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## A Review Of Developments In U.S. Ocean And Coastal Law 1994-1996

William K. Terrill Editor-in-Chief

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# A REVIEW OF DEVELOPMENTS IN U.S. OCEAN AND COASTAL LAW 1994-1996

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# A REVIEW OF DEVELOPMENTS IN U.S. OCEAN AND COASTAL LAW 1994-1996

## *INTERNATIONAL*

### I. LAW OF THE SEA CONVENTION

#### A. *U.S. Status and the Entry into Force*

On October 7, 1994, President Clinton approved and transmitted the United Nations Convention on the Law of the Sea (the Convention), with Annexes, to the U.S. Senate for its advice and consent to accession. The recommendation to adopt the Convention came twelve years after the Convention was completed in Montego Bay on December 10, 1982. The United States played a key role in the drafting of the Convention, but objections to the Part XI provisions on the development and management of deep seabed mineral resources prevented the United States and other major industrial nations from signing the Convention in 1982.

These objections were resolved in the Agreement Relating to Implementation of Part XI of the United Nations Convention (the Agreement), adopted by the United Nations General Assembly on July 28, 1994, and signed by the United States the next day. The Agreement was transmitted in October 1994, along with the Convention, to the Senate for its advice and consent to ratification.

The new deep seabed Agreement maintains the regime envisioned in the Convention of international cooperation and the sharing of seabed resources. But it also provides more development opportunity for major economic players, because it allows them representation in the International Seabed Authority and thus gives them the ability to influence future financial and management decisions. The provisions requiring mandatory transfer of technology have been removed, and the approach taken to management of the seabed resources has been modified from a centralized economic planning approach to one based on free market principles. The Agreement also recognizes prior seabed claims. United Nations Convention on the Law of the Sea, with Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex, July 29, 1994, S. TREATY DOC. No. 103-39 (1994), *available in* 1992 WL 725374.

The 1982 United Nations Law of the Sea Convention entered into force on November 16, 1994 with sixty-five signatories. As of October 21, 1996, 107 States had ratified the Convention, including Australia, Japan, China, South Korea, Germany, and Italy. The treaty is still under consideration and debate in the United States Senate.

### *B. Establishment of the International Tribunal*

In October 1996, the United Nations Secretary General swore in the twenty-one judges elected to sit on the International Tribunal for the Law of the Sea. The new tribunal will be located in Hamburg, Germany, and will adjudicate issues arising under the Law of the Sea Convention, including pollution control, fishing rights, navigation, and deep seabed mining. The tribunal is authorized to hear cases brought by states, individuals, companies, and other non-governmental organizations. By the terms of the Convention, the tribunal will be one forum for settling disputes in the event that participating states fail to come to their own solutions. The court also maintains the authority to take action when necessary. For instance, the court may address applications for the release of vessels arrested by coastal countries.

The judges will serve nine-year terms. A special rotation ensures that not more than half of the judges will be up for re-election at any given time. The judges represent five regions: Africa, Asia, Latin America/Caribbean, Western Europe, and Eastern Europe. The inaugural court president is from Ghana and the vice president is from Germany. Other judges of the court are from Argentina, Belize, Brazil, Bulgaria, Cameroon, China, Croatia, Grenada, Iceland, Italy, India, Japan, Lebanon, Russia, Senegal, Tanzania, Tunisia, South Korea, and the United Kingdom. *Hamburg Base for Tribunal - Law of the Sea Judges Elected*, LLOYD'S LIST INT'L, Aug. 3, 1996, available in 1996 WL 6278212; *United Nations Law of the Sea Judges Sworn In*, LLOYD'S LIST INT'L, Oct. 21, 1996, available in 1996 WL 11841689.

At a conference held November 27 - December 1, 1995, the member states revised the text of the draft protocol on the privileges and immunities of the tribunal. Upon completion, the text will be open for signature and ratification by the states. *Assembly Calls for Universal Participation in Law of the Sea Convention*, UN CHRONICLE, Mar. 1, 1996, available in 1996 WL 10924332.

C. *Establishment of Exclusive Economic Zones and Conflicting Sovereignty Claims*

1. Upon ratification of the Law of the Sea Convention in May 1996, China established a 200-mile Exclusive Economic Zone (EEZ) and claimed territorial waters around the Paracel Islands. Vietnam and Taiwan also claim jurisdiction over the islands' territorial waters. *UN Inaugurates Law of the Sea Tribunal: The 21 Judges Hope to be Able to Settle the Many Worldwide Disputes Over the Ownership of the Islands*, *The Financial Post*, Oct. 22, 1996, available in 1996 WL 5743597. One of the purported reasons for the creation of the EEZ is to promote economic development, especially oil and natural gas development, under China's jurisdiction. *China Developing 200-mile Economic Zone*, *DAILY YOMIURI*, Jan. 31, 1995, at 10, available in LEXIS, Asiapc Library, YOMIUR File.
2. The Diaoyus Islands in the East China Sea are a cause of dispute between China and Japan. Japan established its own 200-mile Exclusive Economic Zone around the Diaoyus Islands, after ratifying the Convention in June 1996. In July 1996, Japan built a lighthouse on the largest island in the chain. The Japanese actions have been bitterly opposed by China and Taiwan. The controversy marks yet another maritime dispute in the East Asian region and threatens the stability of the region. *Blame the Law of the Sea*, *ASIAN WALL ST. J.*, Sept. 20, 1996, available in 1996 WL-WSJA 12473913.
3. South Korea established a 200-mile Exclusive Economic Zone, which conflicts with the Japanese claim to the Takeshima Islands in the Sea of Japan. A South Korean company is pursuing construction projects on the island with protection provided by the Korean military. Japan, Korea, and China held talks to delimit the boundaries between the countries' overlapping EEZs, but no agreements have been reached. *South Korea Establishes 200-Mile Zone*, *Japan Economic Newswire*, Sep. 10, 1996, available in WESTLAW, 9/10/96 JWIRE 00:12:00; *UN Inaugurates Law of the Sea Tribunal: The 21 Judges Hope to be Able to Settle the Many Worldwide Disputes Over the Ownership of the Islands*, *THE FIN. POST*, Oct. 22, 1996, available in 1996 WL 5743597.
4. In late January 1996, Turkish naval commandos landed on Kardak, a small island in the Aegean Sea and asserted sovereignty over it. Greece, which also claims sovereignty over the island, had already raised a flag on the outcrop. It dispatched its own naval and air forces after discover-

ing Turkey's actions. U.S. diplomats, including President Clinton, pressured both governments not to escalate the crisis. During the first week of February 1996, the two countries withdrew their forces. Kardak and hundreds of other similar islands in the Aegean are caught within the larger debate of ownership of the continental shelf and surrounding waters. *Alliance Partners on the Rocks, but Aegean Tragedy Averted*, JANE'S DEF. WKLY., Feb. 7, 1996, available in LEXIS, News Library, JANDEF File. Turkey rejected the suggestion that the dispute over control of the waters in the Aegean be submitted for legal arbitration, and announced that it is prepared to go to war if Greece attempts to use the Law of the Sea Convention to extend its territorial waters to twelve miles. *UN Inaugurates Law of the Sea Tribunal: The 21 Judges Hope to be Able to Settle the Many Worldwide Disputes Over the Ownership of the Islands*, THE FIN. POST, Oct. 22, 1996, available in 1996 WL 5743597.

#### *D. Expanding the Boundary of the Continental Shelf*

The Law of the Sea Convention calls for the creation of a Commission on the Limits of the Continental Shelf Beyond 200 Miles. At a meeting in November 1995, the member states voted to hold elections for the Commission in March 1997, and to begin work helping coastal states establish their continental shelf boundaries. The Commission will be comprised of twenty-one experts from the fields of geology, geophysics, and hydrography. If a state wishes to establish a continental shelf beyond the 200-mile Exclusive Economic Zone limit, the Commission will review the documents and supporting scientific data and make a recommendation. Under Article 76 of the Convention, a State has ten years from the time the Convention enters into force to make a claim, which must be based on specific scientific criteria.

Canada is preparing to ratify the Law of the Sea Convention and claim sovereignty over a large portion of the continental shelf in the Atlantic Ocean, parts of which stretch up to 350 nautical miles from its coastline, the maximum extension allowed under the Convention. Canada seeks control of a large reserve of natural gas and to extend jurisdiction for resource management and environmental protection. *Canada Prepares Claim to Extend Its Underwater Territories*, Agence France Presse, Dec. 21, 1995, available in LEXIS, World Library, AFP File.

Australia and New Zealand also seek to gain rights to the continental shelf located outside of their exclusive economic zones, after discovering the possibility of oil and gas resources. New offshore oil exploration technology is being used to map the area and document the continental

shelf in order to provide evidence that the shelf is the natural extension of the coastline. *NZ Investigates Potential Claim to Seabed Resources*, Dow Jones Aus. & N.Z. Rep., Sep. 23, 1996, available in 9/23/96 DJANZR 20:23:00.

### *E. Treaty Will Add to UNCLOS III*

1. Ninety-nine countries agreed to adopt the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks on August 4, 1995 in New York. The treaty will take effect after thirty countries have ratified it. It is the first international treaty to address fishing in international waters, outside the Exclusive Economic Zones of coastal states. The focus of the treaty is to improve the effectiveness of international fisheries organizations and their regulations. It allows inspectors to board and search signatory countries' registered vessels for such violations as using prohibited gear or exceeding catch quotas. The inspectors may even detain a ship. The treaty provides procedures for dispute resolution and for the exchange of fisheries data. *Fisheries: Nations Agree to Treaty on Straddling Stocks*, Greenwire, Aug. 4, 1995, available in LEXIS, Envirn Library, GRNWRE file. An important effect of the treaty is that fishing by flag-of-convenience vessels will be illegal. *New U.N. Convention Sets International Overfishing Controls*, ECO-LOG WK., Aug. 11, 1995, available in WESTLAW, ECOLOG Database.

2. As of October 1996, fifty-three countries have signed the treaty, and four countries (Saint Lucia, Sri Lanka, Tonga, and the United States) have ratified it. An update of signatories, ratifications and the text of the treaty are available through the United Nations World Wide Web site, at <<http://www.un.org/>>. The formal name of the treaty is the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. When opened for signature on December 4, 1995, it immediately garnered twenty-six signatures, many of which were from island archipelagic states. However, of the six countries that account for ninety percent of the world's high-seas fishing (Japan, Poland, South Korea, Spain, Russia, Taiwan), only the Russian Federation has signed the agreement. *26 Nations Sign U.N. Straddling-Stock Treaty*, Greenwire, Dec. 5, 1995, available in LEXIS, Envirn Library, GRNWRE File. After initial reluctance, the European Union and some of its member nations signed the treaty, perhaps due to encouragement by the fisheries ministers of Northwest Atlantic Fisheries Organization member nations. *NAFO*



*Agrees to Push for UN Treaty Ratification*, Greenwire, Oct. 25, 1995, available in LEXIS, Envirn Library, GRNWRE File.

## II. U.S. TRADE EMBARGOES

### A. *U.S. Tuna Boycott Violates GATT*

In May 1994, the dispute panel for the General Agreement on Tariffs and Trade (GATT) ruled that the United States embargo on tuna imports, authorized by the Marine Mammal Protection Act, violates GATT's free-trade rules. According to the GATT panel, the trade restrictions applied not to the product (tuna), but to the process of catching tuna using purse-seine nets, which violates GATT. One of the panel's main concerns was that unilateral trade measures would be used by one country in an attempt to change the environmental policies of another country. Timothy Noah & Bob Davis, *Tuna Boycott is Ruled Illegal by GATT Panel*, WALL ST. J., May 23, 1994, at A2.

### B. *The Panama Declaration, October 4, 1995*

In spite of the above decision by the GATT dispute panel, the United States continued to boycott tuna from those countries continuing to employ dangerous fishing methods. In response to the boycott, several Latin American countries met in Panama to discuss methods of capturing tuna that minimize the harm to dolphins. On October 4, 1995, the Panama Declaration was adopted and signed by the United States, Mexico, Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Panama, Spain, Vanuatu, and Venezuela. It calls for progressive reductions in dolphin mortality by the year 2001 and for the appointment of a special committee to monitor progress of the countries towards the goal. Some environmental groups are applauding the Panama Declaration, but others are skeptical. They point out that there are no specific fishing requirements outlined in the agreement, yet all signatories may now label their tuna as "dolphin safe." *Tuna Fishing: US/Mexico Accord Approval Not Universal*, AGRICULTURE, Nov. 24, 1995, § 429. To give the agreement effect in the United States, the Panama Declaration must be ratified by Congress. A bill introduced and passed by the United States House of Representatives and supported by the Clinton administration proposed to implement the Panama Declaration. H.R. 2823, 104th Cong. (1996). See also S. 1420, 104th Cong. (1996); *International Dolphin Protection Legislation Overwhelmingly Approved By U.S. House* (visited Oct. 11, 1996) <<http://www.house.gov/resources/press/730dolph.htm>>. How-

ever, in addition to ratifying the Panama Declaration, the legislation revised the U.S. definition of "dolphin safe" tuna to allow the chase, harassment, encirclement and capture of dolphins with nets, so long as an observer onboard a tuna fishing vessel does not see the dolphin die outright. Environmental groups coined the proposed legislation "the Dolphin Death Act," and successfully campaigned to defeat the bill in the Senate. Commenting upon the defeat of the bill, David Phillips of the Earth Island Institute stated, "These bills would have crippled dolphin protection and mislead millions of Americans. . . . Thanks to the public outcry and the leadership of Senator Barbara Boxer (D-CA) and the bipartisan group of Senators and House members, the dolphin-safe label is safe." *'Dolphin Death Act' Stopped!* P.R. Newswire, Oct. 4, 1996, available in WESTLAW, 10/4/96 PRWIRE 10:00:00. Senators Barbara Boxer and Joseph Biden (D-Del.) and Representatives Gerry Studds (D-Mass.) and George Miller (D-Cal.) attempted to compromise with the proponents of the 'Dolphin Death Act.' The group offered legislation which retained the present, strong definition of "dolphin safe" tuna and allowed foreign fisherman to sell their dolphin safe tuna on the U.S. market. H.R. 2823, 104th Cong. (1996); S. 1460, 104th Cong. (1996). The Studds-sponsored bill passed the House but was not voted on by the full Senate before the end of the 104th Congress. H.R. 2823, 104th Cong. (1996).

### C. *United States Court of International Trade Decisions*

1. On December 29, 1995, the Court of International Trade ordered the United States Departments of State, Commerce, and Treasury to apply sea turtle protection measures to all nations exporting shrimp to the United States. The court ruled that under the terms of the Endangered Species Act (ESA), the United States must ban imports of shrimp from *all* foreign countries that do not act to reduce turtle mortalities in shrimping operations. The court's decision forces all countries that export shrimp to the United States to install turtle excluder devices (TEDs) on their shrimp trawling nets. Most species of sea turtles are listed as endangered or threatened species, and large numbers of the turtles die because of entrapment in shrimp nets. Prior to the court's ruling, the United States applied the ban to only fourteen Caribbean and Western Atlantic Ocean countries engaged in shrimping operations. The court ordered that the import ban go into effect no later than May 1, 1996. *Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995).

2. Following the International Court of Trade's decision in *Earth Island v. Christopher I*, the U.S. State Department issued a preliminary list of over fifty nations which could be affected by a U.S. trade embargo. *State Department Identifies Nations Potentially Subject to Shrimp Embargo*, INT'L TRADE REP., Feb. 28, 1996, available in WESTLAW, BNA-ITR Database. On March 19, the World Trade Organization's Association of Southeast Asian Nations (ASEAN) complained that the U.S. ban on the import of foreign shrimp caught by vessels not using a turtle excluder device (TED) was a violation of the United States' World Trade Organization obligations. ASEAN argued that the embargo amounted to an unfair trade barrier. *U.S. Ruling on Possible Embargo of Some Shrimp is Attacked in WTO*, BNA Int'l Trade Daily, March 20, 1996, available in WESTLAW, BNA-BTD Database. Subsequent to the ASEAN objection, the United States returned to the Court of International Trade and requested a one-year extension to enforce the Endangered Species Act embargo provision. The court denied the extension. *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996). On October 8, 1996, the Court of International Trade tightened the ban on the U.S. importation of shrimp from countries without programs to safeguard sea turtles. An order of the court prohibits the importation of shrimp from countries not "certified" to have sea turtle conservation programs comparable to U.S. protection measures. Under the International Court of Trade's decision in *Earth Island I*, shrimp caught by individual foreign trawl vessels equipped with TEDs, could be imported into the United States. However, the courts' most recent decision enjoins the State Department from continuing this practice. *Earth Island Inst. v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade 1996). The decision could have a tremendous impact on U.S. seafood processors and their employees. Experts estimate that the embargo will preclude sixty million pounds of shrimp, valued at \$150 to \$200 million, from entering the United States. Both the National Fisheries Institute and the U.S. government announced that they will appeal the decision. Additionally, both parties plan to seek a stay of the court order to avoid the disruption of trade. *Seafood Industry Joins Government in Appealing Shrimp Embargo Order*, P.R. Newswire, Oct. 29, 1996, available in WESTLAW, PRNEWS Database.

3. In the face of a threatened U.S. trade embargo, Italy announced plans to end fishing with driftnets longer than 1.5 miles. *Italy, Bowing to the U.S., to Cut Size of Fishing Nets*, WALL ST. J., July 29, 1996, at A14. Italy's decision to end large-scale driftnet operations came after the Court of International Trade ordered the Secretary of Commerce to "identify"

Italy under the terms of the High Seas Driftnet Enforcement Act on March 18, 1996. Environmental groups who brought the case before the court argued that the United States Departments of Commerce and State failed to enforce provisions of the Act, which is designed to apply a global moratorium on dragnet and large-scale driftnet operations. *Humane Soc'y of the United States v. Brown*, 920 F.Supp. 178 (Ct. Int'l Trade 1996); *Humane Soc'y of the United States v. Brown*, 18 ITRD 1434 (Ct. Int'l Trade Mar. 18, 1996).

### III. INTERNATIONAL WHALING COMMISSION

#### A. *Developments at the 46th-48th Annual Meetings*

1. In May 1994, the 46th Annual Meeting of the International Whaling Commission (IWC) met in Puerto Vallarta, Mexico. The IWC voted to establish a Southern Ocean Whale Sanctuary in which commercial whaling is prohibited. Scientific whaling within the sanctuary's borders would still be allowed. *Whales Find Sanctuary at IWC Meeting*, MARINE CONSERVATION NEWS, Autumn 1994, at 1.

2. In May 1995, the International Whaling Commission (IWC) held its 47th Annual Meeting in Dublin, Ireland. The meeting participants reaffirmed the moratorium on commercial whaling, which has been in place since 1985-1986. In other discussion, the IWC criticized Norway, which has continued to hunt for whales. Additionally, the Commission adopted a proposal to prohibit scientific whaling in sanctuaries, and specifically within the Southern Ocean Whale Sanctuary. The IWC also adopted a general resolution requiring that scientific research on whales be nonlethal. The killing of a whale is allowable only in the "most exceptional circumstances." *MAFF—Outcome of International Whaling Commission Conference*, M2 Presswire, June 7, 1995 available in LEXIS, Market Library, IACNWS File.

3. In June 1996, the 48th Annual Meeting of the International Whaling Commission (IWC) took place in Aberdeen, Scotland. The Norway delegation walked out of the meeting as a protest against demands that the country stop hunting whales. Norway has authorized commercial whaling despite the moratorium since 1993. The U.S. section of the IWC proposed that the Makah Indian tribe be permitted to resume the hunting of grey whales for subsistence and ceremonial purposes. The tribe has refrained from whale hunting for almost seventy years, in accordance with a federal prohibition. However, a U.S. delegation withdrew the proposal. Both the tribe and the U.S. delegation plan to submit the Makah's

proposal at the 49th Annual Meeting. *U.S. Withdraws Makah Tribe's Bid to Whale Hunt*, WEST's Legal News, July 2, 1996, available in WEST-LAW, WLN-ENV Database. Additionally, the IWC adopted a non-binding resolution, calling on Japan to halt its research whaling program. *Japanese Whaling Fleet Falls Short on Expedition*, CHI. SUN-TIMES, Sept. 18, 1996, at 48; S.

### B. Japan's Actions

1. Disregarding both the 1995 and 1996 International Whaling Commission (IWC) resolution, Japan continues to kill whales for "scientific" purposes. In fact, the country sent whaling ships to the Southern Ocean Whale Sanctuary for the purpose of killing 400 minke whales in 1995. Japan claims that it is not bound by the resolutions, and that its practices are consistent with the International Convention for the Regulation of Whaling (ICRW). *Whaling Ships Sail to Antarctic, Plan Catch of 400 Minke*, Japan Transportation Scan, Nov. 6, 1995, available in LEXIS, News Library, ZJP1 File. In 1996, Japan awaited the conclusion of the 48th Annual IWC meeting before embarking on its annual whale hunting mission. The Japanese whaling fleet returned with far fewer minke than expected. Japan claims that the program is necessary to measure whale populations, ages and migrations. However, the whale meat is sold, and critics say the program is Japan's attempt to keep its whaling industry alive. *Japanese Whaling Fleet Falls Short on Expedition*, CHICAGO SUN-TIMES, Sept. 18, 1996, at 48; S.

