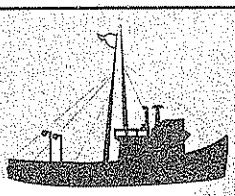

Ocean and Coastal Law Memo

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Recent Developments in Ocean and Coastal Law, 1991

International Developments

I. GATT Ruling

The panel on General Agreement on Tariffs and Trade (GATT) ruled against the U.S. on the United States' first trade embargo enforced under the Marine Mammal Protection Act (MMPA) and the Pelly Amendment. The embargo was imposed on Mexican and Venezuelan tuna under the MMPA and the Pelly Amendment because both countries exceeded U.S. limits on incidental take of dolphins during tuna operations. The Secretary of Commerce was forced to impose sanctions. See Earth Island Institute v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991), reported in this memo. Under the Pelly Amendment, fish product embargoes may be placed on nations engaging in activities that "diminish the effectiveness of international conservation agreements."

The GATT panel, serving as an international body since 1948, articulates agreed rules for international trade that reduce trade barriers and promote international relations. The GATT panel held that the U.S. embargo acted as a quantitative restriction on importation and violated GATT.

The dispute process is still underway and the implications of the GATT ruling are unclear. If the ruling is adopted by GATT members, GATT requires the offending country to announce a schedule to comply with the ruling or, if compliance is impossible, compensate the country for the violation. The U.S. Congress has expressed reluctance to amend the MMPA to comply with the ruling. There is also discussion of possibly amending GATT. For an excellent article examining GATT consistency with U.S. fishing laws, see McDorman, "The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins, and Turtles," 24 Geo. Wash. J. Int'l L. & Econ. 477-525 (1991).

II. High Seas Driftnets

A. The Wellington Convention

In developments concerning high seas driftnets, the U.S. Senate ratified the Convention for Prohibition of Fishing with Long Driftnets in the South Pacific, commonly known as the Wellington Convention. See Convention, opened for signature Nov. 29, 1989, 29 I.L.M. 1449. The Wellington Convention prohibits driftnet fishing in the South Pacific Ocean and further bans transshipments of driftnet catches in waters within the South Pacific. By becoming a party to the Convention, the U.S. will prohibit driftnet fishing in all areas of the U.S. Exclusive Economic Zone (EEZ) within the Convention Area and forbid U.S. nationals from fishing with driftnets in the vicinity. The obligation will apply to the U.S. EEZ around American Samoa and certain unincorporated U.S. islands.

B. United Nations

The United Nations General Assembly adopted a resolution reducing the use of driftnets on the high seas in 1992. G.A. Res. 197, U.N. GAOR, 45th Sess., Supp. No. 49, at 123 (1990). The resolution reduces the number of vessels involved in the fishery, limits net length, and restricts areas of fishing with driftnets. By the end of 1993 the resolution calls for a "global moratorium in large-scale pelagic driftnet fishing."

The United States adopted the resolution only after Congress withdrew unilateral legislation that would have forced the President to enforce the Pelly Amendment against large-scale driftnet nations. See, The Driftnet Moratorium Enforcement Act of 1991, S. 884, 102d Cong., 2d Sess. (1991).

III. International Whaling Commission

In news concerning the protection of marine mammals, the International Whaling Commission (IWC) met in Reykjavik, Iceland, for their 42d annual meeting. This year, the Commission is under considerable pressure to lift the 1985-86 commercial whaling ban. Recent studies revealed that certain whale stocks were making a recovery due to the ban. The studies indicated that the bowhead whale increased in population by 3% a year since 1986. Though a date was not set to lift the ban, Iceland tentatively planned to withdraw from the IWC in 1992 if the ban was not lifted for certain stocks. Also of interest, the U.S. was successful on gaining a three-year (1992-94) quota for Eskimo subsistence hunts, which includes taking 41 bowheads and permitting 54 strikes a year.

IV. Antarctic Treaty on Environmental Protection

The United States joined 25 other nations to protect the Antarctic environment by signing a 50-year ban on oil and mineral exploration. Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455. If entered into force, the treaty prohibits "[a]ny activity relating to mineral resources, other than scientific research." The ban can only be lifted after 50 years and then only if a consultative party so requests. If a party does not request a review of the protocol, the prohibition can continue indefinitely.

In addition, annexes to the treaty establish legally binding measures on the conservation of Antarctic plants, waste disposal, marine pollution, and environmental assessment procedures. The treaty will take effect when ratified by the 26 signatory nations which is expected to take two years.

V. International Maritime Organization

The Senate ratified a treaty signed by the 19 nations of the International Maritime Organization that calls for the creation of a global oil spill response network. The International Convention on Oil Pollution Preparedness, Response, and Cooperation of 1990 requires ships to have oil pollution response plans on board as well as requiring national response plans that would demand prepositioning of response equipment. See Convention, Nov. 30, 1990, 30 I.L.M. 735. The signing nations will also share technical support and research. The treaty is effective after 15 nations ratify it.

