Natural Resources, Energy, and Environmental Law

1993

The Year in Review

Section of Natural Resources, Energy, and Environmental Law
American Bar Association
and
The National Energy Law & Policy Institute
University of Tulsa College of Law

MARINE RESOURCES COMMITTEE[1]
1993 Annual Report

I. Coastal Zone Management Act (CZMA)[2]

A. *Judicial Developments*

In *New York v. United States General Services Administration*[3], the State of New York brought an action to require the General Services Administration (GSA) to provide a consistency determination for its sale of a riverfront single family dwelling. The State sought to obtain from the court a preliminary injunction requiring the GSA to make the determination. However, the Court rejected this request, finding that the State had not made the requisite showings for an injunction, such as showings of irreparable injury, likelihood of prevailing on the merits, and balance of hardships. The court found that the sale was not a "federal development project" affecting the State's coastal zone within the meaning of the CZMA so as to require a consistency determination.

B. *Legislative Developments*

The Commerce, Justice, State Appropriations Act for Fiscal Year 1994 provides that grants to the states for administering the state's coastal zone management program (CZMP) under section 306 of the CZMA shall not exceed $2 million and shall not be less than $500,000.[4]

C. *Administrative Developments*

The National Oceanic and Atmospheric Administration (NOAA) issued its final rule on National Estuarine Research Reserve (NERR) System Programs.[5] Pursuant to the CZMA amendments of 1990, this rule establishes regulations for designating, operating, and funding NERRs.

NOAA also issued draft guidance on the public participation requirements of state CZMPs.[6] In addition, NOAA approved certain CZMPs,[7] found some CZMPs to be inadequate,[8] and issued notices of intent to evaluate others.[9]

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[2]16 U.S.C. §§ 1451-64 (1988 & Supp. IV 1992).

[3]823 F. Supp. 82 (N.D.N.Y. 1993).

[4]Pub. L. 103-121, 107 Stat. 1153 (Oct. 27, 1993).

[5]58 Fed. Reg. 38,214 (1993)(to be codified at 15 C.F.R. pt. 921).

[6]58 Fed. Reg. 58,840 (1993).

[7]58 Fed. Reg. 46,630 (1993) (Rhode Island and Oregon); 58 Fed.Reg. 4,982 (1993)(Guam).

[8]58 Fed. Reg. 46,630 (1993) (Tijuana River, Sapelo Island, and Jobos Bay NERRs); 58 Fed. Reg. 4,982 (1993) (Waimanu Valley NERR).

[9]58 Fed. Reg. 68,390 (1993) (Alabama and Hawaii); 58 Fed. Reg. 50,349 (1993) (South Carolina, Connecticut, Washington and Puerto Rico); 58 Fed. Reg. 42,054 (1993) (New Hampshire, Chesapeake Bay (Maryland), and Great Bay (New Hampshire); 58 Fed. Reg. 21,705 (1993) (Maine and Rookery Bay NERR); 58 Fed. Reg. 12,361 (1993) (Mississipi and North Carolina).

The Secretary of Commerce heard a number of significant consistency appeals in 1993, including three appeals involving oil & gas development on the outer Continental Shelf in the eastern Gulf of Mexico offshore of Florida. In *In the Consistency Appeal of Union Exploration Partners, LTD with Texaco Inc. from an Objection by the State of Florida*[10] and *In the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida*,[11] the Secretary sustained consistency objections filed by the State of Florida to Plans of Exploration (POE) for Pulley Ridge Area oil & gas leases. In both cases, the secretary found the POEs may not proceed as proposed because they may, in combination with other projects, cause adverse effects on the natural resources of Florida's coastal zone, substantial enough to outweigh their contribution to the national interest.

In another Florida offshore oil & gas matter, the secretary rejected a consistency objection for a POE filed by Chevron for a Destin Dome Block lease. The secretary allowed the Chevron POE to proceed because he found that (1) the project furthers the development of OCS reserves; (2) the project will not cause adverse environmental effects; (3) the project will not violate the Clean Air Act or the Federal Water Pollution Control Act; and (4) there is no reasonable alternative that would allow development of the leases in a manner consistent with Florida's coastal management program.

