Litigation Update

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APPEALS COURT URGED TO REVERSE JUDGE'S "CEASE FIRE" ORDER HALTING NAVY TRAINING EXERCISES

(*Center for Biological Diversity v. Pirie*)

The Washington Legal Foundation (WLF) filed its brief in the U.S. Court of Appeals for the D.C. Circuit, urging the court to reverse and vacate a stunning district court ruling that, if left intact, will have a crippling effect on our military's ability to combat terrorism in Afghanistan and elsewhere. On June 1, 2002, a federal judge issued an injunction against the United States Navy and Marines that bars them from conducting joint live-fire military training exercises on a tiny uninhabited island in the Western Pacific, Farallon de Medinilla (FDM), that is part of the Commonwealth of the Northern Mariana Islands (CNMI). The court ordered the halt to the training because a few non-endangered migratory birds might be harmed during the exercises.

WLF's brief was filed on behalf of itself and WLF clients, including the Allied Educational Foundation; U.S. Representatives James V. Hansen, Ken Calvert, Bob Barr; and U.S. Senator Jesse Helms. WLF is also representing The Honorable Pedro A. Tenorio, the Resident Representative to the United States from the CNMI whose residents overwhelmingly support the Navy's presence. The lawsuit was originally filed by the Center for Biological Diversity (CBD) against the Navy to halt all live-fire training exercises on FDM. CBD claims that the bombing results in the unintentional killing of a few non-endangered migratory seabirds protected by the Migratory Bird Treaty Act (MBTA).

FDM is a 200-acre island which has been leased to the United States since 1971. It is the only suitable island in the Western Pacific for maintaining the combat readiness of "forward deployed" United States military units. Training entails joint operations involving the Navy and U.S. Marine Corps, including the use of troops, ships, and aircraft. The Navy has taken costly measures to mitigate any environmental harm caused by the training exercises.

WLF argued in its brief that the CBD did not have standing to challenge the military exercises. CBD claims that one of its members is a birdwatcher who lives in Guam, and that if a bird is killed on FDM, that is one less bird that might have flown some 60 miles from FDM to Guam to be

observed. WLF argued that this injury was too speculative to constitute standing, especially where there was no showing that the species as a whole is diminishing. In fact, more birds may fly to nearby islands rather than stay on FDM. Indeed, some of the migratory birds in question are very common on the islands. WLF also argued that if the MBTA were applied to the facts in this case, it would unconstitutionally encroach on President Bush's power as Commander-in-Chief under Article II. WLF argued that a federal court cannot issue, in essence, a "cease fire" order to the military. That power resides solely in the hands of the President.

U.S. District Judge Emmet G. Sullivan brushed aside WLF's standing argument during an earlier court hearing, even though WLF's entire brief on that issue was subsequently adopted by the Department of Justice (DOJ) after DOJ initially failed to raise the point in its opening brief. The Court also ignored the serious constitutional arguments presented only by WLF, namely, that an interpretation of the MBTA that so interferes with the commander-in-chief powers would be unconstitutional under Article II. The judge instead quickly concluded that the Navy was violating the MBTA, and the only remaining issue was the remedy.

In his recent ruling on the remedy, Judge Sullivan described the Navy's position as one that seeks to violate the MBTA "with impunity." But this mischaracterization clearly ignores all the costly and extensive mitigation measures that the Navy has undertaken to ensure that the non-endangered birds and habitat are protected. For example, the Navy has produced voluminous environmental impact statements, and has placed certain areas of the island where the birds are found "off-limits" for any bombing. In addition, the birds are shooed from FDM before live ordnance is used.

The judge acknowledged that he had discretion to consider the competing interests between protecting non-endangered birds and our national security, but came down on the side of the birds. The judge concluded that Congress did not intend to have any "military necessity" exceptions to the MBTA. But in reading the statute in such a rigid manner, the court ignored WLF's arguments that the MBTA was enacted during World War I in large measure to protect our nation's food supply needs for our troops, because many migratory birds eat insects that devour farm crops. In this case, none of the non-endangered migratory sea birds eat crop-damaging insects. Thus, WLF argued that Congress, which enacted the MBTA to *help* our troops, would surely not have intended that the law could be used to *harm* our troops by empowering courts to issue "cease fire" orders whenever an activist claims that a bird is being threatened by military activity.

Oral argument in this expedited appeal is scheduled for October 8, 2002. WLF is also monitoring several other lawsuits brought by activists environmental groups to stop military exercises and thus, threaten the national security of the United States. Congress is also considering legislation to allow national security concerns to be considered in applying environmental statutes to the military, but activists and their allies in Congress have vowed to oppose any such legislation.

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