

2007

A Review Of Recent Developments In Ocean And Coastal Law, 2008

Lynne Davies Editor-in-Chief
University of Maine School of Law

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

Recommended Citation

Lynne Davies Editor-in-Chief, *A Review Of Recent Developments In Ocean And Coastal Law, 2008*, 13 *Ocean & Coastal L.J.* (2007).
Available at: <http://digitalcommons.maine.law.maine.edu/oclj/vol13/iss2/9>

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

A REVIEW OF RECENT DEVELOPMENTS IN OCEAN AND COASTAL LAW

Compiled by the editorial staff of the Ocean and Coastal Law Journal

I. RECENT EMERGING CONTROVERSY WITHIN THE STATE OF MAINE

Protecting Kennebec Atlantic Salmon: Friends of Merrymeeting Bay Announce Plans to Sue the National Marine Fisheries Service and the U.S. Fish and Wildlife Service

On February 19, 2008, Friends of Merrymeeting Bay, a Maine environmental organization, announced plans to sue the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS).¹ The group intends to file suit in the U.S. District Court in Portland, Maine to compel agency action regarding a 2005 petition to list the Kennebec River population of anadromous Atlantic salmon under the Endangered Species Act (ESA).²

In 2000, NMFS and FWS listed the Atlantic salmon as endangered under the ESA.³ The listing covered wild Atlantic salmon populations from the lower Kennebec River north to the Canadian border.⁴ This listing made it a federal violation to seize salmon in the eight Maine rivers.⁵ In 2005, Friends of Merrymeeting Bay filed a petition to extend the endangered status of Atlantic salmon to the Penobscot River, the Kennebec River, and other rivers not included in the 2000 listing.⁶

1. Seth Harkness, *Group Will Sue to Protect Atlantic Salmon*, PORTLAND PRESS HERALD, Feb. 20, 2008, at B1.

2. *Id.*

3. NOAA & National Fish and Wildlife Service, *Wild Atlantic Salmon in Maine Protected as Endangered Species*, <http://www.publicaffairs.noaa.gov/releases2000/nov00/noaanfws1113.html> (last visited Mar. 28, 2008).

4. *Id.*

5. *Id.*

6. *See* Endangered and Threatened Wildlife and Plants; 90-day Finding for a Petition to List the Kennebec River Population of Anadromous Atlantic Salmon as Part of the Endangered Gulf of Maine Distinct Population Segment, 71 Fed. Reg. 66,298, 66,298-66,301 (Nov. 14, 2006).

A status review conducted by the Maine Atlantic Salmon Commission, Penobscot Indian Nation, NMFS, and FWS concluded that protection under the ESA should be extended to “all anadromous Atlantic salmon whose freshwater range occurs in the watersheds from the Androscoggin River northward along the Maine coast to the Dennys River”⁷ Furthermore, in its response to the 2005 petition, NMFS indicated that the petition contained substantial scientific information supporting a listing of the Kennebec River Atlantic salmon populations.⁸ However, neither agency has issued a final decision regarding the 2005 petition.⁹ Under the ESA, an agency is required to make a final determination on a listing within twelve months of the filing of a petition.¹⁰ Despite announcing that the agencies will be making a final decision this summer, they have missed the statutory deadline for a decision by more than a year.¹¹ Friends of Merrymeeting Bay have made it clear that if a settlement is not reached in the next sixty days, then they will pursue litigation.¹²

II. RECENT GOVERNMENTAL ACTION BEYOND MAINE

NMFS Finds No Fishery Disaster in Northeast for Groundfisherman

One of the purposes of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) is “to take immediate action to conserve and manage the fishery resources found off the coast of the United States.”¹³ During the transition towards sustainable fisheries, NMFS is authorized to determine if a “fisheries failure” has occurred within any given state’s fishery upon request by the state’s governor.¹⁴ If a fishery is found to be a “failure,” the state is entitled to relief funds.¹⁵ The decision to label a fishery as “failed” is within the discretionary power of the Secretary of Commerce (Secretary).¹⁶

7. Endangered and Threatened Species: Notice of Availability of the Status Review for Atlantic Salmon in the United States, 71 Fed. Reg. 55,431, 55,432 (Sept. 22, 2006).

8. See Endangered and Threatened Wildlife and Plants, 71 Fed. Reg. at 66,300.

9. Harkness, *supra* note 1.

10. 16 U.S.C. § 1533(b)(3)(B) (2000).

11. Harkness, *supra* note 1; see also 16 U.S.C. § 1540(g)(2)(A)(i) (2000) (stating that parties must give sixty days notice to an agency before filing suit under the ESA).

12. Harkness, *supra* note 1.

13. 16 U.S.C. § 1801(b)(1) (2000).

14. § 1861a(a)(1).

15. § 1861a(a)(2).

16. § 1861a(a)(1).

Recently, New England governors requested that the Secretary make a failure determination as to the fisheries off the coasts of Massachusetts, Maine, New Hampshire, and Rhode Island.¹⁷ If a finding of a “failure” was made, up to \$30 million in disaster aid would have been available to these states’ fisheries.¹⁸ However, the Secretary found that there is currently no fishery disaster in the Northeast for groundfisherman.¹⁹ This finding was based upon data that indicated New England was experiencing overall increases in fish stocks and increases in fishing revenue.²⁰

In response to this finding, the Senate passed a resolution stating that “the Secretary of Commerce should declare a commercial fishery failure for the groundfish fishery for Massachusetts”²¹ However, “[t]he force of the Senate resolution was not enough to convince NMFS to reconsider its ‘no failure’ finding.”²² In response to questions, NMFS stated simply that it “rejected the consideration request because the data didn’t support a determination” of failure.²³

U.S. Ratification Signals Changing Tides for Conservation Efforts

After three years of non-commitment, the United States has finally become a member of the Western and Central Pacific Fisheries Commission (Commission), a regional fisheries management organization.²⁴ In addition, the United States territories of American Samoa, Guam, and the Northern Mariana Islands were added as Participating Territories.²⁵ This marks an important commitment on the part of the United States to work together with other countries to ensure long-term conservation and sustainable use of highly migratory fish stocks in the west and central

17. Lorelei Stevens, *NMFS Denies Senate on Groundfish Disaster*, 35 COMMERCIAL FISHERIES NEWS A(1), A(1) (2008).

18. *Id.*

19. *Id.*

20. NOAA Press Release, NOAA Finds No Fishery Disaster in Northeast for Groundfisherman (Oct. 23, 2007), available at http://www.noaanews.noaa.gov/stories2007/20071022_nefisheries.html (noting that while groundfish revenue decreased, total revenue from all species rose).

21. S. Res. 376, 110th Cong. (2007) (Sen. John Kerry (D-MA) sponsored the resolution)

22. Stevens, *supra* note 17, at A(1).

23. *Id.*

24. Media Note, Office of the Spokesman for the United States Dept. of State, U.S. Joins Western and Pacific Fisheries Convention (June 28, 2007), available at <http://www.state.gov/t/pa/prs/ps/2007/jun/87537.htm>.

25. John R. Crook, *International Oceans, Environment, Health, and Aviation Law: United States Ratifies Western and Central Pacific Fisheries Convention*, 101 AM. J. INT’L L. 651, 652 (2007).

Pacific Ocean.²⁶ Although the Western and Central Pacific Fisheries Convention (Convention) did not enter into force until 2004, in 2000 the Commission began collecting signatures for its formation at the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific.²⁷ The United States did sign the initial Convention and petitioned for its creation in 2000; however, only recently has it been officially ratified.²⁸ Therewith, the United States has bound itself to follow the guidelines and other rules of the Convention.²⁹ The United States has joined thirteen other countries in ratifying the Convention, among them Australia, New Zealand, and Papua New Guinea.³⁰

By becoming a member of the Commission, the United States agrees to generally “cooperate [with the Convention] with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory fish stocks throughout their range.”³¹ Outlined in Part II, Article 5 of the Convention is a provision to ensure that all fishing actions in the Pacific region encompassed by the Commission³² “are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield”³³ Although the Commission was drafted to promote a general approach to conservation, it “focuses mainly on tuna species, [but] it also works to reduce the inadvertent catch of sea birds and sea turtles in commercial fisheries and has adopted measures to improve compliance with, and enforcement of, fisheries regulations.”³⁴

A lawyer advising tuna fisherman attempting to comply with these Convention requirements should emphasize that all fish product waste should be disposed of in a clean and safe manner. Also, a lawyer should warn such fisherman of the danger of overfishing to the point where the population would be unable to recover. The Commission has developed

26. *Id.*

27. Western and Central Pacific Fisheries Commission, Preparatory Conference, <http://www.wcpfc.int/> (follow the “prepcn” link) (last visited Apr. 10, 2008).

