THE NEW JERSEY/NEW YORK CLEAN OCEAN ZONE

Need and Rational:
Our oceans are in crisis. In the first review of ocean policy in 34 years, the Pew Oceans Commission released "America's Living Oceans: Charting a Course for Sea Change" in June 2003.[1] According to the report, "America's oceans are in crisis and the stakes could not be higher." George E. Pataki, second-term governor of New York, was a Member of the Commission.

In September 2004, the U.S. Commission on Ocean Policy (USCOP) submitted "An Ocean Blueprint for the 21st Century" to the President, as mandated by the Oceans Act of 2000. In drafting the report, the Commission held public meetings around the country and conducted numerous site visits. According to the Report, "[t]he message from both experts and the public alike was clear: our oceans, coasts, and Great Lakes are in trouble and major changes are urgently needed in the way we manage them."[2] Vice Admiral Paul G. Gaffney II, USN (Ret.) now President of Monmouth University, and Lillian Borrone, both New Jersey residents, served as Members on the Commission.

The New York/New Jersey Bight
The New York/New Jersey Bight is "a little sea in the big ocean." The coasts of New York and New Jersey and the Gulf Stream create a triangular mini-sea "wedge" within the Atlantic Ocean, an area of water officially known as the New York/New Jersey Bight (*See* map above). The physical, biological, and hydrodynamic characteristics of this 19,000+ square-mile area are extraordinary.

Bight (bīt) *n*. – a curve or bend in a shoreline.

New York/New Jersey Bight – waters from Montauk Point, NY to Cape May, NJ, and offshore to the outer edge of the Continental Shelf to the 1000 fathom drop-off; over 19,000 square miles of the Atlantic Ocean.

The waters of the Bight have been used as a dumping ground since at least the 1800s. Until the early 1900s, disposal of raw sewage, garbage, refuse, and street sweepings occurred in the inner harbor. As the population soared, raw sewage and dead animals putrefied rivers, public health suffered, and odors and debris became gruesome and fearsome. As a solution, disposal activities

were moved to the outer Harbor and eventually to the ocean waters of the Bight.[3]

In 1984, with eight ocean dumpsites, the Bight was the "Ocean Dumping Capital of the World." The eight dumpsites included those for contaminated dredged spoils, sewage sludge (two sites), acid waste, wood incineration, construction rubble, incinerated toxic wastes, and industrial wastes. The Bight continues to show the consequences of this legacy of pollution: fish advisories from contaminated sediments; beach closures from runoff, storm drains, and raw sewage discharge; and littered beaches.

Though those "dump-and-dash" days may be behind us, there are still those who, looking to exploit the sea and threaten its ecosystem, view this living resource as a cheap disposal ground. The Bight is also at the receiving end of the most densely populated urbanized area in the country, belching a steady toxic tide of poisons into the water. The fertile waters of the Bight are suffocating under the rainy day deluge of sediment, pesticides, petroleum products, and sewage. To make matters worse, the bounty-rich offshore underwater lands are seen by powerful industries as ripe for exploitation.

Ecological Significance of the NY/NJ Bight

- Unique physical, hydrodynamic, and biological characteristics
- Over 300 species of fish inhabit the waters of the Bight
- Nearly 350 species of birds frequent the Bight
- Whales, porpoises, seals, and 7 species of sea turtles inhabit the Bight
- On the route for countless species of migratory fish and birds

Economic Significance of the NY/NJ Bight

- Generates crucial and sustainable economic and intrinsic values to millions of people
- Host to one of the world's busiest ports
- Sustains a multi-billion dollar commercial and recreational fishery
- Provides recreation and tourism opportunities for millions of residents and visitors each vear

The waters of the United States are ecologically and economically significant. Consequently, regional waterbodies should be afforded special protections. As the U.S. Commission on Ocean Policy states "[t]here is a growing awareness that regional approaches can benefit each of the nation's ocean and coastal regions. Focusing efforts within whole ecosystems, rather than arbitrary political boundaries, provides an opportunity for decision makers at all levels to coordinate their activities, reduce duplication of efforts, minimize conflicts, and maximize limited resources. It also promotes a sense of stewardship among government, private interests, and the public by encouraging a shared feeling of connection to a specific area."[4] USCOP highlights several regional approaches, including the Chesapeake Bay Program, the Delaware River Basin Commission, the California Bay-Delta Authority, the Gulf of Mexico Program, and the Great Lakes Program, each of which have "taken different approaches to address pressing regional issues, although a hallmark of most efforts is the

establishment of measurable goals and clear implementation strategies for achieving healthier regional ecosystems."[5]

The Great Lakes, for example, make up the largest surface freshwater system on the planet. Sport fishing, commercial fishing, and Native American fishing represent a 4 billion dollar per year industry with salmon, whitefish, smelt, lake trout, and walleye being major catches.[6] Unfortunately, the Lakes suffer from a variety of ecological problems, many of which stem from urban sprawl, sewage disposal, and toxic industrial effluent.[7] These facts, together with the fact that more than 30 million people live in the Great Lakes basin, has made the Great Lakes worthy of special protections. Indeed, in May 2004, President Bush signed a Presidential Executive Order (EO) recognizing the Great Lakes as a national treasure.[8] The EO called for the creation of a "Regional Collaboration of National Significance" and a cabinet-level Interagency Task Force.[9] "A Strategy to Restore and Protect the Great Lakes" is the result of this collaborative process and is now released for public comment.[10]

Another example of regional protection from a national level is the Environmental Protection Agency's National Estuary Program.[11] Congress established the National Estuary Program in 1987 to improve the quality of estuaries of national importance. Pursuant to Section 320 of the Clean Water Act, the EPA can "develop plans for attaining or maintaining water quality in an estuary," including "protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife" and "allows recreational activities, in and on water, requires that control of point and nonpoint sources of pollution to supplement existing controls of pollution." [12] Several states participate in a National Estuary Program, each of which must develop a Comprehensive Conservation and Management Plan.[13]

The NY/NJ Bight, an approximately 19,000 nautical square mile area, neighbors Manhattan, Long Island, and four coastal counties in New Jersey. New Jersey coastal counties (Atlantic, Cape May, Ocean, and Monmouth) are home to 1,481,095 residents (according to the 2000 Census).[14] The seven Coastal Counties in NY (Bronx, Kings, Nassau, New York, Queens, Richmond, and Suffolk) are home to 10,855,252 residents (according to the 2000 Census).[15] The **coastal** gross state product in New Jersey and New York for 1995 was $79.6 billion and $230.2 billion, respectively.[16] As such, a healthy clean ocean Bight is essential to the economic viability of these states.

Finally, fundamental to the Act is to minimize any new or additional costs for managing the Bight. Since The NJ/NY Clean Ocean Zone Act establishes a public policy to protect the Bight there are no new management costs or fees.

History of the "NJ/NY Clean Ocean Zone Act" ("NJ/NY COZ Act" or "the Act")
Current laws and regulations are insufficient to protect the vast ecological value of this ocean region and its living marine resources from polluting and habitat-destructive activities, such as ocean dumping of contaminated sediments, permanent extraction of offshore sand, and offshore gas and oil exploration, to name a few. Only through public outcry and citizen demands for protection of this most important economic and environmental asset through environmentally sound alternatives, have proposals for these harmful and polluting activities been successfully

defeated. Destructive activities undermine the ecological and economic potentialities for sustainable marine resources and must be prohibited.

The current battles between sound environmental protection and economically driven use are fought permit by permit – a time-consuming, unproductive, and unsustainable process. Now is the time to lock-in the tremendous path of progress, which has led to far-reaching improvements in our ocean water quality, and lock-out environmentally harmful activities, thereby ensuring the continued protection of the ocean today and for future generations.

For over three years, Clean Ocean Action diligently worked with an alliance of over 30 environmental, commercial fishing, recreational fishing, religious, scuba diving, surfing, and civic groups from New York and New Jersey to develop the Ten Points of the Act (below). A similarly comprised legislative committee worked to draft the language of the NJ/NY Clean Ocean Zone Act, which was carefully crafted to accurately and specifically reflect the Ten Points. **Any significant changes to the citizen-proposed legislative language is likely to modify the goals and purposes of the Ten Points** and may lead to dissention of a key constituency group.

To that end, this document provides a detailed narrative of each of the basic Ten Points, providing a description of their meaning and purpose, justification for the action, and recent legislative history.

The new vision, the "NJ/NY Clean Ocean Zone (COZ)," locks-in the current hard-won progress that has been achieved with the support and dedication of thousands of citizens in the bi-state region and permanently protects the waters of the NY/NJ Bight. In short the legislative result of the Clean Ocean Zone will:

Reduce Pollution

1. Prohibit new ocean dumpsites.
2. Mandate capping of the Historic Area Remediation Site (HARS) -- formerly the Mud Dump Site -- with "remediation material." "Remediation material" is defined as being as clean as the sediments found on the ocean floor outside HARS and that protects against adverse ecological effects. Ensure implementation of environmentally sound alternatives for managing dredged material to help keep harbor channels safe for navigation.
3. Prohibit new point sources of pollution and increases of discharge capacity (e.g., wastewater discharge outfalls, industrial discharges). Encourage environmentally protective beneficial reuse of wastewater.
4. Reduce pollution from stormwater and sediments.

