LEGAL UPDATE

WINTER V. NATIONAL RESOURCES DEFENSE COUNCIL: GOING INTO THE BELLY OF THE WHALE OF PRELIMINARY INJUNCTIONS AND ENVIRONMENTAL LAW

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I. INTRODUCTION

Which priority reigns supreme: conducting essential military preparedness training or protecting treasured sea mammals such as dolphins and whales? The American media, in covering *Winter v. Natural Resources Defense Council*,[1] framed the legal battle as a quagmire between the U.S. Navy, reasonably and necessarily testing a new mid-frequency sonar detection system, and environmentalists, staunchly trying to protect their underwater friends that some experts said were dying because of the activities.[2] At least one major newspaper declared upon release of the Supreme Court's decision, "Navy over Whales,"[3] as if Monstro, the vilified whale from the children's

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[1] 129 S. Ct. 365 (2008).

[2] David G. Savage, *Court OKs Navy Sonar Use*, CHI. TRIB., Nov. 13, 2008, at A7.

[3] Renee Schoof, *High Court Sides With Navy Over Whales*, SACRAMENTO BEE, Nov. 13, 2008, at 3A.

story *Pinocchio*, had argued the case himself before the justices.

By the time *Winter* arrived in the Supreme Court, securing a place in the rare category of cases in the high court that have been presciently portrayed by the popular television series "The X-Files,"[4] the case had jumped between the Central District Court of California and the Ninth Circuit Court of Appeals for over two years, with at least nine different court hearings.[5] In March 2007, the National Resources Defense Council ("NRDC") initiated a legal action against the United States Navy to halt the continued use of mid-frequency sonar in training exercises.[6] This sonar system, the NRDC argued, posed a significant risk to marine life in the region, with affects on the natural wildlife including mass strandings, "mass habitat displacement and hearing loss, as well as adverse behavioral alterations - including changes in feeding, diving, and social behavior - that the National Marine Fisheries Service ("NMFS") characterized as 'profound.'"[7]

On appeal, the Supreme Court reversed the Ninth Circuit's decision and vacated the injunction as challenged by the Navy.[8] The majority relied on two rationales to support its reversal. First, the Court deemed the Ninth Circuit's standard of "possible irreparable harm" to be incongruously lenient of the Supreme Court's requirement of "likely irreparable harm" for equitable relief.[9] Second, the majority ruled that, even with such irreparable injury, the "injury [to marine life] was outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors," and granting the preliminary injunction for the NRDC was outside of the court's discretion.[10] Both halves of the *Jacobsen* decision have high precedential value, and the ramifications of the assessment of irreparable harm and the balance of equities will make it more difficult to obtain injunctions, particularly against federal and state agencies.

II. BACKGROUND – A BRIEF MODERN HISTORY OF ENVIRONMENTAL LEGISLATION AND ENVIRONMENTAL LITIGATIVE ADVOCACY

Modern environmental law materialized as part of a broader movement in

[4] *The X-Files: Drive* (Fox television broadcast Nov. 15, 1998) (episode portrayed injuries to civilians that were unintentionally subjected to a surge from a military ground conduction radio system codenamed Project Seafarer).

[5] *Winter*, 129 S. Ct. at 372-74.

[6] Press Release, Nat'l Res. Def. Council, Navy Hit with Lawsuits after Rejecting Coastal Commission Safeguards for Massive High-Intensity Sonar Exercises off Southern California Coast (March 22, 2007), *available at* http://www.nrdc.org/media/2007/070322a.asp.

[7] Brief for the Respondents at 2-5, Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365 (2008) (No. 07-1239), 2008 WL 4154536.

[8] *Winter*, 129 S. Ct. at 382.

[9] *Id.* at 375-76.

[10] *Id.* at 376.

the 1960s, from which emerged the Environmental Protection Agency.[11] Legislation formed during that period, including the National Environmental Policy Act[12] ("NEPA") and the Coastal Zone Management Act[13] ("CZMA"), regulates the actions of public and private actors to mitigate environmental damage and protect natural resources.[14] NEPA, originally passed in 1970, requires federal agencies to publish a detailed environmental impact statement ("EIS") before it takes any "major federal action" and also requires that these federal actions are congruent with the goal of maintaining the environment.[15] The EIS statement must include all reasonably foreseeable future environmental impacts.[16] The reporting procedure has placed environmental concerns in the public sphere and served as a springboard for litigation against federal acts with serious environmental consequences.[17] NEPA does not, however, require agencies to choose the most Earth-friendly path – the actions must only be exposed to public pressure to help reflect environmental values.[18]

Congress drafted and passed CZMA in 1972 to promote transparency, with a focus on coordinating the preservation efforts of federal and state agencies.[19] CZMA mandates that federal activities "shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."[20] To this end, federal agencies must submit consistency statements to state agencies before taking any action.[21] However, states cannot unilaterally halt federal action and the President has the authority to exempt federal agencies from these obligations.[22]

The reporting requirements of NEPA and CZMA have provided a stable cause of action for environmental litigants, but the procedural nature of the statutes limits that success.[23] Another hurdle for environmental litigants is that

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[11] *See* Jack Lewis, *Looking Backward: A Historical Perspective on Environmental Regulations*, EPA J., March 1998, *available at* http://www.epa.gov/history/topics/regulate/01.htm.