28. *Id.*

29. *Id.*

30. *Id.*

31. Internet Guide to International Fisheries Law: Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, <http://www.intfish.net/treaties/westpac.htm> (last visited Apr. 10, 2008).

32. Article 4 describes the extent of the geographic boundaries covered by the Convention. *Id.* art. 4.

33. *Id.* art. 5.

34. Crook, *supra* note 25, at 652.

consequences for non-compliance. Since the United States has recently become a member of the Commission, marking a new commitment to conservation of specific marine life species, this may indicate the beginning of additional treaties for similar protections in other parts of the ocean where U.S. citizens heavily fish. In summary, if this international treaty succeeds, it may signal the creation of multiple treaties of similar span and scope.

Radar Use by Navy Still Being Challenged After Executive Order

Medium frequency active (MFA) sonar works by generating underwater sound at high pressure levels.³⁵ This type of sonar is proven to be extremely effective at detecting modern diesel submarines, which, unlike their predecessors, run quietly.³⁶ In order to maintain proficiency in the use of MFA sonar, the Navy regularly uses the sonar in training missions off the coast of California.³⁷ Unfortunately, MFA sonar is extremely harmful to marine life.³⁸

Between February 2007 and January 2009, the Navy has planned a number of training exercises that involve the use of MFA sonar.³⁹ Following ESA procedures, the Navy filed an Environmental Assessment (EA) that indicated that approximately 170,000 “takes” of marine mammals would occur as a result of the training.⁴⁰ While most of the takes would be minor harassments, other mammals would experience permanent injuries to their sense of hearing.⁴¹

In 2007, environmental groups sued the Navy seeking an injunction to prevent the use of MFA sonar during navy training exercises because the projected “takes” violated the National Environmental Policy Act (NEPA), the ESA, the Administrative Procedures Act (APA), and the Coastal Zone Management Act (CZMA).⁴² The federal district court granted a preliminary injunction based on these alleged violations, and the Navy appealed.⁴³ On appeal, the Ninth Circuit remanded in order for the district court to consider mitigation measures that the Navy could be ordered to

35. Nat. Res. Def. Council, Inc. v. Winter, No. 8:07-cv-00335-FMC-FMOx, 2008 WL 158330, at *1 (C.D. Cal. Jan. 3, 2008).

36. *See id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at *2.

43. *See* Nat. Res. Def. Council, Inc. v. Winter, No. 08-55054, 2008 WL 170312, at *1 (9th Cir. Jan. 16, 2008).

implement. Following these instructions, the district court allowed the Navy operations to continue under stringent mitigating measures, including a measure providing that MFA sonar must be shutdown whenever marine mammals are spotted in the training area. Once again, the Navy took appeal, but this time the President of the United States intervened.

Citing “urgent national security reasons,” the President issued a waiver exempting the Navy from the CZMA while, at the same time, the administration’s Council on Environmental Quality approved lower mitigation measures than the district court had ordered.⁴⁴ Once again remanded, this time due to “intervening events,” the district court judge reinstated the original mitigation measures and questioned the constitutionality of the administration’s actions.⁴⁵

Lawmakers in Gambia Push to Update the Country’s Fisheries Act

On September 7, 2007, the National Assembly of the Country of Gambia approved an update to its Fisheries Act, which had previously remained unchanged since 1991.⁴⁶ Among the reasons for the update, Gambian lawmakers generally referred to the fact that the law was not attuned with modern practices of fisheries management.⁴⁷ Specifically, the lawmakers said that the old act was “obsolete and filled with gaps, thus making the management of the sector based on existing legislation ineffective and unsustainable,” and that new discoveries in techniques and technology “warrant[] the formulation of a new Act which would reflect present realities and be able to address the needs and demands of responsible fisheries exploitation and utilization commensurate with resources management and conservation.”⁴⁸ Additionally, updating the Act “is crucial in the fight against poverty and meeting the objectives of the Poverty Reduction Strategy Paper [(PRSP)].”⁴⁹

The fisheries sector is the third greatest contributor to Gambia’s gross domestic product (GDP), or about twelve percent of the GDP.⁵⁰ Its fishing

44. Jesse McKinley, *Judge Reinstates Rules on Sonar, Criticizing Bush’s Waiver for Navy*, N.Y. TIMES, Feb. 5, 2008, at A20.

45. *Id.*

46. Bubacarr K. Sowe, *New Fisheries Law Enacted*, FOROYYA NEWSPAPER, (Sept. 7, 2007), <http://allafrica.com/stories/printable/200709070919.html> (last visited Apr. 7, 2008).

47. *Id.*

48. *Id.*

49. *Id.*

50. Information on Fisheries Management in the Republic of Gambia, Present Role of Fisheries in the Nat’l Economy, <http://www.fao.org/fi/fcp/en/GMB/body.htm> (last visited Apr. 7, 2008).

areas are a unique mix of both saltwater and freshwater habitats because the country encompasses the mouth of a large river that empties into the Atlantic Ocean.⁵¹ The artisanal fisheries, which are a significant part of the fisheries of the entire country, consist of small populations of locals who catch fish out of wooden canoes for their own consumption, as well as for selling to other industrial fisheries.⁵²

The PRSP is a joint assessment by the International Monetary Fund, the International Development Association, and the Government of Gambia.⁵³ It is meant to both diagnose and monitor the poverty level of Gambia and create action plans to improve the poverty problem.⁵⁴ The report calls for a collaborative effort between the country's government agencies to organize programs (especially in the agricultural sector) to improve the economic and living conditions for citizens.⁵⁵ The response includes fisheries regulation and management with a goal of improving long-term productivity through the use of sustainable fishery management techniques.⁵⁶

Gambia relied upon the Food and Agricultural Organization of the United Nations (FAO) Code for guidance in drafting the new Fisheries Act of 2007. The Code sets out principles and international standards of behavior for responsible practices with a view to ensuring the effective conservation, management and development of living aquatic resources, with due respect for the ecosystem and biodiversity. The Code recognizes the nutritional, economic, social, environmental and cultural importance of fisheries and the interests of all those concerned with the fishery sector. The Code takes into account the biological characteristics of the resources and their environment, and the interests of consumers and other users.⁵⁷

Additional FAO Code provisions about fisheries management, which were relied upon in the new Act, state that “[c]onservation and management measures . . . should be based on the best scientific evidence available and be designed to ensure the long-term sustainability of fishery resources . . .

51. *Id.* at Location and Main Landing Places.

52. *Id.* at Artisanal Fishery.

53. *See generally* INT'L MONETARY FUND & THE INT'L DEV. ASS'N, THE GAMBIA POVERTY REDUCTION STRATEGY PAPER JOINT STAFF ASSESSMENT (2002), *available at* <http://poverty2.forumone.com/files/GambiaPRSPJSA.pdf>.

54. *Id.*

55. *Id.*

56. *Id.*

57. U.N. Food and Agriculture Organization, *Implementation of the 1995 FAO Code of Conduct for Responsible Fisheries* (1995), <http://www.fao.org/fishery/ccrf/2> (last visited Apr. 7, 2008).

[and] short term considerations should not compromise these objectives.⁵⁸ Keeping with this objective, the Gambian government wanted to reflect that new techniques should not only be followed for fisheries management, but should be mandated by law. Because the FAO goals of conservation are consistent with Gambia's dedication to improving its economy long-term, the adoption of the FAO Code in the Fisheries Act of 2007 was a harmonious pairing with the PRSP.

Gambia's efforts are interesting to study as an example of a poverty-stricken country making efforts to integrate modern fisheries management and conservation techniques into its laws. By taking a pro-conservation approach that simultaneously promotes economic improvement, this legislation shows that conservation and economic viability are not mutually exclusive goals. Drafters of new fisheries management legislation might look to Gambia's Fisheries Act of 2007 as a model for conservation-based management that promotes long-term economic growth.

