

## National Security vs. Whales: The Navy and the Natural Resources Defense Counsel Battle Their Way to the Supreme Court

Alicia Schaffner<sup>1</sup>

*"We are tied to the ocean. And when we go back to the sea, whether it is to sail or to watch  
it, we are going back from whence we came."*

Pres. John F. Kennedy, Australian Ambassadors Dinner for the America's Cup Crews,  
September 14, 1962, Newport, R.I.

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### I. Introduction

In the past few years, the battle over the Navy's use of low and mid-frequency sonar has become hotly contested. The lines are clearly drawn between two groups advocating two very different agendas: marine mammal conservation and national security. Sonar is a necessary tool used by the Navy to detect enemy submarines, but environmentalists argue that it should be used only with the proper precaution and after the proper planning.

Legally, this is a battle over whether the Navy properly adhered to federally mandated environmental planning processes. The National Resources Defense Council (NRDC) has long argued that the Navy has not properly taken the environmental impacts of its sonar activities into account when planning training exercises. As a result, the NRDC frequently brings the Navy into court contending that its planning process for sonar training violates the National Environmental Policy Act (NEPA).

The latest skirmish involved a challenge to an Environmental Assessment (EA) prepared by the Navy in 2007 for sonar training in the Pacific Ocean off the coast of California. After a California district court and the Ninth Circuit Court of Appeals enjoined the Navy's sonar training, the Navy appealed to the U.S. Supreme Court. The Supreme Court in *Winter v. NRDC* held that the lower courts had not given proper weight to the Navy's interest in

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<sup>1</sup> J.D. Candidate, Roger Williams University School of Law, 2009.

military training and protecting national security.<sup>2</sup> As a result, the district court had improperly enjoined the Navy from conducting sonar training.

This article begins by examining the general use of sonar by the Navy and its effects on marine mammals. The article then provides a time line of the *Winter v. NRDC* litigation, followed by an analysis of the Supreme Court's ruling.

## II. Listening Underwater

Because of the lack of light in the deep ocean, sound is the primary navigation tool for humans and marine life traversing the depths. Marine mammals use echolocation to avoid collisions and locate prey. Echolocation is when a cetacean produces sound, most likely via vibrations of the nasal sac system near the nasal plugs.<sup>3</sup> The nasal sac system consists of a series of muscular valves and compliant sacs associated with the blowhole. Air sacs contract in synchrony with the echolocation clicks.<sup>4</sup> A cetacean's melon, a fatty structure located in its forehead, may serve as an "acoustic lens" to focus outgoing acoustic energy forward into the water in order to scan the area ahead of it.<sup>5</sup> Vibrations from the water are transmitted through the bones of the skull and adaptations allow cetaceans to localize sound underwater. Although some cetaceans, such as whales, have other senses including sight, touch and taste, hearing is paramount to their survival.<sup>6</sup>

Since humans cannot naturally echolocate underwater, sailors rely on sonar to keep their ships safe. Sonar is an acronym for the phrase "Sound Navigation and Ranging."<sup>7</sup> It is used to detect objects, such as underwater mines and other submarines, and estimate their range, velocity, and direction. Sonar can also be used to determine water depth. Sonar is the Navy's primary defense from an underwater attack.

The Navy uses two forms of sonar: passive and active. Passive sonar is a listening device that uses hydrophones to receive, amplify, and process underwater sounds. Passive sonar is used to detect and identify submarines by matching the sounds detected with known frequencies of submarine engines and propellers.<sup>8</sup> The primary benefit of passive sonar is that it can detect certain submarines without placing additional sound into the water. Unfortunately, passive sonar is ineffective at detecting modern, quiet submarines and submarines that are moving slowly or not at all.<sup>9</sup>

Active sonar, however, can detect quiet submarines and is extremely useful for precise location, classification, and rapid targeting.<sup>10</sup> There are three types of active sonar – high, mid, and low. High frequency sonar (>10kHz) is generally used to determine water depth,

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<sup>2</sup> *Winter v. NRDC*, 129 S. Ct. 365 (2008).

<sup>3</sup> I. A. VAUGHAN ET AL., MAMMALOGY 432-424 (4th ed. 2000).

<sup>4</sup> *Id.* at 424-427.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 424-427.

<sup>7</sup> U.S. Navy, *Understanding Sonar*, <http://www.navy.mil/oceans/sonar.html> (last visited Feb. 2, 2009).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

locate mines, and guide torpedoes. High frequency sonar has a short range, less than five nautical miles, and produces weak sound energy.<sup>11</sup>

Mid-frequency sonar (1kHz-10kHz), with a range of one to ten nautical miles, is the primary tool for identifying submarines. Mid-frequency sonar is emitted into the water column at a pressure of 235+ decibels for about 0.5 – 2 seconds and repeated every 28 seconds.<sup>12</sup> To provide some perspective, this intensity would be similar to that of a rocket taking off.<sup>13</sup> The Occupational Safety and Health Administration (OSHA) requires that hearing protection be used where workers are exposed to sounds at “90 dB for eight hours or 110 dB for as little as thirty minutes.”<sup>14</sup>

Low frequency sonar (<1kHz) has a range of about 100 nautical miles and is used mostly for long-range search and surveillance of submarines.<sup>15</sup> While low frequency sonar is quite useful for tracking submarines, it has the unfortunate drawback of allowing enemy submarines to extrapolate the location of the ship producing the sound.<sup>16</sup> As a result, this sonar is primarily used during training and maintenance activities. About 58% of the U.S. Navy’s surface ships are equipped with active sonar, and about half of these ships are underway at any given point in time.