[12] 42 U.S.C. §§ 4321-4370 (2006).

[13] 16 U.S.C. §§ 1451-1466 (2006).

[14] *See* History of the Clean Water Act, http://www.epa.gov/lawsregs/laws/cwahistory.html (last visited Apr. 14, 2009).

[15] Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 24-26 (2009).

[16] Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing For Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 58-60 (2009) (citing 40 C.F.R. §§ 1502.1, 1508.7, 1508.25(a)(2) (2007)).

[17] Krishnakumar, *supra* note 15, at 25-26.

[18] *Id.* at 25.

[19] Linda Krop, *Defending State's Rights Under the Coastal Zone Management Act* - State of California v. Norton, 8 SUSTAINABLE DEV. L. & POL'Y 54, 55-56 (2007).

[20] 16 U.S.C. § 1456(c)(1)(A) (2006).

[21] 16 U.S.C. § 1456(c)(1)(C) (2006).

[22] *See* 16 U.S.C. § 1456(c)(1)(B) (2006); 16 U.S.C. § 1456(c)(3)(A) (2006).

[23] Mank, *supra* note 16, at 6.

the predominant source of judicial remedies – financial damages – is often not an appropriate award. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."[24] As a result, litigants filing claims under environmental law often seek preliminary injunctions or other declaratory relief.[25] Such injunctions are discretionary and to be used only when other legal remedies would be inadequate.[26] Regardless of the type of claim, a plaintiff seeking a preliminary injunction must establish that: (1) he is likely to succeed on the merits; (2) the presence of irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) that an injunction is in the public interest.[27] Until the *Winter* decision, a non-remote probability of irreparable harm was enough to satisfy this eligibility standard.[28]

III. *WINTER V. NATIONAL RESOURCE DEFENSE COUNCIL*

This case revolves around the U.S. Navy's use of sonar while conducting training exercises off of the coast of Southern California.[29] Sonar has many applications in both commercial and defensive contexts and is primarily utilized to determine the distance between two objects in the water.[30] Recently, the U.S. Navy has been perfecting its use of mid-frequency sonar ("MFS"), an active sonar system that transmits sound waves at frequencies between 1 kHz and 10 kHz to remotely determine a vessel's distance and bearing.[31]

In March 2000, seventeen marine mammals of varying species beached themselves within hours of each other in Northeast and Northwest Providence Channels of the Bahamas Islands, with at least seven perishing on land.[32] Many of the affected animals demonstrated signs of acoustic trauma, including bleeding from the ears – a dehabilitating injury for a sonar-dependent animal.[33] The report links this trauma to the cause of death in the absence of any other perceivable symptoms or illness.[34] A joint report from the U.S. Department of

[24] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987).

[25] *Id.*

[26] Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12 (1982).

[27] *Winter*, 129 S. Ct. at 374.

[28] *Id.* at 375 (citing Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007)).

[29] *Id.* at 371.

[30] Elena M. McCarthy, *International Regulation of Transboundary Pollutants: The Emerging Challenge Of Ocean Noise*, 6 OCEAN & COASTAL L.J. 257, 265 (2001).

[31] *Winter*, 129 S. Ct. at 370-71.

[32] U.S. DEP'T OF COMMERCE & SEC'Y OF THE U.S. NAVY, JOINT INTERIM REPORT: BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15-16 MARCH 2000 2 (2001), *available at* http://www.nmfs.noaa.gov/pr/pdfs/health/stranding_bahamas2000.pdf.

[33] *Id.* at 3.

[34] *Id.*

Commerce and the U.S. Navy determined that "tactical mid-range frequency sonars aboard U.S. Navy ships that were in use during the sonar exercise in question were the most plausible source of this acoustic or impulse trauma."[35] The media, at the time, reported this as the first evidence of a long-speculated link between sonar use and marine life[36] and scholars have since linked over a dozen incidents of marine mammal injury to sonar use.[37] By 2006, the U.S. Navy had voluntarily initiated several practices to reduce injuries to marine mammals, including,

> a 1,000 meter safety zone, with a 6 decibel power-down if marine mammals are within 1,000 meters of the sonar source; an expanded 2,000 meter safety zone in surface-ducting conditions; a power-down in low-visibility conditions; and geographical restrictions (e.g., no sonar use within 25 kilometers of the 200 meter isobath (coastal waters)).[38]

