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Wm. Stanley Sneath

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THE OCEANS

WM. STANLEY SNEATH*

Fishing

Peru announced a ban, effective February 9, 1978, on fishing for sardines and anchovies in Peruvian waters. While no official announcement has been made regarding the duration of the restrictions, fishing for these species is not expected to resume before the end of 1978. The Peruvian government in announcing the ban bowed to the judgment of its fisheries scientists at the Instituto Del Mar. The Instituto had issued a statement that any anchovy fishing in 1978, "however restricted," could be fatal to the remaining stock of fish.

The anchovy fishery, concentrated at the western edge of the Peruvian continental shelf was, at its height, the single largest in the world. In 1971 the Peruvian fleet caught 12 million tons of the fish, a large proportion of the total world catch. Since 1972, however, as yet poorly understood climatic factors have caused the near disappearance of the fish, and the anchovy catch since then has been consistently low.

Prior to the Peruvian announcement, the United Nations Food and Agriculture Organization had recommended a two year ban on anchovy fishing. The military government was, nevertheless, hopeful of using the fishery as a means of gaining badly needed foreign exchange.¹

In the United States, the National Oceanographic and Atmospheric Administration (NOAA) has proposed regulations which would severely restrict the quantity of seafood available from United States waters to foreign processors.² Foreign purchasers wishing to process fish caught by U.S. fishing vessels within the United States 200 mile Fishery Conservation Zone would first have to acquire a permit from the Department of Commerce. Issuance of this permit would be conditional on the absence of any American producer willing and able to take the raw fish. Currently, some foreign fish processing "factory ships" buy fish directly from U.S. vessels. The Commerce Department (of which NOAA is part) feels that this practice partially circumvents the goals of the 1976 National Marine Fisheries and Conservation Act.³ If the proposed rule is adopted, permits for foreign sales of fish would be approved only when the Secretary is satisfied that (1) the optimum yield will not be exceeded; (2) the capacity and intent of the United States fishing industry to harvest exceeds the U.S. capacity and intent to process; and (3) the relevant foreign vessel is capable of processing the fish.

The NOAA regulation is designed to encourage domestic investment in fish-processing equipment and to improve the employment picture in the

*J.D. Candidate, University of Miami School of Law. Mr. Sneath is an Articles and Comments Editor of the *Lawyer of the Americas*.

1. Wall St. J., Feb. 10, 1978, at 22, col. 2.
2. 43 Fed. Reg. 5398 (1978).
3. 90 Stat. 331 (1976), Pub. L. 94-265.

still economically depressed New England sea coast area. While the United States currently processes much of the "high value" catch, such as lobster, crab, salmon and shrimp, a large percentage of the "low-value" catch from the United States continental shelves is processed by foreign interests and reimported into the United States.

Notwithstanding the publication of the proposed rule, there are signs that NOAA may be reconsidering its approach to joint ventures. The agency has indicated that it intends to approve applications for joint ventures involving the sale, to foreign processors, of fish caught in Alaskan waters by U.S. fishermen. NOAA Deputy Administrator James Walsh told a Senate committee that the agency finds nothing in the Fisheries Conservation and Management Act governing the sale of fish to foreign processors.⁴

The Commerce Department also reported that the United States will receive \$10.1 million in fees charged to foreign vessels fishing within the United States Fisheries Conservation Zone. Japan (\$5.9 million) and the Soviet Union (\$3.5 million) are the two largest users of U.S. fisheries.

Cuba and the United States have reached agreement on the maritime boundary between the two states. The agreement was signed on December 16, 1977.⁵

Mineral Resources

Oil exploration on the Baltimore Canyon area of the U.S. continental shelf is expected to get underway rapidly, following the refusal of the Supreme Court of the United States to review a court of appeals decision in favor of the drilling.⁶

The Second Circuit, overturning a decision by the United States District Court for the Eastern District of New York, had held, in *County of Suffolk v. Department of Interior*,⁷ that the Environmental Impact Statement (EIS) prepared by the Department of the Interior satisfied the requirements of § 102(2)(c) of the National Environmental Policy Act (NEPA).⁸ In refusing to grant certiorari, the Supreme Court of the United States removed the last possible obstacle to the development of the potential oil and gas-bearing submerged lands off the New Jersey and Long Island coasts.

