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IN THE NAVY: THE FUTURE STRENGTH OF PRELIMINARY INJUNCTIONS UNDER NEPA IN LIGHT OF NRDC v. WINTER

William Krueger

A preliminary injunction is an incredibly useful and important tool in cases involving the enforcement of environmental statutes and regulations. Parties hoping to protect the environment will often seek preliminary injunctions to prevent environmental harm from occurring while the case is being litigated in court. In Winter v. National Resource Defense Council (NRDC), the Supreme Court held that a lower court acted improperly in issuing a preliminary injunction that placed restrictions on the Navy’s ability to conduct training exercises off the coast of southern California. The Court’s decision in this case is improper and calls into question the efficacy of preliminary injunctions in future environmental enforcement cases, especially when it comes to cases brought against the military. In cases like this one, the Court should adopt a new approach in reviewing preliminary injunctions that will uphold the power and meaning of environmental protection laws.

I. INTRODUCTION: INJUNCTIONS AND THE ENVIRONMENT

Since the 1970s, many laws have been passed with the overarching goal of protecting the environment. Without proper enforcement of environmental protection laws, the environment will likely suffer from increased pollution levels and less biological diversity. Therefore, it is critical to ensure that these laws are enforced. A person or agency with proper standing can bring a citizen suit to enforce environmental protection laws

1 J.D. Candidate, University of North Carolina School of Law, 2010.
against alleged perpetrators. To ensure that the perpetrator does not continue to harm the environment while the action is pending in court, the plaintiff will often seek a preliminary injunction to force the perpetrator to stop or alter his environmentally detrimental practices. Without the preliminary injunction, enforcement of environmental statutes would be much more difficult.

On November 12, 2008, the Supreme Court handed down its decision in Winter v. Natural Resources Defense Council. The Court’s primary concern in this case was whether a preliminary injunction which forbade the Navy’s use of mid-frequency active (“MFA”) sonar during certain portions of its submarine training exercises off the coast of southern California was properly issued. The injunction was sought by the National Resources Defense Council (NRDC), a handful of other environmental interest groups.

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4 A preliminary injunction is a “temporary injunction issued before or during a trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.” BLACK’S LAW DICTIONARY 800 (8th ed. 2004).
5 See W. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (noting that an injunction should be issued “where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable.” (quoting Cavanaugh v. Looney, 248 U.S. 453, 456 (1919))).
7 MFA sonar is used to detect objects in the water. A constant frequency is good for detecting movement of objects, but can become overwhelmed in areas with high reflectivity for sonar. As a result, tactical MFA sonar often involves the use of both constant and rapidly shifting frequencies to detect exactly what is surrounding the sonar’s source. MFA sonar typically has a frequency between 2 and 10 kHz, and has been linked to whales stranding themselves on beaches. See generally U.S. DEPT. OF COMMERCE & SEC. OF THE NAVY, JOINT INTERIM REPORT BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15-16 MARCH 2000 (December 2001), available at http://www.awionline.org/oceans/Noise/Interim_Bahamas_Report.pdf (last visited Mar. 1, 2009) (on file with the North Carolina Journal of Law & Technology).
8 Winter, 129 S. Ct. at 370–71.
9 Established in 1970, the NRDC is an environmental interest group that aims to “protect wildlife and wild places and to ensure a healthy environment for all life on earth.” NRDC: About NRDC, http://www.nrdc.org/about/ (last visited Mar. 1, 2009) (on file with the North Carolina Journal of Law & Technology).
groups, and several concerned citizens. The injunction was granted by the United States District Court for the Central District of California on January 3, 2008, and upheld by the Court of Appeals for the Ninth Circuit on February 29, 2008. The district court granted the injunction because the Navy failed to comply with the requirements of the National Environmental Policy Act (NEPA). Specifically, the Navy failed to prepare an adequate Environmental Assessment (EA) or a subsequent Environmental Impact Statement (EIS), both of which must be prepared for proposed “major Federal actions significantly affecting the human environment.” The injunction imposed several restrictions on the Navy’s ability to use its MFA sonar in training exercises.

The Navy eventually appealed to the Supreme Court, which published three very divided opinions. The Roberts majority opined that the environmentalists’ interests were “plainly

The NRDC has over three hundred attorneys on its staff and has been party to numerous cases seeking enforcement of environmental regulations. Id.

