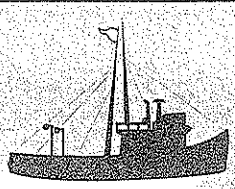


# Ocean and Coastal Law Memo

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## Recent Developments in Ocean and Coastal Law, 1992

*International Developments*

### I. Driftnets

#### *A. UN Resolution Adopted*

UN General Assembly resolution 46-215 was adopted December 20, 1991. This resolution established a moratorium on driftnet fishing in all of the world's oceans including enclosed and semi-enclosed areas by December 31, 1992. The newest resolution also eliminated a conservation management clause in the previous resolution 46-225 which provided a way around the moratorium. The most recent resolution avoided the issue of net length, however.

#### *B. Driftnet Bill Passage*

President Bush signed H.R. 2152 into law in November 1992, establishing the High Seas Driftnet Fisheries Enforcement Act, Pub. L. 102-582. The Act implements the global driftnet moratorium of General Assembly resolution 46-215 and calls for efforts to address controversial fisheries management issues in the central Bering Sea (the "Donut Hole").

#### 1. Implementation of the Act

The Act requires the Secretary of Commerce to publish a list of nations using driftnets in the high seas. After notifying the nations on the list, the Secretary of the Treasury may deny U.S. port privileges to that nation's driftnet vessels. After the Secretary of Commerce notifies a nation that they are on the list, the president will negotiate with that nation to effect an immediate termination of driftnet fishing. If a nation continues to engage in driftnet fishing, the Secretary of the Treasury will prohibit importation of fish, fish products, and sport fishing equipment of that nation.

### II. International Whaling Commission

During the International Whaling Commission (IWC) meeting in Glasgow, Scotland, on June 29, 1992, Norway announced its decision to resume hunting for Northeast Atlantic minke whales. Iceland announced that it will leave the IWC and also that it intends to resume commercial whaling.

At its Glasgow meeting, the IWC rejected a Japanese request to hunt minke whales and reaffirmed the general moratorium on whaling. The IWC adopted specific resolutions providing advice on white whales, narwhals, pilot whales, and striped dolphins and requested information on the killing of pilot whales at the Faroe Islands. A Revised Management Scheme for commercial whaling was adopted, but it was conditioned on the resolution of a number of other issues such as establishing an inspection and observation system. *See* Int'l Envtl. Daily (BNA) (July 1, 7, 8, 1992).

### III. The Earth Summit

The United Nations Conference on Environment and Devel-

opment (UNCED), held in June 1992 in Rio de Janeiro, produced numerous documents, including the Rio Declaration of Principles and Agenda 21, which promise greater international cooperation in protecting the world's oceans and coastlines. Although both the Rio Declaration and Agenda 21 are nonbinding on the 172 signatory nations, many see the documents as authoritative statements of international consensus, creating a potential foundation for customary international law. Stephen Kass & Michael Gerrard, *After Rio*, N.Y. L.J., Aug. 28, 1992, at 3, 6-7. In addition to the official Rio negotiations, parallel meetings, entitled the Global Forum, brought over 2500 nongovernmental organizations from 1500 countries together and resulted in the adoption of at least thirty-three "alternate treaties," several of which deal with fish stocks and the marine environment.

Agenda 21, often called the "blueprint for sustainable development," addresses oceans and coasts in Chapter 17. Chapter 17 is the longest and one of the most complex chapters of Agenda 21, and it gives rise to several important concepts: that marine and coastal systems form "an integral whole that is an essential component of the global life support system"; that such systems are "a positive asset presenting opportunities for sustainable development"; that the 1982 United Nations Convention on the Law of the Sea sets forth the rights and obligations of states; and that "new approaches are needed (at the national, subregional, regional, and global levels), [which] . . . are integrated in content, and precautionary and anticipatory in ambit." *See Earth Summit Held: Stage Set for New Global Partnership*, 19 OCEAN & COASTAL MGMT. 75, 76 (1993).

Specifically, Agenda 21 commits coastal nations to integrated management and sustainable development of coastal and marine resources under their jurisdiction. To further this goal, an intergovernmental conference on coastal zone management will meet in the Netherlands in November 1993 to consider recommendations that all coastal states prepare coastal zone management (CZM) plans by the year 2000. Under Agenda 21, CZM plans would press nations to manage various marine pollutants, including nonpoint sources. Additionally, Agenda 21 calls for the creation of a new Sustainable Development Commission. Although the Commission's precise role will not be known until the General Assembly convenes for its fall session, it may give priority consideration to the conservation and management of fish stocks, particularly highly migratory species and high seas fisheries, in light of the considerable debate over these resources at Rio.

Agenda 21 and the Rio Declaration of Principles embody several concepts essential to effective global marine and coastal management: the precautionary approach, sustainable development, and integrated decision making and management. However, the successful implementation of these approaches necessarily hinges on adequate funding. The Secretariat for UNCED estimated that Agenda 21 implementation would cost about $125 billion per year, yet nations pledged less than $5 billion per year in new money at Rio. Joe Kirwin, *Less Than $5 Billion Pledged for Agenda 21*, INT'L ENVTL. REP. (BNA) NO. 14, at 486 (July 15, 1992). Nonetheless, despite the financial uncertainties, it is clear that Rio was a success in drawing global attention to the increasing and potentially irreversible pressures on marine and coastal resources. As James Wawro, an American Bar Association representative at UNCED, said, "The fundamental global realization made at Rio is that it makes no sense to be [a] rich [country] if you allow the biosphere that sustains your life to disappear." *Things Left Unsaid*, ENVTL. LAW (ABA Newsletter, Wash., D.C.), Summer 1992 (v. 11, no. 4), at 10, 11.

## IV. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

On August 11, 1992, the Senate ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Treaty Doc. 102-5). 138 CONG. REC. S12,291-93 (1992). The Basel Convention (*reprinted in* 28 I.L.M. 649) was adopted by 116 nations under the auspices of the United Nations Environment Programme in Basel, Switzerland, in March 1989 and took effect in May 1992 after Australia became the twentieth nation to formally adopt it on February 5, 1992. However, despite the Senate's ratification, legislative efforts to implement the Convention stalled in the 102d Congress.

As a result, the United States is not a party to the Convention, which means that U.S. waste producers are prohibited from ship-

ping hazardous wastes to nations that have formally adopted the Convention, unless a separate bilateral or multilateral treaty covering such activity exists. Additionally, by not formally implementing the Convention, the United States may have been relegated to a secondary role in the process to implement the Convention's technical guidelines on environmentally sound management and liability and compensation, among others.

The Basel Convention was motivated by concerns that industrialized nations, which produce over 95 percent of the world's hazardous wastes, would export their wastes to developing countries lacking effective environmental safeguards. The city of Philadelphia's well-documented attempt to dispose of municipal incinerator ash in 1986, and the subsequent two-year odyssey of the freighter *Khian Sea* in search of a disposal site for the ash, reinforced the call for international action. *See* Robert Rosenthal, *Ratification of the Basel Convention: Why the United States Should Adopt the Less Environmentally Sound Standard*, 11 TEMP. ENVTL. L. & TECH. J. 61, 63 (1992).

Accordingly, the Convention provides three basic features. First, it requires the "environmentally sound management" of all transboundary shipments of hazardous and other wastes. Second, it establishes a notice and consent process, which requires, *inter alia*, waste exporters to obtain approval from the exporting, transit, and recipient states prior to shipping wastes. Lastly, the Convention prohibits trade in hazardous and other wastes between parties and nonparties except under separate bilateral or multilateral waste agreements.

At the request of the Bush administration, the Senate's ratification was accompanied by four understandings: (1) the Convention does not apply to sovereign immune vessels and aircraft; (2) the Convention does not apply to ships passing through territorial seas and exclusive economic zones (EEZs); (3) in determining whether "suitable" disposal sites exist in the United States that might preclude waste export under Article 4(9)(a), the United States "will consider the cost of disposal, including the comparative cost of environmentally sound disposal outside the United States . . ."; and (4) the Convention clarifies the remedies for illegal waste shipments under Article 9(2) so as not to create an obligation for the exporting state with regard to cleanup, beyond removing the wastes or disposing of them in accordance with the Convention. *See* 138 CONG. REC. S12,292 (1992) (statement of Senator Pell).

The first meeting of the parties of the Convention occurred November 30-December 4, 1992, in Piriapolis, Uruguay, and included representatives from nonparty nations, including the United States, Japan, and several European Community (EC) nations. Significantly, the meeting ended without a call for the total ban of toxic waste trading, and it delayed consideration of the Convention's liability and compensation provisions until the next meeting of the Basel Convention delegates, tentatively scheduled for February 1994. *Basel Convention Parties End Meeting Without Call for Total Ban on Toxics Trade*, 15 INT'L ENVTL. REP. (BNA) No. 25, at 807 (Dec. 16, 1992). Instead, the delegates opted only to request export bans on hazardous wastes destined for disposal in developing countries. Additionally, the delegates (1) asked industrial nations to report at the next meeting what they have done to implement bans on hazardous waste movements to developing nations; (2) agreed on a two-year budget of $4.9 billion; and (3) established working groups to create guidelines for "recyclable" wastes and environmentally acceptable disposal methods and to draft a protocol on liability and compensation, including a compensation fund. Prior to the meeting, the U.S. Environmental Protection Agency (EPA) published a notice describing the Basel Convention and its potential impacts on U.S. waste importers and exporters. *See* 57 Fed. Reg. 20,602 (1992).

## V. Antarctic Treaty Ratified; NSF Adopts Antarctic Rule; Arctic Treaty Possible

### A. *Antarctic Treaty*

In October 1991, the United States and twenty-five other nations agreed to protect the Antarctic environment by signing a fifty-year moratorium on nonscientific oil and mineral exploration on the continent. Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455. On October 7, 1992, the Senate ratified the Protocol, with Annexes done at Madrid, October 4, 1991, and an Additional Annex done at Bonn, October 17, 1991. 38 CONG. REC. S17,333-02 (1992). The ban on exploration extends for fifty years after formal

adoption and will continue indefinitely unless three-quarters of the consulting parties agree to rescind it. However, because the Protocol is not self-executing, it is not binding on the United States until Congress passes and the president signs legislation to implement it. Several bills to implement the Treaty stalled in the 102d Congress. However, trade in hazardous wastes should receive considerable attention this session as Congress debates the North American Free Trade Agreement (NAFTA) and the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).

