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NEPA, National Security, and Ocean Noise: The Past, Present, and Future of Regulating the Impact of Navy Sonar on Marine Mammals

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INTRODUCTION

> Defense and the environment is not an either–or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns. The real choice is whether we are going to build a new environmental ethic into the daily business of defense.
>
> —Dick Cheney, Former Vice President and then–Secretary of Defense[2]

For several decades, and in a variety of contexts, national security and environmental protection interests have clashed.[3] Balancing these competing concerns is a challenging task.[4] However, in the wake of the tragic events of September 11, 2001, the U.S. government "drastically changed its approach to how it handled important environmental concerns in relation to national defense issues."[5]

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[2] Stephen Dycus, *NEPA Secrets*, 2 N.Y.U. ENVTL. L.J. 300 (1993) (quoting Defense Secretary Dick Cheney, Address to Defense and Environmental Initiative Forum (Sept. 3, 1990)).

[3] For a discussion of the tension between environmental protection and military interests in various contexts, *see generally* Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105 (2007); Marcilynn A. Burke, *Green Peace? Protecting Our National Treasures While Providing for Our National Security*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 803 (2008); Jason C. Wells, *National Security and the Endangered Species Act: A Fresh Look at the Exemption Process and the Evolution of Army Environmental Policy*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 255 (2006); Comment, *Exempting Department of Defense From Federal Hazardous Waste Laws: Resource Contamination as "Range Preservation,"* 32 ECOLOGY L.Q. 647 (2005).

[4] Julie G. Yap, *Just Keep Swimming: Guiding Environmental Stewardship Out of the Riptide of National Security*, 73 FORDHAM L. REV. 1289, 1291 (2004).

[5] *Id.*

The most common manifestation of the tensions between national security and environmental protection objectives is the Navy's use of sonar in U.S. waters. The oceans that surround the United States on both coasts provide the U.S. Navy with an indispensable buffer zone in which to test and implement national security objectives. Advancing these important objectives for the safety and welfare of the nation's citizens must, however, be tempered by the equally compelling need for vigilant stewardship of marine living resources.

Marine mammals are particularly vulnerable to underwater noise intrusion associated with the Navy's national security operations.[6] Already imperiled by a variety of other anthropogenic influences, the safety and sustainability of marine mammals hangs precariously in the balance if national security objectives are advanced without due regard for the viability of these species. The integration of the new environmental ethic into the daily business of defense to which then–Secretary of Defense Dick Cheney alluded remains a largely unfulfilled promise with regard to the Navy's use of sonar.

The Navy's enhanced use of sonar is part of a larger trend of increasingly aggressive use of national security measures in the post-9/11 world.[7] This state of heightened vigilance has taken its toll on marine mammals. The Navy's use of low frequency active sonar generates "one of the loudest sounds that human beings can make in the water."[8] To make matters worse, these low frequency sounds can travel for hundreds of miles.[9] Although mass strandings of whales have been linked to the Navy's use of mid-frequency active sonar,[10] the Navy contends that its use of widely deployed low-frequency active sonar does not pose such a risk.[11] Environmental groups strongly contest this assertion and have challenged the Navy's use of low frequency sonar in a series of cases in the past decade, culminating in the Supreme Court's 2008 decision in *Winter v. NRDC*.[12]

Part 1 of this article considers the importance of the Navy's use of sonar to promote national security objectives and reviews the impacts that this practice has on marine mammals. Part 2 provides a brief history of

[6] For a discussion of the impacts of Navy sonar on marine mammals, *see infra* Part I.B.

[7] *See generally* Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection after 9/11*, 30 Wm. & Mary Envtl. L. & Pol'y Rev. 1 (2008).

[8] Humane Society of the United States, Sonar: Acoustic Harassment, available at http://www.hsus.org/marine_mammals/what_are_the_issues/noise_pollution_and_acoustic_harassment/sonar_acoustic_harassment.htmlhttp://www.hsus.org/marine_mammals/what_are_the_issues/noise_pollution_and_acoustic_harassment/sonar_acoustic_harassment.html (last visited June 25, 2010) [hereinafter Sonar: Acoustic Harassment].

[9] *Id.*

[10] *See* Cat Lazaroff, *U.S. Navy Admits Its Sonar Killed Whales*, Low Frequency Active Sonar.net, http://www.lfas.net/usnavyadmitsitssonarkilledwhales.htm

[11] *See* Sonar: Acoustic Harassment, *supra* note 8.

[12] 129 S. Ct. 365 (2008). For a discussion of the Supreme Court's decision and its implication, *see infra* Part 3.2.

cases under the National Environmental Policy Act (NEPA)[13] challenging the Navy's use of sonar and its impacts on marine mammals. It also addresses the emergency exception under NEPA and how the Navy's assertion of this exception set the stage for the conflict in *Winter v. NRDC*. Part 3 addresses the U.S. Supreme Court's controversial decision in *Winter* and considers the unanswered questions that remain in its wake. Part 4 proposes possible future directions for regulating Navy sonar in the wake of Bush era national security policies. It concludes that the Marine Mammal Protection Act (MMPA) should be amended to include a citizen suit provision to enhance protection of marine mammals from the effects of ocean noise in a manner that does not undermine national security objectives. It also endorses the need for additional substantive safeguards such as regional cooperation and safe havens for marine mammals in new legislation and regulations that go beyond the piecemeal "temporary fix" of protection for marine mammals that can be secured in a successful NEPA challenge.

1. NAVY SONAR AND MARINE MAMMALS

Navy sonar is an important tool to promote national security, especially in the post-9/11 world; however, sonar has devastating impacts on marine mammals. This part of the article explores the role that sonar plays in promoting national security and considers the types and extent of impacts that this practice has on marine mammals.

1.1 Navy Sonar as a Tool to Promote National Security

Sound is a vital means through which safety in the marine environment is promoted. This principle holds true not only for the oceans' inhabitants but also for promoting the Navy's national security objectives.[14] "The Navy is charged with maintaining, training, and equipping combat-ready naval forces capable of winning wars, deterring aggression, and ensuring freedom of the seas."[15]

An essential component of the Navy's responsibility is anti-submarine warfare.[16] The navies of potential adversary nations already possess

[13] *See* 42 U.S.C. §§ 4321–4370f (2006).

[14] Robin Kundis Craig, *Beyond* Winter *v.* NRDC: *A Decade of Litigation the Navy's Active Sonar Around the Environmental* Exemptions, 32 B.C. ENVTL. AFF L. REV. 353, 353–54 (2009) [hereinafter Craig].

[15] Paul C. Kiamos, *National Security and Wildlife Protection: Maintaining an Effective Balance*, 8 ENVTL. L. 457, 481–482 (2002).

[16] *The Marine Mammal Protection Act and Surveillance Towed Array Sensor System Low Frequency Active Sonar: Hearings before the Subcomm. on Fisheries, Conservation, Wildlife and Oceans of the House Comm. on Resources*, 107th Cong. 3–4 (2001) [hereinafter *House Comm. on Resources Hearings*] (statement of Vice Admiral Dennis McGinn).

approximately 200 diesel-electric submarines.[17] These submarines "possess tactical characteristics that are extremely difficult to counter—stealth and lethality."[18] If able to penetrate U.S. or multinational task force defenses, these submarines "could undermine military efforts to thwart hostile enemy forces, and could change the balance of political support for U.S. involvement in an armed conflict."[19]

To respond to these threats, the Navy has used sound navigation and ranging ("sonar") to track submarines.[20] For the Navy to effectively engage in combat at sea, sonar is necessary for both offensive and defensive tactics.[21] Sonar employs sound to "help ships and submarines navigate and communicate"[22] and "determine water depths, presence of vessels, and the location of mines."[23]

Sonar is used in three contexts. The first and most important use of sonar occurs in military engagement. The Navy also uses sonar to ensure national security objectives. Third, and most controversially, the Navy conducts regular and rigorous testing of sonar systems to ensure readiness for military engagement and national security objectives. It is the "testing to ensure readiness" aspect of the Navy's sonar use that has generated the most controversy regarding the impacts on marine mammals. Few would question that military engagement must take priority over threats to marine mammals; however, the preparation for those military engagement scenarios can and should be conducted in a manner that is more sensitive and responsive to the needs of marine mammals.

There are two basic types of sonar: passive and active.[24] Passive sonar "receives transmissions of sound and is primarily used to detect the presence of submarines and other objects,"[25] whereas active sonar "both receives and

[17] "*Encroachment Issues" Having a Potentially Adverse Impact on Military Readiness: Hearing Before the Subcomm. on Readiness and Management Support of the Senate Armed Services Comm.*, 107th Cong. 11 (2001) [hereinafter *Senate Armed Services Comm. Hearing*] (statement of Vice Admiral James F. Amerault, Deputy Chief of Naval Operations, Fleet Readiness and Logistics). Congressional testimony reveals that "potential adversaries, including China, North Korea, and Iran, have developed ultra-quiet diesel-electric sub[marines]." Robert McClure, *Tests on Marine Mammals to Look for Sonar Link to Injuries*, *Seattle Post-Intelligencer*, July 12, 2003, at A1.

[18] *Id*. Despite the end of the Cold War, the submarine threat remains real and in some ways has become more challenging. Of the approximately 500 non-U.S. submarines in the world, 224 are operated by non-allied nations. *House Comm. on Resources Hearings, supra* note 16, at 4.

[19] *Id.* at 4–5.

[20] *Id.* at 2.

[21] CC Vassar, NRDC *v.* Winter: *Is NEPA Impeding National Security Interests?,* 24 J. Land Use & Envtl. L. 279, 280 (2009) [hereinafter Vassar].

