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Karla J. Black

University of Maine School of Law

Greg Domareki

University of Maine School of Law

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A REVIEW OF DEVELOPMENTS IN OCEAN AND COASTAL LAW 2000

*Karla J. Black and Greg Domareki**

DOMESTIC

I. LEGISLATION

A. *Oceans Act of 2000*

This year the 106th Congress passed, and President Clinton signed into law, the Oceans Act of 2000. The Act creates a national oceans commission. The 16 member Commission will study the nation's ocean and coastal policies. The Commission will bring together coastal experts, policy makers, environmental groups and industry representatives to address several ocean issues, such as coastal development, overfishing, polluted runoff and degradation of coral reefs. These issues necessitate a need for a coordinated plan to manage the nation's coastal and marine resources. The Act illustrates a growing concern in the political sphere for the world's oceans. The National Oceanic and Atmospheric Administration (NOAA), started in 1970, the Coastal Zone Management Act of 1972 and Fishery Conservation and Management Act of 1976 have been the dominant forces in policy and regulation of the United States' ocean and coastal areas for the past 30 years. The Act comes in response to the ever growing role the ocean and coastal areas play, and will continue to play, in the United States. Currently, over half of our nation's population lives on the coast, which comprises only about 10 percent of our land; 40 percent of all new commercial and residential growth is along the coast; it is projected that by the year 2025, 75 percent of the population will live on the coast. The Act should help facilitate solutions to some of the problems that face, or soon will face, ocean and coastal areas. *See House Passes Ocean Act of 2000: New commission will assess U.S. policies* (visited Oct. 8, 2000) <<http://www.nrdc.org/wildlife/fish/ndeplete.asp.html>>; *See also Oceans Act of*

* University of Maine School of Law, Class of 2002.

2000: *Report of the Committee on Commerce, Science, and Transportation* (visited Oct. 8, 2000) <<ftp://ftp.loc.gov/pub/thomas/cp106/sr301.txt>>.

B. Beach Bill

This year Congress passed the Beaches Environmental Assessment and Coastal Health Act of 2000, more commonly known as the "Beach Bill." The Bill is to protect beach-goers and coastal communities nationwide. The Bill requires coastal states to monitor the quality of the beach water and to warn the public when there are dangerous levels of disease-causing microorganisms. The Bill amends the Clean Water Act. The Bill authorizes \$30 million per year to coastal and Great Lake states to help develop water quality monitoring and public notification programs. The Bill comes in response to increasing concern for the health of beach-goers. The year 1999 saw 6,100 beach closings or advisories because of high levels of bacteria and/or viruses. Contaminated beach water can cause a variety of illnesses, ranging from gastroenteritis and hepatitis, to ear, nose and throat infections. Only eleven states currently require such testing and notification. The Bill ensures a minimum level of testing for bacteria and/or viruses for all of the nation's beaches. The American Oceans Campaign praised the Bill as much needed common-sense legislation. *See David Hall, House Passes Bill Protecting Beach-Goers Coastal Communities Nationwide* (visited Oct. 8, 2000) <<http://www.americanoseans.org/issues/presses13.htm>>.

C. Magnuson Fisheries Act in Need of Reauthorization

For approximately 25 years, American fisheries have been governed by the Magnuson Act. The Bill will soon need to be reauthorized. The Act was last reauthorized as the Magnuson-Stevens Fishery Conservation and Management Act in 1996. The Act's chief sponsor in 1996 was Republican Ted Stevens of Alaska. Several bills have already been introduced. There are competing reauthorization bills, backed by groups with different agendas. Two of the major issues in the debate are individual fishing quotas and gear restrictions. Representative Wayne Gilchrest of Maryland offered a reauthorization bill that emphasized protecting fish habitat from fishing gear and the cessation of overfishing. Gilchrest's bill alarms druggers, scallopers and others who fear being driven off fishing grounds. Senator Olympia Snowe of Maine answered with a bill that would make it harder to target bottom-dragging fishing gear. Her bill also calls for more consideration of the social and economic impacts of regulation on coastal communities. In response, Senator John Kerry of Massachusetts introduced

a bill that is a compromise between the two earlier bills. Reauthorization is not likely before 2001, but lobbying is already heating up. Critics of dragging compare the practice to clear-cutting millions of acres of forest each year. Seafood representatives say this comparison is false because dragging concentrates on specific long-productive fishing grounds. The final bill will have a significant impact on fishery regulations and seafood suppliers for years to come. *See Magnuson Muddle: It's time again for Congress to reauthorize the nation's top fisheries law - and there's no shortage of ideas* (visited Oct. 8, 2000) <http://www.gofish.com/cgi-bin/WebObjects/Gofish.woa/wa/gotoArticle?document_id=13422705.html>.

II. FISHERIES MANAGEMENT

A. *Salmon Recovery Bill*

Congress is working on a bill that would commit up to \$600 million over the next three years to salmon recovery in the Pacific Northwest. Five states: Alaska, Washington, Oregon, California, and Idaho would receive money to improve salmon habitat, reduce runoff, and increase salmon research. The region currently gets millions of dollars a year from the budgets of the Army Corps of Engineers and National Marine Fisheries Service for salmon funds, as well as for a treaty between the United States and Canada. The money will supply a boost to efforts to improve habitat and protect endangered native species. *See House OKs salmon recovery bill: \$600 million would help research, habitat improvements* (visited Oct. 8, 2000) <http://www.gofish.com/cgi-bin/WebObjects/Gofish.woa/wa/gotoArticle?document_id=13422789.html> .

