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## A Review Of Developments In Ocean And Coastal Law

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## A REVIEW OF RECENT DEVELOPMENTS IN OCEAN AND COASTAL LAW

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

### I. RECENT CASES

#### *Blanco v. Burton*

The State of Louisiana and its Governor (plaintiff) sought to enjoin the U.S. Department of the Interior, affiliated agencies, and related officials (defendants), from opening bids and awarding leases, under the federal lease sale plan for oil and natural gas allowing drilling for oil and gas on the state's continental shelf.<sup>1</sup> Citing concerns<sup>2</sup> that the measures taken by the defendants failed to adequately address the shortcomings in coastal protection and the devastation caused by recent storms, the plaintiff sought to preliminarily enjoin the awarding of leases until a final ruling had been issued on the merits of the case.

Although the State showed a likelihood of prevailing on the merits of the case, and established a prima facie case as to other issues, the court dismissed the claim, holding that the preliminary injunction sought by the plaintiff was overly broad.<sup>3</sup> The court noted that the damage reported by the State failed to cite how specific and imminent activity under the leases

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1. *Blanco v. Burton*, No. 06-3813, 2006 U.S. Dist. LEXIS 56533, at \*20 (D.E. La. Aug. 14, 2006).

2. Some of the concerns cited were that the Minerals Management Service (MMS), one of the listed defendants, had insufficiently prepared an analysis of the environmental impact of the leases and their long-term effects in conjunction with recent damage from Hurricanes Katrina and Rita. The plaintiff claimed that, specifically, the Environmental Assessment analysis was based upon outdated National Environmental Protection Act documents, and that the MMS overlooked this fact in a rush to stay on the Multi-sale 2002 Environmental Impact Statement (EIS) schedule. *Id.* at \*12-15.

3. *Id.* at \*3-5.

created irreparable harm to its coasts. Thus, any reported damage, as a result of the sale of the leases, was secondary and cumulative in nature.

Moreover, the court found that the defendants conducted an adequate examination of the conditions of the area to conclude that the continental shelf was suitable for drilling without resulting in irreparable harm to coastal environments.<sup>4</sup> The court further noted that the defendants' actions satisfied the "hard look" standard for environmental initiatives, and that the National Environmental Protection Act (NEPA) does not require agencies to choose an environmentally preferable course of action; rather, "NEPA merely prohibits uninformed—rather than unwise—agency action."<sup>5</sup>

Although the court found that the plaintiff did not connect coastal damage to the sale of leases and that the defendants conducted an adequate examination of the area, the court emphasized that because the plaintiff showed a greater likelihood of success on the merits of their claim, the injunction sought was dismissed without prejudice. Furthermore, the plaintiff was free to seek a permanent injunction of the defendants' activities at the upcoming trial.<sup>6</sup>

This case indicates that the court was willing to emphasize the plaintiff's likelihood of success on the merits when all of the evidence is available for review. Perhaps policy reasons drove the court's approach: with the devastation caused by the recent hurricanes, courts are reluctant to make decisions that would cause more harm and destruction to already devastated areas.

#### *Griffin v. Town of Cutler*

In *Griffin v. Town of Cutler*,<sup>7</sup> the Town of Cutler adopted an ordinance that strictly limited the pool of fishermen that were eligible for mooring licenses in Cutler Harbor.<sup>8</sup> The plaintiffs, Michael and Dale Griffin, claimed that the ordinance violated the Equal Protection Clause<sup>9</sup> and the non-discrimination provision of the Dormant Commerce Clause<sup>10</sup> of the U.S. Constitution.

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4. *Id.* at \*72-77.

5. *Id.* at \*29 (citing *Sabine River Authority v. U.S. Dep't of Interior*, 951 F. 2d 669, 676 (1992)).

6. *Id.* at \*77.

7. 2006 U.S. Dist. LEXIS 66818 (D. Me. Sept. 15, 2006).

8. *Id.* at \*7-8.

9. U.S. CONST. amend. XIV, § 1.

10. U.S. CONST. art. 1, § 8.

The Town of Cutler limited the number of commercial mooring licenses granted to non-residents to ten percent of the mooring vessels in Cutler Harbor. The ten percent figure was based on the total number of moorings that were allocated to residents at the time of application. Out of the forty-five mooring permits issued in 2004, only seven were issued to non-residents, four for commercial use, and three for recreational use.<sup>11</sup>

The licenses were issued to non-residents who had preexisting mooring privileges as of 2003, and no new applicants were granted licenses. All other permits went to resident fishermen.<sup>12</sup>

The Town denied the plaintiffs' application and placed them on a waiting list, citing 38 M.R.S.A. § 7-A<sup>13</sup> as the sole reason for their denial.<sup>14</sup> In their denial, the Town stated that the plaintiffs were not eligible for commercial licenses until seventy-one licenses were granted to residents, thereby admitting that Cutler Harbor still had mooring space available.

The plaintiffs subsequently purchased shorefront property on which to moor their fishing boats and to assert resident status. The Town, however, claimed that the plaintiffs' applications were still non-resident applications, resulting in plaintiffs remaining on the waiting list for the 2004 season. The plaintiffs claimed that, during the 2004 season, they each lost between 300 and 400 lobster traps because the Town denied their application.<sup>15</sup>

In 2005, the plaintiffs again applied for a mooring license, specifically noting their landowner status. The Town, however, denied their application because it was agreed the "mudflat" that represented their land was not a sufficient mooring space.<sup>16</sup>

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11. Griffin v. Town of Cutler, 2006 U.S. Dist. LEXIS 66818, at \*8.

12. *Id.* at \*9 n.4.

13. ME. REV. STAT. ANN. tit. 38, § 7-A (West 2001). The statute describes the waiting list process and the allocation of mooring licenses to non-resident fishermen. The waiting list section of the statute has no qualifying requirements for awarding of licenses based upon residency. The allocation section of the statute describes the ten percent rule upon which the Town relied to deny plaintiffs' applications.

14. Griffin v. Town of Cutler, 2006 U.S. Dist. LEXIS 66818, at \*9.

15. Although they do not provide any direct evidence, the plaintiffs claim that their fishing lines were intentionally cut by certain resident fishermen in response to their continued fishing in Cutler Harbor. *Id.* at \*15.

16. *Id.* at \*16.

The plaintiffs presented eight claims<sup>17</sup> for consideration, and the defendant moved for summary judgment on each claim. The opinion represents the Magistrate Judge's Recommended Decision on the defendant's summary judgment motion, which was subsequently adopted by the District Court.<sup>18</sup>

The opinion dismissed the defendant's motion for summary judgment on the plaintiffs' first claim. The judge found that the denial of the mooring license in 2004 was improper because the Town's reading of the statute (the ten percent rule) was an error of law.<sup>19</sup> The statute does not require that non-residents be placed on a waiting list or denied licensing when it is admitted that mooring space is available. The judge also held that additional findings of fact were required to determine whether the shorefront property purchased by plaintiffs, despite its insufficiency for mooring, constituted "waters" of Cutler Harbor and thus were entitled to mooring space elsewhere in the harbor.<sup>20</sup>

In regard to the federal claims,<sup>21</sup> the Magistrate Judge recommended that the court deny the defendant's motion for summary judgment on the Equal Protection claim but grant the motion on the Commerce Clause claim.<sup>22</sup> The judge found that the plaintiffs had made out a successful Equal Protection claim because the Harbor Master had reacted with clear

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17. The eight claims presented by plaintiffs were: (1) request for judicial review of the Town's initial denial of their April 2004 mooring applications, brought pursuant to Rule 80B of the Maine Rules of Civil Procedure; (2) a request for judicial review of the Town's July 2004 order that the Griffins remove their boats from moorings assigned to third parties; (3) request for judicial review of the Town's July 2004 refusal to issue mooring permits upon notice that the Griffins owned waterfront property in Cutler; (4) claim against the Town for deprivation of the Griffins' civil rights, brought pursuant to 42 U.S.C. § 1983, and specifically identifying rights secured by the Equal Protection Clause and the Commerce Clause; (5) a claim against defendants Drouin, Feeney, and Cates in their personal capacities that parallels the claims asserted against the Town in count IV but including a civil rights conspiracy theory; (6) a request for a declaratory judgment against the Town finding that the 2005 Harbor Ordinance was *ultra vires* and may not be enforced; (7) a claim for "wrongful interference" with the Griffins' trade or business, brought against defendants Drouin, Feeney, Cates, and Taylor; and (8) an abandoned claim brought under the Unfair Trade Practices Act. *Id.* at \*17-19.

18. *Griffin v. Town of Cutler*, 2005 U.S. Dist. LEXIS 22930 (D. Me. Oct. 5, 2005) (affirming the order of the Magistrate Judge and dismissing the due process claims, the claims for punitive damages against the Town of Cutler, and any state tort claims against the Town or the Harbor Masters for their official acts).