A. History of Case Proceedings

In February 2007, the U.S. Navy released a NEPA-required environmental assessment for a series of fourteen training exercises it planned to perform off of the coast of Southern California through January 2009.[39] This report included a series of voluntary mitigation techniques planned by the Navy to prevent damage to the marine wildlife, but was not as detailed as an EIS.[40] The Navy predicted there would be as many as 8,000 incidents of temporary hearing impairment for marine mammals and 466 incidents of permanent impairment.[41]

In March 2007, the NRDC led a consortium of groups in a legal action seeking relief against the Navy, claiming that the February 2007 report was not an adequate fulfillment of its legal duties under NEPA, CZMA, the Endangered Species Act ("ESA"), and the Administrative Procedures Act ("APA").[42] The NRDC also requested a preliminary injunction to halt the use of the mid-frequency sonar during the remaining exercises.[43] The district court found for NRDC and issued a preliminary injunction banning all use of the

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[35] *Id.* at 2.

[36] *Navy to study possible link between beached whales and sonar*, CNN.COM, July 28, 2000, http://archives.cnn.com/2000/NATURE/07/28/beached.whales/index.html.

[37] Joel R. Reynolds, *Submarines, Sonar, and the Death of Whales: Enforcing the Delicate Balance of Environmental Compliance and National Security in Military Training*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 759, 762-70 (2008).

[38] Brief for the Respondents at 7, Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2008) (No. 07-1239), 2008 WL 4154536.

[39] *Winter*, 129 S. Ct. at 372.

[40] *Id.*

[41] Natural Res. Def. Council v. Winter, No. 8:07-cv-00335-FMC-FMOx, 2007 WL 2481037, at *1 (C.D. Cal. Aug. 7, 2007) [hereinafter *NRDC I*].

[42] *Id.* at *1-2.

[43] *Id.* at *2.

mid-frequency sonar during the exercises, finding that the Navy's failure to submit a proper EIS as created a strong likelihood of success on the merits of the claim.[44] On appeal, the Ninth Circuit stayed the preliminary injunction and remanded the issue back to the district court for a modified order.[45] The court held that the injunction was not properly tailored to remedy the alleged harm, demonstrating a failure of judicial discretion.[46] The Ninth Circuit did, however, affirm the grounds for the preliminary injunction, stating that "[h]aving heard arguments on that question and having considered the effect that narrowly tailored mitigation conditions might have on the parties' interests, we conclude that such an injunction would be appropriate."[47]

On remand, the district court issued a new preliminary injunction, allowing the Navy conditional use of MFS. Specifically, the Navy could include the use of mid-frequency sonar as part of the training exercises only by maintaining its pre-existing mitigation measures and by

> (1) imposing a 12-mile "exclusion zone" from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of "helicopter-dipping" sonar; (4) limiting the use of MFA sonar in geographic "choke points"; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions . . . .[48]

With the exception of the size of the shutdown zone and the surface ducting restrictions, these measures were superfluous to the mitigation measures already taken by the Navy.[49] However, the district court believed the new measures would minimize the risk of interaction with wildlife without unfairly burdening the Navy.[50] The district court further affirmed the underlying principles of the preliminary injunction on essentially the same grounds as before: (1) the probability of plaintiff's success under NEPA and CZMA;[51] (2) the possibility of irreparable harm;[52] (3) the balance of equities; and (4) the concern for the public interest.[53]

At this point, the U.S. Navy sought outside assistance from the Executive

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[44] *Id.* at *7.

[45] Natural Res. Def. Council v. Winter, 508 F.3d 885, 887 (9th Cir. 2007) [hereinafter *NRDC II*].

[46] *Id.* at 886.

[47] *Id.* at 887.

[48] *Winter*, 129 S. Ct. at 373.

[49] Natural Res. Def. Council v. Winter, 530 F. Supp. 2d 1110, 1118 n.6 (C.D. Cal. 2008) [hereinafter *NRDC III*].

[50] *Id.* at 1118-21.

[51] *Id*. at 1113-17.

[52] *Id.* at 1118.

[53] *Id.*

Branch. President George W. Bush, in the interest of national security, quickly issued a memorandum exempting the Navy's subject training missions from CZMA.[54] Additionally, the Council on Environmental Quality ("CEQ"), a White House agency, approved the Navy's alternative compliance arrangements with NEPA, claiming that emergency circumstances prevented normal compliance.[55] With the executive branch's backing, the Navy sought to overturn two of the injunction's limitations: the 2,200 yard shutdown zone and the reduced power during surface ducting activities.[56] The district court, however, denied the Navy's motion.[57] The district court reluctantly recognized the ability of the President to exempt the Navy from the provisions of CZMA, but declined to recognize the grounds that the CEQ had used to assert its authority under NEPA.[58] On appeal, the Ninth Circuit upheld the modified basis of the district court's decision and affirmed the validity of the preliminary injunction.[59]

B. Winter *in the Supreme Court: Debating Irreparable Injury*

The Navy quickly appealed the Ninth Circuit's decision in *NRDC V* and the Supreme Court granted certiorari.[60] In its decision, a majority of the Court overruled the Ninth Circuit and vacated the modified preliminary injunction against the Navy's sonar practices.[61] The decision, written by Chief Justice Roberts, wasted no time in attacking the injunction's legal grounds, which were constantly supported for two years in the lower courts. The majority then laid out the Court's groundwork requirements for a preliminary injunction. "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

[54] Memorandum for the Sec'y of Def. & the Sec'y of Commerce, 2008 WL 143626 (Jan. 16, 2008).