B. *Rhode Island Reopens Fishing Grounds*

In July 2000, an oil spill caused the closure of about 4,000 acres in Narragansett Bay. On July 5, a tugboat punctured the barge Penn 460 which was carrying 3.8 million gallons of No. 6 fuel oil. The tug was in the process of helping maneuver the barge. The puncture caused the release of between 9,000 and 14,000 gallons into Narragansett Bay just off Middletown. Oil-response acted quickly to minimize the impact of the spill. Cleanup entailed vacuuming and skimming the water's surface as well as removal of contaminated beach sediment. The oil, oil/water mixture, and oil-saturated absorbents were taken to Clean Harbor Environmental Services in Maine for separation, incineration, and burial. The oil-response crew could not save five mute swans, which were too heavily oiled to be

cleaned, and were thus euthanized. Fortunately, efforts to save forty-two Canada geese were more successful. They were rescued and sent to Tri-State Bird Rescue in Delaware. Forty-one of the geese were rehabilitated and released. While the long-term impact of the spill is undetermined, the spill will be monitored closely by examining intertidal zones and eel grass beds by trolling at varying depths in Narragansett Bay. The impact of the spill will also be monitored by comparing contaminated areas with those not touched. See Jerry O'Brien, *R.I. fishing grounds reopen: Oil spill in July led to closure*, (visited Oct. 8, 2000) <http://www.gofish.com/cgi-bin/WebObjects/Gofish.woa/wa/gotoArticle?document_id=13422843.html>.

C. *The North Atlantic Swordfish Gets Some Help*

The Natural Resources Defense Council's "Give Swordfish a Break" campaign gained victory on August 1, 2000 with the government's announcement of measures to protect the fish. The Natural Resources Defense Council and Sea Web led a two-and-a-half-year campaign to restore swordfish populations to the north Atlantic. The measures will protect juvenile north Atlantic swordfish from being fished by closing 132,670 square miles of ocean to pelagic longline fishing on a seasonal basis. Pelagic fish live near the oceans surface. The longline fishing technique involves lines that are dozens of miles long with bait attached to hundreds of hooks. This technique indiscriminately catches and kills many different types of marine life, including tuna, swordfish, shark, and sea turtles. In part, the measures are a reaction to the disturbing data that indicates that in the 1960s, most of the swordfish caught weighed over 250 pounds as compared with the present average weight of only 90 pounds. This means that a majority of the swordfish caught are too young to breed. The new measures should allow greater numbers of swordfish to reach breeding age. See Natural Resources Defense Council, *North Atlantic Swordfish: NRDC's Give Swordfish a Break Campaign nets victory for recovery efforts* (visited Oct. 8, 2000) <<http://www.nrdc.org/wildlife/fish/nswordbr.asp>>.

D. *Fish Populations are Declining Rapidly*

Many environmentalists warn that soon many seafood items will move from the shopping list to the threatened list as swordfish already have. Overfishing, habitat loss, and population are diminishing the populations of swordfish, sea bass, shark, shrimp, orange roughy, sturgeon, bluefin tuna, Atlantic halibut and Atlantic sea scallops. Over half of the fish in

U.S. waters are being depleted faster than they can replenish themselves. Globally, things are worse; about 70% of waters are overfished. If stocks are not protected, fish may soon be less readily available to shoppers. Beyond losing a crucial source of protein and a healthy alternative to red meat and poultry, the depleted stocks could potentially have serious implications on ocean ecosystems. The problem needs to be addressed at many levels. Commercial fleets can help by using techniques that lower bycatches. About one quarter of the fish caught in the world are wasted. The United States can do its part by enforcing the Sustainable Fisheries Act of 1996, as well as implementing new laws to protect habitat and curb fishing practices. The United States also needs to take a leadership role in governing international fishing. Consumers can eat seafood with strong stocks such as Alaskan salmon, striped bass, mahi-mahi, Dungeness crab, Alaska halibut, tilapia, rainbow trout, and catfish. All is not lost; the threatened stocks can bounce back if given some relief. *See* Natural Resources Defense Council, *Fish Populations in Peril: Many fish are threatened by overfishing, but steps can be taken to reverse the decline* (visited Oct. 8, 2000) <<http://www.nrdc.org/wildlife/fish/ndepite.asp>>.

E. Horseshoe Crabs May Get Protection in Delaware Bay

The Secretary of Commerce and the Delaware Governor have announced a plan for additional protection for horseshoe crabs by prohibiting their harvest in their prime spawning area. Delaware Bay has the largest population of horseshoe crabs in North America. The crab is an ancient group of marine animals related to spiders that live in shore and continental shelf habitats from Mexico to Maine. The 350-million-year-old crab has been over-fished. The crab provides medical benefits (their blood is extracted for testing of bacterial endotoxins), food for migratory birds (many migratory birds feed on the crab's eggs) and bait for fisherman (bait to catch eel and whelk). The proposed preserve would include a 30 nautical mile radius around the mouth of Delaware Bay. This would ensure plentiful numbers of crabs outside the protected area in the future. *See* Commerce Secretary Mineta, Delaware Governor Carper Announce Proposal To Protect Horseshoe Crabs In Delaware Bay (visited Oct. 3, 2000) <<http://www.publicaffairs.noaa.gov/releases2000/aug00/noaa00r141.html>>.

F. National Marine Fisheries Service in Violation of Federal Law

United States District Court Judge Gladys Kessler held the National Marine Fisheries Service (NMFS) in violation of the National Environmen-

tal Policy Act for failing to properly assess fishing impacts on fish habitat and analyze alternatives to protect fish habitat in five of the agency's management regions: the Caribbean, Gulf of Mexico, New England, Pacific and North Pacific. The court's ruling was in response to a lawsuit filed by the American Oceans Campaign and eight other conservation and fishing groups against the Secretary of Commerce and NMFS. Judge Kessler noted that NMFS did not look at "how fishing practices and gear might damage corals, disrupt fish habitat and/or destroy benthic life that helps support healthy fish populations." The court's ruling means that NMFS must go back and conduct assessments to ensure fish habitat protection. NMFS must meet the requirements of the Sustainable Fisheries Act and the National Environmental Policy Act. *See Court: NMFS violated federal law: Agency ordered to redo fishing impact assessments* (visited Oct. 8, 2000) <http://www.gofish.com/cgi-bin/WebObjects/Gofish.woa/wa/gotoArticle?document_id=134227964>.

