



DEPARTMENT OF THE NAVY

COMMANDER
U.S. FLEET FORCES COMMAND
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NORFOLK, VA 23551-2487

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Ser N4/N7/97

April 15, 2009

Ms. Susan Shipman
Director, Coastal Resources Division
Georgia Department of Natural Resources
One Conservation Way
Brunswick, GA 31520

Dear Ms. Shipman:

SUBJECT: RESPONSE TO GEORGIA COASTAL RESOURCES DIVISION (CRD)
COASTAL ZONE MANAGEMENT ACT (CZMA) FEDERAL CONSISTENCY
REVIEW FOR DEPARTMENT OF THE NAVY JACKSONVILLE (JAX) RANGE
COMPLEX - FINAL ENVIRONMENTAL IMPACT STATEMENT/OVERSEAS
ENVIRONMENTAL IMPACT STATEMENT (FEIS/OEIS)

The U.S. Navy has reviewed CRD's letter of February 17, 2009, providing a conditional concurrence to the U.S. Navy's "Negative Determination" for the JAX Range Complex FEIS/OEIS. I would like to thank your staff for their assistance in the federal consistency process. The e-mail exchange of information with Georgia CRD proved to be productive in answering a number of questions concerning ordnance detonations. The U.S. Navy recognizes and appreciates Georgia's role in protecting our coastal resources.

It is clear from your letter of February 17, 2009, that the ongoing consultation process between the U.S. Navy and the National Marine Fisheries Service, under the Marine Mammal Protection Act (MMPA) and Federal Endangered Species Act (ESA) for the JAX Range Complex FEIS/OEIS, has not allayed Georgia's concerns regarding potential vessel strikes of the endangered North Atlantic right whale during JAX Range Complex activities. Accordingly, your letter indicated a willingness to withdraw your objection to the JAX Range Complex FEIS/OEIS as stated in your letter of August 8, 2008, provided the U.S. Navy agreed to a vessel speed restriction of 10 knots or less when transiting through or conducting research, development, testing and evaluation (RDT&E) activities within 30 nautical miles of shore, from Morehead City, North Carolina, to Port Canaveral, Florida, between November 15 and April 15 each year. Pursuant to 15 Code of Federal Regulation §§ 930.43(d)(2) and (e), the U.S. Navy is treating your conditions as objections and intends to proceed with the proposed activities.

It is the U.S. Navy's position that all training and RDT&E activities discussed in the JAX Range Complex FEIS, to include any associated vessel transits, are fully consistent with the

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enforceable policies of the Georgia Coastal Management Program (GCMP) because the State's attempt to enforce a vessel speed restriction are not based on enforceable policies. Efforts to enforce vessel speed limits to minimize potential impacts to federally protected marine mammals are neither enforceable policies, in that such actions are preempted by the MMPA nor expressly authorized under Section 6 of the ESA. Also, we note that these conditions create a significant conflict with the U.S. Navy's obligations under Title 10 of the U.S. Code to provide trained and ready forces. To the extent that any condition would prevent the U.S. Navy from meeting its Title 10 obligations, the U.S. Navy would be consistent to the maximum extent practicable with the enforceable policies of the GCMP. A more detailed discussion of the U.S. Navy's position, as well as a letter reflecting the views of the National Oceanic Atmospheric Association (NOAA) General Counsel, is enclosed.

Notwithstanding our analysis of enforceable policies, we hope to continue to work to resolve your concerns as we move forward with these military readiness activities.

Should you have any questions, please contact Mr. John Van Name (N4541), (757) 836-2943, or E-Mail: john.vannname@navy.mil.