2. On February 9, 1996, President Clinton issued a statement criticizing the ongoing killing of whales by Japan. He noted that its increased killing of whales in the Southern Ocean Whale Sanctuary did not meet the nonlethal requirement of scientific whaling. Clinton also noted that this activity diminishes the effectiveness of the International Whaling Commission's conservation program. However, he rejected the proposal to use economic sanctions against Japan. *Text of Presidential Statement on Int'l Whaling Commission*, U.S. Newswire, Feb. 9, 1996, available in 1996 WL 5619431.

3. October 11, 1996, Japanese fishermen caught one hundred small minke whales using traditional skills, despite the International Whaling Commission's refusal to grant a quota for aboriginal subsistence whaling and the international moratorium on commercial whaling. The Japanese identify whale meat only as a source of food, and do not officially recognize whales as mammals of environmental significance. *Whaling*

*Ban? Maybe in Mexico, but Not Here*, Inter Press Service, Oct. 18, 1996, available in 1996 WL 13588537.

### C. Australia Makes Plans for Global Ban

The Australian government announced its intention to create a task force to examine the best way to galvanize international support for a permanent ban on whaling. Australia believes that the present moratorium on commercial whaling does not adequately prevent the unjustifiable killing of whales. *Government Renews Push for Global Ban on Commercial Whaling*, Agence France Presse, Sept. 30, 1996, available in 1996 WL 12148147.

### D. Marine Pollution

Studies conducted on beluga whales show them to be some of the most contaminated mammals on earth. The culprit is land-based pollution that is released into shoreline areas. Because belugas live in mainly shallow estuary environments, they are exposed to a much higher degree of pollutants than other whales. This contamination has resulted in very low birth and birth-survival rates. One recent survey of all female belugas over twenty-one years of age found that none were pregnant or showed signs of a recent birth. In March 1995, the International Whaling Commission held its first meeting to discuss threats to whales from marine pollution. At the meeting, a program of research on the effect of marine pollution on whales was adopted. *Nine Lives Eight Poisoned Waters: Life—and Slow Death—in the World's Cruel Seas*, THE GUARDIAN, Oct. 1, 1995, at S20, available in 1995 WL 9936266.

## IV. ANTARCTICA

On October 2, 1996, President Clinton signed the Antarctic Science, Tourism, and Conservation Act of 1996 into law. The legislation implements the Madrid Protocol on Environmental Protection in Antarctica, to which twenty-six nations consented in 1992. Presidential Statement on Antarctic, Science, Tourism, and Conservation Act of 1996, M2 Presswire, Oct. 4, 1996, available in 1996 WL 13546668. The United States is the twenty-first nation to ratify the Protocol. Russia, Japan, India, Belgium and Finland are the only consenting nations which have not yet ratified the agreement. *Bill Would Protect Antarctic Environment*, AP Newswire, Sept. 10, 1996, available in 1996 WL 4439402. The Madrid Protocol sets strict environmental standards on scientific stations located in Antarctica. Environmental protections include: limiting pollutant releases, prohibiting mineral prospecting, and requiring that environmen-

tal impact assessments precede any new planned activities. Until all countries ratify, the Protocol does not have international binding force—an important consideration, as a Greenpeace study showed that its provisions are not being voluntarily followed. The study found, among other things, that certain scientific stations were burning their garbage, rather than returning it to their country for disposal. Peter James Spielman, *Antarctic Cleanup Moves at Glacial Pace*, L.A. TIMES, Aug. 13, 1995, at 28, available in 1995 WL 9816602. According to the Antarctic and Southern Ocean Coalition, a major danger of the delay in ratification is that, in its absence, there is no liability regime to cover damage to the Antarctic environment. *Antarctica Still at Risk Say Environmental Groups*, U.S. Newswire, May 19, 1995, available in 1995 WL 6618003. The Antarctic Science, Tourism and Conservation Act also reaffirms the National Science Foundation (NSF) role as the lead agency responsible for managing the Antarctic science program and issuing regulations and research permits. Additionally, the act provides for a Congressional assessment of the future funding for Arctic and Antarctic research programs, and requires the NSF to report to Congress by March 1, 1997, on the use and amounts of funding provided for the federal programs. Larry Pressler, *Senate Passes Antarctica Environmental Legislation, Gov't Press Releases*, Sept. 5, 1996, available in 1996 WL 11124741.

#### V. LAND-BASED POLLUTION

1. On November 3, 1995, 102 nations attending the United Nations conference on ocean pollution in Washington, D.C., approved a non-binding action plan, designed to reduce ocean pollution from land-based sources. Delegates from the approving countries agreed that nations should limit the disposal of untreated sewage, radioactive substances and heavy metals. Additionally, the plan calls for the development of voluntary guidelines to control the discharge of twelve persistent organic pollutants, and urges the global community to negotiate a treaty to limit or ban land-based releases. *U.N. Conference on Ocean Pollution Urges Treaty to Control 12 Toxics*, AIR/WATER POLLUTION REP.'S ENV'T WK., Nov. 10, 1995, available in 1995 WL 2404443. Talks leading to a treaty to control land-based causes of ocean pollution could begin in 1997. *Ocean Conference Targets Land-Based Pollution*, CHEMICAL ENGINEERING, Dec. 1, 1995, available in 1995 WL 7913669. Updates on the status of the treaty negotiations are available through the Worldwide Web site of the United Nations, at <<http://www.un.org>>.

2. All thirty countries bordering the Mediterranean Sea signed a protocol on March 7, 1996, which calls for the gradual elimination of land-based pollution causing damage to the marine environment. The countries agreed to gradually eliminate the discharge of persistent organic pollutants into the ocean, list countries that produce pollutants, and compile a specific list of the most harmful substances. The signatories had a difficult time coming to an agreement due to the diverse nature of the Mediterranean region. The countries bordering the sea include highly industrialized states, as well as poor ones, and nations which are just recovering from civil wars. *Environment: International Protocol to Reduce Pollution in Mediterranean*, EUR. REP., Mar. 29, 1996, available in 1996 WL 8662493.

## VI. LONDON DUMPING CONVENTION

### A. Prohibition on Low-Level Radioactive Waste Dumping

In 1994, the parties to the 1972 Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention) adopted a world-wide prohibition on the dumping of low-level radioactive waste into oceans. None of the countries opposed the ban, although five countries abstained from voting. Russia, one of the five countries that abstained from voting, also entered a formal reservation, which keeps it from being bound by the treaty's dumping prohibitions. *Events of 1994*, 5 COLO. J. INT'L ENV'T'L L. & POL'Y 409, 409 (1994). However, on September 17, 1996, Russia announced that it will formally adopt the London Dumping Convention's ban on dumping liquid radioactive waste into the sea. Russia's change in policy is mainly due to the United States' and Norway's funding and technical support for an upgrade to a low-level waste treatment facility in Murmansk, Russia. Previously, Russia maintained that the lack of adequate treatment facilities prevented its consent to the ban. *Radioactive waste: Russia Expected to Adopt Ban on Dumping at Sea*, EPA Official Says, DAILY ENV'T REP. NEWS, Sept. 18, 1996, available in WESTLAW, BNA-DEN Database. Norway claims that a thorough cleanup of the area, which is one of the world's richest fishing zones, could take up to a century to complete.

## VII. HIGH SEAS FISHING

### A. NAFO Management of Straddling Stocks and Transboundary Fish

On October 20, 1995, Canada and the European Union (EU) agreed to end their fishing dispute over turbot (Greenland halibut). The dispute



began in the 1980s, when the Northwest Atlantic Fisheries Organization (NAFO) placed quotas on this fishery for individual member nations. As stocks of the turbot were increasingly depleted, tension mounted between Canada and the EU over the allocation of the remaining resources. The dispute rose to a dramatic crisis when Canadian fisheries patrol vessels, acting under authority of Canada's unilaterally enacted Coastal Fisheries Protection Act, fired shots across the bow of a Spanish high-seas trawler, the *Estai*. Canadian authorities arrested the vessel and charged her captain with illegal fishing activities. The captain was released only after posting a \$500,000 bond. The action halted international negotiations regarding effective management of the turbot resource. Publicly accusing Canada of organized piracy, Spain sued Canada in the International Court of Justice for violating Spain's internationally recognized right to fish the high seas.

The October 20th agreement seeks to promote fish conservation by, among other things, making it a priority to ratify the newly adopted act of the U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *adopted* Aug. 4, 1995, 34 I.L.M. 1542 ). This International Agreement would provide limited enforcement authority to coastal states for protecting their interests in straddling stocks. Such stocks, like the Greenland halibut, inhabit areas which "straddle" the 200 nautical-mile limit of a coastal state's EEZ, thus making the fish available to high-seas fishing vessels just outside the EEZ. Coastal states have the responsibility under UNCLOS III to conserve living marine resources in their EEZs. But under UNCLOS III as enacted in 1982, they have no power to fulfill that responsibility. Foreign high-seas fishing vessels, under the current legal regime, have been effectively depleting fish stocks within coastal states' EEZs by overharvesting straddling fish stocks just outside the EEZs. *EU/Canada: EU and Canada Resolve to Work Together on Fish Issues*, AGRI SERV. INT'L, Oct. 27, 1995, available in LEXIS, Envirn Library, PUBS File. See also Douglas Day, *Tending the Achilles' Heel of NAFO: Canada Acts to Protect Nose and Tail of the Grand Banks*, 19 MARINE POL'Y 257 (1995).

### VIII. U.S.-CANADIAN PACIFIC SALMON CONTROVERSY

1. Since 1994 the United States and Canada have been unable to resolve their dispute over how many salmon each nation's fishers will be permit-

ted to catch in the waters off southeast Alaska and British Columbia. The Pacific Salmon Treaty (PST), ratified by both countries in 1985, established a joint allocation-setting regime, and a 1985 court order compelled Alaska to comply with the Treaty's program for rebuilding the chinook salmon fishery. *Yakama Indian Nation v. Baldrige*, 898 F. Supp. 1477 (D. Wash. 1995). The PST requires that the United States and Canada manage their fisheries in a manner that permits each nation to receive benefits equivalent to the production of salmon originating in its waters.

2. When allocation talks stalled prior to the 1994 salmon fishing season, Canada sought to pressure Alaska to return to the negotiating table and accept reductions in its chinook salmon harvest. Canada sought to impose a C\$1,500 transit fee on U.S. fishing boats traveling the Inside Passage between the Pacific Northwest and Alaska. *Salmon*, 24 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,498 (Aug. 1994). Negotiations resumed, but when they stalled again, the United States denounced the fees and demanded reimbursement. Canada refused, and the United States responded by passing a non-binding Congressional resolution declaring the Inside Passage to be international waters, thus making the fees technically illegal. Barry Brown, *U.S., Canada Throw Stones Over Waterway*, BOSTON HERALD, March 17, 1996, available in 1996 WL 5331163. The transit fee was suspended in 1995, but by that time 258 boats had paid it. The Fisheries Act of 1995, Pub. L. 104-43, 109 Stat. 366, signed by President Clinton in November 1995, amends the Fishermen's Protective Act to permit reimbursements to U.S. fishermen and directs the Secretary of State to ask Canada to indemnify the United States. *State News: Fees to be Repaid*, ANCHORAGE DAILY NEWS, November 11, 1995, available in 1995 WL 14722300.

3. The United States and Canada agreed on 1995 allocations for coho, sockeye, and pink salmon, but again failed to compromise on the chinook salmon, with Alaska insisting on a catch of 230,000 fish, exceeding the Canadian recommendation by 100,000. *US-Canada: Gov'ts Reach Accord on Some Salmon Harvests*, Greenwire, July 31, 1995, available in LEXIS, Envirn Library, GRNWRE File; *Fisheries: Straddling-Stock Negotiations; Salmon Update*, Greenwire, July 26, 1995, available in LEXIS, Envirn Library, GRNWRE File. Alaska based its demand on a scientific management model different from the rebuilding scheme that had traditionally been used by the Chinook Technical Committee under the Pacific Salmon Treaty.

4. In August 1995, U.S. Pacific Northwest Indian tribes and the States of Washington and Oregon brought suit in U.S. district court in Seattle to enjoin Alaska from setting harvest limits for chinook salmon outside the procedures provided in the Pacific Salmon Treaty. Judge Barbara Rothstein granted a temporary restraining order, and later a preliminary injunction, which effectively ended the 1995 fishery (Alaska had already taken 175,000 fish). The court granted the injunction after finding that the plaintiffs showed a strong likelihood of prevailing on the merits regarding Alaska's alleged violation of the "good faith" standard contained in a 1985 court order (the Baldrige stipulation). *Tobin comments on U.S. District Court Decision on Alaskan Chinook Fishery*, Canada NewsWire, Sept. 12, 1995, available in WESTLAW, CANWIRE Database; *Yakama Indian Nation v. Baldrige*, 898 F. Supp. 1477 (D. Wash. 1995).

5. Alaska governor Tony Knowles, responding to the court's decision, said future allocation decision-making ought to occur at the negotiating table rather than in courts. However, an attempt at mediation failed, and by March 1996 there was more talk of transit fees. Joel Connelly, *Canadian Official Renews Threats in Salmon Talks*, ANCHORAGE DAILY NEWS, March 12, 1996. In June 1996, the States of Washington and Oregon struck an accord bringing them and the Pacific Northwest Treaty Tribes over to Alaska's side in the dispute with Canada. *Worldview US-Canada: New Proposal Sets Limits on AK Chinook Catches*, Greenwire, June 27, 1996, available in WESTLAW, APN-GR Database. They agreed on an allocation-setting method which translated into a U.S. harvest of 155,000 chinook for 1996, a substantial cut from the previous year, but still far from the 60,000 fish limit recommended by Canadian scientists. Canada did not re-impose transit fees, but said U.S. boats would be required to obtain permission to travel the Inside Passage and must stow fishing gear while in Canadian waters. Canada also requested that the salmon dispute be referred to a panel of fishery experts who would determine whether the Alaska catch was consistent with the stock rebuilding program provided for by the Pacific Salmon Treaty. *Canada Imposes New Controls on US Boats*, Greenwire, July 16, 1996 available in WESTLAW, APN-GR Database.

## IX. MARINE ENVIRONMENT

### A. Nuclear Weapons Testing

1. The International Court of Justice (ICJ) dismissed New Zealand's request to review France's plans to conduct testing in the South Pacific by

a vote of twelve to three on September 22, 1995. New Zealand claimed that French nuclear testing violates international law because it introduces radioactive materials into the marine environment. The ICJ dismissed New Zealand's request based upon a 1974 ruling on a different nuclear testing case involving New Zealand and France. The 1974 decision stated that New Zealand would request ICJ review of the nuclear testing situation only if France resumed nuclear tests in the atmosphere. *Nuclear Testing Activities (N.Z. v. Fr.)*, 1995 I.C.J. 288 (Sept. 22).

2. Eight months after resuming nuclear testing, France stated that it will sign the Treaty of Rarotonga, which aims to make the South Pacific a nuclear-free zone. French President Jacques Chirac declared a "definitive end" to French nuclear testing and promised to help promote global disarmament. France stated that its recent nuclear tests, which brought worldwide criticism, were necessary to finalize computer models for nuclear test simulations. *France to Sign Nuclear-Free Treaty in Late March*, Feb. 6, 1996, Agence-Fr. Presse, available in LEXIS, News Library, AFP File. The President also urged all of the superpowers to follow France and sign the test ban treaty. The United States already supports the ban on nuclear testing. In fact, of all the superpowers, only China continues to test nuclear weapons. Craig R. Whitney, *La Bombe Est Fini*, Week in Review N.Y. TIMES, Feb. 4, 1996.

3. The Convention to Ban the Importation in Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes Within the South Pacific Region, otherwise known as the Waigani Convention, was signed in Papua New Guinea on September 16, 1995. The treaty, which bans the importation of nuclear and radioactive wastes, was signed by several South Pacific Forum countries, including Australia and New Zealand. Provisions of the treaty require exporters to notify all affected countries of plans to transport radioactive wastes and require that signatories have an environmentally sound management plan for the waste. Breach of the ban is a criminal offense. *South Pacific Forum Countries Sign Regional Hazardous Waste Convention*, BNA Int'l Env't Daily, Sept. 29, 1995, available in LEXIS, News Library, BNAIED File.

4. In late 1995, ten countries signed the Southeast Asian Nuclear Weapon-Free Zone Treaty. Among other measures, the pact contains an internationally binding ban on nuclear weapons. The signatories include Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand, Vietnam, Cambodia, Laos, and Myanmar. The major worldpowers,

including the United States, are not supporting the treaty, claiming that it may violate provisions of the Law of the Sea and that it conflicts with military interests, like the navigational freedom of military warships and airplanes. *U.S. Sees ASEAN Nonnuclear Pact as Infringing Sea Law*, Japan Economic Newswire, Dec. 16, 1995, available in LEXIS, Asiapac Library, JEN File.

### B. Ocean Pollution

1. Concerned with Russia's practice of dumping nuclear submarine reactors and other radioactive waste in the Arctic Ocean, the United States and Norway entered into an agreement with Russia to cooperate on the disposal of military waste. The new agreement, called the Arctic Military Environmental Cooperation (AMEC), was signed by representatives from the three countries on September 25, 1996. The agreement arose from Norway's apprehension that Russia's practice of dumping nuclear materials in the Arctic Ocean could have an impact upon the ecology of the region. AMEC intends to clean up the toxic spills at Arctic military bases and develop technology for radioactive waste processing. *Norway, Russia, and US Sign Agreement on Arctic Environmental Cooperation*, Agence France Presse, Sept. 26, 1996, available in WESTLAW, ALLNEWSPLUS Database.

2. Japan and the Netherlands proposed to ban the use of tin-based ship bottom paints at the annual International Maritime Organization (IMO) meeting in July 1996. Compounds contained within the tin-based paints purportedly cause sea pollution. IMO member countries agreed that the paints should be banned within the next ten years, and the IMO resolved to draft a detailed plan to prohibit the paints within a year. Prior to the recent resolve, the IMO held several study meetings and adopted resolutions to regulate the use of potential pollutants contained in tin-based paints. Japan has been the leader in the phasing out of tin-based bottom paints and intends to establish an international ban treaty. *Tin Ship Bottom Paint to be Banned in Ten Years*, Comline Daily News Transportation, Sept. 26, 1996, available in WESTLAW, ALLNEWSPLUS Database.

3. A February 1995 report on the state of Australia's marine environment written by the country's Environment Minister, Jon Faulkner, has resulted in commitments to clean up coastal and inland waters. According to the report, environmental degradation of marine areas has been caused by agricultural runoff, erosion and industrial waste discharge. Threatened marine habitats, such as mangroves, marshes and coral reefs, have been

damaged. The report also expressed concern about the sustainability of fish harvests. *More Pollution Control Efforts Needed for Australia's Marine Environment*, WORLD ENV'T REP., Feb. 15, 1995, available in WESTLAW, WENVRPT Database.

4. A nuclear waste dump was discovered off the British channel island of Alderney in shallow water where lobsters are harvested. The British government used the site to dump radioactive waste from 1950 to 1963. So far, no tests have detected any contamination of the area. *Nuclear Dump off Channel Isle*, THE GUARDIAN, Oct. 13, 1995, at 4.

5. South Pacific Island leaders met in September 1996 to condemn plans to establish a waste dump for spent Russian nuclear fuel on the remote, uninhabited Palmyra Atoll, 1,600 kilometers south of Hawaii. President Clinton appeared to oppose the proposed dumpsite, but officials of island governments have been concerned that lobbying continues in Washington in support of nuclear waste storage in remote parts of the Pacific Islands. *Worldview Nuclear Waste: Pacific Islands Set to Condemn Storage*, Greenwire, Sept. 3, 1996, available in WESTLAW, APN-GR Database.

6. After October 1, 1994, British shipowners will be strictly liable for coastal oil spills from both cargo and noncargo (bunker) oil. This act expands the "polluter-pays" principle of international law. Strict liability makes a shipowner liable for any damage from an oil spill, without requiring the victim to prove fault or negligence. *Oil Spills: Strict Liability to Take Effect October 1 for Non-Cargo Oil Pollution Damage in U.K.*, BNA Int'l Env't Daily, Aug. 17, 1994, available in WESTLAW, BNA-IED Database.