VI. U.S./Russian Maritime Boundary

President Bush and then Soviet leader Mikhail Gorbachev signed a maritime boundary agreement that established a 1,600 nautical mile boundary between Alaska and Siberia in the Bering and Chukchi seas. The agreement, signed in 1990, culminated nine years of negotiations between the two countries. The primary obstacle was the interpretation of the 1867 Convention on the Cessation of Alaska. Both countries used a different cartographical method. The discrepancy between the two methods compromised 15,000 square nautical miles. The dispute was resolved using a geodetic line favoring the United States. Agreement on the Boundary, June 1, 1990, U.S.-U.S.S.R., 29 I.L.M. 942.

Domestic Developments

I. Beachfront Property

A. Takings Claims

Destruction caused by Hurricane Hugo in 1989 has stirred litigation that has resulted in appeals to the U.S. Supreme Court. South Carolina, which was hit very hard by the hurricane, has a development restrictive coastal zone management plan (CZMP).

Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991), cert. granted, 112 S. Ct. 436 (1991):

The U.S. Supreme Court will review a South Carolina appellate decision that refused to find a taking when the state's Beachfront Management Act prevented a landowner from building in the critical beach/dune system. The trial court had earlier awarded the landowner $1.2 million as just compensation for a taking.

The Beachfront Management Act set forth specific legislative findings that the beach/dune system was vital to the public interest. The appellate court believed that since Lucas acquiesced to the validity of the legislative findings and policies, he conceded that the erection of new construction "inter alia, contributes to the erosion and destruction of this public resource" and that prohibiting construction was necessary to protect the public from harm.

Lucas argued he was unable to construct any structure on his property which clearly frustrated his "investment backed expectations." However, the court relied on Mugler v. Kansas, 123 U.S. 623 (1887), which held a taking does not occur when a regulation exists to prevent serious public harm, the so called nuisance exception to takings. The court did not determine whether Lucas lost all economically viable use of his property.

Beard v. South Carolina Coastal Council, 403 S.E.2d 620 (S.C. 1991), cert. denied, 112 S. Ct. 185 (1991):

In another case against South Carolina, the court did not find a taking when a landowner was denied permission to build a bulkhead on beachfront property because the construction would violate the state's CZMP. The proposed bulkhead would extend from 18.5 feet to 24 feet past a previously built wall on three separate lots. Since 100 feet of each parcel would remain unaffected by the law, there was not a taking because the entire parcel is considered as a whole. Further, the court found the plaintiffs could sell the entire piece of property including the area between the proposed and existing walls. The court found a legitimate state interest in protecting the coastal environment and regulating property was necessary to protect against serious public harm.

Esposito v. South Carolina Coastal Council, 939 F.2d 165 (4th Cir. 1991) (appeal pending):

In still another case arising in South Carolina, the Fourth Circuit ruled that the South Carolina Beachfront Management Act that prohibited reconstruction of destroyed buildings near the shoreline did not unconstitutionally take private property.

Two landowners brought separate actions which were consolidated on appeal. In Esposito v. South Carolina Coastal Council, No. D:88-2055-1 (D.S.C. 1989), the lower court had denied Esposito's taking claim in which the act prevented him from rebuilding dwellings that were "destroyed beyond repair" in an area 20 feet landward of the baseline. However, the same federal district judge found a taking for another landowner who was unable to build on his beachfront property because 90% of his lot was in the prohibited zone. Chavous v. South Carolina Coastal Council, No. D:89-0216-1 (D.S.C. 1990). See Ocean and Coastal Law Memo, No. 37 (Feb. 1991).

The Fourth Circuit found that prevention of shoreline erosion was a legitimate state interest that needed protection. The court said, "South Carolina's beach/dune system is a valuable resource that not only protects life and property from dangers of the ocean, but also provides a source of recreation and tourism-related revenue." The court refused to second guess the legislature and concluded that there existed an "essential nexus" between the means chosen and the goals of the act. The court further believed that diminution of value alone was insufficient to show a taking without compensation.

B. Other Beachfront Property Issues

Palm Beach v. Dep't of Natural Resources, 577 So.2d 1383 (Fla. Dist. Ct. App. 1991):

The Sierra Club and a private landowner had standing to challenge a Florida Department of Natural Resources (DNR) determination that the department lacked jurisdiction to issue a permit to trim dune vegetation. The court held the DNR had jurisdiction over the matter based on state statutes. The standing issue was settled relying on plaintiffs' assertions that issuance of the permit would cause adverse impacts on their properties as well as the beach/dune system itself.

Conservancy v. A. Vernon Allen Builder, 580 So.2d 772 (Fla. Dist. Ct. App. 1991):

In this case, the Florida Department of Environmental Regulation (DER) was required to consider future developments on a coastal barrier island before they granted a permit to construct a sewer system to the mainland.

Though the possibilities of expanded construction on the island were only speculative, the court held water quality and the public interest required the DER to consider future developments before issuing a permit.

State of New York v. DeLyser, 759 F. Supp. 982 (W.D.N.Y. 1991):

The state does not have an implied right of action under the Rivers and Harbors Act (RHA) to enjoin a defendant from further construction and occupation of a residential structure on pilings in a bay. The Corps of Engineers had failed to enforce a cease work order when construction violated the owners' permit. The court held that the RHA could only be enforced by the federal government.