G. Gag, Black and Red Grouper Get More Protection In the Gulf of Mexico

Regulations implemented on June 19, 2000 aim to prevent overfishing of gag, black and red grouper in the eastern Gulf of Mexico. The measures will raise the minimum size limit for both recreational and commercial fisherman. In line with President Clinton's May 26, 2000 executive order, two new marine protected areas will be established in the Gulf. The two new areas total 219 square nautical miles where the grouper are known to spawn in large numbers. These areas will be closed to all fishing except highly migratory species such as tunas, sharks, and billfishes. The regulations also increase the minimum size, which will reduce harvests and allow more females to reach reproductive age and spawn. In addition, the regulations prohibit the sale of gag, black and red grouper from February 15 to March 15. The prohibition will help allow the fish population to recover. *See New Regulations Announced For The Gulf of Mexico Gag, Black, and Red Grouper Fisheries: Federal action creates two marine protected areas* (visited Oct. 10, 2000) <<http://www.publicaffairs.noaa.gov/releases2000/jun00/noaa00r123.html>>.

H. Battle Brews Over Spiny Dogfish

Plaintiffs, in a suit brought in the District Court of Massachusetts, sued William M. Daley, the United States Secretary of Commerce, seeking to invalidate National Marine Fisheries Service-imposed regulatory restrictions implementing the spiny dogfish Fishery Management Plan (FMP).

The plan set forth quota restrictions that would have a serious impact on the spiny dogfish industry primarily located in New England. The plaintiffs, representing the commercial companies expected to be impacted by these regulations, alleged that the Secretary, in enacting the plan, acted in an arbitrary and capricious manner that was inconsistent with the law.

On April 3, 1998, consistent with the requirements of the Magnuson-Stevens Act, Secretary Daley designated the spiny dogfish "overfished" thus requiring the New England Fisheries Management Council (NEFMC) and the Mid-Atlantic Fisheries Management Council (MAFMC) to develop a fishery management plan within one year to end the overfishing and begin replenishing the stocks. The NEFMC and MAFMC developed a plan for the spiny dogfish which proposed measures to control fishing mortality, contained a definition of overfishing, set forth a five year stock rebuilding schedule, and identified and described the essential fish habitat. After public comment, the Secretary partially approved the spiny dogfish FMP on September 29, 1999 and gave his final approval on January 11, 2000 with the plan to become effective on February 10, 2000. The Secretary delayed the implementation of the plan several times, however, to allow the councils time to agree on the quota and trip limit provisions provided for in the plan. Having not reached an agreement by May 1, 2000, the Secretary implemented an interim final rule that acted to establish the quota and trip limits.

The plaintiffs argued that the final rule and the interim final rule failed to comply with the Magnuson-Stevens Act, certain national standards, and the Regulatory Flexibility Act. Reviewing the Magnuson-Stevens claim and the Regulatory Flexibility Act claim under the Administrative Procedures Act, the court found that it could only set aside an administrative action if it was arbitrary, capricious, or otherwise contrary to law. The court subsequently rejected the plaintiff's claims finding no violation of the Magnuson-Stevens Act, national standards, or the Regulatory Flexibility Act. The court denied plaintiff's motion for summary judgment and granted the defendant's cross-motion for summary judgment. *See A.M.L. International, Inc., v. Daley*, 107 F. Supp. 2d 90 (D. Ma. 2000).

III. PROTECTED AREAS

A. Raising Artifacts from the USS Monitor

This summer an expedition called "Monitor 2000" recovered several artifacts from the famous Civil War ironclad battle ship the USS Monitor. The Monitor sank on New Years Eve, 1862, sixteen miles off Cape Hatteras, North Carolina. The ship was found in 1973, 111 years after it

sank. In 1975, the nation's first national marine sanctuary was created to protect the historic wreck. The artifacts found this summer include a pitcher, a drawer pull, and a brass hinge. The recovered artifacts were handed over to the Mariners' Museum in Newport News, Virginia. The museum is the principal keeper of all the artifacts and documents regarding the Monitor. The artifacts will be treated to ensure their conservation and then displayed. In 1998, the Monitor's propeller was recovered. The expedition hopes to eventually recover the ship's steam engine and turret. *See NOAA Announces Plans to Raise More Artifacts From The Monitor National Marine Sanctuary* (visited Oct. 3, 2000) <<http://www.publicaffairs.noaa.gov/releases2000/aug00/noaa00r418.html>>.

B. Early Detection of Coral Bleaching

Coral Reef Watch, a new NOAA program, has been monitoring coral reefs in the Atlantic, Pacific, Gulf of Mexico, and Caribbean. The program hopes to detect early warning signs of coral bleaching. Coral bleaching is the loss of color in coral. Bleaching is when coral tissues expel a symbiotic algae that is essential to the coral's survival. Bleaching is caused by a variety of events, such as changes in water temperature or changes in nutrient levels. It is believed that research will provide one to two weeks of advanced notice of bleaching episodes. Unfortunately, even with the advanced notice, there is no known way to reverse or stop the bleaching once it begins. The early notice would allow researchers to closely monitor and gain a better understanding of what causes the bleaching. The program successfully predicted a bleaching episode on the Great Barrier Reef in January 2000. *See New NOAA Program Provides Early Warning of Coral Bleaching* (visited Oct. 3, 2000) <<http://www.publicaffairs.noaa.gov/releases2000/sep00/noaa00r520.html>>.

C. Unique Project to Protect Wetlands of Louisiana's Chandeleur Islands

The Chandeleur Islands are a barrier island chain 72 kilometers long that helps protect the Louisiana mainland from hurricanes and damaging storms. The Islands are the site of a recently implemented, never before tried habitat restoration project. The project will plant smooth cordgrass plants. The project is unique in that the planting will take place in two phases, a test phase and a planting phase. Initially, three similar locations will be planted differently with about 1,500 plants, in order to provide specific information on the most effective way to protect the wetlands. Scientists will monitor the designs and determine which one is most

effective. That design will then be used for the large scale project, in which they will install more than 100,000 plants in the spring of 2001. The test phase will help ensure that the planting is a success, as well as saving time and money. In the main phase, grass will be planted in about 364 acres of shallow island areas to stabilize and trap sediment. Beyond protecting the existing marshes, the planting will create more than 70 acres of new marshes on the islands and protect another 30 acres of mainland marshes through wave reduction. Eventually, the project should restore over 450 acres of the island. This restoration is necessary to maintain this critical barrier island chain. *See NOAA Biologists Install Unique Pilot Project On Louisiana's Chandeleur Islands* (visited Oct. 10, 2000) <<http://www.publicaffairs.noaa.gov/releases2000/jun00/noaa00r120html>>.