[22] *Id.*

[23] Gidget Fuentes, *Sonar Ruling Lifts Key Training Restrictions*, Marine Corps Times, Nov. 16, 2008, http://www.marinecorpstimes.com/news/2008/11/navy_ sonar_111408w/

[24] *Id.*

[25] *Id.*

transmits sound."[26] Active sonar transmits "pings" of sound.[27] A sonar operator then listens for the echo of the sound, which allows the operator to measure the size of the object from which the sound bounced and to measure the distance between the operator and the object."[28]

The Navy has three types of active sonar systems.[29] First, Mid-Frequency Active Sonar (MFAS), which the Navy has been using since World War II, employs frequencies of one to ten kilohertz (kHz) and typically can detect objects one to ten nautical miles away."[30] "Second, Low-Frequency Active Sonar (LFAS) uses sound frequencies of less than 1 kHz, which suffer less attenuation in seawater and hence allow the Navy to detect objects up to 100 nautical miles away."[31] "Third, the Navy uses its Surveillance Towed Array Sensor System (SURTASS) LFAS system for long-range search and surveillance of submarines,[32] and it would like to employ that system in at least 75% of the world's oceans."

"At the source, low-frequency active sonar projects at an approximate level of 215 dB, although it is contended that at the convergence zones where the signals begin to combine, the acoustic level can reach 240 dB."[33] These levels far exceed the sound emitted by a Concorde jet at takeoff.[34]

1.2 Harmful Effects of Sonar on Marine Mammals

Marine mammals depend on sound much like humans depend on sight.[35] Unimpaired hearing is indispensable for the most basic functions in marine mammals, such as communication, individual recognition, predator avoidance, prey detection and capture, orientation, navigation, mate selection, and

[26] Vassar, *supra* note 21 at 286.

[27] A "ping" is a complete sequence of sound transmission. *See* Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar, 67 *Fed. Reg*. 46712, 46712 (July 16, 2002) (to be codified at 50 C.F.R. pt. 216) [hereinafter Final Rule].

[28] Vassar, *supra* note 21, at 286.

[29] United States Navy, Ocean Stewardship: Understanding Sonar, http://www.navy.mil/oceans/sonar.html.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Final Rule, *supra* note 27, at 46712; *see also* Letter from Joel Reynolds & Michael Jasny, Senior Attorney and Project Associate (respectively), Natural Resources Defense Council, to Donna Wieting, Chief, Marine Mammal Conservation Division of the National Marine Fisheries Service (May 31, 2001), available at http://www.nrdc.org/wildlife/marine/cjrmj0501.asp

[34] *See* Taffy Lee Williams, *High Intensity Military Sonar: Ocean Patrol or Killing Machine?*, N.Y. Whale & Dolphin Action League, 2002, available at http://www.ny4whales.org/sonar.htmlProfile ("The [Concorde] SuperSonic [jet] at take off is 150 db.") Remarkably, LFA sonar has a sound pressure level of approximately 140 dB when it is more than 400 miles from the vessel. NRDC v. Evans, 364 F. Supp. 2d 1083, 1096 (N.D. Cal. 2003).

[35] Joel R. Reynolds, *Submarines, Sonar, and the Death of Whales: Enforcing the Delicate Balance of Environmental Compliance and National Security in Military Training,* 32 WM. & MARY ENVTL. L. & POL'Y REV. 759, 760 (2008) [hereinafter Reynolds].

mother–offspring bonding.[36] Sound is how marine mammals find their way through the world every day.[37]

Marine mammals' reliance on sound for survival has made these species vulnerable to the Navy's use of sonar. Human-generated sound was not known as a potential threat to marine mammals until the 1970s.[38] In recent years, the harmful effects of human-generated sound on marine life have become a subject of great concern in matters concerning national defense.[39]

Widely used by the Navy for decades and currently on over 50 percent of its vessels, mid-frequency active sonar has been linked to numerous whale strandings throughout the world.[40] The link between the Navy's use of mid-frequency sonar and marine mammal mortality has been conclusively established.[41] In fact, the Navy's own consultants concluded that "the evidence of sonar causation is, in our opinion, completely convincing and that therefore there is a serious issue of how best to avoid/minimize future beaching events."[42] Strandings have occurred throughout the world, "with stranded animals found with bleeding around the brain, emboli in the lungs, and lesions in the liver and kidneys, symptoms resembling a severe case of decompression sickness, or "the bends."[43] Worse still, strandings of whales may represent "only the tip of the iceberg,"[44] because these injuries occur at sea and substantially larger numbers may be dying offshore.[45]

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[36] Marine Mammal Commission Report to Congress, *Marine Mammals and Noise: A Sound Approach to Research and Management* i (2007), http://mmc.gov/reports/workshop/pdf/fullsoundreport.pdf

[37] *Lethal Sounds: The Use of Military Sonar Poses a Deadly Threat to Whales and Other Marine Mammals*, available at http://www.nrdc.org/wildlife/marine/sonar.asp

[38] Marine Mammal Commission Report to Congress, Annual Report to Congress 147 (2008), http://mmc.gov/reports/annual/pdf/2008annualreport.pdf [hereinafter Marine Mammal Annual Report].

[39] *Id.*

[40] *See* Reynolds, *supra* note 35 at 763–68.

[41] *Id.* at 762. "A range of experts, from the International Whaling Commission's ("IWC") Scientific Committee to the U.S. Navy's own commissioned scientists, have agreed that the evidence linking mass strandings to mid-frequency sonar is "convincing" and "overwhelming." *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* Letter from Joel Reynolds, Senior Attorney and Dir., Marine Mammal Protection Project, NRDC, to the Honorable Gordon R. England, Secretary of the Navy, Dep't of the Navy 7 (July 2, 2004), available at http://www.nrdc.org/media/docs/040714.pdf

> In addition to strandings and non-auditory injuries, the harmful effects of mid-frequency sonar may include temporary or permanent loss of hearing, which impairs an animal's ability to communicate, avoid predators, and detect and capture prey; avoidance behavior, which can lead to abandonment of habitat or migratory pathways, and disruption of important behaviors such as mating, feeding, nursing, or migration; aggressive (or agonistic) behavior, which can result in injury; masking of biologically meaningful sounds, such as the call of predators or potential mates; and declines in the availability and viability of prey species, such as fish and shrimp.

Id.

[45] *Id.*

The most notorious example of these impacts involved the mass strandings of whales and other marine mammals linked to the Navy's use of mid-frequency sonar.[46]

> [I]n March 2000, sixteen whales from at least three different species stranded over 150 miles of shoreline along the northern channels of the Bahamas. These beachings occurred within twenty-four hours of U.S. Navy ships using mid-frequency sonar in those same channels. Post-mortem examinations found, in every whale examined, hemorrhaging in and around the ears and other tissues related to sound conduction or production, such as the larynx and auditory fats, some of which was debilitative and potentially severe. It is now accepted that these mortalities were caused, through an unknown mechanism, by the Navy's use of mid-frequency sonar."[47]

Although these strandings have mostly involved whales, other cetacean species have also stranded in connection with the Navy's use of sonar.[48] "Possible triggers for the strandings include a behavioral response that causes deep divers to alter their diving behavior, which then results in decompression sickness-like impacts."[49]

Public awareness of the impacts of ocean noise grew stronger in 1995 when, after urging from NRDC, the Navy disclosed the development of SURTASS LFAS. After a five-year administrative review process, including a programmatic Environmental Impact Statement ("EIS"), a Navy-sponsored scientific research program using the LFA system at significantly reduced source levels, and tens of thousands of public comments opposed to the proposed deployment, NMFS issued a Final Rule. This rule granted a "small take" permit pursuant to the MMPA allowing the Navy to seek and obtain annual authorization to use LFA in 75 percent of the world's oceans. NRDC and others once again sued.[50] The war against the Navy's use of sonar was in full swing.

A flashpoint of controversy in the past decade, the Navy's use of SURTASS LFAS "can affect marine mammals across hundreds of miles because of the power and intensity of the sound waves." [51] This noise "can agitate nerve endings deep within the skin or cause gas bubbles to form in the gastrointestinal tract, even at long distances, around the Navy's LFA sonar system."[52]

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[46] *Id.*

[47] *Id.*

[48] E.C.M PARSONS ET AL., MARINE POLLUTION BULLETIN 56, NAVY SONAR AND CETACEANS: JUST HOW MUCH DOES THE GUN NEED TO SMOKE BEFORE WE ACT? 1 (2008), http://www.orcanetwork.org/habitat/sonareffects.pdf

[49] *Id.*

[50] *See id.*

[51] *Id.*

[52] MICHAEL JASNEY, *SOUNDING THE DEPTHS II: THE RISING TOLL OF SONAR, SHIPPING, AND INDUSTRIAL OCEAN NOISE ON MARINE LIFE*, NATURAL RESOURCES DEFENSE COUNCIL 14 (2005), http://www.nrdc.org/wildlife/marine/sound/sound.pdf

In addition, the use of this sonar "can cause the air-filled tissue in the lungs to vibrate sympathetically, a condition called resonance that, in its extreme form, may lead to hemorrhaging."[53]

The sounds emitted by SURTASS LFAS "overlap with sounds used by large whales and may affect their hearing, physiology, or behavior."[54] The harmful effects of the Navy's use of SURTASS LFAS include potential masking of marine mammals' ability to hear natural sounds at similar frequencies, including calls from conspecifics,[55] echolocation,[56] sounds of ondontocetes,[57] and environmental sounds such as surf noise."[58]

2. NEPA CHALLENGES TO NAVY SONAR

This section addresses the evolution of NEPA litigation involving Navy sonar and the role of NEPA's emergency exception in this context. For a variety of reasons, NEPA has been the most widely used and most successful weapon for environmental groups' challenges to Navy sonar. As these cases illustrate, however, the Navy is well insulated procedurally and substantively from challenges to its use of sonar. In most instances, the Navy "wins the war" in these cases by being able to proceed with its plans to use sonar, even if it loses some of the legal skirmishes along the way.