Similarly, the state could not enjoin further construction without the permit consistency required by § 307(c)(3)(A) of the Coastal Zone Management Act. However the state could sue the federal government to fulfill its CZMA obligations.

The court finally emphasized that the state had its own remedy, but not a federal remedy. The state had "full control over navigable waters within its boundaries subject only to Congress' power to regulate interstate commerce."

C. *Public Trust Doctrine/Littoral Rights*

Atlantic Richfield Co. v. State Lands Commission, 21 ELR 21320 (Cal. Super. Ct. 1990):

Under the Public Trust Doctrine, an oil company was not allowed to build new platforms on an existing offshore oil lease situated in coastal state waters. The California State Lands Commission denied the permit to build based on the risk of oil spills that could endanger a nearby wildlife and marine reserve. ARCO relied on Union Oil v. California, 512 F.2d 743 (9th Cir. 1975), which held that the Secretary of the Interior could suspend leases but not cancel them. The court believed the decision did not control because there was no federal public trust doctrine. Additionally, ARCO could not rely on Commission members' statements that the project would be approved. The court rejected the argument that the state must determine all limitations on an oil lease at the time of leasing. When the leases to ARCO were issued decades ago, there was no way of forecasting the "unknowns and unknowables of developments" such as the nearby marine reserve.

Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990), cert. denied, 112 S. Ct. 278 (1991):

The Ninth Circuit found that public lands ceded to Hawaii by the U.S. were subject to the public trust which included submerged land added by erosion. The case arose when the state ceded 1.75 acres of tidal land to a private owner for development of a hotel. After a lower court denied an injunction to stop construction, the tidal area was filled and construction of a hotel began. The petitioner claimed that the state misconstrued the seaward boundary because erosion had occurred since an 1898 patent had established the boundary. Therefore, the state should own the land and it should be subject to the public trust. Though the court found that the 1898 patent did not include the ceded land and therefore was not subject to the trust, a previous Hawaiian case had held the public trust applied to new land created by lava flows. See State By Kobayashi v. Zimring, 566 P.2d 727 (Haw. 1977). Similarly, the Ninth Circuit believed that submerged land created by erosion since the 1898 patent would include state land subject to the public trust. The case was remanded to determine whether the 1.75 acres became submerged because of natural erosion after 1898.

Cooper v. United States, 1991 WL 277744 (E.D.N.C. 1991):

The district court held that the public trust doctrine does not apply to the dry sand area between the mean high watermark and a frontal dune seawall. North Carolina statutes expressly established private ownership in the dry sand. Therefore, the dry sand owners were unable to recover taxes paid on the dry sand strip of land.

Hall v. Nascimento, 594 A.2d 874 (R.I. 1991):

In this case, the Rhode Island Supreme Court reversed a lower court's decision that had granted several plat owners littoral rights to land that was created by the Corps of Engineer's filling a small portion of a bay. The fill expanded the shoreline by 260 feet. Before the filling, several plats of land abutted the bay on the defendant Association's property. A ten-foot strip of land in front of the plats was originally given to the Association for the use of association members. The court held that the boundary lines presented on the original plat control. Since the Association owned the ten-foot strip, the

Association, not the plat owners, acquired littoral rights to the then-submerged area. The Association's rights however were subservient to the state's fee title subject to the public trust.

D. The Navigation Servitude

Boone v. United States Corps of Engineers, 944 F.2d 1489 (9th Cir. 1991):

The Ninth Circuit affirmed a lower court's ruling that allowed the owner of a Hawaiian lagoon to exclude the public from its development. The court held that the lagoon was not subject to the federal navigation servitude and the Corps could not require access without just compensation. The lagoon was built on the site of a fishpond created in 1829 by Hawaiian natives when they built a seawall across the inlet to the sea. In the 1970's the wall was taken down and the lagoon was attached to the ocean by a canal. The lagoon was navigable.

Despite the navigability, the court affirmed the lower court which had found the navigation servitude did not apply because the lagoon was incapable of use as a continuous highway for the purpose of navigation in interstate commerce. The court could not distinguish this case from Kaiser-Aetna v. United States, 444 U.S. 164 (1979), despite the fact that the depth of the lagoon was three feet deeper than the fishpond in Kaiser-Aetna and that here the lagoon was created entirely by an artificial wall. The Fifth Amendment required compensation if the owners lost their right to exclude.

II. Wetlands

A. Wetlands Legislation

One of the most controversial environmental issues of the year concerns wetlands and the Bush Administration's proposed rules that would include a narrower definition of wetlands and a more streamlined regulatory approach to wetlands. At the heart of the proposal is a rewrite of the Federal Manual for Identification & Delineation of Wetlands that was agreed upon by the Environmental Protection Agency (EPA) and the Corps early in 1989. 56 Fed. Reg. 40445 (1991).

The current regulatory definition of a wetland is "land covered by water or saturated with water at a depth no greater than 18 inches beneath its surface for at least seven consecutive days during the growing season." The proposed changes would narrow the definition of wetlands by lengthening the time the soil must be saturated from 7 days to 21 days or inundation for 15 or more consecutive days. The new proposal also changes the vegetation, soil, and growing season criteria for land to be considered wetlands.