7. A Sea Empress oil tanker carrying some 36.7 million gallons of oil, ran aground on the western headland of the Milford Haven Estuary in Wales on February 15, 1996. The grounding caused more than 19 million gallons of oil to spill into the ocean. The Sea Empress vessel spilled almost twice as much oil as the *Exxon Valdez*, which spilled 11 million gallons off the coast of Alaska in 1989. Thousands of birds, seals and other marine wildlife were damaged by the spill, which is being blamed on human error. *Spotlight Story U.K.: Tanker Spills 19 Million Gallons of Oil, 8 Million More than Exxon Valdez*, Greenwire, Feb. 22, 1996, available in WESTLAW, APN-GR Database. See also *World in Brief: Who's to Blame for Britain's Big Tanker Oil Spill?* ATLANTA J. & CONST., Feb. 23, 1996, available in WESTLAW, ATLNTAJC Database.

### C. Arctic Region

The eight nations that ring the Arctic created a joint council on September 19, 1996, in order to protect the polar region's environment. The Arctic Council formed because of concerns over oil spills, PCB-poisoned polar bears and nuclear waste dumped by the former Soviet Union. The World Wildlife Fund supported the creation of the Council, observing that: "[t]he council has the potential to ensure that environmental protection becomes a priority for all Arctic nations[.] The Council plans to hold ministerial-level meetings every two years and will function on a consensus basis. Canada will chair the council for the next two years. Following Canada's term, the other member states will take turns serving as the council chair for rotating two-year terms. *Eight Arctic Nations Band Together to Combat Pollution*, Associated Press, Sept. 19, 1996, available in WESTLAW, ASSOCPR Database.

### D. Australia

A number of Australia's aboriginal communities agreed to stop hunting sea cows, which are quickly disappearing from the country's coastal waters. Coastal aboriginals hunted the mammals, which are related to the manatees, for thousands of years. Scientists maintain that the number of living sea cows has fallen drastically in recent years. The degradation of their sea grass habitat and entrapment in fishing nets contributes to the decrease in the number of the mammals. *Aborigines Stop Tribal Hunting to Save Threatened Sea Cows*, Associated Press, Aug. 1, 1996, available in WESTLAW, ASSOCPR Database.

## DOMESTIC

### I. COASTAL RESOURCE MANAGEMENT

#### A. Coastal Zone Management Act Reauthorized

On June 29, 1995, Rep. Jim Saxton (R-NJ) introduced H.R. 1965, the Coastal Zone Protection Act of 1996. The Act reauthorizes and amends the Coastal Zone Management Act of 1972 (CZMA). Hearings were held in September of 1995. Supporters of the bill pointed out the importance of protecting the nation's coasts for economic reasons and scenic preservation. They noted that without the CZMA, there would be no comprehensive program addressing this goal. *Legislation to Reauthorize the Coastal Zone Management Act of 1972: Hearings on H.R. 1965 Before the Subcomm. on Fisheries, Wildlife and Oceans of the House Resource Comm.* (testimony of Sarah Chasis, Senior Attorney, Natural Resources

Defense Council), Sept. 12, 1995, *available in* LEXIS, News Library, FEDNEW File. Critics of the CZMA recognized its popularity, but argued that its administrative procedures are too time-consuming and complex. *Id.* (testimony of David Duplantier, Senior Counsel on behalf of American Petroleum Institute). The bill passed both the House and Senate. President Clinton signed the bill into law on June 3, 1996. In addition to reauthorizing the Coastal Zone Management Act, the legislation terminates the annual grants to state programs after fiscal year 1999. However, amendments to the CZMA permit states to use the federal grants to evaluate and facilitate the siting of public and private coastal zone aquaculture facilities. Coastal Zone Protection Act of 1996, Pub L. No. 104-150 110 Stat. 1380 (to be codified at 16 U.S.C. §§ 1451, 1454, 1456a, 1465).

### *B. Coastal Zone Management Act Program Regulations*

On June 28, 1996, the National Oceanic and Atmospheric Administration published revised Coastal Zone Management program regulations. Coastal Zone Management Program Regulations, 61 Fed. Reg. 33,802 (1996) (to be codified at 15 C.F.R. pts. 923, 926, 927, 928, 932, 933). The rulemaking removes outdated provisions from federal regulations and revises remaining sections. The revised regulations are intended to reflect the structure of coastal management programs more precisely. They are also expected to ease, rather than increase, the administrative burden on states. *Id.*

### *C. Coastal Zone Management Decisions*

1. In an action by the New Jersey Department of Environmental Protection and Energy (NJDEPE) to enjoin shipment of partially irradiated reactor fuel through New Jersey waters, a federal court of appeals affirmed the district court's dismissal of the NJDEPE's National Environmental Policy Act (NEPA) challenge to the approval of the shipment by the Nuclear Regulatory Commission (NRC). NJDEPE claimed that the shipment violated NEPA because no environmental impact analysis was completed. The court held that the Coast Guard's conditional approval of the plan to ship does not constitute a "major federal action," and, thus, does not require an environmental impact analysis. NJDEPE also claimed that the shipment violated the Coastal Zone Management Act (CZMA), which requires consistency review of all applications for licenses to ship dangerous materials. The court held that the NRC's submission to the Coast Guard of an operation plan and the Coast Guard's approval of the plan did not constitute federal licensing for CZMA consistency purposes.



New Jersey Dep't of Env'tl. Protection and Energy v. Long Island Power Authority, 30 F.3d 403 (3d Cir. 1994).

2. A California appellate court held that the California Coastal Commission properly approved applications by the California Department of Parks and Recreation to install devices that collect parking fees at sixteen state parks and beaches to offset cuts in the Department's budget. The Surfrider Foundation challenged the Department's approval on the theory that the actions were inconsistent with the public access policies of the California Coastal Act (CCA). The state court held that the actions were consistent with both the CCA and the California Environmental Quality Act (CEQA). In addition, the court held that no environmental impact report was required to be submitted because the actions were statutorily and categorically exempt from the CEQA. *Surfrider Foundation v. California Coastal Commission*, 31 Cal. Rptr. 2d 374 (Ct. App. 1994).

3. Under the Virgin Islands Coastal Zone Management Act, the coastal zone management committee must consider environmental impacts and possible mitigation measures before granting a permit to a developer to build a hotel and marina. The developer must submit the necessary studies and plans to the committee, which may not issue a permit conditioned upon the developer's future production of such information. The developer must produce the information prior to the issuance of a permit because the committee would likely tolerate more environmental harm if evidence of such harm came to their attention after time and money had already been invested in the construction of the project. *Virgin Islands Conservation Soc'y, Inc. v. Virgin Islands Bd. of Land Use Appeals*, 857 F. Supp. 1112 (D.V.I. 1994).

4. A homeowner who filled in a tidal washout area pursuant to a municipal permit violated the Coastal Zone Management Act (CZMA), because he did not obtain prior approval from the state coastal council. The Supreme Court of South Carolina rejected the homeowner's claim that the washout area was not within the critical area covered by the CZMA prior to his actions because Hurricane Hugo had deposited sand in the tidal area, raising it above the level encompassed by the CZMA. The court rejected this claim despite testimony of a coastal council geologist who confirmed the homeowner's claim, holding that the coastal council's decision need only be "reasonable." The court also rejected a takings claim by the homeowner, reasoning that the washout area was within the jurisdiction of the CZMA when the homeowner purchased the

land before Hurricane Hugo struck. *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388 (S.C. 1995).

#### *D. Shorelands*

1. The Supreme Court of Washington upheld a variance that would have enabled the property owner to build a home on beachfront property with less than the minimum required square-footage. The property owner argued that Washington's Shoreline Management Act permits the granting of variances when local regulations deprive property owners of all reasonable use of their land. The court held that the property owner was not deprived of all reasonable use of this property, because the owner retained recreational use of the land, thus giving it some degree of economic value. *Buechel v. State of Washington Dep't of Ecology*, 884 P.2d 910 (Wash. 1994).

2. Pursuant to state wetlands management legislation, the Maryland Department of Natural Resources (DNR) has authority over dwelling units and non-water dependent structures on piers, but this authority does not include water-dependent structures, such as boathouses and boat shelters. In addition, it does not have authority over a dockmaster's office located on a pier, because it is more similar to a structure that is deemed water-dependent rather than those structures intended to be within the DNR's control. *Pier One, Inc. v. Department of Natural Resources*, 641 A.2d 955 (Md. App. 1994).

3. The Supreme Court of California ruled that dry land that forms by accretion is owned by the state and not by the owners of the adjacent property, when it is caused by "human activities in the immediate vicinity of the accreted land." Thus, an accreted twelve-acre parcel of land that abutted a property owner's land was owned by California because the silt producing the land was the result of mining activities that occurred upstream. The court referred to the matter as "artificial accretion" to avoid the California common law doctrine that "natural accretion" is owned by the adjacent property owner. *State of California v. Lovelace*, 900 P.2d 648 (Cal. 1995).

#### *E. Public Trust Doctrine and Public Access*

1. The Mississippi Supreme Court upheld the constitutionality of the Public Trust Tidelands Act of 1989 (PTTA), which defines the boundary between public trust and private land as the mean high water mark as of 1973. The Secretary of State sought to have the PTTA declared unconstitutional because it would result in public trust lands that had filled in from

the time of statehood to 1973 to be given to private land owners in violation of the state's obligation to preserve and own public trust lands. The court, applying the state's public trust doctrine, held that public land could be granted to private owners if done for a "higher public purpose," and that resolving land disputes and facilitating property development were higher public purposes. *State v. Wiesenberg*, 633 So. 2d 983 (Miss. 1994).

2. The Supreme Court of North Carolina held that a private owner in fee simple of submerged land under navigable waters does not have exclusive fishing rights in the water above the land. The court held that the state's public trust doctrine allows all people to fish in public waters, absent legislatively authorized public purposes furthering the public trust. The court rejected the lower court's interpretation that a state statute which grants private owners exclusive right to enter their submerged land for the purpose of fishing also grants the owner exclusive rights to all fishing. *RJR Technical Co. v. Pratt*, 453 S.E.2d 147 (N.C. 1995), reh'g denied, 456 S.E.2d 319 (N.C. 1995).

3. The Federal District Court for the Eastern District of New York affirmed the Fish and Wildlife Service's (FWS) denial of a riparian landowner's special request to construct a dock and boat ramp within New York's Oyster Bay National Wildlife Refuge. The court rejected the plaintiff's arguments that: (1) the government's title to the bay was unclear, and as such, the FWS was without authority to regulate the property; (2) the denial of the permit deprived them of property without due process of law; and, (3) there was no rational basis for the agency's denial. *Montero v. Babbitt*, 921 F. Supp. 134 (E.D.N.Y. 1996).

4. Federal Park Service employees who denied individuals access to Buck Island National Park during the recent government shutdown, violated a 1961 Presidential Proclamation and provisions of the Open Shorelines Act. The Federal District Court for the Virgin Islands issued a preliminary injunction, enjoining the federal government from closing the beach on the federally owned island off the northeast coast of St. Croix, during the park's normal hours of operation. In granting the injunction, the court stated: "The grant of a preliminary injunction enjoining the closing of Buck Island is in the public interest. . . . The public is being done a disservice by not being able to participate in its usual activities at Buck Island." *Riviera v. United States*, 910 F. Supp. 239, 243 (D.V.I. 1996).

5. The Supreme Court of North Carolina clarified the judicial test for determining whether a marshland area is subject to the public trust doctrine. The state uses the navigability-in-fact test to determine whether waters are subject to public trust uses. This test involves determining whether the waters at issue are actually being used, or historically have been used, for navigation. However, the state supreme court found that the lower court erred in ruling that historic navigation was the proper means of determining whether waters are subject to the public trust doctrine. Instead, the proper inquiry is whether the "waters were such that navigation on them by watercraft was possible even if no watercraft had actually navigated on them." *Gwathmey v. North Carolina*, 464 S.E.2d 674, 688 (N.C. 1995). The court commented upon the complexity of the public trust doctrine: "As we have indicated throughout this opinion, the law involving the public trust doctrine has been recognized by this and other courts as having become unnecessarily complex and at times conflicting." *Id.*

6. In an *Opinion of the Justices*, 649 A.2d 604 (N.H. 1994), the New Hampshire Supreme Court responded to questions presented by the New Hampshire House of Representatives. The House was considering S.B. 636, an act that would codify New Hampshire's common law public trust doctrine and establish a public easement on the dry sand area between the high water mark and the vegetation line. The *Opinion of the Justices* reaffirmed the existence of the public trust doctrine in land subject to the ebb and flow of the tide and stated that the scope of the doctrine includes public recreational use of this land. However, the court ruled that the codification of a statewide public easement in the dry sand area would constitute a taking because the evidence needed to establish a public prescriptive easement was lacking. The court stated that the existence of a prescriptive easement is a judicial determination and not one that may be determined by the legislature. The court's recognition that the public trust doctrine includes the public recreational use of the land demonstrates the state's independence from the common law rule imposed in Maine and Massachusetts. In both of these states, the public trust doctrine is limited to fishing, fowling, and navigation as prescribed by the Colonial Ordinance of 1647, and the doctrine does not permit the public use of the land above the low tide mark for recreational purposes.

## II. WETLANDS PROTECTION

### A. *Wetlands Easements*

In *United States v. Johansen*, 93 F.3d 459 (8th Cir. 1996), the Eighth Circuit reversed a lower court decision that permitted easement restrictions to apply to all wetlands on an entire parcel of land, regardless of whether they were wetlands at the time of the easement conveyance. The court held that new wetlands that developed during wet years were not burdened by the wetland easements. Although North Dakota case law recognizes that the legal description of an easement covers the entire parcel of land, and therefore all wetlands on the parcel, the court found support for its decision in a 1983 U.S. Supreme Court ruling that applied a narrower definition of wetland areas. *United States v. North Dakota*, 460 U.S. 300 (1983). In narrowing the limits of the wetland areas, the eighth circuit allows a legal description of an easement as contained in an easement summary. Any other interpretation would lead to "fluctuating" easements and would be inconsistent with the interests and goals of the federal wetlands acquisition program. *United States v. Johanson*, 93 F.3d at 466.

### B. *"Waters of the United States"*

1. The Eleventh Circuit found that Congressional delegation of legislative authority to the U.S. Army Corps of Engineers (Corps) to define the term "waters of the United States" under the Clean Water Act is not an unconstitutional delegation of power, because Congress provided sufficiently precise standards to assess the Corps' decisions. The court also determined that the Corps' inclusion of wetlands that are adjacent to navigable waters as "waters of the United States" was not improper. *Mills v. United States*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1966 (1995).
2. The Ninth Circuit affirmed a lower court's decision that a seasonally dry isolated tract of land, which becomes a temporary pond during the wet months and provides a habitat for migrating birds, falls within the Clean Water Act (CWA). The court determined that the CWA regulates all "waters of the United States," which ordinarily means "navigable waters," but also may include waters used by migratory birds. In a concurring opinion, the court noted that CWA civil penalties for violations of any of the provisions of the CWA are mandatory, not discretionary. *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995).

### III. COASTAL TAKINGS CLAIMS

#### A. *Standing*

The Supreme Court of Hawaii held that an unincorporated public interest organization, whose membership includes persons with native Hawaiian food and fish gathering rights, have interests distinct from those of the general public in a contest against a developer seeking to obtain a permit to build a resort. Due to these distinct rights, the organization has standing to contest the grant of the permit pursuant to the Hawaii Constitution and the state's Coastal Zone Management Act, the latter forbidding approval of a permit for a project that would destroy a cultural resource or adversely affect social welfare activities of a community. Moreover, adding conditions to the permit which would allow for continued access and use for cultural activities of the property does not create a taking of private property subject to compensation. *Public Access Shoreline Haw. v. Haw. County Planing Comm'n*, 903 P.2d 1246 (1995) *cert. denied*, 116 S.Ct. 1559 (1996).

#### B. *Wetlands Denial of Dredge and Fill Permits*

1. In *Loveladies Harbor Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the court held that when a developer is denied a permit to fill wetlands, as a result of wetlands regulations, only the portion of the land that was not developed prior to the adoption of the wetland regulations, or the part that is not given to the state as a condition of the fill permit, is considered in a takings analysis. Thus, property owners may be compensated only for that portion of their land that has been taken.

2. A Federal Circuit Court of Appeals vacated a Federal Claims Court decision that found the denial of a dredge and fill permit to constitute a taking. According to the appeals court, the record did not support the finding that the U.S. Army Corps of Engineers' denial of the permit resulted in a loss of all economic use or value of the land. The case was remanded to the Federal Claims Court to determine whether a compensable regulatory taking had occurred. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

3. The denial of a dredging permit by Florida's Department of Environmental Protection (DEP) resulted in the filing of a takings claim in a South Florida State Court. The trial court granted the plaintiff's motion for summary judgment, finding that the denial of the permits deprived Burgess of all viable economic use of his property and effectuated a taking

of his land without just compensation. On appeal, however, the Florida District Court of Appeals reversed the trial court's order, finding that genuine issues of material fact existed. The court determined that factual issues have to be tried prior to determining whether a taking occurred. Unanswered questions of fact include whether the proposed use would be a water pollution hazard in violation of state nuisance law. *Department of Env'tl. Protection v. Burgess*, 667 So. 2d 267 (Fla. Dist. Ct. App. 1995).

4. In *Marks v. United States*, 34 Fed. Cl. 387 (1995), the United States Court of Federal Claims held that the U.S. Army Corps of Engineers' refusal to allow the dredging of wetland property, and its failure to issue a fill permit, did not constitute a temporary taking in violation of the Fifth Amendment. The plaintiffs had sought to build a multi-unit apartment complex and marina in Key West, Florida since the early 1970s. The development required the plaintiffs to fill areas lying below the high-water line and dredge areas above the high-water mark. In addressing the plaintiffs' claims regarding the filling of the area below the mean high-water mark, the court stated that the proposed regions were within the territorial confines of the federal navigational servitude and, therefore, not subject to the takings provision of the Fifth Amendment. The court further held that the plaintiffs did not meet their burden of showing that the denial of the dredging permit amounted to a temporary taking, even though the land in question was found not to be under the Corps' jurisdiction because the Corps could not prove the land constituted wetlands at the time the plaintiff first sought development permits. *Id.*

### C. Statute of Limitations

1. The Federal Circuit held that the six-year limitations period for filing actions in the Federal Claims Court does not bar a takings claim based on gradual erosion of Florida beaches. The slow, physical process set in motion by the Army Corps of Engineers, along with the government's promise of a sand transfer plant, made accrual of the landowner's claim uncertain. Instead of using the date when the government's actions first caused the property to erode or when the landowner first noticed the erosion, the court used the last date that the government promised to repair the damage to determine when the statute of limitations began to accrue. *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994). The circuit court remanded the case to the Federal Claims Court. On remand, the lower court proceeded to the substantive issue of whether a taking had occurred. The court held that the government must compensate the

plaintiffs for any flooding or damage to their property, above the high-water mark, that occurred after the owner took title to the land. However, in order to qualify for compensation, the landowner must prove the amount of beachfront property lost to erosion and flooding. *Applegate v. United States*, 35 Fed. Cl. 406 (1996).

2. On February 8, 1995, a Federal Claims Court dismissed the State of Alaska's claim that the federal government's control over its exports of crude oil constituted a taking under the Fifth Amendment because Alaska had not filed the claim within the six-year statute of limitations. The court held that even if a taking occurred, the statute of limitations began to accrue upon the enactment of the Export Administration Act of 1979 (EAA). The EAA places strict controls on Alaska's export of crude, severely reducing the economic value of the state's crude oil deposits. The court stated that because Alaska's claim was not filed by 1985, the statute of limitations required the court to dismiss the suit. Alaska attempted to overcome the statute of limitations problem by claiming: (1) that the extent of the reduction in value of the crude oil deposits caused by the EAA was not ascertainable until less than six years ago, and (2) that subsequent executive orders to extend the provisions of the EAA constituted multiple takings. Both of these arguments were rejected. *Alaska v. United States*, 32 Fed. Cl. 689 (Fed. Cl. 1995), *appeal dismissed*, *State of Alaska v. United States*, 86 F.3d 1178 (Fed. Cir. 1996).

#### IV. OCEAN POLLUTION

Between 1990-1994, approximately 1.5 billion pounds of toxic chemicals were dumped, in most cases legally, into U.S. waters. The Environmental Working Group and U.S. Public Interest Research Group reported that approximately one-third of these toxic chemicals were released into sewage systems incapable of treating such materials. *Group Reports on Toxic Chemicals in Waterways*, Congress Daily A.M., Sept. 25, 1996, available in 1996 WL 11367627.

##### A. Ocean Dumping Regulations

In order to clarify regulatory language that was interpreted by the Third Circuit in an unintended manner, the Environmental Protection Agency (EPA) issued a final rulemaking on ocean dumping regulations. The agency proposed the regulatory clarification after the Third Circuit's decision in *Clean Ocean Action v. York*, 57 F.3d 328 (3d Cir. 1995), where the court ruled that the EPA must require dumped materials to be tested for contaminants other than those for which the agency has estab-



lished guidelines. The EPA's final rulemaking intends to clarify the agency's regulations for sediment testing to determine the potential effects of deposited dredge material on the marine environment. The rulemaking specifically addresses the number of sensitive marine species that must be tested for potential harmful exposure to sediment contaminants. The new regulation took effect on September 30, 1996. 61 Fed. Reg. 51,196 (1996); *EPA Clarifies Sediment Testing Requirements*, Business Wire, September 23, 1996, available in WESTLAW, 9/23/96 BWIRE 18:15:00.

