



Coastal Law Memo

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Federal Consistency Under the Coastal Zone Management Act Revisited

The Coastal Zone Management Act (CZMA) was enacted in 1972 to encourage the prudent management of natural resources in the coastal zone. Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-64 (1982)). The operation of the act as amended in 1980 and prospects for the future were discussed in Coastal Law Memo No. 2 (April 1981).

The Act provides two incentives for states to develop coastal management programs: federal grants to fund the programs and the requirement that federal activities be consistent with the states' plans. However, under the Reagan administration, the federal funding of state programs has been reduced. The National Oceanic and Atmospheric Administration (NOAA) has characterized the 1980's as a post-funding era for state programs. NOAA no longer funds new proposals and only those states that can prove critical funding shortages may receive other remaining funds. Thus, the consistency provisions remain the principal incentive for states to comply with the CZMA.

The CZMA mandates that all federal activities "directly affecting" the coastal zone be conducted in a manner consistent with a federally approved state coastal zone management plan. Because the CZMA does not define the term "directly affecting," administrative and judicial interpretation of the phrase is controlling.

Coastal Law Memo No. 4 (March 1983) examined judicial interpretation of the consistency provisions of the CZMA by focusing on two cases, California v. Watt, 683 F.2d 1254 (9th Cir. 1982), rehearing denied, Nov. 10, 1982; and Kean v. Watt, No. 82-2420 (D. N.J. Sept. 17, 1982). However, the United States Supreme Court overruled the Ninth Circuit California v. Watt opinion, radically changing the judicial interpretation of the consistency provisions of

the CZMA. The Supreme Court in Clark v. California, 464 U.S. 312 (1984), held that the Interior Department was not required to perform a consistency review before the sale of oil and gas leases on the outer continental shelf (OCS). The decision cast doubt on the application of the consistency requirement to any activity not physically within the coastal zone, reducing the effectiveness of the CZMA.

The Kean v. Watt case was reversed and remanded by the Court of Appeals for the Third Circuit. The Court of Appeals considered two issues: (1) whether the sale of OCS oil and gas leases "directly affects" the coastal zone within the meaning of § 307(c)(1) of the CZMA, and (2) if § 307(c)(1) applies to a lease sale, whether the term "directly affects" includes economic or social impacts as well as physical impacts on the coastal zone. Following the Supreme Court's Clark v. California lead, the Third Circuit reversed the district court's determination and found that lease sales are not subject to § 307(c)(1)'s consistency requirements. The Court of Appeals also remanded the second issue with instructions to dismiss it as moot. Thus, the district court's holding that the CZMA protects only against inconsistent physical impacts on the coastal zone is no longer effective. It remains to be seen whether "directly affects" includes social or economic impacts as well as physical impacts on the adjacent coastal zone.

This Coastal Law Memo examines the Court's construction of the consistency provisions of the CZMA and the Court's reasoning in Clark v. California. Implications of the decision, as well as several post-Clark v. California cases, are also discussed. Because the Interior Department's proposed 1987-91 program of oil and gas lease sales includes sales off Oregon, Washington, and Alaska, how these issues are

resolved is of great significance to the Pacific Northwest and Alaska and other coastal states around the nation.

I. The Factual Background of the Clark v. California Case.

The Clark v. California case arose out of a dispute over the exact nature of an oil and gas lease sale. On October 17, 1980, the Department of the Interior (Interior) announced Lease Sale No. 53, covering 115 tracts of submerged land off the California coast. The California Coastal Commission (CCC) responded to this announcement, stating that 29 tracts would have to be deleted from the sale in order for the sale to be consistent with California's federally approved coastal management program. One CCC concern was that certain tracts were located within twelve miles of state sanctuaries for endangered sea otters. Because a lease sale is only the first of several steps leading to OCS oil and gas development, Interior argued that a lease sale does not "directly affect" a state's coastal zone.

The State of California filed suit in April 1981, seeking declaratory relief and a preliminary injunction to halt Lease Sale No. 53. The district court declared the bids and leases resulting from the sale void, enjoined Interior from taking any action concerning the tracts at issue until it complied with the CZMA, and directed Interior to conduct "all activities on these tracts in a manner consistent with California's Coastal Management Plan." California v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981). The Ninth Circuit upheld the district court's ruling that Lease Sale No. 53 would directly affect the coastal zone and ruled that Interior must make a consistency determination.

