

## MEMORANDUM

TO: Ken Wiseman, Executive Director, Marine Life Protection Act Initiative

FROM: David Nawi

RE: Legal Analysis of State Authority Regarding Marine Protected Areas in Military Use Areas

DATE: April 8, 2009

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This memorandum responds to your request for a legal analysis of issues related to recommendations the Marine Life Protection Act Initiative Blue Ribbon Task Force may make regarding the potential designation of Marine Protected Areas (“MPAs”) in state waters adjacent to San Clemente Island and San Nicolas Island. Set out below are the questions we have addressed and a summary of our conclusions, a description of the background and context in which the issues arise, and the analysis and conclusions with respect to each issue.

### SUMMARY OF ISSUES AND CONCLUSIONS

**Issue:** Does the State of California (“state”) have authority to designate MPAs in federal military use areas in state waters?

**Conclusion:** The state has the authority to establish MPAs in federal military use areas in state waters. The Marine Life Protection Act (“MLPA”), Fish and Game Code §§ 2850 et seq., authorizes the Fish and Game Commission to designate MPAs in any waters that are within the boundaries of the state (“state waters”), including any military use areas within those waters. The state’s authority to establish MPAs and regulate activities within them derives from the federal Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., which grants the state regulatory authority over submerged lands and the water overlying them, within state waters.

**Issue:** If the state does have such authority, what is the impact of the designation, if any, on federal military uses?

**Conclusion:** Federal military uses would not be affected by the designation of an MPA in a federal military use area. A state regulation, adopted by the Fish and Game Commission under the MLPA specifically provides that designation as an MPA does not expressly or implicitly preclude, restrict, or require modification of current or future uses of the MPAs by agents of the Department of Defense. 14 Cal. Code Regs, title 14, § 632. Even in the absence of such a regulatory prohibition, the Submerged Lands Act, 43 United States Code §§ 1301 et seq., and the Supremacy Clause of the federal Constitution would preclude the state from taking any regulatory activity that would conflict with federal military uses.

**Issue:** If the state does have such authority, under what circumstances, if any, could the state take actions, such as entry for monitoring or enforcement, to assure the effectiveness of an MPA designation?

**Conclusion:** The state would be able to assure achievement of the objectives of an MPA designation to the extent, and only to the extent, its actions would not be in conflict with military uses or other federal activities or regulations. The state's ability to enter an MPA for monitoring, enforcement, or other purposes would have to be determined in light of specific facts and circumstances to determine whether the state's actions would conflict with federal uses or regulations.

**Issue:** Can MPAs be incorporated in the state's coastal zone management program under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 et seq., and if so, what is the effect in federal military use areas that overlap with MPAs?

**Conclusion:** The state could submit for approval of the Secretary of Commerce an amendment to the state's coastal zone management program that includes an MPA. The Secretary has considerable discretion in applying the statutory criteria for approval of such an amendment in consideration of the facts and circumstances relating to the amendment. In light of the broad secretarial discretion, and without knowledge of the relevant facts and circumstances (which might include opposition from the military to such an amendment), the outcome of such a request cannot be predicted.

Incorporation of an MPA in the state's coastal plan would make it more difficult for the military to carry out of activities that did not comply with the MPA regulations, but not necessarily prevent such activities. The CZMA provides that federal agency activities shall be carried out in a manner consistent to the maximum extent practicable with enforceable policies of an approved coastal management program. 16 U.S.C. § 1456(c)(1)(A). The determination of consistency is made by the federal agency proposing to take an action, and regulations under the CZMA excuse consistency in the event of conflict with existing law, 15 C.F.R. § 930.32(a)(1), or in exigent circumstances. 15 C.F.R. § 930.32(b). The military's decision regarding a particular action would be made within this framework and depend on specific facts and circumstances.

## BACKGROUND

The United State Navy has proposed that the Blue Ribbon Task Force of the Marine Life Protection Act Initiative not recommend that the California Fish and Game Commission designate the waters surrounding San Clemente Island and San Nicolas Island as Marine Protected Areas. The Blue Ribbon Task Force provides guidance and recommendations to the California Fish and Game Commission ("Commission") concerning the Commission's authority and duties under the Marine Life Protection Act. Fish and Game Code ("FGC") §§ 2850 et seq. The MLPA establishes goals and procedures for the Commission's adoption of a plan and program to improve California's network of MPAs. FGC §§ 2853-2857, 2859. The Blue Ribbon Task Force is presently considering alternative proposals for the array of MPAs to be designated in the South Coast region, which reaches from Point Concepcion in Santa Barbara County to the border with Mexico. Several of the draft arrays presently before the Blue Ribbon Task Force propose MPAs in the waters surrounding San Clemente and San Nicolas islands.