### *B. NSF Rule*

In a related matter, the National Science Foundation (NSF) published a final rule requiring environmental assessments for certain U.S. activities in Antarctica. *See* 57 Fed. Reg. 40,337 (1992). Despite comments on the draft rule urging application of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1991), NSF relied on a federal district court ruling which specifically held that NEPA does not apply in Antarctica, 57 Fed. Reg. at 40,337, *citing Environmental Defense Fund v. Massey*, 772 F. Supp. 1296 (D.D.C. 1991), and issued the rule to comply with the Antarctic Protocol's environmental assessment requirements. Additionally, an NSF proposed rule governing waste management and disposal in Antarctica, 57 Fed. Reg. 33,918 (1992), 45 C.F.R. pts. 670-72, has come under fire from a broad cast of military, government, and citizen group representatives. *See Critics Say NSF's Antarctica Proposal Lacks Specific, Effective Guidelines*, INT'L ENVTL. DAILY (BNA), Oct. 23, 1992, at 1.

### *C. Arctic Treaty Possible*

On December 3, 1992, the eight countries bordering the Arctic Circle--Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States--adopted the Arctic Monitoring and Assessment Plan. *Arctic Agreement May Lead to Treaty, Environmentalist Says*, INT'L ENVTL. DAILY (BNA), Dec. 4, 1992, at 2. The Plan focuses on air pollution from Eastern Europe and water pollution from a variety of sources and establishes monitoring stations for radioactivity, heavy metals, and polychlorinated biphenyls (PCBs). The Plan could be a precursor to a more formalized Arctic treaty, or it may lead to the designation of the Arctic as a special sea.

## VI. North Pacific Salmon Treaty Comes Into Force

On October 29, 1992, President Bush signed legislation implementing a treaty between the United States, the Russian Federation, Canada, and Japan to ban high seas salmon fisheries. Pub. L. 102-567. Title VIII of the National Oceanic and Atmospheric Administration Authorization Act of 1992, entitled the "North Pacific Anadromous Stocks Act of 1992," implements the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, with Annex, which was signed by the parties in Moscow on February 11, 1992 (Treaty Doc. 102-30). The Senate ratified the treaty in August 1992, 138 Cong. Rec. S12,292 (daily ed. Aug. 11, 1992), and with the passage of the U.S. legislation, it came into force February 16, 1993.

The Convention permits salmon fishing only within the 200-mile limit of each party's EEZ and prohibits all salmon fishing in the high seas. This provision ends Japan's long-standing high seas salmon fishery which has long affected anadromous stocks in Oregon, Washington, and Alaska. The Convention also restricts the incidental taking of salmon, requires the return of such salmon to the sea, and provides for certificates of origin to guarantee that salmon are caught in proper waters.

The Convention creates the North Pacific Anadromous Fish Commission, based in Vancouver, British Columbia, to replace the International North Pacific Fisheries Commission and charges it with ensuring that the enforcement, conservation, and other objectives of the Convention are met. Parties have individual and collective enforcement authorities to arrest and prosecute persons and seize vessels found violating the Convention.

# *Domestic Developments*

## I. Fisheries

### *A. Atlantic Bluefin Tuna*

To implement the recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), and to improve bluefin tuna management, the Secretary of Commerce adopted rules regulating the harvest of bluefin tuna. 57 Fed. Reg. 32,905 (1992). The rules include reducing the total U.S. catch by 10 percent during 1992-93; reducing the allowable catch of bluefin less than forty-five inches to no more than 8 percent of the U.S. allocation; and prohibiting the retention of

young school bluefin of less than twenty-six inches.

The National Marine Fisheries Service previously announced its intent to prepare an environmental impact statement (EIS) on the Atlantic bluefin tuna. 57 Fed. Reg. 214 (1992).

### *B. New England Groundfish Management Plan*

The New England Groundfish Act, H.R. 5557 (Studds, D-MA), became law as part of the National Oceanic and Atmospheric Administration (NOAA) reauthorization act. Pub. L. 102-567. The Act establishes a Northwest Atlantic Ocean Fisheries Reinvestment Program to be created no later than October 1, 1993, to promote commercial fisheries in the Northwest Atlantic, improve the markets for underutilized species, and increase use of fish wastes. The Program also seeks to restore New England groundfish stocks through aquaculture or hatchery programs.

### *C. Cases*

#### 1. Court Finds Florida Regulation of Spanish Mackerel Unconstitutional

The U.S. District Court held that a Florida law regulating catches of Spanish mackerel outside the state's territorial sea violated the Equal Protection Clause, infringed upon interstate commerce, and was preempted by the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. §§ 1801-1882. *Southeastern Fisheries Association v. Martinez*, 772 F. Supp. 1263 (1991).

Chapter 46-23 of the Fla. Admin. Code restricted catches of Spanish mackerel by Florida commercial fishermen in the EEZ to limits lower than those established under the Magnuson Act. The Florida statute was in direct conflict "with important purposes of the Magnuson Act, namely trying to prevent piecemeal extra-territorial state regulation and promoting uniformity." 772 F. Supp. at 1266.

The Court concluded that the federal government has the responsibility to manage fish stocks outside state waters and that the Florida statute is invalid.

#### 2. Ninth Circuit Upholds Harvest Levels for Oregon Coastal Natural-Stock Coho Salmon

The Northwest Environmental Defense Center (NEDC) brought suit against the Secretary of Commerce over the adoption of regulations establishing harvest levels of Oregon coastal "naturally spawning" coho salmon. NEDC asserted that because the 1986 catch levels would result in escapement below the maximum sustained yield of the stock, the Secretary had allowed "overfishing" in violation of the Magnuson Act, 16 U.S.C. §§ 1801-1882. *Northwest Environmental Defense Center v. Brennen*, 958 F.2d 930 (9th Cir. 1992).

The Magnuson Act does not define "overfishing," nor does it establish national standards for fishery management. The Act does set out seven standards for fishery conservation and management with which a management plan must comply in order for the Secretary to approve it. Standard 1 states that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a). NEDC contended that harvest levels above "maximum sustained yield" constituted "overfishing."

The Ninth Circuit Court of Appeals held that the standards were based on "optimum yield," which allows the maximum sustainable yield to be modified by economic, social, or ecological factors. 16 U.S.C. § 1802(21). Thus, "[h]arvest levels above maximum sustainable yield do not necessarily constitute overfishing within the meaning of National Standard 1." *NEDC*, 958 F.2d at 935. Further, the Court held that the Secretary's calculation of escapement goals to meet "optimum yield" does not have to be made on the best scientific evidence, due to the economic and social modification requirements. *Id.* at 936.

The Court also held that NEDC lacked standing to challenge the constitutionality of the Pacific Fishery Management Council's membership and powers. *Id.* at 937. NEDC argued that the Council position appointed by a state governor violated the Appointments Clause and that the Council's ability to affect foreign relations violated the principle of separation of powers.

#### 3. Washington Supreme Court Upholds Limited Entry for Urchin Fishery

After an explosion in the number of urchin divers entering the Washington urchin fishery during the 1988-89 season, the

Washington legislature enacted a regulation to place limits on the number of people who can harvest urchins. Wash. Rev. Code section 75.30.210 added the requirement that vessels have a sea urchin endorsement in addition to a shellfish diver's license in order to harvest urchins. To obtain an endorsement a vessel must have had a shellfish diving license between a specified period of time and must have landed 20,000 pounds of urchins between specified dates, which generally excluded those who did not make substantial landings prior to the 1988-89 season. The regulations allow an exception for "extenuating circumstances."

The Department of Fisheries appealed the decision of a lower court that held that the regulation was unconstitutional. The Washington Supreme Court determined that the state had a legitimate interest in preserving and regulating the urchin fishery through the limited entry scheme. The Court found that the state legitimately limited entry to those divers who made substantial landings prior to the 1988-89 season and thus had demonstrated economic dependence on the continuation of the fishery. The Court found that to solve the overharvesting problem by reducing the number of permits granted, the legislature legitimately excluded the popular 1988-89 season. *Foley v. State Department of Fisheries*, 837 P.2d 14, 119 Wash. 2d 783 (1992).

The Court distinguished *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P.2d 1101 (1936), which held that a limited entry statute arbitrarily discriminated against some salmon fishermen. Unlike the statute in *Bacich*, attempting to restrict gillnet salmon fishing licenses, the statute in *Foley* included a landing requirement and the additional requirement that a vessel maintain its participation in the fishery in order to renew its endorsement. The case was remanded on the issue of whether respondents should have been granted a permit based on extenuating circumstances.

### 4. First Circuit Upholds Massachusetts Vessel Length Limitation

Plaintiffs challenged a rule adopted by the Massachusetts Division of Marine Fisheries in 1985 that bars vessels longer than ninety feet from fishing in Massachusetts waters. *Davrod v. Coates*, 971 F.2d 778 (1st Cir. 1992). Plaintiffs, owners of a "freezer-trawler" fishing boat, challenged both the 1985 length limitation and the conditions of their 1991 permit, which allowed them to fish in Nantucket Sound but limited the quantity of loligo squid they could process. Plaintiffs also contended that the Magnuson Act preempted state authority in Nantucket Sound.

Ordinarily, a state has jurisdiction within the three-mile territorial sea. However, in 1983, an amendment to the Magnuson Act specifically added Nantucket Sound to waters of state jurisdiction to avoid the problem of inconsistent management in federal waters being surrounded by state waters. The Court found that the length requirement did not violate the Commerce Clause because it applied equally to in-state and out-of-state vessels. Finally, an injunction on the catch limitation placed by the lower court was lifted. The Court remanded the case to determine whether a state has a legitimate interest in protecting shore-based processors and also whether alternative regulatory means existed.

### 5. Washington Supreme Court Remands Decision on Validity of Fisheries Regulations

The Neah Bay Chamber of Commerce appealed a lower court decision upholding Department of Fisheries regulations restricting salmon sport fishing. *Neah Bay Chamber of Commerce v. Department of Fisheries*, 832 P.2d 1310, 119 Wash. 2d 464 (1992). The regulations divide Washington coastal waters into various "catch record" areas for the purpose of geographically regulating salmon seasons. Plaintiffs charged that a change in the regulations reduced tourism in Neah Bay. The lower court found that disagreement among experts with regard to the Department's geographic area determinations was itself an indication that the Department had not acted arbitrarily in establishing the regulatory areas. However, the Washington Supreme Court remanded the decision for the lower court to assess the procedural validity of the regulation under the Washington Administrative Procedure Act.

