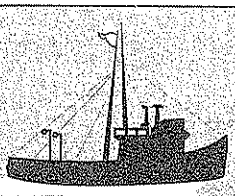

Ocean and Coastal Law Memo

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Recent Developments in Ocean and Coastal Law, 1990

I. Federal Legislation

A. Oil Spill Liability Act of 1990

On August 18, 1990, President Bush signed the Oil Pollution Act of 1990 into law. After approximately 15 years in the making, the United States now has comprehensive legislation covering oil spills. Pressure from environmentalists, fueled by the disastrous 11 million gallon spill from the Exxon Valdez in Alaska's pristine ecosystem, obviously hastened this new legislation.

Before this legislation was enacted, the Clean Water Act (CWA) provided some coverage, albeit small, for oil pollution. Under the CWA, liability was limited to a vessel owner or operator up to the greater of $125 per gross weight ton or $125,000 for inland oil barges; up to $150 per gross weight ton or $150,000 for tanker vessels; and $150 per gross weight ton for all other vessels. This liability applied only to cleanup costs which included restoration of natural resources.

The Oil Pollution Act of 1990 increases the upper limit of a spiller's liability to $10,000,000 or $1,200 per gross weight ton, whichever is greater, for a vessel greater than 3,000 gross tons. For vessels of 3,000 gross tons or less, the limit on liability is $2,000,000. The Act also provides for a $75,000,000 liability cap plus the total of all removal costs for an offshore facility except a deepwater port and a $350,000,000 cap for any onshore facility and a deepwater port. Lastly, any other vessel has a limitation of liability of $600 per gross ton or $500,000, whichever is greater.

The Act also imposes penalties of up to three years incarceration and fines up to $250,000 for an individual or $500,000 for an organization who fails to report a spill. Civil penalties are raised to $25,000 a day, or $1,000 per barrel of oil for a violation. The minimum penalty is $100,000 for cases of gross negligence, but no more than $3,000 per barrel of oil.

One major point of controversy in the Congress was whether double hulls should be required on oil tankers. Proponents argued that double hulls will prevent major spill disasters in the future. Strong support for their assertion was a Coast Guard study of 30 tanker groundings that occurred between 1969 and 1973. The study concluded that 96 percent of the spills caused by those groundings would have been prevented if the tankers were equipped with double hulls. The opponents of double hulls argued that water can rush in between a ruptured hull and the inner hull thereby causing the vessel to settle lower and exaggerate the leak. They also argued that explosive vapors could possibly collect between the hulls and create a bigger catastrophe than with a single hull.

The proponents won out in the end as the Act requires double hull tankers by the year 2010 for all tankers entering United States ports. The Act does allow an amortization period

for complying with this mandate that begins in 1995. On the economic side, estimates for retrofitting the 153 United States tankers run as high as $30 million each for a total cost of about $4 billion.

More specifically, the Act states that all new tankers and barges of more than 5,000 tons that wish to operate in United States waters must have double hulls. Any single hull tankers must be refitted with a second hull or be phased out over a period of time from 1995 to 2010. All barges greater than 5,000 tons must have double hulls by the year 2015. As of the time of this publication, several oil companies including Conoco have ordered tankers with double hulls.

The Act also sets up a fund of $1 billion to cover cleanup costs for spills and compensation for economic damages resulting therefrom. This fund will come from a five cent per barrel of oil fee on domestic and imported oil. This fund will also be available for cleanup costs when liability limits have been reached. It is also accessible when an injured party cannot settle his or her claim for damages within 60 days or when the spiller cannot be found.

Another major victory was scored for coastal states as the act does not "in any way affect . . . the authority of . . . any State (1) to impose additional liability or additional requirements; or (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil." 101 P.L. 380 § 1018(c). Today, approximately one-half of the states have laws that deal with the rights of compensation arising from oil spills. The Supreme Court has ruled in the past that federal statutes do not necessarily pre-empt state oil pollution legislation. See Askew v. American Waterway Operators Inc., 411 U.S. 325 (1973).

The Act also provides for the establishment of a nationwide planning and response system for spills. Under the system, 10 regional response groups are established that are responsible for spill removal equipment, resources, and personnel. Most of the equipment and personnel will be provided by the private sector.

