiations.

¹⁹ The return of public lands had become a crucial issues in the Micronesian Status Negotiations even before the Marianas began to negotiate separately with the United States. After the sixth round of those status negotiations, in late 1972, the Micronesians demanded the return of public land as a precondition to resumption of negotiations with the United States. The new federal policy on public land in Micronesia was announced less than two weeks before the seventh round of Micronesian negotiations was convened in Washington, D.C., and about five weeks before the third round of Marianas negotiations. D. McHenry, Micronesia: Trust Betrayed 112-116 (1975).

President's Personal Representative for Micronesian Status Negotiations, announced on November 1, 1973, a formal policy of the United States regarding land held by the Government of the Trust Territory.²⁰ This policy, called "Transfer of Public Lands from the Trust Territory of the Pacific Islands Administration to the Districts: U.S. Policy and Necessary Implementing Courses of Action," affirmed the fiduciary nature of the Federal Government's interest:

The U.S. Government, as administering authority in the Trust Territory of the Pacific Islands, has always considered public land in Micronesia to be property held in trust for the people of Micronesia.²¹

²⁰ The policy was also announced three days later by the Secretary of the Interior.

²¹ Transfer of Title of Public Lands from the Trust Territory of the Pacific Islands Administration to the Districts: United States Policy and Necessary Implementing Courses of Action, F. Haydn Williams, President's Personal Representative for Micronesian Status Negotiations 1 (Nov. 1, 1990). [hereinafter cited as U.S. Land Transfer Policy]

-- Submerged lands included. Ambassador Williams' announcement made it clear that the Federal policy on Micronesian lands covered all public lands, including submerged lands:

Public lands include all lands acquired by the Spanish, German, and Japanese administrations for governmental or other purposes, as well as such lands as the Trust Territory Government may itself have acquired for public purposes. Tidelands and marine lands are considered part of the public domain as well. As used herein "public lands" also encompasses those private Japanese properties, including those of the Japanese Government controlled agencies and corporations, which were seized at the end of World War II and placed under the control of the "alien property custodian".²²

This policy noted that the United States had studied the question thoroughly and as a result "has now concluded that if it is the desire of the people in a district that public lands in that district be turned over to the district now before termination of the Trusteeship the United States is willing to

²² Id., at 1.

accede to their wishes and to facilitate the transfer of title."²³ The Marianas Political Status Commission formally accepted this new federal policy as "a basis for satisfactory resolution of the public land issues in the Marianas."²⁴

Thus, the parties to the Covenant negotiations agreed that title to the tidelands, submerged lands, marine lands, and filled lands would be transferred from the Government of the Trust Territory of the Pacific Islands to an agency of the Government of the Northern Mariana Islands in trust for the people of the Northern Mariana Islands.

-- Department of the Interior Orders 2969 and 2989. This land return policy was implemented by Department of the Interior Orders 2969 and 2989. Interior Order 2969 authorized the Marianas District Legislature to create a legal entity competent to receive title from the Trust Territory and to hold the submerged and other public lands in the district. Submerged

²³ Id., at 2.

²⁴ Marianas Political Status Commission, Position Paper on the Return of Public Lands to the People of the Marianas 1 (Dec. 13, 1973).

lands were specifically included.²⁵ In 1975, the Marianas District Legislature created the Marianas Public Land Corporation to receive public lands from the Trust Territory pursuant to Secretarial Order 2969.²⁶

On April 1, 1976, one week after U.S. Public Law 94-241 approving the Covenant came into effect, the Secretary of Interior issued Department of the Interior Order 2989. This Order separated the Government of the Northern Mariana Islands from the administration of the rest of the Trust Territory.²⁷ Part VII of this order contained this provision:

All other public lands situated in the Northern Mariana Islands title to which is now vested with the Trust Territory Government and which have not been transferred to the legal

²⁵ "Public lands" were defined to include "lands defined as public lands by Section . . . 2, Title 67, of the Trust Territory Code," that is, lands below the "ordinary high water mark."

²⁶ Act 100-75, Marianas District Legislature (1975). See Northern Mariana Islands Commission on Federal Laws, supra, note 7, at 176.

²⁷ Northern Mariana Islands Commission on Federal Laws, supra, note 7, at 176.

entity created by the Marianas Islands District Legislature according to Secretarial of the Interior Order No. 2969 shall vest in the Resident Commissioner.

As successor to "all rights and obligations" of the Government of the Northern Mariana Islands pursuant to Section 13 of the Schedule on Transitional Matters of the Constitution of the Commonwealth, the Commonwealth of the Northern Mariana Islands was vested with title to those submerged lands no later than January 9, 1978.

Section 801 of the Covenant. Section 801 of the Covenant provides that:

All right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands.

Under the law of the Trust Territory, lands below the ordinary high water mark were real property.²⁸ Consequently, Covenant Section 801 confirms that the return of all submerged lands vested in the Trust Territory of the Pacific Islands was to return to Commonwealth ownership as agreed during the Covenant negotiations. This is made clear by the legislative history of United States Public Law 94-241 approving the Covenant. That legislative history includes the following discussion of Section 801 by the Marianas Political Status Commission:

This Section serves as a guarantee that all of the public land in the Northern Marianas will be returned to its rightful owners, the people of the Northern Marianas. . . . This section assures that all of the land will come back no later than termination and that no land can be disposed of other

²⁸ Ngiraibiochel v. TTPI, 1 Trust Territory Reports 485, 490 (High Court Trial Division Palau, 1958).

than to the Government of the Northern Marianas.²⁹

Congress has subsequently confirmed that the submerged lands described in Section 801 of the Covenant belong to the Commonwealth of the Northern Mariana Islands. In 1988, Congress passed the Abandoned Shipwrecks Act³⁰ to clarify that the States, defined to include the Northern Mariana Islands, have jurisdiction and responsibility for the management of abandoned shipwrecks in the waters and submerged lands of the State. The Act defined the term "submerged lands" by reference to the Covenant:

²⁹ Marianas Political Status Commission, Section-by-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, reprinted in The Covenant to Establish a Commonwealth of the Northern Mariana Islands: Hearings before the Subcommittee on Territorial & Insular Affairs of the House Committee on Interior & Insular Affairs, 94th Cong., 1st Sess. 626 (1975) and in The Northern Mariana Islands: Hearings before the Senate Committee on Interior & Insular Affairs, 94th Cong., 1st Sess. 356 (1975). This Section-by-Section Analysis, as shown by its inclusion in the congressional hearing record, was before the Congress when it considered approval of the Covenant. If the United States disagreed with the Commission's Analysis of Section 801, Congress would have noted that disagreement. No such disagreement is found in the legislative history of Public Law 94-241.

³⁰ U.S. Public Law 100-298, 102 Stat. 432, 43 U.S.C. secs. 2101 et seq.

the term "submerged lands" means the lands . . . of the Commonwealth of the Northern Mariana Islands, as described in Section 801 of Public Law 94-241 (48 U.S.C. 1681).³¹

The Covenant Section 902 Consultations. The Commonwealth's Covenant with the United States includes a dispute resolution provision, Section 902, which requires that the Commonwealth of the Northern Mariana Islands and the United States "consult regularly on all matters affecting the relations between them." At the request of either government, Special Representatives are appointed by the President and the Governor "to meet and to consider in good faith such issues affecting the relationship between the Northern Mariana Islands and the United States as may be designated by either government and make a report and recommendations with respect thereto."

³¹ Id., sec. 3(f)(4). The legislative history of the Abandoned Shipwrecks Act indicates that the House intended that the submerged lands of the Northern Marianas be defined as "those three miles distant from the coastline of the Northern Mariana Islands." H. Rep 100-514, 100th Cong., 2d Sess., at 2. This limitation, however, was not incorporated in the Senate report and is "for the purposes of this Act" only.

In part because of a controversy over the application of the Magnuson Fishery Conservation and Management Act to the detriment of local fishermen, the Commonwealth called for consultations and appointed Special Representatives in 1986. It designated as an issue on the agenda ocean rights and resources and submitted its position paper on the subject on March 30, 1987. The Commonwealth called upon the United States to confirm "the authority of the Commonwealth of the Northern Mariana Islands to conserve, manage, and control the marine resources in the waters and seabed surrounding the Commonwealth of the Northern Mariana Islands to the full extent permitted under international law."³² This would include full resource "rights of a coastal state in the territorial sea, contiguous zone, the exclusive economic zone and the continental shelf as provided in the United Nations Convention on the Law of the Sea."³³ The exercise of these rights by the Northern Mariana Islands would be subject to appropriate federal oversight in the areas of foreign affairs and defense.³⁴

³² Commonwealth of the Northern Mariana Islands Position Paper on Ocean Rights and Resources, Compilation of Documents from the Third Round of the Covenant Section 902 Consultations 253 (MacMeekin & Woodworth 1987).

³³ Id. at 305.

³⁴ Id. at 256.

In April 1990, after three years of consultation, the Special Representative of the President agreed with the Commonwealth recommendation "to send to the president a joint recommendation that the Commonwealth of the Northern Mariana Islands has the authority to conserve, manage and control the marine resources in the waters and seabed of the territorial sea and exclusive economic zone of the Commonwealth."³⁵ The agreement also protected federal interests in the submerged lands and exclusive economic zone by making the Commonwealth subject to federal oversight in exercising its resource jurisdiction. Specifically:

Under this proposal, the Commonwealth shall have the rights of a coastal state in the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf as provided in the United Nations Convention on the Law of the Sea; provided that the exercise of these rights shall be done in cooperation with the United States and subject to

³⁵ Agreements After the Eighth Round, Compilation of Documents from the Eighth Round of Covenant Section 902 Consultations 295 (MacMeekin & Woodworth).

the responsibility and authority of the United States with respect to foreign affairs and defense under Section 104 of the Covenant.³⁶

This agreement was a dramatic breakthrough in the consultations and laid the groundwork for a good faith resolution of these important issues. Unfortunately, this agreement has yet to be implemented and has been criticized by the United States Department of State.

The Special Representatives of the Governor of the Commonwealth of the Northern Mariana Islands received the Position Paper by the Interim Special Representative of the President of the United States at the Ninth Round of the Consultations on September 18, 1990.³⁷ Accompanying that paper was "a formal response to the position papers submitted by the Special

³⁶ Memorandum of Agreement on Ocean Rights and Resources, Compilation of Documents From the Eighth Round of Covenant Section 902 Consultations 287 (MacMeekin & Woodworth 1990). A copy of this agreement is appended to this statement as Appendix 1.

³⁷ Compilation of Documents from the Ninth Round of Covenant Section 902 Consultations, 59 (MacMeekin & Woodworth 1990).

Representatives of the Governor" by the Department of State.³⁸ The position paper on Ocean Rights and Resources offered by the Interim Special Representative of the President (United States Oceans Paper) takes the position "that the Commonwealth gave up control of its ocean resources in exchange for the benefits received when it entered into the Commonwealth relationship with the United States under the Covenant."

The conclusion of the State Department ignores the long-standing policies, discussed above, of the Department of the Interior, the Trust Territory Government and the Office of Micronesian Status Negotiations to return the submerged lands, along with other public lands, to their rightful owners, the people of the Northern Mariana Islands. As the Governor testified, the Commonwealth is vested with title to the submerged lands offshore the Northern Mariana Islands by virtue of Department of the Interior Orders 2969 and 2989 and Section 801 of the Covenant.

³⁸ Letter of Edward E. Wolfe, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, to Timothy W. Glidden, Special Representative of the President for Covenant Section 902 Consultations (June 21, 1990), *id.* at 64. A copy of this letter is attached as Appendix 2.

The State Department's letter acknowledges that the Commonwealth has a territorial sea. This is apparently the only Commonwealth ocean jurisdiction recognized by the State Department. Although acknowledging the existence of Commonwealth's territorial sea, the United States argues that the sea is limited to three miles, rather than the twelve miles established under Commonwealth law. The Special Representatives of the Governor continue to maintain that the Commonwealth's twelve-mile territorial sea is lawful under the Covenant and both United States and international law.

In 1980, the Northern Mariana Islands enacted its Marine Sovereignty Act defining its territorial sea at twelve miles.³⁹ This action was taken during the third year of the Commonwealth's constitutional existence. The law was passed pursuant to the Commonwealth's right of self-government pursuant to Section 103 of the Covenant. As such, it was a legitimate expression of self-determination and self-government by the elected representatives of the people of the Northern Mariana Islands. The law was enacted during the trusteeship and so was protected

³⁹ Commonwealth Public Law 2-7, 2 CMC sec. 1123.

by Article 6 of the Trusteeship Agreement. It was enacted before the Northern Mariana Islands came under the sovereignty of the United States and so did not conflict with the United States limitation of its own territorial sea to three miles.

The Commonwealth's claim to a twelve-mile territorial sea is well within the parameters recognized under international law. The 1958 Convention on the Territorial Sea did not establish an outer boundary of the Territorial Sea but twelve-mile claims became routinely accepted.⁴⁰ The 1982 United Nations Convention on the Law of the Sea adopted the twelve-mile limit.

In Presidential Proclamation 5928, President Reagan, acting "in accordance with international law," proclaimed "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" (emphasis supplied). The wording

⁴⁰ By 1988, one hundred and four nations claimed a twelve-mile territorial sea, while only 13, including the United States, kept to the more restricted three miles. U.S. Department of State, Summary of Territorial Sea, Fishery, and Economic Zone Claims 1 (1988).

of the proclamation makes clear that the listed insular areas retain ownership of their territorial seas. It implies that the assertion of sovereignty and jurisdiction by the United States is on behalf of the insular areas. The territorial sea claimed internationally by Proclamation 5928 thus now coincides with the twelve-mile territorial sea established by the Commonwealth.

Under international customary law, the general rule is that nations with overseas territories or associated states do not claim a proprietary interest in, or jurisdiction over, the mineral or fisheries resources of the territorial sea or exclusive economic zone of such an area unless the citizens of that area are given full and equal representation in the national government.⁴¹ The citizens of the Commonwealth of the Northern Mariana Islands are not represented in the Congress of the United States, nor are they permitted to vote in national elections. Because the people of the Commonwealth of the Northern Mariana Islands do not have full and equal representation in the national government, the United States should recognize and confirm that the people of the Commonwealth are vested with ownership of, beneficial interest in, and primary jurisdiction over the

⁴¹ T. Franck, Control of Sea Resources by Semi-Autonomous States, (Carnegie Endowment for International Peace 1978).

resources of the territorial sea adjacent to the Northern Marianas.

It should be clear from this discussion that there is no consensus within the executive branch of the United States Government as to the jurisdiction in the territorial sea and the contiguous zone the Commonwealth currently has, or should have in the future. We have agreed with the Special Representative of the President about what appropriate policy should be. The Special Representative of the President has told us he remains committed to implementing his agreement with us. But other federal officials continue to oppose the implementation of that policy and to take a very restricted view of the Commonwealth's current boundaries and jurisdiction. Under these circumstances, the Commonwealth does not view H.R. 3842 as jurisdictionally neutral and cannot support enactment of H.R. 3842 for the Northern Mariana Islands.

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JURISDICTIONAL IMPACT
OF H.R. 3842 ON
THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

H.R. 3842, is intended to be jurisdictionally neutral. In his statement on introducing the bill, Chairman Jones said:

This legislation explicitly provides that it does not change State or Federal boundaries as they existed prior to the enactment of this legislation. The dividing line between the States and Federal government within the extended territorial sea is established by the 1953 Submerged Lands Act. . . . Within this boundary, the States own and regulate off-shore resources, including oil and gas and fish. Beyond this boundary, the Federal government has exclusive jurisdiction and management responsibility. Nothing in my bill changes this demarcation

Jurisdictional neutrality is based on boundaries established under the federal Submerged Lands Acts and the Outer Continental Shelf Lands Act. As the Chairman pointed out, boundaries between the States of the Union and the United States are established under the Submerged Lands Act. Guam, American Samoa and the

Virgin Islands have their own submerged lands conveyance in Public Law 93-435.⁴² State or insular jurisdiction within the territorial sea is established by those acts. Federal authority outside the territorial sea (on the continental shelf) is established by the Outer Continental Shelf Lands Act.

Neither the Submerged Lands Act nor the Outer Continental Shelf Lands Act applies to the Northern Mariana Islands or other insular areas. The federal Submerged Lands Act, 43 U.S.C. sec. 1301 et seq., applies only to the States of the Union.⁴³ It does not apply, nor does it confer title, to the submerged lands beneath any navigable waters surrounding the Northern Mariana Islands. Consequently, boundaries of the territorial sea established pursuant to the Submerged Lands Act for the States do not apply to the Northern Mariana Islands. Similarly, the restriction on the seaward extent of the States' boundaries -- "in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues

⁴² 48 U.S.C. sec. 1705.

⁴³ Sec. 1301(g) defines "State" to mean "any State of the Union."

into the Gulf of Mexico"⁴⁴ -- does not apply.

The Outer Continental Shelf Lands Act, 43 U.S.C. sec. 1331 et seq., also does not apply to the Commonwealth of the Northern Mariana Islands. The term "outer Continental Shelf" is defined to mean "all submerged lands lying seaward and outside of the lands beneath navigable waters as defined in section 1301 of this title [that is, seaward and outside the submerged lands adjacent to the States] and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." Being far remote from the North American continent, and from the States of the Union, the submerged lands surrounding the Northern Mariana Islands are not part of the continental shelf of the United States.⁴⁵

H.R. 3842 is not neutral in the Northern Mariana Islands because it purports to establish new federal resource management

⁴⁴ 43 U.S.C. sec. 1301(b).

⁴⁵ See: DOI's Authority to Lease Polymetallic Sulfides in the Gorda Ridge Area, Memorandum MMS.ER.0057, Office of the Solicitor, U.S. Department of the Interior, May 30, 1985, n. 141 at 51.

jurisdiction in the territorial sea.⁴⁶ Except for the Magnuson Act fisheries jurisdiction, the United States has not established federal marine resource jurisdiction in the waters surrounding the Northern Mariana Islands, Guam, American Samoa or the Virgin Islands. The Commonwealth is not covered by any federal submerged lands legislation. Rather, as discussed above, its submerged lands jurisdiction was acquired during the Covenant negotiations by Department of Interior Orders 2969 and 2989 and Section 801 of the Covenant. The United States has not honored this conveyance. The State Department has said that "it is clear beyond doubt that title to [Commonwealth submerged lands] rests in the Federal Government." As a result, section 5 of H.R. 3842, asserting the "exclusive jurisdiction of the United States" in the territorial sea could be read to establish new federal jurisdiction over the entire territorial sea and to preempt the laws of the Northern Mariana Islands and other insular areas in a manner similar to the Magnuson Act.

⁴⁶ Section 7 of the bill also amends thirty-three statutes. We are concerned that this wholesale amendment may inadvertently alter the agreements reached in the Covenant on applicability of federal laws to the Commonwealth.

Section 6 of H.R. 3842 is particularly inappropriate to the Commonwealth because it would establish federal jurisdiction in the contiguous zone over governmental functions that are reserved to the Commonwealth under the Covenant. The contiguous zone is a maritime area in which the government may enforce its customs, fiscal, immigration and sanitary laws. These laws are generally the Commonwealth's responsibility under the self-government provisions of the Covenant. The bill could be read to prevent the Commonwealth from enforcing its laws in the contiguous zone.

CONCLUSION

For these reasons, H.R. 3842, the Territorial Sea and Contiguous Zone Extension Act of 1991 should not apply to the territorial sea and contiguous zone adjacent to the Commonwealth of the Northern Mariana Islands.

* * *

ADDITIONAL RESPONSE TO QUESTIONS RAISED BY MEMBERS

At the Committee's hearing on February 4, 1992, several Members asked questions of the Governor. Mr. Hubbard and Mr. Tauzin raised several questions concerning the status of our consultations with the United States under Section 902 of the Covenant. We trust that our statement responds sufficiently to those inquiries. In addition, we wish to provide additional information with respect to two questions raised at the hearing.

Question: Mr. Hubbard asked the Governor why the Governor thought the Commonwealth should have a 12-mile boundary. Pointing out that the States have a three-mile boundary, he asked why the Northern Mariana Islands would need or want a twelve-mile boundary.

Response: First, our 12-mile territorial sea is based on our history of use of the extended territorial sea. Our people have a long tradition of high seas navigation, including the tradition of use and ownership of submerged lands even further than 12 miles from land.

Second, our 12-mile territorial sea is also based on our Spanish colonial history. Our islands were occupied and administered by Spain for a period of nearly 300 years. We share this heritage with Florida, Texas and Puerto Rico, all of which possess a territorial sea extending beyond three miles.

Third, we codified our 12-mile boundary according to our Covenant right of self-government. At the time we did this, we were not under the sovereignty of the United States but were still subject to the United Nations Trusteeship Agreement, which protected our lands and resources. The Trust Territory of the Pacific Islands claimed an indefinite area of submerged lands during the Trusteeship period. All such submerged lands were returned to our people under Department of the Interior Orders 2969 and 2989, and Section 801 of our Covenant.