Sincerely,



D. F. BAUCOM
Assistant Deputy Chief of Staff
For Operational Readiness
and Training

Enclosure: 1. NOAA General Counsel letter of January 14, 2009

Analysis

Introduction

The conditional concurrence of Georgia Coastal Resources Division (CRD) was based on the U.S. Navy modifying training and research, development, testing and evaluation (RDT&E) activities described in the proposed action to incorporate the following vessel mitigation measures, in addition to those already outlined in the Jacksonville (JAX) Range Complex Final Environmental Impact Statement (FEIS)/Overseas EIS (OEIS) - All U.S. Navy vessels 65 feet or longer, will operate at speeds of 10 knots or less when transiting through or conducting RDT&E activities within 30 nautical miles (NM) of shore from Morehead City, NC, to Port Canaveral, FL, between November 15 and April 15 each year, with two exceptions: (i) vessels may operate at speeds greater than 10 knots as necessary to maintain safe steerage and navigation; and, (ii) vessels may operate at speeds greater than 10 knots when engaged in combat, activities in support of combat, or other defense activities requiring greater vessel speeds.

Georgia Endangered Wildlife Act

As a basis for imposing the speed restriction of 10 knots on naval vessel speed, the State relied upon Georgia's statute on endangered wildlife, which is one of the enforceable policies in the Georgia Coastal Management Plan (GCMP).¹

The underlying Georgia statute on endangered wildlife, the Georgia Endangered Wildlife Act², is addressed in the GCMP and states that such rules and regulations shall be limited to the regulation of the capture, killing, or selling of protected species, and the protection of the habitat of the species on public lands of the State.³ In addition, the GCMP defines the seaward boundary of Georgia's coastal area as extending to the outer limits of State jurisdiction, which is 3 NM seaward from the mean-low watermark. Included within

¹ Coastal Management Program and Program Document, State of Georgia, June 2003, Prepared by NOAA, Office of Ocean and Coastal Resource Management and Georgia Department of Natural Resources Coastal Resource Division. The GCMP consists of legally binding laws of the State of Georgia, through which Georgia is able to exert control over impacts to the land and water uses and natural resources in the coastal area. Document is available at the following internet site address:
<http://crd/dnr.state.ga.us/assets/documents/GCMP.pdf>

² Endangered Wildlife Act (O.C.G.A. 27-3-130 et. seq.)

³ See footnote 1, pages 73 to 74.

the coastal area are both waters of the State and submerged lands.⁴ Based upon the plain wording of this statute, it is our opinion the Act does not provide a mechanism whereby the State of Georgia could impose a 10 knot speed restriction on naval vessels in a large geographic area of the Atlantic seaboard, starting at Morehead City, NC, to Port Canaveral, FL, as part of the federal consistency process.

Preemption by the Marine Mammal Protection Act

In addition, the reliance by Georgia CRD to impose a speed restriction on naval vessels in order to protect against a vessel strike of a North Atlantic Right Whale (NARW), raises the issue of preemption of state law since the State of Georgia is attempting to prevent the take by a federal actor of a federally listed marine mammal species. As reflected in the attached opinion (Enclosure (1)) of the General Counsel for the National Oceanic and Atmospheric Administration (NOAA), Section 109(a) of the Marine Mammal Protection Act (MMPA) preempts Georgia's Endangered Wildlife Act to the extent that it relates to the taking of listed marine mammals. To the extent any state requirement is preempted by MMPA, it is not enforceable under the Coastal Zone Management Act (CZMA). Moreover, the approval of a state program under the CZMA does not negate the preemptive effect of federal law. Therefore, the GCMP contains no "enforceable policy" that would permit the State to regulate naval vessel speed with regard to the taking of marine mammals.

Section 109(a) of the MMPA provides that "[n]o state may enforce . . . any State law or regulation . . . relating to the taking of any species . . . of marine mammal" within the State unless the Secretary of Commerce has transferred management authority for that species to the State. The plain language of this provision is unambiguous and preempts all state statutes and regulations related to the taking of marine mammals. Therefore, as a general matter, unless the Secretary of Commerce has transferred MMPA management authority for marine mammal species to a particular state, any state law that prohibits take of marine mammals constitutes a state law "relating to" the taking of marine mammals and, to that extent, is preempted.