Other safety measures include a requirement that tanker operators participate in the United States Coast Guard's vessel monitoring and tracking system (VTS). This was added because evidence showed that the Exxon Valdez disaster might have been avoided if Exxon's tanker operators participated in the VTS. At the time of that spill, VTS participation was on a purely voluntary basis. The responsibility to determine which ports and channels will have the VTS system is bestowed on the Secretary of Transportation. Additionally, the Coast Guard's program for issuing, renewing, and suspending mariner licenses will also be revamped. Now, the Coast Guard will have access to the National Driver Registry for data related to driver violations for any applicant seeking a Coast Guard license.

B. CZMA Reauthorization

The reauthorization of the Coastal Zone Management Act (CZMA) resulted in several amendments to the 1972 act. The 1990 amendments make several changes including:

1) overturning the 1984 Supreme Court decision of Secretary of Interior v. California which declared that OCS oil and gas leasing was not subject to state consistency review. Now, all federal activities inside or outside a state's coastal zone must be consistent with the state's coastal zone management plan if the activities affect natural resources, land uses, or water uses within the coastal zone;

2) reinstating federal grants for a state to develop a coastal zone management program;

3) establishing annual achievement awards that will recognize local governments, graduate students, or individuals for meritorious achievements and accomplishments in the area of coastal zone management;

4) authorizing federal appropriations for five years at significantly higher funding levels;

5) establishing a Coastal Zone Management Fund which, among other things, financially supports the investigation and application of the public trust doctrine;

6) encourages coastal states to improve their respective coastal zone management programs in one or more of the following areas: ocean resource planning; public access improvements; natural hazards management; reduction of marine debris; assessment of cumulative and secondary impacts of coastal growth and development; special area management planning; siting of coastal energy and government facilities; and coastal wetlands

management, protection, and creation.

The Reauthorization Act also establishes a Coastal Nonpoint Pollution Control Program whereby each state will develop a program to protect coastal waters from nonpoint pollution. Additionally, the definition of "Coastal Zone" has been amended to include ". . . areas which are likely to be affected by or vulnerable to sea level rise" and exclude areas beyond state seaward boundaries.

C. Coastal Barrier Improvement Act of 1990

In 1982 President Reagan signed legislation which set up the Coastal Barrier Resource System (CBRS) and outlawed federal funds for flood insurance to developers who wished to build on designated barrier islands. Now, eight years later, this legislation has been greatly expanded and improved.

The new legislation will add nearly 788,000 new acres along the Atlantic and Gulf coasts. Of this acreage, nearly 67,000 are located in the Florida Keys. Thirty-one thousand acres along the Great Lakes are also added for the first time.

The amendments broadened the definition of a coastal barrier to include land that functions as a coastal barrier but is composed of consolidated sediments. This definitional amendment allowed the inclusion of the acreage in the Florida Keys, as well as shoreline in Puerto Rico, the Virgin Islands, and other areas.

States now have more input because governors are allowed to add any state and locally protected areas in their respective states into the CBRS. Also, the U.S. Fish & Wildlife Service of the Department of Interior is required to map all areas along the Pacific coast (excluding Alaska) that qualify for CBRS designation. The Interior Department is then directed to recommend to Congress those Pacific coast areas that state governors deem are appropriate for inclusion in the CBRS.

The Act provides for the automatic inclusion of eligible surplus federal government lands prior to their sale to private interests. Other provisions exempt the expansion of existing federal navigation channels and related structures, require the Resolution Trust Corporation (RTC) and Federal Deposit Insurance Corporation (FDIC) to annually report to Congress an inventory of all undeveloped bank properties, give government agencies and non-profit organizations a 180-day right of first refusal to purchase these bank properties, and require a study that examines the interrelationships of federal activities with the CBRS and makes policy recommendations.

D. FCMA Amendments

Amendments to the Magnuson Fishery Conservation and Management Act of 1976 (FCMA) were passed just before the Congressional recess. A discussion of some of the more significant changes follows.

Intense lobbying by the fishing industry prompted Congress to change the criteria for membership on a regional council. The amendments direct the Secretary of Commerce to consider the make-up of each regional council to ensure that there is representation on behalf of the active fisheries in the region. The amendments also limit the terms a council member can serve to three terms for all members appointed after January 1, 1986.

The Magnuson Act, as amended, has changed U.S. past policy and now covers tuna as a highly migratory species. However, the management of highly migratory species in the Atlantic was transferred from the councils to the National Marine Fisheries Service (NMFS). On the West Coast, the Western Pacific Council will retain primary responsibility for the management of pelagic fisheries in the Pacific including tuna.

