

## Chapter 16 • MARINE RESOURCES 2016 Annual Report<sup>1</sup>

The Marine Resources Committee is immersed in diverse disciplines focused on the marine environment and its uses. The geographic scope of that focus embraces thousands of miles of national coastline, internal and territorial waters, and Exclusive Economic Zones, as well as estuarine, outer continental shelf, and international waters. Issues range from the development, management, and protection of these waters and their resources to jurisdiction and management over United States flagged vessels across the world's oceans. The 2016 review is meant to discuss the more significant events during 2016 across the full spectrum of the Committee's responsibilities, but it is not meant to be all-inclusive.

### I. FISHERIES

#### A. *Judicial Developments*

*Anglers Conservation Network v. Pritzker*<sup>2</sup> confirmed that fishery management Councils<sup>3</sup> cannot be sued for their actions or inactions. In 2012, the Mid-Atlantic Fishery Management Council (Council) began formulating an amendment to the Fisheries Management Plans (FMPs) that would add several species which were important to birds of prey and recreational fishermen so that quotas could be set for them. Then in 2013, by a ten-to-nine vote, the Council decided to send the proposed amendment to a working group and revisit the issue three years later.<sup>4</sup>

Councils make only "recommendations" on management to the Secretary of Commerce.<sup>5</sup> Then the Secretary makes final decisions which can be judicially challenged. Plaintiffs sued even though the Secretary had made no decision, arguing that since the National Marine Fisheries Service (NMFS) representative had voted in favor of and argued for delaying the action for at least three years, this action by the NMFS representative could be construed as a decision by the Secretary.

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<sup>1</sup>This report was prepared by the Marine Resources Committee and edited where necessary by Peter H. Flournoy, International Law Offices of San Diego, and Ashley Nicole Stilson, Pace University School of Law. In addition to the Editors, Contributors to the report include: Joan Bondareff and Patricia O'Neill of Blank Rome LLP; Lynn Long, Department of Interior; and John G. Cossa, Beveridge & Diamond, PC. Nothing in this review represents the views of the employers of the contributors or their clients.

<sup>2</sup>809 F.3d 664 (D.C. Cir. 2016).

<sup>3</sup>The Magnuson Stevens Act (MSA), 16 U.S.C. §1801, first passed by Congress in 1976 to manage United States federal fisheries, established eight Regional Fishery Management Councils (Councils) each tasked with preparing Fisheries Management Plans (FMPs) for the conservation and management of fisheries under their regional geographic jurisdiction. The FMPs are developed by the Councils through a series of meetings of federal, state, Native American, and territorial fishery management officials, scientists and economists, harvesting constituents, ENGOs, and members of the general public, for approval by the Secretary of Commerce. Once approved, or modified, by the Secretary, and put through a public notice and comment period by the National Marine Fisheries Service (NMFS or Agency), the regulations are enforced by NMFS. Regulations to manage fisheries never get to the Secretary of Commerce without first being proposed through the Council system (except through legislation).

<sup>4</sup>*Anglers Conservation Network*, 809 F.3d at 668.

<sup>5</sup>*Id.* at 668-69.

The court determined the only “action” that had been taken was by the Council, and it could not be attributed to the Secretary. The Council is not a federal agency within the meaning of the Administrative Procedure Act (APA),<sup>6</sup> and therefore, a Council’s “action” or “inaction” cannot be a “final agency action” which is reviewable under the Section 706(2) of the APA.<sup>7</sup> The frustration of Council members and constituents being forced to wait months, or sometime years, until NMFS has acted on a Council recommendation, before they can seek judicial review of that action, will remain.

In *Pacific Choice Seafood Co. v. Pritzker*,<sup>8</sup> the court decided another “procedural” question. Challenges to NMFS’ regulations must be made within thirty days of the publication of a Final Rule in the Federal Register. NMFS instituted an individual transferable quota program (ITQ) in 2010, including a provision that quota shares held by one ownership entity which exceeded 2.7% had to be divested by November 30, 2015 or they would be automatically revoked. NMFS modified this part of the rule, which became final in November 2015, and plaintiffs filed their complaint within thirty days of the November rule, inter alia, challenging the substantive provisions of the 2010 ITQ program.<sup>9</sup> Defendants argued the complaint was time barred, but the court, relying on *Oregon Trollers Ass’n v. Gutierrez*<sup>10</sup> and *Gulf Fishermen’s Ass’n v. Gutierrez*,<sup>11</sup> determined that the November 2015 regulation was “an indispensable part” of the 2010 ITQ program regulations, and therefore, the plaintiffs’ challenges to the 2010 ITQ program were timely.<sup>12</sup>

In *Alaska Oil and Gas Ass’n v. Pritzker*,<sup>13</sup> the court upheld a NMFS determination under the Endangered Species Act that its climate projections used to determine the loss of sea ice over shallow waters in the Arctic which would leave the Pacific bearded seal subspecies endangered by the year 2095. The district court believed that NMFS’ “attempt to predict the bearded seals’ viability beyond [fifty] years was ‘too speculative and remote to support a determination that the bearded seal was in danger of becoming extinct.’”<sup>14</sup> Plaintiffs argued bearded seals were spread over a wide range, their populations had naturally low densities, and the seals spent a considerable amount of time underwater, all of which made it very difficult to obtain any reliable estimate of their population, and in addition, there was considerable disagreement among reviewing scientists over the future availability of sea ice in the Bering Sea.<sup>15</sup> Access to sea ice over shallow water was important to seal mating; the birthing process, so seal mothers would have easy access to food sources while nursing; and decreased exposure to their primary predators – polar bears and walrus.<sup>16</sup>

The issue was: When NMFS determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may it list that species as threatened under the Endangered Species Act? The Court of Appeals found that all of the independent scientific peer reviewers had agreed that the bearded seal’s continued viability depended on the availability of sea ice over shallow waters during

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<sup>6</sup>5 U.S.C. § 706.

<sup>7</sup>*Anglers Conservation Network*, 809 F.3d at 669-70.

<sup>8</sup>Order Denying Defendants’ Motion to Dismiss, *Pac. Choice Seafood Co. v. Pritzker*, No. 15-cv-05572-HSG, 2016 WL 3916322 (N.D. Cal. July 20, 2016).

<sup>9</sup>*Id.* at \*4.

<sup>10</sup>452 F.3d 1104, 1113 (9th Cir. 2006).

<sup>11</sup>529 F.3d 1321 (11th Cir. 2008).

<sup>12</sup>Order Denying Defendants’ Motion to Dismiss, *supra* note 8.

<sup>13</sup>840 F.3d 671 (9th Cir. 2016).

<sup>14</sup>*Id.* at 675 (quoting *Alaska Oil & Gas Ass’n v. Pritzker*, Nos. 4:13-cv-00018-RRB et al., 2014 WL 3726121, at \*15 (D. Alaska July 25, 2014)).

<sup>15</sup>*Id.* at 676-77.

