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Summer 2012

# Coastal Planning, Federal Consistency, and Climate Change: A Recent Divergence of Federal and State Interests

Chad J McGuire



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# NATURAL RESOURCES & ENVIRONMENT

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

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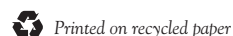
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# Coastal Planning, Federal Consistency, and Climate Change: A Recent Divergence of Federal and State Interests

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Chad J. McGuire

Since the 1970s, the U.S. Government has advanced a policy for the rational development and protection of coastal resources. The passage of the Coastal Zone Management Act in 1972, 16 U.S.C. §§ 1451 *et seq.* (the CZMA) created federal financial assistance and some deference to coastal states as incentives to design and implement plans for the comprehensive management of coastal resources. Under guidelines focused on preservation, protection, development, restoration, and enhancement, all coastal states (Illinois is currently in the final phases) have developed coastal management plans. An additional benefit beyond the creation of comprehensive coastal state policies is that the CZMA requires that the federal government, to the extent practicable, ensure federal practices are consistent with approved state coastal management plans. *Id.* at § 1456(c). In this way, the CZMA establishes what some have referred to as a “reverse supremacy clause” regarding the state and federal relationship in marine policy management. See Patrick J. Gibbons, *Too Much of a Good Thing? Federal Supremacy & the Devolution of Regulatory Power: The Case of the Coastal Zone Management Act*, 48 Naval L. Rev. 84 (2001).

Recently, state and federal interests have diverged regarding the management of some ocean resources. This divergence is observable when observing marine federalism questions through the competing lenses of energy resource development and climate change adaptation. The global economic crisis over the last several years has created calls for policy prescriptions at the federal level to more fully develop our domestic economic capacity, including proposals to increase energy development opportunities offshore. Meanwhile, coastal states have begun to align management priorities to deal with the impacts of climate change, including adaptation strategies aimed at dealing with the impacts of sea-level rise.

A divergence between federal and state interests begins to occur when coastal states update management plans to internalize the costs of climate change, including taking actions today that will protect against sea-level rise occurring in the future; meanwhile, the federal government adopts policy directions aimed at ramping up offshore energy development, especially projects geared toward oil and natural gas production. The purpose of this article is to identify the contrasting policy approaches being undertaken at the state and

federal levels with respect to climate change and offshore resource development respectively, noting how these respective approaches are leading to a divergence between state and federal priorities in the marine environment. The divergent approaches identified will be placed in the context of the CZMA, particularly the federal consistency requirement of that act, which helps to define the relationship between state and federal actions in ocean waters. Legal issues that arise from this divergence will be identified and analyzed. We begin with identification of current policy approaches undertaken by the federal and state governments in relation to resource development and climate change adaptation.

The federal government has engaged in actions over recent years that suggest a trend toward increasing offshore oil and gas development. For example, in March 2010, the Obama administration announced its intention to open the Mid- and South Atlantic offshore areas—essentially from Delaware to Florida—to oil and gas exploration, something that had not been done since the 1980s. Beyond opening up the Atlantic for exploration, the federal government had also scheduled a lease sale off the coast of Virginia to begin in 2011. President Obama indicated these actions were based on a desire to increase American energy independence. John M. Broder, *Obama Oil Drilling Plan Draws Critics*, NY Times, Mar. 31, 2010. Prior to actual exploration or leasing operations beginning in the Atlantic, the Deepwater Horizon oil spill in the Gulf of Mexico occurred, prompting a complete cessation of oil and gas leasing activity off the Atlantic coast through 2017. Juliet Eilperin & Steve Mufson, *Offshore Drilling Policy Reversed*, Wash. Post, Dec. 2, 2010. The opening of the Atlantic followed similar proposals to expand offshore oil and gas leasing operations in the eastern Gulf of Mexico and the north coast of Alaska.

Coastal states, meanwhile, have been working to develop policies to mitigate and adapt to climate change. Mitigation policies are geared toward limiting the impacts of climate change, mostly through efforts to develop state, regional, and national policies that control greenhouse gas emissions. States have engaged in regional greenhouse gas emission initiatives, proposed legislation capping greenhouse gases, and sued the federal government to take a more active role in the regulation of climate change. From an adaptation standpoint, states are moving toward coastal land use policies that internalize the current and future costs of rising seas; these policies include a mix of strategic purchases and development restrictions.