The Navy conducts a variety of training exercises in these waters. The naval activities are described in detail on pages 12 through 19 of the April 1, 2009 memorandum to the

Blue Ribbon Task Force from J. Michael Harty (the “Harty Memorandum”). In short, the Navy uses several areas of San Clemente Island for live-fire training exercises, including small-arms exercises and over-the-beach landings. Additionally, waters off San Clemente Island are used for underwater detonation exercises and as a bombardment range. San Nicolas Island is part of the Point Mugu Sea Range, and is used for overflights by missiles and aircraft.

The Navy proposes that no state MPAs be established in the waters adjacent to either of the islands. At San Clemente Island, the Navy proposes to establish “safety zones” limiting public access to the adjacent waters and to permanently close certain parts of the waters to the public. These safety zones and closures would be achieved through the federal regulatory process. At San Nicolas Island, the adjacent waters are already closed to the public pursuant to existing federal regulation. 33 C.F.R. § 334.980. The Navy proposes no new regulatory changes for San Nicolas Island, but does propose more consistent enforcement of the existing closure.

In support of its proposal, the Navy has articulated a position on relevant legal issues. As stated in the Harty Memorandum, “The Navy has not asserted to date that the Initiative, and the State, lack authority under the MLPA to designate MPAs around San Clemente Island and San Nicolas Island. The Navy’s clear position is that the Department of Fish and Game and the Fish and Game Commission lack authority under the MLPA to regulate military activities.” Harty Memorandum, p. 7. The questions we analyze below relate directly to the potential effects of actions the state may take on the Navy’s conduct of military activities in state waters around San Clemente and San Nicolas islands.

## **I. Authority of the State of California to Designate Marine Protected Areas in Federal Military Use Areas in State Waters**

### **A. Submerged Lands Act Grant of State Authority Over State Waters**

The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 et seq., delegates to the state the authority to regulate activity in its waters.<sup>1</sup> The Submerged Lands Act defines each state’s seaward boundary as “a line three geographical miles distant from its coast line,” 43 U.S.C. § 1312, and grants to each state title to and ownership of lands beneath navigable waters within that boundary and natural resources within such waters. 43 U.S.C. § 1311(a). Along with title, the Act also grants each state authority “to manage . . . said lands and natural resources.” 43 U.S.C. § 1311(a).

Although the statutory language addresses only submerged lands and natural resources, the Supreme Court has referred to the Submerged Lands Act as granting to the states authority over “lands and waters.” *United States v. California* (1978) 436 U.S. 32, 36-37.

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<sup>1</sup> Through the MLPA, California has delegated part of this authority to the Fish and Game Commission. Congress enacted the Submerged Lands Act in order to reverse the effect of an earlier Supreme Court case, *United States v. California* (1947) 332 U.S. 804, which held that state ownership ended at the low-tide line and that the federal government owned submerged lands and the overlying waters from that line to the seaward boundary of the United States. *Barber v. State of Hawai’i* (9th Cir. 1994) 42 F.3d 1185 (describing relationship between Submerged Lands Act and *United States v. California*).

Following this language, other courts have held that the Submerged Lands Act grants the states regulatory authority “over the waters above the submerged lands.” *Barber v. State of Hawai’i* (9th Cir. 1994) 42 F.3d 1185, 1190; *see also Murphy v. Department of Natural Resources* (1993) 837 F.Supp. 1217, 1221 (holding that control of overlying waters is “simply a necessary adjunct incident to [state’s] ownership . . . of the submerged land”). Pursuant to this consistent judicial interpretation, the Act grants to the state regulatory control over activities in waters within the state’s seaward boundary.

The Submerged Lands Act does not directly address how to measure a state’s seaward boundary as it relates to the coast line of islands. “In cases in which the Submerged Lands Act does not expressly address questions that might arise in locating a coastline, [the Supreme Court] relie[s] on the definitions and principles of the Convention on the Territorial Sea and the Contiguous Zone [internal citation omitted].” *United States v. Alaska* (1997) 521 U.S. 1, 8 (“*Alaska*”), *citing United States v. California*, (1965) 381 U.S. 139, 165. “Under Article 10(2) of the Convention, each island has its own belt of territorial sea, measured outward from a baseline corresponding to the low-water line along the island’s coast.” *Alaska*, 521 U.S. at 8. Thus islands such as San Clemente and San Nicolas are surrounded by their own three mile wide bands of state waters. Although the Navy owns the upland portions of both of these islands (the portions above the high-tide line), the state owns, pursuant to the Submerged Lands Act, the submerged lands in the three-mile band around each, and holds regulatory authority over such lands and the overlying waters.

