

1999

A Review Of Developments In U.S. Ocean And Coastal Law January 1 - October 31, 1997

Sharon Gwinn

University of Maine School of Law

Aaron Burns

University of Maine School of Law

John Veilleux

University of Maine School of Law

Follow this and additional works at: <http://digitalcommons.maineraw.maine.edu/oclj>

Recommended Citation

Sharon Gwinn, Aaron Burns & John Veilleux, *A Review Of Developments In U.S. Ocean And Coastal Law January 1 - October 31, 1997*, 4 *Ocean & Coastal L.J.* (1999).

Available at: <http://digitalcommons.maineraw.maine.edu/oclj/vol4/iss1/6>

This Recent Developments is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

A REVIEW OF DEVELOPMENTS IN U.S.
OCEAN AND COASTAL LAW
JANUARY 1–OCTOBER 31, 1997

Sharon Gwinn, Aaron Burns,** John Veilleux****

INTERNATIONAL

I. LAW OF THE SEA CONVENTION

A. Seventh Annual Meeting

On May 23, 1997 the United Nations Convention on the Law of the Sea (the Convention) concluded its seventh annual meeting after adopting the budget of the International Tribunal for the Law of the Sea and the Agreement on Privileges and Immunities of the Tribunal. The session also dealt with a number of other issues, including the rules of procedure for the Commission on the Limits of the Continental Shelf, as well as amendments to its own rules of procedure. It was agreed that the next meeting of the Convention would be held on May 18-22, 1998. *UN: States Parties to Law of Sea Convention Adopt Budget/Privileges & Immunities of Law of Sea Tribunal*, M2 Presswire, May 30, 1997, available in 1997 WL 10370854.

1. The budget for the International Tribunal for the Law of the Sea was adopted after the President of the meeting, Helmut Tuerk of Austria, presented the report of the working group which undertook informal review. It was agreed that the budget for this year would be \$5,767,169 as compared to last year's budget of \$6,170,900. As part of the budget, the parties agreed to a reduction of fourteen to eleven posts for the Professional staff and twenty-two to sixteen posts for the General Service. Agreements were also reached with regards to cost allocations for several upcoming meetings of the Tribunal. The traveling cost budget for the judges of the

* University of Maine School of Law, Class of 1998.

** University of Maine School of Law, Class of 1999.

*** University of Maine School of Law, Class of 1999.

Tribunal will only be available if the Tribunal actually hears a case in 1998. *Id.*

2. Privileges and immunities: nationals and permanent residents would enjoy only functional immunity necessary for the independent exercise of their functions. The question of waivers of privileges and immunities was also resolved. The Agreement was adopted by the consensus with the following understandings: no reliance on immunity for damages claims resulting from motor vehicle accidents; and that the issuance of *laissez-passer* by the United Nations would promote cost-effectiveness. *Id.*

B. The United Kingdom Accedes to the Convention

The United Kingdom announced that it will accede to the Convention because the Convention is of critical importance in the maritime field and to the United Kingdom's interests. More than 150 nations participated in the negotiation of the Convention from 1973-1982 and 117 nations are already a party to the Convention. The Convention currently consists of 320 articles and 9 annexes dealing with every important ocean and coastal issue, including: the extent of coastal States' rights over seas adjacent to their shores; rights of passage; the right of States to conduct marine scientific research; and the balancing of the rights between fishing States and coastal States in the management of fish stocks, as well as a broad dispute resolution provision. The United Kingdom will ratify the Agreement on Implementation of Part XI of the Convention. Accession to the Convention will ensure that the United Kingdom can continue to participate in Convention elections and meetings. *Foreign and Commonwealth Office: U.K. Accession to the United Nations Convention on the Law of the Sea*, M2 Presswire, July 22, 1997, available in 1997 WL 11939817.

C. The Commission on the Limits of the Continental Shelf Elected

In March of 1997 the Commission on the Limits of the Continental Shelf was elected. The Commission will make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles from their territorial sea baselines. *Id.*

D. International Tribunal for the Law of the Sea is Ready to Hear Cases

Although all of its twenty-one newly sworn-in judges have not sat to hear a single case as of yet, the Tribunal is ready for business. To date, no case or application has been brought to the attention of the newly-establish-

ed judicial arm of the Law of the Sea Convention. The Tribunal was designated to deal with all disputes arising from maritime matters governed by the Convention. At this point, the Tribunal's judges have focused on the overall mechanics of their future work and rules and procedures to be followed in their adjudicative functions. Herbert Fromme, *Law Tribunal Ready to go into Action*, Lloyd's List Int'l at 12, March 21, 1997, available in 1997 WL 4461987.

II. UNITED STATES TRADE EMBARGOES

A. *Three Countries Allege that U.S. Embargo on Shrimp Violates the General Agreement on Tariffs and Trade*

On May 20, 1997 the dispute panel for the General Agreement on Tariffs and Trade (GATT) received submissions from Pakistan, Thailand, and Malaysia which argue that the U.S. embargo on certain shrimp and shrimp products is inconsistent with Articles I:1, XI:1 and XIII:1 of GATT. The U.S. embargo on importation of shrimp and shrimp products was imposed pursuant to section 609 of Public Law 101-162 passed by the U.S. Congress in 1989. The embargo is part of an on-going effort by the United States to protect sea turtles which are taken incident to the harvesting of shrimp. Once a country has successfully employed the use of turtle excluder devices (TEDs) and has an incidental take rate of turtles comparable to the United States, the President can waive the embargo by having the State Department certify that these requirements have been met. A recent decision by the Court of International Trade, *Earth Island v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade 1996) indicates that non-certified countries can only export shrimp to the United States if such shrimp is "harvested in manner which does not adversely affect sea turtles."

The submissions to the panel by Pakistan, Thailand, and Malaysia are seeking to have the embargo nullified for four reasons: the United States is discriminating against imports for certain countries based on the equipment used for harvesting violates the most-favored-nation principle in Article I:1; the embargo violates GATT because the United States is using means other than duties or taxes to impose a restriction or prohibition on shrimp; and the embargo is inconsistent with Article XIII:1 because non-certified countries cannot import shrimp while like products from other countries that have been certified may be freely imported into the United States. In short, nations party to the dispute are seeking to have the embargo nullified because of the uncertainty and confusion resulting from the embargo and the decline in their domestic shrimp prices due to an oversupply of shrimp.

United States—Import Prohibition of Certain Shrimp and Shrimp Products, W.T.O., First Submission of Pakistan to the Panel, May 20, 1997, available in 1997 WL 304819 (W.T.O.).

III. INTERNATIONAL WHALING COMMISSION

A. *President Clinton Pressured to Seek International Whaling Commission Enforcement of Whaling Ban*

Four international organizations implored President Clinton to seek enforcement by the International Whaling Commission (IWC) of whaling bans in IWC designated sanctuaries. Leaders from Greenpeace International, the Humane Society of the United States, the International Fund for Animal Welfare, and the World Wide Fund for Nature are pressuring President Clinton to keep Japan and Norway from whaling in contravention of the commercial whaling ban that was adopted by the IWC in 1982. The groups indicate that commercial whaling has nearly tripled since Clinton took office in 1993, with most of the whales being taken by Norway and Japan. *Clinton Urged to Press Japan to Stop Whaling*, JAPAN TRANSP. SCAN, May 26, 1997, available in 1997 WL 8249819.

B. *Developments at the 49th Annual Meeting*

At the close of the International Whaling Commission's annual meeting held in October, 1997 in Monaco, IWC Chairman Michael Canny of Ireland indicated that in the next year the Commission will seriously debate allowing limited commercial whaling. This announcement comes after increased pressure from Japan and Norway to relax the ban on whaling. Canny fears that a failure to compromise will lead to the eventual breakup of the IWC, which will leave no one to police the harvesting of the giant sea mammals. *Whaling Ban May be Modified*, PORTLAND PRESS HERALD, Oct. 25, 1997, at 7.

IV. LAND-BASED POLLUTION

A. *The United Kingdom Joins Other Nations in Banning Ocean Dumping of Nuclear Waste*

On September 2, 1997, the United Kingdom announced that it will join the multinational effort to eliminate chemical and nuclear waste dumping at sea. Fifteen countries, including the United Kingdom, are members of the Oslo-Paris Commission (OSPAR), an international body which regulates the dumping of wastes into the oceans and seas of the world.

OSPAR was set up under the 1972 Oslo Convention for the Prevention of Marine Pollution from Land-Based Sources and was broadened under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic. OSPAR has agreed to a permanent ban on the dumping of low-level and intermediate nuclear waste at sea. *United Kingdom: Government Joins Other Nations in Banning Nuclear Waste Dumping at Sea*, DAILY ENV'T REP. INT'L NEWS, Sept. 18, 1997, available in WL, BNA-ENV Database.

*B. European Union Publishes Exceptions to
Hexachloroethane (HCE) Ban*

The European Union announced certain exceptions to its recent ban on the use of hexachloroethane (HCE) in the manufacture of lead-free metals. The exceptions allow member states to use the toxic chemical in non-integrated aluminum foundries producing specialized castings and in instances where the average consumption of HCE is less than 1.5 kilograms per day. This directive was enacted to comply with the phaseout and eventual ban of the chemical as mandated by the Convention for the Prevention of Marine Pollution from Land-Based Sources and the Paris Commission. HCE was deemed a powerful polluter of oceans and seas by the Commission, which called for its eventual ban. *International Developments: EU Directive Specifies Exemptions to Ban on Use of Hexachloroethane*, CHEM. REG. REP., May 30, 1997, available in WL, BNA-ENV Database.

