Ocean and Coastal Law Center · School of Law · University of Oregon · Eugene 97403

Ocean Law Memo

ISSUE 28 May 1986

Recent Developments in Ocean and Coastal Law, 1984-85

INTERNATIONAL DEVELOPMENTS

U.S.-Canada Gulf of Maine Boundary Determined

On October 12, 1984 the International Court of Justice (ICJ) handed down its landmark decision delimiting the U.S.-Canada maritime boundary in the Gulf of Maine. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.), 1984 ICJ Rep. 246. Pursuant to this decision, the U.S. and Canada are to share the great bounty of Georges Bank's fishery resources. Canada is now entitled to the lion's share of Georges Bank's multimillion dollar scallop fishery located on its rich Northeast Peak, whereas both countries now jointly share several stocks of groundfish divided in two by the new boundary. As a practical result, this decision profoundly affects optimum management of these resources and consequently mandates international cooperation in conservation and management. Moreover, as the delimitation marks the first single boundary ever drawn for both the continental shelf and the water column, this decision provides a significant milestone in the law of international maritime boundaries.

Reflecting a century-old conflict, the dispute over Gulf of Maine resources began in earnest in 1977 when the U.S. and Canada simultaneously expanded their fishery jurisdictions to 200 nautical miles. In the Gulf of Maine, the new jurisdictions incorporated some of the world's richest fishing grounds, including that of the prized Georges Bank, over which the claims clashed irreconcilably. Bilateral negotiations failed to resolve the dispute, forcing the two countries to seek outside binding settlement. In a Special Agreement submitted November 1981, the two countries asked a five-member Chamber of the ICJ, pursuant to Article 26 of the Statute of the ICJ, to delimit by a single boundary both the continental shelf and the water column of the Gulf of Maine.

The ICJ based its delimitation almost exclusively on geography. In so doing, it clarified the rule of customary international law which requires that maritime boundary delimitations, in the absence of agreement, be based on equitable principles adjusted to account for relevant circumstances in order to achieve an equitable result. See, e.g., Case Concerning the Continental Shelf (Tunisia/Libya), 1982 ICJ Rep. 18. The court drew an initial boundary based on the equitable principle of coastline geography. The line bisecting the angle formed by the Nova Scotia and North American continent coastal parallels provided the initial delimitation. In making this initial delimitation, the ICJ rejected application of the equidistance principle as defined in Article 6 of the 1958 Convention on the Continental Shelf even though both countries are party to the treaty. The 1958 Convention governed only the continental shelf and was thus found inapplicable to the dual-purpose boundary. Furthermore, the court found that equidistance had not become a general rule of maritime boundary delimitation in customary international law and the court was thus under no obligation to follow it.

Relevant circumstances considered by the ICJ in making its initial delimitation equitable were again geographical: the boundary was adjusted by the proportional lengths of coastlines. In flatly refusing to consider certain non-geographical circumstances proposed by both parties, the court further emphasized the relationship of geography to equitable delimitations. Thus historical fishing patterns, socio-economic dependence on fishery resources, and naturally existing ecological boundaries delimiting fishery resources were all deemed irrelevant to achieving an equitable result.

Pacific Salmon Treaty Ratified

After nearly 20 years of negotiations the U.S. and Canada have finally reached agreement on how to address the problem of foreign interception of Pacific salmon. In March, 1985, the two countries ratified the bilateral Treaty Concerning Pacific Salmon, and in so doing pledged their commitment to promote salmon conservation and to provide compensation for intercepted fish. Salmon interception refers to the fishing by the fishermen of one country of salmon originating in fresh waters of another country--a problem which arises due to the long ocean migrations of Pacific salmon. Foreign interception has been blamed as at least partially responsible for the declining abundance of many Pacific salmon stocks by reducing the number of fish that would otherwise return to spawn and by frustrating management efforts aimed at conservation and enhancement.

The Treaty establishes an eight-member bilateral Pacific Salmon Commission as the coastwide management authority charged with carrying out the purposes of the Treaty. The Commission is comprised of Canadian and U.S. sections of four members each; each section has one vote and both sections must approve any Commission recommendation or decision. The Commission in turn is supported by the technical assistance of three geographically distinct Panels: the northern, southern, and Frazer River Panels. The Frazer River Convention, signed May 26, 1930 and entered into force July 28, 1937, has been superseded by the new Pacific Salmon Treaty. The International Pacific Salmon Fishery Commission created by that Convention shall, however, continue to function until its responsibilities are transferred to the Fraser River Panel and the Government of Canada.

The Treaty charges the Commission with two simple yet ambitious responsibilities: (1) to "prevent overfishing and provide for optimum production"--the so called conservation principle--and (2) to "provide for each Party to receive benefits equivalent to the production of salmon originating in its waters"--the so called equity principle, which is intended to provide for compensation for intercepted fish. To meet these goals, the Commission is to consider the desirability of reducing interception while considering the desirability of avoiding economic and social dislocation of existing fisheries.

Implementation of these goals will require extensive research to determine stock-specific migration patterns and the extent of their interception. Analysis of binary coded wire tags implanted in hatchery reared salmon which designate the date and site of release will aid the Commission researchers in quantifying the harvest of specific stocks in specific fisheries. However, since these exact questions have plagued Pacific salmon managers for decades, the Commission faces no small task. Moreover, quantifying the benefit of salmon production remains in such a state of scientific, economic, and sociological infancy that the Commission is not even expected to fully implement the equity principle for several years. Thus the Commission's short term goal is to ensure that fishery regimes are developed in an "equitable manner" taking into account the Treaty's equity principle.

