

San Francisco Bay Conservation and Development Commission

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January 13, 2017

TO: Commissioners and Alternates
FROM: John Bowers, Staff Counsel (415/352-3610, john.bowers@bcdc.ca.gov)
SUBJECT: BCDC and Coastal Commission Comments on Proposed CZMA Program Changes
(For Commission Information Only)

On November 8, 2016, the National Oceanic and Atmospheric Administration (NOAA) published in the Federal Register a Notice of Proposed Rulemaking (NPR) to substantially modify NOAA's regulations (15 CFR, Part 923, Subpart H) that govern review by NOAA of changes that a state may propose to make to one or more of the policies contained that state's Coastal Management Program (CMP), as approved by NOAA under the Coastal Zone Management Act (CZMA).

The NPR includes the standards of approvability that NOAA will employ in reviewing CMP changes submitted to it. One of these proposed standards is that NOAA will not approve a state policy that, in NOAA's view, is "preempted" by federal law other than the CZMA under the judicial doctrine of "federal preemption." In a letter dated January 5, 2017, attached hereto, BCDC staff jointly with the staff of the California Coastal Commission (CCC) submitted to the NOAA comments on the NPR that opposes this standard of program change approvability.

The issue of whether the doctrine of "federal preemption" represents a proper basis for NOAA to employ in determining whether a state may include in its CMP any particular policy is one that originally arose a decade ago when NOAA disapproved an attempt by the State of New Jersey to incorporate into its CMP siting standards for liquefied natural gas (LNG) terminals. NOAA denied New Jersey's request for approval of these standards on the basis of the fact that state regulatory authority over LNG terminals had been "preempted" by the federal Natural Gas Act (NGA).

In a letter dated February 28, 2007, to NOAA (see Attachment 1 to CCC/BCDC NPR comment letter), BCDC and CCC staffs expressed concern over the legal basis NOAA provided for its rejection of New Jersey's proposed addition of LNG siting standards to its CMP. The BCDC and CCC staffs based their concern over NOAA's action on two primary grounds: 1) in its explanation of the statutory basis for its action, NOAA, in a manner contrary to the intent of Congress in enacting a provision of the CZMA that defines the term "enforceable policy," misinterpreted that provision by importing into it the doctrine of "federal preemption," and 2) the doctrine of "federal preemption," which concerns conflicts between state and federal laws, is inapplicable to a perceived conflict between two federal laws, in this case the CZMA and the NGA.

To this day NOAA has not responded to the BCDC/CCC staffs' 2007 letter. However, in a letter to the US Navy dated June 20, 2008, NOAA took the position that a number of policies in the CMP of the State of Hawaii relating to the protection of "marine aquatic life" were "preempted" by the federal Marine Mammal Protection Act (MMPA) and thus were unenforceable for purposes of the CZMA. In addition, NOAA's actions in the New Jersey and Hawaii matters prompted other federal agencies to assert similar arguments regarding the unenforceability of state CMP policies based on the "federal preemption" doctrine. In its NPR comment letter the BCDC/CCC staffs cite the example of the assertion of the US Marine Corps (USMC) in a letter to the CCC dated January 12, 2010 (see Attachment 2 to NPR comment letter) that the policy concerning protection of rare or especially valuable species of wildlife in the CCC's CMP is unenforceable against the USMC due to the fact that it is "preempted" by the federal Endangered Species Act. The comment letter also refers to a similar argument advanced by the US Navy to the CCC regarding the "federal preemption" by the MMPA, and thus the unenforceability for purposes of the CZMA, of a policy in the CCC's CMP regarding the protection of marine resources.

In its NPR comment letter the staffs of the BCDC and the CCC reiterate the arguments they made in their 2007 letter that NOAA's position seriously misconstrues the doctrine of "federal preemption" for the reason that the doctrine is simply inapplicable to the ability of states with federally-approved CMPs to apply and enforce the policies contained in those CMPs.

