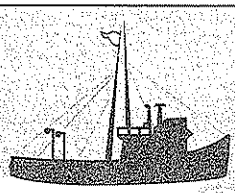


Ocean and Coastal Law Memo

OCEAN AND COASTAL LAW CENTER · SCHOOL OF LAW · UNIVERSITY OF OREGON · EUGENE 97403

Issue 40 May 1994

Recent Developments in Ocean and Coastal Law, 1993

International Developments

I. The 1982 United Nations Convention on the Law of the Sea

A. Ratification

The 1982 United Nations Convention on the Law of the Sea (UNCLOS or the Convention) has seen a flurry of activity in 1993. Seven countries--St. Kitts and Nevis, Zimbabwe, Malta, St. Vincent and the Grenadines, Honduras, Barbados, and Guyana--ratified the Convention. On November 16, 1993, the Convention received the 60th instrument of ratification or accession. LAW OF THE SEA BULL. (UN Division for Ocean Affairs and the Law of the Sea, New York, N.Y.), Dec. 1993, at 2. Article 308 of the Convention states that the "Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession." THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX 106 (1983). Accordingly, on November 16, 1994, the Convention will enter into force.

B. Major Powers Have Not Ratified Convention

However, the major powers and important maritime nations--the United States, Great Britain, and Germany--so far have not ratified or acceded to the Convention because of objections to Part XI of the Convention, which deals with mining of the deep seabed in the international area beyond national jurisdiction. Current Legal Developments. United Nations: Negotiations on the 1982 Law of the Sea Convention, 8 INT'L J. MARINE & COASTAL L. 530 (1993). Moreover, there is now a consensus that there will be a long period after the Convention comes into force when no seabed mining in the international area will occur.

C. The "Boat Paper"

The Secretary General of the United Nations has conducted informal consultations on revising the Convention with regard to outstanding deep seabed mining provisions as a means of achieving universal participation in the Convention. During the August 1993 consultations, several developed and developing countries anonymously prepared the "Boat Paper." OCEANS POL'Y NEWS (Council on Ocean Law, Washington, D.C.), Oct. 1993, at 1. The Boat Paper, so-called because of a drawing of a boat on the cover page, contains a proposed UN resolution and agreement covering the problem areas that have been under discussion during the consultations. More fitting of its official nature, the Boat Paper has recently been given the formal title of "Draft Resolution and Draft Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea."

The Boat Paper recognizes that political and economic changes, including in particular a growing reliance on market principles, show the need to reevaluate some aspects of deep seabed mining. The UN General Assembly is expected to adopt

the Boat Paper and urge all states to sign it before November 16, 1994. All the adjustments stemming from the consultations will have to be accepted by the present parties to the Convention to be legally binding. If implemented, the consultations would constitute the guiding framework for the actions of the International Seabed Authority and for establishing the functions and organs of the Authority on an evolutionary basis as needed. NEWSLETTER OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (Washington, D.C.), Jan.-Feb. 1994, at 14-15.

II. Earth Summit: The First Year

A. U.S. Commitment to Global Issues

On Earth Day, April 21, 1993, President Clinton pledged U.S. commitment to the goals of the UN Conference on Environment and Development (UNCED), the "Earth Summit." President Clinton's Remarks at an Earth Ceremony, Washington, D.C. (Apr. 21, 1993), Reuter Transcript Report. On June 4, 1993, the United States signed the Biodiversity Treaty, citing the United States' creation of a national biological survey as the nation's commitment to conserve the biological wealth of the planet. Joint Statement by U.S. Permanent Representative to the United Nations Madeleine Albright and Counselor of the State Department Timothy Wirth, on the Signature of the Convention on Biological Diversity (June 4, 1993) (press release #86-(93), United States Mission to the United Nations).

The United States has also recently formed the President's Council on Sustainable Development. This 25-member council will build a new partnership among representatives from industry, government, and environmental groups to develop new approaches to integrating economic and environmental policies. Gore, U.S. Support for Global Commitment to Sustainable Development, Address to the United Nations, New York City, June 14, 1993, *in* 4 DEP'T ST. DISPATCH 430 (1993).

B. National Biological Survey

The United States has begun the task of implementing the goals propounded at the Earth Summit in Rio in 1992 by establishing a national biological survey. *Id.* at 432. Proceeding quickly, the U.S. Department of Interior established the new agency by Secretarial Order, while simultaneously requesting implementing legislation from the U.S. Congress.

The U.S. House of Representatives Committee on Merchant Marine and Fisheries introduced H.R. 1845, the National Biological Survey Act of 1993. H.R. 1845, 103d Congress, 1st session, passed the House October 26, 1993. The bill, yet to be considered by the Senate, establishes the National Biological Survey as a new agency in the Department of the Interior. *See* Wirth, U.S. Commitment to Global Issues, Opening Statement at a State Department Press Briefing, Washington, D.C., Jan. 11, 1994, *in* 5 DEP'T ST. DISPATCH 29 (1994).

Mindful of the goal to preserve biodiversity, the functions of this new agency include inventorying and monitoring programs to assess the overall status and trends in the abundance, health, and distribution of plants and animals in terrestrial and marine ecosystems. The Survey will work closely with the National Oceanic and Atmospheric Administration to ensure appropriate coordination of data regarding marine ecosystems. Clinton, Reaffirming the US Commitment to Protect Global Environment, Earth Day Address, Apr. 21, 1993, *in* 4 DEP'T ST. DISPATCH 277 (1993).

C. Straddling and Highly Migratory Fish Stocks

The UN agreed to a resolution calling for a Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks in December 1992. The mandate is one agreed upon at UNCED and shall promote effective implementation of the provisions of UNCLOS on straddling fish stocks and highly migratory fish stocks. OCEANS POL'Y NEWS, Dec. 1992/Jan. 1993, at 5.

In July 1993, 105 countries participated in the Conference which produced a "negotiating text." The negotiating text is not a consensus paper. It seeks to bring forward what has been agreed: the serious and increasingly evident consequences of overfishing, the need for cooperation to manage high seas fisheries, and that UNCLOS provides the legal framework to approach these problems. OCEANS POL'Y NEWS, Oct. 1993, at 4.

However, behind this facade of agreement is the historic controversy between coastal fishing and distant water fishing, between freedom to fish and managed fishing. There will be two sessions in 1994 to continue discussions on the negotiating text. OCEANS POL'Y NEWS, Dec. 1993, at 4.

III. Maritime Boundaries Delimitation: Denmark v. Norway

On June 14, 1993, the International Court of Justice (ICJ), by 14 votes to 1, fixed a delimitation line for both the continental shelf and the fishery zones of Denmark and Norway in the area between Greenland and Jan Mayen. Transmittal to the UN, International Court of Justice Communiqué No. 93/14 (June 14, 1993). The ICJ considered past conventions and subsequent practices of the parties. The court concluded that a median line boundary was not already in place, either as the continental shelf boundary or as that of the fishery zone. The court examined separately the two strands of applicable law: the effect of Article 6 of the 1958 Geneva Convention on the Continental Shelf if applied at the present time to the delimitation of the continental shelf boundary, and then the effect of the application of the customary law which governs the fishery zone.

With respect to the continental shelf, the court considered special circumstances that might distort the result produced by an unqualified application of the equidistance principle. Special circumstances considered included disparity of length of coasts and access to resources. The court determined that population and economy, national security, and conduct of the parties were not relevant to delimitation.

The ICJ concluded that the delimitation line must be drawn within the area of overlapping claims, between the lines proposed by each party. The delimitation line is to lie between the median line and the 200-mile line from the baseline of eastern Greenland. The ICJ then applied equitable consideration to the access of fishery resources and divided the area of overlapping claims into three zones. The court proceeded to set out the coordinates of the various points. LAW OF THE SEA BULL., Dec. 1993, at 57.

IV. Driftnets

A. UN Resolution Enters into Force

On January 1, 1993, UN Resolution 46/215, which was adopted by consensus December 20, 1991, took effect. The Resolution recommended a moratorium on all large-scale pelagic driftnet fishing operations on the high seas, including enclosed and semi-enclosed areas. All members of the international community are urged to take measures individually and collectively to implement the resolution.

