

EFFECT OF THE ENERGY POLICY
ACT OF 2005
(Pub. L. 109-58; “EPA ’05”)
ON THE CONSISTENCY REVIEW
AUTHORITY OF STATES UNDER
SECTION 307(c) OF THE COASTAL
ZONE MANAGEMENT ACT (“CZMA”).

“Except as specifically provided in this Act, nothing in this Act affects the rights of States under:

(1) the Coastal Zone Management Act of 1972;

”

...

- EPA '05 § 311(c)(2); NATURAL GAS ACT § 3(d); 15 USC § 717b(d)

Savings clause: a provision of law that is intended by the legislative authority to prevent or foreclose an interpretation of the legislation of which the clause is a part that might in the absence of the clause be entertained.

APPETIZERS

- "... 'FEDERAL AUTHORIZATION'... INCLUDES ANY PERMITS, ... CERTIFICATIONS, OPINIONS, OR OTHER APPROVALS AS MAY BE REQUIRED UNDER FEDERAL LAW WITH RESPECT TO AN APPLICATION FOR sAUTHORIZATION UNDER § 3...."
- "EACH ... STATE AGENCY CONSIDERING AN ASPECT OF AN APPLICATION FOR FEDERAL AUTHORIZATION SHALL ... COMPLY WITH THE DEADLINES ESTABLISHED BY THE COMMISSION."
- "IN ESTABLISHING A SCHEDULE [FOR ALL FEDERAL AUTHORIZATIONS], THE COMMISSION SHALL ... (B) COMPLY WITH APPLICABLE SCHEDULES ESTABLISHED BY FEDERAL LAW."
- "THE COMMISSION SHALL ... MAINTAIN A COMPLETE CONSOLIDATED RECORD OF ALL DECISIONS MADE OR ACTIONS TAKEN BY ... A STATE ADMINISTRATIVE AGENCY OR OFFICER ACTING UNDER DELEGATED FEDERAL AUTHORITY) WITH RESPECT TO ANY FEDERAL AUTHORIZATION. SUCH RECORD SHALL BE THE RECORD FOR – (1) APPEALS OR REVIEWS UNDER THE COASTAL ZONE MANAGEMENT ACT OF 1972 PROVIDED THAT THE RECORD MAY BE SUPPLEMENTED AS EXPRESSLY PROVIDED PURSUANT TO § 319 OF THAT ACT; ..."

- EPA '05 § 313(a); NATURAL GAS ACT (NGA) §§ 15(a)(2), (b)(2), (c)(1)(B), and (d)(1); 15 USC §§ 717n(a)(2), (b)(2), (c)(1)(B), AND (d)(1)

- “WHEN A SCHEDULE IS ESTABLISHED [BY THE FEREC], IT WILL COMPLY WITH AGENCIES’ APPLICABLE SCHEDULES ESTABLISHED BY FEDERAL LAW.”
 - “NOTHING IN THIS FINAL RULE WILL ALTER SCHEDULES SET BY FEDERAL LAW.”
- 71 FED. REG. 62912, 62914, 62915, n. 18 (OCT. 27, 2006)

- “THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA SHALL HAVE ORIGINAL AND EXCLUSIVE JURISDICTION OVER ANY CIVIL ACTION FOR THE REVIEW OF AN ALLEGED FAILURE TO ACT BY A ...STATE ADMINISTRATIVE AGENCY ACTING PURSUANT TO FEDERAL LAW TO ISSUE, CONDITION ANY PERMIT [DEFINED AS “ANY PERMIT LICENSE, CONCURRENCE OR APPROVAL”] REQUIRED UNDER FEDERAL LAW, *OTHER THAN THE COASTAL ZONE MANAGEMENT ACT OF 1972...*” (EMPHASIS ADDED.)

- EPA '05 § 313(b); NATURAL GAS ACT (NGA) § 19(d)(2); 15 USC § 717r(d)(2)

- “NOTE THIS DESCRIBED CIVIL ACTION FOR THE REVIEW OF AN AGENCY’S ALLEGED FAILURE TO ACT ON A REQUESTED AUTHORIZATION DOES NOT APPLY TO CZMA DETERMINATIONS, SINCE THE DEPARTMENT OF COMMERCE, NOT A FEDERAL COURT, IS THE BODY TO REVIEW A FAILURE TO ACT ON...A CZMA REQUEST.”