The comment letter proposes alternative language for the proposed regulation that would authorize NOAA to disapprove proposed a new or revised state CMP policy on the basis of federal law other than the CZMA only where NOAA finds that such other federal law has either expressly or impliedly repealed the authority that states or NOAA would otherwise have under the CZMA to adopt or approve, respectively, such a policy.

Finally, in their NPR comment letter the BCDC and CCC staffs ask that if NOAA declines to revise its proposed regulations as recommended by BCDC/CCC staffs, NOAA should at minimum clarify the meaning and applicability of a footnote in NOAA's letter to New Jersey that suggests that NOAA's position on the doctrine of "federal preemption" may differ depending on whether a state CMP policy is one of "general applicability" as opposed to one that addresses a particular subject area in an explicit and specific manner.

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January 5, 2017

Kerry Kehoe
Federal Consistency Specialist
Office for Coastal Management
National Oceanic and Atmospheric Administration
1305 East-West Highway, 10th Floor, N/OCM6
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Re: CZMA Program Change Comments - Office for Coastal Management, Notice of Proposed Rulemaking (NPR), Changes to the Coastal Zone Management Act (CZMA) Program Change Procedures

Dear Mr. Kehoe:

The California Coastal Commission (CCC) and the San Francisco Bay Conservation and Development Commission (BCDC) wish to provide comments to the Office for Coastal Management (OCM) on the above-referenced Program Change procedures. We support the overall intent of the proposed changes to the Program Change procedures and believe they will assist states by simplifying and streamlining the review of state efforts to update their certified Coastal Management Programs (CMPs). At the same time, we wish to remind OCM of historic concerns we have expressed over OCM's role and interpretations with respect to providing guidance to states, and reviewing program changes submitted by states, where issues involving potential federal preemption of state laws arise.

Many of our concerns were outlined in our letter to your agency dated February 28, 2007 (CCC/BCDC letter; see Attachment 1). We have not received a response from OCM to those concerns, and we continue to believe the concerns we expressed in that letter are valid. In the context of the proposed Program Change Procedures, our primary concern is over the references to the doctrine of preemption in proposed section 923.84 (b)(5), and the potential interpretation of the proposed language in that subdivision, which would state:

(b) Enforceable policies. In order for NOAA to approve the incorporation of a new or revised enforceable policy into a state's management program, the policy shall:

(5) Not, on its face, be preempted by federal law. If a state policy seeks to regulate an activity where state regulation is preempted by federal law, the policy is not legally binding under state law and shall not be an enforceable policy under 16 U.S.C.

1453(6a). Policies previously approved by NOAA as enforceable policies shall no longer be enforceable if federal law enacted after NOAA's approval subsequently preempts the state policy;

We believe we understand OCM's intent in proposing this language,¹ and that there may be circumstances where application under state law of state CMP enforceable policies would, in fact, be preempted by federal law. However, the present context involves the application of state CMP policies under the authority of the CZMA, a federal, not state, law. As our two agencies stated in our 2007 letter to NOAA, in our judgment this central distinction renders references to preemption inappropriate and misplaced. If NOAA feels it is appropriate to consider conflicts between proposed state CMP policies that would be implemented through the CZMA and other co-equal federal laws, the proposed standard of approvability for NOAA's review of such policies should be the doctrine of conflicts of laws/repeal by implication, as that doctrine was employed by the federal court in the seminal case of *So. Pacif. Transp. Co. v. Cal. Coastal Comm'n* (N.D. Cal. 1981) 520 F.Supp. 800.

