No. 118, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ALASKA,

Defendant.

Brief *Amicus Curiae* of the States of:

ALABAMA, CALIFORNIA, DELAWARE, FLORIDA, GEORGIA, HAWAII, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, NEW JERSEY, NORTH CAROLINA, SOUTH CAROLINA, TEXAS, VIRGINIA, AND WASHINGTON,

Joined by the
COASTAL STATES ORGANIZATION

IN SUPPORT OF DEFENDANT

Of Counsel:

THOMAS F. GEDE
Special Assistant
Attorney General
State of California

DAVID C. SLADE, ESQ.
Counsel of Record
COASTAL STATES ORGANIZATION
Suite 312
444 N. Capitol Street
Washington, D.C. 20001
(202) 628-9636

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

STATE OF ALABAMA
By: JAMES H. EVANS
Attorney General
11 S. Union St.
Montgomery, AL 36130

STATE OF CALIFORNIA
By: DANIEL E. LUNGREN
Attorney General
1515 K Street
Sacramento, CA 95814

STATE OF DELAWARE
By: CHARLES M. OBERLY, III
Attorney General
820 N. French St.
Wilmington, DE 19801

STATE OF FLORIDA
By: ROBERT BUTTERWORTH
Attorney General
The Capitol
Tallahassee, FL 32399

STATE OF GEORGIA
By: MICHAEL J. BOWERS
Attorney General
132 State Judicial Bldg.
Atlanta, GA 30334

STATE OF HAWAII
By: WARREN PRICE, III
Attorney General
425 Queen Street
Honolulu, HI 96813

STATE OF LOUISIANA
By: WILLIAM J. GUSTE, JR.
Attorney General
P.O. Box 94095
Baton Rouge, LA 70804-9095

STATE OF MASSACHUSETTS
By: SCOTT HARSHBARGER
Attorney General
1 Ashburton Place
Boston, MA 02108-1698

STATE OF MISSISSIPPI
By: MICHAEL C. MOORE
Attorney General
P.O. Box 220
Jackson, MS 39205

STATE OF NEW JERSEY
By: ROBERT J. DEL TUFO, JR.
Attorney General
CN-080
Hughes Justice Complex
Trenton, NJ 08625

STATE OF NORTH CAROLINA
By: Lacy H. Thornburg
Attorney General
P.O. Box 629
Raleigh, NC 27602-0629

STATE OF TEXAS
By: DAN MORALES
Attorney General
P.O. Box 12548
Austin, TX 78711

STATE OF SOUTH CAROLINA
By: C.C. HARNESS, III
General Counsel
S.C. Coastal Council
4130 Faber Place
Charleston, SC 29405

COMMONWEALTH OF VIRGINIA
By: MARY SUE TERRY
Attorney General
101 N. Eighth St.
Richmond, VA 23219

STATE OF WASHINGTON
By: KENNETH EIKENBERRY
Attorney General
Mail Stop QA-44
Olympia, WA 98504

COASTAL STATES ORGANIZATION
By: DAVID C. SLADE
General Counsel
444 N. Capitol St.
Washington, D.C. 20001

QUESTIONS PRESENTED

Did Congress authorize the Army Corps of Engineers, acting with the U.S. Departments of the Interior and Justice, to deny the issuance of a permit for a coastal project, regardless of the sponsor of that project, until the coastal State in which the project is located disclaims its rights under the Submerged Lands Act to any additional State submerged lands that may result if the project causes an extension of the coastline?

May the Army Corps of Engineers, acting with the Departments of Interior and Justice, make a blanket determination that coastal jetties, groins, causeways and other structures are not "in the public interest" if their effect is to cause an extension of a State's seaward boundary?

Did Congress authorize the Army Corps of Engineers, acting with the U.S. Departments of the Interior and Justice, to deny coastal States the benefit of an enhanced seaward boundary caused by an artificial modification of the coastline even though the federal government may take advantage of such an artificial accretion in order to extend its own outer continental shelf lands?

TABLE OF CONTENTS

TABLE OF CONTENTS, cont'd Page

TABLE OF CONTENTS, cont'd Page

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES, cont'd

TABLE OF AUTHORITIES, cont'd

TABLE OF AUTHORITIES, cont'd

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ALASKA,

Defendant.

Brief *Amicus Curiae* of the States of:

ALABAMA, CALIFORNIA, DELAWARE, FLORIDA, GEORGIA, HAWAII, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, NEW JERSEY, NORTH CAROLINA, SOUTH CAROLINA, TEXAS, VIRGINIA, AND WASHINGTON,

Joined by the
COASTAL STATES ORGANIZATION

IN SUPPORT OF DEFENDANT

STATEMENT OF INTEREST OF AMICI STATES and the COASTAL STATES ORGANIZATION IN THE OUTCOME OF THIS CASE

The fifteen States joining this brief *amicus curiae* ring the country. Their economies to a great extent depend upon their ports and harbors, their beaches and shores. The central facts of this case pertain to a new port facility constructed in Nome, Alaska, specifically a solid fill causeway extending 2,700 feet perpendicularly from the natural

coastline of Alaska. But the outcome of this case will have far-reaching implications, well beyond the City of Nome and State of Alaska, affecting all coastal projects that modify a State's natural shoreline.