## **B. Delegation of State Authority to Fish and Game Commission**

The Submerged Lands Act’s grant of regulatory power in state waters within the three-mile limit provides the state’s authority for the MLPA and its attendant regulations. Drawing on this authority, the California Legislature has authorized the Fish and Game Commission to designate MPAs through provisions of the Fish and Game Code and the Public Resources Code, including the MLPA. The Marine Managed Areas Improvement Act, Public Resources Code §§ 36700 et seq., sets out six named categories of marine managed areas, each with different management goals.<sup>2</sup> The MLPA provides, “MPAs are primarily intended to protect or conserve marine life and habitat, and are therefore a subset of marine managed areas....” FGC § 2852(c). An MPA is “a named, discrete geographic marine or estuarine area seaward of the mean high tide line or the mouth of a coastal river, including any intertidal or subtidal terrain, together with its overlying water and associated flora and fauna that has been designated by law, administrative action, or voter initiative to protect or conserve marine life or habitat.” FGC § 2852(c). Under this definition, an MPA may be any of several of the types of

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<sup>2</sup> These categories and management goals are as follows: state marine reserve (managed to protect species or other biological resources and/or provide research opportunities); state marine park (managed to provide “opportunities for spiritual, scientific, educational, and recreational opportunities [*sic*]”); state marine conservation area (managed to protect species or other resources, and/or “[p]rovide for sustainable living marine resource harvest; state marine cultural preservation area (managed to preserve cultural or historical objects or sites); state marine recreational management area (managed to regulate recreation so as to preserve “basic resource values”); state water quality protection area (managed “to protect marine species or biological communities from an undesirable alteration in natural water quality”). Public Resources Code (“PRC”) § 36700.

marine managed areas, including state marine reserves and state marine conservation areas. PRC § 36700(a), (c).

Pursuant to Public Resources Code § 36725(a), the Commission is authorized to “designate, delete, or modify” state marine preserves and state marine conservation areas. The MLPA, in turn, directs the Commission to adopt a “master plan that guides . . . decisions regarding the siting of new MPAs” and “regulations based on the plan.” FGC §§ 2855(a), 2859(b). An MPA may be further designated as a “marine life reserve,” under which designation stronger protections for marine life apply, as discussed below. FGC § 2852(d).

The Fish and Game Code does not impose any geographic limits on the authority of the Commission to designate MPAs, nor does it impose any limits based on the use of state waters, e.g., by the military. In the absence of such limits on the grant of authority, the Commission’s authority to designate MPAs extends as far as state sovereignty extends---that is, to all state waters, including those used by the military.

## **II. Effect of MPA Designation on Federal Military Uses**

### **A. Commission’s Regulatory Authority Under the MLPA**

The designation of an MPA, along with potential further actions by the Commission as described below, would impose various restrictions on the use of the area. Fish and Game Code § 2856(a)(2)(I) requires that the master plan for the state’s MPAs include “[r]ecommendations for management and enforcement measures . . . that apply systemwide and or to specific types of sites and that would achieve the goals of [the MLPA].” Section 2859(b), in turn, directs the Commission to adopt the master plan “with regulations based on the plan”; these regulations would implement the management and enforcement measures proposed in the master plan.

The Commission’s general authority to adopt such regulations is derived from Fish and Game Code § 200, which delegates to the Commission the Legislature’s power to “regulate the taking or possession of birds, mammals, fish, amphibia, and reptiles.” Additionally, Section 2860(a) authorizes the Commission to “regulate commercial and recreational fishing and any other taking of marine species in MPAs.” Section 2860(b) also bars the take of any marine species in an MPA that is given the added designation of a marine life reserve. “Take,” under the Fish and Game Code, means to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” FGC § 86. In order to regulate activities in MPAs that do not directly take marine species, the Commission draws upon its authority under Public Resources Code section 36725(e), which authorizes the Commission to “restrict or prohibit recreational uses and other human activities” in marine managed areas, including MPAs.

