



Ocean and Coastal Law Memo

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Recent Developments in Ocean and Coastal Law, 1994-95

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International

I. GATT

In May 1994, the dispute panel for the General Agreement on Tariffs and Trade (GATT) ruled that U.S. restrictions on tuna imports, as authorized under the Marine Mammal Protection Act (MMPA), violate GATT free-trade rules. This ruling allows Mexico to continue importing tuna caught by methods known to endanger dolphins. According to the panel, the MMPA violates GATT because it is applied not to the product, but to the process by which the tuna is produced. The panel's concern is that trade measures will be used to attempt to change the environmental policies of another country. Timothy Noah and Bob Davis, *Tuna Boycott Is Ruled Illegal by GATT Panel*, WALL ST. J., May 23, 1994, at A2.

II. International Whaling Commission

In May 1994, the 46th Annual Meeting of the International Whaling Commission met in Puerto Vallarta, Mexico. The Commission voted to establish a Southern Ocean Sanctuary for whales that prohibits commercial, but not scientific, whaling within its boundaries. *Whales Find Sanctuary at IWC Meeting*, MARINE CONSERVATION NEWS (Center for Marine Conservation, Wash. D.C.), Autumn 1994, at 1.

III. Antarctica

The Madrid Protocol on Environmental Protection in Antarctica has been formally ratified by only 16 out of 26 countries, according

to Beth Marks, the director of the Antarctica Project. Although all signatories agree to follow its principles, a recent Greenpeace study of Antarctica showed that many scientific bases are not complying with the Protocol's guidelines and that environmental degradation due to human activity is still increasing. *Charges of Antarctic Degradation Emerge Following Investigation*, World Env't Rep. (Bus. Publishers, Inc.), Jan. 18, 1995, available in WESTLAW, WENVRPT database. According to the Antarctic and Southern Ocean Coalition, Antarctica's environment continues to be threatened because the Protocol has not yet been fully ratified and there is no liability regime to cover damage to the environment. Antarctic and Southern Ocean Coalition Press Release, May 19, 1995.

IV. International Conference on Land-Based Pollution

In Reykjavik, Iceland, March 6-13, 1995, representatives from 64 countries and other officials met to discuss marine pollution from land-based activities. The group focused on the draft Global Program of Action to Protect the Marine Environment from Land-Based Activities. The goals of this program include classifying areas of concern and establishing priority action areas. The final recommendation was the adoption of a legally binding instrument aimed at reducing or eliminating pollution globally. The United Nations Environment Programme is organizing further discussions on land-based sources of marine pollution to be held in November 1995 in Washington, D.C. *Marine Pollution*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,285 (May 1995).

V. Law of the Sea Convention Update

On November 16, 1994, the United Nations Convention on the Law of the Sea (UNCLOS) entered into force. This treaty regulates navigation, fishing, ocean pollution, seabed mining, marine research, and economic zones. As of the date of this publication, the U.S. Senate had not given its advice and consent to U.S. accession to the treaty, even with U.N. revisions to the seabed mining provisions aimed at making them less disagreeable to the United States. The modifications include provisions reducing costs to governments and commercial miners, making the system more free-market oriented, and guaranteeing access to the resources of the seabed by all investors, as well as others. The treaty is still viewed by some opponents as antibusiness and too burdensome on American mining companies. *Law of Sea Convention Enters into Force*, Nat'l Env't Daily, Nov. 17, 1994, available in WESTLAW, BNA-NED database.

VI. London Dumping Convention

A. Prohibition on Low-Level Radioactive Waste Dumping Adopted

The parties to the 1972 Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention) adopted a worldwide prohibition on the dumping of low-level radioactive waste into oceans. None of the countries opposed the ban, although five abstained from voting. Of that five, only Russia entered a formal reser-

vation, which keeps it from being bound by the Convention's dumping prohibition. *Events of 1994*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 409 (1994). Discussions continue on whether to extend the Convention's dumping prohibition to areas inside territorial sea baselines.

B. *Japan Tightens Industrial Waste Dumping Regulations*

Japan is preparing to tighten its regulations on ocean dumping of industrial waste in response to the November 1993 amendment to the London Dumping Convention. The amendment bans dumping of all industrial waste as of January 1996. *Japan*, Daily Env'tl. News, Apr. 20, 1995, available in WESTLAW, BNA-DEN database.

VII. Straddling Stocks

A. *Straddling and Migratory Fish Stocks Conference*

The sixth session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks met in New York City from July 24 to August 4, 1995, and completed a Final Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The draft of this agreement, while not the final version, includes language for consistent fisheries management on the high seas and in adjacent exclusive economic zone (EEZ) waters. Art. 7. The draft agreement also adopts the "precautionary approach," which requires states to act with caution when information about a

straddling or migratory fish stock is "uncertain, unreliable, or inadequate." Art. 6. At the time this memo went to press, the final agreement was not yet available.

B. *Studies Show Decrease in Fish Catches*

A recent report by the Worldwatch Institute shows a 5 percent decrease in global fish catches since 1989. The Institute blames this change on overfishing and environmental degradation of the oceans. *World Env't Rep.* (Bus. Publishers, Inc.), Aug. 17, 1994, available in WESTLAW, WENVRPT database.

VIII. Canadian Management of Straddling and Transboundary Fish

A. *Canada and EU at Issue over Fishing in the High Seas*

Canada and the European Union (EU) have resolved a short, but heated, dispute involving fishing of the much depleted turbot, or Greenland halibut. Although the problem worsened when Canada seized a Spanish fishing trawler in March 1995, there have been troubles since the mid-1980s, when the Northwest Atlantic Fisheries Organization (NAFO) placed limits on the harvesting of certain groundfish. This increased the fishing of turbot. NAFO awarded Canada 60 percent of the turbot quota, which the EU would not agree to, nor comply with. Feeling that NAFO was not strong enough to enforce the quota, Canada decided to take matters into its own hands. The result was the capture of the Spanish trawler, the *Estai*, and its captain and the cutting of

nets from another Spanish trawler. After one month of talks, Canada and the EU finally came to an agreement to step up conservation measures, including increased enforcement of the fishing quotas. The agreement allots to Canada and the EU 10,000 metric tons each of the total harvest quota of 27,000 metric tons. The rest will be divided among the other members of NAFO (the United States is not a member). NAFO's Fisheries Commission agreed to adopt conservation and enforcement elements implementing the agreement between Canada and the EU. Formal adoption will be considered in September 1995. Douglas Day, *Tending the Achilles' Heel of NAFO: Canada Acts to Protect the Nose and Tail of the Grand Banks*, 19 MARINE POL'Y 257 (1995); Rosanna Tamburri, *Canada, EU End Dispute over Fishing*, WALL ST. J., Apr. 17, 1995, at A9.

B. *Canada Asserts Control over Fisheries in Its EEZ*

In July 1995, Canada's Fisheries and Oceans Minister introduced legislation to protect and manage fisheries within Canada's 200-mile zone. The legislation asserts sovereign authority over resources within the 200-mile zone, along with other provisions. Internet Posting from Gene Buck, Congressional Research Service, Library of Congress, Wash. D.C. (July 7, 1995).

IX. Miscellaneous

A. *French Nuclear Testing in the South Pacific*

In June 1995, France announced that it was resuming nu-

clear testing in the South Pacific after a 3-year test moratorium. France is planning to carry out eight more tests and end the project no later than 1996. The announcement has resulted in protests worldwide, including the boycotting of French goods. Some protestors are concerned about resumption of testing will affect current negotiations for a comprehensive test ban treaty. *International Censure of France over Nuclear Tests Is Spreading*, WALL ST. J., July 13, 1995, at A6.

B. Report Shows Environmental Degradation of Australia's Marine Environment

A report on the state of Australia's marine environment produced in February 1995 by Australia's Environment Minister, Jon Faulkner, has resulted in commitments to clean up coastal and inland waters. According to the report, environmental degradation of the marine areas near urban areas has been caused by agricultural runoff (including erosion) and municipal and industrial waste discharge. Threatened marine habitats, such as mangroves and marshes, as well as coral reefs and sea grass beds, have been damaged. The report also expressed concern about unsustainable fisheries harvesting. *World Env't Rep.* (Bus. Publishers, Inc.), Feb. 15, 1995, available in WESTLAW, WENVRPT database.

C. Strict Liability for Oil Spills by British Shipowners

Since October 1, 1994, British shipowners have been held strictly liable for coastal oil spills from both cargo and noncargo (bunker) oil. The Merchant Shipping (Sal-

vage and Pollution) Act 1994 expands the polluter-pays principle of international law, making a shipowner liable for any damage from the oil without the victim having to prove fault or negligence. *Oil Spills: Strict Liability To Take Effect October 1*, Int'l Env't Daily, Aug. 17, 1994, available in WESTLAW, BNA-IED database.

Domestic

I. Coastal Resources Management

A. CZMA Reauthorization Pending

On May 10, 1995, the House passed an amendment to restore and revise Coastal Zone Management Act (CZMA) section 6217, which would update and expand the Coastal Nonpoint Pollution Control Program. A CWA reauthorization bill, H.R. 961, discussed below, had included language to repeal the program.

B. CZM Procedures

1. NOAA Issues Policy Guidance on Public Participation in the CZMA

On June 13, 1994, the Federal Register published the final policy guidance of the National Oceanic and Atmospheric Administration (NOAA) on public participation under section 306(d)(14) of the CZMA. Under this guidance, state coastal management programs provide public participation in permitting decisions, consistency determinations, and other similar decisions. 59 Fed. Reg. 30,339 (1994).

