

How Dolphins Got The Benefit Of The Doubt And Why It Matters

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The "burden of proof" is a central idea in the law -- it can determine whether the law protects public health and the environment, or whether it has the opposite effect. Getting the "burden of proof" right is crucial, as we'll see in the case of dolphin-safe tuna.

For environmentalists, shifting the burden of proof is a key element in a precautionary approach to environmental law. In chemicals policy, for example, chemicals are currently assumed safe until the government can prove they are harmful. The burden of proof is on the government. Environmentalists urge that the burden of proof should be shifted onto industry to prove chemicals are safe rather than on government to prove they are harmful.

Why is this so important? How can just a few words determine whether a law will effectively protect the environment and human health? Let's take a look at a recent case.

An April 27, 2007 case from the Ninth Circuit Court of Appeals shows how simple and yet profound this issue is.¹ It demonstrates what the burden of proof is and how the outcome of a dispute can turn solely on which party bears that burden. It also shows how the fundamental interests protected by a law are defined by the structure of the burden of proof.

Earth Island Institute v. Gutierrez involves the killing of dolphins by tuna fishers.² One way to catch tuna, it turns out, is to herd pods of dolphins in the open ocean over large "purse-seine" nets that are suspended deep in the water. Schools of tuna follow the dolphins into the center of the nets, which are then closed up like a purse capturing everything inside. The toll on dolphins is heartbreaking: the socially-organized pods are disrupted when they are herded with explosives, boats and helicopters, and at least six million dolphins have been killed by tuna fishers since 1959. Populations of three kinds of dolphins in the "Eastern Tropical Pacific Ocean" have been depleted to below their "optimal sustainable population," and they are not recovering.

For purposes of this case, the history of Congressional efforts to protect dolphins from tuna fishing is very simple. In 1990, Congress passed the Dolphin Protection Consumer Information Act, which barred tuna from being labeled "dolphin-safe" if the tuna were caught using purse-seine nets to encircle pods of dolphins. American consumers generally refused to buy tuna without the dolphin-safe label, with a devastating commercial effect on U.S., Mexican and South American tuna fishers who could not use

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the label because they fished with purse-seine nets. On behalf of industry, the United States government asked Congress to weaken the 1990 law and allow the dolphin-safe label even if tuna was caught by herding dolphins into purse-seine nets, as long as this was done in such a way that no dolphins were observed to be killed or injured.

Congress was skeptical that this was possible. Accordingly, in 1997 Congress amended the dolphin protection laws to permit the dolphin-safe label for tuna caught by herding dolphins into purse-seine nets, but only if the Secretary of Commerce first performed three specified studies and then concluded that tuna fishing with purse-seine nets "is not having a significant adverse impact on any depleted dolphin stock in the Eastern Tropical Pacific Ocean."

Thus, the structure of the core legal test of the 1997 law is this: it presumes that fishing for tuna with purse-seine nets has an adverse impact on depleted dolphin stocks, and it requires the Secretary of Commerce to prove otherwise before the labeling standard can be changed. The default state that this law protects is the sale of tuna without a claim that it is dolphin-safe if purse-seine nets are used to catch it. If the government wants to change this default state, and allow tuna to be labeled dolphin-safe even if it is caught with purse-seine nets, the government must prove that this can be done without "having a significant adverse impact on any depleted dolphin stock." Under this law, then, the government bears the burden of proof to show that tuna fishing with purse-seine nets causes no significant adverse impact on a depleted dolphin stock.

After the 1997 law was passed, there followed a long and dispiriting history of failure by the Secretary of Commerce to perform the studies mandated by Congress, political meddling in the work of scientists, and government decision-making blatantly contrary to its own scientific findings. The Secretary of Commerce eventually concluded that the continuing purse-seine net tuna fishing was not causing a significant adverse impact on dolphin stocks and that the labeling standards should be changed. The Earth Island Institute sued to overturn that decision.

In its April 27, 2007 opinion, written by Chief Circuit Judge Mary M. Schroeder, the court first found that the Secretary of Commerce conducted only poor studies that did not constitute the studies required by Congress, and voided his conclusion on that ground.³ The Secretary of Commerce nevertheless made two additional arguments. First, he argued that the available evidence, taken as a whole, supported his conclusion. But the Ninth Circuit disagreed, and held that the Secretary's conclusion was not supported by the final report of the government's own scientists, who plainly concluded that they did not have enough data to determine whether or not the continuing purse-seine net tuna fishing is still adversely affecting the depleted dolphin stocks.⁴

This led to the Secretary's final argument: that the Secretary could make the change in the dolphin-safe labeling requirement anyway. But the Court enforced the burden of proof imposed on the Secretary by the law:

"The Secretary then points to the inconclusive nature of all the agency's studies and claims that the absence of evidence allows him to make a change in dolphin-safe labeling requirements. [But] there is no basis on which to change the status quo if all of the evidence is inconclusive."⁵

Thus, the record showed that the evidence as a whole was inconclusive, and because of this the Secretary could not meet his burden of proof to change the law's default state, which the court called the status quo. The power of this status quo stands revealed: it cannot be changed in cases of doubt or inconclusive evidence. The party bearing the burden of proof cannot prevail if it fails to produce adequate evidence to show that the default state should be changed. Absent or inconclusive evidence defeats the party bearing the burden of proof, and the law's default state is maintained.