Section 632 of title 14 of the California Code of Regulations is the regulatory section adopted by the Fish and Game Commission containing all provisions related specifically to MPAs. Section 632, in its introductory language, provides, “*Nothing in this section expressly or implicitly precludes, restricts or requires modification of current or future uses of the waters identified as marine protected areas, special closures, or the lands or waters adjacent to these*

*designated areas by the Department of Defense, its allies or agents.*” Cal. Code Regs, title 14, § 632. This provision shields the military from the effect of regulations adopted and applied specifically in relation to MPAs. Thus, the Navy could continue its activities without any restrictions imposed by such regulations.

This regulatory provision, however, does not by itself preclude all state regulation of military uses of state waters. First, by the terms of the regulation, its effect is limited to the regulations in “this section,” that is, California Code of Regulations, title 14, § 632. It therefore would have no effect on limitations based directly on statutory mandates, such as the ban on taking marine life in marine life reserves, contained in Fish and Game Code § 2860(b) and discussed above. Second, it would not limit the reach of general regulations that apply within MPAs but are not specific to them and therefore are not codified in this MPA-specific section of the California Code of Regulations. Third, the Commission could amend the regulation to delete or modify this provision.

In light of the discussion immediately above, we next consider whether, absent the regulatory provision exempting Department of Defense activities from regulations related to MPAs, the Commission, pursuant to the MLPA, could mandate changes in military activities within MPAs.

## **B. Relationship Between State and Federal Authority Over Submerged Lands and Overlying Waters**

### **1. Concurrent Jurisdiction Under the Submerged Lands Act over Non-Federal Activities**

In the Submerged Lands Act, along with a grant to the states of regulatory control over their waters, Congress retained substantial authority for the federal government. The Act provides, “The United States retains all its navigational servitude and rights in and powers of regulation and control of lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.” 43 U.S.C. § 1314.

This reservation has two distinct legal effects. First, the navigational servitude derives from the Commerce Clause of the federal Constitution and “describes the paramount interest of the United States in navigation and the navigable waters of the nation.” *State of Alaska v. Babbitt* (9th Cir. 1995) 72 F.3d 698, 702. Its primary effect is to render the federal government generally immune to claims that its actions to develop or maintain the navigability waters have “taken” property, thus entitling the property owner to compensation under the Takings Clause of the Fifth Amendment to the federal Constitution. *U. S. v. Chicago, Milwaukee, St. Paul & Pacific R. Co.* (1941) 312 U.S. 592, 597 (“The exercise of the [navigational servitude] power within [lands underlying navigable waters] is not an invasion of any private property right in such lands for which the United States must make compensation); see also *Alameda Gateway, Ltd. v. U.S.* (Fed. Cl. 1999) 45 Fed. Cl. 757, 763-64 (“Because the rights of a title holder are subordinate to the [navigational] servitude, the government owes no compensation for the taking of, injury to or destruction of” private property), citing *Chicago*,

*Milwaukee, St. Paul & Pacific R. Co.*, 312 U.S. at 597, and *Owen v. United States* (Fed. Cir. 1988) 851 F.2d 1404, 1408, 1409. Because the Navy has not indicated an intention of making commerce-related navigational improvements at San Clemente Island or San Nicolas Island that might take private or state property, the navigational servitude is unlikely to be relevant to the designation or regulation of MPAs.

Second, the United States' retention of the power to "regulat[e] and control" these waters reserves to the federal government jurisdiction over activities in state waters concurrent with the jurisdiction of the states, leaving the federal and state governments with parallel authority to regulate such activities. *Barber v. State of Hawai'i* (9th Cir. 1994) 42 F.3d 1185, 1190. This concurrent jurisdiction leaves the states free to regulate non-federal activity in state waters in the absence of conflicting federal regulation. *Id.* (Concurrent jurisdiction is discussed further in part II.B.3, below.) Federal authority, however, is paramount. *Id.*

## 2. Federal Immunity to State Regulation

The state's concurrent authority to regulate in state waters does not extend to the regulation of federal activities, including the activities of the Navy. Unless the federal government consents to state regulation, its "activities . . . are free from regulation by any state." *Hancock v. Train* (1976) 426 U.S. 167, 178; *see also, e.g., Blackburn v. United States* (9th Cir. 1996) 100 F.3d 1426, 1435 ("States may not directly regulate the Federal Government's operations or property."); *Public Utilities Commission of California v. United States* (1958) 355 U.S. 534 (holding preempted state law giving state agency approval authority over common rates for carrying goods belonging to federal government); *State of Arizona v. State of California* (1931) 283 U.S. 425, 451 (holding that Arizona law requiring state approval of dam specifications does not apply to federal project, because "[t]he United States may perform its functions without conforming to the police regulations of a state").