2. Reviewability of a State's Activities Impacting the Coastal Zone

On May 19, 1994, Secretary of Commerce Ronald H. Brown found that under the CZMA, one state can review the activities of another state that impact the coastal zone. This decision was the result of a suit brought by the city of Virginia Beach, Virginia, against North Carolina, which wanted to stop the city's project to build a pipeline from Lake Gaston (located in Virginia and North Carolina) to the city. *City of Virginia Beach v. Brown*, 858 F. Supp. 585 (E.D. Va. 1994). North Carolina also objected to the city's finding that the project complied with the North Carolina Coastal Management Plan. The Secretary of Commerce determined that although North Carolina was authorized to review and object to the project, the pipeline was, in fact, consistent with the objectives of the CZMA. *Interstate Consistency Allowed by CZMA, DOC Secretary Finds*, OCEAN AND COASTAL RESOURCE MGMT. NEWSL. (National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management, Silver Spring, Md.), First/Second Quarter 1994, at 1.

3. NRC Shipment Not Subject to District Court Review

In an action to enjoin shipment of partially irradiated reactor fuel, a federal court of appeals found that under the Hobbs Act district courts do not have jurisdiction to review National Environmental Policy Act (NEPA) challenges to the approval of the shipment by the Nuclear Regulatory Commission (NRC). Because there was no

fragmented decision making, the NRC's actions did not fall under the exceptions to the Hobbs Act that would have allowed review in the district court. The Coast Guard did not have total control over the shipments, so its conditional approval of the plan to ship does not constitute a "major federal action" and does not require an environmental impact analysis. New Jersey v. Long Island Power Auth., 30 F.3d 403 (3rd Cir. 1994).

4. **Parking Fee Devices Allowed under California Coastal Act**

The California Coastal Commission properly approved an agency project to install devices that collect parking fees at state park beaches because the action was consistent with the California Coastal Act. Also, no environmental impact report (EIR) was required because the action was both statutorily and categorically exempt from the California Environmental Quality Act. Surfrider Found. v. California Coastal Comm'n, 31 Cal. Rptr. 2d 374 (Cal. Ct. App. 1994).

5. **Environmental Impacts Must Be Considered Before Granting Building Permit**

Under the Virgin Islands Coastal Zone Management Act, the coastal zone management committee must consider environmental impacts and possible mitigation measures before granting a permit to a developer to build a hotel and marina. The developer must submit the necessary studies and plans for the committee to consider, and the committee may not issue a permit conditioned on the developer's

future generation of this information. Virgin Islands Conservation Soc'y v. Virgin Islands Bd. of Land Use Appeals, 857 F. Supp. 1112 (1994).

6. **San Francisco Bay Commission Has Jurisdiction over Marshland**

Under California Government Code section 66610, regarding the San Francisco Bay, the San Francisco Bay Conservation and Development Commission has jurisdiction over development within "marshland" areas that are lower than five feet above the mean sea level. Littoral Dev. Co. v. San Francisco Bay Conservation & Dev. Comm'n, 39 Cal. Rptr. 2d 266 (Cal. Ct. App. 1995).

C. *Shorelands*

1. **Corps' Beach Renourishment Project Enjoined**

The Army Corps of Engineers violated NEPA and the Administrative Procedures Act (APA) and harmed valuable habitats and species, and is therefore preliminarily enjoined from continuing dredging activities for a beach renourishment project. The project was designed to prevent beach erosion and hurricane surge damage along a portion of the Florida coast; however, the dredging was damaging valuable coral reefs and threatening endangered sea turtles. The Corps violated the acts by failing to involve a municipality affected by the project in its decision making. Town of Golden Beach v. District Eng'r, 24 Env'tl. L. Rep. (Env'tl. L. Inst.) No. 29 (S.D. Fla. Sept. 22, 1994).

2. **Statute of Limitations Does Not Bar Takings Claim**

The U.S. Court of Appeals for the Federal Circuit held that the six-year limitations period for filing actions in the Court of Federal Claims does not bar a takings claim based on the gradual erosion of Florida beaches. The slow physical process set in motion by the Corps, along with the government's promise of a sand transfer plant, made accrual of the landowner's claim uncertain. Applegate v. United States, 25 F.3d 1579 (Fed. Cir. 1994).

3. **Variance To Build on "Shoreline of State-Wide Significance" Denied**

The Washington State Department of Ecology was correct in denying a landowner a permit to build on land designated as a "shoreline of state-wide significance" under the state's Shoreline Management Act. The land still had recreational use--and therefore economic value--so this regulation did not deprive the landowner of all reasonable uses of the property. Buechel v. Department of Ecology, 884 P.2d 910 (Wash. 1994).

4. **Water-Dependent Structures Not under Authority of Maryland Department of Natural Resources**

The Maryland Department of Natural Resources (DNR) has authority over dwelling units or nonwater-dependent structures on piers, but this authority does not extend to water-dependent structures such as boathouses and boat shelters. The Court of Special Appeals held that DNR's complaint must be withdrawn. Pier One, Inc.

v. Department of Natural Resources, 641 A.2d 955 (Md. App. 1994).

5. Suite Filed To Block Construction of Dockside Casino

The Center for Marine Conservation and other environmental organizations filed suit in federal district court on November 30, 1994, to challenge a federal permit for construction of a dockside casino on the Mississippi gulf coast. The project is proposed for an undeveloped environmentally sensitive area. The groups claim that allowing a permit for development of this pristine site will pave the way for others who seek permits for similar development projects in sensitive areas. Gulf Islands Conservancy v. Army Corps of Eng'rs, No. 1:94-CV-2567 (D.C. Cir. Nov. 30, 1994) (WESTLAW, BNA-NED database, Dec. 2, 1994).

D. Public Trust Doctrine

In Secretary of State v. Wiesenberg, 633 So. 2d 983 (Miss. 1994), the Mississippi Supreme Court essentially ended the five-year controversy over the public trust tidelands. The decision held that the 1989 Public Trust Tidelands Act, which based the mean high water (mhw) mark on the year 1973, was constitutional. The controversy revolved around the Public Trust Tidelands Act, which was enacted to resolve the disputes over land ownership. All land below the mhw mark is public trust land, and the dispute was about how to define the mhw mark. The Act was being challenged by Secretary of State Dick Molpus on the grounds that under

the Act all public trust lands that were filled prior to 1973 would go into private ownership. Molpus argues that this is in violation of the Mississippi Constitution, which prohibits donations of lands belonging to the state to private individuals. The court determined that the transfer of public trust property will be allowed if it is "incidental to achieving a higher public purpose." The court determined that in this case the transfer of public trust property was allowed because it was "incidental" to achieving the higher purpose of resolving the land title disputes. Margaret Anne Bretz, *Secretary of State v. Wiesenberg*, 14 WATER LOG (University of Mississippi Law Center, University, Miss.) No. 2, at 8 (1994).

II. Wetlands Protection

A. Proposed Rewrite of CWA

On May 16, 1995, the House approved a broad rewrite of the CWA (H.R. 961) that would change regulation of wetlands and allow more flexibility for industry in complying with pollution control rules. In order to be compensated under H.R. 961, a property owner need only experience a 20 percent reduction in property value caused by wetlands regulations. It would also change the definition of wetlands, reducing the areas that fall under the wetlands provisions of the bill. *House Approves Sweeping CWA Rewrite Bill*, Nat'l Env't Daily, May 18, 1995, available in WESTLAW, BNA-NED database. President Clinton says he will veto H.R. 961 if it passes the Senate without any major changes. He criticized it because it would "roll back a quarter century of bipartisan progress in public

health and environmental progress." *Clinton Vows To Veto CWA*, Nat'l Env't Daily, May 31, 1995, available in WESTLAW, BNA-NED database.

B. Guidelines Published Regarding Wetlands Mitigation Banks

On March 6, 1995, the Federal Register published guidelines from the Corps, the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and the Natural Resources Conservation Service (NRCS), formerly the Soil Conservation Service, regarding the establishment, use, and operation of wetlands mitigation banks. This guidance is intended to clarify how these banks may be used to satisfy the mitigation requirements of the CWA and the Food Security Act. 60 Fed. Reg. 12,286 (1995).

C. Proposals for CWA Permitting Process

The Corps proposes to issue a nationwide permit (NWP) to allow small landowners to construct single-family homes in wetlands without applying for an individual Federal Water Pollution Control Act (FWPCA) section 404 permit. The Corps claims that the NWP will effectively protect aquatic environments while reducing regulatory burdens on landowners. 60 Fed. Reg. 15,440 (1995).

The EPA proposes to amend the regulations governing state permitting programs under FWPCA section 402 to allow any interested person an opportunity to challenge the approval or denial of section 402 permits. This ensures

that an interested person can have the opportunity to judicially challenge the final action on state-issued permits as is allowed for permits issued by EPA. 60 Fed. Reg. 14,588 (1995) (to be codified at 40 C.F.R. pt.123).

D. Wetland Loss Rates Have Decreased According to Study

A recent study of wetland losses conducted by the NRCS as part of its National Resources Inventory shows that wetland loss rates decreased substantially during the period from 1982 to 1992. The study found that while the United States is not losing wetlands at such a rapid rate, it has not yet achieved "no net loss" of wetlands. Ralph Heimlich and Jeanne Melanson, *Wetlands Lost, Wetlands Gained*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst., Wash. D.C.), May-June 1995, at 1. Some analysts disagree with this conclusion, pointing to the method by which the NRCS calculated the net loss. Jonathan Tolman, *Achieving No Net Loss*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst., Wash. D.C.), May-June 1995, at 5.

E. EPA Permitting Process

In Michigan a permit was requested to fill nearly four acres of wetlands to create a golf course. The EPA objected to the permit, and, as required in Michigan, the authority to grant the permit was transferred to the Corps. The EPA eventually withdrew its objections and proposed to return authority back to the state of Michigan, but, according to the Sixth Circuit, that would overstep EPA's authority. Friends of the Crystal River v.