The three components of wetlands--hydrology, vegetation, and soil--were interrelated in the 1989 manual. Since often it was impossible to consistently have all three criteria, the 1989 manual allowed a wetland delineation if two of the criteria were met; the third was inferred. The proposed manual requires all three criteria to be met conclusively.

The burden of proof is also shifted. Under present guidelines, the burden is on the owner to show that the land is not a wetland or to obtain a development permit from the Corps. The 1991 proposal places the burden on the agencies to prove the land is a wetland. The administration claims the shifted burden makes it easier for the agencies to explain to the landowners how the wetlands are being delineated.

To expedite the permit process, the proposal incorporates a plan to grant permits automatically if review extends beyond six months and to expand the use of general permits, for which individual applications are not required.

Another part of the proposal establishes a mitigation banking system that would allow private parties to develop or restore wetlands to compensate for damage elsewhere. These parties would be able to accrue mitigation credits on specific wetland categories.

Some parts of the manual may be codified into the CFR despite Hobbs v. United States, 32 ERC 2091 (1990), aff'd, 947 F.2d 941 (4th Cir. 1991), which upheld the position that the manual was not subject to the Administrative Procedure Act. By codifying some of the requirements, the administration claims the public will be more actively involved in the decision-making process.

Interestingly, it is no longer legal for the Corps to expend funds under the 1989 delineation manual. As of August 17, the Corps must use the 1987 delineation manual to define wetlands. P.L. 102-104 (1991). The EPA must still implement § 404 under the 1989 manual's definitions. To add to the confusion, several states, including Oregon, may continue using the 1989 definition

for state designated wetlands if the federal proposal becomes law.

According to the administration, the proposed revisions are intended to reduce the potential for erroneous wetland determinations. However, scientists and environmentalists disagree with the administration. In Washington State, scientists applied the new definitions to 22 of the state's recognized wetlands. Only four of the sites remained wetlands under the 1991 proposal.

B. Wetland Takings and § 404

Presbytery of Seattle v. King County, 787 P.2d 907 (Wash. 1990), cert. denied, 111 S. Ct. 284 (1990):

The Washington Supreme Court held that an owner of property containing wetlands must exhaust his administrative remedies before bringing an action for an inverse taking without compensation. The owner challenged a county ordinance that prohibited new construction within a buffer zone around wetlands. One-third of the owner's land consisted of wetlands. The court held that before the landowner could challenge the ordinance, he must first exhaust his administrative remedies because he was challenging the ordinance on its application, not on its face. The court found that exhaustion of administrative remedies was required because the ordinance allows development of wetlands if the application of the ordinance denied all reasonable uses of the property. Since it was impossible to determine beneficial use of the property without utilizing the application process, the court did not grant relief. Further, the court overruled Allingham v. Seattle, 109 Wash.2d 947 (1988), where the court had looked only to one portion of a regulated piece of property to determine whether a taking had occurred. Washington has now joined the federal rule in takings jurisprudence that a parcel of land is analyzed in its entirety with respect to regulatory impacts.

The U.S. Claims Court denied two landowners' takings claims when the Corps of Engineers refused to issue permits to fill wetlands.

In Ciampetti v. United States, 22 Cl. Ct. 310 (1991), the landowner purchased several lots including known wetlands and uplands for residential development. Though the two tracts were divided by a strip of land bought by the developer in an earlier unrelated sale, the court found that the owner was forced to buy the wetlands in order to purchase the uplands and therefore the transaction was treated as a single event for financing purposes. It was then unrealistic to focus exclusively on the wetland portions to determine a taking.

His investment backed expectations were not frustrated because he had notice of the wetlands designation before the sale. Additionally, his belief that a 1905 riparian grant to develop the property would supplant the Corps' determination was unreasonable.

In another case, the Corps' failure to identify which portion of a tract of land required a dredge and fill permit under § 404 and a 16-month delay of issuing a permit was not a taking. In Dufau v. United States, 22 Cl. Ct. 156 (1990), aff'd, 940 F.2d 677 (1991), the court believed that despite the Corps' failure to identify which part of land was safe to develop, the plaintiff landowners could not reasonably believe that they had lost all economic viability of their land. The 16-month delay did not constitute a temporary taking because it was not an "extraordinary delay" and 10 of the 16 months involved mitigation negotiations.

Route 26 Land Development Association v. United States, 753 F. Supp. 532 (D. Del. 1990):

The court held that the Corps' jurisdiction over a landowner's wetlands cannot be challenged until completion of the landowner's application for a permit under Clean Water Act (CWA) § 404.

Determination of jurisdiction and the issuance of the cease and desist order is not a final agency action, even though the cost of obtaining an after-the-fact permit would be substantial. The jurisdiction decision and the takings claims were not ripe for review until the Corps determined whether to allow filling.

