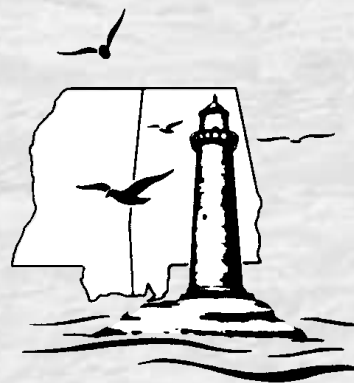


WATER LOG

A Legal Reporter of the Mississippi-Alabama
Sea Grant Consortium



Clinton Creates Coral Reef Reserve

Tammy L. Shaw, J.D.

On December 4, President Clinton issued an executive order establishing the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve (Reserve).¹ The 84 million-acre reserve is the largest protected area ever created in the United States and encompasses about 70 percent of the coral reefs within U.S. waters.

Coordinated Management Scheme

Acting on a commitment of ocean stewardship, President Clinton created the U.S. Coral Task Force in 1998 to lead efforts to map and monitor U.S. coral reefs, to research the cause of coral reef degradation and to implement international strategies for conservation of

these ecosystems. Furthering those efforts, President Clinton instructed the Secretary of the Interior and the Secretary of Commerce to work with the State of Hawaii and the Western Pacific Fishery Management Council in developing recommendations for a coordinated management scheme that would provide strong protection for the Northwestern Hawaiian Coral Reef ecosystem. The Departments of Commerce and Interior held public meetings throughout Hawaii, bringing in state officials, state congressional delegations, fisheries managers and native Hawaiian groups to discuss alternatives for conserving these coral reef ecosystems. The establishment of the Northwestern Hawaiian Coral Reef Ecosystem Reserve is based on those recommendations and comes on the heels of an announcement made just

See Reserve, page 5

Court Finds Essential Fish Habitat Evaluation Inadequate

Kristen Fletcher, J.D., LL.M.

In a key decision for the evolution of Essential Fish Habitat, Judge Gladys Kessler of the U.S. District Court for the District of Columbia found that the five fishery management plans that were challenged for failing to protect fish habitat are adequate. The environmental analysis of those plans, however, was insufficient to meet federal standards and the National Marine Fisheries Service must repeat the analysis and consider additional alternatives.

The Challenge to EFH

Essential Fish Habitat (EFH), defined as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity,"¹ was added to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) in 1996 and mandated improved habitat protection for federally managed fish species. The nation's Regional Fishery Management Councils were directed to identify

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Environmental Penalties Reach An All Time High

Tammy L. Shaw, J.D.

This fall, the federal court system and the State of Mississippi sent a message to industry that polluting does not pay. In different regions of Mississippi environmental violations resulted in some of the largest penalties ever imposed in the state and the nation as a whole. Jackson County industry, Morton International, Inc., will pay \$38 million in civil and criminal penalties for falsifying records and illegally dumping hazardous waste.¹ Central Industries, a Forrest, Mississippi poultry waste processor will pay \$14 million in fines and restitution for dumping slaughterhouse waste into a Mississippi Creek.²

Morton International, Inc.

In October, the United States and the State of Mississippi entered into an agreement with Morton International, Inc. resulting in a civil settlement of thousands of violations of state and federal environmental laws. Under the settlement Morton will pay a \$20 million cash penalty and perform \$16 million worth of environmental enhancement projects. This is the largest-ever civil fine for environmental violations at one facility. In a separate action, Morton pleaded guilty to criminal violations under the Clean Water Act (CWA) and the Resource

Conservation and Recovery Act (RCRA) and agreed to pay \$2 million in criminal penalties.

Falsified Reports and Violations

The enforcement action came about after a routine 1996 audit at the plant revealed falsified documents and reports at Morton's Moss Point facility. The 70-acre plant, located near the Escatawpa River in Jackson County, makes plastic polymers and polysulfide rubber materials, including sealants and adhesives. The company was charged with keeping two sets of records and falsifying discharge monitoring reports. A joint investigation conducted by the Environmental Protection Agency (EPA) and the Mississippi Department of Environmental Quality (MDEQ) revealed that the company had violated numerous clean air, clean water, hazardous waste and other laws. The investigators found that Morton had illegally handled and disposed of several kinds of hazardous waste at an on-site landfill and conducted unauthorized disposal of hazardous waste in deep injection wells.

Cooperative Effort

The Executive Director of the MDEQ, Charles Chisolm, noted that this is one of the "largest environmental enforcement actions in the United States to date."³ The action was a joint effort and an example of cooperation between agencies, including the FBI and U.S. Department of Justice, the EPA's Criminal Investigation Division, and the MDEQ.

In addition to the cash penalty, which will be divided equally between the United States and Mississippi, the company must pay \$10 million toward a plant waste minimization supplemental environmental project, \$4 million to the city of Moss Point to upgrade existing sewer systems and \$2 million to the University of Southern Mississippi's School of Polymer Science for pollution prevention research. Morton must also pay for an independent audit of its 23 other plants across the United States.

United States v. Central Industries, Inc.

The U.S. District Court for the Southern District of Mississippi ordered Central Industries to pay \$14 million in fines and restitution after the company pleaded guilty to conspiring to violate the Clean Water Act (CWA) and 25 specific CWA violations. Central operates a rendering plant in Forrest, Mississippi, in which millions of pounds of waste and by-products from poultry



WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal problems and issues.

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 518 Law Center, University, MS, 38677, phone: (662) 915-7775, or contact us via e-mail at: waterlog@olemiss.edu. We welcome suggestions for topics you would like to see covered in WATER LOG.

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Letter from the Editor

Dear *Water Log* Readers,

With Y2K officially behind us, the staff and I wish you a very happy new year! As we enter 2001 and, officially, the new millennium, those of us involved in coastal resources leave behind a presidential election we are not likely to soon forget! But, we also embrace the mandates and challenges assigned to us by the last Congress and administration. As you will see from the Federal Legislative Update on page 12, the coasts are taking center stage with lawmakers and, as the article on page 1 explains, the exiting President William Clinton has been busy creating protections for important coastal ecosystems. The year 2001 will be integral as these laws and protections are implemented and, as we reported in Issue 20-3, the two new ocean commissions will conduct studies to synthesize many different interests in order to conserve coastal resources.

This represents an exciting time for the field of coastal and ocean law. *Water Log* will continue to analyze and report on these and other events in the field but under new leadership. After three years as Editor of *Water Log*, I am handing the "editorial stove" to Research

Counsel Tammy Shaw. Be assured that I will continue to be associated with *Water Log* and contribute articles (you cannot rid yourself of me that easily!) but I look forward to focusing on other elements of the Sea Grant Legal Program and seeing the directions in which Tammy will take the *Water Log Legal Reporter*.