Our territorial sea should be recognized as are those of the States of Texas and Florida and the Commonwealth of Puerto Rico. Those governments have exercised jurisdiction beyond three miles, even though the United States, until President Reagan's Proclamation, claimed only three.

Finally, our 12-mile territorial sea is based on sheer economic necessity. Our usable land area is very small, less than 100 square miles, and our population more than doubled in the past ten years. Our offshore resources are our best hope to develop a viable, self-sufficient economy. The United States went to extraordinary constitutional lengths to protect our title to dry lands. The same policy considerations support preserving our right to the submerged lands surrounding our islands.

Question: Mr. Lancaster asked whether the other islands commonwealths and territories, Puerto Rico, the Virgin Islands, and American Samoa, have similar concerns that should be addressed in any sort of exemption from this legislation.

Response: The Governments of the other United States Commonwealths, territories and possessions, -- Puerto Rico, the United States Virgin Islands, American Samoa, and Guam -- have all expressed concerns similar to those of the Commonwealth of the Northern Mariana Islands on this bill. On February 3, 1991, the Offshore Governor's Forum, consisting of the Governors of all those American islands, proclaimed the inherent rights of their island peoples in the exclusive economic zone and registered their concern about this bill. Similar expressions have been made by the Pacific Basin Development Council.

In addition, the Commonwealth's concerns have been supported by a variety of State Governments and associations, including the National Governors' Association, the Western Governors' Association, the Western Legislative Conference of the Council of State Governments, and the Coastal States Organization. Regional support has been registered by the Association of Pacific Islands Legislatures and the First Hispano Asia-Pacific Conference. Grass roots support for our concern is reflected in a resolution of the Association of Mariana Islands Mayors, Vice Mayors and Elected Municipal Council Members. Copies of these documents are attached as Appendix 3.

* * *

Respectfully submitted,


LORENZO I. DE LEON GUERRERO
Governor of the Commonwealth of
the Northern Mariana Islands

[Editor's note: Governor Guerrero's statement included a number of appendices that may be reviewed in the Committee office. These include the Memorandum of Agreement on Ocean Rights and Resources by the Special Representative of the President of the United States and the Special Representative of the Governor of the Commonwealth of the Northern Mariana Islands, of April 12, 1990; a response from Edward E. Wolfe, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, of June 21, 1990; and various letters, policy statements, and resolutions concerning the exclusive economic zone of the Commonwealth of the Northern Mariana Islands.]

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS.

The Congress finds as follows:

(1) In Executive Proclamation 5928, issued on December 27, 1988, the President extended the boundaries of the territorial sea of the United States from 3

2

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.

(5) The coastal States—

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

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

(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”;

(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)).

○



United States Department of State
Washington, D.C. 20520

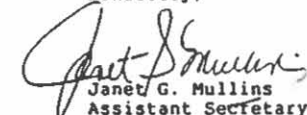
March 5, 1992

RECEIVED
MAR 6 1992
COMMITTEE ON MERCHANT
MARINE AND FISHERIES

Dear Mr. Chairman:

Following the February 4, 1992 hearing at which Mr. David A. Colson testified, additional questions were submitted for the record. Please find enclosed the responses to those questions.

Sincerely,


Janet G. Mullins
Assistant Secretary
Legislative Affairs

Enclosures:
As stated.

The Honorable
Walter B. Jones, Chairman,
Committee on Merchant Marine & Fisheries,
House of Representatives.

[Editor's note: Attached to Mr. Colson's responses were two maps depicting the Bahamas, Dominican Republic, Haiti, the Virgin Islands, and Western Samoa. These maps are on view at the Committee office.]

Additional Questions for David A. Colson
Deputy Assistant Secretary of State
for Oceans and Fishery Affairs
from

The Honorable Walter B. Jones
Chairman, Committee on Merchant Marine & Fisheries
for the February 4, 1992
Hearing on H.R. 3842, The Territorial Sea & Contiguous
Zone Extension & Enforcement Act of 1991

Q: MR. COLSON, I TAKE IT FROM THE STATE DEPARTMENT'S POINT OF VIEW, H.R. 3842 IS FULLY CONSISTENT WITH INTERNATIONAL LAW AND IS A REASONABLE WAY TO PROCEED TO IMPLEMENT A 12-MILE TERRITORIAL SEA AND 24-MILE CONTIGUOUS ZONE FOR THE UNITED STATES?

A. Yes.

Q. I AM CURIOUS ABOUT THE LEGAL QUESTIONS THE JUSTICE DEPARTMENT IS JUST NOW LOOKING AT.

I UNDERSTOOD THE JUSTICE DEPARTMENT LOOKED AT THE QUESTION OF THE PRESIDENT'S AUTHORITY TO EXTEND U.S. SOVEREIGNTY OVER THE 12-MILE TERRITORIAL SEA BEFORE THE 1988 PROCLAMATION WAS ISSUED. AT THAT TIME, IT CONCLUDED THERE WAS SOME DOUBT ABOUT THE MATTER, AND RECOMMENDED IMPLEMENTING LEGISLATION. WHY IS IT REVISITING THIS QUESTION?

A. It is my understanding that they are examining the constitutional responsibilities of the respective branches with respect to assertions of sovereignty and jurisdiction over the territorial sea and contiguous zone. We anticipate that some of the concerns could be resolved by minor technical amendments.

As I indicated in my testimony, the Department of Justice is preparing a full response to the committee, which will both set out concerns and propose resolutions. It is our intention to continue to work cooperatively with the Congress in completing appropriate legislation.

Q. YOU RECOMMEND ADDING AN AMENDMENT TO THE BILL THAT DEFINES THE CONTIGUOUS ZONE. THERE IS AN AMENDMENT OF THE TERM "CONTIGUOUS ZONE" IN H.R. 3842. DO I UNDERSTAND THAT WHAT YOU MEAN IS ADDING A DEFINITION THAT REFERS TO THE RIGHTS AND OBLIGATIONS OF NATIONS WITHIN A CONTIGUOUS ZONE?

A. That is correct. The language should track and not conflict with the 1982 United Nations Convention on the Law of the Sea.

Q. CAN YOU EXPAND ON THE ADMINISTRATION'S OBJECTION TO H.R. 536, THE COASTAL STATE EXTENSION ACT OF 1991?

A. Please see the letter of February 3, 1992 to Honorable Walter Jones for the Administration position on H.R. 536.

Q. YOU SUGGEST THAT WE ADD A CONFORMING AMENDMENT TO THE DEFINITION OF "CUSTOMS WATERS" IN TITLE 19 FOR THE EXTENSION OF THE CONTIGUOUS ZONE. WE WOULD BE GLAD TO CONSIDER YOUR SUGGESTIONS FOR THIS AMENDMENT. I ALSO POINT OUT THAT THE MAIN REASON THIS TYPE OF AMENDMENT WAS NOT INCLUDED WAS TO MINIMIZE COMMITTEE JURISDICTION PROBLEMS. WOULD AMENDMENT OF "CUSTOMS WATERS" IN TITLE 19 HAVE ANY EFFECT ON OUR PRESENT IMMIGRATION POLICIES?

A. This question has been referred to the Department of Justice, which will respond to the Committee directly.

Q. DOES THE STATE DEPARTMENT BELIEVE THAT H.R. 3842 WOULD HAVE ANY EFFECT ON THE PRESENT SEAWARD BOUNDARIES OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS?

A. H.R. 3842 does not affect the present seaward boundaries of the Commonwealth of the Northern Mariana Islands, because at this time the CNMI does not have any sovereignty or sovereign rights seaward of the baselines used to delimit the territorial sea, the area that would be affected by this legislation.

Q. WHY HAS THE STATE DEPARTMENT REJECTED THE AGREEMENT NEGOTIATED BETWEEN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AND THE PRESIDENT'S REPRESENTATIVE IN 1990?

A. There was no agreement resolving the issues raised by CNMI regarding offshore jurisdiction. In April 1990, the Special Representative of the President for Section 902 Consultations and representatives of the Governor of the Commonwealth of the Northern Mariana Islands met and conferred on various issues, as provided under Section 902 of the Covenant, which provides that they "meet and consider in good faith . . . and . . . make a report and recommendations with respect thereto." Following such consultations, the Special Representative and CNMI representatives signed a Memorandum of Agreement on April 12, in which the Special Representative agreed "to support" CNMI's proposal that CNMI's purported offshore authority and jurisdiction "be recognized and confirmed by the United States to include the sovereign right to ownership and jurisdiction of the waters and seabed surrounding the Northern Mariana Islands to the full extent permitted under international law." The Special Representative also "agrees to support CNMI's proposal for resolution of the issue within the Government of the United States." The Special Representative did not comment on the merits of the proposal.

The Administration favors parity among the States and territories concerning grants of submerged lands and rights within the territorial sea. All coastal States (with the exception of Texas and the west coast of Florida), Guam, American Samoa, and the United States Virgin Islands have received offshore rights seaward to 3 nautical miles; the Commonwealth of Puerto Rico has three marine leagues, which is the maximum extent of the Submerged Lands Act grant to Texas and Florida on her west coast. No coastal State, commonwealth, or territory has sovereign rights or jurisdiction over the Outer Continental Shelf or Exclusive Economic Zone or beyond the extent of express Congressional grants within the territorial sea.

Q. IS THERE A NEED TO STUDY THE ADEQUACY OF EXISTING LAWS TO MANAGE RESOURCES IN THE EXTENDED TERRITORIAL SEA?

A. The Administration believes that as laws come up for reauthorization, the implications of extension from 3 to 12 miles should be studied.

The Interagency Group on Oceans, known as the National Security Council Policy Coordinating Committee on Oceans Policy and Law of the Sea, is a standing committee whose aim is to promote United States oceans policy and assure that any actions taken by the United States conform with international law and United States foreign policy interests. All major maritime agencies actively participate in decision-making within this forum.

The working group was pleased to review a rather large number of statutes to determine whether an extension of the territorial sea would have any effect on their operation.

The excellent cooperation that we have had with your committee staff, Mr. Chairman, will help to insure that whatever future action may occur, the appropriate people will have had a chance to review the impact. It is our opinion that each law should be considered on its merits. We stand ready to do whatever we can do to continue this careful approach undertaken by this committee.

Q. SECTION 4, "DEFINITIONS", OF H.R. 3842, DEFINES "UNITED STATES" AS INCLUDING "THE STATES, THE COMMONWEALTH OF PUERTO RICO, THE COMMONWEALTH OF NORTHERN MARIANAS, AND ALL TERRITORIES AND POSSESSIONS OF THE UNITED STATES." COULD YOU PLEASE PREPARE A LIST OF ALL THE TERRITORIES AND POSSESSIONS THAT WOULD BE COVERED BY THIS BILL, PLUS A MAP SHOWING WHERE THE EXTENDED TERRITORIAL SEA (12 MILES) AND CONTIGUOUS ZONE (24 MILES) WOULD BE FOR EACH OF THE TERRITORIES AND POSSESSIONS? I AM INTERESTED IN DETERMINING THE IMPLICATIONS OF EXTENDING THE BOUNDARY OF A TERRITORY OR POSSESSION VIS-A-VIS OTHER JURISDICTIONS. AN EXAMPLE WOULD BE THE ALEUTIAN ISLANDS, WHERE THERE COULD BE IMPLICATIONS FOR OTHER POLITICAL JURISDICTIONS OF EXTENDING THE TERRITORIAL SEA OR CONTIGUOUS ZONE. IT WOULD BE HELPFUL TO HAVE A VISUAL PRESENTATION OF THE BOUNDARIES SO THAT WE CAN BE AWARE OF ANY PROBLEMS.

A. The 12-mile territorial sea of the United States (and the 200-mile Exclusive Economic Zone) extend off the States of the Union, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the United States Virgin Islands, Howland Island, Baker Island, Jarvis Island, Kingman Reef, Palmyra Atoll, Johnston Atoll, Wake Island, and Navassa Island.

Section 9(c)(2) of H.R. 3842 provides that nothing in the Act shall impair "the determination, in accordance with international law, of any maritime boundary with a foreign nation or a foreign jurisdiction." Presidential Proclamation 5928 similarly provides that nothing in it "impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction."

Consequently, we do not anticipate any boundary problems will be created. Attached are maps illustrating the areas where the 24-mile U.S. contiguous zone would overlap a claimed or potential contiguous zone of neighboring States: namely, off The Bahamas, Dominican Republic, Haiti, the Virgin Islands (United Kingdom), and Western Samoa.

As you will see, these are areas in which there are already overlapping claims.

U.S. Department of Justice

Office of Legislative Affairs

RECEIVED
MAR 13 1992
COMMITTEE ON MERCHANT MARINE
AND FISHERIES

Office of the Assistant Attorney General

Washington, D.C. 20530

2 MAR 1992

Honorable Walter B. Jones
Chairman
Committee on Merchant Marine and Fisheries
U. S. House of Representatives
Washington, D.C. 20515-6230

Dear Mr. Chairman:

The Department of State, in its testimony before your Committee on February 4, 1992, indicated that the Department of Justice was examining certain questions with respect to this bill, and would respond to the Committee directly. We are writing to inform the Committee of our conclusions concerning the respective authority of the executive and legislative branches to extend the United States' sovereignty and jurisdiction.

As noted in the bill, the President extended the territorial sea of the United States by Presidential Proclamation 5928 of December 27, 1988. The Proclamation was the necessary and appropriate vehicle to extend United States' sovereignty over its territorial sea, and represented an exercise of the exclusive foreign policy powers granted to the Executive by Article II of the Constitution. In light of these exclusive powers, we believe that certain provisions of the bill should be amended or deleted. In particular, section 3, subsection 1, states that it is a purpose of the Act "to extend the territorial sea of the United States to 12 nautical miles for the purpose of United States sovereignty." This language conflicts with the President's exclusive powers to extend United States' sovereignty. We would suggest amending the text to read "to enable extension of domestic law throughout its 12 nautical mile territorial sea." With this in mind, we also note that sections 5(a) & (b) are superfluous, because they merely repeat action already taken by the President and within his exclusive powers.

We also have concerns relating to the current wording of the section concerning extension of the contiguous zone, which also involves an assertion of rights as against other nations. We note that the original claim of a contiguous zone of 12 nautical

miles was made by executive action in Department of State Public Notice 358.

Section 6(b) of the bill recites that the "contiguous zone of the United States is subject to the exclusive jurisdiction of the United States." This language could be read as an attempt to exercise sovereignty over the contiguous zone, which would require Presidential action. Pursuant to international law, however, the establishment of a contiguous zone involves not an assertion of sovereignty or exclusive jurisdiction, but only an assertion of that limited control necessary to prevent infringement of a coastal nation's customs, fiscal, immigration, or sanitary laws and regulations. See Restatement (Third) of the Foreign Relations Law of the United States §§ 511(b), 513, comment f (1986).

Accordingly, Section 6(b) should be either deleted or amended to reflect accurately the more limited scope of United States' jurisdiction that would exist in the contiguous zone.

The Department of Justice has a further concern with the prospective application of the bill envisioned in Sections 5(c) and 6(c). The Committee and the relevant executive agencies have done extensive work in the preparation of this bill to amend definitions and jurisdictional bases where necessary in statutes which deal with resource management in the affected areas. That case-by-case approach should be continued in the future as statutes are amended or reauthorized. The interrelationships and balances between federal and state rights and responsibilities have been the subject of careful and thoughtful legislation in the past, and form the basis for complex enforcement and regulatory schemes. It is virtually impossible to predict the outcome of the automatic application of a definition without that same sort of analysis of needs and costs. Inadvertent changes wrought by such automatic action could create gaps or overlaps in authority which would hinder effective enforcement of the laws. We strongly urge the Committee to delete these provisions.

We appreciate the efforts of the Committee in preparing this complex legislation to maximize the benefits of the extension of the territorial sea and the contiguous zone.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,



W. Lee Rawls
Assistant Attorney General



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230
Office of Legislation, Education, Outreach,
and Intergovernmental Affairs

MAR 31 1992

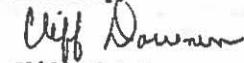
Honorable Walter B. Jones
Chairman, Committee on Merchant
Marine and Fisheries
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are NOAA responses to questions submitted by the Committee in followup to the February 4, 1992 hearing on H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act.

If you or your colleagues have any further questions, please contact me.

Sincerely,



Clifford Downen
Chief

Enclosure

cc: Mr. Davis
Mr. Coble



FOLLOWUP QUESTIONS FOR THOMAS A. CAMPBELL
BEFORE THE
MERCHANT MARINE AND FISHERIES COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
FEBRUARY 4, 1992

1. You referred in your testimony to the amendments we added to the Coastal Zone Management Act in 1990 on federal consistency.

What effect, if any, would H.R. 3842 have on the states' consistency authority under the C.Z.M.A.?

The recent amendments to the consistency provisions of the CZMA confirm that states may review for consistency all federal activities, in or outside the coastal zone, that affect their coastal zones. This authority includes relevant activities occurring outside states' coastal zones in the 3-to-12 mile area. H.R. 3842 does not modify the seaward boundary of the coastal zone, and therefore would not affect the scope of states' consistency authority under the CZMA.

2. While your testimony indicates that NOAA is satisfied with the present operation of the Magnuson Act, there has been criticism of how that law is working to protect our fisheries.

How would you respond to this criticism, and could you envision a greater role for states to help manage these important fishery resources?

The Magnuson Act was passed in part to address the inadequacy of State management; to provide for management of each fishery as a unit throughout its range; and for the benefit of the nation as a whole. The current fishery management council system has been criticized for not protecting some stocks from overfishing. It is true that some stocks, such as groundfish in New England, are overfished. However, altering the State/Federal balance would hinder, not help, the conservation. It would fracture management and diminish the ability to manage a fishery as a unit throughout its range -- one of the primary objectives of the Magnuson Act. Moreover, it would eliminate the consideration of the economics of the various fisheries on a coast-wise basis at a time when fisheries have become increasingly far-ranging. While the current management system is far from perfect, fragmented management would be much worse.

As to the role of the states, under the Magnuson Act the states already have a large role in fishery resource management -- there is truly a State/Federal partnership. States sit on the fishery management councils which develop the management measures. Also, the states and Federal government participate in joint data collection efforts and cooperate in law enforcement.

It is also important to note that, in practice under the Magnuson Act, in cases where a fishery is primarily local -- such as stone crab in Florida and crab in Alaska -- the state has been given the primary management role, with the Council restricted to an oversight role. Thus, under existing law, the Council may be the primary vehicle where multi-jurisdictional resource management is called for, while fisheries local in nature may be left primarily to state management.

3. How do you respond to the proposal from the State of Alaska, that the states be granted ownership of all resources throughout the 12-mile territorial sea? What problems do you foresee from NOAA's point of view if Congress were to decide to grant the states extended jurisdiction?

NOAA is strongly opposed to extending state control as proposed by Alaska because it would adversely affect the appropriate balance of Federal and coastal state responsibility for resources, in the 3-to-12-mile area, as determined by Congress in existing law. The reasons for NOAA's position, as well as other concerns of the Administration, are indicated more fully in the Administration's comments of February 3, 1992 on H.R. 536.

NOAA feels particularly strongly that the Magnuson Fishery Conservation and Management Act is a better vehicle for effective cooperative conservation of fishery resources than individual state management. The responses to Questions 2 and 7 address the potential resource harms that would result from fragmenting management of fisheries that range between jurisdictions. In addition, it should be emphasized that many fisheries have achieved a national status, with participants from many states. Fisheries off the coast of Alaska offer a good example since a significant number of participants in those fisheries are from the Pacific Northwest. The fishery management council system takes into consideration a broader set of interests and concerns than would be the case if management had a purely local focus.

As to the Coastal Zone Management Act, NOAA supports the balance recently reaffirmed by Congress, in the Coastal Zone Act Reauthorization Amendments of 1990. This Act recognizes the

legitimate state interest in activities which affect its coastal zone, at the same time reaffirming -- by deletion of reference to the "territorial sea" and by specific reference to the Submerged Lands Act -- Federal responsibility for resource management seaward of State seaward boundaries.

4. Do you have any information on the number of joint ventures between U.S. harvesters and foreign fish processors in the 3-to-12 mile zone that could be adversely affected by extension of the Jones Act?

Eliminating joint venture operations in the 3-to-12 mile area would adversely affect joint ventures in the Atlantic mackerel fishery. Generally, between two and four such operations take place annually. The countries that continue to have an interest in maintaining mackerel joint ventures are the Russian Federation and the Netherlands. In addition, in view of the changes taking place in the Russian Federation, there have been requests for consideration of joint ventures in the hake fishery in New England. Finally, the changes in the Magnuson Act concerning tuna may lead to some future interest in joint ventures in the Western Pacific. (The adverse effect on joint ventures would be caused by the fact that the joint venture vessel would be unable to traverse the territorial sea. Consequently, it would be unable to stay near the fishing operation, which is necessary to preserve the quality of the fish. Also, in addition to added fuel costs for U.S. catcher vessels, there is some danger in a mackerel vessel towing a full net over a long distance.)

