

Territorial Sea

Legal Developments in the Management of Interjurisdictional Resources

Volume VII, Number 2

Summer-Fall, 1987

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Granite Rock Co. v. California Coastal Commission: With Friends Like This, Who Needs Enemies?

The United States Supreme Court has again missed an important opportunity to clarify the authority of coastal states to manage resource development in their coastal zones. In *California Coastal Commission v. Granite Rock Co.*,¹ the Court held that the state's imposition of environmental permit conditions on private mining operations in the federally owned Los Padres National Forest is not preempted by federal laws and regulations, including the Coastal Zone Management Act (CZMA).² Justice Sandra Day O'Connor authored the majority opinion. Justice O'Connor was also the author of the majority opinion in *Secretary of Interior v. California*,³ a case that dealt a serious blow to the power of states to influence federal actions affecting coastal resources.⁴ It is tempting to view the *Granite Rock* decision as a victory for state coastal zone management efforts, and Justice O'Connor as a new-found friend for the cause. However, serious deficiencies in the majority opinion, and

troubling interpretations of the CZMA in the dissenting opinions, which the majority opinion failed to correct, could herald increasingly difficult times for coastal states in making the federal-state 'partnership'⁵ promised by the CZMA work effectively. The decision provides no clear set of principles for determining whether Congress intended concurrent exercise of state and federal regulatory power under the numerous federal statutes affecting coastal activities. Such uncertainty is particularly troubling in light of the increased development of coastal areas and the already

¹ *California Coastal Commission v. Granite Rock Co.*, ___ U.S._, 107 S. Ct. 1419 (1987).

² 16 U.S.C. §§ 1451-1464 (1982 & Supp. III 1985).

³ 464 U.S. 312 (1984).

⁴ See e.g., Eichenberg & Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism,"* 14

Ecology L.Q. 9 (1987); Armitage, *Federal "Consistency" Under the Coastal Zone Management Act: A Promise Broken* by Secretary of the Interior v. California, 15 ENVTL L. 153 (1984); Comment, *Supreme Court Sinks Consistency Review of Offshore Oil Leases*, 10 COLUM. J. ENVTL L. 131 (1985). The Court's decision in *Interior v. California* provoked Congressional action as well as the criticism of legal scholars. See, e.g., H.R. 1876, 100th Cong., 1st Sess., 133 CONG. REC. H1714 (1987) (bill amending CZMA regarding federal activities subject to the consistency provision); S. 1412, 100th Cong., 1st Sess. (bill to replace "directly affecting" in CZMA § 307 (c)(1) with "significantly affecting," derived from NEPA); H.R. 3202, 100th Cong., 1st Sess. (bill to clarify that effects, not the location of an activity, determine whether consistency requirement applies).

⁵ See Eichenberg & Archer, *supra* note 4, at 64.

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serious strains on the federal-state coastal management relationship.⁶

This note will describe the issues presented by *Granite Rock*, the holding and implications of the majority opinion, and the individual views of several justices on the CZMA's federal-state partnership as revealed in separate opinions. It will conclude with a forecast of issues potentially affected or raised by the *Granite Rock* decision.

Background

The Supreme Court's decision in *Secretary of the Interior v. California*⁷ left unresolved important questions concerning states' authority over resource development activities which affect their coasts. In *Interior*, the Court ruled that coastal states do not have authority to review the Department of Interior's leasing of acreage on the federally owned Outer Continental Shelf (OCS) for the purpose of oil and gas exploration.⁸ In the majority's view, the states must wait until the leases are sold and the oil companies-lessees submit exploration and development plans for federal approval. Then, under the authority of the CZMA, affected states may review the proposed activities for consistency with their coastal laws and policies.⁹

The CZMA prohibits federal agencies from issuing licenses or permits for private activities that affect land or water uses in the coastal zone, including OCS exploration and development plans, until the affected state concurs that the proposed activity complies with the state's approved coastal management program and will be carried out in a manner

⁶ See Chasis, *The Coastal Zone Management Act: A Protective Mandate*, 25 NAT. RESOURCES J. 21 (1985); Kitsos, *Coastal Management Politics: A View from Capitol Hill*, 51 J. AM. PLAN. A. 275 (1985); Wolf, *Accommodating Tensions in the Coastal Zone: An Introduction and Overview*, 25 NAT. RESOURCES J. 7 (1985).