II. Marine Mammal Protection Act (MMPA)[12]

A. *Judicial Developments*

In *United States v. Hayashi*,[13] the court held that the MMPA did not make it a crime to take reasonable steps to deter porpoises from eating fish or bait off a fisherman's line. Hayashi was fishing off a coast of Hawaii, when a group of porpoises began to eat the bait off of Hayashi's lines, he fired two rifle shots into the water behind the porpoises, in an attempt to scare them away. Hayashi was charged with knowingly "taking" a marine mammal in violation of the MMPA, 16 U.S.C. section 1372(a)(2)(A), even though the shots did not hit the porpoises. The MMPA declares it unlawful for any person to "take" a marine mammal in U.S. waters. The term "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill, any marine mammal. The court held that Hayashi's actions did not constitute harassment. "Hayashi's conduct was not the kind of direct, sustained disruption of a porpoise's customary pursuits required to find a criminal 'taking.' Reasonable acts to deter porpoises from eating fish or bait off a fisherman's lines are not criminal under the MMPA."[14]

In another harassment-taking case, the court in *Strong v. United States*[15] held that feeding wild dolphins could disturb their normal behavior, and, thus, was harassment. Although "to feed" is not among the dictionary definitions of "harass," the word "disturb" is synonymous with "harass" and there is substantial scientific evidence that feeding wild dolphins disturbs their normal behavior and may make them less able to search for food on their own.

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[10]1993 NOAA LEXIS 3 (Jan. 7, 1993).
[11]1993 NOAA LEXIS 3 (Jan. 7, 1993).
[12]16 U.S.C.A. §§ 1361-1407 (1985 & Supp. 1993).
[13]5 F.3d 1278 (9th Cir. 1993).
[14]*Id.* at 1283.
[15]5 F.3d 905 (5th Cir. 1993).

In *Public Citizen v. Office of the United States Trade Representative*,[16] various environmental organizations brought an action to compel the Office of the United States Trade Representative to produce an environmental impact statement on the effects of the North American Free Trade Agreement ("NAFTA") before the President submitted it to Congress for ratification. The court held that the National Environmental Policy Act[17] requires the Office of the U.S. Trade Representative to prepare an environmental impact statement on NAFTA. The court held that the plaintiff environmental groups had standing because NAFTA would result in changes to federal and state law and policy, and effect a variety of health and environmental matters, and that these changes would have an environmental impact on the plaintiffs. As an example of a conflict between a treaty and a federal law, the court pointed out that "the Marine Mammal Protection Act impermissibly restricts Mexican trade in violation of [the General Agreement on Tariffs and Trade]."[18]

B. *Legislative Developments*: No major developments.

C. *Administrative Developments*

The National Marine Fisheries Service (NMFS) issued a final rule designating the coastal-migratory stock of bottlenose dolphins along the U.S. Mid-Atlantic coast as depleted under the MMPA. This designation requires the application of certain restrictions on taking and importation, and the preparation and implementation of a conservation plan to restore the stock to its optimum sustainable population level.[19] In another final rule, the NMFS determined that the northeastern stock of offshore spotted dolphin is below its maximum net productivity level and, therefore, is depleted as defind by the MMPA.[20] The NMFS issued a final rule intended to reduce the mortality rate of dolphins in the U.S. purse seine fishery for tuna in the eastern tropical Pacific Ocean.[21]

The NMFS also issued proposed regulations authorizing the taking of bottlenose and spotted dolphins incidental to the removal of oil and gas drilling and production structures from 1993 through 1997.[22] Similarly, the Fish and Wildlife Service issued a final rule that will authorize the incidental, unintentional taking of small numbers of polar bears and walruses resulting from oil and gas industry operations in certain areas of Alaska.[23] The NMFS issued a final rule governing the taking of ring seals incidental to certain oil and gas exploratory activities in the Beaufort Sea from 1993 through 1997.[24]

The NMFS withdrew a proposed rule that provided guidelines for the close approach of marine mammals by vessels and persons in order to conduct a comprehensive evaluation of the numerous comments received and to consider alternatives for addressing this problem.[25]

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[16]822 F. Supp. 21 (D.D.C. 1993).