### III. Impacts of Noise on Marine Mammals

The oceans are noisy. Oil and gas exploration companies conduct high-energy seismic surveys. Commercial shipping ensures a near-constant rumble of engines and propellers. Since the sounds generated from these activities fall within the hearing ranges of marine mammals, all of this activity creates an underwater world constantly flooded with intense sound.

As the level of ocean noise has increased, concerns have risen about the potential impacts on marine mammals and other marine life.<sup>17</sup> In 2005, the National Research Council (NRC) investigated the effects of noise on marine mammal populations. The NRC identified five different levels of effects ranging from individual behavior changes to population-level changes. The NRC also determined that proximity to the source also correlates to the impact of the effect. The closer the cetacean is to the source, the higher the probability that the exposure could result in death and acoustic trauma. Marine mammals farther removed from the sound may suffer hearing loss or display avoidance techniques and other minor behavioral changes.<sup>18</sup>

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<sup>11</sup> MICHAEL JASNY ET AL., NATURAL RESOURCES DEFENSE COUNCIL, SOUNDING THE DEPTHS II: THE RISING TOLL OF SONAR, SHIPPING AND INDUSTRIAL OCEAN NOISE ON MARINE LIFE 3 (2005), available at <http://www.nrdc.org/wildlife/marine/sound/sound.pdf> (last visited Feb. 2, 2009)

<sup>12</sup> *Id.*

<sup>13</sup> *Ocean Noise Affects Marine Life*, 44(5) ENVIRONMENT 4 (2002).

<sup>14</sup> Jasny, *supra* note 11.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> NATIONAL RESEARCH COUNCIL, MARINE MAMMAL POPULATIONS AND OCEAN NOISE: DETERMINING WHEN NOISE CAUSES BIOLOGICALLY SIGNIFICANT EFFECTS (2005).

<sup>18</sup> *Id.*

Not all marine mammals respond to sound in the same way. Some species are very susceptible to sonar. The species affected include: the Pygmy Sperm Whale, Gervais' Beaked Whale, Blainville's Beaked Whale, Melon-Headed Whales, Bottlenosed Dolphin, and the Cuvier's Beaked Whale, which is quite possibly the marine mammal most affected by sonar.<sup>19</sup> Scientists have not yet determined why these animals are so vulnerable to sonar, but all the above species share two traits: the use of echolocation and migration to cold waters for feeding and to warmer waters to give birth.<sup>20</sup>

Both physical and behavioral change can be observed after a marine mammal is exposed to acoustic trauma. Physiological damage includes: injury to body tissue, embolism, gross damage to the auditory system, permanent and temporary hearing loss and disorientation.<sup>21</sup> Due to the stress from the sounds, their immune systems are often vulnerable to disease and reproductive rates decrease.<sup>22</sup> Repetitive exposures to noise, such as sonar, may also lead to chronic impacts, such as desensitization to noise, which results in animals remaining near the sources of the damaging sound.<sup>23</sup>

There are other behavioral effects as well, such as stranding, interruption to normal behavior such as feeding, breeding and nursing, loss of efficiency, increased antagonism, and displacement from preferred areas.<sup>24</sup> Ocean noise may hinder the ability of individual cetaceans to communicate with other members of the same species. Biologically important sounds may be masked by sonar, which leads to decreased reproductive rates.<sup>25</sup> In addition, there may be some interference with the ability to acoustically interpret their environment and interference with food-finding.<sup>26</sup>

There may also be some indirect effects on the cetaceans. High intensity sound may affect the entire ecosystem. For example, the viability of fish eggs may be reduced and the fish themselves may be injured. Sonar may cause temporary deafness which will impact the ability of fish to feed, mate, avoid predators, and school.<sup>27</sup> The loss of fish and fish eggs may reduce the amount of prey available for marine mammals. Ultimately, these changes could impact humans if noise contributes to declining fish catch rates.<sup>28</sup> However, it has been argued that sonar does not have that much of an impact on fish. So far research indicates that the most notable effects only arise after fish are continually exposed to the sound, as opposed to intermittently exposed.<sup>29</sup>

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<sup>19</sup> Jasny, *supra* note 11, at 8-9, 11

<sup>20</sup> whaleroute.com, *Whale Migration*, <http://www.whaleroute.com/migrate/> (last visited Feb. 2, 2009).

<sup>21</sup> Jasny, *supra* note 11, at 7

<sup>22</sup> T. A. Romano et al, *Anthropogenic sound and marine mammal health: measures of the nervous and immune systems before and after intense sound exposure*, 61(7) CANADIAN JOURNAL OF FISHERIES AND AQUATIC SCIENCES 1124 (2004).

<sup>23</sup> Jasny, *supra* note 11, at 7

<sup>24</sup> A. Frantzis, *Does Acoustic Testing Strand Whales?*, 392 NATURE 29 (1998).

<sup>25</sup> *Id.*

<sup>26</sup> Patrick Miller et al., *Whale Songs Lengthen in Response to Sonar*, 405 NATURE 903 (2000).

<sup>27</sup> *NRDC v. England*, Complaint for Declaratory and Injunctive Relief (C.D. Cal. Oct. 19, 2005) available at <http://www.nrdc.org/media/docs/051019.pdf> (last visited Feb. 2, 2009).