⁷ *Interior*, *supra* note 3.

⁸ *Id.* at 324. The case turned on the interpretation of one subsection of the CZMA's consistency provision, 16 U.S.C. § 1456(c)(1), and asked whether OCS oil and gas leasing activities are federal activities that "directly affect" the coastal zone and thus trigger the requirement that they be carried out in a manner that is consistent, to the maximum extent practicable, with approved state coastal management programs. Seriously divided on this question, a majority of the Court concluded that OCS leasing is not subject to consistency review because the consistency requirement applies only to federal activities physically located within a state's coastal zone. *Id.* at 330. This geographical interpretation is at odds with portions of the Act's legislative history and has been soundly criticized. See, e.g., Armitage, *supra* note 4; Fitzgerald, *Secretary of Interior v. California: Should Continental Shelf Lease Sales Be Subject to Consistency Review?* 12 B.C. ENVT'L AFF. L. REV. 425 (1985); Husing, *A Matter of Consistency: A Congressional Perspective of Oil and Gas Development on the OCS*, 12 COASTAL ZONE MGMT. J. 301 (1984); Ruthgeber, *OCS Leasing Policy Prevails Over the California Coastal Commission*, 24 NAT. RESOURCES J. 1133 (1984); Comment, *supra*, note 4; Note, *CZMA Consistency Review: The Supreme Court's Attitude Toward Administrative Rulmaking and Legislative History* in *Secretary of the Interior v. California*, 13 ECOLOGY L.Q. 687 (1986).

Although the Court took pains to limit its conclusion to OCS oil and gas leasing activities, the Court's reasoning raised questions whether other federal activities occurring beyond the seaward

consistent with the program.¹⁰ How much substantive authority this provision gives coastal states is disputed. Opponents of the consistency process emphasize language in recent decisions¹¹ that characterizes the CZMA as a cooperative funding mechanism that neither expands nor contracts the police power authority of coastal states to regulate activities authorized by federal laws.¹² Coastal state proponents have continually asserted that enactment of the CZMA was a "delegation of substantial authority" by the Congress.¹³ The dispute in *Granite Rock* gave the Court an opportunity to clarify the uncertainty over the role Congress intended states to play in management decisions affecting their coastal resources and communities. Unfortunately, the Court decided the case in a manner that only complicates and perpetuates the debate over the extent of state power.

The Issues in *Granite Rock*

Granite Rock Company, a corporation that mines chemical and pharmaceutical grade limestone, operates a quarry in the Los Padres National Forest, which lies within the spectacular Big Sur region of the California coast. Granite Rock holds unpatented mining claims to the quarry site under the Mining Act of 1872,¹⁴ which allows persons to stake claims to minerals on federal lands. In 1981, the Company submitted a 5-year plan of operations to the U.S. Forest Service which regulates surface impacts of mining on federal lands under the National Forest Management Act.¹⁵ The Forest

boundary of the states are subject to the consistency requirement of section 1456(c)(1). Federal licenses and permits for private activities are covered by another subsection of the consistency provision. Their consistency requirement is triggered if the proposed activity "affect[s] land or water uses in the coastal zone." 16 U.S.C. § 1456(c)(3)(A); see *Exxon v. Fischer*, 807 F.2d 842 (9th Cir. 1986).

⁹ 16 U.S.C. § 1456(c)(3)(B) (1982).

¹⁰ 16 U.S.C. § 1456(c)(3)(A) (1982). The extent of state review authority under this provision has been contested by several oil companies. For one such legal challenge to state conditions on OCS development plans, see *Exxon v. Fischer*, *supra*, note 8, discussed in accompanying article.

¹¹ See, e.g., *Norfolk Southern Corp. v. Oberly*, 632 F.Supp. 1225 (D. Del. 1986), *aff'd on other grounds*, No. 86-5322 (3rd Cir. June 30, 1987), discussed in accompanying article. See also n. 26.

¹² Kuersteiner & Sullivan, *Coastal Federalism: The Role of the Federal Supremacy Doctrine in Federal and State Conflict Resolution*, 33 JAG J. 39 (1984).