V. LONDON DUMPING CONVENTION

Russian Atomic Energy Minister Victor Mikhailov indicated recently that Russia is preparing to accept the ban on dumping of radioactive waste in the ocean imposed in 1993 by the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London Dumping Convention). To date, seventy-five countries, including the United States, have ratified the London Dumping Convention. The Convention has regulated ocean dumping of nuclear waste and cross-border transportation of hazardous waste since 1975, and was amended in 1993 to ban ocean dumping of nuclear waste. Russia has held off from adopting the Convention's ban because of the unavailability of adequate facilities to dispose of such waste. However, Russia has recently received assurances from the United States and Norway to fund and technically support the upgrading of a low-level nuclear waste facility in Murmansk, Russia. Russian dumping of nuclear waste has been a major concern for Japan,

when Russia was discovered to be dumping in the Sea of Japan. *Russia: Ocean Dumping of Radioactive Waste to End in 1997, Energy Minister Tells Japan*, BNA INT'L ENV'T DAILY, Apr. 11, 1997, available in WL, BNA-IED Database. See also, Cheryl Hogue, *Radioactive Waste: Russia Expected to Adopt Ban on Dumping at Sea, EPA Official Says*, DAILY ENV'T REP. NEWS, Sept. 18, 1996, available in WL, BNA-DEN Database.

VI. HIGH SEAS FISHING

A. *Russia and Japan Reach Salmon Agreement*

On June 24, 1997 fishery associations from Russia and Japan reached an agreement on salmon harvesting. The agreement provides for a grant to Japan from Russia for the right to harvest 26,000 metric tons of salmon from Russian coastal waters for a price of \$60 million. A caveat to the agreement requires Japan to commit to cease its practice of driftnet fishing. Russia intends to use the funds from this agreement to promote fishery science and the development of sixty Russian salmon farms. *Russian Allocation of Salmon to Japan*, RECENT SALMON AND FISH NEWS ON JUNE 30TH (visited Oct. 28, 1997) <<http://www.win.com/~crc/npfish10.html#30>>.

B. *Japan Blocks U.S. Proposals to Conserve Depleted Fish Stocks*

At the United Nations Convention on Trade in Endangered Species Japan blocked United States proposals that would have increased conservation of depleted fish stocks. The import of the decision for Japan is that the nation will not face increased scrutiny of its huge commercial fishing industry for at least two years. By a slim 50-49 ratio, Japan won a secret committee vote to keep the Convention from creating a working group to draft protection measures for certain species of sea fish. *Japan Stops U.S. Fish Efforts But Fails in Whaling Panel Power Bid*, FT. WORTH STAR-TELEGRAM, June 14, 1997 at 17, available in 1997 WL 4848762.

C. *European Commission Reaches Agreement on Norwegian Salmon Imports*

On June 1, 1997, the European Commission approved a compromise on Norwegian salmon imports. The European Commission dropped its demand for imposing anti-dumping duties on Norway. Instead, a five-year agreement was negotiated with Norway which includes a minimum price for imported salmon and an increased duty on Norwegian salmon. The duties were raised from 0.75% to 3%, and the growth of exported salmon to the European Union was limited to 10% per year. *Norwegian Salmon*,

RECENT SALMON AND FISH NEWS ON JUNE 30TH (visited Oct. 28, 1997) <<http://www.win.com/~crc/npfish10.html#30>>.

VII. UNITED STATES–CANADIAN SALMON CONTROVERSY

A. *Salmon Controversy Continues*

The first six months of 1997 in the United States–Canadian Pacific Salmon Controversy was marked with some amount of acrimony between the two sovereign states. The United States canceled negotiations with Canada over salmon fishing after Canadian authorities, frustrated with the slow pace of talks, seized four American trawlers. Three of the captains of the respective vessels appeared in Court in Port Hardy, British Columbia and paid a fine of \$222 (\$300 Canadian) for failing to check in by radio with local officials and failing to stow their gear. The Canadian Government also announced that it would cancel a lease with the U.S. Navy for an underwater torpedo range off the coast of British Columbia. *U.S.–Canada Salmon Talks off – May Resume*, REUTERS, May 27 1997 available in LEXIS; Carey Goldberg, *US and Canada Baiting Each Other over Pacific Salmon Catches*, PITTSBURGH POST-GAZETTE, June 8, 1997, at A6, available in 1997 WL 4531143.

B. *Coast Guard Escort and Economic Retaliation Suggested*

In response to Canada's seizure of four U.S. fishing ships, Senator Frank Murkowski proposed that the U.S. Coast Guard escort U.S. fishing vessels near Canadian waters, as well as economic retaliation in the form of cuts in lumber imports or farm-raised salmon from Canada. *Worldview US- Canada: Post Election Glow May Not Help Salmon Talks*, AMERICAN POLITICAL NETWORK–GREENWIRE, June 5, 1997, at 24, available in WL, APN-GR.

C. *Sanctions Threatened*

United States Senator Ted Stevens was reported to have stated that he will oppose \$100 million in funding for environmental clean-ups at four former U.S. military facilities in Canada, including former "distant early warning sites" because of Canadian actions to revoke the U.S. Navy's lease at Canada's Nanoose Bay facility. British Columbia premier Glen Clark responded by stating that he may cancel the export of wolves and grizzly bears to the United States for species restoration programs. *Recent Salmon and Fish News on June 30th* (visited Oct. 28, 1997). <<http://www.wln.com/~crc/npfish10.html#30>>.

D. United States Overfishing Confirmed by Mediator

New Zealand mediator Christopher Beeby suggested in a report that the Canadians are right about U.S. overfishing. Canadian officials have claimed that the United States is violating the equitable terms of the existing salmon treaty by overharvesting about four million salmon. The report offered a "fish-sharing" formula, using a per pound, wholesale value of each country's catch that would likely force the United States to either dramatically reduce its salmon catch, or to offer Canada cash compensation. U.S. officials dismissed Beeby's report as a "bean-counting exercise." *Worldview US-Canada: Salmon Mediator Drafts Fish-Sharing Formula*, AMERICAN POLITICAL NETWORK-GREENWIRE, June 2, 1997, at 22, available in WL APN-GR.

E. United States Rejects Canadian Proposal

The United States rejected the Canadian proposal for the United States to reduce its catch of sockeye salmon, which travel from U.S. waters to British Columbia to spawn, to 13.5% of the total run. United States negotiators requested 20%. Three weeks of negotiations resulted in a U.S. counter proposal of 19.75%, which Canada rejected. Canada announced that it will set its own fishing quotas with a particular emphasis on conservation. Murray White, *U.S. Rejects Salmon Proposal: Canada Says it Will Go Ahead with Own Fishing Quotas*, SEATTLE TIMES, June 26, 1997, at B3.

F. Canadian Catch Quotas Set

Fisheries Minister David Anderson set Canada's own quotas after the collapse of talks with the United States to divide the Pacific Salmon Harvest. The total Canadian commercial catch was set at 24 million fish, including 12 million sockeye. Anderson expects 18.2 million sockeye to return to the Fraser River. Under the quota, "not many fish" will make their way to U.S. fishermen. United States officials have suggested that they would launch their own set of aggressive quotas for an "attack" on early migrations of salmon along the Fraser river. American Political Network Greenwire June 30, 1997, available in WL, APN-GR 25 6/30/97; Jim Fox, *The Canada Report*, ST. PETERSBURG TIMES, June 29, 1997, at 18A, available in 1997 WL 6205957.

VIII. INTERNATIONAL MARINE ENVIRONMENT

A. *Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea, and Contiguous Atlantic Area is Signed*

The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea, and Contiguous Atlantic Area (The Agreement) has recently been signed by eighteen countries. Of the eighteen nations signing, twelve have ratified it. France, Italy, Monaco, Portugal, Spain, and Tunisia have signed the Agreement but have not yet ratified it. As a result, the Agreement is not currently in force. The Agreement was drafted in part because cetaceans are an integral part of the marine ecosystem and must be conserved for the benefit of present and future generations. Conserving cetaceans can be adversely affected by pollution, use of non-selective fishing gear, and by deliberate and incidental catches. The Agreement provides for research and monitoring of cetaceans, prohibiting and eliminating deliberate takings of cetaceans, and creating protected areas to conserve cetaceans. Research, conservation, and management measures shall be adopted by the parties to the Agreement, as allowable under member states' law. Furthermore, the parties to the Agreement shall meet annually. Final Act and Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea, and Contiguous Atlantic Area, Nov. 24, 1996, 36 I.L.M. 777 (1997).

B. *Master Plan Launched to Tackle Black Sea Pollution*

A \$758,000,000 master plan is being launched to combat the substantial marine pollution problems in the Black Sea after decades of reckless industrialization by the nations of eastern and central Europe. The plan is part of an on-going redevelopment plan for the Black Sea area which is intended to develop business opportunities in the shipping, insurance, energy, construction, and agriculture industries, and promote fisheries and tourism in the region. The Black Sea region is trying to overcome a deep recession, and spurring investment in Black Sea trade and development by cleaning up the sea is the core objective of the plan. The plan may take as long as two decades to complete.

More than 48,000 ships, carrying up to thirty-two million tons of oil travel through the Black Sea each year en route to the Mediterranean Sea. This heavy tanker traffic is blamed for upwards of 45,000 tons of ship-generated oil pollution in the Black Sea each year. Because most Black Sea ports lack proper reception facilities, most ships discharge their ballast and bilge during loading and unloading. Land-based pollution,

mainly raw sewage, carried from the tributary rivers of the Black Sea, has further exacerbated the problem. As a result of this pollution, ninety percent of the Black Sea's water lacks oxygen, a necessity for aquatic life. H. Warren, *Co-ordinated Action is Key to Black Sea Pollution Strategy*, LLOYD'S LIST INT'L, Jan. 2, 1997, at 5, available in 1997 WL 4459475.

