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A Review Of Developments In Ocean And Coastal Law 1998-1999

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A REVIEW OF DEVELOPMENTS IN OCEAN AND COASTAL LAW 1998–1999

Jeffrey T. Scrimo,* Paul F. Foley,* Michelle Baldwin,** Elizabeth C. Davis,** and Brett D. Witham**

INTERNATIONAL

I. LAW OF THE SEA CONVENTION

A. Ratification of the Law of the Sea Convention


B. Fisheries

2. On November 3, 1998, the international community took steps toward improving the management of living resources by approving three declarations that call for more sustained management of vulnerable fisheries at the international and national levels. The declarations, drafted at an international conference on fisheries held in Rome under the auspices of the UN Food and Agriculture Organization (FAO), were approved by 81 countries and the European Community. Specifically, the declarations set

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international guidelines by creating a Plan of Action for the Management of Fishing Capacity, an International Plan of Action for the Conservation and Management of Sharks, and a Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries. Together, these non-binding declarations were scheduled to be presented to the FAO Committee on Fisheries in February of 1999. See International Conference Tackles Capacity, Sharks and Seabird By-catch, EUR. AGRI., Nov. 10, 1998, available in 1998 WL 12387924.

3. In response to Japan's unilateral withdrawal from a 1965 fisheries accord, South Korea scrapped regulations that prohibited its vessels from fishing near Japanese territorial waters. The breakdown came after the Japanese government failed to sell Japanese politicians on a recently negotiated sea boundary in the waters lying between Japan and Korea. In the resulting confusion between the countries, Japan arrested and fined several South Korean fishing boats that were operating within its expanded territorial sea. Japan's expansion claim was based on a new baseline declared in 1996, which, according to South Korea, was in violation of the 1965 accords. Without successful negotiations, it is feared that the Sea of Japan could degenerate into regulatory chaos. See Seoul Scraps Fishing Regulations Near Japanese Waters, AGENCE FRANCE-PRESSE, Jan. 23, 1998, available in 1998 WL 2206634.

4. In the 1998 annual report of the United States Department of Defense, the U.S. challenged India's demand that warships obtain permission before entering its territorial waters. The U.S. asserted that India's claim, made under the Indian Maritime Zones Act, was an excessive maritime claim that is beyond the authority permitted under the United Nations Law of the Sea Convention (UNCLOS). In response, India declared that its requirement of prior notice for the entry or passage of foreign warships and submarines is permitted under the "innocent passage" provisions of UNCLOS. See U.S. Challenges India's Maritime Claims, THE STATESMAN, July 29, 1998, available in 1998 WL 16242571.

C. 1998 Session of the Seabed Authority

5. On March 16, 1998, the International Seabed Authority opened its fourth annual session in Kingston, Jamaica. The Authority continued the development of the code for deep seabed mining, and granted Canada and Ukraine continued provisional membership for an additional year. According to the Council, there are fourteen countries that are similarly not parties to the Convention, but are making good-faith efforts to adhere to it. See United
II. U.S. TRADE EMBARGES

A. WTO Rules Against U.S. Shrimp Embargo

1. On April 6, 1998, a World Trade Organization (WTO) panel overruled a United States trade embargo against shrimp imports from countries that fail to require turtle excluder devices on shrimp trawlers. India, Pakistan, Malaysia, and Thailand successfully challenged the U.S. embargo as improper discrimination against their shrimp exports; the U.S. promptly appealed. The U.S. requires metal grills on shrimp trawlers to prevent endangered sea turtles from becoming entangled in the nets and drowning.

According to environmental organizations, shrimping has recently caused a significant decline in the population of five species of sea turtles. While the WTO acknowledged the importance of environmental considerations in its decision, the panel ruled that the U.S. cannot impose its policy of protecting endangered sea turtles on other nations. Moreover, the WTO ruled that its mandate to promote economic development through free trade held primacy over environmental considerations. The WTO Appellate Body, in a final decision issued on October 12, 1998, affirmed the panel decision that the U.S. embargo constituted arbitrary and unjustifiable discrimination in enforcement; the right of member countries to implement environmental laws was, however, affirmed in dictum.

Since its inception, the WTO has never before issued a final ruling against the U.S.. In response to the WTO’s decision, environmental organizations are advocating for an international conference to amend the standard by which the WTO weighs environmental issues against its mandate to promote economic development through free trade. See Recent Developments in the News: International Trade, 28 ELR 10350 (1998); Anne Swardson, Taking the Turtle Test on World Trade, WASH. POST, Aug. 19, 1998, at C9; U.S. Loses Appeal on Shrimp Imports, ASSOCIATED PRESS, Oct. 12, 1998, available in 1998 WL 21171346.

B. EU Driftnet Fishing Ban

2. On June 8, 1998, the European Union Fisheries Council agreed to ban fishnets by the year 2001. The ban applies to swordfish and tuna fishing, but not salmon fishing, and will exclude the Baltic Sea. France and Ireland
voted against the measure and Italy abstained. The Council announced it would later adopt measures to encourage driftnet fishermen to retrain, convert to more selective gear, or decommission their vessels. Earlier in 1998, between 300 and 400 of Italy’s 3,500 swordfish fishermen had applied to convert from using driftnets, which costs ECU 150,000 per boat. The U.S. had previously threatened Italy with a trade embargo under the High Seas Driftnet Enforcement Act for use of driftnets well above 1.5 kilometers in length. Although the EU had outlawed driftnets exceeding 2.5 kilometers, Greenpeace maintained that Italy continues to allow driftnets up to eight kilometers in length. Greenpeace estimates that only 18% of the catch from illegal net sizes consists of swordfish, while the remainder consists of 80 other species. Britain’s Royal Society for the Protection of Cruelty to Animals claimed in 1997 that driftnets were leading to the extinction of dolphins, whales, leatherback turtles, and blue sharks.


C. International Dolphin Conservation Program Act

3. On May 21, 1998, the United States and eight other countries signed the International Dolphin Conservation Program, which had been agreed to in February of 1998 by twelve countries after six years of negotiations. Under the agreement, countries are to establish measures to reduce bycatch, conserve tuna stocks and distinguish between safe and unsafe catches, while strengthening enforcement of fishing regulations. Furthermore, the agreement mandates that observers be aboard tuna fishing vessels to monitor catches. An international panel will be established to oversee compliance with the agreement, which was also signed by Costa Rica, Ecuador, Honduras, Mexico, Nicaragua, Panama, Venezuela and Vanuatu. See United States Deal to Save Dolphins, GLOBE & MAIL, May 22, 1998, at A16; Worldview Dolphins: Nine Countries Sign Protection Pact, GREENWIRE, May 22, 1998, available in WESTLAW, 5/22/98 APN-GR 28.

D. U.S. Atlantic Swordfish Ban

4. At the National Oceans Conference in June of 1998, President Clinton announced a ban on the sale or import of Atlantic swordfish under 33
pounds. The President proposed spending $194 million over five years to implement the ban and other measures designed to reduce overfishing in U.S. waters.

On October 12, 1998, the National Marine Fisheries Service responded to President Clinton’s order by proposing a certification procedure to better enforce the minimum size requirement. The draft proposal would require permits to import swordfish, and a certificate of eligibility, which identifies the ocean of origin, flag of the fishing vessel, and documents that Atlantic swordfish pieces originated from swordfish exceeding the minimum size, would be required for each imported shipment. The certification procedure would also provide extensive data for scientists to better monitor swordfish mortality, allowing for the promotion of more effective management techniques for swordfish stocks.


III. INTERNATIONAL WHALING COMMISSION

A. Developments at the Fiftieth Annual Meeting

1. In May 1998, the fiftieth Annual Meeting of the International Whaling Commission (IWC) met in Muscat, Oman. The IWC accepted a Revised Management Scheme for commercial whaling, but noted that further work is necessary before catch limits will be set above zero. Also, the IWC adopted several resolutions, including one that provides advice to its Scientific Committee on the objectives of the Southern Ocean Sanctuary. In particular, the Resolution stressed the monitoring of depleted populations and further research on the effects of environmental change on whales. The IWC also approved the creation of a scientific journal entitled the Journal on Cetacean Research and Management. The Journal began publication in April 1999. See IWC, Final Press Release, 1998 Annual Meeting (visited Nov. 18, 1998) <http://ourworld.compuserve.com/homepages/iwcoffice/press98.htm>.
B. Japan’s Actions

2. Japan has proposed two permits to continue its whaling programs in the Southern Hemisphere and western North Pacific. Although the issuance of the permits is a sovereign right under the Convention, the IWC has adopted a Resolution to encourage Japan to withhold the permits. Japan’s current program takes approximately 400 minke whales from the Antarctic, and 100 minke whales from the western North Pacific. See IWC, Final Press Release, 1998 Annual Meeting (visited Nov. 18, 1998) <http://ourworld.compuserve.com/homepages/iwcoffice/press98.htm>.

C. Miscellaneous

3. In May 1998, Senator Olympia Snow (R-ME) sponsored a measure to reaffirm the U.S. support for the international ban on commercial whaling. In anticipation of the IWC meeting in Oman, the Senate unanimously passed the resolution, supporting U.S. sanctions against Norway and Japan for their continued whaling activities in spite of the international ban. The resolution further supports the creation of whale sanctuaries and increased efforts to end the illegal trade in whale meat. See Worldview Whales: Senate Passes Resolution Against Commercial Kill, GREENWIRE, May 12, 1998, available in WESTLAW, 5/12/98 APN-GR19.

4. A majority of the members at the International Whaling Commission meeting in Oman voted to condemn Norway for its continued commercial whaling in defiance of the international moratorium. Norway has repeatedly refused to accept the 12-year-old moratorium, and has resumed hunting minke whales in the northeast Atlantic. Norway continues to argue to the IWC that the minke whale population in the northeast Atlantic has reached a level that can support sustainable harvesting. Although it plans to continue its commercial harvesting despite the IWC condemnation, Norway’s fisheries ministry has announced that it may implement electronic surveillance on its whaling vessels to assure the international community that its fishery operates according to strict regulation. See IWC Condemns Norway’s “Commercial Whaling” in North Atlantic, AGENCE FRANCE-PRESSE, May 20, 1998, available in 1998 WL 2284909.

5. For the eleventh straight year, the IWC has refused Japan’s request for permission to kill fifty minke whales in its coastal waters. Japan has made the request every year since it officially complied with the 1982 IWC moratorium and withdrew from commercial whaling in 1987. The IWC was not unanimous, however, with twelve countries voting in favor of granting

IV. ANTARCTICA

1. The European Union’s Council of Ministers adopted an amendment to Antarctic Conservation Regulation 66/98/EC on November 17, 1998. The Regulation will continue to implement the measures adopted at the 1997 meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), but the new amendment includes strict rules to control the type and amount of fish that can be harvested in Antarctic waters, as well as mandated times when the stocks can be harvested. See *EU Ministers Agree Fish Conservation Measures in Antarctica*, *EUR. AGRI*, Nov. 20, 1998, available in 1998 WL 12387949.

2. Australia’s Environment Minister, Robert Hill, personally attended the November 1998 meeting of the CCAMLR to warn the international agency that it risks losing credibility as an effective international organization unless it acts immediately to stop illegal poaching in Antarctic waters. According to Greenpeace, as much as sixty to seventy percent of the 1997 toothfish catch may have come from illegal fishing activity. Australia and Greenpeace also allege that vast numbers of seabirds, including hundreds of endangered Albatross, are being caught by the poachers’ long lines.

   Australia has called on increased international action to supplement its own commitment of 15.8 million dollars over four years to support civil surveillance of Antarctic waters. It has also insisted that the CCAMLR require vessel monitoring systems on legal fishing boats, tighten port control measures, and develop a certification scheme that can be used to stifle the trade in illegal fish. See *Australia Warns that Poachers Are Endangering Antarctic Wildlife*, *AGENCE FRANCE-PRESSE*, Nov. 4, 1998, available in 1998 WL 16632665.

3. Japan and Korea refused to tolerate a request by the CCAMLR to install satellite monitoring systems on its squid and krill fishing vessels operating in Antarctic waters. Although Japan claims that its refusal to abide the request is financial, some people suspect that it is the result of Japan’s dislike of extraterritorial regulation. Because most of the Antarctic is legally considered international waters, domestic regulations on Asian fishing vessels cannot be applied. See Nick Hordern, *Asia ‘No’ To Checks on Fishing*, *AUSTRALIAN FIN. REV.*, Oct. 26, 1998, available in 1998 WL 20233797.
4. New Zealand announced in September 1998 that it was preparing to take extreme measures, including possible military action, to prevent illegal fishing in the Ross Sea. As a result of the declassification of U.S. satellite images, which revealed extensive stocks of commercially valuable Patagonian toothfish in the area, a high intensity illegal fishery has developed there over the past few years. The subsequent influx of trawlers from South America, Spain, and Norway signaled to New Zealand and Australia that the decline of controlled fishing in the Southern Ocean was imminent.

New Zealand has begun to test military surveillance and capabilities in the area. The concern, however, is that the Ross Sea is covered by the Antarctic Treaty, which establishes a demilitarized zone in the area and suspends all territorial claims. New Zealand is concerned that military action taken to protect the Ross Sea fishery may be considered a breach of the treaty. Increased toothfish prices, however, assure further illegal fishing activities and increased tension in New Zealand. See Michael Field, Battle Feared for Resources of the Polar Ross Sea, AGENCE FRANCE-PRESSE, Sept. 15, 1998, available in 1998 WL 16599087.

5. In July 1998, the Norwegian government took significant steps to eliminate illegal fishing in the Southern Ocean by its nationals. In a step applauded by Australia, Norway declared that vessels with Norwegian interests or flags of convenience that illegally fish in the Antarctic Ocean and elsewhere will be prohibited from obtaining quotas or licenses to fish in Norwegian waters. Norway also announced increased regulations for Norwegian vessels fishing in CCAMLR areas, and has made it more difficult for Norwegian shipyards to obtain subsidies for the construction of fishing vessels.

Australia claims that Norway's actions are direct proof that Australian pressure through diplomatic channels and vessel arrests is being heard. The Australian government asserts that the new legislation is proof that states, other than the Flag State, can play an integral part in flag state conservation measures. See Australia Welcomes Norwegian Government Action on Illegal Fishing, M2 PRESSWIRE, July 23, 1998, available in 1998 WL 14097742.

6. The Antarctic Protocol was ratified by the requisite twenty-six nations claiming an interest in the continent on January 14, 1998, officially prohibiting mining and oil exploration in and around Antarctica for the next fifty years. The protocol also will require that all scientific and tourist expeditions to Antarctica obtain permission and submit an environmental damage assessment before arrival.
7. The Antarctic Protocol, however, fails to address the regions most serious threat — pirate fishing vessels. Legal fishing vessels in the area continue to report the arrival of more pirate vessels, which are plundering the Patagonia toothfishery to supply the high priced Japanese market. Reports indicate that while most of the pirate vessels are Norwegian and Spanish owned, they are registered under foreign nation flags of convenience, rendering them largely beyond the control of Norwegian and Spanish legislation. Many CCAMLR member nations fear that the pirate activity will destroy the Patagonia toothfishery and drive the endangered Wandering Albatross to extinction. See Paul Brown, Old Threats to Antarctic Linger as New Curbs Come into Force, THE GUARDIAN, Jan. 15, 1998, available in 1998 WL 3074132.

