



# Coastal Law Memo

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## FEDERAL CONSISTENCY WITH STATE COASTAL PROGRAMS:

### California v. Watt and Kean v. Watt

The federal Coastal Zone Management Act (CZMA) mandates that all federal activities "directly affecting" the coastal zone be conducted in a manner consistent to the maximum extent practicable with a federally approved state coastal management plan. But at what point do federal activities "directly affect" the coastal zone? Is a direct effect a physical effect on the lands and waters of the coastal zone? Or is the definition broader than that, thereby including the Department of Interior's planning process for oil and gas lease sales, the decision to lease and the terms of the leases to be offered? This Coastal Law Memo discusses the recent judicial interpretations of the CZMA consistency provisions in California v. Watt, 683 F.2d 1254 (9th Cir. 1982), rehearing denied, Nov. 10, 1982, and Kean v. Watt No. 82-2420 (D. New Jersey Sept. 17, 1982). Also discussed in this Memo are some questions about federal consistency not answered by those decisions.

#### I. The Consistency Provisions of the Federal Coastal Zone Management Act (CZMA)

The CZMA has two central goals: "to preserve, [and] protect the resources of the nation's coastal zone" and to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the . . . implementation of management programs to achieve wise use of the land and water resources of the coastal zone." Congress encouraged states to develop coastal management programs (CMPs) by providing coastal states with federal funding and the consistency provisions of section 307 of the CZMA.

The consistency provisions of the CZMA confirm the quid pro quo relationship between the states and the federal government in the management of coastal

resources. In essence, the consistency provisions promise that federal activities affecting state coastal zones will be conducted in a manner consistent, "to the maximum extent practicable," with state coastal management programs if the states develop and implement CMPs and if the CMPs are approved by the Department of Commerce. Specifically, federal activities must be consistent with state CMPs in five circumstances: 1) when federal agency activities "directly affect" the coastal zone; 2) when federal agency development programs occur "in" the coastal zone; 3) when federal licenses or permits are issued to conduct activities that "directly affect" the coastal zone; 4) when the Secretary of Interior approves plans for the exploration and production of oil and gas on lands leased under the Outer Continental Shelf Lands Act and those plans affect any land or water use in the coastal zone; and 5) when federal assistance is given to state and local activities "directly affecting" the coastal zone.

The act does not specifically include federal activities that occur before OCS leases are sold and industry plans for exploration are submitted. Coastal states, however, have viewed prelease activities as federal activities "directly affecting" the coastal zone. These prelease sale decisions determine the scope and nature of all the oil and gas activities in the sale area on the OCS. Prelease actions include Interior's decisions on which tracts will be leased and whether the lease will contain stipulations to minimize environmental degradation. (For a detailed discussion of the OCS lease sale process and its nexus with the CZMA see, Federal Consistency, Report 3 to the Oregon Outer Continental Shelf Oil and Gas Development Task Force, January 1979; and Ocean Law Memo, Issue 12, February 1979.)

## II. The Meaning of "Directly Affecting"

### A. California v. Watt

In October 1978, the Department of Interior announced tentative tract selections for OCS Lease Sale #53 off the central and northern California coast. The majority of the tracts were located in the Santa Maria basin, which extends from Monterey County in the north to Point Conception in Santa Barbara County to the south. The California Coastal Commission asked Interior to make a consistency determination prior to publication of the Proposed Notice of Sale. Interior refused and issued instead a "negative determination," stating that its preparations to lease OCS lands had no "direct effect" on California's coastal zone and, therefore, it had no obligation to examine Lease Sale #53 for consistency with California's federally approved coastal management program. After Interior published the Final Notice of Sale for Lease Sale #53, California filed suit against the Secretary of Interior, claiming that Interior's refusal to make a consistency determination was a violation of the CZMA.

In California v. Watt, California argued that prelease sale activities "directly affect" the coastal zone because they determine where, when and under what conditions OCS development will occur and that these activities can be "reasonably anticipated" to affect the coastal zone. Interior, on the other hand, argued for a narrower definition of "directly affecting": a physical alteration of the lands and waters in the coastal zone. Such different views of "directly affecting" occurred because Congress did not define or debate the definition of "directly affecting" at the time the CZMA was enacted. The text of section 307(c)(1) passed by the House and Senate required only federal actions "in the coastal zone" to be consistent with state management plans. The Conference Committee, without explanation, changed that phrase to "directly affecting" the coastal zone.