5. Why would enactment of this legislation require NOAA to reissue approximately 160 nautical charts?

How much would it cost NOAA to update its nautical and aeronautical charts to reflect the new territorial sea and contiguous zone? Doesn't NOAA have to change the notation of the territorial sea on the charts anyway as a result of the 1988 Proclamation? [Question submitted by the Honorable Howard Coble.]

Of NOAA's suite of over 980 nautical charts, 160 are of a scale or coverage to be affected by H.R. 3842. These charts must be modified to include a new 24-mile contiguous zone limit, to delete the existing label reference to "contiguous zone" on the 12-mile line, which is currently labelled "TERRITORIAL SEA AND CONTIGUOUS ZONE" on 75% of these charts, and to label--as "TERRITORIAL SEA"-- the 12-mile limit on the remaining 25% of the 160 charts. The modifications are necessary for enforcement

notice purposes and to comply with international obligations to depict on charts the location of the various maritime zones established by the United States.

NOAA would not reissue the affected charts immediately, but is required to depict the new boundaries during the course of the regular chart revision process. The estimated cost of applying the 24 nautical mile contiguous zone limit to these charts (the territorial sea and contiguous zone limits are not shown on aeronautical charts) and changing all existing errant labels is \$30,000. NOAA has already responded to the 1988 Proclamation by changing the labels of the 12 nautical mile limit on 75% of the 160 affected charts from "CONTIGUOUS ZONE" to "TERRITORIAL SEA AND CONTIGUOUS ZONE"; these charts would be modified to delete the "contiguous zone" reference. The estimated cost reflects only the labor directly related to applying the changes and does not cover the entire costs of producing the new edition.

6. What additional expenses, if any, would NOAA incur if H.R. 3842 were enacted into law?

What will be the increased costs to NOAA of enforcing the fisheries and other laws affected by H.R. 3842? [Question submitted by the Honorable Howard Coble.]

NOAA would not anticipate any appreciable increase in expenses were H.R. 3842 to be enacted. With respect to law enforcement, NOAA expects that any such expenses, such as the cost of investigating and preparing enforcement cases, would simply be absorbed by current operating costs.

7. What difficulties do you foresee if state boundaries were extended to 12 miles, resulting in inconsistent fishing laws and regulations?

As I stated in my prepared testimony, of the 32 fisheries managed under fisheries management plans, 30 are interjurisdictional, 19 of which fall predominately within the 12-mile zone. If Federal management affected only a small segment of the fisheries, those plans would be wholly ineffective unless cooperative legislation or regulations were enacted by the coastal states. Past experience suggests that such cooperation would not necessarily be forthcoming. In various instances, state failure to enact cooperative management measures has diminished the effectiveness of conservation measures. For example, in the Atlantic, in the case of the bluefish plan, incompatible regulations, both among

the individual states and with the proposed Federal measures, seriously protracted the adoption of an effective management program. (Indeed, the initial Federal management plan had to be disapproved). In New England, the states' failure to enact compatible legislation led to the withdrawal of the herring management plan, and has seriously hampered comprehensive management of American lobster. On the Pacific coast, Oregon's refusal to go along with area closures that were vital to the conservation of salmon twice required Federal pre-emption in state waters. Under the Magnuson Act, that preemption would not have been possible if Oregon's waters had extended out to 12 miles.

Not only are fish stocks multijurisdictional, but fishing vessels have become increasingly mobile and range over long distances; their operations take place off the coasts of more than one state. Past experience suggests that extending state jurisdiction could have a significant adverse impact on such fishing operations. Not only might it lead to a multiplicity of conflicting state management regimes, but some states might be tempted, as has happened in the past, to impose unduly harsh and costly requirements on out-of-state fishermen. The result would be increased compliance costs, to say nothing of the litigation costs associated with testing the legality of such measures. Further, the need for the fisherman to obtain multiple licenses, comply with differing gear restrictions, and become familiar with more than one set of regulations, would add further to the costs, confusion and difficulties for the fisherman.

The development of limited entry systems -- which we believe is critical to the future management of many important fisheries -- would be seriously hampered by extended state resource jurisdiction. Fragmented management of a fishery would undermine -- if not eliminate -- limited entry as an option for addressing fishery overcapitalization.

Other areas where extension of state boundaries would complicate fishery management include: (1) negotiations with neighboring countries with respect to transboundary stocks; (2) enforcement, especially at-sea efforts, which most states are not currently equipped to do; (3) joint research and data collection efforts with foreign nations; and (4) joint ventures such as that in the Atlantic mackerel fishery.

In addition to these questions, the Committee has also requested examples which illustrate how H.R. 3842 would help NOAA carry out its responsibilities. The following items respond to this request.

1. Title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA) provides that marine sanctuary regulations shall be applied to foreign persons in accordance with generally recognized principles of international law. H.R. 3842 would codify NOAA's view that the generally recognized rights of a coastal nation in its territorial sea--as reflected in the 1982 Law of the Sea Convention--apply in the 3-to-12 mile area for purposes of the MPRSA. NOAA could apply, to foreign persons and vessels, a broader range of requirements and enforcement measures than would be available in the Exclusive Economic Zone (EEZ), for purposes of pollution prevention and protection and preservation of the marine environment, including -- in coordination with the Coast Guard -- requirements relating to navigational safety and maritime traffic.

NOAA and the Coast Guard would also have clear authority to seize a foreign vessel leaving the 12-mile territorial sea after committing an act of willful and serious pollution in violation of sanctuary regulations. In contrast, were the same sanctuary located in the EEZ, there is a question whether seizure would be available as an enforcement measure unless there were clear objective evidence of a violation of an international standard and a resulting discharge causing major damage to sanctuary resources.

2. The Endangered Species Act, like a number of other marine resource statutes, prohibits certain activities, such as taking endangered species. While the Act's prohibitions may apply to U.S. nationals both inside and outside the boundary of the territorial sea, those prohibitions would only apply to foreign nationals to the extent of our jurisdiction over them. Extending the territorial sea boundary to 12 miles for the purpose of the Endangered Species Act (and other such statutes) makes clear that foreign nationals are also prohibited from taking endangered species within this 12-mile area. This will strengthen our ability to protect our marine resources.

3. Under various statutes such as the Lacey Act and the Endangered Species Act, importations occur when an item is brought within our territorial jurisdiction (i.e., crosses the seaward boundary of the territorial sea). H.R. 3842 would clarify that this occurs at the 12-mile, rather than the 3-mile, limit. This would provide needed clarification for enforcement purposes.

U.S. Department
of Transportation
United States
Coast Guard



Commandant
United States Coast Guard

Washington, D.C. 20583-0001
Staff Symbol: G-CC/104
Phone: (202) 366-4280

5730

APR 6 1992

The Honorable Walter B. Jones
Chairman, Committee on Merchant Marine
and Fisheries
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The attached Questions and Answers for the Record are provided pursuant to your Committee hearing on February 4, 1992, on Territorial Sea and Contiguous Zone Extension. All responses have been reviewed and approved, as required, by the Department of Transportation, and the Office of Management and Budget.

Please do not hesitate to call if I can provide further assistance.

Sincerely,

T. W. Joseph
T. W. Joseph
Captain, U. S. Coast Guard
Chief, Congressional Affairs Staff
By direction of the Commandant

Copy: Congressman Robert Davis

QUESTION: DOES THE COAST GUARD HAVE ANY OBJECTION TO THE ENACTMENT OF H.R. 3842?

Answer: The Coast Guard does not object to the bill and we support the careful case-by-case review of the amendments. As presently drafted, H.R. 3842 only modifies some of the statutes within the jurisdiction of the Committee. The specific concern is the work load the Coast Guard will face implementing Section 10 of H.R. 3842. The Coast Guard promulgates an immense number of regulations implementing the statutes that it administers. If a case-by-case approach is not used, the Coast Guard's regulatory process could be totally overloaded and not be responsive to the mandate of the statutes being enacted or amended.

QUESTION: WHAT ADVANTAGES TO NAVIGATIONAL SAFETY AND TO PROTECTION OF OUR LIVING MARINE RESOURCES DOES THE COAST GUARD SEE FROM THE AMENDMENTS TO THE VARIOUS COAST GUARD LAWS INCLUDED IN MY LEGISLATION?

Answer: An example of the advantage to navigational safety is the potential for the extension of Vessel Traffic Services and Traffic Separation Schemes beyond the existing three nautical mile territorial sea as a result of this legislation. Of particular importance in our view, is the retention of the status quo of three nautical miles for the statutes addressing safety devices, especially the one which sets the maximum distance from shore at which an uninspected vessel can operate without an Emergency Position Indicating Radio Beacon (EPIRB). Extending this distance to 12 nautical miles would significantly increase the area of ocean in which non-EPIRB-equipped vessels would be operating, making it more difficult to locate such vessels should they be in distress.

QUESTION: HAVE YOU IDENTIFIED ANY OTHER LAWS ADMINISTERED BY THE COAST GUARD WHICH SHOULD BE INCLUDED IN THIS LEGISLATION?

Answer: The Coast Guard has not identified other laws within its purview that should be included in this legislation. Other statutes which the Coast Guard may be called on to enforce may, in the future, be appropriate for modification to a 12 nautical mile territorial sea. However, the Coast Guard is concerned about the regulatory workload should too many statutes be included in one legislative initiative.

QUESTION: WHAT EFFECT, IF ANY, WILL H.R. 3842 HAVE ON COAST GUARD RESOURCES?

Answer: The Coast Guard will provide the answer to this question in separate correspondence to the Committee.

QUESTION: WILL IT BE CONFUSING FOR THE COAST GUARD TO ADMINISTER SOME LAWS THAT APPLY TO THE 12-MILE TERRITORIAL SEA AND OTHERS THAT ONLY APPLY WITHIN 3 MILES?

Answer: No. The Coast Guard currently enforces numerous laws which vary in application within the territorial sea, contiguous zone, and exclusive economic zone (EEZ) of the United States. The Coast Guard also enforces a certain number of U.S. laws applicable on the high seas. Our experience indicates that administering and enforcing some laws to a 12 nautical mile territorial sea and others to a three nautical mile limit would not be confusing or unmanageable.

QUESTION. THE COAST GUARD HAS RECENTLY ISSUED A NOTICE OF PROPOSED RULEMAKING CONCERNING DESIGNATION OF WATERS WHERE TANK VESSELS MAY OPERATE WITH THE AUTOMATIC PILOT ENGAGED. THIS RULE ONLY APPLIES WITHIN THE NAVIGABLE WATERS OF THE UNITED STATES. WOULD IT BE USEFUL TO AMEND THE TERM "NAVIGABLE WATERS OF THE UNITED STATES" IN THE OIL POLLUTION ACT OF 1990 TO ENABLE THE COAST GUARD TO ESTABLISH ADDITIONAL WATERS WITHIN WHICH AUTOMATIC PILOTS MAY NOT BE ENGAGED.

Answer. The Coast Guard believes that it would not be useful to amend the term "navigable waters of the United States" to establish additional waters where the auto pilot must be disengaged. Casualty data and navigation practices do not support extending the auto pilot regulation beyond U.S. navigable waters as they are now constituted.

If the Territorial Sea is extended, then this rule would apply to tank vessels navigating certain Traffic Separation Schemes and Navigational Safety Fairways which extend past the present territorial sea boundary. Beyond that boundary, these separation schemes and fairways are relatively straight, less congested, and not as navigationally hazardous as the waters closer to shore. Consequently the use of autopilot in these offshore areas is, and should remain, an acceptable navigational practice.

QUESTION. WOULD EXTENSION OF THE TERRITORIAL SEA TO 12 MILES AND CREATION OF 24-MILE CONTIGUOUS ZONE ENHANCE THE COAST GUARD'S ABILITY TO CARRY OUT ITS MISSION AGAINST DRUG SMUGGLING?

Answer. Both the extension of the territorial sea to 12 nautical miles (NM) and the extension of the contiguous zone to 24 NM will enhance the Coast Guard's ability to combat maritime drug trafficking. The territorial sea expansion will extend the maritime area over which the U.S. may exercise sovereignty subject to international law. With few exceptions, this sovereignty is functionally equivalent to that exercised over land territory and internal waters. The contiguous zone expansion will extend the maritime area over which the U.S. may exercise the control necessary to prevent violations of U.S. customs laws in the territorial sea. The practical effect of both extensions is that the Coast Guard would then be able -- without seeking permission from the flag State -- to board foreign flag vessels suspected of drug trafficking out to 24 vice 12 NM from the U.S. coast. *the exception of the right of innocent passage*

QUESTION: WHAT EFFECT, IF ANY, WOULD AN AMENDMENT TO THE DEFINITION OF "CUSTOMS WATERS" IN TITLE 19 HAVE ON THE COAST GUARD'S RESPONSIBILITIES?

Answer: Currently, "customs waters" include waters covered by special treaties or arrangements for certain vessels, and more generally, the three nautical mile territorial sea and the adjacent nine nautical mile band of water known as the contiguous zone. 19 USC 1401(j) specifies "waters within four leagues of the coast of the United States" to be customs waters. 19 USC 1709(b) defines "officer of the customs" to include "any commissioned, warrant, or petty officer of the Coast Guard." While any change to the definition of "customs waters" would not change the responsibilities of the Coast Guard regarding enforcement of Customs laws as "officers of the customs", the area in which that enforcement authority would be applicable would be affected dependent on the change made to the definition of "customs waters."

QUESTION: WHAT WILL BE THE INCREASED COSTS TO THE COAST GUARD OF ENFORCING THE LAWS AFFECTED BY H.R. 3842?

Answer: The Coast Guard will provide the answer to this question in separate correspondence to the Committee.

U.S. Department
of Transportation

United States
Coast Guard



Commandant
U.S. Coast Guard

60 Second St., S.W.
Washington, DC 20543-0001
Staff Symbol G-CG/186
Phone: (202) 366-4280

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MAR 13 1992

The Honorable Walter B. Jones
Chairman, Committee on Merchant
Marine, and Fisheries
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of February 27, 1992, regarding H.R. 3842, the Territorial Sea and Contiguous Zone Extension Act of 1991. The Coast Guard has reviewed H.R. 3842 and supports a careful case-by-case review of conforming amendments to the statutes within the jurisdiction of your Committee.

As a practical matter, the Coast Guard's law enforcement patrols and boardings are not bounded within the territorial sea or contiguous zone; however, we are sensitive to these boundaries in establishing our jurisdiction for law enforcement action. While the extension of the boundaries will increase somewhat the area of jurisdiction the Coast Guard has over certain laws, the number and scope of laws, regulations and treaties the Coast Guard enforces will not be increased. Therefore, I do not believe implementation of this Act will result in significant resource impacts on the Coast Guard. Overall, I anticipate the Coast Guard will continue its policy of enforcing applicable laws during the normal multimission operations of our existing units. Likewise, we will continue to cooperate with various federal agencies to coordinate enforcement of the apposite statutes within the increased geographic area. Administratively, the revisions to existing regulations required by this legislation could potentially create a backlog in the regulation system.

Representatives of the Coast Guard from the Office of the Chief Counsel and the major operating programs affected by this legislation will be pleased to meet with members of your staff to discuss this important legislative initiative. My Congressional Affairs Division will contact Ms. Wilkinson or Ms. Bondareff to coordinate a meeting before March 15, 1992.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

I hope this information assists you in proceeding with the legislation.

Sincerely,

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Acting Commandant

QUESTION: ARE THERE ANY MARINE SAFETY LAWS WHICH SHOULD NOT BE EXTENDED TO THE FULL BREADTH OF THE 12-MILE TERRITORIAL SEA?

Answer: H.R. 3842 has recognized potential marine safety laws which should not be extended, specifically the proposed conforming amendments to 46 USC 4102(a), 46 USC 4502(a)(7) and 46 USC 4506(b). Those statutes, which deal with safety equipment, particularly Emergency Position Indicating Radio Beacons (EPIRB's), would retain the status quo of requiring EPIRB's when uninspected vessels are operated beyond three nautical miles. Without these amendments, alerting and locating equipment (including EPIRB's) would not be required unless an uninspected vessel operated beyond 12 nautical miles. Retaining the three nautical mile status quo is a sound legislative concession to marine safety concerns.



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

April 6, 1992

Honorable Walter B. Jones
Chairman, Merchant Marine and Fisheries Committee
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Secretary of Defense on H.R. 3842, 102nd Congress, a bill "To extend the territorial sea and the contiguous zone of the United States, and for other purposes."

H.R. 3842 would extend the U.S. territorial sea to 12 nautical miles (NM) and the U.S. contiguous zone to 24 NM for select statutes on the date of its enactment and for all laws enacted after December 30, 1990.

The Department of Defense has no objection to extending the U.S. territorial sea to 12 NM and the U.S. contiguous zone to 24 NM. We do, however, have some concerns about the remainder of the bill.

Section 7 of the proposed legislation selectively extends the new territorial sea and contiguous zone to certain existing statutes, but abandons this cautious and sound approach by giving the new territorial sea and contiguous zone limits blanket application commencing on December 30, 1990. Such an automatic application could result in shifts in federal and state relations without a thorough and reasoned review of the impact and implications of these changes. Future application of an extended territorial sea and contiguous zone should be made on a case by case basis following examination of all state and federal issues.

We also recommend that section 6(b) be amended so as to be consistent with international law. The section, as written, authorizes the U.S. to exercise exclusive jurisdiction in the contiguous zone. Customary international law allows states to exercise only limited control in the contiguous zone. The following language, which is in consonance with international law, is recommended:

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COMMITTEE ON MERCHANT MARINE
AND FISHERIES

(b) Jurisdiction of the United States.--Except as provided by other law, the United States may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within the territory or territorial sea.

We also note that extension of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. 1401 et seq. (MPRSA) by section 7 of the proposed bill creates a conflict with the United States' obligations under the Convention for the Prevention of Pollution from Ships (MARPOL), Annex V. MPRSA, if amended, would impose criminal and civil penalties on the discharges of garbage, including food wastes and paper products, that is generated aboard ships, even when properly compacted, contained, and weighted to sink, if made within the 24 NM contiguous zone. To the contrary, MARPOL allows disposal of such operational wastes outside of 12 NM from land. Thus, a vessel which disposed of operational wastes generated outside of 12 NM, between 12 to 24 NM would be in violation of MPRSA but in compliance with MARPOL. A vessel which disposed of such wastes within 12 NM would be in violation of both MPRSA and MARPOL.

This conflict can best be remedied by amending 33 U.S.C. §1402(f), the section which provides the definition of "dumping" in the MPRSA to read as follows:

(f) "Dumping" means a disposition of material: Provided, That it does not mean a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under the provisions of the Federal Water Pollution Control Act, as amended [33 U.S.C.A. 1251 et seq.], under the provisions of section 407 of this title, or under the provisions of the Atomic Energy Act of 1954, as amended [42 U.S.C.A. 2011 et seq.], nor does it mean a disposition of material subject to regulation or standard under the Act to Prevent Pollution from Ships [33 U.S.C.A. 1901 et seq.] or a routine discharge of effluent incidental to the propulsion of, or operation of motor-driven equipment on, vessels: Provided further, That it does not mean the construction...

This amendment would allow the extension of the MPRSA to 12 and 24 NM respectively, while avoiding conflict with MARPOL.

Finally, the proposed legislation raises constitutional questions relating to the authority of Congress to extend the territorial sea and establish the contiguous zone. The Department of Defense defers to the Department of Justice in regards to the constitutionality of the subject bill.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

Chester Paul Beach, Jr.
Chester Paul Beach, Jr.
Acting General Counsel



NATIONAL FISHERIES INSTITUTE, INC.
1525 WILSON BOULEVARD ■ SUITE 500 ■ ARLINGTON, VA 22209 ■ (703) 524-8800 ■ TELEFAX 101 6502504885 ■ FAX (703) 524-4619

February 21, 1992

Walter B. Jones
Chairman
Merchant Marine and Fisheries Committee
1334 Longworth House Office Building
Washington D.C. 20515-6230

Dear Chairman Jones,

Thank you again for the opportunity to testify on H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991. This letter responds to the question asked of me by Rep. Hubbard during the hearing and the follow-up questions in your letter of February 7, 1992.

In response to Rep. Hubbard's question, we concur with the technical amendments to the Magnuson Act suggested in Mr. Tom Campbell's testimony on behalf of NOAA. We believe that NOAA's recommended amendments address the issues we raised in our testimony and would maintain the present jurisdictional framework established by the Magnuson Act. We believe they should be incorporated into H.R. 3842.

In response to your follow-up questions:

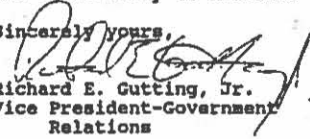
1. Several company members of the National Fisheries Institute participate in joint venture fishing operations with foreign-flag processing vessels in various Atlantic and Pacific fisheries. These operations occur both landward and seaward of the present Territorial Sea. Elimination of these operations would force these companies to find alternative arrangements to process and market the catch. Opinions differ among our member companies as to whether or not these alternative arrangements are feasible given present market conditions. The NFI Board of Directors, however, adopted a general policy position several years ago to oppose joint venture operations on the basis that they are inconsistent with the long-term interests of the U.S. fish and seafood industry.