The Supreme Court reversed the Ninth Circuit, ruling that OCS oil and gas lease sales are not covered by § 307(c)(1) of the CZMA.

II. The Coastal Zone Management Act

Congress passed the CZMA in 1972 to establish a cooperative federal-state program to protect the fragile and valuable resources of United States coasts from unmanaged development. The CZMA contains two overriding objectives. First, the Act is aimed at providing comprehensive, coordinated plans for the protection and beneficial use of coastal zone resources. Second, the CZMA looks toward a scheme of long-term management of the resources.

It is fundamental to the success of

the CZMA objectives that each coastal state adopt a federally approved coastal zone management program. The Act offers two incentives designed to encourage states to develop and operate management programs: direct financial assistance to states and the consistency provisions of § 307 of the CZMA.

The consistency provisions are at the heart of the controversy in Clark v. California. The provisions are divided into four categories, three of which have relevance here. (The fourth provision, § 307(d) of the CZMA, concerns federal grants to state and local governments.)

Section 307(c)(1) provides that federal activities directly affecting the coastal zone must be consistent with the state plan to the maximum extent practicable. Section 307(c)(2), on the other hand, applies only to federal development projects conducted within a state's coastal zone. Under both § 307(c)(1) and (2) the federal agency makes the initial consistency determination. If a federal agency makes a negative determination, an objecting state's options are judicial review or mediation by the Secretary of Commerce.

Section 307(c)(3) covers situations in which nongovernmental applicants for federal licenses or permits wish to conduct activities that will affect land or water use in a state's coastal zone.

There are three significant differences between the federal agency consistency provisions (§ 307(c)(1) and (2)) and the permit consistency provisions (§ 307(c)(3)). First, the threshold requirements of the provisions differ. To trigger a consistency determination under the permit provision, the proposed federal activity must affect "land or water uses in the coastal zone." The federal activity provision, on the other hand, is triggered when the proposed federal activity is such that it would "directly affect" the coastal zone. Neither threshold requirement is defined in the statute; it remains to be seen whether the difference in language will have any practical significance.

Secondly, under the permit consistency provision, the initial consistency determination is made by the applicant, not the agency. Thirdly, the Secretary of Commerce may override any objection by a state to the permit applicant's negative consistency determination. This override is unavailable under the federal agency provisions.

The CZMA itself provides no procedure for determining consistency. This

legislative oversight led to the controversy underlying the Clark v. California litigation.

III. The Reasoning of the Court

The Court briefly examined both parties' readings of § 307(c)(1) and concluded that both were superficially plausible, but unsupported by the CZMA itself. The Court then turned to the legislative history, focusing on the House-Senate Conference Committee that had replaced the words "in the coastal zone" with the phrase "directly affecting the coastal zone." The Senate had defined the coastal zone to exclude federal lands such as the outer continental shelf while the House had included them. The Conference Committee took a neutral position by accepting the Senate's narrower definition of coastal zone while expanding the scope of § 307(c)(1) to include federal activities not "in," but "directly affecting" the coastal zone. The Court concluded that this change of language made more sense as part of this narrow compromise than as a dramatic broadening of the scope of consistency review.

The structure of § 307 suggested to the Court that lease sales were not intended to be covered by § 307(c)(1). The Court observed that § 307(c)(1) and (2) are limited to activities of the federal government and therefore are irrelevant to OCS lease sales because the drilling is neither conducted nor supported by a federal agency. The Court found § 307(c)(3), the permit provision, to be the applicable provision, but ruled that the section does not require consistency review of OCS lease sales. The Court found it significant that neither the original § 307(c)(3) nor the amended § 307(c)(3)(B), which specifically refers to OCS oil and gas development, mentions consistency requirements in connection with lease sales. In drawing a distinction between lease sales and other stages of the OCS leasing process, the Court turned to the Outer Continental Shelf Lands Act, (OCSLA), 42 U.S.C. § 1331 et seq., for guidance. The Court concluded that Congress specified the relationship of each stage of the OCS leasing process to the CZMA and limited formal consistency requirements to the exploration, development and production stages.