The Coastal States Organization is an association of delegates of the Governors of the 35 coastal States, Commonwealths and Territories. Charged with advancing the interests and rights of the coastal States in coastal and marine affairs, the Coastal States Organization has coordinated the development of this *amicus* brief. The scope of interests of the Coastal States Organization, as well as its member States, includes the construction of ports and harbors, shoreline erosion control, rail and road highway systems, tourism and beach nourishment projects, all of which are affected by this case.

Over ninety-nine percent (99%) by weight of the overseas trade of the United States is carried by ship through U.S. ports.[1] A significant amount of domestic trade is also handled between coastal ports. As a result, all around the country port facilities are being constructed, modernized and improved. Causeways, artificial islands and jetties must be installed to link the Nation's highways and railways with waterborne commerce. With very few exceptions, nearly every port in the United States services this vessel traffic from such artificial landfills, harbor works, islands, causeways and other man-made improvements in the shoreline. The Nation's interstate and

---

[1] *U.S. Merchandise Trade, Selected Highlights*, Dec. 1990. Report FT 920, U.S. Department of Commerce, Bureau of the Census. Table 1, pg. 1, Table 6, pg. 16.

foreign commerce, conducted in a fiercely competitive international environment, depend directly upon the effective development and management of the coastal States' ports and harbors.

Much of the waterborne commerce is foreign oil which must be imported to fulfill the Nation's energy needs. As the United States seeks to curb the demand for foreign oil, we look harder and harder for domestic sources. Thus, offshore of Alaska, California, Texas, Louisiana, Alabama and Florida intensive exploration is occurring for offshore oil and gas. To find, develop and produce these offshore resources -- vital to the national interest -- fill must often be placed in the navigable waterways to construct permanent causeways for the exploration and production platforms, and the landing terminals shoreside.

At the same time, many Americans, in their "pursuit of happiness" enjoy the beaches and coasts of the country. Thus, it is no surprise that over 60 percent of Americans live in the coastal areas of the country.[2] Tourism, based on their beaches and shores, is a vital industry in many of the coastal States. But a major, and constant, problem of the coasts is erosion. Erosion threatens private property and the public's beaches without discrimination. In the never-ending battle against beach and shore erosion, revetments, groins, breakwaters and seawalls are being installed. Eroded beaches are often replenished and renourished with additional sand.

---

[2] Coastal States Organization, *America's Coasts*, 1986, at 6.

This case raises questions of national importance that link these otherwise disparate activities together, for each of these activities -- port development, highway and rail construction and maintenance, offshore energy production and erosion control -- requires a permit from the Army Corps of Engineers issued pursuant to 33 C.F.R. Part 320, which includes a "public interest review" of the project.

The general question before this Court is whether Congress authorized the United States Army Corps of Engineers (Army Corps) to require a State to waive its rights under the Submerged Lands Act of 1953 (43 U.S.C. 1301 - 1315) as a pre-condition to issuing a permit to construct an artificial structure, whether that be a causeway, artificial island, seawall or beach nourishment project, which would modify the natural coastline from which the State's three-mile seaward boundary is measured. All State parties to this *amicus* brief have a vital interest in the Court's answer to this question.

To the best of our knowledge, this challenge of 33 C.F.R. § 320.4(f) is a case of first impression. We know of no other federal court case challenging the legitimacy of this provision of the U.S. Code of Federal Regulations.

BACKGROUND STATEMENT

A. The delineation of a State's three-mile seaward boundary.

In simple terms, a State measures its three-mile seaward boundary from the "coast line" in accordance with the

Submerged Lands Act.[3] The "coast line" generally follows the "line of ordinary low water." See 43 U.S.C. 1301(c). Clearly, however, the "coast line" of the country must necessarily jump across the mouths of bays and rivers. Waters inside the "coast line" are inland waters.

In the congressional deliberations over the passage of the Submerged Lands Act, it became clear that agreement on the definition of "inland waters," *i.e.* where to draw the "coast line" across these bays and rivers, was likely to impede passage of the legislation. *See U.S. v. California*, 381 U.S. 139, 152 (1965). In the end, when enacting the Submerged Lands Act of 1953, Congress neither accepted nor rejected any rule or formula for addressing this problem, and left the task of defining "inland waters" to the courts. *Id.* at 150-152, 157, 164.

About a decade later, in 1964, the United States ratified the Convention on the Territorial Sea and Contiguous Zone, T.I.A.S. 5639, 15 U.S.T. (Pt. 2) 1606 (1958) (Territorial Sea Convention), which established the principles for delineating the seaward territorial boundaries of the

---

[3] The States of Florida and Texas have historic boundaries in the Gulf of Mexico extending three marine leagues (nine geographic miles) from their coastlines. *See U.S. v. Louisiana*, 363 U.S. 1 (1960). Florida, on its Atlantic Ocean side, has a statutory three-mile seaward boundary, the same as the other *amici* States and Alaska. Regardless of whether a State has an historic or statutory boundary, however, the Army Corps requires a waiver of rights under the Submerged Lands Act. Thus, the Army Corps indiscriminately requires a State to sign such a waiver, causing the inherent delays in the issuance of the necessary permit.

signatory countries. This convention provided that a country's territorial sea boundary would be measured from a "baseline" that, like the Submerged Lands Act's "coast line," generally follows the line of ordinary low water. *Id.*, art. 3.