19. *Griffin v. Town of Cutler*, 2006 U.S. Dist. LEXIS 22930, at \*26-31.

20. *Id.* at \*30-31.

21. *See supra* note 17.

22. *Griffin v. Town of Cutler*, 2006 U.S. Dist. LEXIS 22930, at \*35-52.

animosity toward the plaintiffs and that the only justification for denial was based upon the flawed statute.

However, the judge found that the Dormant Commerce Clause argument was ultimately unsuccessful and that any negative effect upon interstate commerce was merely incidental. It was held that the statute discriminated against mooring vessels *only*, that such activity was *pre-commerce*, and therefore did not fall within the protections of the Dormant Commerce Clause.<sup>23</sup>

The judge subsequently found that other provisions in the ordinance were facially discriminatory but noted that the plaintiffs had the burden of negating any conceivable rationale proffered by the defendant to justify the discrimination. Because the defendant did not provide a rationale for the discriminatory nature of the ordinance, the judge found the statute to be facially unconstitutional.<sup>24</sup>

This holding, although related substantially to constitutional law issues, has a resounding affect upon ocean and coastal law. The case goes to great lengths to satisfy the constitutional rights of individual resident and non-resident fishermen, while simultaneously maintaining the autonomy of local communities. The town has a proprietary interest in their shorelines, and they are allowed to exercise some discrimination in the granting of mooring licenses to non-resident fishermen: the ten percent rule. However, non-resident fishermen, although initially only eligible for ten percent of mooring space, are, under this case, not limited to just that ten percent. If and when the town fails to lease all of the space typically reserved for resident fishermen, non-residents are now capable of obtaining more mooring space. Therefore, this case, to some extent, benefits both non-resident fishermen seeking mooring permits and local fishing communities trying to retain their harbors for local use.

#### *United States v. Massachusetts*

The Massachusetts legislature enacted the Oil Spill Prevention Act (OSPA) in response to an oil spill in Buzzards Bay, Massachusetts in 2003, where a barge collided with submerged rocks and spilled thousands of gallons of oil into the bay. The OSPA sets forth multiple regulations, including: (1) the prohibition of vessels with certain design characteristics from docking, loading, or unloading in Massachusetts waters; (2) manning and navigation watch requirements for towing vessels and barges; (3)

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23. *Id.* at \*50-52.

24. *Id.* at \*61-66.

requiring vessels transporting oil through Massachusetts waters to take on and employ a Massachusetts licensed pilot; (4) requiring vessel owners to implement alcohol and drug testing policies; (5) requiring tugboat escorts for tank vessels traveling in certain waterways; (6) setting forth mandatory vessel routes; and (7) requiring any oil-carrying vessel in Massachusetts waters to present a certificate of financial assurance to the Massachusetts Department of Environmental Protection.<sup>25</sup>

In *United States v. Massachusetts*, the plaintiffs claimed that the OSPA provisions were preempted by federal laws concerning the maritime transportation of oil vessels, specifically the Ports and Waterways Safety Act of 1972 (PWSA) and the Port and Tanker Safety Act of 1978.<sup>26</sup> Moreover, plaintiffs claimed that the Supremacy Clause of the U.S. Constitution also preempts the state from enforcing OSPA.<sup>27</sup>

The court held that PWSA preempted the state law under two modes of analysis. First, Title II of PWSA requires that only the federal government may regulate the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tanker vessels.<sup>28</sup> Thus, Title II removes any state control over these functions, and is in clear conflict with OSPA.<sup>29</sup> As a result, under the Supremacy Clause, OSPA is preempted by PWSA. Title I, of PWSA allows states to create rules for tank vessel navigation through waters only when those rules are directed at local issues that represent idiosyncratic circumstances particular to the waterway, and when those rules do not conflict with the federal regulation.<sup>30</sup>

The court further found that the manning provision of OSPA was preempted by Title II of PWSA. Title II gives the federal government the exclusive right to regulate the manning of tank vessels, and there is “simply no room” for simultaneous state regulation.<sup>31</sup>

In regard to the towing requirement of oil tank vessels, the court found the provision to run contrary to national interests.<sup>32</sup> The threat of oil spillage extends beyond local concerns to a national security issue;

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25. *United States v. Massachusetts*, 440 F. Supp. 2d 24, 28 (Mass. Dist. Ct. 2006).

26. *Id.*

27. *Id.* at 29-31.

28. *Id.* at 31.

29. The court interpreted Congressional intent in creating the PWSA as “creating a universal national scheme of tank vessel regulation. Congress, in enacting Title II of the PWSA, intended the United States ‘to speak with one voice’ on the matters covered therein.” *Id.* (citations omitted).

30. *Id.* at 32.

31. *United States v. Massachusetts*, 440 F. Supp. 2d at 36.

32. *Id.* at 37.

therefore, is exclusively under the control of the federal government. Title II of PWSA gives the federal government control over the vessels, but under OSPA, the Commonwealth had control of the towing of vessels in their waterways, thereby undermining the purpose of PWSA.<sup>33</sup> Therefore, the court found that the towing provision of OSPA was contrary to national security and was preempted by Title II of PWSA.<sup>34</sup>

The court also found the statute's design requirements to be preempted by Title II, as they fall squarely within the federal regulatory scheme, and that "[s]tate regulations of tank vessel design, whether different, more stringent, or identical to federal rules on the subject, are facially unconstitutional."<sup>35</sup>

The navigation requirements of OSPA were also found to conflict with a recommended route through Buzzards Bay promulgated by the Coast Guard by way of the Ports and Waterways Safety Assessment.<sup>36</sup> The navigation provision of OSPA, therefore, directly conflicted with the discretionary nature of the Ports and Waterways Safety Assessment and was preempted by Title I of PWSA.<sup>37</sup>

The court found the local piloting requirement of OSPA to be preempted not by either Title I or II, but rather by 46 U.S.C. § 8501(d), which mandates that a "State may not adopt a regulation or provision that requires a coastwise vessel to take a pilot licensed or authorized by the laws of a State if the vessel . . . is propelled by machinery and subject to inspection . . ."<sup>38</sup> Reasoning that oil tank vessels were "coastwise vessels" as defined by the statute, the court invalidated the piloting provision of OSPA. The court also found the drug testing policy of the OSPA was preempted pursuant to 46 U.S.C. § 2303(a).<sup>39</sup> Under 46 U.S.C. § 2303(a), the coast guard "shall establish procedures to ensure that after a serious marine casualty occurs, alcohol testing of crew members or other persons responsible for the operation or other safety-sensitive functions of the vessel or vessels involved in such casualty is conducted no later than 2 hours after the casualty occurs . . ."<sup>40</sup>

Finally, the court found that parts of the financial security provision of OSPA were constitutional under the general authority of the

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33. *Id.*

34. *Id.* at 37.

35. *Id.* at 38.

36. *Id.* at 44.

37. *United States v. Massachusetts*, 440 F. Supp. 2d at 44.

38. *Id.* at 33.

39. *Id.* at 39-40.

40. *Id.* at 39.

Commonwealth of Massachusetts to set such securities on vessels traveling through the state's waterways.<sup>41</sup> However, the securities imposed by the statute, in some instances, exceeded one billion dollars and were found to be far too onerous to be upheld.<sup>42</sup> Additionally, the court invalidated all aspects of the statute that conflicted with or were preempted by either Title I or II of PWSA or by a relevant federal statute.<sup>43</sup>

These provisions likely resulted from a huge public response to a local oil spill, and an effort to assert the state's authority by assuming the federal government's responsibility for oil barge regulation. The case, however, only strengthens the preemption power of the federal government, even in situations when the specifics of the locality involved are arguably too tedious for the federal statute to accommodate. However, the court correctly noted that the OSPA provisions are extremely rigid and ultimately favor the state, and could even have a deterrent effect on vessel owners wishing to pursue business in Massachusetts's waterways.

*Regina v. Sec'y of State for Foreign and Commonwealth Affairs*

Quark Fishing Ltd. (claimant) was a company registered in the Falkland Islands and the owner of the fishing vessel *Jacqueline*.<sup>44</sup> Claimant, seeking to fish the Patagonian toothfish in the waters of South Georgia and South Sandwich Islands (SGSSI) for the 2001 fishing season, applied to the Director of Fisheries for South Georgia for a license to fish Patagonian toothfish.<sup>45</sup> Although claimant had been granted such fishing license for the preceding four years, the director refused its application in 2001.<sup>46</sup>

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41. *Id.* at 45-48.

42. *Id.* at 46.

43. *Id.* at 48.

44. *Regina v. Sec'y of State for Foreign and Commonwealth Affairs*, [2005] UKHL 57, [2006] 1 A.C. 529, 529 (appeal taken from Eng.) (U.K.).