C. Oil Pollution

1. Local government authorities were declaring the beaches safe for swimming one week after an oil tanker started spilling 200 tons of crude oil off the coast of Uruguay. The environmental effects of the spill have been compounded by government cleanup efforts involving chemical agents. Tens of thousands of liters of dispersing agents containing aluminum silicate have been dropped onto the spills from a plane on loan from the Argentine Navy. Environmentalists believe that there will be long term effects from the use of these chemicals. *Oil Spills: Despite Spill of Several Hundred Tons, Argentina Declares Water Safe for Swimming*, BNA INT'L ENV'T DAILY, Feb. 25, 1997, available in WL 2/25/97 BNA-IED d5.

2. Soldiers, sanitation workers and volunteers worked to clean Uruguay's coastline following the country's worst environmental disaster. More than six million liters of oil were spilled into the River Plate and the Atlantic Ocean at Madonado, Uruguay, forming a slick that stretched 35 miles long and three miles wide. The oil spills from a Panamanian tanker affected more than 17 miles of coastline and blackened beaches near the seaside resort of Punta Del Este and threatened a sea lion reserve. "World Report," CNN February 23, 1997. American Political Network Greenwire Vol 6, No. 200, available in WL 2/26/97 APN-GR 24.

DOMESTIC

I. COASTAL RESOURCES MANAGEMENT

A. Generally

1. The United States District Court for the Eastern District of New York held that the New York/New Jersey Port Authority was not a federal agency and therefore not required to carry out its activities in a manner consistent with "approved state management programs" under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1)(A) (1996). *Brooklyn Bridge Park Coalition v. Port Authority of N.Y. & N.J.*, 951 F.Supp. 383, 393 (E.D.N.Y. 1997)

2. In Redondo Beach, California, a breakwater built by the Army Corps of Engineers was washed over by a storm. The Corps had developed and improved the King Harbor Area where the breakwater was situated, under the River and Harbor Act of 1950. The breakwater had undergone considerable subsidence, but the Corps opted to wait for the outcome of studies before acting to repair it. However, while the Corps was waiting for the outcome of the study, a storm washed away a restaurant. The owner and the insurer sued under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1996). The Corps of Engineers was found not liable under the discretionary function exception to the Federal Tort Claims Act when it did not undertake any action to shore up the breakwater. *National Union Fire Ins. v. United States*, 115 F.3d 1415, 1422 (C.D. Cal. 1997).

3. The National Oceanic and Atmospheric Administration (NOAA) approved the Ohio Coastal Management Program on May 16, 1997. NOAA approval of the OCMP cleared the way for Ohio to receive federal financial assistance for management of the program. 62 Fed. Reg. 28,448 (1997).

B. Marine Sanctuaries

1. NOAA proposed a designation of approximately 808 square miles of waters encompassing and surrounding Thunder Bay, Lake Huron, and the submerged lands thereunder as a National Marine Sanctuary. 62 Fed. Reg. 33,768 (1997) (to be codified at 15 C.F.R. pt. 922).

2. On June 12, 1997, pursuant to the Florida Keys National Marine Sanctuary and Protection Act and the National Marine Sanctuaries Act, NOAA developed the comprehensive final plan for management of the Florida Keys National Marine Sanctuary. NOAA issued final regulations on January 30, 1997 to implement that plan and to govern the conduct of that sanctuary. 62 Fed. Reg. 32,154 (1997) (to be codified at 15 C.F.R. pts. 922, 929, & 937).

C. California Coastal Act

In California, real estate investment corporations brought an action against the California Coastal Commission arising from corporations' sale of deeds restricted by the Commission. The Court of Appeals held that the plaintiffs violated the California Coastal Act, upheld the lower court's fine of \$10 million, and affirmed a permanent injunction ordering the plaintiffs to rescind sales to third-party purchasers of lots subdivided from larger lots in violation of restrictions contained in coastal development permits.

Ojavan Investors, Inc. v. California Coastal Comm'n, 62 Cal. Rptr.2d 803, 54 Cal. App.4th 373 (1997).

II. COASTAL TAKINGS CLAIMS AND WETLANDS

A. *Notice of Wetlands Regulations*

1. The United States Court of Federal Claims held that where a landowner purchases land with notice of wetlands restrictions and prohibitions under the regulatory scheme with the hope of obtaining development permits, he cannot look to the Fifth Amendment for compensation when such permits are denied. Due to the plaintiff's knowledge that his investment in property located on wetlands would make it difficult to secure federal and state permits, the subsequent denial of a development permit does not provide a basis for a regulatory takings claim. Furthermore, section 111 of the Rivers and Harbors Act, 33 U.S.C. § 595a (1994), was deemed inapplicable here because the federal denial of a permit did not totally restrict the plaintiff's use of his property. Section 111 provides that in partial takings claims, no depreciation in the value of the remaining property is compensable. *Good v. United States*, 1997 WL 528955 (Fed.Cl., Aug. 22, 1997).

2. The New York, Supreme Court, Appellate Division recently held that because the landowner, Gazza, had prior notice of wetlands limitations at the time he purchased property, he did not have an interest in the property that could be taken. In other words, landowner purchased the land knowing that the wetlands regulations were currently in place. The landowner could not obtain what his predecessor in title gave up via the regulations. Therefore, the landowner's takings claim failed because he never had a vested right to build on his land without a variance. *Gazza v. New York State Dep't of Env'tl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997)

3. The Army Corps of Engineers (Corps) issued a Regulatory Guidance Letter regarding the joint U.S. Environmental Protection Agency (EPA) memorandum to the field clarifying the applicability of exemptions under section 404 (f) of the Clean Water Act to "deep-ripping" activities in wetlands. This letter concluded that when deep-ripping and related activities are undertaken as part of an established, ongoing agricultural, silvicultural, or ranching operation to break up compacted soil layers and where the hydrology of the site will not be altered such that it would result in the conversion of waters of the United States to upland, such activities are exempt under section 404(f)(1)(A) of the Clean Water Act. However, when deep-ripping activities are not part of a normal agricultural, silvicultural, or ranching operation and are not exempt when they are used

for the first time (or when a previously existing operation was abandoned) in an agricultural, silvicultural, or ranching operation these operations will require a permit. Regulatory Guidance Letter, 62 Fed. Reg. 2139, 2140-41 (1997).

B. Undue Delay in Permitting Process is Temporary Regulatory Taking

In *Landgate v. California Coastal Commission*, 52 Cal. App.4th 784, 61 Cal. Rptr. 2d 196 (1997), the court held that undue delay in the permitting process is a temporary regulatory taking without compensation in violation of the Fifth Amendment. Plaintiff sought a permit from the California Coastal Commission (the Commission) to build a residence in Malibu County after a lot reconfiguration plan was approved by Malibu County. At the time of the reconfiguration approval, the Commission did not challenge the County's lot plan. On February 7, 1991, the Commission denied Landgate's permit, finding that the lot itself as reconfigured by the County was an impermissible development under the Coastal Act.

III. OCEAN POLLUTION

*A. Comprehensive Environmental Response,
Conservation and Liability Act*

The State of California and the United States brought an action under the Comprehensive Environmental Response, Conservation and Liability Act, CERCLA, against a manufacturer in connection with the release of an estimated 5,500,000 pounds of DDT and PCBs over a span of decades into the San Pedro Channel, the Palos Verdes Shelf, the Los Angeles-Long Island Beach Harbors and the area surrounding Santa Catalina Island and the Channel Islands.

The Ninth Circuit Court of Appeals held that: (1) CERCLA limitations statutes applicable to natural damages refers to the date on which both sets of required regulations were promulgated; (2) "incident involving release" within the meaning of CERCLA section limiting each owner operator's liability, means occurrence or series of occurrences of relatively short duration involving single releases all resulting from or connected to event or occurrence; and, (3) that section did not limit collective liability of manufacturing plants its successor corporations for all releases from their facility to specified amount. *State of Cal. v. Montrose Chem. Corp. of Cal.*, 104 F.3d 1507 (9th. Cir. 1997).

B. Polluted Fisheries

Heal the Bay, a California environmental group, urged the state senate to pass a bill to ban the sale of white croaker, a popular fish among the state's Asian community, because of unacceptable levels of DDT and PCBs in the fish. Commercial catch of the fish from the area of the heavily polluted Palos Verdes shelf has been illegal since 1990. The source of the contaminated fish is unknown, but it is speculated that the fish were caught in or near the state's "no take" zone for Croaker. There is no state testing of pollution levels in the fish, and the state's rules are poorly enforced. A study by the group revealed that some fish contain as much as thirty-two parts per million of DDT—more than 300 times the amount considered an acceptable human cancer risk under state and federal guidelines. Marla Cone, *Fish Tainted by Pollution Being Sold, Study Finds Pollution: Excess Levels of DDT and PCBs Are Found in White Croaker, Heal the Bay Survey Says*, L.A. TIMES, June 5, 1997, at B1, available in WL 1997 WL 2217271.

C. Proposed Change in California Coastal Management

A report stated that the State of California should create a Cabinet level panel to coordinate efforts to protect the Pacific Ocean. This report was issued on March 24, 1997 by the California Resources Agency. The report, which was two years in the making, is a major overview of California's ocean ecosystem. It is intended to serve as an agenda for managing ocean resources in the future. Among the report's other conclusions were: (1) Polluted runoff from farms and cities is the greatest source of water pollution on the coast; (2) The state should continue its ban on offshore oil and gas drilling; and, (3) Seven ocean dependent industries, including fishing, ports, and tourism, produced \$17.3 billion in 1992 and provided 370,000 jobs in the State. *Across the Nation California II: Report Urges Greater Protection of Ocean*, Greenwire Vol 6. No.221, available in WL 3/27/97 APN-GR 17.

