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Winter, Secretary of the Navy, ET AL. v.  
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The United States Supreme Court Invalidates a Preliminary Injunction Prohibiting the Use of Mid-Frequency Active Sonar in Naval Training

*I. Background*

Several groups devoted to the protection of marine mammals and ocean habitats challenged the Navy's use of "mid-frequency active" ("MFA") sonar training, seeking declaratory and injunctive relief on the grounds that the Navy's actions violated the National Environmental Policy Act of 1969 (NEPA), the Endangered Species Act of 1973 (ESA), and the Coastal Zone Management Act of 1972 (CZMA). The plaintiffs, which include the Natural Resources Defense Council, Jean-Michael Cousteau (an environmental enthusiast), and various other groups, argue that MFA can cause serious injuries to marine animals, including permanent hearing loss, decompression sickness, and major behavioral disruptions, and that these findings require the Navy to prepare an environmental impact statement (EIS) as required by the NEPA. *Winter, Secretary of the Navy, ET AL. v. Natural Resources Defense Council, Inc., ET AL.*, No. 07-1239, at 4 (U.S. 2008). They also contend that in areas off the coast of Southern California (SOCAL) where the Navy employs MFA sonar, several mass strandings of marine mammals have occurred and that a particular mammal—the beaked whale—is especially prone to injury and that any such injuries would go unnoticed due to the whales tendency to spend very little time at the surface. *Id.*

The Navy contends that after its initial analysis, it determined that its SOCAL training exercises would not have a significant impact on the environment, and as such, deemed its environmental assessment to be sufficient according to the terms of the NEPA. *Id.* at 5. The NEPA does not require an agency to prepare a full EIS if it determines based on an environmental

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assessment that the proposed action will have little impact on the environment. *Id.* The Navy estimated that the SOCAL training would physically injure only eight dolphins per year, and even these injuries could be prevented through the Navy's voluntary safety measures, given that lookouts can easily spot schools of dolphins. *Id.* at 6. The number of affected beaked whales per year was estimated at 274, none of which would result in permanent injury. *Id.* In fact, the Navy contends that after 40 years of MFA sonar use, there has not been a single documented sonar-related injury to a marine mammal. *Id.* at 4. It was in light of these findings that the Navy determined a full EIS was unnecessary.

In addition, the Navy contends that its training exercises, during which the use of MFA sonar is employed, are essential to the maintenance of national security. The Navy utilizes "strike groups" and MFA sonar to create a training experience that closely models the antisubmarine warfare that is currently the Pacific Fleet's top war-fighting priority. *Id.* at 2. Strike groups are groups of surface ships, submarines, and aircraft centered around an aircraft carrier or assault ship and seamless coordination between the strike group is critical. *Id.* In order to successfully utilize a strike group, extensive integrated training in analysis and prioritization of threats, maintenance of force protection, and execution of military missions is required. *Id.* One specifically pertinent form of training involves the use of MFA active sonar.

MFA active sonar is the most effective means of locating and identifying submerged diesel-electric submarines within a ship's torpedo range. *Id.* Active sonar, as opposed to passive sonar, emits pulses of sound underwater and receives acoustic waves that echo off the target rather than merely listening for waves but not introducing any into the water. *Id.* Active sonar is particularly useful when tracking diesel-electric submarines because such vessels travel almost silently, and therefore cannot be detected using passive sonar. *Id.* The MFA sonar employed by the Navy emits sound waves with a frequency between 1 kHz and 10 kHz. *Id.* at 3. This sonar is complex and requires extensive training under similar circumstances in order to be effective, including such factors as time of day, water density, salinity, currents, weather conditions, contours of the sea floor, and so on. *Id.* In order to achieve the necessary expertise, the Navy utilizes training exercises in detecting, tracking, and neutralizing enemy submarines, such as those at issue here, in order to guarantee that its personnel will perform proficiently as sonar operators in times of real threat. *Id.*

The Navy has chosen SOCAL as the location for these training exercises due to its proximity to land, air, and sea bases as well as amphibious landing areas. *Id.* However, the SOCAL waters are also shared by at least 37 species of marine mammals and the effect on these animals, particularly the physical

harm and the disruption of behavioral patterns, is highly disputed by the parties. *Id.* at 4.