### B. EPA Dumping Report

The National Wildlife Federation, Sierra Club, Sierra Club Legal Defense Fund, and Chesapeake Bay Foundation brought suit against the Environmental Protection Agency (EPA) in the Federal District Court for the District of Columbia, alleging that agency failed to meet a series of report deadlines pertaining to air pollution's effect upon the oceans. The plaintiffs charged that the due dates for the reports were specified in the "great waters" section of the Clean Air Act. National Wildlife Federation President Mark Van Putten stated: "The EPA continues to disregard its deadlines for research and for action ordered by Congress. Meanwhile, many vital waterways are so polluted that eating local fish is hazardous to human health." *Air and Water Pollution Air Toxics: Three Environmental Groups Sue EPA for Late Reports*, Greenwire, July 19, 1996, available in WESTLAW, 7/19/96 APN-GR 11.

### C. New York - New Jersey Dredging Project

1. Although the governors of New York and New Jersey agreed to spend thirty million dollars to deepen channels in New York harbor, George Pataki (R-NY) and Christine Todd Whitman (R-NJ) were troubled over where to deposit dredged waste. *Air and Water Pollution Dredging: Port Debate Surfaces Again in NY, NJ, MD*, Greenwire, May 6, 1996, available in WESTLAW, 5/6/96 APN-GR 7. On July 24, 1996, the White House unveiled a plan designed to settle the dispute over where to dump PCB, dioxin, and heavy metal infested silt and mud dredged from the New York Harbor. The plan permits some dumping to continue for one year. Following the end of the period, the existing dump site off of Sandy Hook, NJ, would be closed to any further dumping. The White House plan also calls for an expedited dredge permitting process in order to clear channels and complete a number of other essential projects by the end of 1997. The plan would also increase spending for research and development of sediment treatment and disposal technology. *Air and*

*Water Pollution Dredging: Clinton Admin. Proposes Plan for New York Harbor*, Greenwire, July 24, 1996 available in WESTLAW, 7/24/96 APN-GR 10.

2. The Third Circuit affirmed a district court's finding that the Army Corps of Engineers did not act arbitrarily or capriciously by issuing a dredge permit to the Port Authority of New York. The court determined that even though the defendants failed to comply with the dredged material testing requirements of the Marine Protection, Research and Sanctuaries Act (MPRSA), the denial of injunctive relief was appropriate because the plaintiffs failed to show that irreparable injury would result from the dumping. *Clean Ocean Action v. York*, 57 F.3d 328 (3d Cir. 1995).

#### *D. Discharge From Land*

1. On July 10, 1996, the Environmental Protection Agency (EPA) designated the first-ever open ocean superfund site. The site is a twenty-seven square mile, DDT-contaminated, ocean tract, located off southern California's Palos Verdes Peninsula. The pollution resulted from Montrose Chemical Corporation's flushing several million pounds of DDT into a sewer which emptied into the Pacific Ocean. Officials estimate that the ocean tract contains 100 tons of DDT deposits. The cleanup process will initially concentrate on underwater, coastal areas containing high levels of DDT. The EPA will probably attempt to cap the areas with dredged sand. In conjunction with the Superfund listing, the EPA released documents stating that the deposits pose a substantial risk to marine life and people who eat fish from the region. *Wastes and Hazardous Substances Superfund II: EPA Makes CA DDT Site First Ocean Listing*, Greenwire, July 12, 1996, available in WESTLAW, 7/12/96 APN-GR 10.

2. The Ninth Circuit reversed a lower court's decision that citizens do not have standing to bring suit for enforcement of water quality standards under the Clean Water Act (CWA). The Ninth Circuit held that citizens may sue for enforcement where water quality standards are a condition of a discharge permit. The court noted that the decision was consistent with case law and with the provisions and legislative history of the CWA. *Northwest Env'tl. Advocates v. Portland*, 56 F.3d 979 (9th Cir. 1995).

3. The First Circuit held that the Environmental Protection Agency (EPA) can rely on the presumption that no "unreasonable degradation" of the marine environment occurs when there is compliance with the water quality standards of the Clean Water Act (CWA). The petitioner in the

case sought review of a National Pollution Discharge Elimination System (NPDES) permit issued to the Town of Seabrook, New Hampshire. The petitioner claimed that "unreasonable degradation" was occurring in a violation of the Ocean Discharge Criteria of the CWA. The court upheld the EPA's denial of an evidentiary hearing to the petitioner. *Adams v. EPA*, 38 F.3d 43 (1st Cir. 1994).

4. The Natural Resources Defense Council and the San Diego Baykeeper filed the first-ever court challenge focussing on ocean pollution from insufficient containment of storm-water runoff. On August 27, 1996, the San Diego Baykeeper and the Natural Resources Defense Council filed a complaint in federal district court, charging that the second largest shipyard in the city violated provisions of the Clean Water Act by allowing toxic chemicals to drain into the bay during rainstorms. *Air and Water Pollution San Diego Bay: Enviro Group Sue Shipyard Over Runoff*, Greenwire, Sept. 3, 1996, available in WESTLAW, 9/3/96 APN-GR 6.

#### *E. Dumping From Vessels*

1. A cruise ship liner agreed to pay \$100,000 for violating the Ocean Dumping Act (Title I of the Marine Protection, Research and Sanctuaries Act). The ship discharged over five tons of debris into the Pacific Ocean. The Ocean Dumping Act prohibits transporting any material from the United States with the intention of dumping it into ocean waters without a valid permit from the Environmental Protection Agency. *United States v. American Global Line, Inc.*, No. CR94-0416 (N.D. Cal. Sept. 1, 1994).

2. A May 30, 1995 report by the General Accounting Office showed increased efforts on the part of the United States Coast Guard to enforce Annex V of the International Convention for the Prevention of Pollution from Ships, MARPOL V. However, according to the report, identifying and penalizing violators could be improved. MARPOL V was implemented in the United States through the Marine Plastic Pollution Research and Control Act of 1987, which charges the Coast Guard with the enforcement of MARPOL V for the United States.

### V. PROTECTED AREAS

#### *A. Marine Sanctuaries*

1. Congress reauthorized, amended, and provided funding to the National Marine Sanctuaries Program by passing the National Marine Sanctuaries Preservation Act. President Clinton signed the measure into

law on October 11, 1996. In addition to providing funding to marine sanctuaries, amendments extend the boundaries of the Hawaiian Islands National Marine Sanctuary, and redesignated the Stellwagen Bank National Marine Sanctuary as the Gerry E. Studds Stellwagen Bank National Marine Sanctuary. National Marine Sanctuaries Preservation Act, P.L. 104-283, 110 Stat. 3363 (1996). The legislation will help fund fourteen designated national marine sanctuaries. Two more sites—located in Thunder Bay, Michigan and Northwest Straits, Washington—are presently in the development. *Natural Resources Marine Sanctuaries: House Approves \$45M Protection Bill*, Greenwire, Sept. 6, 1996, available in WESTLAW, 9/6/96 APN-GR 10.

2. NOAA released the final Florida Keys National Marine Sanctuary Management Plan. On September 25, 1996, staff members of the Center for Marine Conservation said that the final plan for the sanctuary “appears to retain the critical protection for water quality and boating safety.” *CMC Praises Florida’s Sanctuary Management Plan*, U.S. Newswire, Sept. 25, 1996, available in 1996 WL 12123061. However, on November 5, 1996, Florida voters came out against the federal plan by a margin of 55% to 45% in a non-binding referendum. The vote will likely influence the governor’s decision on whether to vote to adopt the plan. *Voters Come Out Against Keys Marine Sanctuary*, Greenwire, Nov. 7, 1996, available in WESTLAW, APN-GR Database.

3. A National Oceanic and Atmospheric Administration Act (NOAA) regulation, limiting the operation of certain small watercraft in the Monterey Bay National Marine Sanctuary in California, was upheld by the District of Columbia Federal Court of Appeals. The court held that NOAA gave a “concise general statement” of the regulation’s “basis and purpose” as required by the Administrative Procedure Act. Additionally, the court noted that within the regulation, NOAA differentiated between personal watercraft and other vessels—further demonstrating that the regulation did not arbitrarily restrict small boats. *Personal Watercraft Indus. Ass’n v. Department of Commerce*, 48 F.3d 540 (D.C. Cir. 1995). Since the decision, the Environmental Action Committee of West Marin County petitioned NOAA to ban the use of personal watercraft within the Gulf of the Farallones National Marine Sanctuary. *Gulf of the Farallones National Marine Sanctuary: Petition to Ban the Use of Motorized Personal Watercraft Within the Gulf of Farallones National Marine Sanctuary*, 61 Fed. Reg. 33,876 (1996) (to be codified at 15 C.F.R. pt. 922).

4. A federal district court in Florida held that when the operator of a boat intentionally grounds a vessel on a coral reef to avoid sinking during a storm, the owners are strictly liable under the Marine Protection, Research and Sanctuaries Act, and cannot use the "act of God" defense when the severe weather conditions were known, or should have been known. *United States v. M/V Miss Beholden*, 856 F. Supp. 668 (S.D. Fla. 1994).
5. The United States brought an *in rem* action against the M/V Jacquelyn, charging that the vessel - which ran aground on the Western Sambo Reef in the Florida Keys National Marine Sanctuary - violated the strict liability provision of the Marine Protection Research and Sanctuaries Act (MPRSA). The defendant argued that the Governor of Florida objected to the inclusion of the Western Sambo Reef in the Florida Keys National Marine Sanctuary, on the ground that the region lies within the state's territorial waters, and that the objection prevented the inclusion of the area in the sanctuary. The defendant claimed that the governor's objection required the area to be treated as Florida territory, not affected by the MPRSA. The court rejected the defendants' argument and held that the vessel was strictly liable. *United States v. M/V Jacquelyn*, 900 F. Supp. 462 (S.D. Fla. 1995).
6. A charter boat captain, who chummed for great white sharks near the Farallon Island National Marine Sanctuary, has agreed to stop. Over two years ago, the skipper was spotted in the waters off Ano Nuervo, attempting to attract sharks for passengers who wanted to photograph the predators from an underwater cage. The Surfers Environmental Alliance and the Abalone Divers Association brought suit against the captain. The parties reached a settlement agreement on August 3, 1996. *Skipper Settles Shark Suit*, L.A. DAILY NEWS, Aug. 9, 1996, at N4.
7. On February 15, 1996, the National Oceanic and Atmospheric Administration proposed a rule to amend the regulations for the Monterey Bay National Marine Sanctuary (MBNMS). If implemented, the rule would prohibit the attraction of white sharks by the use of chum, bait, or other means in the nearshore (seaward to three miles) waters of the MBNMS. 61 Fed. Reg. 5969 (to be codified at 15 C.F.R. pt. 922).
8. The Ninth Circuit held that a National Oceanic and Atmospheric Administration regulation prohibiting dredging or otherwise altering the seabed in the Channel Islands National Marine Sanctuary is not unconstitutionally vague. *Craft v. National Park Serv.*, 34 F.3d 918 (9th Cir. 1994).

### *B. National Estuary Program*

1. The Environmental Protection Agency added the lower Columbia River to the National Estuary Program (NEP). This area includes the lower 146 miles of the river, from the mouth of the river up to the Bonneville Dam. NEP funds will be used for solving pollution problems in the lower Columbia River area through a coordinated watershed approach. *Columbia River Part of National Estuary Program*, Oregon Insider, July 15, 1995, at 5. The addition of the Columbia River to the program increases the number of member programs to twenty-eight. *Browner Approves Two Estuary Management Plans*, EPA Press Advisory, Oct. 4, 1996, available in 1996 WL 564445.

2. The Environmental Protection Agency (EPA) approved comprehensive management plans to restore both the Delaware Estuary and the Massachusetts and Cape Cod Bay Estuary. The restoration plan specifies seventy-seven actions designed to improve land and water use management, enhance habitat, reduce toxic pollution, improve data gathering and dissemination, and increase public education. The plan will be implemented through the cooperative efforts of state, federal and local governments, as well as private organizations and citizens groups. At the present time, the EPA has developed and approved twelve comprehensive National Estuary Program management plans. *Browner Approves Two Estuary Management Plans*, EPA Press Advisory, Oct. 4, 1996, available in 1996 WL 564445.

### *C. Mitigation Banks*

Final policy guidelines for the use of mitigation banks were issued by the National Oceanic and Atmospheric Administration and other federal agencies. The purpose of this guidance is to clarify the manner in which mitigation banks may be used to satisfy mitigation requirements of the Clean Water Act Section 404 permit program and the wetland conservation provisions of the Food Security Act. Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605 (1995).

VI. FEDERAL OUTER CONTINENTAL SHELF (OCS)  
OIL, GAS AND MINERALS

*A. On-Line Information from the Minerals Management Service*

The Minerals Management Service (MMS) within the U.S. Department of Interior is responsible for the Outer Continental Shelf leasing program, and posts extensive information on its home page accessible through the World Wide Web. The MMS "Legisgraph," a table tracking progress of federal legislation relevant to the agency is a useful resource for legal research. Also available are "Federal Register Notices Concerning the OCS Natural Gas and Oil Program and Collection of Revenue from Mineral Resource Production on Public Lands," and information on areas proposed or planned for leasing. The website address is <<http://www.mms.gov/>>.

*B. Outer Continental Shelf Lands Act Amendments*

Amendments to the Outer Continental Shelf Lands Act (OCSLA) were enacted in 1994 through H.R. 3678, which became Public Law 103-426. The law authorizes a negotiation process (in lieu of competitive bidding) when OCS sand, gravel and shell are needed for certain public works projects, including shore protection, beach restoration, and coastal wetlands protection. The amendments require that when OCS materials are proposed for use in projects authorized by Congress and implemented jointly by the U.S. Army Corps of Engineers with state and/or local governments, a Memorandum of Agreement (MOA) is required between the Minerals Management Service (MMS) and the Corps, prior to negotiating a mineral lease between the MMS and the state or local government sponsor for the project. MINERALS MANAGEMENT SERVICE CURRENT ACTIVITIES UPDATE, Fall 1994, at 11. Since enactment of the OCSLA "sand & gravel" amendment, several public projects have been made possible. In Florida, a negotiated lease agreement allowed the city of Jacksonville access to 1.24 million cubic yards of sand on the federal OCS for a Duval County beach renourishing project. *MMS and Corps of Engineers Cooperate on Florida Beach Nourishment Project*, MINERALS MANAGEMENT SERVICE CURRENT ACTIVITIES UPDATE, Spring 1995, at 2, 3. In South Carolina, renourishment of 7.7 miles of shoreline south of Myrtle Beach will be facilitated by a MOA with the Corps. MMS Press Release, May 14, 1996. In Virginia, an agreement with the U.S. Navy will enable use of OCS sand for shore protection at the Virginia Beach Fleet Combat Training Center. MMS Press Release, June 13, 1996.

MMS Press Releases can be obtained at the agency's World Wide Web site, at <[http:// www.mms.gov/](http://www.mms.gov/)>.

*C. Cases and Administrative Rulings Concerning  
Offshore Oil and Gas*

1. In April 1996, a U.S. Court of Federal Claims ruled in favor of Conoco Inc. and other plaintiff oil companies in their suit against the federal government for breach of contract. *Conoco Inc. v. United States*, 35 Fed. Cl. 309 (1996). Conoco initiated the suit in 1992 after it was prevented from conducting exploration and development activities under leases it had purchased from the federal government in the 1980s. The court said the government breached the lease contracts with Conoco and the other oil companies by enacting the Outer Banks Protection Act (OBPA), passed in 1990 as part of a more comprehensive oil spill legislation package. The OBPA called for further review of environmental impacts of existing leases and suspended approval of exploration plans until at least October 1, 1991. Because of complications in the environmental review process, the plans still had not been approved as of February 1994. The court agreed with the oil companies that this constituted a material breach of the lease contracts. Under a settlement announced July 31, 1996, the federal government will pay \$198 million to nine major oil companies in return for the surrender of all of the companies' remaining OCS oil and gas leases in southwest Florida and Bristol Bay, Alaska. *Energy: Government Owes Oil Companies Damages for Suspended Drilling Rights, Court Says*, BNA Nat'l Env't Daily, Apr. 4, 1996; *Offshore Drilling: Companies to Surrender OCS Leases, U.S. to Pay \$198 million Under Settlement*, BNA Nat'l Env't Daily, Aug. 1, 1996.

2. In *BP Exploration & Oil, Inc. v. U.S. Environmental Protection Agency*, 66 F.3d 784 (6th Cir. 1995), the U.S. Court of Appeals for the Sixth Circuit ruled in favor of the Environmental Protection Agency (EPA) in a suit concerning its regulations for effluent discharges in the offshore oil and gas industry. In a group of consolidated cases, petitioners challenged the EPA's choices of certain methods and technologies in its best available technology (BAT) standards, new source performance standards (NSPS), and best conventional pollutant control technology (BCT) standards. All of the standards are designed to limit oil and grease in "produced water" and to regulate discharges of drilling fluids and drill cuttings. Petitioners also challenged EPA limits on discharges of "produced sand." In one of the consolidated cases, the Natural Resources



Defense Council petitioned the EPA to set zero discharge limits on produced water, and to regulate radioactive pollutants in produced water. The court upheld the EPA's Federal Water Pollution Control Act effluent regulations against all of petitioners' challenges. *Id.*

3. In August 1996, the Florida Department of Environmental Protection announced it would grant a permit for offshore drilling for the first time in more than twenty years. The decision came after the Florida Supreme Court refused to allow the state's demand for a \$1.9 billion bond from Coastal Petroleum Co., the prospective permittee, to cover costs of a possible oil spill. Coastal holds oil and gas leases on 880,000 acres of submerged lands in the Gulf of Mexico from the Panhandle to southwest Florida. Environmental groups suggested that Coastal's strategy was to greenmail the state into buying back the leases. *Energy and Natural Resources Offshore Drilling: FL Moves to Give Permit to Oil Firm*, Greenwire, Aug. 20, 1996, available in WESTLAW, APN-GR Database.

#### *D. OCS Oil Exploration and Development Moratorium Measures*

1. Since 1982, OCS areas off the East Coast, the eastern Gulf of Mexico, the West Coast, and Alaska's Bristol Bay have been subject to annually renewed moratoria on oil and gas exploration and development. In the 104th Congress, no fewer than eight bills were introduced in the House of Representatives addressing OCS leasing. The bills ranged from state-specific bans to grants of state veto power over federal OCS actions. At a July 25, 1996 general hearing on OCS moratoria held by the House Resources Subcommittee on Energy and Mineral Resources, seven members testified in favor of various moratorium measures. At the hearing the director of the Department of Interior's Minerals Management Service, which administers OCS leasing programs, asserted that the conflicts that prompted the original 1982 moratoria had been resolved. She emphasized that OCS leasing and exploration provide tens of thousands of well-paying jobs nationwide, and generates about \$3 billion in annual federal revenues. *Energy: Opening Coasts to Oil, Gas Development Threatens Tourism, House Members Testify*, BNA Nat'l Env't Daily, July 29, 1996, available in LEXIS, Envirn Library, BNANED File.. Currently about 12% of U.S. oil production and 25% of natural gas come from OCS operations, primarily in the Western Gulf of Mexico and Prudhoe Bay, Alaska. *Lawmakers Call for Permanent Drilling Ban*, E&P ENV'T, Apr. 12, 1996, available in LEXIS, Market Library, IACNWS file.

2. Moratorium bills introduced in the 104th Congress included H.R. 72, H.R. 73, H.R. 219, H.R. 1778, H.R. 1890 (and companion bill S. 894), H.R. 1898 (and companion bill S. 950), H.R. 2241, and H.R. 2242. The House Appropriations bill for the Department of the Interior, H.R. 1977, when first introduced in June 1995, provided for renewal of the original 1982 moratoria. The bill also contained significant cuts in programs for environmental protection, energy conservation, science, and the arts, and was vetoed by President Clinton. The House failed to override the veto. A provision for moratoria renewal was again included in H.R. 3662, the Fiscal Year 1997 Interior Appropriations bill. Independent from this measure, in a September 25, 1996 letter to President Clinton, a bipartisan coalition of more than 100 House members urged an executive order for a permanent moratorium, suggesting that the annual renewal measures would not yield sufficient protection for the future environmental and aesthetic interests of coastal regions. *One-Fourth of House Members Support Permanent Ban on Offshore Drilling*, INSIDE F.E.R.C.'S GAS MARKET REP., Oct. 4, 1996, available in LEXIS, Energy Library, GASMKKT File.