D. Expanded Boundaries to Protect Oculina Coral

The Oculina Bank Habitat Area of Particular Concern will be expanded. The Oculina Bank is located off Fort Pierce, Florida. The expansion of the protected area is to protect the coral, as well as the fish that thrive in the habitat. The Oculina Bank was created in 1984 to protect the coral. Oculina coral, also known as ivory tree coral, is in water from 230 to 330 feet deep. The delicate coral grows less than half an inch per year, and forms branching colonies that can stretch for hundreds of yards and grow up to fifteen feet high. The habitat supports a diverse deepwater ecosystem, including commercial fish such as red porgy, greater amberjack, snapper, and grouper. The area was the site of intense fishing, until 1984 when trawling and dredging was stopped in the area. However, anchors and weights connected to bait still did significant damage until banned in 1995. Unfortunately, the bans did not come soon enough and the overfishing took its toll. The great biodiversity that had previously characterized the area has since declined. New expanded protection will help facilitate recovery of the habitat and marine life. As of July 14, 2000, fishing with bottom longlines, trawls, dredges, pots or traps is prohibited. Anchoring in the protected area is also prohibited. In all 43 nautical miles will be protected. *See NOAA Fisheries Approves Expanded Boundaries For Protected Habitat Area Off Florida's East Coast To Protect Oculina Coral* (visited Oct. 10, 2000) <<http://www.publicaffairs.noaa.gov/releases2000/jun00/noaa00r128.html>>.

E. Oceans Get Presidential Support

President Clinton wants to expand and strengthen marine protected areas. He believes this is essential to the conservation of America's natural

and cultural marine heritage. He signed an executive order on May 26, 2000, directing federal agencies to use their authority to strengthen management, protection and conservation of existing marine protected areas, as well as expand and create new marine protected areas. Currently, there are over 1,000 marine protected areas. These areas include National Marine Sanctuaries, some National Parks and Wildlife Refuges, National Estuarine Research Reserves and other areas to protect natural or cultural resources such as coral or historic shipwrecks like the USS Monitor. Only about one percent of the ocean within United States jurisdiction is protected; and, only ten percent of protected areas are given the highest level of protection. The executive order requires that the Department of Commerce and the Department of the Interior lead the effort to develop a national system of marine protected areas. Federal agencies will work with states, commonwealths, territories, Regional Fisheries Management Councils and other appropriate entities to establish and manage marine protected areas. The order provides no specific target for the amount of area to be protected. The order also directs the Environmental Protection Agency (EPA) to act to reduce pollution of beaches, coasts and ocean waters through regulations of the Clean Water Act. The EPA, in furtherance of these goals, may set higher levels of protection, especially in valued or vulnerable areas. *See President Clinton: Working to Create an Ocean Conservation Network* (visited Oct. 10, 2000) <<http://www.gov/ooc/press/2000/clintonrel3.html>>.

IV. ENDANGERED SPECIES

A. *White Abalone Proposed as Endangered*

The white abalone is a type of marine shell fish that lives from Point Conception, California to Punta Tortugas, Baja California, Mexico. The white abalone has seen a ninety-nine percent decline since the 1960s. In the 1960s, there were an estimated 2.2 to 4.2 million white abalone; now, there are estimated to be less than 2,540. The decline is attributed to both their reproductive habits and their overcatching. The white abalone reproduces externally; that means that if the female is not within a few meters of the male when they spawn, her eggs will not be fertilized. Thus, when catches reduced the abalone populations, there was a lower probability of successful fertilization. The white abalone was depleted very quickly. In 1972, commercial harvesting of the shellfish hit its peak at 144,000 pounds. However, by 1979, only 1,000 pounds were harvested. Since 1987, there have been only eleven reported landings. One possible solution to help the species bounce back is to collect the white abalone for

artificial propagation. Because the State of California has already closed its white abalone fishery, impact on fishermen will likely be small if the white abalone gains endangered status. *See White Abalone Proposed as 'Endangered' Under Endangered Species Act* (visited Oct. 8, 2000) <<http://www.publicaffairs.noaa.gov/releases2000/may00/noaa00r115.html>>.

B. Steller Sea Lions Get Court's Help

On July 19, 2000, the United States District Court in the Western District of Washington granted an injunction to stop groundfish trawl fishing in steller sea lion critical habitat. The steller sea lion is believed to be at least 3 to 4 million years old. The steller sea lion populates the entire North Pacific Rim, but its major population is concentrated in the western Gulf of Alaska and the Aleutian Islands. The steller sea lion was classified as endangered under the Endangered Species Act in 1997. The species suffers from undernourishment. This is most likely a result of the fact that the steller sea lion shares its habitat with the largest commercial fishery in the United States. Greenpeace and other environmental groups sought to enjoin the fishing until the National Marine Fisheries Service "completes a comprehensive biological opinion adequately analyzing the full scope of the North Pacific groundfish Fishery Management Plans." The court held that for Greenpeace to obtain an injunction they needed to demonstrate a likelihood of "success on the merits" and show "irreparable injury." The court ruled that the National Marine Fisheries Service's failure to prepare a comprehensive biological opinion was in violation of the Endangered Species Act and thus lost on the merits. Greenpeace also carried the "irreparable injury" burden by illustrating that without the injunction it was likely the Endangered Species Act would be violated again. The injunction bans all groundfish trawl fishing until the National Marine Fisheries Service is in compliance pending further order of the court. *See Greenpeace, et al. v. National Marine Fisheries Service, 106 F. Supp. 2d 1066, 1068 (W.D. Wash. 2000).*

