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Michelle Baldwin
University of Maine School of Law

Elizabeth C. Davis
University of Maine School of Law

Brett D. Witham
University of Maine School of Law

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A REVIEW OF DEVELOPMENTS IN OCEAN AND COASTAL LAW 1999–2000

Michelle Baldwin, Elizabeth C. Davis,* and Brett D. Witham**

INTERNATIONAL

I. OCEAN POLLUTION

A. France Proposes Series of Measures on Maritime Transport to EU Partners

1. On December 12, 1999, a Maltese flagged oil tanker chartered by French oil giant Totalfina-Elf sank off the coast of Brittany in western France, spilling somewhere between 12,000 and 15,000 tons of heavy fuel oil. According to statistics released by the Ministry of Environment on February 17, pollution from the Erika has now coated more than 250 miles of Atlantic coastline, producing more than 110,000 tons of oil-covered waste and killing more than 60,000 marine birds. The spill has become France's most serious environmental crisis of the past decade.

In an attempt to reform allegedly lax maritime transport safety standards, which have been blamed for the spill, France has forwarded a series of maritime transport safety proposals to its European Union (EU) partners that it says will help prevent pollution, improve regulation covering shipping of hazardous materials, and make freight companies more responsible for the economic and environmental consequences of accidents. The new marine safety plan focuses on a number of issues France will pursue starting in July, when it takes over the EU's six month rotating presidency, both within Europe and in the London based International Maritime Organization (IMO). Topping the list of new safety measures is a call for the European Commission, the executive body of the fifteen-member EU, to ban all single-hulled tankers from transporting hazardous materials within the fifteen EU member states by 2008. Current EU rules do not call for a phase out of single hull tankers until 2019. The proposed ban would bring European standards into

* University of Maine School of Law, Class of 2001.

line with those in the United States, which call for the use of double hulls in hazardous materials transported by 2010.

Other actions aimed at preventing maritime accidents focus on better disclosure of hazardous shipments. For example, the plan would require all tankers with hazardous cargoes to identify themselves and their route whenever they come within 200 nautical miles of the European coast. Further, the proposed plan would have the European Commission and the IMO enforce better working conditions for sailors, especially in countries offering flags of convenience to international shipping companies; more frequent controls for tankers licensed to carry hazardous materials; and better controls on certification authorities. Finally, to make oil companies more responsible for the economic and environmental consequences of disasters, the plan would increase the maximum payment the petroleum industry's internal oil spill compensation fund must make to about $1 billion, versus just $180 million today. *See* Lawrence Speer, *Oil Spills: France Proposes Series of Measures on Maritime Transport to EU Partners*, BNA INT'L ENV'T DAILY, Feb. 18, 2000, *available in* WL 2/18/2000 IED d2.

B. France Decides to Pump Remaining Oil from Tanker off Brittany Coast

2. On February 18, 2000, France announced that it would shortly open international tender for companies interested in pumping the remaining heavy fuel oil from the tanker that sank forty-five miles off the coast of Brittany in December. The announcement put to rest the speculation as to the method French authorities would choose for recovering the estimated 12,000 tons of fuel oil thought to remain inside the tanker *Erika*, which rests on the ocean bottom 130 meters below the surface. The actual tender is expected in March, with pumping operations likely to begin in April or May. France chose the pumping option after studying a number of alternative techniques for the operation, including construction of an underwater sealed concrete barrier around the tanker, burning the oil, surrounding the tanker underwater, or floating the entire wreck to the surface.

Environmentalists have complained of a lack of urgency in the government's cleanup timetable. They point to reports from maritime officials on February 20 that describe four new oil slicks spotted by pollution control vessels and aircraft working in the vicinity of the wreck as indicating that the *Erika* continues to leak oil. *See Oil Spills: France Decides to Pump Remaining Oil from Sunken Tanker off Brittany Coast*, BNA INT'L ENV'T DAILY, Feb. 23, 2000, *available in* WL 2/23/2000 IED d3.

C. European Commission Approves Tougher Shipping Rules

3. Prompted by the oil spill off the coast of Brittany, the European Commission approved shipping rules that it hopes will prevent future oil spills. The executive body of the European Union approved a set of proposals that would ban oil tankers with single hulls from union waters by 2015. Ships more than fifteen years old would be banned from all EU ports if they had been detained by port authorities more than twice over a two year period. The new rules would also apply to vessels carrying hazardous or polluting cargo. *See International EU: Commission Approves Tougher Shipping Rules*, GREENWIRE, Mar. 22, 2000, *available in* WESTLAW, 3/22/2000 APN-GR 18.

II. HIGH SEAS FISHING

A. ICCAT and the North Atlantic Swordfish

1. At the sixteenth regular meeting of the International Commission for the Conservation of Atlantic Tunas (ICCAT), held in Rio de Janeiro in late November 1999, the United States successfully negotiated a commitment to rebuild North Atlantic swordfish within ten years. The twenty-seven member organization oversees the conservation and management of Atlantic tunas and tuna-like fishes, including the North Atlantic swordfish. The program was made possible by significant sacrifices by U.S. swordfishermen and strong support from Canada, and was described as the most significant conservation action ever taken for this species.

The United States also joined with Canada in securing ICCAT agreement on significant steps in the area of compliance by both member and non-member parties. For the first time ever, trade sanctions were adopted against an ICCAT member country (Equatorial Guinea) due to non-compliance with ICCAT's conservation program for bluefin tuna. In addition, ICCAT adopted a trade embargo on swordfish against two non-member countries, Honduras and Belize, for fishing in a manner that diminishes the effectiveness of ICCAT swordfish measures. *See North Atlantic Swordfish Rebuilding Program Adopted at International Meeting* (visited Feb. 12, 2000) <http://www.publicaffairs.noaa.govv/releases99/nov99/noaa99r163.html>.

B. U.S. Fishing Subsidies

2. An independent report analyzing U.S. fishing subsidies, funded by the NOAA, is expected to play a major role in the United States's efforts to right-size the U.S. fishing fleet and meet international goals of reducing

world fishing capacity. The report was conducted by a group of twenty-two experts, chosen by the Secretary of Commerce as representatives of NOAA Fisheries' constitutencies. Members of the World Wildlife Fund and the National Fisheries institute also participated in the preparation of the report, and support many of the report's recommendations for action. The United States is leading the international effort to eliminate the problem of "too many fishing boats chasing too few fish." The report examines the problem of fishing subsidies allowing for too many boats to enter U.S fisheries, thereby in many cases undermining conservation efforts. However, overharvesting or fishing not only impedes conservation efforts and the goals of the Magnuson-Stevens Act, but also makes it more difficult for fisherman to earn a living and counters the original purpose of the subsidies—to increase the competitiveness of the U.S. fishing industry. By assisting the United States in reaching its domestic goals, the report will help the United States continue its international leadership role in addressing the problem. *See Congressional Report Will Help NOAA Fisheries Resolve Commercial Fleet Overcapitalization* (visited Jan. 26, 2000) <http://www.publicaffairs.noaa.gov/releases99/oct99/noaa99064.html>.

III. MARINE ENVIRONMENT

A. Panel Recommends Restricting Sale of Great Lakes Water

1. On March 15, 2000, an International Joint Commission formed by the United States and Canada released a report recommending that both countries should impose strict limits on the removal of water from the Great Lakes. The Commission did not recommend a total ban because of trade law concerns, but said water removal should only be allowed if it does not endanger the ecosystem. The year-long study recommends that any future "water-using projects" should return into the Great Lakes basin at least ninety-five percent of the amount taken out. The study was prompted when a company won permission in 1998 to ship tankers filled with Lake Superior water to Asia. The Commission said that more research is needed on the environmental impact of the withdrawals as well as how climate and other factors affect lake levels. The recommendations are not yet law, and if the states and provinces do not reach an agreement on managing the lakes, the commission said that it would ask the federal governments of the United States and Canada to take action. *See International Great Lakes: Panel Recommends Restricting Water Sales*, GREENWIRE, Mar. 16, 2000, *available in* WESTLAW, 3/16/2000 APN-GR 16.

B. Puget Sound Action Plans

2. In a joint announcement, the Environmental Protection Agency and its Canadian counterpart, Environment Canada, announced that a group consisting of top officials from both agencies will be established to develop annual action plans for protecting the Puget Sound/Georgia Basin ecosystem. The new group sprang from the Joint Statement of cooperation on the Georgia Basin and Puget Sound Ecosystem, which outlines the common goals and objectives of each country for protecting the area. Plans for the group include sharing scientific information, developing joint research initiatives, ensuring coordination of environment management initiatives, and considering long-term planning issues.