[55] Decision Memorandum Accepting Alternative Arrangements for the U.S. Navy's Southern California Operating Area Composite Training Unit Exercises (COMPTUEXs) & Joint Task Force Exercises (JTFEXs) Scheduled To Occur Between Today and January 2009, 73 Fed. Reg. 4189, 4191-93 (Jan. 24, 2008).

[56] Reply in Support of Defendant Ex Parte Application for Immediate Vacatur of Preliminary Injunction or Partial Stay Pending Appeal at 10-13, 23-25, Natural Res. Def. Council, Inc. v. Winter, 527 F. Supp. 2d 1216 (9th Cir. 2008) (No. 807CV00335), 2008 WL 909563. For a definition of surface ducting, *see Winter*, 129 S. Ct. at 380 ("Surface ducting is a phenomenon in which relatively little sound energy penetrates beyond a narrow layer near the surface of the water. When surface ducting occurs, active sonar becomes more useful near the surface but less useful at greater depths.").

[57] Natural Res. Def. Council v. Winter, 527 F. Supp. 2d 1216, 1219-20 (C.D. Cal. 2008) [hereinafter *NRDC IV*].

[58] *Id.* at 1225-37.

[59] Natural Res. Def. Council v. Winter, 518 F.3d 658, 661 (9th Cir. 2008) [hereinafter *NRDC V*].

[60] *Winter*, 129 S. Ct. at 374.

[61] *Id.* at 369-70.

absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[62] Here, the Court makes a clear distinction between its standard and the Ninth Circuit's, which, by the Court's interpretation, required only a "possibility of irreparable harm."[63] However, the Court used this standard only in cases where the probability of success on the merits was sufficient to justify a lower standard of irreparable harm.[64] In her dissent, Justice Ginsburg notes that this spectrum provided flexibility to standards of equity and to the goals of NEPA.[65]

The Supreme Court, relying on its own precedent, utilized the higher standard of "likely irreparable harm."[66] But the two leading cases cited by the majority – *City of Los Angeles v. Lyons* and *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local No. 70* – require a showing of a likelihood of irreparable harm, not likely irreparable harm.[67] The use of *Lyons* as precedent is particularly interesting, as it seems clearly distinguishable from *Winter*. In *Lyons*, the Court addressed the use of prior actions as evidence of a reasonable chance of future injury, not the likelihood of projected future injury. *Lyons* held that such effects, in the context of past police brutality claims precipitating future claims, "do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy."[68]

Additionally, the subject terms used by the majority to describe the probability of harm – "possible," "likely," and "likelihood" – are ambiguous and are not explicitly defined in *Winter*. In *Lyons*, likelihood of injury is a threat beyond the possibility of remote future injury,[69] while, in the context of other equitable relief cases, the "likelihood-of-success-on-the-merits test" requires a reasonable probability of success.[70] Chief Justice Roberts may have meant that a likely irreparable harm would need to be probable, or an event more likely than not, but this is not clear. Even less helpful is Chief Justice Roberts' recent dissent in *Massachusetts v. E.P.A.*,[71] where he declared that, for equitable relief, "injury . . . must be 'actual or imminent, not conjectural or hypothetical.'"[72] This standard does not incorporate a standard for assessing

[62] *Id.* at 374 (emphasis added).

[63] *Id.* at 375 (citing *NRDC V*, 518 F.3d at 696-97).

[64] *Faith Ctr. Church Evangelistic Ministries*, 480 F.3d at 906.

[65] *Winter*, 129 S. Ct. at 391-92 (Ginsburg, J., dissenting).

[66] *Id*. at 375.

[67] City of Los Angeles v. Lyons, 461 U.S. 95, 103-04 (1983); Granny Goose Foods, Inc. v. Bhd. of Teamsters Local No. 70, 415 U.S. 423, 441-42 (1974).

[68] *City of Los Angeles*, 461 U.S. at 103-04.

[69] *Winter*, 129 S. Ct. at 375-76. *See also* Wisdom Imp. Sales Co. v. Labatt Brewing Co., 339 F.3d 101, 113-14 (2d Cir. 2003) ("[H]arm must be actual and imminent, not remote and speculative").

[70] BLACK'S LAW DICTIONARY 938 (7th ed. 1999).