2.1 Evolution of NEPA Sonar Cases

Prior to the long line of NEPA cases challenging Navy sonar from the late 1990s to the present, the first ocean noise pollution case was filed under NEPA and the Marine Mammal Protection Act (MMPA) in 1994. In *Natural Resources Defense Council v. U.S. Department of the Navy*, NRDC and other environmental organizations sought to enjoin the implementation of a National Marine Fisheries Service (NMFS) regulation that authorized the taking of marine mammals over a five-year period pursuant to the Navy's weapons-testing program.[59] NRDC sought to enjoin the Navy from conducting a "ship-shock" trial, a five-year underwater explosives program proposed for waters in and around the Channel Islands National Marine Sanctuary off the Southern California coast.[60] The ship-shock program was proposed to occur in an area of recognized marine mammal aggregation and species diversity.[61]

[53] *Id.*
[54] Marine Mammal Annual Report, *supra* note 38 at 19.
[55] "Conspecifics" refers to other organisms of the same species.
[56] "Echolocation" is biological sonar used by cetaceans.
[57] "Ondontocetes" are toothed whales.
[58] *See Cetacean Cmty.* v. *Bush*, 386 F.3d 1169, 1172 (9th Cir. 2004).
[59] 857 F. Supp. 734, 735–37 (C.D. Cal. 1994).
[60] *Id.* at 735.
[61] *Id.* at 736.

NMFS prepared an Environmental Assessment (EA) under NEPA, which concluded that the program would have no significant impact on the environment.[62] NMFS issued a Final Rule under the MMPA approving the five-year testing program and requiring the Navy, as a precondition to the testing, to obtain a Letter of Authorization for each test.[63] Based on another EA, the Navy then sought and received a Letter of Authorization for a ship-shock test.[64]

The court granted the injunction and held that the plaintiffs demonstrated a near-certain likelihood of prevailing on the merits on their claims that the challenged regulation and the challenged letter of authorization each violated the MMPA and NEPA primarily because the NMFS and the Navy both failed to adequately consider possible alternative sites for the planned ship-shock trial.[65] In addition, the court concluded that it was sufficiently likely that further surveying and consideration would locate an alternate area that would result in the taking of fewer marine mammals and other animals.[66] As a result, the court determined that the failure to issue this injunction would result in irreparable harm.[67] The court noted that "[a]ny other interpretation of the MMPA would allow NMFS to authorize projects that would result in the taking of an unnecessarily high number of marine mammals."[68]

This successful ocean noise suit under NEPA laid a foundation for a long line of subsequent NEPA-based challenges to the Navy's use of sonar and its impacts on marine mammals. NEPA challenges to the Navy's use of sonar began in the late-1990s and have continued to the present. Two of these cases involved unsuccessful challenges to Navy sonar in Hawaii. First, in *Ocean Mammal Institute v. Cohen*, the plaintiffs filed suit under NEPA and the MMPA to enjoin the Departments of the Navy, Commerce, and Defense's ongoing tests of low-frequency active sonar adjacent to the west coast of Hawaii.[69] The plaintiffs contended that the NMFS violated NEPA when it issued a permit for the testing.[70] The Court held that the NMFS did not act in an arbitrary and capricious manner in issuing the permit for the research project, and that the Navy and the NMFS did not act in an arbitrary and capricious manner in determining that the proposed research

[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 737.
[66] *Id.*
[67] *Id.* at 740.
[68] *Id.* at 738. Faced with a similar factual scenario, the post-9/11 Supreme Court struck a very different balance between national security and environmental protection concerns in its 2008 decision in *Winter*. See *infra* Part III.2.
[69] *Ocean Mammal Inst*. v. *Cohen*, No. 98-CV-160, 1998 WL 2017631, at *1 (D. Haw. Mar. 9, 1998), *aff'd* 164 F.3d 631 (9th Cir. 1998).
[70] *Id.* at *3.

would not have a significant impact on the environment.[71] The court denied the plaintiffs' motion for a preliminary injunction, holding that the plaintiffs failed to show either a likelihood of success on the merits or that the balance of hardships tipped sharply in their favor and that they would suffer irreparable harm.[72]

In another challenge to the Navy's use of sonar in waters off the coast of Hawaii, the plaintiffs in *Hawaii County Green Party v. Clinton* sought injunctive and declaratory relief to prevent the Navy's use of low-frequency active sonar tests and research in that area.[73] Following the court's dismissal of this initial action,[74] the plaintiffs filed another action challenging the Navy's development and deployment of sonar defense systems under NEPA, the Endangered Species Act (ESA), and the MMPA.[75] The plaintiffs sought to re-open the first case, and the Navy moved to dismiss the current case.[76] The court held that the claims under the Administrative Procedure Act and NEPA were not ripe for review because they challenged an ongoing environmental impact statement process concerning the deployment of sonar testing. The claim under the MMPA was ripe, but plaintiffs lacked standing to bring the claim because they had not alleged an injury in fact from the alleged procedural violations.[77] Therefore, the motion to reopen the case was denied and the motion to dismiss was granted.[78]

In *Cetacean Community v. Bush*, a suit was filed in the name of the cetacean community of whales, dolphins, and porpoises.[79] The suit alleged that the Navy's proposed deployment of low frequency active sonar during a time of heightened threat violated various environmental statutes.[80] In granting the government's motion to dismiss, the court held that: (1) animals lacked standing to sue under the ESA, the MMPA, and NEPA; (2) the claim that the special system of deployment (SURTASS LFAS) violated the statutes

[71] *Id.* at *6. These studies sought to measure the responses of humpback and sperm whales to bursts of low-frequency sonar. *Id.* at *1.

[72] *Id.* at *3.

[73] 124 F. Supp. 2d 1173 (D. Haw. 2000).

[74] *Id.* at 1173.

[75] *Id.*

[76] *Id.* at 1191.

[77] *Id.* at 1200.

[78] *Id.* at 1194.

[79] 249 F. Supp. 2d 1206 (D. Haw. 2003). The suit named "President George W. Bush as a defendant 'in his capacity as a member of the National Command Authorities because the National Command Authorities will determine when a threat or warfare condition exists.' However, since the President is not an 'agency' within the meaning of APA, Plaintiff cannot obtain judicial review under APA of its claims that the President violated, or will violate, MMPA or NEPA." *Id.* at 1213–14.

[80] *Id.* at 1207. Both the small take application and the Navy's Draft and Final EISs are specifically limited to use of SURTASS LFA sonar during training, testing, and routine military operations and will not cover use of the SURTASS LFA system in self-defense, in times of war, combat, or heightened threat conditions. Final Rule, *supra* note 27, at 46717.

was unripe for adjudication; and (3) the President of United States was not amenable to suit.[81]

The court held that the plaintiff's claims regarding SURTASS LFAS were unripe for three reasons. First, there has been no final agency action for the plaintiff to challenge since the defendants have not even proposed the use of SURTASS LFAS in threat and warfare situations. Second, the plaintiff suffered no hardship from an agency regulation, since no agency has promulgated regulations dealing with the defendants' use of SURTASS LFAS during threat and warfare conditions. Third, the court rejected the plaintiff's argument that its case is ripe because the defendants will likely avoid "compliance with the three statutes until an emergency situation arises that precludes judicial review of the failure to comply" as pure speculation, especially in light of the defendants' declaration that they plan to use SURTASS LFAS in "armed conflict or direct combat support operations" or "during periods of heightened threat conditions, as determined by the National Command Authorities."[82]

This initial line of cases represents the "first wave" of ocean noise challenges against the Navy. The "ship shock" case was a victory for the environmental groups because the NMFS failed to consider alternatives. By contrast, the next two cases failed because the issues were no longer ripe, because the tests already had been conducted, and for lack of standing since an animal could not sue. In the "second wave" of cases, suits challenged an NMFS Final Rule in 2000, which granted a "small take" permit under the MMPA "allowing the Navy to seek and obtain annual authorization to use LFA in 75% of the world's oceans."[83]

In the first of this "second wave" of cases, *NRDC v. U.S. Dept. of Navy*, NRDC challenged the Navy's Littoral Warfare Advanced Development Program ("LWAD"), a series of tests for the development of a broad range of high-intensity active sonar devices.[84] The plaintiffs alleged that the Navy violated NEPA, the ESA, and the MMPA by treating each test as a separate, individual activity, rather than analyzing the environmental impact of the series as a programmatic whole.[85] The court held that programmatic review of the series of tests was not required because the tests were neither connected nor cumulative and the Navy's general planning of the program did not itself result in an environmental impact or irreversible commitment of resources.[86] The court concluded that the Navy had chosen to conduct separate environmental

[81] *Cetacean Cmty.,* 249 F. Supp. 2d at 1211–1214.
[82] *Id.* at 1207, 1212–13.
[83] *See* Reynolds, *supra* note 35 at 775.
[84] *NRDC* v. *U.S. Dept. of Navy*, No. CV-01-07781, 2002 U.S. Dist. LEXIS 26360, at *6 (C.D. Cal. Sept. 17, 2002).
[85] *Id.*
[86] *Id.* at *19.

assessments (EAs) and consultations based on the difficulty of treating the series of tests as one program, not in an effort to avoid environmental review.[87]