Concern over the area from both the United States and Canada has grown due to the rapid population expansion in the Nortwest, particularly around Seattle, Vancouver and other urban areas. Due to the increase in population, factors contributing to changes in climate, particularly increases in air emissions, have worsened. Changes in climate and atmosphere could affect the agricultural production and health of the environment, as well as become potentially harmful to human health and safety. *See U.S., Canadian Officials to Develop Plan for Protecting Puget Sound Area,* BNA INT'L ENV'T DAILY, Jan. 24, 2000, *available* WL 1/24/2000 NED d11

C. Mexican Salt Plant Plans Halted

3. On March 3, 2000, the Mexican government announced that they are stopping plans to build a salt works plant near a gray whale breeding area in Baja, California; the plant would have been the largest salt factory in the world. Although a two-year environmental impact study said the plant would pose no danger to the whales, the government said it was canceling the project because it would modify the landscape. Environmentalists had been waging a five-year battle against the plant, believing that it would harm one of the last pristine gray whale breeding areas in the world, an area that is also a habitat for sea lions, black sea turtles and prong-horned antelopes. The Natural Resources Defense Council called the end to the project a "stunning victory." *See Plans for Mexican Salt Plant Cancelled,* GREENWIRE, March 3, 2000, *available in* WL 3/3/2000 APN-GR 2.

DOMESTIC

I. COASTAL RESOURCES MANAGEMENT

A. Maryland Runoff Pollution Plan

1. On October 6, 1999, the National Oceanic and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA) announced their intention to grant final approval of Maryland's coastal non-point pollution control plan. On December 16, 1999, federal and Maryland government officials gathered in Annapolis to sign the documents approving the state's plan. The EPA sees the adoption of the plan as an important link in improving the health of the nation's waterways.

Non-point pollution, also known as polluted runoff, is a significant problem throughout the nation and especially in coastal areas and watersheds that feed into sensitive estuaries and coastal environments. The national Coastal Zone Management program, of which the non-point plans are a part, is administered by NOAA's National Ocean Service. The program is a unique and voluntary partnership of federal and coastal state and territorial governments that encourages a balance between land and water uses in coastal zones and conservation of fragile coastal resources. *See* Coastal Nonpoint Pollution Control Program: Approval Decision on Maryland Coastal Nonpoint Pollution Control Program, 64 Fed. Reg. 54,274 (1999); *Officials Mark Beginning of New Coastal Polluted Runoff Control Effort* (visited Jan. 31, 2000) <http://www.publicaffairs.noaa.gov/releases99/dec99/noaa99r426. html>.

B. Army Corps Will Restore Salmon-Friendly Habitat in Columbia River

2. The NMFS announced on December 14, 1999, that the Army Corps of Engineers will restore some one thousand acres of shallow-water habitat for salmon at the mouth of the Columbia River as part of its channel deepening project in the river. In a biological opinion released later in the week, the fisheries service said that the Corps had agreed to offset any potential harm that might come to federally protected salmon during an expected two-year period of river dredging by creating habitat along the banks of the river west of Portland. The fisheries service stated that the Lower Columbia would be more salmon friendly than it was before the dredging started.

The plan, laid out in the fisheries service biological opinion, calls for the Corps to restore lost habitat along parts of the Lower Columbia by breaching

dikes, opening up long-closed channels and removing some fill and bulkheads. The initial result will be the creation of about 1,000 acres of new habitat in shallow water. In addition, the biological opinion calls for an additional 3,000 acres in other parts of the Lower Columbia to be restored, half by 2010 and the rest by 2020. *See Army Corps Will Restore 1,000 Acres of Salmon Friendly Habitat During Channel Deepening* (visited Feb. 12, 2000) <http://www.publicaffairs.noaa.gov/releases99/dec99/noaa99r166.html>.

C. Seawall Bans

3. The North Carolina Court of Appeals upheld the State's ban on seawalls after a group of homeowners challenged the measure. The homeowners wanted to use seawalls to try and protect their resort property, the Shell Island Resort, from the impending tide. The property is valued at twenty-two million dollars. The North Carolina Coastal Resources Commission began to prohibit the use of hard erosion control structures to protect new buildings in the late 1970's, but in 1985, the commission revised its rule to prohibit the use of the structures to protect any building, with some exceptions for historic property.

The Shell Island Resort was built in the 1980's, at which time the developers signed a permit acknowledging both that they were building in an erosion-prone area, and that the state's regulations did not allow for shoreline erosion control structures to be built. In 1996 the development asked the State's Department of Environment and Natural Resources (DENR) for permission to install a seawall, but the request was denied. Shell Island filed suit in January of 1998 claiming that the "denial of a permit for a permanent structure to protect the hotel was a taking of property without consent." After the lawsuit was filed, the Shell Island group asked the DENR secretary to issue an emergency general permit to build a steel seawall, but the request was denied by the secretary, who claimed that he didn't have the authority to bend the rules, and that the group would have to go back to the DENR to get a variance. The Shell Island group, however, decided not to ask for the variance, and instead pursued the lawsuit. North Carolina Superior Court threw out the lawsuit, however, stating that the homeowner's group had not taken all administrative avenues that they could before filing suit. The property owners appealed, but the appeals court upheld the decision, ruling that the allegation of a taking was invalid because "no property owner has the right to construct an erosion control structure on state-owned lands." *See* Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 517 S.E.2d 406 (N.C. Ct. App.1999); *see also North Carolina Seawall Ban Stands Up to Legal Challenge*, COASTAL SERVICES (NOAA Coastal Services

Center) Mar./Apr. 2000, *available at* <http://www.csc.noaa.gov/newsletter/2000/02/nc.html>.

D. Oyster Study Would Bring in Asian Species

4. It was announced on February 24, 2000, that with the aim of restoring the Chesapeake Bay oyster population, scientists in Virginia want to introduce an Asian species for testing purposes. Virginia's decimated shellfish industry has spurred an effort to restore the oysters, which have fallen victim to disease in the past twenty years. Scientists at the Virginia Institute for Marine Science want to test Asian oysters in scattered plots of the bay. However, Maryland officials fear the nonnative oysters would reproduce and "loose another foreign species in the bay." Several invasive species have made their way into the Chesapeake Bay in the past, often disrupting the ecosystem and edging out native species for food and habitat. Scientists in Virginia say that the Asian oysters have been genetically engineered not to reproduce and call it the "only palatable way" to study the oysters. *See Natural Resources Chesapeake Bay: Oyster Study Would Bring Asian Species*, GREENWIRE, Feb. 24, 2000, *available in* WESTLAW, 2/24/2000 APN-GR 11.

E. Everglades Restoration

5. South Florida officials are worried that funding for the Everglades restoration project could put a strain on county budgets and adversely affect the regions water supply and flood control, a major issue for south Florida during hurricane season. Governor Jeb Bush asked the South Florida Water Management District last month to contribute one hundred million dollars to the state's share of the restoration project. The District's governing board is now looking into ways to raise part of that money, as editorials throughout the state back the governor's demand, saying that the region that will receive most of the benefits from the plan should be made to pay for part of the cost. *See Natural Resources Everglades: Officials Concerned with Funding of Restoration,* GREENWIRE, Feb. 23, 2000, *available in* WL 2/23/2000 APN-GR 10.

II. PROTECTED MARINE SPECIES AND ENDANGERED SPECIES

A. Salmon

1. The United States Supreme Court announced on January 24 that it will not review a May 1999 appeals court decision that upheld salmon protection

measures adopted by the Bonneville Power Administration (BPA) for the Columbia and Snake rivers. The BPA action stemmed from a 1990 decision by the NMFS to list Snake River sockeye and Snake River spring/summer and fall Chinook under the Endangered Species Act.

Columbia Falls Aluminum Company and other industrial customers that rely on hydroelectric power produced by facilities on the two rivers alleged in a petition filed November 18, 1999, that the U.S. Court of Appeals for the Ninth Circuit erred in upholding BPA's decision to adopt reasonable and prudent alternatives designed to protect salmon species. The appeals court also ruled that the agency reasonably relied on the biological opinion prepared by the NMFS under the Endangered Species Act. *See* Aluminum Co. of America v. Bonneville Power Administration, 175 F.3d 1156 (9th Cir. 1999). The petition urged the Supreme Court to utilize the case as an opportunity to set standards for evaluating the quality of evidence and ensure that agency decisions and federal environmental policy do not rely on "junk science."