Previously, the Department of the Interior had conducted a lease sale on ninety-three tracts aggregating over 500,000 acres, for which oil and gas interests paid bonuses of \$1.128 billion. The leaseholders are expected to commence operations almost immediately. Some industry spokesmen cautioned, however, that commercial production might not occur for as long as eight years even if commercial quantities of petroleum were found.⁹

Almost every stage of the lease sale has been beset with litigation brought by environmental groups and local governments. The opposing

4. Ocean Science News, May 3, 1978, at 1.

5. Ocean Science News, Jan. 16, 1978, at 3.

6. 46 U.S.L.W. 3526 (1978).

7. 10 E.R.C. 1515 (2d Cir. 1977).

8. 42 U.S.C. § 4332 (2)(c) (1970).

9. Wall St. J., Feb. 23, 1978, at 3, col. 1.

organizations sought injunctions against the sale, alleging that the EIS was inadequate in that it failed to discuss projected pipeline routes from the field to the shore, and that it failed to sufficiently evaluate either the leasing of alternate sites or the possibility of further federal, rather than commercial, exploration.

A similar sale of offshore oil leases on the Georges Bank off New England was postponed indefinitely by the Interior Department. The United States Court of Appeals, First Circuit, upheld a federal district court preliminary injunction barring the sale, which was scheduled to take place on January 31, 1978. The controversy over the lease sale, which was to include 128 tracts covering 729,000 acres, will now be litigated on the merits.¹⁰

The Commonwealth of Massachusetts seeks to delay the sales until Congress enacts certain environmental safeguards to govern drilling and exploration. These include the preparation of a special EIS between the exploration and development phases of operations and a general baseline study of the current conditions of life cycles on Georges Bank. This latter study would provide comparison data to allow early detection of adverse effects stemming from oil and gas development. The state also wishes to see all pipelines from the production area buried in a manner so as to prevent interference with bottom trawling.¹¹

Meanwhile, eleven oil companies have agreed to set up a fund to cover damage to New England fishermen's gear that might result from oil drilling and exploration. The fund would be tapped in the event that the specific company at fault cannot be identified. A sum of \$100,000 would be deposited in the fund whenever the Georges Bank lease sales are completed, with an additional \$50,000 to be committed in the event that the initial fund is depleted.

Both houses of Congress have passed their respective versions of the Outer-Continental Shelf Lands Act Amendments of 1978. The Senate version and the House version, which differ in some respects, will now go to a joint committee for final agreement. The House version provides that twenty percent of the Outer Continental Shelf (OCS) revenues, up to a limit of \$200 million per year, will be paid to coastal states affected by offshore oil and gas exploitation. The House rejected giving the Occupational Safety and Health Administration jurisdiction over shelf working conditions, but gave the Coast Guard similar powers.¹²

The Departments of the Interior and Energy announced that they are considering alternate systems for conducting future offshore oil and gas leases. Currently, oil companies bid for tracts by offering sizeable bonuses to the government. Once they have been awarded the leases, the companies pay a fixed royalty. The proposed plan would not eliminate the cash bonus bidding entirely, but would provide for variable royalty payments. Royalties

10. 10 *Envir. Rep.* (BNA) at 1499 (1978).

11. *J. Com.*, Feb. 7, 1978 at 32, col. 2.

12. *Ocean Science News*, Feb. 6, 1978, at 6.

would vary with the rate of production from a minimum of 12.5 percent for tracts with low production rates to a maximum of sixty percent for leaseholds that produce at a high rate.¹³ This plan is designed to encourage smaller oil producers who might not, under the current system, have the capital to buy leases in advance of actual production.

At the time of writing, The United Nations Law of the Sea Conference has not yet completed its Geneva meeting. Nevertheless, private companies are forging ahead with their respective deep ocean floor mining projects, notwithstanding the uncertain state of possible treaty provisions.

Deepsea Ventures, Inc., a Belgian-American consortium, sent its vessel "Deepsea Miner" into the Pacific Ocean to conduct tests of manganese nodule recovery techniques. The ship is to lower four kilometers of pipe down to the ocean floor and attempt to bring up nodules at a rate of 1000 "wet" tons per day. The nodules would be scooped off the bottom with a dredge head and brought to the surface by hydraulic action.

Other consortiums conducting tests include Kennecott Copper, which conducted mining tests last summer, Lockheed, which has chartered the "Glomar Explorer" from the U.S. Navy, and Ocean Management, Inc., an international company with Canadian, Japanese and West German backing.¹⁴

The United States Department of Energy (DOE) has budgeted \$33 million for development of Ocean Thermal Energy Conversion (OTEC) systems. Theoretically, an OTEC system would be capable of producing electricity by using the heat differential between tropical surface waters and cold, deep ocean waters. As an initial step, the DOE plans to convert the Hughes mining barge into an OTEC test facility.