3. A 1996 report issued by the Minerals Management Service offered the first estimates of undiscovered OCS oil and gas resources since 1987. The report's figures were much higher than the previous assessment. The report projected undiscovered reserves of about 268 trillion cubic feet (tcf) of natural gas, compared to the 1987 estimate of 145 tcf, and a mean estimate of 45 billion barrels of oil, up from approximately 18 billion barrels. About 20% of the undiscovered gas and some 33% of the undiscovered crude lie in areas that are off limits to development under federal drilling moratoria. *MMS Study to Show OCS Lands Hold 268 TCF of Undiscovered Reserves*, INSIDE F.E.R.C.'S GAS MARKET REP., May 31, 1996, available in LEXIS, Energy Library, GASMKKT File.

#### *E. OCS Royalty Laws Enacted*

1. The OCS Deep Water Royalty Relief Act was enacted in November 1995, as Title III of Public Law 104-58; legislation that also removed the export ban from Alaska North Slope crude oil and permitted the sale of the Alaska Power Administration by the Department of Energy. The Royalty Relief Act is designed to provide financial and tax incentives to oil and gas drillers for projects in the deeper waters of the Western and Central Gulf of Mexico. *Deepwater Royalty Relief Approved as Part of Bill Lifting Ban on Export of Alaskan North Slope Crude Oil*, FOSTER

NAT. GAS REP., Nov. 16, 1995, *available in* LEXIS, Energy Library, FNGAS File.

2. The Minerals Management Service (MMS) issued an interim rule, effective July 1, 1996, in order to implement royalty relief, showing its intent to "encourage OCS lessees to incur the expenses or make the capital investments necessary to maintain or increase production." Under the interim rule, royalty payments on new production under a certain volume is suspended if three conditions are met: (1) the lease was purchased prior to Nov. 28, 1995; (2) the lease is located in water depths of at least 200 meters; and (3) the lease is comprised only of whole blocks lying west of 87 degrees 30 minutes West longitude in the Gulf of Mexico. In order for a lease to qualify for royalty relief, the MMS must determine that relief would extend the productive life of the lease by a minimum of one year. *Deep-Water Royalty-Relief Rule to Become Effective on July 1*, INSIDE F.E.R.C.'S GAS MARKET REP., June 14, 1996, *available in* LEXIS, Energy Library, GASMKT File.

3. In debates over the Royalty Relief Act, the Minerals Management Service (MMS) estimated that what opponents were calling "corporate welfare" would actually produce a net gain to the federal treasury, because of increased "bonus bids" on new leases. Deepwater Royalty Relief Approved as Part of Bill Lifting Ban on Export of Alaskan North Slope Crude Oil, FOSTER NAT. GAS REP., Nov. 16, 1995, *available in* LEXIS, Energy Library, FNGAS File. Indeed, when the MMS held a new lease sale for the Central Gulf of Mexico on April 24, 1996, the sale set all-time records for the number of bids received and the number of blocks leased. Sale 166, announced November 1, 1996 and planned for March 1997, will be the 54th OCS lease sale in the Central Gulf. Also announced in November 1996 was the final 5-Year Program for OCS leases, covering 1997-2002. See Press Releases and other information available at the MMS web site, <<http://www.mms.gov/>>. *Johnston Cites OCS Relief as Landmark; Expects ANWR Drill Someday*, Inside Energy/with Federal Lands, Sept. 30, 1996, *available in* LEXIS, Energy Library, INERGY File. The 5-Year Program excludes areas off Alaska, which are within a whale migration corridor, and off the coast of Alabama, in order to protect the state's tourism interests. The program also adds more deep water tracts in the Gulf of Mexico. *MMS Drops Sale Blocks Off Alabama, Alaska; Adds Gulf Deep-Water Areas*, INSIDE F.E.R.C.'S GAS MARKET REP., Sept. 6, 1996, *available in* LEXIS, Energy Library, GASMKT File.

4. The Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 was signed by President Clinton August 13, 1996. The statute, Public Law 104-185, revises and streamlines the collection of revenues from oil and gas production occurring on federal lands within state borders and OCS tracts offshore. The law amends the Federal Oil and Gas Royalty Management Act, the OCS Lands Act, and the Mineral Leasing Act. Among other changes, the provisions of the act establish time limits for decisions on administrative appeal, a seven-year statute of limitation on royalty collection, and a requirement for payment of interest on all royalty overpayments. *Royalty Fairness Act Streamlines Federal Royalty Collections, NGSA Endorses Consensus Rule of Industry Alternatives to Streamline Federal Royalty Valuation*, FOSTER NAT. GAS REP., Aug. 22, 1996, at 1, available in LEXIS, Energy Library, FNGAS File.

5. In a related development, a California interagency study group assessed the royalties paid by producers in the state, and concluded that the companies owed \$856 million in back royalties and interest. Rep. Carolyn Maloney (D-N.Y.) and the watchdog group Project on Government Oversight held a joint news conference on the topic and noted that if the full amount were collected, \$165 million of it could go to the financially troubled California public schools. Maloney urged the Interior Department to audit the companies for underpayment of royalties and to take collection action. *House Resources Panel Approves Bill to Reshape MMS Royalty System*, Inside Energy/with Federal Lands, Apr. 1, 1996, at 12, available in LEXIS, Energy Library, INERGY File.

## VII. OIL POLLUTION

### A. Major U.S. Oil Spills

1. The International Tanker Owners Pollution Federation reported that the total amount of oil accidentally spilled from tankers in 1995 marked a record low. The group claims that a mere 5,000 metric tons of oil accidentally spilled last year—more than 65,000 tons less than the amount spilled in 1994. *Worldview Oil Spills: Number Hits Record Low in 1995, Group Says*, Greenwire, July 15, 1996, available in WESTLAW, APN-GR Database.

5. On Friday, September 27, 1996, a 560-foot oil tanker struck a bridge in Portland, Maine, causing the vessel to spill 170,000 gallons of number six heating oil. The onboard harbor pilot ultimately claimed responsibility for the spill. Dieter Bradbury, Board Lifts Oil-Spill Pilots License, PORTLAND PRESS HERALD, Oct. 10, 1996, at 1A.

### B. Oil Spill Liability

1. A Rhode Island statute allowing economic loss recovery from damages to natural resources is not preempted by the Constitution's admiralty clause. Under general maritime law, claims for purely economic losses from oil spills are not recoverable absent physical harm, but under the Rhode Island statute, a vessel owner may be liable for the economic loss to shellfish dealers caused by an oil spill. *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994).
2. The Eleventh Circuit held that before a private lawsuit can be filed under the Oil Pollution Act, all claims for removal costs or damages must first be presented to the parties responsible for the spill. *Boca Ciega Hotel v. Bouchard Transp. Co.*, 51 F.3d 235 (11th Cir. 1995).
3. After five years of litigation, California, the United States and Apex Oil have finally settled a case involving an oil spill which damaged marine life from San Francisco to Big Sur. The parties settled for \$6.4 million. Most of the money will be dedicated to seabird restoration projects because of the large number of these birds killed by the spill. *United States v. Apex Oil Co.*, Nos. C-89-0246 WHO, C-89-0250 WHO (N.D. Cal. Aug. 31, 1994).
4. A federal district court in Louisiana held that the federal government may recover the costs of monitoring a private party's oil spill cleanup activities under the terms of the Oil Pollution Act of 1990. The case arose from two 1992 oil spills into the Gulf of Mexico, caused by the Conoco Corporation's faulty pipeline. *United States v. Conoco*, 916 F. Supp. 581 (E.D. La. 1996). The court's decision marks a significant victory for the government, as costs for monitoring oil spill cleanup operations can run into the millions. Liz Shuker, *Owners Facing US Oil Clean-up Monitoring Bills*, LLOYD'S LIST INT'L, Apr. 10, 1996, available in 1996 WL 6273598.
5. The Ninth Circuit held that the owner of an oil tanker which ran aground on an uncharted rock and spilled oil could recover cleanup costs from the federal government. Under the Federal Water Pollution Control Act, vessel owners are strictly liable for oil spills. However, the court's decision enables vessel owners to recover cleanup costs from the U.S. government if an owner can show that government negligence in the preparation of the charts was the sole cause of the accident. Even if a vessel owner meets this burden, recovery is limited to the cost of the cleanup operation. *In re Glacier Bay*, 71 F.3d 1447 (9th Cir. 1995).

### C. Exxon Valdez Oil Spill Update

1. The Exxon Valdez oil spill resulted in the filing of numerous federal court claims. Although these multiple actions were consolidated into one case, *In re Exxon Valdez*, the case spent a considerable amount of time in federal court. The *Valdez* matter was divided into a four phase trial. Phase one, determining the culpability of the Exxon Corporation and Captain Joseph Hazelwood, was decided on June 13, 1994. A federal jury found Exxon reckless, and the captain both negligent and reckless. The jury found that the recklessness of both the captain and Exxon was the legal cause of the oil spill. The second phase determined the losses of commercial fishermen and native subsistence users. Exxon settled the claims of Alaska natives for \$20 million on July 25, 1994. This sum only covered the actual value of harvested fish, still allowing the subsistence fishers to pursue punitive damages against Exxon. On August 11, 1994, the federal jury awarded \$286.8 million in compensatory damages to about 10,000 commercial fishermen. In phase three, the jury determined the amount of punitive damages, based on the level of negligence, and the respective net income of the defendants and other evidence. In September 1994, the federal jury awarded the plaintiffs \$5 billion in punitive damages from Exxon and \$5,000 from the captain. Rosanne Pagano, *Exxon Corp. Ordered to Pay \$5 Billion Over Exxon Valdez Spill*, Associated Press, Sept. 16, 1994, available in 1994 WL 10142162. Exxon challenged this award, but on January 27, 1995, U.S. District Court Judge Holland upheld both the punitive and the compensatory damage awards, plus other pretrial rulings. Phase four of the trial is reserved for claims that have not fit into other categories in the litigation. *Exxon's Valdez Argument Rejected by U.S. Court*, PLATT'S OILGRAM NEWS, Jan. 31, 1995, available in 1995 WL 8133240.

2. Exxon Corporation's efforts to arrange security for the \$5 billion punitive damage award stemming from the *In re Exxon Valdez* judgment marked another legal dilemma in the case. A federal district court judge ordered Exxon to provide a letter of credit in order to secure the judgment. Prior to the order, the company attempted to arrange an alternate method of security. A letter of credit is expected to cost between \$6 and \$10 million per year. *Judge Orders Oil Co. to Secure \$5B Judgement*, Greenwire, Sept. 20, 1996, available in WESTLAW, APN-GR Database.

3. The Ninth Circuit ruled that sport fishers are barred from asserting claims for the loss of use and enjoyment of natural resources as a result of the 1989 Exxon Valdez oil spill. The court noted that under the Clean

Water Act and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), only federal and state governments, as trustees of public resources, may recover for lost-use damages caused by oil spills. The court noted that the federal government and Alaska previously recovered lost-use damages from the Exxon Valdez oil spill. The court also stated that the doctrine of *res judicata* bars any private claims, because the government and Exxon entered into a consent decree settling all claims on behalf of the public. *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994).

4. In the state courts, an Alaska Superior Court awarded native corporations and a municipality \$9.7 million for damages to land and archeological sites on September 24, 1994. *In re Exxon Valdez*, No. A89-0095-CV (HRH) (D. Alaska 1994, 1995).

5. A Texas state court jury found that Lloyd's of London and some 250 other insurance companies must pay Exxon \$250 million to assist with the cleanup costs from the *Valdez* spill. The jury found that Exxon's insurance policy with Lloyd's and the other underwriters requires the insurers to help pay for a portion of the \$2.5 billion cleanup operation. Exxon's policy carried a \$410 million deductible. An Exxon spokesperson claims that the jury's decision "represents the first time a court has ruled that a party other than Exxon should bear some of the cost for the Valdez disaster." *TX Court Awards Exxon \$250M from Insurers*, Greenwire, June 11, 1996, available in WESTLAW, APN-GR Database. On July 25, 1996, Texas District Court Judge Carolyn Johnson affirmed the trial court's award and ruled that the insurers owe Exxon an additional \$161 million in interest on the delinquent insurance claims. *TX Court Awards \$161M More to Oil Co.* Greenwire, July 25, 1996, available in WESTLAW, APN-GR Database. Exxon, Lloyd's and the additional underwriters agreed to settle the insurance dispute for \$480 million, thereby putting an end to the appeals process. The settlement ends a three year legal battle. *Exxon, Lloyds Agree to Valdez Settlement*, WALL ST. J., Nov. 1, 1996, at B2.

#### D. Criminal Liability

1. In the first criminal action brought under the Oil Pollution Act of 1990, a cruise liner company was ordered to pay a \$500,000 fine and establish an environmental compliance program. The Coast Guard filmed the ship illegally discharging waste oil off the Florida coast. *Oil Pollution*, 24 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,685 (Nov. 1994).

2. Following a federal jury conviction for criminal negligence, three corporations were fined \$75 million by a federal district court judge in Puerto Rico for their involvement with the Morris J. Berman oil spill in January 1994. Prosecutors claim the fine is the largest criminal fine in the history of environmental law. The fines will be deposited in a fund used to pay for oil spill cleanups. The federal government spent \$90 million to clean up the spill and compensate victims. Ronald Smothers, *Companies Convicted of Negligence in Puerto Rico Oil Spill*, N.Y. TIMES, Apr. 29, 1996, at A20; Matthew L. Wald, *New York Shipping Family Fined \$75 Million for Oil Spill in Puerto Rico*, N.Y. TIMES, Sept. 26, 1996, at B13.

#### *E. Coast Guard Reauthorization Amendments*

On October 19, 1996, President Clinton signed the Coast Guard Reauthorization Act of 1976, Pub. L. No. 104-324, 110 Stat. 3901. In addition to appropriating funds to the Coast Guard through 1997, the Act includes a number of provisions pertaining to oil transportation. The legislation includes the Deepwater Port Modernization Act, Pub. L. No. 104-324 § 501-508, 110 Stat. 925, which amends the Deepwater Port Act of 1974. The original Deepwater Port Act attempted to encourage the construction of port facilities outside of the coastal zone region, due to concerns over supertankers entering U.S. ports in the 1970's, and environmental concerns about the dangers associated with seaborne oil transportation. Only one deepwater port, located in the Exclusive Economic Zone off the coast of Louisiana, presently operates under the terms of the Act. The Deepwater Ports Modernization Act intends to promote and encourage the construction and operation of deepwater ports as an environmentally sound way of transporting oil into the United States. The Act also aims to ensure that the federal regulation of deepwater ports is not more burdensome or stringent than requirements for parties engaged in at-sea oil transfers. Additionally, it subjects deepwater ports to effective competition by removing unnecessary or overly burdensome federal oversight of the ports' business decisions. *Id.* The reauthorization also provides for oil-towing vessel safety. The towing vessel safety provisions require single hulled non-self-propelled tank barges to maintain an operable anchor system, and require a crew member to be on board the barge during towing operations. The provisions also mandate that each vessel have a means to prevent the grounding of a barge if the tow line ruptures. Finally, all vessels towing oil barges are required to carry on-board fire suppression equipment. Pub. L. No. 104-



324 § 901, 110 Stat. 3996 (1996). Other amendments to the reauthorization act include the following: a new definition of "offshore facilities" under the Oil Pollution Act of 1990, which is designed to exclude many onshore pipelines and facilities from OPA's financial responsibility requirements; a report on the adequacy of existing rules to prevent spills from lightering operations; and, an evaluation of automatic fueling shutoff equipment's effectiveness in preventing oil spills during loading or off-loading. Coast Guard Reauthorization Act of 1996, Pub. L. No. 104-324 § 1125, 110 Stat. 3901.

#### *F. Preventative Measures*

1. The U.S. Coast Guard issued a draft final rule, pursuant to the Oil Pollution Act, establishing minimum standards for overfill devices and requiring their phase-in on cargo tanks of certain tank vessels carrying oil or oil residue as primary cargo. The purpose of this measure is to reduce the likelihood of spills when oil is being loaded as cargo. 33 C.F.R. pts. 155,156 (1996).
2. The U.S. Coast Guard established final regulations for the design standards of double hulled vessels as required by the Oil Pollution Act. 33 C.F.R. pts. 155, 157 (1996); 46 C.F.R. pts. 30, 32, 70, 90, 172 (1995).
3. The U.S. Coast Guard issued final regulations requiring owners, masters or operators of single-hulled tank vessels of 5,000 gross tons or more, carrying oil in bulk, to comply with a number of operational measures. The final rulemaking will remain in effect until all existing vessels without double hulls are phased out by the year 2015. 61 Fed. Reg. 39,770 (1996) (to be codified at 33 C.F.R. pt. 157; 46 C.F.R. pts. 31, 35).
4. The U.S. Coast Guard finalized administrative regulations pertaining to vessels operating under the Oil Pollution Act of 1990 and the Comprehensive Environmental Response, Compensation and Liability Act. The rule requires owners and operators of these vessels, with some limited exceptions, to establish and maintain evidence of financial responsibility sufficient to meet their potential liability for discharges of oil or other hazardous substances. 61 Fed. Reg. 9264 (1996) (to be codified at 33 C.F.R. pts. 4, 130-132, 137-138).
5. The Coast Guard adopted an interim final rule requiring oil spill response plans for marine transportation related facilities. The regulations are mandated under the terms of the Oil Pollution Act of 1990, and the

rulemaking affects facilities such as: deep water ports, marinas, certain Coast Guard regulated onshore facilities, tank trucks, and railroad tank cars. 61 Fed. Reg. 7890 (1996) (to be codified at 33 C.F.R. pts. 150, 154).

6. The Minerals Management Service proposed a rule under the Oil Pollution Act, imposing requirements for spill-response plans for oil handling facilities seaward of the coast line. The rule, which also includes associated pipelines, provides guidance for owners or operators of offshore facilities in preparing and submitting response plans that ensure the availability of private spill-response personnel and equipment. The rule would also permit the operation of offshore facilities without approved response plans, if certain conditions are met. 30 C.F.R. pt. 254 (1996).

### *G. Natural Resource Damage Assessment Regulations*

In February 1996, the National Oceanic and Atmospheric Administration (NOAA) promulgated regulations under the Oil Pollution Act (OPA) for the assessment of natural resource damages resulting from a discharge, or substantial threat of a discharge, of oil. One of the purposes of OPA is to make the environment and the public whole for injuries to natural resources caused by an oil spill. The rulemaking intends to provide a framework for conducting sound natural resource damage assessments that achieve OPA's restoration goals. The natural resource assessment process includes three phases: (1) preassessment; (2) restoration planning; and (3) restoration implementation. Natural Resource Damage Assessments, 61 Fed. Reg. 440 (1996) (to be codified at 15 C.F.R. pt. 990). On April 3, 1996, the American Institute of Marine Underwriters and the Water Quality Insurance Syndicate requested that the U.S. Circuit Court of Appeals for the District of Columbia review NOAA's rulemaking. The insurance groups claim that NOAA failed to promulgate the regulation in accordance with proper administrative procedures. The marine insurance companies maintain that the regulations encourage speculative claims and require the use of scientifically unacceptable methods to assess resource damage. *American Inst. of Marine Underwriters v. United States Dep't of Commerce*, No. 96-1101 (D.C. Cir. Filed, Apr. 3, 1996); *U.S. Marine Underwriters File Court Challenge to Natural Resource Damage Regulations*, U.S. Newswire, Apr. 3, 1996, available in 1996 WL 562-491.

### VIII. STATE OCEAN MANAGEMENT

1. The Federal District Court for Hawaii ruled that state regulations and legislation affecting the rights of mariners to anchor and navigate in Hawaiian waters are not preempted by the federal Submerged Lands Act or by other federal statutes. In addition, the court held that charging mooring fees is constitutional, because the charges do not significantly interfere with the fundamental right to travel. *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994).
2. The city of Malibu petitioned the state legislature to declare twenty-seven miles of the city's coastline a marine refuge. The proposed refuge would extend three miles seaward. Potential regulations for the refuge would include measures designed to protect sea life. *Malibu Seeks Marine Refuge for 27-Mile Coastline*, West Legal News, Aug. 8, 1996, available in 1996 WL 443251.
3. A Washington State Superior Court judge struck down San Juan county's legislation banning the use of personal watercraft in the county's bay. The judge found that "Washington has a history of allowing citizens access to the waterways and that the state effectively recognized the rights of owners of these small watercraft when it began registering them." *San Juan Watercraft Ban: Planning A Wise Round II*, SEATTLE TIMES, October 4, 1996, at B4. The judge stated that the dispute would probably be appealed to the state supreme court. The decision in the case is especially important because the waters off the coast of the county have been nominated to become a part of the National Marine Sanctuaries Program. *Id.*

### IX. FISHERIES MANAGEMENT

#### A. *Sustainable Fisheries Act of 1996: Reauthorization and Amendments to Magnuson-Stevens Fishery Conservation and Management Act*

##### 1. *President Clinton Signs Act into Law*

The Magnuson Act, now named the Magnuson-Stevens Act, provides the national framework for management of marine fisheries. Under its auspices, eight regional fishery management councils regulate fishing in the exclusive economic zone. When originally enacted in 1976, the Act's primary purpose was to "Americanize" the fisheries. In contrast, the extensive 1996 amendments focus on conservation. Sponsored by Sen. Ted Stevens of Alaska, the Sustainable Fisheries Act of 1996, Pub. L.

