

## BOOK REVIEW

# *Zoning the Oceans: The Next Big Step in Coastal Zone Management*

by John M. Boehnert, Esq.



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*Ocean zoning will directly affect significant uses of the ocean and coastal waters, including offshore alternative energy development; oil, gas, and mineral extraction; recreational boating; commercial and recreational fishing; shipping and transportation; underwater cabling and communications; recreation and tourism; and aquaculture; to name just a few.*

It is no coincidence that Rhode Island, the Ocean State, leads the nation in a series of firsts in marine law. Among the innovations:

- This state was the first to constitutionalize parts of the public trust doctrine. When Roger Williams wrangled Rhode Island's Charter of 1663 from the King, he made sure it included "liberty...of the...coast," a tradition continued in the Constitution, Art. I § 17.
- The 1827 opinion of *Tyler v. Wilkinson*,<sup>1</sup> arising from the "Pawtucket River" (recognizable to readers as the Blackstone), was the first to systematize riparian rights.
- This state is the first to comprehensively zone the near-waters off its coast. In 1976, the Coastal Resources Management Council (CRMC)<sup>2</sup> promulgated the Coastal Resources Management Plan (CRMP). In 1978, the National Oceanic & Atmospheric Administration (NOAA)<sup>3</sup> approved the CRMP, essentially adopting it into federal law.<sup>4</sup>
- Now, this state has likewise become the first to comprehensively zone the deep waters off its coast. In October 2010, CRMC promulgated the Ocean Special Area Management Plan (Ocean SAMP). In December of that year, NOAA approved.

It is this last pioneering achievement that Rhode Island Bar member John M. Boehnert (not to be confused with the similarly-monikered speaker of the U.S. House of Representatives) turns his attention. The result is a vigorously-written, thoughtfully-researched, and meticulously-documented – e.g., a convenient CD with a digitized version of the voluminous Ocean SAMP is included with each copy – full-length book: *Zoning the Oceans*.

To the above commendations add at least one more: The book is handsomely bound with an alluring cover. At first blush, this might seem to be a trivial and superficial matter. But, in this case, a careful examination of the two images on the front is illustrative of a deeper truth. While the book emanates from Rhode Island events, scrutiny of the sepia-toned map forming

the background of the cover reveals that it depicts the area of the Great Barrier Reef off Australia and the nearby South Pacific. Moreover, the wave featured on the cover is beyond the dimensions of those typically experienced here. The implication, borne out by the text, is that Rhode Island's "blueprint"<sup>5</sup> is global in potential scope and reach. Not only is it the first-in-the-nation but it the first-in-the-world, and it is receiving international attention.

As the book states:

Other states have been pursuing interests in ocean zoning and have visited Rhode Island to learn what it did and how it did it. Similarly, other nations are very much interested in ocean zoning and Rhode Island's pioneering efforts, and England invited the executive director of Rhode Island's coastal regulator [Grover Fugate of the CRMC] for a weeklong visit to share his insights on ocean zoning.<sup>6</sup>

The author adds: "not only representatives of other states but representatives of other countries have contacted Rhode Island to find out what they did and how they did it."<sup>7</sup>

The pictorial allusion to the Great Barrier Reef might also reflect the recent origins of the idea of ocean zoning and its corollary, marine spatial planning. As the book reports, one scholar "traces the beginning of marine spatial planning to the conservation management approach that led to the Great Barrier Reef Marine Park, established in 1975."<sup>8</sup> This reflects the short pedigree of the concept. Rhode Island's leap forward is especially significant in such a short time-frame.

In sum, Rhode Island has taken a new approach in a new field and has done so in a manner that has global implications. These, however, are not the most legally significant features of Rhode Island's Ocean SAMP. Rather, as highlighted by Boehnert, the most significant feature for the lawyer is that it embodies a two-dimensional increase in state jurisdiction, the first of which has been in practice for several decades, and the second of which is new and startling.

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Specifically, the document reflects the following jurisdictional increases: 1) *substantively*, to include a veto power over federal permits as well as non-binding authority over many federal installations. This increase is not new. It has been exercised since the 1972 enactment of the CZMA; 2) *spatially*, to govern federal waters. The latter is an astounding break with the past.