United States v. Bayshore Associates, Inc., 934 F.2d 1391 (6th Cir. 1991):

The Sixth Circuit upheld a lower court's restraining order that prevented the defendant from dredging at its boat club because the disposal site included wetlands. The defendant obtained a § 404 permit from the Corps for maintenance and dredging and disposal of dredge spoils but later changed the disposal location without approval. The Corps claimed the new site included wetlands. The court held that prevention of dumping on wetlands

protected the public interest, that the dumping could cause irreparable harm, and that the government was likely to succeed on the merits.

III. Fisheries

A. The Endangered Species Act

1. Snake River Sockeye Listed as Endangered Species

The National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service have added the Snake River sockeye salmon to the list of endangered and threatened wildlife under the Endangered Species Act (ESA). 56 Fed. Reg. 58519 (1991), 57 Fed. Reg. 212 (1992). NMFS expedited the listing after only four sockeye returned to their spawning grounds in Idaho. NMFS is presently in the process of determining the salmon's critical habitat.

The listing creates a complex procedure involving coordination between numerous agencies, including the Forest Service, the Corps of Engineers, the Bonneville Power Administration, the Federal Energy Regulatory Commission, and the Pacific Fishery Management Council. The listing also has international ramifications with Canada. Further, NMFS has proposed that the Snake River chinook salmon be listed as a threatened species under the ESA. 56 Fed. Reg. 42970 (1991).

As a possible harbinger of things to come, the 1990 listing of the Sacramento River winter-run chinook salmon as threatened resulted in a temporary restraining order against the Sacramento River's largest irrigation district. The district was forced to reduce its diversion by 50% to maintain in-stream flows. United States v. Glen-Colusa Irrigation District, CV-S-91-1074 (E.D. Cal. 1991).

2. Steller Sea Lions

Late in 1990, the steller sea lion was listed as a threatened species under the ESA. 55 Fed. Reg. 4920 (1990). Regulatory measures included establishment of buffer zones of three nautical miles around Alaskan rookeries and an incidental kill limit of 675 lions annually. Designation of critical habitat is currently underway.

There is uncertainty whether commercial pollock fishing reduces the food supply for the sea lion or increases it (by removing larger cannibalistic pollock which allows more juvenile pollock for prey). Litigation resulted concerning the North Pacific Fishery Management Council's proposal to raise the total allowable catch (TAC) of pollock. Greenpeace lost a suit to enjoin the increase of TAC because NMFS had procedurally complied with the ESA. Greenpeace v. Mosbacher, Civ. No. 91-887 (Z)C (W.D. Wash. 1991).

B. Turtle Excluder Devices (TED's)

The National Oceanic and Atmospheric Administration (NOAA) issued a final rule that requires shrimp trawlers in federal waters to comply with sea turtle conservation requirements. Under the rule, shrimp trawlers over 25 feet in length trawling from North Carolina to Florida must use TED's. The rule does not preempt state regulations imposing more stringent requirements. 56 Fed. Reg. 43713 (1991).

C. Challenges to Fishery Management Plans

Washington Crab Producers v. Mosbacher, 924 F.2d 1438 (9th Cir. 1991):

The Ninth Circuit affirmed a lower court's holding that a fishery management plan (FMP) off the Washington coast need not consider information regarding allocation of fish between treaty Indians and non-treaty Indians in inland fisheries.

The original complaint alleged the Secretary of Commerce did not follow the Magnuson Fishery Conservation and Management Act (MFCMA) to establish ocean salmon fishing seasons with information adequate to determine if treaty/non-treaty fishermen would be provided allotted shares of runs of salmon originating in Washington rivers. Commercial and recreational fishermen argued that treaty Indians had harvested more salmon than themselves, so they wished to extend the ocean salmon season to make up for their share lost to the inland fisheries. The court held that the MFCMA did not require the Secretary to consider past catch disparities. The FMP was reasonable because the record demonstrated that it was concerned with adequate escapement to "perpetuate the various salmon species" and to make sure Indians got their allocated share in accordance with the treaties.

In other litigation, the court sustained an FMP that incorporated an individual transferable quota (ITQ) system for surf clams. Sea Watch International v. Mosbacher, 762 F. Supp. 370 (D.C.D. Ct. 1991). The FMP created ITQ's which allow trans-

ferable permits to fish for a fixed percentage of the annual aggregate catch quota for the species and area; i.e., a 5% ITQ is entitled to 5% of the catch.

The plaintiffs asserted that the ITQ system amounted to privatization of the industry and that it was intended to drive small fishers out of the fishery. The court held that the quota system was not arbitrary or capricious and did not violate the MFCMA's national standards even though two fishermen held ITQ's totalling 40% of the annual catch quota for surf clams.

NOAA's final rule that banned the use of drift gillnets in the Atlantic king mackerel fishery was sustained in C & W Fish Co. v. Fox, 931 F.2d 1556 (D.C. Cir. 1991). NOAA's explanation that gillnets captured excessive quantities of unwanted fish provided an adequate basis for its decision to ban the nets. The agency's explanation that the ban would not affect the mackerel catch complied with the MFCMA requirement to obtain maximum sustainable yield. The ban was fair within the MFCMA even though the agency believed the ban benefitted hook and line fishermen over driftnetters.