45. In May 1993, the then Commissioner of SGSSI declared a Maritime Zone, which is similar to the U.S. EEZ, extending 200 miles from SGSSI. The government of SGSSI was to have exclusive jurisdiction over the fisheries. The Commissioner enacted The Fisheries (Conservation and Management) Ordinance 1993 "which, with the Fishing (Maritime Zone) Order 1993, controlled fishing within the Maritime Zone by introducing a licensing regime." *Id.* at 538. The Ordinance was replaced by the Ordinance of 2000. Section 4(5) of the 2000 Ordinance requires the Director of Fisheries to act in accordance with the provisions of the Convention on the Conservation of Antarctic Marine Living Resources ("the Conservation Convention") when he is performing his duties. *Id.* The Conservation Convention was adopted in 1980 and came into force two years later. "It was negotiated to address, among other things, the threat of over-exploitation of fin-fish in the Southern Ocean." *Id.*

46. *Id.* at 536.

Claimant filed an application for judicial review of the director's decision.<sup>47</sup> The Chief Justice quashed the 2001 decision, holding that the courts of England and Wales had jurisdiction over any decision "emanating from the Secretary of State to officials of the Government of South Georgia."<sup>48</sup> Six days later, the Secretary issued an order pursuant to section 5 of the SGSSI Order 1985<sup>49</sup> to grant licenses to two specified vessels but not the claimant's vessel.<sup>50</sup> The Secretary also issued a directive to the Director of Fisheries not to grant claimant a license.<sup>51</sup>

The claimant sought judicial review of the Secretary of State's directive and claimed damages under section 7 of the Human Rights Act 1998 for "deprivation of a possession under article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to that Act."<sup>52</sup> The judge quashed the directive on the grounds that it had been made "unfairly."<sup>53</sup> The Court of Appeal affirmed and remitted the case for damages to the High Court.<sup>54</sup>

The remaining issue in the case was whether claimant could recover damages against the Secretary of State.<sup>55</sup> Claimant had to show that the Secretary's admittedly unlawful instruction violated his rights under section 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms "so as to render him liable in damages under sections 6 and 7 of the Human Rights Act 1998."<sup>56</sup>

The claimant also argued that the Secretary of State, when issuing the unlawful instruction, was acting for her Majesty the Queen in the right of the United Kingdom. The Secretary of State contended that he was acting in the right of SGSSI.<sup>57</sup> As a result of the claimant's argument that the

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47. *Id.* at 529.

48. *Id.*

49. SGSSI was acquired by the Crown by settlement. It was a British dependent territory from 1908 until 1985 and a Dependency of the Falkland Islands. After the SGSSI Order came into effect, it ceased to be a dependency. It is now a British Overseas Territory. *Id.* at 537.

50. *Id.* at 529.

51. *Id.*

52. *Id.*

53. *See id.*

54. *Id.*

55. *Id.* at 536.

56. *Id.* at 537.

57. "SGSSI is a remote territory, far to the south of the Falkland Islands, close to the Antarctic Circle, and it has no inhabitants other than a transient population of about 12 scientists. Thus it is no surprise that it lacks the institutions (representative assembly, legislative council, courts and so on) ordinarily to be expected in a British Overseas Territory." *Id.*

Secretary of State was acting for her Majesty the Queen in the right of the United Kingdom, the issue of the control of over-fishing in these waters became an issue of foreign policy. It raised serious questions beyond just conservation and management of the fish species; such as questions about foreign policy and the powers of the Secretary of State. The decision of the Secretary to disregard the recommendation of the Director to issue four fishing licenses, and recommend issuance of only two fishing licenses, was a consideration of foreign policy, not one about the overexploitation of the fisheries in the area.<sup>58</sup> Despite the purpose of the Conservation Convention, to address the threat of overexploitation of fin fish, the Secretary of State did well to act in response to foreign policy considerations by disregarding the Director's recommendation of four fishing licenses in issuing only two. As stated by Pill, LJ "[t]hus there was a strong political and diplomatic motive for the intervention and instruction of the Secretary of State."<sup>59</sup>

*Greenpeace Ltd v. Sec'y of State for the Env't, Food and Rural Affairs*

Under the Agreement on the Conservation of Small Mammals of the Baltic and North Seas (ASCOBANS) and the European Union Habitats Directive, the parties to the agreement are required to help prevent the "bycatch" of dolphins as a result of fishing. This Agreement was entered into force in 1994; the parties to the agreement are Belgium, Denmark, Finland, Germany, Lithuania, the Netherlands, Poland, Sweden, and the United Kingdom.<sup>60</sup>

Article 12.4 of the Habitats Directive (92/43EEC) of May 21, 1992, requires "[m]ember States to establish a system to monitor the incidental killing of (among other animals) cetaceans, and in the light of the information gathered, to take further measures to ensure that incidental capture and killing do not have a significant negative impact on the species concerned."<sup>61</sup> At a third meeting of the group, it was decided that there needed to be a way to reduce the killing of marine mammals as soon as possible to below the level of unacceptable interaction. This level of unacceptable interaction was determined to be 1.7 percent of the "best estimate of abundance."<sup>62</sup> The immediate measure was to reduce bycatch to less than one percent of that best estimate of abundance.

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58. *Id.* at 539.

59. *Id.*

60. *Greenpeace Ltd. v. Sec'y of State for the Env't, Food and Rural Affairs*, [2005] EWHC (QB) 2114, Env. L.R. 19, 461, 463 [hereinafter *Greenpeace v. Sec'y*].

61. *Id.* at 463.

62. *Id.*

In the United Kingdom “there are six species of dolphin, plus the harbor porpoise.”<sup>63</sup> As is true in the United States, it is difficult to determine the exact number of remaining cetaceans. Cetaceans are often killed as bycatch by becoming entangled in fishing nets and ultimately drowning.<sup>64</sup> It is thought that there is a level at which the bycatch will become too high and the level of cetaceans will diminish significantly.<sup>65</sup> One of the concerns is not just a sustainable level of cetaceans to provide for survival of the species, but also the level of suffering the cetaceans can endure when entangled in fishing nets and drowning.<sup>66</sup>

The U.K. has been a leader in researching levels of bycatch. In 2000, the Sea Mammals Research Unit (SMRU) carried out several surveys to estimate the levels of bycatch in fishing in the open sea (as opposed to fishing in coastal areas).<sup>67</sup> This study observed cetacean bycatch in bass trawler fishing.<sup>68</sup> In March 2004, an EC regulation was adopted to address the cetacean bycatch issue.<sup>69</sup> Unfortunately, the measures under the regulation would not occur until 2008 due to the amount of information yet to be gathered and submitted in the form of a report. It was because of this delayed future action that “[t]he Minister, Ben Bradshaw MP, informed of [sic] the House of the request for an emergency closure of the fishery under Art.7.”<sup>70</sup> He stated:

[i]f this is not accepted, I will take action to ensure that this fishery does not continue in its present state next season, and will be looking to limit the number of vessels allowed into the fishery and to close the fishery within our national 12 mile limit. Alongside this, we will continue with research to identify other fisheries causing bycatch. Our latest research suggests that fisheries other than pair trawling for bass are contributing to the large number of strandings each year.<sup>71</sup>

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63. *Id.* at 464.

64. *Id.* at 465.

65. *Id.*

66. *Greenpeace v. Sec’y, Env. L.R.* at 464-65.

67. *Id.*

68. *Id.* This does not mean that cetacean bycatch does not occur in other fisheries.

69. *Id.* at 466.

70. *Id.* “Article 7 authorises the Commission to decide on emergency measures lasting no more than six months ‘if there is evidence of a serious threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities and requiring immediate action.’” *Id.* at 464.

71. *Id.* at 467.

The U.K. sought EU Commission action to close the bass trawler fishery.<sup>72</sup> The Commission rejected the U.K.'s request, acknowledging the steps the U.K. had taken thus far to address the cetacean bycatch problem, and also addressing the need for some action. The Commission believed, however, that "the legal requirements justifying emergency measures under Art.7 were not satisfied."<sup>73</sup> The Commission stated that there were other measures that could be undertaken in preparation for the next bass trawler fishery season.<sup>74</sup>

The defendant (SSEFRA) suggested a measure that would entail closing bass pair trawl fishing within twelve miles of the U.K. coast together with a licensing system outside that zone. Although SMRU responded by saying that this measure would not necessarily reduce the dolphin bycatch, because it would lead to displacement of the fishing efforts to all the areas outside the twelve mile zone,<sup>75</sup> SSEFRA issued the twelve mile closure zone and the licensing system outside that zone.<sup>76</sup>

The claimant challenged the order under judicial review. The court held that SSEFRA had adequately considered the issue and had reasonably and fairly exercised its power.<sup>77</sup> The Secretary had the power to institute the order, despite the fact that the order may not necessarily greatly reduce dolphin bycatch.<sup>78</sup>

It is interesting to contrast this result with the requirements that National Marine Fisheries Service has in its implementation of conservation and management measures. In the case of *Strahan v. Linnon*,<sup>79</sup> for example, the Coast Guard and the Secretary of Commerce were found to have violated the Endangered Species Act, National Environmental Policy Act, the Marine Mammal Protection Act, and the Administrative Policy Act by inadequately addressing the impact of the Coast Guard's activities on various endangered marine mammals.<sup>80</sup> Despite the reasonableness of the National Marine Fisheries Service in its implementation of the Ship Strike Reduction Team,<sup>81</sup> both the Coast Guard and the Secretary of Commerce

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72. *Greenpeace v. Sec'y, Env. L.R.* at 467.