DOMESTIC DEVELOPMENTS

Outer Continental Shelf Oil and Gas

1. Federal Consistency Issues

Several recent federal court decisions significantly affect regulations governing federal outer continental shelf (OCS) oil and gas development. The most significant was Clark v. California, 464 U.S. 312 (1984). Writing for the majority, Justice O'Conner's opinion held that the sale of OCS leases by the Department of Interior was not an activity which directly affected the state's coastal zone within the meaning of the Coastal Zone Management Act (CZMA) § 307(c)(1). Therefore, a review for consistency with the state's federally approved coastal management program is not required.

In reaching its holding, the court found that based upon legislative history Congress did not intend that the consistency requirement apply to OCS lease sales. The court did recognize, however, that by purchasing an OCS lease, a company gained no vested right to explore, develop, or produce oil and gas. In addition, consistency reviews are expressly mandated at the exploration and development stages of OCS activity by CZMA § 307(c)(3)(B).

On August 30, 1985, the National Oceanic and Atmospheric Administration of the Department of Commerce amended its regulations to exclude Outer Continental Shelf (OCS) oil and gas lease sales from the federal consistency requirements of § 307(c)(1). This step was taken to conform federal regulations to the Clark v. California decision. 50 Fed. Reg. 35210 (Oct. 15, 1985).

In Exxon v. Fischer, CV No. 84-2362 (C.D. Cal. Oct. 11, 1985), appeal pending 9th Cir., a federal district court found that the California Coastal Commission did not have authority under CZMA § 307(c)(3)(B) to object to the impacts of OCS oil and gas activities occurring beyond the three-mile territorial sea. The decision came as a result of a suit filed by Exxon claiming that the Coastal Commission did not have the authority to restrict exploratory drilling operations seven miles offshore in the Santa Barbara Channel. The Commission claimed that such drilling would interfere with a seasonal thresher shark fishery utilized by local fishermen and thus was inconsistent with California's coastal management program. The Secretary of Commerce had sustained California's consistency objection (48 Fed. Reg. 40771 (Aug. 26, 1983); 49 Fed. Reg. 11699 (March 8, 1984)) but the district court allowed Exxon to proceed. See 6 Territorial Sea No. 1 (University of Maine Marine Law Institute, March 1986) for a detailed analysis of Exxon v. Fischer.

In another decision dealing with OCS lease sales and the environment, the 9th Circuit Court of Appeals found that the Secretary of Interior could defer the imposition of measures designed to protect gray and right whales from possible oil spills until after an OCS lease sale has taken place. Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984). The court relied heavily on the analysis in Clark v. California that the various stages of OCS oil and gas development are legally separate and distinct. Therefore, because a lease grants only limited rights to explore without drilling, the imposition of environmental safeguards required by federal laws such as the Endangered Species Act generally may be deferred to post-lease stages.

In an appeal by Gulf Oil to the Secretary of Commerce from a decision by the California Coastal Commission (CCC), the Secretary found a Gulf Plan of Exploration (POE) consistent with Sections 307(c)(3)(A) and (B) of the Coastal Zone Management Act (CZMA). 51 Fed. Reg. 2416 (Jan. 16, 1986). The CCC had found Gulf's POE inconsistent with the CZMA because of the lack of onshore facilities to ensure the safest and most efficient method of oil exploration, development, and transportation, and the cumulative effects of offshore operations on coastal resources. The CCC decision was intended to prevent the drilling of a single exploratory well four miles from the California coast near the San Luis Obispo-Santa Barbara county line. The Secretary overruled the CCC, finding Gulf's POE consistent with the CZMA because it would contribute to the national interest in attaining energy sufficiency. Also, the adverse effects of the project on the natural resources of the coastal zone were not substantial enough to outweigh its contribution to the national interest. Finally, the Secretary found that the Clean Air Act and Clean Water Act were not violated and there was no reasonable alternative to the Gulf POE which could be conducted in a manner consistent with the California Coastal Management Program. 51 Fed. Reg. 2416 (Jan. 16, 1986).

2. Alaskan Natives' Rights

In People of Village of Gambell v. Clark 746 F.2d 572 (9th Cir. 1984), Alaskan natives challenged OCS oil and gas development in the Norton Sound because it would adversely affect their aboriginal right to subsistence hunting and fishing. The court found this claim to be without merit, stating that even if the natives did have an aboriginal right to hunt and fish, it had been extinguished by the Alaskan Native Claims Settlement Act, 43 U.S.C.A. §§ 1601-1628, 1603(b). See also Inupiat Community of the Arctic Slope v. U.S. 746 F.2d 570 (9th Cir. 1984), cert. denied, 106 S. Ct. 68 (1985). The court did accept the second contention of the natives that the Alaska National Interest Land Conservation Act (ANILCA), 16 U.S.C.A. § 3120, applied to OCS lands and waters. In doing this, the court recognized that the Secretary of Interior did have a duty to see that the utilization of the OCS for oil and gas development caused the least possible adverse impact upon rural Alaskan residents who depend upon subsistence resource uses for their survival.