¹³ Eichenberg & Archer, *supra* note 3, at 11; see *Southern Pacific Transportation Co. v. California Coastal Comm'n*, 520 F. Supp. 800, 803 (N.D. Cal. 1981); see also Greenberg, *Federal Consistency Under the Coastal Zone Management Act: An Emerging Focus of Environmental Controversy in the 1980s*, 11 ENVT'L REP. (ENVT'L INST.) 50,001 (1981).

¹⁴ 30 U.S.C. 22 (1982).

¹⁵ 16 U.S.C. §§ 1600-1614 (1982 & Supp. III).

Service approved the 5-year mining plan in February, 1981, on the condition that the company obtain "any necessary permits which may be required by the California Coastal Commission."¹⁶

Granite Rock then engaged in substantial extraction activities, including blasting and opening the quarry, building roads, boring test holes, drilling, and dumping rock waste into a disposal area.¹⁷ In 1983, representatives of the California Coastal Commission examined the site and found that the Company's activities had caused three landslides and sedimentation of the Little Sur River, an important habitat for trout, waterfowl, and shorebirds.¹⁸ The Commission projected that continued operations would generate significant additional water pollution, solid wastes, and noise; would release dust into the air; and would mar the scenery.¹⁹

Because the National Forest lies within California's coastal zone, the Commission asserted regulatory jurisdiction over the quarry operations and requested Granite Rock to obtain a coastal development permit pursuant to the California Coastal Act.²⁰ The Commission had failed, however, to make a timely request for a consistency review of the Company's plan of operations.²¹ Thus, the Commission's only means of regulating the quarry operations was through the direct permit requirement of the state's Coastal Act.

In response to California's request for a permit application, Granite Rock filed suit in federal district court challenging the state's power to require a state-issued development

¹⁶ *Granite Rock*, *supra* note 1, at 1427.

¹⁷ *Granite Rock Co. v. California Coastal Comm'n*, 590 F. Supp. 1361, 1366 (N.D. Cal. 1984).

¹⁸ Freyfogle, *Can a State Regulate Mining and Other Activities on Federally-Owned Land?* S. Ct. PREVIEW 82 (1986).

¹⁹ According to a Los Angeles newspaper, the mining would remove so much of the mountain's peak that it would become "little more than a facade visible from [the h]ighway." Los Angeles Times, Nov. 26, 1984, pt. V at 1, col. 1.

²⁰ CAL. PUB. RES. CODE ANN. §§ 30000-30900 (West 1986). Any person undertaking any development, including mining, in the coastal zone, must secure a permit from the Coastal Commission. *Id.* §§ 30106, 30600.

²¹ NOAA has promulgated regulations establishing procedures for consistency review. A state must provide to federal agencies a list of federally permitted or licensed activities which the state wishes to review. 15 C.F.R. § 930.53 (1986). If a state wishes to review an activity not on that list the state must notify the federal agency and applicant within 30 days of notice of the federal permit application that CZMA consistency review is necessary. 15 C.F.R. § 930.57. Failure to give timely notice is a waiver of the state's right to review the application under the authority provided by the CZMA. *Id.*

²² 590 F. Supp. at 1366. The company originally sought to enjoin California both from requiring a coastal development permit under the Coastal Act and from requiring consistency review of the plan of operations. When California conceded that it had waived its right of review under the CZMA, Granite Rock limited its challenge to the state permit requirement. The Commission asked the court to rule that any future plans would indeed be subject to state consis-

permit for the company's federally-approved plan of operations.²² The district court found for California and held that the federal lands that were subject to Granite Rock's mining claims were not excluded from the coastal zone. Therefore, the CZMA and California's Coastal Act were applicable because the lands were not committed solely to the discretion of the federal government.²³ The court also found that the state's permit requirement was not preempted by either the federal Mining Act or U.S. Forest Service regulations because there was no impermissible conflict between the state and federal laws.²⁴

On appeal, the Ninth Circuit Court of Appeals reversed, holding that the federal Mining Act and U.S. Forest Service regulations did preempt California's permit requirement under its Coastal Act.²⁵ Citing the Act's legislative history and its savings provision in section 1456(e)(2), the court rejected California's claim that the CZMA neutralized the potential preemptive effect of any previous acts of Congress.²⁶ The Ninth Circuit based its analysis of the preemption issue on *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,²⁷ which found that a state hydroelectric permit requirement that "actually intrude[d] into the

tency review. *Id.* at 1367. The court concluded that this issue was not ripe for adjudication. *Id.* at 1375. It did say, however, that the company's argument that direct state permitting and consistency review were mutually exclusive was wholly without merit. *Id.* at 1370, n. 9 ("The consistency review provision is somewhat broader than direct state regulation because it applies to activities affecting the coastal zone and somewhat narrower because it applies only to federally supported or licensed activities. But there is no basis for finding that an activity subject to consistency review is for that reason alone shielded from direct state regulation.")