United States EPA, 35 F.3d 1073 (6th Cir. 1994).

F. Supreme Court Will Not Hear Wetlands Dispute

A county's petition for writ of certiorari to the U.S. Supreme Court in a wetlands dispute was denied. James City County v. United States EPA, 115 S. Ct. 87 (1994). The county sought reversal of an appellate court decision allowing the EPA to veto a FWPCA section 404 permit issued by the Corps. The permit was for filling wetlands to construct a municipal reservoir, and the Court determined that "adverse environmental impacts alone" would justify the EPA's veto. See 12 F.3d 1330 (4th Cir. 1993).

G. Unauthorized Wetlands Fillers Convicted and Sentenced

Two men who violated the FWPCA by filling wetlands on their property without a permit were convicted and sentenced. The Corps has the duty to define "waters of the United States," and this duty was not unconstitutionally delegated because Congress provided sufficiently precise standards to assess whether the Corps properly carried out the delegated duty. "Waters of the United States" can include wetlands adjacent to navigable waters. Mills v. United States, 36 F.3d 1052 (11th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3773 (U.S. Apr. 13, 1995) (No. 94-1678).

H. Defining "Adjacent" Wetlands

A district court held that even though wetlands were at least one-

half mile from navigable water, they were still "adjacent" rather than "isolated" wetlands. Because the wetlands were adjacent, the lot owner was not eligible for a general or nationwide fill permit, but had to apply for an individual permit before proceeding to fill. The lot owner did not obtain a permit and therefore violated the CWA by discharging pollutants in the form of fill into the waters of the United States without a permit. The court used evidence of ecological links with the neighboring navigable waters in determining the classification of the wetlands. United States v. Banks, 873 F. Supp. 650 (S.D. Fla. 1995).

I. Decision over CWA Jurisdiction Will Not Be Reconsidered by Same Court

A federal court of appeal's decision that the CWA has jurisdiction over isolated waters used only by migratory birds is not clearly erroneous, and therefore the same appeals court will not reconsider the case. Also, civil penalties are mandatory under the CWA for any person who violates any of the provisions enumerated in 33 U.S.C.A. § 1319(d). Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995).

III. Wetlands Takings Claims

A. Takings Claim Denied Certiorari by Supreme Court

The Supreme Court denied a petition for writ of certiorari from a developer who claimed that the denial of a dredge and fill permit constituted a taking requiring just compensation. Plantation Landing Resort v. United States, 115 S. Ct.

1822 (1995). See Issue 40 of the *Ocean and Coastal Law Memo* for details on the case in the lower court.

B. Denial of Dredge and Fill Permit Did Not Result in Taking

The Court of Appeals for the Federal Circuit vacated the Federal Claims Court's decision that the denial of a dredge and fill permit resulted in a taking. According to the appeals court, the record does not support the finding that the Army Corps of Engineers' denial of the permit resulted in the loss of all economic use or value of the land. The case has been remanded to the Federal Claims Court to determine the valuation of the property. Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), cert. denied 115 S. Ct. 898 (1995).

C. Denial of Permit To Fill Wetland Is a "Total Taking"

The United States must pay a land developer just compensation for the Corps' denial of a permit to fill wetlands. The permit denial deprived the developer of all economically viable use of the parcel and constituted a "total taking." The court of appeals only analyzed a small portion of the original subdivided land, leaving out the area that was already developed and that area that would belong to the state as a condition of the permit approval. Including the whole parcel in the analysis would likely have led to a different conclusion by the court. Loveladies Harbor v. United States, 28 F.3d 1171 (Fed. Cir. 1994). The federal appellant's petition for rehearing was denied

on September 29, 1994, as was the suggestion for rehearing in banc.

D. The Dolan Case

A city can condition a floodplain development permit without violating the Fifth Amendment if (1) the city can show that there is an essential nexus between the condition and a legitimate state interest and (2) the city makes an individual determination of "rough proportionality" between the condition and the impact of the proposed project. Because the city could not demonstrate the "rough proportionality" between the conditions and the nature and extent of the impact of the development, the Supreme Court did not uphold the city's dedication requirements. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

E. Construction of Boat Launch and Jetties Constitutes a Taking

The Supreme Court of Michigan held that the Department of Natural Resources' construction of a boat launch and jetties that destroyed the plaintiff's beachfront property by causing the sand to filter out of the water constitutes an unconstitutional taking for which compensation is due. Peterman v. Michigan Dep't of Natural Resources, 521 N.W.2d 499 (Mich. 1994).

IV. Ocean Pollution

A. Discharge from Land

1. House Bill Bans Dumping of All Radioactive Wastes

The House passed a bill on May 23, 1994, that would ban the

dumping of *all* radioactive wastes into the ocean. The bill (H.R. 3982) would amend Title I of the Marine Protection, Research, and Sanctuaries Act of 1972, which currently bans only the disposal of high-level radioactive wastes. This bill would bring the United States into conformity with the London Dumping Convention, which was recently amended to ban the dumping of all radioactive wastes. *House Passes Bill to Ban Dumping of All Types of Radioactive Waste*, Nat'l Env't Daily, May 24, 1994, available in WESTLAW, BNA-NED database. See discussion of the London Dumping Convention above.

2. Citizen Suits Can Enforce Water Quality Standards under CWA

The Ninth Circuit reversed its prior decision in this case and ruled that citizen suits can enforce water quality standards under the CWA. The Act allows citizen suits to enforce both discharge permit effluent limitations and permit conditions, and the court ruled that water quality standards are permit conditions. Northwest Env'tl. Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995).

3. EPA Can Rely on Water Quality Standards in Issuing NPDES Permit

The EPA can rely on the presumption that by complying with state water quality standards, there will be no unreasonable degradation of the marine environment. Adams v. United States EPA, 38 F.3d 43 (1st Cir. 1994). The First Circuit denied a landowner's petition to review the EPA's issuance of a National Pollutant Discharge

Elimination System (NPDES) permit allowing discharge of effluent from a municipal wastewater treatment plant off the New Hampshire coast, because the petitioner did not present a genuine issue of material fact showing that the EPA could not rely on the water quality standards.

4. CalTrans Violated CWA Permit

A district court held that the California Department of Transportation violated its FWPCA stormwater discharge permit; the Department failed to adopt a permit compliance plan and properly train and supervise its employees regarding compliance. It also did not take adequate precautions to prevent contaminated water from entering the stormwater drainage system. The court found that contaminated stormwater was flowing virtually unchecked into Santa Monica Bay. Natural Resources Defense Council v. Van Loben Sels, No. CV-93-6073-ER, 1994 U.S. Dist. LEXIS 20061 (C.D. Cal. Nov. 18, 1994).

B. Dumping from Vessels

1. Cruise Ship Liner Violates MPRSA

A cruise ship liner has agreed to pay \$100,000 for violating the Marine Protection, Research, and Sanctuaries Act of 1972 and its 1988 amendment (the Ocean Dumping Ban Act) by discharging over five tons of debris into the Pacific Ocean. The Ocean Dumping Ban Act prohibits transporting any material from the United States with the intention of dumping it into ocean waters without a valid permit from the EPA. United

States v. American Global Line, No. CR-94-0416 (N.D. Cal. Sept. 1, 1994).

2. Coast Guard Has Increased Enforcement of MARPOL V

A report by the General Accounting Office issued on May 30, 1995, showed increased efforts on the part of the U.S. Coast Guard to enforce Annex V of the 1973 International Convention for the Prevention of Pollution from Ships, known as MARPOL V. According to the report, however, identifying and penalizing violators could be improved. MARPOL V was implemented in the United States through the Marine Plastic Pollution Research and Control Act of 1987 (MPPRCA), which charges the Coast Guard with the enforcement of MARPOL V for the United States.

3. Decision To Issue Dredge Permit Was Not Arbitrary and Capricious

The Third Circuit affirmed a district court's finding that the Army Corps of Engineers did not act arbitrarily or capriciously by issuing a dredge permit to the Port Authority of New York. The permit was for dredging material from the Authority's Newark Bay facility for deposit in the Atlantic Ocean. The defendant-appellee failed to comply with the Marine Protection, Research, and Sanctuaries Act's provisions for performing tests on dredged material; the court, however, found that the plaintiffs failed to show that irreparable injury would result from the dumping. Clean Ocean Action v. York, No. 94-5489 (3rd Cir. June 12, 1995), affirming 861 F. Supp. 1203 (D.N.J. 1994).

V. Protected Areas

A. Marine Sanctuaries

1. New Marine Sanctuary in Washington

The Olympic Coast National Marine Sanctuary, located off the northern coast of Washington State, is the newest national marine sanctuary. This sanctuary--twice the size of Yosemite and covering almost 3,300 square miles off Washington's coast--was designated on July 16, 1994. MARINE CONSERVATION NEWS (Center for Marine Conservation, Wash. D.C.), Autumn 1994, at 7.

2. EIS for NW Straits Sanctuary Still Pending

NOAA and the State of Washington have yet to prepare a draft environmental impact statement for the proposed Northwest Straits sanctuary. Progress on designating this sanctuary has been stalled for some time. MARINE CONSERVATION NEWS (Center for Marine Conservation, Wash. D.C.), Autumn 1994, at 7.

3. NOAA Can Limit Some Watercraft in Monterey Bay Marine Sanctuary

A NOAA regulation limiting the operation of certain small watercraft in the Monterey Bay National Marine Sanctuary in California is valid, according to a federal court of appeals. NOAA gave a "concise general statement" of the regulation's "basis and purpose," as required by the APA. In this statement, NOAA also differentiated between personal watercraft and other similar and larger vessels, again showing that it was not

arbitrarily restricting small boats. Personal Watercraft Indus. Ass'n v. Department of Commerce, 49 F.3d 540 (D.C. Cir. 1995).