<sup>28</sup> *Id.*

<sup>29</sup> INTERNATIONAL COUNCIL FOR EXPLORATION OF THE SEA. REPORT OF THE AD-HOC GROUP ON THE IMPACTS OF SONAR ON CETACEANS AND FISH (2005), available at <http://www.ices.dk/advice/Request/EC/DG%20Env/sonar/agisc05.pdf> (last visited Feb. 2, 2009).

#### IV. Marine Mammal Strandings

In March 2000, seventeen cetaceans stranded over the course of two days in the Bahamas' Northeast and Northwest Providence Channels.<sup>30</sup> The multi-species mass stranding included Blainville's beaked whales, Cuvier's beaked whales, and Minke whales. Ten of these whales survived and returned to the ocean, but the other seven did not. Necropsies revealed that the cetaceans had sustained acoustic or impulse trauma evidenced by the presence of hemorrhaging in the brain and auditory system. The Navy was conducting sonar tests nearby around the time of the stranding and its reports indicate that the stranding was caused by mid-frequency sonar.<sup>31</sup> Since the stranding, the original population of beaked whales in this area has disappeared. They may have been killed or permanently displaced because of the sonar testing.<sup>32</sup>

Marine mammal strandings in the vicinity of underwater sonar testing were first documented in the 1960s. Since then, the problem seems to have worsened and several mass strandings have coincided with sonar activities.<sup>33</sup> In addition to the 2000 Bahamian stranding, a mass stranding of approximately 200 melon-headed whales in July 2004 in the Hawaiian Islands was linked to the naval exercise RIMPAC '04.<sup>34</sup> That month, researchers also discovered a large concentration of whale strandings near Yokosuka, a major U.S. Navy base off the Pacific coast of Japan.<sup>35</sup>

In January 2005, in the Outer Banks of North Carolina, thirty-four pilot whales, two pygmy sperm whales, and one minke whale beached themselves.<sup>36</sup> This stranding correlated with a Navy sonar exercise.<sup>37</sup> These exercises were completed in order to ensure that military strike groups were adequately prepared to deploy and work proficiently at sea to aid in the fight on terrorism.<sup>38</sup> Post-mortem tissue scans showed hemorrhaging in the pygmy sperm whale and pilot whale that was consistent with other stranding events.<sup>39</sup>

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<sup>30</sup> Jasny, *supra* note 11, at 1.

<sup>31</sup> U.S. DEPARTMENT OF COMMERCE AND U.S. NAVY, JOINT INTERIM REPORT BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15-16 MARCH 2000 (Dec. 2001), available at [http://www.nmfs.noaa.gov/pr/pdfs/health/stranding\\_bahamas2000.pdf](http://www.nmfs.noaa.gov/pr/pdfs/health/stranding_bahamas2000.pdf) (last visited Feb. 2, 2009).

<sup>32</sup> *Id.*

<sup>33</sup> Jasny, *supra* note 11, at 8-9.

<sup>34</sup> *Id.*

<sup>35</sup> NRDC, *Protecting Whales from Dangerous Sonar*, <http://www.nrdc.org/wildlife/marine/sonar.asp> (last visited Feb. 2, 2009).

<sup>36</sup> Marc Kaufman, *Whale Stranding in NC Followed Navy Sonar Use*, WASHINGTON POST, Jan. 28, 2005.

<sup>37</sup> *Id.*; Jasny, *supra* note 10, at 8-9.

<sup>38</sup> Press Release, U.S. Navy, *Kearsarge Expeditionary Strike Group Completes Exercise*, Jan. 28, 2005, available at [www.navy.mil/search/display.asp?story\\_id=16829](http://www.navy.mil/search/display.asp?story_id=16829) (last visited Feb. 2, 2009).

<sup>39</sup> Press Release, NRDC, *Government Report on Mass Whale Stranding in N.C. Identifies Naval Sonar as Possible Cause*, Mar. 29, 2006, available at <http://www.nrdc.org/media/pressreleases/060329a.asp> (last visited Feb. 2, 2009). Other marine mammal deaths possibly linked to military activity include: Madeira in 2000, Greece in 1996, the U.S. Virgin Islands in 1998 and 1999, the Canary Islands in 1985, 1988, 1989, 2002, and 2004, the Gulf of Alaska in June 2004 and the northwest coast of the United States in 2003. Jasny, *supra* note 11, at 8-9.

## V. Sonar and National Security

The Navy has been firm in its position that the use of sonar in military training is essential for national security.<sup>40</sup> Many countries, including nations hostile to the U.S., have obtained quiet, modern submarines.<sup>41</sup> These submarines are extremely dangerous unless the Navy can detect them. The Navy trains sonar technicians on both active and passive sonar systems. Computers are used for basic training, but field experience is also necessary. Because the ocean is so noisy, sonar technicians must learn how to distinguish natural sounds from manmade noises. Sailors must learn how to focus during stressful situations, because combat can be a time of chaos and panic. According to the Navy, “[l]ive training with sonar at sea is essential to the safety of our sailors, their ability to survive submarine attacks, and ultimately, their ability to hunt and kill enemy submarines when necessary – a critical component of maintaining the security of our nation.”<sup>42</sup>

The Navy does express concern about the potential impact of active sonar on marine mammals, but the Navy’s mission is to defend the United States at sea, through combat if necessary. The Navy has spent millions of dollars on scientific research to better understand the effects of sound on these creatures. The Navy has pledged their commitment to further research and to use mitigation measures to minimize the effects on marine mammals; however, they are steadfast in their conviction that the Navy “cannot put the lives of its Sailors at risk or fail to remain prepared to defend our nation by eliminating active sonar use.”<sup>43</sup>