In this instance, the Secretary of Commerce has not transferred MMPA management authority over any marine mammal species to the State of Georgia. The CZMA requires that federal agency actions be consistent, to the maximum extent practicable, with the enforceable policies of a state's federally approved coastal management program. 16 United States Code (U.S.C.) § 1456(c)(1)(A). Enforceable policies are state policies that are legally binding through laws and regulations by which a state exerts control over natural resources within its coastal zone. 16 U.S.C. § 1453(6a); 15 Code of Federal Regulations (C.F.R.) § 930.11(h). Enforceable policies, however, do not include state statutes and regulations that are preempted by federal law, as they are not "legally binding." NOAA has consistently

⁴ See footnote 1, page 31.

interpreted enforceable policies as those state policies not preempted by federal law.⁵

Although NOAA entered into a Cooperative Agreement with Georgia under Section 6 of the Endangered Species Act (ESA) on November 29, 2005, as is the case with a similar NOAA agreement with the State of Hawaii as discussed in the NOAA General Counsel's opinion, the agreement does not explicitly recognize the state's authority to establish and enforce protections for listed marine mammals separate and apart from the National Marine Fisheries Service (NMFS); instead the agreement grants only limited authority, primarily providing a vehicle for making federal funding available to Georgia to conserve listed species.⁶ Therefore, the Georgia state laws in question are preempted by Section 109(a) of the MMPA, insofar as those laws and regulations relate to the taking of marine mammals, and are not explicitly authorized by NOAA under an ESA Section 6 agreement, they are unenforceable under the CZMA.

Preemption by Federal Law Governing Vessel Speed Restrictions

Notwithstanding the unenforceability under the CZMA of the Georgia State laws at question, NMFS has promulgated a Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with NARWs on December 9, 2008.⁷ Public vessels were exempt from a speed restriction of 10 knots in the Final Rule because NMFS

⁵ See NOAA Office of Ocean and Coastal Resource Management, CZMA Federal Consistency Overview, at 6 (Aug. 10, 2007), available at, <http://coastalmanagement.noaa.gov/consistency/resources.html>; NOAA Office of Ocean and Coastal Resource Management, Program Change Guidance, Section II(D), at 8 (July 1996), available at, http://coastalmanagement.noaa.gov/consistency/FC_policy_guidance.html.

⁶ Cooperative Agreement (CA) between NMFS and the Georgia Department of Natural Resources (DNR) for the Conservation of Endangered and Threatened Species, dated November 29, 2005. Document available at: <http://www.nmfs.noaa.gov/directives/>. Paragraph 2 of the CA states "NMFS and GADNR shall carry out the cooperative program for the conservation of endangered and threatened species, which may involve law enforcement, research, management, and public information and education activities conducted for the benefit of resident endangered and threatened species in the state of Georgia". In this instance, CRD is seeking to impose a speed restriction on naval vessels of 10 knots to protect against a vessel strike of a NARW on its own, despite the actions to date of NMFS in promulgating the Final Rule to address ship strikes discussed in footnote 9, and during the consultation process with the U.S. Navy for the JAX Range Complex FEIS under the MMPA and Federal ESA.

⁷ See 50 Code of Federal Regulations 224.105 (2008), Speed restrictions to Protect North Atlantic Right Whales. Also see the discussion in comment 5 by NMFS in response to public comments on the Notice of Proposed Rulemaking concerning exempting public vessels from speed restrictions at Federal Register, Vol. 73, No. 198, Friday, October 10, 2008, 60173 to 60191.

recognized that national security, navigational, and human safety missions of some federal agencies may be compromised by mandatory vessel speed restrictions on public vessels.⁸ The U.S. Navy currently implements mitigation measures to address ship strikes; and, NMFS has stated that most of these measures are similar to, if not more stringent than, the measures considered in the Final Rule.⁹

It should be noted that the speed restriction of 10 knots sought by Georgia CRD on naval vessels differs dramatically from the Final Rule discussed in the previous paragraph. Georgia CRD would require the U.S. Navy to abide by a speed restriction in a continuous area within 30 NM of shore from Morehead City, NC, to Port Canaveral, FL, between November 15 and April 15 each year.