Serving as Editor of *Water Log* has been one of the most rewarding parts of my work at the Legal Program, as has receiving your comments, recommendations, and praise for the publication. This past year, many of you have communicated to me that *Water Log* is one of the few publications that you read as soon as you receive it. Recognizing the voluminous amount of information that reaches your desks each day in the form of journals and reporters, I consider this a high compliment. If you ever find that you are tempted to place *Water Log* in the "Later" folder, I encourage you to contact Tammy or myself so that we may find ways to improve, expand, and keep it useful and interesting.

Best wishes for a productive and healthy 2001.

Sincerely,

Kristen M Fletcher

Editor

➤ *In Memory of David Brower* ◀

In November, David Brower, a champion and founder of the modern environmental movement, died at the age of 88. Brower was a life-long wilderness enthusiast and conservationist. He twice served as executive director of the Sierra Club and is credited with helping to build that organization into a powerful and influential environmental lobby group. He also founded the Friends of the Earth organization and the Earth Island Institute. His efforts helped to preserve many of this nation's threatened natural treasures, including the creation of national parks and his strong and successful stance against the proposed building of hydroelectric dams in the Grand Canyon. His advocacy with the Sierra Club aided in the passage of the Wilderness Act, as well as many other regulatory measures and in 1999, he helped form a surprising coalition between members of the Sierra Club and Friends of the Earth with labor unions in the Alliance for Sustainable Jobs and the Environment.

Despite numerous disagreements with the leadership of the Sierra Club over what he described as the group's failure to take a strong enough stance on many environmental issues, he is hailed by that group as a "pioneer of modern environmentalism" and as a man "who shaped the face of modern environmentalism." Likewise, President Clinton paid tribute to Brower calling him "one of the earliest and most ardent defenders of the extraordinary natural heritage that enriches and unites all Americans."

Mr. Brower is survived by his wife of 57 years, the former Anne Hus; three sons, Robert and John, both of Berkeley, and Ken, of Oakland, Calif., and a daughter, Barbara Brower of Portland. ♡

David R. Brower 1912-2000

After Halt of Endangered Species Listings, Atlantic Salmon Listed

Kristen M. Fletcher, J.D., LL.M.

Fish & Wildlife Service Initiates Listing Moratorium

In the fall, the U.S. Fish and Wildlife Service (FWS) announced its decision to place a moratorium on all endangered species listings until September 2001. The moratorium will delay protection for more than 300 species that are proposed for listing or are already considered candidates for listing. At the front of the line for ESA protection are the Aleutian Otter, the Pacific fisher and the island fox.

Without ESA designation, species are not protected from habitat destruction, poaching and trafficking of their parts and products. The FWS charges that litigation over critical habitat designation launched by environmentalists has damaged its listing budget. The FWS faces court-ordered designations for almost 300 species after environmental groups sued for failing to timely designate critical habitat for about 90 percent of the 1,200 species listed under the Endangered Species Act. FWS spokesman Chris Tollefson noted that "Any funding we may have available will be allocated for emergency listings only. We will make sure we take care of any species in immediate danger." Conservation groups counter that the financial problem stems from low congressional funding.

FWS Then Joins Interior to List Wild Atlantic Salmon

On November 13, the FWS and Department of Interior

listed the wild populations of Atlantic salmon found in Maine streams and rivers as endangered. The eight waterways affected are the Dennys, East Machias, Machias, Pleasant, Narraguagus, Ducktrap, and Sheepscot Rivers and Cove Brook, a tributary of the Penobscot.

Jamie Rappaport Clark, director of the US Fish and Wildlife Service explained that "[l]ess than 10% of the fish needed for the long-term survival of wild Atlantic salmon are returning to Maine rivers." The ESA now requires the federal agencies to prepare recovery plans for the species. The listing becomes official even before the results of a National Academy of Science study which is expected to be completed in early 2001.

The decision to list has opposition in Maine's aquaculture and agriculture industries, as well as governmental leaders. Gov. Angus King and Senators Olympia Snowe and Susan Collins oppose the decision, claiming it is based on poor science and that, due to the artificial stocking of rivers and resultant interbreeding, a distinct "wild" genetic identity for salmon no longer exists. Based on these challenges, the Maine Attorney General has filed a lawsuit contesting the listing in the U.S. District Court in Portland.

Interior Secretary Bruce Babbitt has indicated that the federal government will review the listing decision once the results of the National Academy of Science study are released. ♡

National Sea Grant Director Receives Presidential Rank Award

Adapted from a NOAA Press Release

In November, Ronald Baird, the director of the National Sea Grant College Program, was awarded a Presidential Rank Award recognizing his accomplishments in positioning the United States as a world leader in marine research and the sustainable development of coastal resources. The Presidential Rank Award recognizes career senior executives who strive to provide service, create partnerships and seek community solutions to effectively and efficiently achieve success.

Baird, who was named Sea Grant director in 1996, has worked to more fully integrate Sea Grant research with

NOAA's science programs, strengthening ties between NOAA and the 30 Sea Grant programs. He has reached out to minority-serving institutions to enhance their marine research programs, streamlined organizational and administrative processes within the Sea Grant program and fostered new partnerships to address national problems such as marine invasive species and shellfish disease. Under Baird's leadership, the Sea Grant program successfully implemented all of the recommendations made in the 1994 National Research Council's review of the program. He continues to push Sea Grant forward, creating a national strategic plan for Sea Grant and urging each individual Sea Grant program to create a similar plan. ♡

Reserve, from page 1

weeks earlier at the International Coral Reef Symposium that without new protection, as much as 50 percent of the world's coral reef would disappear over the next 25 years.²

Rain Forests of the Sea

The Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve includes submerged lands and water, covering an area approximately 12,000 nautical miles by 100 nautical miles adjacent to and seaward of the seaward boundaries of the State of Hawaii. This area supports more than 7000 marine species, including the endangered Hawaiian monk seal and a variety of threatened and endangered sea turtles. The area also has considerable cultural, historic and geological significance and is made up of some of the healthiest and most extensive coral reefs in the United States. Described as the "rain forests of the sea," these marine ecosystems make up some of the world's most biologically diverse ecosystems.

The Executive Order

Executive Order 13,178 provides for the following activities.

- Establishes the Northwestern Hawaiian Coral Reef Ecosystem Reserve, the principal purpose of which is long-term conservation and protection of the coral reef and related marine resources.