The Court's action leaves standing a Ninth Circuit decision that upheld BPA's Columbia River Power System management proposals. *See* Columbia Falls Aluminum Corp. v. Administrator, Bonneville Power Admin., __ U.S. __, 120 S. Ct. 983 (2000).

2. Based on biological evidence that wild Atlantic salmon in the United States are in danger of extinction, on November 17, 1999, the U.S. Fish and Wildlife Service and the NMFS have jointly proposed listing the species as endangered under the Endangered Species Act. Earlier in November 1999, the two services issued a report, *Status Review for Anadromous Atlantic Salmon in the United States*, concluding that Atlantic salmon stocks indigenous to Gulf of Maine rivers, the last known remaining naturally reproducing populations in the United States, remain at very low levels and face continuing threats.

According to officials from the respective agencies, although significant efforts have been made to recover the species under the state of Maine's conservation plan, existing measures to protect wild salmon are no longer enough to ensure their survival. Federal biologists found that small numbers of adult salmon are returning to spawn and young salmon in the Gulf of Maine rivers are surviving at a lower rate than expected, and they do not expect the situation to improve without further protections.

The geographic area affected by the proposal includes all coastal watersheds in Maine with wild populations of Atlantic salmon north of and including the lower Kennebec River to, but not including, the St. Croix River at the United States/Canada border. *See* Endangered and Threatened Species: Proposed Endangered Status for a Distinct Population Segment of

Anadromous Alantic Salmon (Salmo salar) in the Gulf of Maine, 64 Fed. Reg. 62,627 (1999); *see also* Status Report Shows Atlantic Salmon Stocks are Continuing to Decline and Need Additional Protection (visited Jan. 26, 2000) <http://www.publicaffairs.noaa.gov/releases99/oct99/noaa99r154.html>.

3. In February, Maine Governor Angus King sued the federal government in order to gain access to the information that federal scientists used to support a proposal by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to put wild Atlantic salmon on the endangered species list. A formal request for data under the Freedom of Information Act was also filed in December 1999 in order to obtain the information. The lawsuit was filed in U.S. District Court in Portland, Maine on February 24, 2000; the State also sued to get the comment period on the proposal extended, a request that U.S. District Judge Carter granted on March 9, 2000. Judge Carter also required the federal government to turn over all data regarding the salmon, but that request had finally been complied with a week earlier, when the federal government finally turned over all information to Maine Senators Olympia Snowe and Susan Collins. The Interior Department in January agreed to turn over the scientist's information, but the CD-ROMs, which contained the information, were faulty, and Maine officials could not access the information because of a missing template. Dennis Bailey, a spokesman for Governor King said that the federal government then refused to provide the necessary templates, an act which Governor King called "irresponsible."

In Maine, eight rivers are proposed for protection: 1) the Dennys, 2) East Machias, 3) Machias, 4) Narraguagus, 5) Pleasant, 6) Ducktrap, 7) Sheepscot, and 8) Cove Brook, a tributary of the Penobscot River. Governor King's administration is investigating the proposal to list the salmon on the endangered species list because of the huge impact it would have on the State's aquaculture industry, specifically in Washington County, where five of the eight rivers in question are located. Governor King is also worried about the potential impact on the State's cranberry farmers, many of whom draw on the rivers to irrigate their crops. *See Maine to Get U.S. Data on Atlantic Salmon,* BOSTON GLOBE, Jan. 8, 2000, at B8; *see also ME Sues for Access to Federal Data*, GREENWIRE, Feb. 28, 2000, *available in* WL 2/28/2000 APN-GR 12; *Senators Receive Missing Salmon Listing Information,* ASSOC. PRESS NEWSWIRE, Mar. 2, 2000, *available in* WL 3/2/00 APWIRES 02:18:00; *Judge Gives State the Time it Needs to Review Data*, ASSOC. PRESS NEWSWIRE, Mar. 9, 2000, *available in* WL 3/9/00 APWIRES 13:11:00.

4. On February 18, 2000, Oregon Governor John Kitzhaber announced that he was in favor of breaching four federal dams on the Snake River in Washington in an effort to restore the Columbia River basin's endangered salmon populations. In a speech to the Oregon Chapter of the American Fisheries Society, Kitzhaber said the region was required by the Endangered Species Act to try to save the salmon and warned that if dam-breaching were not tried, other alternatives might be even more expensive and disruptive.

Despite spending more than $3 billion on projects such as fish ladders and a truck-and-barging system for the fish, salmon populations continue to decline. According to Ed Bowles, Idaho's manager of anadromous fish, only 3,276 Snake River adult spring and summer chinook returned from the sea to their freshwater hatching grounds in 1999, down from 8,426 the previous year. Dam removal is one of several options being studied by the Army Corps of Engineers, and Kitzhaber's announcement is the first endorsement from a major political figure. However, other key political figures such as Senators Patty Murray (D-WA), Ron Wyden (D-OR) and Representative Earl Blumenauer (D-OR) all said they needed to see more scientific evidence and more public support before they would endorse the proposal. *See Spotlight Salmon Story: OR Gov Supports Breaching 4 Snake River Dams*, GREENWIRE, Feb. 22, 2000, *available in* WESTLAW, 2/22/2000 APN-GR 2.

5. On February 22, 2000, environmentalists and commercial fishers filed a lawsuit charging three federal agencies with failing to meet minimum flows in the Columbia and Snake rivers. The suit was filed in U.S. District Court in Portland, Oregon under the Endangered Species Act. The suit alleges that the Army Corps of Engineers and the Bureau of Reclamation failed to meet minimum flow standards set by the NMFS in 1995. A spokesperson for the Bureau of Reclamation stated that the agency has met its obligations to boost flows by 427,000 acre-feet each year. Stepping up river flows would mean taking water from Idaho farmers who use it for irrigation. *See Natural Resources Salmon: Lawsuit Aims to Boost Flows in Columbia, Snake Rivers*, GREENWIRE, Feb. 23, 2000, *available in* WESTLAW, 2/23/2000 APN-GR 11.

B. Trout

6. On February 4, 2000, NOAA announced that the NMFS is proposing to list a Northern California steelhead trout population as threatened under the Endangered Species Act. The action is a reconsideration of NOAA Fisheries' 1998 decision not to list, which was based in part on a state of California conservation effort designed to protect the population.

The California Board of Forestry was unable to finalize its efforts to modify a series of Forest Practice Rules to meet steelhead protection requirements. In addition, the State fell behind in developing a series of rule changes designed to meet federal steelhead conservation requirements under which the decision not to list had been made. Since adequate changes to the rules were not made in a timely manner, federal officials were compelled to reconsider their 1998 decision.

In March 1998, NOAA fisheries believed that the Northern California steelhead, a distinct population segment—called an Evolutionarily Distinct Unit or ESU—did not warrant a listing as a threatened species, because it determined at that time that the State's conservation efforts would provide adequate protections. This ESU includes steelhead from Redwood Creek in Humboldt County to and including steelhead in the Gualala River in Mendocino County. Under the Endangered Species Act, a threatened species is likely to become endangered in the foreseeable future; an endangered species is likely to become extinct. NOAA Fisheries plans to issue a final listing determination by May 31, 2000. *See* Endangered and Threatened Species: Threatened Status For One Evolutionarily Significant Unit of Steelhead in California, 65 Fed. Reg. 6960, 6961, 6963 (2000).

C. Beluga Whale

7. On October 27, 1999, the NMFS announced its decision to propose listing of the Cook Inlet, Alaska stock of beluga or white whale as "depleted" under the provisions of the Marine Mammal Protection Act. Depletion status would allow NOAA Fisheries to begin a program to rebuild this stock to levels that will support a long-term opportunity for traditional subsistence use by Alaskan Native hunters and Cook Inlet tribes.

The determination that the stock is depleted was based on a comprehensive status review initiated by a NOAA Fisheries finding that the Cook Inlet stock of beluga whales declined approximately fifty percent between 1994 and 1998, falling below its optimum sustainable population. The status review indicates over-harvesting is the primary cause of the observed decline, although many potential impacts may affect this stock. The review process encompassed an examination of the present status and health of the species, including data on stock size, genetics, migratory patterns and distribution within Cook Inlet, as well as data on the age, stock structure, mortalities (including harvest) and growth.

NOAA Fisheries intends to recover the Cook Inlet beluga whale population by working collaboratively with Alaska Native hunters and Cook Inlet tribes in an attempt to develop cooperative management plans that would establish annual harvest levels based on review of the stock's status and recovery. *See* Designation of the Cook Inlet, Alaska, Stock of Beluga

Whale as Depleted Under the Marine Mammal Protection Act (MMPA) and Response to Petitions, 64 Fed. Reg. 56,298, 56,299 (1999).