In contrast, the geographic area covered by the Final Rule is not nearly as large and provides as follows: (1) a 20 NM radius at the ports of Morehead City, NC, and Beaufort, NC, with a 10 knots speed restriction from November 1 to April 30 of each year; (2) a continuous area 20 NM from shore between Wilmington, NC to Brunswick, GA, with a 10 knots speed restriction from November 1 to April 30; and, (3) a continuous area from Brunswick, GA, to St. Augustine, FL, from November 15 to April 15 which coincides for the most part with the Southeast Mandatory Ship Reporting Area.

The U.S. Navy has requested, and expects to receive from NMFS, an incidental take authorization under the MMPA and a biological opinion and associated incidental take statement under the federal ESA for the training and RDT&E activities discussed in the JAX Range Complex FEIS/OEIS. We anticipate that any measure addressing vessel speed will require consistency with mission, training, and operations, to include speed reduction in the event NARWs are sighted within specified distances of the vessels.

⁸ See Section 2.4.8 of the FEIS to Implement Vessel Operational Measures to Reduce Ship Strikes to North Atlantic Right Whales, August 2008, National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS), Office of Protected Resources, discussing the exemption of public vessels from a speed restriction of 10 knots. The FEIS is available at the following internet address:
<http://www.nmfs.noaa.gov/pr/shipstrike/eis.htm>.

It should be noted that NMFS provided the State of Georgia in 2006 with a consistency determination under the CZMA for the above FEIS and stated that it was consistent to the maximum extent practicable with the enforceable policies of the GCMP. According to NMFS FEIS, the State of Georgia CRD did not file a response within the review period with NMFS stating that the exemption of public vessels from the 10 knot speed restriction was not consistent with the enforceable policies of GCMP. See sections 4.6.5.2, 4.6.7.1 and Appendix F.

⁹ See footnote 10. Section 2.4.8 and Appendix A of the FEIS discusses the current mitigation measures employed by U.S. Navy to address ship strikes.

Accordingly, the U.S. Navy's proposed activities, to include any associated vessel transit described in the JAX Range Complex FEIS/OEIS, are fully consistent with the enforceable policies of the GCMP. Also, we note that these conditions create a significant conflict with the U.S. Navy's obligations under Title 10 of the U.S.C. to provide trained and ready forces. To the extent that any condition would prevent the U.S. Navy from meeting its Title 10 obligations, the U.S. Navy would be consistent to the maximum extent practicable with the enforceable policies of the GCMP.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

January 14, 2009

The Honorable Frank R. Jimenez
General Counsel of the Navy
1000 Navy Pentagon
Washington, DC 20450-1000

Dear Mr. Jimenez,

In letters dated December 19, 2008, and January 9, 2009, you asked for the views of the National Oceanic and Atmospheric Administration (NOAA) General Counsel on whether Section 109(a) of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1379(a), preempts certain California and Georgia state laws. In addition, you asked for NOAA/GC's views regarding the implications of preemption on the enforceability of those laws under the Coastal Zone Management Act (CZMA). These questions have arisen in connection with reviews of the Navy's future training activities for consistency with the respective state's coastal management program.

On June 20, 2008, I sent you a letter regarding similar questions you posed in connection with the State of Hawaii's review of the Navy's training activities. In that letter, I expressed this office's view that the Hawaii state laws and regulations in question were preempted by Section 109(a) of the MMPA, insofar as those laws and regulations related to the taking of marine mammals, and are not explicitly authorized by NOAA under an Endangered Species Act (ESA) Section 6 agreement. See 16 U.S.C. § 1535(c). I further expressed this office's view that to the extent any state requirement is preempted by the MMPA, it is not enforceable under the CZMA. The June 20, 2008, letter is consistent with the views earlier expressed by the Director of the Office of Protected Resources, National Marine Fisheries Service, NOAA, in a letter dated February 12, 2007. This office continues to stand by the views expressed in the February 12, 2007, and the June 20, 2008, letters. Copies of those letters are enclosed.