In a subsequent appeal in the same case the 9th Circuit enjoined further exploratory drilling by OCS lessees in Norton Sound and the Navarin Basin pending further consideration by Interior of potential impacts on native subsistence hunting and fishing, stating that "the uses and needs of the Alaskan Natives . . . must prevail over our possible energy needs." Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985), petition for cert. filed. See also Kitlutsisti v. ARCO Alaska, Inc., 592 F. Supp. 832 (D. Ak. 1984), appeal dismissed as moot, 782 F.2d 800 (9th Cir. 1986) (Norton Sound drilling enjoined pending issuance of water pollution permit by federal EPA). Affirmed on appeal before the 9th Circuit in April 1986 was Tribal Village of Akutan v. Hodel, 16 ELR 20245 (D. Ak. Jan. 13, 1986), where the district court had

enjoined the Bristol Bay OCS lease sale because the Interior Secretary had applied an incorrect standard under ANILCA in approving a lease sale "unlikely" to affect subsistence lifestyles.

3. Outer Continental Shelf Lands Act Section 8(g)

In a case with important political and fiscal implications, a federal district court in Texas was called upon to decide what was meant by a "fair and equitable" division of revenues from OCS oil and gas produced from so called "8(g)" lands. Texas v. Interior, 580 F. Supp. 1197 (E.D. Tex. 1984); see 43 U.S.C.A. § 1337(g). At stake in the litigation was $1 billion. 8(g) lands are the innermost three mile strip of federal offshore lands which lies immediately adjacant to state owned offshore lands. Texas argued that the just and equitable division of monies from these lands should be made after a broad analysis, taking into account things such as the onshore economic impacts of offshore development and the enhancement in value of federal tracts that has occurred because of prior state offshore leasing. The Secretary of Interior claimed that only a single factor should be used in determining a "fair and equitable" allocation of 8(g) monies, that being the drainage of oil and gas from beneath state lands. The court sided with Texas as to which approach should be used, and based upon the facts and circumstances presented in the immediate case, called for a 50/50 division of the 8(g) monies between Texas and the federal government. The case has been appealed to the Fifth Circuit Court of Appeals.

The omnibus budget bill signed by President Reagan in April 1986 assumes that $4 billion in 8(g) revenues (27%) would be released from escrow to Louisiana, Texas, Alabama, California, Alaska, Mississippi and Florida. Future bonuses, rentals and royalties subject to 8(g) would also be split 73%-federal, 27%-states, except that future royalties from existing 8(g) leases would be distributed on the basis of surface acreage actually within three miles of state waters but at a 50% rate.

4. OCS Lease Terms

The Department of Interior has adopted a programwide policy on a water-depth criterion for longer primary lease terms for OCS oil and gas leases. 50 Fed. Reg. 13289 (Apr. 13, 1985). In the initial stage of the program, leases on blocks in water from 400 to 900 meters deep will be issued on a sale by sale basis with an 8 year primary lease term as opposed to the former practice of leasing such areas for only 5 years. It will also be stipulated, however, that exploration must be commenced within the first 5 years of the primary term. This requirement is to ensure diligence. This 5 year commencement requirement could be delayed if a suspension of operations is approved under 30 C.F.R. § 250.12. Otherwise, the lease would be cancelled after the initial 5 year period. If an exploratory well is drilled under an exploration plan approved under an approved unit agreement, the well could satisfy the drilling requirements on each of the unitized leases. This programwide policy change will not affect leases on blocks with water depths of 900 meters or more, where primary lease terms will continue to be 10 years. The same 10 year primary lease term will remain in effect for the Arctic OCS.

Marine Sanctuaries

In a tentative ruling by the U.S. District Court for the Central District of California, Judge Alicemarie Stotler rejected a claim by the Western Oil & Gas Association (WOGA) challenging the designation of the Channel Islands National Marine Sanctuary. WOGA v. Byrne, CV No. 82-5034-AHS (March 22, 1985). WOGA had asserted that the designation of the Sanctuary and the issuance of regulations which prohibit new oil and gas development within the boundaries of the Sanctuary were invalid. The claim was based on a theory that the designation and regulations had caused substantial injury to several of WOGA's members. The court's March 1985 tentative ruling rejected these claims, saying that WOGA had failed to show that the decision by the Secretary of Commerce to designate the Sanctuary and promulgate the "no oil" regulations was arbitrary, capricious or an abuse of discretion. Basing its ruling on statutory construction and legislative history, the court found that the Secretary did indeed have the discretion to designate sanctuaries and promulgate regulations that would reasonably promote their purposes. Furthermore, the court found the "no oil" regulations a necessary step to protect against oil spills, aural and visual disturbances, and air and water pollution. All of these negative aspects, wrote Judge Stotler, are attendant upon normal hydrocarbon operations and can be prohibited by regulations designed to provide comprehensive management of waters designated as marine sanctuaries.

In another Channel Islands Sanctuary oil and gas dispute, the California

Coastal Commission's consistency objection to Union Oil's exploration plan to drill two new wells within the boundaries of the sanctuary was overruled by the Secretary of Commerce on appeal. The Secretary found the exploration plan to be consistent with the objectives of the CZMA and allowed federal agencies to approve exploration activities as described in the Union Oil exploration plan. 50 Fed. Reg. 872 (Jan. 7, 1985).

Federal-State Boundary Determinations

The Supreme Court decided two major domestic offshore boundary disputes in 1985. In U.S. v. Maine, (Rhode Island and New York boundary case), 105 S. Ct. 992 (1985), the court determined that Long Island, although in reality an island, would be considered a peninsula attached to the New York mainland. The decision classified Long Island Sound as a closed bay and therefore part of the inland waters of New York and Connecticut. The baseline drawn from Long Island to Watch Hill on the mainland, however, defeated the Rhode Island claim to Block Island Sound as part of its territorial sea.