The National Oceanic and Atmospheric Administration (NOAA) is the agency within the Department of Commerce charged with administration of CZMA. NOAA declined to define "directly affecting" in its initial consistency regulations. Then, in 1978, NOAA adopted a single test for all five consistency provisions. That test required a consistency determination whenever an action "significantly affected" the coastal zone. The Department of Justice ruled that this approach was contrary to Congressional intent because Congress had provided five different statutory tests for consistency. The Justice

Department also concluded that the plain language of the statute should control its interpretation and that the "directly affecting" test should be applied on a case-by-case basis because a determination of direct effects on the coastal zone is a question of fact surrounding each federal action.

NOAA then promulgated new regulations stating that consistency questions would be addressed on a case-by-case basis and encouraged federal agencies "to construe liberally the 'directly affecting' test . . . so as to favor inclusion of federal activities subject to consistency review." NOAA explained that "[i]mplementation of this [consistency] requirement at the OCS prelease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts, thereby reducing conflicts with affected states and avoiding delay in exploitation of offshore energy resources."

Until 1981, NOAA maintained that Interior's prelease sale activities were subject to consistency review because they "directly affect" the coastal zone. In May 1981, two weeks after California filed its suit against Interior, NOAA suddenly reversed its position and adopted a definition of "directly affecting" very similar to Interior's interpretation. NOAA's new position was that a "direct effect" means "a measurable physical alteration in the coastal zone" and that the decision to lease a particular tract could not have a direct impact on the coastal zone because it was a decision incapable of causing a "direct effect" by itself.

Although the "directly affecting" test had caused controversy and confusion for several years, Congress never attempted to amend the statute. In 1980, however, the House Committee on the Merchant Marine and Fisheries defined "directly affecting" in its report to the Congress on the CZMA. The Committee stated--and its Senate counterpart concurred--that the directly affecting test of section 307(c)(1) of CZMA should apply whenever "a federal agency initiates a series of events of coastal zone consequence." The Committee also noted that the "functional interrelationship" between a federal action and its effects on the coastal zone must be examined to find out when a consistency determination is necessary.

California presented the House committee's analysis of the "directly affecting" test to the U.S. District Court for the Central District of California. That court agreed with California and adopted the committee's definition. On appeal, the Ninth Circuit Court of Appeals also adopted the

committee's language when it ruled that "any activity having a functional interrelationship from an economic, geographic or social standpoint with . . . the coastal zone directly affects the coastal zone." Using this definition, the court held that Lease Sale #53 directly affects the California coastal zone because "the decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production" of energy resources on the OCS (emphasis added). The court explained the significance of prelease decisions for the coastal zone, stating that "the size and location of the tracts . . . and the stipulations to which the leases would be subject . . . determine whether oil would be transported by pipeline or ship, which area of the coastal zone will be exposed to danger, the flow of vessel traffic and the siting of on-shore construction."

Comparing the definitions offered by California and Interior, the court stated that Interior's narrow definition of "directly affecting" would "diminish the ability of the state to protect its coastal zone." Since the CZMA gives the states "primary authority" over the coastal zone, the court ruled that any diminution of that authority would be contrary to the purposes of Congress.

Lastly, the court affirmed NOAA's earlier position that a broad application of the consistency provisions supports the goal of the CZMA "to avoid conflict and encourage cooperation between the federal and state governments" by permitting the states to become involved in federal planning at an early stage.

The Ninth Circuit's recognition of coastal state responsibilities and goals for natural resource development on the coast strengthens the states' ability to assert their interests in the federal OCS leasing process. The court's definition of "directly affecting" as any activity having a functional interrelationship with the coastal zone implicitly recognizes not only that Congress has conferred authority over the coastal zone to the states but also promised to respect state authority over coastal resources when the state has a federally-approved CMP.

#### B. Kean v. Watt

The circumstances leading to litigation between Governor Kean of New Jersey and Interior are nearly identical to those in California v. Watt. The question presented in Kean v. Watt was whether Interior's proposed Resale #2 "directly affects" New Jersey's coastal zone. As in California, New Jersey had requested that Interior issue a consis-

tency determination before the Proposed Notice of Sale. Interior refused on the ground that the prelease activities did not directly affect New Jersey's coastal zone--that, in fact, prelease activities affect only the OCS area proposed for the sale and any effects on the coastal zone do not and cannot occur until the exploration and production stage.