- 71 FED. REG. 62912, 62915, n. 24 (OCT. 27, 2006)

“THE COMMISSION NOTES THAT WHEN IT ISSUES AN ORDER GRANTING A PROJECT SPONSOR A...§ 3 AUTHORIZATION UNDER THE NGA TO CONSTRUCT GAS FACILITIES, CLEARANCE TO COMMENCE CONSTRUCTION GENERALLY IS WITHHELD UNTIL THE PROJECT SPONSOR HAS OBTAINED OTHER NECESSARY AUTHORIZATIONS FROM OTHER AGENCIES.”

- 71 FED. REG. 62912, 62918, n. 33 (OCT. 27, 2006)

MAIN COURSE

“THE COMMISSION SHALL HAVE THE EXCLUSIVE AUTHORITY TO APPROVE OR DENY AN APPLICATION FOR THE SITING, CONSTRUCTION, EXPANSION OR OPERATION OF AN LNG TERMINAL.”

- EPA '05 § 311(c)(2); NATURAL GAS ACT (NGA) § 3(e)(1); 15 USC § 717b(e)(1).

“BECAUSE 15 USC § 717b(e)(1) OF THE NGA PROVIDES FERC WITH EXCLUSIVE JURISDICTION OVER SITING AND OPERATING LNG FACILITIES, STATES MAY NOT DO THE SAME UNDER THE AUTHORITY OF THE CZMA.”

- LETTER DATED OCTOBER 4, 2006, FROM DAVID KENNEDY, DIRECTOR, OCRM, TO RUTH EHINGER, MANAGER, COASTAL MANAGEMENT OFFICE, NEW JERSEY DEPT. OF ENVIRONMENTAL PROTECTION

TOOLS OF STATUTORY INTERPRETATION

1. LANGUAGE OF STATUTE.
2. INTERPRETATION BY AGENCY RESPONSIBLE FOR ADMINISTRATION OF STATUTE.
3. RESOLUTION BY COMPETENT LEGAL AUTHORITIES (E.G., COURTS OF LAW) OF SIMILAR OR ANALOGOUS QUESTIONS OF INTERPRETATION.
4. RESOLUTION BY AGENCY ADVANCING DISPUTED INTERPRETATION OF SIMILAR OR ANALOGOUS QUESTIONS OF INTERPRETATION.
5. LEGISLATIVE HISTORY.
6. ABSURD RESULTS?

FERC'S INTERPRETATION OF EPA '05

- “STATES STILL HAVE THE ABILITY TO EFFECTIVELY “VETO” AN LNG FACILITY BY DENYING PERMITS ASSOCIATED WITH THE...COASTAL ZONE MANAGEMENT ACT...”
 - “SUBSTANTIAL AUTHORITY EXISTS THROUGH CURRENT FEDERAL STATUTES PERTAINING TO ASPECTS OF THE PROJECT [WHICH TRIGGER THE APPLICABILITY OF SUCH FEDERAL STATUTES] FOR STATES TO...BLOCK AND THEREBY EFFECTIVELY “VETO” DEVELOPMENT OF AN LNG FACILITY. *NOTHING IN THE ENERGY POLICY ACT OF 2005 CHANGES THE STATES’ AUTHORITIES IN THIS REGARD.*” (EMPHASIS ADDED.)
- <http://ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp>

JUDICIAL PRECEDENT

- “...IN VIEW OF THE CLEAR INTENT OF CONGRESS IN ENACTING THE CZMA TO DEVELOP A JOINT FEDERAL-STATE SYSTEM FOR MANAGEMENT OF COASTAL ZONE RESOURCES, THE QUESTION BEFORE THIS COURT IS WHETHER THE ABANDONMENT PROVISIONS [OF THE REVISED INTERSTATE COMMERCE ACT (RICA)] PREEMPTS OR REPEALS IN PART THE CZMA, ANOTHER FEDERAL LAW.
- “CONGRESS HAS NOT EXPLICITLY REPEALED ANY PART OF THE CZMA BY PASSAGE OF THE RICA.”
- “AS REPEAL BY IMPLICATION IS NOT FAVORED, IT IS INCUMBENT UPON THIS COURT TO GIVE FULL EFFECT TO BOTH ENACTMENTS IF AT ALL POSSIBLE.”