²³ *Id.* at 1367; 16 U.S.C. § 1453(1) (1982).

²⁴ 590 F.Supp. at 1373-74. The court rejected California's claim, however, that the CZMA 'federalizes' state management programs and that therefore no conflict can ever exist between an approved state coastal program and federal regulations. It also rejected the claim that the CZMA preempts federal rights granted under other laws such as the Mining Act. The court characterized the tests for federal preemption of state law as stringent, requiring the court to find that the state law stands as an obstacle to achievement of the congressional objectives under federal law. *Id.* at 1373. It rejected the assumption that the state would apply its laws to deprive the mining company of its rights under the Mining Act and found that California's regulatory requirements were comparable to those of the U.S. Forest Service, which neither occupied the entire field of mining regulation nor posed an irreconcilable conflict with the state standards. *Id.* at 1373-74.

²⁵ *Granite Rock Co. v. California Coastal Commission*, 768 F.2d 1077, 1083 (9th Cir. 1985).

²⁶ *Id.* at 1080-81. The court quoted from the Senate report on the CZMA in its description of the Act as "merely a cooperative funding provision" that was designed to enhance state management authority through grants-in-aid for program development and implementation. *Id.* at 1081, quoting 16 U.S.C. § 1451 (i) ("These grants were intended only to give coastal states an incentive 'to exercise their full authority over the lands and waters in the coastal zone' ... and not to restore authority that the states might previously have lost through federal preemption.")

²⁷ 328 U.S. 152 (1946).

preempt all state regulation of activities on federal lands even if those lands fall within the federal lands exclusion from the definition of the coastal zone.⁴⁶

This interpretation of the CZMA's relevance to the preemption analysis is incomplete. The Court failed to consider language in the CZMA itself expressing congressional intent with respect to the interrelation of federal and state authority. The Court virtually ignored the consistency provision. Although this provision is the most important section in the Act's intergovernmental coordination, the Court focused solely on the jurisdictional savings clause. As the Court itself recognized, this clause limits its disclaimer effect to water resources and submerged lands.⁴⁷ Nevertheless, the majority found this limited disclaimer and its legislative history to "demonstrate Congress' refusal to alter the balance between state and federal jurisdiction."⁴⁸ The majority made no mention of the congressional intent reflected in the consistency provision, especially section 1456(c)(3)(A), which gives a state the power to prevent the issuance of a federal permit or license if the proposed activity violates the state's coastal plan. To neglect to discuss the consistency provision is a serious omission. The provision gives the states the power to influence federal permit decisions not in the capacity of an advisor but as an independent entity making substantive policy choices regarding activities that may be licensed under federal law.

Although the Court stopped short of referring to the CZMA as "merely a cooperative funding mechanism," as the Ninth Circuit had done,⁴⁹ the Court neglected what is clearly the most important jurisdictional aspect of the Act. In the consistency provision Congress gave each participating state the power to review a federal license or permit application and to judge whether the activity proposed is one of the "land or water uses" that is allowed in the proposed location under the state's coastal management plan and whether it would be carried out in accordance with the state's coastal laws and policies.⁵⁰ This second element of the consistency requirement means that the proposed activity must meet any standard contained in the approved program, whether this standard relates to environmental quality or to the other national

interests which the state must accommodate in its programs. Standards can address, for example, whether an activity promotes public access to the shoreline or whether it will dislocate any priority coastal-dependent uses, such as commercial fishing.⁵¹

In addition to a deficient reading of the CZMA, the majority opinion fails to apply long-established standards for preemption determinations under the Supremacy Clause. If the congressional enactment is in a field of law that is a traditional area of state concern, the evidence of congressional intent must be unmistakable and unambiguous.⁵² This presumption in favor of concurrent jurisdiction applies even when the federal enactment is pursuant to the Property Clause.⁵³ Moreover, the opinion should have demonstrated, to contradict the arguments of the dissenters, that there is no irreconcilable conflict between federal land management laws and the California coastal development permit requirement. Forgoing this customary analysis, the Court artificially limits future permit conditions to environmental quality considerations.