In U.S. v. Louisiana, et al., (Alabama and Mississippi boundary case), 105 S. Ct. 1074 (1985), Mississippi Sound was found to be an "historic bay." An historic bay is one in which the U.S. has exercised continuous authority and where foreign states have acquiesced in that authority. Because Mississippi Sound met these criteria, it was found to constitute inland waters of Alabama and Mississippi, giving them title to the submerged lands under the Sound and an additional three miles seaward. Significantly, the court rejected a straight baseline approach for determining the seaward limit of inland waters because such an approach has not yet been adopted by the federal government.

Navigation

1. Pollution Prevention and Preemption

In Chevron v. Hammond, 726 F.2d 483 (9th Cir. 1984), cert. denied with opinions, 105 S. Ct. 2686 (1985), the 9th Circuit found an Alaska statute prohibiting the discharge into state waters of any ballast which had been stored in oil cargo tanks not preempted by a lower Coast Guard standard. The Coast Guard standard was promulgated pursuant to the Port and Waterways Safety Act (PWSA) as amended by the Port and Tanker Safety Act (PTSA), 46 U.S.C.A. 391(a).

Distinguishing the PWSA's intent to completely occupy the field of tanker design found in Ray v. ARCO, 435 U.S. 151 (1978), the court found no intent in the PTSA to entirely occupy the field of tanker ballast discharge regulation. Instead, the court found Congressional recognition of a need to collaborate with states in such regulation and deferred to Alaska's right to set high environmental protection standards within its waters. Further, it found the objectives of both the state and federal statutes similar and thereby concluded that there was no physical impossibility in complying with both standards. Alaska's statute was also deemed compatible with the federal Clean Water Act, which permits the establishment of higher state standards for water quality.

In a case following Chevron v. Hammond, the 3rd Circuit stated that the PWSA patently does not preempt local regulation for strict environmental goals. Bass River Associates v. Mayor, Township Commissioner, Planning Board of Bass River Township, 743 F.2d 159 (3rd Cir. 1984). The court also held that there was no preemption of a state law which prohibited houseboats on the Bass River by federal licensing laws since even though a license was required, houseboats were not involved in interstate commerce. Again, unlike the situation in Ray v. ARCO, Congress had shown no intent to completely occupy the particular fields, so the New Jersey regulations were allowed to stand.

2. Pollution Liability and Remedies

On July 22, 1980, the M/V Sea Daniel and the M/V Testbank collided in the Mississippi River Gulf outlet, spilling containers which held approximately twelve tons of PCP, the largest such spill in United States history. As a result, the outlet was closed for two weeks and the 5th Circuit was called upon to determine the recoverable damages. Louisiana v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), pet. filed, 53 U.S.L.W. 3839. The court held that shipping interests, marina and boat operators, seafood enterprises, tackle and bait shops and recreational fishermen who sustained no physical damage to property as a result of the spill could not recover for purely economic damages regardless of whether the suit was based on nuisance, the 1899 Rivers and Harbors Act, or state law. The district court had entered summary judgment against all except commercial fishermen who had been making commercial use of the embargoed waters. The 5th Circuit agreed, saying that the damage to the other parties was too tenuous to allow their trial to continue.

In a case with a related factual pattern, the 1st Circuit held that no tort action lies for a negligently caused oil spill into a harbor if the spill caused purely financial harm. Barber Lines v. M/V Donau Maru, 764 F.2d 50 (1st Cir. 1985). The court stated that merely because the spill caused significant expenditure by preventing a ship from docking at a nearby berth and having to discharge its cargo elsewhere, this did not give rise to a tort action. They rendered this decision despite the fact that they recognized extra expense as being easier to prove than lost profit.

There is also no recovery for loss of financial benefits of contract or prospective trade. Getty Refining v. MT Fadi B, 766 F.2d 829 (3rd Cir. 1985). Though this is a well settled area of law, the approach taken by a marine terminal's operators was recognized by the court as novel. A crack in a ship's deck and hull had forced it to remain at a wharf, causing Getty to pay demurrage to other vessels which were scheduled to dock there. Getty claimed that the presence of the disabled vessel was an interference with the company's riparian rights, a property interest which they claimed was protected. The court said that even this imaginative approach could not overcome the long established rule of no recovery for economic harm absent physical damage.

When coastal waters are polluted and damages ensue, the proper theory to be used is not nuisance based on maritime tort, but a claim under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 et seq. Conner v. Aerovox, 730 F.2d 835 (1st Cir. 1984). Licensed commercial lobstermen, shellfishermen, and fishermen in New Bedford Harbor, Buzzards Bay and the Acushnet River of Massachusetts were told that nuisance claims for water pollution were no longer maritime tort claims, but had been preempted by the FWPCA. Once Congress has addressed a national concern, said the court, the court is precluded from scrutinizing the sufficiency of the Congressional solution.