The federal government’s recent moves to increase offshore oil and gas production, in many ways a political response

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to current economic conditions and the desire to increase energy independence, present a conflict with the evolving—and somewhat divergent—policy directions of the federal government and coastal states when it comes to prioritizing and implementing coastal resource management policy. This conflict is compounded when one considers the overarching legal framework in which both the federal government and coastal states operate. The Outer Continental Shelf Lands Act

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## The federal consistency provision allows coastal states to proactively defend against federal actions that might impact priorities identified in federally approved coastal management plans.

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(OCSLA), 43 U.S.C. § 1331 *et seq.*, and the CZMA provide a set of legal frameworks in which these diverging interests can be considered. First, the roles these federal laws play in defining the relationship between federal and state interests in the ocean will be analyzed. Then, recent trends indicating federal and coastal state interests may be diverging from one another, creating a potential for conflicting and incompatible uses within a federalism context, will be discussed.

### ***History of Federal-State Relationship in Ocean Resources***

After World War II, security concerns and technology advances spurred the desire in the United States to consider our ocean resources. As the United States asserted jurisdiction over its ocean resources vis à vis the rest of the world, difficulties arose as between coastal states and the federal government regarding the ownership rights of submerged lands adjacent to coastal state borders. Coastal states were of the opinion that submerged lands in coastal waters up to three miles seaward of a coastal land boundary were the sole property of the coastal state, including the natural resources that existed in these submerged lands. The federal government countered with a claim to all property rights in all submerged lands and resources in the coastal zone. California, acting in its capacity as a coastal state, brought suit against the federal government, and the question of ultimate ownership of submerged lands, including resources within submerged lands, was settled in favor of the federal government by the U.S. Supreme Court. *United States v. California*, 332 U.S. 19 (1947). Coastal states, unhappy with this judicial conclusion, sought the aid of Congress to legislate a solution that supported coastal state ownership rights in near shore ocean resources.

The corresponding rights controversy was settled in 1953 with the passage of two statutes. The first was the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, which provided coastal states with ownership to submerged lands (including resources) up to three miles from a baseline established at the coast (a few coastal states later received larger grants because of historical claims). The federal government maintained ownership over waters that extended beyond three miles (up to 200 miles today or the natural extent of the continental slope, whichever is greater). The second federal statute, OCSLA, detailed the manner in which the federal government would provide for the development of natural resources of submerged lands beyond state jurisdiction.

Today OCSLA remains the primary framework for offshore resource development and management. In summary, OCSLA provides private companies access to resources through an detailed bidding procedure in which specified areas are proposed for oil and gas development through a leasing process. The bidding procedure includes significant planning for the proposed development of an area, including details on the site itself, exploration of the site, and the ultimate development and production of the site. During this process environmental impacts are considered to ensure compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* In addition, OCSLA mandates consideration of the impacts of the proposed development on coastal states, specifically impacts to existing coastal management plans developed by coastal states under the CZMA.

The CZMA was passed in 1972 to encourage coastal states to create formal policies for the protection and development of their coastal resources in the form of coastal management plans. The CZMA provides two major incentives for the development of coastal management plans. First, coastal states that agree to develop plans that conform to CZMA priorities receive federal funding for development and implementation. Second, coastal states with plans approved under the CZMA enjoy “federal consistency” under the CZMA, a condition sometimes referred to as “reverse supremacy” whereby the federal government assures the state that federal activities in the marine environment—to the extent practicable—are consistent with the coastal state’s management plan. 16 U.S.C. § 1456(c).

Federal consistency has become an important component of the CZMA, especially since funding for the development and implementation portions of the program has continually diminished since its inception. The federal consistency provision allows coastal states to proactively defend against federal actions that might impact priorities identified in federally approved coastal management plans. For example, a coastal state might identify the natural and pristine condition of its shores as a major priority of its coastal plan because of the importance that untainted coastal zones play in tourism, recreation, and even as nursery habitat for commercial fisheries. The state would outline such priorities in its coastal management plan, and if approved at the federal level such priorities would essentially be assented to by the federal government. If the federal government were to propose the development of an offshore project with the potential to harm this important habitat after adopting the coastal management plan, then the state could use the federal consistency requirement under the CZMA to object to the federal project even where the project is occurring wholly in federal waters. The federal consistency requirement is thus an important tool for coastal states to

effectively extend their jurisdiction to protect resources prioritized in their coastal management plans.