D. MARPOL Compliance

To achieve compliance with Regulation 5 of Annex V of the International Convention on the Prevention of Pollution from Ships (MARPOL), the United States Department of the Navy announced that it will equip surface ships the size of a frigate or larger with equipment to pulp paper, food waste, and cardboard and shred and bag all metal and glass prior to discharge overboard. Pulped material will only be discharged outside of three nautical miles from land and shredded material will only be dis-

charged outside of twelve nautical miles from land. Notice of Record of Decision for the Disposal of U.S. Navy, 62 Fed. Reg. 6955 (1997).

E. Proposed Adoption of Water Quality Standards

Congressman Brian Bilbray (R-Cal.) and Congressman Frank Pallone (D-N.J.) announced that they will introduce a bill to require states to adopt water quality standards that will be consistent with the 1986 proposed criteria by the Environmental Protection Agency under the Clean Water Act. Patricia Dibsie, *Bilbray's Bill Would Create Water-Quality Standard of Beaches*, SAN DIEGO UNION-TRIB., June 28, 1997, available in 1997 WL, WL 314236.

F. New York-New Jersey Harbor Dredge Project

1. Congressman Pallone (D-NJ) introduced a bill that would terminate ocean dumping at the New York Bight Dredged Materials Site (also known as the Mud Dump Site) and other sites within the New York Bight Apex off the coast of New Jersey, available in WL US-BILLTRK US H.B. 244.
2. The four year environmental battle over how to clear slightly contaminated mud from New York harbor ended when the Army Corps of Engineers granted a permit to dredge New York Harbor. In addition, the Environmental Protection Agency released plans for sealing the old dump site for such mud and adjacent contaminated areas with a yard-thick layer of uncontaminated mud. These moves were praised by Governor Christine Todd Whitman (R-N.J.) and Senator Robert Torricelli (D-N.J.) who had opposed the dredging project until the dump site issue was addressed. Andrew C. Revkin, *U.S. Issues Dredging Permits and Announces Plans To Remove New York Harbor Pollution*, N.Y. TIMES, May 8, 1997, at B1, available in WL 1997 WL 7996620; Andrew C. Revkin, *Harbor to be Dredged, but Much Tainted Mud Lacks Home*, N.Y. TIMES, May 12, 1997, at B2, available in 1997 WL 7997261.
3. The Environmental Protection Agency proposed to redesignate and terminate the New York Bight Dredged Materials Site (Mud Dump Site) as of September 1, 1997. Simultaneous with closure of the Mud Dump Site, the site and surrounding areas that have been historically used as disposal sites for dumped materials will be redesignated under 40 C.F.R. § 228 as the Historic Area Remediation Site. The area will be covered with uncontaminated dredged materials. 62 Fed. Reg. 26,267-01 (1997) (to be codified at 40 C.F.R. pt. 228) (proposed May 13, 1997).

IV. PROTECTED AREAS

A. U.S. v. Fisher: *Damage to Seabed in Course of Salvage*

From January through March 1992, Melvin Fisher and several vessels controlled by his company conducted treasure-hunting operations within the boundaries of the Florida Keys National Marine Sanctuary, which is protected under the Marine Sanctuaries Act, 16 U.S.C. § 1431 (1994). For underwater excavation the vessels used devices known as mailboxes, large L-shaped pipes which deflect the vessel's prop wash downward to displace the sediment below. Seagrass living on the seabed is directly destroyed by its removal, and indirectly killed by the drifting silt that settles on surrounding areas. The treasure-hunters were found liable for response costs and damages resulting from the destruction, loss, and injury of Florida Keys Sanctuary resources. To calculate damages, the National Oceanic and Atmospheric Administration, NOAA, used a methodology known as Habitat Equivalency Analysis, and the court adopted its finding that forty-four acre-years of seagrass services were lost, and habitat restoration of 1.55 acres would adequately compensate for this loss. The court also accepted NOAA determinations of the cost (\$351,648) and methodology for habitat restoration, and of its own costs incurred to respond to and assess damage to sanctuary resources (\$237,663 including interest), and ordered defendants to pay these costs. Defendants were also permanently enjoined from using mailboxes and removing artifacts from the Florida Keys Sanctuary without a permit issued by NOAA. *United States v. Fisher*, No. 92-10027 and No. 95-1005, 1997 U.S. Dist. LEXIS 16767 (Fla. July 30, 1997)

B. *Florida Keys Sanctuary Regulations Take Effect*

At the end of January 1997, Florida's Governor Chiles and his Cabinet approved a plan to regulate fishing, diving, and other activities that might harm the coral reefs and other resources of the Florida Keys. The Florida Keys National Marine Sanctuary was created in 1990, but because two-thirds of the 2,800 square-nautical-mile sanctuary is in state waters, the final management plan required state approval. Primary objectives were protecting the only living reef near the shores of the lower 48 states, the Keys' fragile and critical seagrass habitats, endangered species, and the effects of pollution, fishing, boat propellers, and ship groundings. Reflecting area residents' concerns about federal control and the impact of protective measures on their enjoyment of the Keys and their local economies, the plan imposes "no-take" rules in only fifteen square nautical miles, and would require state approval of public user fees. David Hall, *Florida*

Governor, Cabinet Approve Keys' Sanctuary Protection Plan, U.S. News-wire, Jan. 28, 1997; Larry Kaplow, *Chiles Approves Keys Sanctuary to Protect Coral*, PALM BEACH POST, Jan. 29, 1997; Bill Bergstrom, *Fishing, Diving Restricted in Keys Protection Plan*, CHATTANOOGA TIMES, Jan. 30, 1997; *Marine Sanctuaries: Florida Governor Approves Keys Management Plan*, Greenwire, Jan. 29, 1997.

C. Container Ship Aground on Florida Reef

Less than one week after Florida's approval of the management plan for the Florida Keys National Marine Sanctuary, a 600-foot container ship ran aground in the Sanctuary near Key West "after suffering navigational problems." To free the ship, 540,000 gallons of fuel had to be transferred to a specially equipped barge. No fuel was spilled, but delay resulted from legal wrangling between two salvage companies over responsibility in the event of a spill. At the time of the accident the containership *Houston* was owned by Mexico's largest steamship line, Transportacion Maritima Mexicana (TMM), and operated by Contship Container Lines Ltd., under a Liberian flag with a Mexican crew. TMM signed a document promising to cover up to \$6 million in legal settlements with relevant government authorities. Widely scattered damage included a 2,000-foot-long swath cut into a reef of brain coral, layers of red hull paint coating the corals, and large blowholes created in the sand bottom when the ship tried to free itself. Biologists planned to repair and rebuild the reef, which was expected to require decades. Penalties to the ship line could include up to \$100,000 a day for the grounding, negotiated settlement for costs of the restoration effort, and punitive damages. *Legalities Delay Attempt to Pull Vessel from Coral*, CHI. TRIB., Feb. 9, 1997; *Florida: Workers Free Ship Stuck on Coral Reef*, L.A. TIMES, Feb. 10, 1997; *TMM Ship Accident Probe Begins*, J. COMM., Feb. 11, 1997; Terry Tomalin, *Repairing Coral Reef is Sticky Situation*, ST. PETERSBURG TIMES, Feb. 11, 1997.

D. Boston Harbor Islands Become Part of National Park System

During the summer of 1997 the "31-island front yard" of Boston welcomed its first visitors in its new status as a national park. Proponents see the federal designation as adding clout and momentum to longstanding efforts on behalf of the harbor and its environmental integrity. The achievement of the national park status was helped in part by the commitment of state funds from the \$30 million "Back to the Beaches" legislation passed three years earlier. Other funds to improve, maintain, and operate the park will come from federal matching funds (\$1 federal for each \$3 state funding) and private sector support. Eventually, about \$45 million is

expected to be spent on improvements in the islands, and they will operate on an \$8 million annual budget. The innovative structure and financing meant that the new park would not fit under any existing NPS appellations, so it has been given a unique office name, The Boston Harbor Islands—A National Park Partnership. Jeff McLaughlin, *New Chapter Set to Begin for Boston Harbor Islands; 1997 Season First Since US Parks Designation*, BOSTON GLOBE, Apr. 6, 1997.

V. FEDERAL OUTER CONTINENTAL SHELF OIL & GAS

A. Oil Leasing

The U.S. Department of Interior's Minerals Management Service (MMS) began in 1997 to operate its 5-Year Program for Outer Continental Shelf, OCS, natural gas and oil lease sales. There are no lease sales planned for the Atlantic or Pacific coasts. Off Alaska and in the Gulf of Mexico, the 5-Year Program includes sixteen planned sales in seven areas.

In May 1997 MMS released a draft environmental impact statement (DEIS) for Lease Sale 170, covering about 1.7 million acres of the shallow central Beaufort Sea. Sale 144 in the same region, held in September 1996, brought more than \$14 million in bids. The only other area of Alaska OCS sales is Cook Inlet, for which Lease Sale 149 was held in June 1997. Although the 101 whole or partial blocks (each about nine square miles) in the sale comprised only 430,000 acres, and this was itself a seventy-eight per cent reduction from the area originally analyzed in the DEIS, only two blocks (9,766 acres) received bids, both from the same company, Forcenergy, Inc., totaling about \$254,000. The blocks leased are in the so-called 8g zone, a three-mile wide band of federal waters adjacent to state waters. Under the 1986 amendments to the OCS Lands Act, the State of Alaska will receive twenty-seven percent of the revenues from leasing and development in the zone.