V. LAND BASED POLLUTION

A. Protection of the Marine Environment from Land-Based Activities

1. The Global Program of Action for the Protection of the Marine Environment from Land-Based Activities, signed by over 100 countries in 1995 to protect the marine environment and the estimated 3.5 billion people who reside in coastal areas, is in its early stages of implementation. The United Nations Environmental Program Coordinating Office for the Program of Action, located in the Hague, opened in November of 1997. According to UNEP’s Global Environmental Outlook Report, almost 80 percent of marine pollution is caused by land-based activities; the Program of Action, through the Coordinating Office, will promote pollution prevention through the integration of watershed and coastal zone management policies. The Coordinating Office will also implement programs which arise from the 1995 Washington Declaration on Protection of the Marine Environment from Land-Based Activities. The Program of Action is intended to help those countries with existing action plans to amend their regional and national coastal management policies; initial adoption of integrated coastal management action plans will be facilitated in the remaining signatory countries. See United Nations, UN: UNEP Office on Protection of Marine Environment from Land-Based Activities to be Opened at the Hague, PRESSWIRE, Nov. 20, 1997, available in 1997 WL 15144451.
VI. LONDON DUMPING CONVENTION

A. Proposal to Review IMO Rules Rejected

1. Contracting countries to the London Convention voted in late 1997 against a proposal to request the International Maritime Organization (IMO) to review its rules on the decommissioning of offshore installations, which the oil industry must comply with in disposing of redundant oil and gas platforms. Greenpeace submitted a request to the Scientific Group that the rules be reviewed because more platforms can now be removed due to advances in lifting capacity. The Consultative Meeting of Contracting Parties to the London Convention did not endorse a time-consuming review of IMO rules, however, given that potentially needed reforms could be more effectively achieved through the workings of the London Convention. See No Vote on IMO Disposals Review, Lloyd’s List Int’l, Nov. 10, 1997, available in 1997 WL 4466653.

B. Framework for the Disposal of Platforms and Structures at Sea

2. A Waste Assessment Framework for the Disposal of Platforms/Structures at Sea, which would provide guidelines for the disposal at sea of offshore installations, is under discussion. The Contracting Parties to the London Convention have agreed that platform size should not be the sole criterion for determining methods of disposal. International Maritime Organization guidelines currently require the removal of structures that weigh over 400 tons in air and stand in less than 75 meters of water; structures exceeding those limits must be severed to allow 55 meters of water to flow above their remains. Platforms and man-made structures are among the seven categories exempt from the prohibition against dumping in the 1996 Protocol to the London Convention. Guidelines are being discussed for each of these seven exempted categories. See No Vote on IMO Disposals Review, Lloyd’s List Int’l, Nov. 10, 1997, available in 1997 WL 4466653.

C. Australia Ready to Comply with Convention

3. In October 1997, an Australian zinc manufacturer ceased the only remaining legal ocean dumping of toxic waste in the world, after 4 million tons of waste was dumped off the Tasmanian coast. The company, Pasminco EZ, had been given until the end of 1997 to cease its dumping of zinc byproducts that contain arsenic and lead. The zinc manufacturer developed an alternative smelting process that allows byproducts to be treated. Australia will likely soon comply with the London Dumping Convention, which has been signed by almost 80 countries. See Worldview

D. Russia Accepts Low-Level Nuclear Waste Dumping Ban

4. Russia’s Atomic Energy Ministry head, Viktor Mikhailov, informed Japanese officials in 1997 that Russia would accept the permanent worldwide ban on low-level nuclear dumping agreed to by the majority of Contracting Countries in a 1993 revision to the appendix of the London Convention. Middle and high-level nuclear waste dumping had previously been banned. Russia abstained from the November 1993 revision vote, maintaining that it lacked sufficient technical and financial assistance to end low-level nuclear dumping before 1996. In October of 1993, Russia dumped an estimated 900 tons of low-level liquid nuclear waste into the Sea of Japan; Russian President Yeltsin pledged to Japanese Prime Minister Hashimoto during a 1996 Moscow summit that Russia would not again dump nuclear waste in the sea. See Russia to Accept Nuclear Waste Dumping Ban by Year-End, ASIAN POLITICAL NEWS, Apr. 14, 1997, available in 1997 WL 8241740.

VII. HIGH SEAS FISHING

1. On June 8, 1998, the European Union Fisheries Ministers took major strides towards integrating conservation and environmental issues in the implementation of EU fisheries policies. The Ministers agreed that the EU will phase out driftnets, and adopted a decision to ratify the straddling and highly migratory fish stock provisions of the United Nations Convention on the Law of the Sea. Also, the Ministers adopted a European Commission report on North Sea fisheries conservation.

The Commission report concerned the conservation measures that had been established under the 1997 Bergen conference to promote fisheries conservation in the North Sea. The Ministers emphasized the Commission’s conclusion that the Bergen findings should be given effect, and that the integration of fisheries and environmental policies with the socio-economic needs of EU members was of utmost importance. See EU Fisheries Policy Highlights Environmental Concerns, EUR. AGRI, June 12, 1998, available in 1998 WL 12387800.

2. July 1998 marked the first ever high level fisheries meeting between the European Union and Japan. The most prominent issue on the agenda concerned Atlantic tuna fishing. The parties also discussed trawling techniques in the Bay of Biscay and the Mediterranean, where Japanese tuna vessels are particularly active. Of course, Japan used the opportunity to push for more lenient policies on whale fishing. Also discussed were the FAO
initiatives to decrease the over-capacity of fishing fleets, reduce seabird by-catch, and improve shark management.

The EU and Japan agreed to continue to meet on a regular basis, and set the date for a follow-up meeting early in 1999 in Tokyo. They hope to continue to exchange notes on the status of several fisheries, as well as discuss the future trends in international ocean conservation. See *EU launches Fisheries Talks with Japan*, EUR. AGRI, July 24, 1998, available in 1998 WL 12387901.

3. Australia has agreed to meet with Japan to attempt to break a deadlock in southern blue fin tuna fishing negotiations. Australia banned Japanese vessels from entering its territorial waters and ports in response to alleged violations of the Commission for the Conservation of Southern Blue Fin Tuna (CCSBT) treaty through Japan's "experimental" fishing program. Japan claims that the 1,363 tons of blue fin tuna it caught, in addition to its annual quota, was merely an attempt to scientifically determine the extent of under-utilized stocks in waters that its vessels do not ordinarily operate. Japan's program, however, has met spirited resistance from Australia and New Zealand, which assert that Japan is simply using the program as an excuse to exceed its CCSBT mandated quota. See *Australia and Japan Will Meet to Break Tuna Fish Deadlock*, AGENCE FRANCE-PRESSE, Nov. 5, 1998, available in 1998 WL 16633552.

VIII. U.S. — CANADIAN PACIFIC SALMON CONTROVERSY

1. American and Canadian talks concerning the Pacific Salmon Treaty once again broke down on July 9, 1998, sparking increased discontent from Canadian fishermen. The Canadian fishermen have generally been idle in observance of a government initiated ban on the coho salmon fishery. The ban has forced the Canadian fishermen to reduce or halt their fishing for more plentiful salmon species, in order to reduce any incidental by-catch of coho. Meanwhile, Alaska has refused to obey the Canadian ban on salmon that migrate into Canadian waters, claiming that there is "no evidence of a so-called coho crisis." See *U.S. Harvests Salmon as Canada Observes Ban*, GREENWIRE, Aug. 7, 1998, available in WESTLAW, 8/7/98 APN-GR 22.

2. In an important step towards restoring salmon in the Pacific Northwest, the United States announced, in June 1999, that it had completed negotiations with Canada and had successfully come to a consensus on points of dispute regarding the conservation and management of Pacific Salmon under the 1985 Pacific Salmon Treaty. The two countries agreed to establish new fishing regimes under the Treaty to balance the needs to protect and rebuild the salmon population with the interests of both countries in fishing. The new agreement replaces former fixed harvest quotas with "abundance-based"
regimes for the next ten to twelve years. These new regimes will provide a sliding scale for harvest levels based upon the existing state of the salmon population.

In addition, the agreement establishes two regional funds to be managed jointly by the U.S. and Canada to improve fisheries management: a Northern Fund including Alaska and the northern and central areas of British Columbia, and a Southern Fund including southern areas of British Columbia, Washington, Oregon, and the Snake River basin in Idaho. The U.S. intends to seek $75 million in funds to allot to the Northern Fund and an additional $65 million to allot to the Southern Fund. Provisions are also included in the agreement relating to improving scientific cooperation between the U.S. and Canada on issues involving the restoration and optimal production of salmon. See U.S. Dept. of State: United States Announces Agreement With Canada on Pacific Salmon, M2 PRESSWIRE, June 7, 1999, available in 1999 WL 19096414.

3. On July 3, 1998, the Canadian government announced that it had reached an agreement with the State of Washington to set a quota for sockeye salmon caught by Washington fishermen. The catch limits would restrict the U.S. catch on sockeye, which migrate into Canadian waters, to 1.2 million fish, almost double the amount taken by US fishermen in 1997. The agreement, however, met with swift disapproval from Canadian fishermen, who assert that the doubling of the Washington quota over 1997 limits is a sellout to American fishing interests.

The US and Canada also agreed to halt salmon fishing along the Dison Entrance, a disputed maritime border between British Columbia and Alaska. Canada still, however, has been unable to reach agreement with the State of Alaska over salmon stocks that straddle the maritime border between Alaska and British Columbia. See Canada Announces Salmon Pact with Washington State, AGENCE FRANCE-PRESSE, July 3, 1998, available in 1998 WL 2315357.

4. One month after announcing a ban on coho fishing along several stretches of British Columbia’s rivers, the Canadian government assembled a plan to apply 274 million dollars toward the preservation and restoration of the endangered species. The money will be used to create a permanent fund, which the government will use to bring the fishing fleet into harmony with ecological realities by buying back a number of fishing licenses. The fund will also be used to support habitat initiatives, as well as to help encourage new economic opportunities for salmon dependent coastal communities. The 274 million dollar plan is the first step towards Canada’s goal of substituting the crisis-to-crisis management of their fisheries with sustainable management systems. See Worldview Canada: Government
IX. MARINE ENVIRONMENT

A. Activities of the Marine Environment Protection Committee

1. The Marine Environment Protection Committee, in 1998, instructed a working group to draft regulations to phase out and eventually prohibit toxic anti-fouling paints that contain organotins. Metallic compounds in current anti-fouling paints are absorbed into the sea, cause the death of sea life, and disrupt the food chain; the organotin tributyl tin (TBT) causes deformations in oysters and sex changes in whelks. The Committee working group will also prepare a draft Assembly Resolution, for the 21st Assembly in 1999, to encourage Member States to adopt alternatives to organotins while a legal instrument to effect its mandatory prohibition is developed. Copper-based coatings and silicon-based paints can be used as alternatives to TBT; other alternatives are under development. A mandatory legal instrument to prohibit organotins may potentially be adopted through an annex to the 1973 International Convention for the Prevention of Pollution from Ships. See International Maritime Organization, Committee Agrees to Ban Toxic Anti-Fouling Paint (visited Nov. 19, 1998) <http://www.imo.org/imo/news/298/mepc.htm>.

2. The North West European Waters special area, which prohibits oil tankers or ships over 400 gross tons from discharging oil into the sea, took effect on August 1, 1999. The waters include the North, Irish, and Celtic seas, the English Channel, and part of the Northeast Atlantic. Countries will provide proper facilities for receiving tankers’ dirty ballast and tank washing water, as mandated by the MARPOL requirements for special areas. The North West European waters were designated a special area in 1997 under Annex I of MARPOL; other designated special areas include the Mediterranean, Baltic, and Red seas, the Gulf of Aden, and the Antarctic. See International Maritime Organization, North West European Waters Special Area (visited Nov. 19, 1998) <http://www.imo.org/imo/news/298/mepc.htm>.

3. Annex VI on the Prevention of Air Pollution from Ships was adopted in September 1997; it will limit sulphur oxide and nitrogen oxide emissions and prohibit intentional emissions of substances harmful to the ozone. The Marine Environment Protection Committee charged the Subcommittee on Ship Design and Equipment with the development of guidelines to implement Annex VI, with highest priority assigned to nitrogen oxide monitoring and sampling of fuel for use onboard ships. The MEPC also
instructed the Subcommittee on Fire Protection to determine in what contexts, if any, the use of perfluorocarbons (PFCs) was necessary in shipboard fire-extinguishing systems; some delegations speculated that alternatives to PFCs may not be appropriate for the frigid Arctic and Antarctic sea areas. See International Maritime Organization, Follow-Up to Air Pollution Conference and New Annex VI (visited Nov. 19, 1998) <http://www.imo.org/imo/news/298/mepc.htm>.

4. Guidelines on the designation of Particularly Sensitive Sea Areas will be reviewed by the Marine Environment Protection Committee to simplify procedures and better consider the relationship amongst safety, environmental, and navigation considerations. Improved guidelines would also refer to specific provisions of the United Nations Convention on the Law of the Sea while incorporating the interests of other international and nongovernmental organizations. The two current Particularly Sensitive Sea Areas are the Sabana-Camaguey Archipelago in Cuba, designated in September 1997, and the Great Barrier Reef in Australia; maritime activities in each area are subject to specific controls. See International Maritime Organization, Particularly Sensitive Sea Areas (visited Nov. 19, 1998) <http://www.imo.org/imo/news/298/mepc.htm>.

5. The Marine Environment Protection Committee Working Group on ballast water is drafting regulations for ballast water management to be included in a proposed new Annex VII to MARPOL, provisionally scheduled for adoption at a conference in 2000. The Working Group is also developing implementation guidelines to include in a Code related to the proposed Annex. The new Annex would address the estimated 10 billion tons of ballast water annually transferred by vessels; non-indigenous organisms from this ballast water cause major disruption to local ecosystems. The MEPC will establish a Working Group to ensure adequate reception facilities for dirty ballast water. See International Maritime Organization, Harmful Aquatic Organisms in Ballast Water; Adequacy of Reception Facilities (visited Nov. 19, 1998) <http://www.imo.org/imo/news/298/mepc.htm>.

6. The Marine Environment Protection Committee will consider a draft protocol, to be adopted at a year 2000 conference, that would extend the International Convention on Oil Pollution Preparedness, Response, and Co-Operation (OPRC) to include hazardous and noxious substances. The proposed protocol would provide a global framework to respond to incidents involving harmful substances, including chemicals, that cause marine pollution. Effective in 1995, the OPRC currently provides a mechanism to respond to only those incidents of marine pollution caused by oil. See International Maritime Organization, OPRC- Extension to Other
B. Canadian Seabird Fatalities Caused by Oil Discharges

7. Canada reported to the Marine Environment Protection Committee, in March 1998, that 20,000 to 100,000 annual seabird fatalities are caused by oil, despite a lack of significant oil spills. Illegal oil waste discharges, not oil leaks from tankers, are primarily responsible for the fatalities; small amounts of oil can disrupt the habitat of millions of pelagic seabirds, especially puffins, murres and gannets. Canada has increased surveillance of Eastern Canada's continental shelf, which is replete with pelagic birds year round, to ensure compliance with MARPOL 73/78 discharge requirements. Vessels that discharge oil are photographed, oil samples are taken of oil slicks and, when necessary, Canada charges the vessel or forwards the evidence of illegal oil waste discharge it has accumulated to the ship’s flag state. See International Maritime Organization, Canada Warns Ships Over Illegal Spills which Kill Thousands of Seabirds (visited Feb. 10, 1998) <http://www.imo.org/imo/news/298/birds.htm>.

C. Garbage Management Plans Compulsory


D. The Joint Working Group on Fishermen's Training

vessels greater than 24 meters in length; the Joint Working Group hopes to provide guidance on training, certification and watchkeeping standards for personnel on these larger fishing vessels. Prevention of fatigue among fishing workers will also be considered at the Joint Working Group’s next session. See International Maritime Organization, Joint Group on Fishermen’s Training Meets (visited Feb. 19, 1998) <http:www.imo.org/imo/news/198/fish.htm>.