### 6. New Jersey Supreme Court Upholds Constitutionality of Menhaden Regulations

The New Jersey Supreme Court determined that New Jersey menhaden regulations do not violate a 1905 interstate compact between New Jersey and Delaware and that the regulations do not constitute an impermissible burden on commerce. *Ampro Fisheries v. Yaskin*, 127 N.J. 602,

606 A.2d 1099, *cert. denied*, 113 S. Ct. 409 (1992).

The regulations adopted by the New Jersey Department of Environmental Protection and Energy (DEPE) prohibit purse seine fishing of menhaden for other than bait purposes closer than 1.2 nautical miles from the coast. This includes part of Delaware Bay covered by the compact. The Court found that the interstate compact allows complimentary or parallel legislation that does not conflict with laws of the other compact state. The Court then found the DEPE regulations to be consistent with those of Delaware and thus not prohibited by the compact. With respect to the Commerce Clause, the Court found that the regulation did not put an undue burden on interstate commerce. The U.S. Supreme Court denied certiorari.

### 7. Ninth Circuit Upholds Fisheries Service's Harvest Quota for Alaska Pollock

In June 1991, Greenpeace sought to enjoin continued pollock fishing in the Gulf of Alaska, alleging that the National Marine Fisheries Service (NMFS) violated NEPA, 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, in implementing the 1991 total allowable catch (TAC) for pollock. *Greenpeace Action v. Franklin*, 982 F.2d 1342 (9th Cir. 1992). Greenpeace alleged that NMFS implemented the TAC without considering the best scientific and commercial data concerning the status of the pollock fishery and its potential impact on the steller sea lion, a threatened species. Greenpeace further alleged that NMFS violated NEPA by failing to prepare an EIS or an adequate environmental assessment (EA) before implementing the TAC. Greenpeace appealed the lower court's grant of summary judgment in favor of NMFS.

The Court of Appeals for the Ninth Circuit held that Greenpeace's appeal was not moot even though the 1991 fishing season had ended by the time of the appeal. As it held in *Alaska Fish and Wildlife Federation v. Dunkle*, 829 F.2d 933, 939 (9th Cir. 1987), the Court found that this was a situation "in which the complained of activity may be repeated and yet evade review." *Greenpeace Action*, 982 F.2d at 1348. The action was not moot because the issue of the pollock fishery's effect on the stellar sea lion was likely to occur again, and there was public interest in the standards used by the Secretary of Commerce in authorizing certain levels of pollock fishing in the Gulf of Alaska.

In affirming the decision of the lower court, the Court of Appeals held that NMFS's decision not to prepare an EIS was not arbitrary and capricious. The EA need not be based on the best scientific methodology available. "To set aside the Service's determination in this case would require us to decide that the views of Greenpeace's experts have more merit than those of the Service's experts, a position we are unqualified to take." *Id.* at 1352. The Court held that emergency management measures implemented to avoid any potential impact of the fishery on the steller sea lion were reasonably designed to protect the sea lion. Finally, the Appeals Court agreed with the district court in holding that NMFS's determination that the management measures effectively avoid any threat the fishery could have to the sea lion effectively fulfilled its duties under the ESA. NMFS "based its decision on the best scientific data and had grounded its decision in a consideration of the relevant factors." *Id.* at 1356.

### 8. Alaska Supreme Court Upholds State Constitutionality of Fish Spotting Ban

The Alaska Supreme Court held that the Board of Fisheries has the authority to ban aerial fish spotting. *Alaska Fish Spotters Association v. State Department of Fish and Game*, 838 P.2d 798 (Alaska 1992). Even though the regulation banning aerial fish spotting in Bristol Bay had been rescinded by the Board, the Court considered the public interest in the issue and waived the mootness doctrine.

The Court held that the Board's regulation did not violate the Common Use Clause of Article VIII, Section 3, of the Alaska Constitution, reserving fish, wildlife, and water resources "to the people for common use," but constituted a permissible limitation on the methods used to take fish.

## II. Turtle Excluder Devices Update

On December 1, 1992, NMFS adopted a final rule requiring shrimp trawlers to comply with sea turtle conservation measures throughout the year in all areas. 57 Fed. Reg. 57,348 (1992). As of January 1, 1993, shrimp trawlers under twenty-five feet fishing in offshore waters were required to use turtle excluder devices (TEDs) and can no longer use limited tow times as an alternative.

The TED requirement in inshore waters applies to all vessels except those with a headrope of less than thirty-five feet and a footrope of less than forty-four feet. *Id*. The exception was added in response to concerns of shrimp fishermen over the problem of seaweed and debris clogging TEDs. Delaying full implementation of the rule until December 1, 1994, will allow experimentation with different TEDs under different conditions to determine which is the most effective.

All sea turtles in U.S. waters are either endangered or threatened under the ESA. The use of TEDs exempts shrimp trawlers from the ESA's prohibition on the taking of sea turtles.

Significantly, the rule only applies to the Atlantic region, south of the North Carolina/ Virginia border, and excludes the Gulf of Mexico, where the largest U.S. shrimp fishery exists and where opposition to TEDs has been particularly heated.

## III. Wetlands Cases

### *A. Federal Court in Indiana Upholds Corps Permit Denial*

The Court upheld a decision of the Army Corps of Engineers to deny plaintiff an after-the-fact permit for filling .41 acres of wetlands adjacent to Sagauny Lake in Indiana. *O'Connor v. Corps of Engineers*, No. H91-172 (N.D. Ind., 1992), 22 E.L.R. 21464. The Corps originally accepted plaintiff's request for a nationwide permit under the Clean Water Act (CWA), but because plaintiff's request included a request to fill an additional .60 acres, the Corps determined that plaintiff would have to apply for an individual CWA section 404 permit.

The Corps processed the application under the individual permit process and eventually denied the permit based on findings that the activity would not serve the public interest and would contribute to a cumulative negative effect on the environment. The Court held that the permit denial did not constitute a taking of all viable uses of plaintiff's property, only the loss of "an" economically viable and reasonable use of his property. The Court also noted that it did not have jurisdiction to hear the plaintiff's takings claim because the CWA does not specifically withdraw Tucker Act jurisdiction from the Court of Claims.

The Court further upheld the Corps restoration order based on findings that the .41 acres already filled would have a detrimental impact on the Sagauny Lake area.

### *B. Fifth Circuit Overturns Lower Court on Issue of Wetlands Draining*

The EPA and the Army Corps of Engineers successfully appealed an injunction by a lower court on the draining of wetlands. *Save Our Community v. EPA*, 971 F.2d 1155 (5th Cir. 1992). The nonprofit corporation, Save Our Community (SOC), challenged a Corps and EPA determination that the draining of man-made ponds, although within their jurisdiction under the CWA, did not require a section 404 permit. SOC further claimed that repositioning wetland material constituted a discharge under the CWA and thus required a permit. The earlier decision had awarded summary judgment to SOC based on a determination that the CWA applies to drainage activities.

The Court of Appeals reversed the lower court consistent with previous court decisions interpreting the CWA as not covering drainage activity. Additionally, the Court of Appeals remanded the case on the issue of whether there was any significant discharge activity, or to what extent a CWA section 404 permit is required for de minimus discharges currently excepted by Corps and EPA regulations.

### *C. Government's Noncompliance With Johnston Amendment Does Not Bar Criminal Charge*

Plaintiff Hartford Associates failed to enjoin the federal government from proceeding with criminal charges under section 404 of the CWA, 33 U.S.C. § 1344, for unpermitted draining of wetlands. *Hartford Associates v. United States*, No. 91-4585 (JCL) (D.N.J. 1992). Hartford contended that the government's failure to comply with the procedures of the Johnston Amendment precluded enforcement of wetlands violations. President Bush signed the Johnston Amendment to the CWA in August 1991 in response to the publication of the 1989 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*. Under the Johnston Amendment, the Corps identified three options to handle enforcement actions involving wetlands delineated under the 1989 manual in cases where a judicial action has not been filed. The Amendment provides an option to the landowner to have a new delineation made under the 1987 or 1989 wetland delineation manual.

The New Jersey court held that noncompliance with the Johnston Amendment is only available as a claim in defense of an indictment brought by the government, not to prevent the government from bringing charges.

### D. *Tide Gate Construction Not CWA Maintenance*

The District Court for the Northern District of California determined that a salt company's construction of a new tide gate was a change of use and not an exemption for maintenance under the CWA, section 404(f)(2), 33 U.S.C. § 1344(f)(2). *Leslie Salt Co. v. United States*, No. C-90-0034-CAL (N.D. Cal. 1992). "The installation of tide gates constitutes the placement of a pollutant, and the side-casting and reposit of excavated wetlands, and the pouring of concrete, would constitute the discharge of a pollutant."

### E. *Loss of All Economic Value After Permit Denial Found To Be a Taking*

The Florida Court of Appeals held the denial of a dredge and fill permit amounted to a taking because it left the owner with no economically viable use of the land. *Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223 (Fla. Ct. App. 1992). The opinion reversed a lower court ruling in favor of the Department of Environmental Regulation (DER).

Plaintiff purchased two lots in a residentially zoned area with the intention of building two homes. Prior to purchase, plaintiff was notified that part of the land was in a conservation area. After purchase, Orange County issued building and septic tank permits, and the County Environmental Protection Agency requested the involvement of the DER. After a site visit, the DER determined that the property was within a twenty-acre jurisdictional wetland. Plaintiff applied for a dredge and fill permit, and the DER denied the permit.

The only permissible use of plaintiff's property was to build an elevated boardwalk on part of the property and participate in "passive recreational" uses. 601 So.2d at 1227. The Court concluded that although every permit denial does not automatically result in a taking, in this case, plaintiff was denied all economically viable use of the land, and a taking did occur.

### F. *Claims Court Denies Taking Request under Lucas*

The U.S. Claims Court relied on *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), to determine that an Army Corps of Engineers order to suspend development of wetlands for three years did not warrant compensation. *Tabb Lakes, Inc. v. United States*, No. 90-3906L, 26 Cl. Ct. 1334 (1992). Because plaintiffs continue to derive economic return on the property, they did not meet the *Lucas* standard that a landowner must be deprived of all economic value of the land, or at least the property value must have been "substantially diminished."