11 NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008).
12 See Winter, 530 F. Supp. 2d at 1113–17. The injunction was designed to allow the Navy to continue its training exercises while lowering its impact on the environment. Id. NEPA was enacted to force government agencies to consider the environmental impacts of their actions. See infra notes 28–42 and accompanying text.
13 40 C.F.R. § 1,508.9 (2008). An EA must describe the action that will be taken by the government agency, discuss in detail its potential impacts on the environment, and do the same for alternatives to the agency’s proposed action. The findings in the EA help an agency, in conjunction with the Environmental Protection Agency (EPA), determine if a more extensive EIS is required. See id.
14 An EIS must be prepared by a government agency after that agency has prepared an EA and found that its actions will significantly impact the environment. The EIS must detail the effects the agency’s actions will have on the environment and must discuss alternatives to the agency’s proposed action. The agency first issues a draft EIS which the agency then submits to the public and other government agencies for comment. The agency must consider and respond to these comments in its final EIS. This forces government agencies to take environmental issues into account when deciding on courses of action. See CAA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000).
15 Winter, 530 F. Supp. 2d at 1119–21.
outweighed by the Navy’s need to conduct realistic training exercises.”18 The majority focused on two primary factors before holding that the district court had abused its discretion by granting a preliminary injunction.19 First, the Court challenged the level of probability that the district court assigned to the likelihood of the plaintiffs’ success at trial.20 Second, the Court felt that neither the district court nor the Ninth Circuit adequately considered the balance of equities between the plaintiffs and the Navy.21 For these two reasons, the Court held that the district court abused its discretion by imposing the injunctive measures challenged here by the Navy.22 Therefore, the Court vacated the portion of the district court’s injunction that the Navy challenged.23

There were two other opinions which differed from the majority. Justice Bryer, concurring in part and dissenting in part, believed that the proper solution was an injunction restricting the Navy’s use of MFA. However, the injunction should not be as stringent as the district court’s original injunction.24 On the other hand, Justice Ginsburg, who dissented, would have affirmed the lower courts’ decisions and upheld the district court’s injunction.25 Her dissent focused on the “central question” of “whether the Navy must prepare an [EIS].”26 Justice Ginsburg believed that by attempting to circumvent the NEPA process, the Navy’s actions in this case “undermined NEPA” by appealing to the Council on Environmental Quality (CEQ), a division of the White House.27

The outcome of this case is both unfortunate and improper. Its result is a signal that the Court is likely to continue to give

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18 Id. at 382.
19 Id. at 374–81.
20 Id. at 375–76. That is to say, the Supreme Court did not think that the plaintiffs were very likely to win this case if it had gone to trial in the district court. Id.
21 Id. at 376–81.
22 Id. at 382.
23 Id.
24 Id. at 387 (Breyer, J., concurring in part and dissenting in part).
25 Id. at 393 (Ginsburg, J., dissenting).
26 Id. at 387.
27 Id. at 389; see also 42 U.S.C. §§ 4342, 4344 (2000) (establishing and defining the functions and duties of the CEQ).
extraordinary deference to the military in environmental cases which may involve matters of national security, without any attempt to look into the circumstances of the military’s assertions of national security interests. This case also shows how easy it has become for agencies, particularly military branches, to avoid adhering to laws like NEPA. Courts should be more willing to grant preliminary injunctions when it comes to NEPA enforcement actions, lest agencies be allowed to do as they will without any regard to the rule of law. Without more stringent NEPA enforcement by the courts, the Act’s purposes of “sensitiz[ing] … federal agencies to the environment” and “foster[ing] precious resource preservation” will be thwarted.28

This Recent Development explains the law involved in Winter, examines the particulars of the Court’s various arguments, and offers a critique of the Court’s approach to the questions at hand. Part II discusses the legal framework of NEPA and the basic law behind preliminary injunctions. Part III relates the factual and procedural history of the case. Part IV discusses the three opinions issued in this case. Part V offers an argument in favor of a different approach that courts ought to adopt when reviewing preliminary injunctions under NEPA.

II. LEGAL FRAMEWORK:
NEPA AND THE CEQ

A. The NEPA Process

The National Environmental Policy Act29 was passed in 1969 to:

[E]ncourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems

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28 Nat’l Audubon Soc’y v. Dep’t of the Navy, 422 F.3d 174, 184 (4th Cir. 2005).
and natural resources important to the Nation; and to establish a Council on Environmental Quality.\footnote{NEPA § 2, 42 U.S.C. § 4321 (2000). It is important to note that while NEPA requires agencies to comply with these procedures, it does not force agencies to make choices that benefit the environment. The agency must only give proper consideration to environmental concerns. \textit{See id.}}

NEPA achieves this goal by requiring that every government agency comply with certain procedural requirements before an agency takes any action which may harm the environment.\footnote{\textit{See id.} § 102(2).}

The central procedural requirement of NEPA is the EIS.\footnote{\textit{See id.; see also supra note 14 and accompanying text.}} An agency must prepare an EIS any time it proposes to take an action "significantly affecting the quality of the human environment."\footnote{NEPA § 102(2)(C).} An EIS must detail the following:

i) \textit{[T]he environmental impact of the proposed action,}

ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

iii) alternatives to the proposed action,

iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.\footnote{Id.}

Before an agency prepares an EIS, the agency must first determine if its proposed action will have enough effect on the environment to warrant an EIS. To do this, the agency will prepare an EA.\footnote{\textit{See 40 C.F.R. § 1508.9 (2008); see also supra note 13 and accompanying text for a description of EAs.}} An EA serves largely the same function as an EIS, but it is often less formal and less extensive.\footnote{\textit{See 40 C.F.R. § 1508.9 (describing an EA as a "concise public document" meant to "briefly provide sufficient evidence and analysis for determining whether to prepare" an EIS).}}