Fisheries

1. Foreign Fishing

The National Marine Fisheries Service (NMFS) revised its general regulations governing foreign fishing within the Fisheries Conservation Zone (FCZ). 50 Fed. Reg. 34964 (Aug. 28, 1985). NMFS stated that the revisions were necessary because the old regulations no longer reflected the current or projected operation of fisheries. Enforcement efforts, claimed NMFS, are detecting an increasing number of sophisticated and severe violations of old regulations. Vessel-to-vessel transfers of fish in the FCZ have created a significant enforcement problem. To combat this, added to the regulations is a rebuttable presumption that fish on board a vessel conducting fish transfer operations within the FCZ are fish over which the United States has exclusive fishery management authority. Furthermore, the new regulations reflect changes in the Magnuson Act, e.g., 100% observer coverage on foreign fishing vessels, and the shift to joint venture operations between foreign and U.S. vessels. See 16 U.S.C. § 1801 et seq.; see also 16 U.S.C. 1821(i).

2. Treaty Fishing

In United States v. Washington, 759 F.2d 1353 (9th Cir. en banc 1985), the court affirmed a district court opinion declaring that hatchery fish released by Washington State were included in those fish to be apportioned to treaty Indian tribes in the state. The per curium opinion stated that four factors favored the affirmance of the district court's declaratory judgment mandating such an apportionment. The court reasoned that the state lacked ownership of hatchery fish once they were released. Once the state relinquishes control over fish by releasing them into public waters, they may not be excluded from the treaty allocation. Second, the Indian tribes were not unjustly enriched, as claimed by the state, if given a share of hatchery fish. Funding for state hatcheries comes from a variety of sources, including tribes, the federal government, and the private sector. To allow the source of funding to determine treaty allocation rights would allow Washington to buy out these rights by paying for the replacement of treaty protected fish with those which are not protected. Third, the state had never distinguished hatchery fish from natural fish for other purposes. The court reasoned that since the state had made no distinction in its policies from 1895 to 1973, it could not do so now. Furthermore, even if it were technologically feasible to distinguish between hatchery and natural fish, the distinction between the two is not an acceptable means for undermining treaty rights. Lastly, hatchery fish programs serve a mitigating function in that they were essentially designed to replace natural fish lost to non-Indian degradation of habitat and the commercialization of the fishing industry. Therefore, hatchery fish should justly be considered as replacements for fish populations which declined through no fault of the Indians.

However, the court en banc disagreed with the district court and a prior appellate panel that judicial declaration of a general environmental right in favor of the tribes to protect treaty salmon runs from pollution and habitat degradation that would deprive the treaty Indians of their moderate living needs was appropriate at this time. That issue was left for resolution in future disputes about particular federal, state, and private actions alleged to be adversely affecting treaty salmon runs. For more background on this environmental right issue, see Coastal Law Memo No. 4 (October 1983). See also United States v. Washington, 761 F.2d 1404 (9th Cir. 1985), rev. den., 106 S. Ct. 879 (1986) (under treaties giving Indians and non-Indians 50-50 rights in salmon runs, Indian fishers could not catch more than 50% of any given run).

Marine Mammals

In January 1986 the United States Supreme Court agreed to hear on an expedited basis in April the case of Baldridge v. American Cetacean Society, 768 F.2d 426 (D.C. Cir. 1985), involving a conservationist challenge to the U.S. government's failure to impose sanctions on the Japanese for whaling in excess of quotas set by the International Whaling Commission (IWC). Baldridge v. American Cetacean Society, No. 85-955; Japan Whaling Association v. American Cetacean Society, No. 85-954. The Pelly Amendment to the Fishermen's Protective Act requires the Secretary of Commerce to certify a country whose whaling "diminishes the effectiveness" of an IWC quota. The Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act provides that the Secretary of State shall reduce the fishery allocation to that nation in the U.S. fishery conservation zone.

When Japan exceeded the IWC quota for sperm whales, the U.S. Commerce Department and Japan reached an agreement providing that the U.S. would not certify Japan if Japan would adhere to harvest limits and then cease commercial whaling by 1988. In August 1985 the court of appeals issued a writ of mandamus ordering the Secretary of Commerce to certify Japan. The question presented to the Supreme Court is whether the Pelly and Packwood Amendments impose a nondiscretionary duty on the Secretary of Commerce to certify Japan for declining to follow internationally set whaling quotas. The government claims the decision to certify is discretionary, allowing consideration of all relevant factors in recognition of the need for flexibility in responding to international problems, i.e., requiring certification amounts to the judiciary unconstitutionally directing Executive Branch officials in the conduct of foreign affairs. If the Supreme Court upholds certification, Japan must abide by the IWC moratorium beginning with the 1986 season or have its valuable U.S. fishing rights reduced at least 50%. Under a decision honoring the executive agreement, Japan would cease commercial whaling by April 1988, so the end appears to be in sight for Japanese commercial whaling.

Dredging and Filling

In a very important case concerning the definition of "wetlands" for Corps of Engineers permit purposes, Justice White, writing for a majority of the United States Supreme Court, stated that the Corps definition of wetlands could properly include areas adjacent to navigable waters. It was not necessary, he said, for the areas to be inundated or even frequently flooded by the navigable water. U.S. v. Riverside Bayview Homes, 106 S. Ct. 455 (1985), noted, 16 ELR 10008 (1986). The court's decision was based on the Clean Water Act provisions prohibiting any discharge of dredged or fill material into waters of the United States unless first authorized under a permit issued by the Corps of Engineers. 33 U.S.C.A. §§ 1311, 1344, 1362. Corps rules issued under the act (33 C.F.R. § 323.2(c)) define wetlands as those lands which are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances to support, a prevalence of vegetation typically adapted for life in saturated soil conditions." The Court of Appeals in Riverside had concluded that inundation or frequent flooding by an adjacent body of water was a sine qua non of a wetland under the regulation.