- *SOUTHERN PACIFIC TRANSP. CO. v. CAL. COASTAL COMM’N*,
520 F.Supp. 800, 804-5 (N.D. CAL. 1981).

OCRM'S INTERPRETATION OF THE EFFECT ON THE CZMA OF SECTION 106(d) OF THE OCEAN DUMPING ACT

- “AFTER THE EFFECTIVE DATE OF THIS [ACT], ALL LICENSES PERMITS AND AUTHORIZATIONS OTHER THAN THOSE ISSUED PURSUANT TO THIS [ACT] SHALL BE VOID AND OF NO LEGAL EFFECT, TO THE EXTENT THAT THEY PURPORT TO AUTHORIZE ANY ACTIVITY REGULATED BY THIS [ACT], AND WHETHER ISSUED BEFORE OR AFTER THE EFFECTIVE DATE OF THIS [ACT].”
 - “AFTER THE EFFECTIVE DATE OF THIS ACT, NO STATE SHALL ADOPT OR ENFORCE ANY RULE OR REGULATION RELATING TO ANY ACTIVITY REGULATED BY THIS [ACT].”
- OCEAN DUMPING ACT (ODA) §§ 106(a) and (d); 33 USC §§ 1416(a) and (d).

“SECTION 106 OF THE OCEAN DUMPING ACT DOES NOT CREATE A REPEAL BY IMPLICATION OF [CZMA] § 307(c)(3)(A) AS IT APPLIES TO OCEAN DUMPING PERMITS. ... WHILE § 106 OF THE ODA PREEMPTS STATE LAW REGULATING OCEAN DUMPING,...THE CZMA IS NOT STATE LAW, BUT A FEDERAL ENACTMENT....”

- INTERNAL NOAA OFFICE OF GENERAL COUNSEL MEMO FROM DAVID DRAKE TO JOAN BONDAREFF (JAN. 20, 1984), pp. 1, 10

“WHILE SECTIONS 106(a) AND (d) [OF THE ODA] MAY VOID THE ISSUANCE OF STATE PERMITS FOR OCEAN DUMPING AND PEEMPTS DIRECT ADOPTION OR ENFORCEMENT OF STATE RULES OR REGULATIONS GOVERNING OCEAN DISPOSAL, IT DOES NOT EXEMPT THE REVIEW OF THE EFFECTS OF OCEAN DUMPING ACTIVITIES ON THE COASTAL ZONE FROM THE OPERATION OF SECTION 307(c)(3)(A). THIS IS BECAUSE STATE REVIEW OF FEDERALLY PERMITTED ACTIVITIES UNDER THE CZMA IS NOT STATE REGULATION WITHIN THE INTENT OF § 106(d) OF THE ODA, BUT IS A FEDERALLY AUTHORIZED REVIEW OF ACTIVITIES WHICH AFFECT LAND OR WATER USES OF THE COASTAL ZONE.”

- LETTER DATED FEB. 1, 1984, FROM ROBERT J. MCMANUS, GENERAL COUNSEL, NOAA, TO CHARLES GRADDICK, ATTORNEY GENERAL OF THE STATE OF ALABAMA

LEGISLATIVE HISTORY OF SECTION 304(6a) OF THE CZMA

“THE TERM ‘ENFORCEABLE POLICY’ MEANS STATE POLICIES WHICH ARE LEGALLY BINDING...BY WHICH A STATE EXERTS CONTROL OVER...LAND AND WATER USES AND NATURAL RESOURCES IN THE COASTAL ZONE.”