In the Gulf of Mexico, Lease Sale 166 in the Central Gulf area, held in March 1997, received a record number of bids and number of tracts bid on, attracting \$824 million in high bids from eighty-one companies for 1,032 tracts offshore from Alabama, Louisiana, and Mississippi. Lease Sale 168 in the Western Gulf, to be held in August 1997, was expected to be equally successful. Both areas contain many blocks in deep water (greater than 200m), which may be benefitting from the Deepwater Royalty Relief Act (see section V.C. below). Another sale in the Central Gulf is scheduled for March 1998. *MMS Announces Proposed Final 5-year OCS Oil and Gas Leasing Program for 1997-2002*, (Feb. 9, 1998) <<http://www.mms.gov/>>.

*B. U.S.-Mexico Treaty Unratified:
Who Owns the Oil Outside the EEZ?*

As deep water offshore drilling technology comes closer to economic viability, a twenty-year-old treaty delimiting the Exclusive Economic Zone, EEZ, boundaries of the United States and Mexico in the Gulf of Mexico has become important to interests in both countries. The Mexican Senate ratified the treaty soon after its 1978 signing, but the United States has never ratified it, and both countries have informally observed its provisional boundaries, consisting of the countries' 200-mile EEZ limits or the midline between them. There are two areas that lie outside both EEZs, referred to as "donut holes" or, more often, the "western gap" and the "eastern gap." United States OCS Oil Leases have been offered in the northern portion of the western gap, but only recently have they attracted serious industry interest. The U.S. Departments of Interior and State proposed to divide the western gap by negotiations in 1994, but Mexico asserted that the treaty must be finalized first. Now the U.S. Department of the Interior and oil industry groups are urging ratification. Meanwhile, some Mexican politicians have expressed fears that U.S. oil companies could extract oil from Mexican submerged lands using drilling platforms on U.S. territory, and geologists have suggested that the oil field in the disputed area may be one of the world's largest. According to some Mexican officials, most of the western gap area could be claimed by Mexico because it is a natural extension of Mexico's continental shelf. Gerald Karey, *US-Mexico Treaty, Never Ratified, Becomes Key in Era of Deepwater GOM*, PLATT'S OILGRAM NEWS, Mar. 20, 1997; *Squabbles Over Who Owns What in the Gulf of Mexico*, LATIN AMERICAN NEWSLETTERS, LTD., LATIN AMERICAN REGIONAL REPORTS: MEXICO & NAFTA REPORT, Apr. 29, 1997; *U.S.-Mexico Gulf Treaty Pressures Rising*, OIL & GAS J., May 12, 1997.

C. Oil Royalties

The Deep Water Royalty Relief Act (DWRRA), Pub. L. 104-58, signed by President Clinton November 28, 1995, authorizes the Secretary of Interior to modify terms of certain existing leases and establish new terms for OCS leases in water depths greater than 200 meters in the Central and Western Gulf of Mexico leasing areas. Although the MMS published an Advance Notice of Proposed Rulemaking to implement the Act in the Federal Register February 23, 1996, no Final Rule has yet been issued. Nevertheless, the MMS is implementing the Act under Interim Rules, granting "royalty suspension volumes" for fields that were under lease prior

to the enactment of the law, have never produced other than test production, and would not be economic without relief. The amount of the royalty suspension volume that can be granted increases with the depth of the lease. In June 1997 MMS granted royalty relief to Tatham Offshore, Inc. for a field nicknamed Sunday Silence, offshore of Louisiana. The field is seventy-two miles offshore at approximately 457 meters depth. Royalties will be suspended on the first 52.5 million barrels of oil equivalent produced from the field. The Act's purpose is to promote OCS development, increase production, and encourage production of marginal resources, while still giving the public a fair return on OCS resources. *Sunday Silence Awarded Deepwater Royalty Relief in the Gulf of Mexico*, (Feb. 9, 1998) <<http://www.gomr.mms.gov/>>.

D. Implementation of the Oil Pollution Act of 1990

Under the 1990 Oil Pollution Act (OPA), leaseholders of offshore facilities must prove that money will be available to pay claims for cleanup and damages in the event of a spill from the facility. This is termed "Oil Spill Financial Responsibility" (OSFR). Under regulations in 1997, OSFR of \$35 million applied to facilities located in the federal OCS (*see* 33 C.F.R. Part 135). In March 1997 MMS proposed new regulations to extend OSFR coverage to facilities in state waters, to raise the upper limit of coverage to \$150 million, and to make improvements to regulatory flexibility and administration. *Oil Spill Financial Responsibility (OSFR) for Offshore Facilities*, (Feb. 9, 1998) <<http://www.mms.gov/omm/osm/opa90.html>>.

E. Proposed Restrictions and Moratoria

In the 105th Congress, three bills were introduced proposing moratoria on OCS leasing and development off the coasts of Florida and California. H.R. 133, a moratorium for offshore California, and H.R. 180, for offshore Florida, were both introduced on January 7, 1997. The two bills have similar provisions, requiring a temporary moratorium on any leasing or even Interior Department approval of leasing for the OCS Planning Areas adjacent to the state, pending certain environmental studies to be submitted to Congress. The third bill, H.R. 1989 (also S. 937), called the Florida Coast Protection Act of 1997, was introduced June 19, 1997 with twenty-one Florida cosponsors. It would amend the OCS Lands Act to define "preleasing activity" broadly, would prohibit such activity off the Florida coast within 100 miles, and would cancel six leases known as the "Pensacola Block 933 Unit" and compensate the lessees. H.R.133, 105th Cong. (1997); H.R. 180, 105th Cong., H.R. 1989, 105th Cong. (1997).

VI. OIL POLLUTION

A. Aftermath of Exxon Valdez Spill

1. A class of 3455 Alaska Natives sought damages against Exxon, its shipping subsidiary, and vessel alleging that the massive oil spill injured their subsistence way of life. The United States District Court entered summary judgment in favor of Exxon on noneconomic claims for cultural damage, and harvest damage claims were settled. The Court of Appeals held that Alaska Natives failed to prove "special injury" to communal life warranting recovery of noneconomic damages for public nuisance. *In Re The Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997).

2. The Exxon Corporation appealed the \$5.3 billion verdict awarded by an Anchorage, Alaska jury in 1994 to fishermen, native Alaskans, and others harmed by the eleven million gallon *Exxon Valdez* oil spill. The appeal, filed in the United States Court of Appeals for the Ninth Circuit, argued that the District Court erred in allowing the jury to award \$5 billion in punitive damages for the 1989 spill. Exxon contends that appropriate deterrents and punishments for oil spills had already been passed by Congress. Furthermore, Exxon stated that a \$900 million settlement with the state reached in 1991 precluded punitive damages. N.Y. TIMES, June 20, 1997, at D4.

3. Suit was brought in the United States District Court for the District of Columbia by the owners of the former *Exxon Valdez* (now the *SV Mediteranean*). The suit challenged a section of the Oil Pollution Act (OPA) which prohibited any vessel from operating on the navigable waters of Prince William Sound, Alaska, that had spilled more than one million gallons into a marine environment. On motion to transfer the case to the District of Alaska, the Court held that doctrine of *forum non conveniens* should apply to transfer the case to the District of Alaska, considering that the District of Alaska retained jurisdiction to enforce and interpret the consent decree which settled all claims arising out of the *Exxon Valdez* oil spill, and that citizens of Alaska had extraordinary interests in outcome of the suit which outweighed interests of citizens of District of Columbia. *Seariver Maritime Fin. Holdings, Inc. v. Pena*, 952 F.Supp. 9 (D.D.C. 1997).

B. Civil Actions

1. Chevron, U.S.A. Production Co. agreed on March 5, 1997, to pay \$1.16 million to settle a civil complaint alleging that it violated federal environmental safety standards in its Grace oil drilling platform in the Santa

Barbara, California Channel. The law suit alleged that Chevron operated an oil well on the platform from May 1994 through September 1994 with two faulty anti-blowout valves. The valves are designed to prevent the uncontrolled, dangerous flow of oil or natural gas and are considered to be the most important safety feature on an offshore well. The settlement represents the largest civil penalty ever for a violation of the Outer Continental Shelf Lands Act. *Company Agrees to Pay \$1.6 Million to Settle Alleged Violations at Oil Platform*, BNA NAT'L ENV'T DAILY, Mar. 10, 1997, available in WL 3/10/97 NED d11.

2. Berry Petroleum Co. has agreed to pay federal and state agencies more than \$3.1 million in penalties, clean-up costs, and damages in connection with a 1993 oil spill near Oxnard, California. A pipeline used to transport oil from a well field to holding tanks ruptured in December 1993 and dumped 84,000 gallons of crude into McGrath Lake. The spill eventually spread into wetlands and the nearby Pacific Ocean. The spill and Berry Petroleum's response to the spill allegedly violated the federal Clean Water Act, Oil Pollution Act, Endangered Species Act, California's Porter-Cologne Act and several other state water and natural resource laws. The settlement calls for a \$800,000 penalty for federal clean water violations and a \$200,000 penalty for violation of state clean water laws. The company must also place \$1,315,000 into a trust fund for long term restoration measures that will be overseen by the National Fish and Wildlife Foundation. The balance of the cash settlement goes to the State Parks Department, the State Lands Commission, the U.S. Department of the Interior, U.S. Fish and Wildlife Service, and U.S. Coast Guard for the reimbursement of cleanup and response costs. *Company Agrees to Pay \$3.1 Million in Penalties, Costs for California Spill*, BNA NAT'L ENV'T DAILY, Feb. 3, 1997, available in WL 2/3/97 NED d12.