INTERNATIONAL

I. PROTECTED AREAS

A. Council Proposes Designation of Gulf of Maine Area as an International Ocean Wilderness Reserve

A recent proposal sent to President Clinton and Canadian Prime Minister Jean Chretien has urged them to designate an area of the Gulf of

Maine as an International Ocean Wilderness. The proposal suggests setting aside a marine area approximately 20 miles wide along the international border between the United States and Canada. The area would cover approximately 2,000 miles. This plan would ban virtually all forms of commercial marine activity from the area including fishing, mining, oil drilling and aquaculture in an effort to preserve and study the ecosystem. The plan would, however, accommodate inshore lobster and crab fishing. Proponents of the plan, including the Science and Management of Protected Areas Association, Sea Shepherd International, the Sierra Club and the American Oceans Campaign, suggest that the benefits provided by this plan are many, including protection of the area's marine life such as whales, swordfish and cod, and will allow scientists to study the area as it becomes a mature system. Many, however, are upset by this proposal, especially those in the fishing community who fear more regulation and the long-term effects of losing access to highly productive fishing grounds. *See Gulf of Maine: America's First Ocean Wilderness?* (visited Oct. 8, 2000) <<http://www.cnn.com/2000/NATURE/08/04/gulf.wilderness.enn/index.html>>; *Celebrities Fight for Gulf of Maine* (visited Oct. 8, 2000) <http://www.gofish.com/cgi-bin/WebObjects/Gofish.woa/wa/gotoArticle?document_id=13422627>; *Proponents: Hague Line reserve would help ecosystem, fisheries* (visited Oct. 8, 2000) <http://www.gulfofmaine.org/times/summer99/hague_line.html>.

B. Brazil Creates Sanctuary for Southern Right Whale

The Brazilian government has recently signed a decree approving the creation of a new sanctuary for the endangered southern right whale. The sanctuary will consist of an 80-mile stretch of ocean off the country's southern coast. The whales are known to inhabit the 600 square mile proposed area between June and December, where they give birth and nurse their young. The creation of the sanctuary comes as a result of attempts by the International Whaling Commission (IWC) to strengthen the rights of developing countries to use whales in a non-lethal manner. Members of the government in Brazil, fearing the sanctuary would harm the harbors it surrounds, initially met the proposal with skepticism. The President of Brazil eventually signed the decree despite those concerns. Not only will the right whale population benefit from the sanctuary, but it will help protect bottlenose dolphins, seabirds and other vanishing species that have made the area their home. The sanctuary joins others from Argentina and South Africa as havens for the declining whale population in the South Atlantic. Talks of establishing a similar protected area in Uruguay are

under way. See *Brazil Creates Southern Right Whale Sanctuary* (visited Oct. 14, 2000) <<http://ens.lycos.com/ens/sep2000/2000L-09-25-01.html>>.

II. INTERNATIONAL TRADE

A. *United States Urges Trade Sanctions Against Japan for Whaling*

On September 13, 2000, President Clinton requested that trade sanctions be considered against Japan for their ongoing disregard of international whaling protections. The President's request comes after Secretary of Commerce Norm Mineta certified Japan under The Fishermen's Protective Act of 1967, codified at 22 U.S.C. 1978 (the Pelly Amendment). Certification under the Amendment is required when the Secretary believes that nationals of a foreign country are acting contrary to an international fishery conservation program. In his statement regarding Japan's actions, the President suggested that Japan be denied access to allotments for fishing in U.S. waters. Currently, no foreign fishing is allowed in waters governed by the United States, but it is expected that allotments granting fishing rights to foreign countries will be approved later this year. The President's action in requesting the sanctions will also allow 60 days for the Departments of Treasury, Commerce, State, and Interior and the U.S. Trade Representative to consider other sanctions or restrictions available before reporting to the President who, in turn, will submit his findings to Congress for consideration.

Secretary Mineta submitted his certification of Japan to the President after Japan broadened its whaling program in July to include bryde's and sperm whales, in addition to minke whales. Commercial whaling has been banned since 1986 by a resolution of the International Whaling Commission; however, Japan justifies its continued fishing of the mammals by claiming use of a provision provided for by the IWC that allows harvesting of whales for "scientific research." In July, the IWC Scientific Committee refused to endorse Japan's recent proposal to expand their research because it questioned the method and legitimacy of Japan's whaling program. In addition, the Committee recognized that the research Japan claimed to rely on could be conducted by non-lethal means.

This certification of Japan under the Pelly Amendment is not the first time the United States has registered protest of Japan's whaling program. In 1988 the United States certified Japan after it expanded its "research" of the minke whales into the southern hemisphere. The second certification came in 1995 when Japan expanded its program into the North Pacific and decided to take more whales in the Antarctic. This most recent certification came after Japan's announcement in April 2000 that it would expand its

research again in the North Pacific to include the two additional types of whales. Both sperm whales and bryde's whales are protected under the U.S. Marine Mammal Protection Act, and sperm whales are listed as endangered under the Endangered Species Act.

Japan ignored the protests of the United States and other member countries of the IWC and went ahead with their plan to expand their research, killing 88 whales during this fishing season. They have vowed that they will continue their whaling next year. Isao Nakasu, director-general of the Fisheries Agency in Japan urged the United States not to issue trade or any other sanctions against Japan, as any sanctions would be unwarranted. Japan continues to defend its whaling as scientific research, claiming that whale populations are not endangered and that they are possibly responsible for depleting fish stocks in the ocean. However, Japan cannot deny their eagerness to resume commercial fishing of whales as whales are seen as a delicacy in Japan and many restaurants specialize in serving the flesh of the mammal. Currently, the meat served at these restaurants comes from the whales harvested for research purposes. *See President Clinton Directs U.S. Actions In Response To Japanese Whaling* (visited Oct. 22, 2000) <<http://www.noaa.gov/whales/clinton.htm>>; *History of Japanese Scientific Whaling Fact Sheet* (visited Oct. 22, 2000) <<http://www.noaa.gov/whales/japanhistory.htm>>; *September 13, 2000 Letter from the Secretary of Commerce to the President* (visited Oct. 22, 2000) <http://www.noaa.gov/whales/minetaletter.htm>>; *Japan Vows to Fight Sanctions* (visited Oct. 8, 2000) <http://www.gofish.com/cgi-bin/WebObjects/Gofish.woa/wa/gotoArticle?document_id=13422842>; *As U.S. Contemplates Sanctions, Unbowed Japan Completes Whale Hunt, Pledges to Repeat Next Year* (visited Oct. 14, 2000) <<http://www.worldwildlife.org/news/headline.cfm?newsid=194>>.