104-297, 110 Stat. 3559 (1996), was signed by President Clinton on October 11, 1996. The Sustainable Fisheries Act appropriates funds for carrying out the Magnuson-Stevens Act through fiscal year 1999. § 103. In its "definitions" section, important elements include a new definition of "overfishing" and a change to the existing definition of "optimum" as it is used to describe yield in a fishery. § 102. The latter is intended to prevent the maximum sustainable yield of a fishery from being exceeded. *Id.*

## 2. *National Standards and Fishery Management Plan Provisions*

Three new national standards are added to the seven in the existing standards. The standards dictate the factors to be taken into consideration in the development of the conservation and management measures of fishery management plans (FMPs). § 108. The new standards address the importance of fishery resources to fishing communities, the goal of minimizing bycatch, and the safety of human life at sea. Additional amendments include extensive provisions aimed at bycatch reduction and the elimination of overfishing, measures giving the fishery management councils new management tools, and provisions requiring that the councils include in every FMP the criteria for determining whether a fishery is overfished and measures to rebuild any overfished fishery. Councils are also required to identify essential fish habitat under each FMP, to minimize adverse habitat impacts, and to make recommendations concerning federal agency activity impact on fishery habitat. *Id.*

## 3. *Council Reform*

a. A major section of the Sustainable Fisheries Act is devoted to Fishery Management Council reform. § 107. Because Council members are often industry participants, the new measures are intended to prevent conflicts of interest, and to increase accountability to the public. They include provisions for recusal from voting when a member's financial interest is affected, and requirements for detailed minutes of meetings, clear identification of sources of data provided to the Council, and roll call voting upon request of any member. *Id.*

b. The amendments streamline the process of review and implementation for fishery management plans (FMP) by placing time limits on the Secretary's review and by allowing Councils to submit proposed implementation regulations simultaneously with a FMP or FMP amendment. In FMPs, Councils must include provisions dealing with overfishing and bycatch. They must describe the commercial, recreational, and charter

fishing occurring in each fishery and allocate any harvest restrictions or recovery benefits fairly and equitably among the three sectors. Existing FMPs must comply with the new program within two years from the date of enactment. § 108(b)-(e).

#### 4. *Individual Fishing Quotas*

a. Individual Fishing Quotas (IFQs) and their emergence as a management tool in FMPs has been a controversial subject. The IFQ amendment prevents Councils from submitting, and the Secretary of Commerce from approving or implementing, any new IFQ programs until after September 30, 2000. § 108(d). It directs the National Academy of Science, in consultation with the Secretary, Councils, and others, to submit a comprehensive report on IFQs to the Congress by October 1, 1998. § 108(f). The report will, among other things, analyze existing IFQ programs (wreckfish, surf clam/ocean quahog, and halibut/ sablefish) in the United States, IFQs outside the U.S., and alternative measures that may accomplish the same objectives as IFQs. *Id.* As for existing IFQ programs, the amendment requires the Secretary to impose a fee of up to three percent of ex-vessel harvest value to pay for management costs, § 109(c), but the wreckfish and surf clam/ocean quahog fisheries are exempted until January 1, 2000. § 109(d). Up to 25% of the fees may be used to provide vessel loan guarantees for small boat and entry level fishermen, and in the Alaska halibut/ sablefish IFQ program, the Council must reserve the full 25% for that purpose. § 111.

b. Under the amended act, the Secretary of Commerce will establish a central registry system for limited access permits (including IFQ permits), and will impose fees for registration and transfer of permits, not exceeding 0.55 of permit value. The registry will include lien information which will be available to buyers and sellers of permits. § 110.

#### 5. *State Jurisdiction Over Fishing Vessels*

State jurisdiction over fishing vessels in the EEZ is restated and clarified by the amendments. A state may regulate a vessel if it is registered in the state and either: (1) there is no federal FMP for the fishery in which the vessel is operating, or (2) state regulations are consistent with the federal FMP. A state may also regulate if the FMP delegates such authority. In Alaska, under certain conditions when there is no FMP, the state may extend its jurisdiction over all fishing vessels, not just those registered in Alaska. § 112.

## 6. *Community Development Program*

To help sustain participation of small fishing communities in rural western Alaska engaged in the Bering Sea fisheries, a section was added to the Magnuson-Stevens Act to formally establish a community development quota (CDQ) program administered by the North Pacific Council. § 111. There are already CDQ allocations in place for Bering Sea pollock, halibut, sablefish, crab and groundfish. A new CDQ program is also authorized for implementation by the Western Pacific Council. *Id.*

## 7. *Vessel Buyback Program*

The Sustainable Fisheries Act addresses the problem of fleet capacity reduction by authorizing the Secretary of Commerce to implement vessel and/or permit buyout programs at the request of a Council or Governor, so long as it is established that the vessel or permit is permanently retired and the purchase is for conservation and management. § 116. The Secretary may provide direct loan obligations of up to \$100 million per fishery to finance buyout programs, and has considerable flexibility concerning the possible sources of these funds. In a related provision of the enactment, the Secretary is required to submit a report reviewing New England fishing capacity reduction programs. *Id.*

## 8. *Reauthorization of Other Fishery Statutes*

Included in the Sustainable Fisheries Act are re-authorizations and extensions of appropriations for several other fishery statutes, such as: the Interjurisdictional Fisheries Act, the Atlantic Coastal Cooperative Fisheries Management Act, and the Anadromous Fish Conservation Act. §§ 402-404.

### *B. Bycatch Reduction*

The National Marine Fisheries Service issued new trawl regulations for Washington, Oregon, and California aimed at reducing bycatch of juvenile fish and preventing illegal fishing opportunities in the groundfish fishery. The Pacific Fishery Management Council recommended the action, which became effective September 8, 1995. The new rules: (1) require gear to meet minimum mesh size requirements throughout the net; (2) remove the legal distinction between bottom and roller trawls; (3) modify the distinction between bottom and pelagic trawls; (4) discourage dragging of small mesh nets close to the bottom; and (5) modify chafing gear standards to prevent them from effectively reducing trawl mesh size. The new rules also relax marking requirements for vertical hook-and-line

gear to ease the burden on vessels who remain in close proximity to tend their lines. 60 Fed. Reg. 13,377 (1995) (codified at 50 C.F.R. Pt. 663 (1995)).

### C. Individual Fishing Quotas

1. In March 1995, the North Pacific Council implemented a system of Individual Fishing Quotas (IFQs) for halibut and sablefish in the Gulf of Alaska. Proponents claim the transferable quotas will help to rebuild the fishery and make it safer by removing incentives to fish when tired or in bad weather. More time may also mean more money to fishermen because they can schedule trips around market prices and use bycatch as bait rather than discard it, thus lowering bait bills. Critics assert that IFQs "privatize a public resource" without producing a conservation benefit, and warn that the consolidation of fishing rights encouraged by the system will ruin local coastal communities. Sam Smith, *The Halfway Point*, FISHERMEN'S NEWS, July 1995, at 8. Dan Kowalski, *Questions Abound as IFQs Debut in Alaska*, NAT'L FISHERMAN, June 1995, at 14.

2. In the 1996 debates over Congressional reauthorization of the Magnuson-Stevens Act, the use of Individual Fishing Quotas (IFQs) in fishery management plans was one of the most contentious issues. In the end, Congress decided to leave three of these plans (including the halibut/sablefish regime) in place as experiments, subject to in-depth evaluation over the next three years. Pub. L. No. 104-297, § 108(e), 110 Stat. at 3576. The act places a moratorium on the submission of new IFQ plans for other fisheries in the interim. *Id.* The other two IFQ-based FMPs remaining operative during the moratorium are the one for the Atlantic surf clam and ocean quahog fisheries, and the one for Southern Atlantic wreckfish.

3. *Alliance Against IFQs v. Brown*, 84 F.3d 343 (9th Cir. 1996), shows why Individual Fishing Quotas (IFQ) plans are so controversial and highlights the core questions that will determine whether the IFQ becomes a permanent device in fisheries management. A group of Alaskan fishermen challenged the implementation of an IFQ-based fishery management plan for halibut and sablefish. The plan was developed by the North Pacific Fishery Management Council pursuant to provisions of the Magnuson-Stevens Act and the Northern Pacific Halibut Act. The fishermen claimed that they were unfairly excluded from the fishery because the Council and the Secretary of Commerce, in developing and approving the plan, failed to ensure its compliance with certain provisions of the Magnuson-Stevens Act. The district court granted summary

judgment for the government and dismissed the complaint. The Ninth Circuit Court of Appeals affirmed, emphasizing that it could overturn a regulation promulgated by the Secretary of Commerce only if the plaintiff could show that the Secretary's reasons for adopting it were arbitrary and capricious. *Id.*

#### *D. Challenges to State and Federal Fisheries Regulation*

1. In a 1994 case concerning the summer flounder fishery off the mid-Atlantic coast, a coalition of fishermen's groups filed suit against the Secretary of Commerce, contending that the conservative estimate of stock recruitment used by the regional management council in setting the commercial catch quota did not meet the "best available science" standard demanded by the Magnuson-Stevens Act. Holding in favor of the plaintiffs, the U.S. District Court for the Eastern District of Virginia found that the Secretary acted arbitrarily and capriciously in choosing the recruitment estimate upon which the quota was based, and invalidated the quota. *Fishermen's Dock Coop., Inc. v. Brown*, 867 F. Supp. 385 (E.D. Va. 1994). The Department of Commerce appealed, and several large environmental groups joined as amici. *Fishermen's Dock Coop., Inc. v. Brown*, 75 F.3d 164 (4th Cir. 1996). The Fourth Circuit reversed, stating that the lower court misapplied the statute, and noting that "[i]f there was an inevitable element of arbitrariness in the decision, there was not the least caprice." *Id.* at 173.

2. In *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138 (E.D. Va. 1995), a coalition of surf clam and ocean quahog processors challenged the 1995 commercial catch quotas and sought retention of the 1994 quota levels. Plaintiffs asserted that the quotas themselves and the methods used to determine them violated several of the national standards in the Magnuson-Stevens Act, and objected to an alleged lack of notice and comment proceedings, claiming that it violated the Administrative Procedure Act. The court's opinion, which denied the plaintiffs request to have the 1995 quotas set aside, is instructive on the judicial interpretation of the national standards and their meaning in practice.

3. In *North Carolina Fisheries Ass'n, Inc. v. Brown*, 917 F. Supp. 1108 (E.D. Va. 1996), a coalition of fishermen and seafood processors, joined by the State of North Carolina, sought to permanently enjoin enforcement of a moratorium on possession and harvesting of Atlantic weakfish. In December 1995, a final rule promulgated by the Secretary of Commerce pursuant to the Atlantic Coastal Fisheries Cooperative Management Act imposed the moratorium. Although the core of the dispute focused on the



question of whether the moratorium was “necessary,” as defined by the Act, in order to prevent collapse of the weakfish stock, the court found it unnecessary to resolve that question. The court set aside the final rule on the basis that, under the circumstances of the case, the Secretary did not have authority to act in the absence of recommendations from the Atlantic States Marine Fisheries Commission—demonstrating the power of regional management bodies charged with implementing fishery management plans.

4. A Louisiana federal district court enjoined certain provisions of the 1995 Louisiana Marine Resources Conservation Act (the Act). The court denied the plaintiffs’ claim that the state statute was preempted by the Magnuson-Stevens Act, and found that certain provisions of the Act satisfied the test for granting a preliminary injunction due to a potential violation of the Commerce Clause or the Equal Protection Clause of the U.S. Constitution. The enjoined provisions involved: prohibitions on weekend commercial fishing for speckled trout, mullet, and other saltwater finfish; a requirement that fishermen have a prior history with a gillnet license in order to qualify for a commercial rod and reel permit; and a traversal and per net fee for fishing in the exclusive economic zone off Louisiana. *Louisiana Seafood Management Council, Inc. v. Foster*, 917 F. Supp. 439 (E.D. La. 1996).

5. A 1995 lobster management statute was challenged in the Washington County Superior Court by a group of seventy fishermen, who claimed the law was unconstitutional because it attempted to regulate fishing beyond the three mile state jurisdiction, and because it imposed restrictions on Maine fishermen that were not imposed on fishermen from other states. Judge Donald Alexander dismissed the fishermen’s claim, ruling that the state regulation was permitted under the Magnuson-Stevens Act and the Department of Commerce’s regional fishery management plans. The contested law takes a new approach to fishery management by establishing a “bottom-up” system of developing regulations at the local community level. The lobstermen filed notice in October 1996 that they would appeal the court’s dismissal. Diana Graettinger, *Lobstermen to Appeal Judge’s Dismissal of Suit*, BANGOR DAILY NEWS, October 3, 1996, available in 1996 WL 10707674.

#### *E. Fishery Management Plan Amendments and Proposed /Final Rules*

1. In July 1996, the New England Fishery Management Council began managing groundfish fisheries under Amendment 7, which intends to stop declines and rebuild stocks of cod, haddock and yellowtail flounder.

When fully implemented, Amendment 7 makes all vessels subject to limited access permits and days-at-sea (DAS) limitations. *Recovery Measures for New England Groundfish Approved*, NOAA Press Release 96-R139, May 16, 1996. In a related effort toward groundfish stock recovery, the Department of Commerce implemented a \$25 million program to reduce fishing capacity by paying owners to retire their vessels and permits. *Final Vessel to Close Under Pilot Buyout Program*, NOAA Press Release 96-R702, May 23, 1996; *NOAA Begins \$25 Million Buyout Program for Northeast Fishermen*, NOAA Press Release 96-R706, Aug. 26, 1996; *164 Apply for New England Groundfish Vessel Buyout*, NOAA Press Release 96-R712, Nov. 1, 1996. NOAA press releases can be found via the NOAA public affairs World Wide Web home page, at <http://www.noaa.gov/public-affairs> .

2. The New England Fishery Management Council issued notice of public hearing to seek input on Amendment 5 to the Atlantic Sea Scallop Fishery Management Plan (FMP). Amendment 5 would close an area to some fishing activities over an eighteen-month period to allow an experiment and demonstration project involving sea scallop research, resource enhancement, and aquaculture to be conducted. 61 Fed. Reg. 21,431 (1996).

3. The National Marine Fisheries Service published a proposed rule to implement Amendment 8 to the Northeast Multispecies Fishery Management Plan (FMP), Amendment 6 to the Atlantic Scallop FMP, and Amendment 6 to the American Lobster FMP, with the aim of providing mechanisms to reduce economic losses caused by gear conflicts. 61 Fed. Reg. 52,904 (1996).

4. A September 6, 1996 proposed rule and request for comments, issued by the National Marine Fisheries Service, concerning a provision of Amendment 9 to the Fishery Management Plan for Summer Flounder, Scup, and Black Sea Bass Fisheries intends to reduce fishing mortality and rebuild stocks, and would establish a quarterly coastwide commercial quota-setting mechanism with trip limits for coastal states from Maine through North Carolina. 61 Fed. Reg. 47,106 (1996).

5. Overfishing definitions to be included in Amendment 9 to the Fishery Management Plan (FMP) for the Atlantic Surf Clam and Ocean Quahog Fisheries, were approved by the National Marine Fisheries Service. The definitions were required in order to bring the FMP into compliance with Magnuson-Stevens Act guidelines for FMPs. 61 Fed. Reg. 50,807 (1996).

6. As part of the rebuilding effort for the Atlantic swordfish fishery, the National Marine Fisheries Service issued a final rule reducing the annual total allowable catch, decreasing the minimum size, eliminating the trip allowance for undersized fish, and revising reporting requirements. The action intends to assist rebuilding, while allowing a harvest consistent with recommendations of the International Commission for the Conservation of Atlantic Tunas. 61 Fed. Reg. 27,304 (1996).
7. The National Marine Fisheries Service denied a petition submitted by the Offshore Resource Management Corporation, which sought to amend tuna regulations to permit pair trawling for non-bluefin tunas, and amendment of swordfish regulations to increase the swordfish bycatch limit for pair trawlers. 61 Fed. Reg. 48,661 (1996).
8. Commercial vessel trip limits for the Atlantic migratory group of king mackerel were implemented in a September 1996 notice by the National Marine Fisheries Service. The trip limits are part of the framework procedure for adjusting management measures of the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic. 61 Fed. Reg. 48,848 (1996).
9. The National Marine Fisheries Service issued a final rule to implement Amendment 9 to the Fishery Management Plan for the Crustacean Fisheries of the Western Pacific Region, establishing a new annual harvest limitation program for the Northwest Hawaiian Islands lobster fishery. 61 Fed. Reg. 35,145 (1996).
10. In a final rule, the National Marine Fisheries Service established a framework to implement the Washington coastal treaty Indian tribes' rights to harvest Pacific groundfish. It also announced an allocation of 15,000 metric tons of Pacific whiting to the Makah Indian Tribe for 1996, under the terms of the new regulatory framework. 61 Fed. Reg. 28,786 (1996).
11. A proposed rule seeks to receive comment on the addition of the city of Akutan to the list of western Alaska communities eligible to participate in Community Development Quota programs, removal of authority for the use of scales to weigh total catch in the pollock fishery, and a prohibition on filling fish holding bins above the level of the viewing port on processing vessels. 61 Fed. Reg. 24,475 (1996). The western Alaska CDQ program is codified in Section 305(i) of the Magnuson-Stevens Act as amended by the Sustainable Fisheries Act of 1996. Pub. L. No. 104-297, § 111, 110 Stat. at 3592.

12. The National Marine Fisheries Service issued proposed rules pertaining to the new system of Individual Fishing Quotas (IFQs) for halibut and sablefish in the Bering Sea and Gulf of Alaska. 61 Fed. Reg. 32,767 (1996); 61 Fed. Reg. 18,116 (1996).

13. A final rule for the Bering Sea sablefish fishery permits the use of longline pot gear, in order to reduce predation on hooked fish by killer whales. 61 Fed. Reg. 49,706 (1996).

14. A September 12, 1996 proposal by the National Marine Fisheries Service seeks to implement Amendment 37 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area. The amendment would impose groundfish trawl closures and other measures designed to protect red king crab. 61 Fed. Reg. 48,113 (1996).

15. The National Marine Fisheries Service announced the approval of Amendment 38 to the Fishery Management Plan (FMP) for Groundfish of the Gulf of Alaska. The amendment provides flexibility for the North Pacific Fishery Management Council to recommend a total allowable catch amount for Pacific Ocean Perch (POP) below the level currently established in the FMP, in order to improve POP conservation and management. 61 Fed. Reg. 51,374 (1996).

#### *F. Fisheries Act of 1995*

1. On June 30, 1995, the U.S. Senate passed the Fisheries Act of 1995, implementing U.S. participation in international agreements to protect fish stocks on the high seas and off the U.S. coast. The Senate took H.R. 716, previously passed by the House of Representatives, and amended it to incorporate the provisions of S. 267. 141 CONG. REC. H10,680 (daily ed. Oct. 24, 1995). The House subsequently passed the amended legislation and the bill was signed into law by President Clinton on November 3, 1995. Statement on Signing the Fisheries Act of 1995, 31 WEEKLY COMP. PRES. DOC. 1984 (Nov. 3, 1995). The Fisheries Act includes several major titles, most of which are "Acts" themselves. Among them, the High Seas Driftnet Fishing Moratorium Protection Act prohibits the United States from entering into any international agreements that violate the United Nations global moratorium on the use of large-scale driftnets, and requires the use of U.S. monitoring and enforcement capacity to prevent and detect violations in the U.S. Exclusive Economic Zone (EEZ) and, to the extent possible, in international waters. Pub. L. No. 104-43, §§ 603-606, 109 Stat. at 394.