73. *Id.*

74. *Id.*

75. *Id.* at 475.

76. *Id.* at 478.

77. *Id.* at 485.

78. *Greenpeace v. Sec'y, Env. L.R.* at 467.

79. 967 F. Supp. 518 (D. Mass. 1997).

80. *Id.*

81. The Ship Strike Reduction Team was implemented by NOAA in 1991, during the proposal of a right whale ship strike reduction regulation. *See* Endangered Fish and Wildlife, 71 Fed. Reg. 36,299, 36,301 (June 26, 2006) (to be codified at 50 C.F.R. pt. 224)

were found to have acted unreasonably.<sup>82</sup> This past summer, the National Marine Fisheries Service proposed a new federal regulation that would impose new ship speeds on vessels measuring sixty-five feet in length or greater.<sup>83</sup>

## II. RECENT LEGISLATION

### *Stevens-Inouye International Fisheries Monitoring and Compliance Legacy Act of 2006, H.R. 5946, 109th Cong. (2nd Sess. 2006)*

The Stevens-Inouye International Fisheries Monitoring and Compliance Legacy Act of 2006 (Act) was introduced in the House of Representatives on July 27, 2006, by Representative Richard W. Pombo, a Republican representing California's eleventh Congressional District, and co-sponsored by Representatives Neil Abercrombie (D-HI), Wayne Gilchrest (R-MD), Jim Saxton (R-NJ), and Don Young (R-AK). The Act was referred to the House Committee on Resources on the day it was introduced, with the House passing the bill by voice vote on September 29, 2006. The bill is currently pending in the Senate.

The Act is an amendment to the Magnuson-Stevens Fishery Conservation and Management Act (MSA).<sup>84</sup> The Act is intended to "promote improved monitoring and compliance for high seas fisheries, or fisheries governed by international fishery management agreements."<sup>85</sup> The Act is divided into three Titles: Title I is about international fisheries monitoring and compliance, Title II concerns the implementation of Western and Central Pacific Fisheries Convention, and Title III deals with Pacific Whiting.

The provisions of Title I authorize the Secretary of the Interior (Secretary) to share harvesting and processing information, as well as information on illegal fishing, with foreign law enforcement organizations.<sup>86</sup> The Act further authorizes the Secretary, *inter alia*, to develop real time information sharing capabilities, participate in global efforts to build an international monitoring network, support efforts to build

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[hereinafter Endangered Fish and Wildlife] for a complete discussion of the implementation. The Ship Strike Reduction Team has been instrumental in educating mariners about their vessel strike potential and on right whale habitat. *Id.*

82. *Strahan v. Linnon*, 967 F. Supp. at 588.

83. Endangered Fish and Wildlife, *supra* note 81.

84. 16 U.S.C. §§ 1801-1882 (2000).

85. H.R. 5946, 109th Cong., preamble (2nd Sess. 2006).

86. *Id.* § 101.

a database of international fishing vessels, provide technical assistance to other countries to improve their surveillance capabilities, and support international efforts to outfit all large-scale fishing vessels with vessel monitoring systems.<sup>87</sup>

Furthermore, Title I requires the Secretary to report to Congress every two years on the state of knowledge of international violations of the driftnet fishing moratorium provisions of the MSA, and to identify nations with offending vessels, along with any corrective measures those nations have taken.<sup>88</sup> Title I also reauthorizes and provides appropriation for the Atlantic Tunas Convention Act of 1975,<sup>89</sup> directs the Secretary to provide recommendations for regulations to address the impact of United States fishing vessels on fisheries' stock, and directs the Secretary of Commerce to appoint a Senate-confirmed senior official within the National Oceanic and Atmospheric Administration to handle international fisheries agreements and advise on development of international fisheries conservation.<sup>90</sup>

Title II of the Act directs the President to appoint commissioners to the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission).<sup>91</sup> Title II also sets out the authority and duties of the commissioners and authorizes the Secretary of Commerce to promulgate rules to implement measures adopted by the Commission.<sup>92</sup>

Title III of the Act delineates and provides for United States representation on various committees established by the agreement between the United States and Canada on Pacific Hake/Whiting (Agreement).<sup>93</sup> Title III also provides for rulemaking and enforcement authority pursuant to the Agreement to be vested in the Secretary of Commerce.<sup>94</sup>

This Act appears to be an effort to keep the United States involved in the management of international fisheries. By cooperating with foreign governments to manage fisheries and ensure compliance with fishery regulations, the Act should help promote the health and viability of international fisheries. The Act also provides the mechanisms for the United States to perform its obligations under various international agreements. In the future, the Act should foster increased international

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87. *Id.*

88. *Id.* § 103.

89. 16 U.S.C. § 971h (2000).

90. H.R. 5946 at §§ 105, 106, 108.

91. *Id.* § 203.

92. *Id.* § 205.

93. *Id.* §§ 301-307.

94. *Id.* §§ 308, 310.

cooperation in fisheries conservation, and hopefully continue the trend of multi-national involvement in deepwater fishery management.

*National Fish Hatchery System Volunteer Act of 2006,  
H.R. 5381, 109th Cong. (2006)*

The National Fish Hatchery System Volunteer Act of 2006 (Act) was introduced in the House of Representatives on May 11, 2006 by Representative H. James Saxton, a Republican representing New Jersey's third Congressional District, and co-sponsored by Representative Ron Kind, a Democrat representing Wisconsin's third Congressional District. The House Committee on Resources reported the Act to the House on September 6, 2006 and the House passed the bill by voice vote on September 12, 2006. The Senate considered the Act on September 29, 2006 and passed the bill by unanimous consent on the same day. The bill is currently awaiting President Bush's signature.

The Act considers the "integral role" that the National Fish Hatchery System (System) plays in the recovery and restoration of more than 150 native fish species; the challenges the System faces, including aging facilities; and the cost of maintaining the System.<sup>95</sup> Stated purposes of the Act are to encourage the use of volunteers to help manage System fisheries; promote awareness of System resources; encourage public participation in the conservation of System resources; and encourage donations to the System.<sup>96</sup>

To achieve these goals, the Act provides mechanisms for the Secretary of the Interior (Secretary) to accept and disburse "any gifts, devises, or bequests of real and personal property" and, subject to available appropriations, provide funds to match the value of the gifts, bequests, and devises.<sup>97</sup> The Act also provides a mechanism for managing and training volunteers to work at System hatcheries and provides \$150,000 to fund the volunteer program each year through 2011.<sup>98</sup>

In addition to the above-mentioned programs, the Act also authorizes the Secretary to approve projects and programs for System hatcheries that

promote the stewardship of the hatchery . . . support the operation and maintenance of the hatchery . . . increase the awareness and understanding of the hatchery . . . advance education concerning

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95. H.R. 5381, 109th Cong. § 2(a)(1)(B)-(D) (2006).

96. *Id.* § 2(b)(1)-(3).

97. *Id.* § 3.

98. *Id.* § 4.

the purposes of the hatchery and the mission of the System . . . or contribute financial resources to the hatchery.<sup>99</sup>

Finally, the Act directs the Secretary to develop guidelines for hatchery education programs.<sup>100</sup>

This legislation appears to be attempting to supplement the existing resources appropriated for the System with donations and volunteers. While the additional appropriation provided for in this legislation is, relatively speaking, quite small (\$200,000 in total appropriations per year for five years), the potential beneficial impact of the Act on System hatcheries is significant. The Act could relieve some of the pressure on the nations aging hatchery system, and lessen the need for increased taxpayer contributions. Going forward, the Act could serve as a model for other publicly funded resources, not just in the ocean and coastal arena, but also across a broad spectrum of conservation efforts.

This legislation is also an attempt to deal with this country's current fiscal reality. While in a perfect world there would be ample funding available to shore up the System's aging infrastructure, that is not the world in which we currently live. The Act is certainly a better alternative than continuing to make do with the current level of funding or, potentially, a decreased level of funding. By encouraging volunteers and donations, the Act may buy the System valuable time until a future, more conservation-friendly, economic climate emerges.

*H.R. 5447, 109th Cong. (2006)*

H.R. 5447 was introduced in the House of Representatives on May 22, 2006, by Representative Bobby Jindal, a Republican representing Louisiana's first Congressional District. The bill was referred to the House Committee on Resources on the same day it was introduced.