2. We agree that the interaction of the Magnuson Act and the Endangered Species and Marine Mammal Protection Acts should not be addressed in H.R. 3842. We hope the Committee will address this issue during reauthorization.

NOAA has highlighted the need to integrate these laws in the fourth goal of its strategic plan for fisheries which was released last year. In addition, Congress directed NOAA to submit a legislative proposal by January, 1992 to govern the bycatch of marine mammals by commercial fishermen. The Committee should ask NOAA to submit a proposal to integrate these laws and/or manage bycatch. NOAA's proposal might then be reviewed by Sea Grant officials and others.

3. We do not have specific recommendations on how states might be given a greater role in conserving marine mammals and endangered species in state waters. Federal pre-emption of state authority, complex and time-consuming delegation procedures, and limited funding appear to be discouraging state involvement. These would be good issues for the Sea Grant study to address.

Sincerely yours,


Richard E. Gutting, Jr.
Vice President-Government
Relations

ADDITIONAL ANSWERS FROM DR. MICHAEL K. ORBACH, CHAIRMAN
NORTH CAROLINA OCEAN AFFAIRS COUNCIL
REGARDING THE FEB. 4, 1992, HEARING ON HR 3842

1. You mentioned the increasing stresses on the State's marine environment from pollution, habitat loss, overfishing, and harm to sea turtles.

In your opinion, does North Carolina have adequate resources to deal with these problems? Would these problems be helped or harmed if state jurisdiction were extended to 12 miles?

We do not presently have sufficient resources. Those concerns we mentioned in the testimony would be better addressed under extension of state jurisdiction if state laws and policies are as comprehensive and adequate as federal laws, and if the state has at least as much resources as the federal implementing agencies now have.

2. Your testimony indicates that North Carolina is more interested in revenue sharing from the OCS than in extended state jurisdiction.

What benefits would North Carolina derive from a revenue-sharing arrangement that it would not get from extended state jurisdiction?

It is not correct to say that North Carolina is more interested in OCS revenue sharing. Rather, we believe that the opportunity for enactment of an OCS revenue sharing law is excellent right now and should not be jeopardized by incomplete state extension schemes. Also, any extension of state jurisdiction must be accompanied by sufficient resources to deal with the additional jurisdiction and responsibilities.

General OCS revenue sharing would enable states like North Carolina, where no oil and gas resources exist within 12 miles of its coast, to take on more authority and participate more fully in ocean programs. A simple extension of jurisdiction will provide North Carolina with little, if any, additional revenue because there is no evidence of oil and gas in the 3 to 12 mile zone.

3. You testified that North Carolina would like to assume additional fisheries management responsibility.

What additional responsibilities would the State like to assume and would it require changes to the Magnuson Fishery Conservation and Management Act?

We believe there could be some benefits to increasing North Carolina's authority over most fish stocks. We feel that state jurisdiction to 12 miles forms a more coherent management block for many fisheries. Under the present arrangement, it is complicated to manage fisheries under two jurisdictions and two authorities. Yes, the MFCA would have to be modified. To the extent that fishing effort takes place in the 3-12 mile zone, the MFCA would have to be restructured. If the authority of the fishery management councils were reduced, then another entity such as the Interstate Marine Fishery Commission would have to have increased authority to manage interjurisdictional issues.

4. If states are given additional responsibilities for fisheries management, how can we ensure that these fisheries will be managed in the national interest and that the fishing interests of adjacent states will be protected?

The U.S. Constitution requires states to treat all U.S. citizens the same way they treat their own citizens. Therefore, anyone can fish a state's waters but under the rules of the local jurisdiction. In terms of participation in rule-making and management, those species which are truly migratory and represent a "shared resource" requiring coherent management throughout their range, would continue to be managed through the Atlantic States Fisheries Management Commission and the Magnuson Act's Fishery Management Councils, with some changes in authorities and responsibilities.

5. When you suggest that "state management of oil and gas activities between 3 and 12 miles is conceivable," do you mean that the states would manage these resources on behalf of the federal government? In this case, who would get the revenues from OCS oil and gas development?

Yes, the states would manage the resources on behalf of the federal government. The revenues could be shared on some percentage basis or the federal government could contract with the states to perform this function and pay the states a set fee.

6. What role would North Carolina like to have in the Sea Grant study authorized by section 8 of HR 3842?

We'd like to be involved to the greatest extent possible. All views should be aired and the study should emphasize both conservation of resources and opportunities for responsible use of ocean resources.

The William S. Richardson School of Law
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COMMITTEE ON MERCHANT MARINE
AND FISHERIES

March 2, 1992

The Honorable Walter B. Jones
Chairman
Committee on Merchant Marine and Fisheries
U.S. House of Representatives
Room 1334, Longworth House Office Building
Washington, D.C. 20515-6230

Dear Representative Jones:

This letter presents answers to the questions posed in your letter of February 7, 1992, regarding H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991. I have consulted with my colleague Professor M. Casey Jarman in preparing these responses and she agrees with these views.

1. Why do you think it is important that Congress act to extend the sovereignty of the United States over the 12-mile territorial sea?

As explained in pages 4-19 of the paper submitted with my testimony (David M. Forman, M. Casey Jarman, and Jon M. Van Dyke, Filling in a Jurisdictional Void: The New U.S. Territorial Sea), serious questions exist whether the President has the power acting alone to acquire territory for the United States. No comparable precedents exist where such an acquisition has occurred without the participation of Congress. It is necessary for Congress to act in order to clear up the uncertainty that now exists as to whether the United States has actually acquired the waters three-to-twelve nautical miles off its coasts.

If Congress fails to act, it might be argued that Congress will have acquiesced to the President's assertion of power. This acquiescence could have long-term implications for the relationship between Congress and the President and could be viewed as a weakening of the power of Congress. Congress should act, therefore, to assert its power and its views on this important subject.

Are you suggesting that without Congressional action, the United States really does not have a 12-mile territorial sea?

A strong argument can be made, as explained above, that the United States has not actually acquired the three-to-twelve nautical mile zone, because the President acting alone does not have the power to acquire territory for the United States.

2. Why do you think it is important for Congress to act to amend U.S. laws to conform to the extension of the territorial sea?

Without such amendments many ambiguities will continue to exist regarding whether U.S. laws apply in the three-to-twelve nautical mile zone. As explained on pages 19-39 of our paper, some of these ambiguities are significant, and it is impossible to predict how a court would resolve them. In order to bring order to this area and allow persons to understand what laws apply where, it is urgent that Congress act to amend the ambiguous laws and determine which laws do in fact apply in the three-to-twelve nautical mile zone.

3. Can you foresee what kind of confusion there could be in the future if we continue to have a 12-mile territorial sea for international purposes and a 3-mile territorial sea for domestic purposes?

As explained above, it will be impossible to determine which laws apply in the three-to-twelve nautical mile zone unless Congress systematically amends laws to state whether they are supposed to apply in this zone. It is impossible to divide the world of laws into those that apply "for international purposes" and those that apply "for domestic purposes." The Foreign Sovereign Immunities Act, discussed on page 25 of our paper, offers one of many possible examples. If a foreign government engages in commercial activity six miles from our coast, should it have immunity from a suit based on that commercial activity or not? It is impossible to answer that question with any confidence based on the present language of the statute. The other statutes discussed on pages 19-39 of our paper offer many other examples of similar ambiguities.

4. One of your main recommendations is to give the states a greater say in the management of their offshore resources. One of the options you omitted is the states' use of the federal consistency provisions of the Coastal Zone Management Act, which we recently expanded. Shouldn't we give these new consistency provisions a chance to work before doing anything else with state jurisdiction?

The new consistency provisions in the Coastal Zone Management Act (CZMA) are a positive step, but they should not be viewed as a panacea that can resolve the problems in this area. They do not establish a real partnership between the federal and state governments. The federal government retains the position of dominance. The federal government has a much greater information base, and without access to this information, the states cannot easily challenge a federal decision.

The CZMA also leaves ambiguous the question of when conditional consistency agreements are permissible. This ambiguity limits the ability of the states to address permit applications with the sensitivity and sophistication that may be required.

The states and territories deserve to be recognized as full partners with the federal government and should be granted more management authority over the adjacent offshore areas.

5. Section 8 of my bill authorizes Sea Grant to conduct a study of the adequacy of existing state and federal laws to manage the resources of the 12-mile territorial sea. Do you agree it would be a good idea to study fundamental state-federal management issues before changing state jurisdiction? Do you have any recommendations how this study should be conducted?

A lot of studying has already occurred on these issues. The literature is full of material on state-federal management issues and the existing state and federal laws on the offshore waters. It seems clear that changes are needed and that the coastal states and territories should be granted more authority to manage the offshore resources.

Some new research is nonetheless warranted to focus on the best ways of managing these resources in a coherent and comprehensive fashion. I am attaching to this letter materials related to the Ocean Governance Study Group, which has recently been formed to focus on these issues. This Group is a consortium of academicians from across the country, supported by policy-makers who serve as advisors. Its membership includes most of the scholars who have addressed these issues over the years; its steering group consists of faculty members from the University of California at Berkeley, the University of Delaware, and the University of Hawaii at Manoa, and its activities so far have been supported by the Sea Grant College Programs across the country. The group met most recently in Honolulu in January 1992, and I am enclosing the agenda of that meeting and the draft research agenda that this group has been considering. A final report of that meeting is now being prepared which should be ready in the next several weeks.

This Ocean Governance Study Group appears to be the group that would be most capable of conducting the systematic interdisciplinary research needed to address the remaining management issues, and this Group has already begun to work together on these issues. Because of the diverse membership of this group, it can call upon experts from each region and each discipline to work together to address the current problems. As I mentioned in my testimony on February 4, the \$100,000 figure listed in Section 8 of H.R. 3842 appears to be too low to support the research needed, unless it were to be supplemented with existing Sea Grant funds.

6. Professor Van Dyke, you stated in your written testimony that: "Granting states authority in the entire territorial sea, to twelve miles, would eliminate many of the conservation problems that have occurred in the past." Why are you so confident that granting the states full authority over the 12-mile territorial sea would be more protective of, for example, fishery resources than

the current management regime under the Magnuson Fishery Conservation and Management Act?

Most of the Regional Councils established under the Magnuson Act are widely viewed as not working effectively because they have been captured by commercial or recreational interests. The coastal states themselves are more likely to balance the competing interests appropriately, because state decisionmakers will be accountable to the residents of the state as a whole and are less likely to be dominated by narrow interest groups. Because the residents of the coastal areas have such an important long-term stake in ecological vitality of the offshore region, they are more likely to focus on the environmental concerns and to make sure that the renewable resources are in fact being renewed properly. The state policymakers can ensure that onshore activities that may affect the ocean resources--such as dams on spawning rivers and land-based activities that may produce ocean pollution--are undertaken only after the implications of these activities on the ocean environment are fully understood and the negative impacts are reduced to a minimum. In addition, the Public Trust Doctrine is more fully developed under state law, and thus the public's interest in offshore developments are more likely to be recognized. The states can of course continue to work with neighboring states as appropriate to address resource issues that require cooperation.

7. One proposal you make is to give those states with interest and capacity in offshore resources greater control, while leaving to other states management in the 3-mile zone. How would this inconsistent approach to resources management work?

The word "flexible" better describes this approach than the word "inconsistent." Many examples can be cited to provide analogies for this approach. In Section 402 of the Clean Water Act, the federal government establishes minimum criteria for the states to meet with regard to the National Pollution Discharge Elimination System, but the states are allowed to take over permitting and enforcement responsibilities if they are able to meet these criteria. The Marine Mammal Protection Act and the Resource Conservation and Recovery Act similarly allow the states to take over permitting and enforcement responsibilities if they meet federal guidelines.

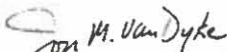
This flexible approach is appropriate in the offshore area, because the resources and conflicts vary so markedly from region to region. Alaska offers an oft-cited example of a state that has put substantial resources into managing its offshore resources, where the federal agencies tend to defer to the state decisionmakers. Many other coastal states and territories are eager to develop their resources similarly, but a few are less eager because their resources are limited or their priorities are elsewhere. Using the examples cited above, the federal government should encourage those interested states and territories to play a greater role in managing the offshore resources, while at the same time maintaining its position in those areas where the coastal residents are less interested in undertaking these responsibilities.

8. One of your specific recommendations, at page 63 of your written statement, is to "apply minimum federal standards to state and federal waters while allowing more restrictive state regulations to extend to federal waters". What would happen if one state had a more restrictive regulation that did not allow any fishing in the 12-mile territorial sea, but the citizens of other states traditionally fished in this area?

If a state had authority over the twelve-nautical-mile area and decided it was necessary to curtail fishing for environmental reasons, or in order to protect a species against over-fishing, such a decision would be binding on citizens of other states. A similar result could occur today in the three-nautical-mile area. A state could not, however, restrict commercial fishing by U.S. citizens from other states unless it also restricted such activity by its own citizens, because of the constraints of the Privileges and Immunities Clauses in the U.S. Constitution. This constraint tends to ensure that a state decision to close a fishing ground would be made only when the circumstances actually require such a result.

I hope these answers are helpful to you. Please let me know how else I can be of assistance.

Best wishes,


Jon M. Van Dyke
Professor of Law

The Ocean Governance Study Group

An initiative of the academic marine policy community to examine the status of ocean governance in the United States

THE OCEAN GOVERNANCE STUDY GROUP

STATEMENT OF PURPOSE

REVISED, JANUARY 1992

BACKGROUND

The Ocean Governance Study Group has been formed in response to a major policy void in U.S. ocean policy. While in the past twenty years the U.S. has enacted a large number of laws dealing with various aspects of ocean resources and space, no comprehensive look has been taken to assess and evaluate how well this management regime is working since the Stratton Commission of 1969. While a number of pieces of legislation have called for the convening of a national ocean policy commission to evaluate problems in the current governance scheme (such as the need to address more effectively multiple use conflicts and to achieve equitability between the federal government and the coastal states) and to formulate new policy directions, none has been enacted into law. In view of this gap, the marine policy community is itself mobilizing to do this assessment and to formulate new directions, with the aid of interested entities in both the public and private sectors.

At the conclusion of a scholarly conference on the legal and policy implications of the U.S. extended territorial sea held in Honolulu on January 9 to 11, 1991 (organized by Professors Jon Van Dyke and Casey Jarman of the University of Hawaii William S. Richardson School of Law, with funding from the University of Hawaii Sea Grant Program and other Sea Grant Programs including those of California, Delaware, Florida, Louisiana, Maine, Massachusetts, Mississippi/Alabama, Oregon, and Washington), the group of scholars assembled at the conference decided to form the Ocean Governance Study Group to work on the analysis of alternative methods of ocean management and on the formulation and implementation of a more integrated regime for the management of ocean waters in the U.S. from the shoreline to the outer limit of the 200-mile Exclusive Economic Zone (including relevant international law aspects that bear on EEZ governance issues).

PURPOSES AND ORGANIZATION

The purposes of the Ocean Governance Study Group are twofold: 1) to promote the scholarly analysis of management options for achieving responsible stewardship of the oceans offshore the United States (including relevant international law aspects), and 2) to present, on the basis of such analyses, policy options that can contribute to the consideration in Congress, in the Administration and in the states/territories, of alternative ocean management frameworks.

Steering Committee

B. Cicin-Sain and R. W. Knecht
Graduate College of Marine Studies
University of Delaware
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William S. Richardson School of Law
University of Hawaii at Manoa
2515 Dole Street
Honolulu, Hawaii 96822
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The steering committee of the Ocean Governance Study Group will initially consist of faculty members from the following institutions:

- o Graduate College of Marine Studies, University of Delaware
- o Boalt Hall School of Law, University of California, Berkeley
- o William S. Richardson School of Law, University of Hawaii

The members of the steering committee are Professors Billiana Cicin-Sain and Robert W. Knecht at the University of Delaware; Professors Harry Scheiber and David Caron at the University of California, Berkeley; and Professors Jon Van Dyke and M. Casey Jarman at the University of Hawaii.

Other members of the Ocean Governance Study Group include:

Lew Alexander, University of Rhode Island
Lee Anderson, University of Delaware
Jack Archer, University of Massachusetts
John Briscoe, San Francisco, California
Richard Burroughs, University of Rhode Island
Donna Christie, Florida State University
Donald Connors, Choate, Hall, and Stewart, Boston
Richard Delaney, University of Massachusetts
Tim Eichenberg, University of Maine
Robert Friedheim, University of Southern California
Susan Hanna, Oregon State University
Tim Hennessey, University of Rhode Island
Marc Herschman, University of Washington
Richard Hildreth, University of Oregon
Laura Howorth, University of Mississippi/Alabama
Jon Jacobson, University of Oregon
Lawrence Juda, University of Rhode Island
Lauriston King, Texas A & M University
Kem Lowry, University of Hawaii
Richard McLaughlin, University of Mississippi/Alabama
Edward Miles, University of Washington
Michael Orbach, East Carolina University
Allison Rieser, University of Maine
Jim Wilkins, Louisiana State University

The academic consortium will be assisted in its work by a group of Policy Advisors composed of public and private sector representatives, by a group of International Advisors specializing in ocean management, and by other interested individuals (the Ocean Governance Policy Network). The following individuals have agreed (or have been invited) to serve as Advisors to the Ocean Governance Study Group:

Policy Advisors

Joan Bondareff, House Merchant Marine and Fisheries Committee,
U.S. Congress
Senator John B. Breaux, Louisiana (invited)
John Carey, NOS/NOAA
Ed Cassidy, Department of Interior
Steve Chamberlain, American Petroleum Institute
Michael Cruickshank, Marine Minerals Technology Center, Hawaii
Cliff Davidson, Alaska State Legislature (invited)
Charles Ehler, ORCA/NOAA

Group for the first two years of its operation, and to develop a funding strategy for the initial component of the research agenda:

2. A Congressional meeting to be held with congressional staff, agency personnel, and other relevant public and private sector representatives in Washington, D.C. in mid-November 1992 to receive feedback on the direction of the Ocean Governance Study Group;

3. An annual conference with a first meeting to be held at the University of California at Berkeley in January 1993 where initial findings from the Study Group will be presented.

The Ocean Governance Study Group

An initiative of the academic marine policy community to examine the status of ocean governance in the United States

SUMMARY OF ACTIONS TAKEN AT THE FIRST MEETING OF THE OCEAN GOVERNANCE STUDY GROUP JANUARY 14-17, 1992 HONOLULU, HAWAII

U.S. OCEAN GOVERNANCE: THE NEXT STEPS PLANNING WORKSHOP TO DEFINE A RESEARCH AGENDA FOR U.S. OCEAN GOVERNANCE

The Ocean Governance Study Group concluded its first formal meeting in Honolulu on January 17, 1992 with the adoption of a four-point WORK PROGRAM. The two and a half day workshop was attended by over 50 participants. A message from Governor Waihee welcoming the workshop participants and highlighting the importance of ocean governance is attached.

ACTIONS TAKEN

The Ocean Governance Study Group refined and adopted an overall Work Program for the first two years of operation. The major elements of the Work Program include:

*Acknowledgements: The organization of the Study Group and of this workshop have been supported financially by the California, Delaware, and Hawaii Sea Grant Programs; the Center for the Study of Marine Policy, Graduate College of Marine Studies, University of Delaware; the William S. Richardson School of Law, University of Hawaii; School of Law, Boalt Hall University of California, Berkeley; and the Office of State Planning, Office of the Governor, State of Hawaii. Financial support to fund the travel of workshop participants has been provided by the following Sea Grant programs: Florida, Louisiana, Maine, North Carolina, Oregon, Rhode Island, and Texas. The funding support of these institutions is gratefully acknowledged.

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I. The conduct of a number of analytical studies by members of the Study Group on the following topics:

1. Implications of changes in the Domestic and International Context for Future U.S. Ocean Policy

Domestic

- e.g.
- changing patterns of ocean use
 - population growth in coastal areas
 - loss of competitiveness
 - changes in administrative law system

International

- e.g.
- changes in East-West relations
 - continuing tensions with developing world
 - changing role of Navy
 - UNCED
 - GATT--related developments

2. The Meaning of Stewardship for the U.S. Ocean

- principles of stewardship
- a constitution/framework for the U.S. EEZ and territorial sea
- obtaining economic benefits from the ocean
- public trust doctrine and federal laws
- international aspects and constraints
- subnational perspectives--the role of states and territories
- indigenous conceptions of stewardship and co-management alternatives
- operationalizing the concept: towards responsible fisheries management

3. Institutional and Policy Fragmentation in National Ocean Policy

A. Costs, Benefits, Outcomes

- case studies documenting costs, benefits and outcomes of fragmentation
- assessment of how interconnections among various laws and policies are working or not working
- Identifying "clusters" of problem areas

B. Models and Options for Improved Integration (including comparative experience)

- experiences with integrated national policy
- other nations
- experiences with integrated state policy--U.S. states

4. Ocean Use Conflicts: Assessing Costs, Benefits, Outcomes

- Specific case studies of user conflicts assessing costs, benefits, outcomes (authors will be encouraged to use a common analytical framework and set of variables)

5. Governing Ocean Space, Models, Methods, and Comparative Experiences

- similarities and differences in terrestrial and marine realms
- Great Barrier Reef Marine Park (Australia)--experience with ocean zoning
- North Sea--experiences with sea use planning
- National Estuary Program--experiences with waterbody management
- UNEP Regional seas program
- Marine protected areas and multiple use planning
- Continuum of multiple use vs. single use approaches

6. Intergovernmental Relations in Ocean Governance

- A. Explaining diversity in state and regional practice and in federal law implementation
- B. Possibilities for Creative Federalism in the Expanded Territorial Sea

7. The Need for Adaptive Management

- Preparing for Climate Change
- Science & Technology, Policy, and Adaptive Management
- R & D budgets for ocean development: comparisons between the U.S. and other nations

These analyses are to be presented at a conference to be held at the University of California, Berkeley, January 10-13, 1993 (tentative dates).