<sup>16</sup>*Id.* at 677.

critical life stages and that NMFS' projections indicated by sea ice would have almost disappeared entirely during the mating, nursing, and birthing season.<sup>17</sup> Additionally, the review of the petition to list the bearded seal as threatened or endangered had lasted four years involving biological review teams, public hearings, and thousands of responded to comments.<sup>18</sup> The court found NMFS' climate predictions beyond 2050 to be reliable, referring to its ruling in [Alaska Oil and Gas Ass'n v. Jewell](#)<sup>19</sup> where it found that those very same climate models represented the "best available science" and reasonably supported the determination that a species reliant on sea ice likely would become endangered in the foreseeable future."<sup>20</sup> Thus, the court upheld the listing.

In [Marilley v. Bonham](#), nonresident commercial harvesters challenged California's fee differential for nonresident fishing licenses, vessel registration, and permits.<sup>21</sup> The *en banc* court determined that the fee differentials charged by California were less than the amount that California subsidized the management of the nonresident harvesters' portion of its commercial fisheries, thus surviving the challenge under the Privileges and Immunities Clause.<sup>22</sup> The court also found that due to California's state interest in receiving compensation for its management, there was a "rational basis" for its fee differentials, thus surviving the Equal Protection Clause challenge.<sup>23</sup> The dissent argued that nonresident harvesters paid other multiple California taxes beginning the fishing season thousands of dollars in the hole because of the discriminatory fees, and this should have been given more consideration.<sup>24</sup> The majority reviewed the only two prior Supreme Court decisions, [Toomer v. Witsell](#),<sup>25</sup> (the Court struck down a license fee for nonresidents which was 100 times greater than that for residents finding it exclusionary) and [Mullaney v. Anderson](#),<sup>26</sup> (Alaska charged a ten-fold differential for nonresident fees trying to justify it on enforcement costs, but presented insufficient evidence). The *Marilley* court noted that in both *Toomer* and *Mullaney* the Supreme Court had found that nonresident fee differentials charged in order to recover the state's expenses in enforcement, conservation, and management measures attributable to the nonresidents could justify such discrimination that would otherwise be impermissible under the Privileges and Immunities Clause, thus upholding the California fees.<sup>27</sup>

## B. Legislative Developments

Congress passed, and the President signed on December 16th, a law implementing two treaties governing fishing for species on the high seas (other than highly migratory species such as tunas and billfish).<sup>28</sup> The bill, [H.R. 6452](#),<sup>29</sup> was entitled "Assuring Access

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<sup>17</sup>*Id.* at 679-80.

<sup>18</sup>840 F.3d at 677.

<sup>19</sup>815 F.3d 544 (9th Cir. 2016), *appeal docketed*, No. 16-610 (U.S. Nov. 7, 2016).

<sup>20</sup>*Alaska Oil and Gas Ass'n*, 840 F. 3d at 679 (citing *Alaska Oil & Gas Ass'n*, 815 F.3d at 558-559).

<sup>21</sup>*Marilley v. Bonham*, 844 F.3d 841 (9th Cir. 2016).

<sup>22</sup>*Id.* at 852.

<sup>23</sup>*Id.* at 854-855.

<sup>24</sup>*Id.* at 855-56 (Smith, J., dissenting).

<sup>25</sup>334 U.S. 385 (1948).

<sup>26</sup>342 U.S. 415 (1952).

<sup>27</sup>*Marilley*, 844 F.3d at 849.

<sup>28</sup>Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, May 2, 2012, S. TREATY DOC. NO. 113-2; Convention on the Conservation and Management of High Seas Fisheries Resources in the South Pacific, Nov. 14, 2009, S. TREATY DOC. NO. 113-1.

<sup>29</sup>H.R. 6452, 111th Cong. (2010).

to Pacific Fisheries Act” and also carried amendments to the implementing legislation for the Western and Central Pacific Fisheries Convention (WCPFC). The language amending 16 U.S.C. section 6910 is important, requiring the Secretaries of State and Commerce to “minimize any disadvantage to United States fishermen in relation to other” countries in United States negotiations, as well as, “maximize the opportunities for fishing vessels of the United States to harvest fish stocks on the high seas.”<sup>30</sup>

## II. MARINE MAMMALS AND THE MARINE MAMMAL PROTECTION ACT (MMPA)

### A. *Judicial Developments*

#### 1. [United States v. Archibald](#)<sup>31</sup>

While aboard a tuna fishing vessel on the high seas, defendant crewman allegedly shot and killed a pilot whale. The defendant argued using a firearm to deter marine mammals is not a crime recognized under the MMPA, and the Government failed to charge section 1387’s “intentional killing” mens rea.<sup>32</sup> In reading section 1387’s “intentional lethal take” language against section 1375(b)’s explicit mens rea requirement, the court determined “it would be absurd to create ... a heightened *mens rea* or ‘a separate crime with a separate element of intent’ through such implicit, indirect means.”<sup>33</sup> The court “discern[ed] no other MMPA provision that may properly be characterized as an element of the instant charges insofar as ‘the statutory definition is such that the crime may not be properly described without reference to the exception’”<sup>34</sup>

#### 2. [Natural Resource Defense Council v. Pritzker](#)<sup>35</sup>

In considering whether NMFS’s 2012 Final Rule, which authorized the Navy’s incidental take of a specified number of marine mammals through low frequency sonar systems (LFA), achieved the “least practicable adverse impact,” the Ninth Circuit reversed and remanded the district court’s ruling which granted summary judgment in NMFS’s favor on the MMPA compliance issue and held the “least practicable adverse impact” is a “stringent standard” NMFS is required to adopt even though NMFS has discretion to choose mitigation measures.<sup>36</sup> The circuit court held NMFS “conflated the ‘least practicable adverse impact’ standard with the required ‘negligible impact’ finding” and determined the MMPA’s least practicable adverse impact standard must be achieved in addition to finding a negligible impact in order to authorize an incidental take.<sup>37</sup>

#### 3. [Pacific Ranger, LLC v. Pritzker](#)<sup>38</sup>

Plaintiffs, commercial fishing vessel operators, contended their NOAA-issued incidental take permit allowed them to take marine mammals “in the course of their fishing operations” as long as they did not intentionally do so, and further that the regulations were

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<sup>30</sup>*Id.*

<sup>31</sup>No. 2:15-cr-0134, 2016 U.S. Dist. LEXIS 53871 (D.N.J. Apr. 22, 2016).

<sup>32</sup>*Id.* at \*1

<sup>33</sup>*Id.* at \*3.

<sup>34</sup>*Id.*

<sup>35</sup>828 F.3d 1125 (9th Cir. 2016).

<sup>36</sup>*Id.* at 1129, 1133.

<sup>37</sup>*Id.* at 1142.