- Prohibits oil, gas and mineral production, discharge or disposal of materials and removal of coral.

- Caps commercial and recreational fishing at current levels, allowing native Hawaiian subsistence and cultural uses to continue within the Reserve boundaries.

- Directs the Secretary of Commerce to establish a council that will ensure continued input from the scientific and environmental community, the fishing and tourism industries, local and state officials and native groups.

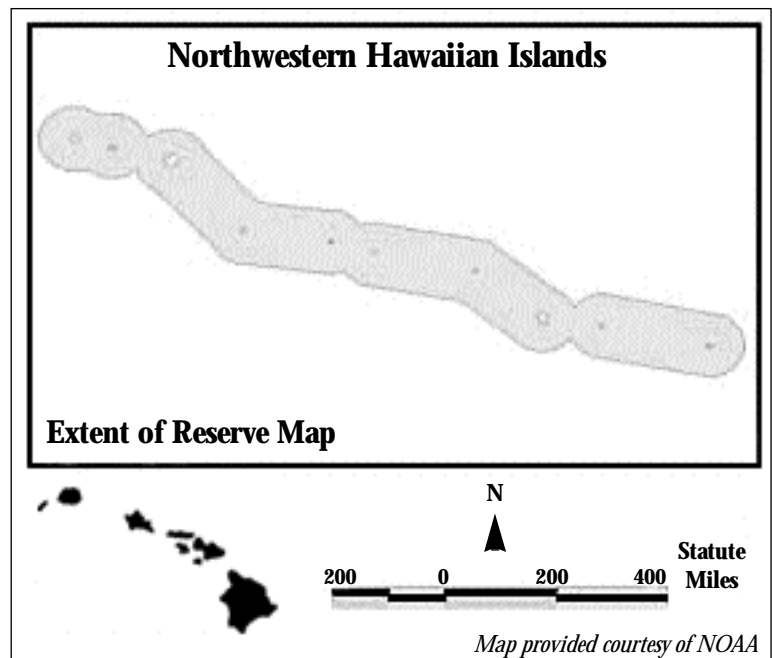
- Designates fifteen "preservation areas" within the Reserve where fishing, anchoring and collecting or touching coral is prohibited.

- Initiates the process to designate the Reserve as a national marine sanctuary under the National Marine Sanctuaries Act.

The Reserve will be managed by state and federal agencies and other entities, allowing not only conserva-

tion activities but also research programs to be conducted within the Reserve area.

The designation of the Coral Reef Reserve under an executive order is just one of the latest in a series of executive actions that the Clinton administration has used to set aside environmentally sensitive lands for preservation and protection. Relying on the Antiquities Act of 1906, President Clinton has created and expanded national monuments, designating thirteen new national monuments and restricting development in many western states. He also has issued other executive orders to stop timber harvesting and to declare areas of national parks and national forest "roadless areas," fur-



ther restricting development in environmentally sensitive areas. These highly controversial measures have set off a firestorm of debate regarding whether President Clinton overstepped his authority in dodging congressional opposition to many of his environmental protection measures. Many political opponents argue that the new administration, under President-elect George W. Bush, may act to overturn these new designations, taking away much of the environmental protection and preservation that President Clinton seeks to leave as his environmental legacy. ♡

ENDNOTES

1. Exec. Order No. 13178, 65 Fed. Reg. 76903 (2000).
2. See NOAA News Online at <http://hawaiiireef.noaa.gov/>.

Longlining Under Attack as Court, NMFS Initiate Closures

Kristen Fletcher, J.D., LL.M.

During the summer and fall of 2000, Judge David Ezra became a well-known figure to fishing communities across the nation, especially those watching the recent attacks on longline fisheries. Judge Ezra of the Federal District Court in Hawaii has closed millions of square miles of the Pacific Ocean to the Hawaii-based longline fishery to reduce impacts on threatened and endangered sea turtles. While the judge eventually served as a mediator between environmental groups, the National Marine Fisheries Service (NMFS), and fishing interests attempting to find a solution that would uphold federal law without closing the fishery, the controversy is indicative of legal challenges across the nation aimed at bycatch associated with longlining.

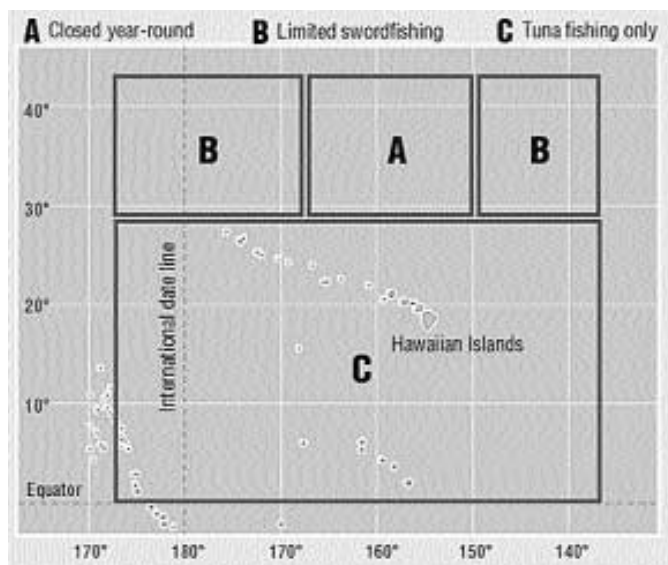
The NMFS defines a longline as fishing gear that is set horizontally, either anchored, floating, or attached to a vessel, that consists of a mainline with three or more leaders (gangions) and hooks, which can be retrieved by hand or mechanical means.¹ Though not completely selective, longline gear can be modified (e.g., gear configuration, hook depth, timing of sets) to target certain species of fish including yellowfin tuna, bigeye tuna, or swordfish. This fishing gear can incidentally hook marine mammals, sea birds and sea turtles during operations, including species protected as threatened or endangered under the federal Endangered Species Act (ESA). The bycatch may significantly impair rebuilding of overfished stocks or the recovery of protected species.

Hawaii Longline Fishery

The Sea Turtle Restoration Project and the Center for Marine Conservation filed suit in 1999 claiming that the NMFS was inadequately managing the longline fishery by failing to protect threatened and endangered sea turtles hooked on longlines. Judge Ezra concluded, in an order issued in October 1999, that the government had violated the National Environmental Policy Act by failing to prepare an Environmental Impact Statement (EIS) for the longline fishery, and that a "carefully tailored" injunction was appropriate while the EIS process was ongoing. A month later, Ezra ordered the closure of thousands of square miles of the Pacific Ocean to the Hawaii-based longline fishery. By June, 2000, he had expanded that order to include more than six million square miles and to require federal observers on board every longlining ship on each fishing trip in the Hawaii industry.