[17]42 U.S.C. § 4321 (1988 & Supp. 1991).

[18]*Public Citizen*, 822 F. Supp. at 28, n.8.

[19]58 Fed. Reg. 17,789 (1993) (to be codified at 50 C.F.R. pt. 216).

[20]58 Fed. Reg. 58,285 (1993)(to be codified at 50 C.F.R. pt.216).

[21]58 Fed. Reg. 63,536 (1993) (to be codified at 50 C.F.R. pt. 216). *See also* 58 Fed. Reg. 29,127 (1993) (interim final rule).

[22]58 Fed. Reg. 33,425 (1993)(to be codified at 50 C.F.R. pt. 228).

[23]58 Fed. Reg. 60,402 (1993) (to be codified at 50 C.F.R. pt. 18, subpt. J).

[24]58 Fed. Reg. 4091 (1993) (to be codified at 50 C.F.R. pt. 228).

[25]58 Fed. Reg. 16,519 (1993).

The NMFS also issued final estimates for subsistence fur seal harvest on the Pribilof Islands.[26]

Finally, the NMFS proposes to define the word "import" as it pertains to the regulations restricting exports to the U.S. of yellowfin tuna and certain other fish and fish products, for purposes of limiting mortality to marine mammals incidentally taken during commercial fishing operations. The definition is intended to clarify that for purposes of the fish importation restrictions of the MMPA, fish or fish products are considered "imported" only when released from a nation's Customs custody, not immediately upon introduction into a nation's territory.[27]

III. Magnuson Fishery Conservation and Management Act (MFCMA)

A. *Judicial Developments*

In *Conservation Law Foundation v. Franklin*,[28] the First Circuit held that the Secretary of Commerce could enter into a consent decree to "eliminate" overfishing of cod, yellowtail flounder, and haddock in New England waters without prior public notice and comment. Section 1854(c) of the MFCMA, which requires notice and comment if the Secretary develops a fishery management plan (FMP), was held not to apply because the consent decree merely required the creation of a new amendment to the FMP. In addition, although the consent decree commits the Secretary to develop a FMP to "eliminate" overfishing, rather than "prevent" overfishing as stated in the MFCMA, it did not result in rule making or establish a new standard.

In *United States v. F/V Alice Amanda*,[29] the Fourth Circuit held that the National Marine Fisheries Service (NMFS) was arbitrary and capricious in applying its Atlantic Sea Scallops Fishery regulations. The Government alleged that a vessel's catch of scallops violated minimum size limits for scallops "frozen" at sea. However, because the regulations were based on "iced" scallops, the NMFS failed to consider relevant factors in applying the regulations.

In *Vietnamese Fishermen Ass'n of America v. California Department of Fish & Game*,[30] the court held that federal regulations under the Pacific Coast Groundfish Plan, regulating the use of gill nets for ground fish in specified federal waters, preempted similar California regulations. California adopted an amendment to its Constitution, in part to regulate, and eventually ban, the use of gill and trammel nets in California waters.[31] The California Department of Fish and Game attempted to apply the amendment out to 200 nautical miles from the California coast.

B. *Legislative Developments*: No significant developments.

C. *Administrative Developments*

Many of the final rules published by NOAA during 1993 involved amendments to existing regulatory programs. Of these final rules, a significant number involved

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[26]58 Fed. Reg. 42,027 (1993).

[27]58 Fed. Reg. 59,007 (1993)(to be codified at 50 C.F.R. pt. 216)(proposed Nov. 5, 1993).

[28]989 F.2d 54 (1st Cir. 1993).

[29]987 F.2d 1078 (4th Cir. 1993).

[30]816 F. Supp. 1468 (N.D. Cal. 1993).

[31]Proposition 132, Marine Resources Protection Act of 1990, Cal. Const. art. XB, § 4(a).