The Dissenting Opinions

The dissenting opinions contain the most troubling discussions of the CZMA. Rather than ignore the consistency provision as evidence of congressional intent as the majority had done, the dissenters interpreted the consistency provision as evidence of congressional intent to offer only a limited role to the states.

After a close reading of the pertinent federal land laws, Justice Powell concluded that the majority's preemption analysis erroneously failed to consider the complex of applicable federal statutes and regulations as a whole. He charged the majority with mischaracterizing the governing federal statutes as embodying a congressional distinction between land use and environmental regulation. Moreover, the majority unduly emphasized provisions in the Forest Service

⁴⁶ *Id.*

⁴⁷ *Id.* "While the land at issue here [a national forest] does not appear to fall under the categories listed in 16 U.S.C. Sec. 1456(e)(1)...."

⁴⁸ *Id.* Even the Court's interpretation of the effect of the disclaimer clause is wrong. The Court correctly identifies the section as reflecting Congress' desire not to alter the jurisdictional status quo, but fails to recognize that Congress itself limited the status quo it sought to preserve to the narrow areas of submerged lands, water resources, and navigable waters.

⁴⁹ *Granite Rock Co.*, *supra* note 25, at 1081. *Compare Interior*, *supra* note 3, at 659.

⁵⁰ 16 U.S.C. § 1456(c)(3)(A) requires an applicant for a federal license or permit to certify that the proposed activity "complies with the state's approved program" and will be conducted in a manner consistent with the program. 16 U.S.C. § 1454(b) details the components required for federal approval of the coastal program.

⁵¹ California's Coastal Act in fact includes these substantive standards for coastal development. *See, e.g.*, CAL. PUB. RES. CODE ANN. §§ 30252, 30255 (West 1986). It was the inclusion of these standards that convinced Justice Scalia that the Act constituted land use control. *Granite Rock*, *supra* note 1, at 4376 (Scalia, J., dissenting). *See also Exxon v. Fischer*, *supra* note 8, discussed in accompanying article.

⁵² *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.")

⁵³ *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

regulations which recognize that certain pollution control laws require adherence to state standards.⁵⁴

Justice Powell also believed that the majority's preemption analysis ignored the critical fact that the mine is on federal land. While not characterizing the state law as posing an "actual conflict" with the federal laws, Justice Powell stressed the preemption criterion that looks at the relative weights of the state and federal interests in regulating a particular subject matter.⁵⁵ In his view, Congress' authority under the Property Clause is extensive; although the Property Clause does not require automatic preemption, the courts should be less reluctant to find preemption than in non-federal land controversies. Finally, the state regulation in question, a separate, duplicative permit system, is particularly intrusive. The regulation gives the state a veto power over a federally-approved project, and allows it to "strike a different balance" between mineral development and environmental concerns.⁵⁶

For Justice Powell the consistency provision was supporting evidence of Congress' intent to confine state involvement in federal land management decisions to the review and

comment procedures set forth in the federal statutes.⁵⁷ The consistency provision, considered in light of the FLPMA and the NFMA provisions for state coordination, "indicates that Congress did not believe the States could have imposed separate permit requirements, even before passage of the CZMA."⁵⁸ In other words, Congress would not have given the states the consistency review process if it had believed that the states could exercise direct permit control over mining on federal lands. While somewhat limited, Justice Powell's review of the consistency provision gives at least some indication of how courts in the future may view its relevance to the scope of state substantive decisionmaking. Justice Powell expressed no opinion on whether the CZMA alone preempts state regulation of mining on federal lands, or on the Court's conclusion that the Act, in its definition of federal lands, did not entail such preemption.⁵⁹

In his separate dissent, Justice Scalia was emphatic in his view that California's permit requirement was an exercise of land use control preempted by federal law. He rejected the Court's distinction that would allow California to impose non-conflicting environmental conditions through its permit requirement.⁶⁰

Unlike Justice Powell, however, Justice Scalia found evidence for federal preemption of state land use control in the CZMA as well as in the FLPMA and NFMA. He specifically cited the consistency provision as one of the statutes that requires federal officials to accommodate state laws and plans, but only to the maximum extent compatible with federal law and objectives.