In *NRDC v. Evans*, the plaintiffs claimed that the NMFS improperly approved use of LFA in as much as 75 percent of the world's oceans in violation of the MMPA, ESA, and APA.[88] The plaintiffs also claimed that the Navy participated in the ESA violation and issued an inadequate EIS in violation of NEPA and the APA. [89] The court held that the plaintiffs demonstrated that the defendants should have considered training in areas that present a reduced risk of harm to marine life and the marine environment when practicable, and should have considered extending shutdown procedures beyond marine mammals and sea turtles to schools of fish.[90] The court held that the defendants' alternatives analysis was arbitrary and capricious.[91]

The court granted the plaintiffs' request for an injunction, holding that the plaintiffs had established irreparable harm.[92] The injunction was "carefully tailored to reduce the risk to marine mammals and endangered species by restricting the sonar's use in areas that are particularly rich in marine life, while still allowing the Navy to use this technology for testing and training in a variety of oceanic conditions."[93] Furthermore, the injunction was only to be in place "until the defendants correct the violations identified in this opinion."[94] "After the injunction, the Navy entered into a settlement agreement with the plaintiffs regarding low-frequency sonar, which restricted the Navy's use of sonar to a "defined and limited area of the western North Pacific Ocean."[95]

In *Ocean Mammal Institute v. Gates*, the plaintiffs sought declaratory and injunctive relief against the Navy's use of MFA sonar.[96] The plaintiffs claimed that the Navy violated NEPA by: (1) failing to provide the required public notice and opportunity to comment on the first EA; (2) preparing EAs that were substantively flawed and inadequate; (3) failing to prepare an EIS for its undersea warfare exercises (USWEXs).[97]

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[87] *Id.* at *24.
[88] 279 F. Supp. 2d 1129, 1137 (N.D. Cal. 2003).
[89] *Id.* at 1137.
[90] *Id.* at 1166.
[91] *Id.*
[92] *Id.* at 1138.
[93] *Id.* at 1191.
[94] *Id. See* Natalie Barefoot-Watambwa, *Who Is Encroaching on Whom? The Balance Between Our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns*, 59 U. Miami L. Rev. 577, 602 (2005).
[95] Press Statement, National Resource Defense Council, Statement from Joel Reynolds, NRDC, Regarding Navy LFA Settlement (Oct. 13, 2003), available at http://www.nrdc.org/media/pressreleases/031013a.asp
[96] 546 F. Supp. 2d 960, 963–68 (D. Haw. 2008).
[97] *Id.* at 963.

On February 2, 2007, the Navy issued its first Finding of No Significant Impact ("First FONSI") for its USWEXs.[98] Subsequently, the Navy conducted two USWEXs in April 2007, and two pygmy sperm whales washed up on Hawaiian beaches.[99] On October 15, 2007, the Navy issued a new EA ("Revised EA") and FONSI ("Revised FONSI").[100] The Revised EA clarified and revised the First EA's analysis of the CZMA and contained analysis of the potential environmental impacts of USWEX based on the public comments received on the First EA.[101] The Navy determined that none of the comments altered its January 2007 determination that its USWEXs would not have a significant effect on the quality of the human environment.[102] The Revised EA and FONSI concluded that there was no threat of significant harm to the environment and, thus, an EIS was not required.[103]

The Navy subsequently completed its long-planned Hawaii Range Complex Final EIS/Overseas EIS, which covered all of the Navy's future training activities in the Hawaii Range Complex.[104] Following the completion of the EIS, the Navy moved to dismiss the plaintiffs' claim as moot.[105] The court dismissed the case as moot, holding that the Navy's preparation of the EIS superseded the challenged EA negative determinations.[106]

In *NRDC, Inc. v. Gutierrez*, NRDC and other environmental organizations claimed that the defendants, the Navy and the Department of Commerce violated NEPA by: (1) failing to consider all reasonable alternatives to the proposed deployment of SURTASS LFA; (2) failing to address or inappropriately rejecting mitigation measures; and (3) failing to consider all reasonably foreseeable individual and cumulative impacts of LFA.[107] The plaintiffs challenged whether the failure to consider any form of a dual criteria[108]—in light of the importance of the location of the continental shelf to the environmental impact and the fact that the Navy has been operating under a dual criteria for five years—constituted a violation of NEPA's requirement to consider all

[98] *Id.* at 965.
[99] *Id.* at 966.
[100] *Id.* at 967.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 963.
[105] *Ocean Mammal Institute* v. *Gates*, No. 107CV00254 (D. Haw. Jan. 13, 2009).
[106] *Id.* at 1.
[107] 2008 WL 360852, *1 (N.D. Cal.).
[108] "Dual criteria" is a standard proposed by Roger Gentry of the National Marine Fisheries Service. He explained that Low Frequency Active (LFA) sonar could be effective to detect submarines between 40 and 200 miles in most but not all cases. Therefore, "to account for vast variations in the width of the continental shelf, [he] would suggest that the EIS have a dual criterion, such as '12 nmi from the shore, OR the distance to the 300 m[eter] isobath, whichever is farther."' *NRDC, Inc.* v. *Evans*, 279 F. Supp. 2d 1129, 1162 (N.D. Cal. 2003.)

reasonable alternatives.[109] The court held that the plaintiffs showed a likelihood of succeeding on the issue of the defendants' alleged failure to adequately examine designation of additional offshore biologically important areas and issued an injunction.[110]

As the NEPA cases in this section reflect, environmental plaintiffs enjoyed some success with NEPA challenges to Navy sonar; however, procedural obstacles precluded the plaintiffs from securing greater relief. Moreover, NEPA is a procedural statute and litigation under it rarely results in enduring substantive protections for marine mammals.

2.2. NEPA's Emergency Exception

The U.S. Supreme Court's opinion in *Weinberger v. Catholic Action*,[111] a case in which the Court rejected a NEPA challenge to a Navy construction project, illustrates the degree of judicial deference to the military when the issue of national security is raised in a NEPA case. In *Catholic Action*, the Navy built 48 earth-covered magazines on Hawaii that had capabilities for storing nuclear weapons.[112] Actual nuclear storage at the site could not be confirmed due to classification for national security reasons.[113] No EIS was prepared.[114] The plaintiff sought an EIS that would analyze: "(1) the risk and consequences of a nuclear accident, (2) the effect of a plane from nearby Honolulu International Airport crashing into one of the magazines, and (3) the hazard to local residents from low-level radiation."[115] The Ninth Circuit ordered that the Navy prepare a hypothetical EIS for a facility capable of storing nuclear weapons.[116]

The Supreme Court held that an EIS was not required because the Navy was only contemplating storing nuclear weapons at the site; nuclear storage was not actually proposed.[117] The Court also stated that "ultimately, whether or not the Navy has complied with NEPA 'to the fullest extent possible' is beyond judicial scrutiny" because the trial would ultimately lead to the disclosure of confidential information.[118] Given this level of judicial deference to military secrecy, the military's assertion of a national security justification would almost always eliminate NEPA's effectiveness as a check on the military's decision-making process, even when the proposals and decisions may involve

[109] *NRDC* v. *Gutierrez*, *supra* note 107 at *6.
[110] *Id.* at *11.
[111] *Weinberger* v. *Catholic Action,* 454 U.S. 139 (1981).
[112] *Id.* at 141.
[113] *Id*.
[114] *Id.*
[115] *Id.* at 142.
[116] *Id.* at 140, 141.
[117] *Id.* at 146.
[118] *Id.*

major risks to the community and the environment where the proposed action is to occur.

Despite the Supreme Court's proclivity, as evidenced in *Catholic Action*, for deference to the military's national security objectives, NEPA's emergency exception is a mechanism for courts to properly balance the national security and environmental protection concerns at issue in Navy sonar cases under NEPA.[119] Pursuant to Council on Environmental Quality (CEQ) regulations, federal agencies may be allowed to take different steps to comply with their NEPA obligations in the case of emergencies, provided that certain conditions are met.[120] The applicable language of the CEQ regulations provides:

> 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 Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.[121]

Only four cases involving challenged to CEQ's granting of alternative arrangements under the emergency exception have led to published decisions.[122] Courts have upheld the CEQ's determination in all of these cases.[123] The three cases before *Winter v. NRDC* that challenged CEQ's grant of alternative arrangements differed from *Winter* because the cases dealt with emergency exceptions backed by a satisfactory NEPA document, either before or after the action.[124] However, in *Winter v. NRDC*, the EA-FONSI was found to be insufficient, and therefore there was no proper NEPA document.[125]

The first case to challenge the CEQ's grant of an alternative arrangement under the emergency exception was *Crosby v. Young*.[126] In *Crosby*, the Department of Housing and Urban Development was allowed to release funding prior to Detroit City Council's completion of an EIS.[127] CEQ applied the emergency exception regulations because it determined that if loan approval

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[119] For a discussion of NEPA's emergency exception and some of the challenges that courts have faced in interpreting it, see generally Robert Orsi, Comment, *Emergency Exceptions from NEPA: Who Should Decide?,* 14 B.C. ENVTL. AFF L. REV. 481 (1987).

[120] Kristina Alexander, Congressional Research Service, CRS Report for Congress, *Whales and Sonar: Environmental Exemptions for the Navy's Mid-Frequency Active Sonar Training*, February 18, 2009, at 4, available at http://www.fas.org/sgp/crs/weapons/RL34403.pdf [hereinafter Alexander].

[121] 40 C.F.R. § 1506.11 (2010). "According to CEQ, this provision has been requested just 41 times since the regulations took effect in 1978." Alexander, *supra* note 120 at 4.

[122] *Id.* Alexander, *supra* note 120 at 4.

[123] *Id.* at 10.

[124] *Id.*

[125] *Id.*

[126] 512 F. Supp. 1363 (E.D. Mich. 1981).

