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LEGISLATIVE HEARING ON
THE CONSOLIDATED LAND, ENERGY, AND AQUATIC RESOURCES ACT OF 2009

BEFORE THE
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

September 16, 2009

Good morning Chairman Rahall, Ranking Member Hastings, and Members of the Committee. My name is Jane Lubchenco and I am the Under Secretary of Commerce for Oceans and Atmosphere and the Administrator of the National Oceanic and Atmospheric Administration. Thank you for the opportunity to testify before you today on the *Consolidated Land, Energy, and Aquatic Resources Act of 2009*. NOAA appreciates the continued efforts of the bill's sponsors and the members of this committee to strengthen comprehensive planning for energy resource use both on land and in the ocean and to take action to improve the integrated management and conservation of our oceans. Comprehensive planning supports ecosystem-based management and NOAA's efforts to protect its trust resources. As part of the Department of Commerce, NOAA has a critical interest in comprehensive ocean planning that both protects existing jobs, including those in ocean-dependent industries such as fishing, marine transportation, and coastal tourism, and fosters the creation of new clean energy jobs.

While NOAA has an interest in, expertise on, and responsibilities relevant to energy planning on a variety of levels, the majority of my comments will focus on Title VI — *Outer Continental Shelf Coordination and Planning* — of H.R. 3534 and the importance of framing OCS activities as part of a broader strategy for integrated use of oceans. Before I discuss NOAA's comments on the bill, let me give you a brief overview of NOAA's roles in energy planning and permitting.

NOAA's Involvement in Energy Planning and Permitting

NOAA's involvement with the energy sector is wide-ranging. NOAA works with the following energy sectors: offshore oil and gas (exploration and production); liquefied natural gas (LNG); hydropower; offshore and land-based wind power; hydrokinetic ocean energy (wave, tidal, and current); ocean thermal energy conversion (OTEC); ocean methane hydrates; solar power; biomass and biofuels. NOAA provides data, scientific research, technical products, management and conflict resolution expertise, as well as operational services that are used by the energy industry, state and local governments, and agency partners for energy-related issues. Under the *Ocean Thermal Energy Conversion Act* (*OTECA*), NOAA is responsible for issuing licenses to any entity wishing to construct or operate an OTEC facility within the U.S. territorial sea. In

addition, NOAA actively participates in many of the energy licensing processes by conducting a variety of environmental consultations required for federal agencies to complete energy facility licensing.

Federal agencies, states, and the private energy sector are increasingly requesting NOAA's scientific and technical expertise in coastal policy and management, fisheries science and management, *Coastal Zone Management Act* federal consistency reviews, *Endangered Species Act* consultations, and mediation. NOAA also provides a broad range of oceanographic, meteorological, and climate services used by the energy sector and federal agencies in charge of leasing and permitting projects. In the emerging field of renewable energy, industry and federal partners will need enhanced NOAA products and services in order to make reliable investments in renewable sources of energy such as wind, wave, solar and water. For example, NOAA data on weather and oceanographic patterns could inform critical siting decisions for these renewable energy industries.

NOAA's mission includes ensuring that energy exploration, production and transport in the ocean and coastal zone occur in an environmentally responsible way and that these activities minimize adverse interactions with other uses. Many potential impacts of energy exploration, production or transport impinge upon NOAA's responsibilities, including:

- physical, biological or chemical impacts on marine biota and benthic habitats;
- acoustic impacts to marine mammals, other protected species, and fisheries;
- impacts on navigation, including increased ship traffic;
- interference with weather radar; and
- impacts on archaeological and historic preservation.

In particular, NOAA has several legislative mandates to protect marine species and their environment, some of which provide strict guidance related to allowable levels of impact on living marine resources. I've included a listing of these mandates in an attachment to this statement. Under these laws and associated regulations, NOAA must examine coastal and ocean energy projects to evaluate potential and actual impacts of within the U.S. Exclusive Economic Zone. NOAA works to implement these statutes in a manner that allows it to protect, manage, and conserve coastal and marine resources, while also generating solutions that recognize the importance of the Nation's energy needs and implications for national security.