4. Draft Management Plan for Florida Sanctuary Released

On April 4, 1995, the Draft Management Plan for the Florida Keys National Marine Sanctuary was released. The 900-page plan describes the regulatory and non-regulatory strategies that will be used to protect the sanctuary.

5. Boat Owners Held Strictly Liable for Intentional Grounding

A Florida district court determined that where a boat intentionally grounds itself on a coral reef to avoid sinking during a storm, the owners are held strictly liable under the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 et seq., and cannot use the "act of God" defense where the severe weather conditions were known or should have been known. United States v. M/V Miss Beholden, 856 F. Supp. 668 (S.D. Fla. 1994).

6. NOAA's Regulations for Dredging in Sanctuary Are Valid

The Ninth Circuit Court of Appeals held that a NOAA regulation prohibiting dredging or otherwise altering the seabed in the Channel Islands National Marine Sanctuary is not unconstitutionally vague. Craft v. National Park Serv., 34 F.3d 918 (9th Cir. 1994).

B. National Estuary Program

The EPA has added the lower Columbia River to the National

Estuary Program (NEP). This area includes the lower 146 miles of the river (from the mouth of the river up to the Bonneville Dam).

Through NEP, funding will go towards solving pollution problems in the lower Columbia River area using a coordinated watershed approach. *Columbia River Part of National Estuary Program*, OREGON INSIDER (Envirotech Publications, Eugene, Or.), July 15, 1995, at 5.

Work continues on the Tillamook Bay, Oregon, national estuary plan.

VI. Federal Outer Continental Shelf Oil, Gas, and Minerals

A. Amendments to the OCSLA Enacted

Amendments to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1337(k) and 1346(a), were enacted through H.R. 3678. These amendments provide the Secretary of the Interior with the authority to negotiate agreements for use of sand, gravel, and shell resources from the outer continental shelf (OCS) when used in connection with certain kinds of public works projects. CURRENT ACTIVITIES UPDATE (Office of International Activities and Marine Minerals, Minerals Management Service, Herndon, Va.), Fall 1994, at 11.

B. First Project under the New Amendments Commences

The Minerals Management Service (MMS) and the Corps signed a memorandum of agreement (MOA) commencing the first project under the recent OCS

amendments. The beach nourishment project will provide sand for about seven miles of beaches in Florida. The signing of the MOA, which promotes interagency cooperation, is the first of two steps required under the new law. The next step is for the MMS to sign a noncompetitive lease with either the state or local government. The lease gives the nonfederal parties legal access to OCS sand resources. *MMS and Corps of Engineers Cooperate on Florida Beach Nourishment Project*, CURRENT ACTIVITIES UPDATE (Office of International Activities and Marine Minerals, Minerals Management Service, Herndon, Va.), Spring 1995, at 2-3.

C. Ban on Oil and Gas Drilling

In the House Appropriations Committee, a 14-year-old ban on oil and gas drilling along the OCS was reinstated June 27, 1995. The ban, however, was included in a bill that cuts deeply into other environmental, energy conservation, science, and arts programs. *Appropriations: Ban on Off-Shore Drilling Reinstated*, Nat'l Env't Daily, June 29, 1995, available in WESTLAW, BNA-NED database.

VII. Oil Pollution

A. Spill Liability Cases

1. State Oil Spill Damages Statute Is Not Preempted by U.S. Constitution

A Rhode Island statute allowing economic loss recovery from damages to natural resources is not preempted by the Constitution's admiralty clause. Under general maritime law, claims for purely

economic losses from oil spills are not recoverable absent physical harm, but under the Rhode Island statute, a vessel owner may be liable for the economic loss to shellfish dealers caused by an oil spill. In re Ballard Shipping Co., 32 F.3d 623 (1st Cir. 1994).

2. Private Lawsuits under OPA

The Eleventh Circuit Court of Appeals determined that before a private lawsuit can be filed under the Oil Pollution Act (OPA), it is mandatory that all claims for removal costs or damages be presented first to parties responsible for the spill. Boca Ciega Hotel v. Boucharde Transp. Co., 51 F.3d 235 (11th Cir. 1995).

3. California Oil Spill Litigation Finally Settled

California, the United States, and Apex Oil have finally settled five years of litigation over an oil spill off the California coast. The parties settled for \$6.4 million for the spill, which caused damage to marine life from San Francisco south to Big Sur. Most of the money will be dedicated to seabird restoration projects because of the large number of these birds killed by the spill. United States v. Apex Oil Co., Nos. C-89-0246 WHO, C-89-0250 WHO (N.D. Cal. Aug. 31, 1994).

4. First Criminal Action under OPA

Under the OPA, a cruise liner company was ordered to pay a \$500,000 fine and establish an environmental compliance program in what was the first criminal action brought under this act. The

Coast Guard filmed the ship in the act of illegally discharging waste oil off the Florida coast. Oil Pollution, 24 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,685 (Nov. 1994).

B. Exxon Valdez Oil Spill Update

The *Exxon Valdez* oil spill resulted in the filing of numerous cases in the federal courts. Although these actions were consolidated into one case, In re Exxon Valdez, this case has long been in the courts for a four-phase trial. Phase I, determining the culpability of the Exxon Corporation and Captain Joseph Hazelwood, was decided on June 13, 1994. A federal jury found Exxon to be reckless and the captain to be negligent and reckless. The jury found that the negligence of both the captain and Exxon was the legal cause of the oil spill. Phase II was to determine the losses of commercial fishermen and native subsistence users. Exxon agreed to settle with the Alaska natives for \$20 million on July 25, 1994. This covered only the actual value of harvested fish and still allowed the subsistence fishers to pursue punitive damages against Exxon. On August 11, 1994, the federal jury awarded \$286.8 million in compensatory damages to about 10,000 commercial fishermen. In Phase III, the jury determined the amount of punitive damages based on the level of negligence, the respective net income of the defendants, and other evidence. In September 1994, the federal jury ordered Exxon to pay \$5 billion in punitive damages and the captain to pay \$5,000. Exxon challenged this award, but on January 27, 1995, Judge Holland issued 12 rulings upholding the punitive

damage awards and the compensatory award, plus other pre-trial rulings. At the state level, on September 24, 1994, the Alaska Superior Court awarded native corporations and a municipality \$9.7 million for damages to land and archeological sites. In re Exxon Valdez, No. A89-0095-CV (HRH) (D. Alaska 1994, 1995). Phase IV will deal with other miscellaneous claims.

Sportfishers are barred from asserting claims for loss of use and enjoyment of natural resources as a result of the 1989 *Exxon Valdez* oil spill based on *res judicata*. The federal and state governments already recovered for the same damages on behalf of the public; as trustees of the public under the CWA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the United States and Alaska have authority to recover for lost-use damages caused by the spill, barring any private claim for these damages. Also, *res judicata* bars any private claims through a consent decree between Exxon and the governments, settling all claims on behalf of the public. Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769 (9th Cir. 1994).

C. Preventative Measures

1. Coast Guard Regulations

The Coast Guard is requiring escort vessels for certain oil tankers transiting Prince William Sound, Alaska, and Puget Sound, Washington. These regulations will reduce the risk of oil spills by tankers running aground or colliding. 59 *Fed. Reg.* 42,962 (1994)

(to be codified at 33 C.F.R. pt. 168).

The Coast Guard issued an interim final rule pursuant to the OPA establishing minimum standards for overfill devices and requiring the phase-in installation and use of overfill devices on the cargo tanks of certain tank vessels carrying oil or oil residue as primary cargo. This will reduce the likelihood of spills when oil is loaded as cargo. 59 Fed. Reg. 53,286 (1994) (to be codified at 33 C.F.R. pts. 155, 156).

The Coast Guard established final regulations for the design standards of double hull vessels pursuant to the requirements of the OPA. 60 Fed. Reg. 13,318 (1995) (to be codified at 33 C.F.R. pts. 155, 157; 46 C.F.R. pts. 30, 32, 70, 90, 172).

2. Minerals Management Service's Spill Response Plans

MMS has proposed a rule to implement OPA. The rule includes requirements for spill response plans for oil handling facilities seaward of the coast line, including associated pipelines. The rule would guide owners or operators of offshore facilities in preparing and submitting response plans that ensure the availability of private spill response personnel and equipment. The rule would also permit the operation of offshore facilities without approved response plans if certain conditions are met. 60 Fed. Reg. 3177 (1995) (to be codified at 30 C.F.R. pt. 254).

VIII. State Ocean Management

A. Oregon Territorial Sea Plan Approved

The Oregon Territorial Sea Plan was adopted by the Oregon Land Conservation and Development Commission on December 9, 1994. The plan has been submitted to NOAA for approval as routine implementation of Oregon's federally approved coastal zone management program. NOAA approval will mean that federal agencies must act consistently with the plan's enforceable policies.

B. Hawaiian Regulations Not Preempted by SLA

The Federal District Court for Hawaii ruled that state regulations and legislation affecting the rights of mariners to anchor and navigate in Hawaiian waters are not preempted by the federal Submerged Lands Act (SLA). In addition, the court held that charging mooring fees is constitutional; the fees do not significantly interfere with the right to travel. *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994).