The June order required a closure until the NMFS completed a new biological opinion, a process that can take a year or more. Specifically, Judge Ezra ordered: a year round closure north of the Hawaiian islands of approximately 2 million square miles; a two-month closure north and south of the Hawaiian islands of approximately 4 million square miles; 100 percent observer coverage on all vessels to monitor catch (to be put in place within 30 days of the order, with the possibility of an additional 180 day extension); and, a limit on the number of total sets to 636 per year, a 95 percent reduction in effort. Ezra refused to modify the order but later decided to mediate a plan that would allow the industry to co-exist alongside the Pacific leatherback turtle.

Longlining Boundaries



Source: Federal District Court in Hawaii

The mediation resulted in modifications that "will achieve the required balance by providing the best possibility to save endangered sea turtles, specifically the leatherback turtle, while minimizing to the degree possible economic harm to the Hawaii Longline Fishery."² The map above shows the areas designated for limits under the order. The new order requires the following:

- Areas A,B,C-- The entire area (equator to 44° N latitude, 137°E to 137°W longitude) is closed to all longline fishing between March 15 and May 31.
- Area A-- Approximately 1 million square miles is closed all year round (44° N to 28° latitude, 168° E to 150° W longitude).
- Area B-- No longline fishing allowed except 231 swordfish sets between August 2000 and March 14.

2001. Each vessel fishing in this area must carry a NMFS approved observer (100% coverage).

- Area C— No swordfish fishing allowed, only tuna fishing. Any swordfish landed accidentally must be donated to charity. In addition, at least 20% of vessels fishing in this area had to carry NMFS approved observers within three months.

The order also called for the NMFS to accelerate completion of the EIS to April 1, 2001 and to file reports with the court each 45 days detailing its progress in preparing the EIS.

Atlantic, Gulf, and Caribbean Closures

The Hawaii longline fishery is one of many targeted for closures. In 2000, the Gulf Council, by a 9 to 5 vote, recommended to the National Marine Fisheries Service that it implement a closure of nearly the entire Gulf of Mexico to pelagic longline fishing during March through September. This recommendation sought to reduce bycatch and the bycatch mortality of small swordfish, billfish, and other non-targeted species. The option encompassed the U.S. EEZ from Texas to Florida, leaving only a portion of the Gulf EEZ from about Naples, Florida south to the Florida Keys open to pelagic longline fishing year-round. A Gulf Council Press Release explained that "This option avoids interactions and potential conflicts between the pelagic longline fleet and the recreational fishery during the March through September season, and allows the pelagic longline fleet to continue operating productively during the remaining five months of the year."³

Despite the recommendation, in the fall, the NMFS issued its final rule which actually prohibits pelagic longline fishing in the DeSoto Canyon and East Florida coast all year and off South Carolina, called the Charleston Bump area from February 1 through April 30. (See map to right.) The NMFS chose to limit fishing in those areas that showed relatively high bycatch rates which, combined with a prohibition on the use of live bait in the Gulf of Mexico, is expected to reduce bycatch of undersized target species and the bycatch of billfish, including blue marlin, white marlin, and sailfish. In addition, in the fall of 2000, the NMFS imposed time and area closures on 55,970 square miles of the Grand Banks in the north Atlantic Ocean east of New England.⁴

Critiques of Closures

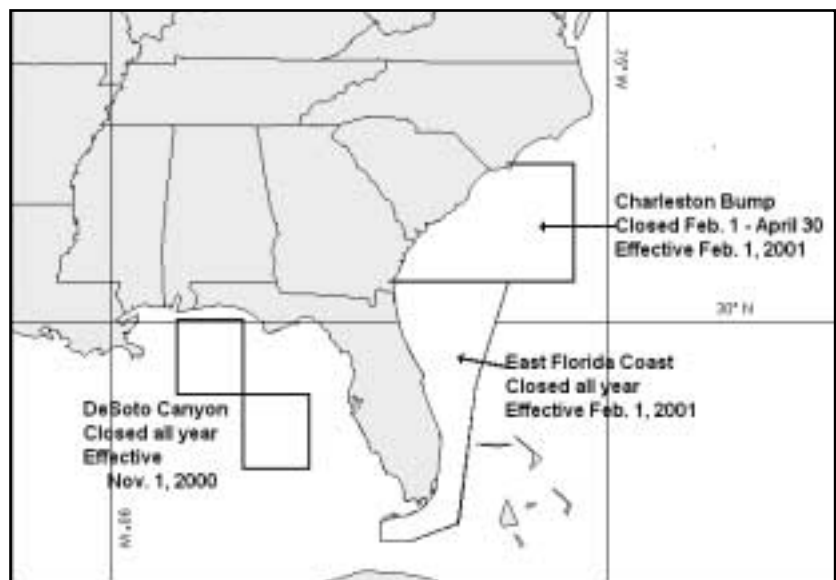
Criticisms of the longline time and area closures include feelings that massive reductions could have a devastating effect on the fishing industry. Others claim that the closures will not show significant improvements of bycatch and that to destroy an entire region's fishing industry for a small gain fails to take into account the importance of fishery resources to fishing communities. Finally, fishing communities argue that the lawsuits are in violation of the National Standards under the Magnuson-Stevens Fishery Conservation and Management Act. They claim that the rules do not, to the extent practicable, minimize adverse impacts on such communities, as is required under National Standard 8, are not based on the best available scientific information (Standard 2), are not equitable (Standard 4) and do not allow for variations and contingencies among fisheries (Standard 6).

Conservation groups counter that when the NMFS fails to protect species listed under the ESA or fails to properly manage fishing techniques, it is in violation of federal law. Amidst the debate, closures are becoming a standard management tool and may compel a fundamental change in the longline industry. ♡

ENDNOTES

1. See Pelagic Longline Management, 65 Fed. Reg. 47,214, August 1, 2000.
2. Order Further Amending Order Modifying Provisions of Order of Injunction at 3 (August 4, 2000).
3. The press release, proposed rule and other documents are available at <http://www.gulfcouncil.org/index.html>.
4. A permanent rule for this fishery will be based upon a new biological opinion due to be completed in 2001.

Longlining Restricted Areas



New Assessment Required in Makah Whale Hunt

Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000).

Kristen M. Fletcher, J.D. LL.M.

More than a year after the Makah Tribe resumed its historic whale hunt, the U.S. Ninth Circuit Court of Appeals found the government's assessment of the impacts of the Makah whale hunt inadequate and in violation of federal law. Reversing the District Court's decision, the Ninth Circuit held that the federal agencies failed to carry out their responsibilities under the National Environmental Policy Act and instructed the agencies to reassess the effects of the hunt.