Also added to the legislation is a prohibition on the use of drift nets 1.5 miles or more in length by any vessel in the United States EEZ, or by American vessels anywhere. The smaller nets are still allowed and are currently being used.

The councils were given some extra authority to protect the habitats of managed species of fish. They may now comment and make recommendations on any activity by a state or federal agency that will have an impact on such species. An extra protective provision was inserted for anadromous species whereby the responsible agency must respond with plans for mitigating the damage within 45 days.

An attempt was made to allow a temporary moratorium that would restrict any new vessels from entering overfished areas, but due to its controversial protectionist overtones, the language was deleted from the final draft.

These and other changes to the FCMA will be reflected in the next edition of the Ocean and Coastal Law Center's Federal Fisheries Management guidebook.

II. Other Developments

A. OCS Oil and Gas

On June 26, 1990, President Bush declared that all OCS sales scheduled for 1990, 1991, and 1992 off of California's shore are cancelled and that 99 percent of the tracts off California will be excluded from consideration for any lease sale until after the year 2000.

The president also announced the cancellation of a proposed 14 million-acre sale off the southwest Florida coast and that the area would also be excluded from consideration until after the year 2000. In addition, President Bush stated that the federal government would begin to cancel existing leases off Florida and "initiate discussions" with the state to participate in a federal-state "buy-back" of the leases, and to conduct additional oceanographic, ecological, and socioeconomic studies in the area, as recommended by the National Academy of Science.

Eighty-seven tracts are excepted from this decade-long ban which comprise about 0.7 percent of all the tracts off California. These tracts have been determined to have a "high resource potential." These 87 tracts might be available for leasing consideration after January 1, 1996, but only if development "appears viable" based on certain guidelines and additional studies.

The guiding principles to be used according to the White House, are:

1) Adequate scientific and technical information and analysis regarding the "resource potential" of each area and environmental, social, and economic effects of oil and gas activity;

2) Environmental sensitivity to certain areas which represent "unique natural resources." The administration stated that even the "small risks" posed by oil and gas development may be "too great" in those areas;

3) Priority should be given to those areas with the "greatest resource potential," especially to those areas where earlier development "has proven the existence of economically recoverable areas.";

4) Energy requirements and the "costs and benefits of various sources of energy must be considered in deciding whether to develop oil and gas offshore. The level of petroleum imports . . . is a critical factor in this assessment.";

5) Supply disruptions or other "external events" might require a "reevaluation of the OCS program. The White House stated that all decisions regarding OCS development are subject to a national security exemption."

Western Oil and Gas Association v. Sonoma County, 905 F.2d 1287 (9th Cir. 1990):

The court held that land use ordinances in California that regulate onshore facilities used to support offshore oil and gas development were not subject to challenge by the oil industry association because the plaintiffs had not demonstrated that the ordinances will interfere with their bidding rights for OCS leases.

B. Marine Sanctuaries

Florida Keys National Marine Sanctuary and Protection Act of 1990:

On November 16, 1990, President Bush signed legislation that designates the Florida Keys as a national marine sanctuary. This is the largest national marine sanctuary that has been designated to date as it encompasses about 2,600 square nautical miles. It is also the first to be designated by the Congress.

This act was introduced by Florida Senator Bob Graham and Representative Dante Fascell as a response to the groundings of three large vessels on coral reefs off Florida in fall of 1989.

The Act restricts certain commercial vessel traffic and prohibits the leasing, exploration, development, or production of minerals of hydrocarbons along the Florida reef tract. The Act also requires the National Oceanic and Atmospheric Administration (NOAA) to develop a comprehensive management plan and implementing regulations for the sanctuary within 30 months. In addition, this act requires the United States Environmental Protection Agency (EPA) and the state of Florida to develop a water quality protection program for the sanctuary within 18 months.

Proposed Monterey Bay National Marine Sanctuary:

NOAA has proposed designating a 2,200 square nautical mile area offshore of Monterey

Bay, California as a national marine sanctuary. NOAA is proposing to establish this marine sanctuary to provide an integrated program of research, education, and resource protection to assist in the long-term management and protection of its resources. The area has a highly productive ecosystem and a wide variety of marine habitats.