Protect Marine Ecosystems

5. Prohibit the permanent extraction (e.g., strip-mining) of natural non-renewable resources, including sand and gravel.
6. Prohibit industrial and non-renewable energy facilities and infrastructure, including oil and gas exploration and development.

7. Require the development of responsible regulations for renewable energy sources.

Support Marine Activities

8. Support recreational and commercial fishing by acknowledging that federal and state laws for fisheries exist. Prohibit the NJ/NY Clean Ocean Zone legislation from being used to adopt or enact fisheries management actions. The NJ/NY Clean Ocean Zone legislation shall not be used to restrict or limit recreational or commercial fishing.
9. Support federal and state approved artificial reefs, and allow underwater research and exploration, but not projects that will adversely affect the ecosystem.
10. Support, celebrate, and sustain maritime activities that depend on a healthy and clean ocean such as: boating, underwater diving, fishing, surfing, swimming, and the enjoyment of the sea. The NJ/NY Clean Ocean Zone legislation will not be used to restrict or limit these activities.

A point-by-point description of the basic Ten Objectives follows under the three main goals: reduce pollution, protect marine ecosystems, and support marine activities.

COZ GOAL I: REDUCE POLLUTION

COZ OBJECTIVE #1
The NJ/NY Clean Ocean Zone (COZ) Act will prohibit new ocean dumpsites.

Background

Although all eight of the old ocean dumpsites in the NY/NJ Bight have been closed or designated for clean-up, there is currently no prohibition on designating new non-industrial/non-sewage ocean dumpsites in the Bight. In fact, the Marine Protection, Research and Sanctuaries Act (MPRSA) provides the U.S. Environmental Protection Agency (USEPA) or U.S. Army Corps of Engineers (USACE) with the authority to designate new ocean disposal sites (other than sites for sewage sludge or industrial waste[17]) anytime and anywhere in the Bight.

Relevant Law

The Congressional Research Service (CRS) Report, "Ocean Dumping Act: A Summary of the Law,"[18] provides a good synopsis of the Marine Protection, Research, and Sanctuaries Act of 1972 and the integrated Ocean Dumping Act:

> The [MPRSA] has two basic aims: to regulate intentional ocean disposal of materials, and to authorize related research. Title I of the Act, which is often referred to just as the Ocean Dumping Act, contains permit and enforcement provisions for ocean dumping. Research provisions are contained in title II, concerning general and ocean disposal research; title IV, which established a regional marine research program; and title V, which addresses coastal water quality monitoring. The third title of MPRSA . . .authorizes the establishment of marine sanctuaries.

The basic provisions of the Act have remained virtually unchanged since 1972, but many new authorities have been added. These newer parts include: (1) research responsibilities for the Environmental Protection Agency (EPA); (2) specific direction that EPA phase out the disposal of "harmful" sewage sludges and industrial wastes; (3) a ban on the ocean disposal of sewage sludge and industrial wastes by Dec.31, 1991; (4) inclusion of Long Island Sound within the purview of the Act; and (5) inclusion of medical waste provisions. Authorizations for appropriations to support provisions of the law expired at the end of fiscal year 1997 (Sept.30, 1997). Authorities did not lapse, however, and Congress has continued to appropriate funds to carry out the Act.

Four federal agencies have responsibilities under the Ocean Dumping Act: EPA, the U.S. Army Corps of Engineers, the National Oceanic and Atmospheric Administration (NOAA), and the Coast Guard. EPA has primary authority for regulating ocean disposal of all substances except dredged spoils, which are under the authority of the Corps of Engineers. NOAA is responsible for long-range research on the effects of human-induced changes to the marine environment, while EPA is authorized to carry out research and demonstration activities related to phasing out sewage sludge and industrial waste dumping. The Coast Guard is charged with maintaining surveillance of ocean dumping.

Title I of the MPRSA prohibits all ocean dumping, except that allowed by permits, in any ocean waters under U.S. jurisdiction, by any U.S. vessel, or by any vessel sailing from a U.S. port. The Act bans any dumping of radiological, chemical, and biological warfare agents and any high-level radioactive waste, and medical wastes. Permits for dumping of other materials, except dredge spoils, can be issued by the EPA after notice and opportunity for public hearings where the Administrator determines that such dumping will not unreasonably degrade or endanger human health, welfare, the marine environment, ecological systems, or economic potentialities. EPA designates sites for ocean dumping and specifies in each permit where the material is to be disposed.

In 1977, Congress amended the Act to require that dumping of municipal sewage sludge or industrial wastes that unreasonably degrade the environment cease by December 1981. (However, that deadline was not achieved, and amendments passed in 1988 extended the deadline to December 1991.) In 1986 amendments, Congress directed that ocean disposal of all wastes cease at the traditional 12-mile site off the New York/New Jersey coast (that is, barred issuance of permits at the 12-mile site) and be moved to a new site 106 miles offshore. In 1988, Congress enacted several laws amending the Ocean Dumping Act, with particular emphasis on phasing out sewage sludge and industrial waste disposal in the ocean.

Amendments enacted in 1992 expanded EPA's role in permitting of dredged material by authorizing EPA to impose permit conditions or even deny a permit, if necessary to prevent environmental problems. Permits issued under the Ocean Dumping Act specify the type of material to be disposed, the amount to be

transported for dumping, the location of the dumpsite, the length of time the permit is valid, and special provisions for surveillance. The EPA Administrator can require a permit applicant to provide information necessary for the review and evaluation of the application.[19]

COZ Solution

To eliminate the possibility of new dumpsites within the NY/NJ Bight, the NJ/NY Clean Ocean Zone Act will prevent the USEPA or USACE from creating or designating any new ocean dumpsites within the NJ/NY Clean Ocean Zone.

COZ OBJECTIVE #2

The NJ/NY COZ Act mandates the capping of the Historic Area Remediation Site (HARS) with "Remediation Material." "Remediation Material" is defined as being as clean as the sediment found on the ocean floor outside HARS and that protects against adverse ecological effects. The Act will ensure implementation of environmentally sound alternatives for managing dredged material to help keep harbor channels safe for navigation.

Background

The most recent closure of an ocean dumpsite in the Bight was the 1997 "termination" of the 6-mile Mud Dump Site.[20] Simultaneously, the USEPA designated the Historic Area Remediation Site (HARS). The HARS is located in the Atlantic Ocean three and one-half miles from the coast of New Jersey, due east of Sandy Hook. The 15-square nautical mile HARS encompasses the original Mud Dump Site (2-square nautical miles). The source of the mud was the dredging of channels in the NY/NJ Harbor.

Dredging harbors and channels to provide safe navigation for ships is essential to the region. Water-borne commerce is an environmentally sound method of transportation and is becoming more so with the advent of emission controls on ships. The Port of New York and New Jersey is the premier port on the east coast. The natural average depth of the Newark Bay region is 19 feet or less. While this allowed for waterborne commerce to thrive in the 18th and 19th centuries, larger ships required deeper channels. Today, many ships require over 40-foot depths and the newest ships require 50 feet.

For nearly a century, disposal of dredged material at the Mud Dump Site formed mounds of sediment on the seafloor, creating a new benthic habitat - typically of fine particle silts and clays. Unfortunately, since the Harbor region was the center of the industrial and chemical revolution, large amounts of toxic waste was disposed in the NY/NJ Bight. Consequently, the mud in the Bight contains a legacy of pollution and is a toxic cocktail. The mud dumping not only modified the benthic community type due to changes in sediment particle size, but also caused widespread pollution because these fine-grained harbor sediments were highly contaminated.

Once sediments are contaminated, the harmful effects are system-wide and not limited to the benthic environment (due to processes of bioaccumulation and trophic transfer). The benthos is the beginning of the food chain, bringing contamination in concentrated forms to species higher in the food chain. Thus, on September 1, 1997, USEPA deemed the Mud Dump and surrounding areas "contaminated" and designated the 15-square nautical mile site as an ocean remediation

site, i.e., a site that must be cleaned up, under MPRSA. Thereafter, the Mud Dump Site was closed due to contamination-related impacts, and HARS was designated.[21]

Closure of the Mud Dump site was not an easy task. In fact, the Memorandum of Agreement that eventually closed the site and designated HARS was an innovative and unprecedented agreement between then Vice President Al Gore and the Secretaries of the Department of Transportation, Department of the Army, and the USEPA (commonly referred to as the "Gore Agreement").[22] The agreement was the result of public outcry and advocacy efforts based on valid scientific evidence. Under the 1996 agreement, disposal of Category II material (materials that were "restricted" for ocean disposal")[23] was halted, the Mud dump Site was closed, and the areas affected by the dumping activities was to be remediated via designation of HARS.

Baseline surveys of HARS prior to its designation showed that sediment contamination was high, with possible negative biological effects. According to the NOAA,[24] total polychlorinated biphenyl (PCB) concentrations in the tissues of lobsters from three sampling areas closest to the Mud Dump Site (now within the HARS area) were consistently higher than those from the Hudson Shelf Valley. The high concentrations were cause for establishing fish consumption advisories. In addition, multiple contaminant levels at the site exceeded sediment quality guidelines set forth by the USEPA.[25] Sediments were acutely toxic to shrimp-like amphipods and infaunal worms, which accumulated high levels of polychlorinated aromatic hydrocarbons (PAHs), PCBs, and dioxins from the sediments.