B. Fine Assessed in Illegal Caviar Smuggling Case is Largest in Wildlife Prosecution

On July 21, 2000, U.S. Caviar & Caviar, a Maryland company, two officials of the company, and a third person pleaded guilty in connection with a caviar smuggling scheme. The company was fined and agreed to pay \$10.4 million, the largest reported fine in a wildlife prosecution. The prosecution was based in part on new regulations requiring permits from the country of origin identifying the species of fish the caviar was taken from and certifying that they were taken legally and that their taking does not threaten the species' survival. The regulations were developed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as a result of declining populations of sturgeon

and paddlefish that produce the delicacy. The defendants in this case admitted to smuggling black market caviar into the United States through the use of forged Russian caviar labels. In 1998, U.S. Caviar & Caviar imported more than 30,000 pounds of sturgeon caviar from the Caspian Sea, at least half of which was brought in with forged documents. The company also admitted to illegally labeling roe from native U.S. paddlefish and shovelnose sturgeon, both protected species in the United States as originating in Russia. See *World Wildlife Fund Applauds \$10.4 Million Fine in Caviar Smuggling Case* (visited Oct. 14, 2000) <<http://www.worldwildlife.org/news/headline.cfm?newsid=171>>.

C. U.K. Protects Basking Sharks from Illegal Importation and Exportation

The United Kingdom recently took steps to protect basking sharks from being illegally imported and exported. Acting under CITES, the U.K. began implementing certification procedures to track trading of the sharks. The United States applauded the move by the U.K. In the past these sharks have been especially prone to commercial exploitation. Much of the demand for the basking shark was due to the valuable lubricating oil of the shark's liver. Although the market demand for the oil has largely been replaced by synthetic alternatives, the shark is still hunted for its fin, which can weigh up to 200 pounds. In Asia, shark fin soup is considered a delicacy and its popularity is rising. U.S. fisheries have banned fishing for the basking shark in Atlantic waters since 1997. See *U.S. Lauds Move to Protect Sharks* (visited Oct. 8, 2000) <http://www.gofish.com/cgi-bin/WebObjects/Gofish.woa/wa/gotoArticle?document_id=134228304>.

D. Changes in Regulation of Tuna Affects Dolphins

1. Court Denies Request for Preliminary Injunction Against Lifting Tuna Embargo

The most recent amendment of the Marine Mammal Protection Act (MMPA) includes the passage of the International Dolphin Conservation Program Act (IDCPA). Part of the IDCPA implements the Declaration of Panama, a binding commitment to protect dolphins and other species and to conserve and manage tuna in the Eastern Pacific Ocean (EPO). The Act and Declaration are the result of many accidental deaths of dolphins in the EPO caused when fisherman fish for yellowfin tuna. An unexplained phenomenon occurs in the EPO where the tuna swim beneath the dolphins,

thus allowing fishermen to locate the tuna when the dolphins surface for air.

A recent lawsuit was brought in the United States Court of International Trade by the Defenders of Wildlife against Penelope D. Dalton in her capacity as the Assistant Administrator for Fisheries for the National Marine Fisheries Service (NMFS). As Assistant Administrator for NMFS, Dalton had been given the authority to render findings on whether Mexico is in compliance with the IDCPA's requirements. Upon notice of such a finding by Dalton and the proposed lifting of the embargo on Mexican tuna, the plaintiffs brought suit alleging irreparable injury from the likely extinction of three depleted stocks of dolphins and sought a preliminary injunction prohibiting the United States from lifting the tuna embargo.

The court held that in order to prevail on a motion for a preliminary injunction, the movant must show (1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardships on all parties favors the movant. The court found that the plaintiffs did not meet their burden of proving immediate and irreparable injury, as no evidence was provided suggesting that more dolphin deaths would occur as a result of lifting the embargo. Additionally, the court found persuasive the defendant's argument that the public interest would not be best served by enjoining the United States from lifting the embargo because of evidence tending to prove that if the embargo remained in place, the international agreement would likely fall apart leaving the dolphins with no protection at all. The court did not reach the merits of the argument presented by the plaintiffs, finding that the defendants provided sufficient evidence that maintenance of a multilateral conservation agreement better serves the environmental interests than unilateral measures undertaken by the United States. The court refused to grant the plaintiffs' motion for a preliminary injunction. *See* Defenders of Wildlife v. Dalton, 97 F. Supp. 2d 1197 (Ct. Int'l Trade 2000).

2. Court Sets Aside Changes To "Dolphin Safe" Label Regulations

A suit challenging the initial findings of the Secretary of Commerce that there was insufficient evidence to show that tuna purse seine fishing harmed depleted dolphin stocks in the Eastern Tropical Pacific Ocean was decided recently in the U.S. District Court for the Northern District of California. The plaintiffs alleged that the Secretary's finding should be set aside under the Administrative Procedures Act, 5 U.S.C. § 706 (2), on the grounds that the finding is an abuse of discretion and inconsistent with law.

Under the Marine Mammal Protection Act, the Secretary was required to commence population abundance surveys as well as to research whether the physiological stress effects of using purse seine nets to chase and encircle dolphins was adversely affecting depleted dolphin populations prior to implementing any change in the “dolphin safe” label program authorized under the Dolphin Protection Consumer Information Act (DPCIA), 16 U.S.C. § 1385. The DPCIA prohibits the display of the “dolphin safe” label on tuna for sale in the United States if the tuna was harvested using the disputed nets intentionally deployed on or to encircle dolphins.