[127] Alexander, *supra* note 120 at 11.

were delayed, the project would risk cancellation, which would be detrimental to the city and its citizens.[128] The EIS was completed at a later date.[129]

National Audubon Society v. Hester[130] involved a challenge to the U.S. Fish and Wildlife Service's (FWS's) decision to take the last wild condors into captivity in an effort to save the species.[131] In the agency's EA-FONSI, the preferred alternative had been to leave some condors in the wild and capture others.[132] The district court held that there was no emergency because FWS had reviewed the situation just months earlier in an EA[133] ; however, the D.C. Circuit reversed, holding that the district court erred in substituting its judgment for the CEQ.[134] The D.C. Circuit concluded that FWS had a rational basis for changing its policy, especially given the lead poisoning death of a condor.[135] The court reasoned that once it had determined that the underlying agency decision "reflects sufficient attention to environmental concerns and is adequately reasoned and explained," its review was complete.[136]

The last case to challenge CEQ's grant of the alternative arrangement under the emergency exception before *Winter* is important because the U.S. Air Force sought the emergency exception.[137] Unlike the two previous cases, *Valley Citizens for a Safe Environment v. Vest* laid the groundwork for the military to request alternative arrangements to NEPA requirements under the emergency exception to ensure military readiness.[138] In *Valley Citizens for a Safe Environment v. Vest,*[139] a previously prepared EIS supported the decision that flights would not occur from the base between the hours of 10 p.m. and 7 a.m."[140] With the U.S. commitment of forces to Operation Desert Storm, however, the Air Force began 24-hour operations from the base.[141] The plaintiffs requested that the Air Force prepare a supplemental EIS prior to the flights, but the Air Force sought alternative arrangements from the CEQ.[142] CEQ allowed the flights to continue and allowed the Air Force to prepare an EA within the year.[143] In evaluating whether the Air Force or CEQ had been

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[128] *Id.* at 10.
[129] *Id.* at 11.
[130] *Nat'l Audubon Soc'y*. v. *Hester*, 801 F.2d 405 (D.C. Cir. 1986).
[131] Alexander, *supra* note 120 at 10.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] 801 F.2d at 407.
[137] *Id.* at 11.
[138] *Id.*
[139] 1991 WL 330963 (D. Mass. May 6, 1991).
[140] *Id*. at 2. Alexander, *supra* note 119, at 11.
[141] *Id.*
[142] *Id.*
[143] *Id.* at *6.

arbitrary and capricious in allowing the emergency exception under these circumstances, the court concluded that the crisis in the Middle East was an emergency.[144]

In *NRDC v. Winter*,[145] the CEQ approved alternative arrangements for the Navy to comply with NEPA because it had determined that emergency circumstances prevented normal compliance.[146] The CEQ had concluded that the district court's injunction imposed training restrictions on the Navy that caused a "significant and unreasonable risk that Strike Groups will not be able to train and be certified as fully mission capable."[147] Accordingly, the CEQ allowed the Navy to continue its exercises pending completion of the EIS.[148] Upon adopting the alternative arrangements and determining that it would comply with them,[149] the Navy sought to vacate the district court's preliminary injunction in light of the CEQ's actions.[150] The district court denied the Navy's motion, and the Ninth Circuit affirmed.[151] The Ninth Circuit held that there was a serious question whether the CEQ's interpretation of the emergency circumstances regulation was lawful."[152]

The Supreme Court in *Winter v. NRDC* did not address the issue of CEQ's authority to issue an alternative arrangement under these circumstances. However, in her dissenting opinion, Justice Ginsburg wrote that CEQ lacked the authority to absolve an agency of its statutory duty to prepare an EIS. Notably, Justice Ginsburg reasoned in this regard that "if the Navy sought to avoid its NEPA obligations, its remedy lay in the Legislative Branch. The Navy's alternative course—rapid, self-serving resort to an office in the White House—is surely not what Congress had in mind when it instructed agencies to comply with NEPA "to the fullest extent possible."[153] Therefore, in *Winter v. NRDC*, the Supreme Court had an opportunity to interpret NEPA's emergency exception in a manner that would promote equitable balancing between national security concerns and marine mammal impacts from Navy sonar. Unfortunately, the Court's decision fell far short of fulfilling that expectation.

3. *WINTER v. NRDC*: SALT IN THE WOUNDS

The Supreme Court's decision in *Winter v. NRDC* made a bad situation worse for environmental groups seeking to use NEPA as a weapon to protect marine mammals from Navy sonar impacts. The Court's decision, with its emphasis

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[144] *Id.* at *5.
[145] *NRDC v. Winter*, 527 F. Supp. 2d 1216, 1229–30 (C.D. Cal. 2008).
[146] *Id.* at 1224.
[147] *Id.*
[148] *NRDC v. Winter*, 518 F.3d 658, 662–663 (9th Cir. 2008).
[149] *Id.* at 663.
[150] *Winter v. NRDC*, 129 S. Ct. 365, 367 (2008).
[151] *Id.*
[152] *Id.*
[153] *Id.* at 391 (quoting 42 U. S. C. § 4332) (Ginsburg, J., dissenting).

on the irreparable harm standard for preliminary injunctions, empowers the courts, rather than Congress and the agencies, to determine the degree of protection for marine mammals. This interpretation weakened the effect of NEPA litigation for Navy sonar impacts. To the extent that NEPA litigation remains a potentially viable avenue in this context, the Court also failed to address the scope of the emergency circumstances exception under NEPA as it relates to national security justifications for Navy sonar.

3.1. Lower Court Decisions

In *NRDC v. Winter*, NRDC sought declaratory and injunctive relief against the Navy for its planned use of mid-frequency active (MFA) sonar in training exercises.[154] The Navy was conducting MFA sonar training exercises off the coast of Southern California, home to 37 species of marine mammals potentially imperiled by this practice.[155] NRDC filed the action alleging that the Navy violated NEPA by failing to prepare an EIS.[156]

The United States District Court for the Central District of California issued the injunction on the grounds that (1) the Navy failed to prepare an EIS as required by NEPA, and (2) the Navy failed to take into account its use of MFA when it submitted its consistency determination to the California Coastal Commission as required by the Coastal Zone Management Act (CZMA).[157] The district court concluded that the plaintiffs would more than likely succeed on the merits of the case because irreparable harm would result if the injunction were not granted.[158]

The Navy appealed to the Ninth Circuit Court of Appeals, which remanded the decision to the district court to impose injunctive measures that would allow the Navy to continue using MFA sonar while mitigating the sonar's effects on marine mammals.[159] On remand, the district court imposed six injunctive measures[160] on the Navy's use of MFA sonar.[161] The Navy

[154] *NRDC v. Winter*, No. 8:07-cv-00335-FMC-FMOx, 2007 WL 2481037, at *1 (C.D. Cal. Aug. 7, 2007).
[155] Terra Bowling, *Supreme Court Says Navy May Continue Sonar Training*, SandBar, 7:4, Jan. 2009, http://nsglc.olemiss.edu/SandBar/SandBar7/7.4sonar.htm
[156] *NRDC v. Winter*, *supra* note 154 at *2.
[157] *Id.* at *1.
[158] *Id.*
[159] William Krueger, *Recent Development: In the Navy: The Future Strength of Preliminary Injunctions under NEPA in Light of* Winter *v.* NRDC, 10 N.C. J.L. & Tech. 423, 432 (2009) [hereinafter Krueger].
[160] Six injunctive measures were imposed on the Navy's MFA sonar: 1. Imposing an exclusionary zone, covering a distance from the coast to twelve miles, within which MFA sonar could not be used; 2. increasing the amount of monitoring for marine mammals, both during and prior to exercises; 3. requiring a ten minute monitoring period for helicopters before they deploy "dipping sonar," 4. restricting the use of MFA sonar in "geographic chokepoints"; 5. requiring the complete shutdown of MFA sonar when a marine mammal is spotted within 2,200 yards of the ship in question; and, 6. requiring that MFA sonar be powered down by six decibels (dB) when a condition called surface ducting, during which sound waves travel much farther in water, is occurring. *Id.*
[161] *Id.* at 433.

appealed two of those injunctive measures: the requirement to shut down the sonar when a marine mammal is spotted nearby and the requirement to power down while surface ducting[162] where sound waves are able to travel much farther through water.[163]

The Navy simultaneously sought relief from the CEQ, claiming that the injunctions created an emergency exception, and the CEQ granted the Navy's application for relief.[164] The CEQ waived Navy compliance with NEPA by approving alternate guidelines for sonar use along the California coast.[165] In early 2008, President Bush signed an Executive Order exempting the Navy from sonar requirements for California contained in the Coastal Zone Management Act (CZMA).[166] The Executive Order also exempted the Navy from having to complete an EIS under "emergency circumstances."[167]

In light of these new developments, the Navy filed an emergency appeal, and the Ninth Circuit stayed the injunction pending appeal.[168] The Ninth Circuit upheld the district court's decision that preliminary injunctive relief was appropriate, but concluded that a blanket injunction prohibiting the Navy from using MFA sonar was overbroad, and remanded the case to the district court "to narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises."[169] On remand, the district court issued a new preliminary injunction allowing the Navy to use MFA sonar on the condition that it implemented mitigation measures.[170]

On February 4, 2008, the district court invalidated CEQ's approval of "alternative arrangements" finding that the Navy was not exempt from NEPA's requirements, and denied the Navy's application to vacate the preliminary injunction.[171] The Ninth Circuit affirmed the district court's ruling that the CEQ's alternative arrangements exceeded the scope of the NEPA's emergency exemption and thus were invalid.[172]

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[162] The Supreme Court in *Winter* held that the district court abused its discretion in requiring the Navy to power down MFA sonar by six decibels when significant "surface ducting" conditions occur. During surface ducting conditions, active sonar becomes more useful near the surface and less effective at greater depths. The Court concluded that because surface ducting is rare and unpredictable, it is especially important for the Navy to train under these conditions when they occur. See *Winter* v. *NRDC*, slip op. at 20–21.