Once an agency creates an EA, it can come to one of three conclusions. The agency can find that its actions will have a significant impact on the environment, thus requiring an EIS.\footnote{\textit{See NEPA § 102(2).}}
Alternatively, the agency can issue a finding of no significant impact ("FONSI"), which presents the EA and discusses why the agency found no significant impact warranting the preparation of a full EIS. The agency’s third option is to issue what is called a "mitigated FONSI," in which the agency outlines mitigating measures it will undertake in conjunction with its proposed action to lower the action’s impact below the threshold requiring an EIS.

If the agency determines that an EIS is required, it will prepare a draft EIS which it will submit for comment to any government agencies with jurisdiction over the action as well as to the public. These comments become part of the administrative record surrounding the EIS. The agency must then consider the comments and incorporate discussion of the comments into its final EIS.

B. The Council on Environmental Quality

Along with creating a procedural framework within which agencies must make their decisions, NEPA creates the CEQ. The CEQ is a part of the Executive Branch, and its three members are appointed by the President. While most of its functions are largely advisory in nature, the CEQ takes on a somewhat adjudicatory role under emergency circumstances.

If an agency feels that “emergency circumstances” will not permit it to comply with NEPA’s requirements before it takes a proposed action with significant environmental impacts, then the agency can “consult with [the CEQ] . . . about alternative arrangements.” This function of the CEQ allows agencies to take

40 NEPA § 102(2)(C).
41 Id.
43 NEPA § 202.
44 Id.
45 See NEPA § 204 (outlining CEQ duties to advise the President of trends in the environment and to propose to the President measures which will “foster and promote the improvement of environmental quality”).
47 Id.
actions which, but for the CEQ's grant of alternative arrangements, would be violations of NEPA, provided that such agency actions are "necessary to control the immediate impacts of the emergency." Any agency actions not directly related to containing the emergency can still be reviewed by the courts under NEPA.

III. HISTORY OF THE CASE:
UP, DOWN, AND ALL AROUND NEPA

The procedural history and facts surrounding Winter are "rather complicated." For many years now, the Navy has conducted integrated training exercises off of the coast of southern California. In these exercises, submarines, surface ships, and airplanes search for simulated enemy submarines. The exercises are aimed at training sailors in the detection of ultra-quiet diesel-electric submarines, which "pose a significant threat to navy vessels." To detect these enemy submarines, both Navy surface ships and submarines must use what is referred to as MFA sonar.

No Navy strike group can be deployed unless it has completed this training, and the use of MFA sonar within these integrated exercises is described by the Navy as "mission-critical." No Navy strike group can be deployed unless it has completed this training, and the use of MFA sonar within these integrated exercises is described by the Navy as "mission-critical."

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48 Id.
49 See id.
51 Id.
52 Id. at 370.
53 Id.
54 Id. Contrast "active" sonar, which actively sends out sound waves and listens to their reverberations to determine the placement of objects in the water, with "passive" sonar, which involves no production of sound, but only listening for incoming sound waves from any number of sources, including enemy submarines. Taking and Importing Marine Mammals, 72 Fed. Reg. 37,404, 37,405 (July 9, 2007) (to be codified at 50 C.F.R. pt. 216).
55 Winter, 129 S. Ct. at 371. Modern diesel-electric submarines are virtually silent and cannot be detected by any means other than MFA sonar. Hundreds of these submarines exist, some held by countries which, in the Navy's eyes, are "potential adversaries." Id. As such, training Navy personnel in the use of MFA sonar is important. Declaration of Captain Martin N. May in Support of Defendant's Opposition to Plaintiffs' Motion for A Preliminary Injunction,
The Navy's use of sonar has had negative environmental repercussions. For instance, MFA sonar has been linked to instances of certain species of whales, particularly beaked whales,\textsuperscript{56} beaching themselves on the shore. A study of one such "stranding event" by the Navy concluded that its use of MFA sonar was "the most plausible contributory source" of the beaching.\textsuperscript{57} One hypothesis for explaining the way in which beaked whales are affected by naval sonar is that, in response to hearing sonar, the whales repeatedly dive and resurface, which can "lead to embolism" and decompression sickness.\textsuperscript{58}