In response to claims that sonar is responsible for mass strandings, the Navy asserts that its use of sonar has been associated with only a “very small fraction” of marine mammal strandings worldwide.<sup>44</sup> The Navy forwards other potential explanations of strandings such as: disease, parasite infestation, harmful algal blooms, injuries from ship strikes or fishery entanglements, exposure to pollution, trauma, starvation, or unusual weather or oceanographic events.<sup>45</sup>

NOAA Fisheries, also referred to as the National Marine Fisheries Services, has conducted research into a subset of stranding events known as Marine Mammal Unusual Mortality Events to try and determine why they occur. Some of the triggers discovered by NOAA Fisheries match the Navy’s explanations including: infections, biotoxins, human interaction and malnutrition.<sup>46</sup> This does boost the Navy’s assertion that there are other causes of

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<sup>40</sup> Fact Sheet, U.S. Navy, *Navy’s Need for Sonar and Marine Mammal Protection Efforts* (2008), available at [http://www.navy.mil/oceans/Need\\_for\\_Training\\_v2.pdf](http://www.navy.mil/oceans/Need_for_Training_v2.pdf) (last visited Feb. 2, 2009).

<sup>41</sup> *Id.*

<sup>42</sup> U.S. Navy, *Understanding Sonar: Navy’s Need for Sonar Training*, <http://www.navy.mil/oceans/training.html> (last visited Feb. 2, 2009).

<sup>43</sup> U.S. Navy, *Understanding Sonar: Marine Mammals and Sound*, <http://www.navy.mil/oceans/maritime.html> (last visited Feb. 2, 2009).

<sup>44</sup> U.S. Navy, *Understanding Sonar: Stranding Events*, <http://www.navy.mil/oceans/strand.html> (last visited Feb. 2, 2009).

<sup>45</sup> *Id.*

<sup>46</sup> NOAA Fisheries, *Marine Mammal Unusual Mortality Events*, <http://www.nmfs.noaa.gov/pr/health/mmume/>.

marine mammal strandings. However, it does not detract from the fact that in some situations military sonar has been positively linked to marine mammal stranding events.

As evidence of its environmental ethic, the Navy has developed an “At Sea” policy to help sailors comply with environmental requirements during naval exercises and training.<sup>47</sup> The policy states that “the Navy shall comply with applicable statutes, regulations and executive orders and will strive to protect the environment, prevent pollution, and protect natural, historic, and cultural resources.”<sup>48</sup>

The Navy policy mandates that major fleet exercises be reviewed for environmental compliance and for potential consequences on marine mammals and other marine life. Mitigation measures must be used and can include conducting exercises in areas known to lack concentrations of marine mammals, posting highly trained lookouts, listening for marine mammals with passive sonar, creating buffer zones within which operations will be altered or delayed if marine mammals are present, ceasing sonar operations if marine mammals are detected within 200 yards of an active sonar dome, and conducting aerial searches for marine mammals in the area before, during, and after sonar operations.<sup>49</sup>

Because some the mitigation measures are highly dependent on visual surveys, most exercises occur during the day. When exercises are conducted at night, the Navy relies on night vision equipment, radar, and passive sonar to locate protected animals and coral reefs.<sup>50</sup> The Navy has designed these measures to help ship commanders maintain readiness and protect the environment during training and exercises by identifying and utilizing appropriate protective measures for sensitive marine life.<sup>51</sup>

## VI. *Winter v. NRDC* Timeline

Under the Coastal Zone Management Act (CZMA), federal activities affecting a state’s coastal resources must “be carried out in a manner that is consistent to the maximum extent practicable” with that state’s coastal management plan.<sup>52</sup> To ensure this mandate is implemented, the CZMA requires federal agencies to submit a consistency determination to the relevant state agency before undertaking activities.<sup>53</sup>

On October 30, 2006, the Navy submitted plans for fourteen training exercises using mid-frequency sonar, scheduled from February 2007 through January 2009 off the coast of Southern California, to the California Coastal Commission.<sup>54</sup> These exercises, involving various ships, submarines, amphibious vehicles, aircraft, and live ordinance, were intended

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<sup>47</sup> The Undersecretary of the Navy, *Memorandum for the Chief of Naval Operations, Commandant of Marine Corps Subj. Compliance with Environmental Requirements in the Conduct of Naval Exercises or Training at Sea* 1 (Dec. 28, 2000), available at [http://www.navy.mil/oceans/At\\_Sea\\_Policy\\_Memo.pdf](http://www.navy.mil/oceans/At_Sea_Policy_Memo.pdf) (last visited Feb. 2, 2009).

<sup>48</sup> *Id.* at 2.

<sup>49</sup> U.S. Navy, *Environmental Stewardship: Marine Mammal Protection*, <http://www.navy.mil/oceans/protection.html> (last visited Feb. 2, 2009).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 33 U.S.C. § 1456(c)(1)(A).

<sup>53</sup> *Id.* § 1456(c)(1)(C).

<sup>54</sup> Kenneth Weiss, *Bush Acts to Lift Curbs on Navy Sonar Use*, LOS ANGELES TIMES, Jan. 17, 2008.

to prepare naval strike groups for deployment to the western Pacific and the Middle East.<sup>55</sup> This submission set off the two-year legal battle that has yet to be completely resolved.