<sup>38</sup>No. 15-cv-509-KBJ, 2016 U.S. Dist. LEXIS 135543 (D.D.C. Sept. 30, 2016).

unconstitutionally vague in providing “fair warning of what conduct is permitted.”<sup>39</sup> The court granted defendants’ cross-motion for summary judgment finding the MMPA’s plain text prohibits all marine mammal takes and “only certain takings are excepted as incidental.”<sup>40</sup> The court held the incidental take definition “must be read narrowly, to give effect to Congress’s intent” to protect marine mammals and not to “immunize all but the most flagrant ... acts directed toward the marine mammals that ... [are] regularly encounter[ed] in the ordinary course of business.”<sup>41</sup>

### B. *Legislative Developments*

Senator Dan Sullivan (R-AK) introduced a [bill](#) to amend the MMPA to facilitate Native Alaskan marine mammal product imports into the United States.<sup>42</sup> Representative Jaime Herrera Beutler (R-WA) introduced a [bill](#) to amend the MMPA to authorize NOAA to issue one-year permits to Washington, Oregon, Idaho, and various Native American tribes to lethally take healthy, non-listed, Columbia River sea lions in order to protect endangered, threatened, and non-listed fish species.<sup>43</sup> Representative Denny Heck (D-WA) introduced a [resolution](#) to express support to recognize June 2016 as National Orca Protection Month.<sup>44</sup>

### C. *Administrative Developments*

Numerous administrative developments occurred in 2016, including the following: NMFS issued a [proposed rule](#) to list the Gulf of Mexico Bryde's whale (*Balaenoptera edeni*) as threatened or endangered under the ESA;<sup>45</sup> EPA issued notice of a [general permit](#) to authorize marine mammal carcass transport from the United States and ocean disposal;<sup>46</sup> NOAA reopened the public comment period on the MMPA’s [proposed rule](#) to prohibit swimming with and approaching Hawaiian spinner dolphins within fifty yards;<sup>47</sup> NMFS issued a [final determination](#) to designate the Sakhalin Bay-Nikolaya Bay-Amur River Stock of beluga whales (*Delphinapterus leucas*) as a depleted marine mammal stock under the MMPA;<sup>48</sup> NMFS and NOAA issued a [proposed rule](#) to list the Maui's dolphin (*Cephalorhynchus hectori maui*) as endangered and the South Island Hector's dolphin (*C.*

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<sup>39</sup>*Id.* at \*2, \*10.

<sup>40</sup>*Id.* at \*12.

<sup>41</sup>*Id.* at \*14.

<sup>42</sup>S. 2728, 114th Cong. (2016).

<sup>43</sup>The Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, and the Columbia River Inter-Tribal Fish Commission; H.R. 564, 114th Cong. (2016).

<sup>44</sup>H.R. Res. 773, 114th Cong. (2016).

<sup>45</sup>Notice of 12-Month Finding on a Petition to List the Gulf of Mexico Bryde's Whale as Endangered Under the Endangered Species Act (ESA), 81 Fed. Reg. 88,639 (Dec. 8, 2016) (to be codified at 50 C.F.R. pt. 224).

<sup>46</sup>General Permit for Ocean Disposal of Marine Mammal Carcasses, 81 Fed. Reg. 87,928 (Dec. 6, 2016).

<sup>47</sup>Protective Regulations for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act; Reopening of Public Comment Period, 81 Fed. Reg. 80,629 (Nov. 16, 2016) (to be codified at 50 C.F.R. pt. 216) (referring to [proposed rule](#), 81 Fed. Reg. 57,854 (Aug. 24, 2016)).

<sup>48</sup>Designating the Sakhalin Bay-Nikolaya Bay-Amur River Stock of Beluga Whales as a Depleted Stock Under the Marine Mammal Protection Act (MMPA), 81 Fed. Reg. 74,711 (Oct. 27, 2016) (to be codified at 50 C.F.R. pt. 216).

*hectori hectori*) as threatened under the ESA;<sup>49</sup> NFMS issued a [final rule](#) to revise the humpback whales (*Megaptera novaeangliae*) ESA listing status;<sup>50</sup> NMFS issued an [interim final rule](#) to prevent humpback whale takes from human approach within 200 nautical miles of the Hawaiian Islands;<sup>51</sup> USDA [proposed a rule](#) to amend the Animal Welfare Act regulations regarding captive marine mammal humane handling, care, treatment, and transportation;<sup>52</sup> and NMFS issued a [final rule](#) replacing right whale North Atlantic critical habitat with two new areas.<sup>53</sup>

### III. POLAR BEARS, SEA TURTLES, SALMON, AND THE ENDANGERED SPECIES ACT (ESA)

#### A. *Judicial Developments*

##### 1. [Alaska Oil & Gas Ass'n v. Jewell](#)<sup>54</sup>

The Fish and Wildlife Service (FWS) issued a final rule designating critical polar bear habitat. The district court vacated the final rule holding it violated the APA's arbitrary and capricious standard and FWS did not adequately justify unincorporated State comments. The Ninth Circuit reversed, holding the standard FWS followed was correct, and FWS "drew rational conclusions from the best available scientific data," in designating critical habitat.<sup>55</sup> The court also held FWS provided Alaska with adequate justification for not incorporating the state's comments in the final rule.

##### 2. [National Wildlife Federation v. National Marine Fisheries Service](#)<sup>56</sup>

Environmental organizations alleged NMFS violated ESA and APA in issuing a 2014 BiOp on the Federal Columbia River Power System's effects on salmon and steelhead. The court determined NMFS acted arbitrarily and capriciously in concluding the BiOp did not violate ESA, and the United States Army Corps of Engineers violated the National Environmental Policy Act (NEPA) in failing to prepare an environmental impact statement (EIS) for its records of decision implementing the BiOp's reasonable and prudent alternatives. The court found a lengthy analysis was necessary to define those standards because "federal consulting and action agencies must do what Congress has directed them to do."<sup>57</sup>

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<sup>49</sup>Proposed Rule To List the Maui's Dolphin as Endangered and the South Island Hector's Dolphin as Threatened Under the Endangered Species Act, 81 Fed. Reg. 64,110 (Sept. 19, 2016) (to be codified at 50 C.F.R. pts. 223 and 224).

<sup>50</sup>Identification of 14 Distinct Population Segments of the Humpback Whale (*Megaptera novaeangliae*) and Revision of Species-Wide Listing, 81 Fed. Reg. 62,260 (Sept. 8, 2016) (to be codified at 50 C.F.R. pts. 223 and 224).

<sup>51</sup>Approach Regulations for Humpback Whales in Waters Surrounding the Islands of Hawaii Under the Marine Mammal Protection Act, 81 Fed. Reg. 62,010 (Sept. 8, 2016) (to be codified at 50 C.F.R. pt. 216).

<sup>52</sup>Animal Welfare; Marine Mammals, 81 Fed. Reg. 5629 (Feb. 3, 2016) (to be codified at 9 C.F.R. pts. 1 and 3).

<sup>53</sup>Critical Habitat for Endangered North Atlantic Right Whale, 81 Fed. Reg. 4838 (Jan. 27, 2016) (to be codified at 50 C.F.R. pt. 226).