Background

The current dispute is less than a decade old, dating back to 1994 when the National Marine Fisheries Service determined that the eastern North Pacific stock of gray whale, then listed as endangered, had rebounded to a population level sufficient to remove it from the Endangered Species List. Upon removal, the Makah acted to resume its historic whale hunt.

The history of the dispute, however, begins in 1855 when the U.S. and the Makah entered into the Treaty of Neah Bay which granted to the Makah the "right of taking fish and of whaling or sealing at usual and accustomed ground and stations" for the cessation of most of their land on the Olympic Peninsula.¹ Despite this right, the Makah ceased whaling in 1920 after commercial whaling had decimated populations.

In 1946, the U.S. signed the International Convention for the Regulation of Whaling (ICRW) to provide for regulation of the commercial whaling industry. While the ICRW placed a ban on the taking of gray whales, it also provided for an "aboriginal subsistence exception" to the ban "when the meat and products of such whales are to be used exclusively for local consumption by the aborigines."²

After the ban on taking gray whales was lifted in the U.S., the Tribe asked the U.S. to assist it in obtaining an aboriginal subsistence quota from the ruling body of the ICRW, the International Whaling Commission (IWC). In 1995, the U.S. informed the IWC of the Makah's interest in harvesting up to five gray whales for ceremonial and subsistence purposes and that the U.S. intended to submit a future proposal. The National Oceanic and Atmospheric Administration (NOAA) also prepared an internal report evaluating the merits of the Tribe's proposal. By 1996, a

NOAA representative indicated to colleagues that the agency had created an interagency agreement to support the Makah's application to the IWC. In March 1996, NOAA entered into a formal agreement with the Tribe providing that the U.S. would make a formal proposal to the IWC for a whaling quota. The Tribe agreed to prepare an adequate statement of need and set out a management agreement with NOAA. The agency would monitor the hunt, help collect whale information, and write regulations.

The U.S. proposed the Makah quota to the IWC in June 1996, the same month that the U.S. Representatives Jack Metcalf and George Miller introduced a resolution opposing the proposal. The resolution passed and the U.S., realizing it did not have enough support for the proposal, withdrew its proposal from the IWC "to give the Tribe an opportunity to address the delegates' concerns."³

In June 1997, the plaintiffs contacted NOAA alleging violations of the National Environmental Policy Act (NEPA) because the Makah whaling proposal was authorized and promoted without the preparation of an Environmental Assessment. A draft Environmental Assessment was issued on August 22, 1997, for public comment. The final Environmental Assessment and "finding of no significant impact" was issued on October 17, 1997, four days after a second agreement was signed between the Tribe and NOAA. A day later, the 1997 IWC meeting was held in which the U.S. negotiated a quota for four whales annually.

Plaintiffs Challenge the Environmental Findings

The day that the federal agency issued the finding of no significant impact, Congressman Metcalf and environmental groups filed suit claiming violations of NEPA and other federal statutes. The court found in favor of the government and the Makah Tribe on summary judgment.

On appeal, the plaintiffs argued that, although the agencies prepared an assessment, it was prepared too late in the process to be an effective analysis of the environmental impacts. They claimed that "by making a commitment to authorize and fund the Makah whaling plan, and then drafting a NEPA document which simply rubber stamped the decision . . . defendants eliminated the opportunity to choose among alternatives . . . and seriously impeded the degree to which their planning and decisions could reflect environmental values."⁴

While the NEPA does not require a federal agency to choose the most environmentally-friendly alternative, it

does require the agency to take a hard look at the environmental consequences of its actions.⁵ To do this, an agency must prepare an environmental assessment to assist in the decision-making process. If the result of the assessment is that the activity will not have significant impact on the environment, then the agency is done with its analysis under NEPA. If the assessment reveals that there will be a significant impact, the agency must then prepare the more comprehensive Environmental Impact Statement (EIS).

The Court determined that the issue before it was “whether the Federal Defendants prepared the [assessment] too late in the decision-making process, i.e., after making an irreversible and irretrievable commitment of resources.”⁶ The court concluded that they did evidenced by the fact that the agencies had committed to helping the Makah carry out its quota from the 1995 announcement at the IWC to the agreement signed between the Makah and the NOAA, more than a year before the assessment was prepared. The “point of commitment” was the 1996 signing of the agreement, effectively requiring the government to work on behalf of the Makah to secure a quota. As a result of the failure of the agencies to conduct an assessment before committing to a particular outcome, the court found that “it is highly likely that because of the Federal Defendants’ prior written commitment to the Makah and concrete efforts on their behalf, the [assessment] was slanted in favor of finding that the Makah whaling proposal would not significantly affect the environment.”⁷

Once determining that the assessment was insufficient, the court then determined that the proper remedy would be to re-prepare the environmental assessment. Recognizing that the new assessment may be the “classic Wonderland case of first-the-verdict, then-the-trial”, it must be conducted under circumstances that ensure an objective evaluation free of the previous taint.

Conclusion

The federal agencies that conducted the assessment in support of the Makah’s efforts to resume whaling improperly bypassed the federal requirement to conduct an assessment before committing resources to the effort. Despite the dissent’s arguments that the assessment was not proven insufficient and that a new one would be a waste of resources, the court remanded the case for preparation of a second environmental assessment without the taint of a federal agency that has irretrievably committed to the decision.⁸ ✓

ENDNOTES

1. Treaty of Neah Bay, 12 Stat. 939, 940 (1855).
2. 62 Stat. at 1723.
3. *Metcalf v. Daley*, 214 F.3d 1135, 1138 (9th Cir. 2000).
4. *Id.* at 1143.
5. 42 U.S.C. § 4321 - 4370 (2000).
6. *Metcalf v. Daley* at 1142.
7. *Id.* at 1145.
8. The draft Makah Whaling Environmental Assessment is now available at http://www.nmfs.noaa.gov/prot_res/PR2/Conservation_and_Recovery_Program/makah_DEA.html.

EFH, from page 1

EFH for each federally managed species, minimize adverse effects caused by fishing, and identify actions to encourage the conservation and enhancement of EFH. The information was added in the form of amendments to existing fishery management plans for federal fisheries.