The federal consistency requirement does not give coastal states absolute power over federal activities in the ocean. As indicated in the example immediately above, states have the right to *object* to the proposed federal activity under the CZMA on the basis that the activity frustrates an identified value of the coastal state. However, the federal government does retain the authority to continue the project where it can show that the challenged activity is “consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security.” 16 U.S.C. § 1456(c)(3). National security includes the development of energy security through offshore development. Still, federal consistency allows coastal states the opportunity to become part of the conversation relating to federal operations in ocean waters, allowing for state interests to be heard and considered. Often state objections to federal actions on the basis of federal consistency result in mediated alterations to help lessen the potential impact on state coastal resources.

The procedure of the CZMA, including its federal consistency requirement, has been incorporated into OSCLA

through the permitting process. As noted earlier, there is a general process outlined under OSCLA by which private companies explore potential offshore sites for oil and gas exploration. At an early stage in this process, environmental impacts are considered under NEPA. Coastal states are made aware of the possible environmental impacts, which must include analysis of potential effects on identified coastal resources. Once a lease sale has been made and an exploration plan finalized, the drilling operator must submit a coastal zone management consistency certification prior to drilling. This document is sent to potentially impacted coastal states, which then review the plan and either concur or object to the planned production on the grounds of federal consistency. Throughout this process coastal states are given several opportunities to have a say in the citing, planning, and development related to offshore oil and gas leasing.

The interrelationship between the federal statutes identified above, most specifically the CZMA and OSCLA, creates a partnership between federal and state interests in the marine environment centered on a commitment at both the federal and state level to identify important coastal resources and to avoid actions that do not arbitrarily frustrate these

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priorities. Climate change is arguably frustrating this process by creating a divergence between state and federal interests. As coastal states are forced to deal with the impacts of climate change (e.g., sea-level rise, erosion, storm surges), the priorities of coastal management are changing. States are moving to adapt to these changes by reprioritizing coastal management plans to reflect the realities of climate change. At the same time, the federal government is moving in direc-

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Any federal government  
action contributing to climate  
change—especially through  
increased greenhouse gas  
emissions—must be seen as  
inconsistent with state coastal  
management plans, at least  
plans that include coastal  
priorities adversely impacted  
by sea-level rise.

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tions that potentially frustrate this process, in particular, by encouraging efforts to increase domestic offshore energy production as a way to spur national economic output and energy security. By focusing on the CZMA and federal consistency, one can better understand how these currently diverging paths may ultimately resolve, taking as a starting point current climate change adaptation strategies being implemented by coastal states and current federal policy geared toward increasing oil and gas production.

### ***Coastal State Adaptation Strategies to Climate Change Impacts***

A variety of impacts to the coast can be implicated by climate change, including increasing frequency and intensity of storm events leading to secondary effects, such as increased erosion rates. One result of climate change that will apply universally to all coastal areas (although the impacts will vary depending on location and local conditions) is sea-level rise as a consequence of a warming planet. By focusing on the adaptation strategies of sea-level rise we can gain some understanding

of how coastal states are defining priorities related to this effect of climate change.

Coastal states essentially have two options to address sea-level rise: stay and adapt to local conditions by, for example, armoring against the tide where necessary, or retreat inland to remove the public from the danger while maintaining important coastal resource functions (ecosystem services). U.S. Climate Change Science Program Synthesis and Assessment Product 4.1, Coastal Sensitivity to Sea-Level Rise: A Focus on the Mid-Atlantic Region 88–97 (2009), available at [http://epa.gov/climatechange/effects/coastal/pdfs/SAP\\_4-1\\_SynthesisandAssessmentProduct.pdf](http://epa.gov/climatechange/effects/coastal/pdfs/SAP_4-1_SynthesisandAssessmentProduct.pdf). A coastal community may choose to remain at the shore for a variety of reasons. For example, the area may be naturally armored against the rising sea through heavy rock outcroppings and escarpments that provide the coastal community with built-in protection. Such conditions are often found in coastal areas of northern New England and the Pacific Northwest. In addition to natural protections, low-lying coastal communities may have a preexisting tradition of armoring, such as building seawalls and other forms of man-made protections from the sea. Existing development may create incentives for the coastal community to remain and utilize armoring techniques to hold the sea back.

Conversely, coastal communities may choose to retreat from coastal areas that are undeveloped or otherwise develop policies allowing the seas to naturally migrate inland to maintain the natural landscape of the coastal area. Retreat can allow the traditional near-shore habitat, including wetlands, sea grasses, and other features that occur along the seashore, to develop upland. Such a natural landscape can also support tidal wetlands as nurseries for commercial fish species. These are examples of priorities identified under the CZMA and incorporated into many current coastal management plans.