The designation and the concomitant regulations will become effective after the close of a 45-day Congressional review.

Washington Sanctuaries:

Work also continues on two marine sanctuary designations involving Pacific Ocean and Puget Sound waters off Washington State.

C. Wetlands

1. Taking Claims

Loveladies Harbor, Inc. v. United States, 21 Cl.Ct. 153 (1990):

In this case, the Claims Court, per Chief Judge Smith, found that the Army Corps of Engineers' denial of a fill permit for 12.5 acres of land in Long Beach, New Jersey, denied plaintiffs all economically viable uses of their land which thereby resulted in a taking. The interesting discussion in this case centered around the burdens of proof involved in wetlands takings claims.

The court stated that a plaintiff's "ultimate burden [i]s one of persuading the court . . . that it is more likely true than not that there remains no economically viable use for their property." In this case the court found that plaintiffs sustained this burden beyond any reasonable doubt. The United States loosely defended by arguing that there were alternative uses such as bird watching, hunting, etc. for plaintiffs' property, but the court found these to be not reasonably probable uses.

The court found a 99 percent diminution in value to plaintiffs' property and concluded that this drastic economic impact coupled with the lack of any countervailing substantial legitimate state interest formed the basis for the court's decision that a taking had occurred.

Florida Rock Industries, Inc., v. United States, 21 Cl.Ct. 161 (1990):

The Court of Claims found that the Army Corps of Engineers' denial of a permit to fill plaintiff's property constituted a taking which entitled plaintiff to a just compensation award pursuant to the Fifth Amendment to the United States Constitution.

In this case, plaintiff was a large-scale miner of limestone who purchased a 1,560-acre tract of land in 1972 for $2,964,000. The Corps denied plaintiff's permit application to mine a 98-acre parcel of the tract, and as a result, the court addressed the following issues:

(1) whether plaintiff had a legitimate entitlement to the proposed use of its property;

(2) if so, whether the Corps' denial of a CWA § 404 permit denied plaintiff the economically viable use of its land so as to constitute a taking under the Fifth Amendment; and

(3) if so, the amount of compensation to which plaintiff is entitled.

The United States defended by asserting that if plaintiff mined his property, such actions would constitute a nuisance under the legal maxim that "no one has a legal protected right to use property in a manner that is injurious to the safety of the general public." See Allied General Nuclear Servs. v. United States, 839 F.2d 1572, 1576 (Fed. Cir. 1988). The court rejected this argument because limestone mining was not considered to be a nuisance in this particular area of Dade County, Florida. Therefore, the court held that as to issue one, the plaintiff "had a legitimate entitle-ment, but for the wetlands restric-tions, to use its property in the manner proposed." 21 Cl.Ct. at 167.

As to the second issue, the court acknowledged that the determination of a taking is done on an ad hoc, case-by-case basis. The court did, however, rely on three factors mentioned by the Supreme Court as follows:

(1) the economic impact of the regulation on the claimant;

(2) the extent to which the regulation has interfered with distinct investment-backed expectations; and

(3) the character of the government action. 21 Cl.Ct. at 178 citing Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986).

Using this analysis, the court stated that they must reject assertions made by the United States that holding the land as an investment is an economically viable use because such a specu-

lation is neither practicable nor reasonably probable.

The court eventually concluded that there was no other business by which the plaintiff could "recoup its investment or better, subject to the [Corps'] regulation." Id. at 176.

In the end, the court awarded plaintiff an astounding $1,029,000 plus interest for the 98-acre parcel plus attorney's fees and costs. The court reached this figure because it found the value of the property was $10,500 per acre before the taking and only $500 per acre after the taking or a 95 percent diminution in value.

Bond v. Department of Natural Resources, 454 N.W. 2d 395 (Mich. App. 1989):

The Michigan Court of Appeals held that the mere designation of property as wetlands did not deprive plaintiff of any viable use of his land; nor did the absence of clear standards to guide property owners in the development of land constitute a taking merely because plaintiff could not build the original development he envisioned.

2. Standing and Wetlands

National Wildlife Federation v. Agr. Stabil. and Cons. Service, 901 F.2d 673 (8th Cir. 1990):

The 8th Circuit Court of Appeals, Judge Hanson writing, ruled that plaintiffs (a conservation organization) had standing to challenge the decision of the Agricultural Stabilization and Conservation Service to exempt 6500 acres of wetlands from wetland conservation provisions of the Food Security Act of 1985 (a/k/a Swampbuster).