New Jersey argued that prelease sale activities affected its coastal zone because the area considered for leasing includes several underwater canyons that are the natural habitat of tilefish, a species important to New Jersey's commercial and recreational fishermen. New Jersey contended that oil and gas drilling in those canyons would destroy the tilefish's habitat and affect the New Jersey coastal zone by harming the commercial and recreational fishing industries and by eliminating jobs in the fishing industry, disrupting the social fabric of small coastal communities whose traditional ways of life are tied to the sea.

The court divided the issues of the case into two questions: 1) whether Interior must take into account only the effects of prelease activities or whether it must also consider the likely effects that subsequent exploration and production of oil and gas on the OCS would have on New Jersey's coastal zone; and 2) whether the potential destruction of tilefish habitat on the OCS and the subsequent economic and social impacts in the coastal zone are "direct effects" within the meaning of the CZMA consistency provisions.

After an examination of the Ninth Circuit opinion in California v. Watt, the U.S. District Court for the District of New Jersey ruled that Interior must consider "all the likely effects upon the coastal zone of leasing, exploration, development and production activities" when determining whether a proposed lease sale "directly affects" the state's coastal zone. The court then stated that "when all stages of the Resale #2 program are considered, it closely affects the coastal zone and a consistency determination must be made" (emphasis added). (The reason the District Court chose the words "closely affects" is unclear.)

In response to the question of whether economic harm to the coastal zone through the destruction of tilefish habitat on the OCS "directly affects" the coastal zone, the court found that the CZMA could not protect a coastal industry from an injury occurring "totally outside the coastal zone." The court stated that the purpose of the CZMA is to protect the natural resources of the coastal zone and that the

consistency provision cannot be triggered unless there is "some interference with the natural order of the coastal zone." Since the tilefish inhabit the OCS and their destruction would affect only the natural order on the OCS, the court held that economic harm to a coastal fishing industry caused by an injury on the OCS is not an effect on the coastal zone within the meaning of the CZMA. (New Jersey has appealed this ruling to the Third Circuit Court of Appeals.)

The court in Kean v. Watt appears to agree with the Ninth Circuit's broad interpretation of the "directly affecting" test as encompassing the cumulative effects of prelease decisions. But the court moves away from the Ninth Circuit's "functional interrelationship" test by limiting the relationship to one of environmental harm and by requiring that environmental harm must occur within the coastal zone. These qualifications are not consistent with the reason for applying a broad definition of "directly affecting," i.e., that prelease activities are "the first link in a series of events of coastal management consequence."

The Kean decision fails to recognize that adverse environmental effects on the OCS also affect the coastal zone. The Kean court, apparently, would label drilling on the OCS a direct effect only if it affected tilefish or their habitat in the coastal zone. Thus, the destruction of an important food source on the OCS, which would adversely affect a species residing primarily in the coastal zone appears to be immune from consistency review.

### III. Unanswered Interpretive Questions

#### A. Maximum Extent Practicable

The court, in California v. Watt, carefully examined the legislative history and agency interpretations of the "directly affecting" test. It did not give the same careful examination to the phrase "to the maximum extent practicable." The court did not review the legislative history of the CZMA or NOAA's administrative interpretations. In fact, the court never defined the meaning of the phrase "to the maximum extent practicable." Instead, the court defines the phrase by what it believes the phrase does not mean. The court concludes that section 307(c)(1) requires "that Lease Sale #53 be made consistent with California's plan to the maximum extent practicable. Accommodation to . . . a lesser extent does not afford consistency . . . accommodation to a greater extent exceeds the command of the statute."

The Ninth Circuit found that "the limit beyond which conformity with a state plan would be practicable cannot be precisely delineated." The court permits factors such as the "reasonableness of the State plan" and the degree to which "development . . . would be hampered" to determine consistency to the "maximum extent practicable." The court goes on to require Interior to set the leasing and production activities for Lease Sale #53 "on a path consistent with the state plan to the maximum extent practicable in light of the then available knowledge." However, Interior need not act "to preclude any possible future inconsistency from arising as development proceeds." In making these conclusions the court ignored the more specific guidance NOAA had provided federal agencies and the states.