Comments on H.R. 3534

Use of Comprehensive Marine Spatial Planning

NOAA commends Chairman Rahall and this Committee for drawing much-needed attention to comprehensive energy planning, an important issue for the Nation and our ecosystems and we look forward to working with the Committee on this issue. NOAA's legislative responsibilities dictate the need to embed energy considerations into the broader perspective of other ocean uses. The broad construct within which we believe it is appropriate to consider these issues is marine spatial planning (MSP). MSP is a tool to evaluate the suite of activities that can coexist in a place with the goals of ensuring that legislative mandates are met, minimizing conflicts, and protecting the health of the ocean for future uses. MSP is a process for determining in an objective and transparent fashion which combination of compatible human uses are allocated to

specific ocean areas in order to sustain critical energy, ecological, economic, national security and cultural services for future generations. The purpose is simply to minimize conflicts among activities, identify efficient combinations of activities, streamline decision-making, provide predictability in planning investments, ensure the continued provision of key benefits to society, reduce impacts in ecologically sensitive areas, and protect the overall health of the oceans.

Both the U. S. Commission on Ocean Policy and the Pew Oceans Commission emphasized throughout their reports the necessity of a more comprehensive integration of multiple uses and the importance of framing MSP relative to the full suite of uses, not just one sector such as energy.

President Obama's June 12, 2009 memorandum that created an Interagency Ocean Policy Task Force reinforced the importance of this broader perspective. The President's memorandum directed the Task Force to develop a recommended framework for effective coastal and marine spatial planning. Specifically, the memorandum called for, "A comprehensive, integrated, ecosystem-based approach that addresses conservation, economic activity, user conflict, and sustainable use of ocean, coastal and Great lakes resources…" . In keeping with the direction outlined in the President's memorandum we recommend that MSP principles be applied more broadly. Indeed, we believe that that is the only way to ensure the many legislatively mandated responsibilities in oceans are met. Over the next three months, the Task Force will be preparing its recommendations on a framework for coastal and marine spatial planning. Included as part of this process, are a series of regional public listening sessions and stakeholder roundtables from a variety of ocean use sectors, designed to hear public input on what this framework should look like. NOAA is an active member of the Task Force and believes this process offers an excellent opportunity to consider the most appropriate ways to manage for multiple ocean uses.

This bill addresses a particular and important subset of ocean uses. However, we believe it is important to consider these uses as part of a more comprehensive planning process that includes the full suite of key competing and complementary uses. An improved, thoughtful, transparent, and goal-oriented process for due consideration of multiple compatible uses will minimize future conflicts, greatly facilitate planning, and ensure overall goals can be met. In addition, there will be a need to increase synergistic relationships between existing ocean uses.

Competing uses of the ocean are developing faster than our current capacity to manage them. Rapid growth of most uses will only exacerbate existing conflicts. The prevailing sector-based management approach is being increasingly challenged to ensure healthy and resilient ocean ecosystems and the ecological services they provide to all Americans. To succeed, MSP must be designed to recognize existing and emerging competing uses as well as ensure the appropriate balance among them. MSP should be conducted in a comprehensive, holistic manner in which society's desired uses of ocean places are optimized by conscious design, not inadvertent and, possibly, counterproductive competing uses.

Of specific concern is Section 602, which creates Regional Outer Continental Shelf Councils that will prepare spatially explicit Regional Outer Continental Shelf Strategic Plans for energy development only. An alternative is to consider the critically important energy uses in a more comprehensive context. As urgent as energy needs are today, a broader strategy that recognizes

the importance of energy along with other critical uses of oceans is more likely to produce long-lasting benefit to the Nation. As such, the Administration cannot support the Regional Outer Continental Shelf Councils or Strategic Plans outlined in H.R. 3534. A comprehensive, national approach to marine spatial planning must first be established.

Aquaculture

NOAA believes that aquaculture must be conducted in an environmentally responsible fashion, and that a national aquaculture policy that vests NOAA with authority to ensure that aquaculture is practiced in a sustainable fashion is the best approach. We would like to work with the Committee to address the current ambiguity in authority and create a durable structure for responsible management of aquaculture. NOAA therefore strongly opposes Section 704, the offshore aquaculture language within this bill. Section 704 would remove Department of Commerce/NOAA authority to permit or regulate offshore aquaculture under the *Magnuson-Stevens Fishery Conservation and Management Act* (*Magnuson-Stevens Act*) and invalidate existing permits that have been issued under that authority. NOAA recommends deleting Section 704 in its entirety.