H.R. 5447 would amend the Magnuson-Stevens Fishery Conservation and Management Act<sup>101</sup> "to authorize the Secretary of Commerce to establish a regional economic transition program to provide immediate disaster relief assistance to the fishermen, charter fishing operators, United States fish processors, and owners of related fishery infrastructure affected by a catastrophic regional fishery disaster."<sup>102</sup>

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99. *Id.* § 5(a)(1)-(5).

100. *Id.* § 6.

101. 16 U.S.C. § 1851 (2000).

102. H.R. 5447, 109th Cong., preamble (2006).

Specifically, H.R. 5447 would provide funds or other economic assistance to processing facilities, cold storage facilities, and docks, as well as financial assistance and job training to fishermen affected by catastrophic disasters.<sup>103</sup> In addition, H.R. 5447 would provide funding for vessel repair and refloating, debris removal and cleaning, and fishery rehabilitation.<sup>104</sup> H.R. 5447 also defines “catastrophic regional fishery disaster” as a natural disaster or other closure to protect human health that, *inter alia*, results in economic loss to coastal or fishing communities and affects more than one state.<sup>105</sup>

This bill appears to be an effort on the part of a Congressman from Louisiana to be proactive about future natural disasters in the wake of Hurricane Katrina. While the bill, if it passes, would provide for needed assistance if another natural disaster hits the nation’s coastline, much of this funding and assistance is likely already available through other means. Because this bill would add another, quite specific, safety net to national disaster response, its overall effectiveness is questionable.

*An Act to Reestablish the Maine Coast Environmental Trust Fund within the Department of Marine Resources—L. D. 1234*

In May 2006, the 122nd Legislature endorsed Maine’s increasing effort to conserve the coastal environment by appropriating \$25,000 of public funds into the Maine Coast Environmental Trust Fund, a previously established trust meant to preserve the coast.<sup>106</sup>

The overall purpose of the trust is to protect and improve the quality of the coastal environment. The trust provides grants to qualifying organizations for activities to advance scientific research concerning the nature, magnitude, and effect of pollution of the State’s marine environments,<sup>107</sup> with the goal of reducing pollution or preserving and enhancing marine habitats.<sup>108</sup> Studying the cumulative impact of pollution has become one of the State’s highest priorities,<sup>109</sup> particularly in certain areas of the coast.

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103. *Id.* § 1.

104. *Id.*

105. *Id.*

106. L.D. 1234 (122d Legis. 2006).

107. *Id.*

108. *Id.*

109. MAINE STATE PLANNING OFFICE, MAINE COASTAL PLAN: FINAL ASSESSMENT AND STRATEGY UNDER SECTION 309 OF THE COASTAL ZONE MANAGEMENT ACT 2 (July 2006), available at [http://www.maine.gov/spo/mcp/downloads/309\\_reports/final\\_309A&S.pdf](http://www.maine.gov/spo/mcp/downloads/309_reports/final_309A&S.pdf).

L.D. 1234 was initiated to restore the clam flats in Stockton Harbor because the area has become increasingly threatened by pollution.<sup>110</sup> GAC Chemical Corporation, located in Searsport, Maine, has contributed to an increase in industrial debris and wastes on the property's shoreline and is directly polluting Stockton Harbor in upper Penobscot Bay.<sup>111</sup> The hope is that L.D. 1234 will provide funding to study the effects of coastal pollution and work to restore local clam flats.<sup>112</sup>

The \$25,000 provided by the State provides a small part of a much greater need to control an increase in pollution, the threat it creates, and the need to improve ways of tracking cumulative impacts on the coastal environment.<sup>113</sup> Individuals and corporations who want to protect the coastal environment can make gifts, bequests, and donations to the trust.<sup>114</sup> In addition, funds may be stipulated to the trust as a result of settlement of legal actions for violations of environmental laws, rules, or regulations.<sup>115</sup>

*An Act to Preserve Maine's Working Waterfront—L.D. 1972 An Act  
Regarding Working Waterfront Covenants—L.D. 1930*

The Maine Legislature passed L.D. 1972 to protect the state's commercial fishing interests in April 2006,<sup>116</sup> with Governor John Baldacci signing it into new law at a press event in June. L.D. 1972 was made possible only after a November 2005 referendum amended Maine's Constitution,<sup>117</sup> allowing the Legislature to create a preferential tax category for working waterfronts. L.D. 1972 implements the constitutional amendment by providing a tax break for waterfront property that is currently used to support commercial fishing activities.<sup>118</sup>

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110. L.D. 1234 (122d Legis. 2006).

111. See Environmental Release Report: GAC Chemical Corp. (2002), available at [http://dev.scorecard.org/env-releases/facility.tcl?tri\\_id=04974DLTCHKIDDE](http://dev.scorecard.org/env-releases/facility.tcl?tri_id=04974DLTCHKIDDE).

112. See Joint Standing Committee on Appropriations and Financial Affairs, 122d Leg. (2006), available at <http://www.state.me.us/legis/ofpr/afa041205.htm>.

113. See MAINE STATE PLANNING OFFICE, *supra* note 109, at 2.

114. L.D. 1234 (122d Legis. 2006).

115. *Id.*

116. L.D. 1972 (122d Legis. 2006).

117. Jon Keller, *Working Waterfront to be Protected*, FISHERMEN'S VOICE MONTHLY NEWSPAPER, Mar. 2006, at 1, available at <http://www.fishermensvoice.com/archives/0306wwftobeprotected.html>.

118. *Id.*

L.D. 1972 was initiated by the Maine Working Waterfront Coalition; the Act provides for current use valuation of working waterfront land.<sup>119</sup> Owners who use at least fifty percent of their land to provide access or support to working waterfronts qualify for the tax reduction. The tax reduction can significantly reduce property taxes.<sup>120</sup> Specifically, assessed values can be reduced up to fifty percent if the property is permanently protected through deed restrictions.<sup>121</sup>

Increasing property values in Maine have forced those who have worked the water for generations to sell their land because they are unable to afford property taxes.<sup>122</sup> Recognizing this dilemma, the Legislature declared that it is in the public interest to encourage the preservation of working waterfront land and to prevent the conversion of this valued resource.<sup>123</sup> L.D. 1972 is meant to ensure that high taxes do not force commercial fishermen to sell their property.<sup>124</sup>

L.D. 1930, passed in April 2006, also works to preserve Maine's working waterfronts.<sup>125</sup> The law, effective as of August 23, 2006, allows owners of working waterfront real estate, defined as "land, legally filled lands, piers, wharves and other improvements to lands all adjacent to the navigable coastal waters of the State,"<sup>126</sup> to sell some of their development rights to a third party as a covenant, ensuring that the property remain as working waterfront.<sup>127</sup> Moreover, the covenants could also give owners the advantage of the tax reduction created by L.D. 1972, discussed above.

The hope is that working waterfront covenants will help to control the use and sales price of working waterfront real estate.<sup>128</sup> This measure should help to create and preserve the permanent availability and affordability of coastal real estate for commercial fishing activities.<sup>129</sup>

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119. L.D. 1972 (122d Legis. 2006). The State has implemented a similar strategy to protect open spaces, forests, and farmland. Keller, *supra* note 117, at 1.

120. L.D. 1972 (122d Legis. 2006).

121. *Id.* § 1145.

122. Keller, *supra* note 117, at 1.

123. L.D. 1972 (122d Legis. 2006).

124. *Id.*

125. L.D. 1930 (122d Legis. 2006).

126. *Id.*

127. *Id.*

128. Keller, *supra* note 117, at 2.

129. Other Maine policies have also supported the objective of working waterfront preservation and protection. In 1986, the Maine Legislature enacted nine coastal policies, the third of which prioritized the need to "support shoreline management that gives preference to water-dependent uses over other uses" and preserves coastal access. Working Waterfronts Initiative: State Programs that Support Working Waterfronts, [http://www.state.me.us/spo/mcp/wwi/state\\_programs.php](http://www.state.me.us/spo/mcp/wwi/state_programs.php) (last visited Nov. 8, 2006). This

Working waterfronts are a meaningful part of Maine's heritage, tradition, and ethos. Innovative approaches to preserving Maine's endangered working waterfronts, like L.D. 1972 and L.D. 1930, have become increasingly important as the threat to working waterfronts has increased. Only time will tell whether these new initiatives are successful in solving this critical issue.

