

Litigation Update: Winter v. NRDC, Inc.

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LITIGATION UPDATE

WINTER V. NRDC, INC.

by Natalie Dillree*

INTRODUCTION

On November 12, 2008, the Supreme Court vacated portions of a preliminary injunction limiting the Navy's use of mid-frequency active ("MFA") sonar in training exercises.¹ Environmental organizations argued that MFA sonar would cause injury to marine mammals.² Ultimately, the Court held that the Navy's interest in adequately training its sailors outweighed the alleged irreparable injury.³

LEGAL BACKGROUND AND ARGUMENTS

This case involves Navy MFA sonar training exercises performed in the waters off the coast of southern California ("SOCAL").⁴ The Navy's fleet faces a threat from diesel-electric submarines because they operate "almost silently" and are "extremely difficult to detect and track."⁵ To track these submarines, the Navy uses MFA sonar, "which involves emitting pulses of sound underwater. . . ." To ensure that sonar operators are "thoroughly skilled" in its use, the Navy conducts regular training exercises under "realistic conditions."⁷

At least thirty-seven species of marine mammals can be found in the SOCAL operating area.⁸ The plaintiffs assert that "MFA sonar can cause much more serious injuries to marine mammals than the Navy acknowledges, including permanent hearing loss, decompression sickness, and major behavioral disruptions."⁹ Furthermore, the plaintiffs allege that MFA sonar has been linked to "several mass strandings of marine mammals" in the area.¹⁰

Plaintiffs sued the Navy, seeking declaratory and injunctive relief.¹¹ The environmental groups asserted that the training exercises violated several federal laws, including the National Environmental Policy Act of 1969 ("NEPA").¹² Under NEPA, an environmental impact statement ("EIS") must be prepared for any "major Federal action significantly affecting the quality of the human environment."¹³ However, no EIS is required if, based on a shorter environmental assessment ("EA"), a federal agency determines that "the proposed action will not have a significant impact on the environment."¹⁴

In February 2007, the Navy prepared an EA that concluded that the SOCAL training exercise scheduled through January 2009 "would not have a significant impact on the environment"

and, because of this finding, did not prepare a full EIS.¹⁵ The Navy insisted that MFA sonar could only cause "temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing and breeding."¹⁶

Based on the plaintiffs' demonstration of a "possibility of success" on their claims under NEPA and another federal law, the District Court entered a preliminary injunction prohibiting the Navy from using MFA sonar during its training exercises.¹⁷ The District Court further determined that there was "a 'near certainty' of irreparable injury to the environment, and that this injury outweighed any possible harm to the Navy."¹⁸

The Navy appealed. The Court of Appeals held that this "blanket injunction" was "overbroad" and remanded to the District Court.¹⁹ The District Court then entered a revised preliminary injunction, imposing six restrictions on the Navy's use of MFA sonar training exercises.²⁰

However, in a simultaneous development, the Council on Environmental Quality ("CEQ") allowed the Navy to adopt "alternative arrangements" because the injunction created a "significant and unreasonable risk" that Navy sailors would "not be able to train and be certified as fully mission capable."²¹ Therefore, the CEQ authorized the Navy to continue its training exercises under previously adopted mitigation measures.²²

Subsequently, the Navy moved to vacate the District Court's preliminary injunction with respect to two of the imposed conditions.²³ The District Court rejected the Navy's motion.²⁴ The Court of Appeals affirmed, holding that the preliminary injunction was appropriate because "the balance of hardships and a consideration of the public interest weighed in favor of the plaintiffs."²⁵ The Supreme Court then granted certiorari.²⁶

HOLDINGS

The Supreme Court vacated the portions of the preliminary injunction challenged by the Navy.²⁷ The Court concluded that the Ninth Circuit's "possibility" of irreparable harm standard was too lenient to warrant a preliminary injunction, stating that their "frequently reiterated standard requires plaintiffs

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seeking preliminary relief to demonstrate that irreparable injury is likely. . . .”²⁸ Furthermore, “even if plaintiffs have shown irreparable injury . . . any such injury is outweighed by the public interest and the Navy’s interest in effective, realistic training. . . .”²⁹ The Court further concluded that the “most serious possible injury” to plaintiffs would be “harm to an unknown number of the marine mammals that they study and observe.”³⁰

CONCLUSION

The Navy’s arguments challenged the government’s obligation to adhere to environmental laws.³¹ Therefore, some environmental groups feared that an unfavorable ruling would essentially excuse the government from performing studies of the effects of their actions on the environment.³² However, Chief Justice Roberts evaded such broad arguments, writing that the majority did not mean to say that military interests will always trump environmental concerns.³³ In addition to the decision’s narrow language, some protections for marine mammals are still intact, as four of the originally imposed restrictions on MFA sonar use remain.³⁴



Endnotes: Litigation Update

¹ *Winter v. NRDC*, 129 S.Ct. 365, 382 (2008).

² *Id.* at 371.

³ *Id.* at 376.

⁴ *Id.* at 370.

⁵ *Id.*

⁶ *Winter*, 129 S.Ct. at 370.

⁷ *Id.* at 371.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Winter*, 129 S.Ct. at 372.

¹² *Id.*

¹³ *Id.*, citing 42 U.S.C. § 4332(2)(C) (2000).

¹⁴ *Id.*, citing 40 C.F.R. §§ 1508.9(a), 1508.13 (2207).

¹⁵ *Id.*

¹⁶ *Winter*, 129 S.Ct. at 371.

¹⁷ *Id.* at 372.

¹⁸ *Id.* at 373.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 374.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 375.

²⁹ *Id.* at 376.

³⁰ *Id.* at 378.

³¹ Jerry Markon & Juliet Eilperin, *Justices Revoke Limits On Navy Use of Sonar*, THE WASHINGTON POST, Nov. 13, 2008, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/12/AR2008111201058.html> (last visited Feb. 26, 2009).

³² *Id.*

³³ *Id.*

³⁴ *Id.*