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I. COASTAL ZONE MANAGEMENT ACT (CZMA)[2]

A. *Judicial Developments*

In *Lucas v. South Carolina Coastal Council*,[3] a majority of the U.S. Supreme Court held that South Carolina's Beachfront Management Act, which is part of the state's federally-approved Coastal Management Program, constitutes a regulatory taking of beachfront property if the intended development is otherwise lawful under preexisting common law principles of property and nuisance. The Court held that there is a "categorical rule" of regulatory takings which requires compensation whenever a regulation totally deprives a property owner of all economic value of the property.[4] According to the Court, the South Carolina Supreme Court was "too quick to conclude" that the Act fell within the narrow exception to the categorical rule where a property use constitutes a common law nuisance. While the Court remanded the case to South Carolina state court for an application of South Carolina common law, the majority opinion expressly found it "unlikely" that the Act would survive this stringent regulatory takings standard on remand.[5]

In *Conoco Inc. v. United States*,[6] discussed below in connection with the Outer Continental Shelf Lands Act, holders of offshore oil and gas leases filed suit against the federal government in the Court of Claims. The lessees claimed damages based on obstacles to lease development, including, among other things, CZMA requirements.

B. *Legislative Developments:* No significant developments.

C. *Administrative Developments*

The National Oceanic and Atmospheric Administration (NOAA) adopted its first set of regulations implementing the Coastal Zone Management Act Reauthorization Amendments of 1990.[7] These amendments required NOAA and the Environmental Protection Agency (EPA) to develop programs designed to assist states in developing and implementing their own coastal protection programs. The 1992 NOAA regulations establish criteria for making coastal zone enhancement grants to states. In addition, the regulations revise procedures by which NOAA evaluates state coastal management programs and national estuarine research reserves, and establish procedures governing interim sanctions that can be imposed

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[2]16 U.S.C. §§ 1451-64 (1992).

[3]112 S.Ct. 2886 (1992).

[4]*Id.* at 2893-94.

[5]*Id.* at 2901.

[6]Case No. 92-331 C (Cl. Ct. 1992).

[7]57 Fed. Reg. 31,105 (July 14, 1992) (to be codified at 15 C.F.R. §§ 928, 932).

Prior to enactment of the IDCA, the National Marine Fisheries Service (NMFS) issued an interim final rule clarifying the definition of "intermediary nation" for purposes of the moratorium provisions of the MMPA.[30] The IDCA, however, amends the MMPA definition of "intermediary nation," and the NMFS has recently used this definition in reconsidering previously imposed embargoes.[31]

The NMFS issued a proposed rule permitting the incidental taking of ringed seals during oil and gas on-ice seismic operations offshore Alaska.[32] The NMFS also issued proposed rules designating certain dolphin stocks[33] as depleted under the MMPA,[34] and is considering adding additional stocks to the list.[35]

The NMFS also issued a proposed rule for regulations protecting whales, dolphins and porpoises by establishing minimum approaching distances for people, vessels and aircraft.[36] With respect to seals and sea lions, the NMFS published proposed draft guidelines to govern minimum approaching distances,[37] having concluded that there is not a present, demonstrated need for regulation.

Finally, the NMFS has given notice[38] of its intention to initiate the first comprehensive examination of its permit program for scientific research and public display of marine mammals since the passage of the MMPA and issuance of the permit regulations in 1974.[39]

IV. Endangered Species Act (ESA)[40]

A. *Judicial Developments*

In *Lujan v. Defenders of Wildlife,*[41] the U.S. Supreme Court ruled that members' interests in observing or studying endangered species are not enough to give environmental groups standing to challenge a regulation under the ESA. Various environmental groups brought an action challenging an interpretation of the Secretary of the Interior that federal agencies need not consult the Interior and Commerce departments before funding projects in foreign countries that may affect endangered species. The court ruled that the intent of members to revisit project sites at some indefinite future time, where they will presumably be deprived of the

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[30]57 Fed. Reg. 41,701 (Sept. 11, 1992) (to be codified at 50 C.F.R. § 216).

[31]57 Fed. Reg. 59,979 (Dec. 17, 1992) (to be codified at 50 C.F.R. § 228).