This Court has recognized the Territorial Sea Convention as "the best and most workable" solution to the problems of delimiting the State submerged lands. In its 1965 decision in *U.S. v. California*, this Court held that the territorial sea baseline established in accordance with the convention also delineates the "coast line" for purposes of the Submerged Lands Act. 381 U.S. 139, 165. This Court's purpose was to establish a "single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations ... " *Id.*, 381 U.S. at 165. The Territorial Sea Convention also establishes that the boundaries of a country's territorial sea are ambulatory, and may be modified by natural changes in the coastline, as well as artificial accretion. *See* T.I.A.S. 5639, 15 U.S.T. (Pt. 2, art. 8) 1606, 1608 (1958). This Court has held that the ambulatory nature of boundaries as allowed by the Convention applies equally to the delineation of State seaward boundaries. *See U.S. v. California*, 381 U.S. 139, 177 (1965); *U.S. v. California*, 432 U.S. 40, 41 (1977); *U.S. v. Louisiana*, 389 U.S. 155, 158 (1967); and *U.S. v. California*, 447 U.S. 1 (1980).

Thus, again in simple terms, a State locates its seaward boundary by measuring three geographic miles from the "baseline" from which the U.S. territorial sea is measured. The ease and beauty of this methodology is that the baseline from which the coastal States measure their three-mile seaward boundaries, the baseline from which

the United States measures its territorial sea boundary, and the baseline from which the United States measures the seaward boundary of the U.S. Exclusive Economic Zone remain one and the same. This result, a common baseline for measuring both State and Federal seaward boundaries, as intended by this Court, is however, frustrated by the Army Corps' policy of requiring States to waive their rights to an extended seaward boundary, while the federal government does not.

B. The "Double Standard" imposed by the Army Corps' waiver requirement results in different baselines for measuring a State's seaward boundary and the federal seaward Territorial Sea and Exclusive Economic Zone boundaries.

In effect, the federal government is employing a double standard. The extended coastline created by artificial projects of the kind at issue creates a new baseline for measuring the outward limits of the U.S. territorial sea, the outer continental shelf, as well as a State's submerged lands. *United States v. California*, 381 U.S. 139, 148-149 (1965). *See also* Shalowitz, *Shore and Sea Boundaries* 157 (U.S. Dept. of Commerce 1975 ed.). No such waiver, however, is made by the federal agencies of the additional territory and outer continental shelf lands gained accordingly. While taking advantage of the extended baseline for purposes of its territorial sea and outer continental shelf boundaries, it attempts to deny the same extension to affected States. Having multiple baselines from which to measure both State and Federal seaward boundaries is, however, precisely what this Court sought to avoid when it applied the provisions of the Territorial Sea Convention to define the term "coast line" for purposes of the Sub-

merged Lands Act. *See U.S. v. Louisiana*, 389 U.S. 155, 165 (1967).[4]

C. The nine projects requiring waivers.[5]

The Joint Stipulation of Facts requires that the Parties prepare a compilation of permits and disclaimers-of-rights in the Army Corps permits, and to lodge this compilation with this Court. *See* Joint Stipulation, at 7. In addition to this compilation, the following summary of these nine projects is informative as to the kinds of projects that are involved, projects that range from large port development projects to fairly minor (in terms of "coast line" relocation) beach renourishment projects. This summary also shows the pervasive and all-inclusive nature of the federal policy at issue.

---

[4] Of course, this Court has pointed out that Congress can, acting pursuant to the federal authority over navigable waters, protect itself against efforts by states to extend their seaward boundaries by making artificial changes to the shoreline. *See U.S. v. California*, *supra*, 381 U.S. at 177. None of these projects discussed in the next section, however, demonstrate such an intent by a State. The extension of the seaward boundary is merely incidental to the purpose of the projects.

[5] In addition to these waivers exacted from six states, the federal government is currently requiring the State of New Jersey to waive its rights under the Submerged Lands Act in connection with a beach replenishment project along the Atlantic Ocean in Loveladies, N.J. The State estimates that the project will increase the width of the present coastline by 50 feet. Thus, the boundary of the State would be extended three miles out by the same 50 feet. As of this date, the State has not signed this waiver.

Alaska: In addition to the Nome port project, the State was required to waive its rights in at least three other projects: for Sohio Alaska Petroleum Co to construct a causeway in the Beaufort Sea; for Standard Alaska Production Company, to construct a gravel fill causeway and enlarge an existing artificial island 1.25 miles off the coast at Heald Point in the Beaufort Sea, and for ARCO Alaska, to place gravel in waters of the United States. All three of these permits involved offshore oil production.