An OTEC system would involve bringing huge quantities of cold water up from depths of four or five kilometers through pipes as wide as ninety feet in diameter. According to James Madewell, manager of the DOE OTEC program, most of the technical problems have either been solved or are near solution. Approaching solution are problems associated with the performance of the heat exchangers that would allow extraction of energy from the water, problems with salt water corrosion, problems with the water pipe construction and problems associated with the electric cables needed to bring the electricity ashore. Problems with biofouling, once considered a major stumbling block, appear to be solved, as do questions concerning the practical sufficiency of the heat differential.¹⁵ Estimates of the cost of building an OTEC plant producing 250-350 megawatts range from \$350 million to \$1 billion. Such a plant could produce electricity for 15-40 mills per kilowatt hour.¹⁶

13. 43 Fed. Reg. 5900 (1978).

14. J. Com., Jan. 1, 1978, at 1, col. 5.

15. Ocean Science News, Feb. 20, 1978, at 6.

16. *Id.*, Feb. 13, 1978, at 6.

Both Westinghouse Electric Company and Lockheed Missiles and Space Company have been awarded preliminary design contracts by the DOE. The corporations will produce designs for commercial scale plants. Elsewhere, nine European companies have pooled their OTEC technologies and hope to build a pilot plant in the 10-25 megawatt range.¹⁷

Maritime Transportation

An Intergovernmental Maritime Consultative Organization (IMCO) conference was held in London during February. The delegates discussed various proposals for improving tanker safety and preventing pollution, and finally adopted specific standards for vessel construction and equipment.

The IMCO regulations would require existing crude carriers of greater than 40,000 deadweight tons (dwt) to install segregated ballast tanks and crude oil tank-washing systems. Existing tankers of greater than 70,000 tons must also install inert gas systems. Both changes must be completed by June 1981.

IMCO also intends to require all new tankships of over 20,000 dwt to be built with protectively located segregated ballast tanks. In addition, all product carriers of over 20,000 dwt will be required to install inert gas systems.

Segregated ballast tanks are vessel tanks that are never filled with oil. They are only used to hold the seawater ballast that all modern tankers use to maintain stability and seaworthiness when empty of cargo. The current practice of loading ballast water into just-emptied cargo tanks leads to oil contamination of the seawater, which in most cases is pumped overboard prior to loading oil. Despite attempts to separate the oil from the water much of the oil gets pumped overboard.

Tank-washing using sprayed jets of crude oil dislodges sludge and oil residues that collect on the interiors of cargo tanks. Again, the current practice is to wash these tanks with sea water. The dirty water is then pumped overboard after some of the oil separates through settling. Inert gas systems reduce the danger of explosions in vapor-saturated empty cargo tanks by replacing the oxygen with non-combustible gases from the vessel's exhaust. Protective placement of the segregated ballast tanks would provide a measure of shielding for the cargo tanks. The ballast tanks would be placed about the ship in a manner designed to place a double hull over particularly vulnerable areas of the cargo tanks, hopefully reducing the chances that a grounding or collision would breach the tank and cause an oil spill.

The United States delegation had argued for the adoption of more stringent standards, including double bottoms, segregated ballast tanks and inert gas systems for all tankers over 20,000 tons. The United States appears willing to accept the IMCO rules, and the U.S. Coast Guard intends to propose regulations consistent with the IMCO standards.¹⁸

17. J. Com., Feb. 7, 1978, at 32, col. 5.

18. *Id.*, Feb. 27, 1978, at 32, col. 5.

Although decisions of the 106 member organization are not binding on the United States until endorsed by the Senate, the U.S. Coast Guard has the authority to implement the IMCO rules. Last May the Coast Guard proposed rules consistent with the United States position at the conference, and it now appears as if the IMCO regulations will be enforced by the United States prior to the June 1981 deadline.¹⁹

In another field of maritime safety, the U.S. Coast Guard's AMVER (Automated Mutual-Assistance Vessel Rescue) system is to be augmented by the addition of twelve radio stations to be built on the coast of Great Britain. AMVER is a computerized vessel plotting system which uses information received from participating vessels to provide rescue agencies with updated information on the locations of these ships. Each ship radios in its voyage plan, including time of departure, expected courses, destination and speed. AMVER also receives data concerning the special capabilities of each vessel, i.e., particular rescue equipment or trained personnel. If a distress call is received from a participating vessel, or any other ship, AMVER controllers can contact the nearest vessel capable of providing assistance. The system's computer will print out a list of all ships expected to be in a position to provide aid. An average of over 2000 vessels are carried on the AMVER plots each day. In 1977, approximately 6800 ships used the facility, which is voluntary except for Norwegian ships, whose participation is mandated by their government.