The deadline for submission of amendments was October of 1998. During October and the months following, the National Marine Fisheries Service (NMFS) received EFH amendments which presented information about each species’ habitat needs. After approving and partially approving the amendments, environmental groups filed suit against the agency claiming that the EFH amendments from the Gulf of Mexico, New England, Caribbean, Pacific, and North Pacific regions were inadequate because they failed to adequately address the negative effects of fishing gear on EFH. In the court’s words, “all Councils identified some EFH within each of their jurisdictions, yet none adopted measures that would restrict fishing gear in order to minimize adverse effects”² The plaintiffs also

claimed that the NMFS violated the National Environmental Policy Act³ (NEPA) by failing to adequately analyze the environmental impacts and possible alternatives to the amendments.

Fulfilling the EFH Mandate

For each region, an EFH amendment was prepared and then followed by environmental analysis under the NEPA. The NEPA requires the federal agency to take into account the environmental impacts of its action and consider alternatives to the proposed action. The NMFS approved or partially approved each amendment and determined that only informal environmental analysis was necessary.

The Gulf of Mexico Regional Fishery Management Council (Gulf Council) submitted its Generic EFH Amendment in October of 1998 including “only a cursory discussion of the effects of three types of fishing gear on EFH.”⁴ On February 8, 1999, the NMFS partially approved the Amendment noting that the Gulf Council

EFH, from page 9

“lacked the detailed scientific information necessary to determine the practicality of additional management measures.”⁵ Similarly, the October 1998 Amendment submitted by the New England Fishery Management Council (New England Council) “contained no assessment of fishing gear impacts on EFHs. The 15-page discussion of fishing gear contained minimal discussion of the likely impacts of the various types of gear considered on the EFHs; the discussion primarily emphasized the lack of information on the specific effects of any specific gear on any particular habitat or species.”⁶ NMFS also approved the Caribbean, Pacific, and North Pacific amendments, finding little analysis of fishing gear impacts or recommendations to reduce adverse effects. In each instance, the NMFS cited lack of scientific information upon which the Councils could draw.

District Court Analysis

Standing The defendants first challenged whether the environmental groups could legally sue. The plaintiffs claimed that NMFS’ actions harmed them because EFH was not adequately protected from commercial fishing, citing locations where the plaintiffs fish, scuba dive, or photograph reefs that may be damaged.⁷ By showing particularized injuries to aesthetic, environmental, and recreational interests, the plaintiffs demonstrated legal standing to bring their claims.

Judicial Review. In addition, the defendants claimed that the

plaintiffs cannot seek a court’s review of the actions at hand. The defendants cited the Magnuson Act which provides that regulations promulgated by the Secretary are subject to judicial review. Thus, they argue that because none of the EFH amendments resulted in the promulgation of a formal federal regulation, that the Magnuson Act does not allow judicial review for the plaintiffs. The court analyzed the regulation and Magnuson Act language in light of another federal statute, the Administrative Procedures Act, which provides that *all agency action is reviewable*. Under this statute, the terms “rule” and “regulation” are used inter-

changeably and include an “agency statement of general or particular applicability . . . designed to implement, interpret, or prescribe law and policy.”⁸ The court found that “each of the EFH Amendments was affirmatively approved by the Secretary, and this approval constitutes a reviewable action. . . .”⁹

Magnuson Act Requirements. After ruling on the standing and judicial review questions, the court turned to whether the EFH amendments complied with the Magnuson Act and the applicable regulations. Initially, the court made clear that “[r]eview of the Secretary’s action must be especially deferential, given the highly complicated scientific data that the agency must interpret” and the court must exercise “its narrowly defined duty of holding agencies to certain minimal standards of rationality.”¹⁰

The plaintiffs alleged that the EFH amendments failed to sufficiently analyze the effects of fishing activities and fishing gear. To determine if the Councils went far enough in their analysis, the court first noted the requirements of the EFH regulation, which it called “very specific,” compelling the

gathering of a wide range of information to identify EFH and the assessment of potential adverse effects of fishing activities. Even though such specificity exists, the court found that neither the statute nor the regulation requires the Councils to affirmatively conduct research to better identify EFH and the adverse effects

of fishing on it.¹¹ Because of this lack of affirmative duty, the court held that the Councils’ reliance on the best *available* scientific information was sufficient and, thus, met the requirements of the Magnuson Act.

The court explained that “while the plaintiffs would have preferred a more detailed analysis of the effects of fishing activities and of the three types of gear. . . the Secretary did consider the relevant factors in determining that the analysis was adequate based on the best available scientific information. . . .”¹² The court extended this rationale to conclude that the Secretary may use discretion in determining when Councils must adopt addition-



al protective measures, considering both the protective measures already in place and the lack of available scientific evidence on the adverse effects of fishing gear.

National Environmental Policy Act. The court did find that the defendants failed to conduct adequate environmental analyses of the EFH amendments under the NEPA. The statute requires the NMFS to consider environmental impacts before an action is taken by conducting either an Environmental Assessment (EA) or the more comprehensive Environmental Impact Statement (EIS). Once the agency conducts an EA and finds that the action will not have a significant impact, it can then go forward with the project without conducting an EIS. However, the preparation of an EIS for a fishery management plan or amendment is automatically required whenever significant beneficial or adverse impacts may be expected to result from the action. The decision to conduct an EIS is determined using five factors including impact on long-term productivity of stocks, damage to ocean and coastal habitats, threats to endangered or threatened species, and controversy or socio-economic effects. Because the EAs failed to consider these factors, the court found that “there is simply not enough evidence or analysis in any EA to determine whether an EIS is necessary.”¹³

In addition, the NEPA requires the agency to consider all feasible alternatives. The plaintiffs claimed that because the EAs only considered the two alternatives of maintaining the status quo (no EFH amendment) and

approving the amendment, they didn’t meet the NEPA requirement to adequately appraise other alternatives. The court agreed and added that the EAs were couched in general and vague terms and spent more time describing the proposed alternative than actually analyzing it.

Conclusion

Finally, the court ordered a new EA or EIS for each EFH amendment calling for more than the initial “glaring lack of discussion” of environmental impacts on the designated EFH. The NMFS and Councils must now reevaluate the environmental consequences of the EFH amendments and possible alternatives to the amendments as proposed. ✓

ENDNOTES

1. 16 U.S.C. § 1802 (10) (2000).
2. *American Oceans Campaign v. Daley*, Civil Action No. 99-982 at 6 (Dist. DC 2000).
3. 42 U.S.C. § 4321 (2000).
4. *American Oceans Campaign* at 8.
5. *Id.*
6. *Id.* at 9.
7. *Id.* at 16.
8. 5 U.S.C. § 551(4) (2000).
9. *American Oceans Campaign* at 19.
10. *Id.* at 20 - 21.
11. *Id.* at 24.
12. *Id.* at 25.
13. *Id.* at 39.

