
Logo of the Abalone Alliance (and a possible trademark violation)

For several months now, I have been looking for a good comparison case to the Mono Lake Committee, whose work is one of the great success stories of the modern environmental movement. Why did the Mono Lake Committee succeed when other organizations failed? Lots of organizations had good causes and dedicated leaders: what made Mono Lake so special?

There are lots of reasons: lack of financing, poor organization, inability to generate strategic alliances. But prosaic legal doctrine also constitutes a key factor. A comparison case illuminates this point.

Right around the same time when and in the same state where the Mono Lake Committee got going, protests exploded over the then-proposed Diablo Canyon nuclear power plant. Spearheading these protests was the Abalone Alliance, which took its name from 1) the Clamshell Alliance protesting the Seabrook nuclear power facility in New Hampshire; and 2) the species that would be harmed by the "thermal pollution" (aka heated water) from the plant.

Looking at the Abalone Alliance's activities is particularly useful as a comparison because its most activities occurred between 1977 and 1985, pretty much exactly when the MLC was doing its most significant work.

Diablo Canyon's location near an earthquake fault, and anti-nuclear sentiment generally, made the struggle against it a (well-funded) *cause celebre*. According to wikipedia:

> On August 7, 1977, 1,500 people demonstrated at the gate of Diablo Canyon, resulting in 47 arrests. The next year, 5,000 people rallied and 487 were arrested. On September 10, 1981, the Abalone Alliance occupied the site, leading to 1,960 arrests. Nearly 30,000 people showed up in support. At the end of the ten-day action, a 25-year-old engineer discovered a mirror image reversal in the seismic blueprints. PG&E was forced spend $3 billion and three additional years of repairs before reopening.[7] Anti-War Activists Daniel Ellsberg and Tom Hayden, activist stars like Ed Asner, Martin Sheen, Martin Landau, Blythe Danner, Patti

> Davis, Robin Williams, Lily Tomlin, Harrison Ford, Carrie Fisher, Marsha Mason, John Belushi, Jane Fonda and Robert Blake and performers such as Jackson Browne, Bonnie Raitt, Crosby, Stills, Nash & Young, The Eagles, Linda Ronstadt, Peter Yarrow, Holly Near, Joan Baez, Dan Fogelberg, Bruce Springsteen and the E Street Band,James Taylor, Carly Simon, Chaka Khan, The Doobie Brothers, Jesse Colin Young, Stevie Wonder, Gil Scott-Heron, Stevie Nicks, Tom Petty, Poco, Wavy Gravy,Warren Zevon and others joined the anti-nuclear concerts, protests and larger movement – which included a series of concerts at Madison Square Garden through Musicians United for Safe Energy, as well as 'Peace Sunday' at the Rose Bowl (with over 100,000 in attendance) and multiple 'Survival Sundays' held at the Hollywood Bowl both through the Alliance for Survival, a Los Angeles based Abalone Alliance affiliate. A number of the high profile participants were included in the arrests at Diablo and the mass jailings were described as a "tornado of talent". Jackson Browne defending his civil disobedience at a San Luis Obispo courthouse after his arrest for trespassing at the blockade ("I consider my actions to be patriotic"). In 1984, the Alliance organized the Peoples Emergency Response Plan, where affinity groups blockaded at the Diablo Gates over a four-month period.

As hard as the motley crew of grad students and their counsel worked to save Mono Lake, they didn't come anywhere close to that.

So why did the Mono Lake Committee succeed and the Abalone Alliance fail? At first blush, the answer seems boring and prosaic, but true: the law just wasn't on the Alliance's side. Nuclear energy permitting is controlled by the Nuclear Regulatory Commission, which tilts heavily toward the nuclear industry, and basic administrative law doctrines defer to agency decision-making. Nowhere is this more true than with the Nuclear Regulatory Commission: courts defer to it more than virtually any other agency (even though the famous Calvert Cliffs decision in 1971 went against it). As Katherine Trisolini, Professor of Law at Loyola Law School (and my wife!) shows in a forthcoming Yale Law and Policy Review article, the NRC has also structured its internal procedures to avoid grappling with difficult issues and hiding its activities from judicial review. When the Alliance challenged the Diablo Canyon project, a sharply divided DC Circuit en banc ruled 5-4, San Luis Obispo Mothers for Peace v. US Nuclear Regulatory Commission, to uphold the NRC's determination.

The public trust doctrine, on the other hand, posed no such barrier to a favorably-inclined judiciary. It was a doctrine as old as western legal history, and Marks v. Whitney already held that it was a flexible doctrine inviting judicial creativity.

It is only partially true that the disparity in outcomes reflected ideology. True, Robert Bork wrote the DC Circuit opinion, and 3 of the 5 judges voting with him were Reagan appointees. But two — Abner Mikva and Harry Edwards — are generally not thought of as conservative rubber stamps. The dissenting opinion was written by Patricia Wald, and she was joined by Skelly Wright (the author of *Calvert Cliffs*) and Spottswood Robinson. But it was also joined by Douglas Ginsburg.

A couple of brief takeaways: First, legal doctrine matters, not just on pure substance, but also concerning the extent to which judges should even be part of these decision. Second, federalism matters, and not in the way environmental scholars usually think of it. Here, it was a state court that pushed harder for environmental protection, and the federal court that did not. This partially reflects politics, of course, but then maybe the focus should be on *that* instead of levels of government.

More to come on this. But I think if we are looking for a good comparison to the Mono Lake Committee, the Abalone Alliance could be a prime case.