HARS is now being capped primarily with dredged sediments from NY/NJ Harbor. Since the HARS designation and the beginning of the capping process, there has been considerable debate over standards for the cap material. In fact, except for the persistent man-made chemical, PCB (1 of 60 "contaminants of concern"), no new standards have been developed for the purposes of remediating the site.[26] For the other 59 "contaminants of concern," standards are still being developed through a lengthy peer review process guided by USEPA. Meanwhile, sediments continue to be placed at HARS, without adequate assessment to ensure that the sediments are indeed clean and safe for the Bight, and in turn for marine life and public health. For this reason, the Clean Ocean Zone aims to redefine "Remediation Material" in such a way that guarantees that only sediments that are clean and safe for the Bight are placed at HARS.

A Healthy Ocean and a Healthy Port: Finding Other Solutions for Dredged Material
Finding environmentally sound alternatives to manage dredged material was a shared goal of union leaders, shipping interests, and environmentalists. Indeed, federal and state leadership stepped up to the challenge. Under the leadership of then NJ Governor Christie Todd Whitman, the Dredged Material Management Task Force identified and developed environmentally sound non-ocean disposal solutions for dredged material. In addition, Congress acted through the Water Resources Development Act (1992, 1994, 1996) to fund decontamination studies. Although these studies continue, significant progress has been made. Today, dredged material that is deemed unsuitable for HARS disposal is treated and beneficially used for remediation of contaminated landfills in the region. The treatment renders the dredged material inert and useful in transforming industrialized or abandoned landfills into usable land. Examples include the Penn/Fountain Landfills in New York, and the Jersey Gardens Mall and Bayonne Golf Course in New Jersey.

While these technologies cost more than ocean dumping, they are actually economic investments in the region, which create engines of growth. For example, the Jersey Gardens Mall, once a fenced off, leaking, blighted area, is now the site of a multi-million dollar economic asset to the community - as a tax base and a place of employment for 5,000 workers. The site also provides public access to the Arthur Kill River and, as a remediated site, improves water quality. In addition, the implementation of technologies has made the region a national leader in dredged material management and the associated growth of technology-based jobs, not to mention the jobs associated with the remediation of landfills and the construction of such projects as malls. Thus, by meeting the navigational needs of the Harbor, the region has become a national leader in using **dredged material as a resource and not a waste material, while also improving the environment.**

Relevant Law

The HARS designation requires that "[t]he site (HARS) will be managed so as to reduce impacts within the Primary Remediation Area to acceptable levels in accordance with 40 C.F.R. § 228.11(c). Use of the site will be restricted to dredged material suitable for use as the Material for Remediation. This *material shall be selected so as to ensure that it will not cause significant undesirable effects including through bioaccumulation or unacceptable toxicity*, in accordance with 40 C.F.R. 227.6"(*emphasis added*). HARS is to be "capped or covered with clean material that will not cause significant undesirable effects through bioaccumulation or toxicity."[27] The federal regulation imposing this requirement followed the 1997 designation and was passed in an incredible six-month timeframe by USEPA. In addition, New Jersey passed the Ocean Sludge Dumping Elimination Act[28] and Ocean Dumping Enforcement Act, each of which regulate ocean dumping.[29]

COZ Solution

The COZ supports a true, clean ocean standard that would reduce levels of contamination in sediment and biota at the site, meet ambient "background" levels found in areas not impacted by dumping, not introduce additional pollutants, and protect against adverse effects including through bioaccumulation. By redefining "Remediation Material" to mean dredged material that, after testing, is shown to be similar to those sediments outside HARS and mandating that placement of Remediation Material at HARS can only be for the purpose of ecological remediation and protection of sensitive species at sensitive life stages, the Act ensures that the materials placed at HARS will actually remediate (i.e., improve) the effected region. It is important to note that this definition is **site-specific to HARS**, and not intended to apply to the regulation of other ocean disposal areas.

By enacting the COZ Act, the goals and intentions of the relevant agencies, as expressed in a 2000 Memorandum of Agreement[30], will be expedited. In doing so, remediation of HARS will become a priority and thus, the clean-up process will be accelerated.

COZ OBJECTIVE #3

The NJ/NY COZ Act will prohibit new point sources of pollution and increases of discharge capacity (e.g., wastewater discharge outfalls, industrial discharges), and encourage environmentally protective beneficial reuse of wastewater.

Background

Thousands of point sources of pollution flow into the Bight. The Clean Water Act (CWA) defines a "point source" as a "pipe, ditch, tunnel, concentrated feedlot operation, or other concentrated source of effluent and is distinguished from diffused sources such as runoff."[31] Point source discharges can include industrial wastewater, treated municipal wastewater and stormwater. There are no direct industrial dischargers currently in the proposed Clean Ocean Zone and New Jersey law prohibit such discharges.

Direct Ocean Discharge from Wastewater Treatment Plants

There are 14 direct ocean wastewater dischargers in NJ and two in NY. The majority of the 14 ocean wastewater dischargers in New Jersey are currently discharging at rates below their maximum capacity.[32] For example, the Ocean City Regional Wastewater Treatment Facility has an average design flow of 7.3 million gallons per day (MGD).[33] However, the facility did not exceed 80% of its capacity (5.84 MGD) in 1998.[34] Long Island has two ocean wastewater dischargers – Nassau County Sewerage District #3 and Suffolk County Sewerage District #3.[35] Neither facility has reached their capacity.[36] The Nassau County facility has a design flow of 72 MGD but an average flow of 57 MGD.[37] The Suffolk County facility has a design flow of 30.5 MGD but an average flow of 25 MGD.[38] All these dischargers have built- in capacity to increase the volume of discharge and remain within the current limit. As for longer-term future capacity needs, facilities should plan to reuse or recycle wastewater. Beneficial reuse of wastewater is embraced in regions of the nation where water supply is limited. Reusing freshwater is an important solution to conserving potable water supplies, recharging groundwater, and preventing saltwater intrusion. In fact, discharging treated wastewater into the ocean is essentially throwing freshwater away. Today, we know that freshwater is a valuable resource -- every drop counts.

Unfortunately, for example, in NJ, wastewater treatment facilities in New Jersey discharge an extraordinary volume of fresh water into the Atlantic Ocean that, if properly managed, could be reused. Based on COA's Report "Wasting Our Waters Away," nearly 170 million gallons of treated fresh water are discharged into the ocean per day, totaling approximately 65 million gallons annually.[39] If all 65 billion gallons were poured into one-gallon milk jugs and lined up end to end, they would circle the Earth 412 times.[40] The discharged water has the potential for beneficial reuse and could naturally recharge bogs, wetlands, streams, rivers, and estuaries. Especially with the likelihood of droughts in the region, all efforts should be made to reuse the discharged wastewater using environmentally protective standards that are publicly reviewed.

Citizens are open to the idea of recycling wastewater. As part of the "Wasting Our Waters Away" Report, COA surveyed nearly 200 citizens from central and northern New Jersey and found that 71% of citizens would not oppose reuse of wastewater if the water were properly treated.[41]

Relevant Law
The CWA, § 301(a), mandates that "[e]xcept as in compliance with [specific provisions] of this Act, the discharge of any pollutant by any person shall be unlawful."[42] Section 502(12) defines "discharge of pollutant" as "any *addition* of any *pollutant* to *navigable waters* from any *point source*."[43] Thus, the plain language of the CWA prohibits (a) the addition of any pollutant (b) into navigable water (c) from any point source (d) without a permit.[44] Violators of this provision are strictly liable.[45] Section 402 of CWA establishes a pollution discharge permit system known as the National Pollutant Discharge Elimination System (NPDES).[46] NPDES permits are required for discharge of pollutants from a point source into navigable waters.[47]

Most states administer the Clean Water Act, via their federally delegated authority, and can issue NPDES permits and establish state water quality standards. In addition, states are free to impose stricter controls than required by federal effluent limitations.[48] States must designate uses (e.g., domestic, fishery, water supply) and develop water quality standards that are sufficient to support those uses. The states must then impose effluent limitations on the NPDES permits (termed State Pollutant Discharge Elimination System permits, SPDES; or New Jersey Pollutant Discharge Elimination System permits, or NJPDES in New Jersey) in order to achieve the standards.[49]

COZ Solution
Although point sources are governed by federal oversight, more can be done to reduce the amount of pollutants from point sources into the Bight and encourage the reuse of freshwater wasted from point source discharges. Therefore, the NJ/NY COZ Act, once enacted, will prohibit new point sources of pollution, as well as any increase in discharge capacity (for example, the ability of a wastewater or industrial facility to increase its capacity to discharge) while encouraging environmentally protective beneficial reuse of wastewater.

COZ OBJECTIVE #4
The NJ/NY COZ Act will reduce pollution from stormwater and sediments.

Background
Nonpoint source pollution plagues our waterways and adversely affects human health and wildlife. Nonpoint source, or "pointless" pollution, is the number one cause of coastal water pollution. Pointless pollution is caused by many sources, including runoff of litter, pet wastes, fertilizers, pesticides, leaky septic systems, and faulty sewage and stormwater systems.