In April 1999, the Secretary’s initial finding that insufficient evidence existed to suggest that chase and encirclement by the tuna purse seine fishery was adversely affecting the dolphin stocks was published. The Secretary had no scientific data from the stress research yet went on to find that the fishing was not expected to prevent the depleting stocks from recovering. This finding gave rise to the change in the “dolphin safe” label standards allowing for display of the label where the tuna was caught by using the purse seine nets, so long as no dolphins were killed or seriously injured during the catch. The plaintiffs brought the instant suit requesting that the initial findings be set aside.

The court found that the Secretary’s actions could not be reconciled with Congress’ intent that the Secretary’s findings be based on the results of the stress research projects. The court granted the plaintiffs’ motion for summary judgment with respect to that claim and set aside the Secretary’s finding and the resulting change in the “dolphin safe” standards until a finding based on the results of the stress research could be issued. *See Brower v. Daley*, 93 F. Supp. 2d 1071 (N.D. Cal. 2000).

3. Mexico Wants World Trade Organization to Resolve Regulation of Tuna

The Mexican government has announced its intention to involve the World Trade Organization in its 12-year dispute with the United States over tuna regulations. The conflict began when the United States Congress passed regulations that prohibited importing tuna caught in the Pacific with purse nets because of the damaging effect the nets were having on the dolphin populations. The ban on Mexican tuna was lifted in 1998 after tuna fishing fleets changed their methods and the Department of Commerce amended its tuna labeling regulations. Mexico’s optimism of renewed trade was short-lived because a U.S. federal court put the new regulations on hold in response to claims by environmental groups. *See Brower v. Daley*, 93 F. Supp. 2d 1071 (N.D. Cal. 2000). The Mexican government

claims that this unfair situation has now given rise to numerous problems, including predatory fishing practices by Spanish and Ecuadorian fleets in the eastern Pacific which cause harm to other species, a loss of \$150 to \$200 million in revenue annually to Mexico and the estimated direct loss 6,000 jobs and an additional 20,000 related jobs in Mexico. *See Mexico Wants WTO in Tuna Fray* (visited Oct. 8, 2000) <http://www.gofish.com/cgi-bin/WebObjects/Gofish.woa/wa/gotoArticle?document_id=134228290>.

III. MARINE ENVIRONMENT

A. Plans for Mitsubishi Salt Plant are Abandoned

On March 2, 2000, Mitsubishi and the Mexican government announced the abandonment of plans to build an industrial salt plant in southern Baja California following a protest campaign held by the Natural Resources Defense Council (NRDC). While announcing the decision, Mexican president Ernesto Zedillo stated that the need to preserve the lagoon outweighed the economic importance of the project. Had the plan gone through, the Mexican government and the Japanese company would have constructed the plant at Laguna San Ignacio, which is known to be the last undisturbed birthing and nursery grounds of the gray whale. The whales migrate thousands of miles from the Bering Sea each year to winter in Laguna San Ignacio. The area had been recognized for its ecological importance in the past when the United Nations declared it a World Heritage Site and the Mexican government created a "biosphere reserve" to protect it. *See WWF Hails Mexico's Decision to Protect Key Whale Sanctuary as Historic Contribution to Conservation* (visited Oct. 14, 2000) <<http://www.worldwildlife.org/news/headline.cfm?newsid=107>>; *Whale Nursery Saved: Coalition Stops Mitsubishi from Building a Saltworks at Laguna San Ignacio* (visited Oct. 8, 2000) <<http://www.nrdc.org/wildlife/marine/nbaja.asp>>.

IV. FISHERIES MANAGEMENT

A. International Agreement Signed to Protect Tuna in Western Pacific

A meeting of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific took place in Hawaii from August 30 to September 6, 2000. The Seventh Session of this conference resulted in a new international agreement to conserve the tuna populations of the western Pacific Ocean.

Concern was raised when Japan, one of the region's most important fishing nations, objected to key provisions of the agreement. It is still uncertain whether Japan will abide by the new agreement. Participating members were hopeful that Japan would ultimately accept the agreement and recognize that because half of the world's tuna comes from this area it is crucial that steps be taken to avoid overfishing and the collapse of the tuna population. Other countries participating in the conference included, among others, Australia, China, France, Indonesia, New Zealand and the United States as well as other multilateral organizations and conservation non-governmental organizations. *See WWF Endorses New Treaty Governing Ocean Fisheries in Pacific, Urges Japan to Cooperate* (visited Oct. 14, 2000) <<http://www.worldwildlife.org/news/headline.cfm?newsid=192>>.

B. U.S. Signs International Agreement Protecting Sea Turtles

On October 12, 2000 President Clinton signed the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC). This Convention is the first international treaty to deal with the protection of endangered sea turtles and their habitat. Current signatories to the Convention include Venezuela, Peru, Mexico, Brazil, Costa Rica, Ecuador and the United States. One more country must sign the Convention before it will come into effect. Countries that are a party to the Convention agree to conserve sea turtle habitats, protect nesting beaches, limit intentional and accidental capture, prohibit international trade in sea turtles and their products, and support sea turtle research. In addition, the parties all agree to require the use of Turtle Excluder Devices (TEDs) by their shrimp fishing fleets. It is hopeful that the use of TEDs will lessen the threat of accidental sea turtle deaths caused by their capture in shrimp nets. Sea turtles have been particularly vulnerable to exploitation as well as accidental death because of the long distance of their migratory patterns. *See Countries Join Forces To Protect Endangered Sea Turtles: First International Treaty for the Protection of Sea Turtles* (visited on Oct. 22, 2000) <<http://www.cmc-ocean.org/pressrelease.php?id=612186983>>.