The Supreme Court, however, was quick to disagree. The history of the regulation, they said, underscores the absence of any requirement of inundation. In fact, they noted that the words "periodic inundation" had been specifically deleted from the regulation. The property in question contained vegetation which required saturated soil conditions for growth and reproduction. The saturated soil was caused by ground water and not by flooding from adjacent navigable waters. This condition, concluded the Supreme Court, plainly brought the property within the category of wetlands as defined by current regulations. Furthermore, it was found reasonable for the Corps of Engineers to interpret the term "waters" to encompass wetlands

adjacent to the more easily and conventionally defined "navigable waters."

However, it is not necessary that the wetlands in question have as their source of flooding or permeation the adjacent navigable waters. This is reasonable since wetlands not flooded by adjacent water can still drain into those waters and can also have other effects such as filtration, purification, and the prevention of flooding and erosion. Consequently, the Corps definition of "waters of the United States" as encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction was held to be a reasonable and a permissable interpretation of the Clean Water Act and not an unconstitutional taking of the property involved.

In U.S. v. Tull, 769 F.2d 182 (4th Cir. 1985), a decision handed down before Riverside Bayview Homes, the U.S. sued a real estate developer for alleged filling of wetlands without a Corps permit. Tull argued that Clean Water Act regulations were unconstitutionally vague because of the imprecise definition of "wetlands." The court rejected this argument, saying that the definition was sufficiently definite to give a person of ordinary intelligence fair notice regarding what conduct the act requires. The court also rejected Tull's argument that he was entitled to a jury trial since the government was seeking civil penalties under the Clean Water Act. The government, reasoned the court, was not suing to collect a penalty analogous to a remedy at law, but was asking the court to exercise statutorily conferred equitable power in determining the amount of a fine. In determining that the land in question was actually a wetland, the court noted that buried soil analysis showed the presence of peat, which develops only in a wetlands system. In addition, vegetation analysis showed that "obligate" wetlands species were present and could develop only under saturated soil conditions.

In U.S. v. Huebner, 752 F.2d 1235 (7th Cir. 1985), rev. denied, 54 U.S.L.W. 3223, the 7th Circuit noted the narrowness of the Clean Water Act's agricultural discharge exemption contained in 33 U.S.C.A. § 1344(f)(1). See also Avoyelles v. Marsh, 715 F.2d 897, 925 n.44 (5th Cir. 1983); U.S. v. Akers, 24 ERC 1121 (9th Cir. 1986). Although the farmers in Huebner claimed that they were merely constructing irrigation ditches in a wetland, the court held that such construction was prohibited under § 1344(f)(2) since it brought an area of navigable waters into a use to which it was previously not subject. Because the flow of waters was impaired and its reach reduced, the construction required a Corps permit. Despite this holding, the court did rule that the new irrigation ditches which were constructed and the old ones which were deepened did not have to be removed and the land did not have to be restored to its original state. Because cranberry beds were not inherently incompatible with surrounding wetlands, it would be an abuse of the judicial discretion to order them destroyed. All that was required here was future compliance with the Clean Water Act.

Corps determinations that wetlands are not involved in a development project also will be carefully reviewed by the courts. NWF v. Hanson, 623 F. Supp. 1539 (E.D.N.C. 1985), held arbitrary and capricious a Corps action which found a tract containing typical wetland vegetation not to be a "wetland" for permit purposes.

In several recent wetland cases the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA) both played important roles. In the latest of a line of cases dealing with the Westway Project in New York, a highway development which calls for 242 acres of the Hudson River to be landfilled, the 2nd Circuit held that a permanent injunction against highway construction was an abuse of discretion by the district court which heard the case. Sierra Club v. U.S. Army Corps of Engineers, 772 F.2d 1043 (2nd Cir. 1985). The Sierra Club and others had alleged that a dredging permit issued by the Corps of Engineers violated NEPA, the CWA, and previous court orders. At trial, the district court granted a permanent injunction against highway construction. The appellate court held, however, that it is not within the power of the judiciary to bar an executive agency from making administrative decisions assuming that there is full good faith compliance with the requirements of NEPA and the CWA. Since a court's review of administrative choices under NEPA and the CWA focuses primarily on the procedural regularity of the decision, it is not for the courts to tell the executive branch what projects they may or may not consider or how much of the taxpayers money may be expended in order to "get it right."

However, in lifting the permanent injunction, the appeals court did find that the Corps' decision to issue a dredging permit was arbitrary and capricious since it gambled with the loss of a major east coast fishery resource. The court required that further study

into the transitory habitat of juvenile striped bass be made, despite the fact that to do so could very well result in condemning the Westway project to oblivion.

In Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985), a case dealing with the dredging of canals and the construction of a water based community on Galveston Island, Texas, the court noted the clash in views regarding the court's scrutiny of an EIS. Saying that some circuits use a "reasonableness" standard and others an "arbitary and capricious" standard, the court noted that three U.S. Supreme Court justices want that court to review the question. In Fritiofson the court stated that the 5th Circuit employs what they consider the more rigorous "reasonableness" standard.