Nonpoint source pollution is harmful to the coastal ecosystem, as well as to public health as it contaminates drinking water and waterways, closes beaches and shellfish beds, causes algal blooms (which can lead to fish kills), contaminates sediments, adversely affects the lifecycles of aquatic organisms, can lead to public health risks and fish consumption advisories for humans, and endangers wildlife through ingestion of and entanglement with litter.

Additionally, nonpoint source pollution and contaminated sediments affect wildlife from all parts of the food chain including worms, clams, and crabs as well as larger marine life such as fish, dolphins, and whales. For instance, about half of NJ's hard clam beds are closed because of high

bacteria counts due to pointless pollution. Similarly, in 2001, nine out of ten NJ beach closures were due to high fecal coliform bacteria, the cause of which is contaminated stormwater runoff.[50]

Relevant Law

Traditionally, the Clean Water Act loosely regulates nonpoint sources. Section 208 and 303 of the CWA require the development of area-wide wastewater management plans that must include an identification of procedures for controlling diffuse sources through the use of "best management practices."[51] In addition, §319 was added in 1987 to require that each state address nonpoint source pollution by preparing (1) an assessment of nonpoint sources and best management practices (BMPs) necessary to control them and (2) a program to implement BMPs.[52] Unfortunately, this requirement was linked to eligibility for funding with no other enforcement mechanisms in place and the program remains ineffective in many states.[53] However, also in 1987, §402(p) established a program for addressing five classes of stormwater discharges, including municipal separate storm system discharges and discharges associated with industrial activity, for such discharges to be permitted as point sources under the NPDES program. A federal regulation, commonly known as Stormwater Phase II, requires permits for stormwater discharges from Municipal Separate Storm Sewer Systems (MS4s) in urbanized areas and for construction activities disturbing one or more acres.

Moreover, the Coastal Zone Act Reauthorization Amendments Section - Coastal Nonpoint Source Pollution Control Program (Section 6217) - regulates nonpoint pollution in coastal waters. The program requires that states and territories with approved Coastal Zone Management Programs (CZMPs) develop Coastal Nonpoint Pollution Control Programs. The program describes how the state will implement nonpoint source pollution controls, known as management measures, that conform with those described in "Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters." This program is administered jointly with the National Oceanic and Atmospheric Administration (NOAA).

Relevant New Jersey Law

In 2003, New Jersey adopted a package of regulations, the New Jersey Pollutant Discharge Elimination System (NJPDES) Municipal Stormwater Regulation Program (MSRP Rule) and the Stormwater Management Rule, in compliance with § 402(p) and USEPA's implementing regulations.[54] The NJPDES Rule requires municipalities to develop control plans for stormwater runoff resulting from both existing and new development and implementation of "Statewide Basic Requirements," as required by § 402(p) of the CWA and USEPA's regulations.[55] Specifically, the Stormwater Management Rule requires the implementation of Best Management Practices for *new* development to reduce pollution runoff levels from total suspended solids by 80%, to reduce the nutrient load to the maximum extent feasible, to protect special resource areas by requiring vegetative buffers around vital streams and reservoirs, and new performance standards for groundwater recharge requiring maintenance of 100% of the average annual groundwater recharge. In addition, both rules will be implemented through the issuance of four General Permits that were also published for public review. To date, the stormwater program is underway, with municipalities expected to develop a stormwater plan and begin implementation within the next 2-3 years.

Relevant New York Law
On January 8, 2003, the NY Department of Environmental Conservation (NYDEC) finalized new permits for stormwater discharges. To implement the law, the NYDEC has issued two general permits, one for Municipal Separate Storm Sewer System's (MS4s) in urbanized areas and one for construction activities. The permits are part of the State Pollutant Discharge Elimination System (SPDES). Operators of regulated MS4s must have applied for permit coverage by March 10, 2003. Operators of construction activities that existed on or after March 10, 2003, and that involve one acre or more of land disturbance must obtain SPDES permit coverage through either an individual permit or the new General Construction Permit.

COZ Solution
Finding ways to stop the problems associated with pointless pollution, such as using new indicators for water pollution testing, identifying sources, and developing strong pollution elimination programs, is extremely important in the fight to protect waterways and beaches. Therefore, the NJ/NY COZ Act will mandate compliance with all applicable laws, including the CWA and the Coastal Zone Management Act (CZMA). Compliance shall further the goals of the NJ/NY COZ Act by implementing management measures for nonpoint source pollutants to restore and protect coastal waters, including reducing and preventing nonpoint source discharges into the NY/NJ Bight.

COZ GOAL II: PROTECT MARINE ECOSYSTEMS

Although the barbaric days of ocean dumping have been left behind, there are still those who are looking to exploit the sea's riches and threaten the marine ecosystem. The bounty-rich offshore underwater lands are seen by powerful industries as ripe for exploitation. Among these new and renewed threats are proposals for permanent extraction of non-renewable resources and development of industrial and non-renewable energy facilities. Proposals for development of renewable offshore energy sources, such as wind turbines and wave energy, also exist. Although the development of ocean-based renewable energy sources may be beneficial, there is no specific regulatory framework, management requirements, or standards, nor a thorough analysis of the environmental consequences of such development in the Atlantic Ocean.

COZ OBJECTIVE #5
The NJ/NY COZ Act will prohibit the permanent extraction (e.g., strip-mining) of non-renewable natural resources, including sand and gravel.

Background
The ocean floor is a rich bottom (or benthic) habitat consisting of muds, sands, and gravels. These resources are publicly owned. In recent years, private commercial companies have pursued sources of sand and gravel for use in construction material and proposals by private companies to mine vast areas of the seafloor have intensified. (These industrial activities are not to be confused with maintenance dredging of navigational channels and beach nourishment/replenishment activities.)

Offshore sand and gravel mining essentially strips the top layer of the ocean floor, including any living resources therein. This process has been referred to as *"strip-mining."* The equipment used for strip-mining includes a trailing, suction hopper dredge, which is usually a self-propelled ship.[56] Once the sediments are scraped-up, processing involves offloading, conveying, screening, load-out, milling or grinding, drying, mixing, handling, storing, and transporting to users primarily for commercial construction projects. Companies stand to make millions of dollars from extracting and processing these public resources.

However, strip-mining operations disrupt and damage important elements of the entire Bight aquatic food chain. For example, the Bight is home to fish egg and larval stages of hundreds of marine species. The area is also a migratory pathway for bottom fish, including summer flounder. Shellfish (i.e., scallops, surf clams, lobsters, and crabs) also inhabit the area and support economically important and historic commercial and recreational fisheries. Further, shoaling areas, which protect beaches from adverse storm effects, may be damaged or destroyed by sand and gravel mining. According to the Minerals Management Service (MMS), it takes up to eight years for the density of organisms to recover and stabilize after strip-mining activities.[57] Also the return of the biological community is unpredictable and likely not the same as before the mining.[58]

As of 2003, no sand and gravel mining operations have been approved in any offshore waters of the United States. However, the NY/NJ Bight has been the first region targeted for commercial strip-mining operations with proposals including offshore areas from 3-12 nautical miles from shore. Should such a project obtain approval, it would establish a national precedent. For example, an application was re-submitted in 1996 to strip-mine 100 square miles of the Bight.[59] The MMS denied the request with Bruce Babbitt, then Secretary of Interior, finding that he would not proceed with "a lease sale at this time" due to the "area's proud history as a port, a fishery, and a recreational mecca" that is "challenged by diminishing wetlands, as well as dredge disposal, channel widening, and other concerns."[60] However, the Secretary of the Interior indicated that it is possible that not all future decisions on sand and gravel mining will be denied.

It should be noted that strip-mining differs from **beach nourishment** activities in two ways: (1) strip-mining permanently removes millions of tons of offshore sand and gravel from the marine ecosystem (for use by private companies), while beach nourishment activities take sand from near-shore areas and place it onshore with no net loss of sand to the marine ecosystem; and (2) proposals for strip-mining affect vast areas (over 100 square miles) while beach nourishment activities are conducted from smaller borrow areas.[61]

Strip-mining also differs from maintenance dredging. **Maintenance dredging** is restricted to navigational channels and can combine the need for navigational dredging with harvesting of materials, such as sand resources, for beach replenishment or commercial aggregate, without damage to pristine benthic habitat.

Relevant Law

The MMS may issue sand and gravel commercial leases.[62] The United States claimed jurisdiction over the hard mineral resources of the OCS in the 1945 Truman Proclamation and codified such authority in the 1953 Outer Continental Shelf Lands Act (OCSLA).[63] During the

1980's, the federal government began to encourage development of offshore minerals as part of the National Minerals and Materials Program Plan.[64] In the late 1980s, MMS published rules on pre-lease prospecting of minerals (other than oil, gas, and sulfur), and general rules for leasing and operations on OCS.[65] The OCSLA, as amended, provides for the private use of aggregate (sand and gravel) for construction material through a competitive bidding and lease process in Section 8 (k)(1).[66]

Put simply, a private company may submit a mining application to MMS at any time. Based on the application, the Secretary of Interior (head of MMS) may initiate the lease sale process. Once a lease sale is initiated, rules for a competitive bidding system, public review and comment, and general environmental assessments are required prior to a decision by the Secretary of Interior.