2. The Sea of Okhotsk Fisheries Enforcement Act, contained within the Act, prohibits U.S. fishermen from fishing in the region commonly referred to as the "Peanut Hole," except under international agreements, in an effort to stop overfishing of Pacific pollock. This Fisheries Act provision helped lead to the Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation of Straddling Fish Stock in the Central Part of the Sea of Okhotsk, which became effective on June 13, 1996. *The Sea of Okhotsk Fisheries Enforcement Act, 1995: Hearings on P.L. No. 104-43 Before the Subcomm. on Fisheries, Wildlife and Oceans Comm. on Resources, 104th Cong. (1996)* (testimony of R. Tucker Scully, Acting Deputy Assistant Secretary for Oceans, September 12, 1996).
3. Congress officially authorized U.S. participation in the Northwest Atlantic Fisheries Organization (NAFO) by approving the Northwest Atlantic Fisheries Conservation Act, which was contained within the Fisheries Act of 1995. Pub. L. No. 104-43, §§ 201-211, 109 Stat. at 377-82. The approval requires the Department of Commerce to issue regulations that implement NAFO-adopted fishery rules and subjects violators to civil and criminal penalties under the Magnuson-Stevens Act.
4. The Fisheries Act of 1995 reauthorizes U.S. participation in the International Commission for the Conservation of Tunas, which acts through multilateral agreement to manage and conserve bluefin tuna and other migratory species that travel through and between the territorial waters of the Atlantic and Mediterranean nations. Atlantic Tunas Convention Authorization Act of 1995, Pub. L. No. 104-43, §§ 301-311, 109 Stat. at 382-88.
5. Another provision of the Fisheries Act of 1995 implements an agreement between the United States and Canada. The Yukon River Salmon Act establishes an international panel which will make conservation and management recommendations for the salmon fishery, and creates a Yukon River restoration and enhancement fund. Yukon River Salmon Act of 1995, Pub. L. No. 104-43, §§ 701-710, 109 Stat. at 392-95.
6. The High Seas Fishing Compliance Act, also included in the Fisheries Act of 1995, requires the Secretary of Commerce to issue permits to U.S. vessels that fish on the high seas. The first such permit was issued April 4, 1996, and by September 12, 1996, 650 permits had been issued. Permit holders are required to act in compliance with all international conservation and management measures recognized by the United States.

*The Fisheries Act of 1995: Hearings on Pub. L. No. 104-43 Before the Subcomm. on Fisheries, Wildlife and Oceans Comm. on Resources, 104th Cong. (1996) (testimony of Roland A. Schmitten, Assistant Administrator for Fisheries, September 12, 1996).*

7. Title IV of the Fisheries Act of 1995 amends and reauthorizes the Fishermen's Protective Act of 1967 (FPA), adding two new sections to it. Pub. L. No. 104-43, §§ 401-404, 109 Stat. at 388-391. A new Section 11 responds to Canada's 1994 imposition of transit fees in the Inside Passage off British Columbia, an element in a larger U.S.-Canada dispute over salmon allocations under the Pacific Salmon Treaty. As amended, the FPA allows the State Department to reimburse U.S. fishermen who paid the fees, and establishes procedures for them to claim reimbursement. A new Section 12 provides that whenever any nation imposes conditions on operation or transit of U.S. fishing vessels and the conditions are inconsistent with international law or agreement, the Secretary of State shall certify that fact to the President, who must then direct federal agencies to impose reciprocal conditions on the vessels of the certified nation. Title IV of the Fisheries Act also reauthorizes the Fishermen's Guaranty Fund, which functions as "seizure insurance" for U.S. fishing vessel owners.

### *G. Aquaculture*

1. Senator Kerry of Massachusetts proposed a bill, S. 1192, to create a Coastal and Marine Aquaculture Research and Development Program. The bill provided federal assistance for marine aquaculture development and gave the Department of Commerce the sole power to issue permits for aquaculture in federal waters. The bill was referred to the Committee on Commerce, Science, and Transportation. 141 CONG. REC. S12,370, S12,391 (daily ed. Aug. 11, 1995). The bill was not enacted prior to the conclusion of the 104th Congress.

2. H.R. 2046, a bill to amend the Coastal Zone Management Act (CZMA) was introduced by representative Reed of Rhode Island. The bill proposed to provide funding to the states to support adoption of procedures and policies to evaluate and facilitate siting of coastal zone aquaculture operations, and to establish in NOAA a marine aquaculture development program to be known as the Nantucket Program. 141 CONG. REC. H7067 (daily ed. July 17, 1995). The bill was referred to the Committee on Resources. 141 CONG. REC. H9671 (daily ed. Sept. 28, 1995).

3. Senator Akaka of Hawaii introduced S. 678, proposed as the National Aquaculture Development, Research and Promotion Act of 1995. It would have provided for coordination and implementation of a national aquaculture policy for the private sector by the Secretary of Agriculture, and established an aquaculture research and development program. The bill was referred to the Senate Committee on Agriculture, Nutrition, and Forestry, and gained bipartisan support from twenty-nine cosponsors, but did not emerge from the Committee during the 104th Congress. 141 CONG. REC. S5217, 5219 (daily ed. Apr. 5, 1995).

4. In November 1996, the U.S. Environmental Protection Agency began considering whether to allow the first open-ocean salmon farm in the United States. The American Norwegian Fish Farm proposed the establishment of a facility off Cape Ann, Massachusetts. The Army Corps of Engineers was also reviewing the proposed facility and expected to make a decision on its permit within a few months. The EPA expressed concern that the potential environmental impacts of the farm had not been adequately studied, and worried that if pens ruptured and fish escaped, they could breed with wild fish or infect them. *Fisheries: EPA Skeptical of Massachusetts Aquaculture Plan*, Greenwire, Nov. 11, 1996, available in WESTLAW, APN-GR Database.

## X. TRIBAL RIGHTS

### A. Subsistence Hunting and Fishing

1. On June 2, 1996, the Ninth Circuit Court of Appeals upheld a lower court's ruling that an Indian treaty granting fishing rights outside the reservation boundaries and in deep water includes the right to harvest shellfish. The lower court's decision divided the shellfish equally between treaty and non-treaty harvesters and allowed the parties to work out an implementation plan. The Ninth Court denied a motion to intervene, brought by several commercial fisherman, on the grounds that the appeal was not timely and would prejudice the parties. The decision ends seven years of litigation concerning tribal rights to harvest fish, including shellfish, within the traditional Indian fishing grounds. *United States v. Washington*, 86 F.3d 1499 (9th Cir. 1996).

2. A November 1995 decision by the Ninth Circuit Court of Appeals upheld a district court's determination that a 1993 order, issued by the Secretary of Commerce, which reduced the ocean harvest rate of Klamath River chinook, did not violate the Magnuson Act. The circuit court also affirmed the dismissal of claims stating that the Secretary of the Interior

failed to enforce limitations on Indian fishing in the Klamath River. The court emphasized that tribal fishing rights, whether they arise from treaty, statute or executive order, are entitled to protection and are subject to the Magnuson Act. The court further stated that the tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights. *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995).

3. The Ninth Circuit reversed a district court's denial of a preliminary injunction to prevent state enforcement of a ban on rainbow trout subsistence fishing. The ruling requires the U.S. government to give preference to subsistence fishing in certain Alaskan waters. The court held that there were serious questions as to whether there was a federal "interest" in the waters in dispute so as to make them "public lands" under the Alaska National Interest Lands Conservation Act (ANILCA) and gave preference to nonwasteful subsistence hunting and fishing on public lands. *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994).

### *B. Housing*

The First Circuit permanently enjoined a Native American tribe from allowing anyone to inhabit a recently built housing complex. The First Circuit held that the site, although an Indian community, was not a part of "Indian country" for purposes of presumptive sovereignty to the exclusion of the state's building and zoning regulations. The court also found that the individual requirements of the state's coastal resources management plan were applicable and that the complex was subject to a nearby town's drainage easement. *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996), *aff'g in part, rev'd in part*, 878 F. Supp. 349 (D.R.I. 1995).

## XI. PROTECTED MARINE SPECIES

### *A. Salmon*

#### *1. Listings*

a. On October 25, 1996, the National Marine Fisheries Service announced the listing of the Central California coho salmon as a threatened species. 50 C.F.R. § 227.4(h) (1996); *Coho Salmon in California Granted Partial Protection*, WASHINGTON POST, Oct. 26, 1996, at 6A. However, the decision of whether to list the Northern California and Oregon salmon has been postponed for six months. 61 Fed. Reg. 56,211 (1996) (to be codified at 50 C.F.R. pt. 227).



b. The National Marine Fisheries Service determined that the Mid-Columbia river summer chinook salmon does not constitute a species under the Endangered Species Act. 59 Fed. Reg. 48,855 (1994).

c. On March 10, 1995 the National Marine Fisheries Service announced that the Atlantic salmon is not a "species" under the Endangered Species Act and that listing the Atlantic salmon throughout its historic United States range is not warranted. 60 Fed. Reg. 14,410 (1995) (to be codified at 50 C.F.R. pt. 17).

## 2. *Pacific Northwest Salmon Related Cases*

a. On March 28, 1994, Oregon Federal District Court Judge Marsh found the National Marine Fisheries Services' (NMFS) biological opinion (which concluded that the power operations on the Columbia River constituted "no jeopardy" to listed species) was arbitrary and capricious and heavily weighted in favor of the status quo. He ordered the NMFS to re-initiate consultations with state and tribal fisheries under the Endangered Species Act § 7. *Idaho Dep't. of Fish & Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886 (D.Or. 1994). In March of 1995, the NMFS introduced its revised salmon plan.

b. On September 9, 1994, the Ninth Circuit held that the Pacific Northwest Electric Power and Conservation Planning Council (Council) violated the Northwest Power Act (NPA) and section 706 of the Administrative Procedure Act. The court concluded that the Council failed to provide a statutory basis for rejecting fishery managers' and Indian tribes' recommendations on stream flows necessary to protect salmon, and it failed to evaluate proposed program measures against sound biological objectives. The court also noted that provisions in the NPA require that the Council give "due weight," a high degree of deference, to fishery managers in the development of their Salmon strategy. *Northwest Resource Info. Ctr., Inc. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 50 (1995).

c. On July 7, 1994, the Ninth Circuit enjoined ongoing and future activities in the Willowa-Whitman and Umatilla National Forests in Oregon that might affect chinook salmon, pending Endangered Species Act (ESA) § 7(a)(2), 16 U.S.C. § 1536(a)(2) (1994), consultations between the United States Forest Service (USFS) and the National Marine Fisheries Service. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied* 115 S.Ct. 1793 (1995). Shortly after the decision, a federal district court in Idaho followed suit by enjoining ongoing

and future activities in Idaho national forests, pending ESA § 7 consultations. *Pacific Rivers Council v. Thomas*, 873 F. Supp. 365 (D.Idaho 1995). The latter injunction was lifted in March 1995. *Idaho Judge Dissolves Salmon Protection Injunction Forest Service Activities*, BNA State Env't Daily, Mar. 10, 1995, available in LEXIS, BNA Library, BNA SED File.

d. In *Pacific Northwest Generating Co-op v. Brown*, 25 F.3d 1443 (9th Cir. 1994), superseded by 38 F.3d 1058 (1994), the Ninth Circuit found that, even though certain utilities companies satisfied the requirements for standing and had suffered injury, their claims were either moot or founded in misrepresentation of the Endangered Species Act (ESA). The decision upheld the district court judge's decision to dismiss the suit, but, unlike the district court, granted standing. See *Pacific Northwest Generating Co-op v. Brown*, 822 F. Supp. 1479 (D.Or. 1993). The Ninth Circuit followed a footnote in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), to find that the utility and power users demonstrated concerns which fell within the "zone of interest" test, and that they need not establish causation or redressibility with anything more than reasonable probability. The Ninth Circuit also concluded that the unintended killing of endangered salmon that occurs in commercial fishing is an incidental "taking" permitted under the ESA. The court dismissed as impossible the contention that the "transporting or trading" of endangered salmon after harvest violated ESA prohibitions, because Congress could not have intended to entirely close down commercial fishing.

e. The Ninth Circuit has exclusive jurisdiction to review challenges to final actions of the Bonneville Power Administration (BPA) based on administrative record. The authorization for citizen suits under the Endangered Species Act does not take precedence over the statute placing BPA under the exclusive jurisdiction of the Ninth Circuit. *Northwest Resource Information Center, Inc. v. National Marine Fisheries Service*, 25 F.3d 872 (9th Cir. 1994).

f. The Ninth Circuit held that the transportation program and flow improvement measures employed by the Army Corps of Engineers (Corps) designed to assist salmon smolts downstream are not "connected actions" under the National Environmental Policy Act. Thus, the Corps did not have to consider the transportation program in its supplemental environmental impact statement. The court also held moot a challenge to the grant of a "take" permit to the Corps, issued under the Endangered

Species Act to collect and transport salmon. Northwest Resource Info. Ctr. v. National Marine Fisheries Service, 56 F.3d 1060 (9th Cir. 1995).

g. The Federal Energy Regulatory Commission's (FERC) jurisdiction includes licensing and relicensing of private hydroelectric facilities on non-navigable waters under the Federal Power Act, even if such a license will effect the spawning of anadromous fish. The Ninth Circuit rejected the FERC's argument that the Department of Commerce's licensing jurisdiction extends only to projects affecting the navigable capacity of a waterway or generating power for interstate transmission. United States Dep't of Commerce v. Federal Energy Regulatory Comm'n, 36 F.3d 893 (9th Cir. 1994).

h. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit found that the National Environmental Policy Act's environmental impact statement does not apply to critical habitat designation under the Endangered Species Act.

i. The Ninth Circuit ruled that the National Marine Fisheries Service (NMFS) is obligated to conduct a more thorough environmental assessment before allowing any fishing in the Pacific Northwest region that may result in the incidental taking of large numbers of endangered chinook and sockeye salmon. The court found that the NMFS release of the take statement constituted a major federal action, for which the environmental assessment is required by the National Environmental Protection Act. The case highlighted a battle between commercial fishermen, who inevitably take some endangered salmon when harvesting non-threatened salmon, and power companies, which inadvertently kill endangered salmon while diverting water for electricity. Each group essentially competes over who may take the most endangered salmon under ESA § 7, which permits some incidental takings. *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996).

#### *B. 1994 Marine Mammal Protection Act Amendments*

On April 26, 1994, the Marine Mammal Protection Act (MMPA) was reauthorized with various amendments. Changes to the act include a ban on the shooting of seals, sea lions, killer whales, and other marine mammals that interact with fishing operations. The act now contains a program designed to reduce the accidental take of marine mammals in fishing gear to insignificant levels, approaching zero, in seven years. Additionally, there are new requirements for fishing vessel registration and monitoring. Vessels in category I and II fisheries must report within forty-eight hours to the National Marine Fisheries Service (NMFS) only

when marine mammals are killed or injured. The act contains measures to reduce incidental takes of marine mammals from target fisheries which affect struggling and particularly vulnerable marine mammal populations. The NMFS and Fish and Wildlife Service (FWS) also have explicit authority to enter into agreements with Alaska Native organizations for the conservation of marine mammals, co-management of the subsistence use of marine stocks, harvest monitoring, research participation, and co-management structure development. MMPA now contains specific authority for the Secretary of Commerce to protect the habitat of marine mammal populations. Under the new provision, the NMFS and FWS are to be advised of actual, expected or potential impacts of habitat destruction of marine mammal stocks. The NMFS will also appraise the impact of selected pinnipeds on threatened stocks of salmonids on the Pacific coast. Intentional killing of non-depleted pinnipeds, which are individually identifiable, could be permitted by the Secretary of Commerce if certain criteria are met. Finally, rules regarding the taking of marine mammals for public display were added. The NMFS and FWS will issue permits for the taking or importing of marine mammals for the purpose of public display only if: (1) the taking occurs only after careful consideration of the effects on wild population; (2) the taking is conducted in a humane fashion; (3) the institution taking the animal is registered or licensed under the Animal Welfare Act; (4) the educational program offered by the institution meets professionally recognized standards of the public display community; and (5) facilities at the institution are open to the public on a regular basis. *Marine Mammal Protection Act Reauthorized*, MARINE CONSERVATION NEWS, Summer 1994, at 1.

### *C. Marine Mammal Protection Cases and Regulations*

1. The Ninth Circuit held that the Marine Mammal Protection Act (MMPA) does not make it a crime to take reasonable steps to deter porpoises from eating fish or bait off fishermen's lines. The court clarified the meaning of "harass" under the "taking" prohibition of the MMPA. Harassment must entail a level of direct and significant intrusion upon the normal life sustaining activities of a marine mammal. The court stated that interpreting the MMPA to prohibit isolated interference with abnormal marine mammal activity (such as taking bait off lines) would lead to absurdity, and that a criminal conviction under the MMPA must be supported by evidence of intentional and not negligent conduct. *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994).

2. On April 26, 1994, a federal district court issued a preliminary injunction enjoining the National Marine Fisheries Service (NMFS) and the Navy from promulgating a regulation that authorized the taking of marine mammals over a five year period. The "take" was purportedly necessary for a Navy weapon testing program. The court criticized NMFS' failure to consider alternative sites in violation of the Marine Mammal Protection Act and National Environmental Protection Act. *Natural Resources Defense Council, Inc. v. Dep't of Navy*, 857 F. Supp 734 (C.D. Cal. 1994).
3. On February 1, 1995, the National Marine Fisheries Service issued a final rulemaking on the Marine Mammal Protection Act's prohibition of intentional lethal takings of marine mammals. The new regulation applies to all commercial fishing operations and became effective March 3, 1995. 60 Fed. Reg. 6036 (1995) (to be codified at 50 C.F.R. pt. 229).
4. The National Marine Fisheries Service published proposed changes to the List of Fisheries (LOF) as required by the Marine Mammal Protection Act. A commercial fishery is placed on the LOF and classified as a category I, II, or III fishery based upon the level of serious injuries and mortalities that occur to marine mammals in the course of fishing operations. The LOF intends to alert the members of the fishing and marine community to the nature of interactions between marine mammals and various commercial fisheries. It also informs industry participants which fisheries are subject to provisions of the MMPA. 61 Fed. Reg. 37035 (1996).

#### D. Manatees

1. The development of manatee detectors in Florida now helps manatees to pass safely through the gates on the state's locks and dams. In 1994, sixteen manatees were killed while trying to pass through lock or dam gates in Florida. *Science File: Detectors for Canal Gate May Prevent Killing of Manatees*, L. A. TIMES, July 18, 1996, at 2B.
2. A Florida state appellate court ruled that the state legislature properly delegated authority to the Department of Environmental Protection (DEP) to adopt slow speed zones in certain intercoastal waterways. The slow speed zones help protect slow moving, endangered manatees from being injured or killed by motorboat propellers. The DEP is authorized to regulate the operation and speed of motorboats in areas where manatee sightings are frequent. *Marine Indus. Ass'n v. Florida Dep't of Env'tl. Protection*, 672 So.2d 878 (Fl. App. 4th Dist. 1996).

3. A mysterious pneumonia epidemic killed a number of manatees in southwest Florida. The cause of the manatee deaths baffled scientists for approximately eight months. However, in early July 1996, scientists discovered that a previously undocumented red tide (a toxic organism that accumulates in fish) caused the deaths. The red tide, although natural, was unusual and appears to have abated. There have not been any further reports of manatee deaths since the return of warm summer waters. *Mystery Manatee Killer is Red Tide Outbreak*, FLORIDA TODAY, July 3, 1996, at 8B.

#### *E. Whales*

1. In June 1994, the National Marine Fisheries Service and Fish and Wildlife Service removed the North Pacific (California) Gray Whale from the endangered species list. The Gray Whale now numbers approximately 21,000 and appears to have recovered to its pre-whaling populations of 15,000-20,000 animals. *Gray Whale is First Whale Removed From Endangered Species List*, MARINE CONSERVATION NEWS, Autumn 1994, at 5.

2. On January 19, 1995, the National Marine Fisheries Service issued a rule prohibiting aircraft from flying closer than 1,000 feet and vessels from approaching within 100 yards of any humpback whale in Hawaiian waters. *Approaching Humpback Whales in Hawaiian Waters*, 60 Fed. Reg. 3775 (1995) (to be codified at 50 C.F.R. pt. 222).

3. The National Marine Fisheries Service (NMFS) ordered the Coast Guard to slow down its boats along the eastern seaboard to protect against collisions with humpback, sperm and North Atlantic right whales. *Coast Guard Ordered to Brake for Whales*, THE ASSOCIATED PRESS, Aug. 6, 1996, available in 1996 WL 4434681. NMFS also proposed to establish a 500-yard buffer zone to separate the highly endangered right whales from anything that might threaten their lives. *North Atlantic Right Whale Protection*, 61 Fed. Reg. 41,116 (1996) (to be codified at 50 C.F.R. pts. 217 and 222) (proposed Aug. 7, 1996).