## *II. Decision in the Lower Courts*

The District Court granted the plaintiff's motion, holding that they had demonstrated a "probability of success" under NEPA and CZMA, thereby prohibiting any use of MFA sonar by the Navy for training purposes. *Id.* at 6. Following a stay in the injunction pending the Navy's emergency appeal, the Ninth Circuit agreed that preliminary injunctive relief was the correct remedy. However, the court held that the total prohibition of sonar use must be narrowed to provide conditions under which the Navy could continue the use of MFA sonar in its training exercises. *Id.* at 7.

On remand, the District Court imposed a new preliminary injunction, which allowed the use of MFA sonar only when six mitigating measures were satisfied. *Id.* These included, (1) the imposition of a 12-mile "exclusion zone" from the coastline; (2) lookouts to conduct additional marine mammal monitoring; (3) the restriction of the use of "helicopter-dipping" sonar; (4) the limitation of MFA sonar in geographic "choke points"; (5) the shutdown of MFA sonar when a marine mammal is spotted within 2,200 yards of the vessel; and (6) the powering down of MFA sonar by 6 dB during significant surface ducting conditions. *Id.* Of these, the Navy challenges only the last two restrictions.

In response to this injunction, the President, pursuant to 16 U.S.C. §1456(c)(1)(B), granted the Navy an exemption to CZMA after determining that the continuation of the restricted exercises "was 'essential to national security,'" and that adhering to the injunction imposed by the District Court "would 'undermine the Navy's ability to conduct realistic training exercises that are necessary to ensure the combat effectiveness of...strike groups.'" *Id.* at 8.

In concert with the President's action, the Council on Environmental Quality (CEQ), pursuant to 40 CFR §1506.11, in response to what it deemed "emergency circumstances" authorized the Navy to implement "alternative arrangements," which were deemed appropriate because the injunction created an unreasonable and significant risk that the strike groups would be unable to train and certify as necessary. *Id.* According to these arrangements, the Navy was able to continue the operation of MFA sonar, subject only to the original conditions upon which its exemption from the Marine Mammal Protection Act of 1972, 86 Stat. 1027, was granted. *Id.* (See *Id.* at 5 for original restrictions).

In response to these exemptions, the Navy moved to vacate the District Court's injunction with respect to the last two restrictions, however, the District Court refused to do so and the Ninth Circuit affirmed. *Id.* at 9. In doing so, the Court of Appeals found that the plaintiffs had successfully shown a likelihood of success and a "possibility" of irreparable injury, further holding that the negative impact on the Navy's training exercises was "speculative" at best. *Id.* The court also questioned whether there was a true "emergency" as suggested by the CEQ, and concluded that the preliminary injunction was predictable in light of the litigation history. *Id.* With respect to the two challenged restrictions, the court found that: (1) the 2,200-yard shutdown zone was unlikely to affect operations because the Navy often shuts down the sonar system during training and (2) the power-down requirement was not unreasonable because significant surface ducting conditions, when sound travels further than it otherwise would due to temperature differences, are relatively infrequent, meaning that various groups were certified without ever facing such conditions. *Id.* at 10.

In response to the lower court's holding, several Navy officers testified that not only was the use of MFA sonar "mission critical," but the two challenged restrictions made it impossible for the Navy to accomplish realistic training. *Id.* at 15. Specific aspects of training that can be affected include the ability to learn how to avoid sound reducing "clutter" from environmental conditions and ocean floor layout, instruction on how to avoid interference, and practice coordinating efforts with other sonar operators. *Id.*

### *III. Decision in the U.S. Supreme Court*

After granting certiorari, the Court held: (1) the correct standard for preliminary relief requires plaintiffs to demonstrate that an irreparable injury is *likely* in the absence of an injunction; (2) even if the likelihood of irreparable injury has been shown, it is outweighed by the public interest and the Navy's interest in satisfactory training; (3) preliminary injunction as a remedy is the exception and the court must balance the competing claims of injury when considering such a grant; and (4) the lower courts' erred in granting preliminary injunction, most notably by failing to give the Navy's concerns adequate weight. It is important to note that the Court did not address the underlying merits of the suit, but did state that the foregoing analysis makes it clear that any permanent injunction on the same grounds would also be an abuse of discretion.

#### *IV. The Standard for Preliminary Relief*

The Court held that, "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 10. The Court found the lower courts' findings of irreparable harm problematic, but ultimately stated that even if the plaintiffs were assumed to have met the likelihood showing required, any irreparable injury is outweighed by "the public interest and the Navy's interest in effective, realistic training of its sailors." *Id.* at 13. The Court found that consideration of these factors alone necessitate a denial of injunctive relief, and therefore found not reason to address the likelihood of success on the merits. *Id.* at 13-14.