NOAA is in favor of a national aquaculture policy and is currently working towards developing one. Aquaculture has the potential to provide a safe and nutritious local seafood supply to complement supply from U.S. commercial fisheries, create jobs in U.S. coastal communities, and maintain working waterfronts. NOAA believes that aquaculture must be conducted in a manner that safeguards U.S. coastal and ocean environments.

Without authority to regulate aquaculture, NOAA would be less able to implement ecosystem-based management of ocean resources and ensure the sustainability of marine fisheries. Additionally, Section 704 would create a regulatory gap because there would not be an overarching statute to address environmental and fishery concerns for aquaculture operations in the Exclusive Economic Zone. While the U.S. Army Corps of Engineers and the Environmental Protection Agency have some regulatory authority over siting and monitoring the water quality impacts of offshore aquaculture operations, and the U.S. Food and Drug Administration has the regulatory authority over the safety of aquaculture products, NOAA has the mandates, research portfolio, technical expertise, outreach and extension network, and appropriate infrastructure to ensure that such operations adequately safeguard our Nation's living marine resources. Additionally, because NOAA is within the Department of Commerce, it is well placed to balance the goals of developing an economically viable offshore aquaculture industry while protecting our Nation's valuable living marine resources and the ecosystems and communities they support.

If Section 704 is not deleted, a grandfather clause should be added, allowing existing permitted aquaculture activities to continue and the applicable Fishery Management Plans to be amended by the Fishery Management Councils pursuant to their *Magnuson-Stevens Act* authority. Invalidating current permits unduly interferes with existing efforts by Fishery Management Councils to manage fishery resources pursuant to existing aquaculture-related Fishery Management Plans. Furthermore, invalidating these existing permits would be detrimental to ocean conservation efforts and would negatively impact coastal community economies.

Conclusion

Comprehensive energy planning and comprehensive ocean management are important for our Nation's future, if we are to use resources efficiently and sustainably. Our ocean resources support many jobs in the fishing, recreation, and maritime transportation sectors, and present an opportunity for new clean energy jobs moving forward. NOAA supports the Committee's desire to create a framework for such management, but believes that a framework for true marine spatial planning must be more comprehensive than what is articulated in the bill. NOAA will continue engaging on these critical issues through the work of the Ocean Policy Task Force. We look forward to working with you to address these issues once the Task Force develops its recommendation for a comprehensive marine spatial planning framework. I have mentioned some of our general comments in this testimony and look forward to providing more detailed, specific comments to the Committee as this legislation evolves. Thank you very much for the opportunity to provide testimony.

RELEVANT NOAA LEGISLATIVE MANDATES FOR THE PROTECTION OF MARINE SPECIES AND THEIR ENVIRONMENT

- ***Magnuson-Stevens Fishery Conservation and Management Act* (*MSA*; 16 U.S.C. §§ 1801 *et seq.*):** Pursuant to the *MSA*, NOAA is responsible for the conservation and management of marine fishery resources and their habitats. NOAA is also responsible for establishing programs to prevent overfishing; rebuilding overfished stocks; insuring conservation; facilitating long-term protection of essential fish habitats (EFH); and realizing the full potential of the Nation's fishery resources. The *MSA* requires federal agencies to consult with the Secretary of Commerce, through the National Marine Fisheries Service (NMFS), with respect to "any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act." When a federal action agency determines that an action (such as issuance of a license for an energy project) may adversely affect EFH, they must initiate consultation with NMFS and prepare an EFH Assessment. NMFS then conducts the EFH consultation and responds to the action agency with EFH Conservation Recommendations to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH. Federal agencies must provide a detailed response in writing to NMFS that includes their proposed measures for avoiding, mitigating, or offsetting the impact of the proposed activity on EFH. If the federal agency chooses not to adopt the suggested NMFS Conservation Recommendations, it must provide an explanation. Depending on the degree and type of habitat impact, compensatory mitigation may be necessary to offset permanent and temporary effects of the project.