IX. Fisheries Management

A. Magnuson Fishery Conservation and Management Act Reauthorization Update

The Magnuson Fishery Conservation and Management Act (MFCMA) expired in 1993 but has been continued since then by annual appropriations. On May 10, 1995, House Resolution 39 (H.R. 39), which would reauthorize the MFCMA, was approved by the House Resources Commit-

tee. The bill includes several amendments to the original act dealing with overfishing, fish quotas, and conflicts of interest among regional council members. Specifically, each regional council would be required to create an enforceable definition of overfishing, delineate essential fish habitat, and include measures to minimize bycatch. The Secretary of Commerce would have to notify regional councils when scientific data indicates overfishing is occurring. Potential conflicts of interest among council members would be monitored and sanctions would include mandatory expulsion of council members who knowingly violate conflict of interest rules, fail to file financial disclosure forms, or provide false financial information. The Secretary would also be required to create rules to prevent members from voting on matters where they have interests that would be "significantly affected." Finally, fishery access would be limited by providing more authority to the regional councils, including the option of implementing individual transferable quota programs, the potential to charge quota holders a fee, and the ability to authorize financial assistance for displaced fishermen. H.R. 39 would provide \$610 million through 1999 including \$114 million for 1996. Bob Benson, *Resources Panel OKs Controls on Coastal Water Fishing*, CONG. Q., May 13, 1995, at 1323.

B. Pacific Salmon Treaty

On June 15, 1994, the Canadian government blockaded the 1000-mile Inside Passage and demanded a \$1500 fee from U.S. commercial fishing boats traveling through the Canadian waters to

Alaskan fishing grounds. 24 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,498 (Aug. 1994). The confrontation is symptomatic of the continuing dispute over salmon allocation between the United States and Canada and the stalled negotiations over the Pacific Salmon Treaty. The two nations have turned to mediation for assistance in negotiating the treaty. T.J. Doherty, *Salmon Treaty Seeks Mediator*, *PAC. FISHING*, July 1995, at 17.

C. Bycatch Reduction

NMFS issued new trawl regulations for Washington, Oregon, and California aimed at reducing the bycatch of juvenile fish and preventing illegal fishing opportunities. The Pacific Fishery Management Council (PFMC) recommended the action, which will take effect on September 8, 1995. The new rules require (1) gill mesh to meet minimum mesh opening requirements throughout the length of the net, (2) removal of the legal distinction between bottom and roller trawls, (3) modification of the distinction between bottom and pelagic trawls, (4) less dragging of small-mesh nets close to the bottom (by forcing the nets to be more vulnerable to wear from the sea floor and thereby making dragging less economical), and (5) modification of chafing gear requirements to prevent the gear from effectively reducing mesh size. In addition, the new rules relax the marking requirements for vertical hook-and-line gear to ease the burden on vessels who remain nearby to tend their lines. 60 *Fed. Reg.* 13,377 (1995) (to be codified at 50 *C.F.R.* pt. 663). See John Bragg, *Trawl Regs Target Bycatch*, *PAC. FISHING*, May 1995, at 24.

D. Individual Fishing Quotas

On March 15, 1995, Alaska began the largest individual fishing quota (IFQ) program in the world. The IFQ is for halibut and sable fisheries. Proponents of the IFQ program claim that it will halt declining fish stocks and make fishing safer by giving fishermen the option to not fish when tired or in bad weather as they felt compelled to do by the brief fishing seasons under the derby system. More time may also mean more money to fishermen because they can schedule their trips around the market prices and use bycatch as bait rather than discard it--lowering fishermen's bait bills. Critics are far less enthusiastic about IFQs. The Alliance Against IFQs is adamant in its opposition, claiming that IFQs "privatize a public resource" and will have devastating impacts on local coastal communities. Sam Smith, *The Halfway Point*, *FISHERMEN'S NEWS*, July 1995, at 8; Dan Kowalski, *Questions Abound As IFQs Debut in Alaska*, *NAT'L FISHERMAN*, June 1995, at 14.

E. U.S. Senate Passes International Fisheries Bill

On June 30, 1995, the U.S. Senate passed the Fisheries Act of 1995, which incorporates several provisions on international fisheries. The Senate took H.R. 716, previously passed by the House of Representatives, and amended it to incorporate the provisions of S. 267. It is expected that the House will pass H.R. 716, as amended, and that the legislation will be signed into law by President Clinton.

The cornerstone of the Fisheries Act of 1995 is legislation to implement the Agreement to Promote Compliance with the International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted in November 1993 by the Conference of the Food and Agriculture Organization (FAO) of the United Nations. The FAO Agreement, also known as the "Reflagging Agreement," addresses the problem of unlicensed fishing vessels fishing on the high seas in violation of international fishery management agreements. Provisions of the Agreement seek to prevent vessels from nations that participate in international fisheries treaties from "reflagging" to nontreaty nations in order to avoid compliance with the measures. The framework for the Agreement was established in the 1982 U.N. Convention on the Law of the Sea, and it is intended to strengthen the link between fishing vessels and their flag nations in order to ensure international cooperation in high seas fishery management and conservation. Under the Agreement, U.S. high seas fishing vessels will have to obtain a permit from the Secretary of Commerce and report catch statistics and fishing locations to the Secretary. The Secretary of Commerce will make this information available to the FAO and will also report information regarding illegal high seas fishing operations to the flag nation of the violating fishing vessel. The Coast Guard has authority to enforce the Agreement, including seizure of vessels and catch and issuance of citations. The Agreement imposes similar measures on other high seas fishing nations.

Provisions related to fisheries in the Pacific Ocean include re-authorization and amendment of the Fishermen's Protective Act to provide reimbursement to U.S. fishing vessels charged a fee by Canada to travel through the Inside Passage to and from U.S. waters in Alaska. The legislation contains the Sea of Okhotsk Fisheries Enforcement Act, which expands on an agreement between the United States and Russia to not fish in the central Bering Sea. In addition to the current prohibition on fishing in the "Donut Hole" region of the central Bering Sea, U.S. vessels will now be prohibited from fishing in the "Peanut Hole" region of the central Sea of Okhotsk. A prohibition on fishing in these two regions is critical to the conservation of Russian pollock stocks. The legislation contains the High Seas Driftnet Fishing Moratorium Protection Act, which reaffirms the United States' commitment to prevent high seas driftnet fishing. The Act follows resolutions adopted by the United Nations that establish and reaffirm a global moratorium on large-scale driftnet fishing, and it prohibits the U.S. from entering into any international fishing agreements "that would prevent full implementation of the global moratorium on large-scale driftnet fishing on the high seas, as such moratorium as expressed in Resolution 46/215 of the United Nations General Assembly."

Also included in the legislation is the Yukon River Salmon Act, which implements an international treaty between the United States and Canada to conserve and manage transboundary salmon stocks on the Yukon River. The legislation provides for U.S. representa-

tion on the Yukon River Panel, which was established by the treaty, and designates the State of Alaska Department of Fish and Game as the management entity for purposes of the Agreement.

X. Tribal Rights

A. Tribes Compensated for Flooded Fishing Sites

The Department of the Interior and the U.S. Army Corps of Engineers entered into an agreement with four Native American tribes in Oregon and Washington to spend \$57 million over five years to build 29 new fishing areas along the Columbia River to compensate for the flooding of traditional tribal fishing sites. Before dam construction began on the Columbia, the government promised to replace the Native Americans' flooded fishing sites with other shoreline land, but it took until this year to get it done. The compensation will go to the Warm Springs and Umatilla Tribes in Oregon, the Confederated Tribes and Bands of the Yakama Indian Nation in Washington, and the Nez Perce in Idaho. Scott Sonner, *U.S., NW Tribes Sign Fishing Pact*, OREGONIAN (Portland, Or.), June 24, 1995, at B02.

B. Court Upholds Tribes' Statutory Fishing Rights

A California district court held that Native American tribes had federally reserved fishing rights and that fishing rights secured by executive or statutory authority command the same authority as rights secured by treaty. The court also held that there could be off-reservation regulation pursuant to on-reservation fishing rights.

Parravano v. Babbitt, 861 F. Supp. 914 (N.D. Cal. 1994).

C. Ninth Circuit Overturns Subsistence Fishing Ban in Alaska

The Ninth Circuit Court of Appeals reversed a district court denial of a preliminary injunction to prevent state enforcement of a ban on rainbow trout subsistence fishing. The ruling requires the U.S. government to give preference to subsistence fishing in certain Alaskan waters. The court held that there were serious questions about whether there was a federal "interest" in the waters so as to make them "public lands" under the Alaska National Interest Lands Conservation Act and gave preference to nonwasteful subsistence hunting and fishing on public lands. The court concluded that the navigation servitude held by the United States did not constitute a federal "interest." Native Village of Quinhagak v. United States, 35 F.3d 388 (9th Cir. 1994).

D. Tribe's Off-Reservation Hunting and Fishing Rights Not Compensated under FPA

On September 28, 1994, Idaho Federal District Court Judge Ryan held that the Nez Perce Tribe's treaty rights to hunt and fish in usual and accustomed places was not compensable under the Federal Power Act (FPA). Congress intended to preserve state law, not private causes of action under the FPA, and the Tribe's right to fish is considered property. Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994); see also 24 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,779 (D. Idaho, Mar. 21, 1994).

E. Request for Injunction of Oil Exploration Lease Held Moot

The Ninth Circuit Court of Appeals held that the lawsuit brought by the Tribal Villages of Gambell and Stebbins to enjoin the sale of oil and gas exploration leases on the Alaskan OCS was moot because the exploration had already been conducted. The court held that there was no controversy and therefore no grounds for relief. People of the Village of Gambell v. Babbitt, 999 F.2d 403 (9th Cir. 1993).

F. State's Coastal Management Plan Not Preempted in Indian Country

A Native American tribe was permanently enjoined from allowing anyone to inhabit a recently built housing complex. The district court found the state's coastal resources management plan was not preempted and was applicable even though the buildings were in "Indian country." The complex was also subject to the nearby town's drainage easement. Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co., 878 F. Supp. 349 (D. R.I. 1995).