The National Marine Fisheries Service (NMFS) is involved in lease sales if Essential Fish Habitat (EFH) is a concern. NMFS role is to protect, conserve, and enhance fishery resources by protecting fish habitat.[67] Much of the Bight has been identified as EFH, therefore, a federal action taken by MMS that may adversely impact EFH would require consultation with NMFS. NMFS must then provide EFH Consultation Recommendations for any action that would adversely affect EFH. However, these recommendations are only advisory in nature.[68]

COZ Solution
The NJ/NY COZ Act regulates only those activities that permanently remove inanimate, nonrenewable, natural resources from the marine ecosystem, excluding dredging of materials in navigation channels. The COZ designation would prohibit future applications for sand and gravel mining in the Bight.

COZ OBJECTIVE #6
The NJ/NY COZ Act will prohibit industrial and non-renewable energy facilities and infrastructure, including oil and gas exploration and development.

Background
Numerous proposals for a natural gas pipeline from Canada to New Jersey, offshore oil and gas exploration and development, and a buoyed Liquid Natural Gas (LNG) off-loading facility 20 miles off the coast of Belmar, NJ, may become a harsh reality for the NY/NJ Bight. These and other large projects are in various stages of discussion or consideration, and pose significant ocean pollution threats. Some of these marine-based industrial uses have never been tried in NY/NJ Bight waters, or elsewhere in the United States; therefore, questions exist as to the safety, potential for environmental harm, and impacts such projects may have on the competing uses of the NY/NJ Bight.

Oil and Gas Exploration and Development
Like on land, the ocean floor, specifically the Outer Continental Shelf (OCS) (which extends 200 miles from shore) can contain deposits of oil and gas resources. The majority of offshore oil and gas activities occur in the Pacific Ocean, Gulf of Mexico, and off the Alaskan coast.[69] Currently, there are no oil and gas leases in existence off the Atlantic Coast.[70] Interestingly, studies performed by the Minerals Management Service in 1984 (the most recent study) estimate that the

Atlantic OCS Region's recoverable oil would last approximately 2 weeks and natural gas would last slightly longer than 4 months, using current national consumption rates.[71]

Exploring and drilling for oil and gas resources is a complex process, which requires thousands of miles of pipelines, numerous tankers plying coastal waters, many refineries, and skilled labor. Oil and gas activities not only impact federal and state waters where platforms are located, but the land along the coast as well. In addition, "the biological consequences of such development, whether offshore, in the coastal zone, or on-land, can be acute or chronic, resulting from pollution or physical alteration of habitat."[72] These impacts include, but are not limited to:

- Catastrophic spills, such as those that occurred in Prince William Sound, Alaska and Santa Barbara, California;
- Unintentional releases of oil and gas from production or transportation facilities. Such releases can range from catastrophic spills to the release of smaller quantities of materials into the ocean;
- Routine releases of toxic metals, oil, gas, and byproducts (i.e., "drilling muds" and "cuttings") from exploration and production;
- Disturbance and destruction of the ocean benthic or bottom environment, including the smothering of benthic organisms;
- Release of "produced waters" from offshore activities, which contain very substantial amounts of oil and grease, as well as heavy metals, toxic organics and a variety of highly toxic additives, which can create acute and chronic toxicity problems; and
- Onshore impacts, including extensive wetlands loss from the construction of onshore facilities and related structures.[73]

The negative impacts listed above, as well as others, could lead to serious damage or destruction of New York and New Jersey's marine and coastal resources, which are of extreme ecological value. The waters of the Bight also support significant economic and social values, which could be seriously damaged by offshore oil and gas activities, including commercial fishing, commercial shell-fishing, recreational fishing, recreational boating, water recreation, whale-watching, and shore tourism.

Relevant Law

The federal government has exclusive jurisdiction over OCS resources more than three miles seaward of the coastline.[74] The Minerals Management Service (MMS), in the United States Department of Interior, oversees the exploration and development of offshore areas through a competitive lease process. This practice proceeds in four phases: 1) a five-year lease program; 2) lease sale; 3) exploration; and 4) development and production.[75] The Outer Continental Shelf Lands Act requires the Secretary of the Interior to prepare and maintain five-year leasing programs, which are developed, proposed, and implemented by MMS. The current five-year lease program became effective on July 1, 2002 (and extends to 2007). However, this lease cycle includes a moratorium on oil and gas activities in the Bight until 2007.[76]

Fortunately, waters of the mid-Atlantic coast have been carefully preserved by an annual congressional prohibition on new offshore oil and gas leasing for over 22 years. These same waters have also been protected since 1990 by a separate Executive Order put in place by former

President George W. Bush, Sr., and subsequently extended by President Clinton to the year 2012.[77] Unfortunately, succeeding presidents can remove executive orders.

However, at the time of this publication, recent bills in Congress have included provisions for "inventory and analysis" of oil and gas resources on the OCS (including exploration of current moratoria areas), as well as to identify impediments to the development of resources. The impediments to be identified include "moratoria, lease terms and conditions, operational stipulations, approval delays by the federal government and coastal states, and local zoning restrictions for onshore processing facilities and pipeline landings."[78] Both of these provisions indicate an intention to reopen those areas currently protected from oil and gas exploration, including the NY/NJ Bight. In addition, prospecting for oil and gas in the NY/NJ Bight has been a re-occurring threat to the area for many years. Test wells drilled between 1978 and 1984 showed modest amounts of gas resources and small amounts of oil off the coast of New Jersey. These wells were abandoned as "non-commercial."[4]

Numerous federal and state elected officials and citizens have firmly and continuously stated opposition to oil and gas development off the coast of New York and New Jersey.

Natural Gas Pipelines
Review and permitting of natural gas pipelines falls under the jurisdiction of the Federal Energy Regulatory Commission. This jurisdiction is primarily from the Natural Gas Act of 1938 and the Natural Gas Policy Act of 1978.[79]

Liquid Natural Gas (LNG) Facilities
The situation governing LNG facilities is somewhat murky. Currently, the Federal Energy Regulatory Commission (FERC) grants federal approval for the siting of new offshore LNG facilities under the Natural Gas Act of 1938.[80] However, FERC defers to the U.S. Coast Guard on safety and security issues. The Coast Guard and U.S. Department of Transportation, Maritime Administration have joint jurisdiction over facilities outside state waters pursuant to the Deepwater Port Act. The Maritime Administration deals with the financial analysis of the project, whereas the Coast Guard implements the bulk of the work, including the environmental review. However, FERC's current jurisdiction could change depending on the outcome of the case currently in the 9th Circuit[81] or on recently introduced legislation.[82]

Energy Policies
The Coastal Zone Management Act requires that federal agency activities, within or outside the state's coastal zone, that may affect any land or water use or natural resource of the coastal zone, must be carried out in a manner that is "consistent to the maximum extent practicable" with the enforceable policies of the state's approved State coastal management programs.[83]

New Jersey's Coastal Zone
New Jersey's policies on energy use have not been incorporated into the State's Coastal Management Program and thus cannot adequately be used to comment on energy proposals. Regardless, if portions of a project are within New Jersey's waters, various additional permits for these energy projects would be required. For example, the attachment of cables from wind turbines to the land would likely require a Waterfront Development Act permit and the use of

tidelands would require minimal compensation under the Tidelands Act. Despite these mechanisms, the most important tool New Jersey could use - a statute to prohibit, condition, or impact the permitting of energy facilities in federal waters that impact State resources - is lacking.

New York's Coastal Zone
In New York, the Department of State, Division of Coastal Resources regulates energy development off the coast. According to the Division,

> [t]he enforceable coastal policies are those in the New York State Coastal Management Program (CMP) and the enforceable policies of any Local Waterfront Revitalization Program, regional coastal management programs such as the Long Island Sound Coastal Management Program, or other special area management plan that has been incorporated into New York State's approved management program. Likewise the State Waterfront Revitalization of Coastal Areas and Inland Waterways Act includes provisions to assure consistency of state actions and where appropriate federal actions, with the policies of the coastal area and inland waterways, and with accepted waterfront revitalization programs of the area defined or addressed by such programs.[84]

Numerous policies are relevant to energy facilities in the coastal area. For example, Policy 27 states that "[d]ecisions on the siting and construction of major energy facilities in the coastal area will be based on public energy needs, compatibility of such facilities with the environment, and the facility's need for a shore front location." As the policy further explains,

> [a] determination of public need for energy is the first step in the process for siting new facilities. The directives for determining this need are contained primarily in Article 5 of the New York State Energy Law. That Article requires the preparation of a State Energy Master Plan . . . The policies derived from the siting regulations under these Articles are entirely consistent with the general coastal zone policies derived from other laws, particularly the regulations promulgated pursuant to the Waterfront Revitalization and Coastal Resources Act. That Act is used for the purposes of ensuring consistency with the Coastal Management Program.[85]

COZ Solution
The NJ/NY COZ Act will prohibit industrial and non-renewable energy facilities and infrastructure, including oil and gas exploration and development, LNG facilities, and pipelines transporting nonrenewable energy.

COZ OBJECTIVE #7
The NJ/NY COZ Act will require the development of responsible regulations for renewable energy sources.

Background
As technology evolves and renewable energy sources are discovered and cultivated, "green" energy sources are growing options in the NY/NJ Bight. At the time of this publication, numerous proposals for wind turbines along the coast are in various proposal stages. Some of these marine-based renewable energy sources have never been tried in NY/NJ Bight waters, or elsewhere in the marine waters of the United States. Therefore, questions exist as to the safety, success, suitability, stability, potential for environmental harm, and impacts such projects may have on the resources of the NY/NJ Bight, as well as on the competing maritime uses.