<sup>54</sup>*Alaska Oil & Gas Ass'n*, 815 F.3d at 544.

<sup>55</sup>*Id.* at 562.

<sup>56</sup>184 F. Supp. 3d 861 (D. Or. 2016). For case origin, see [Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.](#), 254 F. Supp. 2d 1196 (D. Or. 2003).

<sup>57</sup>*Nat'l Wildlife Fed'n*, 184 F. Supp. 3d at 871-72.

3. [United States v. Washington](#)<sup>58</sup>

In 1854-1855, Pacific Northwest Indian tribes entered into a series of treaties relinquishing their title to Puget Sound watershed lands in exchange for guaranteed off-reservation fishing rights. Washington later constructed barrier culverts under roads to allow streams to flow underneath; however, such culverts do not allow fish passage and resulted in dramatic salmon stocks decline. The Ninth Circuit held Washington's barrier culvert management violated and continues to violate its treaty obligations and ordered Washington to correct most of its high-priority barrier culverts within seventeen years.<sup>59</sup>

4. [DeForest v. City of Ashland](#)<sup>60</sup>

A municipality ordered an environmental study of a property leased to a gun club to “ass[ess] ‘chemicals of potential ecological concern.’”<sup>61</sup> While the study found no chemical or other impact, the municipality filed suit claiming ESA violations among others.<sup>62</sup> The municipality alleged the gun club discharged lead shot and other pollutants into an adjacent creek, which constitutes a “take” of endangered Coho salmon. The gun club contended the leased property's wetlands were not salmon habitat and no salmon were killed or injured. In considering the ESA's “harm” definition, the court granted defendant's cross-motion for summary judgment, finding the municipality failed to establish any identifiable harm to salmon lead exposure.

5. [Center for Environmental Science Accuracy & Reliability v. National Park Service](#)<sup>63</sup>

The Hetch Hetchy Water and Power Project, located on the Tuolumne River, contains two hydropower facilities. The Tuolumne River flows to the Sacramento-San Joaquin Delta, which is critical habitat for several fish species, including winter-run and spring-run Chinook salmon. Plaintiffs alleged defendants violated ESA section 7 because they approved annual instream flow and other Hetch Hetchy Project operating requirements without first consulting with FWS and/or NMFS and violated NEPA because they failed to prepare an EIS. The court held there was no consultation and thus “no ripe, concrete challenge,” even though ESA requires the “best available science.”<sup>64</sup>

6. [Institute for Fisheries Resources v. Burwell](#)<sup>65</sup>

The Federal Drug Administration (FDA) approved a company's proposal to create genetically-modified salmon. The FDA initially determined the approval “may affect” a listed species, triggering the ESA's consultation requirement; however, the FDA changed its determination to “no effect” at FWS's suggestion.<sup>66</sup> The court granted defendants' motion to dismiss finding FWS's recommendation was not a final APA agency action.

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<sup>58</sup>827 F.3d 836 (9th Cir. 2016).

<sup>59</sup>*Id.* at 865.

<sup>60</sup>No. 1:11-cv-03159-CL, 2016 U.S. Dist. LEXIS 167840 (D. Or. Jul. 25, 2016).

<sup>61</sup>*Id.* at \*4.

<sup>62</sup>*Id.* at \*2, \*4.

<sup>63</sup>No. 1:14-cv-02063-LJO-MJS, 2016 U.S. Dist. LEXIS 115940 (E.D. Cal. Aug. 29, 2016).

<sup>64</sup>*Id.* at \*61.

<sup>65</sup>No. 16-cv-01574-VC, 2016 U.S. Dist. LEXIS 116751 (N.D. Cal. Aug 30, 2016).

<sup>66</sup>*Id.* at \*3-4.

7. [Wild Fish Conservancy v. Irving](#) <sup>67</sup>

NMFS issued a BiOp and incidental take statement (ITS) for the Leavenworth National Fish Hatchery's effects on endangered Chinook salmon and steelhead in Icicle Creek. Plaintiff alleged the BiOp and ITS were arbitrary and capricious, NMFS failed to prepare an EIS, and the BLM and FWS failed to insure hatchery operations did not jeopardize listed species. The court found the following: the BiOp was arbitrary and capricious because NMFS failed to consider potential climate change effects on stream flows in its hatchery's operation and water use analysis; the ITS failed to meet ESA standards because it did not set an adequate take trigger level, lacked adequate take monitoring requirements, and included contradictory provisions; and NMFS was not required to prepare an EIS because BiOp and ITS implementation triggers NEPA, and thus, the action agency, not the consulting agency, is required to prepare an EIS.

B. *Legislative Developments*

Representative Sheila Jackson Lee (D-TX) introduced an [amendment](#) to the SHARE Act bill to strike the exemption to import polar bear trophies taken in sport.<sup>68</sup> Senator Dan Sullivan (R-AK) introduced a [bill](#) that would, among other things, require the Department of the Interior to issue permits to allow a hunter to import polar bear parts (other than internal organs) provided the hunter submits proof the bear was legally harvested from an approved Canadian population before the May 15, 2008.<sup>69</sup> Representative Don Young (R-AK) introduced a similar [bill](#) in the House.<sup>70</sup>

C. *Administrative Developments*

FWS issued a [proposed rule](#) on regulatory program development and local management structures for carrying out the responsibilities under the Agreement between the United States and the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population and title V of the Marine Mammal Protection Act of 1972, as amended.<sup>71</sup> FWS issued a [final rule](#) on the incidental take regulations authorizing the nonlethal, incidental, unintentional take of small numbers of Pacific walrus and polar bears during oil and gas industry activities in the Beaufort Sea and adjacent northern Alaskan coast.<sup>72</sup>

IV. DEEP SEABED MINING, CONTINENTAL SHELF DELINEATION, THE ARTIC, AND OTHER ISSUES UNDER THE 1982 U.N. LAW OF THE SEA CONVENTION

A. *Deep Seabed Mining*

During the twenty-second annual session of the International Seabed Authority (ISA or Authority), contract status for polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts were discussed. As of April 27, 2016, a total of twenty-

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<sup>67</sup>No. 2:14-CV-0306-SMJ, 2016 U.S. Dist. LEXIS 162056 (E.D. Wash. Nov 22, 2016).

<sup>68</sup>H. Amdt. 948 to H.R. 2406, 114th Cong. (2016) (amendment failed by recorded vote).

<sup>69</sup>S. 659, 114th Cong. (2016).

<sup>70</sup>See H.R. 327, 114th Cong. (2016).

<sup>71</sup>Co-Management of Subsistence Use of Polar Bears by Alaska Natives; Conservation of the Alaska-Chukotka Polar Bear Population, 81 Fed. Reg. 78,564 (Nov. 8, 2016) (to be codified at 50 C.F.R. pt. 18).