D. Challenges to State Landing Laws

A Florida landing law that restricted the harvest of Spanish mackerel outside state waters for registered Florida vessels violated Equal Protection, the Commerce Clause, and the Supremacy Clause. Southeastern Fisheries Association v. Martinez, 772 F.Supp. 1263 (S.D. Fla. 1991). Equal Protection was violated because only citizens of Florida were prohibited from participating in the federal annual quota of Spanish mackerel. See Bateman v. Gardner, 716 F.Supp. 595 (S.D. Fla. 1989) aff'd, 922 F.2d 847 (11th Cir. 1990) and Ocean and Coastal Law Memo, No. 35 (July 1990). The Commerce Clause was violated because the landing law attempted to regulate fishing outside state waters by prohibiting vessels to use Florida ports in carrying legal cargoes of fish. The Supremacy Clause was violated because the Florida law conflicted with the MFCMA. The court reiterated that the federal government is responsible for the fish stocks outside state waters.

In another case, commercial fishermen successfully challenged part of an FMP that allowed state landing laws of redfish to remain despite a conflict with the FMP. In Southeastern Fisheries Association v. Mosbacher, 773 F.Supp. 435 (D.D.C. 1991), NMFS had closed the direct redfish fishery but allowed a 100,000-pound quota for incidental bycatch of the shrimp fishery. Four of the five gulf states prohibited landing of any commercial redfish. The district court held that failure to supersede state landing laws was arbitrary and an abuse of discretion. The redfish FMP required compliance with state laws even if a vessel was not registered in the state where the catch was landed. In effect, the FMP permitted fishermen to catch redfish but prohibited them from landing the fish.

Ampro Fisheries v. Yaskin, 588 A.2d 879 (N.J. Super. Ct. 1991):

A 1909 interstate compact between New Jersey and Delaware invalidated a New Jersey regulation that prohibited the seining of menhaden within .6 miles of the shoreline and prohibited "reduction" (fish meal) within 1.2 miles of the shoreline. The New Jersey statute was enacted to limit overcrowding near shore between recreationists and fishermen. The 1909 compact provided that both New Jersey and Delaware would share the regulations for Delaware Bay. The court invalidated the regulations even though neither state had implemented uniform statutes.

E. Fisheries Enforcement

The state of California could not charge fishermen who illegally caught abalone with grand theft larceny under the state's penal code. People v. Brady, 286 Cal. Rptr. 19 (Cal. Ct. App. 1991). The court declared that abalone were not the state's property within the terms of the penal code. The state acted only as a trustee to protect and regulate fishing for the common good. Despite the holding, the poachers were punishable under the Fish and Game Code.

Bateman v. United States, 768 F.Supp. 805 (S.D. Fla. 1991):

Owners of a shrimping vessel were not liable under the MFCMA for the captain's illegal possession of stone crabs. The court distinguished this case from the majority rule imposing strict liability on vessel owners for illegal actions of their captain. Here, the crabs were not caught for profit but only for consumption on the vessel.

United States v. Alexander, 938 F.2d 942 (9th Cir. 1991):

Defendants who were convicted of selling herring roe on kelp under an Alaskan law argued the state law conflicted with the Alaska National Interest Lands

Conservation Act (ANILCA) which permitted subsistence use of herring roe including "customary trade." Because ANILCA was a civil statute and did not regulate subsistence use or criminalize any conduct and the Alaskan law was an integral part of the framework protecting the state's fisheries, the law was not struck down. The case was remanded to determine whether the defendants were engaged in customary trade.

IV. Water Pollution

A. Oil Spills

Exxon Settlement

Alaska and the U.S. federal government settled three suits against Exxon Corporation arising from the 1989 Exxon Valdez oil spill. The $1.025 billion settlement was reached after a federal judge rejected an earlier settlement. Exxon pleaded guilty to four misdemeanors under three environmental laws--the CWA, the Refuse Act, and the Migratory Bird Treaty Act. The settlement consists of $900 million in fines of which $125 million will be used for restitution and rehabilitation of Prince William Sound.

In further litigation concerning the Exxon Valdez oil spill, a federal court held that compensation exceeding strict liability limits should be decided under general maritime law, not state law. In re Exxon Valdez, 767 F.Supp. 1509 (D. Alaska, 1991). General maritime law bars recovery for economic losses in the absence of physical harm. Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303 (1927). However, the rule from Robins did not apply to claims based on strict liability. Therefore the Trans-Alaska Pipeline Authorization Act (TAPAA) and an Alaskan strict liability statute controlled. TAPAA imposed a $100 million cap on damages while the Alaskan act imposed unlimited liability. The court held the two acts did not conflict for the first $100 million because the remedy was uniform under either statute. Any compensation over $100 million was to be decided under general maritime law.

Of potential significance to the Exxon spill, the Ninth Circuit held that TAPAA implicitly repealed the 1851 Limitation of Liability Act. In re Glacier Bay, 944 F.2d 577 (9th Cir. 1991). The ruling prevents vessel owners and operators from limiting their liability in connection with oil spills of trans-Alaska oil under the older act. The case arose from a 1987 oil tanker spill in Cook Inlet in Alaska. See In re Glacier Bay, 764 F.Supp. 1379 (1990), discussed in Ocean and Coastal Law Memo, No. 37 (Feb. 1991). The court held that TAPAA imposed an "irreconcilable conflict" with the limitation act. The court believed TAPAA by its nature was intended to become the controlling statute regarding trans-Alaska crude, and it included both strict liability and negligence principles of up to $100 million.