#### *V. Injunctive Relief as the Exception*

In each claim for injunctive relief, a court must balance the claims of injury on each side. In this case, the Court found that the lower courts underestimated the burden imposed on the Navy by the injunctive relief. In general, the professional judgment of military personnel will receive great deference when determining the outcome of a balance of equities. Here, the Navy asserts that the MFA sonar is "mission-critical" and that realistic training cannot be accomplished in accordance with the two challenged restrictions. *Id.* at 15. When this interest is examined in combination with the public interest in a well-trained military force, the Court found that the balance strongly favored the Navy. *Id.* at 16. The Court went on to examine the specific implications of each of the challenged restrictions and found that both placed a significant burden on the Navy's ability to adequately train its forces. *Id.* at 18-20. Increasing the radius of the shutdown zone from 200 to 2,200 yards, the Court found, would actually increase the overall surface area from 125,664 square yards to 15,205,308 square yards. *Id.* at 18. Furthermore, mandatory shutdowns often result in the loss of several days' worth of training and make a practical difference because the voluntary shutdowns employed by the Navy in the past were often at tactically insignificant times. *Id.* at 18-19. The infrequency of surface ducting was unconvincing to the Court as a rationale for upholding the restriction because its rarity and unpredictability made it especially important for Navy training, and furthermore, the decrease of 6 dB made training unrealistic because it amounts to a 75% reduction. *Id.* at 20.

### *VI. Analysis on the Merits*

While the Court explicitly declines to address the underlying merits of the plaintiff's claims, it states, "[W]hat we have said makes clear that it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction." *Id.* at 22. The factors discussed above, it found, were relevant in assessing any injunctive relief, either preliminary or permanent. *Id.*

Ultimately, the Supreme Court found that the District Court abused its discretion by imposing the two challenged restrictions, and therefore reversed the Court of Appeals and vacated the preliminary injunction to the extent that it was challenged by the Navy.

### *VII. Concurring in Part; Dissenting in Part*

Justice Breyer identifies the issue at hand as a question of whether the District Court was "legally correct in forbidding the training exercises *unless* the Navy implemented the two controverted conditions" and whether these conditions properly balanced the harms on each side of the dispute. *Id.* at 2 (Breyer, J., concurring in part, dissenting in part). The purpose of the injunction was to impose fuller consideration for environmental effects that an EIS, as required by NEPA, would take into account. *Id.* at 3. Therefore, the lack of injunctive relief would actually impose the exact harms that NEPA is meant to cure. *Id.* However, Justice Breyer states that the record before the Court lacks adequate support for an injunction imposing the two challenged requirements for five main reasons: (1) the evidence showing a need for the two special conditions is uncertain, specifically because the harm posed by these two requirements has not been assessed separately from the six original requirements; (2) the Navy has filed affidavits explicitly addressing the two restrictions' interference with adequate training; (3) the District Court failed to address why the Navy's contentions were rejected; (4) the Court of Appeals failed to adequately explain its rejection of the Navy's arguments; and (5) the injunction was originally remanded in order to assure that the Navy was able to continue training exercises—a purpose that both lower courts failed to argue was satisfied. *Id.* at 3-9.

For the above reasons, the concurrence would vacate the preliminary injunction with respect to the two challenged restrictions as they apply to the Navy. *Id.* at 9. However, while Justice Breyer would normally call for a remand, in this case any such action by the District Court would be rendered moot by the EIS that is expected to be finished by February of 2009. For this

reason, the Justice would impose the interim policies adopted by the Court of Appeals pending resolution by this Court until the full EIS is ready. *Id.* at 10.

#### *VIII. Dissent*

The dissent argues that the judgment of the Ninth Circuit should be affirmed for various reasons. *Id.* at 12 (Ginsburg, J., dissenting). First, by acting before preparing an EIS, the Navy has thwarted the very purpose of the NEPA, and indeed does not even dispute its obligation to prepare an EIS in the future. *Id.* at 1. Secondly, if the Navy was unable to adhere to the requirements of NEPA before acting, it should have sought legislative exemption. *Id.* at 6. On top of these factors, the majority's estimate of harm actually misinterpret the predictions of the environmental assessment, which show a significant amount of potential harm. *Id.* at 11. In summation, because there is likely, substantial harm to the environment, an almost inevitable success on the merits for the plaintiffs, and a great degree of public interest in taking environmental precautions before acting, the dissent finds no abuse of discretion in the mitigating measures upheld by the Ninth Circuit. *Id.* at 12.