Relevant Law
Marine-based facilities are governed by various laws and are in differing jurisdictions depending on the type of project and where that project is located. For projects within three miles of the coast, the state is responsible for permitting facilities under the state's laws and regulations. For projects outside of three miles, federal jurisdiction begins and federal laws and regulations govern projects. (However, as is explained below, comprehensive federal laws and regulations for offshore renewable energy facilities are lacking.) States have an opportunity to participate in the decision-making process for projects beyond the three-mile limit if there are any potential impacts "within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone" via a Coastal Zone Management Act federal consistency determination.[86] The state's opportunity to comment on federal projects under the Coastal Zone Management Act allows a State to incorporate its policies into the permit as part of its Coastal Management Program.[87]

Offshore Renewable Energy Facilities
The regulation of offshore renewable energy facilities is not as straightforward. Recent proposals for offshore wind facilities provide an example of the inevitable issues surrounding offshore renewable energy development, whether it is wind, wave, or geothermal energy.

According to a Congressional Research Service Report entitled, "Wind Energy: Offshore Permitting" (November 1, 2004 and updated March 30, 2005),

> [t]he federal government and coastal states each have roles in the permitting process, the extent of which depends on whether the project is located in state or federal waters. Currently, no single federal agency is responsible for permitting activities on the submerged lands in federal waters, with regulatory authority allocated among various agencies based on the nature of the resource to be exploited.[88]

The USACE, pursuant to §10 of the Rivers and Harbors Act of 1899 and the Outer Continental Shelf Lands Act, would likely permit marine-based wind facilities. However, there is some debate as to whether the USACE has adequate authority to regulate this new industrial use of the ocean. The issue is currently being played out publicly in Massachusetts with the contentious

permitting process of the Cape Wind Associates project in Nantucket Sound (*See* Box 2). The USEPA plays a critical role by reviewing the USACE's Environmental Impact Statements (EIS) (*See* Box 1) under the National Environmental Policy Act (NEPA). However, the NEPA process is problematic.

NEPA "directs all federal agencies to include in proposals for . . . *major federal actions significantly affecting the quality of the human environment*, a detailed statement [an EIS] by the responsible official on: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented"(*emphasis added*).[1] "Major federal action" includes "actions with effects that may be major and which are potentially subject to Federal control and responsibility."[2] Importantly, the significance standard applies to both *beneficial and adverse* impacts.[3] Yet, even though performance of an EIS seems necessary for the placement of offshore wind turbines, the USACE's currently posits that an EIS is discretionary.

USEPA's Review of the USACE Draft Environmental Impact Statement (DEIS) of the Cape Wind Project

On February 24, 2005, USEPA, Region 1, commented on the Corps Draft Environmental Impact Statement (DEIS) for the Cape Wind energy project in Nantucket Sound. In doing so, USEPA rated the DEIS as "Category 3-Inadequate" and requested that USACE prepare a supplemental DEIS (and make available for public comment). While noting that the facility would help the region meet state and federal goals focused on renewable energy production and air quality, USEPA states, *"[w]e do not believe that the DEIS provides enough information to fully characterize baseline environmental conditions, the substantial impacts of the proposed project, and alternatives that avoid or minimize those impacts. Without this information we do not believe an adequate mitigation and monitoring plan can be developed, nor can a decision be made as to whether the project is environmentally acceptable and in the public interest*." The USEPA provides further detail about the inadequacies, including inadequate aquatic impact analysis, such as conversion of habitat and threatened and endangered species. To read USEPA' comment in its entirety, see http://www.epa.gov/NE/nepa/pdfs/d_capewind_022405.pdf.

Box 1.

[1] 42 U.S.C. § 4332(C), NEPA § 102(C).
[2] 40 C.F.R. 1508.18
[3] 40 C.F.R. 1508.27(b)(1). See also National Wildlife Federation v. Marsh, 751 F. 2d 767, 14 ELR 20172 (11th Cir. 1983); Environmental Defense Fund v. Marsh, 651 F. 2d 983, 11 ELR 21012 (5th Cir. 1981).

Alliance to Protect Nantucket Sound, Inc., et. al. v. U.S. Dep't of the Army, U.S. Corps of Engineers, and Cape Wind Associates, LLC, et. al. (1st Cir. 2005)

On November 20, 2001, Cape Wind Associates, LLC submitted an application to USACE for a navigability permit under Section 10 of the Rivers and Harbors Act of 1899 to construct and operate an offshore data tower in Horseshoe Shoals. Horseshoe Shoals is an area of Nantucket Sound that is located on the Outer Continental Shelf and consequently subject to federal jurisdiction and control under the Outer Continental Shelf Lands Act. A separate permit for the entire wind energy plant was also submitted but is not at issue in this decision.

In December 2001, USACE issued the permit subject to a number of conditions, including that the data tower be removed within five years, that Cape Wind post a $300K bond for emergency repairs or removal, and that it share the data collected with government agencies and others.

The Alliance brought suit alleging that: (1) USACE lacked the authority to issue a Section 10 permit for the data tower, (2) the USACE acted arbitrarily and capriciously, in violation of the Administrative Procedure Act by granting Cape Wind's permit application in spite of Cape Wind's lack of property rights on the OCS, and (3) USACE failed to comply with the National Environmental Protection Act's requirements for evaluating the data tower's environmental impacts.

The district court held in favor of USACE and Cape Wind. The Alliance appealed.

On February 16, 2005, the First Circuit Court of Appeals affirmed the decision of the district court. In doing so, the First Circuit held that USACE had jurisdiction to issue a Section 10 permit for Cape Wind's data tower, USACE did not act arbitrarily nor capriciously as USACE did not need to evaluate the sufficiency of Cape Wind's property interests in the OCS, and USACE complied with the National Environmental Policy Act.

The Court stated that "*the Corps has authority to grant a Section 10 permit for all structures on the OCS, regardless of their function*" and that "*a Section 10 permit is necessary for all structures on the OCS unless otherwise indicated by law*" but the Court "*d[id] not determine whether such a permit is sufficient to authorize building on the federally controlled OCS*."

What does this mean for the NY/NJ Bight? USACE can, and indeed must, issue a permit for the installation of any structure on OCS. However, it is not clear whether the USACE permit, by itself, allows construction on OCS.

Box 2.

COZ Solution

The NJ/NY COZ Act will require the development of comprehensive, responsible regulations for the development of renewable energy sources in the ocean. In doing so, the Act will provide a good governance approach to offshore renewable energy development, and require that a regulatory framework is established prior to the siting of such facilities in the NY/NJ Bight.

COZ GOAL III: SUPPORT MARINE RESOURCE ACTIVITIES

The physical, hydrodynamic, and biological characteristics of the NY/NJ Bight are unique in the world and its ecological richness depends on protecting the quality of the environment. The NY/NJ Bight also sustains the economy of the region through its bounty of natural resources and intrinsic values for millions of people through tourism, as well as being host to the nation's largest east coast global port and its thousands of related industries – the lifeblood of New Jersey's economy. Also, recreational and commercial fisheries provide enormous economic benefits both in food production and recreational activities. Divers, surfers, and swimmers dot the shoreline all year to enjoy the Bight's unique qualities. In addition, coastal property values, which are among the highest in the nation, depend on healthful water quality.

The summers of 1987 and 1988 provide stark evidence of water quality's link to the state and local economies. Raw sewage, medical waste, dead and dying dolphins washed ashore along the bi-state region. When all indirect effects of the 1988 event are included, losses were estimated at $820.7 million to $3,060.8 million. [89]

Specific economic values of the marine resources of the NY/NJ Bight are described below, in alphabetical order.

Commercial Fishing
In New Jersey, "[a]nnual commercial landings of finfish and shellfish are over 182 million pounds with an approximate dockside value of $100 million," according to the New Jersey Department of Environmental Protection (NJDEP), Coastal Management Program,[90] thus generating $100 million to the New Jersey economy annually.[91]

In New York, "41.3 million pounds of fish and shellfish with a dockside value of $59.6 million was landed in 2000," according to the National Marine Fisheries Service, which "is a significant decrease from the peak reached in 1997 when 63.0 million pounds of fish and shellfish were landed in New York with a dockside value of $97 million. Studies have estimated that the total contribution of commercial fishery landings to the local economy is 3 to 4 times more than the reported dockside value." For 1999, the New York Sea Grant study estimated that New York's commercial fishing industry contributed a total of $149.6 million to the state's economy and directly employed approximately 10,500 New Yorkers."[92]

Diving
According to the NJDEP's, Division of Fish and Wildlife's, "In 2000, New Jersey's recreational dive boat fleet consisted of an estimated 620 private and 38 charter boats. These vessels undertook a combined 2,664 dive trips in 2000, involving 19,728 divers who made 37,482 dives."[93] In doing so, the diving community contributed a significant amount of money to local businesses such as dive shops, boat shops, restaurants, and gas stations.

The Port of New York and New Jersey
The NJ DEP also states that "[t]he Port of New York and New Jersey is the largest container port on the east coast of the United States. The port generates more than 228,000 direct and indirect

jobs and $30 billion in regional economic activity."[94] Products from all over the world enter the U.S. stream of commerce at the Ports of New York and New Jersey.