III. RECENT CASES IN MAINE AND BEYOND

States May Require Permits for Flow of Rivers through Hydropower Facilities

S.D. Warren Co., the operator of a hydroelectric dam on the Presumpscot River in Maine, sought review of a Maine Board of Environmental Protection (BEP) decision approving an operator's application for water quality certification under the federal Clean Water Act (CWA) subject to certain conditions.⁵⁹ S.D. Warren argued that the mere "flow of the Presumpscot River through [their existing] dams [did] not constitute a discharge" into the river under section 401 of the CWA.⁶⁰ Affirming the decision of the Maine Law Court, the U.S. Supreme Court held that because the dam raised potential for discharge, section 401 of the CWA was triggered and state certification was required.⁶¹

The Court found that:

58. U.N. Food and Agriculture Organization, Code of Conduct for Responsible Fisheries 7.1.1 (2000), <http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm#7> (last visited Apr. 7, 2008).

59. S.D. Warren, Co. v. Me. Bd. of Env'tl. Prot., 547 U.S. 370 (2006).

60. Brief of Petitioner-Appellant at 14, S.D. Warren, Co. v. Me. Bd. of Env'tl. Prot., 547 U.S. 370 (2006) (No. 04-1527).

61. See S.D. Warren, Co. v. Me. Bd. of Env'tl. Prot., 2005 ME 27, ¶ 8, 868 A.2d 210, 214.

Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the opportunity for fishing in long stretches of river, and that the dams have prevented recreational access to and use of the river.⁶²

Based on these findings the Court, noting that "the Clean Water Act provides for a system that respects the States' concerns," held that changes in the river like these fall within a state's legislative authority.⁶³ Thus, the Court held that the State of Maine could require a permit for such discharge.

This ruling confirms states' rights to regulate dams under the CWA. Furthermore, it allows states to continue to "require fishways to insure fish passage, set minimum flow releases to prevent river beds from drying up, limit changes to pond levels to protect aquatic habitat and allow construction of boat access ramps to ensure public recreation."⁶⁴

Protecting Humpback Whales: A Hawaiian Challenge to the Prohibition of Parasailing

In *U.F.O. Chuting of Hawaii, Inc. v. Allan Smith*,⁶⁵ two parasailing companies (collectively U.F.O.) challenged a Hawaii state law that prevented commercial parasailing in certain ocean waters during specific times of the year.⁶⁶ The Hawaii law was passed to protect humpback whales that mate, bear calves, and raise their young off the coast of Hawaii.⁶⁷ U.F.O. argued that its Coast Guard license, authorizing it to carry passengers in coastwise trade under federal law, preempted Hawaii's ban on parasailing because the federal law actually conflicted with Hawaii's seasonal ban.⁶⁸

62. *S.D. Warren, Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370 at 385 (quoting *In re S.D. Warren Co.*, Maine Board of Environmental Protection (2003), in App. to Pet. for Cert. A-49).

63. *Id.*

64. ME. DEPT. OF ENVTL. PROT., MONTHLY COMPLIANCE ACTIVITY REPORT 4 (2006), <http://maine.gov/tools/whatsnew/attach.php?id=24066&an=1>.

65. 508 F.3d 1189 (9th Cir. 2007).

66. *Id.* at 1191.

67. *Id.*

68. *Id.* at 1192.

The United States District Court for the District of Hawaii granted summary judgment for Hawaii.⁶⁹ In affirming the district court, the Ninth Circuit held that summary judgment was appropriate for the state of Hawaii because “the parasailing ban is nondiscriminatory and does not impose an unreasonable burden on interstate commerce.”⁷⁰ The applicable law states that a statute is unreasonable or irrational when “the asserted benefits of the statute are in fact illusory or relate to goals that evidence an impermissible favoritism.”⁷¹ The court elaborated that the parasailing ban is facially neutral and does not distinguish between residents of Hawaii and non-residents, and therefore is a legitimate exercise of Hawaii’s police power.⁷² Moreover, the court concluded that Hawaii’s parasailing restriction only affected U.F.O. at certain times of the year and did not completely exclude U.F.O. from using its federal license.⁷³ This case was significant because it clarified Hawaii’s ability to regulate its surrounding waters despite conflicting federal regulations. The court gave considerable deference to Hawaii’s interest in protecting humpback whales and implied that this protection outweighed the inconvenience imposed on the parasailing industry.

Citizen and Judicial Review Denied: Only the U.S. Customs Service will Decide Whether to Prosecute under the Endangered Species Act

In *Salmon Spawning & Recovery Alliance, et al., v. W. Ralph Basham, et al.*,⁷⁴ the Court of International Trade (CIT) held that an environmental group did not present a justiciable controversy when it sought a declaratory judgment that Customs Service (Customs) violated the ESA.⁷⁵ Salmon Spawning & Recovery (Recovery) argued that Customs failed to perform ESA mandated duties “in connection with the importation of threatened and endangered salmon from Canada into the United States.”⁷⁶ Initially, Recovery filed suit in United States District Court for the Western District of Washington, but the action was transferred to the CIT.⁷⁷

69. *Id.*

70. *Id.* at 1196.

71. *Id.* (quoting *Alaska Airlines Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991)).

72. *Id.*

73. *Id.* at 1194.

74. 477 F. Supp. 2d 1301 (Ct. Int’l Trade 2007).

75. *Id.* at 1303.

76. *Id.*

77. *Id.* at 1306.

Prior to filing its claim, Recovery produced documents detailing the killing of endangered salmon in Canada and importation to the United States to support their claim that Customs was violating the ESA.⁷⁸ The CIT assumed that Recovery had suffered an injury in fact but nevertheless held that the discretionary “nature of Customs’ exercise of its enforcement powers” rendered the Court incapable of redressing Recovery’s claim.⁷⁹ The CIT cited to U.S. Supreme Court precedent that labeled a federal agency’s decision to prosecute as absolutely discretionary.⁸⁰ As such, it would be an unconstitutional violation of the separation of powers doctrine to hear the case in the CIT. The CIT held that “the solution does not reside in this Court.”⁸¹ This case is important because it further limits the initiation of citizen suits when environmental regulations are not enforced by federal agencies.

The Bottom-Up Style of the Magnuson-Stevens Act Controls

On December 18, 2007, the United States Court of Appeals for the D.C. Circuit reversed a summary judgment order that had been granted in favor of Secretary Gutierrez in his official capacity as Secretary of Commerce. The Circuit Court found that new fishing regulations had been enacted without the procedure required by statute.⁸²

In April 2006, a final rule was issued by the Commerce Department authorizing NMFS to set groundfish retention standards for the fishing region in the Bering Sea and Aleutian Islands.⁸³ Under the MSA 16 U.S.C. §§ 1801-1883, NMFS is authorized to set these standards.⁸⁴ However, the plaintiff, Fishing Company of Alaska, contended that NMFS added three provisions to the new rules without following required procedure.⁸⁵

The procedure for creating fishing management and enforcement regulations is outlined in Section 1853(c) of the MSA. First, a regional body made up of representatives of state governments, federal agencies, and interested constituencies proposes regulations it “deems necessary or appropriate for the purposes of . . . implementing a fishery management plan or plan amendment” and submits it to the Secretary of Commerce (via

78. *Id.*

79. *Id.* at 1307.

80. *Id.* at 1308.

81. *Id.* at 1310.

82. *Fishing Co. of Alaska, Inc. v. Gutierrez*, 510 F.3d 328, 329-30 (D.C. Cir. 2007).

83. *Id.* at 329.

84. *Id.*

85. *Id.*

NMFS).⁸⁶ Second, the Secretary of Commerce reviews the plan or amendment for consistency with the fishery management plan, the MSA, and other applicable law.⁸⁷ If the proposal is found to be inconsistent with the laws, it is returned to the regional body with proposed revisions.⁸⁸ If the proposal is consistent with the laws, it is published for comment in the Federal Register.⁸⁹ Third, the Department of Commerce consults with the regional body about any changes proposed during the comment period.⁹⁰ After this, the final rule is published.