The Navy scheduled fourteen integrated training exercises from early 2007 through January 2009.\textsuperscript{59} As a government agency, the Navy is required to comply with NEPA when taking actions that could significantly affect the environment.\textsuperscript{60} As a first step in the NEPA process, the Navy prepared an EA in February 2007.\textsuperscript{61} The Navy devoted its EA to studying the level of harm MFA sonar would cause to certain species of marine wildlife.\textsuperscript{62} It divided these harms into two classifications: Levels A and B harassment.\textsuperscript{63} Level A harassment, the more severe of the two, is defined as an instance of physical injury, whereas Level B harassment is defined as "temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing, and breeding."\textsuperscript{64} The EA concluded

\begin{footnotesize}
\begin{itemize}
\item[56] Beaked whales are the world's deepest-diving air-breathing animal, and are particularly sensitive to naval sonar. See generally Peter L. Tyack et al., Extreme Diving of Beaked Whales, 209 J. OF EXPERIMENTAL BIOLOGY 4238 (2006).
\item[57] Winter, 129 S. Ct. at 383–84 (Breyer, J., concurring in part and dissenting in part); see also U.S. DEPT. OF COMMERCE, supra note 7, at 22.
\item[58] Tyack et al., supra note 55 at 4251.
\item[59] Winter, 129 S. Ct. at 372.
\item[61] Winter, 129 S. Ct. at 372. There was evidence to suggest that the Navy's exercises were harmful to marine mammals. See U.S. DEPT. OF COMMERCE, supra note 6, at 22; see also supra note 13 and accompanying text.
\item[63] Winter, 129 S. Ct. at 372.
\item[64] Id.
\end{itemize}
\end{footnotesize}
that MFA sonar, used over all fourteen of the Navy’s planned training exercises, would cause 170,000 instances of Level B harassment and some 564 instances of Level A harm. Of these 564 Level A harms, 436 of them were thought to be visited upon a beaked whale population that numbers only 1,121 in the southern California waters. Yet, the EA concluded that the Navy’s training exercises would not significantly affect the environment. Because of its FONSI, the Navy was not required to prepare an EIS.

Shortly after the Navy issued its EA and FONSI, the plaintiffs sued the Navy in federal district court. The plaintiffs alleged that the Navy had violated several environmental statutes, including NEPA, and sought injunctive relief. The Navy contended that an injunction would prevent it from conducting its training exercises, which the Navy argued was unacceptable given the nation’s interest in maintaining a well-trained naval fleet. The district court agreed with the plaintiffs and issued a preliminary injunction barring the Navy’s use of MFA sonar in its training exercises off of the southern California coast. The Navy then appealed to the Ninth Circuit, which remanded to the district court to impose injunctive measures which would allow the Navy to use MFA sonar while mitigating the sonar’s effects on marine wildlife. On remand, the district court, relying on extensive evidence from the

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65 Id. at 393 (Ginsburg, J., dissenting).
66 Id. at 392 (Ginsburg, J., dissenting).
67 Id. at 372.
68 Id.; see also 40 C.F.R. § 1508.13 (2008).
69 Winter, 129 S. Ct. at 372.
70 Id.
72 NRDC v. Winter, 2007 WL 2481037 (C.D. Cal. 2007) (No. 8:07-cv-0035-FMC). The District Court felt that the plaintiffs had demonstrated strong probability of success on the merits for their allegations of the Navy’s violations of NEPA and several other statutes, and that there was a substantial likelihood of irreparable harm if the injunction were not issued. See id. at *3–*11.
73 Winter, 129 S. Ct. at 373; NRDC v. Winter, 508 F.3d 885, 887 (9th Cir. 2007).
plaintiffs and the Navy, imposed six injunctive measures on the Navy's use of 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 shut down 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.

The Navy then appealed once again to the Ninth Circuit, challenging only the last two injunctive measures: the requirement of a complete shutdown when a marine mammal is nearby, and the requirement to power down during surface ducting.

Contemporaneous with its second appeal, the Navy sought relief from the CEQ. The Navy claimed that its appeal to the CEQ was necessary because the injunctions against its use of MFA sonar in its training exercises created an emergency situation, given the critical need to train its crews in the use of MFA sonar

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74 NRDC, 530 F. Supp. 2d at 1118–21.
75 Dipping sonar is a sonar-emitting device attached to a cable that is lowered into the water from a hovering helicopter. See Joint Appendix at 371, Winter, 129 S. Ct. 365 (2008) (07-1239), 2008 WL 3586903.
76 A "geographic chokepoint" is a "strategic strait or canal which could be closed or blocked to stop sea traffic." Declaration of Captain Martin N. May, supra note 54, at n.16.
77 In water, sound generally travels faster at greater depths. Sound is also generally refracted upwards in water, causing sound to go toward the surface, thus slowing the sound. Given the right sea conditions, sound that is heading toward the surface will be reflected downward. A series of upward refractions and downward reflections then cause the sound to travel much farther than it would under normal conditions. See Taking and Importing Marine Mammals, 72 Fed. Reg. at 37406 (July 9, 2007) (to be codified as 50 C.F.R. Pt. 216).
80 Id.
before deployment. In light of these "emergency circumstances," CEQ granted the Navy's application for relief. This allowed the Navy to comply with an "alternative arrangement" to NEPA, which included public notice of the Navy's mitigation efforts and invitation for public input.