D. White Whales

8. Conservationists, fishers and federal regulators were brought together for a conference in Boston in February to discuss ways to protect the right whale, an endangered species. The conference was spurred by the death of three white whales in the last ten months off the coasts of Cape Cod, Nantucket and Rhode Island. Chris Mantzaris, chief of the National Marine Fisheries Service's Protected Resources Division, hoped that the conference would lead to both short and long-term goals to help the whales. *See International Whales: Conference Plots Course to Help Right Whales,* AMERICAN POLITICAL NETWORK GREENWIRE, Feb. 23, 2000, at Vol. 10, No. 9, *available in* WESTLAW, 2/23/2000 APN-GR 14.

E. Dolphins

9. An interim final rule was issued by NMFS for the United States to implement new regulations to meet internationally adopted standards for the protection of dolphins during tuna harvesting in the Eastern Tropical Pacific Ocean (ETP). The regulations provide that only tuna harvested in compliance with the International Dolphin Conservation Program Act will be allowed to be imported to the United States, as well as establishing a new labeling standard allowing the dolphin safe logo to be used when no dolphins were killed or seriously injured during the set as opposed to the previous standard which mandated that no dolphins could be encircled during the set. These changes resulted from findings by NMFS, made on April 29, 1999, on the insufficiency of evidence showing that the practice of encircling dolphins as a method of fishing for tuna has a "significant adverse impact" on depleted dolphin stocks in the ETP. The new regulations mandate that affirmative findings must be made every five years for each nation seeking to import yellowfin tuna into the United States based on documentary evidence their fishing practices submitted by each harvesting nation, establish basic tracking and verification of status requirements for tuna imports from the ETP and sets forth changes to the captain certification and observer certification requirements to ensure that every shipment of tuna meets the dolphin-safe labeling standard. *See* Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Findings, 64 Fed. Reg. 24,590 (1999); *see also* 65 Fed. Reg. 30, 32 (2000).

F. Sharks

10. A bill to ban shark finning, the practice of slicing off a shark's fins and discarding its carcass at sea, in U.S. waters has been introduced to Congress. The proposed legislation follows on the heels of two other important measures on the issue. The first of which is a concurrent resolution expressing strong opposition to the practice of shark finning as irresponsible and damaging (106 H. Con. Res. 189). Another measure taken in response to this practice is a bill for the Secretary of Commerce for a study to be completed by October 1, 2000 on the practice of shark finning in United States waters of the Central and Western Pacific Ocean and the effects that practice is having on shark populations in the Pacific Ocean (106 H.R. 3078). The Clinton Administration has further come out as opposed to the practice.

The most recent legislation, introduced on January 27, 2000 by Representative Randy Cunningham and Chairperson Jim Saxton, Subcommittee on Fisheries Conservation, Wildlife & Oceans, seeks to permanently ban the process and directs the Secretary of State to work towards a similar ban on a worldwide level. Called the Shark Finning Prohibition Act (106 Bill Tracking H. R. 3535), this legislation, which is currently in committee, would amend the Magnuson Stevens Fishery Conservation and Management Act to eliminate "the wasteful and unsportsmanlike practice of shark finning." Finning was banned in federal waters of the U.S. Atlantic in 1993, but the practice has increased since increased in Pacific waters. A number of conservation organizations, fishermen, and the Hawaii legislature have expressed concern over the practice, but the Western Pacific Regional Fishery Management Council (WESPAC) has as of yet refused to take action, despite a dramatic increase in the number of sharks killed in the Hawaiian longline fisheries (from 2,289 in 1991 to 60,857 in 1998) and despite pressure on WESPAC by NMFS and NOAA to prohibit shark finning. Sharks are seen as being particularly vulnerable to overfishing because of their slow growth rate, late sexual maturity, and production of few young. *See* H. Con. Res. 189, 106th Cong. (1999); *see also* H.R. 3078, 106th Cong. (1999); H.R. 3535, 106th Cong. (2000).

G. Steller Sea Lions

11. On October 15, 1999, NOAA announced that the NMFS has addressed all requirements of a federal court order to clarify its plans to protect dwindling Steller sea lion populations while also allowing the $670 million pollock fishery to continue. The NMFS stated that the protection for Steller sea lions was strengthened and the concerns of the court were addressed. *See NOAA Fisheries Respond to Court Concerns Regarding Protection*

Measures for Endangered Stellar Sea Lions (visited Jan. 26, 2000) <http://www.publicaffairs.noaa.gov/releases99/oct99/noaa99r156.html>.

In December 1998, NOAA Fisheries issued a Biological Opinion that concluded that the pollock fisheries of the Gulf of Alaska and the Bering Sea and Aleutian Islands areas were likely to jeopardize the endangered western population of the Steller sea lions, and destroy or adversely modify their critical habitat. Following extensive input from the public and industry, NOAA Fisheries implemented many of the recommendations made by the North Pacific Fishery Management Council to protect the sea lions. In July 1999, the court found that the protection measures implemented were not adequately explained by NOAA Fisheries and required the agency to more clearly identify how the protection measures fulfill the legal requirements of the Endangered Species Act. *See* Greenpeace v. National Marine Fisheries Serv., 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

As part of its response to the court, NOAA Fisheries identified several modifications designed to protect Steller sea lions and meet fishing industry needs. NOAA Fisheries is implementing three comprehensive management strategies designed to reduce potential competition between Stellar sea lions and the pollock fishery: dispersing the fisheries over time; dispersing them over space; and better protecting Stellers around rookeries and major haulouts. According to NOAA Fisheries managers, the document submitted today accomplishes the judge's order. *See NOAA Fisheries Responds to Court Concerns Regarding Protection Measures for Endangered Steller Sea Lions* (visited Jan. 26, 2000) <http://www.publicaffairs.noaa.gov/releases99/oct99/noaa99r156.html>.

H. Manatees

12. A coalition of environmental groups, including the "Save the Manatee Club" filed suit on January 13, 2000, in order to demand better enforcement of laws designed to protect the manatees. The suits accuse Florida and federal officials of failing to restrict and regulate the ever-growing pleasure boat traffic in the areas where the manatees live. The lead attorney for the groups charged the responsible agencies with violating the intent of the federal Endangered Species Act by approving permits for boat docks, marinas and other coastal development areas where manatees live. The suit looks to require law enforcement to put more officers on the waterways, establish more manatee sanctuaries and no-boating areas, and suspend coastal developments in manatee areas. *See* Larry Lipman, *Suits Seek to Safeguard Manatees,* ATLANTA CONST., Jan. 14, 2000, at A10, *available in* 2000 WL 5435518.

I. Whale Watching Guidelines

13. An advance notice of proposed rulemaking on the subject of whale watching was published by NMFS in January 2000. The rule is in response to the increased potential for the harrassment, injury and death of whales when large number of vessels gather around groups of whales during whale watching expeditions. Reports from private citizens on whales being injured by being struck by whale watching vessels include two whales in 1998 and one in 1997, and three reports of harassment in 1999. Thus the rule seeks to set forth operational procedures for whale watching vessels in the Northeast to deal with this increasing perceived threat. Investigating these reports of whale injury and harassment, as well as recommending codification of whale watch guidelines is the Whale Watch Advisory Group, set up under the ESA Right Whale and Humpback Whale Recovery Plans and composed of representatives from the whale watch industry, conservation groups, and state and federal agencies.

The possible actions for NMFS to take include revision of the current whale watch guidelines to decrease the chances of collisions and other adverse interactions by such means as speed limits and minimum approach distances near whales, without codification. Codification of the guidelines, on the other hand, would make them requirements rather than recommendations and would allow for penalties or sanctions to be issued for their violation. The guidelines would possibly include such measures as establishing a minimum approach rule to provide space for individual animals to avoid harassment or injury, a certification requirement to engage on whale watching operations that is based on demonstrated knowledge of whale behavior and proper vessel operation, and sanctions for noncomformance with the regulations. *See* North Atlantic Whale Protection, 65 Fed. Reg. 270 (2000) (to be codified at 50 C.F.R. pts. 216 & 222) (announced Dec. 28, 1999).

J. Sawfish

14. A petition from the Center for Marine Conservation to add North American populations of smalltooth sawfish and largetooth sawfish to the List of Threatened and Endangered Wildlife under the Endangered Species Act was submitted to NMFS on November 30, 1999. Both species were designated as candidate species for listing under the ESA on June 23, 1999. The petitions contain biological, distributional, and historical information on sawfish, and indicated that they are threatened by habitat destruction and modification, overutilization, inadequate existing regulatory mechanisms, and other natural or manmade factors affecting their existence.