C. Enforcement of the Oil Pollution Act of 1990

1. Hyundai Merchant Marine Co., Ltd. and Britannia Steam Ship Insurance Co. were ordered to reimburse the U.S. Coast Guard \$1,109,673.00 plus interest and costs under the Oil Pollution Act of 1990 for a vessel recovery action undertaken by the U.S. Coast Guard. In 1991 the *M/V Hyundai No.12* ran aground between Koniujji Island and Simeonoff Island off the coast of Alaska. The vessel carried as much as 200,000 gallons of IFO-180 fuel oil. Very little of this oil escaped during the incident. *United States v. Hyundai Merchant Marine Co. No. A94-03910- CV (HRH)*. 1997 U.S. Dist LEXIS 10530; 1997 AMC 2333 (D. Alaska 1997)

D. Regulatory Changes

1. On June 9, 1997 the Research and Special Programs Administration (RSPA) of the Department of Transportation announced exclusions from RSPA's safety regulations for hazardous liquid pipelines. The pipelines include low-stress pipelines regulated for safety by the U.S. Coast Guard and low-stress pipelines less than one mile long that serve certain plants and transportation terminals without crossing an offshore area or a waterway currently used for commercial navigation. RSPA previously stayed enforcement of the regulations against these pipelines to mitigate compliance difficulties that did not appear warranted by risk. *Low-Stress Hazardous Liquid Pipelines Serving Plants and Terminals*, 62 Fed. Reg. 31,364 (1997) (to be codified at 99 C.F.R. pt. 195).

2. The U.S. Coast Guard handed down a final rule, which represents the last phase in the Coast Guard's three-phase effort to establish economically and technologically feasible structural and operational measures to reduce the threat of oil spills from tank vessels without double hulls, as required by the Oil Pollution Act of 1990. The Coast Guard determined that no interim structural measures were feasible. 62 Fed. Reg. 1622 (1997) (to be codified at 33 C.F.R. 157).

VII. STATE OCEAN MANAGEMENT

A. California: Wave of Bills Introduced for Ocean Resource Protection

1. A bipartisan coalition of California Assembly members introduced more than thirty new bills which together might be the most ambitious and comprehensive effort to strengthen coastal protection since 1972 when the California Coastal Commission was created. Prominent among the bills were Assembly Bill 1241, which would create a state Marine Life Management Commission to oversee the entire coastal ecosystem, and Assembly Bill 1000, which would put a bond measure on the November 1998 ballot for \$663 million, mostly to acquire and restore river corridors, forest watersheds, urban waterfronts, wetlands, and trails, but also to clean up storm runoff and improve sewage treatment. Another measure, Assembly Bill 1315, would increase funding to the California Department of Fish and Game nearly tenfold. Alex Barnum, *Legislature to Consider Flood of Coastal Protection Bills; Effort Called Strongest in 25 Years*, S.F. CHRON., Mar. 24, 1997, at A17.

Corollary to the statewide bills are some with local impact, such as AB 374 and SB 1006, which would ban fishing along six square miles of the Malibu coastline. Ken Leiser, *Marine Refuge Bills Gather Steam in the Legislature*, Copley News Service, May 23, 1997. An equivalent measure was introduced during the previous session but not acted upon.

Support for such a broad-based legislative effort might be encouraged by a comprehensive "Ocean Agenda" released in March 1997, produced pursuant to the California Ocean Resources Management Act of 1990 (CORMA), Cal. Pub. Res. Code §§ 36000-36003 (West 1996). Among the four primary goals of the Agenda is "to maximize California's interest within State tidelands, the territorial sea and the EEZ." <<http://www.ceres.ca.gov/cra/ocean/aboutCORMP.html>>.

B. Florida: Debate Over Marine Sanctuary

1. Although the Florida Governor and Cabinet did give approval for the Florida Keys National Marine Sanctuary, required by the 1990 enabling legislation because two thirds of the sanctuary is in state waters, it did so after what amounted to a public vote of no-confidence. A non-binding referendum held in November 1996 resulted in a fifty-five (55) percent vote against the sanctuary. Opponents called the sanctuary a "blueprint for the federal takeover of the culture, economy, and political autonomy" of the Florida Keys, claiming the "purported environmental crisis in the Keys is a clever justification for a power grab organized by big government acting in collusion with big environmentalism." Sean Rowe, *A Key Battle; The Conh Coalition and Taras Lyssenko Claimed Environmentalists Were Out to Destroy the Culture and Economy of the Keys. Voters Listened*, MIAMI NEW TIMES, Jan. 9, 1997. The situation raises difficult questions concerning the interaction of state and federal participants in ocean management.

2. In another apparent misstep by the federal government on local sensibilities, the Department of Defense settled on the Florida Keys as the best place for the U.S. Air Force to locate the mid-range component of its proposed Theater Missile Defense Extended Test Range. A newspaper account quoted a local Chamber of Commerce official saying, "You're not even allowed to stick your big toe in the marine sanctuary and now they want to launch rockets?" Jenny Staletovich, *Tempers Fly High in the Keys Over Air Force Missile Test Plan*, PALM BEACH POST, Jan. 12, 1997, at 1A; Marc Caputo, *Florida Keys Cry Foul Over Plan to Fire Ballistic Missiles From Their Backyard*, CHRISTIAN SCI. MONITOR, Mar. 13, 1997, at 3.

C. *User Fees for Hawaii Public Beach*

In its second foray into charging entrance fees for Hanauma Bay Nature Park on the island of Oahu, the Honolulu City Council re-imposed fees of \$3 per nonresident plus \$1 for parking in April. The new charges were to help pay for an expanded educational program and a study of how many visitors the bay's ecosystem can handle. A previous fee system, in place until it was abandoned in January 1997, charged higher fees and directed the money to the city's general fund, and was opposed by the state's travel industry. Laura Bly, *Hawaiian Park Charges Tourists*, USA TODAY, Apr. 11, 1997, at 7D.

D. *Chesapeake Bay: Shellfish v. Pollution*

In resource management at both the state and the federal level, the application of "ecosystem principles" (as mandated by the Sustainable Fisheries Act for federal regulation) to management problems is emerging as a new, experimental and sometimes surprising strategy.

Oysters in Chesapeake Bay today number perhaps a hundredth of their population a century ago because of over-harvesting and the effects of two oyster-killing parasites called MSX and Dermo. Reseeding efforts have been conducted with the help of, and as an aid to, fishermen, since the 1960's, but two 1997 projects show a shift in focus. In the Lynnhaven River on the Virginia side of the Bay, the Virginia Marine Resources Commission built a \$100,000 artificial oyster reef—"actually a big pile of oyster shells dumped overboard, extending 60 feet wide and 500 feet long." The idea is to seed the reef with baby oysters, with the reef keeping them away from bottom-dwelling predators and closer to a reliable, relatively clean food source in the surface waters. The state, in conjunction with the Chesapeake Bay Foundation, planned to involve schoolchildren in the project by having them grow the baby oysters in protected pens in the fall and then setting them out on the reef in spring 1998. The Lynnhaven River, a large watershed that once supported more than 3,000 acres of oyster grounds, has been closed periodically to shellfish harvesting since 1937, and completely since 1986. Although the problem of household sewage from Virginia Beach has largely been solved, many other sources still add more pollutants than the river can handle. It is thought possible that oyster culture can lead to a commercial harvest, with the catch being "relayed" to clean water for purging before harvesting. If more of the pollution sources such as runoff, marinas, pleasure boats and the like can be controlled, a more efficient fishery could be revived. But for now, the focus of such efforts is really on enhancing the Bay ecosystem for its own sake. State

marine biologists in Maryland are shifting the loci of oyster reseeded projects to waters that are too polluted for fishing. For the oyster fishermen who assist with the seeding, there is considerable irony in this approach. But in the long run, if biologists are correct that the oysters themselves will survive the bacterial levels, there could be commercial as well as environmental benefits. Tom Pelton, *Oystermen Become Sultans of Spat; Erstwhile Harvesters Reseed Former Prey*, BALTIMORE SUN, May 7, 1997, at 1B; Scott Harper, *The Lynnhaven Oyster; Can an Old Friend Make a Comeback?* VIRGINIAN-PILOT, Mar. 13, 1997, at A1.

VIII. FISHERIES MANAGEMENT

A. Sustainable Fisheries Act Implementation

The Sustainable Fisheries Act (SFA), Pub. L. 104-297, amended, reauthorized, and resulted in the renaming of what is now called the Magnuson-Stevens Fishery Conservation and Management Act (M-SFCMA), 16 U.S.C. § 1801-1882 (1994). After the passage of the SFA in September 1996, the National Marine Fisheries Service (NMFS) immediately began implementation, which will eventually involve amendment to all or virtually all fishery management plans (FMPs), the completion of several studies in order to design some new fishery management programs and tools, the establishment of several new advisory panels (APs), and numerous other actions. A computerized NMFS task list may be found, along with "SFA Updates" and other information pertinent to the various NMFS initiatives in implementing the SFA, via the NMFS homepage, <<http://www.nmfs.gov/>>. The page has moved from its previous address, <<http://kingfish.ssp.nmfs.gov/sfa>>. This summary is meant only to cover briefly some of the highlights of SFA implementation during the first half of 1997.