With its relief from the CEQ in hand and its appeal to the Ninth Circuit pending, the Navy applied once again to the district court to have the last two measures of the injunction order vacated. The district court refused to vacate its order, questioning the legality of the CEQ's action. The Navy brought an emergency appeal, and the Ninth Circuit upheld the district court's ruling, questioning the reality of any "emergency circumstances" which the CEQ found as the basis of its action. The Ninth Circuit further held that the imposition of the last two measures of the injunction was unlikely to affect the Navy's ability to train its fleet. The Navy finally appealed to the Supreme Court, which granted certiorari.

82 See 40 C.F.R. § 1506.11. When "emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of [NEPA]," the agency, here the Navy, can consult with the CEQ to make alternative arrangements to NEPA's procedural requirements, namely the EIS. Such alternative arrangements are meant to alleviate only the "immediate impacts of the emergency." Id.
84 Id.
85 Winter, 129 S. Ct. at 374.
87 NRDC v. Winter, 518 F.3d 658, 681 (9th Cir. 2008). The Court of Appeals and the District Court used the Chevron standard in determining that the CEQ's finding that the Navy's need to avoid NEPA's requirements constituted "emergency circumstances" was contrary to the plain meaning of CEQ's regulations. See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984). See also 40 C.F.R. § 1506.11 (2008) (allowing CEQ to create alternative arrangements when emergency circumstances exist).
88 NRDC v. Winter, 518 F.3d at 699–702.
IV. THE COURT’S OPINIONS

A. The Majority Opinion

Chief Justice Roberts wrote a five-justice majority opinion. The opinion begins by listing the elements a plaintiff must show to obtain a preliminary injunction: “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.”90 According to the majority opinion, there were serious questions as to whether the plaintiffs’ claim in this case could pass muster on any of these four requirements.91 The opinion focuses heavily on the balance of equities between the Navy on the one hand and the environmental interests of the plaintiffs on the other.92 The majority was also concerned with the legal standards the district court used in adopting its injunction, especially the district court’s scant discussion of the balance of equities between the parties.93 The Court ultimately vacated the last two measures of the lower court’s injunction, which were the 2,200-yard shut-down zone and the prohibition on using MFA sonar during surface ducting conditions.94

1. The Plaintiffs’ Claims and Their Likelihood of Success

The Court dealt briefly with this first prong of the test, the plaintiffs’ likelihood of success on the merits, for the appropriateness of a preliminary injunction.95 While the lower courts both determined that the plaintiffs were likely to succeed on the merits at trial, the Supreme Court gave some credence to the Navy’s contention that the plaintiffs’ success was not likely given the CEQ’s determination of emergency circumstances.96 The lower courts agreed with plaintiffs’ argument that the CEQ was

90 Winter, 129 S. Ct. at 374 (citing Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987); see also supra notes 45–46 and accompanying text.
91 See Winter v. NRDC, 129 S. Ct. at 374–82.
92 Id. at 376–78.
93 Id. at 374–76.
94 Id. at 382.
95 See id. at 375.
96 Id.
incorrect in its interpretation of what constitutes emergency circumstances. While the Court’s discussion of this prong was relatively cursory, its conclusions about the plaintiffs’ likelihood of success were ultimately unimportant to the Court’s analysis, as the Court attacked the plaintiffs’ claims on other grounds.

The Court spent a significant amount of time dealing with the possibility of irreparable harm to plaintiffs in the absence of injunctive relief. The lower court stated that when a plaintiff can show a likelihood of success on the merits, a court may grant an injunction when the plaintiff shows a mere “possibility” of irreparable harm. The Navy argued that requiring only a possibility of irreparable harm is a misstatement of the standard for granting injunctive relief, and that this alone is enough to overturn the lower courts’ rulings. The Navy also argued that the plaintiffs, in order to show an irreparable harm for which they would have standing to bring a lawsuit, must show some “species-level harm” that would directly adversely affect “their scientific, recreational or ecological interests.”

On the other hand, the plaintiffs contended that no matter what constituted an “irreparable harm,” they would prevail on this point because the lower courts found that it was “a near certainty” that such harm would occur.

In discussing the lower courts’ assessment of the possibility of irreparable harm to the plaintiffs, the Court raised two concerns. First, the Court found that it is “not clear” whether the lower courts’ articulation of an improper standard of review has any effect on its decision, given that the lower courts found “a near certainty” of irreparable harm. However, regardless of what standard the lower courts adopted, the Court reasoned that they

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98 Winter, 129 S. Ct. at 375–76.
99 Id. at 375. Here, the irreparable harm to the plaintiffs is the injuries which might be visited upon the marine mammals that the plaintiffs study, admire, and wish to protect.
100 Id.
101 Id. (emphasis in original).
102 Id.
103 Id. at 376.
104 Id.
applied those standards to the wrong facts. The Navy, at this point in the case’s long history of litigation, was challenging only two of the six mitigating measures imposed in the district court’s original injunction. Therefore, in the Court’s view, the district court should have considered the plaintiffs’ likelihood of irreparable harm given the remaining four mitigation measures imposed on the Navy by that court, rather than considering the potential harm without those protective measures. This is “significant” in the Court’s view because the remaining four mitigation measures, particularly the twelve-mile coastal exclusionary zone, would surely result in a reduced number of harms visited upon marine life by MFA sonar, and would accordingly change the analysis of the plaintiffs’ likelihood of harm.