B. U.S. to Enforce Moratorium

The United States plans to take the following steps in the event U.S. enforcement authorities have reasonable grounds to believe that any foreign flag vessel encountered on the high seas is conducting or has conducted large-scale pelagic driftnet fishing operations on the high seas. U.S. authorities will confirm foreign flag registration. After notifying flag nation authorities, the United States will seek a special arrangement to take appropriate action. If the vessel is not registered, consistent with Article 92 of UNCLOS, the United States will treat the vessel as stateless. LAW OF THE SEA BULL., June 1993, at 107.

V. International Whaling Commission

A. Annual Meeting

The 45th International Whaling Commission (IWC) meeting was held in Kyoto, Japan, May 10-14, 1993. In 1992, the Scientific Committee submitted a Revised Management Scheme (RMS) for the resumption of commercial whaling. In 1993, the Scientific Committee reported that it had completed the scientific aspects of its work. However, the IWC announced that without an approved monitoring system, accurate data-gathering programs, and an effective observation and inspection system on whaling vessels and land stations, the RMS would not be adopted. OCEANS POL'Y NEWS, May 1993, at 1. The moratorium on commercial whaling will remain effective at least until 1994.

B. Norway Resumes Commercial Whaling

In June 1993, Norway resumed commercial whaling of the minke whale to protest the IWC's decision to maintain the commercial whaling moratorium for another year.

The Commerce Department certified that Norway's resumption of commercial whaling has diminished the effectiveness of the IWC's conservation program. This certification is the first step toward trade restrictions that could create an embargo on Norwegian products under the Pelly Amendment to the Fisherman's Protective Act. *Clinton Decision Due Today on Norway Whaling Sanctions* (Oct. 4, 1993), *available in* WESTLAW, BNA-IED Database.

Under the Pelly Amendment, the President is required to report his response to the Norwegian action to Congress. Congressional & Presidential Calendar, Legislative Calendar, 103d Cong., 1st Sess., House, Floor Action (Oct. 6, 1993), 1993 DEN 193 D48, *available in* WESTLAW, BNA Database. The President's response emphasized that "the U.S. is deeply opposed to commercial whaling" and "has an equally strong commitment to science-based international solutions to global conservation." H.R. Doc. No. 103-146, 103d Cong., 1st sess. (1993). The report notes that the relevant issue is the absence of a credible, agreed management and monitoring regime that would ensure that commercial whaling is kept within a science-based limit. OCEANS POL'Y NEWS, Nov. 1993, at 4.

The United States has given Norway until the 1994 meeting of the IWC to comply with the ban on commercial whaling, at which time the President will reconsider imposing a ban on Norwegian fish products. MARINE CONSERVATION NEWS (Center for Marine Conservation, Washington, D.C.), winter 1993, at 7.

VI. Bering Sea Pollock Negotiations

From November 30 to December 4, 1993, the U.S. Department of State hosted the Ninth Conference regarding the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea. Parties to the conference--the United States, the Russian Federation, Japan, the Republic of Poland, the Republic of Korea, and the People's Republic of China--have been negotiating an agreement covering pollock fishing on the high seas enclave of the Bering Sea known as the Donut Hole. The draft "Agreement for the Conservation and Management of Pollock Resources in the Central Bering Sea" has a number of innovative articles. The Agreement includes provisions on governance through an annual conference; establishment of the allowable harvest level for pollock (AHL); individual national quota (INQ); and decision making by consensus. Compliance provisions provide for observers and transponders and scientific cooperation and exchange of data.

A tenth conference was held February 7-11, 1994, to conclude negotiations, and it has produced a final text of the Agreement.

VII. Antarctic Treaty

A. NEPA Held to Apply to U.S. Actions in Antarctica

The U.S. Court of Appeals for the District of Columbia Circuit held that the doctrine of extraterritoriality does not automatically exempt the federal government from completing a National Environmental Policy Act (NEPA) environmental impact statement (EIS) before burning solid food wastes at a facility in Antarctica. *Environmental Defense Fund v. National Science Found.*, 986 F.2d 528 (D.C. Cir. 1993). NEPA requires that the federal government consider environmental concerns when undertaking major projects. Because government decision making, the conduct at issue here, occurs in the United States, not in foreign countries, the court reasoned that NEPA applies. Moreover, Antarctica, a "global commons," has no sovereign power, and, therefore, there was no chance for conflict with a foreign government.

The Administration decided not to seek rehearing of the decision. Under the doctrine of extraterritoriality, courts generally do not apply U.S. laws to conduct outside the territory of the United States to avoid conflict with laws and policies of other nations. *Impact Statement: Administration Seems Ready to Accept Ruling That NEPA Applies to Antarctica*, 23 Env't Rep. (BNA) 3030 (Mar. 19, 1993).

B. Protocol on Environmental Protection to the Antarctic Treaty

The Protocol on Environmental Protection to the Antarctic Treaty is an international accord to protect the pristine ecosystems of the southernmost continent. In October 1992, the Senate consented to ratification of the Protocol; notwithstanding, the United States may not officially ratify the pact until implementing legislation that conforms to the accord is passed. H.R. 3532, introduced November 17, 1993, is the Administration's proposal for implementing legislation. *Polar Regions: Bill in House Would Allow Suits over Environmental Harm in Antarctica*, Int'l Envtl. Daily (BNA), Feb. 9, 1994, at 1.

The proposal addresses issues of sewage disposal, incineration, applicability of NEPA, tourism, and mineral resource exploration and would designate federal regulatory agencies. The bill would repeal two other U.S. laws, the Antarctic Conservation Act of 1987 and the Antarctic Protection Act of

1990. See *Antarctica: Raw Sewage Discharges Would Be Allowed In Administration's Antarctica Bill*, Int'l Envtl. Daily (BNA), Nov. 17, 1993, at 1.

Domestic Developments

I. Wetlands Cases

A. Injunction Requires Restoration to Preexisting Condition

The district court for the Northern District of California determined that a salt company's construction of a new tide gate was a violation of §§ 301 and 404 of the Clean Water Act (CWA). *Leslie Salt Co. v. United States*, Nos. C-85-8615-CAL, C-86-4187-CAL, 1993 WL 137283 (N.D. Cal. Apr. 26, 1993). The court held that the CWA requires that penalties be imposed and found civil penalties of $50,000 supported by the record. The court further held that the United States is entitled to injunctive relief that restores the property at the points of violation to "essentially their pre-existing condition."

B. Order to Cease and Desist from Filling Wetlands Not a Taking

The U.S. Court of Appeals held that an order to cease and desist from filling wetlands without a permit was not a regulatory taking of property for which compensation was required. *Tabb Lakes LTD v. United States*, 10 F.3d 796 (U.S. Ct. App. Fed. Cir. 1993). Legally, the possibility of a permit precludes the order itself from constituting a taking. The court focused on the parcel as a whole and held that the standard for determining economically viable use of property was not that "no one would buy each and every lot in each and every section of a parcel." Further the court held that any mistake by the Army Corps of Engineers allegedly causing unreasonable delay in the permit process did not convert the original act of issuing a cease and desist order into a taking.

C. Environmental Effects Alone Justify EPA Veto

Reversing a district court decision, the Fourth Circuit upheld an Environmental Protection Agency (EPA) veto of an Army Corps of Engineers-issued Clean Water Act § 404 permit for the construction of a dam and reservoir. *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993). The EPA based its § 404(c) veto solely on a finding of "unacceptable" environmental effects. The term unacceptable in EPA's view refers to the significance of adverse effects: large impacts that the aquatic and wetland ecosystems cannot afford.

The court held that EPA need not consider the affected county's need for water. Even when there is no alternative available and "vetoing" the site means stopping a project entirely, the loss of the § 404(c) resources may still be so great as to be unacceptable. The court stated that "although there is no precedent and little legislative history, we are persuaded by the structure of the Act that [EPA] has the authority."