E. Nuclear Weapons Testing

10. China test fired a cruise missile in the Taiwan Strait in March of 1996, allegedly to intimidate Taiwan voters before their participation in Taiwan’s first direct presidential election. The prototype medium-range cruise missile China tested in 1996 had a maximum range of 1,800 kilometers; China has since developed an improved version with an onboard computer that can fly at low altitude. This newly developed missile was reportedly test fired by China in the East China Sea in October 1998. See Beijing Urged to Explain Purpose of Cruise Missile Test, TAIWAN CENT. NEWS AGENCY, Oct. 1, 1998, available in 1998 WL 20468068.

11. France’s National Assembly voted unanimously in February 1998 to ratify the Comprehensive Test Ban Treaty. France was heavily criticized for nuclear weapons tests in the South Pacific in 1995 and 1996. The Comprehensive Test Ban Treaty will not become effective until ratified by 44 states engaged in nuclear weapons research or production; France is only the 10th state to ratify the agreement. See France Signs Nuclear Test Ban, TORONTO GLOBE & MAIL, Feb. 25, 1998, at A13.

F. Import of Hazardous Wastes

12. Caribbean states renewed their protest against shipments of nuclear waste through their waters, in response to a British vessel’s 30 ton nuclear waste shipment through the Panama Canal in January 1998. The vessel, the Pacific Swan, left Cherbourg, France and passed through the Canal, the most efficient route to its destination of Japan. Every independent English-speaking Caribbean nation objected to the nuclear waste shipment before the 1997 General Assembly of the United Nations; a UN committee has been established to review the issue. The Heads of Governments of the Organization of Eastern Caribbean States, at their annual summit in St. Lucia in January 1998, again voiced their opposition to nuclear waste shipments throughout the Caribbean, citing the potentially fatal effects of a nuclear waste disaster on the region’s tourism, fishing, and commercial shipping industries. See Wesley Gibbings, Environment-Caribbean: Living

Nations represented by the International Atomic Energy Agency adopted, in September 1997, the first convention to minimize risks from the transport of radioactive material. The convention was supported by 62 countries, while two voted against and three abstained. Some countries, including New Zealand, Turkey, Brazil and Morocco, advocated for countries to receive mandatory notification when radioactive material is transported through their jurisdiction; France, Britain, and Japan were among those countries opposed to a mandatory notification requirement. See ADDS Details of Countries Joining Accord, Agreement, AGENCE FRANCE-PRESSE, Sept. 5, 1997, available in 1997 WL 13390224.

13. The Environmental Protection Agency (EPA) is reportedly drafting legislation to be introduced to Congress in 1999 to ratify the Basel Convention Treaty. The EPA may seek enabling legislation from Congress to implement the treaty under the Resource Conservation and Recovery Act. The treaty, which prohibits countries from exporting hazardous wastes to countries not on the Annex 7 list, will take effect once ratified by seventy-five percent of the Conference of Parties. Should the treaty become effective without ratification by the United States, the U.S. will not be allowed to participate in international trade markets for Basel-regulated wastes and recyclables unless the treaty is subsequently ratified. See Clinton Administration to Introduce Legislation Implementing Basel Treaty, HAZARDOUS WASTE NEWS, Sept. 21, 1998, available in 1998 WL 10239961.

14. The European Commission, in November 1998, amended regulation 259/93 to increase the number of hazardous wastes included in its export ban to non-OECD countries. In addition to the wastes already on the European Union Hazardous Waste List, the export ban will be extended to include both those wastes identified in February 1998 at the Basel Convention conference in Malaysia, and those that appear on the "amber" and "red" lists annexed to the Shipment Regulation. See EU Widens List of Banned Hazardous Waste Exports to Non-OECD Countries, AFX NEWS, Nov. 10, 1998, available in 1998 WL 20320395.

G. Activities of the Arctic Council

15. Ministers from member states of the Arctic Council, meeting in Iqualuit, Canada, signed a declaration in September 1998 to establish a University of the Arctic. The institution, which will primarily function in cyberspace, is expected to advance scientific knowledge of the circumpolar region by providing a forum for students to learn from experts throughout
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the region; the curriculum will primarily be based upon applied projects rather than formal courses. Finland agreed to coordinate the secretariat for the University during the institution’s formation and early stages of development. See Circumpolar Countries to Set Up Arctic University, TAIWAN CENT. NEWS AGENCY, Sept. 19, 1998, available in 1998 WL 17237051.

16. The United States agreed to replace Canada as chair of the Arctic Council at the organization’s first ministerial meeting in Iqaluit, Canada in September 1998. The U.S. chairmanship will end in the fall of 2000, when projects will be reviewed and an agenda outlined for the next two years. The first Council meeting chaired by the United States is scheduled for May 1999 in Alaska. In September, the Council also sanctioned the participation of the Aleut International Association, which represents Aleuts in Alaska and Russia, in the Council’s future activities. See Alaska Taking Lead Role in Arctic Council, TULSA WORLD, Nov. 27, 1998, available in 1998 WL 11161097.

DOMESTIC

I. COASTAL RESOURCE MANAGEMENT

A. Coastal Zone Management Act

1. In January 1998, Georgia became the thirty-second state to receive federal approval for a coastal zone management program. Approval under the Coastal Zone Management Act (CZMA) means that Georgia is entitled to nearly 1 million dollars in federal matching funds for coastal projects. Georgia will also receive coordinated assistance from the National Oceanic and Atmospheric Administration (NOAA), and will play an increasingly crucial role in federal decisions concerning the coastal zone. See 63 Fed. Reg. 7759 (1998); Across the Nation Georgia: State Adopts Coastal Management Plan, GREENWIRE, Jan. 8, 1998, available in WESTLAW, 1/8/98 APN-GR 14.

B. Public Trust Doctrine and Public Access

2. In North Carolina, a group of out-of-state residents challenged the State’s beach access policy by making a legal claim to the dry sand zone in front of their vacation homes. The claim has alarmed the North Carolina Coastal Resource Council, which fears that a successful constitutional claim could mean the end of high tide public beach access across the state.
Although North Carolina claims that the dry sand area between the high tide
mark and the vegetation line is open to the public, the plaintiffs assert that
the policy is denying them the full enjoyment of their property, and will, at
a minimum, demand compensation from the State for taking the property.
See Brian Feagans, Serious Threat; Suit Aims for Private Beaches,

3. In what is considered the first lawsuit to address public beach access in
Connecticut, a Superior Court judge has upheld the restrictive beach
ordinances of the Town of Greenwich. The ordinances restrict the access
to municipal beaches to residents of the Town and their invited guests. The
ruling further entrenches similar restrictive ordinances in other Connecticut
towns.

The civil suit to challenge the constitutionality of the ordinances was
brought by a Connecticut resident, Brenden Leydon, after a security guard
refused to allow him to enter the beach. The Superior Court judge, Judge
Edward Kazin, Jr., held that the State’s public trust doctrine does not entitle
State residents to use municipally-owned beaches, and that restricting beach
access did not deny Leydon his First Amendment rights to free speech and
peaceful assembly. Leydon plans to appeal the decision, and insists that the
public trust doctrine will play an integral part in the case. See Jane Dee and
Colin Poitras, Judge Allows Restricted Beach Access, THE HARTFORD

C. Miscellaneous

4. Acting to further the purposes of a number of environmental statutes,
President Clinton issued an Executive Order on June 15, 1998 to improve
coral reef protection. The order requires all federal agencies to identify any
activities that may degrade coral reef ecosystems, and to utilize programs
to protect and improve coral reef health. Furthermore, the agencies must
ensure that the projects that they authorize, fund, or carry out do not further
degrade coral reef ecosystems.

The order also establishes a Coral Reef Task Force (CRTF), to be co-
chaired by the Secretary of Commerce and the Secretary of the Interior.
The CRTF will also include the Administrator of the Environmental
Protection Agency, the Attorney General, the Secretary of Agriculture, the
Secretary of Defense, the Secretary of State, the Secretary of Transportation,
the Director of the National Science Foundation, the Administrator of the
Agency for International Development, and the Administrator of the
National Aeronautics and Space Administration. Although these members
must be included, the CRTF can be expanded as needed to satisfy its
responsibility to “oversee the implementation of the policy and Federal
agency responsibilities set forth in this order, and . . . guide and support

5. In January of 1998, the Supreme Court was asked to settle the longstanding dispute over the ownership of filled portions of Ellis Island. In a decision handed down in May 1998, Justice Souter declared that New York did not acquire title to the filled lands under an 1834 compact that granted it title over all islands in the Hudson River. The Court also held that New York did not acquire sovereignty by prescription and acquiescence, and that the Court did not have authority to adjust the original boundary between New York and New Jersey for convenience and practicality purposes. Congressional approval of the 1834 compact between the states had transformed the compact into law, and the Court could not therefore change the law unless the compact was unconstitutional. The Court also rejected New York's argument that New Jersey sovereignty over the land would interfere with New York's regulation of navigation and commerce in the harbor. See State of New Jersey v. State of New York, 523 U.S. 767 (1998).

6. The government of Guam filed suit against the United States, asserting that it was entitled to own approximately twenty-four thousand acres of land under the Organic Act of Guam, the Territorial Submerged Lands Act, and the doctrine of aboriginal title. The district court disagreed with Guam, and on June 4, 1999, the Ninth Circuit Court of Appeals affirmed the lower court's grant of summary judgment to the United States. The court of appeals found that the Organic Act of Guam was a one-time grant of property, and that the United States is not required to later transfer all property owned in Guam once it is no longer used for military purposes. The Court rejected Guam's aboriginal argument in finding that the government of Guam is neither a tribe nor a tribal member, nor a trustee for any aboriginal inhabitants of Guam, and therefore cannot claim aboriginal right. See The Government of Guam v. the United States of America, 179 F.3d 630 (9th Cir. 1999)

7. The battle for historical resources found on state submerged lands continued in the case of California v. Deep Sea Research, Inc.. In the case, the State of California challenged a salvor's in rem admiralty action against an 1865 shipwreck by asserting that it had colorable possession of the wreck under either the Abandoned Shipwreck Act of 1987, or Cal. Pub. Res. Code Ann. § 6313. California then raised the Eleventh Amendment as a bar to the federal action. The Supreme Court responded on April 22, 1998.
After examining prior cases concerning the operation of the Eleventh Amendment on maritime and admiralty jurisdiction, the Court declared that the Eleventh Amendment does not bar federal jurisdiction over an in rem admiralty action when the res is not in the actual possession of the state. The case was remanded for consideration of whether the ship is abandoned within the meaning of the Abandoned Shipwreck Act. *See* California v. Deep Sea Research, Inc., 523 U.S. 491 (1998).

8. President Clinton issued Executive Order 13112 on February 3, 1999 to prevent the introduction of and provide for the control of invasive species in United States waters. The order directs any federal agencies that may affect the status of invasive species to act, wherever practicable, to prevent the introduction of, control, and monitor the population of invasive species. In addition, federal agencies are encouraged to conduct research for the above stated purpose, educate the public on invasive species, and provide restoration of the native species wherever possible. Similarly, federal agencies are prohibited from carrying out any action that they believe may promote the introduction or spread of invasive species. The Executive Order further establishes an Invasive Species Council to issue recommendations for plans and actions for the prevention and control of invasive species. The Council will be in charge of implementing the provisions of the Executive Order, including the issuance of a National Invasive Species Management Plan to detail goals, objectives, and specific measures to be carried out by Federal agencies. *See* Exec. Order No. 13,112; 64 Fed. Reg. 6183 (1999).

II. WETLANDS PROTECTION

*A. Army Corps of Engineering Permitting*

1. In a Sixth Circuit decision regarding a highway development project in Ohio, the court found: 1) the Army Corps of Engineers’s (“Corps”) decision that the filling of under 10 acres of wetlands was of No Significant Impact was not an abuse of discretion; 2) a final mitigation plan was not necessary to issue a section 404 permit conditioned on mitigation goals; and 3) failure to accept an alternative that was considered but found to be impracticable does not constitute arbitrariness. The Sierra Club and other plaintiffs unsuccessfully brought suit to prevent construction of a four-lane highway, partially through natural wetlands, that would connect Toledo to its northern suburbs. In 1992, the Corps granted a section 404 permit, conditioned on implementation of a wetland mitigation plan; Plaintiffs failed to demonstrate that the Corps’ decision to grant this permit was arbitrary and capricious, or an abuse of discretion. *See* Sierra Club v. Slater, 120 F.3d 623 (6th Cir. 1997).
2. A property owner's lands were found by the Eleventh Circuit to be adjacent to navigable waters and, therefore, wetlands due to a groundwater hydrological connection. The government sued Defendant to prevent him from making future discharges into wetlands on his property, and to require him to both restore the wetlands he had disturbed and pay a civil penalty. The court held that because expert evidence was provided that Defendant's property was adjacent to navigable waters through a groundwater hydrological connection, Defendant failed to meet the burden necessary for him to overcome the deference to which the Corps is entitled in interpreting its own regulations. See United States v. Banks, 115 F.3d 916 (11th Cir. 1997).

3. Environmental groups challenging the Corps's grant of permits for discharge into wetlands survived the Army Corps's motion to dismiss on grounds that the court had authority under the Administrative Procedure Act (APA) to review the Corps's definition of wetlands and its interpretation of mitigation guidelines. In addition, the court held that agency inaction can be reviewed under the APA; the Corps alleged failure to consult other federal agencies and to consider secondary and cumulative impacts in its evaluation of permit applications was therefore reviewable in this case. See Florida Keys Citizens Coalition v. West, 996 F. Supp. 1254 (S.D. Fla. 1998).

4. In 1998, the D.C. Circuit Court found that the Tulloch Rule, which subjects any fallback from dredging to permitting requirements, exceeded the Corps's statutory authority under the Clean Water Act. The plaintiffs, consisting of a mining organization and various trade associations, challenged a 1993 Corps regulation that expanded the definition of discharge to include fallback. The court upheld the lower federal court's issuance of a permanent injunction against subjecting fallback from dredging to permitting requirements. A narrow injunction applied only as to the plaintiffs would, according to the court, not only "generate a flood of duplicative legislation" but violate precedent that rules of broad applicability under the Administrative Procedure Act be invalidated. See National Mining Association v. US Army Corps, 145 F.3d 1399 (D.C. Cir. 1998).

5. The D.C. Circuit Court held, in 1997, that the withdrawal of water from Lake Gaston, a navigable water, to provide a water source for the five-city Virginia Beach area did not constitute a discharge. While the court recognized that the withdrawal of water from Lake Gaston would reduce the volume of water that passes through the dam turbines, the court held that reduction in water volume does not constitute a discharge for the purposes

C. The Commerce Clause and Wetlands Regulation

6. The Fourth Circuit, overturning the criminal convictions of Wilson, a developer, and the two corporations for which he was employed, found the Corps's definition of United States waters, which includes those waters that "could effect" interstate commerce, to exceed the authority granted to Congress under the Commerce Clause. The court struck down the Corps's regulation, found at 33 C.F.R. 328(a)(3), defining waters of the United States as those that "could effect" interstate commerce as impermissibly broad, in absence of language that either requires a "substantial effect" on interstate commerce or establishes a more precise causal connection to navigable waters. The Charles County, Maryland wetlands filled in this case were over six miles from the nearest defined federal waters. See United States v. Wilson, 133 F.3d 215 (4th Cir. 1997).

7. In a 1998 decision, an Illinois Federal District Court upheld the Corps's authority to regulate wetlands that are intrastate migratory bird habitats. The court held that the Commerce Clause grants Congress the power to regulate intrastate migratory bird habitats, despite recent precedent that could be interpreted as limiting the migratory bird rule. See Solid Waste Agency v. Corps., 998 F. Supp. 2d 946 (N.D. Ill. 1998).