In January 2007, the Commission voted to allow the Navy's exercises to continue if the Navy abided by strict mitigation measures relating primarily to the use of sonar.<sup>56</sup> Some of the Commission's mitigation measures included maintaining sound levels below 154 dB, avoiding seamounts, and utilizing two NOAA-trained observers to monitor the sonar use.<sup>57</sup> However, because the Navy did not agree that sonar would "result in reasonably foreseeable effects to California's coastal uses or resources," it refused to comply with the Commission's proposed mitigation measures.<sup>58</sup>

In response to a successful previous sonar lawsuit by the NRDC, Congress amended the MMPA in 2003 to authorize the Secretary of Defense to "exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of [the MMPA], if the Secretary determines that it is necessary for national defense."<sup>59</sup> The Department of Defense issued the Navy a National Defense Exemption for the California training exercises in January 2007.<sup>60</sup> The exemption was conditional, however. The Navy was required to implement twenty-nine specific conditions designed to protect marine mammals which were developed in coordination with NOAA Fisheries, including:

- 1) training lookouts and officers to watch for marine mammals;
- 2) requiring at least five lookouts with binoculars on each vessel to watch for anomalies on the water surface (including marine mammals);
- 3) requiring aircraft and sonar operators to report detected marine mammals in the vicinity of the training exercises;
- 4) requiring reduction of active sonar transmission levels by 6 dB if a marine mammal is detected within 1,000 yards of the bow of the vessel, or by 10 dB if detected within 500 yards;
- 5) requiring complete shutdown of active sonar transmission if a marine mammal is detected within 200 yards of the vessel;
- 6) requiring active sonar to be operated at the "lowest practicable level"; and
- 7) adopting coordination and reporting procedures.<sup>61</sup>

In February 2007, prior to the first scheduled test, the Navy released an environmental assessment (EA) pursuant to the National Environmental Policy Act (NEPA).<sup>62</sup> NEPA requires federal agencies to prepare environmental impact statements (EIS) for "major Federal actions significantly affecting the quality of the human environment."<sup>63</sup> If the significance of the action is unknown or unclear, an agency may first prepare an EA to

<sup>55</sup> *NRDC v. Winter*, 518 F.3d 658, 698 (9th Cir. 2008).

<sup>56</sup> Jane Kay, *Strict Rules for Navy's Use of Sonar Off Coast*, SAN FRANCISCO CHRONICLE, Jan. 11, 2007.

<sup>57</sup> *Id.*

<sup>58</sup> *California Coastal Panel Seeking AG Advice on Navy Sonar Stance*, INSIDE THE NAVY, Mar. 12, 2007.

<sup>59</sup> 16 U.S.C. § 1371(f).

<sup>60</sup> 43 Fed. Reg. 4189, 4190 (Jan. 24, 2008).

<sup>61</sup> *Winter v. NRDC*, 129 S.Ct. 365, 371-372 (2008).

<sup>62</sup> U.S. NAVY, COMPOSITE TRAINING UNIT EXERCISES AND JOINT TASK FORCE EXERCISES FINAL ENVIRONMENTAL ASSESSMENT/OVERSEAS ENVIRONMENTAL ASSESSMENT 107, 115 (2007).

<sup>63</sup> 42 U.S.C. § 4332(C).



determine whether the potential environmental impacts will rise to a level which warrants the preparation of an EIS.<sup>64</sup> If, after the preparation of EA, the agency concludes that the impact will not be significant, it may issue a “Finding of No Significant Impact” (FONSI) and refrain from producing an EIS.<sup>65</sup>

In its EA, the Navy estimated that the sonar use during the fourteen training exercises would result in the taking of 170,000 marine mammals.<sup>66</sup> Most of these would be non-lethal behavioral-type takes, primarily as the result of harassment. The Navy also estimated that there was the potential for “8,000 exposures powerful enough to cause a temporary threshold shift in the affected mammals’ sense of hearing and an additional 466 instances of permanent injury to beaked and ziphiid whales.”<sup>67</sup> Despite these findings, the Navy concluded that the training exercises would not have a significant impact on the environment and, therefore, an EIS was not required.<sup>68</sup> The Navy commenced training operations on schedule.

In March 2007, the National Resources Defense Council (NRDC) filed suit in the district court for the Central District of California. The NRDC claimed the Navy violated NEPA by failing to prepare an adequate EA that considered “the cumulative impacts of, and all reasonable alternatives to, the proposed actions” and by failing to prepare an EIS despite “the potential for the challenged exercises to have a significant impact on the environment.”<sup>69</sup> With respect to the CZMA, the NRDC argued that the Navy “failed to carry out federal activities that affect California’s costal zone in a manner consistent with the [California Coastal Management Plan].”<sup>70</sup>

#### A. August 2007 District Court Opinion

In August 2007, the District Court enjoined the Navy’s sonar training activities.<sup>71</sup> According to the district court, a preliminary injunction may be granted when the party seeking the injunction demonstrates “either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor.”<sup>72</sup>

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<sup>64</sup> 40 C.F.R. § 1501.4.

<sup>65</sup> *Id.* § 1501.4(e).

<sup>66</sup> *NRDC v. Winter*, 2007 WL 2481037 at \*1 (C.D. Cal. Aug. 7, 2007).

<sup>67</sup> *Id.*

<sup>68</sup> U.S. Navy, *supra* note 62, at 112.

<sup>69</sup> *NRDC v. Winter*, 2007 WL 2481037 at \*3 (C.D. Cal. Aug. 7, 2007).

