



Vol. 18 No. 21

September 5, 2008

NATIONAL SECURITY & ENVIRONMENT BEFORE HIGH COURT IN *WINTER* CASE

by
Brandon T. White

This fall the Supreme Court will hear a case addressing a clash between competing environmental and military interests. The case, *Winter v Natural Resources Defense Council*, presents a national security issue as the environmental activist group National Resources Defense Council (NRDC) seeks to limit the Navy's use of mid-frequency active (MFA) sonar because of its potential harm to marine mammals. It is scheduled for oral argument on October 8.

Background. In 2007, NRDC filed suit in California federal court to protect whales and other marine animals from the potentially harmful effects of Navy sonar use. In January, U.S. District Judge Florence-Marie Cooper issued a preliminary injunction prohibiting the Navy's use of sonar, stating that there was "near certainty" of irreparable harm to the environment.

The U.S. Court of Appeals for the Ninth Circuit subsequently amended the district court's order. The appeals court affirmed the ruling while allowing the Navy to conduct sonar training during the litigation, with some limitations. The Navy was allowed to conduct training exercises if it halted sonar transmissions whenever a marine mammal was seen within 1.25 miles or 2200 yards of a sonar source. In addition, the Ninth Circuit ordered the Navy to reduce sonar power by 75 percent during certain thermal conditions in the ocean. The administration appealed on behalf of the Navy.

The Arguments. NRDC argues that federal regulations require the Navy to prepare an Environmental Impact Statement (EIS) whenever their operations cause environmental harm. The Navy's failure to abide by this, if applicable, would violate the National Environmental Protection Act (NEPA).

Conversely, the Navy claims they are entitled to exemptions outlined by both the President and the Council on Environmental Quality (CEQ). Pursuant to 16 U.S.C. § 1456(c)(1)(B), the President has exempted from the provisions of the Coastal Zone Management Act the Navy's use of MFA sonar during the training activities in southern California, finding that use of such sonar is "essential to the national security" and in the "paramount interest of the United States."¹ Moreover, the CEQ has cited

¹After any final judgment, decree, or order of any Federal court that is appealable under 28 U.S.C. §§ [1291](#), [1292](#), or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) of this section is not likely to result

Brandon T. White, a Finance Bachelor of Arts candidate at the University of Florida, was a Fellow with Washington Legal Foundation for the summer 2008 term and a scholar of the prestigious Institute for Responsible Citizenship, a highly selective leadership program for high achieving college students.

“emergency circumstances” as allowing for “alternative arrangements” to satisfy certain environmental considerations pursuant to 40 C.F.R. § 1506.11², which provided the Navy a means of complying with the National Environmental Policy Act.

The Navy argues that the Ninth Circuit’s sonar limitations cripple their ability to conduct realistic pre-deployment training. This, in turn, prevents U.S. forces from being able to detect a submarine before it is in a position to attack. Additionally, the Navy argues that in the forty years of sonar training off the southern coast of California the record contains “no evidence” that marine mammals have been harmed. Although the Navy has never argued that its active sonar is benevolent, it states that the potential risks it may pose to marine life are minor when compared to the harm to national security.

Broader Concerns. In addition to the national security arguments raised by the Navy and opposed by the NRDC, *Winter* may have implications for the effect of preliminary injunctions on hundreds of businesses and their employees who engage in land use and resource extraction activities. The California Forestry Association provides an example of the affects preliminary injunctions have had on their business in their *amicus* brief supporting the Court’s granting of review in *Winter*. It states, “Preliminary injunctions interrupt the steady supply of timber needed for our member business; they cause economic injuries to business and local communities. Additionally where federal forests are not timely thinned, this increases the risk of insect infestations coming onto private timberlands and the risks of catastrophic wildfires to timberlands and local communities.” Regarding *Winter*, the injunction standard the Ninth Circuit used, if affirmed by the Supreme Court will empower environmental groups to enjoin land use activity, opening the door for more restrictions to be set in place. This could have adverse effects on groups such as the Navy who seek to protect our national security.

The Challenge for the Supreme Court. The Supreme Court has the intricate task of considering whether the Navy will be allowed to continue its use of sonar in national security training in the face of challenges from environmentalists claiming that the sonar is destroying wildlife and causing harm to marine animals. In doing so, they must consider whether the U.S Court of Appeals for the Ninth Circuit erred in enforcing environmental regulations against the Navy while conducting sonar training exercises. Among the issues will be whether the CEQ properly construed statutory regulations in finding “emergency circumstances” in this case, and whether the preliminary injunction, based on a preliminary finding that the Navy had not satisfied NEPA’s procedural requirements is inconsistent.

in such compliance, the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.”

²“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.”