In June 2003, the North Pacific Fishery Management Council (Council) outlined Amendment 79 to its Fisheries Management Plan.⁹¹ The proposed rule endorsed “the concept of a minimum ground fish retention standard . . . [by] impos[ing] economic disincentives on vessels with high rates of bycatch,” and called for new monitoring and enforcement measures, namely the use of certified scales onboard vessels to weigh fish and keeping observers on board to monitor bycatch.⁹² After the Council approved the outlined amendment, NMFS drafted a regulation based on the outline.⁹³ The draft included three monitoring and enforcement regulations that were not included on the Council’s outline: (1) fish from different hauls cannot be mixed in holding bins; (2) observers are to take samples of catch from a single location only with a clear line of sight between the holding bin and the scale; and (3) vessels may operate only one scale at a time.⁹⁴ The draft proposal was then published in the Federal Register without giving the Council a chance to consider the regulations that had been added by NMFS—regulations that the Council had not deemed “necessary or appropriate.”⁹⁵ Actually, the Council was not even aware of the added regulations⁹⁶ and was left with participation in the public comment period as its only recourse.⁹⁷

86. *Id.* (quoting 16 U.S.C. § 1853(c)).

87. *Id.*

88. *Id.*

89. 16 U.S.C. § 1854(b)(1)(A) (2000).

90. *Id.* § 1854(b)(3).

91. Groundfish Retention Standards, 70 Fed. Reg. 35,054, 35,055 (June 16, 2005) (to be codified at 50 C.F.R. pt. 677).

92. *Fishing Co. of Alaska*, 510 F.3d at 330.

93. *Id.* at 331.

94. *Id.*

95. *Id.* at 332.

96. *Id.*

97. *Id.* at 333.

NMFS contended that the regulations were mere clarification of the proposal submitted by the Council.⁹⁸ The U.S. Court of Appeals for the D.C. Circuit, however, found that the Council's proposal did not lack clarity; rather, it simply lacked these three additional regulations.⁹⁹ When deciding that these three additional regulations were inconsistent with the proposal, the court considered not only what the additional regulations prohibited, but also proposed regulations allowed.¹⁰⁰ Activities that were allowed under the Council's proposed regulations became unlawful under NMFS' regulations.¹⁰¹ Additionally, because the Council had not deemed these regulations "necessary or appropriate" as required by law, Secretary Gutierrez should not have deemed the regulations lawful.¹⁰²

This decision is a powerful statement about localized control of fishing regulations. The bottom-up system of regulation laid out under the MSA does not tolerate the imposition of regulations conceived by the higher-ups.

Complete Closure of a Commercial Fishery is Deemed not a Taking

In *Palmyra Seafoods, L.L.C. v. U.S.*, the Federal Court of Claims granted a motion to dismiss plaintiff's takings claim.¹⁰³ Plaintiff, Palmyra Seafoods L.L.C. (Palmyra), held a license to run a commercial fishing facility on an old naval base on Palmyra Atoll, an island located about 1,000 nautical miles south of Hawaii within the U.S. Exclusive Economic Zone.¹⁰⁴

Until late 2000, all of Palmyra Atoll was wholly owned by the Fullard-Leo family.¹⁰⁵ In 1999, the family granted a license to use the naval base, consisting of an airstrip, dock, harbor, and base camp, as a commercial fishing facility, and conveyed an exclusive sublicense to establish commercial fishing operations to Palmyra Development Company.¹⁰⁶ In 2000, Palmyra Development Company conveyed the license to Palmyra Pacific Enterprises, which in turn conveyed the license to Palmyra.¹⁰⁷

98. *Id.*

99. *Id.* at 332.

100. *Id.*

101. *Id.*

102. *Id.* at 333.

103. 80 Fed. Cl. 228, 236 (Fed. Cl. 2008).

104. *Id.* at 228.

105. *Id.* at 229.

106. *Id.*

107. *Id.*

Palmyra invested millions of dollars improving the property for use as a commercial fishing facility.¹⁰⁸

In 2000, the Fullard-Leo family sold the rest of their land on Palmyra Atoll to the Nature Conservancy, and the Navy transferred custody of nearby Kingman Reef and other surrounding reefs to the Department of the Interior.¹⁰⁹ On January 18, 2001, the Secretary of the Interior issued Order Number 3224 “designating as a National Wildlife Refuge the tidal lands, submerged lands, and waters out to a twelve nautical mile distance surrounding Palmyra and Order No. 3223 designating as a National Wildlife Refuge Kingman Reef and surrounding submerged lands and waters out to distance of twelve nautical miles.”¹¹⁰ Six days later, the Secretary of the Interior issued new regulations closing Palmyra and Kingman Reef to commercial fishing.¹¹¹ In 2003, The Nature Conservancy donated 416 acres of Palmyra Atoll to the United States for inclusion in the National Wildlife Refuge, and in 2006, added twenty-eight more acres to the gift.¹¹² It was at this time that Palmyra brought a takings claim¹¹³ in federal court contending that “prohibition on public access and on commercial fishing resulting from the Palmyra Designation [as a National Wildlife Refuge], the Kingman Designation and the related regulations” rendered the following property interests worthless: (1) Palmyra license; (2) Palmyra sublicense; (3) property improvements; and (4) the commercial fishing enterprise.¹¹⁴

First, the court held the plaintiffs’ property was not taken because the closure of the waters to commercial fishing frustrated the license and did not appropriate a contractual right.¹¹⁵ Next, the court addressed Palmyra’s evidence that the government interfered with the fishing enterprise for the purpose of favoring a competing business—The Nature Conservancy’s Eco-Tourism Camp on Palmyra Atoll.¹¹⁶ Here, it expressed concern with the apparent inappropriateness in the government’s dealings with The Nature Conservancy, but, nevertheless, found only that Palmyra’s contract

108. *Id.*

109. *Id.*

110. *Id.*

111. Establishment of the Kingman Reef National Wildlife Refuge, 66 Fed. Reg. 7660 (Jan. 24, 2001).

112. *Palmyra Pacific Seafoods, L.L.C.*, 80 Fed. Cl. at 229.

113. *Id.* at 231. A takings claim consists of two parts: one is property, the other is taking of that property by the government. *Id.*

114. *Id.* at 229.

115. *Id.*

116. *Id.* at 234.

was frustrated, not appropriated.¹¹⁷ Indeed, the contract could be appropriated if kept alive for government use, which was not the case here.¹¹⁸ The court explained: “[i]f a contract or other property is taken for public use, the government is liable; but if injured or destroyed by lawful action, without a taking, the government is not liable.”¹¹⁹ Thus, this holding that a plaintiff’s claim was not sufficient to support a takings claim under the Fifth Amendment presents a chilling message to those considering major investment in commercial fishing facilities: watch out, the rules can change quickly.

Challenging the Delegation of the EPA’s Permit Power

The National Pollution Discharge Elimination System (NPDES) was created by the Clean Water Act of 1972¹²⁰ and was designed to help protect the U.S. waters from pollution.¹²¹ The Environmental Protection Agency (EPA) oversees the necessary permitting program under the NPDES unless a state applies to transfer this authority to state officials.¹²² Even if a state takes over the permitting process, however, the EPA continues to exercise oversight.¹²³ Under Section 402(b) of the Clean Water Act (CWA), the EPA is required to transfer permitting powers when nine criterion are met.¹²⁴ These criterion are meant to ensure that the state agency overseeing the permitting process has sufficient powers under state law.¹²⁵ At the same time, Section 7(a)(2) of the ESA¹²⁶ requires federal agencies to take steps to ensure that their actions do not threaten endangered species.¹²⁷

Here, Arizona applied to take over its NPDES permitting program.¹²⁸ The EPA discussed the transfer with the FWS to determine if any endangered species were or would be threatened.¹²⁹ While the FWS did not identify any specific species, it expressed general concern that some species could be threatened due to increased development resulting from the

117. *Id.* at 234-35.

118. *Id.* at 235.

119. *Omnia Commercial Co., Inc. v. United States*, 261 U.S. 502, 510 (1923).

120. 33 U.S.C. §§ 1251-1274 (2000).

121. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2525 (2007).

122. *Id.*

123. *Id.*

124. *Nat’l Ass’n of Home Builders*, 127 S.Ct. at 2525.

125. *Id.*

126. 16 U.S.C. §§ 1531-1544 (2000).

127. *National Ass’n of Home Builders*, 127 S.Ct. at 2525-26.

128. *Id.* at 2527.