This distinction between preemption and conflicts of laws is not merely an academic one. Reliance on the wrong standard can lead to significant misunderstandings of the appropriate form of analysis. Our concern in this regard finds support in past instances where NOAA guidance has, in our judgment, been inappropriately relied upon to support what seem to be clearly erroneous positions regarding the effect of the doctrine of federal preemption on the enforceability of state CMP policies. A relevant example of such inappropriate reliance is shown in a letter dated January 12, 2010, from the US Marine Corps to the CCC in response to a CCC staff objection to a negative determination from the USMC (see Attachment 2). While separate from the context of Program Changes, the letter nevertheless underscores the concern over instances in which the doctrine of federal preemption has been employed in a manner we believe to be contrary to the intent and language of the CZMA. In this letter, the Marine Corps asserted that the Endangered Species Act (ESA) preempts state CZMA review of impacts to federally-listed threatened and endangered species (see first paragraph, top of page 2). We believe this assertion was completely without merit. The US Navy has made similar assertions regarding the Marine Mammal Protection Act (MMPA). While the CCC did not for several reasons further challenge the Marine Corps or the Navy, the CCC staff has instead urged these agencies to work cooperatively with the CCC and focus on effects to coastal resources (rather than make arguments regarding the scope of the CCC's authority). To date, and in response, the Marine Corps and the Navy have acted in accord with the CCC's recommendations.

¹ In its NPR NOAA relies upon its interpretation of section 304(6a) of the CZMA as the legal authority for proposed section 923.84(b)(5). At pp. 4–6, the 2007 CCC/BCDC letter to NOAA sets forth the basis for the position of our agencies that NOAA's interpretation of CZMA § 304(6a) conflicts with the manifest intent of Congress in enacting that provision as part of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), as set forth in the legislative history of the CZARA, specifically House Conference Report No. 101-964.

Our goal in raising this concern at this time is to ensure that proposed Program Change Rules are not promulgated in a manner that might encourage misinterpretation of federal preemption concepts. Accordingly, we are recommending that OCM either: (1) delete references to preemption in the proposed rule (and leave that issue for CZMA participants, or, if necessary, the courts, to resolve); or, alternatively, (2) replace proposed 15 CFR § 923.84(b)(5) with the following language:

(5) Not, on its face, seek to regulate an activity where federal law, other than the CZMA, has either expressly or impliedly repealed the authority that states and the NOAA would otherwise have under the CZMA to adopt or to approve, respectively, such a policy. Policies previously approved by NOAA shall no longer have any force and effect if federal law enacted after NOAA's approval either expressly or impliedly repeals the authority that states would otherwise have under the CZMA to employ the state policy in consistency reviews of federal activities.

As noted in the 2007 letter from our agencies, this language reflects what we believe to be the appropriate legal standard to apply to a perceived conflict or incompatibility between the CZMA and another federal law, as outlined in the *So. Pacif. Transp.* case.

In addition, we interpret the above reference to a state policy having the effect proscribed therein “on its face” (language that is in the current NOAA proposal) as a recognition that state CMP policies that are enforceable policies of *general applicability* remain legitimate standards for states to use in their conduct of federal consistency reviews. Thus, the only state policies that can be disapproved or invalidated under this language, as we understand it, are those that expressly and specifically purport to regulate activities where federal law has occupied the field or otherwise expressly or impliedly repealed the authority a state would otherwise have under the CZMA over such activities. NOAA itself recognized this distinction in footnote 3 of its October 4, 2006, letter to the New Jersey Department of Environmental Protection. Accordingly, if, contrary to the recommendation we make herein, NOAA does decide to adopt the language of section 923.84(b)(4) set forth in its NPR, we would urge that this distinction be expressly recognized in the preamble discussion of the proposed language.

Finally, we endorse and call to your attention the very similar views set forth in a letter to NOAA dated December 22, 2006, from the Coastal States Organization (CSO) (see Attachment 3).

Thank you for the opportunity to comment on the proposed rule. We would be happy to engage in further dialogue with you to discuss this matter of mutual significance at your convenience, and we can be reached at the telephone numbers or email addresses below.

Sincerely,



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Attachments

Attachment 1 - CCC/BCDC letter to OCM, February 28, 2007

Attachment 2 - US Marine Corps letter to CCC, January 12, 2010

Attachment 3 – CSO letter to OCM, December 22, 2006