Penalties, from page 2

try slaughtering are processed each week for the production of pet food and other products.

Federal prosecutors charged that Central consistently violated wastewater standards from the 1970’s through the 1990’s, accepting significantly more waste than it had capacity to process without violating its discharge permits. Central illegally dumped waste, including blood, feathers and entrails into Shockaloe Creek, a tributary of the Pearl River which is a central Mississippi water supply. In 1995, the dumping was so excessive that the waters of the creek turned brown and emitted a foul odor, earning it the nickname “Blood Creek.”

While admitting guilt, Central argues that the violations only occurred during the years of 1994 and 1995 and that the most flagrant violations were committed by independent contractors hired to manage the waste on-site. In addition to the \$13 million fine, the company must pay \$1 million in restitution to the Mississippi

Department of Environmental Quality and submit a detailed apology to the residents of Scott County. Central also received five years probation.⁴ ✓

ENDNOTES

1. Morton International, Inc. is a wholly-owned subsidiary of Rohm and Haas Company based in Philadelphia, PA.
2. *United States v. Central Industries, Inc.*, S.D. Miss., docket number unavailable (2000) (on file with author).
3. *U.S., Mississippi Reach Environmental Agreements with Morton*, EPA Headquarters Press Release, Washington, D.C., October 27, 2000.
4. *Mississippi Waste Processor Pleads Guilty to Water Violations*, EPA Headquarters Press Release, Washington, D.C., November 9, 2000.



2000 Federal Legislative Update

John Treadwell, 2L

Tammy L. Shaw, J.D.

The following is a summary of legislation affecting coastal, natural and water resources enacted by the United States legislature during 2000.

106 Public Law 256 - Oceans Act of 2000

(S. 2327)

Creates the National Ocean Commission in order to conduct a comprehensive review of U.S. ocean and coastal activities, focusing on resource management, existing laws and development opportunities. The Commission will assess fisheries, marine commerce and transportation activities to improve efficiency and reduce duplication of federal efforts. The Commission's report will assess the supply and demand of the nation's ocean and coastal resources and make recommendations for changes in existing laws.

106 Public Law 284 - Beaches Environmental Awareness, Cleanup and Health Act of 1999 (B.E.A.C.H)

(H.R. 999)

Amends the Clean Water Act effective October 10, 2000, to protect the public from pathogens, waterborne bacteria and pollution in coastal waters. The law directs the EPA Administrator to conduct studies to assess potential health risks from exposure to pathogens in coastal waters. Within 18 months, the Administrator will adopt national pathogen standards and monitoring, testing and public notification measures. Under the Act, states have 3 years to adopt initial coastal water quality standards based on EPA criteria.

106 Public Law 331 - Cahaba River National Wildlife Refuge Act

(H.R. 4286)

Establishes the Cahaba River National Wildlife Refuge in Bibb County, Alabama.

106 Public Law 355 - Amends the National Historic Preservation Act

(H.R. 4613)

Amends the National Historic Preservation Act to prescribe guidelines under which the Secretary of the Interior shall implement a national lighthouse program.

106 Public Law 369 - Cat Island National Wildlife Refuge Establishment Act

(H.R. 3292)

To provide for the establishment of the Cat Island National Wildlife Refuge in Feliciana Parish, Louisiana.

106 Public Law 374 - Water Resources Research Act of 1984

(H.R. 4132)

Amends the Water Resources Research Act of 1984 to authorize appropriations through fiscal year 2005 for research institutes established under the Act which focus on water problems and issues of a regional and interstate nature.

106 Public Law 450 - Amends the Yukon River Salmon Act of 1999

(H.R. 1651)

- Title I - Amends the Fishermen's Protective Act of 1967 to extend the effective period for authorizing reimbursement to owners of U.S. commercial fishing vessels for certain costs incurred when a vessel is seized and detained by a foreign country.

- Title II - Amends the Yukon River Salmon Act of 1999 establishing the Yukon River Salmon Panel which will advise the Secretary of Interior on restoration and enhancement of salmon stocks originating from the Yukon River in Canada and on the negotiation of international agreement with Canada regarding management of those salmon stocks.
- Title III - Authorizes the Secretary of Commerce to acquire and equip up to 6 fishery survey vessels used for collecting data necessary to the development of fishery management plans.
- Title IV - Amends the Atlantic Tunas Convention Act of 1975 to make it unlawful for any person, other than one holding a purse seine permit to use an aircraft to locate or otherwise assist in fishing for and catching Atlantic bluefin tuna or to catch, possess or retain Atlantic bluefin tuna located by use of an aircraft.

106 Public Law 455 - Resource Issues in Glacier Bay National Park (S. 501)

Requires the Secretary of the Interior to allow commercial fishing in the outer waters of the Glacier Bay National Park in Alaska, in accordance with a management plan to be developed by the Secretary and the State of Alaska.

106 Public Law 457 - Clean Waters and Bays Act of 2000 (S. 835)

The Estuary Restoration Act of 2000 establishes an estuary restoration program consisting of partnerships between the public and the private sector. Projects and recommendations will be made by the partnerships and reviewed by the Habitat Restoration Council and an advisory board consisting of scientific experts, state and local government representatives and non-governmental representatives. The Council will determine which projects are to be approved and the Secretary of the Army will carry out the approved projects. The goal of the Act is to restore 10 million acres of estuaries by 2010.

- Section 902 of the Act, authorizes the Secretary of Commerce and the Secretary of the Interior to carry out a long term estuary assessment project for a monitoring network for the Mississippi River, south of Vicksburg and for the Gulf of Mexico.

106 Public Law 513 - Amends the National Marine Sanctuaries Act (S. 1482)

Amends the National Marine Sanctuaries Act (Act) as follows:

- (Sec. 5) Revises sanctuary designation standards;
- (Sec. 6) Changes designation and implementation procedures;
- (Sec. 7) Adds activities to the list of unlawful activities, including specifying activities that constitute interference with enforcement of the Act;
- (Sec. 8) Empowers officers authorized to enforce the Act to arrest based on interference with enforcement. Authorizes the Secretary to bring civil actions and to assess civil penalties for violation of the Act;
- (Sec. 10) Authorizes the Secretary to conduct, support and coordinate research, monitoring, evaluation and education programs;
- (Sec. 11) Mandates public notice before the Secretary identifies an activity subject to a sanctuary special use permit; and
- (Sec. 13) Makes a vessel that injures a sanctuary resource liable in rem.