- ***Endangered Species Act* (*ESA*; 16 U.S.C. §§ 1531 *et seq.*):** The purpose of the *ESA* is to provide a means whereby ecosystems upon which endangered and threatened species depend may be conserved, and to provide a program for the conservation of such listed species. The *ESA* prohibits the "take" of endangered or threatened species, with "take" defined as, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Section 7 of the *ESA* requires federal agencies to consult with NOAA to insure "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or adversely modify or destroy [designated] critical habitat . . .". If a proposed federal activity (such as the issuance of a license for an energy project) may affect a listed species or designated critical habitat, the agency proposing to issue the license must consult with NOAA and/or the U.S. Fish & Wildlife Service pursuant to section 7 of the *ESA*.

- ***Marine Mammal Protection Act* (*MMPA*; 16 U.S.C. §§ 1361 *et seq.*):** Pursuant to the *MMPA*, it is generally illegal to "take" a marine mammal without prior authorization from NOAA. "Take" is defined under the *MMPA* as harassing, hunting, capturing, or killing, or attempting to harass, hunt, capture, or kill any marine mammal. Except with respect to military readiness activities and certain scientific research conducted by or on behalf of the federal government, "harassment" is defined as any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal in the wild, or has the

potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to migration, breathing, nursing, breeding, feeding or sheltering. Under the *MMPA*, NOAA authorizes the take of small numbers of marine mammals incidental to otherwise lawful activities (except commercial fishing), provided the takings would have no more than a negligible impact on those marine mammal species and would not have an immitigable adverse impact on the availability of those species for subsistence uses. An activity has a "negligible impact" on a species or stock when it is determined that the total taking is not reasonably expected to reduce annual rates of survival or annual recruitment (i.e., offspring survival, birth rates). In the event that any aspect of a proposed energy activity will result in a "take" the project applicant, or the lead agency acting on behalf of the applicant, would be required to obtain an incidental take authorization in advance from NOAA.

- ***National Marine Sanctuaries Act* (*NMSA*; Title III of the *Marine Protection, Research, and Sanctuaries Act*, 16 U.S.C. §§ 1431-1445c-1.):** The *NMSA* and implementing regulations regulate certain activities within sanctuaries that might cause adverse impacts on sanctuary resources. In certain cases, actions that would otherwise violate these regulations may be authorized by permit. In addition, pursuant to *NMSA* section 304(d), any federal agency action that is likely to injure the resources of a sanctuary (whether that action occurs within or outside of the boundaries of a sanctuary) should consult with NOAA prior to taking such action, and NOAA may recommend alternatives to the proposed action to protect sanctuary resources. These requirements apply to energy projects proposed to be located within, near, or that would affect a sanctuary. This has included LNG projects proposed in the North Atlantic, California and Gulf; oil and gas projects in the Gulf; and hydrokinetic projects in the Pacific Northwest. The *Energy Policy Act of 2005* clarified that authorizations for alternative energy projects on the outer continental shelf that would occur within a national marine sanctuary would be issued by NOAA's Office of National Marine Sanctuaries under the *NMSA* and not by the Minerals Management Service under the *Outer Continental Shelf Lands Act*.

- ***Coastal Zone Management Act* (*CZMA*; 16 U.S.C. §§ 1451 *et seq.*):** The *CZMA* encourages states to preserve, protect, develop, and where possible, restore and enhance natural coastal resources. Federal actions having reasonably foreseeable effects on any land or water use or natural resource of a state's coastal zone must be consistent with a state's federally-approved *CZMA* enforceable policies. NOAA administers the *CZMA* and facilitates cooperation between states, federal agencies and others. The Secretary of Commerce, on appeal by a non-federal applicant, may override a state's *CZMA* objection to a federal authorization or funding application. The CZMA provides incentives for states to address energy issues through ocean management/Marine Spatial Planning (MSP) efforts. States use CZMA section 309 funds to develop MSP/ocean management/energy components for coastal management programs. In addition, the section 309 grant program provides an additional avenue for NOAA's Office of Ocean and Coastal Resource Management (OCRM) to provide assistance to determine how states may want to approach MSP/ocean management/energy.