Smalltooth sawfish are found in the Atlantic, Pacific and Indian Oceans and are found as distinct population units. Largetooth sawfish are found in the Atlantic and Pacific Oceans. Because sawfish are easily entangled in net gear, have a habitat that is restricted to shallow coastal, estuarine, and fresh waters, and have a low rate of population increase due to the fact that they grow slowly, mature late, and produce few young, they are extremely vulnerable to overexploitation and habitat degradation.

Historical records and reports show that smalltooth sawfish were abundant during the nineteenth century in North America and have since declined, primarily due to incidental commercial catch, to the point that landings of smalltooth sawfish in North America today are rare. Unlike smalltooth sawfish, however, no data exists to support that there is now or ever has been a resident population of largetooth sawfish in North American waters. Therefore, NMFS has found, based on the petitions and the information available, that while the listing of smalltooth sawfish as an endangered species may be warranted, that of largetooth sawfish is not. A status review of smalltooth sawfish has been initiated in order to make a determination on whether or not listing is warranted. This finding will be made within one year from the date that the petition was received, as is required by section 4(b)(3)(B) of the ESA. Although NMFS will not initiate a status review of largetooth sawfish at this time, they will continue to solicit information on that species and will maintain it as a candidate species that may be listed in the future. *See* Endangered and Threatened Wildlife and Plants, 65 Fed. Reg. 12,959 (2000) (to be codified at 50 C.F.R. pts. 223 & 224) (proposed Mar. 6, 2000).

K. Litigation

15. Florida conservationists won in Florida Circuit Court on March 15, 2000 in a suit to ensure the constitutional authority of the State's Fish and Wildlife Conservation Commission (FWCC). The Florida legislature had in 1999 passed a statute making the FWCC's authority statutory, rather than constitutional, which conservationists feared would make it easier to delay or invalidate rules protecting manatees and sea turtles. The FWCC was created by voters in a constitutional revision in November 1998, and has constitutional authority over endangered and threatened marine species. A spokesman for the Sea Turtle Survival League, who was joined in the suit by the Save the Manatee Club and the Florida Wildlife Federation, called the ruling a great victory for those wanting full protection for endangered and threatened marine species. *See Florida Commission Has Constitutional Authority to Protect Species*, ENV'T NEWS SERVICE, Mar. 15, 2000, *available in* 2000 WL 7838297.

III. FISHERIES MANAGEMENT

A. Miscellaneous

1. On January 19, 2000 Commerce Secretary William M. Daley announced the official determination that the West Coast groundfish fishery had failed. With the announcement, West Coast groundfish fishermen are a step closer to getting federal relief. The official determination comes after a sharp decline in catches of groundfish from California to Washington. West Coast fishermen have seen catches for the entire industry go from a 20-year average of about 74,000 tons to less that 36,000 tons last year. Landings this year are projected at about 27,000 tons.

Under section 312(a) of the Magnuson-Stevens Act, NOAA Fisheries can declare a commercial fisheries disaster if requested to do so by a governor, or at the Secretary's discretion. The Secretary must determine that a fishery resource disaster resulted from either natural causes, man-made causes beyond the control of fishery managers, or undetermined causes. Further, if a commercial fishery failure occurred, then it must have resulted from the fishery resource disaster.

Scientists with the NMFS state that the disaster is the result of undetermined, but probably natural causes. Factors that may have contributed to the declines include changes in ocean conditions, low productivity, and five El Niño events since 1982. Penny Dalton, NOAA fisheries director, cited the lack of basic scientific data about the groundfish stock as a major underlying cause for the current situation and added that if funds were made available, NOAA would like to work with fisherman to gather more data and improve the understanding of the fishery.

While no funds are presently appropriated to assist fishermen in adjusting to the effects of the groundfish stock declines, if Congress does appropriate funds, they will likely be used by federal agencies and the states to assess the economic and social effects of the commercial fishery failure, assist individuals and communities, and support activities that would restore the fishery or prevent a similar failure in the future. In other fishery disaster determinations, notably those for New England groundfish and for northwest salmon fisheries, funds have been used for activities such as vessel and permit buyouts, job retraining, economic diversification, grants for cooperative research, and paying fisherman for habitat restoration work and data collection. *See Commerce Secretary Daley Announces West Coast Groundfish Fishery Failure* (visited Feb. 2, 2000) <http://www.publicaffairs.noaa.gov/releases2000/jan00/noaa00r103.html>.

2. The National Marine Fisheries Service has developed a draft of a comprehensive plan for West Coast groundfish research, a plan it hopes to

have finalized by late spring, 2000. The draft plan describes the scope of proposed groundfish research for the next three to five years, and identifies priority research for providing regulators with information on which to base their decisions. Noting that the scientific information that the NMFS has now on ground fish is inadequate, manager at the Northwest Fisheries Science Center in Newport, Oregon stated that the NMFS cannot do all of what is needed by itself, recognizing the need to identify what the NMFS has to do for research over the long term. The NMFS plans to hold several public hearings throughout the spring. *See* Steven Hedlund, *NMFS Developing Research Plan,* SEAFOOD BUS. NEWS, (Feb. 24, 2000) <http://www.gofish.com>.

3. In November 1999, the Pacific Fishery Management Council approved a cutting of catch quotas by more than fifty percent for four kinds of Pacific Ocean rockfish and cod. Groundfish accounted for nearly a quarter of the value of all West Coast commercial fish last year, and the quota cut is expected to have significant economic consequences for coastal communities in California, Oregon and Washington. California Governor Gray Davis has already asked President Clinton to declare a federal disaster, so that financial relief could be given to those dependent on the fishing industry. The cuts may still not be severe enough to satisfy some conservationists, and additional conservation measures could follow for other groundfish. *See Council Approves 50% Cut in West Coast Catch*, GREENWIRE, Nov. 5, 1999, *available in* WL 11/5/1999 APN-GR 6.

4. On December 9, 1999, NOAA announced that the NMFS has completed its implementation of a list of allowable fisheries and fishing gear that is expected to provide better management of fish stocks and habitat essential to their long term health. Required under the Magnuson-Stevens Fishery Conservation and Management Act, the list incorporates substantial input from fishing industry members, fishing managers, and others concerned that some gear types or fisheries may have been left off a proposed list published in late January of 1999. NOAA asserts that by completing the list, managers in NOAA Fisheries and the regional fishery management councils now have a new tool to inform them of any potential adverse effects of fishing gear before it is used, thus enabling them to take action to protect fish stocks before fishing is begun, if necessary.

Under the new requirements, new gear types can be used and/or new fisheries can be opened, but only after one of the regional fishery management councils, or NOAA in the case of Atlantic Ocean's highly migratory species, has an opportunity to review the impact the gear or fishery may have on fish stocks under its stewardship. *See* Magnuson-Stevens Act Provisions;

List of Fisheries and Gear, and Notification Guidelines, 64 Fed. Reg. 67,511(1999) (to be codified at 50 C.F.R. pt. 600).

5. On March 9, 2000, the Marine Fish Conservation Network (MFCN) stated that management of the nation's fisheries has been an expensive flop for much of the last decade. The nationwide coalition of nineteen environmental and fishermen's groups said that ineffective policies have caused depleted stocks on the East and West coasts and cost the federal government $160 million since 1994 in disaster relief for fishermen, with $421 million in additional aid currently being considered by Congress. An MFCN official said that regional fishery management councils have failed to enforce fishery regulations, causing overfishing and closure of fisheries. The official also accused the NMFS of providing poor oversight, citing an acknowledgement by the agency last year that it did not know the status of nearly three quarters of the nation's managed fish stock. The agency conceded that there was room for improvement, but defended itself by pointing to the difficult balancing act the agency must overcome in managing fisheries. *See Natural Resources Fisheries: Coalition Slams Fishery Management*, GREENWIRE, Mar. 10, 2000, *available in* WESTLAW, 3/10/2000 APN-GR 9.