I trust that this letter provides you with the information that you need. If you have any further questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "Jane C. Luxton".

Jane C. Luxton
General Counsel





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

FEB 12 2007

Admiral J.A. Symonds
Director, Environmental Readiness Division
Department of the Navy
Office of the Chief of Naval Operations
2000 Navy Pentagon
Washington, DC 20350-20000

Dear Admiral Symonds:

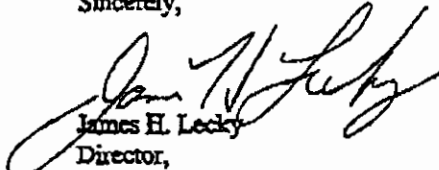
I am in receipt of your letter of February 12, 2007, in which you seek the advice of the National Oceanic and Atmospheric Administration (NOAA) concerning section 109(a) of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1379(a). Specifically, you request NOAA's interpretation of the meaning and scope of section 109(a), and whether this provision pre-empt's a state's action to regulate the taking of marine mammals.

One of the fundamental purposes of the MMPA is to protect and conserve marine mammal species, and to limit the taking of such species. "Take" under the MMPA is defined to mean "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13). "Harassment" is further defined to include activities that "injure" or "disturb" marine mammals. 16 U.S.C. § 1362(18). The authority to regulate the taking of marine mammals has been granted to the Secretary of Commerce, acting through NOAA.

Section 109(a) of the MMPA states "[n]o State may enforce, or attempt to enforce, any State law or regulations relating to the taking of any species . . . of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species to the State . . ." Although the specific text of a state statute or regulation and the circumstances of its application will determine whether it is pre-empted, at a minimum, section 109(a) would pre-empt enforcement of a state law or regulation, the sole purpose of which, either facially or as applied, is to prevent the harassment, injury, disturbance or other taking of a marine mammal.

Should you have any additional questions, please contact me at 301-713-2332.

Sincerely,


James H. Lecky
Director,
Office of Protected Resources





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

June 20, 2008

The Honorable Frank R. Jimenez
General Counsel of the Navy
1000 Navy Pentagon
Washington, DC 20450-1000

Dear Mr. Jimenez,

In a letter dated June 19, 2008, you asked for the views of the National Oceanic and Atmospheric Administration (NOAA) on the issue of whether Section 109(a) of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1379(a), preempts certain provisions of Hawaii state law, Haw. Rev. Stat §§ 195D-1 – 195D-32 and Haw. Admin. Reg. §§ 13-124-1 – 13-124-10, which prohibit take of federally-listed species, as those laws relate to marine mammals. In addition, you asked for NOAA's views regarding the implications of preemption on the enforceability of those laws under the Coastal Zone Management Act (CZMA).

Our view is that enforcement of the Hawaii state laws and regulations identified above is, in this context, preempted by Section 109(a) of the MMPA, insofar as those laws and regulations relate to the taking of marine mammals. To the extent any state requirement is preempted by the MMPA, it is not enforceable under the CZMA.

Section 109(a) of the MMPA provides that "[n]o state may enforce . . . any State law or regulation . . . relating to the taking of any species . . . of marine mammal" within the State unless the Secretary of Commerce has transferred management authority for that species to the State. MMPA § 109(a), 16 U.S.C. § 1379(a); cf. 16 U.S.C. § 1362(13) (defining "take"). See generally 50 C.F.R. Part. 403 (governing transfer of MMPA authority). The plain language of this provision is unambiguous and preempts all state statutes and regulations related to the taking of marine mammals. As noted by the District Court for Hawaii in a case interpreting Section 109(a), the Supreme Court has held that the use of the phrase "relating to" underscores Congress' broad pre-emptive purpose. *U.F.O. Chuting of Hawaii, Inc. v. Young*, 327 F. Supp.2d 1220, 1223 (D. Haw. 2004) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992)). Thus, as a general matter, unless the Secretary of Commerce has transferred MMPA management authority for marine mammal species to a particular state, any state law that prohibits take of marine mammals constitutes a state law "relating to" the taking of marine mammals and, to that extent, is preempted.