The Court also gives an interpretation of Lucas: "Lucas appears to follow the proposition that a plaintiff need not suffer total deprivation of economic value in order to have suffered a taking."

### G. *Fourth Circuit Finds 1989 Wetland Delineation Manual To Be Interpretive, Not Legislative, in Nature*

The Court of Appeals for the Fourth Circuit upheld a six-month prison sentence against plaintiff for knowingly filling wetlands without a permit in violation of the CWA. *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992). The Court found that (1) using the definition of wetlands from a subsequently adopted federal wetland manual did not violate ex post facto prohibition; and (2) plaintiff's conviction did not violate due process.

The Court concluded that the Corps' 1989 manual was interpretive in nature, and not legislative, and under *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission*, 874 F.2d 205 (1989), is not a "law" within the meaning of the ex post facto clause.

Further, the Court held that because sufficient evidence supported the jury's conclusion that plaintiff knew he was filling wetlands, the Court could conclude that the plaintiff had fair warning that he was subject to the CWA's criminal penalties and there was no violation of due process.

### H. *Florida Rock Still Pending*

The United States appealed a Claims Court decision that the Army Corps of Engineers' denial of a section 404 permit under the CWA was a taking of private property requiring compensation. *Florida Rock Industries v. United States*, 22 E.L.R. 20591. The original lawsuit was brought against the government by a limestone miner who was denied a permit to fill wetlands pur-

chased before the enactment of the section 404 dredge and fill program. The 1991 Claims Court decision awarded Florida Rock Industries $1.029 million plus attorneys fees. 21 Cl. Ct. 161 (1991). The Claims Court later awarded Florida Rock $808,784 in attorneys fees. *Florida Rock Industries v. United States*, No. 266-82L, 23 Cl. Ct. 653 (1991).

On appeal, the United States argues that Florida Rock's claim that its property was rendered valueless by the permit denial is precluded by a state court determination that the property retained fair market value--based on state tax assessments--despite the permit denial. Further, the government argues that the court should not have denied that an actual market existed at the time of the alleged taking, even though the market consisted of buyers unaware of the development restrictions on wetlands. Florida Rock filed a reply brief on February 24, 1992, asserting that the determination of market value through a state tax assessment differs from a determination of constitutional takings. Florida Rock also asserts that the government should not benefit from the fact that the reasons for the permit denial at the time of the takings was not widely known, thus creating a market of uninformed purchasers. A decision is pending.

### *I. Loveladies Harbor Decision Pending*

The United States is appealing a U.S. Claims Court $2,658,000 taking award based on the denial of a CWA section 404 permit. *Loveladies Harbor Inc. v. United States*, No. 91-5050 (Fed. Cir., U.S. Motion on lack of jurisdiction filed May 5, 1992). The United States argues that the Claims Court does not have jurisdiction over a claim when the plaintiff has the same claim pending in another court.

The government bases its argument on an April 1992 Federal Circuit decision, *UNR Industries v. United States*, 962 F.2d 1013 (Fed. Cir.) (en banc) *cert. granted*, 113 S. Ct. 373 (1992), establishing that the Claims Court cannot have jurisdiction where the same claim is pending in another court. The United States argues that the Claims Court lacked jurisdiction here because plaintiff was maintaining an identical claim in the U.S. District Court for the District of New Jersey. The developers assert that the claims were not identical and that *UNR Industries* should not be applied here retroactively. A decision is pending.

### *J. Landowners Get Compensation in Exchange for Fee Simple in Wetlands Case*

Landowners brought action against the United States, alleging that the Corps of Engineers' denial of a CWA section 404 permit to discharge fill into wetlands resulted in a "taking." *Formanek v. United States* (26 Cl. Ct. 332 (1992)), 22 E.L.R. 20893. The Claims Court held that the denial of a permit constituted a taking for which landowners were entitled to just compensation and instructed plaintiffs to convey the fee simple to the United States upon satisfaction of the judgment.

### *K. Takings Claim Rejected by Claims Court*

The Claims Court found that the Corps of Engineers' denial of a section 404 permit to fill an eleven-acre borrow pit in Chesapeake, Virginia, did not constitute a taking of private property. *Atlantic Limited v. United States*, No. 637-87L (Cl. Ct. 1992). Atlantic had pursued a permit since 1981 and after two rejections the permit was granted in 1985.

Atlantic sued the Corps for the temporary taking of private property. The Court found that Atlantic had not established a valid claim for a temporary taking because it was never entitled to a permit. Further, Atlantic failed to produce evidence of specific damages.

### *L. Decision on Isolated Wetlands Vacated and Remanded*

Hoffman Homes, Inc. petitioned for review of an EPA order that imposed administrative penalties for discharging dredged and fill material without a CWA section 404 permit into an intrastate wetland. The Court of Appeals for the Seventh Circuit initially held that (1) section 404 of the CWA prohibiting discharges of dredged or fill materials into "navigable waters" without a permit did not give EPA jurisdiction over intrastate, nonadjacent, or "isolated" wetlands; and (2) EPA did not have jurisdiction under the Commerce Clause to regulate fillling of such wetlands based on potential use by migratory birds. However, upon rehearing, a panel for the Seventh Circuit vacated its earlier decision and referred the case for negotiation between the parties. *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310 (7th Cir. 1992), *vacated*, 975 F.2d 1554 (7th Cir. 1992).

## IV. Public Trust Doctrine

### *A. Private/State Boundaries*

#### 1. Court Upholds Florida Coastal Construction Control Line

A Florida Court of Appeals upheld a final order of the Department of Administrative Hearings, which ruled that the placement of the coastal construction control line (CCCL) on appellant's land was valid. *St. Joseph Land and Development Co. v. Florida Department of Natural Resources*, 596 So.2d 137 (Fla. Dist. Ct. App. 1992).

Plaintiff challenged the Florida Department of Natural Resources' (DNR's) interpretation of the term "front" in its legislative directive to establish CCCLs "along the sand beaches of the state fronting on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida." Plaintiff disputed whether his property "fronted" on the Gulf of Mexico. The Court upheld the DNR's definition that a property which can be directly affected by a 100-year storm event in the Gulf can be considered to "front" on the Gulf. The Court also upheld the DNR's determination of the CCCL using a complex computer model which projects 100-year storm tides based on weather and topographic data. The Court stated that "DNR's definition reflects the physical interaction between the sand beach at issue and the Gulf of Mexico." 596 So.2d at 140.

#### 2. Dock Construction Permit Denial Not a Taking

Appellants were denied a permit to construct a dock on their property by the Florida Department of Environmental Regulation and argued that this constituted a taking. The Court of Appeals determined that there was no taking because "the appellant's riparian rights were subject to the state's ownership of the sovereign submerged lands. . . . " *Kreiter v. Chiles*, 595 So.2d 111 (Fla. Ct. App. 1992). The Court also held that the appellant doesn't have the right to wharf out for the purposes of ingress and egress, and only in the absence of land-based ingress and egress routes from the property could the appellant argue that it was necessary to wharf out.

#### 3. Fourth Circuit Affirms Ebb and Flow Test for Navigability

The Fourth Circuit Court of Appeals affirmed the use of the "ebb and flow" test to determine whether the Army Corps of Engineers has jurisdiction over a waterway. *United States v. Sasser*, 22 E.L.R. 21188 (4th Cir. 1992).

Appellants argued that *The Daniel Ball*, 77 U.S. 537 (1871), stood for the proposition that the "ebb and flow" test was no longer determinative of jurisdiction over navigable waterways. The Court points out that *The Daniel Ball* was restricted to admiralty jurisdiction. Further, more recent opinions have affirmed the use of the ebb and flow test to determine the Corps' jurisdiction over coastal waters. *See United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610 (3rd Cir. 1974).

#### 4. Littoral Owner Gains Land Through Accretion in Hawaii

The Hawaii Supreme Court overturned a decision of the Land Court of the city of Honolulu in finding that land gained through imperceptible accretion belongs to the littoral owner. *Application of Banning*, 832 P.2d 724, 7 Haw. 297 (1992).

Although the city of Honolulu determined that continuous public use for over twenty years created an implied public easement, the Court determined that public policy that favors extending public ownership of the shoreline must be balanced by the littoral landowner's interest.

The Court found that while continuous adverse use establishes a presumption of an implied easement, it is not a conclusive presumption. Further, the Court found that the public access point "must be confined to a definite and specific line; no public easement can be acquired where the line of travel varies to a considerable extent." The Court continues: "Nevertheless, slight deviations in the line of travel leaving the road substantially the same may not destroy the rights of the public." 832 P.2d at 726.

#### 5. Negligence Suit for Storm Damage Struck Down

Owners of oceanfront property sued Massachusetts under negligence and regulatory taking theories to recover for storm damage which allegedly resulted from the Commonwealth's refusal to allow erection of stone seawalls. The Superior Court of Barnstable County dismissed the property owners' claims on the pleadings, and the property owners appealed. The Appeals Court held that (1) landowners failed to make a negligence claim against the Commonwealth, and (2) remand was necessary for determination of whether the

Commonwealth's application of the Wetlands Protection Act resulted in a regulatory taking. *Wilson v. Commonwealth of Massachusetts*, 583 N.E.2d 894 (Mass. App. Ct. 1992).

**6. Landowner Unsuccessful in Claiming Shoreline as Private Property**

A private property owner brought suit contending that actions of the state of Texas created a cloud over title to shoreline property and accretions. The District Court entered summary judgment in the property owner's favor and the state appealed.

The Court of Appeals held that (1) the last call on patent was the boundary line, and therefore the property did not include any of the accreted shoreline claimed by the landowner; (2) alleged admissions in pleadings in prior actions were unavailable to contradict the terms of an unambiguous patent, the construction of which was a question of law to be based on the intent of the parties as expressed within the four corners of the instrument; and (3) the state was not equitably estopped from challenging the landowner's title to property by reason of its acceptance of a conservation easement over the land, including the property in dispute. *State v. Brazos River Harbor Navigation District*, 831 S.W.2d 539 (Ct. App. Texas 1992).

## V. State Ocean Planning

### *A. Oregon Territorial Sea Plan*

The Oregon Department of Land Conservation and Development (DLCD) is in the process of developing a plan to manage land and waters within Oregon's coastal zone. One aspect of the Territorial Sea Plan will be to elaborate, explain, and implement Goal 19, the state comprehensive land use goal concerning ocean resources. The plan will also address resource management issues such as developing a management strategy for rocky intertidal areas along the coast. The "rocky shores plan" will include a long-range interpretational/educational program incorporating the entire coastal region and involving local coastal governments and organizations.