Recreational Fishing
According to the American Sportfishing Association, there are 805,870 recreational anglers in New Jersey and 1,549,637 in New York.[95] The recreational fishing industry provides food for anglers and their families, as well as jobs for the businesses associated with fishing and tourism. Today, a rich recreational fishery includes striped bass, bluefish, fluke, winter flounder, weakfish, porgy, blackfish (tautog), and black sea bass.

In 2003, the American Sportfishing Association estimated that recreational fishing brought $724,634,011 in retail sales with a total multiplier effect[96] of $1,363,259,834 to the state of New Jersey.[97] Recreational fishing accounts for 12,021 jobs in New Jersey, with salaries and wages totaling $328,359,434.[98] The sport generates $7,750,295 in New Jersey income taxes and $56,339,961 in federal income taxes.[99]

The same report indicates that recreational fishing in New York generated $1,116,861,525 in retail sales with a total multiplier effect of $2,011,716,251.[100] The sport accounts for 17,083 jobs and $503,486,172 in salaries and wages in New York.[101] A total of $15,594,751 in state income taxes and $90,197,940 in federal income taxes is contributed by NY recreational fishing.[102] Estimates of New York's statistics by the Marine Recreational Fishing Statistics Survey of the National Marine Fisheries Service are "that more than a half-million anglers made more than 4.6 million fishing trips in New York State's marine waters in 2004."[103] Additionally, a 2001 New York Sea Grant Institute study estimated that "New York State's marine recreational fishing industry contributes a total of more than $1.3 billion to the state's economy and supports 21,000 jobs annually."[104]

Surfing
Surfing is a growing sport, among both men and women. In Monmouth County, for example, the Jersey Shore Chapter of Surfrider conducted a random phone survey of Monmouth County residents (with 62 respondents) in 2003. Fifty-four percent of the residents surveyed surfed.[105] Residents in Monmouth County contributed at least $10 million to the economy from surfing and associated businesses (includes purchasing equipment, wax, bathing suits, wet suits, parking fees, beach badges, breakfast, and lunch).[106] In Monmouth County alone, four new surf shops opened in the last three years.[107]

Tourism
According to the New Jersey Department of Commerce, travel and tourism in New Jersey contributes $32 billion in economic activities each year and generates 416,000 jobs (the second largest private sector employer). The four coastal counties – Atlantic, Cape May, Ocean, and Monouth – account for more than 72% or $21.6 billion in annual economic activity in New Jersey.[108] In 1995 (the most recent numbers accessible), coastal tourism in New York contributed $2.9 billion to the overall economy, comprising 62.5% of the state economy.[109]

COZ Solution
The polluting and harmful activities of the Bight in the past caused ecological and economic crises. These destructive activities undermine the ecological and economic potentialities to sustain living marine resources in the NY/NJ Bight. The Clean Ocean Zone aims to keep the oceans healthy and clean so that marine activities, and subsequently, New York and New Jersey's economy, can thrive.

COZ OBJECTIVE #8

The NJ/NY COZ Act will support recreational and commercial fishing by acknowledging that federal and state laws for fisheries exist, and prohibit the NJ/NY COZ legislation from being used to adopt or enact fisheries management actions. The NJ/NY COZ legislation shall not be used to restrict or limit recreational or commercial fishing.

Background
The Bight has been an important commercial and recreational fishing ground since the colonial days. Colonists began whaling on Long Island around 1640. Fisheries were the most important source of income to Long Island and New Jersey coastal communities for a long time.[110] Early settlers even used the abundance of shellfish to encourage others to settle in the region. For example, the prevalence of oysters resulted in the naming of oyster species for the bays and inlets where they were found: Rockaway, Jamaica, Bluepoint, and others.[111]

Is COZ a Marine Protected Area (MPA)?

The COZ is *not* an MPA as designated under Executive Order 13158 because under the COZ legislation, regulation of fisheries management activities through the COZ legislation is strictly prohibited.

Relevant Law
A wide array of state, federal, and international laws and regulations currently govern fisheries management in the NY/NJ Bight, including, but not limited to:

- The Magnuson-Stevens Fishery Conservation and Management Act
- Atlantic Coastal Fisheries Cooperative Management Act of 1994 (which authorized the Secretary of Commerce to close fisheries that the Atlantic States Commission determined are not in compliance with its management plan)
- United Nations Food and Agriculture Organization's Committee of Fisheries' Compliance Agreement and the Fish Stocks Agreement (global agreements that are binding on signatories)
- Agreement for the Implementation of the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
- Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
- International Convention for the Conservation of Atlantic Tuna.

The 1976 Magnuson Fishery Conservation and Management Act (MFCMA), as amended,[112] extends exclusive United States fisheries jurisdiction to 200 nautical miles offshore (the area from the low-water line along the coast out to 200 nautical miles offshore is termed the

"Exclusive Economic Zone" or "EEZ").[113] MFCMA established eight regional fishery management councils to formulate, monitor, and revise fishery management plans for species of a geographic region.[114] The Councils submit these plans to the Secretary of Commerce ("Secretary") who, under MFCMA, must review the plans to ensure they are consistent with national standards and other applicable laws.[115] The Secretary must also publish the proposed plans or amendments in the Federal Register for public comment.[116] Once approved by the Secretary, fishery management plans are to be enforced through regulations of the U.S. Department of Commerce. Councils also submit proposed implementing regulations for the Secretary to review, publish in the Federal Register for public comment, and finalize.[117]

COZ Solution
Fishery management structures exist and currently apply to the NJ/NY Clean Ocean Zone. The NJ/NY COZ Act will support recreational and commercial fishing by acknowledging that federal and state laws for fisheries exist, and will prohibit the COZ legislation from being used to adopt or enact fisheries management actions. The COZ legislation shall not be used to restrict or limit recreational or commercial fishing.

COZ OBJECTIVE #9

The NJ/NY COZ Act will support federal and state approved artificial reefs, and allow underwater research and exploration, but not projects that will adversely affect the ecosystem.

Artificial Reef Background
An artificial reef program has existed in New Jersey since 1984. The NJDEP Bureau of Marine Fisheries is involved in the construction and biological monitoring of the reefs. According to NJDEP, "[t]he purpose is to create a network of artificial reefs in the ocean waters along the New Jersey coast to provide a hard substrate for fish, shellfish and crustaceans, fishing grounds for anglers, and underwater structures for scuba divers."[118] There are currently fourteen artificial reef sites in New Jersey encompassing a total of twenty-five square miles of sea floor.[119] In January 2005, the Corps applied for a permit to deploy additional materials on the 14 NJ sites, as well as to create an additional 15th site. At the time of this publication, the permit decision is still pending.

New York's program began in 1962 and "has provided new fishing and diving opportunities and enhanced fishery resources and habitat."[120] Eleven artificial reef sites currently exist in New York waters under the supervision of the New York State Department of Environmental Conservation Marine Fishing Access Unit.[121]

Artificial Reef Relevant Law
It is the responsibility of the U.S. Army Corps of Engineers (USACE) to regulate the construction and maintenance of fishing reefs and fishing attractors in waters of the United States, including the waters that overlay the outer continental shelf. Permits for such structures are required from USACE pursuant to §10 of the Rivers and Harbors Act of 1899 and/or §404 of the Clean Water Act. Under CWA §404, the United States Environmental Protection Agency (USEPA) may prohibit, restrict, or withdraw use of an artificial reef site for the discharge of dredged or fill material that would have unacceptable effects on fish, wildlife, shellfish, recreation, or municipal water supplies. The role of the USEPA is to assure that only acceptable

material is used as artificial reef material and that the placement of these materials on the ocean floor will not violate federal laws or regulations that protect the environment.

The states of New York and New Jersey each have valid USACE permits for artificial reef sites in the Atlantic Ocean. The USACE consults USEPA for all requests of permits for artificial reefs and confirms authorization of sites to receive certain materials for the purpose of enhancing the aquatic environment.[122] As with any federal activity affecting a state's area of concern, states can participate in the decision-making process for projects beyond the 3-mile state limit if there may be impacts "within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone" via a Coastal Zone Management Act federal consistency determination.[123]

Underwater Research Background and Relevant Law

The regulation of underwater research generally depends on the type of research to be performed. For example, for research that may harm or harass marine mammals, a letter of intent must be sent to the National Marine Fisheries Service under the Marine Mammal Protection Act. Title II of the Marine Protection, Research, and Sanctuaries Act (MPRSA) governs ocean research, both general research on ocean resources under the jurisdiction of the National Oceanic and Atmospheric Administration (NOAA), and USEPA related research regarding the phasing-out of ocean disposal activities. In the past, several studies were proposed in the NJ/NY Bight that had the potential to cause ecological harm. For example, the offshore incineration of toxic waste and a 10-year study to dump millions of tons of sewage sludge and hazardous waste in the ocean floor were presented as "research activities." Citizen groups rallied to oppose these activities and theproposal were abandoned. As a result, environmentally sound solutions were found.

COZ Solution

The NJ/NY COZ Act will support federal and state approved artificial reefs, and allow underwater research and exploration, but not projects that will adversely affect the ecosystem.