This principle of sovereign immunity derives directly from the Supremacy Clause of the federal Constitution: "It is a seminal principle of our law 'that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them.' From this principle is deduced the corollary that '(i)t is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.'" *Hancock*, 426 U.S. at 178, *quoting McCulloch v. Maryland* (1819) 4 Wheat. 316, 426, 4 L.Ed. 579, 606. The military activities at San Clemente Island and San Nicolas Island are "functions" or "operations" of the federal government. Statutory or regulatory enactments associated with the designation of an MPA therefore would not impose any effective mandate or restraint on military activities in the absence of a waiver of sovereign immunity.

The federal government, through Congressional action, may waive its immunity and subject itself to state regulation. *See, e.g., Parola v. Weinberger* (9th Cir. 1988) 848 F.2d 956, 961-62 (holding that federal Resource Conservation and Recovery Act waives immunity and subjects federal installations to certain state and local regulations concerning solid waste collection). Any such waivers of federal sovereign immunity, however, "must be unequivocally

expressed in the statutory text.” *United States v. Alaska Public Utilities Com’n* (9th Cir. 1994) 23 F.3d 257, 260. The Court of Appeals, for example, has found a waiver in the language of 42 U.S.C. § 6961, which states that federal agencies “shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural” regarding solid waste disposal. *Parola*, 848 F.2d at 961-62. In the present situation, the Submerged Lands Act does not include the required clear statement of a waiver. To the contrary, the Act’s retention of the federal navigational servitude and federal authority in state waters appears to demonstrate Congressional intent to maintain federal law in the paramount position set out in the Supremacy Clause. Thus, the Navy is not subject to regulations promulgated by the Commission, nor to statutory requirements adopted by the California Legislature.

### **3. State Regulatory Authority Over Private Activity in Military Use Areas**

The inability of the state to regulate discussed immediately above applies to federal activities, and not to non-federal activities within geographic areas. The activities of private parties within an MPA could still be subject to state regulation, even if the MPA were designated in an area also used by the military. Under the Submerged Lands Act’s scheme of concurrent jurisdiction, however, federal authority remains paramount. State regulation would be effective as long as it is not preempted by federal regulation or in conflict with federal activities. Preemption can occur in a number of ways.

First, federal law may preempt state regulation explicitly, by expressly reserving exclusive power to the federal government. Although past litigants have claimed that Submerged Lands Act works such a preemption, courts have consistently rejected this argument. In *Barber v. State of Hawai’i* (9th Cir. 1994) 42 F.3d 1185, the State of Hawai’i had adopted regulations requiring a permit for anchoring or mooring boats in certain state waters. A non-profit group challenged these regulations, claiming, *inter alia*, that “under the Submerged Lands Act, navigation is the exclusive domain of the federal government.” *Id.* at 1190. The Court of Appeals rejected this argument, holding that the Submerged Lands Act’s grant of state authority included “jurisdiction over the waters above the submerged lands.” *Id.* The court based this holding on two sources of authority. First, the court stated that in *United States v. California* (1978) 436 U.S. 32, the Supreme Court “noted that the Submerged Lands Act implicated both ‘submerged lands and waters.’” *Barber*, 42 F.3d at 1190 (emphasis added by *Barber*). Second, the Court of Appeal noted that the legislative history of the Act indicated that it was intended to extend “the police power of each coastal state” to the state’s seaward boundary. *Id.* at 1191 n. 4 (quoting H.Rep. No. 215, 83rd Cong. 1st Sess. 2 (1953) reprinted in 1953 U.S.C.C.A.N. 1385, 1406). These authorities, the Court held, demonstrated that the Act’s reservation of federal authority did not divest the state’s authority over navigable waters but instead allowed the state and federal governments “to retain concurrent jurisdiction over those waters.” *Barber*, 42 F.3d at 1191.