129. *Id.*

permitting power transfer.¹³⁰ The EPA approved the transfer, specifically acknowledging, however, that it was bound to do so under Section 402(b) and could not consider any factors beyond those nine specified in the statute.¹³¹

The Ninth Circuit Court of Appeals reversed the EPA's decision, finding that the EPA's decision was "arbitrary and capricious" because it did not understand its obligations under the ESA.¹³² The court found that even though Arizona had met all nine criterion for a successful petition, Section 7(a)(2) of the ESA created an additional general requirement (extending to any agency decision) "to attend to [the] protection of the listed species," and the EPA failed to consider this additional requirement.¹³³ Because the Ninth Circuit's interpretation of Section 7(a)(2) conflicted with other Court of Appeals decisions, the U.S. Supreme Court granted certiorari to address this split.¹³⁴

Writing for the majority, Justice Alito reversed the Ninth Circuit's finding that the EPA's decision was arbitrary and capricious.¹³⁵ Alito framed the primary issue in question as whether the ESA functions as an additional criterion needed to require permitting power under the CWA.¹³⁶ Thereafter, the Court found that Section 402(b) of the CWA includes a mandatory requirement that the EPA approve a transfer application if the nine criterion are met.¹³⁷ The Court elaborated that "[b]y its terms, the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application."¹³⁸ The ESA, in turn, includes a mandatory requirement under Section 7(a)(2) that agencies ensure their actions will not endanger protected species.¹³⁹ "[I]t would effectively repeal the mandatory and exclusive list of criteria set forth in section 402(b), and replace it with a new, expanded list that includes section 7(a)(2)'s no-jeopardy requirement."¹⁴⁰

The Court concluded that while there is precedent for a newer statute, like the EPA, to effectively amend, repeal, or implicitly repeal an earlier

130. *Id.*

131. *Id.*

132. *Id.* at 2528.

133. *Id.*

134. *Id.* at 2529.

135. *Id.* at 2529-30.

136. *Id.* at 2525.

137. *Id.* at 2531.

138. *Id.* at 2531.

139. *Id.* at 2532.

140. *Id.*

statute, like the CWA, such an implicit repeal is not preferred.¹⁴¹ Otherwise, the effect would be particularly significant: a change of the “statutory mandate” in Section 402(b) of the CWA.¹⁴² Thus, the Court found that the CWA permitting process was not discretionary, but mandatory under the statute.¹⁴³ Ultimately, the majority held that the ESA does not create additional criteria requiring transfer of permitting powers under the CWA.¹⁴⁴ Thus, the Court remanded the matter for further proceedings.¹⁴⁵

Dissenting, Justice Stevens (joined by Justices Souter, Ginsberg, and Breyer) stated, that the majority’s limitation of Section 7(a)(2) to discretionary matters was incorrect because it is inconsistent with both the ESA and the regulations promulgated under Section 402.03 of the Code of Federal Regulations.¹⁴⁶ The dissent pointed out that the Court had held previously that the ESA applies to all decisions made by federal agencies and that it was not limited to discretionary decisions.¹⁴⁷ Also, the dissent relied upon the plain language of Section 402.03, which it felt did not support a limitation of the ESA to discretionary matters.¹⁴⁸ The dissent argued that the ESA does not create a tenth requirement for the CWA permitting process transfer; rather the ESA should encourage a collaborative consultation process when it conflicts with an agency’s responsibilities: “the consultation process would generate an alternative course of action whereby the transfer could still take place—as required by section 402(b) of the CWA—but in such a way that would honor the mandatory requirements of section 7(a)(2) of the ESA.”¹⁴⁹

The majority’s restriction of the ESA to the NPDES permitting process under the CWA may lead to further restrictions on the application of the ESA to pollution control mechanisms in the CWA. In addition, such restrictions may have a detrimental effect on protected species in coastal waterways.

141. *Id.*

142. *Id.* at 2532-33.

143. *Id.* at 2536.

144. *Id.* at 2525.

145. *Id.* at 2538.

146. *Id.* See also 50 C.F.R. § 402.03 (2006).

147. *Nat’l Ass’n of Home Builders*, 127 S.Ct. at 2540.

148. *Id.* at 2541-42.

149. *Id.* at 2546.

*International Court of Justice to Delimitate
Pacific Ocean Maritime Zone*

Peru has instituted proceedings against Chile in the International Court of Justice (ICJ) to establish a specific maritime boundary delimitation between the two countries.¹⁵⁰ Peru asserts that the location in dispute ought to be under the sovereign control of Peru because it falls within 200 nautical miles of the Peruvian coast and outside Chile's exclusive economic zone.¹⁵¹ Chile, however, refuses to recognize Peru's claim to the area and instead argues that this area is part of the high seas, and therefore not subject to sovereignty under the Treaty between Chile and Peru.¹⁵² Peru is advocating for the ICJ to determine this dispute's outcome using customary international law because the maritime zones between the two countries have never been delimited by a court, government, or agreement.¹⁵³ Furthermore, Peru asserts that the ICJ has jurisdiction over this matter pursuant to Article XXXI of the 1948 American Treaty on Pacific Settlement, to which both countries are signatories without reservation.¹⁵⁴

*Australian Court Issues Restraining Order against
Japanese Whaling Company*

A federal court in Australia recently made findings that Kyodo Senpaku Kaisha Ltd., a Japanese whaling company, killed and injured Antarctic minke whales, fin whales, and humpback whales in the Australian Whale Sanctuary in violation of the Environment Protection and Biodiversity Conservation Act of 1999 (EPBCA).¹⁵⁵ The court issued a restraining order against the company to prevent further killings, unless permitted or authorized under Sections 231, 232 or 238 of the EPBCA.¹⁵⁶

The effect of the court's ruling remains to be seen because the 'whale sanctuary' has limited standing in international law and is located in an exclusive economic zone which, while claimed by Australia, is recognized

150. Press Release, Int'l Court of Just., Peru Institutes Proceedings Against Chile with Regard to a Dispute Concerning Maritime Delineation Between the Two States (Jan. 16, 2008), available at <http://www.icj-icj.org/docket/files/137/14387.pdf>.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Humane Soc'y Int'l, Inc. v. Kyodo Senpaku Kaisha, Ltd.* [2008] F.C.A. 36, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2008/36/html.

156. *Id.*

by just four other nations: New Zealand, Britain, Norway and France.”¹⁵⁷ Also, it appears that the ruling may have a lasting impact on diplomatic agreements between the countries.¹⁵⁸

IV. RECENT BOOK REVIEWS

Bruce Barcott, *In the Shadow of Moby Dick*, THE NEW YORK TIMES, July 29, 2007 (reviewing ERIC JAY DOLIN, *LEVIATHAN: THE HISTORY OF WHALING IN AMERICA* (2007)).

Leviathan: The History of Whaling in America gives a rich and detailed history of whaling in America, arguing that much of America’s culture, spirit, and economy came from the whaling industry. The book begins in 1540, and details the ways in which the whaling industry developed from drift whaling, combing for whale carcasses on beaches, to the golden age of whaling in 1812, when month long whaling expeditions with large ships were common. During this time America dominated the whaling industry, and in 1846, 735 of the world’s 900 whaling ships belonged to America. Eventually, the American whaling industry was decimated by the gold rush in California and the discovery of crude oil in 1859, which replaced whale oil as America’s primary fuel source. This change most likely saved much of the whale population from extinction.

Dolin presents his book as a detailed historical account of American whaling, and makes no attempt to pass moral judgment on the whaling industry. The book gives a snapshot into the harsh reality of life aboard a whaling ship, and analyzes the whale-oil trade. While the book has been criticized for providing too much detail, it does provide a unique historical and objective look at the whaling industry in America.

Ken Collins, *Prescient Marine Champion*, 450 NATURE 350 (2007). (reviewing JACQUES COUSTEAU & SUSAN SCHIEFELBEIN, *THE HUMAN, THE ORCHID, AND THE OCTOPUS: EXPLORING AND CONSERVING OUR NATURAL WORLD* (2007)).