The AMVER Center, located on Governors Island in New York Harbor, relies on reports radioed from participating ships. The addition of the new British stations will bring the number of radio terminals to ninety-five.²⁰

The Liverpool Underwriters Association reported that a total exceeding one million gross tons of shipping was lost in 1977. The casualty losses consisted of 203 ships totalling 1,200,318 gross tons, and were slightly less than the 1976 figures. Of sixty-five ships lost due to fire and explosion, only nine were tankers.

Flags of convenience suffered the largest casualty rate, both in terms of numbers and tonnage. Ships registered under either the Greek flag or a flag of convenience accounted for 122 losses, totalling 870,180 gross tons. Forty-five of these losses were ships of Panamanian registry.²¹

The Supreme Court of the United States recently struck down parts of the Washington Tanker Law in *Ray v. Atlantic Richfield*.²² The Court modified the prior decision of a three judge district court which had held the entire statute invalid.²³

19. *Id.*, at 1, col. 6.

20. *Id.*, Jan. 16, 1978, at 12, col. 1.

21. *Id.*, Feb. 7, 1978, at 31, col. 6.

22. *Ray v. Atlantic Richfield*, 46 U.S.L.W. 4200 (1978).

23. *Atlantic Richfield v. Evans*, No. C-75-648-M, 9 E.R.C. 1876, (W.D. Wash. Sept 24, 1976).

The Washington statute²⁴ purported to regulate the movement of oil tankers into Puget Sound. Washington Law required: That all tank vessels of over 40,000 dwt take a state pilot on board when entering the Sound; that oil tankers of between 40,000 dwt and 125,000 dwt meet certain strict construction and equipment standards or use a tugboat escort during all loaded passages; and that no oil tankers of over 125,000 dwt enter Puget Sound.

The Supreme Court, in a six part decision held: (1) That Washington is precluded by federal law from imposing state pilots on enrolled, coastwise tankers, although it is free to do so for vessels under registry; (2) that Congress, in Title II of the Ports and Waterways Safety Act of 1972 (PWSA),²⁵ by indicating its intent that the Coast Guard promulgate uniform design and construction standards, preempted the field, and that state design and construction standards are invalid under the Supremacy clause; (3) that the state *could* require a tug escort for certain vessels, since this was the sort of local navigation control left to the states in the absence of federal action, and since the Coast Guard has not yet specifically promulgated regulations on the subject under the PWSA; (4) that the tug escort requirements are consistent with the commerce clause as defined in *Cooley v. Board of Wardens*,²⁶ which allowed states to regulate pilotage where no uniform national rule is necessary; (5) that the tug requirement, although applicable to foreign vessels, does not unduly interfere with the power of the Federal Government to conduct foreign affairs; and (6) that the state may not exclude oil tankers of over 125,000 dwt since under the PWSA a state may not impose higher safety standards than those imposed by the Coast Guard, and the Coast Guard has not seen fit to impose any size limits, other than in certain local pilot rules.

The State of Washington, before the district court, had argued unsuccessfully that the Tanker Law was part of a comprehensive Coastal Zone Management plan, which had been approved by the Commerce Department. The district court found, however, that the law was only peripherally related to the coastal management plan, and that the provisions of the Coastal Zone Management Act (CZMA)²⁷ calling for federal cooperation with an approved plan were not applicable.

The district court rejected the state's reliance upon *Askew v. American Waterways Operators, Inc.*,²⁸ noting that the case dealt only with Florida's imposition of tort liability upon tanker and oil terminal operators.²⁹ Although the Florida law itself dealt with special equipment requirement for tankers and terminals as well as with tort liability, this aspect was briefly mentioned but not discussed in the *Askew* opinion. The district court therefore construed the *Askew* opinion as if it dealt solely with operator liability.³⁰

24. Wash. Rev. Code § 88.16. 170-190.

25. 46 U.S.C. § 391a (Supp. V 1970).

26. 53 U.S. (12 How.) 299 (1851).

27. 16 U.S.C. § 1451 (Supp. III 1973).

28. 411 U.S. 325 (1973).

29. Fla. Stat. Ann. § 376.07(2) (West).

30. 9 E.R.C., at 1878.

The district court also distinguished *Huron Portland Cement v. City of Detroit*,³¹ noting that the Supreme Court opinion had approved of state air pollution regulations which did not conflict with or overlap the federal regulation of vessel safety.