D. State Denial of Permit to Fill Wetlands Not a Taking

Property owners who were denied a state permit to fill wetlands on their property did not suffer an unconstitutional taking because the circumstances did not fall within the *Lucas* analysis or under traditional takings analysis. *Mock v. Dep't of Envtl. Resources*, 623 A.2d 940 (Pa. Cmwlth. 1993). The permit request to fill wetlands to construct an auto shop was denied because the proposed project had an adverse impact on wetlands ecology and an auto repair shop did not need to be built close to water.

Under the traditional takings analysis, the court held that there was no physical interference, that owners failed to establish that the land had lost all residual value, that the evidence failed to establish what the owner's reasonable investment-backed expectations were when they bought the property, and that the regulations by which Pennsylvania regulates activities that may affect wetlands did not lack a legitimate public purpose. Under the *Lucas* analysis (112 S. Ct. 2886 (1992)), the court held that the Department of Environmental Resources denied only a specific project under consideration and did not prohibit all construction on the owner's property and that the evidence did not establish that there was "no economically beneficial use of land."

E. Source of Wet Condition Irrelevant to Wetlands Delineation

A landowner challenged wetlands delineation and argued that structures artificially created wetland characteristics by retaining water on portions of his property. A federal district court held that the failure of the Fish and Wildlife Service (FWS) to consider characteristics of a property without the presence of manmade water-control structures would not establish that wetlands

delineation was an arbitrary agency action. *Harris v. United States*, 820 F. Supp. 1026 (N.D. Miss. 1993). In addition, the court held that the source of the wet conditions was irrelevant to the issue of whether or not land was appropriately delineated as wetlands pursuant to Executive Order 11990. It is the policy of FWS in delineating wetlands that a finding of a positive indicator in one or more of the three parameters–soils, hydrology or vegetation–determines whether the property is properly designated as wetlands.

F. Denial of Permit for Failure to Mitigate Not a Taking

The Court of Claims held that the developer of a Louisiana tourist resort did not have a sufficient compensable property interest to bring a takings claim against the Army Corps of Engineers for its denial of the developer's CWA dredge and fill permit application. *Plantation Landing Resort, Inc. v. United States*, 30 Fed. Cl. 63 (1993).

The court distinguished the regulatory action in *Lucas v. South Carolina*, 112 S. Ct. 2886, from the instant case because here the regulation did not "flatly prohibit" plaintiff from developing the land, nor did the regulation deny plaintiff all "economically beneficial or productive use" of the land. The Corps' denial of the CWA § 404 permit for plaintiff was premised on mitigation requirements. Central to the takings claim was the failure to reach agreement on the amount of mitigation required to fully compensate for the values and functions of those special aquatic sites that would be adversely affected by plaintiff's proposal. Furthermore, the Corp provided plaintiff with several mitigation alternatives to "restore and/or create wetlands," which were considered appropriate compensation, and offered suggestions as to how these could be achieved.

II. Minimum Streamflows

A. Washington Allows Minimum Flows As Condition of Permit Certification

The State of Washington's Department of Ecology (Ecology) conditioned the issuance of a CWA § 401 permit on the maintenance of minimum instream flow rates to assure compliance with state water quality related statutes. The Public Utilities District challenged these certification requirements for the building of a hydroelectric power plant. The Washington Supreme Court held that Ecology's stream flow requirements were authorized under the CWA and that the state's actions were not preempted by the Federal Power Act, 16 U.S.C. §§ 791(a) *et seq.* *State of Washington Dep't of Ecology v. Public Utility District No. 1 of Jefferson County*, 849 P.2d 646 (Wash. 1993), *cert. granted*, 114 S. Ct. 55 (U.S. Wash. 1993).

CWA § 401 requires states to certify compliance with state water quality standards before issuing a permit that would result in effluent discharge. These state water quality standards may serve as the source for conditions imposed in the § 401 certification. The State of Washington's water quality standards prohibit the degradation of the state's waters and the degradation of fish habitat and spawning grounds. Therefore, § 401 of the CWA requires the Department of Ecology to certify that the hydroelectric project would not degrade fish habitat. Thus, the court held that any state conditions imposed in a § 401 certificate become part of the federal license for which certification is required and are not preempted.

B. New York Limits Water Quality Concerns As Condition of Permit Certification

The Supreme Court of New York recently considered similar issues when an electric utility brought an action seeking annulment of the Department of Environmental Conservation's (DEC's) permit conditions. The court held that exceptions to the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC) with respect to licensing and permitting hydroelectric projects are narrow; exceptions extend only to regulations promulgated in accordance with the CWA. *Niagara Mohawk Power Corp. v. N.Y. State Dep't of Envtl. Conservation*, 82 N.Y.2d 191, 604 N.Y.S.2d 18 (N.Y. 1993); *petition for cert.* filed Feb. 8, 1994.

For purposes of CWA § 401 state certification, DEC is limited to considering the water quality standards set forth by the state and approved by the EPA under CWA § 303. DEC opined that all state laws that pertain to water quality be considered before certification is issued from the state in which the discharge originates. However, the court held that the Federal Power Act established a comprehensive scheme of federal regulation of hydroelectric projects that essentially preempts state regulation of hydroelectric facilities within ERC's jurisdiction.

III. Navigable Waterways Management

A. Navigational Servitude Avoids a Taking

A district court held that wharf owners who were ordered by the Army Corps of Engineers to remove pilings from their wharf did not suffer a taking. Although the owners had an enforceable property right to maintain a wharf over submerged lands, that right is subject to the federal government's navigational servitude. *Donnell v. United States*, 834 F. Supp. 19 (D. Me. 1993).

The doctrine of navigational servitude expresses a notion that the public's right of navigation supersedes any claim of private ownership. The court held that the plaintiffs' constructive easement over the land underneath their wharf has always been held subject to the federal government's control regarding navigation pursuant to the Commerce Clause. The Army Corps has always retained both the power and the right to modify, suspend, or revoke plaintiffs' nationwide permit as necessary "in the public interest." 33 C.F.R. § 330.1(d). Thus the Army Corps' suspension of plaintiffs' nationwide permit to operate in navigable waters, contingent upon their removal of 20 feet of pilings, trumps the Plaintiffs' state-created property right in the land under the wharf, nullifying any taking that may have occurred. The court further held that the action was not within the jurisdiction of the Court of Federal Claims.

B. Navigable Waters

The Army Corps of Engineer's determination that a creek in central Florida was a "navigable waterway of the United States" was set aside because the creek is neither susceptible of being used in its ordinary condition as a highway for commerce nor linked to an interstate or foreign body of water. *Lykes Bros., Inc. v. Army Corps of Engineers*, 821 F. Supp. 1457 (M.D. Fla. 1993).

C. Privately Dredged Canal Not Subject to Navigational Servitude

A canal dredged on private property with private funds that does not interfere with or obstruct preexisting navigable waterways is not subject to a navigational servitude that would grant the public a right to use the waterway. *Dardar v. La Fourche Realty Co.*, 985 F.2d 824 (5th Cir. 1993). The Fifth Circuit stated that connecting waterways made navigable through erosion are "naturally" navigable and thus ordinarily subject to the navigation servitude, even if the erosion was caused by increased water flow from the privately dredged canal. However, the court further held that connecting waterways initially rendered navigable by private dredging are not subject to navigational servitude.

D. Hawaii Bans Thrill Craft Use

Plaintiffs, a water sport company and tourist operations, challenged a statutory ban on commercial operation of thrill craft on bays on weekends and holidays. The Supreme Court of Hawaii upheld summary judgment in favor of the State of Hawaii. The court held that the statute does not violate the equal protection clause and that no federal law preempts the state statute. *Kaneohe Bay Cruises, Inc. v. Hirata* 861 P.2d 1 (Sp. Ct. Haw. 1993).

E. Alluvial Deposits

A California appellate court ruled that land formed by gradual and imperceptible accretion along a segment of the Sacramento River is owned by the owners of the riverbank, because the accretion resulted "from natural causes." *State v. Superior Court*, 21 Cal. App. 4th 38, 25 Cal. Rptr. 2d 761 (Cal. Ct. App. 1993).