In other litigation concerning the same case, 16 fishermen injured from the spill were awarded $2.55 million. See In re Glacier Bay, D. Alaska: A-88-115 (1991). The $2.55 million will be used to determine a formula to apportion compensatory damages to the remaining 109 fishermen who filed suits.

B. Cleanup Enforcement

Kyoei Kaiun Kaisha v. M/V Bearing Trader, 760 F. Supp. 174 (W.D. Wash. 1991):

In an action to recover cleanup costs of a ship grounded in Alaska, the court held that the Federal Water Pollution Control Act (FWPCA) preempted common law claims of negligence, unseaworthiness, and nuisance. The limits set by the FWPCA were not sufficient to fully reimburse the government for cleanup costs. Though the Ninth Circuit had not ruled on the issue, the District Court believed the Ninth Circuit would rule for preemption based on rulings from other circuits.

Chevron U.S.A. v. Yost, 919 F.2d 27 (5th Cir. 1990):

Regardless of actual harm, the EPA could initiate civil penalties under the FWPCA against spillers for spills creating a sheen on the water. Chevron reported 12 accidental discharges of oil to the Coast Guard and was assessed with $8,800 worth of civil penalties. The court held that if the EPA determines that a spill "may be harmful to the public health," then such a spill is subject to the penalty provision even in the absence of actual harm.

New York Coastal Fisherman's Association v. New York Sanitation Dep't, 752 F.Supp. 162 (S.D.N.Y. 1991):

In this action, the District Court held a citizen suit brought under the CWA could continue because the state of New York was not diligently prosecuting New York City to clean up a landfill that emitted leachate into Eastchester Bay. The suit was

brought after the State Department of Environmental Quality (DEQ) issued two consent orders that addressed the problem but failed to eliminate the flow of leachate from the site itself.

Though the state agreed the city did not comply with the CWA, the state argued that the consent orders showed that the state was diligently prosecuting the action under a state law that was comparable to the CWA. The court disagreed. Since 1983, when the leachate was first discovered, all that the DEQ had accomplished was to require the city to collect the leachate and then channel it into the bay. The state's target for city compliance with the CWA extended past 1995. The court said this was too long. Since there were viable alternatives to control the leachate, the citizens suit could proceed.

V. Other Developments

A. Dolphin Protection Consumer Information Act

The Dolphin Protection Consumer Information Act (DPCIA) was implemented this year. The act is a part of the Fishery Conservation Amendments of 1990 (P.L. 101-627). Essentially, the DPCIA regulates the use of labels suggesting that tuna is dolphin safe, amends the MMPA to require documentation regarding the use of large-scale driftnets, and authorizes civil penalties for violations.

NMFS implemented the plan which applies to all tuna caught in the Eastern Tropical Pacific and other fish known to be taken in large-scale driftnets with methods that injure marine mammals. Large-scale driftnet nations are required to provide certification by a "responsible government official" that the imported fish were not harvested with large-scale driftnets. 56 Fed. Reg. 47418 (1991).

B. Marine Mammal Protection Act

Earth Island Institute v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991):

The Ninth Circuit affirmed the lower court's preliminary injunction that banned the import of tuna from Mexico under the MMPA. The litigation led to the dispute under GATT discussed above. Under the MMPA, imports of tuna products must halt unless the Secretary of Commerce certifies that the nation's incidental kill rate of dolphins is comparable to that of the United States. The Secretary had found Mexico exceeded the MMPA limits and was forced to impose an embargo by the lower court. The next day, NMFS lifted the ban and determined that Mexico was within the limits on eastern spinner dolphins for the first six months of 1990. The government argued that a six-month reconsideration period was within their discretion. The court held that NMFS's reconsideration provisions conflicted with the MMPA. The MMPA required findings based on a full year's data, not six months. Using NMFS's reconsideration argument, "foreign nations could thus continually exceed MMPA limits for part of each year, yet never be subject to the bar."

Small Numbers Exception

The Fish and Wildlife Service issued a final rule for the incidental take of walruses and polar bears under the small numbers exception of the MMPA. The rule applies in the Chukchi Sea for the next five years. 56 Fed. Reg. 27443 (1991). The rule was issued after a suit was filed to force the Secretary of Interior to revoke an oil company's lease for harassing walruses during drilling operations. Trustees for Alaska v. Lujan, 919 F.2d 119 (9th Cir. 1990).

C. NEPA

Tongass Conservation Society v. Cheny, 924 F.2d 1137 (D.C. Ct. App. 1991):

The court rejected a citizens suit brought under the National Environmental Protection Act (NEPA) contesting the Navy's environmental impact statement (EIS) for a submarine testing range in an Alaskan fjord. The Navy had investigated 14 alternative sites for the Trident submarine testing range and concluded the fjord would be the best site because of limited ambient noise. The scientific data indicated that the fjord was the best site for testing, and since the data was supportable, only one EIS was required. The court also held that the EIS adequately addressed the testing range's impact on the local tourist industry even though the EIS addressed only the effects on sport fishing.