2. The Public Interest and the Balance of Equities

The Court went on to address the remaining two factors in the test for the appropriateness of a grant of injunctive relief: the balance of equities between the two parties, and the public interest. The balance of equities inquiry weighs the burdens and hardships that will be placed on either party if the injunction is left in place or lifted, while the public interest inquiry determines whether the public will benefit most by the lifting or continuation of the injunction. The Court resolved both of these questions in the Navy’s favor.

In doing so the Court relied heavily on the opinions and statements of seasoned Navy officers. One such Naval officer pointed out that the need for training in MFA sonar is “mission-critical,” while other officers asserted that it would be extremely

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105 Id.
106 Id. at 374.
107 Id. at 376.
108 Id.
109 See id. at 376–81.
110 Id. at 376–77.
111 See id. at 378.
112 See id. at 376–81.
113 See id.
114 Id. at 377; see also NEPA, supra note 29 and accompanying text.
difficult to train submarine crews effectively to detect enemy diesel-electric submarines if the injunction’s last two mitigation measures were imposed.\footnote{Winter, 129 S. Ct. at 377.} In the Court’s view, imposing the mitigation measures in question would be tantamount to “forcing the Navy to deploy an inadequately trained antisubmarine force,” an outcome which would “jeopardize[] the safety of the fleet.”\footnote{Id. at 378.} The interests the Navy and the public have in a well-trained naval fleet was weighed against the interests that the plaintiffs and the public have in protecting the marine species that MFA sonar may harm.\footnote{Id.} The Court noted that any ambiguity about the balance of equities and the public’s interest “does not strike us as a close question,”\footnote{Id.} and it is therefore unlikely that the public would choose the environmental interests over a well-trained Navy.

The Supreme Court analyzed these issues differently than the lower courts. While the Supreme Court felt that the last two mitigation measures of the injunction were overly burdensome on the Navy, both the district court and the Ninth Circuit felt that the imposition of the same measures would merely force the Navy to “alter and adapt” its training methods.\footnote{NRDC v. Winter, 527 F. Supp. 2d 1216, 1238 (C.D. Cal. 2008); see also NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008).} The Court of Appeals for the Ninth Circuit held that the 2,200-yard MFA sonar shut-down zone was similar enough to the Navy’s own 2,000-meter shut-down zone for low-frequency active sonar as to be practically indistinguishable.\footnote{Winter, 518 F.3d at 701. Note that the difference between 2,000 meters and 2,200 yards is a little less than thirteen yards.} The Ninth Circuit also noted that several other national navies’ regulations require the shutdown of active sonar when a marine mammal is detected within 2,000 meters of a sonar-emitting ship.\footnote{Id. at n.67 (noting that NATO requires a shut-down of active sonar if a marine mammal is detected within 2,000 meters, while the Australian Navy requires such a shut-down if a marine mammal is detected within 4,000 yards of the ship in question).} With regard to the restrictions on the use of sonar during surface ducting conditions, the Ninth Circuit also...
determined that ordering these were not burdensome because the Navy had previously certified submarine strike groups, which had not previously been trained under surface ducting conditions, as ready for deployment. With regard to these assertions, the Supreme Court states that the Ninth Circuit Court of Appeals' "reasoning [was] backwards," and that the lower courts "did not give sufficient weight to the views of several top Navy officials."  

3. Abuse of Discretion and Order Vacated

The Supreme Court concluded its discussion by turning once more to the balance of equities between the Navy's and public's interest in a well-trained military and the plaintiffs' interests in environmental protection. While the Court emphasized that it did not mean to belittle the "importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals," the Court nevertheless held that those interests were "plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines." Thus, the Court reversed the Ninth Circuit and vacated the district court's injunction order with respect to the 2,200 yard shut-down zone and the restrictions put in place during surface ducting conditions.

B. The Minority Opinions

In addition to the five-justice majority opinion, two minority opinions were issued in this case, one by Justice Breyer, who concurred in part and dissented in part, and another by Justice

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122 Id. at 701-02.
123 Winter, 129 S. Ct. at 380.
124 Id. at 379. The Court has great precedent for giving deference to the determinations of military officials, even in the face of restrictions on constitutional rights such as free speech. See, e.g., Chappell v. Wallace, 462 U.S. 296, 300 (1986) (noting that courts must "hesitate long before . . . the court . . . tamper[s] with the established relationship between enlisted military personnel and their superior officers," even when that relationship allegedly resulted in discriminatory treatment toward the plaintiffs).
125 Winter, 129 S. Ct. at 381-82.
126 Id. at 382.
127 Id.
Ginsburg, who dissented. Justice Breyer began by noting that the plaintiffs' "argument favoring the District Court injunction is a strong one." However, he remained convinced that the Navy's interest is weightier than the plaintiffs'. His strongest argument was that the Navy offered as evidence several senior officers' affidavits that had the overarching message that the mitigation measures in question would be fatal to the Navy's mission to train its sailors, however, neither lower court gave an adequate reason why those affidavits were not accepted at face value. Given these facts, Justice Breyer concluded, like the majority, that the last two mitigation measures were inappropriate as written and must be vacated.

