

## ITSSD: U.S. Navy Had a Whale of a Job Fending Off Green Lawfare in NRDC v. Winter Case

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PRINCETON, N.J., April 8 /PRNewswire-USNewswire/ -- In a newly released **Washington Legal Foundation** working paper, international lawyer Lawrence Kogan describes the U.S. Navy's challenge in convincing the U.S. Supreme Court to vacate a green injunction effectively preventing critical U.S. Naval sonar training exercises from taking place off the Southern California coast. The injunction had been issued on the grounds that the Navy's failure to prepare a full environmental impact statement could trigger possible but scientifically unverifiable discomfort to beaked whales.

"The green group and California State pleadings the Supreme Court reviewed in *Winter* provide a bird's eye view of continuing activist efforts to rewrite U.S. environmental regulatory law from the bench in pacifist Europe's socialist image," emphasizes Kogan. "Respondents and amici urged the Court to embrace up to three different applications of Europe's Precautionary Principle: the Ninth Circuit's presumption of irreparable environmental injury, its presumption in favor of issuing preliminary injunctions in environmental matters, and/or its presumption against issuing a military exemption in NEPA cases."

Despite this legal 'win', the Navy remains very concerned that Europe's Precautionary Principle is being used also by third nations (e.g. China) as a domestic and international environmental 'lawfare' tool to decrease U.S. military capabilities against "the world's [growing] inventory of quiet diesel-electric submarines."

According to one Navy Commander, "...[N]ongovernmental organizations...such as Greenpeace...[are working] in conjunction with certain coastal countries, including close U.S. allies, to unilaterally impose maritime and...environmental...rules that restrict international shipping, aircraft overflight of the seas [and the]...right of freedom of navigation,...and...[which thereby,] diminish national security." [http://www.foreignpolicy.com/story/cms.php?story\\_id=4703](http://www.foreignpolicy.com/story/cms.php?story_id=4703) Similarly, a Navy JAG Corps Officer has concluded that, "the means are available for an adversary to engage in full-scale international and domestic lawfare by exploiting international forums and misusing domestic environmental protection laws to blunt our technological anti-submarine advantages, degrade our training, reduce our capabilities, restrict our operations, reveal our training methods and locations, limit future technological advances and undercut our national strategic objectives." <http://www.maritimeindia.org/modules.php?name=Content&pa=showpage&pid=166>

If, as these officers strongly suggest, the U.S. Navy has barely kept its head above water when defending against *U.S.-based* environmental lawsuits, how could it realistically expect to successfully handle the many additional *foreign-based* green lawsuits it would certainly face once America accedes to the UN Law of the Sea Convention?

<http://itssdjournallunclos-lost.blogspot.com/2008/01/us-citizens-seeking-thorough.html>

*The Institute for Trade, Standards and Sustainable Development (ITSSD) is a non-partisan non-profit international legal research and educational organization that examines international law relating to trade, industry and positive sustainable development around the world. This article is accessible at:*

<http://www.itssd.org/Winter%20Decision%20--%200409KoganWPFinal.pdf>.