II. A Congressional meeting to be held in November 1992 in Washington, D.C. with Congressional staff, agency officials, and environmental and

industry groups, to solicit their perspectives on salient issues in U.S. ocean governance and analytical needs connected with these, and to review the initial work program of the Study Group.

III. Four ad hoc working groups were created to prepare, in the short-term, **brief policy commentaries** analyzing policy options on several forthcoming legislative and administrative issues.

- the reauthorization of the Marine Protection, Research and Sanctuaries Act, focusing in particular on the opportunities that the sanctuary program offers for area-based multiple use ocean governance
- proposals for the sharing of revenues from exploitation of the outer continental shelf
- policy options for management of the expanded territorial sea
- public policy implications of current trends of depletion of fishery stocks and privatization of fishery resources

IV. A Standing Committee on fund raising was created for the purpose of drafting a proposal for funding from foundation and other sources. The target date to complete the proposal is May 15, 1992.

BACKGROUND ON THE OCEAN GOVERNANCE STUDY GROUP

The Ocean Governance Study Group was established in November 1991 as an initiative of the academic marine policy community to examine the status of ocean governance in the United States. The major purposes of the group are to: 1) promote the scholarly analysis of management options for achieving responsible stewardship of the oceans offshore the United States, and 2) to present, on the basis of such analyses, policy options that can contribute to the consideration in Congress, in the Administration, and in the states/territories, of alternative ocean management frameworks.

The Ocean Governance Study Group is composed of 31 ocean policy experts from academic institutions around the country and is led by a six-member Steering Committee, including Billiana Cicin-Sain and Robert W. Knecht, University of Delaware; Harry N. Scheiber and David D. Caron, University of California, Berkeley; and Jon M. Van Dyke and M. Casey Jarman, University of Hawaii at Manoa. The Study Group is assisted in its work by a group of 28 Policy Advisors drawn from Congress, the Administration, state governments, regional organizations, and national interest groups representing industry and environmental concerns; a

5-member group of International Advisors specializing in ocean management, and by other interested individuals (the Ocean Governance Policy Network).

In attendance at the Honolulu Workshop were 19 members of the Study Group: Richard Burroughs (University of Rhode Island), David Caron (University of California), Donna Christie (Florida State University), Billiana Cicin-Sain (University of Delaware), Tim Eichenberg (University of Maine), Susan Hanna (Oregon State University), Timothy Hennessey (University of Rhode Island), Richard Hildreth (University of Oregon), Jon Jacobson (University of Oregon Law School), M. Casey Jarman (University of Hawaii), Lawrence Juda (University of Rhode Island), Lauriston R. King (Texas A & M University), Robert Knecht (University of Delaware), Kem Lowry (University of Hawaii), Michael K. Orbach (East Carolina University), Alison Rieser (University of Maine), Harry N. Scheiber (University of California), Jon Van Dyke (University of Hawaii), Jim Wilkins (Louisiana State University).

Others in attendance at the meeting in Honolulu were Policy Advisors Virginia Tippie (Office of the President), John Carey (NOAA/National Ocean Service), Jerry Norris and Trevor Carroll (Pacific Basin Development Council), Mike Cruickshank (Marine Minerals Technology Center) and Richard Poirier (Office of State Planning, Hawaii), and International Advisor Ronald P. Barston (London School of Economics and Political Science).

Other attending were Mike Ham (CZM Program, Guam), Katherine Maraman (Office of the Governor, Guam), Eric Smith (Commonwealth of the Northern Mariana Islands), Deni Leonard (Warm Springs Indian Reservation, Oregon), John Craven and Scott Allen (Law of the Sea Institute, Honolulu); Jack Davidson (Director of Hawaii Sea Grant Program); Jim Sullivan (Director of California Sea Grant Program); Tom Laughlin (NOAA International Affairs); Craig MacDonald (Hawaii Dept. of Business, Economic Development and Tourism); Elizabeth Pa Martin (Native Hawaiian Advisory Council); Sherwood Maynard (Director, Marine Option Program, University of Hawaii); Valerie McMillan (Hawaii Office of State Planning); Clyde Murley (Natural Resources Defence Council, Honolulu); Mel Peterson (Pacific Ocean Defence Policy Institute); Rose T. Pfund (Hawaii Sea Grant Program); Donna Schuele and Amy Toro (Univ. of California School of Law, Berkeley); William Tam (Hawaii Attorney General's Office); Joy Yanagida (Attorney, Maui); Joan Yim (Hawaii Office of State Planning).

In preparation for the workshop, three volumes of material were prepared. Volume 1 contains comments received on the draft research agenda which had been distributed earlier, Volume 2 contains a collection of 20 papers relevant to ocean governance issues. Volume 3, prepared immediately prior to the workshop, contains 9 additional papers and commentaries on ocean governance.

A report detailing the Work Program of the Study Group will be available in March of this year.



MESSAGE FROM GOVERNOR JOHN WAIHEE

January 15, 1992

The people of Hawaii are pleased to extend their greetings and aloha to the members of the academic marine policy community on the occasion of their conference on ocean governance.

As a mid-Pacific state, Hawaii naturally devotes much attention to the waters that surround the islands and the resources those waters contain.

Hawaii has been an interested and participating party to the development of rules that address the 200-mile economic zone and anticipates further discourse with the Ocean Governance Study Group and related entities.

Throughout their history, the people of these islands have found sustenance and transport in the waters of the vast Pacific; the future will surely bring greater understanding and insight to the management and use of this resource.

I congratulate the planners of the ocean governance conference for their insight and support of marine issues.


JOHN WAIHEE

STATE OF ALASKA

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COMMITTEE ON MERCHANT MARINE
AND FISHERIES

February 14, 1992

Honorable Walter Jones
Chairman
Committee on Merchant Marine & Fisheries
U.S. House of Representatives
Room H2-550, Annex #2 House Office Bldg.
Washington, D.C. 20515

Dear Chairman Jones:

Thank you for the opportunity to testify on HB 3842 on February 4, 1992. Alaska endorses the extension of domestic laws in the full extent of the 12 mile territorial sea. However, we believe that both federal and state laws should be included in the extension. The states are well qualified to assume this responsibility. Thus, our testimony pointed out that extraterritorial management over fisheries in Alaska has been previously approved by the courts and is now subject to specific delegations from the Secretary of Commerce. Other states have exercised state ownership to nine miles 1/ and, in the Great Lakes, much further to the Canadian boundary.2/

The following are additional comments for your consideration concerning state fishing laws and environmental protection in the territorial sea.

I. FAIRNESS OF FISHING LAWS.

During the hearing, an industry witness expressed concern about the fairness to nonresidents of fisheries laws in the respective states. I referred to Carlson v. State, 798 P.2d 1269 (1990) as the only instance of differential treatment of nonresidents being challenged in Alaska. The case is currently on remand to determine if charging nonresidents three times as much as resident fishermen for commercial licenses violates constitutional protections.

1/ Texas and Florida in the Gulf of Mexico (43 U.S.C. §1301(b)).

2/ 43 U.S.C. §1312.

WALTER J. HICKEL, GOVERNOR

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Committee on Merchant Marine & Fisheries

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The actual fee difference in the most expensive fisheries in Alaska is only \$500 (\$750 - \$250). Pursuant to Carlson, 798 P.2d at 1278, the \$500 difference is designed to allow each participant, nonresident and resident alike, to pay their fair share to the overall costs of management and enforcement of these valuable fisheries.

Pursuant to the Chairman's request, a copy of the decision is attached for your records.

II. ENVIRONMENTAL PROTECTION.

Specific federal environmental protection statutes such as the Clean Water Act, 33 U.S.C. §1251 et seq., and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq., allow states to assume responsibility for federal regulatory programs in the three mile territorial sea. The United States laws apply in the seaward contiguous zone. In order to avoid jurisdictional confusion, this state option should be extended to the full extent of the 12 mile territorial sea.

For example, section 301 of the Clean Water Act makes it unlawful to discharge a pollutant without a permit, including discharges into the three mile "territorial sea." However, permits to control such discharges may be issued by a state that has assumed responsibility for this program. State jurisdiction for this program has heretofore replaced federal law in the full extent of the territorial sea. However, if state jurisdiction is not extended to the 12 mile limit, the state's permitting program will be limited to the first three miles of the territorial sea and there will be no opportunity to replace the federal laws in the outer limits to 12 miles. More importantly, offshore facilities located in the various parts of the territorial sea will not be treated equally.

The same bifurcation of authorities might frustrate the cleanup of oil spills as they are washed from the state's jurisdiction to federal jurisdiction without the present necessity of reaching the contiguous zone. Similarly, responsibility over section 404 "dredge and fill" permits will be bifurcated by having more than one definition of "territorial sea." See CWA §§ 1321(16) and 1344(b). Such a bifurcation of responsibility will adversely impact the efficacy of Clean Water Act and CERCLA activities.

Alaska does not now have primacy for any Clean Water Act program, nor is it the lead agency on any CERCLA actions. However, since Alaska will certainly be developing primacy under the Clean Water Act and may well be the lead agency on CERCLA activities involving the territorial sea, we urge the committee to

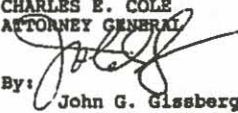
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recommend adding the CWA and CERCLA as the bill progresses.

Thank you.

CHARLES E. COLE
ATTORNEY GENERAL

By: 
John G. Gissberg
Assistant Attorney General

JGG:me

CARLSON v. STATE
Cite as 798 P.2d 1269 (Alaska 1990)

Alaska 1269

Donald H. CARLSON, Warren Hart, Gerald Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Appellants,

v.

STATE of Alaska, Commercial Fisheries Entry Commission, Appellee.

No. S-3290.

Supreme Court of Alaska.

Oct. 5, 1990.

Class action was brought challenging State's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits. The Superior Court, Third Judicial District, Anchorage, Karen L. Hunt, J., denied relief, and the class appealed. The Supreme Court, Compton, J., held that: (1) proper inquiry in determining whether State's practice violated privileges and immunities clause or commerce clause was whether all fees and taxes which must be paid to State by nonresident to enjoy the state-provided benefits were substantially equal to those which must be paid by similarly situated residents when the residents' pro rata shares of state revenues to which nonresidents made no contribution were taken into account; (2) 3:1 fee differential was authorized by statute prior to 1983; and (3) assuming class members prevailed on their claim, they would be entitled to seek a refund provided that the protest requirement of applicable refund statute was waived.

Affirmed in part, reversed in part, and remanded.

1. Constitutional Law — 207(1)

Less favorable treatment by State towards nonresidents runs afoul of privileges and immunities clause if the activity in question is sufficiently basic to the livelihood of the nation as to fall within purview

of the clause and it is not closely related to the advancement of a substantial state interest. U.S.C.A. Const. Art. 4, § 2, cl. 1.

2. Constitutional Law — 207(1)

Availability of less restrictive means is relevant in determining whether discrimination against nonresidents bears a close relationship to the permissible purpose so as not to run afoul of privileges and immunities clause. U.S.C.A. Const. Art. 4, § 2, cl. 1.

3. Constitutional Law — 207(2)

Commercial fishing is a sufficiently important activity to come within purview of privileges and immunities clause, and license fees which discriminate against nonresidents are prima facie a violation of it. U.S.C.A. Const. Art. 4, § 2, cl. 1.

4. Commerce — 82.40

Constitutional Law — 207(2)

Proper inquiry in determining whether State's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits violated privileges and immunities clause or commerce clause was whether all fees and taxes which must be paid to State by a nonresident to enjoy state-provided benefit were substantially equal to those which must be paid by similarly situated residents when residents' pro rata shares of state revenue to which nonresidents made no contribution are taken into account. AS 16.43.160(b); U.S.C.A. Const. Art. 1, § 8, cl. 3; Art. 4, § 2, cl. 1.

5. Fish — 10(1)

State's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits was authorized by statute prior to 1983. AS 16.43.110(a), 16.43.160(a).

6. Fish — 10(1)

Assuming class of nonresident commercial fishermen prevailed on their claim that State's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits was un-

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constitutional, class members could seek a refund provided that protest requirement of applicable refund statute was waived; however, class would be limited by two-year statute of limitations. AS 16.43-160(b), 43.05.275, 43.15.010 et seq.

Loren Domke, Domke and Olmstead, P.C., Juneau, for appellants.

Margot O. Knuth, Asst. Atty. Gen., and Douglas B. Bailey, Atty. Gen., Juneau, for appellee.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

This is a class action challenging Alaska's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits. The class, consisting of "all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to the State for commercial or gear licenses or permits," alleges violations of two federal constitutional provisions: the Privileges and Immunities Clause,¹ and the Commerce Clause.² The class also challenges the charging of differential fees from June 22, 1978 until January 1, 1983 under former 20 Alaska Administrative Code (AAC) 05.220(a) as being without statutory authority. The class seeks declaratory and injunctive relief as well as a refund of excess payments under the current "unconstitutional" regime and the 1978-1982 "unconstitutional" and "unauthorized" regime. The superior court denied relief.

1. The Privileges and Immunities Clause provides:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. art. IV, § 2, cl. 1.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. STATUTORY HISTORY.

In 1949 the territorial legislature passed a law imposing a \$50 commercial fishing license fee on nonresident fishermen and a \$5 fee on residents, a 10:1 ratio. Ch. 66, § 2, SLA 1949. The law was struck down as violative of the Privileges and Immunities Clause of the Federal Constitution. *Mullaney v. Anderson*, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952).

Beginning with statehood in 1959, the state charged differential licensing fees to resident and nonresident commercial fishermen pursuant to statute. Nonresident fishermen using most types of gear were charged three times the resident fee. See former AS 16.05.550, AS 16.05.570-.640; Ch. 94, art. III, § 8, SLA 1959. Exceptions to this rule existed for setnet or long line gear under former AS 16.05.560 (2:1 ratio) and for commercial operators of a single small boat under former AS 16.05.650 (no distinction).

The Limited Entry Act became effective April 27, 1978. Ch. 79, SLA 1973, codified in Alaska Statutes, Title 16, Article 43.

Alaska Statute 16.43.010(a) described the purpose of the Limited Entry Act as follows:

It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination.

Alaska Statute 16.43.100(a)(6) provided that the Commercial Fisheries Entry Commission (CFEC) "shall ... establish qualifications for the issuance of entry permits" AS 16.43.100(b) provided that the CFEC "may do all things necessary to the exercise of its powers under this chapter, whether or not specifically designated

2. The Commerce Clause provides:

The Congress shall have the power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes....

U.S. Const. art. I, § 8, cl. 3.

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in this chapter." AS 16.43.110 provided that the CFEC "may adopt regulations, consistent with law, necessary or proper in the exercise of its powers or for the performance of its duties under this chapter."

Alaska Statute 16.43.160 was first enacted in 1973. Ch. 79, SLA 1973. Former AS 16.43.160 provided in part:

(a) The [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits to reflect the cost of administering this chapter. Fees collected under this section shall be paid into the general fund.

(b) Annual fees established under this section shall be no less than \$10 and no more than \$100 and shall reasonably reflect the different rates of economic return for different fisheries.

Between 1973 and 1978, commercial fishermen were thus required to pay for both a gear license and a limited entry permit. While gear license fees for nonresident commercial fishermen were thrice, in most instances, what they were for residents initially, entry permit fees did not distinguish between residents and nonresidents. See former 20 AAC 05.220 (1974).

During the 1977 legislative session, the legislature revised the commercial fishing licensing scheme. Ch. 105, SLA 1977. Gear licenses were abolished altogether. Ch. 105, § 19, SLA 1977. Alaska Statute 16.43.160(a) was amended by removing the phrase "to reflect the cost of administering this chapter." Thus, AS 16.43.160(a) then read in part: "The [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits." Additionally, AS 16.43.160(b) was amended to increase the maximum amount the CFEC could charge for a license from \$100 to \$750. Ch. 105, § 15, SLA 1977. These changes became effective January 1, 1978. Ch. 105, § 20, SLA 1977.

On the effective date of these changes, the CFEC could no longer charge differential gear license fees, or for that matter any gear license fees. On this same date, the CFEC amended 20 AAC 05.220 to provide for a 3:1 nonresident fee differential

for entry permits. See Ch. 105, § 20, SLA 1977; former 20 AAC 05.220.

It was the view of then Attorney General Avrum Gross, as demonstrated by a letter from him to then Governor Jay Hammond, that "the fees now collected for [gear] licenses would be incorporated administratively by the [CFEC] into the fee for a permit as would the 3-1 nonresident-resident fee differential." Moreover, the increase in the maximum chargeable entry fee (from \$100 to \$750) was believed by Attorney General Gross, as shown by another letter to Governor Hammond, to "allow entry permit fees to incorporate the license fees which would be eliminated." The letters also show that he anticipated the enactment of regulations to accomplish this incorporation.

In 1981, an informal opinion of the attorney general was issued concerning whether the 3:1 fee ratio of 20 AAC 05.240(a) was authorized by statute, following a request by the chairman of the CFEC. 1981 Informal Op. Att'y Gen. 984. Without citing any directly supportive authority, the author concluded the differential was not authorized. *Id.* The regulations attorney for the CFEC disagreed with this assessment.

In 1982, the legislature again amended AS 16.43.160(b). This section now reads:

(b) Annual fees established under this section shall be no less than \$10 and no more than \$750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

The 1982 amendment thereby gave more certain authority to the CFEC to charge a 3:1 fee differential. This amendment was effective January 1, 1983. Ch. 79, § 3, SLA 1982.

B. HISTORY OF STATE EXPENDITURES AND REVENUES.

The record contains a lengthy and detailed analysis of the revenues and expenditures connected with fisheries management for fiscal years 1978-1984.

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The state contended below that the 3:1 fee ratio partially reimburses the state for that portion of the costs of fisheries management, enforcement and conservation attributable to nonresidents. The state, in essence, argued that it is subsidizing all commercial fishermen by not charging any of them (resident or not) his share of the costs of fisheries management.

The state's analysis identified four sources as the aggregate cost of fisheries management. First, the state included the annual operating budget of the CFEC itself (cost of issuing licenses and permits, etc.). These amounts are evidenced by state budget reports for each year in question.

Second, the state included 40.6% of the annual operating budget of the Department of Public Safety (DOPS), representing the amount spent by state law enforcement agencies in support of commercial fisheries enforcement. The amount of the DOPS operating budget is also evidenced by state budget summaries for each year.

Third, the state included the annual operating budget of the Division of Commercial Fisheries, a division of the Department of Fish and Game. This division determines "how many fish are available each year for commercial harvesting." These expenditures are also voluminously documented by budget reports. Not counted as expenditures were "[a]dministration and [s]upport costs."

The state also included the annual operating budget of the Fisheries Rehabilitation Enhancement and Development (FRED) Division of the Department of Fish and Game. FRED

rehabilitates and enhances fisheries by determining where and when fish are needed or wanted to be, and then producing the fish at that time and place. This is done by conducting extensive research studies and then working on the variety of projects that will implement the plans decided upon, which include establishing and running fish hatcheries, fertilizing

lakes, planting fish, and cleaning up streams used by androgenous fish.

FRED's expenditures are also documented by budget breakdowns for each year. Not counted in FRED's expenditures were "[a]dministration and [s]upport costs" and sport fishing expenditures.

The state then attributed to nonresidents a percentage of these costs equal to the percentage of entry permits held by nonresidents in each year.³

Finally, the state presented evidence of revenues collected in connection with commercial fishing. The state included two sources: commercial entry permit fees and commercial fishing license fees. These numbers are again documented by budget reports.

The state then compared the percentage of expenditures attributable to nonresidents with the percentage of revenues taken in from nonresidents. In each year nonresident revenues from the sources counted falls considerably short of nonresident expenditures. See Appendix.

The class does not seriously dispute the factual accuracy of the foregoing figures. The amounts cited by both litigants as to expenditures suffer from only minor, immaterial discrepancies. Rather, the class disputed the inclusion of certain costs and the exclusion of certain revenues in the analysis. First, the class contended that the proper framework for examining whether nonresidents were contributing their share to fisheries management would be to contrast CFEC revenues with only CFEC expenditures, i.e. "expenses directly traceable to the costs of issuing permits and licenses." Including only these expenditures, the 3:1 fee ratio scheme results in a net profit to the state.