F. Floating Homes Obstruct Waterway

A decision by the U.S. Army Corps of Engineers under the Rivers and Harbors Act that floating homes were permanently moored and, therefore, had to be removed for obstructing a waterway was not arbitrary, capricious, or an abuse of discretion. *United States v. Seda Perez*, 825 F. Supp. 447 (D.P.R. 1993). The court issued a permanent injunction that prohibited mooring under the Rivers and Harbors Act.

G. Cumulative Impacts Valid Basis for Permit Denial

The Army Corps of Engineers properly refused to permit a 512-slip commercial marina because the Corps' decision was rationally based on a cumulative impact assessment. The court concluded that discharges would significantly degrade the water and aquatic ecosystem, the project would contribute to severe overcrowding of recreational boats on lakes and the river, and there was substantial public opposition to the proposal. *Fox Bay Partners v. U.S. Army Corps*

of Engineers, 831 F. Supp. 605 (N.D. Ill. 1993).

IV. Endangered Species Act

A. Salmon

1. Oregon, Washington, and California Stocks of Coho Salmon Considered for Listing

On October 27, 1993, the National Marine Fisheries Service (NMFS) received a petition to list five stocks of Oregon coho salmon as either endangered or threatened species and to designate critical habitat under the ESA. 58 Fed. Reg. 57,770 (1993). In light of the general decline in many west coast populations of coho salmon, NMFS has determined that it is now prudent to conduct a comprehensive status review that will assess coho salmon stocks in Washington, Oregon, and California. A final ruling is pending.

2. Snake River Designated Critical Habitat for the Sockeye Salmon

NMFS listed the Snake River sockeye salmon as endangered on November 20, 1991 (56 Fed. Reg. 58,619 (1991)) and Snake River spring/summer chinook salmon and fall chinook salmon as threatened on April 22, 1992, under the ESA, 16 U.S.C. §§ 1531 *et. seq.* (57 Fed. Reg. 14,652 (1992)). On December 28, 1993, pursuant to § 4(a)(3)(A) of the ESA, NFMS designated critical habitat for these listed species. 58 Fed. Reg. 68,543 (1993).

NMFS determined that essential habitat consists of four components: (1) spawning and juvenile rearing areas; (2) juvenile migration corridors; (3) areas for growth and development to adulthood; and (4) adult migration corridors. The essential features of each of these areas were identified. The critical habitat designation includes all river reaches presently or historically accessible to each of the three species, except reaches above impassable natural falls.

NMFS noted that in order that essential areas and features are maintained or restored, special management may be needed. Activities that may require special management considerations for listed species include, but are not limited to: (1) artificial propagation; (2) land management; (3) timber harvest; (4) water polluting activities; (5) livestock grazing; (6) habitat restoration; (7) irrigation withdrawal; (8) mining; (9) road construction; (10) migration barriers; (11) hydroelectric power system operation; (12) water storage; (13) dredge and fill operations; (14) predator control; and (15) barge transportation of materials.

B. Cases

1. High Volume Hydropower Users Lack Standing to Challenge under ESA

A group of Northwest utilities and aluminum smelters filed a complaint against NMFS over the agency's actions on Snake River salmon, alleging an ESA violation. The plaintiffs contended that NMFS places too much emphasis on the operation of the hydroelectric system in its management plan and not enough emphasis on harvest, habitat, and the effects of hatcheries on wild fish stocks.

The federal district court held that plaintiffs lacked standing to challenge the decision of NMFS and other federal agencies to augment water flow over dams on the Columbia River to improve juvenile migration of two species of salmon listed as endangered or threatened under the ESA. *Pacific Northwest Generating Coop. v. Brown*, 822 F. Supp. 1479 (D. Or. 1993). The court found the causal link between the injury plaintiffs asserted--rate increases due to decreased flow for power generation--and the alleged ESA violations too attenuated. Moreover, the court took judicial notice that a conflict exists between plaintiffs and the species they seek to protect.

2. Ninth Circuit Held to Be Court of Jurisdiction over BPA

An action was brought against Bonneville Power Administration (BPA) based on claims of ESA violations. The U.S. district court held that under ESA, the district court lacked subject-matter jurisdiction over claims against BPA concerning the threat to existence of endangered salmon species posed by operation of the Federal Columbia River Power System. *Northwest Resources Info. Ctr. v. NMFS*, 818 F. Supp. 1399 (W.D. Wash. 1993). The court further held that the Northwest Power Act clearly states that all final actions and decisions of the BPA are reviewable only in the Ninth Circuit.

3. Court Overturns ESA Regulatory Definition of "Harm"

Plaintiffs, dependent on the forest products industry, challenged ESA regulations. The

U.S. Court of Appeals initially held that a regulation defining "harm" to an endangered species to include habitat modification was not void for vagueness. The court also held that a regulation automatically extending to all threatened species prohibitions established for endangered species was a reasonable and permissible construction of ESA. *Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993). However, the court's final holding that the regulation defining "harm" to an endangered species includes habitat modification exceeded statutory authority. 62 U.S.L.W. 2587 (D.C. Cir. Mar. 11, 1994) (No. 92-5255).

The District of Columbia Circuit held that the definition of "harm" was neither clearly authorized by Congress nor a "reasonable interpretation" of the statute. The court reasoned that harm contemplated the perpetrator's direct application of force against the animal taken, which the concept of forbidden habitat modification lacks. This decision conflicts with *Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1981).

C. ESA Reauthorization

Reauthorization of the ESA was pending as this memo went to press.

V. Marine Pollution

A. Some Recoveries for Economic Loss Still Controlled by Robins Dry Dock

A vessel owner filed an action seeking exoneration from or a limitation of liability after his vessel ran aground and spilled a substantial amount of its heating oil cargo. Claimants allege purely economic loss arising out of the oil spill, contending that the oil spill caused them financial harm by preventing their ability to work and conduct their businesses for an extended period of time. The district court held that general maritime law has barred claims for purely economic losses surrounding tort since *Robins Dry Dock & Repair v. Flint*, 275 U.S. 303 (1927). *In re Ballard Shipping Co.* 810 F. Supp. 359 (D.R.I. 1993).

B. OPA Allows Recovery of Damages for Lost Profits

An oil platform operator could maintain a suit to recover lost future production from an oil spill caused by another vessel. A Louisiana district court held that the Oil Pollution Act allows damages for lost profits due to injury to real or personal property, including natural resources.

The court further held that the CWA imposes liability to the government on private parties that discharge oil but that private parties cannot sue for natural resources damages under the Clean Water Act. *Sekco Energy, Inc. v. M/V Margaret Chouset*, 820 F. Supp. 1008 (E.D. La. 1993).

C. Criminal Conviction for Violation of NPDES Permit

The Ninth Circuit affirmed the conviction and sentence of the manager of a sewage treatment plant in Hawaii for violating the Federal Water Pollution Control Act (FWPCA). The defendant knowingly discharged waste-activated sludge into the ocean in violation of the plant's national pollution discharge elimination system (NPDES) permit and rendered inaccurate the plant's method for monitoring discharges. *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993).

D. Conviction Enhanced for "Continuous or Repetitive Discharge"

The Fourth Circuit affirmed the convictions and sentence of a marina manager for discharging pollutants into navigable waters of the United States in violation of FWPCA §§ 301(a) and 309(c)(2). *United States v. Strandquist*, 993 F.2d 395 (4th Cir. 1993). The court held that the U.S. Sentencing Guidelines that apply to the mishandling of environmental pollutants reflect a determination of the seriousness of the environmental offenses. Moreover, the court held that the base sentence was properly enhanced for "ongoing, continuous, or repetitive discharge."

E. Savings Clause Reserves Natural Resource Claims

The Fifth Circuit held that § 302(d), the savings clause, of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) reserves to the federal government a general maritime law suit for natural resource damages against a company in the company's limitation of liability proceedings, which stem from its contribution to a spill of about 100,000 gallons of styrene into navigable waterways. *In re Cropwell Leasing Co.*, 5 F.3d 899 (5th Cir. 1993).