Jacques Cousteau is cited by many marine scientists as an inspiration, and is considered to be a pioneer in protecting the seas from human harm. The book *The Human, the Orchid, and the Octopus: Exploring and Con-*

157. Piers Akerman, *Whaling Can Cut It*, SUNDAY TIMES (W. Austl.), Jan. 20, 2008, at Sec. 1.

158. See Blain Harden, *A Clash of Views On Whale-Loving; Creature Is a Delicacy in Japan, a Cause in the West*, WASH. POST, Jan 26, 2008, at A10.

servicing Our Natural World, in English for the first time, gives unprecedented insight into the development of Cousteau's views on conserving the marine environment. The book contains stories of his underwater exploration that serve as a backdrop for Cousteau's focus on environmental issues, and his philosophy on conservation. Cousteau began his campaign to conserve the marine environment in 1960, publically renouncing spear fishing. Moreover, Cousteau is considered the driving force behind the Madrid Protocol, which protects the Antarctic continent.

Although the book was originally written over ten years ago, Cousteau's focus on conserving shallow coastal waters, and his concern for overfishing ensure that this book remains relevant today.

David A. Colson & Brian J. Vohrer, *Book Review*, 101 AM. J. INT'L L. 534 (2007) (reviewing MARITIME DELIMITATION (Rainer Lagoni & Daniel Vignes eds., 2006)).

In September 2004, the International Tribunal for the Law of the Sea (ITLOS) hosted a symposium on maritime delimitation in which more than 160 experts on the law of the sea participated.¹⁵⁹ *Maritime Delimitation* is a collection of twelve essays that were originally presented at the symposium. The essays were written by eminent professionals and scholars in the law of the sea, including tribunal judges.

The essays can be divided into three categories. The first category is comprised of essays that examine aspects of the compulsory binding dispute-settlement procedures of the United Nations Convention on Law of the Sea (UNCLOS) as they relate to maritime boundaries. Specifically, these essays examine the development of international jurisprudence on maritime delimitation, the application of UNCLOS dispute-settlement mechanisms to maritime delimitations, the similarities and differences between the statutes, rules, and practices of the ICJ and those of ITLOS, and, finally, the policy decisions UNCLOS States have made regarding the body to exercise jurisdiction over delimitation disputes, and the breadth of that jurisdiction.

The second group of essays describes the issues that arise in the negotiation and adjudication of state maritime boundaries. These essays appraise the role of geographical expertise in boundary delimitations, the

159. International Foundation for the Law of the Sea, *Events*, <http://www.iflos.org/e/?cmd=100#13> (last visited Apr. 4, 2008). The symposium was organized by the International Foundation for the Law of the Sea in cooperation with the Law of the Sea and Maritime Law Institute, University of Hamburg, the Association du Droit de la Mer, and the Bucarius Law School. *Id.*

considerations in preparing a maritime-boundary case for litigation, the negotiation of maritime-boundary agreements, and the potential use of alternatives to such agreements, specifically with joint-development zones.

The final set of essays considers state practices related to maritime-boundary delimitation. The essays discuss past and present maritime-boundary delimitation disputes in the Caribbean and Adriatic Seas. The final essay explores whether there are international rules to govern the extension of existing boundaries to create new maritime zones.

This work is useful and informative to those unfamiliar with maritime law, as well as to those who specialize in it. While some of the essays have been criticized as largely restatements of other research and writing in this area, other essays have been commended for their novel ideas and contributions. Overall, *Maritime Delimitation* receives positive and enthusiastic reviews for its wide ranging subject matter and detailed commentary.

H.E. Judge Anderson, *Book Review*, 10 SING. Y.B. INT'L L. 373 (2006) (reviewing ZOU KEYUAN, *LAW OF THE SEA IN EAST ASIA: ISSUES AND PROSPECTS* (2005)).

East Asia's recent political and economic rise has increased its significance in today's world affairs. Despite the close proximity of major states in this region—often separated by narrow waters or the partially-enclosed seas of the Pacific Ocean—the maritime boundaries of these states remain largely undefined. Most East Asian nations have ratified UNCLOS and follow the Convention's laws and practices as they relate to regulation of fisheries, off-shore natural resources, security issues, protection of the environment, and international shipping. However, the jurisdictional maritime boundaries of these states remain contested.

The purpose of *Law of the Sea in East Asia: Issues and Prospects* is to educate readers on maritime issues in East Asia and to propose possible solutions to these matters under international law. The work is comprised of ten essays written by Zou Keyuan, a preeminent scholar on East Asia and the law of the sea, and were originally published individually in various scholarly journals. The essays examine the role of UNCLOS and state compliance with its laws, current sovereignty and boundary disputes, fishery management problems, safety of navigation and maritime security issues, and Chinese practice related to its historical maritime claims. Keyuan calls for increased cooperation by the East Asian states in the settlement of the maritime disputes.

The work has received praise for its broad range of topics and its use of materials written in both Chinese and English. For example, Keyuan includes his English translations of the fishery agreements between China

and Japan and between China and Vietnam. However, the work has been criticized for focusing on China and its neighbors, rather than providing a more thorough study of the complete East Asian region. Despite its concentration on China, the author is commended for his ability to interpret Chinese law and explain the nation's history and thinking, while applying international concepts.

V. RECENT PUBLICATIONS DISCUSSING TRANSNATIONAL SCARCITY ISSUES

Europe's Appetite Contributes to Illegal Fishing

Europe's growing appetite for fish has made the European fish market worth about \$22 billion a year.¹⁶⁰ The supply of fish from within the region has been unable to keep pace with the booming demand. Consequently, Europe must now import sixty percent of all fish it consumes.¹⁶¹

As prices for fish have doubled and tripled, illegal fishing, which has emerged to supply Europe's demand, has become lucrative with an estimated annual worth of \$1.6 billion.¹⁶² Some groups such as World Wide Fund for Nature believe that fifty percent of the fish sold in Europe have been "laundered like contraband" from developing nations, "caught and shipped illegally beyond the limits of government quotas or treaties."¹⁶³ As the market for fish has become global, it is increasingly difficult to track the origin of fish and enforce catch quotas.¹⁶⁴ Moreover, it is difficult to account for the legality of fish sold in the European Union from the territorial waters of developing countries because these countries typically have fewer resources to dedicate to the enforcement of catch quotas and treaties.¹⁶⁵

160. Elisabeth Rosenthal, *In Europe, the Catch of the Day Is Often Illegal*, N.Y. TIMES, Jan. 15, 2008, at A1. In 2004, the total value of exported fish and fish products was \$71.5 billion. United Nations Food and Agricultural Administration, *Fact Sheet: The International Fish Trade and World Fisheries* (2006), available at <http://www.fao.org/newsroom/common/ecg/1000301/en/enfactsheet2.pdf>.

161. Rosenthal, *supra* note 160; United Nations and Agricultural Administration, *supra* note 160.

162. Rosenthal, *supra* note 160. Greenpeace estimates that \$4 billion is lost each year from illegal fishing. Greenpeace USA, *Pirate Fishing*, <http://www.greenpeace.org/usa/campaigns/oceans/threats/pirate-fishing> (last visited Apr. 4, 2008).

163. Rosenthal, *supra* note 160.

164. *Id.*

165. *Id.* See United Nations Food and Agricultural Administration, *supra* note 160. The waters of Northwest Africa have been overfished by European, Chinese, and Russian fleets

Challenges to enforcement are further compounded by the fact that many commercial fishing boats fly flags of convenience from other nations and “stay at sea for years at a time, fishing, fueling, changing crews and unloading their catches to refrigerated boats at sea.”¹⁶⁶ This has led groups, such as the Environmental Justice Foundation and Greenpeace, to criticize loopholes in international law that only allow countries where the boats are registered to monitor and discipline illegal activities.¹⁶⁷ Commercial fishing boats flying flags from landlocked countries can act with impunity because these countries do little in the way of monitoring or punishing illegal fishing.¹⁶⁸

In the near future, improving the enforcement of catch quotas and international treaties is unlikely. However, nonprofit groups like the Marine Stewardship Council (Stewardship) have developed international fishery certification programs that assess and approve fish species taken from sustainable fisheries.¹⁶⁹ Thus, consumers purchasing fish at stores like Wal-Mart have the option of purchasing Stewardship-approved fish, which provides them with assurances that they are dining on a certified sustainable fish.¹⁷⁰ Developing more conscientious appetites among consumers may provide the financial incentives that will drive enforcement of sustainable fishing practices.