The Fritiofson court further held that a decision to forego the preparation of an EIS may be unreasonable for two distinct reasons: (1) the evidence before the court demonstrates that, contrary to the finding of no significant impact (FONSI), the project may have a significant impact on the human environment. See Louisiana v. Lee, 758 F.2d 1081 (5th Cir. 1985), pet. filed as Dravo, Inc. v. Louisiana, 54 U.S.L.W. 3229 (shell dredging in the Louisiana Gulf Coast area) or (2) the agency's review was flawed in such a manner that it cannot yet be said whether or not the project may have a significant impact. See Louisiana Wildlife Federation v. York, 761 F.2d 1044 (5th Cir. 1985) (conversion of bottomland hardwood wetlands to agriculture and the construction of levees to implement a federal flood control project). In Fritiofson the 5th Circuit simply stated that if a project may have a significant impact, a court should order the preparation of an EIS. In doing so, the federal district court must, however, say that there may be significant impacts expressly in its opinion. A court cannot jump from a finding that an EA is inadequate to the ultimate conclusion that an EIS is required. It is not the law that an EA can be cured only by the preparation of an EIS. Therefore, regarding dredging and construction on Galveston Island on the Texas Gulf Coast, the Corps was required to supplement their EA and re-evaluate their FONSI, making it necessary for an injunction to stand until a proper analysis has been performed.

In River Road Alliance, Inc. v. U.S. Army Corps of Engineers, 746 F.2d 445 (7th Cir. 1985), an environmental challenge was raised to the Corps' granting of a permit for a temporary barge fleeting facility on the Mississippi River. In addressing the aesthetic value of the area, the court stated that aesthetic concerns alone do not require an EIS, even though the area may be considered scenic. They also found that adverse impacts on catfish and mussel beds, because confined to a small area, were insufficient to require an EIS. Furthermore, if a public hearing is held, then a decision to prepare an EA as opposed to a full EIS is entitled to greater weight. However, the court also held that an assessment of alternatives to the project under NEPA § 102(2)(E) is required independently of an EIS and must be done even if no significant environmental impacts are found by the agency.

State Coastal Zone Management

In March 1986 the U.S. Supreme Court agreed to review Granite Rock Company v. California Coastal Commission, 768 F.2d 1077 (9th Cir. 1985), cert. granted March 31, 1986, No. 85-1200, where the Ninth Circuit had ruled that the holder of an unpatented mining claim on land owned by the federal government was not required to obtain a permit from the California Coastal Commission to continue its mining operations. The lower court had reasoned that the CZMA was not intended to change the status quo with respect to the allocation of state and federal power within the coastal zone. The lower court had further held that the Commission was preempted by federal Forest Service regulations from requiring the limestone mining firm to obtain a state permit.

The scope of the federal consistency obligation with respect to Delaware's federally approved coastal management program is being challenged on a very different theory. In Norfolk Southern Corp. v. Oberly, 594 F. Supp. 514 (D. Del. 1985) (plaintiff's motion for preliminary injunction denied), the plaintiff challenged portions of the program as being an unconstitutional burden on foreign and interstate commerce. The plaintiff's challenge was supported by the federal Departments of Justice and Commerce; the latter originally approved Delaware's coastal management program as adequately considering the national interest in the siting of facilities of regional importance.

The only existing deepwater anchorage between Maine and Mexico is located in Delaware Bay. The plaintiff claims that the project to use Big Stone Anchorage, located in Delaware Bay, to "top off" large coal-carrying vessels will have a negligible environmental effect. However, Delaware's coastal management program absolutely bans such

bulk product transfer facilities in its coastal zone. See Coastal Barge Corp. v. Coastal Zone Industrial Board, 492 A.2d 1242 (Del. Sup. Ct. 1985). In April 1986 the federal district court rejected the plaintiff's challenge because Congress in effect has approved the challenged restrictions on commerce contained in the Delaware program through the Commerce Secretary's approval of the program under the CZMA. An appeal by the plaintiffs is expected. The outcome on appeal may clarify significantly federal and state roles under the CZMA. However, because of the special facts of the case (absolute prohibition on using a unique anchoring spot), the appellate court's decision could be a narrow one. See 5 Territorial Sea No. 4 (University of Maine Marine Law Institute, Dec. 1985) for a detailed analysis of the Delaware situation.

Southern Pacific Transportation Co. successfully appealed to the Secretary of Commerce the California Coastal Commission's ruling that a proposed railroad bridge was inconsistent with the California CMP. 50 Fed. Reg. 41722 (Oct. 15, 1985). The Secretary reasoned that such a railroad bridge would further the objectives of the CZMA regarding the siting of coastal dependent transportation facilities and found that the project's adverse effects did not outweigh its contribution to safe rail transportation and did not violate the Clean Air Act or Clean Water Act. Futhermore, no reasonable alternative existed which would allow the project to be completed in a manner totally consistent with the California CMP.

The federal district court decision in Save Our Dunes v. Pegues, CV No. 84-T-518-N (M.D. Ala. Dec. 17, 1985) posed a threat to continued federal CZMA funding of state coastal programs which, since their original federal approval, have been amended or modified without specific federal approval of the amendments or modifications. The court strictly interpreted CZMA § 306(g), 16 U.S.C. § 1455(g) (1982), as it then read as prohibiting further CZMA program administration grants until such state program changes have been federally approved. According to the court, a supplemental environmental impact statement must be prepared if the changes can significantly affect the environment "in qualitative or quantitative terms," making the amendment approval process potentially a quite elaborate one. With federal funds delayed or cut off, state programs could deteriorate to the point of federal disapproval, thereby losing the benefits of federal consistency as well.