The exact same factual record would have led to the opposite result if the 1997 law had allocated the burden of proof differently. For example, if the law had been designed more like most current American environmental laws, it would have allowed the dolphin-safe label for tuna caught using purse-seine nets unless the government showed the fishing caused a significant adverse effect on a dolphin stock. This structure would have put the burden of proof on government to show the existence of a significant adverse effect rather than the absence of one. Because the evidence was inconclusive, however, the government would not have been able to meet that burden either. But the default state protected by the law would have been totally different: this time tuna could be labeled "dolphin-safe" even though it was caught with purse-seine nets and even if dolphin stocks were in reality being significantly adversely affected. The interest protected by the law would have been the fishing industry instead of dolphins.

Thus, the structure of the burden of proof (i.e., who bears the burden of proof and what that person must show) defines a preferred default state that the law will maintain in all cases of inconclusive or insufficient evidence. This preferred default state reflects the fundamental interests that the law is designed to protect. In designing our laws, we are free to define this preferred default state however we wish, in accord with the kind of world we want to have. If we want them to, our laws can be designed so that the default state they protect is a healthy environment.

These principles can be widely applied to virtually any environmental or health issue. For example, a signature accomplishment of the new European chemicals law, REACH,⁶ is that it places the burden of proof on industry to seek authorization to market some highly dangerous chemicals. In the United States, the proposed "Kid Safe Chemicals Act of 2005" would place the burden on industry to prove a chemical presents a "reasonable certainty of no harm" in order to market it.⁷ This would represent a dramatic change from our current law, the Toxic Substance Control Act, which places the burden on the

Environmental Protection Agency (EPA) to prove that a chemical presents an unreasonable risk before EPA can impose regulations.

The default state that these laws (REACH and Lautenberg) are trying to establish and protect is one in which a chemical is not introduced into commerce without being tested and shown to be safe with respect to available data.

Establishing this default state is accomplished by placing the burden on industry, as a condition for placing a product on the market, to produce safety and use information, to prove their products are safe with respect to that information and perhaps to show that there are no safer alternatives. Under a law having such a structure, when there are data gaps and inconclusive studies, the law would retain the default state of not allowing the chemical on the market. Cases of doubt would be resolved against industrial proponents of the chemical, rather than, as they are now under our current law, against those seeking to regulate chemicals.⁸

Earth Island Institute v. Gutierrez shows us many things about the power of the American legal system. It shows that our system is capable of forcing those seeking greater industrial activity to carry a burden of proof to provide evidence that their activities are safe.

Our system is capable of enforcing a requirement to generate specified data, of overturning a government decision that is contrary to the evidence in view of the burden of proof, and of refusing to change the law's default state if the evidence is inconclusive. American judges are capable of doing all this even when it means confronting the power of the federal government and a substantial national and international industry. They are capable of doing all this on behalf of a non-human species that lives in the ocean and is of little economic value to us.

This case encourages those who believe in the rule of law, believe that laws can be crafted that will implement precautionary approaches to protecting human health and the environment, and believe that such laws can be enforced even against a recalcitrant federal government.

Just one caveat remains -- *Earth Island Institute v. Gutierrez* may yet be appealed to the U.S. Supreme Court.

NOTES

¹ *Earth Island Institute v. Gutierrez*, Case No. 04-17018; D.C. No. CV-03-00007-The Opinion (April 27, 2007) (9th Circuit) (available at: [www.ca9.uscourts.gov/ca9/newopinions.nsf/20F544E39ADF428C882572C9007A07DE/\\$file/0417018.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/20F544E39ADF428C882572C9007A07DE/$file/0417018.pdf?openelement))

² The subsequent discussion of the facts and law is taken entirely from the 9th Circuit Opinion in *Earth Island Institute v. Gutierrez* (see note 1). Many additional details can be found in the Opinion.

³ *Earth Island Institute v. Gutierrez*, Case No. 04-17018; D.C. No. CV-03-00007-The Opinion (April 27, 2007)(9th Circuit), pp. 4619-22.

⁴ *Earth Island Institute v. Gutierrez*, Case No. 04-17018; D.C. No. CV-03-00007-The Opinion (April 27, 2007)(9th Circuit), pp. 4622-27.

⁵ *Earth Island Institute v. Gutierrez*, Case No. 04-17018; D.C. No. CV-03-00007-The Opinion (April 27, 2007)(9th Circuit), p. 4626.

⁶ "REACH" is a European Union regulation entitled "Registration, Evaluation and Authorization of Chemicals" (available at http://ec.europa.eu/environment/chemicals/reach/reach_intro.htm).

⁷ The "Kid Safe Chemicals Act of 2005," submitted as S.1391 to the U.S. Senate in 2005 (available at <http://sciencecorps.org/KidSafeChemicalsAct/>).

⁸ The various elements of a core legal test in a chemicals law, including the burden of proof, are analyzed in detail in Joseph H. Guth, "The Core Legal Test in a Chemicals Law," *Rachel's Democracy & Health News* #892 (February 1, 2007) (www.rachel.org).