As coastal states plan for sea-level rise, whether that planning includes staying along the coast or retreating inland, the impacts on existing priorities within coastal management plans implicate the shared federal and state planning triggered by the CZMA. As noted, the CZMA creates incentives for coastal states to develop management plans that incorporate priorities consistent with federal guidelines. The federal guidelines contained in the CZMA state a national policy “to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.” 16 U.S.C. § 1452. Amendments to the CZMA have clarified this policy to include, among other priorities, “the study and development of plans for addressing the adverse effects upon the coastal zone of land subsidence and of sea level rise.” 16 U.S.C. § 1452(2)(K). Thus, when a coastal state wants to protect against climate change to limit impacts on the coastal zone, it is clearly within the priorities established by the federal government. It should not be unreasonable for a coastal state to expect federal cooperation in helping to protect against climate change impacts.

One way coastal states may protect against climate change impacts is to determine whether federal policies are consistent with their coastal climate change management goals. Certainly this would include federal policies aimed at *mitigating* the impacts of climate change even as coastal states are already focused on *adapting* to existing and developing impacts of climate change. For example, while sea level is rising, it has not risen to its maximum potential. Examples of worst-case scenarios include the following: the melting of the Greenland Ice

Sheet and the Western Antarctic Ice Shelf, either of which would result in an approximate 20-foot increase in sea-level rise; the complete melting of the East Antarctic Ice Shelf would raise the sea level by approximately 200 feet. Current scientific consensus suggests that additional—hopefully substantially additional—forcing of carbon into the atmosphere would be needed to create these worst-case scenarios. See U.S. Global Change Research Program, Global Climate Change Impacts in the United States 18 (2009), *available at* [www.globalchange.gov/what-we-do/assessment/previous-assessments/global-climate-change-impacts-in-the-us-2009](http://www.globalchange.gov/what-we-do/assessment/previous-assessments/global-climate-change-impacts-in-the-us-2009). Thus, federal actions taken now to reduce greenhouse gas emissions could significantly reduce the likelihood of these worst-case scenarios becoming a reality.

In looking at the issue of rising seas, any efforts aimed at mitigating future climate change must be seen as helping to achieve the parallel goals of states and the federal government in managing coastal resources as reinforced in the CZMA. Any federal government action contributing to climate change—especially through increased greenhouse gas emissions—must be seen as inconsistent with state coastal management plans, at least plans that include coastal priorities adversely impacted by sea-level rise. By viewing the issue through this lens, where federal action impacts state coastal priorities, we can analyze how a federal movement toward increasing domestic oil and gas production in any capacity, but particularly offshore, would frustrate federal consistency requirements.

### ***Federal Offshore Oil and Gas Development: Impact on Climate Change and Federal Consistency***

Domestic offshore oil production is becoming an increasingly higher percentage of total U.S. domestic oil production, representing about 30 percent of total U.S. production in 2010. Looking at historical trends, it is clear that the bulk of future domestic oil production lies in offshore development. See Federal OCS Oil & Gas Production as a Percentage of Total U.S. Production: 1954–2010 (2011), *available at* [www.boemre.gov/stats/PDFs/AnnualPercentage1954-2010.pdf](http://www.boemre.gov/stats/PDFs/AnnualPercentage1954-2010.pdf). Thus, it is reasonable to assume that any future policy geared toward increasing domestic U.S. production of oil will continue to place the emphasis offshore. (Offshore natural gas production is actually decreasing as a share of total domestic production, no doubt due to major terrestrial sources and recently increased production on land.) As noted above, the Obama administration was prepared to open up the Mid- and South Atlantic coast to oil and gas development for the first time in decades but ultimately retracted this proposal after the Deepwater Horizon spill. It is likely future federal plans will include both an increase in intensity of existing offshore drilling and an expansion into offshore areas that do not currently have offshore drilling projects.

Coastal states have two major legal arguments using federal consistency under the CZMA. The first is a general argument that the federal government is acting in a manner inconsistent



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with states' coastal management plans when it engages in activities that increase greenhouse gas emissions. Borrowing from arguments made in the *Massachusetts v. Environmental Protection Agency* litigation, 549 U.S. 497 (2007), over the federal government's duty under the Clean Air Act to regulate greenhouse gases, a coastal state may argue the federal government is responsible under federal consistency guidelines to ensure its activities are consistent with state coastal management plans. The argument would be that any federal activity that allows for an increase in greenhouse gas emissions is inconsistent with existing priorities contained in approved coastal management plans.