In light of this concurrent jurisdiction, the court continued, “Unless and until the Federal Government adopts legislation or regulations . . . that actually conflict with Hawaii’s regulations,” the state rules would remain effective and govern mooring. *Id.* Because no federal regulation did, in fact, conflict with the state’s regulations, the state rules were not preempted

and retained their force. *Id.* at 1191-94; *see also* *Murphy v. Department of Natural Resources* (1993) 837 F.Supp. 1217, 1221 (holding that Submerged Lands Act “do[es] not divest the individual States of control over the water column in the absence of Federal action”); *Organized Village of Kake v. Egan* (D. Alaska 1959) 174 F.Supp. 500, 504 (upholding Alaska regulation of fishing methods in state waters because “[t]he right to control fisheries rests in the state in the absence of affirmative action of Congress.”) *citing* *Manchester v. Commonwealth of Massachusetts* (1891) 139 U.S. 240. The Submerged Lands Act thus does not explicitly preempt state authority over state waters, but instead preserves that authority.

Federal law may also preempt state authority by implication. This occurs “where the intent of Congress is clearly manifested, or implicit from a pervasive scheme of federal regulation that leaves no room for state and local supplementation.” *Barber*, 42 F.3d at 1189. When the federal government “occupies the field” in this manner, no state regulation is effective, whether or not there are actual conflicts between state and federal rules. Implied preemption may also arise “from the fact that the federal law touches a field (e.g. foreign affairs) in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Barber*, 42 F.3d at 1189 (internal quotation marks omitted).

Here, the Submerged Lands Act, by granting authority over state waters to the states, manifests a Congressional intent to allow state regulation to continue concurrently with federal jurisdiction. *Id.* at 1192-94. Thus, federal law does not “occupy the field” of the regulation of navigation and other activities in state waters. *Id.* The Submerged Lands Act similarly makes clear that the interest in such activities is shared by the state and federal governments, and that the federal interest is not “so dominant . . . to preclude enforcement of state laws.” *Id.*

In connection with preemption by implication, we have considered the potential argument that the federal government “occupies the field” of military affairs and that therefore any state regulation of activity in a geographic area that the military uses would be impliedly preempted. This argument, however, would not reflect the appropriate analysis for implied preemption. “State law is preempted implicitly where the federal interest in the *subject matter* regulated is so pervasive that no room remains for state action, indicating an implicit intent to occupy the field.” *Rondout Elec., Inc. v. NYS Dept. of Labor* (2nd Cir. 2003) 335 F.3d 162, 166 (emphasis added). Cases considering whether a given federal statute or regulatory regime “occupies the field” define the regulated “subject matter” narrowly. For example, one court considering the preemption of state laws relating to the taxation of items purchased for Indian gaming facilities held that the federal statutes “comprehensive regulation of Indian gaming does not occupy the field with respect to sales taxes imposed on third-party purchases of equipment used to construct the gaming facilities.” *Barona Band of Mission Indians v. Yee* (9th Cir. 2008) 528 F.3d 1184, 1193; *see also* *In re Tippett* (9th Cir. 2008) 542 F.3d 684, 689 (considering whether federal Bankruptcy Code “occupies the field of title transfers initiated by Chapter 7 debtors”); *Whistler Investments, Inc. v. Depository Trust and Clearing Corp.* (9th Cir. 2008) 539 F.3d 1159, 1164 (considering whether Congress intended “to occupy the field of clearing and settling securities transactions”). In a situation where there is no conflict between state

regulation and military use or regulation, we do not believe that implied preemption would be applied to preclude the state's exercise of regulatory authority.

The final form of preemption is known as "conflict preemption." Where federal and state regulations directly conflict, federal authority preempts state authority. The federal regulation governs and the state rule is of no effect. *E.g.*, *Douglas v. Seacoast Products Inc.* (1977) 431 U.S. 265, 286-87 (holding that federal law governing fishing licensure preempted Virginia licensing law, even in state waters); *Natural Resources Defense Council v. US EPA* (9th Cir. 1988) 863 F.2d 1420, 1436 ("[T]he United States retains the power to regulate water quality in navigable waters, notwithstanding the [Submerged Lands Act's] grant of authority to Florida").<sup>3</sup> As long as the military (or any other federal entity) did not adopt regulations concerning private activity in an MPA, then conflict preemption would not be implicated, and state regulations would continue in force. If federal regulation of private activities in these areas were adopted, then it would be subject to a case-by-case preemption analysis. In each instance, this analysis would inquire whether state and federal regulations were compatible or in conflict—that is, whether or not a person could comply with both regulations without violating either. If the regulations did not conflict, then both would remain effective. If they did conflict, then the federal regulation would govern.