1. Changes to National Standards for Fishery Conservation and Management

The SFA added three new National Standards and would require revisions of five of the original seven Standards. The Standards function as guiding principles for resource management and development of FMPs. The added Standards are concerned with fishing communities (Standard 8), bycatch reduction (Standard 9), and safety of life at sea (Standard 10). Significant revisions to Standard 1 (optimum yield) are mandated by the SFA, and minor revisions are indicated for Standards 2 (scientific information), 4 (allocations), 5 (efficiency), and 7 (avoidance of duplication). NMFS developed proposed National Standard Guidelines incorporating the

changes and published them for public comment at Magnuson–Stevens Act Provisions; National Standard Guidelines, 62 Fed. Reg. 41,907 (1997).

2. *Individual Fishing Quotas*

The SFA placed a moratorium on new individual fishing quotas, IFQ, programs pending a study to be conducted by the National Research Council (NRC). In addition to the NRC study, the progress of which can be followed at its web site (< <http://www2.nas.edu/osb/>>), NMFS is conducting a series of public hearings. The questions being investigated include: (1) effects of limiting or prohibiting quota transfer; (2) mechanisms to prevent foreign control of the harvest; (3) limiting duration of IFQ programs; (4) giving IFQs to processors; (5) impacts on communities and other fisheries associated with the shift in capital value to IFQs; (6) monitoring and enforcement; (7) factors making a particular fishery suitable for management by IFQs; and (8) equitable initial allocations; and other related matters. The NRC study is to be completed by October 1998.

There are three existing IFQ programs which are continuing during the moratorium. For purposes of improving the functioning of limited access systems in general, the SFA directs the Secretary of Commerce to establish a system for central registry of limited access system permits, including individual fishing quotas (IFQs). The system will provide for title registration and “security interests” in these permits. “Security interests” include “assignments, liens and other encumbrances of whatever kind.” Procedures are to be created for making changes to title registration in cases of involuntary transfers, foreclosures (judicial and nonjudicial), enforcement of judgments, and other appropriate matters. Registration will perfect title to, and liens against, limited access permits (except Federal tax liens). Fees for registration or transfer of permits would go into a Limited Access System Administration Fund and be used to administer the Registry system. SFA § 110(c); M-SFCMA § 305(h).

NMFS published an Advance Notice of Proposed Rulemaking, ANPR, for this system March 6, 1997 (62 Fed. Reg. 10,249), seeking public comment on a variety of questions, including: (1) should NMFS manage the Registry itself or contract for the service; (2) where should the physical location of the Registry be; (3) should registration be voluntary or mandatory; and, (4) how should fees be determined. Central Title and Lien Registry for Limited Access Permits, 62 Fed. Reg. 10,249 (1997).

3. *Essential Fish Habitat*

SFA amendments to the M-SFCMA require NMFS to carry out a number of activities to describe, identify, conserve, and enhance essential

fish habitat (EFH). EFH is defined in the SFA as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." There are several new required FMP provisions, including requirements to: (1) Describe and identify EFH and adverse impacts to EFH for the fishery, based on guidelines established by NMFS; (2) minimize the adverse effects on EFH caused by fishing, to the extent practicable; and, (3) identify other actions to encourage the conservation and enhancement of EFH. Once the FMPs are amended with EFH provisions, NMFS is required to recommend conservation and enhancement measures for any action undertaken by a state or Federal agency that would adversely affect any EFH. Within thirty days of receiving a NMFS recommendation, Federal agencies are required to respond with a written description of how they will follow the recommendation, or to explain why they are not going to follow the recommendation.

The NMFS Office of Habitat Conservation is charged with implementing the SFA mandate toward designating and conserving essential fish habitat. A proposed rule containing guidelines for the description and identification of EFH in fishery management plans, adverse impacts on EFH, a process for NMFS to coordinate with Federal and State agencies on activities that may adversely affect EFH, and actions to conserve and enhance EFH was published April 23, 1997. 62 Fed. Reg. 19,723 (1997). Six public meetings were held between May 12 and July 2, 1997 (Secaucus, New Jersey; New Orleans, Louisiana; Seattle, Washington; Juneau, Alaska; Charleston, South Carolina; and San Francisco, California).

In addition to publication of the proposed rule, a Technical Assistance Manual was made available to the public on April 23, 1997. The Manual provides a non-binding additional interpretation on specific implementation topics that may assist the Councils with preparation of their EFH amendments.

The proposed regulation was preceded by two ANPRs published in the Federal Register, the first on November 8, 1996 (61 Fed. Reg. 57,843), and the second on January 9, 1997 (62 Fed. Reg. 1306). The latter announced availability of the "Framework for the Description, Identification, Conservation, and Enhancement of Essential Fish Habitat" which contains a detailed outline of NMFS proposals for the regulations.

4. Advisory Panel on Ecosystem Principles

The Secretary of Commerce must establish an Advisory Panel (AP) to ascertain the extent to which ecosystem principles are being applied in fisheries conservation and management, and to propose actions the Secre-

tary and Congress should take to expand their application. The panel will be composed of not more than twenty members including representatives from the Councils, states, fishing industry, conservation organizations, others with expertise in marine management, and individuals who possess a mastery of the structures, functions, and characteristics of ecosystems. The panel's findings will be submitted in a report to Congress no later than October 11, 1998. SFA § 207(a); M-SFCMA § 406.

5. *Fishing Capacity Reduction*

NMFS submitted a report to Congress in January 1997 evaluating the New England Capacity Reduction Initiative, known informally as a buy-back program), which was intended as a pilot program wherein vessels could be "bought out" of the fishery and retired permanently, thus making a permanent impact on the problem of too many boats chasing too few fish. The SFA provided for creation of a full-scale Fishing Capacity Reduction Program, and also amended Title XI of the Merchant Marine Act, adding sections 1104A(a)(7), 1111, and 1112, to allow buy-back loans; under some suggested arrangements these loans would be repaid by industry fees, assessed on those who remain in the fishery after a buy-back. Pub. L. 104-297, §§ 302(a) and 303.

6. *Reporting by Foreign Vessels in State Waters*

Section 112(c) of the SFA amended § 306(c) of the Magnuson-Stevens Act to require the owner or operator of a foreign fishing vessel (FFV) engaged in fish processing and support of U.S. fishing vessels within the internal waters of a state to submit reports on the tonnage of fish received (by species), and the locations where the fish were harvested. NMFS published a proposed rule March 20, 1997 (62 Fed. Reg. 13,360), and, receiving no public comment, published a notice of final rule May 19, 1997 (62 Fed. Reg. 27,182).

7. *Negotiated Conservation and Management Procedures*

Section 110(g) of the SFA amended section 305 of the Magnuson-Stevens Act by adding a new section (g) that authorizes both the Secretary and the Councils to establish a fishery negotiation panel to develop management measures, using procedures comparable to those under the Negotiated Rulemaking Act. A negotiation panel's report must specify the consensus reached and is to be published in the Federal Register. Councils and the Secretary are not obligated to use any of the panel's report in developing fishery management measures. A final rule establishing

procedures by which the panels would be created and operated was published May 1, 1997. 62 Fed. Reg. 23,667-23,671 (1997).

B. NMFS Strategic Plan

In May 1997 NMFS/NOAA published the "NOAA Fisheries Strategic Plan," a blueprint for agency re-engineering. The opening statement by NMFS leadership states, "[i]n the spirit of the Government Performance and Results Act, we have focused on measurable results which are important to the American people." These measurable objectives are: (1) maintain healthy stocks important to commercial, recreational, and subsistence fisheries; (2) eliminate overfishing and rebuild overfished stocks; (3) increase long-term economic and social benefits to the nation from living marine resources; (4) promote development of robust and environmentally sound aquaculture; (5) recover and maintain protected species populations; (6) reduce conflicts that involve protected species; and, (7) protect, conserve, and restore living marine resource habitat and biodiversity. NMFS welcomes public comment on the plan, which is available on its homepage at the following address: <<http://www.nmfs.gov/>>.

C. Challenges to Federal Fishery Regulation

In *Associated Fisheries of Maine v. Daley*, 954 F. Supp. 383, (D. Me. 1997), the plaintiff challenged Amendments 5 and 7 to the Northeast Multispecies FMP. Amendment 5 was promulgated March 1, 1994, and was intended to halt the decline of cod, haddock and yellowtail flounder populations in the New England region. Amendment 7, promulgated May 31, 1996, has the objective of reducing fishing mortality on these populations almost to zero, in order to rebuild stocks rather than just halt avoid further depletion. Associated Fisheries complained that in enacting the regulations the Secretary of Commerce had violated provisions of the Regulatory Flexibility Act (RFA), the Administrative Procedure Act (APA), and the Magnuson Act, among others. The court concluded that the challenge to Amendment 7 could not be maintained, and thus did not deal with the same arguments as applied to Amendment 5.

Section 604 of the RFA (as in effect at the time of the Secretary's action) requires the agency to perform a regulatory flexibility analysis before promulgating a final rule. The analysis must include a description of alternatives "designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected." Associated Fisheries argued that the Secretary failed to comply with this requirement because he did not examine the effect of Amendment 7 on

small businesses, particularly trawlers and other small fishing boats, and did not examine alternatives that would reduce the burden on these small entities. Not only did the court find this claim inconsistent with the administrative record, it also concluded that provisions of the Small Business Regulatory Enforcement Fairness Act in effect when Amendment 7 was promulgated made judicial review of the RFA claim unavailable.

Associated Fisheries further claimed that the Secretary violated the APA by failing to conscientiously consider comments responding to Amendment 7 and thereby engaging in arbitrary and capricious rulemaking. Again the court found this argument unsupported by the administrative record.