## VI. National Estuary Program

### *A. Tillamook Bay, Oregon*

On October 22, 1992, Tillamook Bay, Oregon, was selected for the National Estuary Program under CWA section 320. The Oregon Department of Environmental Quality is working with the EPA to implement the program.

The program will be developed in two phases. An initial six-month period will be used to establish local program offices and develop a conference agreement between Oregon and the EPA. The second phase will focus on the development of a comprehensive management plan for the estuary zone. The plan will cover all aspects of the Tillamook watershed, including the historical reaches of anadromous fish.

Under the requirements of the National Estuary Program, a comprehensive conservation and management plan for the estuary will be developed to address point and nonpoint pollution sources and corrective actions to restore and maintain environmental and recreational aspects of the estuary. The comprehensive plan also includes a review of existing authorities and regulations in the estuary, identifies management problems, and proposes solutions for implementing the plan.

Funding to implement the conservation and management plan is separate from the funding of the National Estuary Program and is administered through the CWA's section 319 Nonpoint Source Management Programs, 32 U.S.C. § 1329.

## VII. Marine Mammal Protection Act

### *A. Tuna-Dolphin Issues*

**1. Bush Signs Moratorium Legislation**

On October 26, 1992, President Bush signed H.R. 5419, the International Dolphin Conservation Act of 1992, which provides for a global moratorium on "setting" purse seines over dolphins to capture the tuna swimming below. Pub. L. 102-523. Both H.R. 5419 and its companion bill, S. 3003, passed both houses with broad bipartisan support, capping a long, convoluted process of judicial embargoes, administrative certifications, and political debate.

**2. How It All Started: The MMPA Embargo Provisions**

NMFS estimates that more than six million dolphins have been killed during U.S. and foreign tuna fishing operations in the eastern tropical Pacific Ocean. *See* 57 Fed. Reg. 27,010 (1992). To address this concern,

the Marine Mammal Protection Act (MMPA) prohibits the importation of certain yellowfin tuna and tuna products from countries ("primary embargo countries") whose tuna fisheries incur marine mammal mortality rates 1.25 times the rate allowed U.S. tuna fisheries. 16 U.S.C. § 1371(a)(2)(B). The MMPA also prohibits the importation of yellowfin tuna from any intermediary country ("secondary embargo countries") planning to export yellowfin tuna to the United States if that country cannot certify that it has acted to prohibit the importation of tuna from any nation from which direct tuna export to the United States is banned. 16 U.S.C. § 1371(a)(2)(C).

In August 1990, the District Court for the Northern District of California ordered a primary embargo on tuna imports from several Latin American countries, including Mexico. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (1990), *aff'd*, 929 F.2d 1449 (1991). The Mexico embargo subsequently led to the controversial GATT panel decision discussed below. Yet despite the GATT panel ruling, primary embargoes remain in effect against Mexico, Venezuela, Colombia, 57 Fed. Reg. 59,979-02 (1992), and Panama, 58 Fed. Reg. 3013-01 (1993).

On February 3, 1992, the District Court for the Northern District of California ordered secondary embargoes against twenty intermediary nations, including several EC nations. *Earth Island Institute v. Mosbacher*, 785 F. Supp. 826 (1992). All secondary embargoes have now been lifted, except for those in place against Costa Rica, Italy, Spain, France, and Japan. *See* 57 Fed. Reg. 59,979-02 (1992).

### 3. General Agreement on Tariffs and Trade

As a result of the court-ordered embargo, Mexico requested formation of a GATT Panel to rule on the embargo's GATT consistency. In September 1991, the GATT Panel ruled that the MMPA's primary and secondary embargo provisions violated GATT. *U.S. Restrictions on Imports of Tuna, Report of the Panel*, 30 I.L.M. 1594. Specifically, the Panel ruled that (1) the MMPA violated GATT's prohibition against quantitative and qualitative trade restrictions by regulating the *processes* used to catch tuna (purse seining) instead of the *product* being traded (tuna); and (2) GATT's Article XX exceptions to protect the environment could not be used to justify unilateral actions to protect extraterritorial resources, such as dolphins in the high seas. *Id.* In response to the panel ruling, and in light of the ongoing Uruguay Round of GATT negotiations, the House of Representatives passed a resolution stating that it would not approve any trade agreement that jeopardizes U.S. environmental laws. H. Con. Res. 246, 102d Cong., 2d Sess. (1992).

Under GATT rules, the panel decision is not binding on signatory nations until adopted by consensus by the full GATT Council. Partly because of pressures associated with NAFTA, Mexico has yet to move for formal adoption of the ruling. However, the U.S. Trade Representative recently announced that the EC and the Netherlands, on behalf of the Netherlands Antilles, have initiated a challenge to the MMPA's secondary embargo provisions, and the GATT Council has agreed to convene a dispute settlement panel to resolve the conflict. 57 Fed. Reg. 38,549-01 (1992). Because of the previous GATT panel ruling, many experts believe this new Panel will specifically rule against the MMPA's secondary embargo provisions.

### 4. The Primary Features of the Act

The International Dolphin Conservation Act reflects an attempt by the Bush administration to address concerns raised by the GATT Tuna-Dolphin Panel and, more immediately, to deal with the problems created for nations denied access to U.S. markets. It accomplishes these objectives in several ways. First, the Act authorizes the Secretary of State to enter international agreements providing for a five-year moratorium on the practice of "setting" purse seines over dolphins to capture tuna. § 302(a), 16 U.S.C. § 1412(a). The moratorium would go into effect March 1, 1994. Second, the Act prohibits the Secretary of the Treasury from imposing tuna embargoes on any country that commits to enter the five-year moratorium in 1994 if the country agrees in the meantime to implement an acceptable onboard observer program and reduce dolphin mortality in 1992 and 1993. § 305(a), 16 U.S.C. § 1415(a).

Third, the Act prohibits the sale in the United States of "any tuna or tuna product that is not dolphin safe" after June 1, 1994, § 307(a), 16 U.S.C. § 1417(a); provides for civil and criminal penalties for violations of these prohibitions, § 307(b), 16 U.S.C.

§ 1417(b); and commits the U.S. tuna fleet to reduce dolphin mortality to zero by December 31, 1999. § 306(a), 16 U.S.C. § 1416(a). Finally, the Act clarifies the term "intermediary nation," allowing secondary embargoes only against countries that transship yellowfin tuna that is directly subject to a primary embargo. 16 U.S.C. § 1362(c)(17).

Alternate legislation, which supported a tuna-dolphin plan adopted by the Inter-American Tropical Tuna Commission, stalled in the 102d Congress. *See* S. 2995, 102d Cong., 2d Sess. (1992).

### *B. Ninth Circuit Upholds Ruling Allowing Sale of Otter Goods*

On December 28, 1992, the Ninth Circuit affirmed a decision to strike down a rule under the MMPA which prohibited the taking of sea otters by Alaska Natives for nonsubsistence purposes. *Beck et al. v. Department of Commerce*, 796 F. Supp. 1281 (D. Alaska 1991), *aff'd*, 982 F.2d 1332 (9th Cir. 1992). The MMPA exempts Native Alaskans from its prohibition against takings if the purpose of the taking is, *inter alia*, to create and sell "authentic native articles of handicrafts and clothing." 16 U.S.C. § 1371(b)(2). The U.S. Fish & Wildlife Service (FWS) interpreted this exemption to apply only to articles traditionally produced prior to 1972 and specifically denied the exemption for sea otter products, based on the finding that "no handicraft trade using sea otters by Alaska Natives was in existence" prior to 1972. 55 Fed. Reg. 14,973 (1990); 50 C.F.R. § 18.3 (1991).

Plaintiff Native Alaskans challenged the rule after FWS agents confiscated various articles of sale made from sea otter pelts. The District Court found that Native Alaskans traditionally used otter pelts prior to 1972 and that the MMPA's statutory scheme left the FWS with no discretion to define the term "authentic" for the purpose of regulating takings exempted under MMPA § 1371(b). Accordingly, the District Court found that the FWS's rule was an impermissible attempt to regulate otter harvest levels, *Beck*, 796 F. Supp. at 1289, and held that the FWS rule "defining 'authentic' article[s] of native handicraft is fundamentally inconsistent with 16 U.S.C. § 1371(b) [of the MMPA]." *Beck*, 796 F. Supp. at 1291.

The Ninth Circuit affirmed, finding that a central purpose of the Native Alaskan exemption is not to restrict "what marine mammals or other natural materials can be used . . . ," but only to ensure "that the items be produced, fashioned or decorated in the traditional native way and not mass produced." *Beck*, 982 F.2d at 1342. As a result of this ruling, the FWS may not restrict the harvesting of otters by Native Alaskans for use in the production and sale of traditional native arts and crafts unless a showing is made that the species is "depleted." *See* 16 U.S.C. § 1371(b).

### *C. Court Upholds Permits to Import Whales for Aquarium*

On July 31, 1992, the District Court for the District of Columbia granted whale watchers standing to challenge permits to import marine mammals for aquarium displays but ruled that the Secretary of Commerce's issuance of such permits was not an abuse of discretion under the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A), and the MMPA. *Animal Protection Institute of America v. Mosbacher*, 799 F. Supp. 173 (D.D.C. 1992). The case involved two permits granted by the Secretary to the John G. Shedd Aquarium of Chicago: one allowing importation from Japan of six false killer whales, *Pseudorca crassidens*, and the other allowing importation from Canada of four yet-to-be-captured beluga whales, *Delphinapterus leucas*. *Id.* at 175.

The Court first addressed the standing issue in light of the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). The Court found that plaintiff environmental groups satisfied two prongs of the traditional standing test--causation and redressability, *Animal Protection*, 799 F. Supp. at 177, and recognized that whale watchers had previously been found to satisfy the third element of the standing test, injury in fact. *Id.* at 176, *citing Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 231 n. (1986). Despite the additional standing requirement enunciated in *Lujan*, that plaintiffs must be "directly" affected by agency action to be injured in fact, the Court found that plaintiffs' "concrete plans" to whale watch in upcoming months "militat[ed] toward a finding of standing." *American Protection*, 799 F. Supp. at 177.