D. Penalty for Illegal Filling of Wetlands

8. The Fourth Circuit found that a $35,000 civil penalty and required restoration imposed by a lower court for the illegal fill of 2.2 acres of wetlands was not an abuse of discretion. Defendant, Smith, filled 3.2 acres of palustrine forested wetlands located on his property without authorization; 2.2 acres of these wetlands were filled by Defendant after he was notified by the Corps of their location. The court held that the cost of wetlands restoration does not have to be considered in imposing a civil penalty. Furthermore, the court affirmed the lower federal court's decision that restoration of wetlands in this case was both practical and maximized environmental benefits. See United States v. Smith, No. 96-2450, 1998 U.S. App. LEXIS 12969 (4th 1998).
III. COASTAL TAKINGS CLAIMS

A. Partial Regulatory Takings

1. The D.C. Circuit, in a 1997 decision, treated the third phase of a development consisting of 27 lots as an entire parcel; the Corps's prohibition on development of twelve individual wetland parcels was, therefore, not a categorical taking. The court, however, remanded to determine whether a partial regulatory taking had occurred by balancing economic factors, investment-backed expectations, and the nature of the regulatory action. Although the lower federal court found the economic impact upon the plaintiff to be insignificant, the D.C. Circuit held that findings pertaining to investment-backed expectations and the "propriety of the Government's actions" were also required before these three variables could be properly balanced. See Broadwater Farms Joint Venture v. United States, 27 ELR 21516 (1997).

2. In a 1996 Ninth Circuit opinion, reviewed by the Supreme Court in its 1998 term, the court found that less than complete deprivation of economic value could constitute a taking, and affirmed a jury decision that the taking was unreasonable. See Del Monte Dunes v. Monterey, 95 F.3d 1422 (9th Cir. 1996). Plaintiff, Del Monte, purchased 37.6 ocean-front acres located in the City of Monterey, commonly referred to as the Del Monte Dunes, in 1984 from Ponderosa Homes, whose applications to the City to develop a major residential complex had been denied four times. Plaintiff filed suit when Monterey denied its final development application in 1986; Del Monte then realized an $800,000 profit later that year when it sold the land to the state for $4.5 million. Affirming a $1.45 million federal court jury verdict for a temporary taking of Plaintiff's property, the Circuit Court found that a right to a jury trial does exist for takings claims. See Id. at 1427. This finding was criticized for potentially replacing the traditional deference shown to local legislative bodies with jurors' conceptions of reasonableness. See David F. Pike, Taking It to the Limits, L.A. DAILY J., Sept. 8, 1998. Environmentalists and local officials assert that land use planning would be severely hampered should landowners be given a right to a jury trial for takings claims. See David G. Savage, Land of Opportunity, ABA J., Oct. 1998, at 34. Municipalities would then be required to prove to juries the reasonableness of each permit denial that is challenged in court, or face the prospect of significant liability. See id.

3. The Michigan Supreme Court held that three related development parcels would be treated as a whole parcel for takings analysis, and remanded to determine if the diminution of economic value, although not complete, nevertheless constituted a taking. Plaintiffs sought compensation
after the Michigan Department of Natural Resources denied them a permit to fill wetlands to commercially develop a portion of their property. The court held that deprivation of economic value that is "one step short of complete" is not a categorical taking, but may require compensation pending the application of a proper balancing analysis on remand. See K&K Construction v. Department of Natural Resources, 575 N.W.2d 531 (Mich. 1998).

4. The Court of Federal Claims did not find a taking where there was less than total deprivation of economic value, and the developer's reasonable investment-backed expectations in this heavily regulated area were not infringed. Plaintiff was denied a dredge and fill permit due to restrictions mandated by the Endangered Species Act. The court held that in absence of a total deprivation of economic value, reasonable investment-backed expectations were not violated where the developer should have expected limits upon his development options. See Good v. United States, 39 Fed.Cl. 81 (1997).

B. Statute of Limitations

5. The Court of Federal Claims ruled that the six year statute of limitations begins tolling once the government denies a permit, whether or not further efforts can be undertaken to reverse the permit denial. Plaintiffs claimed their property was taken when the Corps's choice of an alignment for a government levee prevented the development of their wetland property. The Corps, in 1979, denied a permit application for a different alignment that would have allowed Plaintiffs to develop their property; the court held that Plaintiffs' claim was then barred because of the six year statute of limitations governing claims before it. Plaintiffs asserted that a possibility existed, despite the permit denial, that a compromise would later be reached and the levee aligned in a manner that would permit development of their property. In response to Plaintiffs' argument, the court distinguished the permit denial in this case from circumstances where a continuous physical process gives rise to a takings claim; the takings claim does not ripen in such circumstances until the physical process stabilizes. See Cristina Investment Corp. v. United States, 40 Fed.Cl. 571 (1998).

IV. OCEAN POLLUTION

A. Toxic Chemical Discharge into U.S. Waters

1. Industries discharged almost one billion pounds of toxic chemicals into the United States's waters between 1992 and 1996, according to a U.S. Public Interest Research Group study that examined data available from the
Toxics Release Inventory. This included 11 million pounds of carcinogens, 15.5 million pounds of persistent toxic metals, and 1.6 million pounds of reproductive toxins. One polluter was responsible for all reported toxic discharges between 1992 and 1996 into 74% of the waters polluted, while three or fewer polluters were responsible for all reported toxic discharges into 92% of polluted waters. Over 500 million pounds of toxic chemicals were reported discharged by industries into the Mississippi River during this time; this exceeded the amount of toxics released into all other U.S. waters combined. The most cancer-causing toxic chemical discharges were received by the Columbia River, while Washington State waters received the most cancer-causing substances. New Jersey's DuPont Chambers Works discharged more reproductive toxins into U.S. waters than any other facility; these toxins were all discharged into the Delaware River, which received more reproductive toxin discharges than any other U.S. water body. Elkem Metals dumped 1.2 million pounds of toxic metals into U.S. waters between 1992 and 1996, more than any plant in the nation.


2. The EPA and Department of Defense (DOD) completed step one of the three-phase process to set uniform national discharge standards for Armed Forces vessels by promulgating a final rule on May 10, 1999. This rule establishes the types of vessel discharges that require control through the use of marine pollution control devices (MPCD) and which do not, based on consideration of the anticipated environmental effects of the discharge and other factors listed in the Clean Water Act. In making the determinations, EPA and DOD assessed each discharge for its potential to cause adverse impacts on the marine environment due to the chemical constituents present in the discharge (including bioaccumulative chemicals of concern), thermal pollution, or by introducing nonindigenous aquatic species.

The rule also creates the mechanism through which states can petition the EPA and the DOD to review discharges to determine if a MPCD should be used. Furthermore, it establishes the process that the states and EPA
must follow to create no-discharge zones. Future rulemakings will promulgate the MPCD performance standards for those types of discharges requiring MPCDs (Phase II), and specify the requirements for the design, construction, installation, and use of MPCDs (Phase III). See Uniform National Discharge Standards for Vessels of the Armed Forces, 40 C.F.R. pt. 9 (1998).

B. Dredging Projects

3. The Chicago District of the Army Corps of Engineers announced in November 1998 that it planned to build a $136 million facility for the disposal of contaminated dredge sediment from Indiana Harbor. Since Indiana Harbor was last dredged in 1972, one million cubic yards of contaminated sediment has settled in the harbor. The proposal, subject to approval by the Corps’s Washington headquarters, calls for a confined disposal facility to be built upon the contaminated site of a former petroleum refinery with Resource Conservation and Recovery Act status, in a joint effort with the Environmental Protection Agency. The confined disposal facility would have a capacity of 4.7 million cubic yards; industry users of the harbor would help finance the disposal of material dredged from their berthing areas. Legislation enacted in the 1970s forced the Corps to cease the dumping of dredged material into Lake Michigan. See Contaminated Sediment: Corps to Dispose Dredged Harbor Soil in Indiana RCRA Hazardous Waste Site, HAZARDOUS WASTE NEWS, Nov. 9, 1998, available in 1998 WL 10240035.

4. The Environmental Protection Agency announced in October of 1998 that the New Bedford Harbor Superfund site will be cleaned by a $120 million dredging project. The dredging project will bury PCB contaminated materials from the harbor in four shorefront disposal facilities. The EPA currently has only half of the $120 million the project will require, however, and the earliest the cleanup is expected to be completed is 2006. New Bedford Harbor, widely regarded as Massachusetts’ dirtiest, was designated a Superfund Site in 1983; a ban on eating fish from the PCB contaminated harbor has been in effect since 1977. Manufacturers responsible for the discharge of PCB wastes into the harbor have paid a $70 million settlement, which the EPA will use to begin dredging the harbor in 2001. New Bedford will then be required to compete with hundreds of other Superfund sites to obtain the additional $50 million required to complete the cleanup. The EPA will coordinate the dredging with efforts to deepen the harbor’s navigation channels to attract more shipping business to the port city. See Peter J. Howe, $120m Harbor Cleanup Set for New Bedford, EPA OK’s Massive Dredging Plan, BOSTON GLOBE, October 2, 1998, at B1.
5. The Corps and EPA announced in August of 1997 that contaminated sediment dredged from New York Harbor would no longer be buried in a New Jersey dump site known as the Mud Dump Site. The site will be sealed by a layer of non-toxic sediment; contaminated sediment from the harbor will be placed, then sealed, in underwater pits in Newark Bay or diverted to upland uses. The Corps and the EPA designated a 15.7 square nautical mile area the Historic Area Remediation Site. The Site, which includes the two square mile Mud Dump Site, will be remediated by uncontaminated dredged materials to reduce contamination to acceptable levels. No solution has been found, however, as to the disposal of dredged material that cannot be placed in the ocean. The thirty dredging projects the Corps authorized in New York Harbor, completed in 1997, resulted in the removal of 6.8 million cubic yards of dredged material, 4.8 million cubic yards of which was authorized to be disposed at the Mud Dump Site. See EPA and Corps will Close Mud Dump; Remediate Surrounding Area, BUSINESS WIRE, Aug. 26, 1997, available in WESTLAW, 8/26/97 Bus. Wire 10:27:00; Air and Water Pollution Dredging: Feds Announce Plan to Clean NY Harbor, NJ Dump, GREENWIRE, May 8, 1997 available in WESTLAW, 5/8/97 APN-GR 5; Air and Water Pollution Dredging: EPA, Corps to Seal Toxic Mud Dump in Atlantic, GREENWIRE, Aug. 28, 1997, available in WESTLAW, 8/28/97 APN-GR 5.

6. On May 10, 1999, the EPA and the Army Corps of Engineers promulgated a final rule to amend section 404 of the Clean Water Act (CWA), bringing their interpretation of that act into line with their statutory authority. This action was the result of an injunction by the U.S. Court of Appeals for the District of Columbia Circuit which mandated that the agencies amend the "Tulloch rule" by deleting the redeposit of dredged material and incidental fallback from the definition of discharge.

The EPA had issued a regulation, the "Tulloch rule," defining the term "discharge of dredged material" as: "any addition of dredged material into, including any redeposit within, the waters of the United States." As defined, the term included, but was not limited to the following: "any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." This term is important for it determines what types of activities do or do not require a CWA section 404 permit. The court concluded that incidental fallback is not an "addition" of a pollutant, and that, therefore, the agencies' assertion of authority to regulate any redeposit of dredged material exceeded their statutory authority. See American Mining Congress v. United States Army Corps of Engineers, 951 F. Supp. 267 (D.C. Cir. 1997).
To conform the regulation to the holding, the EPA has made two modifications to the rule. First, the new rule deletes use of the word "any" as a modifier of the term "redeposit," and second, it expressly excludes "incidental fallback" from the definition of "discharge of dredged material." Revisions to the Clean Water Act Regulatory Definition of "Discharged Dredge Material." 33 C.F.R. pt. 323 (1998); 40 C.F.R. pt. 232 (1988).

C. Montrose Superfund Site

7. The Environmental Protection Agency proposed in 1997 that an additional seventeen square miles of ocean floor be incorporated into the Montrose Chemical Corporation Superfund site. Located off the coast of the Palos Verdes Peninsula in California, the site contains an estimated 100 metric tons of DDT and 10 metric tons of PCBs. Montrose Chemical, when it manufactured the pesticide DDT, discharged millions of pounds of the chemical into Los Angeles County's sewage pipeline, which empties onto the Palos Verdes shelf. Citing recent research at Michigan State University that suggests DDT byproducts are cleaned naturally by bacteria in marine sediments, however, Montrose claims that no cleanup of the DDT is necessary. But the EPA questions the validity of this laboratory research, and estimates that it would take several decades for DDT to biodegrade in a natural environment, during which time Southern California's marine life would continue to be poisoned. The EPA is expected to propose a cleanup solution where the ocean floor will likely be sealed with a thick barrier of sand, at an estimated cost of $300 million. California and the federal government are seeking hundreds of millions in monetary damages from Montrose and six other companies, Los Angeles County, and the 150 municipalities that discharged DDT into the county sewage system. See Marla Cone, Disappearing DDT? L.A. TIMES, May 21, 1998, at B2; Natural Remedy Suggested for DDT, SUPERFUND WEEK, May 15, 1998, available in 1998 WL 8594028; Montrose Cleanup May Expand, SUPERFUND WEEK, Aug. 22, 1997, available in 1997 WL 12955937.

D. Pending Legal Actions

8. In potentially one of the largest legal actions ever taken against the Environmental Protection Agency, environmental organizations, in July 1998, planned to file a lawsuit to force the EPA to clean Santa Monica Bay and other bodies of water in southern California that the EPA has classified as exceeding safe levels of pollution. The suit is aimed at enforcing the second component of the Clean Water Act, the total maximum daily load (TMDL) of acceptable pollution that can be discharged into water bodies; environmental organizations argue that limits on point-sources of pollution are not by themselves adequate to ensure a clean Santa Monica Bay. See
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The Natural Resources Defense Council, in another action to limit non-point sources of pollution, announced in 1998 that it would sue the BIW International Airport to prevent the flow of runoff from de-icing chemicals into Chesapeake Bay. The NRDC indicated that legal action would also be commenced against O'Hare International Airport for similar reasons. See *Water Pollution: NRDC Sues MD Airport Over Toxic Runoff*, GREENWIRE, Jan. 8, 1998, available in WESTLAW, 1/8/98 APN-GR 7.

### E. Citizen Suit Standing

9. The Third Circuit reversed a $2.6 million citizen suit judgment under the Clean Water Act for lack of standing. The court held that Plaintiffs' recreational use of the Delaware River and Defendant Magnesium Elektron's violation of their permit limit were insufficient to confer standing in absence of evidence that actual damage was caused to the river's ecosystem. Magnesium Elektron discharged pollutants into the Delaware River tributary in excess of its allowable limit; the maximum statutory penalty of $2.6 million was imposed by the trial court. The court held that Plaintiffs' reduced recreational use of the Delaware River does not confer standing in absence of evidence of actual pollution; a showing of actual injury to the waterway is required. See PIRG v. Magnesium Elektron, 123 F.3d 111 (3rd Cir.1997); M.B. Gerrard and M.J. Bose, *Developments in Defining Citizen Standing*, 218 N.Y.L.J. 3 (1997).

### F. Caltrans Settlement

10. California's state highway agency, Caltrans, agreed in a settlement to reduce toxic storm-water runoff from highways into San Diego waters. San Diego Baykeeper was joined by the Department of Justice in negotiating a settlement that requires Caltrans to spend $2.5 million to improve drainage systems, conduct surprise inspections of its construction sites, and pay a $430,000 fine for alleged Clean Water Act violations. Caltrans also agreed to help purchase a 1.25 acre former salt marsh and restore it as a functioning wetland. Silt, oils, and metals, carried by rainwater from San Diego's freeways and Caltrans' construction sites pollutes waters throughout the San Diego region. See Terry Rodgers, *Caltran Agrees to Pollution Settlement*, SAN DIEGO UNION-TRIB., Dec. 18, 1997, at B1.