At this point, the Court addressed the issue originally presented by the Ninth Circuit's decision; that is, whether the proposed lease sale would directly affect the California coastal zone. The Court reasoned that because the purchase of an OCS lease grants only the right to conduct preliminary

activities, the possible effects on the coastal zone that may eventually result cannot be termed "direct." The Court could have used this reasoning to overturn the ruling below that lease sales directly affect the coastal zone, but instead relied principally on the limited geographic scope of § 307(c)(1).

The four dissenting justices favored the plain meaning of § 307(c)(1) and found no basis for distinguishing effects of activities within the coastal zone from those outside the coastal zone. They felt that the majority had misconstrued the legislative history of § 307(c)(1). The dissent applied the statutory construction rule, "Statutes should be construed in a manner consistent with their underlying policies and purposes," and found the five-justice majority's position squarely at odds with the CZMA's underlying purposes of long-range planning and close cooperation between federal and state agencies.

IV. Analysis

The dispute over the interpretation of §307(c) of the CZMA resulted from two basic conflicts. First, the CZMA and the OCSLA as amended in 1978 have differing goals and purposes. The OCSLA emphasizes "expeditious and orderly development" of the OCS. One motivation behind the legislation was the desire to lessen the United States' dependence on foreign oil. The CZMA, on the other hand, was enacted to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." These statutes exist side by side although the CZMA is weighted toward resource conservation while the OCSLA favors resource development. Neither is given clear preeminence over the other. Problems have arisen not only due to policy conflicts but also because these two statutes place control over various portions of the two acts in numerous agencies (including the Secretary of Commerce, the Secretary of the Interior, state governors, and state coastal commissions) without giving any one agency clear final authority.

Secondly, the state and federal governments have differing interests in the coastal zone. Regulatory power over submerged lands adjacent to the nation's coast has long been jointly exercised by the federal and state governments. States seek to conserve coastal resources by participating in OCS oil and gas decision-making. At the same time, Interior seeks unhindered authority to expedite extraction of OCS resources for national consumption.

There would be little reason for friction between coastal states and Interior if oil and gas activities could be conducted in isolation, without affecting state coastal zones. Oil spills are perhaps the most feared negative effect, and they do not respect jurisdictional lines. Coastal states may also be affected by increased vessel traffic, pipelines, and onshore refining and storage facilities and faced with the increased costs of regulating these consequences of OCS development. However, all of the revenues from OCS oil and gas development currently go to the federal treasury and constitute the federal government's second biggest source of revenue.

V. Implications of the Decision

The Court's holding in Clark v. California that § 307(c)(1)'s consistency requirements do not apply to OCS oil and gas leasing was quite narrow, leaving open many questions. First, although the holding is limited to activities associated with the lease sale stage of OCS oil and gas development, the Court's statement that § 307(c)(1) was "aimed [solely] at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act" could apply to federal activities of any sort on the OCS such as hard minerals leasing and fisheries management.

Secondly, the Court found it unnecessary to define two key phrases of § 307(c)(1), "directly affecting" and "to the maximum extent practicable." These definitions are important for federal activities in the coastal zone and in federal enclaves. Arguably, since the Court did not overrule the Ninth Circuit's California v. Watt decision on these points, the lower court ruling has some continued vitality. The Ninth Circuit had construed "directly affecting" to mean setting in motion a chain of events of coastal management significance. As to the meaning of "to the maximum extent practicable," the Ninth Circuit ruled that a state's coastal management plan does not take absolute precedence over the federally supported activity. It held that Interior has the final say on whether the standard has been met, but it did not specify the standard.

Finally, the decision strengthened the consistency requirements of § 307(c)(3)(B) in two ways. The Supreme Court indicated that federal agencies have an obligation to ensure that private parties who are issued federal

permits fulfill consistency obligations. More importantly, the Court repeatedly emphasized the limited nature of the rights obtained by OCS lessees.