Justice Ginsburg's opinion took a slightly different approach in attacking the majority's conclusions. Rather than focusing on the balance of equities between the two parties, Justice Ginsburg framed her discussion as one concerning a simple violation of NEPA's requirements. In the case at hand, the Navy prepared an EA that predicted some significant impacts on the environment, but did not follow-up with an EIS. However, at the time of this case's decision, the Navy was in the process of preparing an EIS, which was to be completed by January 2009, as part of the alternative arrangements created by the CEQ.

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128 Winter, 129 S. Ct. at 382 (Breyer, J., concurring in part and dissenting in part).
129 Id. at 383.
130 Id. at 384–86.
131 Winter, 129 S. Ct. at 386 (Breyer, J., concurring in part and dissenting in part). Justice Breyer would have imposed a less stringent version of both of the mitigation measures. In his opinion, MFA sonar can still be used, even if a marine mammal is detected within 2,200 yards, but only if that occurs during a "critical point in the exercise." Id. at 387. He would also require total shutdown of MFA sonar during surface ducting conditions if a marine mammal is detected within 500 meters, with a sliding scale of reduction at greater distances. Id. These restrictions are consistent with the Ninth Circuit's Order from February 29, 2008. See NRDC v. Winter, 518 F.3d 704, 705–06 (9th Cir. 2008).
133 Id. at 388.
134 Id. at 387; see supra notes 37–43 and accompanying text.
Justice Ginsburg also pointed out that the “EIS is NEPA’s core requirement.”\textsuperscript{135} As such, “the timing of an EIS is critical”\textsuperscript{136} because it makes the public and government agencies aware of the possible environmental harms that could result from the agencies’ actions before they take them.\textsuperscript{137} Had the Navy prepared an EIS before its training exercises as required under NEPA, plaintiffs would have no grounds to mount a direct challenge to the Navy under NEPA.\textsuperscript{138}

Finally, Justice Ginsburg noted that “[f]lexibility is the hallmark of equity jurisdiction.”\textsuperscript{139} She is concerned that the majority opinion leaves the impression that a plaintiff seeking equitable relief, like a preliminary injunction, will be forced to meet a set of formulaic, rigidly set bars and requirements to prevail.\textsuperscript{140} Rather, equity ought to be based on a “sliding scale” of factors, wherein injunctive relief might be granted “based on a lower likelihood of harm when the likelihood of success is very high.”\textsuperscript{141} Justice Ginsburg concludes by noting that, in her view, the balance of equities and the public interest lie with the plaintiffs, and therefore the Ninth Circuit decision ought to have been affirmed and the injunction upheld.\textsuperscript{142}

V. THE SLIDING SCALE AND MILITARY DEFERENCE

This case should have been decided in the plaintiffs’ favor. One way to overcome the majority’s assertion that the plaintiffs failed to meet their burden of establishing a likelihood of harm would be to use the “sliding scale” Justice Ginsburg described in her dissent.\textsuperscript{144} Historically, the driving force behind equity

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\textsuperscript{135} Id. at 389 (Ginsburg, J., dissenting).
\textsuperscript{136} Id. at 390.
\textsuperscript{137} Id. at 389–90.
\textsuperscript{138} Id. The plaintiffs would still likely have claims under other environmental statutes.
\textsuperscript{139} Id. at 391.
\textsuperscript{140} Id. at 391–92.
\textsuperscript{141} Id. at 392.
\textsuperscript{142} Id. at 393.
\textsuperscript{143} See id. at 374–76.
\textsuperscript{144} See id. at 392.
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jurisdiction was “the power of the Chancellor” to render a fair decision based on “the necessities of the particular case.” As the Court’s precedent points out, the unquantifiable nature of environmental harms favors the issuance of an injunction in most cases. An injunction ought to be granted unless the environmental harms at issue are slight or not likely to occur compared to the other interests in a given case. At the very least this will provide time for study and mitigation, both of which are the goals of NEPA.