XI. Protected Marine Species

A. Salmon

1. ESA Listings

• On July 19, 1995, NMFS proposed to list as threatened California and Oregon coho salmon. 60 Fed. Reg. 38,011 (1995) (to be codified at 50 C.F.R. pt. 227).

• On March 16, 1995, NMFS proposed the listing of southern Oregon and northern California steelhead as threatened. NMFS found that the Klamath Mountains Province steelhead is a "species" under the Endangered Species Act (ESA). 60 Fed. Reg. 14,253-02 (1995) (to be codified at 50 C.F.R. pt. 337).

• NMFS determined that the mid-Columbia River summer chinook salmon does not constitute a species under the ESA. 59 Fed. Reg. 48,855 (1994).

• In March 1995 NMFS announced that the Atlantic salmon is not a "species" under the ESA and that listing it as endangered was not warranted. 60 Fed. Reg. 14,410 (1995) (to be codified at 50 C.F.R. pt. 17).

2. Columbia-Snake River Salmon-Related Cases

• On March 28, 1994, Oregon federal district court Judge Marsh found NMFS's biological opinion (which concluded that the power operations on the Columbia River constituted "no jeopardy" to listed species) was arbitrary and capricious and too heavily weighted in favor of the status quo. He ordered NMFS to reinstate consultations with state and tribal fisheries agencies under ESA section 7. Idaho Dep't of Fish and Game v. National Marine Fisheries Serv., 850 F. Supp. 886 (D. Or. 1994); *see also* 24 Env'tl. L. Rep. (Env'tl. L. Inst.) 21,384 (D. Or. Mar. 28, 1994). In March of 1995, NMFS introduced its revised salmon plan. *See discussion of the NMFS Salmon Recovery Plan below.*

• On September 9, 1994, the Ninth Circuit Court of Appeals echoed Judge Marsh's decision in finding that the Pacific Northwest Electric Power and Conservation Planning Council (known as the Northwest Power Planning Council, or NPPC) violated the Northwest Power Act (NPA) and the APA. The court concluded that the Council failed to explain a statutory basis for rejecting fishery managers' and Indian tribes' recommendations on stream flows necessary to protect salmon and for failing to evaluate proposed program measures against sound biological objectives. Provisions in the NPA require the Council to give "due weight" and a high degree of deference to fishery managers in the development of their Salmon Strategy. Northwest Resource Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371 (9th Cir. 1994). For analysis and commentary, *see* 24 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,743 (9th Cir. Sept. 9, 1994). *See discussion of the NPPC Recovery Plan below.*

• On July 7, 1994, the Ninth Circuit court enjoined ongoing and future activities in the Wallawa-Whitman and Umatilla National Forests in Oregon pending ESA section 7(a)(2) consultations between the U.S. Forest Service (USFS) and NMFS. Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995). Shortly after the decision, a federal district court in Idaho followed suit by enjoining ongoing and future activities in Idaho national forests also pending ESA section 7 consultations. Pacific Rivers Council v. Thomas, 873 F. Supp. 365 (D. Idaho 1995). The latter injunction was lifted in March of 1995.

- In Pacific Northwest Generating Coop. v. Brown, 25 F.3d 1443 (9th Cir. 1994), the Ninth Circuit Court of Appeals found that even though the utility companies satisfied the requirements for standing and had suffered injury, their claims were either moot or founded in misinterpretation of the ESA. The decision upheld federal district court Judge Marsh's decision to dismiss the suit but, unlike the district court, allowed industry standing (822 F. Supp. 1479 (D. Or. 1993)). The Ninth Circuit followed a footnote in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) to find that utility companies and power users had demonstrated concerns that fell within the "zone of interest" test and that they need not establish causation or redressability with anything more than reasonable probability. The Ninth Circuit also concluded that the unintended killing of endangered salmon that occurs in commercial fishing is an "incidental" taking that is permitted under the ESA, and it dismissed as impossible the contention that "transporting or trading" of endangered salmon after harvest violated ESA prohibitions because Congress could not have intended to entirely close down commercial fishing.

- The Ninth Circuit Court of Appeals has exclusive jurisdiction to review challenges to final actions of the Bonneville Power Administration (BPA). The authorization of citizen suits in the ESA does not take precedence over the statute placing BPA under the exclusive jurisdiction of the Ninth Circuit. Northwest Resource Info. Ctr. v. National Marine Fisheries Serv., 25 F.3d 872 (9th Cir. 1994).

- The Ninth Circuit Court of Appeals held moot an appeal challenging the process by which NMFS decided to issue a "no jeopardy" opinion under ESA section 7(b) concerning the effect of power operations on salmon. The 1994-1998 biological opinion has superseded the challenged 1993 no jeopardy biological opinion. Idaho Dep't of Fish and Game v. National Marine Fisheries Serv., 56 F.3d 1060 (9th Cir. 1995).

- The Federal Energy Regulatory Commission's (FERC's) jurisdiction includes the impacts on the spawning of anadromous fish in licensing and relicensing of private hydroelectric facilities on nonnavigable water under the FPA. The Ninth Circuit Court of Appeals rejected FERC's argument that the Department of Commerce's licensing jurisdiction extends only to projects affecting the navigable capacity of a waterway or generating power for interstate transmission. United States Dep't of Commerce v. Federal Energy Regulatory Comm'n, 36 F.3d 893 (9th Cir. 1994).

- In Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit Court of Appeals found that the NEPA environmental impact statement process does not apply to critical habitat designation under the ESA.

- The Seventh Circuit Court of Appeals upheld FERC's authority to include clauses in licenses for water power projects that allow the agency to require licensees to construct and maintain possible future fishways. The FPA does not require FERC to protect the economic viability of all projects, and FPA section 18 expressly provides

for a fishway condition. Such clauses do not violate the APA or the FPA as unreasonable terms. Wisconsin Pub. Serv. Corp. v. Federal Energy Regulatory Comm'n, 32 F.3d 1165 (7th Cir. 1994).

- The Ninth Circuit Court of Appeals held that the transportation program and flow improvement measures employed by the Army Corps of Engineers to assist salmon smolts downstream are not "connected actions" under NEPA. The court also held moot a challenge to NMFS's decision to grant the Corps a "take" permit under the ESA to collect and transport salmon because a new permit has since been issued. Northwest Resource Info. Ctr. v. National Marine Fisheries Serv., 56 F.3d 1060 (9th Cir. 1995).

3. Salmon-Related News

- Gillnet fishing on the Columbia River for spring chinook will be prohibited in 1995. This historic decision marks the first time that the season has been closed. The Columbia River Compact, a negotiating team that works to regulate tribal, sport, and commercial fishing in the river, announced the decision. Tribes will still be allowed a minimal number of chinook for their ceremonies. John Bragg, *Columbia Spring Chinook Fishery Shut Down*, PAC. FISHING, Mar. 1995, at 19.

- On June 5, 1995, the Corps announced its intention to prepare a draft environmental impact statement (EIS) under NEPA to investigate proposals for the use of reservoir drawdowns and surface-oriented bypass systems to improve

juvenile salmon migration. 60 Fed. Reg. 29,578-02 (1995).

- Last minute negotiations saved the Savage Rapids Dam from demolition. Located on the Rogue River in Oregon, the dam is an impediment to the dwindling salmon and steelhead runs. However, lawmakers agreed to study alternatives to removing the dam for at least one more year. Joan Laatz, *Savage Rapids Dam Gets Reprieve*, OREGONIAN (Portland, Or.), June 1, 1995, at D07.

4. NMFS Salmon Recovery Plan

In response to Judge Marsh's order to renew consultations in Idaho Dep't of Fish and Game v. National Marine Fisheries Serv., 850 F. Supp. 886 (D. Or. 1994), NMFS released its Proposed Recovery Plan for Snake River Salmon. The proposed plan uses an "adaptive management" approach and calls for changing water storage practices, improving in-river fish passage around the dams, reducing ocean fishing mortality (through buy back programs and renewed efforts in renegotiating the Pacific Salmon Treaty), improving artificial fish transportation systems, and implementing hatchery reforms (including capping the number of hatchery releases at 1994 levels). Notably, the plan does not call for the eventual drawdown of the four major reservoirs as the NPPC plan does (see discussion below). While the NMFS plan does recommend that the necessary studies, planning, design, and documentation be completed for drawdowns, the decision is deferred until 1999. Also controversial is NMFS's continued emphasis on artificial transporta-

tion of smolts--again, unlike the NPPC plan. The NMFS salmon recovery plan faces seven court challenges objecting to the way in which NMFS complied with the court's previous orders in developing the revised plan. *NMFS Biological Opinion Challenged*, OREGON INSIDER (Envirotech Publications, Eugene, Or.), May 15, 1995, at 1. For a more detailed analysis of the NMFS and NPPC plans, see Mara Brown, *Update and Commentary on Columbia-Snake River Salmon Recovery*, OCEAN AND COASTAL LAW MEMO (Ocean and Coastal Law Center, University of Oregon School of Law, Eugene, Or.) No. 43, at 1 (1995).

5. NPPC Salmon Recovery Plan

On December 14, 1994, the NPPC approved a series of amendments to the Columbia River Basin Fish and Wildlife Program. The changes came about in response to Northwest Resource Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371 (9th Cir. 1994), which ordered the NPPC to conduct further consultation with tribal and state fishery agencies. The new program uses an adaptive management approach and calls for, among other things, (1) the use of supplementation to help rebuild depleted, naturally producing spawning populations, (2) increasing flows in the Snake River by purchasing water from the upper Snake River basin and by spilling water over the dams, (3) beginning a series of two-month drawdowns in 1995, which would eventually include four major dams, and (4) complete screening of all water diversions by 1996. The NPPC plan differs

from the NMFS plan (discussed above) by calling for drawdowns and not artificial transportation. There are no court challenges to NPPC's Fish and Wildlife Program pending. *New Strategy for Salmon*, WANA CHINOOK TYMOO (Columbia River Inter-Tribal Fish Commission, Portland, Or.) Issue 1, at 4 (1995). For a more detailed analysis of the NMFS and NPPC plans, see Mara Brown, *Update and Commentary on Columbia-Snake River Salmon Recovery*, OCEAN AND COASTAL LAW MEMO (Ocean and Coastal Law Center, University of Oregon School of Law, Eugene, Or.) No. 43, at 1 (1995).