- CZMA § 304(6a); 16 USC § 1453(6a)

“IF THE LAWS AND REGULATIONS ON WHICH A STATE SEEKS TO BASE ITS OBJECTION ARE PREEMPTED BY FEDERAL LAW, THEY ARE NOT “LEGALLY BINDING” [WITHIN THE MEANING OF THAT TERM AS IT IS USED IN SECTION 304(6a)]. GIVEN THIS, NEW JERSEY WOULD NOT BE AUTHORIZED TO BASE AN OBJECTION ON A PREEMPTED LNG-SPECIFIC POLICY.”

- LETTER DATED OCTOBER 4, 2006, FROM DAVID KENNEDY, DIRECTOR, OCRM, TO RUTH EHINGER, MANAGER, COASTAL MANAGEMENT OFFICE, NEW JERSEY DEPT. OF ENVIRONMENTAL PROTECTION

“FINALLY, § 6208(b) PROVIDES THAT FEDERAL AGENCIES AND APPLICANTS ARE REQUIRED TO BE CONSISTENT WITH THE ‘ENFORCEABLE POLICIES’ OF A STATE CZM PROGRAM. THEY SHALL GIVE ADEQUATE CONSIDERATION TO PROGRAM PROVISIONS WHICH ARE IN THE NATURE OF RECOMMENDATIONS. AGAIN, THIS PROVISION CODIFIES THE EXISTING REGULATORY PRACTICE [15 CFR §§ 930.39(c) AND 930.58(a)(4)].”

- COASTAL ZONE ACT REAUTHORIZATION AMENDMENTS (CZARA) OF 1990, HOUSE CONFERENCE REPORT No. 101-964, p. 5

“IN DEVELOPING FINDINGS, THE APPLICANT SHALL GIVE APPROPRIATE WEIGHT TO THE VARIOUS TYPES OF PROVISIONS WITHIN THE MANAGEMENT PROGRAM. WHILE APPLICANTS MUST BE CONSISTENT WITH THE ENFORCEABLE, MANDATORY POLICIES OF THE MANAGEMENT PROGRAM, THEY NEED ONLY DEMONSTRATE ADEQUATE CONSIDERATION OF POLICIES WHICH ARE IN THE NATURE OF RECOMMENDATIONS.”

- 15 CFR § 930.58(a)(4) (1990)

“THE CONFEREES ARE AWARE OF THE ARGUMENT THAT THE APPLICATION OF FEDERAL CONSISTENCY TO ACTIVITIES UNDER THE OCEAN DUMPING ACT AMOUNTS TO STATE REGULATION OF OCEAN DUMPING FOR PURPOSES OF § 106(d) OF THAT ACT. THE CONFEREES REJECT THIS ARGUMENT.”

- HOUSE CONFERENCE REPORT No. 101-964, P. 4

IS THIS RESULT ONE THAT IS ABSURD?

IF UNDER OCRM'S THEORY A CMP POLICY, IN ORDER TO BE "ENFORCEABLE" UNDER CZMA § 304(6a), MUST, INDEPENDENT OF THE CZMA, BE ENFORCEABLE OR LEGALLY BINDING AGAINST A PERSON OR AGENCY SUBJECT TO THE CONSISTENCY REVIEW REQUIREMENTS OF THE CZMA, THEN NO CMP POLICY CAN EVER BE "ENFORCEABLE" AS AGAINST A FEDERAL AGENCY. (CZMA § 307(c)(1); 15 CFR § 930.39(c).)

SUMMARY AND CONCLUSION

OCRM'S POSITION WITH REGARD TO THE PREEMPTIVE EFFECT OF EPA '05 ON STATE AUTHORITY UNDER THE CZMA:

IS CONTRARY TO:

1. THE EXPRESS LANGUAGE, I.E., THE SAVINGS CLAUSE, OF EPA '05;
2. FERC'S INTERPRETATION OF EPA '05;
3. RELEVANT JUDICIAL PRECEDENT;
4. OCRM'S OWN PREVIOUS DETERMINATIONS REGARDING THE INTERPLAY BETWEEN THE CZMA AND OTHER FEDERAL LAWS;
5. THE LEGISLATIVE HISTORY OF THE CZMA.

AND

6. LEADS TO AT LEAST ONE RESULT THAT IS PATENTLY ABSURD.

- DESSERT???