*Acknowledging & Advocating the Protection of our Disappearing
Marine Resources*

Naturally functioning marine ecosystems are becoming ever more scarce, yet mankind is loathe to acknowledge, or simply does not appre-

thereby destroying the coastal economies of these countries. *Fishing Until All the Fish are Gone*, INT’L HERALD TRIB., Jan. 21, 2008, available at <http://www.iht.com/articles/2008/01/21/opinion/edfish.php>.

166. Rosenthal, *supra* note 160; see generally, Food and Agriculture Organization of the United Nations, *FAO Newsroom: Illegal Fishing and High-Seas Fisheries*, http://www.fao.org/newsroom/en/focus/2004/47127/article_47140en.html (last visited Apr. 4, 2008).

167. Rosenthal, *supra* note 160; see Food and Agriculture Organization of the United Nations, *supra* note 166.

168. Rosenthal, *supra* note 160; see Food and Agriculture Organization of the United Nations, *supra* note 166.

169. Elisabeth Rosenthal, *A Favorite Meal, Now Offering a Side Order of Environmental Awareness*, N.Y. TIMES, Jan. 15, 2008, at A6; MARINE STEWARDSHIP COUNCIL, Annual Report 2006/07 7 (2007) available at http://www.msc.org/assets/docs/MSC_Annual_report_2006-07_EN.pdf.

170. *Id.*

ciate, the increasing scarcity of marine resources.¹⁷¹ Marine “scarcities generally are not (yet) perceived because the signals of scarcity either do not exist or are not effectively translated from particular disciplines into the public decision-making arena.”¹⁷² This extremely interesting article, argues that the public’s perception of scarcity is impeding political action to protect marine resource, and advocates the creation “of new markets for imaginary needs” in order to change patterns of public consumption of marine resources.¹⁷³

These “imaginary needs,” explains the author, can be achieved in the form of lifestyle value.¹⁷⁴ Lifestyle value can be defined as the value that attaches to tourism activities, such as snorkeling and whale watching. This article proposes increasing the public perception that marine resources are indeed scarce, while simultaneously promoting the lifestyle value of visiting and experiencing these scarce resources. This will “offer the public concrete choices and create competition between traditional commodities users and the new amenities users, making increased preservation of marine ecosystems,” both politically viable and economically efficient.¹⁷⁵ Scarcity, argues the author, is the key concept; when the public acknowledges that marine resources are disappearing, the “imaginary need” to experience them increases, and thus provides incentives for endorsing political protection.

VI. RECENT ARTICLES WORTH NOTING

Donald Kennedy, *Year of the Reef*, SCIENCE, Dec. 14, 2007, at 1695. The world’s coral reefs are in serious decline. The ocean’s temperatures and its acidity have been significantly affected by climate change and an increase in levels of carbon dioxide and other greenhouse gases being absorbed by the oceans. The effects of these changes on coral reefs, such as heat bleaching and degradation of the carbonate structure of reefs, is threatening the health and survival of a vital marine ecosystem. Decades of unmanaged and unsustainable harvesting practices have decimated coral populations. In light of the ever-increasing threat to coral reefs, reef protection is becoming a top priority of environmental organizations and people around the world. As a result, 2008 has been declared the “Inter-

171. Robin Kundis Craig, *Valuing Coastal and Ocean Ecosystem Services: The Paradox of Scarcity for Marine Resources Commodities and the Potential Role of Lifestyle Value Competition*, 22 J. LAND USE & ENVTL. L. 355, 407 (2007).

172. *Id.*

173. *Id.* at 409.

174. *Id.*

175. *Id.* at 410.

national Year of the Reef.” This editorial introduction highlights recent legislation and international efforts aimed at protecting coral reefs. Additional articles explore the mysteries of coral reproduction, the effect of over-fishing on reef dwelling predators, and the effects of climate change and ocean acidification on coral.¹⁷⁶

Lucy Wiggins, *Existing Legal Mechanisms to Address Oceanic Impacts From Climate Change*, 7 SUSTAINABLE DEV. L. & POL’Y 22 (2007). This article considers three international treaties—the Convention Concerning the Protection of the World Cultural and Natural Heritage, UNCLOS, and the Convention of Biological Diversity—each of which expresses a purpose of curbing greenhouse gas emissions in an effort to protect the ocean and its inhabitants from the effects of climate change. The author identifies deficiencies in the three treaties, focusing largely on their limited scopes, and proposes that they be amended to allow for the multilateral establishment of marine protected areas on the high seas. This approach, though not easily implemented, would establish a single system that would provide maximum protection to marine life.

Ann Powers, *Farming the Ocean*, 22 NAT. RESOURCES & ENV’T 45 (2007). An increasing demand for fish coupled with a decreasing wildlife supply has led to increased global attention to aquaculture¹⁷⁷ and mariculture.¹⁷⁸ While fish farming may boost stocks, it is accompanied by harmful effects on the marine environment, such as destruction of important habitats like mangroves, damage to coral reefs, and contamination of ocean waters. This article discusses the environmental impacts of ocean farming. Also, discussed are the national aquaculture regulations currently in place under the CWA and international regulations under UNCLOS. Ultimately the regulations were found inadequate in addressing environmental costs. The author concludes that future legislation governing the expanding aquaculture industry must address and regulate the negative ecological effects on the marine environment.

Shellfish Desires, ECONOMIST, Dec. 8, 2007, at 8. Trawling by dredging, a practice widely used by commercial fishers to harvest bottom

176. See, e.g., Elizabeth Pennisi, *Spawning for a Better Life*, 318 SCIENCE 1712 (2007); Christopher Pala, *Life on the Mean Reefs*, 318 SCIENCE 1711 (2007); O. Hoegh-Guldberg et al., *Coral Reefs Under Rapid Climate Change and Ocean Acidification*, 318 SCIENCE 1737 (2007).

177. Aquaculture is the cultivation of aquatic organisms.

178. Mariculture is the cultivation of ocean species.

dwelling fish, crustaceans, and mollusks, destroys sensitive benzoic zone ecosystems and indiscriminately “catches” whatever is dredged up from the ocean floor. Because much of the rapid declines in the world’s fish stocks are attributable to destruction of marine ecosystems, development of a safer method for trawling is essential to the future vitality of both the marine floor ecosystem and fish populations. Cliff Goudey of the Massachusetts Institute of Technology recently unveiled an alternative to the traditional dredging device used for bottom trawling. Goudey’s device, designed for scallop trawling, uses hemispheric scoops that push water downward as they are pulled through the water just above the ocean floor. The pressure dislodges the scallops while leaving the rest of the sea floor intact. Furthermore, the scoops move out of the way when they encounter anything solid, preserving vegetation, corals, and geologic formations extending upward from the ocean floor. There is a benefit to the fishermen too; it takes less effort to use Goudey’s device than the traditional dredge device. Although Goudey’s invention is still being tested, the results look promising.

Scott C. Matulich et al., *Policy Formulation Versus Policy Implementation Under the Magnuson-Stevens Fishery Conservation and Management Act: Insight From the North Pacific Crab Rationalization*, 34 B.C. ENVTL. AFF. L. REV. 239 (2007). There is never total peace when it comes to bureaucracy. But there appears to be more than the usual amount of disagreement when it comes to the Regional Fishery Management Councils, created by the MSA and NMFS. In short, the MSA is a law that allows for greater local control of fishing policies by setting up local councils that create local fishing regulations and policies. Their local character, in theory, allows the councils to create these policies with a better sense of what works best for local fisherman. NMFS is the overlying central regulatory body that is charged with drafting overall regulations and implementing the policies that are set forth by the local councils.

However, in the case of the North Pacific Council and their proposed policy driven regulations, which allowed certain crab quotas to be shared among groups of fishermen to promote efficient distribution, NMFS did not help their cause. NMFS drafted a regulation that in effect negated the whole policy decision of the council, which limited the sharing of fishing quotas by fishing cooperatives. Even though the regulation was later overturned due to complaints from other departments, the issue still remains that the regulatory scheme of the MSA is open to serious abuse by other departments. These departmental abuses can undermine local policy decisions. As such, a practicing lawyer in this area trying to convince the local council to adopt a certain fishing policy should be aware of this pitfall, and alert all agencies in a unilateral effort to make sure there is no

confusion in any department about the overall goal of proposed regulations. This way, mistakes, as outlined in this article, will be avoided. The authors of this article suggest that the solution to this problem is to place an underlying policy statement for each council decision at the beginning of all NMFS regulations. By adopting such a procedure, the chances of conflict are lowered.