[32]57 Fed. Reg. 42,538 (Sept. 15, 1992) (to be codified at 50 C.F.R. § 228); 57 Fed. Reg. 51,171 (Nov. 3, 1992) (to be codified at 50 C.F.R. § 228).

[33]57 Fed. Reg. 27,010 (June 17, 1992) (the eastern spinner dolphin); 57 Fed. Reg. 27,207 (June 18, 1992) (to be codified at 50 C.F.R. § 216); 57 Fed. Reg. 40,168 (Sept. 2, 1992) (the northern stock of the offshore spotted dolphin) (to be codified at 50 C.F.R. § 216).

[34]16 U.S.C. §§ 1362(1)(A) and 1383(b)(a) (1992).

[35]57 Fed. Reg. 51,177 (Nov. 3, 1992) (the coastal-migratory stock of bottlenose dolphins, U.S. Mid-Atlantic) (to be codified at 50 C.F.R. § 216.15).

[36]57 Fed. Reg. 34,101 (Aug. 3, 1992) (to be codified at 50 C.F.R. §§ 216, 218, 222); 57 Fed. Reg. 47,606 (Oct. 19, 1992) (to be codified at 50 C.F.R. §§ 216, 218, 222); 57 Fed. Reg. 51,157 and 51,176 (Nov. 3, 1992) (to be codified at 50 C.F.R. § 222.31).

[37]57 Fed. Reg. 34,121 (Aug. 3, 1992); 57 Fed. Reg. 47,606 (Oct. 19, 1992).

[38]57 Fed. Reg. 51,156 (Nov. 3, 1992) (to be codified at 50 C.F.R. § 216).

[39]15 C.F.R. § 216 (1992).

[40]16 U.S.C. §§ 1531-44 (1988).

[41]112 S.Ct. 2130 (1992).

opportunity to observed endangered animals, is not enough to support a finding of an actual or imminent injury that is required for standing.

The ESA makes it unlawful for any person to take any endangered species within the United States,[42] and defines take to include harm.[43] In *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*,[44] the court considered the legality of a regulation promulgated by the Secretary of the Interior that defined harm to include death or injury to wildlife caused by habitat modification,[45] and that extended the prohibition against takings to cover threatened as well as endangered species. This harm definition was opposed by landowners, logging companies and others whose timber harvesting was restricted to avoid harm-type takings of the northern spotted owl and other species. The court held that the definition is permissible because Congress intended an expansive interpretation of the word "take." In another spotted owl case, *Seattle Audubon Society v. Evans*,[46] decided December 23, 1991, the court held that the Forest Service's duty under 36 C.F.R. § 219.19 to maintain a viable population of owls did not cease when the owl was listed under the ESA.

United States v. Ivey[47] involved the smuggling and conspiracy to buy bobcat hides brought into the U.S. from Mexico. The ESA[48] prohibits trade in species contrary to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The court held that, for purposes of violation of the ESA, endangered species were those listed as endangered in appendices to the Convention at the time of the offense and not at the time of the Convention's signing.

B. *Legislative Developments:* No major developments.

C. *Administrative Developments*

The National Marine Fisheries Service (NMFS) has developed Recovery Planning Guidelines[49] that provide a framework for developing and implementing coordinated recovery programs for endangered and threatened marine species. The guidelines discuss the role of recovery teams, the content of recovery plans, and monitoring and tracking of recovery actions.

The NMFS issued rules requiring shrimp trawlers to comply with sea turtle conservation measures, including turtle excluder devices (TEDs), throughout the year in all areas,[50] and issued rules allowing the use of restricted tow-times as an alternative to the use of TEDs.[51] The NMFS determined that the Snake River spring/summer and fall chinook salmon are species under the ESA and should be