California: Two disclaimers have been exacted by the Army Corps. In 1970, the State waived its rights to submerged lands it would have received by virtue of an 8,800 foot freeway embankment in Ventura County, extending a maximum of 600 feet seaward. This project would have resulted in an additional four acres of submerged lands. The lands could have produced an estimated $125,000 in mineral resources. The other permit pertained to a 900 foot rock groin constructed by Chevron, U.S.A. off of El Segundo, which would have resulted in 100 acres of submerged lands coming into State ownership. In response to objections by the federal government, the State waived its rights in 1983.[6]

Florida: A waiver was required by the Army Corps before it would issue a permit to Collier County, a coastal county

---

[6] Sixteen other artificial structures, apparently constructed before the Corps adopted its offending policy, have been recognized by this Court for purposes of establishing the Federal/State boundary. *See U.S. v. California*, 432 U.S. 40, 41-42 (1977).

on the Gulf of Mexico. The permit was needed for a beach nourishment project to combat erosion. The State found that because charts were to be prepared that would permanently delineate the seaward historic boundary of the State of Florida (*See U.S. v. Florida*, 425 U.S. 791 (1976)) the boundary could not be extended by a beach nourishment project, and thus consented to signing the waiver. Nonetheless, additional delay in the issuance of the permit was the result.

Louisiana: A waiver was required by the Army Corps before a permit would be issued to the Louisiana State Department of Transportation and Development to install and maintain T-groins for erosion control. This action was necessary to protect a Louisiana State highway that was being threatened by coastal erosion.

North Carolina: The only known disclaimer for a coastal project arose in 1987, when the State Department of Transportation sought approval for an emergency project to protect a bridge span of N.C. Highway 12 between the Cape Hatteras National Seashore and Pea Island National Wildlife Refuge. This emergency project involved construction of a stone revetment extending 2,750 into the Atlantic Ocean to protect the bridge from erosion. The Army Corps conditioned its permit approval for this emergency project on the State waiving its rights under the Submerged Lands Act. If the State had refused the waiver, a project of national significance would have been delayed, if not prohibited outright.

South Carolina: Only one disclaimer has been required in the State, for a 1991 renourishment project to replenish the severely eroded shore at Folly Beach. South Carolina

was required by the Army Corps to waive its rights under the Submerged Lands Act even though the renourishment project would only temporarily extend the coastline a few hundred feet. In 1979, the beach at Hilton Head was renourished, at federal expense, and no waiver was required.

D. Local coastal projects provide national benefits, serve the "public interest," and should not be delayed.

The benefits of these local projects, whether it is the construction of a major port facility or a beach nourishment project, are national in scope. Indeed, this is recognized by the United States in the Alaskan disclaimers, wherein the federal government and the State of Alaska acknowledge that "both Statewide and nationwide benefits will be derived from ... increased employment, increased revenue generated, and enhanced economic opportunities in Northwestern Alaska and the adjacent outer continental shelf." Joint Stipulation of Facts, at 27a. A beach nourishment project can also provide national benefits, especially in view of the importance of recreation at the beaches, and the related tourism and economic growth. If these coastal projects can go forward in such a manner that navigation is not obstructed and the coastal and marine water quality is not diminished so as to cause harm to either human health or the environment, the public benefits provided by their completion is clearly in the "public interest."

Delaying, or denying, the construction or completion of these coastal projects would not serve the public interest, a fact that is likewise recognized by the U.S. Government. *See* Joint Stipulation of Facts, at 28a-29a. But that is

exactly the result of 33 C.F.R. § 320.4(f), regardless of whether the State has a three-mile statutory or nine-mile historic boundary. Approval of each project must be delayed while the Army Corps consults with the other federal agencies, and each State (and their many agencies) reviews the impact that the waiver would have on its seaward boundary, what resources are involved, and weighs the factors in order to determine if the State should waive its seaward boundary delineation rights under the Submerged Lands Act.

SUMMARY OF ARGUMENT

The Army Corps is totally lacking in authority to withhold a permit for the construction of a coastal project because of the project's affect on a State's seaward boundary until the State has waived its statutory rights under the Submerged Lands Act. None of the three statutes upon which the Army Corps bases its authority to impose such a condition: the 1899 Rivers and Harbors Appropriations Act, the Clean Water Act, and the Marine Protection, Research and Sanctuaries Act, provide the basis to deny a permit based on a coastal project's affect on the location of a State's seaward boundary.

Congress set forth an orderly process for determining the boundary between a State's submerged lands and federal outer continental shelf by passing the Submerged Lands Act. Congress recognized that disputes may arise between the States and the federal government "as to whether or not lands are" State-owned submerged lands, or federally managed outer continental shelf lands. *See* 43 U.S.C.

1312. To resolve such disputes, Congress included within the Submerged Lands Act a specific provision delegating to the Secretary of the Interior the authority to negotiate a remedy for such disputes with the States. *See* 43 U.S.C. 1336. Since only Congress has the power to establish State boundaries (*U.S. v. Louisiana*, 363 U.S. 1, 35 (1960)) the Army Corps' actions have no independent validity, and are an unlawful infringement on this congressional delegation of authority to the Secretary of the Interior.

Within the Submerged Lands Act Congress expressly reserved certain paramount federal powers associated with commerce, navigation, national defense and international affairs. *See* 43 U.S.C. 1314. Requiring a State to waive its statutory rights under the Submerged Lands Act has no rational relationship to the exercise of any of these powers.

Further, Congress "determined and declared" that it is "in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States" be vested in the States. 43 U.S.C. 1311(a). Having so determined and declared, it is not for the Army Corps to reopen the question as to whether or not State ownership of certain submerged lands is in the "public interest."