VI. Protected Marine Species

A. Marine Mammal Protection

1. Feeding Dolphins Is a Prohibited Taking

Feeding wild bottlenosed dolphins is "harassment" prohibited by the Marine Mammal Protection Act (MMPA). Ruling against commercial tourboat operators who brought tourists out to feed the dolphins in Corpus Christi Bay, the court in *Strong v. United States*, 5 F.3d 905 (5th Cir. 1993), rejected the district court's decision that feeding was permissible under the MMPA because it did not fit the dictionary definition of "harassment." The Fifth Circuit found that "disturb" was synonymous with "harass" and that substantial scientific evidence exists that feeding wild dolphins disturbs their normal behavior and might impair their ability to search for their own food. The court vacated the district court's order permanently enjoining enforcement of an MMPA regulation defining feeding of marine mammals in the wild as a prohibited "taking."

2. Shooting Near Porpoises is Not a Taking

Another court of appeals reversed a fisherman's conviction under the MMPA for attempting to scare porpoises away from his Ahi tuna lines by firing two rifle shots into the water near them. *United States v. Hayashi*, 5 F.3d 1278 (9th Cir. 1993). The court held that the "take" definition contained in NMFS regulations (50 C.F.R. § 216.3 (1992)) did not reach the fisherman's conduct and that a criminal conviction under the MMPA required "knowing" conduct–an "intentional act which results in disturbing or molesting a marine mammal." The rifle shots were not a "sustained, direct and significant intrusion" sufficient to constitute a "taking." Reasoning that the prohibition against "taking" activities was based on anything altering "normal" behavioral patterns as part of nature, the court found the regulations to not be concerned with mammals acting in ways that endanger human life or property. According to the court, a reading of the Act prohibiting isolated interference with *abnormal* marine mammal activity would mean "[n]othing could legally be done to save a modern day Jonah from the devouring whale or to deter a polar bear from mauling a child." The court hinted that a construction of the MMPA and its restrictions less restrictive than its own could raise a serious issue of adequate notice to potential violators and thus render the law unconstitutionally vague.

3. Dolphin Transfer Upheld by Court

No standing was found for a dolphin to challenge his transfer by the Department of Commerce from his home at the New England Aquarium, since the MMPA does not authorize suits brought by animals. *Citizens v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993). The court found that the dolphin's transfer to Hawaii with neither permit nor publication of the permit in the Federal Register did not constitute a "taking" and could not be challenged by the plaintiff animal rights organization, since both its members and the organization itself lack standing. The plaintiffs did not show that they would be be harmed, and the procedural harm alleged was held insufficient.

4. Sewage Tunnel Held No Taking of Whale

A court refused to issue a preliminary injunction to stop construction and eventual use of a sewage discharge tunnel that will carry treated effluent nine miles out into Massachusetts Bay. *Bays' Legal Fund v. Browner*, 828 F. Supp. 102 (D. Mass. 1993). Rejecting a challenge grounded in the MMPA, the court held the construction and use of the outfall tunnel no "taking" of the northern right whale, because there was insufficient evidence that it would pose a disturbance of any kind to the animal. Though the plaintiffs argued that there was no finding that the tunnel would have zero effect on the whale and contended that the MMPA does not allow for a "negligible impacts" exception to its "taking" prohibition, the court disagreed. The court instead cited what it saw as the rule of *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795, 802 (D.C. Cir. 1988): there is no "negligible impact" exception to the rule where takings are a certainty, as opposed to a mere possibility. The court found no likelihood shown that a taking would occur here.

B. Sea Turtle Protection

The Ninth Circuit held that it was proper to dismiss an environmental organization's action to enforce a statute banning shrimp importation from countries failing to protect sea turtles. *Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993). The goal of the legislation was to encourage foreign shrimpers to use turtle excluder devices

(TEDs), mandated for use by U.S. fishermen, to prevent the common occurrence of sea turtles becoming trapped in commercial shrimp trawl nets and drowning. Because the statute was an "embargo," the court held it to be within the exclusive jurisdiction of the Court of International Trade. In addition, the provision of the law directing the Secretary of State to conduct negotiations with foreign countries was found to infringe on the President's exclusive power to negotiate with foreign governments.

C. MMPA Reauthorization

Congress was close to reauthorizing the MMPA in April 1994 based on S. 1636, which provides for commercial fisheries incidental take plans. Further details will be provided in next year's recent developments memo.

D. New Regulations

NOAA issued final interim rules prohibiting the use of explosive devices in purse seine nets involving marine mammals; establishing a procedure for permitting fishing operations to experiment with new equipment and procedures to reduce marine mammal mortality; and requiring that, in purse seine sets involving marine mammals, U.S. tuna fishing vessels in the eastern tropical Pacific Ocean must complete the backdown maneuver and begin rolling the net to sack-up no later than 30 minutes after sundown, unless the operator has received an exemption. 58 Fed. Reg. 63,536 (1993) (to be codified at 50 C.F.R. pt. 216).

VII. Marine Sanctuaries

A. National Coastal Monitoring Act

The National Coastal Monitoring Act was added to the Marine Protection, Research, and Sanctuaries Act, providing for a comprehensive national program for the monitoring of coastal ecosystems.

B. Stellwagen Bank Sanctuary Established

NOAA issued regulations establishing Stellwagen Bank National Marine Sanctuary in the Gulf of Maine. 58 Fed. Reg. 53,865 (1993) (to be codified at 15 C.F.R. pt. 940).

C. Olympic Coast Plan Released

In November 1993 NOAA released the Final Environmental Impact Statement/Management Plan for the new Olympic Coast National Marine Sanctuary. The boundaries of the 2,635-square-mile sanctuary extend from Koitlah Point on the Strait of Juan de Fuca to the south end of the Copalis National Wildlife Refuge, generally from low tide to 30 to 40 miles offshore. The scope of regulations in the FEIS/MP is fairly narrow. Oil and gas development are prohibited, discharging or depositing any material is restricted, and flying motorized aircraft below 2,000 feet near the sanctuary's coastal boundaries and offshore wildlife refuges is prohibited. Fishing is not regulated in the plan.

D. Monterey Bay Developments

1. Jet Ski Regulations Struck Down

Jet ski regulations for the Monterey Bay Sanctuary were held invalid. *Personal Watercraft Indus. Ass'n v. Department of Commerce,* Civil Action No. 93-1381 SSH, unpublished memorandum opinion (D.D.C. Aug. 24, 1993). Plaintiffs challenged the regulations under the Administrative Procedure Act, and the court set them aside as arbitrary and capricious since they treated personal watercraft differently from all other vessels without adequately supporting the disparate treatment with a factual record. The U.S. Department of Justice is currently considering whether to appeal the decision.

2. Shark Cage Tours Proposed

A budding user conflict in the Monterey Bay Sanctuary surrounds the latest offshoot of ecotourism. Monterey Bay entrepreneurs want to begin offering shark cage outings, in which the adventurous can experience sharks, including the bay's great whites, up close, through use of a shark cage and chumming to attract the sharks. The proponents say their activities will be no different from shark fishing activities already taking place, but other bay users, including surfers and divers, are concerned about the potential increased shark presence.

3. Fireworks over Bay under Study

Also currently under study by the Monterey Bay Sanctuary managers is the practice of shooting fireworks off over the

bay waters. Although favored by fire marshals, the noise, smoke, light, and plastic (a potential MARPOL violation) and paper residue from the displays have authorities concerned about disruptive effects on marine mammals. NOAA headquarters is currently developing a draft policy that will address the fireworks issue in all the nation's sanctuaries.

4. Vessel Traffic Study Continues

A joint study of vessel regulation in Monterey Bay Sanctuary is being conducted by NOAA and the Coast Guard. Although recognized as needed from the inception of the sanctuary, the study was slated to be completed over a year and a half so as not to impede designation. The study is considering all vessel traffic, from oil tankers traveling between San Francisco and Los Angeles to kayakers. The study is in two phases: a literature review, followed, if necessary, by field study. Upon completion of the first phase in April 1994, recommendations regarding new regulations will be made to Congress. Currently, tankers travel right through the middle of the sanctuary, and any necessary rerouting around the 50-mile-wide sanctuary could prove costly.