<sup>72</sup>Marine Mammals; Incidental Take During Specified Activities, 81 Fed. Reg. 52,276 (Aug. 5, 2016) (to be codified at 50 C.F.R. pt. 18).

four “contracts for exploration had entered into force (15 for polymetallic nodules, 5 for polymetallic sulphides and 4 for cobalt-rich ferromanganese crusts).”<sup>73</sup> Since the twenty-first session in July 2015, several new contracts have been signed, including a contract with Companhia de Pesquisa de Recursos Minerais S.A. covering exploration for cobalt-rich ferromanganese crusts and a contract for exploration for polymetallic nodules with the UK Seabed Resources Ltd.<sup>74</sup> Additionally, ISA and the Cook Islands Investment Corporation signed a fifteen-year contract for polymetallic nodules exploration in the Clarion-Clipperton Fracture Zone,<sup>75</sup> and ISA and the Government of India signed a fifteen-year contract for polymetallic sulphides exploration in the central Indian Ocean.<sup>76</sup>

On July 18, 2016, ISA granted six contracts five-year extensions for polymetallic nodules exploration in the Area.<sup>77</sup> The six contractors are: Yuzhmorgeologiya sponsored by the Russian Federation, the Interoceanmetal Joint Organization sponsored by Bulgaria, Cuba, Czech Republic, Poland, the Russian Federation and Slovakia; the Government of the Republic of Korea; the China Ocean Mineral Resources Research and Development Association sponsored by China; Deep Ocean Resources Development Co. Ltd sponsored by Japan; and the Institut français de recherche pour l’exploitation de la mer.<sup>78</sup>

On July 14, 2016, the ISA issued the initial working draft of regulations for exploitation of polymetallic nodules in the deep seabed beyond the limits of national jurisdiction (the Area), “Regulations and Standard Contract Terms on Exploration for Mineral Resources in the Area,” which represents the first phase in the development of comprehensive regulations.<sup>79</sup> ISA requested comments to the draft Regulations by November 25, 2016 and received forty-three comments from stakeholders, including eight governments, ten by Contractors, one by an international organization and nineteen by non-governmental organizations and institutions in response to the draft Regulations.<sup>80</sup> At this time, ISA and International Hydrographic Organization (IHO) also signed an Agreement of Cooperation to specify the scope of cooperation between the IHO and the Authority and help facilitate the exchange of bathymetric survey data, development of compatible digital input in relation to nautical charting requirements, global consistency in the treatment of bathymetric data covering ISA contract areas, development of a global approach to issuance of notices to mariners related to navigational warnings, development of standardized information in nautical publications that draw mariners’ attention to

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<sup>73</sup>[Press Release](#), Int’l Seabed Auth., International Seabed Authority Opens Twenty-Second Annual Session In Kingston With Agenda, Including Development Of Minerals Exploitation Regulations And Elections Of A Secretary-General And New Members Of Various Organs (July 12, 2016).

<sup>74</sup>*Id.*

<sup>75</sup>[Cook Islands Investment Corporation Signs Exploration Contract with the International Seabed Authority](#), INT’L SEABED AUTH. (July 16, 2016).

<sup>76</sup>[The Government of India Signs Exploration Contract with the International Seabed Authority](#), INT’L SEABED AUTH. (Sept. 26, 2016).

<sup>77</sup>[Seabed Council Puts Forward Two Candidates for Election of Secretary-General; Approves Six Exploration Contract Extensions; Begins LTC Election Debate](#), INT’L SEABED AUTH. (July 18, 2016).

<sup>78</sup>[International Seabed Authority 22nd Session \(Background Press Release\)](#), INT’L SEABED AUTH. (July 4, 2016).

<sup>79</sup>[International Seabed Authority Legal and Technical Commission Issues Working Draft Exploitation Regulations](#), INT’L SEABED AUTH. (July 14, 2016).

<sup>80</sup>[Now Online: Comments to Draft Exploration Regulations](#), INT’L SEABED AUTH. (Dec. 3, 2016).

installations used by ISA contractors and development of charting policies that address hazards related to concurrent activities in the ISA contract areas.<sup>81</sup>

## B. *Continental Shelf Delineation*

The Commission on the Limits of the Continental Shelf (Commission) considered numerous member state submissions seeking recognition of claims over extended areas of the continental shelf. During its Fortieth Session, the Commission approved the “Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Iceland in respect of the Ægir Basin area and the western and southern parts of Reykjanes Ridge on 29 April 2009”, with amendments<sup>82</sup> and published [full recommendations](#) on the limits of Argentina’s continental shelf, which were approved by the Commission on March 11, 2016.<sup>83</sup>

During its Forty-first session, the Commission reviewed [several submissions](#), including the following: the Russian Federation regarding the Arctic Ocean; Brazil regarding the Brazilian Southern Region; Uruguay; the Cook Islands concerning the Manihiki Plateau; Norway regarding Bouvetøya and Dronning Maud Land; South Africa concerning the Republic of South Africa’s mainland territory; the Federated States of Micronesia, Papua New Guinea and Solomon Islands, jointly, concerning the Ontong Java Plateau; France and South Africa, jointly, in the area of the Crozet Archipelago and the Prince Edward Islands; Kenya; Mauritius, in the region of Rodrigues Island; Nigeria; and Seychelles, regarding the Northern Plateau Region.<sup>84</sup>

In August, “the Commission approved, without a vote, the ‘Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by the Oriental Republic of Uruguay on 7 April 2009’” and “‘Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by the Cook Islands in respect of the Manihiki Plateau on 16 April 2009’, with amendments.”<sup>85</sup> The Argentine Republic submitted the only [partial revised submission](#), and it will be included on the Commission’s forty-third session agenda.<sup>86</sup>

## C. *Arctic Developments*

In 2016, the United States remained Chair of the Arctic Council. The United States theme for its chairmanship is “One Arctic: Shared Opportunities, Challenges and Responsibilities.”<sup>87</sup> The goals for the United States chairmanship remain the same: (1)

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<sup>81</sup>[International Seabed Authority and the International Hydrographic Organization Sign Agreement of Cooperation](#), INT’L SEABED AUTH. (July 14, 2016).

<sup>82</sup>Comm’n on the Limits of the Cont’l Shelf, [Progress of work in the Commission on the Limits of the Continental Shelf](#), 40th Sess., N.Y., Feb. 1-Mar. 18, 2016, U.N. Doc. CLCS/93 (Apr. 18, 2016).

<sup>83</sup>Comm’n on the Limits of the Cont’l Shelf, Summary of Recommendation of the Commission on the Limits of the Continental Shelf, Subcomm. of Submission Made by Arg., 24th Sess. (2016).

<sup>84</sup>Comm’n on the Limits of the Cont’l Shelf, [Progress of work in the Commission on the Limits of the Continental Shelf](#), 41st Sess., N.Y., July 11-Aug., 2016, U.N. Doc. CLCS/95 (Sept. 21, 2016).

<sup>85</sup>*Id.*

<sup>86</sup>Comm’n on the Limits of the Cont’l Shelf, Partial Revised Submission by Argentina, 24th Sess. (updated Nov. 4, 2016).