Associated Fisheries' claims under the Magnuson Act were that the science on which Amendment 7 was based was unreliable, the economic analysis was defective, and the management methods chosen were more costly than equally effective alternatives. The court concluded that "what the record reflects is strenuous disagreement among the scientists and economists—disagreements that are good faith differences in how to interpret data, analyze difficult problems, interpret the past and predict the future. But the record does not demonstrate that the Secretary has abused his discretion or has failed to follow the standards set by Congress. It is appropriate . . . for the Secretary to be conservative in dealing with the issue of conservation and, in the face of uncertainty, to take the more strenuous measures—even though they may unfortunately have a short term drastic negative effect on the fishing industry." *Associated Fisheries of Me. v. Daley*, 954 F. Supp. 383 (D. Me. 1997).

IX. PROTECTED MARINE SPECIES AND ENDANGERED SPECIES

A. *Standing to Sue Under the Endangered Species Act*

In *Bennett v. Spear*, 117 S. Ct. 1154 (1997), irrigation districts and ranchers affected by the operation of the Klamath Irrigation Project appealed after the District Court and Court of Appeals both dismissed their suit for lack of standing. Dismissal was based on the "zone of interests" test, which requires that a plaintiff's grievance arguably fall within the zone of interests protected by the statutory provision or constitutional guarantee invoked in the suit. The appeals court held that the test limits the class of persons who may obtain judicial review not only under the Administrative Procedure Act, but also under the Endangered Species Act's citizen-suit provision, 16 U.S.C. § 1540(g), and interpreted the ESA section to allow only for plaintiffs with an interest in preservation of an endangered species.

The Supreme Court reversed and remanded, holding that landowners and others can sue the government when "agency officials zealously but unintelligently pursue their environmental objectives" under the ESA. Thus the Oregon ranchers and irrigation agencies are permitted to contest water cutbacks made to protect two endangered fish species. *Bennett v. Spear*, 117 S.Ct. 1154 (1997).

B. Marine Mammal Protection Act

Whale enthusiast Richard Max Strahan filed suit against the U.S. Coast Guard and officials of the Department of Commerce, NOAA, and NMFS, alleging violation of the Endangered Species Act (ESA), National Environmental Protection Act (NEPA), Marine Mammal Protection Act (MMPA), and Administrative Procedure Act (APA). Strahan claimed that the negative impacts of Coast Guard activities on various marine mammals, particularly the northern right whale, were inadequately addressed by the agencies. The District Court granted full summary judgment to the defendants, finding that their programs for conservation, species recovery, and enforcement were sufficient to prevent the plaintiff from showing actual harm to the whale species in the future. However, the court reminded the defendants, who "had to be cajoled by the case management initiatives of this Court to participate in the procedures mandated by [the] statutes," to "remain vigilant in their protection of the species." The Court made note of the Congressional message to agencies as expressed by the Supreme Court in *TVA v. Hill*, 437 U.S. at 180, that they "must use . . . all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which" the species is no longer listed. *Strahan v. Linnon*, 967 F. Supp. 581 (D. Mass. 1997).

C. Whales and Porpoises

1. NMFS issued an interim final rule to restrict approaches within 500 yards of a northern right whale, whether by vessel, aircraft, or other means. Exceptions were provided for emergency situations, for certain whale rescue efforts, and for vessels unable to comply because of restricted ability to maneuver. The northern right whale is recognized as the world's most endangered large whale species. *North Atlantic Right Whale Protection*, 62 Fed. Reg. 6729 (1997).
2. The need to protect the northern right whale also resulted in NMFS closure of the drift gillnet fishery for swordfish in the Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, for most of 1997.

Atlantic Swordfish Fishery; Extension of Drift Gillnet Emergency Closure, 62 Fed. Reg. 30,775 (1997).

3. Pursuant to section 118 of the Marine Mammal Protection Act (MMPA), NMFS proposed the Atlantic Large Whale Take Reduction Plan (ALWTRP) and implementing regulations. 62 Fed. Reg. 16,519 (1997). The Plan's aim is to reduce the level of serious injury and mortality of four large whale species (right, humpback, fin, and minke whales) that occur incidentally in four east coast fisheries (northeast sink-gillnet, mid-Atlantic coastal gillnet, American lobster pot, and southeastern U.S. shark net fisheries). As part of the Plan development process NMFS conducted eleven public hearings on the proposed Plan. 62 Fed. Reg. 19,985 (1997).

4. The Gulf of Maine/Bay of Fundy stock of harbor porpoise is considered "strategic" under the Marine Mammal Protection Act as amended in 1994, because the level of human-caused mortality is greater than potential biological removal (PBR), defined as the maximum number of animals, not including natural deaths, that may be removed from a stock while allowing that stock to reach or maintain its optimum sustainable population. These harbor porpoise interact with mid-Atlantic gillnet fisheries. Together these facts require, under section 118(f) of the MMPA, that NMFS establish a Take Reduction Team to prepare a draft Take Reduction Plan to assist in the recovery or prevent the depletion of the marine mammal stock. NMFS therefore assembled a team of twenty-eight people to focus on reducing bycatch of porpoise in the mid-Atlantic gillnet fisheries, and set three meetings for the Team during the first half of 1997. 62 Fed. Reg. 8428 (1997).

5. In March 1997 NMFS issued a final rule implementing restrictions on gillnets contained in Framework Adjustment 16 to the Northeast Multi-species FMP. The intent of the restrictions was to restrict the use of small mesh pelagic gillnets, which had previously been exempt from the multi-species regulations, to avoid increasing the risk of harbor porpoise entanglements but still allow a traditional bait fishery to continue by specifying the size and method of deployment permitted for such gear. 62 Fed. Reg. 9377 (1997).

D. Seals and Sea Lions

1. In accordance with the Marine Mammal Protection Act, the Gulf of Maine Aquaculture-Pinniped Task Force was set up to advise NMFS of issues and problems concerning harbor seals and gray seals interacting in dangerous or damaging ways with aquaculture resources and facilities. The

Task Force published a report for public comment February 20, 1997, and NMFS' responses to the comments was provided March 17, 1997. 62 Fed. Reg. 12,602 (1997).

2. In June 1997, the U.S. Fish & Wildlife Service (USF&WS) reclassified the Steller Sea Lion (*Eumetopias jubatus*) with respect to its status under the Endangered Species Act, based on a finding that two distinct population segments exist, divided roughly by the line of 144 degrees West longitude, which strikes the Alaska coast near Cape Suckling. The population west of that line was designated as endangered, while the population east of the line remained in threatened status, on the List of Endangered and Threatened Wildlife. 62 Fed. Reg. 30,772 (1997).

E. Manatees

A USF&WS study confirming that manatees were being harassed by swimmers and divers at Three Sisters Springs near Florida's Crystal River National Wildlife Refuge caused a renewal of interest among dive shops in establishing a refuge there. Some said they would rather have a sanctuary set up by the County Commission than a federally authorized refuge, asserting that a county-established sanctuary would allow more local involvement, and violations could be handled through the local court system. Barbara Behrendt, *Study Renews Interest in Manatee Sanctuary*, ST. PETERSBURG TIMES, May 17, 1997, at 1.

A Florida state senator introduced a bill (SB 760) that would require propeller guards on all motorboats manufactured in Florida after December 31, 1998. Florida is home to nearly 770,000 boats with motors and about 2,600 manatees, and a U.S. Fish & Wildlife Service biologist said it was rare to see a manatee that didn't bear at least one propeller scar. The bill met with strong opposition from the marine industry, and was amended to call for a third-party study of propeller guards to determine whether they could save lives of manatees and humans while addressing boat operators' concerns about cost, boat performance and handling, and even human safety. Neil Santaniello, *Bill Calls for Study of Prop Guards; Devices Could Protect Manatees From Blades*, FORT LAUDERDALE SUN-SENTINEL, April 21, 1997, at 1B.

X. NAVIGATION & NAVIGABLE WATERWAYS

A. Clean Water Act

1. The eleventh circuit upheld the conviction of a Florida man under the Clean Water Act for having industrial wastewater discharged into a storm

sewer. The Eleventh Circuit held that the term “navigable water” under the Clean Water Act was not limited to bodies of water that were navigable in fact, but applied to any watershed that would eventually lead to a navigable body of water. *United States v. Edison*, 108 F.3d 1336, 1341 (11th Cir. 1997).

2. A federal district court held that the Clean Water Act’s National Pollutant Discharge Elimination System does not apply to any discharges to ground water. The court held that Congress intended the act only to apply to “navigable waters” and that Congress did not intend to apply the act to ground water of any form. *Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods*, 962 F.Supp 1312 (D. Oregon 1997).

B. Riparian Navigation

A private landowner was granted an injunction against sport fishing guides to prevent the guides from anchoring, fishing, or wading in a river that is within the owner’s property. The New York Court of Appeals held the public easement in the navigable-in-fact waterway did not displace other rights accompanying the private ownership of the riverbed of the navigable-in-fact river and the state’s conveyance of the land including the river included an exclusive right to fish. *Douglaston Manor, Inc. v. Bahrakis*, 678 N.E.2d 201 (N.Y. 1997).

C. National Security

The U.S. Coast Guard, pursuant to Presidential Proclamation No. 6867, established a National Security Zone, restricting the operation of certain vessels within the internal waters and territorial seas of the United States, adjacent to or within the coastal waters around Southern Florida. Private vessels of less than fifty meters in length may not get underway or depart the security zone with the intent to enter Cuban territorial waters without express authorization from the U.S. Coast Guard. *Security Zone: Coast Waters Adjacent to South Florida*, 62 Fed. Reg. 26,390 (1997) (to be codified at 33 C.F.R. pt. 165).