6. On January 11, the National Marine Fisheries Service published its final rule to implement the Spiny Dogfish Fishery Management Plan. The spiny dogfish is a common small shark that is found in the North Atlantic Ocean. Landings of spiny dogfish in the last ten years have seen a marked increase on the East Coast, as an export market for the resource has developed. Because the female of the species is larger than the male, the majority of landings have been of females, resulting in the decline of the biomass of mature females by over fifty percent in the last decade. The stock was added to the list of overfished stocks in April of 1998. Developed by the Mid-Atlantic and New England Fisheries Management Councils, the plans will enact an annual commercial quota, a semi-annual allocation of the commercial quota, a prohibition on "finning" and new permit and reporting requirements for commercial vessels, operators and dealers. Aimed at conserving the spiny dogfish while also achieving optimum yield, the quota-based program should allow for rebuilding of the stock by reducing species mortality. The rule, which was originally slated to take effect on February 10, 2000, was postponed by the Secretary until March 15, 2000 in order to allow additional time for the Mid-Atlantic and New England Fishery Management Councils to come to a consensus on how to proceed with the implementation of the FMP. *See* 65 Fed. Reg. 1557 (2000) (codified at 50 C.F.R. pt. 648); 65 Fed. Reg. 7460 (2000) (codified at 50 C.F.R. pt. 648); *NMFS Implements Spiny-dogfish Regs, Seafood Business News* (visited Jan. 24, 2000) <http://www.gofish.com>.

7. The National Marine Fisheries Service announced in February that there would be no prohibition on the sale of gag, black and red grouper from February 15 to March 15, 2000; the proposal to prohibit sales in future years is, however, still under review. On January 26, 2000, the NOAA Fisheries published a proposed rule that included measures intending to prevent overfishing of gag, black, and red grouper. The rule, proposed by the Gulf of Mexico Fishery Management Council, proposed to increase the recreational and commercial minimum size limits for gag and black grouper, prohibit sale of gag, black, and red grouper harvested from Gulf federal waters from February 15th to March 15th of each year, and establish two areas in the eastern Gulf that would be closed to all fishing. Until the NOAA Fisheries make a final decision to approve or disapprove the proposal, current regulations remain in effect. *See NOAA Fisheries' Southeast Regional Home Page* (visited Feb. 17, 2000) <http://caldera.sero.nmfs.gov/fisher/>; *see also Implementation of Proposed Regulations for the Gulf of Mexico Gag, Black Grouper, and Red Grouper Fisheries Postponed* (visited Feb. 17, 2000) <http://www.publicaffairs.noaa.gov/releases2000/feb00/sero00nr001.html>.

8. The seventeen-member panel that regulates deep-water fishing grounds from North Carolina to Florida are in the early stages of considering no-fishing zones to protect snapper, grouper and other reef fish. A similar proposal a decade ago caused fierce controversy and was later dropped, so the council intends to move slowly and cautiously this time. The stock of the long-lived, and slow-growing species is tumbling, and the panel believes that no-fishing zones may be the only way to save the species. Although it is illegal to harvest fish such as the Nassau Grouper, these fish swim with other harvested fish and are sometimes caught as a result; even when returned from the sea, the fish often die from stress. After holding meetings with fisherman and environmental groups, the council hopes to reach a decision as to which areas would be declared no-fishing zones. Several other no-fishing zones have been proposed by a sister panel in the Gulf of Mexico to protect the spawning grounds of the gag group, as well as the reef fish around the Dry Tortugas off the Florida Keys. *See Panel Considers Marine Reserves to Protect Reef Fish*, ASSOC. PRESS NEWSWIRE, Dec. 4, 1999, *available in* WL 12/4/99 APWIRES 02:22:00

9. In October, Commerce Secretary William M. Daley appointed twenty fisheries experts to the group that advises him on marine resource policies and programs. The NOAA Fisheries Marine Fisheries Advisory Committee (MAFAC), makes recommendations regarding reauthorization of the Magnuson-Stevens Act, the Endangered Species Act, and the Marine

Mammal Protection Act. Appointments to MAFAC, that operates under the authority of the Federal Advisory Committee Act, existed for three years, and of the twenty appointees, thirteen are reappointments. Committee members represent an array of marine resource matters, from commercial and recreational fishing interests, to environment, academic, tribal and consumer points of views. *See Commerce Secretary Daley Appoints 20 Experts to Marine Fisheries Advisory Committee* (visited January 26, 2000) <http://www.publicaffairs.noaa.gov/releases99/oct99/noaa99r155.html>.

10. Working hard to respond to the needs and complaints of fisherpersons, NOAA announced that the National Marine Fisheries Service has significantly improved the Atlantic tunas permitting and recreational bluefin tuna landing reporting system. NOAA fisheries contracted with AppNet, Inc. to issue or renew Atlantic tuna permits over the Internet, hoping to make the permit process faster and easier. Besides the Internet, permits may be obtained or renewed by fax or mail, and the twenty-five dollar fee for the permits is payable by credit card or money order. With the new systems in place, NOAA hopes to provide instant access to permits for those who are eligible. The new permits will also reflect the change in the fishing year for Atlantic tunas, the new year will be June through May of the following year, a change made by NOAA to speed implementation of international fishery management recommendations. The permits will then be renewable on an annual, fishing year basis.

Other new permit regulations include a change for owners of charter boats or head boats that fish for Atlantic tunas, sharks, swordfish or billfish. Such owners must now obtain a Highly Migratory Species Charter/ Headboat permit covering all species under the Highly Migratory Species Fishery Management Plan, replacing the current Atlantic tunas Charter/Headboat permit. The current permit will however be valid until its expiration date of May 31, 2001, and the requirement of the new permit is not officially effective until the Office of Management and Budget approves the new class of permit. *See NOAA Fisheries Announces New Permit Provider, Expanded Options to Obtain Atlantic Tunas Permits,* (visited Feb. 12, 2000) <http://www.publicaffairs.noaa.gov/releases99/nov99/noaa99r161.html>.

11. Responding to the 1997 International Dolphin Conservation Act, the Commerce Department announced in January new final interim regulations allowing importation of harvested tuna, as well as a new labelling standard for tuna. The new standard calls for tuna to be labelled as "dolphin safe" if no dolphins were observed injured or killed while encircled in purse seine nets. The "dolphin safe" label was previously applied if no purse seine nets were set on dolphins during fishing for tuna. Although Commerce Secretary

William Daley announced that dolphin deaths should continue to go down with these new labelling standards, the new standards have been severely attacked by several conservation groups. *See Endangered Species: New Tuna Label Rules Draw Fire From Environmental Groups,* BNA INT'L ENV'T DAILY, Jan. 7, 2000, *available in* WL 1/7/2000 NED d11.

12. New fish trap regulations for the Gulf of Mexico were announced in January by NOAA. The regulations announced three new important requirements with which vessel owners or operators must comply in addition to the existing reporting requirements. The first new regulation regards a one-month period for mandatory inspection of all fish trap gear, permits and vessels; notification by NOAA will be provided to the owners of all such vessels. The owner is required to contact the Special Agent-in-Charge (SAC) at the NMFS in order to schedule an inspection, and is required to make available for inspection on land all gear with attached trap tags and buoys, and permits. An owner or operator failing to comply with the inspection requirements would not be permitted to use or possess a fish trap in the Gulf EEZ until all gear, permits and vessels are in compliance.

Fishing trip reports are the subject of the next new regulation promulgated by NOAA Fisheries. For each trip on which a fish trap will be used or possessed, an owner or operator of a vessel for which a fish trap endorsement has been issued must submit a trip initiation report and a trip termination report to the SAC or his designee. A trip initiation report must include the vessel name, official number, number of traps to be used, sequence of trap tag numbers, departure times, dates, points, intended time and date of trip termination. The initiation report must be filed before beginning the trip, and the termination report, which must include similar information, must be submitted immediately upon returning to port and prior to any offloading.

Vessels possessing Gulf reef fish in or from the Gulf EEZ, that exhibit trap rash, may now only do so if that vessel has a valid fish trap endorsement. Trap rash is defined as physical damage of the fish resulting from contact with wire fish traps, and includes broken fin spines, fin rays, visually obvious loss of scales or cuts and abrasions on the body of the fish. Possession on board a vessel without a valid endorsement is prima facie evidence of illegal trap use and is prohibited. *See New Gulf of Mexico Fish Trap Regulation* (visited Mar. 16, 2000) <http://www.nmfs.gov/SERO/nr00_01.htm>.