Those requirements would be superfluous, and the limitation upon federal accommodation meaningless, if the States were meant to have independent land use authority over federal lands. The Court is quite correct that the CZMA did not purport to change the status quo with regard to state authority over the use of federal lands. But as the CZMA's federal lands exclusion and consistency review provisions clearly demonstrate, that status quo was assumed to be exclusive federal regulation.⁶¹

⁵⁷ *Id.* at 1437, nn. 6 & 7.

⁵⁸ In discussing the consistency provision, Justice Powell referred to the fact that California had forfeited its right under the provision to object to Granite Rock's mining activities by failing to make a timely complaint. *Id.* at n. 7. He correctly pointed out that the provision prohibits issuance of the federal permit in the face of state objections unless the Secretary of Commerce holds a hearing and then determines "that the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security." *Id.*, citing 16 U.S.C. § 1456(c)(3)(A) (1982).

⁵⁹ *Id.*

⁶⁰ "We are not dealing with permits in the abstract, but with a specific permit, purporting to require application of specific criteria, mandated by a numbered section of a known California law. That law is plainly a land use statute, and the permit the statute requires Granite Rock to obtain is a land use control device. ... Since, ... state exercise of land use authority over federal lands is preempted by federal law, California's permit requirement must be invalid." *Id.* at 1439 (Scalia, J., dissenting).

⁶¹ *Id.* at 1441 (citations omitted).

⁵⁵ *Id.* at 1437.

⁵⁶ *Id.* Justice Powell cited *First Iowa* to support his view of the intrusiveness of the permit system. It created an "intolerable conflict in decisionmaking" which federal power should overrule to be faithful to the Property Clause and to common sense. *Id.* at 1438. To give the state the power to prevent the mining company from pursuing its valid claim was an unprecedented "abdication of federal control over the use of federal land." *Id.* at 1437.

California Wins Appeal Of Thresher Shark Consistency Decision

In a recent federal appeals court decision, California won approval for its effort to use the CZMA consistency process to influence offshore development activities. Although the decision was primarily on an issue of procedure, the court clarified some of the confusion engendered by the lower court's decision concerning section 307(c)(3)(B) of the CZMA. This provision contains the consistency requirement that applies to all OCS activities affecting land or water uses in the coastal zone. In *Exxon Corp. v. Fischer*, 807 F.2d 842 (9th Cir. 1987), the U.S. Court of Appeals for the Ninth Circuit upheld California's finding that Exxon Corporation's proposed oil drilling on the southern California OCS would affect land and water uses in California's coastal zone. (For background on this case, see Eichenberg, *The Thresher Shark Case: Another Challenge to State Coastal Management Authority*, VI:1 TERRITORIAL SEA (March, 1986).)

Under its consistency review authority, the California Coastal Commission had ruled that one of Exxon's proposed exploratory wells would adversely affect the thresher shark fishery, in contravention of the state's policy of protecting and promoting coastal fisheries, unless the drilling operation observed seasonal restrictions. The oil company appealed to the Secretary of Commerce to overrule California's finding of inconsistency. Exxon claimed that only the transportation activities to and from the well could be reviewed by California. The drilling itself was beyond the state's review because it did not affect land or water uses in the coastal zone. The Secretary of Commerce determined that the drilling would affect the coastal zone although not substantially. He sustained the state's consistency decision because California had offered Exxon a "reasonable alternative" to its proposed activity—the opportunity to drill during the fishery's off-season. Accordingly, the Secretary refused to overturn California's consistency objection.

Exxon then filed suit in federal district court, claiming California could not conduct a consistency review of its proposed exploratory well. The district court agreed and held that California had violated the CZMA by objecting to activities that did not affect the coastal zone. Under the court's reasoning a consistency objection cannot be based on potential adverse economic effects on a coastal industry, but must be limited to effects on natural resources located within the coastal zone. The court also held that the CZMA appeals provision do not empower the Secretary to decide whether Exxon's operations affected land and water uses in the coastal zone. Thus, Exxon could seek judicial relief from California's decision without first challenging the Secretary's decision to sustain the state's objection.