<sup>87</sup>[U.S. Chairmanship of the Arctic Council](#), U.S. ST. DEP’T (2015).

Improving Economic and Living Conditions in Arctic Communities; (2) Arctic Ocean Safety, Security and Stewardship; and (3) Addressing the Impacts of Climate Change.<sup>88</sup>

In its [Midterm Update](#), the United States published its list of accomplishments including: the release of procedures for the safe operation of unmanned aircraft systems in the Arctic; advancing emergency preparedness by exercising the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic and the Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic; and expansion of its observer manual for greater observer engagement.<sup>89</sup> For the remainder of the year, the Council plans to: have a legally-binding agreement to enhance scientific cooperation in the Arctic ready for signature by Ministers at the Fairbanks Ministerial in 2017; develop a report of black carbon and methane emissions from both Arctic and non-Arctic states; and develop a new Arctic Resilience Framework to establish shared priorities for building resilience in the Arctic.<sup>90</sup>

On December 9, 2016, President Barack Obama issued an [Executive Order](#) (Order) establishing a Northern Bering Sea Climate Resilience Area.<sup>91</sup> The purpose of the Order is to protect an area encompassing 112,300 square miles that represents a hugely productive, high-latitude ocean ecosystem and supports one of the largest seasonal marine mammal migrations in the world.<sup>92</sup> The Area is delineated to focus a collection of protections related to oil and gas, shipping and fishing. According to the [Fact Sheet](#),<sup>93</sup> the Order also established an inter-agency Task Force to coordinate Federal activities in this area to enhance ecosystem and community resilience, conserve natural resources, and protect the cultural and subsistence values this ecosystem provides for Alaskan native communities. The Order is accompanied by \$37 million in private philanthropic funds over the next three years to build in-region capacity of indigenous-led organizations and emerging leaders across the Arctic, among other purposes.<sup>94</sup>

Specifically, with respect to oil and gas development, the Order reiterates that President Obama has withdrawn 40,300 square miles from the Norton basin planning area and portions of the St. Matthew-Hall planning area from future oil and gas leasing in order to protect the regional ecosystem and coastal communities. This decision was previously announced by Secretary of the Interior Sally Jewell on November 18, 2016 in [the final five-year Obama Administration Offshore Oil and Gas Leasing Plan for 2017-2022](#).<sup>95</sup> The final plan offered eleven potential lease sales, including one sale off the coast of Alaska in the Cook Inlet Program Area. The Secretary decided not to include the Beaufort and Chukchi Seas planning areas in the Arctic in the final plan.<sup>96</sup> This decision was ratified by President Obama when, on December 20, 2016, using his authority under Section 12 (a) of the Outer Continental Shelf Lands Act,<sup>97</sup> he permanently withdrew from leasing the Beaufort Sea

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<sup>88</sup>*Id.*

<sup>89</sup>U.S. STATE DEP'T, U.S. CHAIRMANSHIP OF THE ARCTIC COUNCIL MIDTERM UPDATE (2016).

<sup>90</sup>*Id.*

<sup>91</sup>Off. of the Press Sec'y, Executive Order—Northern Bering Sea Climate Resilience (Dec. 9, 2016).

<sup>92</sup>*Id.*

<sup>93</sup>Off. of the Press Sec'y, Fact Sheet: White House Announces Actions to Protect Natural and Cultural Resources in Alaskan Arctic Ocean (Dec. 9, 2016).

<sup>94</sup>*Id.*

<sup>95</sup>U.S. Dept. of Int., Secretary Jewell Announces Offshore Oil and Gas Leasing Plan for 2017-2022 (Nov. 18, 2016).

<sup>96</sup>*Id.*

<sup>97</sup>43 U.S.C. § 1341(a) (2017).

and Chukchi Sea Planning Areas.<sup>98</sup> Existing leases in both areas were protected from the withdrawals.

#### D. *Implementation of the Polar Code*

The United States Coast Guard is making plans to implement the new International Code for Ships Operating in Polar Waters, referred to as the [Polar Code](#) enacted through IMO Resolutions MSC.386(94) and MEPC.265(68).<sup>99</sup> Due to the varying completion dates of these amendments the SOLAS-related provisions found in Part I-A of the Polar Code will become effective for all newly constructed ships built on or after January 1, 2017; the MARPOL-related provisions found in Part II-A also become effective on that date.<sup>100</sup> On January 1, 2018, ships constructed before January 1, 2017, will be required to comply with the SOLAS-related provisions contained in Part I-A; and, finally, on July 1, 2018, the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW) amendments for training of personnel employed on ships operating in polar waters will enter into force.<sup>101</sup>

On November 22, 2016, the Coast Guard issued a notice of proposed rulemaking to add a new Polar Ship Certificate to the list of existing certificates required to be carried on board all United States and foreign-flagged vessels subject to SOLAS and operating in Arctic and Antarctic waters, generally above sixty degrees north latitude and below sixty degrees south latitude.<sup>102</sup> The proposed rule would apply to commercial cargo ships greater than 500 gross tons, and passenger ships carrying more than twelve passengers when these ships operate within polar waters.<sup>103</sup> Comments on the proposed rule were due on December 22, 2016.

#### E. *1982 Law of the Sea Convention*

On July 12, 2016, an arbitral panel sitting in The Hague issued a significant ruling in the *South China Sea Arbitration (The Republic of the Philippines v. the People's Republic of China)* interpreting UNCLOS for those nations who are party to it. The United States is not a party, and due to Republican opposition not likely to become one anytime soon. In the South China Sea ruling, a unanimous five-member panel of Permanent Court of Arbitration (PCA) ruled that China, as a party to UNCLOS, was bound by the maritime boundaries established under UNCLOS, including the 12 nm territorial sea and the 200 nm Exclusive Economic Zone (EEZ) provisions, and therefore could not avoid the arbitration by a claim of sovereignty or establish legitimate claims to rocks and other outcroppings in the South China Sea simply by claiming they had historic rights to those rocks.<sup>104</sup> The arbitration was brought to the tribunal by the Philippines as a result of China's alleged interference with traditional Philippine fishing activities at Scarborough Shoal, an island in the South China Sea.

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<sup>98</sup>Off. of the Press Sec'y, [Presidential Memorandum](#) - Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing (Dec. 20, 2016).

<sup>99</sup>Lt. Chris Rabalais, *12/6/2016: Polar Code—Entry into Force*, THE COASTGUARD BLOG FOR MAR. PROFS. (Dec. 6, 2016).

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

<sup>102</sup>Adding the Polar Ship Certificate to the List of SOLAS Certificates and Certificates Issued by Recognized Classification Societies, 81 Fed. Reg. 83,786 (Nov. 16, 2016) (to be codified at 46 C.F.R. pts. 2 and 8).