13. The National Marine Fisheries Service, in its annual report to Congress on marine fish stocks, revealed that ninety-eight of the reviewed species are overfished, five are approaching overfished conditions, and 127 species are not overfished. Due to conservation efforts and updated data, managers

removed ten species from the overfished list, but added eighteen. However, the number of species whose status is not known jumped from 544 to 674 this year, due in part to a lack of adequate time to address the information requirements of the new Sustainable Fisheries Act. The new definition of "overfished" requires scientists to assess the stock's biomass and the amount of that biomass that is harvested each year; due to this new, more complex definition, and a lack of information, seventy-nine species this year were moved from the "approaching overfished" status to "unknown." The report on the status of the stocks, as well as rebuilding efforts, is required by the 1996 Magnuson-Stevens Act. An executive summary or the full report can be obtained from the Internet at www.nmfs.gov/sfa. *See NOAA Annual Report to Congress: Small Increase in Overfished Species* (visited Feb. 12, 2000) <http://www.publicaffairs.noaa.gov/releases99/oct99/noaa99070.html>.

14. The National Marine Fisheries Service released "Our Living Oceans: Report on the Status of Living Marine Resources (1999)," its report card on the status of 283 stocks. Many of the species covered by the report are under federal management in the U.S. Exclusive Economic Zone, as well as the governance of international laws and multilateral treaties. The report releases new data and analysis on the covered species, and is intended as an "overview and report card on the biological status of U.S. living marine resources." The report is designed to showcase those areas in which the NMFS has been successful in rebuilding stocks, as well as those areas that need improvement. Copies of "Our Living Oceans '99" can be obtained from the NMFS through the mail, by telephone or fax or through the NMFS' website: https://orders.access. gpo.gov/su_docs/sale/prf/prf.html. *See* Steven Hedlund, *NMFS Reports on Status of Stocks* (visited Jan. 7, 2000) <http://www.gofish.com>.

15. NOAA has proposed a rule to track and monitor the trade of Patagonian and Antarctic toothfish due to findings of overexploitation. A large market for toothfish developed in the 1990's as it became popular in U.S. markets and restaurants, sold under the name "Chilean Sea Bass." This market has resulted not only in great rates of exploitation of the resource, but also in a high degree of illegal and unregulated fishing activity for the species. The species is managed internationally through the Commission for Conservation of Antarctic Marine Living Resources (CCAMLR), which has adopted a number of measures in the past three years to try to cure the problem. These regulations have been largely ineffective, however, and in November 1999, CCAMLR adopted a Catch Documentation Scheme for toothfish to track and monitor trade by requiring documentation for all landings, transhipments, and importations of the species. *See NOAA Proposes New Conservation*

Measures to Protect Toothfish (visited Mar. 20, 2000) <http://www.publicaffairs.noaa.gov/releases2000/mar00/noaa00r108.html>.

B. Highly Migratory Species

16. On December 12, 1999, NOAA announced that in order to enhance rebuilding of depleted stocks of Atlantic swordfish and billfish, the NMFS is proposing a year-round closed area in the Atlantic Ocean and a seasonal closure in the western Gulf of Mexico, together totaling approximately 196,370 square miles. Fishery managers believe closing these areas will reduce bycatch of unwanted and/or undersized fish and will also help rebuild other overfished species such as bluefin tuna and some large coastal shark populations.

The proposed Atlantic closed area encompasses waters from Wilmington Beach, North Carolina, to Key West, Florida. The proposed Gulf of Mexico area includes waters within the EEZ and encompassing 26 degrees N lat. (Isabel, Texas), and 90 degrees W long. (Grand Isle, Louisiana), to the coast. The proposal reflects input from meetings with two advisory panels held earlier in the year to discuss alternatives for the time and area closures. Members of the Highly Migratory Species and Billfish Advisory Panels supported the time and area management strategy. *See* Atlantic Highly Migratory Species; Pelagic Longline Management, 64 Fed. Reg. 69,982 (1999) (to be codified at 50 C.F.R. pt. 635).

C. Federal Lobster Rules

17. On December 6, 1999, NMFS announced rules for lobstering in northeastern waters that will more closely integrate federal and state fishery management plans into a comprehensive effort to end overfishing and rebuild egg production in this resource. The action is the result of two years of work by managers and the lobster industry to fashion a unified way to manage this diverse fishery with lobsters distributed across state boundaries from North Carolina to Maine, as well as across state and federal boundaries.

Lobster fishing in state waters is managed under a plan developed through the Atlantic States Marine Fisheries Commission (ASMFC), an interstate body that includes state, federal and industry representatives. Based on a plan agreed to through the ASMFC, states individually implement rules required to carry out the plans in their waters. Over the past two years, new measures have been added to the interstate plan, and federal managers have conducted the public process required to establish complimentary measures for federal waters.

This action withdraws the federal fishery management plan for lobsters, developed through the New England Fishery Management Council. The

plan is replaced by these rules, which are implemented under the Atlantic Coastal Fisheries Cooperative Management Act. The act provides authority for state and federal managers to devise plans that will apply to fishing on stocks that span several legal jurisdictions. *See* American Lobster Fishery, 64 Fed. Reg. 68,228 (1999) (to be codified at 15 C.F.R. pt. 902 & 50 C.F.R. pts. 649 & 697).

IV. PROTECTED AREAS

A. Coral Reefs

1. On October 29, 1999, NOAA, working in collaboration with other federal, state and territory stakeholders, proposed to establish an ecological reserve to protect the best remaining coral reef habitat in the Florida Keys National Marine Sanctuary. The Tortugas ecological reserve would be off limits to all taking of marine life, but would be open for diving, snorkeling and other non-consumptive activity. The Tortugas, located 70 miles west of Key West and more than 140 miles from mainland Florida, has the clearest and the healthiest coral reefs in the 2800-square-nautical-mile sanctuary. This biologically rich, relatively undisturbed site plays a critical role in sustaining the health of Florida's coral reefs and economy.

The establishment of the proposed reserve was unanimously approved by the Florida Keys National Marine Sanctuary Advisory Council. It would consist of two distinct and separate reserves totaling 185 square nautical miles. Tortugas North, 125 square nautical miles, includes Sherwood Forest, an area of coral growth largely in state waters, as well as half of Tortugas Bank, an extremely productive area of the Sanctuary. Tortugas South, a sixty square-nautical-mile area that lies entirely in federal waters, would protect Riley's Hump, an important spawning site for snapper and grouper species.

Worldwide, coral reefs cover less than one percent of the ocean floor. They are likely to be the most valuable, and most threatened, marine ecosystems on the planet. Recent studies suggest that close to sixty percent of the world's coral reefs are being degraded by human activities and other stresses including polluted runoff, sedimentation, fishing impacts, ship groundings, new diseases and climate change. *See Tortugas 2000: Protecting Florida's Coral Reefs* (visited Feb. 12, 2000) <http://www.publicaffairs.noaa.gov/releases99/oct99/noaa99r418.html>.

2. At their third meeting, the U.S. Coral Reef Task Force, established by President Clinton in 1998, adopted and released a draft *National Action Plan to Conserve Coral Reefs*. The plan focuses on the themes of understanding coral reef ecosystems and reducing the adverse impacts of human activities.

Some of the strategies recommended in the *National Action Plan* included mapping all U.S. coral reefs, assessing and monitoring reef health, creating a network of reef marine protected areas and restoring damaged reefs. Another important recommendation is to reduce impacts of extractive uses, such as inappropriate fishing methods and trade of reef resources. Many reef resources are overharvested or collected with destructive methods. The draft report recommends identifying and protecting important U.S. coral reef fisheries habitats and spawning populations by expanding the coverage of no-fishing zones to include reef habitats.

The Coral Reef Task Force also adopted a *Guide for Management of Coral Reef Protected Areas.* The guide will help managers build effective coral reef protected areas, and focuses on monitoring, education, and management. It suggests that twenty percent of the area be established as marine wilderness or replenishment zones. The task force will be seeking public comment on the *National Action Plan*, as well on the released *Oversight of U.S. Agency Actions* that affect coral reef protection. Both the *Plan* and the *Oversight* are available for public comment, and based on such, revisions will be made to both documents, which will then be made available for adoption and implementation by the task force next summer. Currently U.S. coral reefs cover approximately seventeen thousand square kilometers, and are located primarily in the U.S. islands in the Pacific, but also off the coast of Florida, Georgia, Texas, and U.S. islands in the Caribbean.

Information about the Task Force meeting and copies of the National Action Plan or the Oversight can be obtained at the Task Force website at www.coralreef.gov, or by contacting the NOAA Public Affairs Office at 202-482-6090 or the Department of the Interior at 202-501-4633. *See Charting a New Course for Coral Reef Conservation* (visited Feb. 12, 2000) <http://www.publicaffairs.noaa.gov/releases99/nov99/noaa99doicoralcons.html>.