*Canada Adds Ten Aquatic Species to the Species at Risk Act*

Canada's Species at Risk Act<sup>130</sup> (SARA) was implemented in 2003 to protect terrestrial and aquatic species from becoming extinct.<sup>131</sup> SARA aims to provide recovery plans for those species that are at risk due to anthropogenic activity by prohibiting the killing, harming, harassing, or taking of listed species, and by prohibiting the destruction of the critical habitat of those species at risk.<sup>132</sup> The Committee on the Status of Endangered Wildlife Canada, a non-governmental body of independent experts, processes scientific data and makes recommendations as to what species are in need of protection.<sup>133</sup>

On August 24, 2006, the Minister of Fisheries and Oceans announced the addition of ten aquatic species to the list of protected species under SARA.<sup>134</sup> Species included the north pacific right whale, four white sturgeon populations, two fin whale populations, sculpin, green sturgeon, and the grass pickerel.<sup>135</sup>

Adding these species to SARA will have an impact on commercial fishermen and aquaculturists. For commercial fishermen, the new legislation could lead to gear restrictions and area closures.<sup>136</sup> For

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has remained an important objective for the State. The Maine State Planning Office cited continued loss of traditional coastal access as a high priority concern for the State in its 2006 Maine Coastal Plan. MAINE STATE PLANNING OFFICE, *supra* note 109, at 2.

130. Species at Risk Act, 2002 S.C., ch. 29 (Can.).

131. *Id.* § 6.

132. *Id.* § 32(1).

133. *Id.* § 31; *see also* Canadian Dept. of Fisheries and Oceans, About the Species at Risk Act, [http://www.dfo-mpo.gc.ca/species-especies/aboutAct/aboutAct\\_faqs\\_e.asp](http://www.dfo-mpo.gc.ca/species-especies/aboutAct/aboutAct_faqs_e.asp) (last visited Nov. 9, 2006).

134. Press Release, Office of the Minister of the Environment, Canada, The Green Line, Forty-two Species Added for Protection Under the Species at Risk Act (Aug. 24, 2006), *available at* [http://www.ec.gc.ca/press/2006/060824\\_n\\_e.htm](http://www.ec.gc.ca/press/2006/060824_n_e.htm).

135. Canadian Dept. of Fisheries and Oceans, Species Profiles, [http://www.dfo-mpo.gc.ca/species-especies/species/species\\_searchSpecies\\_e.asp](http://www.dfo-mpo.gc.ca/species-especies/species/species_searchSpecies_e.asp) (last visited Nov. 9, 2006).

136. Canadian Dept. of Fisheries and Oceans, What the Act Means to You: the Fishing Industry, [http://www.dfo-mpo.gc.ca/species-especies/actMeans/actMeans\\_commercialFishing\\_e.asp](http://www.dfo-mpo.gc.ca/species-especies/actMeans/actMeans_commercialFishing_e.asp) (last visited Nov. 9, 2006).

aquaculturists, the legislation will lead to designation of areas that are to become “off-limits” to future aquaculture facilities, based on the fear that the facilities will affect critical habitat of the listed species.<sup>137</sup>

Although the new legislation might cause an outcry from Canada’s commercial fishermen and aquaculturists, new gear restrictions and area closures might also lead to the sustainability of Canada’s fisheries as a whole. If landings and effort are restricted in current months, the long-term benefits may include increasing the sustainable yield. As for the aquaculture industry, the site-permitting process may become more complicated as more restrictions are placed on potential areas for start-up facilities.

#### *Australia Designates Thirteen New Marine Protected Areas*

Beginning in December 2005, the Australian government has been hard at work in designating a new network of marine protected areas (MPAs). Before designating the final boundary marks of the 226,000 square kilometers of protected zones, there were more than twenty boundary adjustments, the goal of which was to reduce the impact on Australia’s commercial fishing and petroleum industries.<sup>138</sup> The MPA network now includes areas off of Victoria, Tasmania, New South Wales, and eastern Southern Australia, and protects diverse sea-floor features in the continental shelf, continental slope, and the deep ocean (abyssal) plains.<sup>139</sup>

Thirteen MPAs will each be declared a Commonwealth reserve under the Environment Protection and Biodiversity Conservation Act of 1999.<sup>140</sup> Each MPA is designated as a Commonwealth reserve because it extends 5.7 kilometers offshore, to the limit of Australia’s exclusive economic zone.<sup>141</sup>

Australia’s designation of new MPAs is significant in that Australia reigns as the world leader in marine-environment conservation, with one-

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137. Canadian Dept. of Fisheries and Oceans, What the Act Means to You: the Aquaculture Industry, [http://www.dfo-mpo.gc.ca/species-especes/actMeans/actMeans\\_aquaculture\\_e.asp](http://www.dfo-mpo.gc.ca/species-especes/actMeans/actMeans_aquaculture_e.asp) (last visited Nov. 9, 2006).

138. Environment Protection and Biodiversity Conservation Act, 1999, § 351(3) (Austl.); Press Release, Australian Minister for the Environment and Heritage, Australia leads world with new Marine Protected Areas (May 5, 2006), available at <http://www.deh.gov.au/minister/env/2006/mr05may06.html>.

139. *Id.*

140. Environment Protection and Biodiversity Conservation Act, 1999, § 344(1)(b) (Austl.).

141. Fact Sheet, Australian Department of the Environment and Heritage, The South-east MPA Network Proposal Overview (Oct. 2006), available at <http://www.deh.gov.au/coasts/mpa/southeast/publications/pubs/se-cmr-overview.pdf>.

third of the world's MPAs located in Australian waters.<sup>142</sup> The MPAs will lead to area closures restricting commercial fishing, which will enable certain areas to rejuvenate from the adverse affects of bottom trawling.

### III. FEDERAL REGULATIONS

#### *Sea Turtle Conservation*<sup>143</sup>

There are seven species of marine sea turtles, six of which live in United States' waters.<sup>144</sup> Under the Endangered Species Act of 1973,<sup>145</sup> the Hawksbill turtle, the Kemp's ridley turtle, and the leatherback turtle are listed as endangered; the green turtle and the Olive ridley are listed as endangered/threatened; and the loggerhead turtle is listed as threatened.<sup>146</sup>

The National Marine Fisheries Service (NMFS) identifies the following threats to sea turtle populations: destruction and alteration of nesting and foraging habitats, incidental capture in commercial and recreational fisheries, entanglement in marine debris, and vessel strikes.<sup>147</sup> NMFS states that "[i]ncidental take in fishing operations, or bycatch, is one of the most serious threats to the recovery and conservation of marine turtle populations."<sup>148</sup>

The most recent effort by NMFS to reduce the numbers of sea turtles incidentally taken in commercial fishery efforts occurred on May 27, 2005, when the Federal Register published a proposed rule requiring a modification of sea scallop dredge gear for federally-permitted vessels fishing in the mid-Atlantic. Because it was a proposed rule, NMFS sought public comment on the action until June 27, 2005.<sup>149</sup> NMFS received nine comment letters from eight different individuals or organizations, five of which were in support of the action.<sup>150</sup> Additionally, NMFS held two public

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142. Australia leads world with new Marine Protected Areas, *supra* note 138.

143. Sea Turtle Conservation, 71 Fed. Reg. 50,361 (Sept. 25, 2006).

144. NMFS, Fisheries Interaction/Protected Species Bycatch, <http://www.nmfs.noaa.gov/pr/interactions/#turtle> (last visited Nov. 8, 2006).

145. 16 U.S.C. § 1531 (1994).

146. NMFS, *supra* note 144.

147. *Id.*

148. *Id.*

149. Sea Turtle Conservation, 71 Fed. Reg. at 50,361. Other recent efforts include offshore pound net leader modifications and turtle excluder devices. 50 C.F.R. 222.102 (2005); 50 C.F.R. 223.207 (2005).

150. Sea Turtle Conservation, 71 Fed. Reg. at 50,362.

hearings on the matter at which two individuals presented oral comments.<sup>151</sup> The proposed regulation became effective on September 25, 2006.<sup>152</sup>

The regulation requires that all vessels fishing under a permit and having a sea scallop dredge modify their dredges with a chain mat configuration when fishing south of 41° 9.0' North latitude from the shoreline to the outer boundary of the Exclusive Economic Zone.<sup>153</sup> The purpose of the chain mat is to make it nearly impossible for turtles to enter the dredge bag, thereby preventing incidental catch of sea turtles.

Interestingly, one of the comments received during the public comment period expressed concern over the effectiveness of the chain mats. The comment stated that although sea turtles will be brought to the surface in the dredge less often, this may not necessarily reduce the overall mortality of sea turtles due to contact with the dredge below water.<sup>154</sup> In other words, this regulation will only serve to reduce the visibility of incidental sea turtle taking, whereas the view from the ocean floor could be substantially the same. NMFS responded to this concern, recognizing the uncertainty of the extent of sea turtle interaction with the dredge bag and equipment.<sup>155</sup> Nonetheless, NMFS held that it was reasonable to conclude that the chain mats will reduce mortality and the extent of injury because sea turtles that would otherwise be included in the dredge will be excluded by the chain mat.<sup>156</sup>

#### *Northeast Multi-species Fishery*<sup>157</sup>

The Fishery Management Plan for the Gulf of Maine and Georges Bank precludes vessels from operating in these areas unless the vessel fishes under a New England multi-species or a scallop days at sea allocation, employs certain exempted gear, fishes under the Small Vessel Handgear or Party/Charter permit restrictions, or operates in an exempted fishery.<sup>158</sup> Citing economic hardship, the General Category scallop fleet requested that National Marine Fishery Service (NMFS) establish an additional exempted scallop dredge fishery in the Gulf of Maine and Georges Bank Exemption

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151. *Id.*

152. *Id.* at 50,361.