6. Columbia River Inter-Tribal Fish Commission Salmon Recovery Plan

On June 15, 1995, the Columbia River Inter-Tribal Fish Commission proposed a salmon recovery plan that would cost an estimated \$240 to \$370 million aimed at halting the decline of all Columbia River Basin fish stocks in 7 years and rebuilding the runs to five million in 25 years. The tribal plan calls for (1) limiting withdrawals from the river and preventing removal of vegetation along streams, (2) altering dam operations to incorporate drawdowns, (3) eliminating sources of toxins that accumulate in Columbia River fish, (4) supplementing runs with genetically identical fish and reintroducing runs to streams where they have become extinct, and (5) ending the barging of young salmon past the dams. The tribal plan must be given consideration by NMFS and the NPPC because the tribes are, by treaty, comanagers of the salmon. Roberta Ulrich, *Tribes Have Plan To Save*

Lots of Salmon, OREGONIAN (Portland, Or.), June 15, 1995, at C05.

7. The Clean Water Act and Salmon Recovery

- On May 31, 1994, the Supreme Court held that states could condition certification of a hydroelectric project on any limitations necessary to ensure compliance with state water quality standards or other appropriate requirements of state law. Minimum stream flow standards are an appropriate requirement of state law, and therefore Washington could impose minimum flow standards as required under the CWA. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900 (1994).

- On April 14, 1995, the Oregon Environmental Quality Commission granted a request by NMFS for a temporary variance from the state's dissolved gas water quality standard in order to implement NMFS's plan to increase spills over the Columbia River to aid migrating salmon smolts. The Oregon dissolved gas standard of 110 percent was established under the CWA, but NMFS asked for the standard to be changed to 120 percent from April 19 through August 31, 1995. Earlier in the month the Washington State Department of Ecology agreed to relax its dissolved gas standard at some of the Columbia River dams. Increased spills are intended to allow the smolts to avoid the power-generating turbines and decrease their travel time down the river. However, the increased spills result in lost revenue to the power company and may cause gas bubble trauma in fish. Tom Alkire, *Endangered*

Species: Oregon Grants NMFS Variance from CWA Dissolved Gas Standard for Fish Passage, Nat'l Env't Daily, Apr. 18, 1995, available in WESTLAW, BNA-NED database.

8. Salmon-Related News in Oregon

- On April 17, 1995, former Oregon Senator Bill Bradbury became executive director of For the Sake of Salmon, a federally funded effort to coordinate salmon recovery efforts. Bradbury expects to work with the states, Indian tribes, and federal agencies involved in watershed restoration. *For the Sake of Salmon*, RESTORATION (Oregon State University, Corvallis, Or.), Apr. 1995, at 3.

- On July 5, 1995, Oregon House Bill 2615 (H.B. 2615) was signed into law by Governor Kitzhaber (effective immediately) to create a State Salmon Corporation. The purpose of this independent public cooperation is to acquire and operate salmon hatchery facilities so as to enhance salmon populations but not deplete natural fish runs. The Corporation will be governed by a board of directors representing sports anglers, ocean trollers, coastal government agencies, and the public. The board members will be appointed by the governor. Julie Coontz, *Salmon Politics in the Oregon Legislature*, RESTORATION (Oregon State University, Corvallis, Or.), Apr. 1995, at 4.

- Effective September 9, 1995, Oregon will create a Salmon Production Task Force that will make legislative recommendations in areas of salmon production. The Task Force will (1) develop a

salmon production strategy to ensure that salmon runs will not become endangered under the ESA, (2) establish methods for measuring the production of public fish hatcheries, (3) establish quantifiable hatchery, recreational, and commercial fish harvest goals, and (4) provide effective hatchery programs. Julie Coontz, *Salmon Politics in the Oregon Legislature*, RESTORATION (Oregon State University, Corvallis, Or.), Apr. 1995, at 4.

- Lawmakers passed a bill to require irrigators to install and maintain fish screening devices. Under H.B. 3212 (signed and effective June 30, 1995), irrigators would pay about 7 percent of the costs of the screens. Julie Coontz, *Salmon Politics in the Oregon Legislature*, RESTORATION (Oregon State University, Corvallis, Or.), Apr. 1995, at 4.

- In House Joint Memorial 3 (H.J.M. 3), signed in March 1995, the Oregon legislature asked the U.S. Congress to amend the federal ESA to give equal weight to human and fiscal impacts when listing species. Opposition to H.J.M. 3 was voiced by former Oregon Senator Bill Bradbury, who expressed concern that human and fiscal impacts will always outweigh the listing of species and argued that the place for human and fiscal impacts to be considered is in the recovery plan. Julie Coontz, *Salmon Politics in the Oregon Legislature*, RESTORATION (Oregon State University, Corvallis, Or.), Apr. 1995, at 4.

- In House Joint Memorial 4 (H.J.M. 4), the Oregon legislature asked the U.S. Congress to amend the Marine Mammal Protection

Act of 1972 to allow population control of California sea lions and harbor seals to protect salmon and other fish species. Julie Coontz, *Salmon Politics in the Oregon Legislature*, RESTORATION (Oregon State University, Corvallis, Or.), Apr. 1995, at 4. H.J.M. 4 states that all reasonable measures should be taken to control the detrimental effects of sea lions and seals on endangered species.

B. Marine Mammal Protection Act Reauthorization

On April 26, 1994, the MMPA was reauthorized with various amendments. The changes include a ban on the shooting of seals, sea lions, killer whales, and other marine mammals that interact with fishing operations. The Act contains a program to reduce the accidental take of marine mammals in fishing gear to insignificant levels approaching zero in seven years. Additionally, there are new requirements for vessel registration and monitoring. Vessels in category I and II fisheries are now asked to report to NMFS (within 48 hours) only when marine mammals are killed or injured. The Act has measures to target fisheries with struggling and particularly vulnerable marine mammal populations to reduce incidental take in those areas. NMFS and FWS also have explicit authority to enter into agreements with Alaskan Native organizations for the conservation of marine mammals, comanagement of subsistence use of marine stocks, harvest monitoring, research participation, and comanagement structure development. Also new to the MMPA is specific authority for the Secretary of Commerce to protect the habitat of marine mammal populations. NMFS

and FWS are to be advised on actual, expected, or potential impacts of habitat destruction on marine mammal stocks by the Marine Mammal Commission and the newly established Regional Scientific Review Groups. NMFS will also appraise the impact of selected pinnipeds on threatened stocks of salmonoids on the Pacific Coast. Intentional killing of nondepleted pinnipeds that are individually identifiable could be permitted by the Secretary of Commerce if certain criteria are met. Finally, rules regarding the taking of marine mammals for public display were added. NMFS and FWS will issue permits allowing the taking and importing of marine mammals for the purpose of public display only if (1) the taking would occur only after careful consideration of the effects on wild populations, (2) only if it will be conducted in a humane fashion, (3) the institution taking the animal is registered or licensed under the Animal Welfare Act, (4) the education program offered by the institution meets professionally recognized standards of the public display community, and (5) facilities at the institution are open to the public on a regular basis. *Marine Mammal Protection Act Reauthorized*, MARINE CONSERVATION NEWS (Center for Marine Conservation, Wash. D.C.), Summer 1994, at 1.

C. Marine Mammal Protection Cases and Regulations

1. Ninth Circuit Clarifies the Requirements for Criminal Conviction under MMPA

The Ninth Circuit held that the MMPA does not make it a crime to take reasonable steps to deter

porpoises from eating fish or bait off fishermen's lines. The court clarified the meaning of "harass" under the "taking" prohibition of the MMPA. Harassment must entail a level of direct and significant intrusion upon the normal life-sustaining activities of a marine mammal. The court held that interpreting the MMPA to prohibit isolated interference with abnormal marine mammal activity (such as taking bait off lines) would lead to absurdity and that a criminal conviction under the MMPA must be supported by evidence of intentional, not negligent, conduct. *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994). For analysis and commentary, see 24 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,985 (9th Cir. Apr. 26, 1994).

2. Navy Enjoined from Weapons Testing That Would Kill Marine Mammals

On April 26, 1994, a California district court issued a preliminary injunction against NMFS and the U.S. Navy to enjoin the promulgation of a regulation that authorized the taking of marine mammals over a five-year period as a result of the Navy's weapon testing. The court criticized NMFS's failure to consider alternative sites in violation of the MMPA and NEPA. *Natural Resources Defense Council v. Dep't of Navy*, 857 F. Supp. 734 (C.D. Cal. 1994).

3. NMFS Prohibits Intentional Taking of Marine Mammals in Commercial Fishing Operations

On February 1, 1995, NMFS issued a final rule making the MMPA's prohibition of intentional lethal takings of marine mammals

applicable to all commercial fishing operations. The regulation is effective March 3, 1995. 60 Fed. Reg. 6036 (1995) (to be codified at 50 C.F.R. pt. 229).