ARGUMENT

A. 33 C.F.R. § 320.4(f) is beyond the Army Corps' statutory authority, is *ultra vires*, and thus is without any legal force and effect.

The sources of statutory authority upon which the Army Corps relies for 33 C.F.R. Part 320 are sections 9, 10, 11, 13, and 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401, 403, 404, 407 and 408); section 404 of the Clean Water Act (33 U.S.C. 1344) and section 103 of the Marine Protection, Research and Sanctuaries Act (33 U.S.C. 1413, commonly known as the Ocean Dumping Act). See 33 C.F.R. § 320.2 None of these statutes, taken jointly or separately, provide a congressional delegation of authority to the Army Corps to deny or condition a permit for a coastal project because of the effect such a project may have on the location of a State's seaward boundary.

1. The Rivers and Harbors Appropriations Act of 1899.

The "great design" of the Rivers and Harbors Act was to maintain and promote navigation. *U.S. v. Ohio Barge Line Inc.*, 458 F.Supp. 1086, 1091 (D.C.Pa. 1978), vacated on other grounds 607 F.2d 624 (1979). The "intent and purpose of (the Rivers and Harbors Act) was to insure free navigability of interstate commerce through the federal regulation" of navigable waters. *Minnehaha Creek Watershed Dist. v. Hoffman*, 449 F. Supp. 876 (D.C.Minn. 1978), *affirmed in part, reversed in part on other grounds, Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (1979). *See also U.S. v. Sexton Cover Estates, Inc.*, 526 F.2d 1293 (C.A.Fla. 1976) ("Promoting and protecting navigation was the dominant theme of this chapter ..."); *U.S. v. Logan & Craig Charter Service. Inc.*, 676 F.2d 1216 (C.A.Mo. 1982) (Section 10 of Rivers and Harbors Act "was enacted to prevent private parties from obstructing navigable waters ..."). "Under section 10 of the Harbor Act ... the Army Corps has traditionally protected naviga-

tion by regulating the building of structures (piers, docks, etc.) within navigable waters as well as dredge and fill activities in such waters. Any proposed project which interferes with navigation has required a Army Corps Rivers and Harbors Act permit..... Starting in 1968, the Army Corps began to use its authority under the Rivers and Harbors Act to regulate activities within navigable waters which, while not necessarily obstructing navigation, would cause pollution." Citations omitted. *U.S. v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151, 1158 (1st. Cir. 1987).

The Rivers and Harbors Act "is within the power of Congress so far as navigation comes within the provisions of interstate commerce or within the admiralty and maritime jurisdiction." *U.S. v. Banister Realty Co.*, 155 F. 583 (1907). Congress passed the Rivers and Harbors Act to assure that the Nation's navigable waters would be free and clear of obstructions to navigation, in order to increase and enhance interstate and foreign commerce. This purpose has no rational relation to the location of a State's seaward boundary. To the best of our knowledge, the case law is devoid of any holding that the purpose of the Rivers and Harbors Act is in any way related to the location, delineation or determination of a State's seaward boundary.

2. The Clean Water Act.

"The objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In order to achieve this objective, Congress declared that "it is the national policy that the discharge of toxic pollutants

in toxic amounts be prohibited." 33 U.S.C. 1251(a)(3). Section 404 of the Clean Water Act, 33 U.S.C. 1344, implements the steps to achieve the national objective of restoring and maintaining the Nation's water quality by regulating by permit the discharge of dredged or fill material into the navigable waters of the United States. *See generally* 33 U.S.C. 1344.

The scope of the national objective of the Clean Water Act is the restoration and maintenance of the water quality of the Nation's navigable waters, an objective that has no rational relation to the location of a State's seaward boundary. To the best of our knowledge, the case law is devoid of any holding that the purpose of the Clean Water Act is in any way related to the location, delineation or determination of a State's seaward boundary.

3. The Ocean Dumping Act.

The transport and dumping of material into the ocean waters of the United States has been found by Congress to endanger "human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities." 33 U.S.C. 1401(a). To address this problem, Congress enacted the Ocean Dumping Act to "prevent or strictly limit the dumping into ocean waters" of materials. 33 U.S.C. 1401(b). Thus, the purpose of the Ocean Dumping Act is "to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean

waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States." 33 U.S.C. 1401(c).

The scope of the congressional purpose and intent in enacting the Ocean Dumping Act was to protect the human health and welfare, as well as the marine environment. These intents and purposes have no rational relation to the location of a State's seaward boundary. Once again, the case law appears devoid of any holding that the Ocean Dumping Act is in any way related to the location, delineation or determination of a State's seaward boundary.

4. No statutory basis exists for 33 C.F.R. 320.4(f).

In accordance with the 1899 Rivers and Harbors Appropriations Act, the Clean Water Act, and the Ocean Dumping Act, the Army Corps may deny a permit for the construction of a harbor facility if it is determined that the construction or facility would result in an obstruction to navigation, endanger human health or welfare, the marine environment, or the economic potential. None of these statutes, however, grant the Army Corps the authority to deny such a permit because of the effect that a construction project may have on the location of a State's seaward three-mile boundary.

