

# 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<sup>1</sup>  
1993 Annual Report

I. COASTAL ZONE MANAGEMENT ACT (CZMA)<sup>2</sup>

A. *Judicial Developments*

In *New York v. United States General Services Administration*<sup>3</sup>, 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.<sup>4</sup>

C. *Administrative Developments*

The National Oceanic and Atmospheric Administration (NOAA) issued its final rule on National Estuarine Research Reserve (NERR) System Programs,<sup>5</sup> 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NOAA also issued draft guidance on the public participation requirements of state CZMPs.<sup>6</sup> In addition, NOAA approved certain CZMPs,<sup>7</sup> found some CZMPs to be inadequate,<sup>8</sup> and issued notices of intent to evaluate others.<sup>9</sup>

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<sup>1</sup>Contributors to this report are Bradley R. Hogin, Baker & Hostetler, Los Angeles and Joan Bondareff, U.S. House of Rep., Comm. on Merchant Marine and Fisheries (Part D); J. Lanier Yeates and N. Stephan Kinsella, Jackson & Walker, Houston (Part II); Scott Seiler and David P. Bendana, Liskow & Lewis, New Orleans (Part III); and Wyndylyn von Zharen, Texas A&M University (Part IV).  
<sup>2</sup>16 U.S.C. §§ 1451-64 (1988 & Supp. IV 1992).  
<sup>3</sup>823 F. Supp. 82 (N.D.N.Y. 1993).

<sup>4</sup>Pub. L. 103-121, 107 Stat. 1153 (Oct. 27, 1993).

<sup>5</sup>58 Fed. Reg. 38,214 (1993)(to be codified at 15 C.F.R. pt. 921).

<sup>6</sup>58 Fed. Reg. 58,840 (1993).

<sup>7</sup>58 Fed. Reg. 46,630 (1993) (Rhode Island and Oregon); 58 Fed.Reg. 4,982 (1993)(Guam).

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

<sup>9</sup>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) (Mississippi 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*<sup>10</sup> and *In the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida*,<sup>11</sup> 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)<sup>12</sup>

### A. Judicial Developments

In *United States v. Hayashi*,<sup>13</sup> 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."<sup>14</sup>

In another harassment-taking case, the court in *Strong v. United States*<sup>15</sup> 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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<sup>10</sup>1993 NOAA LEXIS 3 (Jan. 7, 1993).

<sup>11</sup>1993 NOAA LEXIS 3 (Jan. 7, 1993).

<sup>12</sup>16 U.S.C.A. §§ 1361-1407 (1985 & Supp. 1993).

<sup>13</sup>5 F.3d 1278 (9th Cir. 1993).

<sup>14</sup>*Id.* at 1283.

<sup>15</sup>5 F.3d 905 (5th Cir. 1993).