Alternatively, the class contended that if inclusion of all fisheries management expenditures in the analysis was appropriate, then "all sources of revenue [to the state] attributable to [nonresident] commercial fishermen" should also be included. The class urged the inclusion of "revenues de-

rive more benefit from maintenance expenditures.

3. The evidence of record shows that this percentage of costs actually favors nonresidents, who catch more fish per capita and hence de-

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rived indirectly from commercial fishermen from tax shifting by the fish processing industry, federal funds, marine fuel taxes, corporate and individual income taxes, and other sources of revenue derived from commercial fishermen." Including these indirect revenues, only in fiscal years 1983 and 1984 did expenditures exceed revenues.

C. PROCEDURAL BACKGROUND.

On its first motion for summary judgment, the state prevailed on some issues, with the court finding material questions of fact remaining on others. On the Privileges and Immunities issue, the superior court held, relying on *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 889 (1948), that while the issuance of licenses to fish commercially was sufficiently important to implicate the Privileges and Immunities Clause, the state had demonstrated a "permissible" reason for the discrimination. This reason was "to have the non-resident[s] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of this state, which costs are largely borne by the residents through general fund expenditures." The superior court decided that an analysis of whether this purpose was being met by the 3:1 fee ratio required comparison of all revenues collected directly from commercial fishers, with all the expenditures by the State on maintaining, conserving, or managing the fishery. It rejected the class' two proposed methods of determining fair share contribution: 1) comparing CFEC revenues with CFEC expenditures and 2) comparing all revenues from all sources (including corporate taxes, business license taxes, fuel taxes, etc.) garnered from nonresident commercial fishers with all expenditures to maintain fisheries.

The superior court found that the state had presented evidence "of the operating budgets of the four entities of the State which are concerned with enforcement, operation, management, and conservation of the fisheries. The State's evidence indicates further that the operating budgets of

these entities exceeded, in the years 1979 through 1984, the amount they collected in resident and non-resident licensing. ..." Nevertheless, the superior court also found that there was a material question of fact as to whether the operating budgets truly reflected the costs of fisheries management.

As to the Commerce Clause challenge, the court held that commercial fishing in this state is within the reach of the Clause. It also held that the fee differential discriminated against interstate commerce on its face. However, the court reasoned that the same "legitimate local purpose" (ensuring that nonresidents pay their fair share of management costs) justified the discrimination, assuming the fee differential bore a substantial relationship to the purpose. Again, the court found the same question of material fact; whether the state's figures truly reflected the costs of management. The court also held that there is no less restrictive way to ensure that nonresidents pay their fair share of the costs of fisheries management than to collect the money from them as a fee.

The superior court further held that the CFEC had implied authority to enact 20 AAC 05.220(a) and charge a 3:1 fee differential before 1983. The court offered several factors supporting its conclusion. First, it noted that the 3:1 entry fees were enacted concurrent with the abolition of 3:1 gear license fees. The court reasoned that the 1977 amendments, as reflected by the attorney general's letters, were intended to substitute differential entry permit fees for differential gear fees. The court also noted that the Limited Entry Act did not forbid fee ratios. The court added that AS 16.43.160(a) did not merely authorize the issuance of licenses, but instead directed the CFEC to "establish annual fees for the issuance and annual renewal of entry permits or interim use permits." Finally, the court reasoned that the deletion of the requirement that permit fees "reflect the cost of administering this chapter" from AS 16.43.160(a), along with the increase in maximum chargeable license fees, were indicative of intent to allow the CFEC to

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recoup to the General Fund whatever monies were expended for the management of fisheries.

Finally, the superior court held that even should the class eventually prevail, its members would not be entitled to a refund of fees extracted under an unconstitutional or unauthorized statute.

Later, the superior court reconsidered its decision that there were questions of material fact concerning whether the figures submitted by the state sufficed. Based on the state's more expansive documentation of costs and expenditures (discussed in section I B, *supra*), the court held that no question of material fact remained regarding the accuracy of the state's calculations.

The class appeals.

II. DISCUSSION

A. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED AS TO THE CLASS' PRIVILEGES AND IMMUNITIES AND COMMERCE CLAUSE CHALLENGES.

The Privileges and Immunities Clause of article IV, section 2 of the United States Constitution provides: "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The primary purpose of this clause... was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.... In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Toomer v. Witsell, 334 U.S. 385, 395-96, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389 (1948) (footnote omitted).

[1, 2] Less favorable treatment by the state towards nonresidents runs afoul of the Privileges and Immunities Clause if: 1)

the activity in question is "sufficiently basic to the livelihood of the Nation" ... as to fall within the purview of the [clause]," and 2) "[it] is not closely related to the advancement of a substantial state interest." *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65, 108 S.Ct. 2260, 2264, 101 L.Ed.2d 56 (1988) (citations omitted). See also *Toomer*, 334 U.S. at 396, 68 S.Ct. at 1162; *Robison v. Francis*, 713 P.2d 259, 263-64 (Alaska 1986). In determining whether the discrimination bears a close relationship to the permissible purpose, the availability of less restrictive means is relevant. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284, 105 S.Ct. 1272, 1278, 84 L.Ed.2d 205 (1985); *Robison*, 713 P.2d at 264.

[3, 4] Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are *prima facie* a violation of it. See *Toomer*, 334 U.S. at 397, 68 S.Ct. at 1162; *Mullaney v. Anderson*, 342 U.S. 415, 417-18, 72 S.Ct. 428, 429-30, 96 L.Ed. 458 (1952). Compare *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 388, 98 S.Ct. 1852, 1862, 56 L.Ed.2d 354 (1978) (sport or recreational hunting not protected by Privileges and Immunities Clause). Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal. The class argues both that there is no "substantial reason" for the discrimination, and that even if there is, the fee differential is not "closely related" to furthering the purpose.

In *Toomer*, South Carolina sought to justify a 100:1 ratio by arguing that its "conservation program for [fisheries] requires expenditure of funds beyond those collected in license fees—funds to which residents and not non-residents contribute." *Toomer*, 334 U.S. at 398, 68 S.Ct. at 1163. The Court held that it was permissible "to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expendi-

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tures from taxes which only residents pay." *Id.* at 399, 68 S.Ct. at 1163 (emphasis added). However, the Court also held that South Carolina had not established a relationship between the justification and the differential fee. "Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to [fisheries] conservation." *Id.* at 398, 68 S.Ct. at 1163 (emphasis added).

Mullaney dealt with Alaska's territorial predecessor to the differential fee scheme at issue here. The territorial scheme imposed a \$5 license fee on resident commercial fishermen, and a \$50 fee on nonresidents, a 10:1 ratio. Ch. 66, § 2, SLA 1949; see also *Mullaney*, 342 U.S. at 416, 72 S.Ct. at 429. In *Mullaney*, Alaska, as did South Carolina in *Toomer*, asserted that the discriminatory fee was justified by a substantial reason; to wit, "the higher cost of enforcing the license law against nonresident fishermen." *Id.* at 417-18, 72 S.Ct. at 430.

The *Mullaney* Court reiterated its suggestion in *Toomer* that this would be a sufficient reason to impose a discriminatory fee, but again held that there was "nothing to indicate that [the fee differential] 'would merely compensate' for the added enforcement burden." *Id.* at 418, 72 S.Ct. at 430. According to the *Mullaney* Court, "[c]onstitutional issues affecting taxation do not turn on even approximate mathematical determinations. But something more is required than a bald assertion to establish a reasonable relation between the higher fees and the higher cost to [Alaska]." *Id.*

Subsequent to *Mullaney*, non-fisheries cases have resounded the "more than a bald assertion" theme. In *Austin v. New Hampshire*, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975) the Court found

no support in the record for the assertion of the court below that the [tax] creates no more than a "practical equality" between residents and nonresidents when

the taxes paid only by residents are taken into account. "[S]omething more is required than bald assertion—by the state court or by counsel here—to establish the validity of a taxing statute that on its face discriminates against nonresidents."

Id. at 666 n. 10, 95 S.Ct. at 1197 n. 10 (citation omitted).

In *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), Alaska's local hire law failed Privileges and Immunities scrutiny for this same reason.

[A]lthough the statute may not violate the [Privileges and Immunities] Clause if the State shows "something to indicate that non-citizens constitute a peculiar source of evil at which the statute is aimed," ... and, beyond this, the State "has no burden to prove that its laws are not violative of the ... Clause," ... certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." ... What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities; and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed.

Id. at 526-27, 98 S.Ct. at 2488 (citations and footnote omitted).

How much record support is needed under these cases to demonstrate a sufficiently "close connection" to a legitimate state purpose remains unclear. One court has noted:

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[T]here is a certain ambiguity in the Supreme Court cases concerning the burden of going forward with the evidence and the burden of persuasion of the challenger and the state. ... Justice Brennan dissenting in *Baldwin* discussed the burdens on the challenger and the state in a privileges and immunities case as follows: "Although a State has no burden to prove that its laws are not violative of the Privileges and Immunities Clause, its mere assertion that the discrimination practiced against nonresidents is justified by the peculiar problem nonresidents present will not prevail in the face of a prima facie showing that the discrimination is not supportable on the asserted ground."

Justice Brennan, writing for the Court in *Hicklin*, discussed the burdens in a privileges and immunities case in the following language: "For although the statute may not violate the Clause if the State shows 'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed,' and, beyond this, the State 'has no burden to prove that its laws are not violative of the ... Clause,' certainly no showing was made on this record that nonresidents were 'a peculiar source of the evil [the statute] was enacted to remedy....'"

Professor Tribe comments on the burden of proof in a privileges and immunities case as follows: "The standard of review employed in *Toomer* ... characterized by a shift in the burden of proof to the discriminating state and by an insistence on a fairly precise fit between remedy and classification, is almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."

Another commentator ... described the burden of proof rule established in *Hicklin* as follows: "[Justice Brennan in *Hicklin*] departed from the traditional allocation of the burden of proof in cases arising under the clause. Before *Hick-*

lin, the nonresident had the burden of disproving the validity of the justifications offered by the state. *Hicklin* places a duty on the state to demonstrate a relationship between the presence of nonresidents and the problem which the state purports to alleviate. The shift of the burden of proof in this first prong discards the presumption of constitutionality that a statute normally enjoys and is inconsistent with Justice Brennan's position in *Baldwin* that the state had this burden only after the nonresident had made a 'prima facie showing that the discrimination is not supportable on the asserted grounds.' While Justice Brennan offered no explanation for this shift, it is consistent with his concern for the individual's interest.

Although the United States Supreme Court cases are not clear, we conclude that the challengers of the statutes in the case at bar bear the burden of producing evidence demonstrating the discriminatory effect of the statute on nonresidents. If a discriminatory effect is shown, the state has the burden of producing 'something to indicate that nonresidents constitute a peculiar source of evil at which the statute is aimed' ... if the state makes such a showing, the challengers have the burden of showing the discrimination is "not supportable on the asserted grounds."

Taylor v. Conta, 106 Wis.2d 321, 316 N.W.2d 814, 823 n. 17 (1982) (citations omitted). *Contra*, *Silver v. Garcia*, 592 F.Supp. 495, 498 (D.P.R.1984); *Glenovich v. Noerenberg*, 346 F.Supp. 1286, 1293 (D.Alaska), *aff'd*, 409 U.S. 1070, 93 S.Ct. 687, 34 L.Ed.2d 660 (1972) (state bears the burden of justification). We are persuaded by the Wisconsin Supreme Court's analysis, and agree with its conclusion that the burden of persuasion to demonstrate justification is properly placed on the state.

The analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated.⁴ The Com-

4. Early cases suggested that the Commerce Clause does not come into play until the fish are

actually harvested, e.g., *McCready v. Virginia*, 94 U.S. 391, 396, 24 L.Ed. 248 (1876); *Toomer*, 334

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merce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Maine v. Taylor*, 477 U.S. 131, 137, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986) (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980)). "[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Taylor*, 477 U.S. at 138, 106 S.Ct. at 2447, quoting *Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736.⁵

U.S. at 394-95, 68 S.Ct. at 1161-62 (Commerce Clause not implicated by a nondiscriminatory tax where taxable event, the taking of shrimp, "occurs before the shrimp can be said to have entered the flow of interstate commerce."); *Alaska v. Arctic Maid*, 366 U.S. 199, 203, 81 S.Ct. 929, 932, 6 L.Ed.2d 227 (1961) (actual taking of fish is a "local activity" outside the Commerce Clause, despite the fact that the fish are destined for interstate commerce). See also *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F.Supp. 1287, 1301-06 (E.D.Va.1982) (review of the cases); *State v. Reefer King Co., Inc.*, 559 P.2d 56, 64 (Alaska 1976), modified on reh'g, 362 P.2d 702 (Alaska 1977) (taxes distinguishing between floating and shorebased processors do not implicate Commerce Clause where statute excludes interstate movement of "floaters" from taxation).

Diction in more recent cases, however, suggests the contrary.

[While] at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce. The movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce.

Douglas v. Seacoast Products, Inc., 431 U.S. 265, 281-82, 97 S.Ct. 1740, 1750, 52 L.Ed.2d 304 (1977) (citations and footnote omitted).

Hicklin also suggests that the Commerce Clause applies to this case. "[T]he Commerce

The superior court, in granting summary judgment in favor of the state, adopted the reasoning of *Salorio v. Glaser*, 82 N.J. 482, 414 A.2d 943, cert. denied, 449 U.S. 874, 101 S.Ct. 215, 66 L.Ed.2d 94, app. diss., 449 U.S. 804, 101 S.Ct. 49, 66 L.Ed.2d 7 (1980). In *Salorio*, New Jersey sought to impose an "Emergency Transportation Tax" (ETT) on nonresidents who used the state highway system. *Salorio*, 414 A.2d at 945. The *Salorio* court interpreted *Toomer* and *Mullaney* to permit a state to "impose upon nonresidents the additional expenses occasioned by their activities within the state, or the reasonable costs of benefits which they receive from the state." *Salorio*, 414 A.2d at 953. "[T]he State may exact from [nonresidents] a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause." *Id.* 414 A.2d at 954.

Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce." *Hicklin*, 437 U.S. at 533, 98 S.Ct. at 2491 (emphasis added).

The Court has also held that state laws which ban the export from the state of fish taken in state, and state laws which ban the import of fish taken out of state, at least implicate the Commerce Clause. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (export, struck down); *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) (import, upheld). Despite its broad dictum in *Douglas*, the court in *Hughes* quoted with approval from Justice Field's dissent in *Geer v. Connecticut*, 161 U.S. 519, 538, 16 S.Ct. 600, 608, 40 L.Ed. 793 (1896) (Field, J., dissenting): "[w]hen any animal ... is lawfully killed for purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Hughes*, 441 U.S. at 329, 99 S.Ct. at 1732.

5. *Taylor* seems to squarely put the burden of justification on the state, whereas Privileges and Immunities Clause cases (as discussed *supra*) have been inconsistent on this issue. It would be anomalous, however, to conclude that a law facially discriminating against interstate commerce could pass muster under the Privileges and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation. *Baldwin*, 436 U.S. at 379, 98 S.Ct. at 1858.

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We believe that the superior court erred in adopting *Salorio*. In our view, its focus is misplaced. Implicit in *Salorio* is the notion that it is permissible to require nonresidents to pay up to 100% of their *pro rata* share of expenditures regardless of what percentage of their *pro rata* share residents are in fact paying. In other words, *Salorio*, as applied to this case, seems to add up to a general proposition that the state may subsidize its own residents in the pursuit of their business activities and not similarly situated nonresidents, even though this results in substantial inequality of treatment. Such a principle seems economically indistinguishable from imposing a facially equal tax on residents and nonresidents while making it effectively unequal by a system of credits and exemptions. Such schemes have been struck down by the United States Supreme Court. *Austin, supra*; *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920). See also *Williams v. Zobel*, 619 P.2d 422, 429-30 & 436-37 (Alaska 1980) (Rabinowitz, C.J., concurring).

The proper focus in our view is on whether residents and similarly situated nonresidents are being treated with substantial equality. The appropriate inquiry is thus whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

The language of *Toomer* to the effect that it would be permissible "to charge nonresidents a differential which would merely compensate the state ... for any conservation expenditures from taxes which only residents pay" requires additional discussion. We read this statement to mean that if nonresident fishermen paid the same taxes as Alaskans and these taxes were substantially the sole revenue source for the state out of which conservation expenditures were made, then differential fees would not be permissible. That, however, is not the case in Alaska where a very high proportion of total state reve-

nues are derived from petroleum production. For example, in fiscal year 1986, 86 percent of state revenues were so derived. *Trustees for Alaska v. State*, 795 P.2d 805-810 (Alaska 1990). Thus, in 1986, it would be correct to say that eighty-six cents of each dollar spent for conservation came from state revenue sources to which nonresident fishermen made no contribution. These revenues could have been used to benefit residents through various other programs and they are, analytically, equivalent to "taxes which only residents pay."

The point of *Toomer*, thus, is that the state may equalize the economic burden of fisheries management; where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference. On this record we are unable to determine whether the higher fees charged nonresidents are excessive for this purpose. Thus, we are unable to say whether there is "a fairly precise fit between remedy and classification." *Taylor v. Conta*, 316 N.W.2d at 823 n. 17. The burden is on the state to make this showing.

We reverse the superior court's determination of this issue and remand for further proceedings consistent with this opinion.

B. THE 3:1 FEE DIFFERENTIAL WAS AUTHORIZED BY STATUTE PRIOR TO THE EFFECTIVE DATE OF THE 1982 AMENDMENTS TO AS 16.43-160(b) (1/1/83).

[5] We now address the class' contention that the 3:1 fee ratio was not authorized by statute prior to 1983. Alaska Statute 16.43.110(a), beginning in 1973 and continuing to the present day, provides that the CFEC "may adopt regulations, consistent with law, necessary or proper in the exercise of its powers or for the performance of its duties under this chapter." Ch. 79, § 1, SLA 1973. Former AS 16.43.160(a) mandated that "[t]he [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits." (Emphasis added). The language limiting the CFEC's fees to "reflect

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the cost of administering this chapter" was removed by the 1977 amendments, along with an increase in the maximum fee from \$100 to \$750 and abolishment of gear licenses. Ch. 105, § 15, SLA 1977.

The analysis of this issue is governed by *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256 (Alaska 1988). Examining the validity of CFEC regulations is a three step process: we determine "whether the legislature delegated rule-making authority to the [CFEC], whether the [CFEC] followed the Administrative Procedure Act in promulgating this regulation, and whether the regulation is consistent with and reasonably necessary to implement the statutes authorizing its adoption." *Johns*, 758 P.2d at 1260, quoting *Chevron USA Inc. v. Leschke*, 663 P.2d 923, 927 (Alaska 1983). No one contends that the differential fee structure was not promulgated in accordance with the APA.

This court recognized in *Johns* that AS 16.43.110(a) is a broad delegation of power to the CFEC to adopt regulations "necessary or proper" to implement the purposes of the Act. *Johns*, 758 P.2d at 1256; see also *Kalmakoff v. State, Commercial Fisheries Entry Comm'n*, 693 P.2d 844, 853 (Alaska 1985). The purpose of the Limited Entry Act is "to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination." AS 16.43.010(a). Thus, if the 3:1 ratio regulation was a necessary or proper implementation of these purposes, it was authorized.

6. The class appears to argue that AS 16.43.160(a) is a dedication of state taxes or licenses to a special purpose in contravention of Article IX, § 7 and an improper delegation of taxing power under Article X, § 2 of the Alaska Constitution.

The "special dedication" argument is frivolous. On the face of AS 16.43.160(a), all funds collected from license fees are paid directly into the general fund. Compare *State v. Alex*, 646 P.2d 203, 207-11 (1982) ("earmarked" funds).

The Article X, § 2 argument is equally meritless. The class argues that if we construe AS 16.43.160(a) to authorize the collection of fees

We conclude that this regulation was a proper implementation of the purposes of the Act. Conservation and sustained yield management are not free. What evidence of legislative intent there is from the 1977 amendments to the Act shows that Limited Entry Act fees were intended to substitute for the previous differential gear license fees as the means of ensuring nonresident contribution toward the cost. The maximum amount chargeable was raised from \$100 to \$750. Ch. 105, § 15, SLA 1977. The clause seemingly limiting the level of fee collection to CFEC expenditures alone was abolished. Ch. 105, § 15, SLA 1977. The executive branch also apparently believed that was the purpose of the amendment. We therefore reject the class' contention.*

C. IS THE CLASS ENTITLED TO A REFUND SHOULD THEY PREVAIL ON REMAND?

[6] The class also appeals the superior court's ruling that its members would not be entitled to a refund should they prevail on their constitutional claims. Since we are remanding the superior court's determination of the constitutional issues, we will address the issue of refund availability.

Alaska Statute 43.15.010(a) provides:

The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if (1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax, or (2) in the ab-

by the CFEC in an amount greater than is necessary to fund the CFEC's issuance of licenses, this would give rise to an unconstitutional delegation of taxing power. Article X, § 2 simply has nothing to do with this case. It provides that "[a]ll local government powers shall be vested in cities and boroughs. The State may delegate taxing powers to organized cities and boroughs only." This is a limitation intended to simplify the structure of local government; nothing in this suggests any limitation on the state's ability to create a state agency and authorize it to set license levels. Compare *Alex*, 646 P.2d at 211-13.

