Winter v. Natural Resources Defense Council: The United States Supreme Court Tips the Balance Against Environmental Interests in the Name of National Security

I. OVERVIEW OF THE CASE

The waters off the coast of southern California (SOCAL) are home to at least thirty-seven species of marine mammals, nine of which are categorized as threatened or endangered under the Endangered Species Act (ESA).[1] For the last forty years, the SOCAL waters have also played host to the United States Navy's integrated training exercises, which include the use of "mid-frequency active" (MFA) sonar to detect and track submerged submarines.[2] Scientists have linked sonar to behavioral disruptions, permanent and temporary hearing loss, and mass strandings of marine mammals.[3] In preparation for fourteen training exercises scheduled over the next two years, the Navy issued an Environmental Assessment (EA) in February 2007, stating that the exercises would not have a significant impact on the SOCAL environment.[4] Based on these findings, the Navy did not prepare an Environmental Impact Statement (EIS), which is required by the National Environmental Policy Act of 1969 (NEPA) prior to the commencement of "every major Federal action[] significantly affecting the quality of the human environment."[5]

---

1. Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 371 (2008). Plaintiffs also alleged violations of the Endangered Species Act of 1973 and the Coastal Zone Management Act of 1972. Because the lower courts and the Supreme Court focused primarily on the alleged NEPA violation, this Note will do the same. *Id.* at 372; Natural Res. Def. Council v. Winter, 518 F.3d 658, 665 (9th Cir.), *rev'd*, 129 S. Ct. 365 (2008).

2. *Winter*, 129 S. Ct. at 370.

3. *Id.* at 372.

4. *Id.*

5. *Id.* (quoting 42 U.S.C. § 4332(2)(C) (2006)). It is worth noting that the Navy, in December 2006, announced its intention to prepare an EIS. Wanting to begin its exercises before the EIS process was complete, the Navy released its EA instead. When *Winter* was decided, the Navy was in the process of completing a full EIS, scheduled for publication in January 2009, one month after the exercises ended. *Id.* at 387-88 (Ginsburg, J., dissenting).

The Navy commenced its training exercises using MFA sonar on the same day it released its EA.[6]

The Navy's EA predicted 564 instances of physical injury (Level A harassment), including permanent hearing loss, and almost 170,000 behavioral disturbances (Level B harassment), including disruptions of migratory, feeding, surfacing, and breeding patterns, to marine life in the SOCAL waters resulting from the Navy's use of MFA sonar in its training exercises.[7] Based on these estimates, the plaintiffs in the noted case, comprised of several environmental protection groups and one concerned citizen, filed suit in the United States District Court for the Central District of California, alleging, among other violations, that the Navy's failure to prepare a fully detailed EIS in the face of potentially significant and irreparable harm to the SOCAL marine environment violated NEPA's mandates.[8] Finding that the plaintiffs demonstrated a strong likelihood of success on the merits of their NEPA claim and a "near certainty" of irreparable harm that outweighed any injury the Navy might sustain, the district court granted a preliminary injunction enjoining the Navy from using sonar in its remaining exercises.[9] Upon remand from the United States Court of Appeals for the Ninth Circuit, the district court narrowed its injunction and permitted the Navy to continue its use of sonar, conditioned upon compliance with six mitigation measures, two of which the Navy objected to on the grounds that they unreasonably restricted "realistic training" conditions.[10] The Navy again appealed to the Ninth Circuit, which denied its request to vacate the injunction with respect to the two contested conditions.[11] The United States Supreme Court granted certiorari and presented the following issues for review: (1) whether the Ninth Circuit applied the correct irreparable harm standard for issuing a preliminary injunction and (2) even if the plaintiffs established a likelihood of irreparable harm, whether the balance of the equities required that the injunction be vacated.[12] As to the first issue, the Court *held* that the Ninth Circuit's "possibility" of harm standard was too lenient and should be replaced

---

6. *Id.* at 388 (Ginsburg, J., dissenting).
7. *Id.* at 392.
8. *Id.* at 372 (majority opinion).
9. *Id.* at 372-73.
10. *Id.* at 373, 377. On appeal, the Navy challenged two conditions of the injunction: (1) shutting down MFA sonar when a marine mammal is within 2200 yards of a vessel and (2) powering down MFA sonar by six decibels during significant surface ducting conditions, when sound travels farther than it would under normal conditions. *Id.* at 373.
11. *Id.* at 374.
12. *Id.* at 375-76.

with a "probability" standard.[13] As to the second, the Court *held* that even if the plaintiffs established a "near certainty" of irreparable harm to the environment, the public interest in national security and the Navy's concomitant interest in training its fleet warranted vacating the contested conditions.[14] *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008).