[163] *Id.*

[164] Krueger, *supra* note 159 at 434.

[165] *Id.*

[166] Catherine Mongeon, *In Brief: NRDC's Battle Against the Navy*, 35 ECOLOGY L.Q. 277, 282 (2008) [hereinafter Mongeon].

[167] *Id.*

[168] 502 F.3d 859, 865 (9th Cir. 2007).

[169] 508 F.3d 885, 887 (9th Cir. 2007).

[170] 530 F. Supp. 2d 1110, 1118–1121 (C.D. Cal. 2008).

[171] 527 F. Supp. 2d 1216, 1216 (C.D. Cal. 2008).

[172] 518 F.3d 658, 682 (9th Cir. 2008).

3.2. The Supreme Court Decision

In a much-anticipated opinion, Justice Roberts writing for the Court vacated the lower court's injunction, emphasizing the importance of balancing equities and public interest.[173] The Court reasoned that the Navy's need to conduct training to respond to national security threats posed by enemy submarines outweighed the possibility of harm to marine mammals.[174] Quoting from George Washington's Annual Address to Congress, Chief Justice Roberts stated, "To be prepared for war is one of the most effectual means of preserving peace."[175] The beginning of Chief Justice Roberts's majority opinion set the tone for the Court's weighing of interests in *Winter* and illuminates the main reasoning behind the Court's decision to vacate the preliminary injunction on the Navy's use of sonar in the case.

The Court articulated three main reasons to support its conclusion. First, the Court ruled that the lower courts' standard allowing issuance of a preliminary injunction based only on a "possibility" of irreparable harm is too lenient.[176] Instead, the Court required the use of a precedential standard that requires demonstration of "irreparable injury *likely* to happen in absence of injunction."[177] In the alternative, the Court ruled that even if plaintiffs have demonstrated a likelihood of irreparable injury, such injury is outweighed by the public interest and the Navy's interest in training its sailors.[178]

Second, the Court concluded that the balance of equities and consideration of the overall public interest "tip strongly in favor of the Navy."[179] A court is not obligated to grant an injunction as it is a discretionary remedy never awarded as of right.[180] Military interests do not always trump other considerations in this balancing process, but courts must give deference to the professional judgment of military authorities concerning the importance of military interest.[181] In this case, the Court noted that the record "underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat."[182] It emphasized that the training could not be accomplished under the challenged mitigation restrictions.[183]

Third, the Supreme Court concluded that the lower courts' justifications for entering the preliminary injunction were not persuasive.[184] First, "the

[173] 129 S Ct. at 367.
[174] *Id.*
[175] *Id.* at 365.
[176] *Id.* at 367.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.* (citing *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986)).
[182] *Id.*
[183] *Id.*
[184] *Id.* at 368.

District Court did not give serious consideration to the balance of equities and the public interest."[185] The lower courts failed to defer to senior Navy officers' predictive judgments about how the preliminary injunction would reduce the effectiveness of the training exercises.[186] In addition, the lower courts abused their discretion by requiring the Navy to shut down MFA sonar when a marine mammal is spotted within 2,200 yards of a sonar-emitting vessel.[187] The lower courts held that this zone would not be overly burdensome because marine mammal sightings during training exercises are relatively rare.[188] However, because training scenarios can take several days to develop, each shutdown can result in the loss of several days' worth of training.[189] The Court determined that the district court also abused its discretion by requiring the Navy to power down MFA sonar during significant surface ducting conditions.[190] Given that surface ducting is both rare and unpredictable, the Navy must be able to train under these conditions when they occur.[191]

The majority decision contains both procedural and substantive flaws. Procedurally, the Supreme Court inappropriately reversed the case based on the mere disagreement with the lower courts' decision. The majority clearly disagreed with the district court's conclusions, but under well-established precedent mere disagreement is not a sufficient basis for reversal. "The clearly erroneous standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."[192]

The majority also failed to apply traditional appellate review standards, and rejected the district court's finding of irreparable harm while endorsing the Navy's declarations regarding threat to national security.[193] The majority recognized that the case involved "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force."[194]

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[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.* On June 21, 2010, the Supreme Court revisited the issue of preliminary injunctions in another NEPA context in *Monsanto* v. *Geertson Seed Farms*. As in *Winter* v. *NRDC*, the Court's analysis again focused not on the merits of the environmental review but on whether the preliminary injunction that the district court issued was too broad. In this regard, the Supreme Court concluded that the district court's injunction was too broad, holding that the injunction improperly prevented the government from approving partial deregulation without first complying with full environmental impact review. *See* U.S. *Supreme Court Issues Decision in Monsanto Case*, http://legalplanet.wordpress.com/2010/06/21/u-s-supreme-court-issues-decision-in-monsanto-case/
[192] Joel R. Reynolds, Taryn Kiekow, & Stephen Zak Smith, *No Whale of a Tale: Legal Implications of* Winter *v.* NRDC, 36 ECOLOGY L.Q. 753, 766 (2009) [hereinafter Reynolds et al.]
[193] *Id.*
[194] *Id.*

Yet, the majority failed to recognize—and in so doing ignored Supreme Court precedent—that district courts are uniquely situated to analyze evidence and make determinations of fact even as to such complex issues. Nonetheless, the majority substituted its own judgment without identifying any clear error in the lower court's fact finding.[195]

The *Winter* decision is also flawed substantively based on the majority's "unquestioned deference to an invocation of military necessity at the expense of the environment."[196] First, the majority's definition of cognizable harm made it inevitable that "military interests would prevail in the balance of conflicting harms and public interests."[197] Further, in "balancing the public's interest in national security against its environmental interests," the Court rejected the reasoning of the lower courts without laying out a framework for future decisions.[198] Finally, the majority gave "broad deference to Executive determinations of military necessity, leaving open the possibility that the Executive will stretch the definition of "emergencies" that trigger a NEPA exception."[199] As a result, the decision leaves the status of injunctions for procedural violations of environmental laws by the military in a state of flux.[200]

This decision left unanswered the question of whether a court reviewing an environmental claim can disagree with the military's assessment of danger to national security.[201] The majority relied on mere assertions that the use of MFA sonar during training exercises is of the utmost importance to the Navy and the nation without requiring specific documentation or quantification of the threat.[202] Not only did the Supreme Court disagree with the lower court's logic, overturning the holding that infrequency of occurrence made the training conditions dispensable, but the majority seemed to take issue with the fact that the lower courts questioned the military's statements at all.[203] Although courts rarely second-guess military conclusions, they police the outer limits of claims of military necessity.[204]

Courts have consistently held that NEPA does not include a military exception. However, in allowing the CEQ to define "emergency" exceptions broadly, the Court may have created a *de facto* national security exception to

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[195] *Id.*
[196] Lisa Lightbody, Case Comment, *Winter v. Natural Resources Defense Council, Inc.*, 33 Harv. Envtl. L. Rev. 593, 600 (2009).
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.* at 605.
[202] *Id.* at 606.
[203] *Id.*
[204] *Id.*

NEPA.[205] Regardless of how the Supreme Court rules on Executive meddling in the future, the *Winter* decision only increases incentives for the military not to comply with NEPA.[206]

While the majority avoided discussing the merits of the plaintiffs' claims, Justice Ginsburg, in her dissent joined by Justice Souter, addressed these issues directly.[207] First, "if the Navy had completed the required EIS before taking action," the parties and the public could have benefited from the environmental analysis—and the Navy's training could have continued.[208] Instead, the Navy acted first, and thus thwarted the purpose an EIS is intended to serve.[209]

The dissent then addressed one of the fundamental errors in the majority's holding: the military could conceivably avoid complying with NEPA at all times, if it alleged that compliance will threaten national security.[210] Congress has never written a military exemption in NEPA, despite providing similar exemptions in other environmental statutes.[211] While the Navy's training exercises are critical, they "do not authorize the Navy to violate a statutory command, especially when recourse to the Legislature remains open."[212]

4. RECOMMENDED SOLUTIONS

The disappointing outcome in *Winter v. NRDC* is merely one symptom of a larger disease; namely, the Navy's ability to dodge environmental law mandates in the marine context. A long line of NEPA challenges to Navy sonar has yielded very limited substantive protections for marine mammals.[213] Consequently, the Navy's use of sonar has proceeded essentially unimpeded for the past two decades, protected by broad military exemptions from environmental laws that are supposed to protect vulnerable marine species.

In the wake of *Winter v. NRDC*, unanswered questions remain that require solutions at two levels. First, adjustments need to be made to enhance marine mammal protection within the NEPA framework. Second, outside the NEPA context, new substantive mandates are necessary to enhance protection of marine mammals from sonar's harmful impacts. Adjustments within the NEPA context will be easier to achieve if proposed substantive protections can be enacted. In addressing these new substantive protections, national security

[205] *Id.*
[206] *Id.*
[207] Reynolds et al., *supra* note 192 at 771.
[208] 129 S Ct. 356, 387 (Ginsburg, J, dissenting).
[209] *Id.*
[210] *Id.*
[211] *Id.* at 391.
[212] *Id.* at 393.
[213] See *supra* Part 2.1. The most successful of these cases was *NRDC v. Evans*, which produced an effective settlement with the Navy that provided substantive protections for marine mammals. *See supra* notes 88–95 and accompanying text.

interests and their relationship to environmental protection need to be revisited as a general matter and, in particular, in the context of Navy sonar's impacts on marine mammals. Congress and the federal agencies, not the courts, should direct the way forward in this re-evaluation of the clash between national security objectives and the sanctity of the marine environment.