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sence of a judgment, it is obvious to the Department of Revenue that the taxpayer would obtain judgment if legal proceedings were prosecuted by the taxpayer.

We recently considered the scope and effect of this statute in *Principal Mutual Life Ins. Co. v. State, Division of Insurance*, 780 P.2d 1023 (Alaska 1989). Although we declined to definitively resolve the question of whether AS 43.15.010(a) foreclosed a common law action in assumption for taxes wrongfully assessed and paid, we clearly held that both under the statute and common law, the taxpayer must formally "protest the payment of the tax at the time of payment in order to subsequently maintain" either a common law or statutory cause of action. *Principal Mutual*, 780 P.2d at 1028-30.

In *Pacific American Fisheries, Inc. v. Mullaney*, 13 Alaska 729, 105 F.Supp. 907, 909 (1952), the district court considered whether the excess fishing license fees collected under Alaska's previous 10:1 fee scheme, struck down in *Mullaney v. Anderson*, could be refunded under § 48-7-1, ACLA 1949, recodified into the current tax refund statute as AS 43.15.010. See *Principal Mutual*, 780 P.2d at 1028 n. 17. The district court held that the differential gear license fee was a tax within the meaning of the refund statute. *Pacific American Fisheries*, 105 F.Supp. at 908-09. The holding of *Pacific American Fisheries* finds continued support in the title of AS 43.15, "Refunds of Taxes and Licenses." See also AS 43.15.010(c) (providing for the refund of "license taxes" where a licensee is "prevented from using

the license by court order....") Thus, in the abstract, the class might avail itself of this statute to recover any unconstitutionally extracted fees.

However, the class seems to concede in its brief that the necessary protests were not made, instead presenting argument that the requirement of a protest was waived. The protest requirement may be waived by the taxing authority. *Principal Mutual*, 780 P.2d at 1029. On remand, the court should conduct appropriate inquiry into this issue.

We also note that the superior court has been operating under the assumption that a six-year statute of limitations applies to the class' sought after refund. However, there is a specific statute of limitations applicable to claims for tax refunds. Alaska Statute 43.05.275 provides that:

a claim for credit or refund of a tax under this title for which a taxpayer is required to file a return or pay a tax may be filed by the taxpayer (1) before the later of (A) three years from the time the return was filed; or (B) two years from the time the tax was paid; or (2) within two years from the time the tax was paid, if no return was filed.

(Emphasis added). On remand, assuming that the class overcomes the hurdle of failing to protest payment, it is limited by this two year statute of limitations.

III. CONCLUSION

The judgment of the superior court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

APPENDIX

PERCENTAGE OF COSTS PAID BY NONRESIDENTS COMPARED TO PERCENTAGE ATTRIBUTABLE TO NONRESIDENTS

Year	Total No. of Permits	Number of Permits Held by Non-Res.	% Held	Total Costs of Enforcement & Conservation (in Thous.)	Fair Share of Non-Res. (Total Costs × %) (in Thous.)	Amount Paid by Non-Res. (in Thous.)	% Paid
1979:	26,716	4,884	18%	18,151.7	3,267.3	1,492.2	8.22%
1980:	29,432	5,648	19%	17,901.2	3,401.2	1,240.4	6.93%
1981:	28,312	5,039	18%	23,316.1	4,196.9	1,465.1	6.28%
1982:	29,021	5,181	18%	28,986.5	5,217.5	1,397.8	4.82%
1983:	24,450	4,608	19%	30,999.0	5,889.8	1,335.6	4.31%
1984:	29,322	4,718	16%	34,023.2	5,443.7	1,381.3	4.06%

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

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March 31, 1992

The Honorable Walter B. Jones
U.S. House of Representatives
Committee on Merchant Marine
and Fisheries
Room 1334, Longworth House
Office Building
Washington, DC 20515-6230

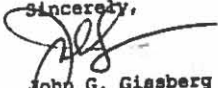
Dear Representative Jones:

Thank you for the extension of time to reply to the additional questions enclosed to your February 7, 1992 letter regarding Alaska's testimony to the House Merchant Marine and Fisheries Committee on H.R. 3842, The Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991. We have now been able to provide answers to all the factual, legal, and policy questions presented. For the most part, our answers are specific to Alaska but, where indicated, we believe they would apply to other states as well.

We appreciated the opportunity to testify before the Committee on February 4 and through the enclosed answers. Please do not hesitate to let us know if there is any further information that might be helpful. We shall, of course, contact you and the committee promptly should new or additional information come to our attention.

Best wishes.

Sincerely,


John G. Gissberg
Senior Assistant Attorney
General

Enclosure

RECEIVED

APR 9 1992

COMMITTEE ON MERCHANT MARINE
AND FISHERIES

ADDITIONAL QUESTIONS
FOR JOHN GISSBERG, ASSISTANT ATTORNEY GENERAL
ALASKA DEPARTMENT OF STATE

FROM

THE HONORABLE WALTER B. JONES
CHAIRMAN, COMMITTEE ON MERCHANT MARINE AND FISHERIES
FOR THE

FEBRUARY 4, 1992

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

1. Coastal Zone Management

Question

You testified that Congress should not establish an arbitrary line for management of our offshore resources. I agree with you, and that is one of the main reasons we amended the federal consistency provisions of the Coastal Zone Management Act in 1990.

Don't the consistency provisions give the State of Alaska the authority to require that all federal activities, regardless of location, that affect the coastal zone of Alaska be conducted consistent with Alaska's coastal management program, and this would include any activity within the 200-mile EEZ of the United States.

Answer

The 1990 amendments to the Coastal Zone Management Act, as suggested in your question, may have been designed to "require that all federal activities, regardless of location, that affect the coastal zone of Alaska be conducted consistent with Alaska's coastal management program. . . [so as to] include any activity within the 200 mile EEZ of the United States." However, though well-intentioned, the subject consistency requirements of the CZMA at 16 U.S.C.1456(c) only apply "to the maximum extent practicable." As a result of this limitation, federal activities that are not practical to execute in a manner with a state's approved coastal management program may disregard that state's program.¹

¹ For example, the Army Corps of Engineers appears to have determined that it is not practical to conform ocean dumping within 12 miles to some Eastern state's coastal management programs.

For example, federal agencies, not the states, have authority to "assert that compliance with the [state's] management program is prohibited." 44 C.F.R. 930.32(a). In the same way, federal agencies, not the states, "determine which of their activities directly affect the coastal zone of States. . . ." 44 C.F.R. 930.33(a). As a result, for example, we understand that it may have been determined that ocean dumping within 12 miles of certain Atlantic Coast states is not an activity that "directly affects the coastal zone."

Therefore, an extension of state entitlement to offshore lands, waters, and resources to 12 miles would secure state responsibility to the seaward limits of the territorial sea and allow the state/federal relationship in ocean areas to continue in the new territorial sea as it now successfully operates in the three-mile limit.

2. Prior Federal Ownership of Submerged Lands

Question

Is it accurate to state that until Congress granted the coastal states ownership of submerged lands out to 3 miles in the 1953 Submerged Lands Act, this offshore area belonged to the federal government, although it may have been claimed by the states?

Answer

It would not be accurate to say that "until Congress granted the coastal states ownership of submerged lands out to 3 miles in the 1953 Submerged Lands Act, this offshore area belonged to the federal government." (emphasis added) Although the United States had originally sought a ruling that it owned the submerged lands in fee simple, the U.S. Supreme Court ruled that the federal government only has "paramount rights in, and full dominion and power over" the submerged lands to three miles. U.S. v. California, 332 U.S. 19, 38 (1947); United States v. California, 332 U.S. 804, 805 (1947). Further, there have been no judicial statements suggesting the submerged lands to three miles "belonged to" or were ever "owned by" the federal government. See e.g., U.S. v. California, 436 U.S. 32, 42 (White, dissenting U.S. v. California, 332 at 43; opinion).

In this regard, it is worth noting that the original 13 states had ownership claims that extended far beyond the three-mile limit. See e.g., U.S. v. Maine, 420 U.S. 515 (1975). These claims were treated as valid ownership interests vis a vis the federal government and other states until the U.S. Supreme Court recognized "paramount" federal rights in U.S. v. California, 332 U.S. 19 (1947).

Only after the Congress enacted the Submerged Lands Act of 1953 did any government entity acquire "ownership of and title to" the submerged lands to the seaward boundary of the territorial sea. The Congress was clear and plain in its intent that the vesting of such title to the states was in "the public interest." 43 U.S.C. 1302.

3. Federal "Ownership Interests"

Question

You suggest that only the states can own the offshore areas to 12 miles, and that this area can not be owned by the federal government.

Doesn't the federal government own the title to lands where it is in the public interest, such as national parks, national forests, national wildlife refuges and the like? If Congress decided the federal government should own the offshore area between 3 and 12 miles, couldn't we apply the same rationale, that it is important to all the citizens of the United States, to have this area be managed by the federal government?

Answer

Although it is true that the federal government does actually own certain isolated lands within the three-mile limit, these instances represent extremely unusual exceptions and constitute a minuscule portion of the former three-mile territorial sea limit. For example, when the United States laid claim to a one-mile band of submerged lands that had been included in a 1949 reservation of a national park in the Channel Islands National Monument area of California, the U.S. Supreme Court found the Submerged Lands Act conferred even such park lands to the states. U.S. v. California, 436 U.S. 32, 41 (1977) ("A plainer statement of congressional intent would be hard to find.")

The Court also noted that even without title, the Submerged Lands Act "provides for the retention by the United States of its navigational servitude and its 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 . . . 67 Stat. 32, 43 U.S.C. 1314(a)." Id.

The states can, of course, transfer title to submerged lands to the federal government in accordance with public trust requirements. See e.g., AS 35.05.045 (sale of submerged lands generally prohibited) and 819(a) (transfer to federal agency

for public use okay); also California Public Res. code 6301.5.

However, to date Congress has not deemed that "it is important to all the citizens of the United States, to have this area [of the territorial sea] managed by the federal government." Even more so, this is clearly no basis for a grant of federal ownership to a belt of submerged lands that would surround the states from three to twelve miles. Such a decision would be a profound deviation from the previously expressed will of Congress in the Submerged Lands Act.

4. O.C.S. Revenue "Losses"

Question

How does Alaska propose that Congress offset the potentially large revenue losses to the federal government from O.C.S. oil and gas development if we were to extend state boundaries to 12 miles.

Answer

At this time, we are unaware of any "potentially large revenue losses to the federal government" that would result from an extension of state boundaries to 12 miles. For example, in Alaska, the only offshore production is from 262 state wells producing oil and gas on state submerged lands from Cook Inlet to Prudhoe Bay. There are no producing wells on the outer continental shelf. Further, there do not appear to be any prospects for any revenue generating wells at this time.

The same appears to be true for other states. Even where there might be some revenue potential beyond three miles, as long as federal control continues to 12 miles, the submerged lands between three and 12 miles are subject to drilling moratoria.

In any case, there are no recent, verifiable figures reflecting and "potentially large revenues" on O.C.S. lands.

5. Possible Alaska Development Initiatives to 12 Miles

Question

In what areas of the O.C.S. would Alaska allow oil and gas development to take place if Alaska and other states were granted an extension of their boundaries to 12 miles?

Answer

The State of Alaska would very much like to include outer continental shelf lands from three to 12 miles in the state's current oil and gas leasing program. However, based on the present disparity between exploration and production in state waters within three miles and the federal outer continental shelf, we would expect most oil and gas activity would continue to take place in near shore areas.

Under the five year schedules described in AS 38.05.180(b), in order to open the area from three to 12 miles, likely tracts are first nominated. These would then be subjected to geologic, economic, and environmental evaluations before production was authorized. If lessees failed to produce oil or gas within ten years, the leases usually provide for default to the state.

6. Fisheries Management

Question

The Magnuson Act was passed in 1976 to deal with interstate fishing disputes and assure regional management of fishing stocks throughout their range. Your proposal would have the Congress roll back some of these fundamental principles on fisheries management.

Are you recommending that Congress change the structure of the Magnuson Act and allow the states to assume direct responsibility for all fisheries between 3 and 12 miles? If so, how can we ensure that fishery stocks are managed throughout their range?

Answer

Rather than representing a federal fisheries management program from 3 to 12 miles to "deal with interstate fishing disputes" and "assure regional management of fishing stocks throughout their range," we believe the Magnuson Fishery Conservation and Management Act is designed to "protect and maintain the diversity of fisheries in the United States." 16 U.S.C. 1801(c)(4). The MFCMA was also designed to "Americanize" fisheries within 200 miles of our coastline. 16 U.S.C. 1801 (a)(3), (a)(7), (b)(6), etc. It was not enacted to regionalize management responsibilities that could otherwise be handled by the states.

Only when state action "will substantially and adversely affect the carrying out of a fishery management plan" is it necessary for the federal government to "assume responsibility

for the regulation of any fishery." 16 U.S.C. 1856(b) (1) (B) and (b) (2). Otherwise, the "Act shall not be construed as extending or diminishing the jurisdiction or authority of any State. . . ." 16 U.S.C. 1856(a) (1).

Since all species presently subject to federal Fishery Management Plans from three to 200 miles would still be covered by the same plans if state fisheries jurisdiction reached 12 miles, the National Marine Fisheries Service would have the same authority it has today to "assume responsibility for the regulation of any fishery" 16 U.S.C. 1865(b) (2).

Such interstate conflicts should not, however, be imagined because the states are under an obligation to conform management options for interstate fisheries to the standards of MFCMA plans. Thus, no state could act in a way that jeopardizes any resource. Similarly, the MFCMA and federal constitutional guarantees of equal protection, privileges and immunities and commerce clause protection would prevent discriminatory treatment of nonresidents. Finally, the open access provisions of the Alaska Constitution at Article VIII (attached) give offer even further assurances of fair treatment.

In conclusion, an extension of state jurisdiction to 12 miles does not require the Congress to "change the structure of the Magnuson Act." It would simply authorize the states to do what they do best, namely manage the resources off their coasts free from the conflict that would be unnecessarily generated by a nine mile ribbon of inclusive federal ownership and control. As is the case today to three miles, the state's activities would be subject all applicable federal laws on fisheries, commerce, navigation, national defense, international affairs, etc.

7. Revenue Gains to the State

Question

Do you have any estimates of revenue gains to the State of Alaska if Congress were to extend its boundaries seaward another 9 miles?

Answer

An extension of the state's seaward boundaries to 12 miles from the coastline (including barrier island chains) is not expected to result in any appreciable revenue gains in the foreseeable future.



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COMMITTEE ON MERCHANT
MARINE AND FISHERIES

January 28, 1992

The Honorable Walter B. Jones
Chairman
House Committee on Merchant
Marine and Fisheries
1334 Longworth House Office Building
Washington, DC 20515-6230

Attention Ms. Joan Bondareff, Senior Counsel

Dear Mr. Chairman:

The attached resolution adopted recently by the Western States Land Commissioners Association may be of interest to the Committee during its deliberations on H.R. 3842 and H.R. 536. Should the Committee have any questions, please call Mr. Garry Mauro, Texas Land Commissioner, telephone (512) 463-5256.

Sincerely,

James F. Trout
James F. Trout
Secretary

Attachment

cc: Garry Mauro

Alaska • Arizona • Arkansas • California • Colorado • Hawaii • Idaho • Louisiana • Minnesota • Montana • Nebraska • Nevada
New Mexico • North Dakota • Oklahoma • Oregon • South Dakota • Texas • Utah • Washington • Wisconsin • Wyoming



**RESOLUTION CONCERNING
EXTENSION OF THE TERRITORIAL SEA**

WHEREAS, efforts are underway in the United States Congress to extend the territorial sea, thereby extending state sovereign authority and ownership to lands under navigable waters; and

WHEREAS, it is in the interest of the coastal states to own and manage submerged lands under the territorial sea; and

WHEREAS, the expansion of state jurisdiction would enable states to extend their policies consistent with those they apply under the submerged lands trust;

NOW THEREFORE BE IT RESOLVED, that the Western States Land Commissioners Association urges its member states to support Congressional efforts to amend the Submerged Lands Act to extend the lands under navigable waters of coastal states and territories from three to twelve nautical miles seaward from the coastline.

Adopted this ninth day of January, 1992

Richard R. LeBlanc
President

James F. Trout
Secretary

Alaska • Arizona • Arkansas • California • Colorado • Hawaii • Idaho • Louisiana • Minnesota • Montana • Nebraska • Nevada
New Mexico • North Dakota • Oklahoma • Oregon • South Dakota • Texas • Utah • Washington • Wisconsin • Wyoming

**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

1735 New York Ave. N.W. • Suite 500 • Washington, DC 20006
Telephone: 202-662-8411 • Fax: 202-737-4045

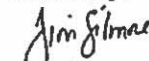
The Honorable Walter B. Jones
January 30, 1992
Page 2

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.

APTA 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,



Jim Gilmore
Washington Representative

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FEB 19 1992

COMMITTEE ON MERCHANT MARINE AND FISHERIES

5332 W. Falls View Dr.
San Diego, CA 92115
12 February 1992

The Honorable Walter B. Jones, Chairman
Committee on Merchant Marine and Fisheries
United States House of Representatives
Room 1334 Longworth House Office Building
Washington, DC 20515

Dear Chairman Jones:

If the hearing held February 4 on H.R. 3842 is still open, please accept this communication with enclosures as testimony concerning it. If not, please refer it to the Committee's staff for future reference. Information in the enclosures is especially relevant to the subject of H.R. 536 which received mention during the February 4 hearing. I feel certain that it will be of interest when H.R. 536 is considered.

Extending national territorial limits to 12 miles is sound policy; existing laws need rationalization to reflect the extension. H.R. 3842 does this well. Testimony presented February 4 includes additional laws that need to be referenced in it, but the basic concepts are sound and clearly stated. My one caveat would be to make sure that the resources management study proposed in Section 8 is objectively prepared. While the National Sea Grant program is financed largely from national funds, the coastal states play a dominant role in allocation of these funds. Many studies where federal and state interests are at question in Sea Grant sponsored research to date show a bias in favor of greater state control. This bias reflects the control of funding, not an objective assessment of facts.

An objective assessment of marine fishery resources leaves no question of the need for unified management areas as large as can be realistically formed. The reasons rest not a question of equity between the state and federal levels but in adverse effects on productivity. The interests of citizens of coastal states would be much better served by unified management than by the fragmentation of ecosystems that result from state control. The reasoning for these conclusions is spelled out clearly in chapter 4 of the enclosed book, Ownership and Productivity of Marine Fishery Resources. The case studies of striped bass and redfish in the section headed "Unified National Control of Fisheries" (pp. 65-75) present ample empirical evidence of the benefits that the citizens of coastal states could gain from a large area management system.

H.R. 536 would effectively prevent the benefits of large area management to the detriment of coastal states as well as the nation as a whole. It would also seriously impair development of measures to remove the imperatives of the commons. The rationale for this conclusion is presented in the above cited book, and in the short article of the same title, enclosed with this letter.

The key maxim here is to "Harvest first, divide profits afterward." If the states must share as states in these profits, then I suggest that legislation be developed to permit this maxim to be fulfilled through a state-federal profit sharing system.

My own feeling is that the question of equity favors federal control of all ocean resources, especially those beyond the historical three mile limit. The extension of national control over resources to 200 miles off our coasts was made in the name of the citizens of the nation as a whole, not those of the coastal states alone. Coastal states gain because of the economic activity associated with development of mineral resources that resulted from the extension. Coastal state citizens will also benefit in every way from increased productivity of living marine resources that can result from unified management under a system of full ownership. If, however, self interest must rule, let the coastal states realize that in reference to fishery resources, their self interest resides in unified management. State control has been properly tested. The empirical evidence of this is clear; the logic behind this no less so.

Thank you for such consideration as you may give to the ideas presented here and in the enclosures.

Sincerely yours,

Elmer A. Keen

Elmer A. Keen

enclosures:

Elmer A. Keen. 1988. Ownership and Productivity of Marine Fishery Resources: An Essay on the Resolution of Conflict in the Use of the Ocean Pastures. Blacksburg, VA: The McDonald and Woodward Publishing Company.

Elmer A. Keen. 1991. "Ownership and Productivity of Marine Fishery Resources," Fisheries, V.16, Nr.4, pp 18-22.

Feature

Ownership and Productivity of Marine Fishery Resources

Elmer A. Keen

ABSTRACT

The incentives of the commons ceased to suffice as a management framework for marine fishery resources during the 1960s. The laws of demand and supply went awry. Demand rose; supply of the more valuable species declined as fishing effort increased. Measures taken to solve the resulting overfishing problem have failed to remove the root cause, the incentives of harvest rights inherent in a commons. The resulting management system creates ill will and friction that severely impede management of the resources. The efficacy of a management framework based on ownership of the ocean pastures is compared to one based on rights to harvest. The conclusion is reached that a full owner framework provides a well-tested basis for management of marine fishery resources that can result in a large increase in resource benefits.