COZ OBJECTIVE #10

The NJ/NY COZ Act will support, celebrate, and sustain maritime activities that depend on a healthy and clean ocean such as: boating, underwater diving, fishing, surfing, swimming, and the enjoyment of the sea. The NJ/NY COZ legislation <u>will not</u> be used to restrict or limit these activities.

Background

Traditional maritime uses include all types of fishing, boating, and recreation that are enjoyed by citizens living along and visiting the NY/NJ Bight. Recreational and commercial fishing roots can be traced back hundreds of years ago as a source of food and recreational pursuit. Ocean and beach related recreational uses are numerous, including surfing, kayaking, and swimming. Further, underwater research and exploration provide enjoyment and a livelihood to numerous sectors. Details about the economic benefits of these maritime uses can be found above, at page 22. These maritime uses of the Bight are an important part of history and the future, and therefore, must be protected.

COZ Solution
The NJ/NY COZ Act will support, celebrate, and sustain maritime activities that depend on a healthy and clean ocean such as: boating, underwater diving, fishing, surfing, swimming, and the enjoyment of the sea. The COZ legislation will not be used to restrict or limit these activities.

CONCLUSION

In sum, enactment of the NJ/NY Clean Ocean Zone Act will help to eliminate the current problems with case-by-case and permit-by-permit environmental regulation by creating a statute that prohibits point source pollution, in all cases, in the entire NY/NJ Bight region. The Act will effectively eliminate the existence of permit applications for pollution discharges into the NY/NJ Bight, thus significantly reducing the regulatory and permitting attention currently given to such applications. Additionally, the Act does not require funding for management.

The implementation of pollution disposal alternatives may increase cost, as compared to current ocean disposal methods. For example, non-ocean disposal management of dredged material is initially more expensive than traditional ocean disposal. However, beneficial reuse of dredged materials in upland regions generates significant economic improvements (as discussed above - see p.10-11). In addition, not disposing contaminated dredged material in the ocean improves the ecological health and economic potentialities of the Bight. A healthy Bight will inevitably improve tourism, fishing, surfing, diving, and real estate revenues.

Now is the time to lock-in the tremendous path of progress, which has led to far-reaching improvements in our ocean water quality, and lock-out environmentally harmful activities by passing the NJ/NY Clean Ocean Zone Act.

To date, 81 organizations, 25 municipalities, and 6 environmental commissions have signed-on in support of the NJ/NY Clean Ocean Zone. Visit www.cleanoceanzone.org for an updated list of supporters. In addition, NJ Acting Governor Richard Codey made the NJ/NY Clean Ocean Zone a priority for the coast in his 2005 Coastal Initiative to "protect the integrity and economic viability of the Jersey Shore."[124]

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[2] U.S. Commission on Ocean Policy, "An Ocean Blueprint for the 21st Century: Final Report," p. 4. Washington, D.C., July 2004. ISBN#0-9759462-0-X. Available at http://www.oceancommission.gov.
[3] Environmental Protection Agency, Region 2, *Supplement to the Environmental Impact Statement on the New York Dredged Material Disposal Site Designation for the Designation of the Historic Area Remediation Site (HARS) in the New York Bight Apex,* at Table 3-1 (May 1997).
[4] U.S. Commission on Ocean Policy, "An Ocean Blueprint for the 21st Century: Final Report," p. 87. Washington, D.C., July 2004. ISBN#0-9759462-0-X. Available at http://www.oceancommission.gov
[5] *Id.* at 88, Box 5.1.
[6] Wikipedia, The Free Encyclopdia, available at http://en.wikipedia.org/wiki/Great_Lakes, (last visited July 27, 2005).
[7] Wikipedia, The Free Encyclopdia, available at http://en.wikipedia.org/wiki/Great_Lakes, (last visited July 27, 2005).

[8] U.S. Environmental Protection Agency – Great lakes, information available at http://www.epa.gov/glnpo/index.html (last visited July 22, 2005).
[9] *Id*.
[10] *Id.*
[11] For more information on the National Estuary Program, visit http://www.epa.gov/owow/estuaries/ (last visited October 26, 2005).
[12] The National Estuary Program was established by Congress in 1987 by amendments to the Clean Water Act, available at http://www.epa.gov/owow/estuaries/s835_estuaries2000.pdf (last visited October 26, 2005).
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[14] U.S. Census Bureau, data available at http://www.factfinder.census.gov, (last visited July 27, 2005).
[15] *Id.*
[16] Coast Alliance, "State of the Coasts: A State-by-State Analysis of the Vital Link between Healthy Coasts and a Healthy Economy," p. 106,109, June 1995.
[17] 33 U.S.C. 1414b, MPRSA § 104B(a).
[18] Copeland, Claudia. CRS Report: RS20028, *Ocean Dumping Act: A Summary of the Law,* January 22, 1999 (updated when necessary). Available at http://www.ncseonline.org/nle/crsreports/marine/mar-25.cfm.
[19] *Id.*
[20] 40 CFR 228, Final Rule, "Simultaneous De-designation and Termination of the Mud Dump Site and Designation of the Historic Area Remediation Site," effective September 20, 1997.
[21] 40 CFR 228.15 (d)(6)(v)
[22] Memorandum of Agreement among the Department of Transportation, the Environmental Protection Agency, and the U.S. Army Corps of Engineers, July 24, 1996 (termed the "Gore Agreement" or "Three Party Letter") available at http://epa.gov/region02/water/dredge/threeparty.htm (last visited July 15, 2005).
[23] New York-New Jersey Harbor Estuary Program, Including the Bight Restoration Plan, "Final Comprehensive Conservation and Management Plan," March 1996, p.138 - Defines "Category II Materials" are described as "sediments which meet ocean dumping criteria. Test results indicate no significant toxicity but a potential for bioaccumulation, USEPA and USACE will require appropriate management practices such as capping."
[24] NOAA, 1996 as cited in USEPA 1997
[25] Source to be determined.
[26] In October 2000, EPA and USACE implemented an updated PCB guideline to limit disposal of dredged material containing PCBs at HARS. In July 2002, the new PCB guideline was invalidated in a court case; in April 2003, a new EPA rulemaking establishing the same PCB guideline was finalized.
[27] 40 CFR 228.15 (d)(6)(v)(A) (2002).
[28] N.J.A.C. 58:10A-44 to 46.
[29] N.J.A.C. 58:10A-47 to 51.
[30] Memorandum of Agreement Among the Department of the Army, the Environmental Protection Agency,
[31] 33 U.S.C. § 1363 (14) (2002).
[32] "Wasting Our Waters Away: Technical Report, Wastewater Discharges into the Atlantic Ocean from New Jersey, 2001." Clean Ocean Action, available at www.CleanOceanAction.org.
[33] *Id.* at 25.
[34] *Id.*
[35] New York State Dep't of Env'l Protection, Division of Water, telephone conversation with Tony Leung, Environmental Engineer, July 27, 2005.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] "Wasting Our Waters Away: Technical Report, Wastewater Discharges into the Atlantic Ocean from New Jersey, 2001." Clean Ocean Action, p.1, available at www.CleanOceanAction.org. *Id.* at 1.
[40] *Id.*
[41] *Id.* at 17.
[42] CWA § 301(a), 33 U.S.C. § 1311(a).
[43] 33 U.S.C. § 1362(12)(A) (emphasis added).
[44] *See* CWA § 301(a), 33 U.S.C. § 1311(a); CWA § 502(12), 33 U.S.C. § 1362(12); see also *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

45 *See Connecticut Fund for the Env't v. Upjohn Co*., 660 F. Supp. 1397, 1409 (D. Conn. 1987).
[46] 33 U.S.C. § 1342
[47] 33 U.S.C. § 1363(7)
[48] 33 U.S.C. § 1342(b)
[49] 33 U.S.C. § 1311
[50] Natural Resources Defense Council, "Testing the Waters," 2002.
[51] 33 U.S.C. § 1288 and 1313.
[52] 33 U.S.C. § 1329(b)
[53] 33 U.S.C. § 1329(h)
[54] CWA § 402(p); USEPA, National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722-68,851 (Dec. 8, 1999) (to be codified at 40 CFR Parts 9, 122, and 124).
[55] Watershed Management, Stormwater Management, Proposed Repeals, New Rules, and Amendments, 35 N.J.Reg. 119-158 (Jan. 6, 2003); New Jersey Pollutant Discharge Elimination System, Stormwater Regulations, Underground Injection Control, Proposed Amendments, Repeal, and New Rules, 35 N.J.Reg. 169-215 (Jan. 6, 2003).
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[57] *Id.* at 3-26 and A-17.
[58] *Id.* at 3-26.
[59] Federal Register, Vol. 61, No. 99 (May 21, 1996).
[60] Letter from Bruce Babbit, Secretary of Interior, to Richard Rosamilia, President of Amboy Aggregates of 6/28/00, at 2.
[61] *Id.* at A-8.
[62] Outer Continental Shelf Lands Act of 1953, as amended, § 8(k)(1), 43 U.S.C. § 1337(k)
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[66] 43 U.S.C. § 1337(k)
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[114] 16 U.S.C. § 1801(b)(5) and 1852.
[115] 16 U.S.C. § 1854(a)(1)(A).
[116] 16 U.S.C. § 1854(a)(1)(B) and (a)(2)(A).
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