[71] 549 U.S. 497 (2007).

[72] *Id.* at 541 (Roberts, C.J., dissenting).

the likelihood of irreparable harm, thought it is in the unique context of assessing damages to states for global warming damages. *Winter* does make clear, however, that the standard of possible irreparable harm used by the Ninth Circuit is too lenient to maintain equitable relief as "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[73]

C. Winter *in the Supreme Court: Debating the Public Interest*

The majority, armed with sufficient legal grounds to reverse, did not stop its review after rejecting the Ninth Circuit standard of irreparable harm. The majority also ruled that "even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."[74] The public interest factor of equitable relief is a unique legal question – it separates the rights of the litigants from the matter and addresses the issue from the public perspective.[75] Still, courts dealing with equitable remedies must give special attention to the consequences of their decisions. In this section of the decision, the majority heavily relies on the logic of recent decisions in national security cases, perceiving pressures in the wake of the current conflict against terrorist forces, to justify yielding to the military's judgment.[76] The Court recognized that it has in the past and will continue to "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[77]

The majority addressed each measure challenged by the Navy to explain how issuing the preliminary injunction was beyond the court's discretion and imposed an unfair burden on the Navy.[78] Specifically, the imposed 2,200 yard shutdown zone was more than one hundred times larger than the Navy's self-imposed zone and, according to affidavits from Navy officers, could have resulted in the loss of several days of training.[79] Additionally, surface ducting conditions are rare and unpredictable, making them exceptionally important to performance training exercises.[80] Finally, the Court notes that the Navy's self-mitigation techniques should be afforded respect because there is no recorded incident of Navy-caused harm to a marine mammal in this area.[81] However, the Navy's voluntary shutdowns have all occurred during tactically insignificant times, and the independent strength of these measures is

[73] *Winter*, 129 S. Ct. at 375-76.

[74] *Id.* at 376.

[75] *Id.* at 376-77.

[76] *Id.*

[77] *Id.* at 377 (citing Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).

[78] *Id.* at 378.

[79] *Id.* at 378-79.

[80] *Id.* at 380.

[81] *Id.* at 381-82.

ambiguous.[82]

D. Winter in the Supreme Court: Concurrences and Dissents

Two justices issued alternative opinions in *Winter*. Justice Breyer authored the first, a concurrence in part and dissention in part.[83] Breyer's opinion differs on the course of action for the Court, preferring not to vacate the injunction but rather to modify a stay of the injunction until the Navy's completion of a NEPA-compliant EIS, which would make the NRDC's claim moot.[84] The decision notes that the EIS is reportedly near completion, and this remedy only slightly differs from the majority's.[85] Justice Breyer agrees that the evidence supporting the claim of irreparable injury is weak, at best, and that the trial court did not adequately support the implied assertion that the two contested mitigating factors were sufficient to establish substantial irreparable harm and justify equitable relief.[86] However, Justice Breyer does not specifically address the majority's public interest and equity balancing analysis.

Justice Ginsburg dissented, maintaining that the district court's preliminary injunction was not outside of its discretion.[87] The dissent focuses on the Navy's systematic and unnecessary circumvention of NEPA's primary duty – the release of an EIS.[88] It also challenges the majority's determination that irreparable harm was lacking, noting that equitable relief requires flexibility to deal with the necessities of each individual case.[89] To that end, the dissent defends the lenient standard of irreparable harm in the context of a "sliding scale" where there is a high probability of success on the merits of the claim.[90] The sliding scale test particularly affects environmental law cases due to the nature of the legal injuries involved.[91] The dissent, although it does not completely address the majority's equity balancing or interest analysis, holds that "the training exercises serve critical interests. But those interests do not authorize the Navy to violate a statutory command . . . ."[92]

IV. IMMEDIATE DOMESTIC IMPLICATIONS OF *WINTER*

Shortly after the Supreme Court vacated the contested aspects of the

[82] *Id.* at 378-81.
[83] *Id.* at 382 (Breyer, J., concurring in part and dissenting in part).
[84] *Id.* at 387.
[85] *Id.* at 386-87.
[86] *Id.* at 383-84.
[87] *Id.* at 387 (Ginsburg, J., dissenting).
[88] *Id.* at 389-90.
[89] *Id.* at 391-92.
[90] *Id.*
[91] *Id.* at 393.
[92] *Id.*

preliminary injunction and remanded the case, the NRDC and the Navy settled their dispute out of court.[93] The Navy acknowledged that sonar could be deadly to marine mammals, committed to complete and disclose full environmental reviews on major training exercises around the world, and fund $15 million in marine mammal research projects.[94] This ostensibly seems like a victory for the Navy because it did not need to extend its self-imposed or previously mandated mitigation measures and can now freely continue its exercises near Southern California. It is unlikely that this will be the last time that whales are a subject of the American court system – the outgoing administration of President George W. Bush enacted a last-minute regulation that enables the Navy's broad use of sonar during tests in the Atlantic Ocean.[95]

While this particular legal battle has ended, the ramifications of *Winter* have the potential to affect other cases for years to come. Two legal dimensions deserving of further legal observation are the newly intensified standards for obtaining a preliminary injunction and the foreseeable future of environmental advocacy law in the wake of the new public interest and equity measuring assessments used by the Supreme Court.