<sup>103</sup>*Id.*

<sup>104</sup>[The Republic of the Phil. v. The People's Republic of China](#), PCA Case No. 2014-19 (Perm. Ct. Arb. 2016).

As a threshold matter, the PCA ruled that they had jurisdiction over the dispute under UNCLOS because it pertained to maritime boundaries to which both nations had agreed. The PCA then ruled that protections for pre-existing rights to resources were not adopted in the Convention, and therefore any rights that China claimed to the resources and waters of the South China Sea were extinguished by the entry into force of the Convention and were incompatible with the Convention's system of maritime zones. The islands were temporary outcroppings, not areas that generated either an EEZ or continental shelf. The PCA also ruled that China violated the traditional fishing rights of Philippine fishermen by halting their access to Scarborough Shoal and through its large-scale land reclamation and construction of artificial islands in the Spratly Islands, had caused severe harm to the coral reef environment, thus violating China's obligations under UNCLOS to preserve and protect the marine environment. China did not participate in the proceedings and the PCA cannot enforce this award. In October 2016, Philippine President Rodrigo Duterte decided to enter into bilateral talks with China.<sup>105</sup>

## V. COASTAL ZONE MANAGEMENT ACT AND MARINE SPATIAL PLANNING

### A. *Judicial Developments*

In *Pacificans for a Scenic Coast v. California Department of Transportation*,<sup>106</sup> the district court addressed whether the California Department of Transportation's (Caltrans) proposed widening of Highway 1 in Pacifica violated the Coastal Zone Management Act (CZMA). Caltrans had assumed the Federal Highway Administration's (FHA) CZMA obligations, the project affected California's coastal zone, and Caltrans did not submit a consistency determination to the relevant state agency pursuant to CZMA. The court held Caltrans' highway widening project approval, acting in its FHA assumed role, was not subject to CZMA because CZMA applies only to federal agency activity, which does not include federal license or permit issuance or granting of federal assistance to applicant agencies. The project's environmental approval only consisted of issuing licenses, permits, and approvals for the project.

### B. *Administrative Developments*

On November 8, 2016, NOAA published a Notice of Proposed Rulemaking and request for comments seeking to revise CZMA change regulations, associated guidance, and a guidance Addendum in order to develop a more efficient process for making changes to state coastal management programs. The Proposed Rule removes unnecessary requirements in the current regulations, establishes program change documentation all states would adhere to, continues to ensure federal agencies and the public have an opportunity to comment on a state's proposed change to its management program, and ensures compliance with CZMA requirements and other applicable federal law.<sup>107</sup>

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<sup>105</sup>Jane Perlez, [Rodrigo Duterte and Xi Jinping Agree to Reopen South China Sea Talks](#), N.Y. TIMES (Oct. 20, 2016).

<sup>106</sup>No. 15-cv-02090-VC, 2016 WL 4585768 (N.D. Cal. Sept. 2, 2016).

<sup>107</sup>[Changes to the Coastal Zone Management Act Program Change Procedures](#), 81 Fed. Reg. 78,514 (Nov. 8, 2016) (to be codified at 15 C.F.R. pt. 923).

### C. *Marine Spatial Planning Developments*

On December 7, 2016, the National Ocean Council, created in 2010 by Executive Order 13547, announced it finalized the Nation's first ocean plans – “a historic collaboration among states, tribes, Federal agencies, and ocean stakeholders.”<sup>108</sup>

The first approved ocean plans are the [Northeast Ocean Plan](#) and the [Mid-Atlantic Ocean Action Plan](#).<sup>109</sup> The Plans create data portals to allow scientists, stakeholders, and the public to obtain and use information about the marine environment and engage in decision-making processes such as NEPA. In the Northeast, Federal agencies are expected to use the Plan to inform dredging and Federal navigation projects, develop additional regional commercial and recreational fisheries maps and data, and improve outreach to stakeholders related to renewable energy development. In the Mid-Atlantic, Federal agencies will use the Plan to improve consultations with regional Native American tribes, support aquaculture siting and permitting, and engage fishing communities in planning and environmental offshore sand-mining review.

## VI. OFFSHORE WIND ENERGY

### A. *Judicial Developments*

#### 1. [Fisheries Survival Fund v. Jewell](#)

In the first federal offshore wind energy lease sale challenge, a coalition of fishing advocates, local towns, and municipalities in New Jersey, New York, and Rhode Island filed suit in the Federal District Court for the District of Columbia seeking to enjoin the United States Department of the Interior's Bureau of Ocean Energy Management (BOEM) from issuing a commercial wind energy lease approximately eleven miles offshore of the New York.<sup>110</sup> Plaintiffs' allege BOEM failed to adequately solicit input from the fishing industry and other affected stakeholders regarding the proposed site's suitability for wind development and to identify potential alternative lease locations. Plaintiffs also allege the National Environmental Policy Act requires BOEM to prepare a full environmental impact statement (EIS) considering the effects of a potential project on the lease area prior to issuing a lease. Because the current BOEM lease issuance procedure is now a cornerstone of the United States offshore wind leasing and development process, a decision unfavorable to BOEM may jeopardize other offshore wind leases.

#### 2. [Public Employees for Environmental Responsibility v. Hopper](#)

In the most recent federal court decision related to the United States Department of the Interior's 2011 Cape Wind project approval, the D.C. Circuit Court of Appeals reversed a 2013 Federal District Court decision upholding the validity of the project's EIS.<sup>111</sup> The Court found BOEM's EIS deficient because the agency should have obtained and considered certain geophysical and geological information relating to seafloor hazards

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<sup>108</sup>Christy Goldfuss & John P. Holdren, [The Nations' First Ocean Plans](#), THE WHITE HOUSE PRESIDENT BARACK OBAMA (Dec. 7, 2016, 9:02 AM).

<sup>109</sup>[The Northeast Ocean Plan](#), NORTHEAST REGIONAL PLAN. BODY (last visited Feb. 7, 2017); [Your Ocean Plan](#), MID-ATLANTIC REGIONAL COUNCIL ON THE OCEAN (last visited Feb. 7, 2017).

<sup>110</sup>*Fisheries Survival Fund v. Jewell*, No. 1:1-CV-02409 (D.D.C. Dec. 8, 2016) (BOEM held an auction to sell the lease on December 15, 2016, and Statoil Wind US, LLC submitted the winning \$42 million bid).