Notwithstanding these statements about the limited rights of lease sale purchasers, state officials contend that, once a lease has been granted, the states are in a weak position to challenge development terms. Furthermore, the Court's interpretation of § 307(c)(1) terminated a process the states had found valuable in protecting state interests, thus skewing the balance of power between state and federal governments. For example, Alaska and Interior reached agreement quickly on changes to OCS Sale 71 stimulated in part by the Ninth Circuit's decision in California v. Watt (Sale 53) favoring California's position on the consistency issue.

According to the April 1985 Office of Ocean and Coastal Resource Management Federal Consistency Study-Draft, the pattern of reasonable accommodation of state and federal interests in OCS lease sales continued during the 17 months the Clark v. California case was pending before the Supreme Court. During that time Interior prepared 28 consistency determinations for nine lease sales involving 18 coastal states. The affected states concurred with 18 of those 28 Interior consistency determinations. Of the ten state inconsistency objections, five were resolved through Memoranda of Understanding negotiated between coastal state governors and Interior pursuant to the consultation provisions of OCSLA section 19. The state filed suit with respect to the remaining five objections, but four of the suits were dismissed and the sales took place either as scheduled, or with a one or two month delay. In the fifth case involving Georges Bank sale 52, the sale was temporarily enjoined and then cancelled by Interior due to lack of industry interest.

VI. Administrative and Legislative Response

Recently, the National Oceanic and Atmospheric Administration (NOAA) amended its regulations to conform with the Clark v. California decision. The changes in the consistency regulations were limited to those clearly necessitated by the Supreme Court's decision. The final rule excludes only oil and gas lease sales from the uses subject to coastal state management programs under section 307(c)(1) of the CZMA. The final rule amending Parts 923 and 930 of 15 C.F.R. became effective November 9, 1985. 50 Fed. Reg. 35210 (1985). NOAA

is also continuing to gather information from states, federal agencies, industry, and public interest groups. When the study is completed, NOAA will again review the need for further rulemaking.

Bills to reverse the Court's Clark v. California decision were introduced in both the House and the Senate. For example, House Bill, H.R. 4589. 98th Cong., 2d Sess. (1984), would have strengthened the CZMA consistency requirements in several ways. Section 307(c)(1) would be renumbered as § 307(c)(1)(A) and amended to specify that federally supported activities "whether within, or landward or seaward of, the coastal zone" are covered. A new § 307(c)(1)(B) would define "directly affects" as "(i) produces identifiable physical, biological, social, or economic consequences in the coastal zone; or (ii) initiates a chain of events likely to result in such consequences." The new § 307(c)(1)(C) would define "maximum extent practicable" as mandating consistency unless consistency required a violation of federal law, or would be barred by "unforeseen circumstances." The bill was introduced in January 1984 and was approved with amendments by the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries in May 1984.

The Senate Bill differs from the House Bill in one significant aspect. It offers a more precise definition of "to the maximum extent practicable," requiring full consistency except when national security, federal law, or declared national emergencies require deviation from the state coastal zone management plan. The Senate Bill was introduced in February 1984 and was reported with amendments by committee in May 1984. S. Rep. No. 512, 98th Cong., 2d Sess. 4 (1984). However, the CZMA probably will be reauthorized in 1986 without any change to the consistency provisions or the Clark v. California decision. See Minsch, CZMA: The Politics of Reauthorization, 9 The Coastal Society Bulletin No. 1 at 18 (1986).

VII. Post-Clark v. California Cases

In Village of False Pass v. Watt, 733 F.2d 605 (9th Cir. 1984), the Ninth Circuit carried one step further the notion that a lease sale is just a preliminary phase of oil and gas development. The court held that Interior did not violate the Endangered Species Act by failing to adopt, at the leasing stage, specific measures protecting whales from oil spills and seismic testing. The Ninth Circuit also found that Interior had not abused its discretion

in determining that no worst-case analysis on the effect of oil spills on migrating whales was necessary before Interior's decision to issue the final lease sale notice. Protective measures could be imposed at later stages in the OCS development process.