On the merits, the Court held that the Secretary's approval of the animal display permits was authorized under MMPA § 1371(a)(1) and was not an abuse of discretion. *Animal Protection*, 799 F. Supp. at 179. Significantly, the Court refused to find that

the Secretary must (1) certify under MMPA § 1371(a)(3)(A) that the capturing country's program for "taking" marine mammals is consistent with the MMPA; (2) ascertain the optimum sustainable population of the whales under MMPA § 1373(a) prior to issuing permits; or (3) determine under MMPA § 1372(b) that the particular animals to be imported are pregnant or "in a parenting way." *Animal Protection,* 799 F. Supp. at 179-80. Instead, the Court found the administrative record supported issuance of the permits and stated that "even after [the Aquarium] exercises its permits and imports the whales it wants, free-swimming [whales] will still be found in the ocean in abundance." *Id.* at 180.

### *D. NMFS Proposes Limits to Marine Mammal Viewing*

On August 3, 1992, NFMS proposed regulations to protect whales, dolphins, and porpoise from activities associated with watching these animals. 57 Fed. Reg. 34,101 (1992); 50 C.F.R. pts. 216, 218, 222. The proposed rule would apply to all persons, vessels, and aircraft subject to U.S. jurisdiction, but it would not apply to activities that operate under a permit or exemption issued under the MMPA or the ESA. Proposed minimum approach distances would be 100 yards for all whales (300 yards for hump-back cow/calf pairs) and 50 yards for dolphins and porpoise. Aircraft would be prohibited from operating within 1000 feet of these animals.

On the same day, NMFS proposed guidelines limiting how close people, vessels, and aircraft may approach seals and sea lions. 57 Fed. Reg. 34,121 (1992). The guidelines would apply to all persons, vessels, and aircraft subject to U.S. jurisdiction and limit approaches by water to 50 yards, approaches by land to 100 yards, and approaches by air to 1000 feet. These distances reflect a measure of safety which NMFS feels is consistent with the sound management practices required by the MMPA.

## VIII. Outer Continental Shelf Lands Act

### *A. Ninth Circuit Finds Efforts to Halt Exploration in the Beaufort Sea Moot*

On June 16, 1992, the Ninth Circuit Court of Appeals refused to grant declaratory relief to plaintiff environmental groups in a dispute over the Atlantic Richfield Company's (ARCO's) oil and gas exploration in Cabot Prospect off northern Alaska in the Beaufort Sea. *Trustees for Alaska v. Department of Interior,* 967 F.2d 591 (9th Cir. 1992) (unpublished memorandum opinion available in Westlaw). Because ARCO completed the exploratory activities prior to judicial review, the Court dismissed the suit as moot and refused to reach the merits on whether the Secretary of the Interior's approval of the exploration plan violated the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.* (1992), and the "incidental take" provisions of the MMPA, 16 U.S.C. § 1371(a)(5) (1992).

In July 1991, the Secretary of the Interior approved ARCO's plan to drill two exploratory wells in Cabot Prospect. Anticipating that ARCO might encounter polar bears, the Secretary advised ARCO that the MMPA prohibits the taking of marine mammals unless Letters of Authorization are obtained. *Trustees,* 967 F.2d at 591. Subsequently, ARCO commenced exploration without obtaining the Letters of Authorization, and plaintiffs filed for review, arguing that the Secretary's approval of the exploratory plan violated both the OCSLA and the MMPA.

However, prior to review, ARCO completed its exploration. As a result, the Court dismissed the case as moot and refused to grant plaintiffs declaratory relief because "no pending actions would be resolved if [the Court] required the Secretary to mandate compliance with the [MMPA]." *Trustees,* 967 F.2d at 591. Furthermore, the Court refused to find an exception to the mootness doctrine under the theory of "capable of repetition yet evading review," finding that while the activity of oil and gas exploration is capable of being repeated, the plaintiffs had not sought or obtained a stay of the specific activity in dispute and thus could not benefit from the exception by arguing that the activity evaded review. *Id.*

## IX. Endangered Species Act

### *A. NMFS Announces Gray Whale Delisting*

On December 20, 1992, NMFS issued a notice of determination to remove the eastern North Pacific (California) stock of the gray whale from the List of Endangered and Threatened Species (the List). 58 Fed. Reg. 3121 (1993). NMFS reviewed the gray whale's threatened status under the ESA as part of its regular five-year status review of

species on the List. ESA § 4(c)(2), 16 U.S.C. § 1533(c)(2); *see* 56 Fed. Reg. 29,471 (1991). Although the Northwest Indian Fisheries Commission and others filed a petition to delist the gray whale on March 7, 1991, NMFS found a second status review would be duplicative and unnecessary despite finding the petition provided substantial information to warrant a status review under ESA § 4(b)(3)(A). 56 Fed. Reg. 64,498 (1991).

After public comment, NMFS determined that the California stock gray whale population is "between 60 and 90 percent of its carrying capacity," had "recovered to near or above its estimated pre-commercial exploitation [levels]," and "is not currently in danger of extinction." 58 Fed. Reg. 3151 (1993). In making its determination, NMFS refused to consider potential future threats to the California stock, such as the possible resumption of commercial whaling or oil and gas exploration, and instead focused on actual, present-day threats. *Id.* Interestingly, NMFS refused to change the endangered status of the western Pacific (Korean) gray whale, and NMFS will monitor the status of the California stock for at least five years under ESA § 4(g) to determine whether to continue its unprotected status. *See* 16 U.S.C. § 1533(g).

### B. *Marbled Murrelet Listed as Threatened*

The FWS announced a final rule granting threatened status to the Oregon, Washington, and California populations of the marbled murrelet (*Brachyramphus marmoratus*) under the ESA, 16 U.S.C. § 1531 *et seq.* 50 C.F.R. pt. 17; 57 Fed. Reg. 45,326 (1992). The murrelet populations have come under increasing attack from commercial timber harvesting, gillnet fishing operations, and oil spills. The FWS attempted to delay listing the bird, but the U.S. District Court for the Western District of Washington ordered an expedited listing on September 15, 1992. *Marbled Murrelet v. Lujan*, 1992 U.S. Dist. LEXIS 14645.

## X. Coastal Hazards

### A. *Supreme Court Rules on Takings Claim*

The Supreme Court ruled on June 29, 1992, that any law or regulation that deprives a landowner of all economically beneficial use of property constitutes a compensable taking unless the use is prohibited under the state's common law of property or nuisance law. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

In 1986, Lucas bought two undeveloped parcels of beachfront property on a barrier island east of Charleston. Subsequently, South Carolina enacted the Beachfront Management Act which required Lucas to obtain a permit from the South Carolina Coastal Council (SCCC) in order to build on the lots. Lucas filed suit after the SCCC denied his permit request. The trial court held that enforcement of the Act rendered Lucas's property valueless and ordered the state to pay more than $1.2 million in compensation. The South Carolina Supreme Court reversed, holding that a regulation intended to prevent serious public harm requires no compensation. *Lucas v. SCCC*, 304 S.C. 376, 383, 404 S.E.2d 895, 899 (1991).

The U.S. Supreme Court reversed, holding that the South Carolina Supreme Court erred in applying the "noxious and harmful use" standard to justify no compensation for a taking under the Beachfront Management Act. *Lucas*, 112 S. Ct. at 2915. The Court acknowledged that the "noxious and harmful use" standard "was merely [the Court's] early formulation of the police power justification necessary to sustain (without compensation) any regulatory *diminution in value*." *Id.* at 2920 (emphasis added). The Court then relied on the trial court's finding that Lucas was denied all economically beneficial use of his land and held that the "harmful and noxious use" standard could not justify departing from the Court's "categorical rule that total regulatory takings must be compensated." *Id.* at 2921. However, the Court carved a narrow exception to this rule, holding that a total regulatory taking may go uncompensated only if the state's "background principles of nuisance and property law" justify the land use restrictions. *Id.* at 2930. The Court remanded the case to the South Carolina Supreme Court to determine whether, at the time Lucas obtained title to the property, his "bundle of rights" included the right to build in the coastal zone.

On remand, the South Carolina Supreme Court held that the SCCC failed to identify "any common law basis . . . by which it could restrain Lucas's desired use of his land" and remanded the case to the trial court to determine damages. *Lucas v. SCCC*, 424 S.E.2d 484 (S.C. 1992).

### B. *California Court Says No Fundamental Right to Seawall*

A California Court of Appeals ruled on July 31, 1992, that beachfront homeowners had no fundamental right to construct a seawall which encroached on state tidelands and affirmed a California Coastal Commission (CCC) decision requiring a public easement over the seawall. *Antoine v. California Coastal Commission,* 10 Cal. Rptr. 2d 471 (Cal. App. 2d Dist. 1992).

Plaintiff homeowners received a coastal development permit from the county of Santa Barbara in 1984 to construct a seawall to protect badly eroding shoreline property. *Id.* at 474. The permit did not require plaintiffs to provide lateral public access across the seawall, and a private group appealed the permit to the CCC. *Id.* The CCC reviewed evidence that the seawall was inside the surf zone and frequently awash and ruled that the permit must contain a public access easement because the wall encroached on state tidelands. *Id.* at 475.

In reviewing the trial court's order to remove the public access condition, the Court of Appeals found that property owners have "no fundamental vested right to construct a revetment in the coastal zone without a permit." *Id.* at 476, *citing Whaler's Village Club v. CCC*, 220 Cal. Rptr. 2d (Cal. App. 3d 1985). As a result, the Court applied the substantial evidence test and found that plaintiffs failed to show that the seawall was wholly beyond state tidelands. *Antoine*, 10 Cal. Rptr. 2d at 478-79.

To reach this result the Court reviewed various judicial methods for determining the mean high tide boundary between state and private lands. As to the vertical component of the boundary, the Court found the California rule to be the same as the federal rule, *i.e.*, "mean high tide is the average of all high tides." *Id.* at 480, *citing Borax Consolidated v. Los Angeles*, 296 U.S. 10, 26-27 (1935). Next, the Court acknowledged the shifting nature of horizontal boundary lines on sandy beaches and held that even intermittent encroachment on state lands, such as during storms, may justify a public access easement. *Antoine*, 10 Cal. Rptr. 2d at 481. Under this ruling, any structure which even temporarily occupies state tidelands may be subject to a public access easement.