VIII. Federal and State Fisheries Management

A. State-Federal Jurisdiction

1. Eleventh Circuit Remands Florida Mackerel Case, Cites Supremacy Clause

Fishing interests challenged Florida's Spanish mackerel landing law, claiming that it illegally regulated fish harvested outside the state's waters. *Southeastern Fisheries Ass'n v. Chiles*, 979 F.2d 1504 (11th Cir. 1992). The Florida regulation at issue limited the number of pounds of Spanish mackerel that a commercial vessel could bring into a Florida port on any given day. The court refrained from ruling on whether the Florida regulations were preempted by or conflicted with the Magnuson Act, or whether the regulations violated the Equal Protection or Commerce Clauses of the U.S. Constitution. Instead, the court remanded the case to the district court for factual findings.

Though the 11th Circuit remanded, it nonetheless commented that the Supremacy Clause was dispositive of the case, since the pervasive federal scheme and legislative history of the Magnuson Act showed congressional intent to occupy the field. Since the Atlantic and Gulf of Mexico fishery management councils had no set daily landing limit in the fishery management plan, only an annual quota for total catch, a conflict was created, making it impossible to comply with both laws.

2. California Net Ban Held Preempted by Magnuson Act

A California state proposition which sought to forbid the use of gill or trammel nets in federal waters off the California coast was held unconstitutional under the Supremacy Clause. *Vietnamese Fishermen's Ass'n of America v. California Dep't of Fish and Game*, No. C-91-0778-DLJ, 1993 WL 128068 (N.D. Cal. Apr. 6, 1993). The Pacific Fishery Management Council's Pacific Groundfish Management Plan authorized the use of gill and trammel nets for taking groundfish in parts of the exclusive economic zone (EEZ). Upon the request of California, the Council produced a "Consistency Determination" regarding enforcement of the California state net ban in waters beyond three miles. The Council found California Proposition 132 inconsistent with the plan. The plaintiffs sought a permanent injunction against enforcement of the Proposition in waters beyond three miles. The court held that, since the laws conflict directly, federal law prevails under the doctrine of preemption, based on the Supremacy Clause. The court gave "deference" to the Council's inconsistency determination, though it did not reach the question of whether it should be given res judicata effect.

B. Federal FMP Challenges

1. New England FMP Timetable Upheld

A court upheld, against challenge by several intervening fishing associations, a consent decree reached among environmental groups and the Secretary of Commerce establishing a timetable for a fishery management plan applicable to New England waters. *Conservation Law Found. v. Franklin*, 989 F.2d 54 (1st Cir. 1993). The consent decree had established a timetable for either an FMP or amendment to eliminate the overfished condition of cod, yellowtail flounder, and haddock stocks in New England waters.

2. California Federal Court Backs Commerce Secretary's FMP Rejection

A federal district court upheld the Commerce Secretary's rejec-

tion of the Pacific Fishery Management Council's recommendations and the Secretary's imposition of differing emergency regulations regarding Klamath River fall chinook salmon. *Parravano v. Babbitt*, 837 F. Supp. 1034 (N.D. Cal. 1993). After the Secretary rejected the Council's recommendations on the ground that they would lead to overfishing and further deterioration of the chinook stock, he issued an emergency regulation increasing the spawning escapement floor and decreasing the ocean harvest rate. His decision was held not arbitrary and capricious, as it complied with the National Standards of the Magnuson Act. A reasonable basis for the Secretary's decision was provided by National Standard 1 of the Act. The court affirmed that the "Secretary's role is not simply to act as a rubber-stamp for Council recommendations." *Id.* at 1044. The court also reaffirmed that no formal cost-benefit analysis is required to determine optimum yield under National Standard 1.

3. Ninth Circuit Finds Sea Lions Adequately Provided for in FMP

In a case involving Steller sea lions, the Ninth Circuit held that the Secretary of Commerce and NMFS did not violate NEPA by not preparing an EIS regarding the pollock fishery's impact on the Stellar sea lion. Greenpeace Action v. Franklin, 982 F.2d 1342 (9th Cir. Dec. 29, 1992, amended Oct. 5, 1993). The court held that the decision not to prepare an EIS was not arbitrary and capricious, because there was no failure to consider crucial factors, a sufficiently hard look was taken at the impact of pollock fishing on other species, and no true public controversy mandating EIS preparation existed.

The Steller sea lion suffered a sharp decline in population between 1960 and 1989 and was classified as "threatened" under the ESA in 1990. The pollock is a groundfish that makes up up to half the sea lion's diet. The FMP in question had boosted total allowable catch (TAC) 41 percent from 1990 to 1991, triggering Greenpeace Action's motion for an injunction against continued fishing. The court found that NMFS had taken a "hard look" at the environmental consequences of its TAC through an adequate environmental assessment and that no EIS was therefore required. The court agreed with NMFS that Greenpeace Action's criticisms of its decisions were merely a difference of scientific opinion and that there was no requirement that the best scientific methodology be used to arrive at NMFS's conclusions. NMFS also had instituted emergency management safeguards in the fourth quarter fishery to lessen the impact on the sea lions, including a 10-nautical-mile no-trawl zone around Steller sea lion rookeries and a method for dividing the allowable catch around the fishery.

4. Limited Entry Scheme Held Valid

A federal district court dismissed a challenge to a limited entry scheme for the Pacific whiting fishery. *Northern Eagle Partners v. Franklin*, No. C92-1915D (W.D. Wash. Aug. 24, 1993). The court held that it was not unlawful under the § 303(b)(6)(A) "present participation" criterion or the National Standard 2 "best available science" criterion for the final regulations issued in 1992 to rely upon a 1988 control date for entry. The reasons cited by the court included enough record evidence to conclude that changes in the fishery were taken into account. The court stated that regional fishery management councils "must be able to set cut-off dates limiting the information to be considered" in order to complete FMPs.

C. Other Regulatory Challenges

1. Fourth Circuit Holds Non-Resident Fishing Fee Unconstitutional

Virginia's charging non-resident commercial fishermen an additional fee was held to violate the Privileges and Immunities Clause of the U.S. Constitution. *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264 (4th Cir. 1993). The $1,150 "Special Nonresident Harvester's License" required by the state fell in a challenge by Maryland fishermen. Virginia asserted a putative state interest--to prevent a "subsidy" to nonresidents of fishery management expenses drawn from the Virginia general fund. The court held, however, that nonresidents already paid the same fees as resident fishermen and various sales and use taxes in addition.

2. Catch Forfeiture Reversed As Arbitrary and Capricious

A partial forfeiture of catch proceeds for violating scallop size limits was reversed by the Fourth Circuit, because the application of regulations for determining size limits was arbitrary and capricious. *United States v. F/V Alice Amanda*, 987 F.2d 1078 (4th Cir. 1993). NMFS had thawed, sampled, and counted

10 pounds of Atlantic sea scallops from the *Alice Amanda* catch and, based on this count, declared the entire catch illegal and demanded the proceeds from its sale. When the owners refused, the Coast Guard boarded the vessel and seized it. Forfeiture proceedings were then initiated. The court reversed the forfeiture order.

Because the sampling procedures used were not adopted after the notice and comment and publication procedures required by the Magnuson Act, they were held invalid. The court also found that it was arbitrary and capricious of the agency to fail to consider the relevant factors that possibly distinguish frozen scallops, such as those at issue here, from iced scallops, which the sampling procedure was designed to measure--factors about which the agency had knowledge. The new breed of freezer vessels like the *Alice Amanda*, which freeze their catch at sea rather than ice them as was traditionally done, might well show a significant weight loss in the frozen-at-sea scallops, with the effect that their meat count will be higher after thawing than when caught. The result would be that the meat count--used to assure that the minimum size of scallop that fishermen were allowed by law to possess was met, and allegedly exceeded here--might be wrong.

3. Alaska Supreme Court Upholds Chinook Allocation

Alaska Board of Fisheries regulations for the allocation of chinook were upheld. *Tongass Sport Fishing Ass'n v. AK*, 1994 WL 7759 (Jan. 14, 1994). The "common use," "no exclusive right to fishery," and "uniform application" provisions of the Alaska Constitution were not offended by the division of the allowable catch between commercial troll fishermen and sport fishermen. The Board was held to have taken the necessary "hard look" at the relevant criteria in making its allocative decision, and no decisional document was held required. The court held that such managed utilization accords with the Constitution and public trust duties of Alaska to manage resources for the benefit of all the people. There were no limitations on admission to a particular user group here, and the four-day hearing by the Board showed that they considered the relevant criteria in arriving at their allocation. Since rulemaking powers were exercised here, a decisional document was not required.