The second argument a coastal state might make focuses more on the offshore nature of the development and the additional risks associated with the proximity of the development to coastal resources. In essence, this argument adopts the greenhouse gas emissions argument identified above but adds an additional element by describing the kinds of dangers associated with offshore oil and gas development, specifically an oil spill or tragedy similar to Deepwater Horizon. The danger to coastal resources from offshore drilling poses far less of a proximate cause hurdle than the causation issues associated with a direct climate change argument. While there is little precedent to evaluate the merit of a coastal state argument based on greenhouse gas emissions under the CZMA, there is precedent regarding the general dangers posed by offshore leasing for oil and gas production and how such activities might be construed to frustrate coastal management priorities under a federal consistency analysis.

### ***Federal Consistency as Applied to Offshore Leasing for Oil and Gas Development***

The concept of federal consistency under the CZMA has been refined since its inception through a mix of legislative amendments, executive regulations, and court opinions. While the story continues to evolve, a few points have been made. First, the overall goal of federal consistency is to ensure that state and federal actions are in harmony when those actions impact *agreed-upon* coastal priorities as reflected in coastal management plans. Sometimes, however, federal priorities *outside* the coastal zone trump state coastal interests. Not surprisingly, energy development, as part of a larger umbrella of national security, is one of the actions that does not always have to conform to coastal priorities.

An early example of the tensions created between the need for energy development and coastal zone impacts came during the Arab oil embargo and resulting energy crisis in the 1970s. In response to energy shortages, Congress amended the recently enacted CZMA in 1976 to include a Coastal Energy Impact Program (CELP). CELP was in part an acknowledgment that increased intensity of offshore oil and gas development would impact coastal resources. While CELP provided specific funding to help mitigate the impacts offshore development would likely have on coastal resources, the federal government, through the secretary of Commerce, could also find that the development was in the national interest (i.e., beyond an individual state interest, and thus approvable regardless of its impact on coastal priorities). The "national interest" exception is generally the means by which certain federal actions are upheld when they interfere with coastal requirements because it is *impracticable* to adhere to

the coastal policy. See 15 C.F.R. §§ 930.121-930.122 (indicating instances of national security or otherwise where the federal activity is furthering the national interest in a "significant manner"). Factors used to determine if an activity significantly furthers the national interest include: (1) the degree to which the activity furthers the national interest; (2) the national interest outweighs the activity's adverse coastal impacts; and (3) there is a lack of reasonable alternatives. *Id.* at § 930.121.

The national-over-state-interests argument is a hallmark of federalism debate, signifying a utilitarian approach where the good of the particular state must give way to the good of the nation as a whole. Energy development certainly falls within this zone of national interests over coastal state interests. But the argument for an overriding national energy interest may have been stronger in the context of the oil embargo of the 1970s, with its threat of national shutdown over basic lack of supply, than it is today, when domestic energy production is diversified and energy policy is premised more on economic factors such as job creation and costs of gasoline rather than on an "emergency." Technology also affords greater opportunities in the "sourcing" of energy, including the use of alternatives such as wind and solar power for electricity generation. The point here is that a "national security" justification, based on energy supply, may not be as powerful as it once was to warrant an exception to the federal consistency requirement of the CZMA.

One potential option to resolve state-federal conflicts over federal actions claimed to be inconsistent with state coastal priorities may be mediation under the CZMA. The statute contains a mediation provision, 16 U.S.C. § 1456(h). Under this section, the Secretary of the Interior is required to mediate a serious dispute between a state and the federal government over the administration of an approved coastal management plan. The process of mediation includes public hearings in the affected coastal state on the issue. This provision might afford coastal states the opportunity to create a public forum to discuss federal policy directions that impact coastal state resources. In the context of climate change, coastal states could use this platform as a way of advocating for federal policies that reduce carbon intensity both within and outside of the coastal zone.

### ***Conclusion***

The CZMA reflects shared governance of ocean resources as between federal and coastal state interests. Federally approved coastal management plans are meant to represent an agreement between the federal government and coastal states on what attributes are important in the coastal zone and how those attributes are to be protected. Federal energy development that includes increasing oil and gas production, and certainly increasing oil and gas production in federal waters, impact this agreement. The federal consistency requirement under the CZMA offers an opportunity—but far from a guarantee—whereby coastal states can begin to bring pressure to assure that federal actions not frustrate coastal states' capacity to adapt to climate change impacts. Coastal states should use existing tools such as the consistency requirement and possibly the CZMA mediation provision to gain federal (and public) attention, in the near future, to bridge the policy divide between federal and coastal state priorities in our shared ocean resource, before this divide grows any greater. 🌳