This surprising jurisdictional reach is the result of a complex series of historical accessions and concessions by and between the dual sovereigns, which Boehnert makes lucidly understandable. Suffice it to say that these culminated in the CZMA, which partly reverses Federal supremacy, albeit with checks and balances. The Federal government has voluntarily yielded back to the states, as stated by the Supreme Court in *Martin v. Waddell's Lessee*,<sup>9</sup> "the rights...surrendered by the Constitution to the general government." Further, certain obscure regulations under the CZMA afforded states the opportunity, if they had a scientific basis, to regulate activities in Federal waters.

But, as Boehnert makes clear, these legal developments merely set the stage by providing the juridical context. It remained for a state to take full advantage of the Federal offer, something no state did until Rhode Island "recognized"<sup>10</sup> the opportunity and came forward. This move on the part of Rhode Island officials is described by Boehnert as "very shrewd."<sup>11</sup> In passages that lend a hint of drama to a technical topic, Boehnert describes how Rhode Island's CRMC and associated working groups "effectively exploited"<sup>12</sup> and "capitalized upon"<sup>13</sup> the provisions of the arcane CZMA regulations allowing extra-territorial jurisdiction.

The upshot is that Rhode Island has authority over traditionally federally-regulated matters, not only in its own territorial sea of roughly several hundred square miles, but beyond. The state has managed to "dramatically extend...its influence."<sup>14</sup> "The special area management plan prepared by Rhode Island involves far more than Rhode Island state waters, incorporating federal waters in the almost 1,500-square-mile Ocean SAMP region."<sup>15</sup>

Boehnert makes clear that a further ingredient was needed, beyond a favorable statutory/regulatory climate and beyond legal acumen: institutional knowledge and experience. In a comparison with

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Massachusetts' slightly later and much less elaborate program, lacking the "depth and comprehensiveness of the Ocean SAMP,"<sup>16</sup> Boehnert clarifies Rhode Island's advantages:

Rhode Island's plan arose...within an existing regulatory structure. And that regulatory structure included an experienced coastal manager...that had...implemented numerous such plans.<sup>17</sup>

In short, this innovation was built on prior innovations. Zoning the deep ocean was facilitated by CRMC's knowledge of zoning immediate coastal waters. In the Ocean State, innovation bred more innovation when it came to the marine environment.

This review has given short shrift to the substance of Rhode Island's program, which creates zones for compatible, and presumptively approvable, uses of the ocean and its floor. Those in ocean-dependent industries and environmentalists alike will have to turn to the book itself which gives a full exposition.

This book is a great addition to the libraries of admiralty law practitioners and environmental law practitioners. But, it has an appeal beyond that. Administrative lawyers and political scientists will admire it is an excellent case-study of a political process and one that worked. Beyond that, in these difficult times for our state, all Rhode Islanders should cherish this dynamic narrative of a local story with a successful outcome.

*\*The views expressed herein are solely those of the reviewer and do not reflect those of the Rhode Island Attorney General, any State agency, or the State of Rhode Island.*

*EDITOR'S NOTE: Rhode Island Bar Association member John M. Boehnert's book, ZONING THE OCEANS: THE NEXT BIG STEP IN COASTAL ZONE MANAGEMENT was published in 2013 by the American Bar Association and available for purchase through that Association.*

#### ENDNOTES

1 24 F. Cas. 472, No. 14312 (C.C.D. R.I. 1827).

2 The CRMC was created in 1971 by its enabling statute, R.I. Gen. Laws § 46-23-1 et seq.

3 NOAA is part of the U.S. Department of Commerce.

4 Pursuant to the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451, et. seq.

5 ZONING THE OCEANS at xviii & 207.

6 *Id.* at xxi.

7 *Id.* at 207.

8 *Id.* at 64 (citing *Univ. of Del. & CCPI, Delaware Marine Spatial Planning: Offshore Wind Context (Final Report)* 10 (Mar. 19, 2012),

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