4. New York Ban on Lobster Trawling Stands

The Second Circuit affirmed the upholding of New York's ban on trawling for lobsters in Long Island Sound. *New York State Trawlers Ass'n v. Jorling*, 1994 WL 12677 (2d Cir. Jan. 18, 1994). The court found that the statute regulates evenhandedly against residents and nonresidents alike. The statute was held rationally related to the legitimate state interest in protecting the environment and conserving marine resources. No significant burden on interstate commerce was found arising from the statute. Any incidental burdens were deemed not "clearly excessive" in relation to the local benefits of protecting the lobster fishery. There was no showing that the law was arbitrary or unreasonble in discriminating against trawlers. Trawl nets--as opposed to traps--were held to clearly increase the mortality and damage rates among lobsters, and the state's interest in regulating the taking of its fish and wildlife resources was held to be a long-established right.

D. FCMA Reauthorization

Reauthorization of the Magnuson Fishery Conservation and Management Act (FCMA) is not expected until the summer of 1994.

IX. Coastal Resources Management

A. State Coastal Program Litigation

1. Coastal Plan Violator Must Remove All Structures

A property owner who built a retaining wall, enlarged a bulkhead, and filled wetlands must restore the wetlands completely because North Carolina's Coastal Zone Management Plan was violated. *State ex rel. Cobey v. Simpson*, 423 Se.2d 759 (N.C. 1992). The Supreme Court of North Carolina reversed the trial court's partial-restoration remedy, which would have allowed natural restoration of the filled wetlands to occur over time. Where the defendant had deposited fill material in coastal wetlands and erected a retaining wall and an addition to an existing bulkhead, all without obtaining a required permit, only complete removal of the offending structures and fill would effect the complete restoration mandated by law.

2. New York Federal District Court Refuses Preliminary Injunction Where Harm to Coast Not Shown

New York could not preliminarily enjoin the General Ser-

vices Agency (GSA) from auctioning forfeited residential riverfront property without a "consistency" determination under the Coastal Zone Management Act (CZMA), because a preliminary injunction requires irreparable injury to the coastal environment, rather than to the integrity of the consistency determination process. *New York v. Gen. Servs. Agency*, 823 F. Supp. 82 (N.D. N.Y. 1993). Where title to a single-family residence on the Hudson River was taken by the federal government pursuant to federal drug forfeiture statutes, the state alleged that the sale of the house constitutes a federal activity affecting the state's coastal zone, thus triggering CZMA requirements. The GSA refused New York's request for a "consistency determination," despite the urging of the Commerce Department's Office of Ocean and Coastal Resource Management.

3. Permit Exemption Does Not Make Project Consistent with Coastal Plan

Exemption from permit requirements of New Jersey's Coastal Facility Review Act (CAFRA) does not render a developer's project consistent with the state's coastal zone management plan (CZMP), because CAFRA represents only one aspect of the CZMP and overall environmental concerns must be taken into account. *In re Stoeco Dev. Ltd.*, 621 A.2d 29 (N.J. 1993). Stoeco appealed the Army Corps' denial of a CWA § 404 permit based on a finding of inconsistency with New Jersey's State Coastal Zone Management Program by the New Jersey Department of Environmental Protection and Energy. Stoeco sought to develop two tracts it owned on a barrier island in the Atlantic. The inconsistency determination was based on the decision that the property constituted wetlands. The court treated the inconsistency determination as "final agency action" subject to review and held that there was no requirement of exhaustion of administrative remedies (an appeal to the Secretary of Commerce) because the Secretary has no particular expertise in determining whether issuance of a § 404 permit would comport with New Jersey's coastal zone plan, and so no piecemeal litigation would be avoided. The court left resolution of the factual issues involved here to the pending federal litigation.

4. Alaska Court Remands Oil and Gas Lease Sales for Further Study of Consistency

The Alaska Department of Natural Resources' (DNR's) determination that Alaska's sale of offshore oil and gas leases was consistent with the Alaska Coastal Management Program (ACMP) was held erroneous, because DNR failed to identify the areas within the proposed lease area with known or substantially possible geophysical hazards and failed to identify known archaeological sites at the initial sale stage. *Trustees for AK v. State Dep't of Nat. Res.*, 851 P.2d 1340 (AK 1993), amended after reh'g, superseding 847 P.2d 1061 (AK 1993). An environmental group challenged the state's sale of oil and gas leases in Camden Bay in the Beaufort Sea. DNR held the sale consistent with the ACMP. The plaintiffs alleged that the consistency determination was inadequate because of insufficient support in the record with regard to ACMP standards concerning (1) geophysical hazards, (2) historic, prehistoric, and archaeological resources, and (3) transportation and utilities. Regarding earthquake danger, the court held that DNR's summary statement that the entire lease area is a "known geophysical hazard" did not satisfy the regulatory requirements. The court found too much risk involved in deferring a careful and detailed look at the particularized geophysical hazards involved (numerous earthquake faults) until later stages of the development process. Segmented analysis caused by lease-by-lease assessments will ignore an assessment of cumulative environmental threats and put more pressure on approving later environmentally unsound permits. The case was remanded to DNR to identify and report on substantial geophysical hazards in the areas of high development potential.

Regarding the archaeological resources, the court noted that no cultural resource surveys had been done in the sale area despite the identification of numerous archaeological sites in the adjacent onshore area. DNR delegated this task to the lessees, to be carried out when they explored and developed leased sites. This was held not to comply with the ACMP. The regulations were interpreted to require the identification of known sites at the initial sale stage, for the same reasons given with regard to geophysical hazards--lessees themselves evaluating on a segmented basis risks undervaluing the cumulative cultural significance of the region as a whole. Also, conflicts of interest may lead to underreporting. DNR must comprehensively survey the known archaeological data, set

out the results, and state its conclusions.

A reasonable basis was found for DNR's conclusion that inevitable degradations to the environment were outweighed by a "significant public need for the proposed activity," lack of feasible alternatives, and steps taken to minimize the sale's impact on the environment as required by the ACMP. The case was remanded to DNR to take further action regarding geophysical hazards and archaeological resources.

B. Submerged Lands Management

1. Hawaii's Mooring Regulations Held Not Preempted by SLA

A court granted summary judgment to the State of Hawaii on a challenge to its mooring legislation, holding that the Submerged Lands Act (SLA) did not preempt Hawaii's regulation of navigation in ocean waters, because there was neither congressional intent to retain exclusive jurisdiction over navigable waters nor actual conflict between Hawaii's regulation and federal law. In response to the plaintiff's constitutional arguments, the court held that mooring fees in navigable waters violated neither the Commerce Clause nor Equal Protection, because Hawaii has a legitimate interest in insuring safe ports and the fees were an evenhanded and rationally related means that imposed little burden on interstate commerce. *Hawaiian Navigable Waters Preservation Soc'y v. Hawaii*, 823 F. Supp. 766 (D. HI 1993). A citizen's group representing boaters affected by state regulation of mooring fees challenged the constitutionality of all Hawaii's regulations and legislation affecting the rights of mariners to anchor and navigate in ocean waters surrounding the Hawaiian islands. A 1988 law provided authority to regulate anchoring and mooring within the ocean waters and navigable streams of the state and required permits. The court found that § 1311(d) of the SLA does not indicate Congress' intent to retain exclusive jurisdiction over navigable waters, but rather its intent to exercise concurrent jurisdiction with the states. Retention of the federal navigational servitude does not mean that the the federal government has exclusive control over state waters, only that the government may, without paying compensation, decrease the value of littoral and riparian property.

The court dismissed the plaintiff's Equal Protection claim, finding that the right of access to mooring privileges is not a fundamental right, so strict scrutiny need not be applied to the regulation. Only a rational relation to a legitimate state interest need be shown, as was done here--the need to avoid conflicting uses between recreational ocean users and vessels moored passively.