4.1 NEPA's Applicability to the Marine Context Needs to Be Adjusted

Although NEPA litigation has achieved some success in compelling the Navy to delay or adjust its use of sonar, NEPA will never be a sufficiently viable tool for marine mammal protection. This reality cannot be overcome even with the help of valiant efforts from NRDC and other environmental organizations in seeking to use NEPA to it fullest potential to combat the Navy's use of sonar. The reason for NEPA's shortcoming in this context is simple: NEPA is not a marine resource protection statute, and it is ill-suited to be so used. NEPA has been a weapon of choice in the Navy sonar context largely because the military has so deftly avoided weak substantive mandates in federal environmental laws relating to marine mammal protection that NEPA is the only statute available to afford any form of relief, albeit incomplete, to environmental plaintiffs.

Neither the Navy's nor the environmental plaintiffs' ultimate objectives are served by protracted and costly NEPA litigation, especially given the "harder questions" associated with balancing national security and environmental protection objectives that remain unresolved in the wake of *NRDC v. Winter*. Therefore, to the extent that NEPA remains one of the more viable options for protection of marine mammals, a system to reconcile the Navy's assertion of national security objectives with protection of marine mammals needs to be established.

Two options have recently been proposed to reconcile these competing interests under NEPA. One proposal recommends that a national security exemption be adopted under NEPA to provide guidance for when certain national security objectives should not have to comply with NEPA's mandate. NEPA lacks a national security or national defense exception. The Endangered Species Act (ESA)[214] is the only major substantive environmental statute with a national security exemption, which was added to the statute in 1978.[215] The exemption requires the Endangered Species Committee to relieve an agency from ESA requirements when the Secretary of Defense requests such relief for national security reasons.[216]

This proposal suggests that a national security exemption under NEPA is necessary because the extensive and time-consuming EIS process can impair

[214] See 16 U.S.C. §§ 1531–1543 (2006).

[215] Vassar, *supra* note 21 at 297.

[216] 16 U.S.C. § 1536(j). As of this writing, the Secretary of Defense has not sought a national security exemption under the ESA.

military training and activities and fails to provide an adequate balance between national security and environmental interests.[217] "[T]he suffocating nature of NEPA on important national security activities that don't rise to the level of an emergency but which require action as a preventative measure . . . calls for a statutory change to NEPA to give the military flexibility in achieving and maintaining national security objectives."[218] This national security exemption under NEPA would involve a review committee for approval of the exemption.[219] While this approach would offer more structure and consistency than the current ad hoc approach in the courts, it runs the risk of perpetuating the status quo of extreme deference to military objectives cloaked in the "more legitimate" clothing of a statutory exemption.

A second proposal suggests that a "uniform national standard" be applied for determining when and how national defense activities must comply with environmental standards.[220] This approach is preferable to a national security exemption because it does not proceed from the assumption that national security objectives are entitled to special treatment. Instead, national defense and security measures would be evaluated on their own merits on a case-by-case basis in the same manner as non-military requests.

Apart from these proposals to amend the NEPA framework to address national defense and security matters, another option is to work with what is already contained within NEPA: to address the emergency exception itself and require the military to be held to the same emergency circumstances standard as any other federal agency. The Supreme Court dodged this issue in *Winter v. NRDC* by focusing on the preliminary injunction standard and the importance of providing deference to national security objectives.[221] The Ninth Circuit in *Winter* properly construed the emergency exception narrowly, which was consistent with a line of cases prior to *Winter* that had interpreted NEPA's emergency exception narrowly.[222] It seems appropriate to focus on the emergency nature of the circumstances at issue to justify an exception, regardless of which federal agency is seeking to fit within its protections. In this regard, one thing is certain: planned military training exercises are not worthy of any exception or exemption from NEPA, regardless of their relationship to promoting national security objectives. In every instance, such activities can proceed in a manner that is most environmentally protective without harming national security interests. The foundation for the new environmental ethic to which then–Secretary of Defense Cheney alluded in 1990[223] is available in

[217] *Id.* at 303.
[218] *Id.* at 299.
[219] *Id.* at 305.
[220] *See* Craig, *supra* note 14 at 376.
[221] For a discussion of the Supreme Court's decision in *Winter* v. *NRDC*, *see* Part 3.2.
[222] *See* Part 2.2. *supra* for a discussion of these cases.
[223] *See* fn 1 *supra*.

this regard: environmental concerns need to be built into to how the Navy conducts its sonar training exercises, unless the nation is involved in active military engagement with enemy forces.

4.2. New and Existing Laws Need to Provide Substantive Protections to Avoid or Diminish the Impacts of Navy Sonar on Marine Mammals

NEPA has been the weapon of choice by default in many Navy sonar cases. The reason for this unfortunate reality is that the Navy has been able to bypass the mandates of federal environmental laws in the name of national security objectives.[224] For example, in the *Winter v. NRDC* context, the Navy successfully dodged compliance with three substantive environmental statutes—the ESA, MMPA, and CZMA—as well as seeking to avoid the procedural mandates of NEPA.

In *Winter*, the SOCAL area where the sonar tests were being conducted was home to nine species listed as endangered or threatened under the ESA. The NMFS issued a Biological Opinion under section 7(a)(2) of the ESA,[225] which concluded that while the SOCAL exercises might "adversely affect" certain threatened and endangered species, the exercises were not "likely to jeopardize the [species'] continued existence."[226] The NMFS also issued an Incidental Take Statement under which harm to these threatened or endangered species would be excused under the ESA as "incidental."[227]

In addition, in January 2007, the Deputy Secretary of Defense issued a National Defense Exemption, which exempted from the requirements of the MMPA all of the Navy's military readiness activities employing MFA sonar for the duration of the SOCAL exercises.[228] The Deputy Secretary of Defense conditioned the exemption on the Navy adopting a number of mitigation measures, which already had been standard operating procedure in the Navy's anti-submarine warfare exercises since 2004.

On January 15, 2008, President Bush signed an executive order exempting the Navy's training exercises from compliance with the CZMA.[229] On the same day, CEQ purported to approve "alternative arrangements" for the Navy to continue its use of MFA sonar while complying with NEPA, reasoning that "emergency circumstances" prevented normal compliance.[230]

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[224] For a helpful discussion of the military's exceptions and exemptions from environmental law statutes, see generally Craig, *supra* note 14. See also David M. Bearden, *Exemptions from Environmental Law for the Department of Defense*: *Background and Issues for Congress* (2007), available at http://ncseonline.org/NLE/CRSreports/08Jun/RS22149.pdf

[225] 16 U.S.C. § 1536(a)(2).

[226] *NRDC v. Winter*, 2008 U.S. App. LEXIS 4504, *17 n.11 (9th Cir. Feb. 27, 2008).

[227] *Id.*

[228] See 17 U.S.C. § 1371(f).

[229] Mongeon, *supra* note 166 at 282.

[230] Krueger, *supra* note 159 at 434. CEQ's authority to grant such relief derives from 40 C.F.R. § 1506.11.

The Navy's evasion of federal environmental protection mandates at issue in the *Winter* context only tells part of the story. There is a long and unfortunate history of erosion of species protection under the MMPA and ESA Amendments.[231] However, proposed amendments to the MMPA as of this writing seek to change that balance.[232]

The environmental protection measures of the MMPA weakened under the weight of military readiness objectives.[233] Under the 2003 Amendments to the MMPA, the two types of harassment were redefined for military readiness activities: "Level A harassment" means an act that injures or has the significant potential to injure a marine mammal or marine mammal stock; whereas "Level B harassment" refers to an act that disturbs or is likely to disturb a marine mammal or marine mammal stock by causing disruption of behavioral patterns, such as migration, breathing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered. These definitions are much narrower than the general definition of harassment (applicable to non-military actors), which is an act that

> (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or
> (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.[234]

In other words, more harm is required for military readiness activities before they rise to the statutory level of harassment. The military also benefits from a weaker definition of the "incidental take" requirement as applied to military readiness activities.

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[231] For example, Section 318(a) of the National Defense Authorization Act for FY2004 (P.L. 108–136) authorized the Secretary of the Interior to exempt military lands from designation as critical habitat under the ESA, whereas section 318(b) directs the Secretary of the Interior to consider impacts on national security when deciding whether to designate critical habitat. *Exemptions from Environmental Law for the Department of Defense*, http://ncseonline.org/NLE/CRSreports/08Jun/RS22149.pdf

Section 319 of P.L. 108–136 authorized a broad exemption from the MMPA for "national defense" that the Secretary of Defense may invoke in consultation with the Secretary of Commerce, the Secretary of the Interior, or both as appropriate. *Id.* Section 319 also amended the definition of "harassment" of marine mammals, as it applies to military readiness activities, to require greater scientific evidence of harm, and required the consideration of impacts on military readiness in the issuance of permits for incidental takings. *Id.*

[232] *See* Vassar *supra* note 21 at 290.

[233] For a discussion of the weakening of MMPA protections throughout the amendment process in the past two decades, see generally Elena McCarthy & Flora Lichtman, *The Origin and Evolution of Ocean Noise Regulation under the U.S. Marine Mammal Protection Act*, 13 OCEAN & COASTAL L.J. 1 (2007).

[234] 16 U.S.C. § 1362(18).