The Supreme Court adopted this approach in Amoco Production Co. v. Gambell. In that case, the Supreme Court was dealing with the Department of Interior’s decision to lease oil and gas rights off of the Alaskan coast. The plaintiffs, two Alaskan villages and an organization of Alaskan Natives, sought to enjoin the sale of these leases, citing potential harm to their subsistence way of life. The Court, in discussing what must be shown before a preliminary injunction can be issued, described the test as one where a court “must balance the competing claims of injury” by the parties to the suit to determine “the effect on each party of the granting or withholding” of an injunction. While this formulation of the test for a preliminary injunction did not lead to the actual issuance of an injunction in Gambell, such a test would likely have a strong bearing on the outcome in Winter, Winter, 129 S. Ct. at 391–92 (citations omitted). See, e.g., Amoco Production Co. v. Gambell, 480 U.S. 531, 545 (1987) (noting that environmental harms are difficult to quantify, and that if such a harm is “sufficiently likely, [then] . . . the balance of harms will usually favor the issuance of an injunction to protect the environment”). See id. See NEPA § 2, 42 U.S.C. § 4321 (2000).


Id. at 534.

Id.

Id. at 542.

Id. at 542.

See id. The Court held that the required likelihood of harm to plaintiffs had not been shown, while the defendant oil company had expended nearly $70 million in preparation for oil and gas exploration. Id. at 545.
particularly because the lower courts established "a near certainty" of irreparable harm to plaintiffs' interests.154

Furthermore, the formulation of the injunction test used by the Supreme Court in Winter is inherently different from the Court's earlier formulation in Gambell. While the Court in Gambell characterized the test generally as one of balancing,155 in Winter, the Court outlined a four-part test, of which each portion must be satisfied before an injunction can be issued.156 The newly defined test from Winter places a greater burden on potential plaintiffs, in that they must establish at the outset both their likelihood of success on the merits and their likelihood of suffering irreparable harm without injunctive relief.157 This new, formulaic rubric for the issuance of an injunction removes much of the flexibility that has historically been the "hallmark of equity jurisdiction,"158 and will likely lead to a reduced number of injunctions in environmental enforcement actions. Because of the Court's historic recognition of the difficulties in quantifying and preventing environmental harms,159 and in light of a historic preference for issuing injunctions to protect the environment,160 the formulation of the preliminary injunction test from the Gambell case should be employed by courts when deciding environmental enforcement cases.

Finally, courts confronted with scenarios similar to the one in Winter can help themselves reach a different conclusion by taking a different approach to the amount of deference given to military officials. As the Court points out in this case, courts generally "give great deference to the professional judgment of military authorities concerning the relative importance of a particularly

155 See Gambell, 480 U.S. at 534–42.
156 Winter, 129 S. Ct. at 374.
157 See id. Note that the plaintiffs likelihood of suffering irreparable harm has two distinct elements—the likelihood of the harm and the magnitude of the harm. Under the test from Winter, if a plaintiff's case is deficient on either of these two points, his bid for an injunction will be unsuccessful.
158 Winter, 129 S. Ct. at 391 (Ginsburg, J., dissenting).
160 See id.
military interest." There is often good reason for this, for most judges do not “begin the day with briefings that may describe new and serious threats” to the nation.

However, there are some instances where judicial oversight of military decisions is appropriate. One case which demonstrated this in a scenario quite similar to the one in Winter was National Audubon Society v. Dep’t of the Navy. In that case, the U.S. Court of Appeals for the Fourth Circuit was confronted with the Navy’s decision to locate a new practice outlying landing field (“OLF”) for its jets near a wildlife refuge that served as the winter home for several species of migratory waterfowl. The primary issue in the case was whether the EIS which the Navy had prepared prior to its construction of the OLF was sufficient. The Fourth Circuit held, over the Navy’s objections, that the Navy’s EIS was insufficient, and that an injunction was not overly burdensome because the Navy had alternative methods of achieving its training goals.

National Audubon Society demonstrates that not all military decisions are beyond the reach of judicial review. To be sure, the military deference cited approvingly by the Supreme Court in Winter should apply to decisions involving purely strategic or tactical questions, and would almost certainly place combat decisions outside of the jurisdiction of the courts. However, when it comes to decisions by the military that are largely logistical in nature, courts should be more willing to inject themselves into the military’s decision-making process and correct any grievous harm they may encounter.

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161 Winter, 129 S. Ct. at 377 (citation omitted).
162 Id. (citing Boumedine v. Bush, 128 S. Ct. 2229, 2276–77 (2008)).
163 422 F.3d 174 (4th Cir. 2005).
164 Id. at 181–83.
165 Id. at 183.
166 Id. at 196 (noting both other potential OLF sites and the option of “homebasing” alternatives (emphasis omitted)).
VI. CONCLUSION

The Court ultimately decided against the environmental plaintiffs in this case, ruling that the Navy’s and the nation’s interests in a well-trained military outweighed the admittedly costly environmental harms the Navy will likely cause through its use of MFA sonar. In this case, based on equitable principles, the equitable doctrines that permeate the dissent from Justice Ginsburg should have held sway. To further protect the environmental interests at stake in future cases similar to this one, courts should incorporate more equitable protections for the environment to protect it from government over-reaching and malfeasance. An increased reliance on the balancing aspects of the historic test for the issuance of an injunction and a reduction in the deferential treatment given to logistical military decisions can help to avoid the unfortunate result wrought in this case.