Michael B Walsh, *A Rising Tide in Renewable Energy: The Future of Tidal In-Stream Energy Conversion (TISEC)*, 19 VILL. ENVTL. L.J. 193 (2008). This article discusses the TISEC system, a new clean energy alternative that has been attracting attention in recent years. These machines are a unique and arguably more environmentally safe energy option than other traditional “green” forms of energy, such as conventional hydropower, wind mill power, solar power, and tidal barrage power plants. This is because TISEC eliminates the need for large tracts of land on which to build power plants, and is a “free-flow” technology. Instead of storing potential energy by artificially damming up a body of water, the TISEC turbine sits in the natural tidal pool and the generator spins as the tide goes in and out. One major legal hurdle that had to be overcome to bring this technology into production, first by Verdant Power in the East River in New York City, was to gain the approval of the Federal Energy Regulatory Commission (FERC). The technology was approved for operation only because of a special case-by-case evaluation exception given by FERC, based in large part on a policy decision to encourage the development of new environmentally friendly technology, even if it did not meet all current regulations. In the future, this perceived leniency of FERC could expand to other areas of power supplies.

A lawyer responsible for gaining FERC approval in this area could use this case as precedent. Getting FERC approval in the hydropower area is an uphill battle for new technologies because the system as currently constructed is meant only to deal with traditional hydroelectric power technology. Nevertheless, due to new fast track licensing processes for new technology, and a new strict scrutiny approach to all new applications, FERC is making strides, as this TISEC situation shows, to make it easier for “greener” energy technology to gain federal approval and go into circulation.

Press Release, NOAA, Researchers Use Background Radiocarbon to Find Fish Ages (Feb. 1, 2008), <http://www.fakr.noaa.gov/newsrelease/2008/radiocarbon020108.htm>. Scientists collecting information to use in fishery stock assessment and management typically determine the age of fish by counting annual growth rings found in fish ear bones, which are also

known as otoliths. Researchers at NOAA's Alaska Fisheries Science Center have developed a method for confirming the ages of fish using trace radiocarbon (C-14) from Cold War era nuclear bombs. Scientists have used the half-life of C-14 to create benchmark values for each year. Extracted otolith centers (bones that develop during a fish's first year of life) are sent to The National Ocean Sciences Accelerator Mass Spectrometry Facility at the Woods Hole Oceanographic Institute, where the amount of C-14 in the bone is measured. This measurement has proven to be a precise method for confirming a fish's age and is applicable to many species of fish. The Alaska Fisheries Science Center has a collection of otoliths from more than one million fish specimens. Scientists there age more than 30,000 specimens of twenty different species of fish each year as they gather data used in assessment and management of fishery stocks.

NOAA's Undersea Research Program, Hudson Canyon AUV Cruise (Oct. 10, 2007), <http://www.nurp.noaa.gov/News/HT101007.htm>. Hudson Canyon is the largest underwater canyon on the continental margin of the United States. The head of this canyon has been declared a Habitat Area of Particular Concern by the New England Fisheries Management Council, because it contains essential habitat for lobster, long-fin squid, hake, and sea bass, species important to commercial and recreational fisheries. In August 2007, a team of scientists from the NOAA Undersea Research Program at Rutgers University, the NOAA National Institute for Undersea Science and Technology, and the University of North Carolina at Wilmington completed the first close-up exploration of the head of Hudson Canyon using the autonomous underwater vehicle, Eagle Ray. This project mapped depths and habitats in portions of the canyon and collected data about physical qualities of the water column, giving clues as to the composition of the sediments and presence of dissolved gas hydrates under the canyon. Currents in the canyon, which carry nutrients necessary to support the undersea ecosystem, were also studied.

Blain Harden, *Whales a Cause in the West, a Delicacy in Japan*, WASH. POST, Jan. 26, 2008, at A.10. Japanese fleets have been hunting whales in the Southern Ocean for many years. This year, however, has brought renewed conflict over the practice. While the program is officially conducted in the name of science, the Australian government and some environmental groups argue that the hunt is truly conducted as a commercial whale-meat harvest. Adding fuel to the fire, the Australian government, which claims part of the Antarctic as their own, recently created a whale sanctuary in some of the waters where whales are being harvested. Japan has refused

to recognize Australia's claim or the legality of the sanctuary, and is in the process of harvesting more than 800 minke and 50 fin whales.

Pete Thomas, *Killer Whales Seem to be Moving Farther South*, L.A. TIMES, Feb. 1, 2008, at D.13. Recently, off the coast of California, about forty killer whales were sighted by a whale-watching ship further south than killer whales have ever been spotted. The sighting of these whales so far south concerns scientists who believe this is an indication that the killer whale's food source, salmon, has become scarcer in the whale's usual feeding grounds. The concern over the killer whale's food source has prompted calls for a ban on commercial salmon fishing. Currently, there are believed to be only eighty-eight killer whales in existence, down from ninety-seven twelve years ago.

Capt. James Mize, *Protecting California's Coastal Communities: Four Models of Public Interest Lawyering*, 30 ENVIRONS ENVTL. L. & POL'Y J. 199 (2007). This article considers four different approaches to public-interest lawyering in California as they relate to protecting ocean and coastal resources. To illustrate the different policies and their efficacy, an analysis is undertaken of the strategies employed by four organizations: Earthjustice, The Oceans Conservancy, Surfrider Foundation, and United Anglers of Southern California.¹⁷⁹ Because each organization has a very different background, the strategies employed to realize organization goals vary greatly. Nevertheless, despite coming from very different places, each group seeks to protect marine resources. By weighing the costs and benefits of each organizations's varied legal tactics, the article highlights effective ways that the law is used to preserve the lore of fishing communities, while also protecting some specific communities from disappearing from California's culture. Legal strategies include introducing legislation, litigation, community organizing and advocacy, and legally assisting those directly involved in coastal communities. After a careful analysis of how different organizations utilize these strategies to protect marine resources, this article concludes that community organizing is the most effective legal strategy to protect California's fishing communities. A community organizer, who is armed with legal knowledge and skill, should

179. See Earthjustice, Oceans, <http://www.earthjustice.org/program/oceans> (last visited Mar. 25, 2008); Surfrider Foundation, Surfrider Foundation Mission and Principles, <http://www.surfrider.org/whoweare2.asp> (last visited Mar. 25, 2008); The Oceans Conservancy, About Us, http://www.oceansconservancy.org/site/PageServer?pagename=abt_aboutus (last visited Mar. 25, 2008).

have a strong position when working directly with disadvantaged fishing communities to protect California's fishing resources.

Christopher Mark Macneill, *Gaining Command & Control of the Northwest Passage: Strait Talk on Sovereignty*, 34 *TRANSP. L.J.* 355 (2007). As Arctic resources become more accessible due to melting ice caps, both the United States and Canada have strengthened their efforts to secure access to the region. The Northwest Passage is the primary route to Alaska for the United States. Canada has long claimed that the Northwest Passage is its sovereign territory. However, the United States contends that it has the right to innocent passage under the freedom of the seas principle because the Northwest Passage is actually a body of international water. Due to a recent dispute over an American vessel's course through the passage, Canada has increased efforts to strengthen its sovereignty claim. Canada has tried to extend, based on ecological principles, its straight baselines to include several island formations. It has also influenced treatment by UNCLOS of Article 234, which allows special state powers to protect the ecology of Arctic regions. This note explores the legal basis for Canadian sovereignty claims in contrast to the right to innocent passage maintained by the United States. The author concludes that the legal principles are inconclusive, but points out that any sovereignty gained by Canada would be subject to considerable restraints and perhaps an obligation to allow the United States free passage.

Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal is "Best"?*, 102 *NW. U. L. REV.* 123 (2007). This note is a survey of legislative proposals before Congress to reduce greenhouse gases. The author identifies and resolves policy decisions underlying these proposals. The note begins by identifying the goals of climate change policy. Next, the author attempts to compare the effectiveness of these legislative proposals by considering their ability to accomplish the goals of climate change policy. Concluding that none of the proposals, in their current form, adequately meet the best options for the identified policy decisions, the author makes several suggestions for amendments that would resolve these weaknesses.