Taken together, these three statutes embody Congress's clear intention of maintaining the Nation's waterways free from obstruction, and doing so in a manner that does not unreasonably diminish the quality of the navigable waters, endanger human health, safety or welfare, or harm the

coastal or marine environment. Neither jointly nor separately do these three statutes delegate to the Army Corps the authority to deny or condition a permit for a coastal project because of the effect such a project may have on the location of a State's seaward boundary.

To find the statute where Congress does clearly and specifically address the question of the seaward boundary between State submerged lands and Federal outer continental shelf, one must look not in Title 33 (Navigation and Navigable Waters) but in Title 43 (Public Lands), specifically to the Submerged Lands Act at 43 U.S.C. 1301 *et seq.*

B. The Submerged Lands Act vests the coastal States with clear title and ownership of the submerged lands within three geographic miles of their coastlines. Inclusive within this ownership is the right to establish a baseline that reflects both natural and artificial modifications to the coastline from which to measure the three-mile boundary. Measuring the seaward boundary in this manner does not affect any paramount federal power. Any State / Federal seaward boundary disputes are to be addressed by the Secretary of the Interior, not the Army.

We do not question the constitutional authority of Congress to prevent the coastal States from unilaterally extending their coastlines or seaward boundaries.[7] We do

---

[7] Certainly Congress did not contemplate that the coastal projects of local or private sponsors could be held hostage and denied unless the State in which they were located disclaimed

assert, however, that Congress has not exercised this authority through either the Rivers and Harbors Act, the Clean Water Act or the Ocean Dumping Act. Congress has spoken on this subject only in the Submerged Lands Act which expressly grants to the States "title to, and ownership of" the submerged lands out to three geographic miles from the States' coastline, while expressly reserving to the federal government certain paramount rights of commerce, navigation, national defense and international affairs. *See* 43 U.S.C. 1312, 1314.

1. This Court established the applicable rule of property in its construance of the Submerged Lands Act of 1953.

Since the formation of the Union by the thirteen original States, the States contended that their ownership extended seaward, generally to a distance of three miles offshore. In 1947, however, this Court held, in the case *U.S. v. California*, 332 U.S. 19, that the seaward boundary of a State's territory was the "low water mark." This ruling brought about great debate in Congress that extended from the "Seventy-fifth, Seventy-sixth, Seventy-ninth, Eightieth, Eighty-first, and Eighty-second Congresses." H. Rep. Nº 695, *reprinted in* 1953 U.S. CODE, CONG. & ADMIN. NEWS 1396. In fact, "the longer it continue[d], the more vexatious and confused it [became]." *Id.* "Interminable litigation [arose] between the States and the

---

any incidental benefits that might accrue as a result. *Cf. Nollan v. California Coastal Commission*, 483 U.S. 825 (1988).

Federal Government, between applicants for leases ... and between the States and their lessees." *Id.*

Finally, in 1953, Congress enacted the Submerged Lands Act, wherein full title and ownership of the submerged lands was vested in the States. Seldom have the States so aggressively pursued their rights as they did when getting the Submerged Lands Act passed by Congress and signed into law by President Truman. These hard-won rights of the coastal States to the submerged lands off their coastline out to a three-mile seaward boundary as measured from an ambulatory coastline remain jealously guarded.

The Submerged Lands Act finally laid to rest the great debate, and provided that "The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line ..." 43 U.S.C. 1312. The term "coast line" is defined as meaning "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." 43 U.S.C. 1301(c).[8]

2. Artificial modifications of the coastline act to shift the State's seaward boundary.

---

[8] For California, this line has been determined to be the lower low water line. *See United States v. California*, 381 U.S. 139 (1965); *United States v. California*, 447 U.S. 1, 6 (1980).

The Submerged Lands Act is silent as to whether artificial modifications of the coastline act to change the seaward boundary of a State. However, under this Court's interpretations of the Submerged Lands Act (and the related international treaties on the question) the three-mile seaward boundary must be measured from the baseline drawn along points on the low tide line of the State's coast. This baseline, as held by the Court, is drawn along the mean low tide line of the coastline as it has been changed and modified by both natural and man-made forces. *U.S. v. California*, 381 U.S. 139, 177 (1965)("when a State extends its land domain by pushing back the sea ... its sovereignty should extend to the new land, as was generally thought to be the case prior to the 1947 *California* opinion."); *U.S. v. Louisiana*, 389 U.S. 155, 158 (1967)("it is clear that in the case of the three-mile unconditional grant artificial jetties are a part of the coastline for measurement purposes"). *See also U.S. v. California*, 432 U.S. 40, 41-42 (1977).

This construction recognizes the desirability of a "single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations." *United States v. California*, *supra*, 381 U.S. at 165; *U.S. v. Louisiana*, 394 U.S. 11, 34 (1969). Nothing that Congress has done since these decisions were rendered negates their salutory affect.

It is this statutory right -- to measure a State's seaward boundary from an ambulatory coastline -- upheld by this Court, and part of the bundle of rights that the States fought so hard to obtain, that the Army Corps requires the States to waive as a condition for the necessary permit for the construction of ports, harbors, breakwaters,

causeways and other facilities that serve to increase, augment and enhance interstate and foreign commerce.