<sup>70</sup> *Id.* The CZMA claim was eventually dropped from the lawsuit. The CZMA allows the President to exempt federal agencies from compliance with a state CMP when he “determines that the activity is in the paramount interest of the United States.” (16 U.S.C. § 1456(c)(1)(B)). In January 2008, after determining that Navy’s use of mid-frequency sonar in the SOCAL training exercises was “essential to national security” and “in the paramount interests of the United States,” President Bush exempted the Navy from compliance with the CZMA. (Marc Kaufman, *Navy Wins Exemption from Bush to Continue Sonar Exercises in California*, THE WASHINGTON POST, Jan. 17, 2008). This was the first time this provision had been invoked.

<sup>71</sup> *NRDC v. Winter*, 2007 WL 2481037 at \*4 (C.D. Cal. Aug. 7, 2007).

<sup>72</sup> *Id.*

The court found that NRDC “raised substantial questions as to whether the SOCAL exercises will have a significant impact on the environment.”<sup>73</sup> The NRDC presented substantial scientific evidence to the court linking marine mammal strandings to sonar activities. Although the Navy has been using mid-frequency sonar in California training exercises for over thirty years without one documented stranding, the court concluded that “a lack of documented evidence of the disturbance, injury, or even death of marine mammals in a particular geographic area does little to prove that MFA sonar never caused such adverse effects.”<sup>74</sup> The Navy even acknowledged this potential for harm in its EA.

The court also concluded that NRDC demonstrated a probability of success on their claim that the Navy’s proposed mitigation measures were inadequate. “An agency may avoid the requirement to prepare an EIS by adopting mitigation measures sufficient to eliminate any substantial questions over the potential for significant impact on the environment.”<sup>75</sup> The court found that the 1,000-yard safety zone and presence of visual monitors would do little to protect the whales from the effects of the sonar.

The court granted NRDC’s requested preliminary injunction after determining that NRDC “established to a near certainty that use of MFA sonar during the planned SOCAL exercises will cause irreparable harm to the environment.”<sup>76</sup> The court was satisfied that the balance of harm tilted in favor of NRDC, because the harm to the environment “outweighs the harm that [the Navy] would incur if prevented from using MFA sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period.”<sup>77</sup>

#### *B. November 2007 Ninth Circuit Court of Appeals Ruling*

The Navy appealed the grant of a preliminary injunction to the Ninth Circuit Court of Appeals. The Ninth Circuit held that the district court failed to properly balance the harms. “The district court was required to consider, not only ‘balance of hardships’ as between the [NRDC] and the Navy as an Executive Branch agency, but also the ‘public interest’ in having a trained and effective Navy.”<sup>78</sup> The Ninth Circuit granted the Navy’s motion to stay the preliminary injunction pending appeal.

After hearing the appeal, the Ninth Circuit stated that the “[p]laintiffs have met the necessary burden of proof to demonstrate that some form of preliminary injunctive relief is appropriate.”<sup>79</sup> The court found that the NRDC met its burden for injunctive relief because the NRDC showed “a strong likelihood of success on the merits of their claims,” as well as the fact that they might suffer “irreparable injury” if relief is not granted.<sup>80</sup> The court also found that the balance of hardships tipped in favor of the NRDC and that the public

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at \*6.

<sup>76</sup> *Id.* at \*10.

<sup>77</sup> *Id.*

<sup>78</sup> *NRDC v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007).

<sup>79</sup> *NRDC v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007).

<sup>80</sup> *Id.*

interest would be served by an injunction that prescribed the proper mitigation measures.<sup>81</sup> The court vacated the stay of injunction and remanded the case to the district court so it could enter a “modified preliminary injunction” containing the “appropriate mitigating conditions.”<sup>82</sup>

### *C. January 2008 District Court Opinion*

The struggle to find the proper balance between environmental protection and national security continued after the Ninth Circuit remanded the case to the district court. The court tried to craft more balanced mitigation measures which would satisfy the desires of both sides. In the end, the court imposed a number of mitigation measures on the Navy’s training exercise. First, the court required the Navy “maintain a 12 nautical mile exclusion zone from the California coastline at all times.”<sup>83</sup> Second, the Navy was prohibited from using any type of MFA sonar when marine mammals are spotted within 2,200 yards (approximately 2,000 meters).<sup>84</sup> Third, the court required the Navy to “monitor for the presence of marine mammals for 60 minutes before employing MFA sonar” and use aerial monitoring and two dedicated NOAA-trained lookouts at all times. Finally, MFA sonar has to be powered down “in the presence of significant surface ducting conditions” (which causes sound to travel at higher intensities than normal) and the Navy had to avoid using “MFA sonar in the geographically restricted, biologically rich Catalina Basin.”<sup>85</sup> The Navy filed for appeal on January 11, 2008, but the Ninth Circuit quickly denied their request for a stay.<sup>86</sup>

### *D. Presidential Exemption and CEQ Alternative Arrangements*

When the Ninth Circuit refused to stay the district court’s injunction, the Navy sought relief through the Executive Branch. The Council on Environmental Quality (CEQ), located within the Executive Office of the President, consented to the Navy’s use of “alternate arrangements” to comply with NEPA “because ‘emergency circumstances’ prevented normal compliance.”<sup>87</sup>

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the federal agency taking the action should consult with the CEQ about alternative arrangements. Agencies and the CEQ will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.<sup>88</sup>

The CEQ was established to assist federal agencies with the implementation of NEPA and works with other agencies and executive offices to develop “environmental policies and initiatives.”<sup>89</sup> 40 C.F.R. § 1506.11 allows CEQ to permit federal agencies, in “emergency

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 887.