### G. Indictment for Ocean Dumping

11. Owners and operators of a tanker vessel were indicted, in December 1998, on three felony counts under the Clean Water Act for illegal discharge
of fuel oil off the coast of San Francisco. Crewmembers from the tanker *M/V Command* allegedly discovered a crack in the starboard fuel tank and then neglected to drain the tank of 50,000 gallons of fuel during repairs. Two days later, wastewater contaminated with oil from this tank was allegedly discharged into the Pacific Ocean. The resulting oil slick injured or killed hundreds of birds and other sea wildlife and required over $1 million in cleanup costs. *See Tanker Vessel Owners and Operators Indicted for Ocean Dumping*, EPA PRESS ADVISORY, Dec. 11, 1998 available in 1998 WL 854946.

V. PROTECTED AREAS

A. Marine Sanctuaries


2. A comprehensive final management plan for the Hawaiian Islands Humpback Whale National Marine Sanctuary was issued by the National Oceanic and Atmospheric Administration in May 1997. The plan includes long-term monitoring, and educational and research activities for the sanctuary. The regulations will implement the final management plan in compliance with both the Hawaiian Islands National Marine Sanctuary Act and the National Marine Sanctuaries Act. *See 15 C.F.R. pt. 922 (1997)*.


B. Estuaries

4. The Senate, in October of 1998, passed a bill to enhance coordination of federal and non-federal estuary programs and provide financing for the restoration of estuary habitat. The bill would establish an Estuary Collaborative Council to advise voluntary estuary programs; these programs could obtain federal cost sharing for up to 65 percent of project costs. Voluntary
programs established by the bill would attempt to restore one million acres of estuary habitat. See 144 CONG. REC. S12467 (daily ed. Oct. 14, 1998).

5. The Army Corps of Engineers, in October 1998, proposed a project to restore the flow of water in the Everglades. The 20 year project would reestablish the proper balance of fresh and salt water in Florida Bay estuaries. Development presently causes 85 percent of Everglades freshwater to flow into the ocean during the wet season; this leaves the Everglades too dry for the remainder of the year. The project, expected to begin in 2002, will cost an estimated $8 billion and require the removal of more than five hundred miles of canals and levees. Florida and the federal government would share the cost of the project. See Everglades Restoration, 28 ELR 10754 (1998).


VI. FEDERAL OUTER CONTINENTAL SHELF

A. Oil Drilling Moratorium Extended

1. President Clinton, in June of 1998, signed an executive order that extends the offshore oil and gas drilling ban until 2012. The ban, first imposed by President Bush in 1990 under the Outer Continental Shelf Lands Act, would have expired in 2002. The moratorium applies generally to the Atlantic and Pacific coasts and southwest Florida, but does not apply to the Gulf of Mexico, where drilling is currently allowed. California government officials and environmentalists had earlier advocated for a declaration of a permanent ban on oil and gas leasing along their coast. See Clinton Extends Oil Drilling Ban, CHI. TRIB., June 13, 1998, at 16; Spotlight Story Oceans: Clinton Unveils Package of Offshore Protections, GREENWIRE, June 15, 1998, available in WESTLAW, 6/15/98 APN-GR 4.

2. California representatives urged the federal government, in July 1998, in letters from Sen. Boxer and Rep. Capps, to deny drilling applications for forty undeveloped outer continental shelf leases. Although California has declared a moratorium on new leases within its jurisdiction, neither its ban nor the federal government’s moratorium on new leases in the outer continental shelf apply to forty leases that were issued fourteen years ago, before the moratorium on new leases became effective. According to the
Minerals Management Service’s Pacific Coast office (MMS), no company has submitted an exploration proposal for any of the forty leases. The MMS suspended the leases in 1992 pending the outcome of the California Offshore Oil and Gas Energy Resource Study, the final draft of which is expected to be released in 1999. When the lease suspensions retire in early 1999, the MMS is expected to either terminate the leases or renew their suspension. See Bill Loveless, California Lawmakers Aim to Stop Development of Existing Leases, INSIDE ENERGY/WITH FED. LANDS, Aug. 31, 1998, available in 1998 WL 10449800.

B. Demonstration of Financial Responsibility for Oil Spills

3. The Minerals Management Service issued new regulations for damages from oil discharges caused by oil and gas exploration and production facilities. The regulations, which cover the outer continental shelf and some state waters, requires offshore facilities to demonstrate up to $150 million in financial responsibility corresponding to the risk of potential oil spills. Facilities located on the outer continental shelf must demonstrate a minimum of $35 million in financial responsibility, while those located in state waters are required to demonstrate financial responsibility of at least $10 million. See 63 Fed. Reg. 42,699 (1998).

C. Possible Amendments to the Outer Continental Shelf Lands Act

4. The House, in October 1998, passed a bill that would prohibit the Secretary of the Interior from charging state and local agencies for limited uses of some outer continental shelf resources. This amendment to the Outer Continental Shelf Lands Act would include certain uses of sand, gravel, shell and other resources by state and local agencies. See 144 CONG. REC. H10940 (daily ed. Oct. 15, 1998).

A bill referred to the Committee on Energy and Natural Resources in June of 1998 would amend the Outer Continental Shelf Lands Act to prohibit new leases off portions of the Florida coast. Existing lease activities would be permitted only if studies are conducted that compile the information necessary to perform relevant analyses of development and production activities. The bill would also subject development and production activities to full state review. See 144 CONG. REC. S7172, S7186 (daily ed. June 25, 1998).

D. Federal Jurisdiction

5. On October 13, 1998, the Supreme Court expressly defined the boundary line between the submerged lands of Texas and the United States. The opinion defines with more particularity the boundary line that was
declared in United States v. Louisiana, 364 U.S. 502 (1960) and the supplemental opinion in United States v. Louisiana, 314 U.S. 836 (1969). The boundary will be used to determine which entity is entitled to the lands, mineral, and other natural resources underlying the Gulf of Mexico. See United States v. Louisiana, 525 U.S. 1 (1998).

6. In an action filed by Alaskan native village, the U.S. Court of Appeals for the Ninth Circuit held that the village’s claims of unextinguished aboriginal title over portions of the outer continental shelf (OCS) were barred under the federal paramountcy doctrine. The native villages were seeking exclusive hunting and fishing rights over the areas. The villagers claimed that their members had hunted and harvested the area for over seven thousand years, and that their social, economic and cultural well being depends on their ability to continue to hunt and fish in this area. Under the Magnuson-Stevens Act, the Secretary of Commerce limited access to the sablefish and halibut fisheries in the Gulf of Alaska and the lower Cook Inlet. It is against this regulation that the villages’ seek injunction, claiming it authorizes nonnative fisherman to hunt this area, while prohibiting native fisherman without individual fishing quotas from doing the same.

The federal paramountcy doctrine arose from four cases concerning the dispute about control and ownership of the territorial sea and adjacent portions of the OCS. In all four cases, concerning territory adjacent to California, Louisiana, Texas and Maine, the United States established control and ownership of the seabed and territorial waters; the Supreme Court found that “the marginal sea is a national, not state concern.” See United States v. Louisiana, 339 U.S. 699 (1950). The string of cases firmly established that the federal government had paramount rights to the offshore seabed.

After examining the paramountcy doctrine, the Court of Appeals concluded that the doctrine not only bars states’ claims to the OCS, but also claims from persons and indigenous entities. The Court of Appeals agreed with the District Court’s finding that if the states have no property rights to these lands, it cannot be otherwise for a tribal entity. The court rejected the village’s argument that their purported right and the federal government’s paramountcy could coincide, finding that the village’s claim of exclusive use was no different than the right claimed by the states in the previous cases. See Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998)
VII. OIL POLLUTION

A. Oil Spills

1. After pleading guilty to federal charges in the U.S. District Court for the District of Rhode Island, the Eklof Marine Corp., Thor Towing Corp., Odin Marine Corp., Leslie Wallin, and Gregory Aitken were heavily fined for a January 1996 oil spill off the coast of Rhode Island. Because both the tug and the barge were unequipped to navigate in the stormy waters that caused the spill, the defendants were fined 3.5 million dollars by the federal government, and will be required to invest 1 million dollars on remedial safety measures and 1.5 million to the Nature Conservancy to be used to buy land for conservation purposes. Reportedly, the Nature Conservancy plans to use the money to purchase seabird habitat along the Maine coast. Additional charges, arising from the same spill, resulted in an additional 3.5 million dollar fine for the companies, as well as three years of probation. See Tanya Meekins, New England Oil Spill Results in Heavy Penalties, EPA PRESS RELEASE, available in 1998 WL 17722.

2. Royal Caribbean Cruises, Ltd. was indicted by a federal grand jury on February 19, 1998 for presenting the U.S. Coast Guard with false statements and falsifying documents during a pollution discharge investigation. The investigation was conducted upon arrival of the Nordic Empress to its home port of Miami after a Coast Guard aircraft filmed the vessel illegally discharging pollutants. Royal Caribbean was charged with knowing that its Oil Record Book contained false information, because though the ship contained a bypass device that enabled the crew to avoid disposing the bilge waste through the required Oil Water Separator, the record book denied that any waste had been treated in such a manner.

On May 12, 1998, the U.S. District Court in the Southern District of Florida denied Royal Caribbean’s motion to dismiss the charges. Although Royal Caribbean claimed that the U.S. could not prosecute because the discharge had occurred outside the territorial waters of the U.S., and Royal Caribbean ships fly a Liberian flag, Judge Middlebrooks held that it didn’t matter where the spill occurred because the U.S. has jurisdiction to prosecute for the false statements made to the Coast Guard in a U.S. port. The judge also held that because the prosecution is a proceeding that only concerns the false statements, and not the pollution itself, the United Nations Convention on the Law of the Sea does not apply. See United States of America v. Royal Caribbean Cruises LTD., 11 F. Supp. 2d 1358 (S.D. Fla. 1998).
3. Twenty-five million dollars in settlement funds were disbursed by Exxon after a new claims program was approved by Judge Russel Holland in the ever continuing *Exxon Valdez* controversy. The program will provide a mechanism to enable the eventual distribution of the 5 billion dollar punitive damage verdict delivered against Exxon in 1994. Although Exxon is currently appealing the verdict, Judge Holland has already approved the delivery of damages to eleven of the fifty-one groups claiming an interest. See *Valdez Claims Program Approved*, THE OIL DAILY, Sept. 25, 1998, available in 1998 WL 9211566.

4. Judge Russel Holland has upheld provisions of the Oil Pollution Act (OPA) that permanently prohibit the *Exxon Valdez* from returning to Prince William Sound. The provisions provide that any vessel that has spilled more than 1 million tons of oil into the marine environment after March 24, 1989 is banned from entering the sound. According to Judge Holland, Exxon waived its right to challenge the provisions when it settled the litigation with the government in 1991. While Exxon’s lawyers argued that banning the *Valdez* from the sound was unconstitutional, Judge Holland rejected the claim. To date, the *Exxon Valdez* remains the only active vessel in the world banned from Prince William Sound. See Natalie Phillips, *Oil Tanker Still Barred from Sound, Judge Refuses to Remove Restriction on Exxon Valdez*, ANCHORAGE DAILY NEWS, June 18, 1998, available in 1998 WL 13050290.

C. State Preventative Measures

5. In Washington State, Intertanko, a trade association composed of oil tanker owners and operators, brought suit to challenge the constitutionality of statutes regulating the operation of oil tankers in state waters. Intertanko argued that Washington’s statutes should be preempted by the federal actions taken in the field, particularly the Oil Pollution Act of 1990 (OPA). In response to both Washington’s and Intertanko’s motions for summary judgment, Judge John Coughenour of the U.S. District Court, Western District of Washington held that the statutes were not preempted by OPA, and dismissed the suit. On appeal, the Ninth Circuit largely affirmed the lower court’s decision that Washington’s entire oil regulation scheme was not preempted. It did, however, declare that Washington’s restrictions on radar and emergency towing package requirements were actually restrictions on vessel design specifications, and therefore preempted by OPA. See Intertanko v. Locke and Natural Resources Defense Council, 148 F.3d 1053 (9th Cir. 1998).
D. U.S. Oil Spills

6. At least two endangered Brown Pelicans, and 94 other seabirds, were killed in a 2,500 gallon oil spill near San Francisco, California. The U.S. Coast Guard used a commercial satellite and shipping logs to trace the spill to a Liberian tanker en route to Panama. Laboratory analysis, conducted on samples from the spill and the tanker’s hold, confirmed that the oil did indeed come from the vessel. Because the cause of the spill is still officially unknown, the liability of the vessel’s owners is unclear. See Oil Spill, 28 E.L.R. (1998).

7. Members of the Washington State Department of Ecology were outraged at 1998’s sixth recorded incident of a U.S. Navy warship oil spill in Puget Sound. The incident occurred on Wednesday, April 15, 1998, when the U.S.S. Carl Vinson spilled jet fuel while at its mooring in the Puget Sound Naval Shipyard. Washington’s Department of Ecology has expressed increasing frustration at its lack of authority to fine the Navy for spills that would result in high penalties for civilian vessels. The Department is angered by the continuing trend of Navy incompetence, but says that it can only rely on public pressure to put an end to the Navy’s destructive habits. See Hal Spencer, Navy Ship Spills Continue at Bremerton, State Ecology Regulators Can Only Fume After 6th Discharge of 1998, News Trib., Apr. 17, 1998, at B3.

E. Miscellaneous

8. A challenge to the final rule issued by the National Oceanic and Atmospheric Administration (NOAA) pursuant to the Oil Pollution Act of 1990 (OPA), resulted in the court vacating a part of that rule. The rule created the procedures for the assessment of natural resource damages resulting from a discharge of oil, and provided that natural resource damage assessments made by a trustee in accordance with the regulations "shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding" under OPA.

The court agreed with Petitioner’s challenge to the rule that the trustees have power to remove residual oil. Petitioners argued that because OPA delegates sole responsibility for oil removal to the President, NOAA exceeded its statutory authority by authorizing trustees to remove residual oil. Concluding that the final rule's authorization for removal of residual oil suffered from a lack of reasoned decisionmaking, the court vacated that portion of the rule and remanded it to the agency for further consideration. However, the court rejected a number of other challenges and sustained the final rule in all other aspects. See General Electric Company v. United States Department of Commerce, 128 F.3d 767 (D.C. Cir. 1997).
VIII. STATE OCEAN MANAGEMENT

1. In an effort to coordinate ocean policies and raise public awareness about ocean related issues, Florida governor Lawton Chiles announced the creation of a twenty-four member ocean policy panel. The panel, the first of its kind in the State, will be composed of various professionals, including scientists and educators, as well as boaters and fishermen. Betty Castor, President of the University of South Florida, will head the panel, which plans to implement strategies to halt what many feel is a steady deterioration of Florida's ocean resources. See Ocean Panel to Set, Coordinate State Policies, TAMPA TRIB., Jan. 30, 1998, available in 1998 WL 2762959.

IX. FISHERIES MANAGEMENT

A. Federal Litigation

1. On February 24, 1998, the United States District Court for the Middle District of Florida handed down its decision in Southern Offshore Fishing Association v. Daley. The case arose from a challenge of a fishery management plan (FMP), ordered by the Secretary of Commerce, that imposed commercial harvest quotas for some species of sharks. The order came after years of government encouragement of fishermen to engage in the shark fishery, once considered a underutilized resource. The Southern Offshore Fishing Association, a conglomeration of shark fishermen and shark fishing institutions, challenged the order under the Regulatory Flexibility Act. The Association also claimed that the order violated National Standards One and Two of the Magnuson-Stevens Fisheries Conservation Act, and challenged the process used to formulate the FMP. Although Judge Merryday found that the FMP did not violate Standards One and Two, and that the process used in its formulation was not arbitrary and capricious, he did hold that the Secretary had failed to meet the requirements of the Regulatory Flexibility Act. Judgment was entered in part for each of the parties, and remanded. See Southern Offshore Fishing Association v. Daley, 995 F. Supp. 1411 (M.D. Fla. 1998).