### C. *Oregon Appeals Court Rejects Taking Claim for Seawall Permit Denial*

The Oregon Court of Appeals ruled on August 5, 1992, that Cannon Beach's refusal to permit construction of a seawall over the dry sand area of a beach was not a taking under the Oregon or U.S. constitutions. *Stevens v. City of Cannon Beach*, 114 Or. App. 457, 835 P.2d 940 (1992). The Court upheld the trial court's reading of *State ex rel. Thorton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), which held that the "doctrine of custom" created a public right to access and use the dry sand area. Significantly, the Court relied on the "doctrine of custom" to satisfy the U.S. Supreme Court's holding in *Lucas,* stating that "the purportedly taken property interest was not part of plaintiff's estate to begin with." *Stevens*, 144 Or. App. at 459, 835 P.2d at 941.

## XI. Submerged Lands Act

### A. *States Required to Abandon Territorial Claims*

The U.S. Supreme Court ruled that the Army Corps of Engineers had authority under section 10 of the Rivers and Harbors Appropriation Act (RHAA), 33 U.S.C. § 403, to require Alaska to relinquish its rights to additional submerged lands before it issued a permit allowing the state to construct a port facility extending out into Norton Sound. *United States v. Alaska*, 112 S. Ct. 1606, 118 L. Ed. 2d 222 (1992).

In 1982, the city of Nome applied to the Corps for a section 10 permit to construct a large port facility and causeway into Norton Sound, an arm of the Chukchi Sea. The Corps granted the permit, but because the causeway construction would shift the state/federal boundary and constrict federal submerged land holdings under the Submerged Lands Act (SLA), 43 U.S.C. § 1312, the Corps included a disclaimer in the permit requiring Alaska to relinquish its additional territorial claims. Alaska made the disclaimer but reserved its right to legal challenge. *United States v. Alaska*, 112 S. Ct. at 1609 n.2. The issue came to a head when Interior Department's Minerals Management Service sought to lease tracts for mineral prospecting in an area Alaska could have claimed by virtue of building the causeway. Alaska threatened legal action, prompting a U.S. move to settle the claim under the Supreme Court's original jurisdiction. *Id.* at 1610.

The Supreme Court held that the federal Commerce power, and the attendant power to regulate construction of new structures under RHAA section 10, clearly overrides the state's right to jurisdiction over coastal areas under the SLA. *Id.* at 1618. The Court relied on earlier opinions, congressional intent, section 10's plain language, and administrative interpretations to broadly construe the Secretary's section 10 authority. Accordingly, the Court held that the Secretary may consider factors other than navigation--including whether to attach a waiver of land rights to a section 10 permit--when determining whether to issue a permit. *Id.*

Significantly, Alaska failed to persuade the Court that Article 8 of the 1958 Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1607, T.I.A.S. No. 5639, and Article 11 of the 1982 UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122, 21 I.L.M. 1261, would allow the United States to use the new causeway to redraw both the territorial sea and EEZ boundaries, thereby expanding U.S. submerged land holdings. While the Court noted the utility of a single coastline, *United States v. Alaska*, 112 S. Ct. at 1617-18 (*citing United States v. California*, 381 U.S. 139 (1965) (California II)), it found a more important consideration to be the "definiteness and stability" of the federal/state boundary under the SLA. *United States v. Alaska*, 112 S. Ct. at 1618.

As a result, the Court effectively held that the federal government may restrain coastal states from obtaining additional land holdings by virtue of coastal construction under the SLA. This decision has major implications for other coastal states seeking to obtain RHAA section 10 permits, including California, Florida, Louisiana, and North and South Carolina, which already have been subject to section 10 permits conditioned on the waiver of submerged lands claims.

## XII. Marine Pollution

### *A. Ocean Dumping Legislation*

On October 31, 1992, President Bush signed H.R. 6167, the Water Resources Development Act of 1992. Pub. L. 102-580. Title V of that Act, entitled the "National Contaminated Sediment Assessment and Management Act," amends the ocean dumping provisions of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §§ 1401 *et seq.*, in a number of ways.

First, section 502 of the Act establishes a National Contaminated Sediment Task Force, composed of a variety of federal, state, and private interests, to review, *inter alia*, the extent and seriousness of aquatic sediment contamination and to report findings and recommendations to Congress. Next, the Act requires EPA, in consultation with NOAA and the Corps of Engineers, to conduct a comprehensive survey and monitoring program to assess and address aquatic sediment quality in the United States. *Id.* § 503. The Act also requires the Corps to provide EPA forty-five days to concur or decline in the issuance of dumping permits. *Id.* § 504 (amending MPRSA § 103(c), 33 U.S.C. § 1413(c)).

Significantly, section 505 preserves states' rights "to adopt or enforce any requirements respecting dumping of materials" into state ocean waters, except with regard to federal projects where EPA makes specified findings (amending MPRSA § 106(d), 33 U.S.C. § 1416(d)). The Act also requires EPA to designate sites and times for sediment disposal to mitigate environmental impacts and gives EPA authority to prohibit dumping when necessary (amending MPRSA § 102(c), 33 U.S.C. § 1412(c)). Further, EPA must develop site management plans to ensure environmental safety for existing and proposed disposal sites, and after January 1, 1995, it may not officially designate any disposal site without completing such plans. *Id.* Additionally, section 507 of the Act limits dumping permits to a period of seven years (amending MPRSA § 104(a), 33 U.S.C. § 1414(a)).

Finally, the Act amends the criminal penalty provisions of the MPRSA, § 105(b), 33 U.S.C. § 1415(b), to allow for the seizure and forfeiture of property or proceeds involved in or resulting from any knowing violation of the Act.

### *B. Coast Guard Moves on Double Hull Requirements*

Pursuant to the Oil Pollution Act of 1990 (OPA), 46 U.S.C. § 3703a, the Coast Guard adopted interim standards for double hulls on vessels carrying oil in bulk as cargo or cargo residue. 33 C.F.R. pts. 155, 157; 46 C.F.R. pts. 30, 32, 70, 90, 172; 57 Fed. Reg. 36,222 (1992). The standards apply to all vessels built or converted under contracts placed after June 30, 1990. The standards are to provide shipping and shipbuilding industries with

guidance to meet the OPA's double hull requirements according to a timetable commencing in 1995.

### C. *Exxon Valdez Captain Immune from Prosecution*

The Alaska Court of Appeals ruled on July 10, 1992, that the captain of the *Exxon Valdez*, Joseph Hazelwood, was immune from prosecution under the CWA, 33 U.S.C. § 1251 *et seq.*, after reporting an oil spill as required. *Hazelwood v. Alaska*, 836 P.2d 943 (Alaska Ct. App. 1992). The case stemmed from the highly publicized spill on March 24, 1989, of eleven million gallons of oil into Prince William Sound.

The Court considered whether certain evidentiary exceptions could pierce the prosecutorial immunity conferred by the CWA's reporting requirements, 33 U.S.C. § 1321(b)(5). Alaska invoked the independent source rule, arguing that another federal statute, which did not carry immunity, created a simultaneous duty to report the spill. *Hazelwood*, 836 P.2d at 946. It also raised the inevitable discovery doctrine, arguing the spill was so large that it would have been discovered regardless of Hazelwood's notification. *Id.* at 950.

In an apologetic tone, the Court found no basis to grant the evidentiary exceptions, holding the CWA to confer blanket immunity to persons complying with the Act's reporting requirements. *Id.* at 954. As a result, Hazelwood's lower court conviction for negligent discharge of oil was reversed, and the accompanying 1000 hours community service and $50,000 in restitution were dropped.

### D. *Ninth Circuit Rules on Five Gallon Spill*

The Ninth Circuit Court of Appeals reversed a district court ruling, holding that the Coast Guard could not revoke or suspend a captain's license in the absence of finding that he, and not his vessel, violated the CWA, 33 U.S.C. § 1251 *et seq. Klatt v. United States*, 1991 U.S. Dist. LEXIS 7344 (N.D. Cal), *reversed*, 965 F.2d 743 (1992). The controversy arose after the captain reported to the Coast Guard that his ship discharged two to five gallons of oil into Amorco Wharf, in Martinez, California.

The Coast Guard sought to suspend or revoke the captain's license under 46 U.S.C. § 7703, which allows such action if the licensee violates any law intended to protect navigable waters. The Coast Guard argued that CWA section 1321(b) imposes strict liability against "a person in charge of any vessel" discharging oil to navigable waters, and therefore the captain was subject to disciplinary action under 46 U.S.C. § 7703(1)(A). *Klatt*, 965 F.2d at 745-46. However, the Court held that a no-fault violation of the CWA could not be the basis for Coast Guard action against the captain's license. Despite the minor extent of the spill, the Court's ruling suggests that strict liability pollution laws can not justify attacks on mariners' licenses under 46 U.S.C. § 7703, unless some degree of culpability is involved.

### E. *Court Denies Averted Liability Award for Salvors*

The District Court for the Eastern District of Louisiana ruled on December 2, 1992, that plaintiffs rescuing a runaway barge full of benzene could not recover an award for the averted liability defendants would have faced under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, and the OPA, 33 U.S.C. § 2701 *et seq. Trico Marine Operators, Inc. v. Dow Chemical Co.*, 809 F. Supp. 440 (E.D. La. 1992).

In November 1990, defendants' *M/V Lisa* broke away from its benzene-laden tow in rough seas. Plaintiffs helped recapture the barge and brought action to recover an award for the environmental damage liability they helped avert. The District Court looked to traditional criteria for assessing salvage awards, *id.* (citing *The Blackwall*, 77 U.S. (10 Wall.) 1 (1869)), as well as the 1989 Convention on Salvage and Lloyds of London's Open Salvage Form, and it refused to adopt a rule allowing awards above the value of the salvaged property. *Trico Marine*, 809 F. Supp. at 443.

However, influenced by dicta in *Allseas Maritime v. M/V MIMOSA*, 812 F.2d 243 (5th Cir. 1987), the Court added an additional factor to the traditional list for determining salvage liability and held that plaintiffs' skill and efforts in preventing environmental damage must be assessed in determining compensation. *Trico Marine*, 809 F. Supp. at 443. Thus, although the Court for the first time allowed averted environmental impacts to be considered in compensation awards, it retained a liability cap equal to the value of the salvaged property, thereby protecting merchants from the lofty liabilities attached to CERCLA and the OPA.