A. Standards for Obtaining a Preliminary Injunction

The Supreme Court's decision in *Winter* should not have been entirely unexpected. The Court had previously held that it is contrary to traditional equity principles to presume irreparable harm when an agency's EIS is incomplete.[96] Nonetheless, the Court's legal reasoning marks a specific departure from previous precedent. A key aspect of the Supreme Court's decision to overturn the Ninth Circuit was to declare the Ninth Circuit's standard of possible irreparable harm too lenient, and that irreparable harm must be likely to warrant a remedy as severe as a preliminary injunction.[97] This is not simply a departure from the Ninth Circuit's previously established standard, which allowed for a sliding scale standard of irreparable harm depending on how likely success would be on the merits of the claim, but also from the standards used by other federal courts.[98] Courts previously linked likelihood to a requirement that "the injury must be both certain and great; it must be actual and not theoretical . . .," a standard that did not depend on the actual probability of the event.[99] Moreover, under the previous standard, "the

[93] Press Release, National Res. Def. Council, Environmental Coalition Reaches Agreement with Navy on Mid-Frequency Sonar Lawsuit (Dec. 28, 2008), *available at* http://www.nrdc.org/media/2008/081228.asp.

[94] *Id.*

[95] Kate Wiltrout, *Navy Gets Approval for Sonar in Atlantic*, VIRGINIAN-PILOT & LEDGER STAR, Jan. 24, 2009, at 8.

[96] *Amoco*, 480 U.S. at 544-45.

[97] *Winter*, 129 S. Ct. at 374-76.

[98] *Faith Ctr. Church Evangelistic Ministries*, 480 F.3d at 906.

[99] Wis. Gas Co. v. Fed. Energy Regulatory Comm'n, 758 F.2d 669, 674 (D.C. Cir. 1985).

party seeking injunctive relief must show that '[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'"[100]

These doctrinal changes, as applied by federal courts, illustrate that a significantly higher burden to obtain a preliminary injunction is not just a theoretical possibility, but a reality. Federal copyright law provides the most notable example of *Winter*'s effects. In *Jacobsen v. Katzer*, the plaintiff, the owner of an open source copyright on model train programming software, moved for a preliminary injunction in response to the defendant's alleged unauthorized distribution of the software.[101] Previously, courts indicated that "a plaintiff who demonstrates a likelihood of success on the merits of a copyright claim was automatically entitled to a presumption of irreparable harm."[102] However, the district court denied what it recognized to be an otherwise valid application for a preliminary injunction, stating:

> The Federal Circuit court's list of potential harms that a copyright holder may face in the open source field are just that—potential harms . . . The standard under *Winter* requires that Jacobsen demonstrate . . . that the harm is real, imminent and significant, not just speculative or potential. Because Jacobsen fails to meet the burden of presenting evidence of actual injury to support his claims of irreparable injury and speculative losses, the Court cannot, on this record, grant a preliminary injunction.[103]

The *Jacobsen* application of the *Winter* test reflects a stark departure from previous holdings.[104] The First Circuit even went as far as to say that "irreparable harm is usually presumed if likelihood of success on the copyright claim has been shown . . . There is, therefore, no need actually to prove irreparable harm when seeking an injunction against copyright infringement."[105] *Winter* and *Jacobsen* illustrate a higher burden to acquire an injunction against a potential infringer, diminishing the general value of the copyright and complicating the intellectual property legal environment.

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[100] *Id.* (citing Ashland Oil, Inc. v. Fed. Trade Comm'n, 409 F. Supp. 297, 307 (D.D.C. 1976)).

[101] Jacobsen v. Katzer, No. C 06-01905 JSW, 2009 WL 29881, at *1 (N.D. Cal. Jan 5, 2009).

[102] *Id.* at *7-8.

[103] *Id.* at *9.

[104] *See* Cadence Design Sys. v. Avant! Corp., 125 F.3d 824, 827-28 (9th Cir. 1997) ("[I]f a plaintiff establishes a likelihood of success on the merits of a copyright infringement claim, 'it would seem erroneous to deny a preliminary injunction simply because actual damages can be precisely calculated . . . .'" (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[A], at 14-105 (1997))).

[105] Concrete Mach. Co. v. Classic Lawn Ornaments, 843 F.2d 600, 611-12 (1st Cir. 1988). *But see* S. Monorail Co. v. Robbins & Myers, Inc., 666 F.2d 185, 187-88 (5th Cir. 1982) (noting that "no party has cited, nor have we been able to find, any case in this court expressly adopting this presumption of irreparable injury").