153. *Id.*

154. *Id.* at 50,366.

155. *Id.*

156. Sea Turtle Conservation, 71 Fed. Reg. at 50,367.

157. Great South Channel Scallop Dredge Exemption Area, 71 Fed. Reg. 51,779 (Aug. 31, 2006).

158. *Id.* at 51,780.

Area.<sup>159</sup> The area for which the fleet sought exemption was one in the traditional scalloping grounds in the Great South Channel, located off Cape Cod, Massachusetts.<sup>160</sup>

After the proposed rule was published on July 6, 2006, the public comment period commenced.<sup>161</sup> NMFS received twenty-five comment letters on the proposed rule; eighteen of which were from General Category scallop vessel owner/operators, three of which were from industry representatives, one from an individual, one from a state-level fisheries management agency, one from the Council, and one from an environmental advocacy group.<sup>162</sup> Ultimately, NMFS modified the proposed rule in order to include a slightly larger area around the Great South Channel.<sup>163</sup>

An analysis of available data reflected that an exemption in the Great South Channel would be permissible because the bycatch of regulated species by scallop dredge vessels would fall below regulatory requirements (five percent, by weight, of total catch in the Great South Channel).<sup>164</sup> The final rule then “implements an exempted fishery for vessels fishing with General Category scallop permits, or limited access scallop permits not fishing under DAS allocation, to use small dredges with a combined width not greater than 10.5ft (3.2 m) in portions of the Great South Channel.”<sup>165</sup> Vessels fishing in this exemption, however, are still subject to seasonal closures and scallops per trip limits.<sup>166</sup> NMFS expects positive economic impacts for small commercial fishing entities and minimal ecological impacts on the fishery as a result of this action.<sup>167</sup>

*Northeast Multi-species Fishery Framework Adjustment 43*<sup>168</sup>

The Northeast groundfish fishery includes the Atlantic cod, haddock, yellowtail flounder, pollock, whiting, scup, summer flounder, redfish, butterfish and other species. Prior to 2004, the Fishery Management Plan prohibited possession or landing of any groundfish species by vessels

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159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Great South Channel Scallop, 71 Fed. Reg. at 51,779.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 51,783.

168. 71 Fed. Reg. 46,871 (Aug. 15, 2006) (to be codified at 50 C.F.R. pt. 648).

fishing for Atlantic herring.<sup>169</sup> This prohibition, however, led to many fishermen halting their fishing operations in Georges Bank, because haddock bycatch was prohibited, yet inevitable in their efforts for herring.<sup>170</sup> The National Marine Fishery Service (NMFS), therefore, executed an emergency rule<sup>171</sup> that established an incidental catch allowance for haddock. This emergency rule was then extended an additional six months,<sup>172</sup> resulting in the eventual enactment of Framework Adjustment 43<sup>173</sup> as a solution to the incidental catch problem.

The regulation applies to all Category 1 vessels on all trips that do not use Northeast multi-species days-at-sea (DAS) allocation. The major provisions are as follows: Category 1 vessels may possess and land haddock of unlimited amounts until the haddock bycatch cap is reached. This action establishes this cap and also creates the Gulf of Maine/Georges Bank Exemption Area.<sup>174</sup> After the cap is reached, the regulated vessels are prohibited from fishing for, possessing, or landing herring in excess of 2,000 lb. of herring per trip in or from the Gulf of Maine/Georges Bank Exemption Area.<sup>175</sup> The regulation further authorizes possession of up to 100 pounds of other regulated groundfish provided that the trips do not use Northeast multi-species DAS allocation.<sup>176</sup>

Category 1 vessels are exempt from the minimum size requirements for the allowed bycatch of haddock and the other regulated multi-species.<sup>177</sup> However, these bycatch species may not be sold for human consumption.<sup>178</sup>

Monitoring/enforcement measures require that: (1) all processors and dealers retain and report all culled haddock to make available for inspection for twelve hours; (2) haddock brought on deck may not be discarded or

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169. Framework Adjustment 43, 71 Fed. Reg. at 46,874.

170. *Id.*

171. Haddock Incidental Catch Allowance for the 2005 Atlantic Herring Fishery, 15 C.F.R. § 902 (2005); 50 C.F.R. § 648 (2005).

172. Haddock Incidental Catch Allowance for the 2005 Atlantic Herring Fishery, 50 C.F.R. § 648 (2005).

173. Framework Adjustment 43, 71 Fed. Reg. at 46,871.

174. The cap equals 0.2% of the combined target total allowable catch, which is calculated for each groundfish fishing year. For 2006, the cap is 161,377 pounds. *Herring boats granted haddock bycatch allowance*, COMMERCIAL FISHERIES NEWS, Sept. 2006, 34:1, available at [http://www.fish-news.com/cfn/editorial/editorial\\_9\\_06/Herring%20boats%20granted%20haddock%20bycatch%20allowance.html](http://www.fish-news.com/cfn/editorial/editorial_9_06/Herring%20boats%20granted%20haddock%20bycatch%20allowance.html).

175. Framework Adjustment 43, 71 Fed. Reg. at 46,872.

176. *Id.*

177. *Id.*

178. *Id.*

pumped into the hold; and (3) vessels must notify NMFS six hours prior to landing.<sup>179</sup>

This regulation is consistent with National Standard 1 and 8<sup>180</sup> set forth in the Magnuson-Stevens Act<sup>181</sup> in that it attempts to prevent overfishing while also considering the adverse economic impacts that the original fishery management plan had on the herring fishing industry. This is most apparent in the regulation's prohibition on bycatch for sale for human consumption. Because the sale for human consumption is prohibited, there is no incentive for the fishermen to exploit the bycatch species in the fishery. Therefore, the regulation prevents overfishing of some species while permitting access to the herring in order to support the livelihood of the commercial herring fishermen.

#### 2006 RECOMMENDED WEBSITES FOR OUTER CONTINENTAL SHELF OIL AND GAS LEASING

##### I. INTRODUCTION

The development of the outer continental shelf (OCS) is an issue of concern for an array of competing state and federal interests, from environmentally charged organizations to economically conscious corporate entities. The Outer Continental Shelf Lands Act (OCSLA) of 1953, as amended,<sup>182</sup> regulates<sup>183</sup> and defines the OCS<sup>184</sup> and provides leasing procedures of such lands.<sup>185</sup> Since 1982, a presidential withdrawal or moratorium has been in place to prohibit the lease of certain OCS lands.<sup>186</sup>

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179. *Id.*

180. National Standard 1: "Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." National Standard 8: "Conservation and management measures shall, consistent with the conservation requirements of [the Magnuson-Stevens] Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." Magnuson-Stevens Act, 16 U.S.C. § 1851(1), (8) (2000).

181. *Id.* §§ 1851-1863.

182. 43 U.S.C. §§ 1331-1356 (2000).

183. *Id.* § 1333.

184. *Id.* § 1331.

185. *Id.* §§ 1334-1337.

186. Marc Humphries, *Outer Continental Shelf: Debate Over Oil and Gas Leasing and Revenue Sharing*, CRS REPORTS IB10149, 1, (Apr. 7, 2006), available at <http://www.cnie.org/NLE/CRSreports/06Mar/IB10149.pdf>.

The prohibition is to extend until 2012.<sup>187</sup> The Department of the Interior has authority over the OCS, as granted by the OCSLA, to plan for the allocation of OCS resources by auctioning leases to those interested in drilling oil and gas resources.<sup>188</sup> The DOI communicates its plan through five-year proposals that Congress is to consider.<sup>189</sup> Currently, the agency that handles the planning of the future of the OCS is proposing a bill that, in order to take effect, would require that Congress vote to lift the moratorium, thus allowing states and other entities to lease acreage on the OCS to drill for gas and oil.<sup>190</sup> The following websites provide information about this issue, and helpful menus of links to the numerous related topics, such as environmental concerns, issues of state and federal control, energy use, and economic importance.

## II. OUTER CONTINENTAL SHELF OIL AND GAS LEASING

- NOAA Coastal Services Center, Ocean Planning Information System // URL <http://www.csc.noaa.gov/opis/html/legislativeatlas/> (last visited Jan. 3, 2007).