### F. *District Court Says No Economic Damages for Spill*

On February 25, 1992, the District Court for the Eastern District of Michigan refused to find recoverable economic damages under the OPA, 33 U.S.C. § 2701 *et seq.*, and traditional tort theories after an oil spill blocked a shipping channel and harmed local businesses. *In the Matter of the Petition of Cleveland Tankers, Inc.*, 791 F. Supp. 669 (E.D. Mich. 1992).

The Court first applied a "bright line" rule to refuse economic damages absent physical injury to a proprietary interest. *Id.* at 672. Next, the Court reviewed the damages provisions in OPA section 2702 and ruled that only subsistence reliance on natural resources, "such as water, to obtain the minimum necessities for life," could justify economic damages stemming from the damage of such resources. *Cleveland Tankers*, 791 F. Supp. at 678. Because claimants suffered damages in the form of lost business and increased operating costs, the Court barred the claims.

### G. *Strict Liability for Trans-Alaska Pipeline Oil*

On August 31, 1992, the Ninth Circuit Court of Appeals affirmed a district court decision holding that the strict liability provisions of the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. § 1651 *et seq.*, cover spills occurring after ships transfer oil at sea. *Slaven v. BP America, Inc.*, 786 F. Supp. 840 (C.D. Cal. 1991), *aff'd*, 973 F.2d 1468 (9th Cir. 1992).

The controversy arose on February 7, 1990, when the tanker *American Trader* spilled approximately 400,000 gallons of crude oil in the Pacific Ocean, causing widespread damage to the beaches and waters off Huntington Beach, California. The *American Trader*'s cargo had been transloaded, or "lightered," at sea from the tanker *Keystone Canyon*, which had taken on the oil in Alaska and had sought to lighten its load to navigate shallow coastal areas.

Plaintiffs injured by the spill filed suit for compensation from the Trans-Alaskan Pipeline Fund, arguing that the strict liability provisions in TAPAA section 1653(c), applying to oil originating from the Pipeline, supported their claim. *Slaven*, 973 P.2d at 1471. Defendants argued that only spills from the vessel which originally received the oil from the Pipeline could trigger strict liability. *Id.*

The Court of Appeals closely examined the plain language, legislative history, and agency interpretation of the TAPAA and held that the TAPAA's comprehensive land- and marine-based liability scheme imposed strict liability on spills of transloaded oil. *Id.* at 1478. The Court reasoned that Congress could not have intended to allow a tanker to load oil from the Pipeline, then transfer the oil to another vessel to escape liability during the dangerous southward voyage. *Id.* at 1475. In effect, the Court ruled that TAPAA's strict liability follows the oil taken from the Pipeline rather than the vessel which originally loaded it.

## XIII. National Marine Sanctuaries Program

### A. *Reauthorization*

Congress reauthorized the National Marine Sanctuaries Program in 1992, making significant revisions to broaden and strengthen the program's conservation, education, enforcement, and other mandates. Pub. L. 102-587. The most important revision requires the Secretary of Commerce to consider "maintenance of critical habitat of endangered species" when evaluating proposed sanctuaries. *Id.* § 2103(b)(1). The Act also allows NOAA to review any federal agency action that might impact a sanctuary resource, *id.* § 2104(d), and requires NOAA to review and revise sanctuary management plans every five years. *Id.* § 2104(e). Illegal damage to or possession of sanctuary resources is now prohibited, *id.* § 2106, and civil penalties have been raised to a maximum of $100,000. *Id.* § 2107(a). The Act also authorizes appropriations for the program in the amounts of $8 million for FY 1993, $12.5 million for FY 1994, $15 million for FY 1995, and $20 million for FY 1996. *Id.* § 2111.

### B. *New and Modified Sanctuaries*

Congress designated or modified several national marine sanctuaries in 1992. The Stellwagen Bank Sanctuary bans sand and gravel mining in the rich fisheries and whale calving grounds off the coast of Massachusetts, Pub. L. 102-587, while the Hawaiian Humpback Whale Sanctuary includes important breeding, calving, and nursing areas for the endangered humpback whale and requires develop-

ment of a comprehensive management plan. *Id.* The Flower Garden Banks Sanctuary includes coral reefs and rich marine life 110 miles south of Texas. Pub. L. 102-251.

Furthermore, Congress finalized designation of the Monterey Bay Sanctuary, requiring a report on vessel traffic through the area and banning all oil and gas activities, Pub. L. 102-587; amended the Florida Keys Sanctuary Act to prioritize research needs, establish long-term ecological monitoring, and implement a water quality program, *id.*; and prohibited oil and gas activities within the proposed Olympic Coast Sanctuary off Washington State. *Id.*

Mara Brown
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March 15, 1993

For further information on subjects covered in the *Ocean and Coastal Law Memo*, contact Professor Richard G. Hildreth, Ocean and Coastal Law Center, University of Oregon School of Law, Eugene, OR 97403-1221. Tel. (503) 346-3845.

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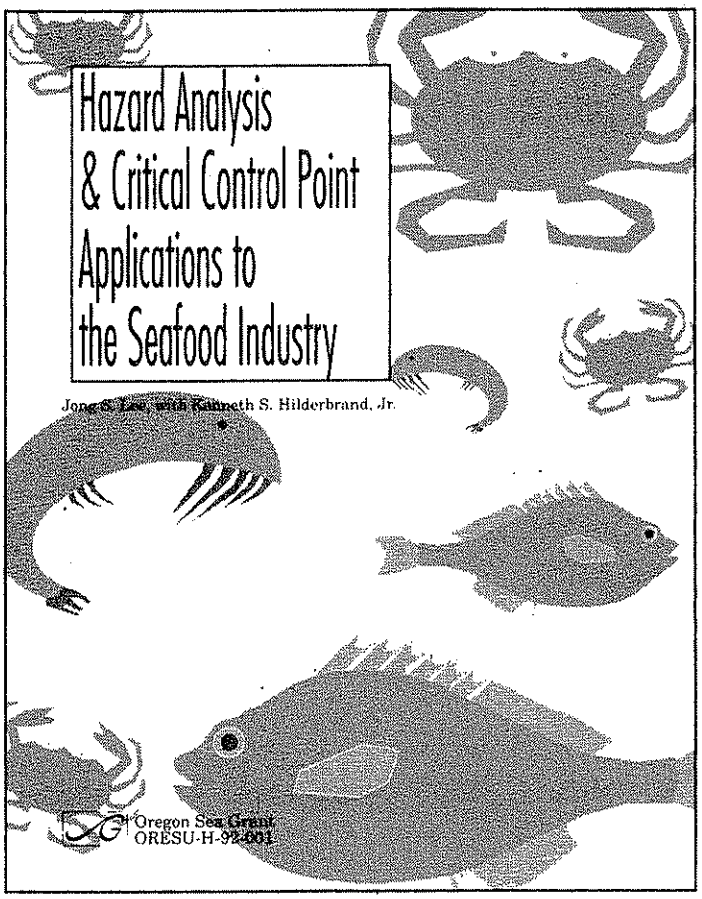
# Publication Announcement

Oregon Sea Grant

**Hazard Analysis and Critical Control Point Applications to the Seafood Industry**
*Jong S. Lee, with Kenneth S. Hilderbrand, Jr.* 1992. Publication no. ORESU-H-92-001. 28 pages. Paper $4.00.

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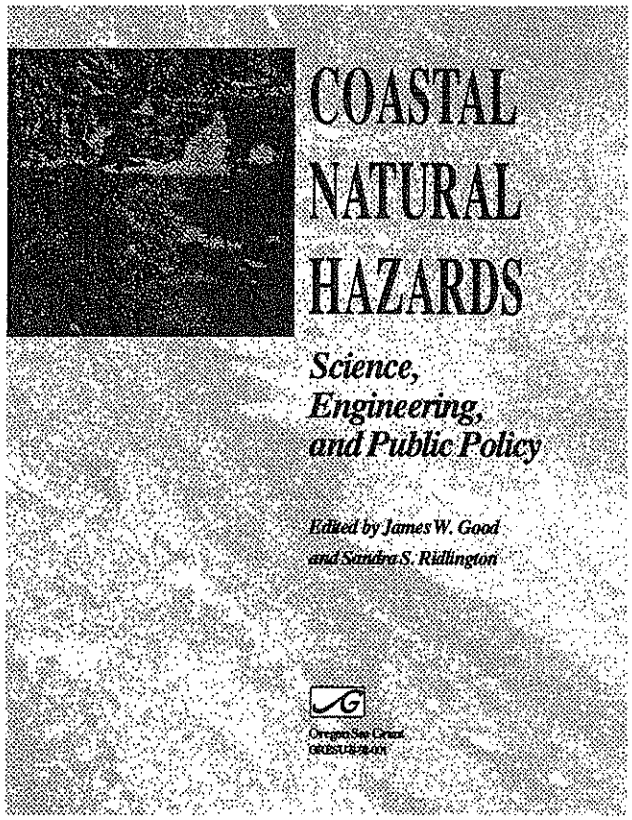
# Publication Announcement

## Oregon Sea Grant

**Coastal Natural Hazards: Science, Engineering, and Public Policy.** *James W. Good and Sandra S. Ridlington, editors.* Publication no. ORESU-B-92-001. 162 pages. Paper $15.00.




If you're thinking of building a home on the coast of Oregon, Washington, or California—or you're one of the people who regulates such building—*Coastal Natural Hazards: Science, Engineering, and Public Policy* is a publication for you. The book lays out the risks of building on the sifting sands and eroding sea cliffs that typify the U.S. Pacific coast. It also looks at some of the ways people have tried to stop the changing coastline from doing what comes naturally.

Although written mainly for lay readers, the book grew out of an October 1990 Oregon conference of coastal geologists, oceanographers, engineers, planners, and resource managers. At that conference, distinguished participants reviewed the state of knowledge in their specialities.

In this book, we learn about the effects of El Niños on beach and shore erosion and about recent research into factors that control sea cliff erosion. Scientists present evidence for periodic great subduction zone earthquakes that have occurred along the Pacific Northwest coast and speculate on when the next quake might strike. Policy analysts introduce planning and engineering approaches to hazard mitigation on the West Coast. They also discuss the successes and shortcomings of public policies designed to deal with development in hazardous areas.

The book should serve as a primer for the newcomer to the subject of coastal natural hazards, whether a local official, property owner, realtor, or coastal visitor. In addition, it should be a useful reference for the policymaker, emergency manager, professional planner, beach and coastal manager, academic, and student.

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