Introduction

Fishermen are forced onto the innovation treadmill by the common property nature of fishery resources," according to Serchuk and Smolowitz (1990, p. 6). They note that in 1987, the daily catch rate per vessel in the New England groundfish fishery averaged only 5,500 lbs of all marketable species combined, whereas the rate for haddock (*Melanogrammus aeglefinus*) alone averaged 12,000 lbs. 1935 through 1960, Serchuk and Smolowitz (1990) suggest that managers should turn to control of technology rather than restrict fishing effort and/or total landings.

A more fruitful approach would be to ask why common property worked for fisheries until about 1960 but has proved woefully inadequate since. The answer points to changes that can be far more effective than measures used to date: technology control included.

Why and When Common Property Failed

The common property framework no longer works because it puts the law of supply in reverse. In 1960, the price of fish ranked about even with chicken but well below that of beef (Figure 1) and other red meats. The commons framework worked well at that time.

If the price of fish went up, fishermen fished more, caught more, and the price fell back in line. In the mid-1960s fish prices began to rise and have continued to do so at a rate well above the rate of inflation. Flounder (*Limanda ferruginea*) landed in New England rose about 20-fold in price, haddock almost 10-fold, between 1960 and 1985. Beef prices rise and fall largely because the long cycle of reproduction and the low fecundity rate of cows slows the response to price changes, but prices more or less matched inflation over the period. Chickens, with their short cycle of reproduction and high fecundity rate, enabled poultry producers to respond smoothly and evenly to market signals. The technology of chicken production also improved considerably. As a result, consumers find chicken cheaper in real terms today than they did in 1960.

The precipitous rise in fish prices since the 1960s resulted from a stagnation or actual decrease (see, e.g., Figure 2) in supply of the more desirable fish while demand for them increased. Why did the commons framework produce such a disastrous reversal of the law of supply at this time? Figure 3 shows 1978 levels of exploitation of the fish stocks depicted. Stocks shown to the left of the Maximum Sustainable Yield (MSY) line respond to demand as expected; if

demand increases so does supply. For stocks to the right, the law of supply is in reverse. An increase in demand can only lead to a decrease in supply. I call the point at the top the tragedy point. It is tragic that we go beyond it and produce fewer fish because of overinvestment in fishing effort when investing in the stocks could lead to a larger supply.

A graph for the late 1950s would show the law of supply in reverse for the sardine, *Sardinops sagax*, only. All others were still to the left of the tragedy point. The haddock still responded positively to an increase in demand. Pulse fishing by European fishermen helped push the haddock and cod, *Gadus morhua*, over the top in the early 1960s. Japanese and Soviet mothership fleets did the same for the Pacific ocean perch, *Sebastes alutus*, stocks. Prices continued to rise for these fish, fishermen found they could make ends meet just as well catching fewer fish at the higher prices received. Fishing effort continued to grow; supply continued to fall. Price increases permitted fewer fish to support increasing numbers of fishermen.

Replace the common property framework with the full owner framework under which the farmer, used as an example by Serchuk and Smolowitz (1990), operates and such would not happen. A full owner would have, at worst, stopped adding fishing effort at the MSY point and have watched profits grow as costs remained fixed and prices rose. At best, a full owner also would have increased volume and unit

Elmer A. Keen is a professor emeritus, Department of Geography, San Diego State University, San Diego, CA 92182. His principal research interest is the management of marine fishery resources.

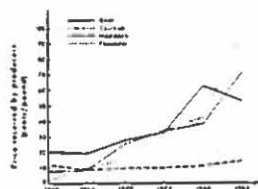


Figure 1. New England ex-vessel prices for haddock and flounder compared to farm prices for beef and chicken, 1960-65. Data from U. S. Statistical Abstract.

value of landings by more careful management and by investing in research to find ways to produce more high value species. Just as a rancher removes thistles and tumbleweed from pastures to reduce competition and favor better species, so might the ocean pasture owner weed out competing species to encourage production of the more desirable ones. The fecundity rate of fish greatly exceeds that for chicken; research to take advantage of this high fecundity could also be expected.

Imperatives of the Commons

The incentives, or perhaps better imperatives, that common property places on fishermen are strong ones. Once fishing pressure exceeds the tragedy point in stock exploitation, these imperatives wreak disaster unless countered. Countering them through control of technology has been tried with only limited success; the various forms of harvester rights, lumped together under the generic term limited entry, have not proved any more effective. Ownership of an individual fish under a commons framework comes only with capture. This is the key element to keep in mind if the imperatives of the commons are to be understood. The more critical of these imperatives are:

- To harvest the best first;
- To invest in more efficient ways to harvest the resource;
- To harvest the resource before someone else does;
- To avoid being laughed at for investing to increase overall productivity of the resource only to have the benefits accrue largely to someone else.

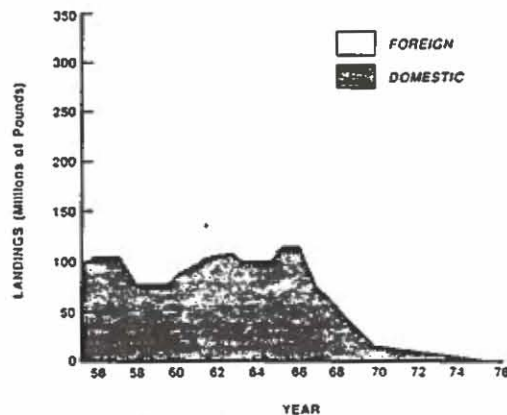


Figure 2. Haddock landings from Georges Bank, 1955-75. National Marine Fisheries Service briefing materials, undated.

The first two imperatives make good sense before the tragedy point is reached. For example, in the days when salmon were plentiful, a salmon fisherman went after the most valuable fish—large chinook or spring salmon, *Oncorhynchus tshawytscha*. If he caught silvers, *Oncorhynchus kisutch*, pinks, *Oncorhynchus gorbuscha*, or smaller chinooks, he kept them just in case he did not fill up with the more valuable

large chinooks that consumers wanted most. If he loaded his boat with variety while chinook were still biting, the harvest the best-first imperative became market the best first. He quite logically would continue to fish and replace less valuable species and sizes until return to port became the wiser course of action. He may actually have thrown away more salmon than he landed, but the consumer was well

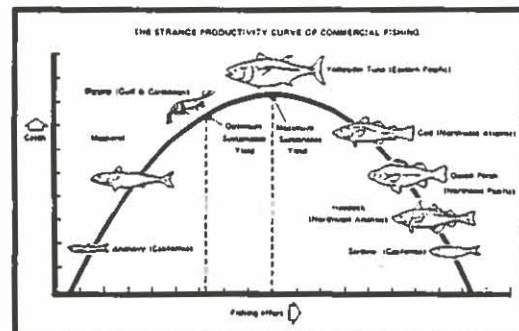


Figure 3. The relationship between fishing effort and catch for fishery resources managed under a common property framework. National Marine Fisheries Service briefing materials, undated.

served because the most desired fish was made available at the lowest price. Improved technology, of course, made the individual fisherman more competitive and encouraged this upgrading of the catch before returning to port. Fishermen and consumers alike benefited from these two imperatives. Needless to say, this is no longer the case.

The imperative to harvest before someone else does so becomes especially strong after the tragedy point sets in and annual catch quotas are established. Data on the Pacific halibut, *Hippoglossus stenolepis*, fishery (Figure 4) illustrate this well. The quota for area 3A, the area with the largest quota, was taken in 4 days. Hundreds of boats had to be frozen to avoid flooding the market. The quality of the fish dropped because of poor handling while fishing, inadequate freezing equipment to handle such a large volume of fish, and having to freeze fish for storage when they could have been stored to much better advantage in the ocean. A full owner would harvest as the market dictated. The volume and unit value of halibut would rise to the benefit of all concerned.

Alaskan salmon fisheries illustrate the last imperative very well. These fisheries are under a limited entry system. Licenses for which the original recipient paid only the cost of issuance may now sell for a half million dollars or more. The value of the license is suggestive of the pure profit that ac-

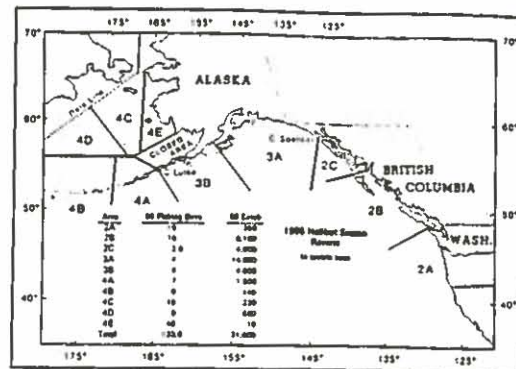


Figure 4. The 1986 halibut fishery by length of season and landings by management area for the fishery. Data and base map from the International Pacific Halibut Commission.

crues to the owner. Salmon hatcheries for wild stock pay off quite well, but fishermen have little incentive to invest any part of profits to increase overall production as long as numerous other fishermen have an equal right to harvest the fruits of the investment. The individual making the investment would recover only a small part of it even though the value of the total increase in landings resulting would be far larger than the sum invested.

Efforts to control overfishing of both Pacific halibut and salmon through control of technology, length of season, and annual quotas led to gross ineffi-

ciencies being imposed on harvest of stocks of these species. Economists used them as examples for development of limited entry concepts with various forms of harvester rights (Crutchfield and Zellner 1962, Crutchfield and Pontecorvo 1969). Advocates of limited entry seem to assume that rights to harvest remove the imperatives of the commons. They do not. All reasonable forms of such rights have been tested. The latest and most hopeful to the fishery management methodologists are individual transferable quotas. This form gives each right-holding fisherman a share of the annual

quota while the fish are still in the ocean. Fishermen can then take their quotas when they wish. This removes the imperative to take the best first that we saw in action with the Pacific salmon, but it greatly strengthens the imperative to land only the best. It leads to a major waste of fish at sea for many species where value varies with size (Edwards and Murawski, unpublished data).

The most important maxim that can be drawn from our now considerable experience with management of fishery resources beyond the tragedy point is to harvest first, allocate the benefits later (Keen 1988). Allocation of rights while fish are still in the water results in inefficiencies in producing, harvesting, and marketing that simply cannot be justified. The regulatory system required to administer harvester rights creates friction and ill will that interferes with management of the stocks at all levels. Figure 5, for example, shows Barber's (1987) interpretation of the North Pacific Fishery Management Council engaged in the allocation process. The divisiveness and friction portrayed can only grow if the stocks improve and the pie grows larger. The imperatives growing out of the common property dictum that ownership comes only with capture assures this.

The Benefits of Full Ownership

A full owner framework removes the divisiveness inherent in allocation un-



Figure 5. The North Pacific Fisheries Management Council allocating annual allowable catches. Barber (1987).

der harvester rights. Payment for harvest is in currency in keeping with the service rendered. No more friction and ill feeling will be created than is created in the harvest of grain in the high plains of North America or of pen-cultured salmon in British Columbia. Harvesters will have no reason to give misleading data on catches. Managers will have a much better data base from which to work. Marketing will be carried out in response to market forces alone with no adverse effects from the imperatives of the commons.

The Alaska salmon fishery provides an excellent example of the benefits that could derive from full ownership. At the 1989 American Fisheries Society annual meeting in Anchorage, the president of the Alaska Chapter proudly announced that the value of the 1988 salmon landings totalled \$740 million, the highest on record. A full owner would, conservatively speaking, have increased this value to over \$1 billion. The harvest took place under the imperatives of the commons. The entire \$740 million went to harvest of the

resource. Using the most effective harvest methods, traps and wheels included, the cost of harvest could have been kept well under \$100 million. The fish would have been landed in superior condition without waste and at a higher market value overall. The fishery could easily have returned a pure profit of at least a half billion dollars. This economic rent could have been used to make everyone connected with the fishery better off. Older fishermen who wished to do so could have retired permanently at a comfortable level. Others could have been paid at income levels of the past to give up fishing if they so desired. Suppliers of vessels and gear could have been compensated for any reduction in income resulting from elimination of fishing effort. Funds for management, including enhancement, would be ample. The true owners of the resource—all citizens including fishermen—would get more and better fish, and at lower costs.

Leading advocates of harvester rights recognize the efficacy of full or sole ownership but write it off as being too draconian or politically impossible (Crutchfield 1959; Pearse 1981). In the years immediately after the law of supply went into reverse, a change to full ownership probably sounded too radical. Frustration with attempts to manage fisheries under harvester rights since then has led to sober rethinking of the basic cause for reversal. Full ownership may soon be accepted as the conservative move that it is (Ackroyd et al. 1990). The size and nature of the ownership unit and agency will

be different (Keen 1989), but rights of ownership to ocean pastures are no different in principle than the basic rights to land that provide incentives to farmers and ranchers in market-controlled economies. The major political impediment to full ownership was the narrow territorial seas that cut the habitats of most stocks of fish in two. This has been removed in large part by the 200-mile Exclusive Economic Zones that assure coastal nation control over 90% of the oceans' commercial fishery stocks.

Conclusion

Changes in institutional arrangements that make the law of supply work as we expect it to work are needed. Common property focuses investment incentives on harvest; this worked well as long as fish were plentiful. We now need arrangements that focus investment incentives on the ocean pastures. Full ownership in the sense of that held by a farmer or rancher is a tried and true way to provide the needed incentives. To do so will capture the potential profit represented by the biggest impediment to good fisheries management—overinvestment in the means of harvest. Ways to allocate profits will need to be worked out. Do they, for example, go to the public treasury because we elect to have a public owner, or do they go to stockholders because we elect to place the fisheries under a privately-held corporation with stock initially divided equitably among those now in the fish-

ery? Either way, the allocation process will be a much less friction ridden one than we now have; the benefits to be allocated will be much larger. The maxim of harvest first, allocate afterward will be met. Everyone wins, or at least can, be much better off as a consequence.

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Office of the Governor

LORENZO L. DELEON GUERRERO

Governor

BENJAMIN T. MANGLOMA
Lieutenant Governor

Commonwealth of the Northern Mariana Islands

19 FEB 1992

RECEIVED

FEB 27 1992

COMMITTEE ON MERCHANT MARINE

The Honorable Walter B. Jones, Chairman
Committee on Merchant Marine and Fisheries
United States House of Representatives
Room 1334, Longworth House Office Bldg.
Washington, DC 20515-6230

Dear Chairman Jones:

I have been advised of the Hearing on H.R. 3842, the Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991, scheduled before your Committee on February 4, 1992. I am happy to learn that Governor Guerrero testified before your distinguished committee. This bill, as I understand it, is designed to implement Presidential Proclamation 5928 of December 27, 1988, which extended the territorial sea of the United States and Commonwealth of the Northern Mariana Islands to twelve nautical miles.

The issue of the extent and jurisdiction of the Commonwealth's territorial sea and submerged lands has for some years been the subject of consultations between Special Representatives of the Governor of the Northern Mariana Islands and a Special Representative of the President of the United States pursuant to Section 902 of our Covenant with the United States. I am pleased to chair the Governor's Special Representatives at those consultations. In March 1987, during the Third Round of Consultations, the Commonwealth presented a position paper on Ocean Rights and Resources, proposing a means of clarifying the Commonwealth's rights and responsibilities in the ocean waters surrounding the Northern Mariana Islands, including the territorial sea.

On April 12, 1990, during the Eighth Round of Consultations, the Special Representatives of the President and the Governor agreed in principle to a basis for resolving the issue of Ocean Rights and Resources. The Special Representatives agreed that the Commonwealth's "sovereign right to ownership and jurisdiction of the waters and seabed surrounding the Northern Mariana Islands" should be recognized and confirmed by the United States. Under this proposal, "the Commonwealth shall have the rights of a coastal state in the territorial sea, . . . the exclusive economic zone,

* Memorandum of Agreement on Ocean Rights and Resources, April 12, 1990, enclosed with this letter.

and the continental shelf as provided in the United Nations Convention on the Law of the Sea." The agreement provides that the exercise of these rights "shall be done in cooperation with the United States and subject to the responsibility and authority of the United States with respect to foreign affairs and defense under Section 104 of the Covenant."

Unfortunately, this agreement has encountered criticism from the U.S. Department of State and has not yet been implemented. The State Department insists that:

Congress under the terms of the Submerged Lands Act . . . conveyed all proprietary interests to the resources located within three miles from shore to the several States Until such time as Congress may be disposed to enact similar legislation on behalf of the Northern Mariana Islands, it is clear beyond doubt that title thereto rests in the Federal Government.

The State Department opinion ignores the fact that title to the submerged lands underlying the territorial sea of the Northern Mariana Islands, previously vested in the Trust Territory of the Pacific Islands, passed to the Commonwealth pursuant to Department of the Interior Orders 2969 and 2989 and Section 801 of the Covenant.

Consultations on this issue continue. The Special Representative of the President of the United States remains committed to resolving the issue on the basis of our April 1990 agreement. Given the current disagreement between the Commonwealth and the United States Government on this issue, we are very concerned that H.R. 3842 might, if passed, be interpreted to preempt our Commonwealth's existing rights in the territorial sea, submerged lands and contiguous zone. We respectfully request that the Commonwealth be removed from the application of this bill, so that this issue may be resolved pursuant to the procedures established by our Covenant with the United States.

I understand that the record of this hearing will remain open for written comment. I will be pleased to submit, in the near future, a statement summarizing the progress of our consultations on the issue and our position on H.R. 3842 as it applies to the Commonwealth.

Sincerely,

BENJAMIN T. MANGLOMA
Chairman, 902 Governor's Special Representative

THE SPECIAL REPRESENTATIVE OF
THE PRESIDENT OF THE UNITED STATES
and
THE SPECIAL REPRESENTATIVES OF
THE GOVERNOR OF
THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MEMORANDUM OF AGREEMENT
ON
OCEAN RIGHTS AND RESOURCES

April 12, 1990

The Special Representative of the President of the United States and the Special Representatives of the Governor of the Commonwealth of the Northern Mariana Islands, appointed pursuant to Section 902 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, met and conferred at the Eighth Round of Consultations pursuant to 902 in Saipan, on April 9 through 12, 1990.

The Special Representatives of the President and the Governor agreed in principle to a basis for resolution of the issue of "Ocean Rights and Resources." This issue was raised by the Special Representatives of the Commonwealth in a position paper submitted in our consultations on March 30, 1987. The issue concerns the authority of the Commonwealth of the Northern Mariana Islands to conserve, manage and control the marine resources in the waters and seabed of the territorial sea and exclusive economic zone of the Commonwealth for the benefit of the people of the Northern Mariana Islands.

The Special Representative of the President agrees to support the Commonwealth's proposal that the authority and jurisdiction of the Commonwealth of the Northern Mariana Islands be recognized and confirmed by the United States to include the sovereign right to ownership and jurisdiction of the waters and seabed surrounding the Northern Mariana Islands to the full extent permitted under international law. Under this proposal, the Commonwealth shall have the rights of a coastal state in the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf as provided in the United Nations Convention on the Law of the Sea; provided that the exercise of those rights shall be done in cooperation with the United States and subject to the responsibility and authority of the United States with respect to foreign affairs and defense under Section 104 of the Covenant.

Agreement on Ocean Resources
Eighth Round
April 12, 1990
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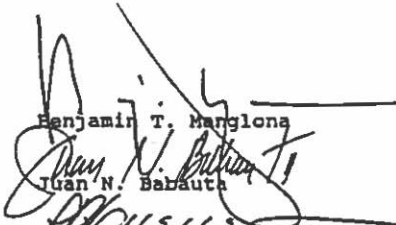
In addition, the proposal provides that the Northern Mariana Islands shall, with the approval of and in cooperation with the United States, participate in regional and international organizations which are concerned with international regulation of the rights set out above, and may enter into treaties and other international agreements regarding the exercise of those rights, including such treaties and agreements relating to the harvesting, conservation, management, exploration or exploitation of the living and non-living resources from the marginal sea.

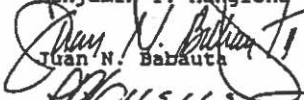
The United States assist or act on behalf of the Northern Mariana Islands in the area of foreign affairs as may be requested by the Northern Mariana Islands, and mutually agreed from time to time, to such extent as is required for the exercise of the rights of the Northern Mariana Islands in the exclusive economic zone.

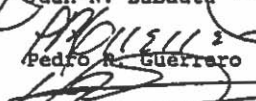
The Special Representative of the President agrees to support this proposal for resolution of the issue within the Government of the United States, to seek agreement to the proposal within other agencies of the Government of the United States. The Special Representative of the United States will consider technical advice on appropriate means of recognizing, confirming and implementing the described rights of the Northern Mariana Islands in its territorial sea and exclusive economic zone and will respond to the Commonwealth's other proposals for resolving this issue at the earliest possible date.

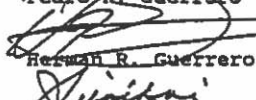
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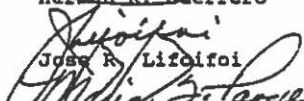
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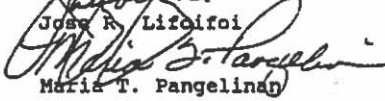

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