2. In November 1998, the Ninth Circuit Court of Appeals declared that a fisherman had a property interest in receiving approval for a guaranteed fishing quota permit. The fisherman, Richard Foss, challenged the National Marine Fisheries Service (NMFS) decision to deny his application because it was filed forty-five days late. He claimed that the decision violated his Fourteenth Amendment right to due process of law. Although the trial court held that the Fisherman did not have a property or liberty interest in the permit, and therefore no due process grounds existed, the Ninth Circuit disagreed. According to Circuit Judge Margaret McKeown, Foss had a
property interest in the permit because it "was a regulatory entitlement, not an abstract gleam in Foss's eye or a unilateral expectation." Nevertheless, the court held that NMFS's procedure for denying the permit was "constitutionally sufficient" to meet the Fourteenth Amendment attack. See Foss v. National Marine Fisheries Service, 161 F.3d 584 (9th Cir. 1998).

3. On September 28, 1998, the United States District Court for the Eastern District of Virginia declared that the Secretary of Commerce had violated the Magnuson-Stevens Act as amended in 1996, and set aside the 1997 summer flounder quota limits. The plaintiffs, the North Carolina Fisheries Association, argued that the quota limits should be thrown out because the Secretary had failed to take the economic impacts on small businesses into consideration, as is mandated by the Regulatory Flexibility Act and National Standard 8. In an earlier proceeding, preliminary review of the administrative record prompted the court to order the Secretary to submit economic analysis to support his claim that the summer flounder quota would have little economic impact on small businesses. After subsequent review of the analysis, the court determined that the Secretary had "acted arbitrarily and capriciously in failing to give any meaningful consideration to the economic impact of the 1997 quota regulations on North Carolina fishing communities." Because the Secretary had merely done analysis to "justify a prior determination," the court granted summary judgment to the plaintiffs. See North Carolina Fisheries Association v. Daley, 27 F. Supp. 2d 650 (E.D. Va. 1998).

4. In a review of the decision by the Secretary of Commerce to adopt revised state-by-state fishing quotas for scup, the First Circuit Court of Appeals set aside the regulation pending further proceedings. The Court held that the record did not support the Secretary's decision, as the Secretary offered almost no explicit information as to why the state-by-state quotas were needed. The Court also held, however, that while awaiting further proceedings, the Secretary could adopt state-by-state quotas on an emergency basis. The regulation was further set aside on the basis that the new quotas threatened more discrimination between states than it would avoid. While the Magnuson-Stevens Act prohibits discriminating between residents of states, the Court noted that some discrimination could be tolerated in order to achieve the statute's goal of fishery conservation. See Massachusetts v. Daley, 170 F.3d 23 (1st Cir. 1999).

5. Several environmental and fisherman's organizations sought injunctive relief against the United States and various private corporations to stop the transportation of vitrified nuclear waste. The plaintiff's sought relief under the National Environmental Policy Act (NEPA), the Atomic Energy Act (AEA), and the Nuclear Non-Proliferation Act (NNPA). The United States
District Court of Puerto Rico granted summary judgment for the defendants, holding that the United States's consent was not required for retransfer of irrecoverable nuclear waste, and that the United States could not intervene in innocent passage through U.S. waters of ships carrying such waste. Under the NNPA and the AEA, the United States' consent for retransfer is only necessary when the waste could be used for proliferation purposes. The District Court found that this uranium was at least partially irrecoverable, thus insignificant for proliferation purposes, and therefore the United States's consent was unnecessary. The transfer was therefore subject to the terms of the United Nations Law of the Sea Convention of 1982 and the principle of right of innocent passage, and the United States could not interfere in any retransfer, absent any act of willful or serious pollution. See Mayaguezanos v. United States, 38 F. Supp. 2d 168 (D. Puerto Rico 1999).

6. Several commercial fishermen sued to challenge the United States Secretary of Commerce's 1997 report that Atlantic Bluefin Tuna was overfished. The plaintiff's contended that the Secretary's use of "overfished" was arbitrary and capricious, exceeded the secretary's statutory authority, and was therefore subject to judicial review under the Administrative Procedure Act (APA) and the Magnuson-Stevens Act. The United States District Court of Massachusetts found that the Secretary's declaration was not a regulation under the Magnuson-Stevens Act, and therefore was not entitled to judicial review under the Act. The court specifically found that the declaration was an advisory "guideline," not a regulation that would carry with it the threat of civil penalty or citation. The court further found that judicial review was precluded under the APA because of the legislative intent to preclude guideline review under the Magnuson-Stevens Act. See Tutein v. Daley, 43 F. Supp. 2d 113 (D. Mass. 1999).

B. Changes in the Sustainable Fisheries Act of 1996

7. In accordance with requirements of the Magnuson-Stevens Act of 1996, the National Marine Fisheries Service reported to Congress on the state of the nation's fisheries. According to the report, 100 species of fish reviewed are overfished or approaching that level, and 200 species are not overfished. The report will be used to evaluate whether Fishery Management Councils (FMC) are meeting their statutorily designated duty to reevaluate Fishery Management Plans (FMP) and rebuild overfished stocks. After evaluating the report, NMFS will issue orders to non-compliant FMCs, which will then have until October 1999 to submit a new FMP for approval. See National Oceanic and Atmospheric Administration, Congress Updated on Status of Marine Fisheries (visited 12/1/98) <http://www.noaa.gov/public-affairs/press98.html>.
8. NMFS has implemented new regulations required by the Magnuson-Stevens Fishery Conservation and Management Act as amended by the Sustainable Fisheries Act of 1996. The regulations are designed to protect fish stocks from certain types of potentially harmful fishing gear and take a more proactive approach than past regulations. The final rule is now slated to take effect as of December 1, 1999. It states that no person or vessel will be permitted to employ fishing gear in fisheries within the U.S. Exclusive Economic Zone (EEZ) other than that of a type included in a list that has been established by each regional fishery management council or under the authority of the Secretary of Commerce, unless they comply with specifications set forth for a ninety day notification period. The list of fisheries and types of gear was generated through information received by the eight regional fishery management councils and further includes guidelines and definitions of types of gear type in order to aid in determining the specific gear that will be allowed in each particular fishery and, consequently, which types of gear will require notification. 64 Fed. Reg. 4030 (1999) (to be codified at 50 C.F.R. pt. 600).

9. NMFS has approved several FMP amendments that describe and identify Essential Fish Habitat (EFH) in Alaska and risks to that habitat for groundfish, scallops, salmon, and king and Tanner crabs in accordance with the Magnuson-Stevens Fishery Conservation and Management Act. EFH is defined under section 303(a)(7) of the Magnuson-Stevens Act as the "waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." Federal agencies are required to consult with NMFS on any activities that may adversely affect an EFH, thereby protecting and conserving these habitats for the species that live within them. The approved amendments include: Amendment 55 to the FMP for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area; Amendment 55 to the FMP for Groundfish of the Gulf of Alaska; Amendment 8 to the FMP for the Commercial King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands; Amendment 5 to the FMP for Scallop Fisheries off Alaska; and Amendment 5 to the FMP for the Salmon Fisheries in the EEZ off the Coast of Alaska. 64 Fed. Reg. 20,216 (1999) (to be codified at 50 C.F.R. pt. 679).

Several amendments designating EFH waters for several species in the Atlantic, including Amendment 1 to the Monkfish FMP, Amendment 11 to the Northeast Multispecies FMP, Amendment 9 to the Atlantic Sea Scallop FMP, and Amendment 1 to the Atlantic Salmon FMP have also been approved. The monkfish FMP amendment was considered separately from the other amendments, which were approved March 3, 1999. Approval for the monkfish FMP amendment was issued on April 22, 1999. See 64 Fed. Reg. 32,825(1999) (to be codified at 50 C.F.R. pt. 648) (Monkfish); 64 Fed. Reg. 19,503(1999) (to be codified at 50 C.F.R. pt. 648) (Multispecies, Atlantic Sea Scallop, and Atlantic Salmon).
NMFS announced the partial approval of the Generic EFH Amendment to the FMPs of the Gulf of Mexico. Approval was granted for the identification of 26 selected species and the coral complex, but did not approve the identification of EFH for the remaining species under management or the assessment of fishing impacts on EFH. Assessment of fishing impact on EFH was approved on only three of the proposed types of fishing gear: trawls, recreational fishing gear, and traps/pots. See 64 Fed. Reg. 13,363 (1999) (to be codified at 50 C.F.R. pt. 622).

Partial approval was also given for a "comprehensive amendment" that addresses EFH, overfishing definitions, bycatch, fishing sectors, and fishing communities in the Western Pacific Fishery Management Council's FMPs. Definitions of EFH based on identification and description for the four FMPs was approved. The sections of the comprehensive amendment disapproved by NMFS include the bycatch provisions of Amendment 6 to the FMP for Bottomfish and Seamount Groundfish and Amendment 8 to the Pelagics FMP due to a lack of a detailed discussion of specific measures to be taken to minimize bycatch and the mortality of bycatch. See 64 Fed. Reg. 19,067 (to be codified at 50 C.F.R. pt. 660).

**C. Aquaculture**

10. Aquaculturalists in thirteen states now have permission to kill double-crested cormorants that are feeding on their fish stocks. The U.S. Fish and Wildlife Service (FWS) granted the permission in the March 4, 1998 publication of the Federal Register. According to the Service, the availability of lethal alternatives will reduce the economic loss that some aquaculturalists face, but will have "no significant effect on the cormorant population...." In order to qualify for permission, aquaculturalists will be required to prove that they have a cormorant problem, and display that they have attempted non-lethal techniques that have been unsuccessful. It is estimated that the FWS order will save aquaculturalists $20 million per year in lost fish. Currently, only the states of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas are covered by the order. See 63 Fed. Reg. 10,550 (1998); Department of Interior, Service Allows Aquaculturalists to Take Cormorants Preying on Commercial Fish Stocks, DEP'T OF THE INTERIOR PRESS RELEASE, Mar. 4, 1998, available in 1998 WL 106,493.

**D. Aid**

11. At the commissioning ceremony of the *Gordon Gunter*, the second largest research vessel in the country, Secretary of Commerce William Daley announced that 3.5 million dollars in federal aid would be made
available to help restore the brown shrimp fisheries in Louisiana and Mississippi. The aid comes after fishermen suffered a 75 to 80 percent reduction in catch, reportedly due to fresh water flooding of coastal waters caused by flood control systems built on the Mississippi river. Most of the aid will go directly to the states for use in the restoration of the fisheries and prevention of further collapse. A portion of the aid will be divided between the five Gulf states, for use in the research of red tides. See NOAA, Commerce Secretary Declares Failure of Louisiana and Mississippi Brown Shrimp Fisheries: Sec. Daley Announces 3.5 Million in Aid (visited 12/1/98) <http://www.noaa.gov/public-affairs/press98.html>.

12. In August 1998, the Commerce Department granted 7 million dollars in federal aid to Alaska, to help them recover from the 1997 salmon fishery failure in Bristol Bay and Kuskokwim. The federal aid supplemented the 2.33 million dollars already granted by the state. The grant will be divided to help struggling communities, give loans to fishery permit holders, encourage economic development planning, and improve fisheries research, education, and training. See NOAA, Commerce Secretary Daley Announces the Availability of 7 Million in Federal Aid To Alaskans for 1997 Salmon Failure (visited 12/1/98) <http://www.noaa.gov/public-affairs/press98.html>.

13. In February 1999, NMFS issued a proposal of regulations that would establish procedures for conducting fishing capacity reduction programs. These programs would pay fishermen with excess fishing capacity in a specific fishery to either relinquish their permit or both relinquish their permit and withdraw their vessels from that fishery. Withdrawal of vessels would be accomplished either by scrapping them or subjecting them to title restrictions that would prevent the vessels' use for fishing. The proposed effects of such procedures are an increase in fishing productivity and aid in conservation and management measures in the fishery. NMFS sets forth framework procedures to allow them to determine the amount of reduction, the cost of such reduction, and to disseminate that information to the fee referendum voters. While guidelines for financing are proposed, adoption of a final program plan for financing would not occur until after a referendum approval of the fee system. See 64 Fed. Reg. 6854 (1999) (to be codified at 50 C.F.R. pt. 253).

E. Highly Migratory Species

14. Secretary of Commerce, William Daley, made a draft proposal in October that would require the certification of all imported Atlantic swordfish. The certification process would be used to prohibit the importation of undersized swordfish into the U.S.. Under the proposed
all seafood importers would be required to obtain a permit to import swordfish, and would be required to report its importation for every shipment. The proposal would ban the import of any Atlantic swordfish with a dressed weight of under thirty-three pounds. Daley's proposal will officially implement the 1995 recommendation of the International Commission of Atlantic Tunas (ICCAT) that harvesting of undersized Atlantic swordfish should be limited. See 63 Fed. Reg. 54,661 (1998); NOAA, Commerce Secretary Proposes Import Ban on Small Swordfish (visited 12/1/98) <http://www.noaa.gov/public-affairs/press98.html>.

15. The National Marine Fisheries Service proposed a rule in June 1998 to establish a quota on South Atlantic swordfish at 289 metric tons dressed weight per year for the years 1998–2000. The proposed quota would be split into biannual seasons, and would bring U.S. catch levels into accord with international law. According to the proposal, gear allocations within the fishery would continue, and quotas could be adjusted to reflect whether the fishery was being over or under harvested. See 63 Fed. Reg. 31,710 (1998); NOAA, More Timely Quota Adjustments Proposed for Atlantic Swordfish; South Atlantic Swordfish Quotas Also Established (visited 12/1/98) <http://www.noaa.gov/public-affairs/press98.html>.

16. In October 1998, the National Oceanic and Atmospheric Administration announced a request for public comment on the newly proposed draft fishery management plan concerning North Atlantic swordfish, Western Atlantic bluefin tuna and large coastal sharks. The new draft, which was developed with the assistance of scientists, conservationists, fishermen, state officials, and regional fishery management councils, was modified to meet the stock rebuilding requirements implemented under the amendments to the Magnuson-Stevens Fishery Conservation and Management Act.


F. Council Developments

17. The North Pacific Fisheries Management Council decided to wait until it received more scientific information from the National Marine Fisheries Service before making a decision on whether to decrease the Alaska bottom fisheries to protect endangered Stellar sea lions. The Council is awaiting information from NMFS which may indicate if commercial fisheries are
indeed causing a decline in the species. Further action was anticipated for December, 1998. See Natural Resources Sea Lions: Council Tables Move To Protect Alaska Species, GREENWIRE, Nov. 16, 1998, at 14.

18. The American Fisheries Act of 1998 will take effect on October 1, 2001. Introduced as a bill to prevent foreign ownership and control of U.S. flag vessels employed in fisheries in the U.S. Exclusive Economic Zone (EEZ) and to prevent issuance of fishery privileges for certain vessels, it was subsumed under the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, which was signed by President Clinton on October 21, 1998. The purpose of the American Fisheries Act is to reserve U.S. fisheries resources for U.S. citizens and improve conservation of U.S. fishery resources by reducing the overcapitalization of the U.S. fishing fleet. The act amends current statutes pertaining to fishery endorsements to require that a minimum of seventy-five percent of the interest in the owning entity and each parent entity is owned by U.S. citizens. See American Fisheries Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-616 (1998).

G. Miscellaneous

19. A ban on commercial sea scallopers’ access to parts of Georges Bank that has been in place since 1994 has been lifted for the 1999 season. The ban, implemented by NMFS in an emergency action, closed off access to three large portions of the area to all vessels capable of catching groundfish, including scallop vessels. Recent studies indicate that the sea scallop beds have grown considerably during the closure and have been adequately replenished to allow for resumed harvesting activity. Regulations have been set for harvesting the area to guard against overharvest of sea scallops and minimize bycatch of recovering groundfish stocks. The Eastern Georges Bank area will remain open from June 15, 1999 to December 31, 1999 to allow sea scallopers a limited period of access to the area. The New England Fishery Management Council, in conjunction with NOAA, intends to develop a plan for the continued managing of the fishery through planned openings and closings. See 64 Fed. Reg. 31,144 (1999) (to be codified at 50 C.F.R. pt. 648).