D. Whales

1. Gray Whale Removed from Endangered Species List

In June 1994, NMFS and FWS removed the North Pacific (California) gray whale from the endangered species list. 59 Fed. Reg. 31,094 (1994) (to be codified at 50 C.F.R. pt. 17). The gray whale now numbers approximately 21,000 and appears to have recovered to its pre-whaling population of 15,000-20,000 animals. *Gray Whale Is First Whale Removed from Endangered Species List*, MARINE CONSERVATION NEWS (Center for Marine Conservation, Wash. D.C.), Autumn 1994, at 5.

2. Aircraft and Vessels Must Give Humpbacks Space in Hawaiian Waters

On January 19, 1995, NMFS issued a rule prohibiting aircraft from flying closer than 1000 feet or any vessel from approaching within 100 yards of any humpback whale in Hawaiian waters. 60 Fed. Reg. 3775 (1995) (to be codified at 50 C.F.R. pt. 222).

E. Dolphins

1. Ninth Circuit Reverses an Injunction Against Tuna Imports from Secondary Nations

The Ninth Circuit Court of Appeals reversed a district court preliminary injunction which would have forced the government to im-

plement bans on the importation of tuna from "secondary" nations. In vacating the district court's ruling, the Ninth Circuit held that the Court of International Trade--rather than the district court--had jurisdiction. Earth Island Inst. v. Brown, 28 F.3d 76 (9th Cir. 1994), cert. denied 115 S. Ct. 509 (1994).

2. Fishermen Cannot Incidentally Take Depleted Spotted Dolphins

A district court judge held that fishermen could not take spotted dolphins, even with an MMPA incidental take permit, once the Secretary of Commerce listed the dolphins as depleted. The court also held that fishermen were not entitled to additional administrative hearings before the Secretary issued the rule to prohibit continued taking of the listed dolphins. Earth Island Inst. v. Brown, 865 F. Supp. 1364 (N.D. Cal. 1994).

3. NMFS Can Prohibit Feeding of Dolphins

In Strong v. United States, 5 F.3d 905 (5th Cir. 1993), the Fifth Circuit Court of Appeals overruled the district court in finding that NMFS had authority to issue rules prohibiting the feeding of wild bottlenose dolphins under the MMPA. The MMPA prohibits harassment, which includes interference with normal behavior. Scientific evidence indicates that feeding does interfere with the normal behavior of dolphins. The decision means that NMFS may once again prohibit dolphin-feeding cruises. *Court Upholds Ban on Feeding Dolphins*, MARINE CONSERVATION NEWS (Center for

Marine Conservation, Wash. D.C.), Spring 1994, at 1.

F. Turtles

1. NMFS Issues Biological Opinion for Sea Turtles

On November 14, 1994, NMFS issued its biological opinion for sea turtles. The opinion proposes to develop an emergency response plan to increase enforcement efforts and implement immediate conservation efforts when mortality reaches critical levels. NMFS also plans to register all shrimp trawlers fishing in the Gulf of Mexico and southeastern states and identify areas that need special sea turtle conservation consideration. *NMFS Proposes New Measures To Reduce Sea Turtle Deaths*, MARINE CONSERVATION NEWS (Center for Marine Conservation, Wash. D.C.), Spring 1995, at 10.

2. NMFS Turtle Excluder Device Rules

On May 3, 1995, NMFS imposed temporary restrictions that prohibit shrimp trawlers in Gulf of Mexico offshore waters from using soft turtle excluder devices (TEDs), bottom TEDs, and try nets (unless equipped with NMFS-approved TEDs that are not soft or bottom opening). 60 Fed. Reg. 21,741 (1995) (to be codified at 50 C.F.R. pts. 217, 227). This is in addition to the final rule issued on March 24, 1995, that required shrimp trawlers using TEDs in the Gulf of Mexico and the Atlantic Ocean to attach specified flotation devices to TEDs with bottom escape devices. 60 Fed. Reg. 15,512 (1995) (to be codified at 50 C.F.R. pt. 227).

3. Fifth Circuit Remands Civil Conviction Against Shrimpers

The Fifth Circuit reversed and remanded two district court actions (847 F. Supp. 496 (S.D. Miss. 1994)) granting summary judgment in an action by NOAA to collect civil penalties against shrimpers. The shrimpers were accused by NOAA of knowingly violating the ESA by failing to use qualified TEDs while shrimping. The district court erred by not considering the record as a whole in one action. In the other action, the court erred by granting summary judgment because the shrimpers had not waived their due process right to judicial review, even though they had not yet exhausted all attempts at discretionary review within NOAA. United States v. Menendez, 48 F.3d 1401 (5th Cir. 1995). For analysis and commentary see 25 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,938 (Apr. 12, 1995).

4. Eleventh Circuit Upholds Turtle Taking Convictions

The Eleventh Circuit Court of Appeals upheld an individual's conviction under the Lacey Act, 16 U.S.C.A. §§ 3372-3373, for capturing and selling alligator snapping turtles in violation of Alabama law. The court also upheld the conviction under ESA section 9 for taking Alabama red-bellied turtles. United States v. Guthrie, 50 F.3d 936 (11th Cir. 1995).

G. Sharks

NMFS decided to not proceed with an increase in the 1995 Atlantic shark quota. *For This Year At Least, Shark Quota Won't In-*

crease, MARINE CONSERVATION NEWS (Center for Marine Conservation, Wash. D.C.), Spring 1995, at 9.

XII. Endangered Species Act

A. Supreme Court Clarifies the Definition of "Take" in Sweet Home Case

On June 29, 1995, the U.S. Supreme Court held that the Secretary of the Interior had reasonably construed Congress' intent by promulgating a regulation that interpreted the word "harm" in the definition of "take" to include "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3 (1995). Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407 (1995). In a 6-3 ruling that reversed the D.C. Court of Appeals, the Supreme Court found that the Secretary's definition of harm was not contrary to congressional intent to prohibit the unauthorized taking of threatened or endangered species. The majority found several compelling reasons to allow the Secretary's interpretation. First, the ordinary understanding of the word encompasses both direct injury (hunting and killing) and indirect injury (including habitat modification), and to define harm so as not to include indirect injury is to give the word harm "no meaning that does not duplicate the meaning of other words used to define 'take.'" A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation." Second, the broad purpose of the ESA supports the decision to extend the interpretation to include habitat modification. The

central purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved. . . ." (citing 16 U.S.C.A. § 1531(b)). Third, because Congress had authorized the Secretary to issue permits for takings that were incidental to an otherwise lawful activity, it recognized the broader meaning of harm: "No one could seriously request an 'incidental' take permit to avert . . . liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read 'harm' so narrowly that the permit procedure would have little more than that absurd purpose." The majority also concluded that the ESA's legislative history proved that Congress intended "take to apply broadly to cover indirect as well as purposeful actions." The Supreme Court rejected the court of appeals rationale that harm referred to only the direct application of force because the words accompanying it in the definition apply to only direct, purposeful action. Instead the Supreme Court said that the other words in the definition of "take" do imply that the use of indirect force and harm should be distinguished from the other words around it in the definition so as to give "harm" independent meaning. The Court also did not accept the argument that Congress intended the habitat acquisition and preservation provision of the ESA to be the sole means of habitat modification. Instead, the provision is meant to apply to actions different than the one presented in the case. Justice O'Connor concurred with the majority upon the understanding that the regulation is limited to significant habitat modification that causes actual death or injury

to identifiable, protected animals as well as to "ordinary principles of proximate causation, which introduce notions of foreseeability." The dissent found it "unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds for the acquisition of private lands, to preserve the habitat of endangered animals." The majority decision, in the view of the dissenters, "imposes unfairness to the point of financial ruin--not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."

Reauthorization of the ESA was still pending at the time this memo went to press.

XIII. Navigation and Navigable Waterways

A. *Only Navigable Waters with Federally Reserved Water Rights are "Public Lands" under Alaska Lands Act*

The phrase "public lands" in the Alaska National Interest Lands Conservation Act includes navigable waters, but only those in which the United States has reserved water rights. Federal agencies that administer the Act's subsistence-use priority on public lands are responsible for identifying those waters. Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995).

B. *Glacier Bay Park Officials Were Justified in Denying a Cruise Ship Operator Permit*

Park officials in Glacier Bay National Park, Alaska, were not arbitrary and capricious in denying

a cruise ship operator a permit to enter Glacier Bay. The ship operator sought a preliminary injunction alleging that the agency had violated the notice-and-comment requirements of the APA. The court found that the "public property" exception to the APA notice-and-comment requirement applied and that the cruise ship operator failed to show "irreparable injury." Clipper Cruise Line v. United States, 855 F. Supp. 1 (D.D.C. 1994).

C. *Maryland Statute Preempted by Federal Maritime Law*

A Maryland statute imposing strict liability for damages to natural oyster bars was preempted by federal maritime law. The Maryland Department of Natural Resources had brought the suit against a barge owner for damage to a natural oyster bar when the barge ran aground. Maryland Dep't of Natural Resources v. Kellum, 51 F.3d 1220 (4th Cir. 1995).

D. *Houseboats are "Structures" under the Rivers and Harbors Act*

The First Circuit ruled that the district court was correct in upholding the Corps' decision to deny after-the-fact permits to four houseboats moored in La Parguera Bay, Puerto Rico. The houseboats are "structures" subject to permitting requirements of section 10 of the Rivers and Harbors Act, which outlaws any unauthorized "obstruction" to the navigable capacity of U.S. waters. United States v. Members of the Estate of Boothby, 16 F.3d 19 (1st Cir. 1994).

E. *City Ordered to Restore a Navigable Waterway*

The city of Oak Creek, Wisconsin, was required to restore to its natural condition the channel of a navigable waterway that had significant fishery, wildlife, and scenic value. The city had altered the waterway without a permit. City of Oak Creek v. Wisconsin Dep't of Natural Resources, 518 N.W.2d 276 (Wis. Ct. App. 1994).

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