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106 Public Law 514 - Coastal Barrier Resources Reauthorization Act of 1999 (S. 1752)

Amends the Coastal Barrier Resources Act to revise the definition of “undeveloped coastal barrier.” Authorizes the Secretary of the Interior to add a qualifying parcel of real property to the John H. Chafee Coastal Barrier Resources System if the parcel’s owner so requests.

106 Public Law 541 - Water Resources Development Act of 2000 (S. 2796)

Section 528 authorizes funds for the Secretary of the Army’s participation in programs concerning the restoration and preservation of Mississippi’s coastal barrier islands and coastal wetlands. Title VI contains the Comprehensive Everglades Restoration Plan which provides for the restoration and preservation of the South Florida ecosystem and the Everglades, the protection of water quality in the Everglades and for water-related needs of the South Florida region.

106 Public Law 554 - Consolidated Appropriations Act 2000 (H.R. 4755)

Provides for the following marine-related activities:

- (Sec. 209) Calls for the National Academy of Sciences to conduct an independent scientific review of the Biological Opinion for the Bering Sea/Aleutian Islands and Gulf of Alaska groundfish fisheries relating to the stellar sea lion protective measures and scales back the regulations to limit their effect on the commercial fisheries and the proposed catch levels;
- (Sec. 112) Amends the Clean Water Act to provide for grants for municipalities for Wet Weather Discharge Control Projects such as stormwater best management practices and watershed management;
- (Sec. 137) Allows for the addition of Cat Island to the Gulf Islands National Seashore upon its acquisition by the Secretary of Interior; and
- (Sec. 144) Extends the moratorium on the approval or implementation of a new individual fishing quota program until October 1, 2002 but allows the Gulf Council to gather data and develop a profile for a quota system for managed Gulf of Mexico species and directs the North Pacific Council to analyze fishing and processor quotas, cooperatives, and community quotas. It also implements a fishing reduction program in the Bering Sea and Aleutian Islands crab fisheries.

The text of these provisions is available in Conference Report on H.R. 4577, 146 Cong. Rec. H 12253 (Dec. 15, 2000).

106 Public Law 555 - Atlantic Coastal Fisheries Act of 2000 (H.R. 2903)

- Amends the Atlantic Striped Bass Conservation Act by appropriating increased funds for the study of Atlantic Striped Bass populations and development of a program to ensure a balanced and healthy population.
- Establishes the John H. Prescott Marine Mammal Rescue Assistance Program and provides funds for the rescue and rehabilitation of stranded and sick marine mammals.
- Appropriates funds for the study of biological and environmental factors leading to a rise in the mortality of Eastern Grey Whales.

106 Public Law 557 - Shark Finning Prohibition Act (H.R. 5461)

Amends the Magnuson-Stevens Fishery Conservation and Management Act to eliminate the wasteful and unsportsmanlike practice of shark finning. ✓

Lagniappe *(a little something extra)*

Around the Gulf . . .



Under Public Law 300, the Secretary of the Interior has been directed to establish the **Red River National Wildlife Refuge** in Louisiana for the protection of resident and migratory waterfowl and aquatic life within the Refuge. The bill was H.R. 4318.

Last Fall, the Alabama Supreme Court reversed a **\$52 million punitive damages award** in which lakefront property owners alleged that two textile plants' chemicals and dyes contaminated Lake Martin and their properties. The court ruled that the property owners failed to show chemical contamination of the waters and that contaminated water actually washed onto their properties. (*Russell Corp. v. Sullivan*).

In another reversal, the Alabama Supreme Court set aside a **\$1 million verdict** against Courtaulds Fibers finding insufficient evidence that chemicals released from the company's plants caused illnesses in an adjacent landowner horses and diminished his property value. The plaintiff alleged that the rayon manufacturer was negligent for failing to take additional steps to reduce the release of carbon disulfide (CS₂) but the court disagreed citing insufficient showing of industry practices relating to the CS₂ emission. (*Courtaulds Fibers, Inc. v. Long*).



Around the Nation and the World . . .



Some 650 obsolete **New York City subway cars** could be added to New Jersey's artificial reefs over the next few years under a proposal being negotiated between NYC and the New Jersey Department of Environmental Protection. The subway is retiring 1,300 cars, built in the 1960s and known among rail buffs as Redbirds for their distinctive scarlet color. Half the cars would go to New Jersey reefs, the other half to waters off Long Island, saving the NYC transit agency up to \$13 million in disposal costs.

In November, voters in Virginia passed a referendum amending that state's constitution to include the right to "**hunt, fish and harvest game**," becoming the sixth state in the nation to take such action. Supporters were moved by increasing efforts by animal rights activists to ban organized hunting events and tournament fishing in other states. Opponents of the amendment, including the Fund for Animal Rights and the U.S. Humane Society, fought to keep the referendum off the ballot.

The U.S. Fish and Wildlife Service is now accepting comments for the designation of the **Northern Sea Otter** in the Aleutian Islands as a candidate species for listing under the Endangered Species Act. The FWS warned that "[d]ue to the precipitous and rapid nature of the ongoing population decline, we have assigned the northern sea otter in the Aleutian Islands listing a priority of three under our Listing Priority System." Submit written comments and data regarding the northern sea otter to the Marine Mammals Management Office, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503. ♪

WATER LOG (ISSN 1097-0649) is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under Grant Number NA86RG0039, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies. Graphics by ©Nova Development Corp., ©Corel Gallery, NOAA, Federal District Court in Hawaii, National Marine Fisheries.



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MASGP-00-004-04

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Coastal Urban Sprawl on the Rise

Daniel McGrath, an Illinois-Indiana Sea Grant researcher at the University of Chicago's Great Cities Institute, reports that, by the year 2025, urban sprawl will consume approximately 5.8 million acres of coastal land that is currently either agricultural land or open space. For comparison, this increase in land area is roughly equivalent to the current total of combined urban land areas in the New York, Boston, Chicago, Los Angeles, and San Francisco metropolitan regions.

Using population statistics from the 1990 U.S. Census and urban land area data from the past five decades, McGrath has arrived at the forecast for the year 2025. Assuming the current trends in average population density and land use continue, he explains that the forecast doesn't look good. McGrath predicts, "Given that the nation's top 20 oceanic and Great Lakes coastal metropolitan regions are likely to increase their population by an additional 32 million people, by the year 2025 the 'urban footprints' of these 20 regions are likely to expand by 46%, or from about 20,000 square miles to about 29,000 square miles." That's an additional 9,000 square miles, or about 5.8 million acres, of land.

For information on McGrath's work, see http://www.seagrantnews.org/news/20001207_sprawl.hor visit the Illinois-Indiana Sea Grant web page at <http://www.iisgcp.org/> .



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