Copyright is not the only branch of American law that felt these effects in the immediate wake of *Winter*. As of March 20, 2009, four months from the original release of the Supreme Court's decision, *Winter* has been cited in dozens of cases, including those dealing in national security law[106] and labor law, [107] by courts denying requests for preliminary injunctions. It is more likely than not that these cases are merely the proverbial tip of the iceberg, and that the legacy of *Winter* will not be isolated to environmental case law.

B. Environmental Litigation

Winter places environmental litigation in a particularly precarious position. Equitable relief is inherently linked to environmental law due to the struggles to identify specific damages or calculate the monetary values of injuries.[108] "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."[109] Federal precedent reflects this rationale, and some courts tried to make environmental advocacy claims practical in a judicial system reliant on financial damages as a primary remedy.[110] This is particularly true in light of the Supreme Court's recent positions on standing and injury regarding the growing global warming threat.[111] Because of this unique relationship, however, the shifting standard of irreparable harm may place environmental litigants at a significant procedural disadvantage.

Winter, in two environmental law cases, has explicitly influenced the decision to scale back equitable relief. In *Animal Welfare Institute v. Martin*,[112] the Federal District Court of Maine rejected a significant portion of a preliminary injunction motion because, according to the *Winter* standard, the moving party had not properly demonstrated irreparable harm.[113] That court rejected its previous standard that required a significant risk of non-compensable injury to establish irreparable harm.[114] Moreover, the district court noted that, as per *Winter*, not "'any take and every take' of whatever

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[106] Al-Adahi v. Obama, No. 05-280 (GK), 2009 U.S. Dist. LEXIS 9650, at *28-30 (D.D.C. Feb 10, 2009).

[107] United Farm Workers v. Chao, 593 F. Supp. 2d 166, 168-71 (D.D.C. 2009).

[108] *Amoco*, 480 U.S. at 544-45.

[109] *Id.* at 545.

[110] *See* Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1158-60 (9th Cir. 2006); P.R. Conservation Fund. v. Larson, 797 F. Supp. 1066, 1071-73 (D.P.R. 1992); U.S. v. Ray, 281 F. Supp. 876, 877-78 (D. Fla. 1965).

[111] *Mass. v. E.P.A.*, 549 U.S. 497, 516-23 (2007).

[112] 588 F. Supp. 2d 70 (D. Me. 2008).

[113] *Id.* at 101-06.

[114] *Id.* at 101-02 (citing Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1258 (10th Cir. 2003)).

definition meets the standard for irreparable harm."[115] Similarly, in the Federal District Court of Idaho, a judge rejected a motion for equitable relief after noting that an established mining process, with isolated detrimental effects and developed monitoring and mitigation methods, could not result in likely irreparable harm.[116] These decisions indicate a shift in the balancing standards for preliminary injunctions. Additionally, the standard for likely irreparable harm is stricter than the harm reporting requirements for NEPA, creating a procedural incongruence that may make relief under NEPA more difficult to obtain than required by Congress.[117] These changing doctrines could cripple the ability of environmental advocates to enforce both present and future environmental legislation.

The assessment of the public interest in *Winter* is also very troublesome for future environmental litigants. This balancing test is important because injunctions are a matter of judicial discretion once the requirements for equitable relief have been established.[118] The majority in *Winter* determined that the district court abused its discretion in issuing the injunction due to the national interest of having a well trained navy.[119] In assessing the public value of the sonar exercises, the majority gave "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" even when those military authorities were clearly an interested party.[120] The Supreme Court is quick to point out that "military interests do not always trump other considerations, and we have not held that they do."[121] However, the Court has consistently ruled in the military's favor in NEPA cases, stating in one case that "whether or not the Navy has complied with NEPA 'to the fullest extent possible' is beyond judicial scrutiny in this case . . . the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[122] This level of deference, paired with the executive authority allowed by NEPA, may constitute a de facto military exception to the NEPA standards.[123]

Winter also appears to join a trend of growing judicial deference to the

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[115] *Id.* at 105-06.

[116] Greater Yellowstone Coal. v. Timchak, No. CV-08-388-E-MHW, 2008 WL 5101754, at *17 (D. Idaho Nov. 26, 2008).

[117] *See* Mank, *supra* note 16, at 58-60.

[118] *Winter*, 129 S. Ct. at 381 (citing *Weinberger*, 456 U.S. at 313).

[119] *Id.*

[120] *Id.* at 376-78.

[121] *Id.* at 378.

[122] Weinberger v. Catholic Action of Haw., 454 U.S. 139, 146-47 (1981) (citing Totten v. U.S., 92 U.S. 105, 107 (1876)).