4. On September 26, 1996, a United States district court judge in Boston, Massachusetts, ruled that the State of Massachusetts violated the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) by issuing permits to lobstermen and other fishermen who use gear known to have killed North Atlantic right whales. The judge ordered the State to "restrict, modify or eliminate" the use of lobster gear, gillnets and other fixed fishing gear located in the coastal waters of Massachusetts

Bay and Cape Cod Bay, which is designated as critical habitat for right whales. The court order requires that a seven-member panel submit a plan to reduce fishing gear damage to the whales. The plan must be submitted prior to December 16, 1996, and the judge must approve the terms of the plan. *Strahan v. Coxe*, 939 F. Supp. 963 (D. Mass. 1996). On October 18, 1996, a federal appeals court rejected Massachusetts' request to delay the deadline for the submission of the Plan. Scott Allen, *State Ordered to Proceed on Plans to Protect Whales*, BOSTON GLOBE, Oct. 18, 1996, at C11. A staff member of the Conservation Law Foundation stated that the court's decision gives the National Marine Fisheries Service (NMFS) much more control over fishing in Massachusetts than ever before. *Judge Orders MA to Draw Up Protection Plan*, Greenwire, Sept. 30, 1996, available in WESTLAW, 9/30/96 APN-GR 16. Strahan, who initiated suit against the State of Massachusetts, has also filed suit against the NMFS. He claims that the NMFS, which is charged with managing the country's ocean fisheries, guarding protected species and ocean habitat, and inspecting seafood, is incapable of protecting the right whale and other endangered marine animals due to an inherent conflict of interest. Edie Lau, *The Fight For The Right Whale As One of the World's Most Fascinating Whales Nears Extinction, Richard Max Strahan is Fighting to Save It—and Close the Fishing Industry Down*, PORTLAND PRESS HERALD, Nov. 24, 1996, at 1A. In 1994, Strahan sued the United States Coast Guard, alleging that the agency violated the ESA and MMPA by failing to adequately regulate whale tourist boats. Eric Niiler, *Lawsuit: Coast Guard Neglects Endangered Whales*, THE PATRIOT LEADER, June 8, 1994, at 9.

5. A federal district court overturned an administrative law court's finding that an underwater photographer "harassed" a pod of pilot whales in violation of the Marine Mammal Protection Act. The underwater photographer was accused of "taking" a pilot whale by "harassment" after his underwater video aired on a national television show. The video contained footage which first showed a companion of the appellant touching a whale and later revealed footage of the whale biting the companion. The administrative law court concluded that the photographer was in control of his companion's actions, and that he was vicariously liable for the companion's actions. The federal district court, however, found that the administrative law judge relied upon insufficient or speculative evidence to reach the conclusion that the photographer harassed the whale. *Tepley v. National Oceanic and Atmospheric Admin.*, 908 F. Supp. 708 (N.D. Cal. 1995).

### E. *Dolphins and Porpoises*

1. The Ninth Circuit vacated a district court's preliminary injunction that would have forced the government to implement bans on the importation of tuna from "secondary" nations. In reaching this decision, the Ninth Circuit held that the Court of International Trade, rather than the district court, had jurisdiction. *Earth Island Inst. v. Brown*, 28 F.3d 76 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 509 (1994).

2. A federal district court held that fishermen could not take spotted dolphins, even with a Marine Mammal Protection Act incidental take permit, once the Secretary of Commerce listed the dolphin as depleted. The court also held that fishermen were not entitled to additional administrative hearings before the Secretary issued the rule to prohibit continued taking of the listed dolphin. *Earth Island Inst. v. Brown*, 865 F. Supp. 1364 (N.D. Cal. 1994).

3. In *Strong v. United States*, 5 F.3d 905 (5th Cir. 1993), the Fifth Circuit overruled a district court ruling and found that the National Marine Fisheries Service (NMFS) is authorized to issue rules prohibiting the feeding of wild bottlenose dolphins under the Marine Mammal Protection Act (MMPA). The MMPA prohibits harassment, which includes interference with the normal behavior of dolphins. The decision means that the NMFS may prohibit dolphin feeding cruises. *Court Upholds Ban on Feeding Dolphins*, MARINE CONSERVATION NEWS, Spring 1994, at 1.

4. The Ninth Circuit upheld the National Marine Fisheries Services' (NMFS) calculation of the number of dolphins that an association of tuna fishers could take in 1994 under a Marine Mammal Protection Act (MMPA) general permit. The permit allowed the association's members to take a limited number of dolphins when using the purse seine method to fish for tuna. Under the applicable MMPA Section, the court determined that Congress intended: (1) to impose on the association a ceiling of 800 dolphin takes from January 1, 1993, to March 1, 1994; (2) to establish a global moratorium to prohibit certain tuna-harvesting practices by March 1, 1994; and (3) if no global moratorium occurred, to prohibit the number of dolphin mortalities for each year after 1992 from exceeding the number of mortalities that occurred in the preceding year (the annual reduction provision). Because it was apparent by December 1993 that no global moratorium would occur by the March 1994 deadline, it became reasonably certain that the Act's annual reduction provision would take effect on March 1, 1994, and that the ceiling of 800 dolphin takes would



no longer apply. The NMFS properly issued a notice of fishery closure setting the 1994 quota at 114, when, by February 7, 1994, the association's 1994 take of 107 dolphins threatened to surpass its 1993 quota of 115. *American Tunaboat Ass'n v. Brown*, 67 F.3d 1404 (9th Cir. 1995).

#### F. Turtles

1. In Riviera Beach, Florida, endangered baby sea turtles were mistakenly crawling toward a shoreside mall's parking lot, rather than the ocean, due to the mall's bright lights. The lights disoriented hatchling sea turtles, who confused the bright lights with the moon, which they depend upon to guide them into the ocean. The city agreed to change the lights to dimmer, yellow lights. The city faced fines under the Endangered Species Act of \$20,000 for each dead turtle. *Parking Lot Lights Endangering Turtles: Dimmer Lights to Protect Hatchlings*, SUN SENTINEL, Sept. 16, 1996, at 1B.

2. On November 14, 1994, the National Marine Fisheries Service (NMFS) issued its biological opinion for sea turtles. The opinion proposes to increase enforcement efforts and implement immediate conservation efforts when turtle mortalities reach a critical level. The NMFS also plans to register all shrimp trawlers in the Gulf of Mexico and southeastern states and identify areas that require special turtle conservation consideration. *NMFS Proposes New Measures to Reduce Sea Turtle Deaths*, MARINE CONSERVATION NEWS, Spring 1995, at 10.

3. On March 24, 1995, the National Marine Fisheries Service issued a final rule, which requires shrimp trawlers using Turtle Excluder Devices (TEDs) in the Gulf of Mexico and the Atlantic Ocean to attach specified flotation devices to TEDs with bottom escape openings. *Sea Turtle Conservation*, 60 Fed. Reg. 15,512 (1995) (to be codified at 50 C.F.R. pt. 227).

4. The United States District Court for the Southern District of Texas held that the National Marine Fisheries Service (NMFS) did not violate its duties to protect sea turtles under the Endangered Species Act (ESA). The Center for Marine Conservation (CMC) charged that the federal defendant violated a number of its substantive duties under the ESA, because the agency permitted the continued "taking" of endangered sea turtles after the Gulf of Mexico shrimp fishermen reached the incidental take limit. The court found that CMC's claims could not overcome the deferential standard given to agency actions. However, in the opinion's conclusion, the court thanked CMC for bringing the lawsuit and expressed

regret that it was unable to further protect the endangered sea turtles. *Center for Marine Conservation v. Brown*, 917 F. Supp 1128 (S.D. Tex. 1996). Following the court's decision, the Earth Island Institute dropped its lawsuit attempting to restrict trawler operations in the waters off Texas and Louisiana. *Environmental Group Ends Suit Over Turtles*, BATON ROUGE ADVOCATE, Mar. 26, 1996, at 12A.

5. The Fifth Circuit reversed and remanded two district court decisions granting summary judgment to the defendants in an action by the National Oceanic and Atmospheric Administration (NOAA) to collect civil penalties from shrimpers. The shrimpers knowingly violated the Endangered Species Act by failing to use qualified turtle excluder devices while shrimping. The Fifth Circuit held that the district court erred by not considering the record as a whole in one action. In the other action, the district court erred by granting summary judgment, because the shrimpers had not waived their due process rights to judicial review, even though they had not yet exhausted all attempts at discretionary review within NOAA. *United States v. Menendez*, 48 F.3d 1401 (5th Cir. 1995).

6. The Eleventh Circuit upheld an individual's conviction under the Lacey Act for capturing and selling alligator snapper turtles. The court also upheld the conviction under the Endangered Species Act for taking Alabama Red-Bellied Turtles. *United States v. Guthrie*, 50 F.3d 936 (11th Cir. 1995).

7. The Federal District Court for the Virgin Islands denied an application for a temporary restraining order seeking to prevent the erection of a temporary emergency housing facility in St. Thomas, U.S.V.I. Plaintiffs alleged that numerous provisions of the Endangered Species Act (ESA) were violated in planning and providing for the temporary housing and that the construction was causing irreparable harm to the Virgin Island Boa, the Hawksbill Turtle, and the Green Sea turtle. The court denied injunctive relief. The district court concluded that the plaintiffs failed to meet the stringent preliminary injunction standard. The court went on to state that even if the plaintiffs had met their burden, relief would have been denied on the grounds of failure to comply with the ESA's notice requirements. *The Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 939 F. Supp. 1195 (D.V.I. 1996).

### G. Sharks

1. Fishing and finning is being cited as a major reason for a rapid decline of the Atlantic coastal shark population. The majority of sharks

are susceptible to overfishing because they grow very slowly and reproduce in small numbers. The National Coalition for Marine Conservation (NCMC) claims that the steep declines will not cease under current federal regulations. The NCMC asked the Secretary of Commerce to initiate an emergency action under the Magnuson Act to reduce coastal shark quotas by fifty percent. The group maintains that even with a fifty percent reduction in the total allowable shark catch, the shark stocks may still not recover. Bill Sargent, *NCMC Looks Out for Sharks*, FLORIDA TODAY, Aug. 4, 1996, at 10C.

2. The U.S. Fish and Wildlife Service is reviewing public comments on a number of shark species that could benefit from protection. The Service is being spurred by the Convention on International Trade in Endangered Species, which plans to implement restrictions on the harvesting and trade of international sharks to arrest the decline in the number of living sharks. Species Being Considered for Amendments to the Appendicies to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 61 Fed. Reg. 482,862 (1996); *Shark Trade Faces Restrictions at Next CITES Meeting*, Japan Economic Newswire, Sept. 6, 1996, available in WESTLAW, JWIREPLUS Database.

#### H. Sea Otters

The U.S. Fish and Wildlife Service hopes to remove the Southern sea otter from the endangered species list within three years. In July 1996, the Service announced that the number of living sea otters is on the rebound and expects the population of sea otters to reach 2,650 by 1999. Maria Alicia Gaura, *A Plan to Drop Sea Otters from Endangered Species List*, SAN FRANCISCO CHRONICLE, July 19, 1996, at A13.

### XII. ENDANGERED SPECIES ACT

#### A. Definition of "Harm"

On June 29, 1995, the U.S. Supreme Court held that the Secretary of the Interior reasonably construed Congress' intent under the Endangered Species Act (ESA) in promulgating a regulation that interpreted the word "harm" as including "significant habitat modification or degradation that actually kills or injures wildlife." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2416 (1995). In a 6-3 ruling that reversed the decision of the D.C. Court of Appeals, the Supreme Court found that the Secretary's definition of harm was not contrary to Congress' intent to prohibit the unauthorized taking of threatened or endangered species. The majority found several compelling

reasons for the Secretary's interpretation. First, the ordinary understanding of the word encompasses both direct injury (hunting and killing) and indirect injury (including habitat modification). To define "harm" as excluding indirect injury is to give the word "no meaning that does not duplicate the meaning of other words," such as those used to define "take." *Id.* at 2413. A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation. *Id.* Second, the broad purpose of the ESA supports the decision to extend the interpretation to include habitat modification. The central purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Id.* (citing 16 U.S.C. § 1531(b) (1994)). Third, because Congress authorized the Secretary to issue permits for takings that were incidental to an otherwise lawful activity, it recognized the broader meaning of the word harm. "No one could seriously request an 'incidental' take permit to avert . . . liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read 'harm' so narrowly that the permit procedure would have little more than that absurd purpose." *Id.* at 2414. The majority also concluded that the ESA's legislative history proved that "Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions." *Id.* at 2416. The Supreme Court rejected the court of appeals' rationale that harm referred only to the direct application of force, because the words accompanying it in the definition apply only to direct, purposeful action. Instead, the Supreme Court said that the other words contained in the definition do imply the use of indirect force, and harm should be distinguished from the other words around it in the definition, so as to give "harm" independent meaning. *Id.* at 2414-15. Additionally, the Court did not accept the argument that Congress intended the habitat acquisition and preservation provision of the Act to be the sole means of habitat modification. Rather, the Court determined that the provision applies to actions different than the one presented in the case before the Court. *Id.* at 2417 n.19. Justice O'Connor concurred with the majority, upon the understanding that the regulation is limited to significant habitat modification that causes actual death or injury to identifiable protected animals, and is "limited by ordinary principles of proximate causation, which introduce notions of foreseeability." *Id.* at 2418. The three dissenters found it "unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds *for the acquisition of private lands*, to preserve the habitat of endangered

animals." *Id.* at 2421 (alteration in original). The majority decision, in the view of the dissenters, "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Id.*

### B. Standing

The Ninth Circuit held that plaintiffs who fail to allege an interest in the "preservation" of endangered species do not fall within the zone of interests of the Endangered Species Act (ESA) and therefore lack standing to sue the government for allegedly violating the Act. According to the court in *Bennett v. Plenert*, 63 F.3d 915, 920-21 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3639 (U.S. March 25, 1996) (No. 95-813), the ESA's overall purposes do not encompass the economic and recreational interests that formed the basis for the plaintiffs' challenge to the government's biological opinion, which recommended maintaining minimum water levels in two reservoirs to ensure the survival of two fish species. In alleging that the government violated the ESA consultation provisions and failed to consider the economic impact of its critical habitat determinations for the fish, plaintiffs sought only a greater share of the water and did not contend that compliance with the Act would improve the fish's lot. The court also held that the ESA citizen suit provision does not automatically confer standing on every plaintiff who satisfies the constitutional standing requirements and claims a violation of the Act's procedures. *Id.* at 921-22.

### C. Revival of Species Listings

In April 1995, United States Congress imposed a moratorium on final listings of endangered or threatened species and final designations of critical habitats. However, President Clinton waived the moratorium that was included in the omnibus appropriations bill covering the remainder of fiscal year 1996. With the end of the moratorium, the U.S. Fish and Wildlife Service must make decisions on whether to list a total of 243 species as endangered and threatened wildlife and plants. *Congressional Moratorium Lifted on Endangered Species Listings; Fish and Wildlife Services Sets Priorities for Resuming Program*, U.S. Newswire, May 10, 1996 available in 1996 WL 5621274.

### D. Future Listings

1. The Steller Sea Lion, classified as a threatened species in October 1996, will be placed on the endangered species list. The Gulf of Alaska Sea lion population is suffering from an unexplained decline. Researchers claim that the number of Sea Lions has dropped from 48,000 to 44,000

over the course of the past two years. *Sea Lion's Status to be Changed to Endangered*, SEATTLE TIMES, Oct. 13, 1996, at B8.

2. The National Marine Fisheries Service (NMFS) proposed Endangered Species Act protection for the western steelhead trout. *U.S. Acts to Protect Steelhead Trout Runs Along the West Coast*, WALL ST. J., July 31, 1996, at A8. The agency's decision to extend protection to the Steelhead trout followed a federal district court judge's order that NMFS had to make a decision on whether to list the Steelhead prior to the end of July. *Federal Court Moves Up Deadline for Steelhead Trout Listing*, West's Legal News, July 1, 1996, available in 1996 WL 359999.

#### *E. Agency Guidelines*

New guidelines, revealed by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service on September 16, 1996, intend to streamline the Endangered Species Act's habitat conservation plan (HCP) permit process. The HCP process preserves rare species and maintains biological diversity, while permitting development that will not reduce the survival and recovery of wild, endangered species. *Feds Streamline Habitat Conservation Planning*, West's Legal News, Sept. 19, 1996, available in 1996 WL 527463.

### XIII. NAVIGATION AND NAVIGABLE WATERWAYS

#### *A. "Public Lands" Include Navigable Waters*

The phrase "public lands" in the Alaska National Interest Lands Conservation Act (ANILCA) includes navigable waters, but only those in which the United States has reserved water rights. Federal agencies that administer ANILCA's subsistence-use priority on public lands are responsible for identifying those waters. *Alaska v. Babbitt*, 54 F.3d 549 (9th Cir. 1995).

#### *B. Ship Denied Permit to Enter Glacier Bay*

National park service officials in Glacier Bay, Alaska were not arbitrary and capricious in denying a cruise ship operator a permit to enter Glacier Bay. The ship operator sought a preliminary injunction alleging that the agency had violated the notice-and-comment requirement of the Administrative Procedure Act (APA). The court found that the "public property" exception to the APA notice-and-comment requirement applied and that the cruise ship operator failed to show "irreparable harm." *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1 (D.D.C. 1994).

### *C. Preemption*

1. The Fourth Circuit held that the federal maritime law preempts a Maryland statute imposing strict liability for damages to natural oyster bars. The decision resulted from the Maryland Department of Natural Resources suit against a barge owner for damage to a natural oyster bar when the barge ran aground. *Maryland Dep't of Natural Resources v. Kellum*, 51 F.3d 1220 (4th Cir. 1995).

2. The Ninth Circuit upheld Hawaii's moorings and anchorage regulations, finding that they are a permissible exercise of the state's police powers and are not preempted by federal legislation. The court rejected the plaintiff's challenge, ruling that federal jurisdiction is concurrent and not exclusive, and that "[c]ongressional intent to preempt state action is far from clearly manifest, federal regulation has not occupied the field of navigation and the federal interest in navigation is not so dominant as [plaintiff] implies." *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994).

### *D. After-the-Fact Permit Denied*

The First Circuit ruled that a district court was correct in upholding the Army Corps of Engineers' decision to deny after-the-fact permits to four houseboats moored in La Parguera Bay, Puerto Rico. The houseboats are other "structures," subject to permitting requirements of section 10 of the Rivers and Harbors Act outlawing any unauthorized "obstruction" to the navigable capacity of U.S. waters. *United States v. Estate of Boothby*, 16 F.3d 19 (1st Cir. 1994).

### *E. Restoration to Natural Condition*

Wisconsin's intermediate appellate court upheld the trial court's order for a city to restore the channel of a navigable waterway that had significant fishery, wildlife, and scenic value to its natural condition after the city altered the waterway without a permit. *City of Oak Creek v. State*, 518 N.W.2d 276 (Wis. Ct. App. 1994).

### *F. Federal Navigational Servitude*

The Fifth Circuit affirmed in all respects a district court ruling that commercial fishermen are not entitled to public use of certain waterbodies in Southern Louisiana. The district court determined that the waterbodies are not subject to the federal navigational servitude because evidence showed that they are either inaccessible to the public, unsuitable as highways for travel or commerce, or were made navigable by privately

funded dredging. *Dardar v. Lafourche Realty Co.*, 55 F.3d 1082 (5th Cir. 1995).

### *G. State Navigational Servitude*

A New York state intermediate appellate court held that, under New York law, the public right of navigation within a privately owned riverbed also includes the right to fish, the right to temporarily anchor, and the right to wade in the water. However, individuals do not have a right to tie a boat to the shore or walk along the bank of the river. *Douglaston Manor, Inc. v. Bahrakis*, 639 N.Y.S.2d 613 (1996).

### *H. Disparate Fee Schedule Allowed*

The First Circuit affirmed a district court's decision allowing a fee schedule for waterway use that charged non-resident boat owners over two times more than resident boaters. The plaintiffs argued that the disparate fee violated fundamental rights and was unreasonable in its application. The First Circuit rejected these arguments and found that the schedule was enacted for the legitimate governmental purpose of dissipating the financial burden caused by out-of-state recreational boaters. *LCM Enterprises, Inc. v. Town of Dartmouth*, 14 F.3d 675 (1st Cir. 1994).

### *I. Pilotage*

The Second Circuit upheld a New York statute requiring New York state licensed pilots to be onboard vessels passing through the western portion of Long Island Sound bound for Connecticut ports. The court found that the state statute does not interfere with the Federal Boundary Waters Act, because the statute only regulates pilotage within New York territorial waters. *Ball v. Interoceanica Corp.*, 71 F.3d 73 (2d Cir. 1995), *cert. denied*, 117 S. Ct. 169 (1996).

### *J. Miscellaneous*

1. The Panama Canal Commission proposed an increase in the general toll rates for ships passing through the canal. The Canal Commission expects toll deficiencies of approximately \$2.2 million dollars for 1996, \$34.5 million in 1997 and \$69.7 million in 1998. The proposed increases intend to offset the expected shortfalls and provide revenue to replace, expand and modernize the canal. *Tolls for Use of Canal*, 61 Fed. Reg. 46,407 (1996) (to be codified at C.F.R. pt. 135) (proposed Sept. 3, 1996).
2. President Clinton signed the National Invasive Species Act of 1996 into law on October 30, 1996. The act amends the Nonindigenous Aquatic Nuisance Prevention and Control Act and intends to prevent the



further introduction and spread of nonindigenous species into U.S. waters. Nonindigenous marine species such as the zebra mussel and ruffe have had a negative effect upon a number of fish species in the great lakes and are expected to spread to other waters. The legislation acts as a preventative measure by imposing ballasting restrictions on seagoing vessels. National Invasive Species Act of 1996, Pub. L. No. 104-332, 110 Stat. 4073 (codified as amended in scattered sections of 16 U.S.C.).