<sup>83</sup> *NRDC v. Winter*, 530 F. Supp. 2d 1110, 1119 (C.D. Cal. 2008).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1121.

<sup>86</sup> *Id.* at 1223.

<sup>87</sup> *Id.* at 1224.

<sup>88</sup> 40 C.F.R. § 1506.11.

<sup>89</sup> *Id.*

circumstances,” to take actions that will affect the environment without observing the ordinary NEPA procedural requirements. Any alternative arrangements developed by the federal agency and CEQ should be tailored to control the “immediate impacts of the emergency.”<sup>90</sup>

The CEQ determined that the district court’s injunction “imposes training restrictions that continue to create a significant and unreasonable risk that Strike Groups will not be able to train and be certified as fully mission capable.”<sup>91</sup> The alternative arrangements approved by the CEQ included: “(1) providing notice to the public regarding ongoing EIS preparation; (2) a commitment to continue research measures “for continual improvement in the quality of information” on the “quantity, distribution, migration, and reactions of marine mammals to MFA sonar;” and (3) maintaining the [mitigation measures required by the National Defense Exemption].”<sup>92</sup>

The alternative arrangements would be in place for the remaining training exercises. The Navy agreed to complete the EIS it was currently working on for the SOCAL exercises. A final draft of the EIS was released in December 2008.<sup>93</sup>

#### *E. February 2008 District Court Opinion*

The CEQ’s actions prompted the Navy to move to vacate the district court’s injunction with respect to the 2,200-yard shutdown zone and the restrictions on training in surface ducting conditions. The district court held that §1506.11 was inapplicable to the Navy’s situation because there was no emergency circumstances.<sup>94</sup> In previous cases upholding the CEQ’s approval of alternative arrangements for military activities, courts deferred to CEQ’s determination “based on facts suggesting the need to avert imminent crises outside the agency’s control.”<sup>95</sup>

Here, however, the district court concluded that any “emergency,” if there was one, was largely of the Navy’s own making. The Navy knew there was a possibility that an injunction could be issued. The possible outcomes of litigation are far from sudden and can be prepared for ahead of time.<sup>96</sup> According to the court, this emergency arose from the Navy’s failure to provide the environmental documentation required to conduct these tests in a timely manner.<sup>97</sup> The court also had difficulty categorizing *routine* naval training as an emergency.<sup>98</sup> The court refused to read “emergency circumstances” so broadly as to “permit[] agencies to avoid their NEPA obligations by re-characterizing ordinary, planned

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<sup>90</sup> *NRDC v. Winter*, 527 F.Supp.2d 1216, 1225 (C.D. Cal. 2008).

<sup>91</sup> *Id.* at 1224.

<sup>92</sup> *Id.*

<sup>93</sup> See, Southern California Range Complex Environmental Impact Statement website, <http://www.socalrangecomplexeis.com/default.aspx>.

<sup>94</sup> *NRDC v. Winter*, 527 F.Supp.2d 1216, 1227-1228 (C.D. Cal. 2008).

<sup>95</sup> *Id.* at 1228.

<sup>96</sup> *Id.* at 1229.

<sup>97</sup> *Id.* at 1228.

<sup>98</sup> *Id.*

activities as ‘emergencies’ in the interests of national security, economic stability, or other long-term policy goals.”<sup>99</sup>

The court recognized that Congress, if it so chooses, can change the law in order to change the outcome of litigation. However, neither the executive nor the legislative branch can encroach on judicial power by directing the outcome of litigation.<sup>100</sup> The court denied the Navy’s request for a stay of the previous injunction. The court reasoned that the injunction allows the Navy to train, albeit with mitigation measures. The court found the injunction to be in the public interest, because it allows for training to maintain national security in a way that is least detrimental to the environment.<sup>101</sup> Ultimately, the court held that the stay allows the Navy to continue training exercises “while limiting negative effects on marine life.”<sup>102</sup>

#### *F. February 2008 Ninth Circuit Court of Appeals Ruling*

On February 29, 2008, the Ninth Circuit affirmed the district court’s February ruling.<sup>103</sup> The Ninth Circuit determined that the Navy’s need to train with mid-frequency sonar without the use of mitigation measures did not qualify as an “emergency circumstance” under CEQ regulation. As such, it was not entitled to alternative accommodations under NEPA and the Navy was bound to act under the parameters of the district court’s narrowly tailored injunction.

### **VII. U.S. Supreme Court Decision**

After this long and winding road of litigation, the case finally moved to the U.S. Supreme Court. The Navy raised two primary issues on appeal: (1) whether the Ninth Circuit was correct in determining that the district court was not compelled to vacate its preliminary injunction after the CEQ determined that the imposed mitigation measures created an emergency circumstance and (2) whether the issuance of the preliminary injunction was valid.

On November 12, 2008, the Supreme Court, apparently favoring national security over environmental protection, held the Navy’s need to conduct realistic training “plainly outweighed” the NRDC’s important interest in the preservation of marine mammals.<sup>104</sup> The Court, however, did not reach the merits of the case. The Supreme Court reversed the decision of the Ninth Circuit Court of Appeals on procedural grounds.