- ***National Environmental Policy Act* (*NEPA*; 42 U.S.C. §§ 4321 *et seq.*)** *NEPA* requires federal agencies to prepare Environmental Impact Statements (EIS) for major federal actions that significantly affect the quality of the human environment. The Council on Environmental Quality (CEQ) regulations implementing *NEPA* require each lead federal agency to invite the participation of other affected entities, including federal, state and local agencies, throughout the *NEPA* process. Furthermore, after the lead federal agency prepares a Draft EIS, it is required to "obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards." NOAA maintains jurisdiction and special expertise over marine resources as contemplated by CEQ's regulations. In those instances where NOAA receives a Draft EIS from the lead agencies (for example, the Federal Energy Regulatory Commission (FERC), Minerals Management Service, etc.), NOAA is required to comment on statements within its jurisdiction, expertise, or authority.

- ***Fish and Wildlife Coordination Act* (*FWCA*; 16 U.S.C. §§ 661-666c.):** The *FWCA* requires federal departments and agencies that undertake an action, or issue a federal permit or license that proposes to modify any stream or other body of water, for any purpose including navigation and drainage, to first consult with the U.S. Fish and Wildlife Service, NOAA, and appropriate state fish and wildlife agencies. NOAA responds with comments and recommendations to conserve the fish and their habitat. The action agency then must give equal consideration to the conservation of fish and wildlife resources in making water resource development decisions. NOAA fulfills its responsibilities under *FWCA* by consulting with the Army Corps of Engineers on permits and water resource development projects, with FERC in decisions regarding hydroelectric project licensing, and on various other federal actions involving water resources and energy development.

- ***Ocean Thermal Energy Conversion Act* (*OTECA*; 42 U.S.C. §§ 9101 *et seq.*)** Under *OTECA*, no person may construct or operate an ocean thermal energy conversion facility located within the territorial sea of the United States, except pursuant to a license issued by the NOAA Administrator. No applications have been received, but OCRM is ramping up an OTEC program since several companies and the Navy is moving forward with OTEC pilot projects and commercial scale projects. NOAA is closely coordinating with Department of Energy and the Navy.

- ***Federal Power Act* (*FPA*; 16 U.S.C. §§ 791a, *et seq.*, as amended by the *Energy Policy Act of 2005 (EPAct 2005)*):** Pursuant to Sections 10(a) and 10(j) of the *FPA*, NMFS has authority to recommend that FERC include measures in licenses for hydroelectric power projects for the protection, mitigation, and enhancement of fish and wildlife and their habitats. Under *FPA* section 18, NMFS has authority to issue mandatory prescriptions for "fishways" to ensure the safe, timely and effective passage of fish past hydroelectric power projects. In addition, NOAA may also issue mandatory conditions for the adequate protection of a federal "reservation", for example national marine sanctuaries

- ***Oil Pollution Act of 1990*** **(*OPA90*; 33 U.S.C. §§ 2701, *et seq*.)**: *OPA90* greatly increased federal oversight of maritime oil transportation, and improved the Nation's ability to prevent and respond to oil spills, including contingency planning requirements for both government and industry. Under *OPA90*, NOAA and other federal and state agencies and Indian tribes act as Trustees on behalf of the public to assess the injuries to natural resources from spills, scale restoration to compensate for those injuries, and implement restoration. NOAA is a full partner with industry and the US Coast Guard in mounting effective responses to oil spills in coastal and offshore environments. On more than 150 spills each year, NOAA scientists support response efforts with a number of scientific services including trajectory predictions for the spilled oil, identification of critical resources that need to be protected, shoreline assessment that guide deployment of cleanup teams, and weather predictions to ensure safe and effective operations. In this way, NOAA science helps industry responders make better decisions that reduce both response costs and environmental impacts. The agency also helps train responders. For example, the agency is now working with Shell Oil and the USCG to prepare for a major "Spill of National Significance" exercise that will be held next March in New England and involves a spill scenario that threatens to oil northeast beaches from Portland to Cape Cod. NOAA also helps the oil industry by working cooperatively to resolve liability of natural resource damage claims. By working cooperatively with responsible parties, costs are lowered and restoration of injured resources is able to happen more quickly.