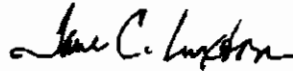
In addition, Section 6(c) of the ESA, 16 U.S.C. § 1535(c), generally authorizes states to enter into cooperative agreements with the Secretary of Commerce (through NOAA) or the Department of the Interior under which funding is made available to a state to assist in state efforts to conserve endangered and threatened species. A specific type of Section 6 agreement, however, requires findings by the Secretary that the state has established programs for conservation of all protected species, and recognizes the state's authority to establish and enforce protections for such species. See ESA § 6(g)(2)(A), 16 U.S.C. § 1535(g)(2)(A); see also ESA § 6(c)(1)(A)-(E), 16 U.S.C. § 1535(c)(1)(A)-(E), and compare text preceding § 6(c)(2), 16 U.S.C. § 1535(c)(2). An uncodified provision of the 1981 amendments to the MMPA states: "Nothing in the amendments made by subsection (a) [amending § 109(a)] shall be construed as affecting in any manner, or to any extent, any cooperative agreement entered into by a State under [ESA] section 6(c)." P.L. 97-58, § 4(b). Thus, in the case of certain ESA Section 6 agreements that explicitly recognize the state's authority to establish and enforce protections for listed marine mammals, the uncodified provision may be read to provide a limited exception that would allow enforcement of state laws relating to such species to ensure that the purposes of the Section 6 agreement are fulfilled. Such an exception would not apply in this case for the reasons discussed below.

In this case, the Secretary of Commerce has not transferred MMPA management authority over any marine mammal species to the State of Hawaii. Moreover, although NOAA entered into a cooperative agreement with the Hawaii Department of Land and Natural Resources on August 29, 2006, this agreement does not explicitly recognize the state's authority to establish and enforce protections for listed marine mammals; instead the agreement grants only limited authority, primarily providing a vehicle for making federal funding available to Hawaii to conserve listed species. See Cooperative Agreement Between the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, and the Hawaii Department of Land and Natural Resources for the Conservation of Threatened and Endangered Species, at 4. Therefore, enforcement of a Hawaii state law that prohibits take of federally-listed species is preempted under the MMPA, to the extent it relates to the taking of marine mammals. Section 109(a) of the MMPA does not preempt enforcement of Hawaii state law to the extent it does not relate to the taking of marine mammals.

To the extent Hawaii's state requirements are preempted by the MMPA, they are not enforceable under the CZMA. The CZMA requires that Federal agency actions be consistent, to the maximum extent practicable, with the enforceable policies of a state's Federally-approved coastal management program. 16 U.S.C. § 1456(c)(1)(A). Enforceable policies are state policies that are legally binding through laws and regulations by which a state exerts control over natural resources within its coastal zone. 16 U.S.C. § 1453(6a); 15 C.F.R. § 930.11(h). Enforceable policies, however, do not include state statutes and regulations that are preempted by Federal law, as they are not "legally binding." Moreover, NOAA's approval of a State CZM program does not negate the preemptive effect of Federal law. NOAA has consistently interpreted enforceable policies as those state policies not preempted by Federal law. See NOAA Office of Ocean and

Coastal Resource Management, CZMA Federal Consistency Overview, at 6 (Aug. 10, 2007), available at <http://coastalmanagement.noaa.gov/consistency/resources.html>; NOAA Office of Ocean and Coastal Resource Management, Program Change Guidance, Section II(D), at 8 (July 1996), available at http://coastalmanagement.noaa.gov/consistency/FC_policy_guidance.html.

Sincerely,



Jane C. Luxton
General Counsel