In its consistency regulations NOAA has interpreted the phrase "to the maximum extent practicable" to require federal activities to be "fully consistent" with approved state CMPs "unless compliance is prohibited" by the law governing the federal agency's operations. NOAA has concluded that the effect of the consistency section of the CZMA is "to require federal agencies, whenever legally permissible, to consider state [coastal] management programs as supplemental requirements" to be followed as carefully as the agency follows its own legislative mandates.

The legislative history of the CZMA supports NOAA's interpretation of "to the maximum extent practicable." The House of Representatives' report adopted by the Conference Committee stated that "it is expected that each federal agency . . . will see that those activities are consistent" with state coastal management programs (emphasis added). The only exception recognized was for unforeseen circumstances that might arise after approval of the state CMP. It was clearly the intent of Congress that any federal objections to a state's CMP should be worked out before it was approved by the Secretary of Commerce. In fact, the 1976 amendments to the CZMA required state coastal programs to include planning processes and criteria for locating facilities necessitated by offshore oil and gas drilling and other coastal energy development.

The goals of the CZMA also support NOAA's interpretation. Federal activities are required to be consistent with state plans to "encourage and assist states to exercise their full authority over the coastal zone." An interpretation allowing federal agencies greater discretion--allowing agencies to balance state interests against the federal interest, for example, or to permit "reasonable" consistency--would

encourage federal agencies to overlook the state CMPs entirely, secure in the knowledge that if consistency questions were raised, the state's requirements could be bent to accommodate the federal interest of convenience. NOAA's approach requiring consistency unless prohibited by law or regulation, better supports the CZMA goal of state planning for the management of coastal areas because it encourages the states to enforce their coastal programs and take responsibility for conservation of their natural resources.

#### B. Secretarial Override

Another problem with the Ninth Circuit's California v. Watt opinion is the court's application of the secretarial override provision of section 307(c)(3)(A) to the consistency provision governing federal activities directly affecting the coastal zone, section 307(c)(1). Section 307(c)(3)(A) is the consistency provision governing persons applying for a federal license or permit to conduct activities affecting "land and water uses in the coastal zone." This provision requires such applicants to comply with the state's approved CMP unless the Secretary of Commerce, either by his or her own initiative or upon request of the applicant, determines that the applicant's activity is consistent with the goals of the CZMA or is otherwise in the interest of national security.

The court in California v. Watt states that the (c)(3) secretarial override provision may be applied to disputes over section (c)(1) consistency. In addition to mistakenly applying the override provision to federal agency activities directly affecting the coastal zone, the court allows the Secretary of Commerce to balance the national interest against the state interest. The statute, however, only authorizes the Secretary to override the state when the state's findings conflict with national security or when the activity is consistent with the objectives of the CZMA. By using the term national security rather than national interest, Congress intended to confine secretarial overrides to issues of national security rather than general issues of national interest.

The application of the secretarial override to 307(c)(1) consistency also is contrary to Congressional intent. Congress deliberately excluded the override provision from the (c)(1) consistency section. In its original draft of the CZMA, the Senate had included a secretarial override for the section equivalent to 307(c)(1). However, in the final conference version, the override was limited to section 307(c)(3)

and (d). This change emphasizes Congress' intent that federal authority over the coastal zone should be, in general, limited to approval of state coastal management programs. In fulfillment of this commitment to the states, the CZMA should be interpreted as requiring that federal activities directly affecting the coastal zone of a state with a federally approved coastal management program must be conducted in a manner consistent with that management program whenever legally and practically possible.

#### Conclusion

The recent litigation concerning the consistency provisions of the Coastal Zone Management Act has illuminated the strengths and weaknesses of "cooperative federalism" in the coastal zone. The CZMA encourages the assertion of state authority over natural resources in the coastal zone and requires persons--including the federal government--affecting the coastal zone to respect the states' authority. California v. Watt supports a significant coastal state role with respect to federal activities affecting the coastal zone by recognizing that federal activities directly and significantly affect state interests when they initiate a series of events that ultimately have an impact on state coastal planning and resources.

However, major questions about the CZMA remain unanswered. These include the meaning of consistent "to the maximum extent practicable" and the scope of the secretarial override provisions. Unless the Interior Department and the coastal states are able to develop a more cooperative approach to OCS oil and gas development, these questions are also likely to be answered by the courts in the near future.

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