



By Carolyn Raffensperger

A State Preempts the U.S. Navy

It's no secret that the federal government under the Bush administration is behind the curve on environmental and public health issues. The states are taking the lead on global warming, toxic chemicals in children's toys, and protection of marine mammals and turtles. At the head of the pack is California. Who would have thought that a Republican governor in a western state would be in the fore of critical global environmental problems?

Of course, opponents of environmental regulation have developed legal tools and theories, especially preemption, to thwart state action. However, there are occasional legal twists that reinforce the ability of states to do the right thing when faced with a recalcitrant federal government. This is the story of one of those twists.

Our story begins with the U.S. Navy, hat in hand, asking the California Coastal Commission for permission to conduct training exercises in the state's coastal waters. The commission granted permission on the condition that the Navy take precautionary measures. These measures included avoiding coastal areas with populations of large marine mammals and sea turtles, and especially minimizing the use of sonar.

Rather than comply, the Navy said the commission didn't have au-

thority under federal law to restrict the training exercises. On its face this looks like a preemption case. But the kicker is that state commission claims authority under a federal law, the Coastal Zone Management Act of 1972.

The CZMA creates a federal and state partnership for management of coastal resources through a process of certifying state programs. Under the CZMA, states develop coastal management programs and procedures that guarantee federal consistency across agencies. After a state's program has been certified, a federal agency is obligated to undertake its activities consistent with the program. While the federal agencies have an obligation to comply with the state program, they lack final authority for determining compliance. In fact, the commission has the authority to review federal agency activities for consistency.

The California state program was certified in 1978, granting these powers to the commission, which said the process allows it "to authorize federal activities in a manner that minimizes impacts to coastal resources and is consistent" with the California Coastal Management Program. These activities include naval exercises that use sonar and underwater explosives.

The scientific committee of the International Whaling Commission says that the evidence linking sonar to whale strandings is "very convincing and appears overwhelming." As Coastal Commissioner Sara Wan said, "The Navy cannot simply arm-wave away the entire body of evidence . . . that sonar can harm and kill marine mammals."

According to the Natural Resources Defense Council, "Earlier this year, 37 whales of three species stranded along North Carolina's Outer Banks after U.S. Navy sonar exercises. Sci-

entists at several major universities, working under federal contract, conducted necropsies and tissue analyses on the whales to determine why they died. The government, however, has refused to release the scientists' findings despite a Freedom of Information Act lawsuit filed by NRDC in June."

The Coastal Commission has brought suit in federal court and is seeking a preliminary injunction against future sonar drills and a writ of mandamus to compel the Navy to fulfill its obligations under the CZMA.

This is an old issue. In 2001, Admiral William J. Fallon testified before Congress that in its training exercises, the Navy had made an effort to use the precautionary approach,

which he defined as "in the absence of scientific information to the contrary, the regulators must assess that the proposed training is harmful to the environment." Fallon also observed that some environmental laws contain a national security exemption, but that such an exemption is, historically, rarely used.

The Marine Mammal Protection Act, for instance, contains a broad exemption for national defense. However, the Coastal Commission in its suit against the Navy is not suing under the MMPA, but under the consistency provisions of the CZMA.

These consistency provisions, the opposite of preemption, are a model for future environmental legislation, both in Congress and state legislatures. They would allow more local control over environmental health. Projects could be tailored to local conditions and serve as experiments in environmentally protective management strategies.

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