[123] Julie G. Yap, *Just Keep Swimming: Guiding Environmental Stewardship Out of the Riptide of National Security*, 73 FORDHAM L. REV. 1289, 1298-99 (2004).

executive branch in the aftermath of the September 11 attacks.[124] The majority asserts that it must defer to the Navy because "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."[125] The logic is similar to that found in other historic cases where public pressure dictates stronger executive power to address national threats.[126] Judicial deference affects environmental litigation more acutely than other legal fields because Congress has, in the name of national security, written greater exemptions and waiver powers into environmental regulations.[127] Claimants have found information vital to the discovery and adjudication processes very difficult to acquire.[128] Additionally, the War on Terror's tangible effects on the discretion of the public and judges has made it harder to defend against an executive assertion of the public interest.[129]

These trends can lead to a general dilution of the value of environmental protection in judicial forums. One example is *Greater Yellowstone Coalition*, where the judge determined that a combination of local economic interests, including decreased property values and shortfalls in tax revenues, could pre-empt the irreparable harm to the environment caused by the byproducts of phosphate mining.[130] This creates a unique role for economic damages, which now can be the primary ground for asserting a competing equitable interest against a preliminary injunction, but not the sole basis for asserting likely irreparable injury.[131] The combination of increasing judicial deference to the executive branch, a diminished judicial value of environmental protection, and

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[124] Neil Kinkopf, *Symposium: War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century: The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1181-87 (2006).

[125] *Winter*, 129 S. Ct. at 377 (citing Boumediene v. Bush, 128 S. Ct. 2229, 2276-77 (Oct. 27, 2008)).

[126] *See* Korematsu v. U.S., 323 U.S. 214, 218 (1944) ("[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it." (citing Hirabayashi v. U.S., 320 U.S. 81, 99 (1943))).

[127] Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105, 125-36 (2007).

[128] *Id.* at 136-46.

[129] *See* Nancye L. Bethurem, *Environmental Destruction in the Name of National Security: Will the Old Paradigm Return in the Wake of September 11?*, 8 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 109, 126-30 (2002).

[130] *Greater Yellowstone Coal.*, 2008 WL 5101754, at *15-17.

[131] *See* AZ Holding, L.L.C. v. Frederick, No. CV-08-0276-PHX-LOA, 2009 WL 484881, at *3-4 (D. Ariz. Feb. 26, 2009).

greater procedural barriers to obtain injunctions may make environmental litigation not only more difficult, but also create an atmosphere where such litigation is in an objectively adverse legal position by default.

V. CONCLUSION

In *Winter*, a majority of the Supreme Court vacated an injunction and upheld the rights of the U.S. Navy to test mid-frequency sonar despite the Navy's prediction that multiple marine mammals would sustain injuries.[132] The struggle to balance national defense measures and environmental interests continues, with all branches of the armed forces addressing what the Department of Defense has termed "encroachments."[133] More specifically, the NRDC and the Navy look poised to go to court again on similar issues, this time regarding naval sonar testing in the Atlantic Ocean.[134] The actions of the executive and judicial branches do not indicate any intent to recognize the whale's growing influence on popular culture.[135]

While *Winter* seems more than likely to be influential in the resolution of the Atlantic Ocean dispute, its effects will not be limited to that or any other whale-sonar case. With the shift towards a "likely" standard of irreparable harm as a requirement of equitable relief, the burden of a party seeking a preliminary injunction has demonstratably increased. This may have a particularly detrimental effect for copyright cases, where the ability to acquire equitable relief against infringing parties is a key remedy for copyright holders. Environmental advocates, in addition to this standard, must also face more challenging tasks of proving a compelling equity in the face of both opposing interests and a broadly conceived public interest. Future courts may choose to act differently as attitudes change and regulations are amended but, for the time being, *Winter* has proven not to be a fluke in the course of American jurisprudence.

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[132] *Winter*, 129 S. Ct. at 382.

[133] Colonel E.G. Willard, Lieutenant Colonel Tom Zimmerman & Lieutenant Colonel Eric Bee, *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DOD Training and Operational Prerogatives Without New Legislation?*, 54 A.F. L. REV. 65, 65-67 (2004).

[134] *See* Wiltrout, *supra* note 96, at 8.

[135] Rob Walker, *A Successful Failure*, N.Y. TIMES, at MM (Feb. 15, 2009) ("To certain particularly dedicated users of the online social-networking service Twitter, the 'Fail Whale' is as iconic as any corporate logo, and far more beloved. Some have bought the T-shirt, and some have joined the fan club."). *See also South Park: Free Willzyx* (Comedy Central television broadcast Nov. 30, 2005) (episode featured a group of elementary school students seeking to free a killer whale from an amusement park); *Futurama: Three Hundred Big Boys* (Fox television broadcast June 15, 2003) (episode plot revolved around an arrogant show orca named Mushu); FREE WILLY (Warner Bros. 1993); HERMAN MELVILLE, MOBY DICK (1851).