20. Based on a request from the Gulf of Mexico Fishery Council, NMFS has issued an emergency interim rule to increase the minimum size limit for red snapper caught in the EEZ of the Gulf of Mexico, from 15 inches to 18 inches for persons subject to a bag limit, so as to reduce the rate of harvest. The rule also allows for a 24 day extension of the recreational red snapper fishing season to keep it open until August 29, 1999. The Council and NOAA believe that the extension will help reduce economic hardship in the
for-hire sector that would have resulted from the prior August 5 closure date. The closure period, lasting until December 31, 1999, will be strictly enforced by the U.S. Coast Guard and deputized state enforcement officers. 64 Fed. Reg. 30,445(1999) (to be codified at 50 C.F.R. pt. 622).

A final rule was approved by NMFS that further addresses red snapper in the Gulf of Mexico. The rule establishes a four fish recreational daily bag limit, with a zero fish bag limit for the captain and crew of a charter vessel or headboat. The rule also changes the open periods for the fall red snapper commercial season from the first fifteen days of each month to the first ten days of each month, beginning September 1 each year. In issuing the regulation, the Council and NMFS hope to strike a balance between the economic benefits to be gained from the red snapper fishery and the rebuilding of the red snapper stock. See 64 Fed. Reg. 47,711(1999) (to be codified at 50 C.F.R. pt. 622).

21. NMFS has proposed regulations that would implement management measures for the American lobster fishery in the Exclusive Economic Zone (EEZ) from Maine to North Carolina. American lobsters account for twenty-seven percent of the Northeast Region’s total fishery revenue. Although overall lobster population in recent years have increased, a decrease in lobster brood stock and increase in lobster fishing efforts have generated concern. The proposed regulations are an attempt to end overfishing and rebuild American lobster stocks. The regulations adopt the Atlantic States Marine Fisheries Commission’s approach to management. NMFS would withdraw approval of the American Lobster FMP, remove existing regulation issued under the Magnuson-Stevens Fishery Conservation and Management Act, and issue new regulations under the authority of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA) to continue existing management measures and implement a variety of new measures. Since eighty percent of American lobsters are harvested in state fisheries, the capacity to enforce interstate cooperative plans is crucial. The Magnuson-Stevens Act limits the power of the Secretary to insist on cooperative management of fisheries that occur solely in state waters. The ACFCMA, however, makes such plans prepared under a previously voluntary interstate process mandatory.

The new rules designed to implement the Commission’s American Lobster Interstate FMP include the following measures: a moratorium on new entrants into the fishery; boundary designations for lobster management areas specified by the Commission; a requirement that owners of vessels using traps must inform NMFS each year of the lobster management area they will set trap gear in and restrictions on combinations of areas that traps may be set in if traps are to be set in more than one area; limits on the number of near shore area traps and their size; a maximum harvestable lobster size in certain areas based on a measure of the carapace (unseg-
mented shell of the lobster) for the purpose of protecting large females that are capable of producing many eggs; limits on the number of offshore area traps and their size; a requirement that each trap set by a Federal permit holder have a trap tag attached to the trap that will be issued by NMFS and a limit upon the number of trap tags allowed to be purchased each year; provisions for state and federal coordination to develop alternative tagging programs; non-trap harvest restrictions similar to those that currently exist (it is unlawful to take in excess of 100 lobsters for each lobster day at sea, or up to a maximum of 500 lobsters per trip); and allowance for any modification of the plan necessary to meet the egg rebuilding schedule established by the Commission. See 64 Fed. Reg. 2708 (1999) (to be codified at 50 C.F.R. pts. 649 and 697).

X. TRIBAL RIGHTS

A. Makah Tribe's Planned Whale Hunt

1. The U.S. District Court, in September of 1998, denied Plaintiffs' summary judgment motion and request for a preliminary injunction to block the Makah Tribe's planned gray whale hunt. Plaintiffs, including kayakers, tour boat operators and U.S. Rep. Jack Metcalf, contended that the National Marine Fisheries Service failed to adequately measure the environmental impact of whale hunting; the federal government's support of the Makah before the International Whaling Commission, which granted the Makah a quota, was therefore illegal. The court, rejecting Plaintiffs' argument, found that the environmental consequences of the Makah's hunt were sufficiently considered by the Secretary of Commerce. In November of 1998, Plaintiffs appealed the lower federal court decision to the Ninth Circuit; they did not, however, seek an injunction to prevent whaling during consideration of their appeal. Plaintiffs in their appeal will continue to assert that the federal government's support of the Makah constituted a violation of federal environmental law, and that the International Whaling Commission quota granted to the Makah has been improperly interpreted by the United States. The Makah, who were granted the right to whale in an 1855 treaty, stopped hunting for economic reasons in the 1920s and sought to resume hunting, partly as a means of cultural renewal, when the gray whale was removed in 1995 from the Endangered Species List. A hunt management plan agreed to by the Makah and the National Oceanic and Atmospheric Administration prohibits commercial use of edible whale products. See Peggy Andersen, Judge Rules for Makahs in Whaling Challenge, COLUMBIAN, Sept. 22, 1998, available in 1998 WL 17199173; Tina Kelley, Whaling Standoff in Neah Bay, CHRISTIAN SCI. MONITOR, Nov. 12, 1998, at 3, available in 1998 WL 2371886; Peggy Andersen, Whaling Opponents Appeal Dismissal of

B. Consultation with Tribal Governments Required

2. President Clinton, in July 1998, issued Executive Order 13084, which requires agencies to consult with tribal governments before enacting regulations or policies that significantly affect tribes. The order will also make waivers more accessible to tribal governments. See Exec. Order No. 13,084, 63 Fed. Reg. 27655 (1998).

C. Alaska Not Preempted from Regulating State Owned Property

3. The Supreme Court of Alaska held, in 1997, that the Marine Mammal Protection Act’s (MMPA) provisions for Alaska Natives do not preempt Alaska State law that prohibits individuals from entering certain State owned property without a permit and discharging a firearm without a license. Adam and Marie Arnariak were each charged with entering Round Island, a State owned walrus sanctuary, without a permit; Adam Arnariak was also charged with unlawful discharge of a firearm on the island. Charges against the Arnariaks were dismissed by the lower court on grounds that the MMPA, which excludes Alaska Natives from certain portions of the act, preempts state regulation relating to the taking of marine mammals. Alaska’s highest court reversed the lower court’s dismissal. The court held that the MMPA’s alleged denial of Alaska’s right to control its property would constitute an unconstitutional taking without compensation by the federal government; the MMPA, however, must, like any statute, be construed as constitutional where such an interpretation is reasonable. The statutory language and legislative history of the MMPA clearly demonstrated to the court that the act, which Congress did not intend to “interfere with state sanctuaries which protect marine mammals,” does not unconstitutionally deny Alaska’s right to regulate its State owned property. See Alaska v. Arnariak, 941 P.2d 154 (Alaska 1997).

D. Fishing Rights to the Outer Continental Shelf

4. Alaskan Native Villages’ claims to exclusive hunting and fishing rights to a portion of the outer continental shelf (OCS) were rejected by the Ninth Circuit. The Native Villages asserted that the Secretary of Commerce could not promulgate regulations that grant non-tribal members fishing rights, nor could the Secretary limit, through quotas, the fishing rights of natives. The court denied the Native Villages’ claim to unextinguished aboriginal title and exclusive hunting and fishing rights to traditional areas of the OCS. The court held that the federal paramountcy doctrine bars not only state, but
indigenous claims to the OCS; Native Villages’ argument that their aboriginal claim of title was distinct from state claims of sovereignty was rejected by the court. See Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998).

E. Shellfish Included in Stevens Treaties

5. The Ninth Circuit, in a 1998 decision, upheld the rights of several tribes to shellfish under the Stevens Treaties. Tribes located in the Western Washington Territory negotiated the Stevens Treaties, which preserved the tribes’ right to fish, with the United States in 1854 and 1855. The State of Washington argued that the tribes’ right to shellfish was limited to only those species harvested prior to the treaty, but the court instead held that the treaty parties had not intended to limit the term “fish” to only those species. Time, place and manner restrictions on the tribes’ harvest of shellfish, however, were upheld by the court as not unduly interfering with the tribes’ rights of access. See United States v. Washington, 157 F.3d 630 (9th Cir. 1998).

XI. PROTECTED MARINE SPECIES

A. Marine Mammal Protection Act — Enforcement

1. An animal activist was fined $60,000 in federal court for “harassing” U.S. Navy dolphins by transporting them and releasing them into the waters off Key West. The activist, Rick O’Barry, along with the Dolphin Project, Lloyd Good III, and the Sugarloaf Dolphin Sanctuary, are accused of violating the Marine Mammal Protection Act. The crux of the government’s case has been that the defendants transported the dolphins without government approval and a valid reason. The two dolphins were eventually recaptured, and were reportedly in desperate need of medical attention. O’Barry claims that because he can’t afford the legal assistance required to win in court, he plans to ignore the federal fine. See Dolphin Activists Fined $60,000 for Illegal Release, FLORIDA TODAY, Jan. 16, 1998, at 07B.

B. MMPA — Incidental Take

2. The Center for Marine Conservation and the Humane Society of the United States successfully settled the Gulf of Maine harbor porpoise lawsuit with the U.S. Department of Commerce and the National Marine Fisheries Service (NMFS). The settlement, which has been approved by U.S. District Court for the District of Columbia, directly addresses the environmental organization’s concerns that NMFS has not been doing its duty to minimize incidental harbor porpoise deaths and injuries caused by New England
gillnet fisheries. The suit had been filed in August 1998, in an effort to lower the average 1,700 harbor porpoises drowned in fishing nets every year for the past seven years. According to the plaintiffs, the provisions of the Marine Mammal Protection Act require that no more than 483 harbor porpoises be permitted to die in fishing nets, or by other human causes, per year. The new settlement is expected to force NMFS to take those numbers more seriously.

Under the settlement, NMFS has agreed to make a final decision on whether it should list the Gulf of Maine harbor porpoise on the Endangered Species List. The plan will also require fishermen to use electronic "pingers" on their nets so that the porpoises can hear them, and will specify closed fishing areas. NMFS will also be required to inform the public of the number of harbor porpoise deaths that occur over the next two years. See Conservation Groups Settle Harbor Porpoise Lawsuit, U.S. NEWSWIRE, Nov. 10, 1998, available in 1998 WL 13607338.

3. Regulations have been put in effect to reduce serious injury and mortality in the Canadian East Coast stock of minke whale and the following western North Atlantic whale stocks, all of which are listed as endangered species under the ESA: right whale, humpback whale, and fin whale. This Incidental Take Reduction Plan, issued pursuant to the Marine Mammal Protection Act, focuses on certain fisheries that have high rates of whale entanglement-related injuries and mortalities occurring incidental to fishing operations. These regulatory measures took effect on April 1, 1999 and contain time and area closures, as well as extensive gear requirements, restrictions, and prohibitions for lobster, anchored gillnet, and shark gillnet fisheries. Exempted from this plan are specific areas where large whale occurrence are so rare that the gear requirements would have a negligible effect.

In addition, the plan includes various nonregulatory measures, such as research and development of fishing gear that will reduce risk of entanglement, public outreach and education, an increase in cooperative efforts to disentangle whales that may get caught in fishing gear, improvement of monitoring of whale population distribution, and the creation of a network to alert mariners of right whale distribution. Furthermore, NMFS will consult with both the Atlantic Large Whale Take Reduction Team (an advisory group of fishermen, scientists, and representatives from other interested parties such as environmental groups and state parties) and its Gear Advisory Group (a group of individuals with direct knowledge of fishing gear and disentanglement practices) in further developing the plan. See 64 Fed. Reg. 7529 (1999) (to be codified at 50 C.F.R. pt. 229).
C. Navy Sonar Testing

4. A coalition of environmental groups including the Ocean Mammal Institute, Earth Island Institute, Greenpeace Foundation, Animal Welfare Institute, and Earthtrust were denied a request for a preliminary injunction to halt the U.S. Navy's low-frequency-anti-submarine sonar testing off of Hawaii. The groups argued that the sonar could substantially harm endangered whale species by impairing their hearing and possibly causing deafness, thereby increasing mortality rates. The U.S. Court of Appeals for the Ninth Circuit held that the cessation of the testing program in the area made the issue moot. Although the plaintiffs argued that the testing would continue in other areas, and therefore the issue meets the exception of repeatability to the mootness bar, the court felt that the plaintiffs accusations were mere speculation. See Ocean Mammal Institute v. Cohen, 164 F.3d 631 (9th Cir. 1998).

5. The United States District Court for the District of Hawaii held moot the Hawaii County Green Party's claim for injunctive relief to halt navy sonar testing on August 7, 1998. The court declared that the issue became moot when the U.S. Navy ended its testing in the area, thereby relieving the court of subject matter jurisdiction. The court also found that because the harm caused by the experiments was not likely to be repeated, the issue did not fit under any exceptions to the mootness bar. See Hawaii County Green Party v. Clinton, 14 F. Supp. 2d 1198 (D. Hawaii 1998).

6. Kanoa Incorporated, a whale watching corporation, was denied a temporary restraining order to halt sonar testing on humpback whales under a National Marine Fisheries Service permit. Although the corporation asserted that the experiments were causing a reduction of whales within the usual viewing areas, the U.S. District Court for the District of Hawaii held that the corporation lacked standing to challenge the permit under the Administrative Procedure Act. The court found that the plaintiff did not have standing under NEPA, the MMPA, or the ESA, and that the Fur Seal Act did not provide a cause of action. See Kanoa Inc. v. Clinton, 1 F. Supp. 2d 1088 (D. Hawaii 1998).

D. Miscellaneous

7. NMFS has proposed regulations that would allow yellowfin tuna that would otherwise be under embargo to be brought into the United States upon the satisfaction of certain requirements. The regulations are an implementation of the International Dolphin Conservation Program Act (IDCPA) which was enacted based on the agreements set forth in the Panama Declaration. The Panama Declaration, which limits dolphin
mortalities associated with tuna fishing in the Eastern Tropical Pacific Ocean (ETP) to no more than 5,000 dolphins per year, was signed by nations participating in the voluntary international dolphin conservation program in the ETP following the U.S. ban on tuna not meeting dolphin-safe standards. The Declaration requires that the U.S. modify its standards for the dolphin-safe label following congressionally authorized research of the fishery impacts on depleted dolphin stocks.

The proposed regulations include provisions concerning the operation of U.S. fishing vessels in the ETP, the tracking and verification of tuna imports from the ETP, and changes in the standards for use of “dolphin-safe” labels for tuna products. The changes in labeling standards result from initial findings made by NMFS, on April 29, 1999, that there is insufficient evidence that the encirclement of dolphins as a fishing method to harvest tuna (fishermen set their nets around groups of dolphins because schools of tuna swim below them) is having a “significant adverse impact” on depleted dolphin stocks in the ETP. The initial findings were issued following a study conducted on three dolphin stocks: the northeastern offshore spotted dolphin, the eastern spinner dolphin, and the coastal spotted dolphin.

The existing standard allows dolphin-safe labels to be used only if no dolphins are present in the area during the catch. The new standard allows for the practice of encircling by the tuna purse seine fishery by mandating that tuna harvested in the ETP by purse seine vessels with a carrying capacity of over 400 short tons be labeled dolphin-safe only if no dolphins were killed or seriously injured during the catch. The new standards are supported by several leading environmental organizations, including the Center for Marine Conservation and the World Wildlife Fund. NMFS will continue to research the possible significant adverse effects on dolphins by the tuna purse seine fishery in the ETP before issuing its final finding between July 1, 2001, and December 31, 2002. See 64 Fed. Reg. 24,590 (1991) (initial findings); 64 Fed. Reg. 31,806 (1999) (proposed rule) (to be codified at 50 C.F.R. pt. 216).