The military exemption mandates of the National Defense Authorization Act (P.L. 108-136) have been applied in the Navy sonar context.[235] Since 2006, the Secretary of Defense twice has invoked the authority in P.L. 108-136 to exempt the use of MFA sonar from the MMPA during certain training exercises and operations. The Secretary invoked the first exemption in June 2006 for six months,[236] and the second in January 2007 for two years.[237] The Navy stated that the longer two-year exemption would allow it to continue critical training while preparing a comprehensive environmental compliance plan for its ranges and operating areas.[238]

In response to these gaping holes in the substantive protections for marine mammals in key federal environmental statutes, two proposals may promote enhanced protection of marine mammals from the impacts of Navy sonar. First, the MMPA needs to be amended in two ways to add a citizen suit provision to enhance citizen enforcement under the Act and a narrowly tailored national security exemption like the provision in the ESA. Second, new substantive protections need to be enacted at the domestic and international levels to address marine mammal protection.

The MMPA is one of only a few major environmental statutes without a citizen suit provision.[239] The reasons for this omission are unclear but the effects of this omission are painfully evident. Since the 1970s, citizen suit provisions have been enormously valuable in promoting citizen enforcement of environmental laws, and they are more valuable than ever in the post-9/11 era.[240] Compared to suits filed under the Administrative Procedure Act, cases filed under citizen suit provisions are more likely to promote compliance with substantive mandates by having citizen-plaintiffs serve as private attorneys general under the Act.[241] Because of the congressional blessing that citizen suits represent for potential plaintiffs to be eligible to sue under these statutes, citizen suits are less likely to be dismissed on standing and other procedural

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[235] *See* David M. Bearden, *Exemptions From Environmental Law for the Department of Defense: Background and Issues for Congress*, (May 15, 2007), available at http://www.fas.org/sgp/crs/natsec/RS22149.pdf

[236] The Department of Defense authorized this exemption after conferring with the Department of Commerce.

[237] Navy Office of Information, *New National Defense Exemption to MMPA Authorized for Navy*, Jan. 23, 2007, *available at* http://www.navy.mil/search/display.asp?story_id=27415

[238] *Id.*

[239] NEPA and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) also lack citizen suit provisions.

[240] *See generally* James R. May, *Now More than Ever: Environmental Citizen Suit Trends*, 33 ELR 10704 (2003).

[241] *See* Reynolds, *supra* note 35 at 800 (quoting Michael Jasny et al., *Sounding the Depths II: The Rising Toll of Sonar, Shipping, and Industrial Ocean Noise on Marine Life* 28 (2005), available at http://www.nrdc.org/wildlife/marine/sound/sound.pdf ("Congress should add a 'citizen-suit' provision to the MMPA, which would strengthen the authority of the public to do what, in some cases, the regulatory agencies will not.")

grounds.[242] Moreover, the procedural injuries that plaintiffs typically allege in MMPA suits are more likely to prevail when brought under a citizen suit provision. Although far from a guarantee of success, the federal courts and the Supreme Court have recognized procedural injury as a viable form of injury under the citizen suit provisions of other environmental laws.[243]

To enhance protection of marine mammals in the future, substantive protections are essential at the domestic and international levels. There are three principal ways in which this goal can be achieved: protect species, protect habitat, and promote regional and international cooperation on marine mammal conservation.

With regard to protecting species and promoting international cooperation, a bill to amend the Whale Conservation, Protection, and Study Act (WCPSA),[244] pending before the House of Representatives as of this writing, would offer valuable substantive protections for whales if enacted by promoting international whale conservation, protection, and research. Perhaps most significant for the purposes of this article's analysis, the bill calls for international cooperation to address the adverse effects of anthropogenic noise on whales and other marine life, recognizing the importance of military readiness activities which shall, so far as is reasonable and practicable, be conducted in a manner consistent with those efforts."[245] This language is a refreshing shift in priorities compared to the outcome in *Winter* because it reflects a presumption in favor of environmental protection goals and mandates that military readiness activities be conducted in a manner consistent with these goals. In addition, given the highly migratory nature of whales, promoting regional and international cooperation is essential for effective management. In this regard, the bill seeks to "conclude a whale protection Agreement with the Government of Canada aimed at coordinating and promoting conservation efforts for whales that migrate through waters of both countries.[246] To further promote regional and international cooperation, the bill also calls for international marine protected area networks,[247] which is a growing trend in other nations and regions of the world and is an indispensable regulatory tool for effective management of marine mammals.[248]

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[242] Plaintiffs who file suit under citizen suit provisions must still satisfy Article III standing requirements, however.

[243] *See* Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 232–33 (2010).

[244] Whale Conservation, Protection, and Study Act, H.R. 2455, 111th Cong., 1st Sess. (May 18, 2009).

[245] *Id.* § 3(f).

[246] *Id.* § 2(b)(3).

[247] *Id.* § 3(g).

[248] *See generally* Randall S. Abate, *Marine Protected Areas as a Mechanism to Promote Marine Mammal Conservation: International and Comparative Law Lessons for the United States*, 88 OR. L. REV. 255 (2009).

Substantive protections are not limited to a focus on particular species, however. On January 19, 2010, the National Oceanic and Atmospheric Administration (NOAA) released a proposed plan to reduce adverse effects on marine mammals resulting from the Navy's use of MFA in training exercises.[249] The plan calls for the Navy to limit its use of sonar in "hot spots" (important marine mammal habitat) along the Atlantic coast, in the Gulf of Mexico, and along the Southern California coast where the use of mid-frequency sonar endangers whales, porpoises, and dolphins.[250] Another habitat-oriented substantive protection provision in NOAA's proposed plan involves creating a "comprehensive sound budget" for the oceans to reduce human sources of ocean noise and address problem of cumulative impacts.[251]

A Navy sonar case pending in the Southern District of Georgia as of this writing illustrates the critical need for these new and enhanced substantive protections for marine mammals. In January 2010, Defenders of Wildlife and several other environmental groups filed a lawsuit challenging the Navy's use of sonar at a proposed Undersea Warfare Training Center.[252] The lawsuit seeks to protect endangered right whales by compelling the Navy to comply with NEPA, ESA, and the APA before proceeding with plans for a training range.[253] The proposed training center would be located in "an area 500 nautical miles in size" southeast of the Georgia/Florida border.[254] However, the training center would be not-so-conveniently located adjacent to waters where right whales give birth to and nurse their calves each year from November to April.[255]

This case differs from *Winter* in two important ways. First, there are other threats in this situation in addition to the impacts of sonar (*i.e.*, right whales are especially vulnerable to ship strikes because of their size and slow movement).[256] Second, the North Atlantic right whale is listed as critically endangered under the ESA.[257] Even Chief Justice Roberts, writing for the

[249] Letter from Jane Lubchenco, NOAA Administrator, to Nancy Sutley, Chair, White House Council on Environmental Quality, Jan. 19, 2010, available at http://www.nrdc.org/media/docs/100119.pdf

[250] *Id.*

[251] *Id.*

[252] Complaint, *Defenders of Wildlife v. U.S. Dep't of Navy* (S.D. Ga. Jan. 28, 2010), at para. 1, available at http://www.southernenvironment.org/uploads/publications/Final_complaint_-_12810.pdf [hereinafter Complaint]. *See also Whales v. Sonar: NOAA May Limit Sonar Tests, but Another Case Heads to Court*, DISCOVER MAGAZINE, Feb. 1, 2010, available at http://blogs.discovermagazine.com/80beats/2010/02/01/whales-vs-navy-noaa-may-limit-sonar-tests-but-another-case-heads-to-court/

[253] Complaint at para. 1.

[254] *Id.*

[255] *Id.* at para. 2. In fact, a right whale calf was born in March 2010 near the proposed site of the Navy's training center. *See Endangered Right Whale Born Near Proposed Navy Training Site*, LOS ANGELES TIMES, Mar. 24, 2010, http://latimesblogs.latimes.com/unleashed/2010/03/endangered-right-whale-born-near-proposed-navy-training-site.html

[256] Complaint, *supra* note 252 at para. 2.

[257] The National Marine Fisheries Service (NMFS) has described the North Atlantic right whale as one of "the world's most critically endangered large whale species and one of the world's most endangered mammals." *Id*. (quoting 73 Fed. Reg. 60,173, 60,173 (Oct. 10, 2008)).

majority in *Winter*, conceded that the Navy's national security interests would not necessarily trump environmental concerns in every case. Therefore, the Defenders of Wildlife case appears to be the right set of facts to weaken the applicability of the *Winter* outcome. Better still, it also serves to underscore the need to address these clashes between the Navy and marine mammal protections in a manner outside the NEPA context, and outside the courts entirely. Substantive protections of species and habitat through measures such as the proposed amendments to the WCPSA and NOAA's hot spots program offer a much better alternative to enhance protection of these vulnerable species rather than allowing NEPA litigation and the courts to determine their fate.

CONCLUSION

Joel Reynolds, a senior attorney with NRDC and a veteran of NEPA litigation challenging Navy sonar for the past two decades, offered these thoughtful observations about the past and future of balancing the needs of the Navy and marine mammals:

> In each case . . . the district courts have affirmed the principle that, absent an explicit statutory exemption, those laws apply not just to the rest of us but also to the military services in their training for our national defense, even in this post 9/11 era. And as settlement agreements have been achieved in those cases—agreements that allow the Navy to continue to train but under terms requiring a higher level of environmental compliance—it has become increasingly difficult to dispute that a balance between military preparedness and environmental protection is achievable if only there is a will to achieve it.[258]

Such a balance between national security and environmental protection is achievable, but not on an ad hoc basis in NEPA litigation. This article maintains that striking the proper balance between clashing goals in the marine context is best achieved through substantive protections for marine mammals. These protections should be established by Congress and relevant federal agencies, which is far preferable to another decade of procedural gymnastics under NEPA as interpreted by a Supreme Court that is more deferential than ever to military prerogatives. To the extent NEPA remains as one tool within a broader range of protections for marine mammals from the impacts of Navy sonar, NEPA's emergency exception should be the focus for evaluating national security objectives.

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[258] Reynolds, *supra* note 35, at 801.