Plaintiffs had alleged that their members will suffer "a decrease in water supplies and of water moisture for growing crops, a decrease in the purity of the water they use for aesthetic purposes, as well as damage to aesthetic, hunting, and flood control due to conversion of the lands to cropland. The court held that because they alleged that their injuries were cumulative, a denial of standing would be erroneous simply because they may have suffered some injury. On this point, the court stated that "[r]edress from additional future injury is sufficient to support standing" and concluded that plaintiff's interests also fell within the zone of interests because the losses they alleged were among the injuries the bill seeks to avoid.

In Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990), the 7th Circuit Court of Appeals held that an EPA compliance order which required a developer to stop filling wetlands and to restore areas already filled was not subject to judicial review under Clean Water Act § 309(a)(3) unless EPA decided to bring a civil suit to enforce the order or to assess penalties.

In Lujan v. National Wildlife Federation, 110 S.Ct. 3177 (1990), the United States Supreme Court had occasion to examine the judicial tests for standing to bring suit. That case, brought by an environmental organization, centered around whether representational standing was satisfied by two members of the National Wildlife Federation (NWF) who submitted affidavits that stated that they used an area of land "in the vicinity" of a 4500-acre parcel of federal land affected by federal Bureau of Land Management (BLM) actions.

The Court set forth a two-part test for standing. First, the party seeking standing must identify a final "agency action" that affects him or her. Second, the party must show that the agency action in dispute caused a "legal wrong" or "adversely affected or aggrieved" the party "within the meaning of a relevant statute." Under the facts of this case, the Court conceded that BLM's actions were subject to review as final agency action and that "recreational use and aesthetic enjoyment" were within the protected zone of interests of the statutes (here Federal Land Policy and Management Act (FLPMA) and National Environmental Policy Act (NEPA)).

Next, the Court applied a test seemingly different to the zone of interests test under Clarke v. Securities Industry Association, 107 S.Ct. 750 (1987) which inquired into whether Congress intended to confer standing. The test used here seemed to be more like the "injury in fact" test of Sierra Club v. Morton, 92 U.S. 1361 (1972). The Court here looked solely at the members' affidavits and did not consider the meaning of the underlying statutes or congressional intent. The Court concluded that because the affidavits established that NWF members merely used a large area of land "in the vicinity" of land affected by the BLM, their interests in use and enjoyment had not been "actually affected."

D. State Public Trust Doctrine/ Littoral Rights

In Weeks v. N.C. Dept. of Natural Resources and Community Development, plaintiff chal-

lenged a denial of his application to build a 900-foot pier to reach deep water to dock his sailboat. The defendant Commission determined that plaintiff could get a permit for a 400-foot pier, but the 900-foot pier would jeopardize superior public trust rights in submerged tidal lands.

The Court of Appeals affirmed summary judgment because plaintiff failed to request judicial review of the Commission's findings which was provided for by statute, and the court also held that the superior court is not required to conduct pointless jury trials if no issue of fact supports plaintiff's claims. Plaintiff also claimed a taking due to an unreasonable exercise of police power, to which the court replied that plaintiff was not deprived of all practical uses of his property.

E. Takings and Beachfront Property

Property destruction and damage caused by Hurricane Hugo resulted in several significant court decisions.

Chavous v. South Carolina Coastal Council, No. D: 89-0216-1 (D.S.C. Oct. 13, 1989):

Plaintiffs purchased a beachfront parcel on Hilton Head Island, South Carolina. In 1988, South Carolina amended Title 45, Ch. 39 of the Code of Laws of South Carolina, 1976 (48-39-270 through 48-39-360) to prevent all new construction in the area 20 feet landward of the baseline. Plaintiffs were denied permission to build in this zone and challenged the statutes as violating the Due Process and just compensation provisions of the Fifth Amendment of the United States Constitution.

The court found that under the current application of the statutes, plaintiffs could only use their property to construct a walkway to the beach and/or a small deck. Because the court said that this was not an economically viable use of valuable beachfront real estate, the plaintiffs were "entitled to relief under the takings clause without regard to whether or not the statutes substantially advance a legitimate state interest."