In response to Save Our Dunes, section 306(g) was amended in 1986 as part of H.R. 3128 reauthorizing the CZMA for five years. Under the reauthorization measure, the federal-state funding ratio for state CZM programs would change in stages from the current 80% federal-20% state ratio to a 50/50 split beginning with fiscal year 1989.

Also reauthorized for two years each were Title II of the Marine Protection Research and Sanctuaries Act (ocean dumping research) and the National Ocean Pollution Planning Act.

Coastal Barriers

In Bostic v. United States, 753 F.2d 1292 (4th Cir. 1985) developers and landowners of property on Topsail Island, North Carolina complained that the Coastal Barriers Resources Act, 16 U.S.C. 3501 et seq., wrongly designated their land as part of an undeveloped coastal barrier. Their objection centered on the fact that the alleged wrongful designation disqualified them from receiving federal flood insurance. The Bostic court held, however, that since a § 3503 map designated the island as an undeveloped coastal barrier, Congress unquestionably intended to include it in the Coastal Barrier Resources System. Such a designation, said the court, reduces federal expenditure and discourages development which would otherwise occur. This is accomplished because developers tend not to build in a coastal barrier area if their only recourse, when federal flood insurance is not available, is to purchase insurance in the private market which can be prohibitively expensive.

Public Trust Doctrine

In Summa Corp. v. California ex re. State Lands Commission, 104 S. Ct. 1751, reh. den. 104 S. Ct. 2693 (1984), the U.S. Supreme Court announced a decision that could have far-reaching implications for public access to tidelands in California that avoided any reexamination of its landmark public trust decision in Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892). Reversing the California Supreme Court decision in City of Los Angeles v. Venice Properties, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), the court held that because California had not asserted a public trust easement over tidelands in the original Mexican grantee's patent confirmation proceedings held pursuant to the Public Lands Act of March 3, 1851, it could not assert it now. The court found it unnecessary to determine whether, as the California Supreme Court found, Mexican law had imposed a public

trust-like servitude on the original Mexican land grant.

In Matthews v. Bay Head Improvement Association, 471 A.2d 355 (N.J. 1984), the New Jersey Supreme Court traced the development of the public trust doctrine from the time of Justinian through current New Jersey jurisprudence. Building on its 1972 decision in Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, where it extended the public trust to recreational uses such as swimming and held that the public trust applied to the municipally owned dry sand beach immediately landward of the high water mark, the Matthews court found a public right of access to the dry sand area controlled by a quasi-public body.

Matthews, a resident of a neighboring borough, sued to gain access to the Bay Head beach. All of the beachfront property in Bay Head is privately owned. The Bay Head Improvement Association is but one of many private owners, but in effect, the Association controls all access to the beach. Through the use of badges, the Association restricts beach use to members and their guests. Membership in the Association is limited to Bay Head residents. After considering a number of factors including the Association's purpose and activities, its virtual monopoly over access to the beach, and its relationship to the municipality of Bay Head, the court found that the Bay Head Improvement Association is a quasi-public organization and that it could not restrict its membership to residents, thereby "frustrat[ing] the public's right[.]"

In order to afford the public "reasonable access to the foreshore as well as a suitable area for recreation on the dry sand" the court ordered the Association to open its membership to the public at large and to provide a reasonable number of daily and seasonal badges for nonresidents. The Association may continue to charge a reasonable, non-discriminatory fee to cover its costs for beach maintenance. The court rejected the New Jersey Public Advocate's request that it open all privately owned beachfront property to the public, but it did not foreclose the possibility that this might happen in a future case.

Beach Access

The California Court of Appeals ruled in favor of the California Coastal Commission in two cases challenging development permit conditions requiring dedication of public accessways or payment of in-lieu fees. In Remmenga v. California Coastal Commission, 209 Cal. Rptr. 628, 163 Cal. App. 3d 493 (1985), review denied, 106 S. Ct. 241 (1985), lot owners in the Hollister Ranch subdivision challenged a $5,000 fee required in lieu of a dedication of a public accessway as an unconstitutional condition for receipt of a permit. The court found that the Legislature "had ample basis upon which to conclude that the construction of the propose[d] improvement. . ., in combination with improvement of other lots in that area, would have a cumulative adverse impact on the public's constitutional right of access."

In Whalers' Village Club v. California Coastal Commission, 220 Cal. Rptr. 2 (Ct. App. 1985), the court found that the construction of a revetment was "new development" within the meaning of the California Coastal Act and that the Coastal Commission could require a homeowner to offer to dedicate an easement for public access to the beach as a condition of granting a development permit. The court also found that the Coastal Commission abused its discretion in restricting Whalers' Village from interfering with the public's use of the easement area prior to the acceptance of the offer of dedication. The court noted that a restriction of this type would be proper where public access rights had arisen through use or implied dedication.

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May 15, 1986

The author gratefully acknowledges the assistance of Nancy Dahl, Nancy Diamond, Lori Nemiroff, Greg Skillman, and Gay Vogt of the Ocean and Coastal Law Center.

Ocean Law Memo is an aperiodic publication of the University of Oregon Ocean and Coastal Law Center (OCLC) and is distributed by the Oregon State University Extension/Sea Grant Program. OCLC is funded by the Oregon State University Sea Grant College Program, which is supported cooperatively by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, by the State of Oregon, and by participating local governments and private industry.

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