The lower courts had held that once a plaintiff demonstrates a strong likelihood of prevailing on the merits, “a preliminary injunction may be entered based only on a ‘possibility’ of irreparable harm.”<sup>105</sup> The Supreme Court agreed with the Navy that this

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<sup>99</sup> *Id.* at 1232.

<sup>100</sup> *Id.* at 1234.

<sup>101</sup> *Id.* at 1238-1239.

<sup>102</sup> *Id.* at 1239.

<sup>103</sup> *NRDC v. Winter*, 518 F.3d 658, 702 (9th Cir. 2008).

<sup>104</sup> *Winter v. NRDC*, 129 S. Ct. 365, 382 (2008).

<sup>105</sup> *Id.* at 375.

standard is “too lenient.”<sup>106</sup> According to the Court, “a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>107</sup>

Although the district court originally determined that irreparable harm would result from sonar training exercises generally, the court did not revisit its findings after the Navy agreed to abide by four of the court’s six mitigation measures. By the time the litigation reached the Supreme Court, the Navy was only challenging the 2,200-yard shutdown zone and the requirement to power down during surface ducting conditions. The Supreme Court found this failure to be significant, as the four mitigation measures could significantly reduce the risk of harm.<sup>108</sup>

But even if the NRDC had shown irreparable injury, the Supreme Court determined that the injury was “outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.”<sup>109</sup> The Court found that the lower courts had “significantly understated the burden the preliminary injunction would impose on the Navy’s ability to conduct realistic training exercises.”<sup>110</sup> The interests of the Navy with respect to national security and training must be weighed against “possible harm to the ecological, scientific, and recreational interests” asserted by the NRDC.<sup>111</sup> In this case, the Court held that the balance tipped in favor of the Navy. The Court made clear, however, that “military interests do not always trump other considerations.”<sup>112</sup>

The Court found that the lower courts did not seriously consider the balance of harm to the parties, especially the harm to the public interest in national defense. The Court emphasized the lower court’s lack of deference to Navy officers’ judgments about how the injunction would reduce the effectiveness of the Navy’s training. The Navy presented evidence that the mitigation measures would force the Navy to deploy a submarine force that is inadequately trained in the use of sonar which is the only instrument reliable enough to detect the enemy submarines and thus necessary to detect enemy submarines.<sup>113</sup> The Supreme Court held that the assertions of military experts with respect to training needs and national security threats were entitled to “great deference.”<sup>114</sup>

The Supreme Court held that “the District Court abused its discretion by imposing a 2,200-yard shutdown zone and by requiring the Navy to power down its MFA sonar during significant surface ducting conditions.”<sup>115</sup> The Ninth Circuit had determined that requiring the Navy to shutdown MFA beyond its self-imposed zone of 200 yards would not be burdensome because marine mammal sighting were rare. The Supreme Court noted,

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 374.

<sup>108</sup> *Id.* at 376.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 377.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 378.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 382.

however, that the injunction would greatly expand the radius of the zone and that if the shutdowns occurred during critical times it could delay training for several days, imposing a significant burden on the Navy. With respect to the requirement to “power down” during surface ducting conditions, the Ninth Circuit determined this was a reasonable restriction because the Navy had certified other training groups without training in such conditions. The Supreme Court again disagreed, finding that because submariners take advantage of the phenomenon to avoid being detected by sonar and since this phenomenon is rare, it is particularly important for the Navy to be able to train under these conditions. The Supreme Court reversed the decision of the Ninth Circuit and vacated the preliminary injunction to the extent it was challenged by the Navy.

### VIII. Conclusion

The lengthy litigation between the Navy and NRDC has finally come to an end, just in time for a new round of military training exercises.<sup>116</sup> The Navy does seem to have a growing marine stewardship ethic. When it comes to prioritizing their duties, however, the Navy places protecting the country before protecting marine life and the environment. The Supreme Court seems to agree that the Navy’s responsibilities with respect to national security come before their responsibility as stewards to the environment. Although the NRDC made a valid argument that the Navy should have prepared an EIS before proceeding with the training, the Supreme Court did not address that issue. Justice Ginsberg, in her dissent, wrote in support of the NRDC’s position and highlighted how the Navy undermined the purpose behind NEPA with their actions in this case.<sup>117</sup> Justice Ginsburg suggests that all of this litigation could have been avoided had the Navy just acted properly from the beginning.

Of course, this case is not a total loss for the NRDC. The lower courts imposed six mitigation measures on the Navy’s testing. Four remain in place following the Supreme Court’s decision. The training exercises conducted by the Navy during the past two years were therefore more environmentally friendly than they might have been without the litigation.

Justice Roberts, using a quote from President Theodore Roosevelt, suggests that “the only way in which a Navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed.”<sup>118</sup> The Navy’s efforts to develop the capability to detect enemy submarines are an essential component of its military responsibilities. But the ocean and all of the creatures within it are an integral part of the human ecosystem. If agencies are allowed to perform actions that will have a significant effect on the environment without adequate forethought, the environment will suffer in the long run. A balance between national security and environmental protection must be found before it is too late.

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<sup>116</sup> In January, the NOAA Fisheries issued regulations governing the U.S. Navy’s unintentional taking of marine mammals incidental to training, maintenance, and research, development, testing, and evaluation activities conducted in the Southern California Range Complex through January 2014. 74 Fed. Reg. 3882 (Jan. 21, 2009).

<sup>117</sup> *Winter v. NRDC*, 129 S. Ct. 365, 389-391 (2008).

<sup>118</sup> *Id.* at 382.