The absence of federal preemption of state regulation of private activities could be important in situations where the military allowed activity that state regulation barred. For example, the state might designate an MPA in an area that is used by the military but is not subject to a permanent military closure. In such a case, the military, on its own, might allow more public visitors and more intensive activity than would the state. Under these circumstances, there would not appear to be a conflict with military activities or regulations, and the state's regulations would be effective as to private parties.

### **C. Ability of the State to Take Actions in a Military Use Area to Ensure the Effectiveness of an MPA Designation**

If the state were to designate an MPA or MPAs in military use areas presently used by the military, it may wish to enter those areas in order to monitor resources, or for enforcement purposes related to private activities. Such entry and enforcement would be subject to the preemption analysis described above: if the state regulations authorizing such activities and the activities themselves did not conflict with any federal regulation or federal activities, then the state could conduct the activities. Again, such potential conflicts and preemption would be subject to a case-by-case analysis. If there were a conflict--- for example because the area were closed to all entry by federal regulation, or because state entry would conflict with a military training exercise--- then the state would be precluded from taking the conflicting action.

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<sup>3</sup> These cases concern Congressional authority under the Constitution's Commerce Clause. In contrast, the situation we address arises from actions of the Navy acting for purposes of national defense. Given the Submerged Lands Act's explicit reservation of federal authority "for the constitutional purpose of [ ] . . . national defense," 43 U.S.C. § 1314, there is no reason to believe that the analysis or result would be different if Congress were acting pursuant to its authority to "provide and maintain a Navy" under Article 1, § 8, clause 13 of the federal Constitution.

### **III. Incorporation of MPAs in the State's Coastal Zone Management Program Under the Coastal Zone Management Act**

#### **A. Amending the California's Coastal Management Program to Include MPAs**

The Coastal Zone Management Act (the "CZMA"), 16 U.S.C. §§ 1451 et seq., directs coastal states, including California, to submit "management programs" to the federal Secretary of Commerce (the "Secretary") for approval. 16 U.S.C. § 1454.<sup>4</sup> Such a management program "includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. § 1453(12). The "coastal zone" covered by such a plan extends "seaward to the outer limit of State title and ownership under the Submerged Lands Act." 16 U.S.C. § 1453(1). Because, as set out above, the waters adjacent to San Clemente Island and San Nicolas Island are within California's seaward boundary, these waters are within the state's coastal zone.

In order to approve a management program, the Secretary must find that it meets the requirements set out in the CZMA. 16 U.S.C. § 1455(d). Most relevant here are the requirements that the management program "includes . . . [a]n inventory and designation of areas of particular concern within the coastal zone. and "provides for-- (A) the inventory and designation of areas that contain one or more coastal resources of national significance; and; (B) specific and enforceable standards to protect such resources." 16 U.S.C. § 1455(d)(2)(c), (d)(13). The Secretary must also find that the state has complied with various procedural requirements, such as providing notice to and cooperating with state and federal agencies, and holding public hearings. 16 U.S.C. § 1455(d)(1), (d)(4). The Secretary must further ensure that "the views of Federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b).<sup>5</sup>

California submitted and received approval for its management program in 1977. See National Oceanographic and Atmospheric Administration, *Final Evaluation Findings: California Coastal Management Program, May 2001 – February 2005*, at p. 10 (available at <http://coastalmanagement.noaa.gov/mystate/docs/CaliforniaCMP2005.pdf>). Adding MPAs<sup>6</sup> to the program would require an amendment of California's approved coastal management program. 16 U.S.C. § 1455(e); 15 C.F.R. § 923.80(d)(2) ("substantial changes" to "[s]pecial management areas" require plan amendment).

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<sup>4</sup> California's management program is often called the "CZMP," for "coastal zone management program," or "CCMP," for "California coastal management program."

<sup>5</sup> A cognate provision of the MLPA requires that the Department of Fish and Game "shall confer as necessary with the United States Navy regarding issues related to its activities." FGC § 2863.

<sup>6</sup> In this discussion, the term "MPA" is intended to encompass both the designation of specific areas and the regulations concerning the allowed uses of those areas.