C. Public Trust Doctrine

1. Mississippi Holds Use of Former Tidelands No Taking

No compensation was due adjacent property owners where beach land was used in the construction of a highway. *Mississippi State Highway Comm'n v. Gilich*, 609 So.2d 367 (Miss. 1992). The property owners here sought compensation for the alleged taking of beach property on the Gulf of Mexico coast in the City of Biloxi. The court traced the history of the land from Mississippi's statehood in 1817, when Mississippi took title to all lands under tide waters to be held in trust for the people. Where beaches gradually and imperceptibly erode and the tide reaches further and further inland, as here, the new tidelands accreted to the public trust. Once the state possesses such tidelands, it's deemed to possess them forever. Citing the Mississippi Constitution's provision that "lands belonging to, or under the control of the state shall never be donated directly or indirectly to private corporations or individuals," the court held that the plaintiffs never owned the beach land at issue above the current mean high tide line and, therefore, no compensation was due where such land was used for the construction of a highway. The plaintiffs' efforts in artificially creating beach land by reclaiming inundated portions by pumping sand did not create private property.

In addition to finding the land a public beach held in trust for the public, the court followed cases that said that Mississippi's codified littoral/riparian rights are not property rights per se, but mere licenses or privileges, and are thus revocable. Where such rights are revoked for the greater public good, through exercise of the police power, abutting property owners have no claim for damages. None of the rights guaranteed by law (planting and harvesting oysters, construction of boathouses and other structures, etc.) were implicated by the highway construction, which left the shoreline clear and merely cut off the view and convenient pedestrian access to the shore from the plaintiff's apartment building.

The court reversed a damages award for the taking of property, which had been premised on the Mississippi Constitution's "takings" provision, holding that the plaintiff never owned the sand beach here. The case was remanded for determination of whether damages were due for interference with access, light, air and view from the highway construction.

D. State Ocean Planning: Oregon Update

The first draft of the State of Oregon's Territorial Sea Plan was published in October 1993. The plan provides an "ocean management framework" for the territorial sea that describes the hierarchy and interrelations of management authority both within state government and among the various federal entities having jurisdiction. The plan also provides a "rocky shore management" strategy. The strategy is based on a recently completed inventory of Oregon's rocky shoreline areas and includes a classification system for shore areas, priority planning for four conservation districts, and tighter regulation of tidepool areas.

E. National Estuary Program: Tillamook Bay Update

The Tillamook Bay National Estuary Project has drafted a Management Conference Agreement with the U.S. EPA. When signed, the Agreement will provide for commitments to improve water quality and the living resources of Tillamook Bay through the National Estuary Program. This will take place through public education efforts, inventory and analysis of existing resource management programs, and identification of priority problems and goals for the estuary. The problems of pathogen contamination, excessive sedimentation, and critical habitat degradation in the bay and its tributaries will be addressed in a final Comprehensive Conservation and Management Plan by 1998.

Brita Dagny Otteson
David Gingold

May 1994

With special thanks to Andrea Coffman for research assistance and Nancy Farmer for manuscript assistance.

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

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

Publication Announcement

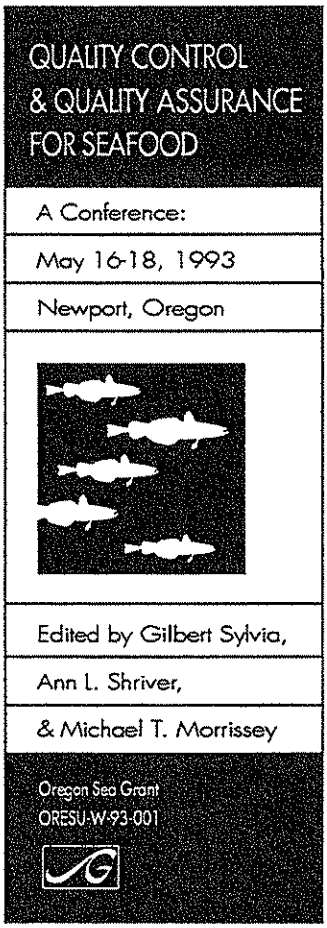
Oregon Sea Grant

Quality Control and Quality Assurance for Seafood. A Conference: May 16-18, 1993, Newport, Oregon.

Edited by Gilbert Sylvia, Ann L. Shriver, and Michael T. Morrissey. 1993. Paper $15.00 (169 pages). Sea Grant Pub. no. ORESU-W-93-001. ISBN 1-881826-08-12.

The 27 papers in this volume grew out of a 1993 international conference on quality control and assurance for seafood. The authors, who are quality control and marketing professionals from business, academia, and government, address applied and practical methods for seafood companies in designing, implementing, and managing seafood safety and quality control programs.

Their papers focus on three major areas: (1) evolving HACCP standards in the United States and Europe; (2) the authors' experience in incorporating HACCP safety programs with other programs designed to control and document seafood quality, including total quality management (TQM), statistical quality control (SQC), and ISO 9000; and (3) the integration of production, quality control, and seafood marketing in a quality-assured marketing management program.



Although discussing a broad range of quality issues, the authors agree on some fundamentals related to seafood safety and quality programs:

- Evolving international standards for seafood safety will be based on HACCP concepts.
- HACCP can be used with other techniques to develop quality control programs.
- Quality assurance programs (quality guaranteed to the final consumer) are more comprehensive than quality control programs (quality at a single level of production or distribution).
- Quality control and quality assurance standards must be market driven and developed as part of a marketing management program.
- Quality programs for seafood associations can succeed only if they are based on enforceable standards.

To order *Quality Control and Quality Assurance for Seafood,* return this application to

Sea Grant Communications
Oregon State University
Administrative Services A402
Corvallis OR 97331-2134
(503) 737-2716

Number of copies _____ Amount enclosed* _____

Name _____

Address _____

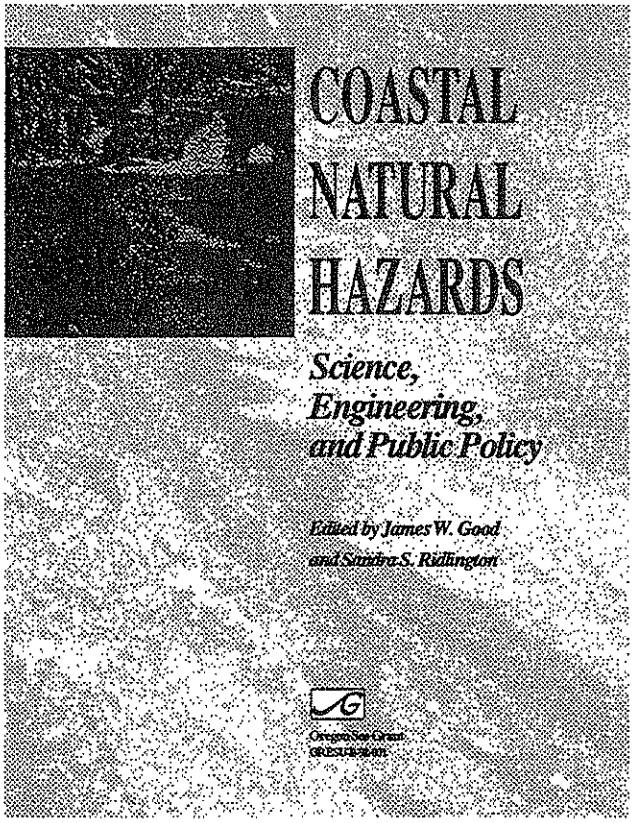
City _____ State _____ Zip _____

*Prepayment is requested. Make check payable to Oregon State University.

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.

To order *Coastal Natural Hazards,* return this form to

Sea Grant Communications
Oregon State University
Administrative Services A402
Corvallis, Oregon 97331-2134

Number of copies _____ Amount enclosed _____

Name _____

Address _____

City _____ State _____ Zip _____

Oregon State System of Higher Education
Extension Sea Grant Program
Oregon State University
Administrative Services Bldg. 422-A
Corvallis, Oregon 97331-2119

ADDRESS CORRECTION REQUESTED