3. NMFS issued issued a final rule to take effect December 6, 1999 that implements Amendment 1 to the FMP for Corals and Reef Associated Plants and Invertebrates of Puerto Rico and the U.S. Virgin Islands. The amendment, developed by NOAA and the Caribbean Fishery Management Council, establishes the Hind Bank Marine Conservation District as a no take area in the exclusive economic zone off of the U.S. Virgin Islands. The area includes sixteen square nautical miles and is designed to give full protection to the biologically diverse coral reef resources and reef fish stocks that make their habitat within the area. Within this area, fishing and anchoring of fishing vessels is completely prohibited. The Amendment was developed in recognition of the ecological stress that is placed on coral reefs through the practices of coastal development, deforestation—including

sedimentation, pollution, and dredging, and fishing through both gear impacts and the effects of overfishing. The limited coral habitats of the US Caribbean are considered to be seriously degraded by such practices. The objectives in the changes to the FMP are to further the conservation and protection of the species in the fishery management unit, to minimize adverse human impacts on the resources, and to provide special management of reef and sea grass habitats. Due to the need to protect red hind spawning aggregations, Hind Bank has been closed to fishing in the winter season since 1991, a measure which showed positive effects for the red hind in terms of size and abundance. This closure will now be year round and encompass all fish stocks within the area, including highly migratory species. NOAA and the Council do not anticipate any major problems, despite the fact that some fishermen will have to relocate from their customary fishing grounds. *See* NOAA Fisheries of the Carribbean, Gulf of Mexico, and South Atlantic; Coral Reef Resources of Puerto Rico and the U.S. Virgin Islands, Amendment 1, 64 Fed. Reg. 60,132 (1999).

B. Marine Sanctuaries

4. The San Francisco Chronicle reported that thousands of rare birds and hundreds of marine mammals in California's Monterey Bay National Marine Sanctuary are becoming entangled and killed in fishing nets as a result of legal fishing practices. Biologists estimate that about 2,500 murres, a deep-diving seabird, and more than 100 porpoises may be killed each year by the use of gill nets. While commercial fishing in the area is not illegal, environmentalists are pushing for tougher restrictions. The NMFS is working with fishermen to collect data by posting observers on some fishing vessels that use gill nets in the area. The NMFS could impose regulations requiring gill-netters to fish in deeper waters where there are fewer birds and porpoises. The NMFS will continue to collect data and reserve any recommendations until next year. *See Natural Resources Monterey Bay: Nets Causing Problems for Sanctuary Wildlife*, GREENWIRE, Mar. 22, 2000, *available in* WESTLAW, 3/22/2000 APN-GR 9.

C. Estuaries

5. The Grand Bay National Estuarine Research Reserve, located in eastern Jackson County, Mississippi, has been formally designated by NOAA and the Mississippi Department of Marine Resources to be the twenty-fourth reserve of the National Estuarine Research Reserve System that operates under the Coastal Zone Management Act of 1972. On June 16, 1999 Dr. James Baker, under the Secretary for Oceans and Atmosphere, signed findings of designation and on December 7, 1999 the formal designation was

put in place. The Reserve contains a diversity of environments, including approximately 18,400 acres of Mississippi Sound, coastal bay, extensive saltwater marshes, maritime pine forest, pine savanna and pitcher plant bogs. The designation of the reserve is not only an important step in conservation in the north-central Gulf of Mexico, but will provide opportunities for long-term research and public education of these unique coastal resources as well. *See* NOAA Notice of Designation of the Grand Bay National Estuarine Research Reserve, Mississippi, 64 Fed. Reg. 48,142 (1999); *Grand Bay Designated as 24th Estuarine Reserve in Nation* (visited Mar. 20, 2000) <http://www.publicaffairs.noaa.gov/releases99/dec99/noaa 99r425.html>.

D. Incidental Harassment

6. The California Department of Transportation (CALTRANS) submitted an application to NOAA for an incidental harassment authorization, due to CALTRANS proposed East Span Seismic Safety Project for the Oakland Bay Bridge. The demonstration project would include driving large piles, one of which is larger than any pile-driving hammer previously used, into the Bay bottom. Due to the use of such untested hammers, a pile installation demonstration is needed to determine which Pacific Harbor seals and California sea lions may be disturbed. The demonstration project will give CALTRANS the opportunity to measure resulting sound pressure levels, record possible impacts to marine mammals, and experiment with measure to reduce potential harm to marine mammals prior to general use on the piles. The National Marine Fisheries Service has preliminarily determined that only incidental harassment of a small number of harbor seals and possibly California sea lions would result from the project, and that there would only be a negligible effect upon the species. *See* NOAA, *NOAA Seeks comments on a Proposed Authorization For CALTRANS to Harass Seals and Sea Lions During Demonstration Bay Bridge Project,* (visited Feb. 2, 2000) <http://www.publicaffairs.noaa.gov/releases2000/jan00/noaa00r102.html>.

E. Miscellaneous

7. A moratorium on oil drilling on Georges Bank has been extended until December 31, 2012. The moratorium, which came into effect in Canada in 1988 under the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Acts, was originally to expire on January 1, 2000. The moratorium has been effective thus far in protecting the resources in the area, which is one of the most productive fishing grounds in the world. The extension was recommended by an independent panel, appointed under the Acts, which conducted a public review of the environmental and socio-economic impacts that would result from exploration and drilling. *See*

Natural Resources Canada, *Georges Bank Moratorium Extended* (visited Mar. 20, 2000) <http://www.nrcan.gc.ca/css/imb/hqlib/99115.htm>.

V. OCEAN POLLUTION

A. Court Refuses to Grant Exxon a New Trial

1. On March 16, 2000, the Ninth Circuit Court of Appeals rejected an appeal by Exxon Corp. on the verdict for its 1989 *Valdez* oil spill. Exxon is attempting to reverse a 1994 decision forcing it to pay $5 billion in punitive damages for spilling 11 million gallons of oil off the Alaska coast. Exxon contended that irregularities during jury deliberations warranted a new trial. In the final weeks of the trial deliberations, the jury was deadlocked. One morning as it returned to work, a bailiff allegedly held out a bullet to one of the jurors and joked that it might be useful in breaking the impasse. Exxon claimed that the comment made by a bailiff, who joked about shooting a juror to "put her out of her misery," justified a retrial. Chief U.S. District Judge Russel Holland said the bailiff's comments did not appear to hurt the outcome of the original case and refused to grant a new trial. *See Air & Water Valdez: Court Refuses to Grant Oil Giant New Trial*, GREENWIRE, Mar. 17, 2000, *available in* WESTLAW, 3/17/2000 APN-GR 5.

B. OPA and Oil Tanker Regulation

2. The Supreme Court ruled on the issue of oil tanker laws on March 6, 2000. In a unanimous decision, the Court held in favor of Intertanko, a coalition from the oil tanker industry, in stating that states may not enact oil tanker laws and regulations that are stricter than those provided in the federal Oil Pollution Act of 1990 (OPA). Intertanko had challenged the constitutionality of a variety of Washington State laws referred to as Best Achievable Protection Regulations (BAP) that imposed requirements on oil tankers to prevent oil spills. The Court reversed the Ninth Circuit's holding that the regulations were not preempted by federal law, stating that the federal government's interest in uniformity of regulation of maritime commerce amounts to a comprehensive regime for oil tanker safety and therefore any conflicting state laws must be struck down. *See* United States v. Locke, 120 S. Ct. 1135 (2000); Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998).

VI. CLEAN WATER ACT

3. In a 7-2 decision on January 12, 2000, the Supreme Court upheld the right of citizen plaintiffs to bring suit under the Clean Water Act. The Court reversed its recent trend of restricting the ability of citizens to sue to enforce

environmental laws by allowing civil penalties as a means of redress for the injuries of private plaintiffs. The defendant had violated its National Pollutant Discharge Elimination System (NPDES) permit, which limited its discharge of pollutants into the waterway. A citizen suit was filed on June 12, 1992, seeking declaratory and injunctive relief, as well as civil penalties. The Supreme Court reversed the Fourth Circuit's decision to vacate the civil penalties that were awarded by the District Court. The majority opinion held that the plaintiffs could show the requisite injury to gain standing if they were caused reasonable worry and avoided use of the river as a result of the defendant's permit violations. The Court stated that fact that the civil penalties are payable to the government, not to the citizens, does not exclude them as a form of redress for the plaintiffs. *See* Friends of the Earth v. Laidlaw Environmental Services, __U.S.__, 120 S. Ct. 693 (2000); Steve France, *Rolling on the River*, 86 A.B.A.J. 39 (2000).