XII. ENDANGERED SPECIES ACT

A. Litigation

1. The United States District Court for the District of Massachusetts granted a Fish and Wildlife Service request for a preliminary injunction to halt the Town of Plymouth’s policy allowing the use of off-road vehicles in piping plover habitat areas. The court held that the Service is entitled to the injunction until the Town satisfies federal and State guidelines issued for the protection of the endangered bird. See United States v. Town of Plymouth, 6 F. Supp. 2d 81 (D. Mass. 1998).
2. Virgin Island property owners and residents were denied injunctive relief to halt the Federal Emergency Management Agency (FEMA) from establishing temporary housing for displaced hurricane victims on the beach. The plaintiffs brought the action under the ESA, claiming that the establishment of the shelters would adversely affect endangered sea turtles. The District Court found that the FEMA had not abused its discretion by determining that the project would not jeopardize an endangered species, and that plaintiffs had not made the requisite showing of a sufficient threat of harm to warrant the injunction. See The Hawksbill Sea Turtle v. Federal Emergency Management Agency, 11 F. Supp. 2d 529 (D.V.I. 1998).

3. In August 1998, the Eleventh Circuit reversed the dismissal of a preliminary injunction that required the county of Volusia, California to ban beach driving and artificial lighting of the beach during the sea turtle nesting season. The injunction was issued after a challenge by individual plaintiffs and sea turtles claimed that the activities harmed the endangered sea turtles, and was therefore a "take" under the Endangered Species Act. The lower court dissolved the injunction, and dismissed the case, after the county received an incidental take permit from the U.S. Fish and Wildlife Service. On appeal from the dismissal, the Eleventh Circuit declared that incidental take permits cannot be issued to exempt an activity performed as a purely mitigatory measure from liability. See Loggerhead Turtle v. The County of Volusia County, Florida, 148 F.3d 1231 (11th Cir. 1998).

4. On April 2, 1999, the Court of International Trade held that shrimp importation guidelines violated sea turtle protection law. The court found that a United States Department of State guideline, permitting importation of shrimp caught by vessels equipped with a turtle excluder device (TED), even if the vessel was from a country not certified as requiring TEDs on all shrimping vessels, violated a statute allowing importation of only those shrimp harvested in a manner that did not harm sea turtles. The court agreed with Earth Island Institute et al., that the guideline would eliminate any incentive for countries to put TEDs on more than a handful of nets because the guideline allowed a country to evade the statute's embargo by exporting to the United States those shrimp caught by a few designated vessels which are equipped with TEDs, while exporting elsewhere shrimp caught by those which are not. See Earth Island Institute et al. v. Daley, 48 F. Supp. 2d 1064 (Ct. Int'l Trade 1999).

5. Greenpeace, the American Oceans Campaign, and the Sierra Club filed suit against the National Marine Fisheries Service (NMFS) and William M. Daley, Secretary of Commerce in April 1998, challenging the 1998 North Pacific Fishery Management Plans under both the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA), in connection
with the interaction between fisheries and the Steller sea lion population. In particular, the suit challenged: determinations made in NMFS’s Biological Opinion, issued December 3, 1998, regarding the 1999–2001 atka mackerel fishery and the 1999–2001 pollock fisheries, the “Final Reasonable and Prudent Alternatives” passed by the Council and approved by NMFS, and the legal adequacy of the Supplemental Environmental Impact Statement issued on December 18, 1998, regarding the North Pacific fisheries.

On cross-motions for summary judgment, the District Court, pronounced three holdings: (1) evidence supported NMFS’s determination, under ESA, that pollock fisheries but not mackerel fisheries were likely to jeopardize sea lions; (2) “reasonable and prudent alternatives” under ESA were arbitrary and capricious; and (3) NEPA required preparation of a broad Supplemental Environmental Impact Statement for the groundfisheries. The Court ordered a remand of the Biological Opinion to the NMFS, for preparation of Revised Final Reasonable and Prudent Alternatives, and a remand of the Environmental Impact Statement in order to fairly evaluate the dramatic and significant changes which have occurred in the groundfisheries. See Greenpeace, et al. v. National Marine Fisheries Service, 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

B. Sea Otters

6. California shellfishers are demanding that the government enforce federal legislation banning sea otters from Southern California. The demand comes as increasing numbers of the endangered species have moved down the coast, and into the no-otter designated area between the border of Mexico and Point Conception, in what may be an attempt to escape a polluted and disease ridden environment in the north. The otters have been met by angry fishermen, who claim that the otters have no right to move so far south and compete with them for the urchins and lobsters that fetch them high prices in foreign markets. The fishermen are demanding that the U.S. Fish and Wildlife Service immediately capture and remove the otters.

Opponents of the fishermen’s demands worry that the forced relocation will “harm” the otters, which would violate the Endangered Species Act. This worry is founded on the estimate that approximately two of every thirty otters removed will die. According to environmental groups, the deaths would be an unacceptable addition to the unprecedented eleven percent reduction in population over the last three years. It is believed that the high mortality rate, the highest since 1982, is being caused by brain-destroying parasites washed into the environment from suburban cat feces, as well as worms that devour the otter’s insides. In response to the conflicting interests, California’s State Fish and Game Commission decided

C. Salmon

7. In March 1998, the National Marine Fisheries Service (NMFS) announced its plan to list two populations of West Coast steelhead trout on the Endangered Species List. The populations are found in California and along the border of Washington and Oregon. The listing comes despite increased cooperation between the federal and state governments in conservation efforts.

NMFS also announced a plan to keep three other populations off of the Endangered Species List in lieu of special conservation plans that are being designed in a cooperative venture with Oregon and Washington. According to NMFS official, the new plans promise to usher in “a new age of the Endangered Species Act.” NMFS claims that the new flexibility it incorporated into the ESA will help it to keep this legendary species from extinction. See NOAA, *Federal Endangered Species Act Listing for Two West Coast Steelhead Populations; California, Oregon Plans Will Protect Three Others* (visited 12/1/98) <http://www.noaa.gov/public-affairs/press98.html>.

8. A federal district court order, issued in June 1998, has forced the National Marine Fisheries Service (NMFS) to list Oregon coastal coho salmon as “threatened” under the Endangered Species Act. The court order was issued after a challenge was successfully mounted by environmental groups against a May 1997 NMFS decision that protection of the species was unnecessary. NMFS’s decision had reportedly been influenced by harvest and hatchery reforms, as well as increased commitments in state conservation plans. Despite the court order, NMFS officials have reported that they plan to continue a cooperative approach to coho salmon conservation with Oregon fishermen and communities. See NOAA, *Fisheries Service Lists Oregon Coho Salmon Under Federal Court Order* (visited 12/1/98) <http://www.noaa.gov/public-affairs/press98.html>.

9. The NMFS took an unprecedented step in March 1999, by listing nine species of salmon and steelhead in Washington and Oregon on the Endangered Species list, including several species found in metropolitan Portland and Seattle. The agency declared that the listings were the result of land-use and water-development projects that have degraded watershed
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and stream conditions critical to salmon survival, as well as other factors; the factors included habitat loss, over-harvesting, dam construction and operation, and certain hatchery practices. The salmon populations listed range from the sockeye salmon in Washington's rugged Olympic Peninsula to chinook salmon, the largest of any salmon, found in the heavily urbanized area of Puget Sound. Because it is listed as an endangered species, any accidental or incidental "take" of Upper Columbia River spring chinook would require a permit. This marks the first time that the ESA has been extended to protect salmon found in heavily populated areas. See Endangered and Threatened Wildlife and Plants; Listing of Nine Evolutionarily Significant Units of Chinook Salmon, Chum Salmon, Sockeye Salmon, and Steelhead, 64 Fed. Reg. 41,835 (1999).

D. Turtles

10. On May 15, 1998, the Commerce Department, through the National Marine Fisheries Service, announced that two additional bycatch reduction devices (BRD) would now be certified for use in the Gulf of Mexico shrimp fishery. The BRDs, which are added to fishing nets, enable endangered sea turtles and other non-target fish, such as commercially and recreationally valuable red snapper, to escape from the net. The new BRDs, named the Jones-Davis and Gulf fisheye, reportedly enable fishermen to retain over 96 percent of their catch, therefore making BRDs less economically damaging. See NOAA, Fisheries Service Certifies Two Additional Bycatch Reduction Devices (visited 12/1/98) <http://www.noaa.gov/public-affairs/press98.html>.

11. The National Marine Fisheries Service issued an interim final rule on April 13, 1998, certifying the use of the Parker soft Turtle Excluder Devices (TED) in the fisheries of the southeastern Atlantic. The rule gives shrimp fishers an additional choice in the type of TED that they use, thereby making compliance to TED requirements easier and more economical. As the name of the device indicates, TEDs are used in fishing nets to reduce the incidental take of "endangered" and threatened sea turtles. Currently, every species of sea turtle found in U.S. waters is listed as "endangered" or "threatened" under the Endangered Species Act of 1973. See Sea Turtle Conservation; Shrimp Trawling Requirements, 63 Fed. Reg. 17948 (1998) (to be codified at 50 C.F.R. pts 217 and 227) (Interim Final Rule; Request for Comments, Apr. 13, 1998).

E. Stellar Sea Lion

12. Largely in response to concern for the endangered Stellar sea lion, NMFS has announced its intention to prepare a supplemental environmental
impact statement (EIS) on the conduct of groundfish fisheries authorized and managed in the Gulf of Alaska and in the Bearing Sea and Aleutian Islands Area. The EIS will consider the environmental, biological, and socio-economic impacts of groundfish harvest regulations, alternative harvest management regimes, and will identify and evaluate significant changes in the fisheries since the issuance of the original EISs for the two fisheries in 1978 and 1981. Among the factors to be considered will be the continued existence of the Stellar sea lion, which is listed as an endangered under the ESA. The Stellar sea lion relies upon the resources in the fisheries for sustenance. The North Pacific Fishery Management Council has reserved making a decision on whether to decrease the bottom fisheries until further scientific information has been issued by NMFS. See 64 Fed. Reg. 53,305(1999) (to be codified at 50 C.F.R. pt. 679); Natural Resources Sea Lions: Council Tables Move To Protect Alaska Species, GREENWIRE, Nov. 16, 1998, available in WESTLAW.

F. Gulf of Maine Harbor Porpoise

13. On January 5, 1999, the NMFS and NOAA announced that it was withdrawing the Gulf of Maine Harbor Porpoise as a proposed candidate for threatened status under the ESA. Several significant comment period extensions and reopenings have occurred since the January 7, 1993 proposal to list the species as threatened. The agencies cited the accrual of additional information on the population, its commercial fishery bycatch rate, and management actions taken to reduce bycatch to justify the action.

NMFS pointed to the recently implemented Harbor Porpoise Take Reduction Plan (HPTRP) that it expects will reduce the current fishery mortality/bycatch level to below the Potential Biological Removal (PBR) level within the next 6 months. NMFS determined that the HPTRP and other conservation efforts will help the sustainability of the GOM/BOF population of harbor porpoise based on the following: (1) Strong commitments have been made to carry out these programs; (2) the parties with the authority to implement the bycatch reduction efforts have followed appropriate procedures and formalized the necessary documentation and; (3) objectives and time frames for achieving these objectives have been established and include adaptive management principles. NMFS believes that the bycatch reduction programs currently in place will effectively address the factors causing the decline of the GOM/BOF harbor porpoise population and increase the population's sustainability. See Threatened Fish and Wildlife; Listing of the Gulf of Maine/Bay of Fundy Population of Harbor Porpoise as Threatened Under the Endangered Species Act, 64 Fed. Reg. 465 (1999) (codified at 50 C.F.R. pt. 227). The agencies did, however, retain the species on the ESA candidate list to notify the public of their concern for the species, and make it clear that monitoring of its status would

G. Miscellaneous

14. The EPA, NMFS, FWS, Department of Interior, and NOAA filed a notice for public comments in January 1999, on a draft proposal for a Memorandum of Agreement (MOA) that would enhance coordination between the agencies regarding protection of endangered and threatened species under the Clean Water Act (CWA) and section 7 of the Endangered Species Act (ESA). Specifically, the draft MOA addresses the protection of endangered and threatened species under the Water Quality Standards and National Pollutant Discharge Elimination System programs established by the CWA.

The agencies determined that a national agreement detailing how these programs protect an important component of the aquatic environment — endangered and threatened species — will help achieve the complementary goals of "protection and propagation of fish, shellfish and wildlife," and that of providing for "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." Further motivation for the MOA included the goal of enhanced cooperation among the agencies, by more effectively ensuring that effects from pollutants on listed species are addressed under existing authorities, which would help avoid the need to list new species under the ESA and facilitate recovery of species so that they no longer require protection under the ESA. The deadline for comments was March 16, 1999. See Draft Memorandum of Agreement Between the EPA, FWS, and NMFS Regarding Enhanced Coordination Under the CWA and ESA, 64 Fed. Reg. 2742 (1999).

XIII. NAVIGATION AND NAVIGABLE WATERWAYS

A. Controversy Over Harbor Boundary

1. A developer, whose two piers were declared within redrawn harbor boundary lines and then charged $1.7 million by the Corps for the cost of demolishing the piers, has filed a suit in Federal Claims Court that was scheduled to be heard in 1999. The developer's previous building proposals had been rejected, and the Port of Oakland had attempted to purchase the property in 1985 before the Corps redrew the harbor lines. Plaintiff alleges that the lines were arbitrarily redrawn to include his piers within the harbor's right of way. See Alameda Gateway Engaged in David vs. Goliath Battle with U.S. Government, BUSINESS WIRE, Oct. 29, 1998, available in WESTLAW, 10/29/98 Bus. Wire 15:42:00.
B. Classifications as "Navigable"

2. An Illinois federal court upheld an Army Corps of Engineers’s classification of a fifty-five acre non-wetland tract that was the site of a migratory bird habitat as a “navigable water.” The Corps asserted jurisdiction over rainwater-filled depressions, created by a former gravel mining pit, on Plaintiff’s 553 acre parcel on grounds that the waters were a potential migratory bird habitat. Plaintiff’s argument that regulation of intrastate, non-wetland bird habitats exceeded Congress’s powers under the Commerce Clause was rejected by the court. The court held that the cumulative harm caused to isolated intrastate waters used as migratory bird habitat could have a substantial effect upon interstate commerce that related to those birds. See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 998 F. Supp. 946 (D. Ill. 1998).

3. New York’s highest court ruled, in December of 1998, that whether a recreational boater can navigate a river by canoe will be considered in determining classification of a river as navigable. The court held that because state rivers are now more likely to be used for recreation than commerce, a river’s capacity to carry recreational boaters is a more appropriate test for navigability than its capacity to transport commerce in the form of logs floating downstream. The suit originated in 1991 when the Sierra Club was charged with trespassing for organizing a recreational boating trip down the South Branch of the Moose River, which the Adirondack League Club claimed as their property. See Joel Stashenko, Top Court Bolsters Access to Waterways, ALBANY TIMES UNION, December 18, 1998, available in 1998 WL 15825081.

C. Concerns Over Corps’s Navigation Budget Reduction

4. The Marine Retailers Association of America expressed concern over the low priority the Army Corps of Engineers (Corps) must assign to recreational sites, given that the Corps’s navigation budget between 1998-1999 was reduced 15 percent. The Corps anticipates its navigation budget may be reduced 25 percent by 2002. In 1994, over $12 billion was spent by recreational visitors to sites of Corps projects. See Cutbacks for the Corps Spell Trouble for Boating, BOATING INDUSTRY, Aug. 1, 1997, available in 1997 WL 15651.