The National Oceanic and Atmospheric Administration is a federal agency housed within the U.S. Department of Commerce devoted to advancing technology and science, and to providing products and services, for the good of the coastal resource management community. Due to the encompassing nature of such a task, NOAA is divided into five offices (e.g. the National Weather Service), with the Coastal Services Center falling under one of those offices, the National Ocean Service. Although the above website links directly to a list of links describing legislation around outer continental shelf resources (e.g. The Outer Continental Shelf Lands Act), the overview of the site provides an extremely comprehensive directory of data, helpful links to state and federal authority, emerging issues, and interactive mapping.

- U.S. Department of the Interior, Minerals Management Service, Offshore Minerals Management // URL <http://www.mms.gov/offshore/> (last visited Nov. 7, 2006).

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187. *Id.*

188. 43 U.S.C. § 1337(a).

189. *Id.* § 1344(a).

190. U.S. Department of the Interior, Minerals Management Service, Proposed OCS Oil and Gas Leasing Program 2007-2012, <http://www.mms.gov/5-year/2007-2012main.htm> (last visited Jan. 3, 2007).

The OCS Lands Act requires the Department of the Interior (DOI) to manage the mineral resources on the outer continental shelf of the United States. The Mineral Management Service (MMS) is the bureau of the DOI that handles this task. This website describes the goals and priorities of the MMS, as well as the expectations conferred upon it by the U.S. Government statutorily and otherwise. There are links to related sites, databases of pertinent statistical information, and collections of primary and secondary legal authority. The list of other useful services this website provides includes a strategic plan, the latest press releases, a useful “library,” and even a “kid’s page.”

- U.S. Geological Survey, Energy Resources Program, Oil and Gas Resources // URL <http://energy.usgs.gov/oilgas.html> (last visited Nov. 7, 2006).

This website recognizes the importance of energy derived from oil and gas through its extensive concentration and effort invested in scientific studies aimed at understanding, evaluating, and predicting the quality, quantity, and geologic distribution of national and world oil and gas resources. The exhaustive list of topics and links on this site range from definitional and general to specific regional studies. The well-funded assessments of the current and potential availability of oil and gas are extremely comprehensive and interesting. The information is primarily scientifically based, but the site suggests many environmental and health issues which present live and potential legal and policy issues. Most of the information is downloadable in PDF format.

- U.S. Senate Committee on Energy & Natural Resources, Homepage // URL <http://energy.senate.gov/public/> (last visited Nov. 7, 2006).

The senate committee votes on initiatives that affect policies that involve OCS oil and gas leases. This site has information regarding news surrounding the committee, schedules for committee meetings and hearings, issues to be discussed by the committee, and the effects of bills. This site makes it easy to follow the status of recent developments pertaining to national energy and natural resources.

- Preparation of proposed MMS program: <http://www.mms.gov/5-year/PDFs/5yrPP0806.pdf> (last visited Nov. 7, 2006).
- Press release: <http://www.mrm.mms.gov/Intro/PDFDocs/20060824.pdf> (last visited Nov. 7, 2006).

These pdf files exist among the MMS's links. Together, the preparation of the MMS proposed five-year plan and the August 24, 2006 press release provide a basic background and general understanding of current developments in legislative action involving OCS oil and gas leasing.

- National Council for Science and the Environment, CRS Reports, RL33493 - Outer Continental Shelf: Debate Over Oil and Gas Leasing and Revenue Sharing // URL <http://ncseonline.org/nle/crs/abstract.cfm?NLEid=1678> (last visited Nov. 7, 2006).

For a full briefing of the current developments, read the twenty-one page CRS Report dissecting the debate. This is the link to the abstract, which has a downloadable pdf link to the entire report.

## 2006 RECOMMENDED WEBSITES FOR CLIMATE CHANGE

### I. INTRODUCTION

Most scientists have come to the agreement that the earth's climate is getting warmer as a result of human activity.<sup>191</sup> The consequences of this global warming phenomenon will have devastating effects on the world's coastal areas, as the melting polar ice caps cause sea levels to rise.<sup>192</sup> Moreover, the addition of freshwater into the ocean as a result of the melting polar caps will affect salinity levels and ocean circulation patterns, in turn altering global weather patterns and marine habitats.<sup>193</sup> The websites listed below address these climate change issues and provide information on current research and legislation occurring in the U.S. and around the world to help prevent the disastrous effects of climate change.

### II. INTERNATIONAL PROGRAMS

- United Nations Framework Convention on Climate Change (UNFCCC) // URL: <http://unfccc.int/2860.php> (last visited Nov. 7, 2006).

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191. Pew Center on Global Climate Change, *Global Warming Basics*, <http://www.pewclimate.org/global-warming-basics> (last visited Oct. 15, 2006).

192. *Id.*

193. Pew Center on Global Climate Change, *Global Warming & the Arctic - FAQs*, [http://www.pewclimate.org/arctic\\_qa.cfm#8](http://www.pewclimate.org/arctic_qa.cfm#8) (last visited Oct. 15, 2006).

This site discusses the background and construction of the UNFCCC and the functioning of the Kyoto Protocol. Featured links include: access to official documentation since 1991; information about financial support, education and outreach, and cooperation with other international agencies; access to the national reports of the countries who are party to the convention; methods and science for mitigation of climate change impacts; and information on Kyoto Protocol mechanisms.

- Department for Environment, Food & Rural Affairs (DEFRA), Environmental Protection, Climate Change // URL: <http://www.defra.gov.uk/environment/climatechange/index.htm> (last visited Nov. 7, 2006).

This site provides information about governmental action being taken in the United Kingdom (UK) to address climate change. The links include access to the latest governmental initiatives, both in the UK and internationally, information about UK and European Union emissions trading, and access to UK publications about climate change concerns and policy effectiveness.

### III. FEDERAL GOVERNMENT AGENCIES

- Environmental Protection Agency (EPA), Office of Air and Radiation // URL: <http://epa.gov/oar> (last visited Jan. 3, 2007).

This is the main EPA website for global warming. The site contains information on a number of general global warming topics, including greenhouse gas emissions, current news and events, and the United States' climate change policy. There are also a number of links specific to the impact of climate change on sea levels and coastal areas. The "Health and Environmental Effects" section provides a link to information about effects on coastal zones' sea level, water resources, and polar regions. The "Where You Live" section contains links to climate change programs by region and state. This section also includes links to a number of state and regional climate change action plan websites.

- National Oceanic & Atmospheric Administration (NOAA), Climate Program Office // URL: <http://www.climate.noaa.gov> (last visited Nov. 7, 2006).

This site is a collection of NOAA research on climate change trends and concerns. The purpose of this site is to provide access to climate change

data to decision makers, researchers, and the general public in the hopes of enhancing management strategies. In addition to providing information on specific NOAA climate change projects, the site contains various links to information on current events, education, and research. For example, the “Opportunities” link provides information about the availability of funding for research and education programs. Also the “Library” link contains information on recent federal legislation and congressional press releases dealing with climate change.

- National Aeronautics and Space Administration (NASA), Goddard Space Flight Center // URL: [http://www.nasa.gov/centers/goddard/earthandsun/climate\\_change.html](http://www.nasa.gov/centers/goddard/earthandsun/climate_change.html) (last visited Nov. 7, 2006).

Visit this site for an interesting visual demonstration of effects of climate change and greenhouse gas emissions on global ice cover water levels.

#### IV. NON-GOVERNMENTAL ORGANIZATIONS

- Woods Hole Oceanographic Institution, Ocean and Climate Change Institute // URL: <http://www.whoi.edu/institutes/occi/index.htm> (last visited Nov. 7, 2006).

This institute is dedicated to developing the science and technology of ocean monitoring to help better understand the effects of climate change. The Institute’s “Publications” section provides a link to its annual report on recent developments in climate change information and technology. The “Research and Education” section provides information about the Institute’s current research themes and projects. “Related Topics” provides links to current events related to ocean and climate change. The site also contains an “Activities” section that informs interested citizens, students, and scientists of upcoming seminars and events.

- Pew Center on Global Climate Change // URL: <http://www.pewclimate.org/> (last visited Nov. 7, 2006).

The Pew Center is dedicated to providing a forum for research and analysis of climate change topics. The site serves as a very comprehensive collection of information about climate change and what is being done, locally and internationally, to address the issue. The “Policy Center” link provides access to the Pew Center’s policy reports and information about what is being done in Congress to promote climate change legislation. The

“What’s Being Done” link expands this inquiry to initiatives at the state, regional, and international level.

- International Arctic Research Center // URL: <http://www.iarc.uaf.edu/> (last visited Nov. 7, 2006).

This site serves as the center for information on Arctic climate change research. The “Research” link provides a variety of research themes and topics dealing with melting Arctic ice caps, rising sea levels, and the impact these phenomena have on the rest of the world. Other features of this site are links for outreach and education opportunities, current news about the Arctic, and upcoming events and workshops dealing with Arctic climate change issues.