Chavous v. South Carolina Coastal Council, No. D: 89-0216-1 (D.S.C. Mar. 27, 1990):

This subsequent hearing was to determine the proper remedy for the taking. The court held that under the Eleventh Amendment to the U.S. Constitution, South Carolina had not waived its sovereign immunity to the lawsuit and therefore the court was prohibited from awarding money damages for the landowner's loss to date. The court did, however, enjoin all South Carolina officials from enforcing any construction prohibition.

Esposito v. South Carolina Coastal Council, No. D: 88-2055-1 (D.S.C. Oct. 13, 1989):

The same court, per Judge Hawkins, held that a property owner with a preexisting house on the property is able to make economically viable use of his land and therefore the statutes do not constitute a taking under these facts. In support of this holding, the court stated that "all of the plaintiffs used their properties as either permanent residences or vacation quarters prior to the enactment of the statutes" and they still use their property in the same manner.

The statutes prevent reconstruction of current dwellings if destroyed beyond repair, and the court found no evidence indicating that any of the plaintiffs had been "denied permission to build, or rebuild, any structure or recreational amenity within the . . ." 20-foot area. The court intimated that plaintiffs' failure to sell their homes was due to a depressed real estate market rather than the statutes.

The court further held that the statutes do not violate the Due Process Clause because the statutes are substantially related to an important state interest--protection of South Carolina's beaches.

Feuer v. South Carolina Coastal Council, No. D: 88-3073-1 (D.S.C. Oct. 13, 1989):

Plaintiff asserted that these same statutes at issue in the above cases were violative of the Due Process, takings, and the Contract clauses of the Constitution because it prevented him from enforcing a contract for the sale of his property. The court held that "because plaintiff may petition for a change in the baseline or the setback line, the taking issue [was] not ripe for resolution. . . ." The court also reiterated the Due Process holding in Esposito verbatim. As to the Contract Clause claim, because plaintiff's contract was executed 23 days after the laws became effective, and based on a Supreme Court decision stating that the Contracts Clause was narrowly drafted to protect only those contractual rights existing prior to the effective date of the relevant legislation, plaintiff's claim had no merit.

F. Fisheries

1. Gillnet Rights

Marincovich v. Tarabochia, 787 P.2d 562 (Wash. 1990):

Plaintiffs in this case were an association of gillnet fishermen who pooled funds to remove snags and debris to make fishing possible in areas of the lower Columbia River. They sued to enjoin defendants from fishing in areas covered by their state Department of Fisheries permits. They argued that 1) the permits impliedly gave them the exclusive right to fish the areas they clean and 2) local custom and usage constituted a basis to recognize a proprietary interest in drift rights. The court held for defendants and reaffirmed established principles that "citizens enjoy equal access to the navigable waters of their respective states" and that an "individual fisherman cannot assert a property right over the fish until they are caught." The court acknowledged that under the existing system, chaos, overcrowding, and economic detriment to holders of permits will increase but stated that only the Department of Fisheries "is in a position to establish the orderly promotion of gillnet fishing on the Columbia River."

2. Fisheries and Turtle Excluder Devices

State v. Davis, 556 So.2d 1104 (Fla. 1990):

The Florida Supreme Court held that the Florida Marine Fisheries Commission's emergency rule, which requires trawlers on vessels greater than or equal to 25 feet to have qualified TEDs (turtle excluder devices) installed, was consistent with legislative policy and Florida statutes.

Plaintiff, a shrimp trawler, was cited for failing to comply with the emergency rule. He challenged by claiming that the Commission's rule constituted an invalid exercise of delegated authority. The statutes at issue empower the Commission with full rulemaking authority over marine life with the exception of endangered species. The court interpreted these laws as intending to prevent the Commission from enacting rules that allow the taking or harvesting of endangered species, rather than encouraging such. As such, the emergency rule was upheld because it was found to originate from a properly delegated power.