On appeal, the Ninth Circuit reversed the district court, reasoning that the principal issue in the case had already been decided by the Secretary of Commerce. This issue concerned whether Exxon's drilling operations would actually affect land and water uses in the coastal zone of California. Following established principles of administrative law, the court refused to relitigate the Secretary's determination, since the Secretary had decided the issue while acting in a judicial capacity.

The court left open the question whether Exxon could have bypassed the Secretary entirely and gone directly to the district court to challenge California's consistency decision. The court simply decided that Exxon could not relitigate in a collateral proceeding an issue decided by the Secretary. The court rejected Exxon's argument that the Secretary's decision was irrelevant to the validity of California's objection. In finding for California, the Ninth Circuit held that the Secretary's decision to deny Exxon's appeal necessarily included a decision by the Secretary that the state's demand for a consistency review was valid. Thus, the Ninth Circuit implicitly affirmed the Secretary of Commerce's interpretation that economic impacts on commercial fisheries are a proper matter for consistency review under the CZMA.

The *Exxon* case did not require the Ninth Circuit to consider directly the scope of state consistency review under the CZMA. Thus, how much substantive influence on federally-licensed OCS activities a coastal state may have remains to be clarified. The decision does, however, validate coastal state authority to consider the effect of OCS activities on the economic viability of the commercial fishing industry, and presumably other coastal industries and activities, as part of the consistency review process.

Appeals Court Upholds Delaware's Coastal Law

On June 30, 1987, the U.S. Court of Appeals for the Third Circuit found that Delaware's Coastal Zone Act (CZA) does not violate the Commerce Clause of the U.S. Constitution. *Norfolk Southern Corp. v. Oberly*, No. 86-5322 (3rd Cir., June 30, 1987) (hereinafter, the "Opinion"). The opinion affirmed the district court's decision in *Norfolk Southern Corp. v. Oberly*, 632 F.Supp. 1225 (D. Del. 1986). See Cournoyer, *Delaware's Coastal Zone Act Challenged as Burden on Interstate Commerce*, V:4 TERRITORIAL SEA (December, 1985).

The Norfolk Southern Corporation had applied for a state permit to carry on a coal lightering operation. The project would have involved "topping off" partially loaded supercolliers (deep draft, coal carrying vessels over 100,000 deadweight tons) in a deep water anchorage in Delaware Bay. The project's goal was to facilitate overseas transportation of coal. Currently, coal must be exported from East Coast ports in partially-loaded vessels; available port facilities are too shallow to accommodate the deep draft of a fully-loaded supercollier.

Delaware denied the permit because the state's coastal law prohibits new heavy industrial development along Delaware Bay, including offshore bulk product transfer facilities. This prohibition was enacted to protect the natural resources of the Bay. The U.S. Secretary of Commerce had approved Delaware's law under the Coastal Zone Management Act (CZMA). Norfolk Southern challenged the Delaware law in federal district court as an unconstitutional burden on interstate commerce. The district court found that the CZMA "immunized" the Delaware law from constitutional scrutiny on the theory that in enacting the CZMA Congress had implicitly consented to state laws that might otherwise burden interstate commerce in order to protect coastal resources. *Norfolk Southern Corp. v. Oberly*, 632 F.Supp. 1225 (D. Del. 1986).

The Third Circuit rejected this reasoning. The court reviewed the legislative history of the CZMA and found that Congress had not intended to authorize expansion of state powers or protection from constitutional scrutiny. The goal of the CZMA was to encourage states to use their full authority to promote wise management of coastal lands, waters, and other resources. The statute included financial incentives to help states use their existing powers more effectively. "While the CZMA states a national policy in favor of coastal zone management, it does not on its face expand state authority to legislate in ways that would otherwise be invalid under the commerce clause." Opinion at 17.

The court then reviewed Delaware's coastal law to determine whether it violated the Commerce Clause. There were three possible tests that the court could have used to gauge the constitutionality of the Delaware law. Norfolk Southern argued for the strict scrutiny test. This standard is used for state actions that purposefully or arbitrarily discriminate against interstate commerce. Economic protectionism, laws which attempt to shield in-state businesses from competition, fall into this category. Delaware advocated use of the

deferential "rationality" standard, which the courts employ for regulations affecting areas of strong state interest, such as public health and safety.