In Granite Rock Company v. California Coastal Commission, 768 F.2d 1077 (9th Cir. 1985), the Ninth Circuit ruled that the holder of an unpatented mining claim on land owned by the federal government was not required to obtain a permit from the California Coastal Commission to continue its mining operations. The court reasoned that the CZMA was not intended to change the status quo with respect to the allocation of state and federal power within the coastal zone. The court further held that the Commission was preempted by federal Forest Service regulations from requiring the limestone mining firm to obtain a state permit.

In Exxon v. Fischer, CV No. 84-2362 (C.D. Cal. Oct. 11, 1985), Exxon sued to enjoin the California Coastal Commission from restricting its drilling operations in the Santa Barbara Channel seven miles off the coast. The Commission had objected to Exxon's development plan because the drilling would interfere with the harvest of thresher sharks by local fishermen. The Commission did agree that Exxon's plan would be acceptable if Exxon limited its drilling to a period from late November to the end of April, but Exxon refused to limit its drilling operations and appealed to the Secretary of Commerce for an override of California's consistency objection and filed suit in federal district court.

The Secretary ruled in favor of California, but the court held for Exxon, stating that the Commission had acted beyond its authority when it objected to activities affecting the harvesting of marine resources located outside the state's coastal zone. At issue was the interpretation of § 307(c)(3) of the CZMA which requires an applicant to certify that any OCS exploration or development plan affecting land use or water use in the coastal zone will comply with the state's coastal zone management program. The court concluded that such land or water use must occur within the coastal zone. Judge Rymer reasoned that allowing the Coastal Commission to extend its control beyond the three-mile territorial sea included in state coastal zones by the CZMA would expand state authority into waters that are the exclusive province of the federal government. The district court further held that the economic interests of the thresher shark

industry did not constitute land use within the meaning of § 307(c)(3). The court defined land use to include only the physical utilization of land within the coastal zone.

The scope of the federal consistency obligation with respect to Delaware's federally approved coastal management program is currently being challenged on a very different theory. In Norfolk Southern Corp. v. Oberly, 594 F. Supp. 514 (D. Del. 1985), (plaintiff's motion for preliminary injunction denied), the plaintiff challenged portions of the program as being an unconstitutional burden on foreign and interstate commerce. The plaintiff's challenge is supported by the federal Departments of Justice and Commerce; the latter originally approved Delaware's coastal management program as adequately considering the national interest in the siting of facilities of regional importance.

The only existing deepwater anchorage between Maine and Mexico is located in Delaware Bay. The plaintiff claims that the project to use Big Stone Anchorage, located in Delaware Bay, to "top off" large coal-carrying vessels will have a negligible environmental affect. However, Delaware's coastal management program absolutely bans such bulk product transfer facilities in its coastal zone. The outcome of this case may clarify federal and state roles under the CZMA. However, because of the special facts of the case (absolute prohibition on using a unique anchoring spot), the court's ultimate decision could be a narrow one. See 5 Territorial Sea No. 4 (University of Maine Marine Law Institute, Dec. 1985) for a detailed analysis of the Delaware situation.

Finally, the federal district court decision in Save Our Dunes v. Pegues, CV No. 84-T-518-N (M.D. Ala. Dec. 17, 1985) poses a threat to continued federal CZMA funding of state coastal programs which, since their original federal approval, have been amended or modified without specific federal approval of the amendments or modifications. The court strictly interpreted CZMA § 306(g), 16 U.S.C. § 1455(g) (1982), as prohibiting further CZMA program administration grants until such state program changes have been federally approved. According to the court, a supplemental environmental impact statement must be prepared if the changes can significantly affect the environment "in qualitative or quantitative terms," making the amendment approval process potentially a quite elaborate one. With federal funds delayed or cut off, state programs could

deteriorate to the point of federal disapproval, thereby losing the benefits of federal consistency as well.

Conclusion

The Clark v. California decision dealt a serious blow to the CZMA by removing the most powerful remaining incentive for states to adopt and maintain coastal zone management programs. It remains to be seen whether the CZMA's goal of better management of coastal zone resources will be accomplished despite the reduction in funding and the judicial weakening of federal consistency requirements. The recent "anti-consistency" decisions in the wake of Clark v. California illustrate the need for Congress to better define state and federal roles in the management of our ocean and coastal resources.

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