3. The ambulatory nature of baselines and seaward boundaries has been recognized by Congress.

It was clearly recognized by Congress when the Submerged Lands Act was passed that the coastline would be constantly modified and changed by man's actions. "Apart from the resources which may be taken from submerged lands, the States have other interests in the use of such lands. Many piers, docks, wharves, jetties, sea walls, groins, pipe lines, sewage-disposal systems, acres of reclaimed land and filled-in beaches, etc. have been established, *and many more will be established on these lands*." H. Rep. Nº 1778, *reprinted in* 1953 U.S. CODE, CONG. & ADMIN. NEWS, 1436. Emphasis added. Congress was also aware that natural changes constantly reformed the coastline. *Id.*, at 1424.

This Court has recognized that problems may arise due to the ambulatory nature of a State's coastline, from either natural or artificial causes. But, as this Court has noted, "if the inconvenience of an ambulatory coastline proves to be substantial, there is nothing in this decision which would obstruct resolution of the problems through appropriate legislation or agreement between the parties." *U.S. v. Louisiana*, 394 U.S. 11, 34 (1969).

The word "agreement," however, connotes negotiations. But the stark fact of the matter is that the Army Corps simply gave the City of Nome a "take-it-or-leave-it" proposition. Either the State waives its rights under the

Submerged Lands Act, or the Army Corps refuses to issue the permit. This is not negotiating an agreement, it is holding the permit hostage until the "disclaimer-of-rights" ransom is paid. This is the untenable position that the Army Corps puts all coastal States in whenever such a permit is needed for any "slight and sporadic changes which can be brought about artificially" to the coastline. *U.S. v. California*, 381 U.S. at 177. This injustice to the States (as well as the private or public sponsors of the project) at the hands of the Army Corps is exactly the outcome that was intended to be avoided by both Congress and this Court.

4. The paramount powers reserved to the federal government by the Submerged Lands Act are wholly unrelated to the location of a State's seaward boundary.

The Submerged Lands Act reserves to the federal government "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.*" 43 U.S.C. 1314(a). Emphasis added. But the Army Corps' requirement that a State must waive its statutory rights under the Submerged Lands Act because of the impact of a coastal project on the location of a State's seaward boundary does not further any of these paramount powers. The fact that a State's seaward boundary is changed by an artificial modification of the coastline in no way leads to any infringement, interference, diminishment or prohibition of any of the federal government's reserved, paramount powers.

a. Neither commerce nor navigation are affected by the location of a State's seaward boundary.

Certainly the location of a State's invisible seaward boundary can in no way amount to an "obstruction" of navigation. Nor can it be seen as interfering with interstate or foreign commerce. Causing a delay in (or not allowing) the construction of a port, however, would interfere with the furtherance of interstate and foreign commerce. No real-world problem burdening modern shipping and navigation can be seen to arise due to the placement of a State's invisible seaward boundary a few hundred feet in one direction or another.

b. Neither national defense nor international affairs are affected by the location of a State's seaward boundary.

The location of a State's seaward boundary has no relation to national security or defense. "This ownership in [a State] would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the Nation." *United States v. California*, 332 U.S. 19, 42-43 (1947)(Justice Reed, dissenting). Nor could the shifting of a State's seaward boundary a few hundred feet possibly interfere with international affairs. Indeed, on the outer continental shelf, the United States possesses full jurisdiction, control, and power of disposition to the exclusion of any foreign power. *See* Pres. Proc. 2667 (1945) wherein President Truman proclaimed U.S. jurisdiction and control over the continental shelf apper-

taining to the United States. *See also* 43 U.S.C. 1331 *et seq.*, codifying proclamation 2667.

Also relevant is the fact that President Reagan, in 1988, extended the U.S. territorial sea out to 12 nautical miles for the primary purpose of advancing the national security interests of the United States. *See* Pres. Proc. 5928, Dec. 27, 1988. Thus, the seaward boundary between United States territory and the international high seas is now 12 miles offshore -- nine miles beyond most States' three-mile seaward boundaries, and three miles beyond the historic nine mile seaward boundary of Texas and Florida in the Gulf of Mexico. Thus, any ambulation of a State's seaward boundary would be well within the seaward boundary of U.S. territory.

Likewise, within the Exclusive Economic Zone which extends 200 miles from the coastline, the United States possesses full jurisdiction and control, to the exclusion of all foreign powers, over the natural resources therein. *See* Pres. Proc. 5030, (March 10, 1983). Whereas these waters were once regarded as international in character, where actions taken by the United States could affect foreign relations with another country (*See U.S. v. California*, 332 U.S. 19 (1947); *U.S. v. Louisiana*, 339 U.S. 699 (1950); *U.S. v. Texas*, 339 U.S. 707 (1950)), the natural resources within these waters are now purely under domestic, national, control. This being the case, a shifting of the ambulatory boundary between the State and Federal submerged lands could not possibly jeopardize or interfere with national defense or international affairs; the State / Federal boundary is purely within the domestic jurisdiction of the United States vis-a-vis foreign countries.

5. Congress intended that State / Federal disputes concerning offshore submerged lands be negotiated by the Secretary of the Interior, not the Army.