Before such amendments may be included in the state's coast management program, they must be approved by the Secretary. To approve a proposed amendment, the Secretary must determine that the amendment "is likely to meet the program approval standards in [section 1455]." 16 U.S.C. § 1455(e)(3)(B). The CZMA's implementing regulations clarify that an amendment may be approved if the management program with the amendment "would still constitute an approvable program." 15 C.F.R. § 932.82(c). In its actions to approve an amendment, the state must also have followed the same procedural steps required for the initial plan approval. *Id.*

Assuming that the state took the required procedural steps, the Secretary would have broad discretion in deciding whether or not to approve the amendment. *Cf. American Petroleum Institute v. Knecht* (9th Cir. 1979) 609 F.2d 1306, 1312 (noting that Secretary exercises "considerable discretion in determining whether the state [management] program" meets statutory requirements). A factor to be considered in the exercise of secretarial discretion is the statutory directive that a management program must "provide[] for adequate consideration of the national interest involved in planning for, and managing the coastal zone." 16 U.S.C. § 1455(d)(8). Given its stated opposition to the establishment of MPAs in military use areas, the Navy may argue that an amendment including such MPAs should be rejected because it fails to provide adequately for the "national interest" in national defense. The Secretary may find this argument compelling. Because an amendment submitted to the Secretary of Commerce would be considered in light of all relevant facts and circumstances at the time of its submission, and because the Act gives wide discretion to the Secretary, we cannot at this time hazard a prediction as to whether such an amendment would be approved.

## **B. Effect of Amending California's Coastal Management Plan to Include MPAs**

The CZMA provides that "[f]ederal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." 16 U.S.C. § 1456(c)(1)(A). "Federal agency activities" include "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities." 15 C.F.R. § 930.31(a). This broad definition includes "a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone." *Id.*

Many of the Navy's activities, as described in the Harty Memorandum, would affect both water uses and natural resources in the coastal zone and fall within the regulatory definition of Federal agency activities that are subject to the consistency requirement. The state could assure that such activities would be subject to the consistency requirement by including them on a list of such activities in the management program. *See* 15 C.F.R. § 930.34(2)(b). If the management plan were amended to include MPAs, then the CZMA would require such activities to be "carried out in a manner which is consistent to the maximum extent practicable" with the enforceable regulations concerning activities within the MPAs. 16 U.S.C.

§ 1456(c)(1)(A). Under the CZMA's implementing regulations, "consistent to the maximum extent practicable" means "fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency." 15 C.F.R. § 930.32(a)(1).

Despite the strength of the consistency requirement, several factors render uncertain the extent to which a coastal management program amendment would effectively ensure that military activities comply with state regulation. The military would make the consistency determination concerning its own activities. In making that determination, the military could conclude that a particular activity was "consistent" with the management program based on its view of compliance with state regulations or its judgment regarding the activity's effect on protected resources.<sup>7</sup> Pursuant to 15 C.F.R § 930.32(a)(1), set out above, the military might also identify an existing law that it claimed would preclude compliance with state regulation. The military could also rely on a further CZMA regulation to raise the claim that exigent circumstances preclude consistency. 15 C.F.R. § 930.32(b).<sup>8</sup>

Based on the above, it is our judgment that if the Secretary of Commerce were to approve amendment of the state's coastal management program to include MPAs, including enforceable regulations, in military use areas, such an amendment would render it more difficult for the military to carry out activities that did not comply with the MPA regulations, but not necessarily prevent such activities. As in the case of Secretarial approval of a potential amendment to the CZMP discussed above, the result with regard to any particular military activity would be determined by a fact-specific analysis.

We would be glad to answer any questions or provide further information regarding the issues we have addressed.

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<sup>7</sup> Some military activities, however, would be very difficult to square with certain MPA regulations. For example, there would be a seemingly unavoidable conflict between the underwater detonations the Navy undertakes off San Clemente Island and the MLPA's ban on take of marine species inside marine life reserves.

<sup>8</sup> Were the Navy to take any of these routes to a consistency finding, and that finding were challenged in court, it is likely that a reviewing court would grant substantial deference to the Navy's determination. For example, in the recent National Environmental Policy Act case of *Winter v. Natural Resources Defense Council* (2008) --- U.S. --- 129 S.Ct. 265, the Supreme Court overturned a lower court's grant of a preliminary injunction, relying in large part on the public's interest in military training and readiness. This tendency to place great weight on military goals could play a role in judicial review of Navy decisions under the CZMA. Moreover, should the Navy not prevail in litigation challenging its compliance with consistency requirements, the CZMA provides that the President may grant an exemption from the consistency requirement upon his determination that the subject activity was "in the paramount interest of the United States." 16 U.S.C. § 1456(c)(1)(B).