The Supreme Court, in *Atlantic Richfield*, agreed with the district court's interpretation of *Huron*, and refused to even discuss the applicability of either the CZMA or the *Askew* case. This indicates that the Supreme Court agreed with the lower court's extremely narrow interpretation of *Askew*.

The opinion of the Court, which in its entirety was joined by only four justices (although at least six justices supported each holding), relied largely on the PWSA and the federal pilotage statute. Federal law allows states to impose pilotage requirements on all vessels except those sailing under license or enrollement. Enrolled (and licensed) vessels are ships which are both owned by United States citizens and licensed to trade between points in the United States. Such vessels are by statute exempt from state and local pilotage regulation.³² Therefore, the State of Washington is constrained from requiring the presence of state pilots on enrolled vessels sailing under the command of an officer holding a U.S. Coast Guard pilot's license for Puget Sound. This does not, however, exclude the state from requiring that foreign vessels and United States vessels sailing under registry be under the command of a state pilot while in state waters.³³ *Cooley v. Board of Wardens*³⁴ held that a state is free under the commerce clause to promulgate local pilotage and navigation regulations to the extent that the federal legislature had not acted on the subject. Indeed, the Court pointed out that the PWSA expressly allowed states to promulgate pilot regulations, giving the Coast Guard only the power to make temporary regulations where the State has not yet acted.³⁵

The Court had little difficulty finding that the equipment and construction requirements promulgated by the Washington Tanker law were invalid in light of the PWSA. Three justices dissented from this holding on the grounds that this part of the statute was not mandatory, but could be avoided by the alternative tug escort requirement which was itself found valid. The minority opinion notes that there has been no attempt nor any need to comply with the equipment rules, since all tanker operators have availed themselves of the use of a tug escort. Thus, the minority found no need to rule on this part of the Washington law.³⁶

The majority, however, found that this aspect of the law³⁷ was clearly in conflict with Title II of the PWSA.³⁸ Title II, the Court noted, provides that

31. 362 U.S. 440 (1960).

32. 46 U.S.C. §§ 215, 364 (1970).

33. *Id.*, § 215.

34. 53 U.S. 299.

35. 33 U.S.C. § 1221(5) (Supp. IV 1974).

36. 46 U.S.L.W., at 4208.

37. Wash. Rev. Code § 88.16.190 (2).

38. 46 U.S.C. § 391(a) (Supp. IV 1974).

the Coast Guard shall establish "such rules and regulations as may be necessary with respect to the design, construction and operation of the covered vessels and with respect to a variety of related matters."³⁹ Title II also gives some measure of control over foreign vessels.⁴⁰ Since the Coast Guard had previously promulgated such regulations and is now in the process of revising its regulations on tankers, the Court found it clear, under the Supremacy Clause, that the field had been preempted by the federal legislature and that the Washington law was invalid.

Although the PWSA provided for the federal imposition of local navigation rules as part of a Vessel Traffic Control scheme, the Coast Guard has not yet promulgated a rule requiring tug escorts in Puget Sound. The Court, in dicta, notes that such rules, if promulgated, might pre-empt the Washington law, but holds that tug escort requirements are the sort of local navigation rule left to the states in the absence of federal action.⁴¹ The Court found that no federal action had yet occurred which would displace the state law, which was therefore valid.

Finally, the majority found that the 125,000 dwt size limit on oil tankers entering Puget Sound was the sort of state safety standard prohibited by implication in the PWSA.⁴² The court rejected the contentions of the dissenters and the State of Washington that the size limit was a local navigation rule, noting that even if it were a local navigation rule, the Coast Guard, which had imposed certain size-based rules in Rosario Strait (a passage within the Sound), had pre-empted the field by issuing that rule and no others.

This case is important in several respects. First, it emphasizes that the state governments do not have the power to make laws imposing equipment, construction safety standards on vessels. This cuts short any tendency of state balkinization of U.S. shipping and port regulations.

In addition, the Court, by broadly construing the power of the U.S. Coast Guard under the PWSA, upheld the power of federal government to promulgate and enforce detailed local rules and regulations governing port safety and vessel construction. There is little doubt that the U.S. Coast Guard's authority to impose mandatory Vessel Traffic Control systems, while still somewhat limited, will be enhanced by this decision.

39. 46 U.S.L.W., at 4202.

40. *Supra* note 37, § 391 (7)(D).

41. *See* 53 U.S. 299.

42. 46 U.S.C. § 1221(b) (Supp. IV 1974).