V. OCEAN POLLUTION

A. IMO Adopts Protocol to Avoid Hazardous Pollution

The International Maritime Organization (IMO) adopted a new protocol intended to provide an international framework for encouraging cooperation to combat major incidents or threats of marine pollution from ships

carrying hazardous and noxious substances. At the March 2000 meeting of the Conference on International Cooperation on Preparedness and Response to Pollution Incidents by Hazardous and Noxious Substances in London, the Protocol on Preparedness, Response and Cooperation for Pollution Incidents by Hazardous and Noxious Substances, 2000 (HNS Protocol) was adopted. Parties to the HNS Protocol will be required to establish a procedure to deal with any incidents of pollution involving hazardous or noxious substances. Each country can satisfy this requirement by implementing plans independently or in cooperation with other countries. The protocol will become effective twelve months after ratification by not less than fifteen states that are party to the convention. Measures to provide damages for incidents involving hazardous and noxious substances had already been provided for by the IMO in 1996 with the adoption of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea. The 1996 damages convention has yet to enter into force. *See IMO Adopts Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances (OPRC-HNS Protocol)* (visited Oct. 10, 2000) <<http://www.imo.org/imo/briefing/2000/fax5.htm>>.

B. 1971 Oil Pollution Compensation Fund Replaced

The 1971 International Convention of the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund) has been approved for an early winding up. Contracting parties to the fund, established to provide compensation to victims of oil pollution from ships carrying oil as cargo, signed a protocol in September allowing for the early winding up of the IOPC fund. The IOPC Fund will be replaced by a 1992 fund that sets a higher limit on the amount of compensation payable by that fund. Payments will be made from the 1992 fund with money contributed by contracting states. This 2000 protocol will be brought into force by the tacit acceptance procedure, whereby it is deemed to have been accepted six months from the date of its adoption unless objections are received by not less than one-third of the contracting states. The 1992 fund currently has 61 contracting states. *See Conference Agrees to Early Winding up of 1971 Oil Pollution Compensation Fund* (visited Oct. 10, 2000) <<http://www.imo.org/imo/briefing/2000/fax18.htm>>.

VI. LAW OF THE SEA CONVENTION

A. Tribunal Lacks Jurisdiction in Bluefin Tuna Dispute

A five-member international arbitral tribunal decided on August 7, 2000 that it lacks jurisdiction to decide the merits of a dispute between Australia and New Zealand with Japan over the fishing of southern bluefin tuna. As a result of that decision, the tribunal revoked an interim injunction that had been imposed on Japan by the International Tribunal for the Law of the Sea on August 27, 1999, which prohibited an experimental fishing program proposed by Japan for the southern bluefin tuna.

The lawsuit came as the result of a disagreement between the parties regarding whether the bluefin is recovering from severe overfishing. In 1993 the parties had entered into a convention for conservation of southern bluefin tuna that established a commission to set a total allowable catch and otherwise promote recovery of the fish. The convention also provided for dispute resolution through any peaceful means they prefer. The three countries are also parties to the 1982 United Nations Convention on the Law of the Sea, which provides for compulsory settlement of disputes arising under it, including arbitration. The Arbitral Tribunal making the decision was established pursuant to the Law of the Sea Convention.

The issue before the Tribunal was whether or not it had jurisdiction over the merits of the dispute. Japan argued that the dispute arose solely under the 1993 Convention, and, accordingly, could not be compelled to arbitrate the merits of the dispute. Japan claimed that a provision of the Law of the Sea Convention allows parties to avoid compulsory arbitration if another treaty, to which they are parties, excludes it or governs the case. The Tribunal rejected this argument holding that a dispute could arise under more than one treaty but agreed with Japan's contention that a provision of the 1993 Convention did exclude compulsory jurisdiction over disputes arising both under it and the Law of the Sea Convention. The Tribunal found that because there was only one dispute in question that arose under both conventions, the Tribunal lacked subject matter jurisdiction. *See Arbitral Award in the Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)* (visited Oct. 22, 2000) <<http://www.worldbank.org/icsid/bluefintuna/pressrelease2.htm>>.

VII. MARITIME REGULATIONS

A. *IMO Gives Approval for Creation of "No-Anchoring" Zones*

In an unprecedented move, the International Maritime Organization gave preliminary approval for a proposal made by the United States to amend international shipping rules and allow countries to establish "no-anchoring" zones for large ships. A companion proposal was made to the IMO's Subcommittee on Safety of Navigation where the United States proposed the creation of three such "no-anchoring" zones in an effort to protect coral reefs in the northwest sector of the Gulf of Mexico. Large ships would often anchor in the area before or after entering ports in Louisiana or Texas, which was causing damage to the coral reefs that exist in the Flower Garden Banks National Marine Sanctuary. The subcommittee initially approved the proposal. The proposals require countries creating such zones to clearly mark them on international navigation charts. The primary focus of the measures is prevention rather than enforcement and liability for damages. Both proposals will be forwarded to the IMO's Maritime Safety Committee for final consideration at its December meeting in London. *See International Maritime Group Moves on Historic Measures to Protect Coral Reefs from Anchor Damage* (visited Oct. 3, 2000) <<http://www.publicaffairs.noaa.gov/releases2000/jul00/noaa00ranchoring.html>>.

B. *International Treaty Signed to Establish Continental Shelf Boundaries*

On June 9, 2000 U.S. Secretary of State Madeline Albright and Secretary of Foreign Relations Rosario Green of Mexico signed a historical treaty establishing a continental shelf boundary separating United States and Mexican jurisdiction in an area of the Gulf of Mexico known as the "Western Gap." In 1978, the United States and Mexico signed a maritime boundary treaty to take effect in 1997 that established boundaries between the 12-mile limit to the 200-mile limit in the Pacific Ocean and the Gulf of Mexico. The initial agreement, however, created gaps in areas beyond 200 miles from the eastern and western coasts, including the Western Gap which is approximately 5,092 nautical miles in area. Negotiations to resolve the Western Gap dilemma began in 1998. The treaty agreement just signed resulted in a division of the Gap so that the United States will receive 1,913 square nautical miles of the Gap and Mexico will receive remaining 3,179 nautical miles of it. In addition, the agreement created a 1.4 nautical mile buffer zone on either side of the boundary. A 10-year

moratorium was placed on oil and gas exploration in the buffer zone so that both countries could learn more about the geological and geophysical properties of the area. *See MMS Lauds U.S. and Mexico Continental Shelf Boundary Treaty Agreement* (visited Oct. 10, 2000) <<http://www.mms.gov/ooc/press/2000/061300.htm>>.