Congress recognized that there might be State / Federal boundary disputes when the Outer Continental Shelf Lands Act was enacted in 1953. *See* Statement of Managers on the Part of the House, Outer Continental Shelf Lands Act, *reprinted in* 1953 U.S. CODE, CONG. & ADMIN. NEWS, 2184. In recognition of potential disputes over this boundary, Congress did pass "appropriate legislation." *U.S. v. Louisiana*, 394 U.S. 11, 34 (1969). In the event of a dispute "as to whether or not lands are" State owned submerged lands, or federally managed outer continental shelf lands, Congress authorized the Secretary of the Interior, with the concurrence of the Attorney General, to "negotiate and enter into agreements with the State." 43 U.S.C. 1336. These agreements can pertain to "operations under existing mineral leases and payment and impounding of rents, royalties, and other sums ... or ... the issuance or non-issuance of new mineral leases pending the settlement or adjudication of the controversy." *Id.*

This is consistent with the finding of this court that it must not be assumed "that Congress, which has constitutional control over Government property, will execute its powers in such a way as to bring about injustices to States, their subdivisions, or persons acting pursuant to their permission." *U.S. v. California*, 332 U.S. 19, 40 (1947). Indeed, Congress did not allow any such injustice to occur; it specifically provided a remedy for any State / Federal disputes concerning whether submerged lands are State owned or federal outer continental shelf lands, in the Outer Continental Shelf Lands Act.

The authority delegated to the Secretary of the Interior by Congress to negotiate with the States is limited, as noted, to working out an agreement pertaining to existing mineral leases, and the payment of rents and royalties, and the issuance (or non-issuance) of new mineral leases. Congress did not authorize the Secretary of the Interior, or any other federal official or agency, to require a State to waive its rights under the Submerged Lands Act.

Thus, Congress delegated this limited authority in this specific situation to the Secretary of the Interior, not the Army. Any attempt by the Army Corps to require a State to waive its rights under the Submerged Lands Act due to the effect of a coastal project on the location of the State's boundary is an unlawful infringement on this precise, limited, congressional delegation of authority to the Secretary of the Interior. The result of this infringement of authority is the perpetration of an injustice upon the coastal States -- exactly the outcome intended to be avoided by both Congress and this Court.

C. State title and ownership of the submerged lands out to three miles from its coastline, as modified by any natural or artificial causes, is in the "public interest."

"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 ... recognized, confirmed established, and vested in .. the respective States ..." 43

U.S.C. 1311(a). Emphasis added. So Congress "determined and declared" in 1953 when it passed the Submerged Lands Act.

Now comes the Army Corps, however, through the regulations found at 33 C.F.R. Part 320, to reopen the question of whether State title and ownership of the submerged lands out to three miles from its coastline, as modified by any natural or artificial causes, is in the "public interest." In accordance with these regulations, before issuing a permit for the placement of dredge or fill material into the navigable waters of the United States, the Secretary of the Army conducts a "public interest review" of the project. *See* 33 C.F.R. § 320.4(a). One of the factors of this "public interest review" is "whether the coast line or base line might be altered." 33 C.F.R. § 320.4(f). One may well ponder exactly what type of coastal project may be conducted worthy of requiring an Army Corps permit that would not alter the coastline or baseline. In any event, where Congress has so determined and declared something to be in the "public interest," it is not for an executive agency to reopen the question.

CONCLUSION

All around the country port facilities are being constructed, modernized and improved. Causeways, artificial islands and jetties are being installed to link the Nation's highways and railways with waterborne commerce. Fill is often placed in the navigable waterways to construct permanent causeways for the exploration and production platforms for the recovery of offshore oil and gas. At the

same time, revetments, groins, breakwaters and seawalls are constantly being installed, and beaches are being renourished with additional sand in the never-ending battle against erosion.

But to accomplish any of these projects -- anything from an 8,000 foot causeway to a ten foot beach renourishment project -- a permit must be obtained from the Army Corps to ensure that the project does not obstruct navigation or pollute the waters. Without any statutory authority, however, the Army Corps is now demanding that the State, whether it is a sponsor of the project or not, must waive its rights under the Submerged Lands Act to extend its seaward boundary three miles from the modified coastline, before the Army Corps will issue the permit.

A State, when confronted with such a demand by the Army Corps, must weigh all of the factors before deciding whether to waive its rights. Many State agencies are involved, and thus this review process can be very time consuming. Nonetheless, the Army Corps even makes this demand in emergency situations.

Congress set forth an orderly process for determining the boundary between State and federal submerged lands when it passed the Submerged Lands Act. Congress recognized the ambulatory nature of the coastline. Congress also recognized that disputes will arise between the States and the federal government over whether or not lands are State submerged lands or federal outer continental shelf lands. Congress provided a procedure for resolving these disputes, a procedure that does not authorize the Army Corps to withhold a coastal construction permit until a State waives its rights under the Submerged

Lands Act. By so withholding such a permit, the Army Corps not only acts unlawfully, but introduces an unreasonable delay into the process of obtaining a permit for the myriad of projects that must take place along the country's coastline in order to foster interstate and foreign commerce, protect life and property, and provide for the common welfare.

For these reasons, we respectfully urge this Court to grant to the State of Alaska its prayer for relief.

DATED: October, 1991

Respectfully submitted,

David C. Slade, Esq.
Counsel of Record
Coastal States Organization
Suite 312
444 N. Capitol Street
Washington, D.C. 20001
(202) 628-9636