<sup>111</sup>[Public Emps. for Env'tl. Resp. v. Hopper](#), 827 F.3d 1077 (D.C. Cir. 2016).

before approving the project. The Court vacated the EIS and enjoined project construction until BOEM adequately supplements the EIS with the necessary shallow hazard information, but left Cape Wind's federal lease intact. The Court also invalidated the second incidental take statement (ITS) the United States Fish and Wildlife Service (FWS) prepared for the project addressing impacts to threatened and endangered birds.<sup>112</sup> The District Court previously invalidated FWS' ITS because the agency failed to expressly affirm that certain mitigation measures were unnecessary to protect bird populations.<sup>113</sup> The Appeals Court vacated the revised ITS because FWS failed to properly consider environmental groups' input on the revised draft.<sup>114</sup>

### 3. [Town of Barnstable v. O'Connor](#)

On February 14, 2014, the Town of Barnstable, Massachusetts and other Cape Cod organizations brought suit in the District Court for the District of Massachusetts against the Massachusetts Department of Public Utilities, Cape Wind, and NSTAR, [alleging that a power purchase agreement between Cape Wind and NSTAR had been coerced by state officials in violation of the Commerce Clause of the United States Constitution and the Federal Power Act](#).<sup>115</sup> However, during the pendency of the case,<sup>116</sup> NSTAR terminated the power purchase agreement due to Cape Wind's default on a financing milestone, [rendering the case moot](#).<sup>117</sup>

## B. *Federal and State Project Updates*

### 1. Block Island Wind Project

On December 12, 2016, Deepwater Wind, LLC's 30 MW Block Island Offshore Wind Project, located in Rhode Island state waters about 2.5 nautical miles southeast of Block Island, started generating electricity, making it the first operational offshore wind project in the United States.<sup>118</sup>

### 2. New Jersey Demonstration Project

On May 3, 2016, New Jersey Governor Chris Christie vetoed [S-988](#), a bill that would have allowed Fishermen's Energy, LLC to go forward with its plans to construct a 25 MW five turbine demonstration project in state waters approximately 2.5 miles off the New Jersey

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<sup>112</sup>*Id.* at 1081-82.

<sup>113</sup>See [Public Emps. for Envtl. Resp. v. Beaudreau](#), 25 F. Supp. 3d 67 (D.D.C. 2014).

<sup>114</sup>*Hopper*, 827 F.3d at 1088, 1090.

<sup>115</sup>*Town of Barnstable v. O'Connor*, No. 1:14-cv-10148-RGS (D. Mass. Jan. 21, 2014) (no written opinion available).

<sup>116</sup>See [Town of Barnstable v. Berwick](#), 17 F. Supp. 3d 113 (D. Mass. 2014), *rev'd sub nom.* *Town of Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015).

<sup>117</sup>See [Motion to Alter Judgment](#), *Town of Barnstable v. O'Connor*, No. 1:14-cv-10148-RGS, at 2-3 (D. Mass. Filed Feb. 17, 2016) (discussing termination of the power purchase agreement). The cancellation of the PPA with NSTAR also resulted in the dismissal of a state case challenging Cape Wind's transmission line permits; See *Cape Wind Assocs., LLC v. Energy Facilities Siting Bd.*, No. SJ-2016-12161 (Mass. Aug. 25, 2016).

<sup>118</sup>See Tatiana Schlossberg, [America's First Offshore Wind Farm Spins to Life](#), N.Y. TIMES (Dec. 14, 2016).

coast.<sup>119</sup> The project has suffered numerous setbacks over the years, including repeated rejection by the New Jersey State Board of Public Utilities.<sup>120</sup>

### 3. Maryland Renewable Energy Credits

On November 21, 2016, the Maryland Public Service Commission initiated review of two applications for a \$1.9 billion offshore renewable energy credit (OREC) authorized by the [2013 Maryland Offshore Wind Energy Act \(“Act”\)](#).<sup>121</sup> The winner will be virtually guaranteed purchasers for the power it generates. The applicants are US Wind, Inc., which holds a federal lease offshore Ocean City, Maryland, and Skipjack Offshore Energy, LLC, a subsidiary of Deepwater Wind Holdings, LLC,<sup>122</sup> which is in the process of [acquiring NRG Bluewater Wind, LLC’s federal lease offshore Delaware](#).<sup>123</sup>

### 4. Virginia Research Lease

On March 24, 2016, [BOEM approved the State of Virginia’s Department of Mines, Minerals and Energy’s Research Activities Plan for the research lease it acquired in 2015, authorizing installation of two 6-MW turbines on the lease](#).<sup>124</sup>

### 5. North Carolina Proposed Sale

On August 12, 2016, BOEM issued a [proposed sale notice](#) to sell one commercial wind energy lease offshore Kitty Hawk, North Carolina.<sup>125</sup> BOEM is currently determining whether to hold a competitive sale in the lease area.

### 6. Florida Lease Relinquishment

On May 31, 2016, Florida Atlantic University’s Southeast National Marine Renewable Energy Center (FAU) applied to relinquish its federal research lease offshore Florida. BOEM has not yet approved the relinquishment.<sup>126</sup>

### 7. California Competition

On January 14, 2016, Trident Winds, LLC submitted an [unsolicited application for a commercial wind energy lease offshore California](#), which included a proposal to construct

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<sup>119</sup>See [Tom Johnson, Christie Sinks Wind Turbines off Jersey Shore for Second Time](#), N.J. SPOTLIGHT (May 3, 2016).

<sup>120</sup>See Tom Johnson, [BPU Blocks Offshore Wind Project for Second Time](#), N.J. SPOTLIGHT (Nov. 25, 2014).

<sup>121</sup>See [Maryland Public Service Commission Starts Reviewing Offshore Wind Applications](#), OFFSHORE WIND (last visited Feb. 7, 2017); [Background](#), OFFSHORE WIND ENERGY RFP (last visited Feb. 7, 2017).

<sup>122</sup>See Barry Cassell, [Deepwater Wind Seeks Maryland Approval for 120-MW Skipjack Offshore Project](#), RENEWABLE ENERGY WORLD (Dec. 5, 2016).

<sup>123</sup>See [Delaware Activities](#), BOEM (last visited Feb. 7, 2017).

<sup>124</sup>[Virginia Offshore Wind Technology Advancement Project \(VOWTAP\)](#), BOEM (last visited Feb. 7, 2017).

<sup>125</sup>Atlantic Wind Lease Sale 7 (ATLW-7) for Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore North Carolina (Kitty Hawk)—Proposed Sale Notice and Request for Interest; MMAA104000, 81 Fed. Reg. 54,591 (Aug. 15, 2016).

<sup>126</sup>[Florida Activities](#), BOEM (last visited Mar. 6, 2017).

a floating wind turbine array.<sup>127</sup> Statoil Wind US, LLC [subsequently expressed competitive interest in acquiring the same lease area](#). BOEM will determine whether, and under what circumstances, to competitively issue a lease in the proposed area.

## 8. Hawaii Competition

In response to [multiple indications of interest](#) in acquiring commercial wind leases offshore Oahu, Hawaii, on June 24, 2016, BOEM [issued a Call for Information and Nominations \(“Call”\)](#) to gauge competitive interest in the proposed lease areas and to seek public input on potential site conditions, resources, existing uses, and environmental impacts. BOEM has determined that competition exists, and is [preparing for a competitive lease sale](#).<sup>128</sup>

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<sup>127</sup>[California Activities](#), BOEM (last visited Feb. 7, 2017).

<sup>128</sup>[Hawaii Activities](#), BOEM (last visited Feb. 7, 2017).