3. FCMA FMP Enforcement

National Fisheries Institute, Inc. v. Mosbacher, 732 F. Supp. 210 (D.D.C. 1990):

The Secretary of Commerce (SOC) directed the five Atlantic fishery management councils to jointly prepare a fishery management plan (FMP) for the Atlantic Ocean billfish in the 1970's. Finally, in 1988 in response to public comments, the Atlantic councils and the SOC approved the final rule implementing the FMP. Plaintiffs challenged the SOC's authority to prohibit the possession or retention of a billfish (blue marlin, white marlin, sailfish, and longbill spearfish) within the United States EEZ by a vessel with a pelagic longline or drift net aboard. 50 CFR § 644.22(b). Plaintiff argued that this was invalid because it applies to fish caught beyond the EEZ. The court said that Congress delegated to the SOC the power to promulgate the necessary regulations to implement the approved FMP and the phrase "all fish within the EEZ" applies to fish located within the EEZ rather than a narrower "harvested" construction. 16 U.S.C. § 1811(a). The court's rationale was that the regulations only applied to U.S. vessels within the EEZ and therefore the SOC didn't exceed any jurisdictional boundaries.

The court also held that the SOC did not exceed his authority under the Magnuson Act by promulgating regulations that prohibited the purchase, barter, trade, or sale of billfish in any state of the Atlantic Ocean because the SOC determined that billfish must be conserved and one way to achieve that objective was to prevent the development of a commercial billfish market.

G. Water Pollution

United States v. Schmott, 734 F. Supp. 1035 (E.D.N.Y. 1990):

The government requested and was granted a preliminary injunction against a marina adjoining Jamaica Bay (an urban wildlife refuge within New York City) from storing boats or building docks in Schmitt Cove because the government established a likelihood of injury and success on the merits resulting from defendants' violations of the Rivers and Harbors Act (RHA) and the Clean Water Act (i.e., failure to secure dock construction permits).

The court reviewed conflicting precedents and held "that irreparable harm is presumed where the government seeks to enforce a statutory violation by way of preliminary injunction expressly authorized in favor of the Government by that statute." Here,

§ 406 of the RHA empowers the government to obtain injunctions for §§ 401, 403, or 404 violations. In regards to the alleged CWA violation, the court found that the government proved irreparable harm, and as such, a preliminary injunction was granted.

Atlantic States Legal Foundation v. Universal Tool, 735 F. Supp. 1404 (N.D. Ind. 1990):

A manufacturer violated the CWA by failing to comply with its National Pollution Discharge Elimination System (NPDES) permit and is liable to a nonprofit corporation under the citizen's suit provisions of CWA § 505 for injuring aesthetic, recreational, and environmental values. Defendant tried to argue that since they were in compliance since November 1987, the issue was moot.

The court held that the defendant has to "demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur and that defendant did not satisfy this heavy burden that defendant won't violate its permit in the future."

Fowl River Protective Association, Inc. v. Board of Water and Sewer Commissioners of the City of Mobile, No. 88-561 (Sup. Ct. Ala., May 25, 1990):

This court overruled a lower court holding that approved the Commission's interpretation of a state water anti-degradation policy. That interpretation had resulted in the granting of a permit to the Sewer Board to discharge up to 25 million gallons of sewage per day into waters situated approximately one-half mile from the shore of Mobile Bay. The court noted that states who issue NPDES permits are bound by federal statutes and EPA regulations. The court also stated that Alabama's own anti-degradation policy is consistent with national policy and went on to hold that if the issuance of the permit was upheld, Alabama's anti-degradation policy would be violated.

Basing its decision on convincing scientific testimony adverse to the Commission, the court held that the Alabama Department of Environmental Management (ADEM) did not have authority to issue an NPDES permit here. The reasons cited by the court were that

(1) ADEM and the hearing officer did not properly interpret Alabama's anti-degradation policy;

(2) the facts on record showed that the testing method which was used to determine the maximum waste load allocations to be discharged had many deficiencies; and

(3) a lower court erred when it only addressed a phenomenon called stratification in terms of fecal coliform bacteria.

In re Glacier Bay, 746 F. Supp. 1379, 741 F. Supp. 800 (D. Alaska 1990):

In actions arising out of a 1987 oil tanker spill in Cook Inlet, the court has made rulings of potential significance to the litigation surrounding the March 1989 Exxon-Valdez spill in Prince William Sound. Like the Exxon Valdez, the Glacier Bay carried Trans-Alaska Pipeline oil. Thus, the court has held that the tanker owners cannot limit their liability to the value of the ship and its freight under the 1851 Limitation of Liability Act. Instead, the liability rules of the Trans-Alaska Pipeline Authorization Act govern. Under that act and Alaska's Environmental Conservation Act, the court has held that commercial fishermen are entitled to recover their economic losses regardless of whether they suffered any physical damage to their vessels and equipment.

Joseph Kellerman
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