[42]16 U.S.C. § 1538(a)(1)(B).
[43]16 U.S.C. § 1532(19).
[44]35 Env't Rep. (BNA) 1264 (D.D.C. May 29, 1992).
[45]50 C.F.R. § 17.3 (1991).
[46]952 F.2d 297 (9th Cir. 1991).
[47]949 F.2d 759 (5th Cir. 1991).
[48]16 U.S.C. § 1538(c)(1).
[49]57 Fed. Reg. 53,097 (Nov. 6, 1992).
[50]57 Fed. Reg. 57348 (Dec. 4, 1992) (to be codified at 50 C.F.R. §§ 217, 227).
[51]57 Fed. Reg. 40,859 (Sept. 8, 1992) (to be codified at 50 C.F.R. §§ 217, 227); 57 Fed. Reg. 52,735 (Nov. 5, 1992) (to be codified at 50 C.F.R. § 227); 57 Fed. Reg. 54,533 (Nov. 19, 1992) (to be codified at 50 C.F.R. §§ 217, 222, 227); 57 Fed. Reg. 57,348 (Dec. 4, 1992) (to be codified at 50 C.F.R. §§ 217, 227).

listed as threatened,[52] and proposed to designate critical habitat for the salmon.[53]

V. Magnuson Fishery Conservation and Management Act (MFCMA)[54]

A. *Judicial Developments*

Of judicial proceedings apparently concluded in 1992, the most significant was *Northwest Environmental Defense Center v. Brennen[sic]*,[55] in which the Ninth Circuit upheld actions of the National Marine Fisheries Service (NMFS)[56] in the face of four challenges to regulations purportedly in furtherance of the ever-controversial "framework" fisheries management plan (FMP) for the West Coast ocean salmon fisheries. Most important, the court squarely held that establishment of harvest levels in excess of a fishery's maximum sustainable yield (MSY) does not necessarily constitute "overfishing" forbidden by National Standard 1 of the MFCMA.[57] This is so because the "optimum yield" of a fishery, as distinguished from MSY, may be calculated taking into account " . . . any relevant economic, social, or ecological factor."[58] Accordingly, the Secretary's decision to set an escapement level of 135,000 for Oregon coastal naturally-spawning coho was entitled to deference and was not arbitrary and capricious, absent record evidence to that effect.[59]

In more northerly developments, a Washington district court has thus far upheld actions of the Secretary in connection with the allocation of Alaskan groundfish quotas between the inshore and offshore fisheries. In *American Factory Trawler Association v. Knauss*,[60] the court has rejected contentions of the offshore sector of the fishery that reserving pollock stocks exclusively for harvest in the smaller, less mobile inshore sector of the Bering Sea and Aleutian Islands (BSAI) violates various provisions of the MFCMA (in particular, the command of National Standard 4 that any necessary allocation of fishing privileges be "fair and equitable"[61]) and procedural requirements pertaining to consideration of certain revised cost-benefit estimates after the close of a public comment period. At stake here is an effort by successive Secretaries of Commerce and their designees to achieve a politically palatable compromise between, on the one hand, small-scale fishermen in remote Alaskan communities and the shoreside processing plants they

[52]57 Fed. Reg. 14,653 (Apr. 22, 1992) (to be codified at 50 C.F.R. § 227).
[53]57 Fed. Reg. 57,051 (Dec. 2, 1992) (to be codified at 50 C.F.R. § 226).
[54]16 U.S.C. §§ 1801-82 (1992).
[55]958 F.2d 930 (9th Cir. 1992).
[56]NMFS is a component of the National Oceanic and Atmospheric Administration (NOAA), an agency constituting about one-half of the Department of Commerce. NOAA is headed by the Under Secretary of Commerce for Oceans and Atmosphere, formerly titled the "Administrator." "NMFS," "NOAA" and "the Secretary" are sued interchangeably herein.
[57]16 U.S.C. § 1851(a)(1).
[58]16 U.S.C. § 1802(21). *See also* Art. 61, UN Convention on the Law of the Sea, UN Pub. No. E.83.V.5 (1983).
[59]Plaintiffs argued, apparently without sufficient data, that a coho stock suffering low escapement will be suppressed in future years. It is unclear whether proof of that proposition would have satisfied the Ninth Circuit that impermissible "overfishing" was taking place.
[60]No. C92-870R (W.D. Wash.) (unreported).
[61]16 U.S.C. § 1851(a)(4) (1992).