D. Marine Sanctuaries

1. Flower Garden Banks Marine Sanctuary

Flower Gardens Bank became the nation's 10th national marine sanctuary after 18 years of deliberations. The sanctuary includes a pair of coral reefs 12 miles apart and 120 miles off the Texas coast.

Under sanctuary regulations, anchoring, dredging, and oil and gas development are banned. Unfortunately, no regulation prohibits drilling or anchoring between the two reefs outside the sanctuary boundaries. Only recreational fishing is allowed.

2. Proposed Monterey Bay National Marine Sanctuary

NOAA is in the final stages of work on the Monterey Bay Marine Sanctuary which now includes six proposed alternative boundaries ranging from 460 square miles to 3,800 square miles. Oil and mineral development, dumping, and taking of marine mammals and seabirds will be prohibited. The area has a highly productive ecosystem and a wide variety of marine habitats.

3. Proposed Olympic Peninsula National Marine Sanctuary

NOAA has proposed designating 2,605 square nautical miles off the Olympic Peninsula of Washington State a national marine sanctuary. Though NOAA's proposal prohibits discharges of deposits within the proposed boundary and prohibits alterations of the seabed, the proposal only bans offshore oil drilling to the year 2000. 56 Fed. Reg. 47836 (1991).

The sanctuary encompasses a highly productive ecosystem in a pristine ocean and coastal environment that is home to ecologically and commercially important species of fish and marine mammals.

4. Other Sanctuaries

Thunder Bay in Lake Huron off the Michigan coast is now an active candidate for designation as a marine sanctuary. Work continues on the proposed Northern Puget Sound Marine Sanctuary in Washington as well as the proposed Norfolk Canyon Sanctuary off the Virginia coast.

E. Outer Continental Shelf Lands Act & Pollution

The Minerals Management Service (MMS) amended rules governing civil penalty assessment under the Outer Continental Shelf Lands Act (OCSLA). The amendment enables the MMS to assess civil penalties without first providing notice and time for corrective action in cases where the failure constitutes a threat of serious, irreparable, or immediate harm to the environment or property. 56 Fed. Reg. 21953 (1991).

The EPA has proposed rules that will establish air pollution control requirements for Outer Continental Shelf oil platforms within 25 miles of shore. The purpose of the requirements are to maintain federal and state air quality standards and to provide equity between onshore and offshore oil facilities. The proposal exempts most of the Gulf of Mexico. 56 Fed. Reg. 63774 (1991).

F. State Ocean Management

1. California

California voters passed the Marine Resources Protection Act of 1990 which will ban most gillnetting along the California coast by 1994. The initiative is designed to restore and maintain ocean resources and provide increased scientific and biological research to provide long-term protection of mammal and fish resources. Cal. Const. art. X, B, (1990).

2. Oregon

The Oregon Legislature passed two acts to protect the state's coastal waters and shores.

The Pacific Ocean Resources Compact attempts to create a legal mechanism where the Pacific States can regulate some ocean activities in the U.S. territorial sea and EEZ off the region's coast. ORS 196.175-196.185 (1991). The goal of the Compact is to better protect the environment by coordinating regional interests, especially prevention of oil spills and oil spill response planning. The Compact requires an interstate advisory panel that will work closely with the United States Coast Guard to prevent and deter oil spills.

Before the Compact is enforceable, it must be ratified by two or more of the states of Alaska, California, Hawaii, or Washington, and the Compact must acquire the consent of Congress. British Columbia may become an associate party without voting powers.

Oregon also passed the Oregon Ocean Resources Management Act. ORS 196.405-196.580 (1991). The act calls for a computerized system of coastal marine resource information that will be shared with California and Washington. By establishing such a system, the legislature intends to develop consistent oil spill response plans with adjacent states, work with federal agencies to protect marine habitat, and develop a regional approach to attain fisheries information. The act also prohibits oil and mineral exploration within state waters until 1995.

3. New Jersey

New Jersey beat a federal deadline by a year that would prohibit dumping of sewage sludge in the Atlantic. In 1988, Congress voted a final ban on ocean dumping of sewage sludge and ordered a rapid phase-in of land-based alternatives. Presently New Jersey is seeking ways to convert clean sludge to beneficial uses.

Erik J. Glatte
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Publication Update

TITLE: **1991 Supplement** to FEDERAL FISHERIES MANAGEMENT: A GUIDEBOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

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- ABSTRACT -

The **1991 Supplement** to FEDERAL FISHERIES MANAGEMENT: A GUIDEBOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT, 1985 Edition, is now available. Several major changes to the Magnuson Fishery Conservation and Management Act (MFCMA) have been made since publication of our 1985 Guidebook, Update 1, and Update 2. The 1991 Supplement includes a new section on the Gulf of Mexico fishery management plans with a listing of the regional fishery management council personnel. The supplement is published as a separate addition to be placed in the back of the loose-leaf pages of the 1985 Guidebook edition.

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