The court rejected both of these tests and instead chose the balancing test, a middle ground between strict scrutiny and deferential review. Explaining the underlying values of the Commerce Clause, the court emphasized that the purpose of this constitutional provision is to ensure that "our economic unit is the Nation," not individual states. The framers of the Constitution intended to eliminate protectionist restrictions on interstate trade as a way of achieving this goal.

The balancing test weighs the burden on interstate commerce against the local benefits derived from the state law. A valid state law burdens interstate commerce only incidentally in comparison with local benefits. In *Norfolk Southern*, the Third Circuit found that Delaware's ban on bulk transport facilities did burden commerce, but did not discriminate between intrastate and interstate operations. Since there was no burden to interstate commerce alone, the court found the law constitutional.

The court stressed that the Commerce Clause required it to determine whether a state law is a barrier to free flow of trade among the states. Yet, in the court's view, the Commerce Clause:

does not authorize a federal court to engage in the kind of broad-based 'national interest balancing' requested by Norfolk Southern. Balancing the societal value of decreasing unemployment in the Eastern coal mines and shrinking the size of the trade deficit against the societal value of protecting the coastal zone is within the province of Congress. Opinion at 46.

This decision makes it clear that states can enact coastal protection statutes that may inhibit certain types of commercial activity within the coastal zone. However, the CZMA does not insulate these state laws from constitutional scrutiny. As long as the regulations treat in-state and out-of-state interests even-handedly, they will not be invalidated as burdens on interstate commerce.

Staff Changes

Jill Bubier, Associate Editor of the *Territorial Sea*, has recently taken a leave of absence to pursue a graduate degree in natural resources management at the University of Vermont. Jill has been with the Marine Law Institute since December, 1983. The staff will miss her thorough research and insightful analyses, as well as her good company. We wish Jill all the best in her new venture.

Todd Burrowes is now serving as Associate Editor of the *Territorial Sea*. He is a 1987 graduate of the University of Oregon School of Law, where he served as a writer and editor of our sister publication, *Ocean Law Memo*. We welcome Todd's contribution to the Institute and look forward to working with him on future issues of *Territorial Sea*.

Publication Available

The University of Maine's Canadian-American Center has recently published *Resource Economies in Emerging Free Trade: Proceedings of a Maine/Canadian Trade Conference*. The 355-page book provides an analysis of U.S./Canada trade in agriculture, fish, and forest products. It contains 31 articles by scholars from government agencies and universities in Canada and the United States. The book may be ordered by sending a check for \$12.00 (US funds) for each copy to the Canadian-American Center, 154 College Avenue, University of Maine, Orono, Maine, 04469.

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Territorial Sea is a publication of the Marine Law Institute of the University of Maine School of Law.

The staff of the Territorial Sea invites its readers to submit information on legal developments in the management of marine fisheries and other interjurisdictional resources, including legislation, litigation, regulatory activities, and policy research. We would also welcome suggestions for topics you would like to see covered. Authors are especially encouraged to submit articles for inclusion in this publication.

For further information about this publication, please contact the Marine Law Institute, 246 Deering Avenue, Portland, ME 04102. Telephone: (207) 780-4474.

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Partial funding is provided by grant #NA81AA-D-0035 from the National Oceanic and Atmospheric Administration to the University of Maine/University of New Hampshire Sea Grant College Program. The 1987 subscription rate for individuals is \$15.00 for four issues. The charge for organizations is \$25.00. Subscriptions are based on the calendar year. Single issues, including back issues, are \$4.00 and \$7.00 respectively. All subscription fees and donations are tax-deductible.

The Marine Law Institute carries out research and educational projects on legal issues affecting ocean and coastal resources. A significant amount of the Institute's effort is directed toward understanding the interjurisdictional problems associated with management of marine resources on the state, federal, and international levels. In all of its projects, the Institute employs an interdisciplinary approach which emphasizes the relationship between legal and scientific principles in the development and implementation of marine policy. This approach is achieved through cooperative and joint projects with other research institutions and with resource management agencies at all levels of government.

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