II. BACKGROUND

"Recognizing the profound impact of man's activity on the interrelations of all components of the natural environment,"[15] Congress enacted NEPA in 1970 to establish a "national policy which will encourage productive and enjoyable harmony between man and his environment."[16] To implement that policy, NEPA imposes procedural requirements to ensure that federal agencies take a "hard look" at the environmental consequences of their actions.[17] Under NEPA, federal agencies must prepare an EIS before engaging in any "major Federal action[] significantly affecting the quality of the human environment."[18] The Supreme Court has called the EIS requirement the "heart of NEPA."[19] An agency must first complete an EA to determine whether an EIS is necessary.[20] If the EA concludes that a proposed action will have a significant effect on the environment, the agency must complete an EIS.[21] On the other hand, if the EA determines that an action will not have a substantial environmental impact, the agency must issue a finding of no significant impact (FONSI) explaining why an EIS is unnecessary.[22]

The Supreme Court has identified two aims of NEPA's procedural requirements.[23] First, by requiring the preparation of an EIS, NEPA places a duty on federal agencies to consider "every significant aspect of the environmental impact of a proposed action."[24] Second, it ensures that the agency will assure the public that it has done so.[25] The "detailed

---

13. *Id.* at 375.
14. *Id.* at 376.
15. 42 U.S.C. § 4331(a) (2006).
16. *Id.* § 4321.
17. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).
18. 42 U.S.C. § 4332(2)(C).
19. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 757 (2004).
20. 40 C.F.R. § 1501.4(c) (2009).
21. Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1216 (D. Haw. 2001).
22. 40 C.F.R. § 1508.13.
23. Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983).
24. *Id.* (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978)).
25. *Id.*

statement" required by NEPA not only obligates an agency to consider environmental effects of its actions, but also provides an "outward sign" to the public that such consequences have been taken into full account.[26] By assuring the public that environmental impacts have been carefully considered, the publication of an EIS also provides a "springboard" for public discussion.[27]

NEPA does not impose substantive duties on federal agencies.[28] Instead, NEPA mandates "action-forcing" procedures that require an agency to take a "hard look" at the environmental consequences of its actions.[29] If an agency properly identifies and evaluates the potentially negative environmental impacts of a certain undertaking, compliance with NEPA does not require that the agency refrain from commencing the action.[30] NEPA does not mandate particular results.[31] It "merely prohibits uninformed—rather than unwise—agency action."[32]

To that end, an agency's EA may be insufficient to obviate the need for an EIS if a court determines that substantial questions are raised about whether a proposed action may have significant effects on the environment.[33] Courts will afford an agency wide discretion in its assessments of scientific evidence as long as it takes the requisite "hard look" at the consequences and makes a "reasoned decision based on the evaluation of the evidence."[34] Courts reviewing an agency's decision not to complete an EIS apply the Administrative Procedure Act's arbitrary and capricious standard.[35] The arbitrary and capricious standard of review requires courts to determine whether an agency completed a thorough environmental analysis (hard look) before deciding not to issue an EIS, whether an agency considered all relevant facts in making its decision, and whether an agency provided a "convincing statement" of its conclusion that no significant environmental impact would result from its actions.[36] If substantial questions are raised as to the reliability of an agency's conclusion that no significant environmental impact would result from its actions, an agency will be required to complete an EIS.[37]

---

26. Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).
27. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).
28. *Id.* at 350-51.
29. *Id.* at 350.
30. *Id.*
31. *Id.*
32. *Id.* at 351.
33. Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1239 (9th Cir. 2005).
34. Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1301 (9th Cir. 2003).
35. *Id.* (citing 5 U.S.C. § 706(2)(1) (2006)).
36. *Native Ecosystems Council*, 428 F.3d at 1239.
37. *Id.*

Courts faced with claims predicated on NEPA violations often consider issuing preliminary injunctions to ensure agency compliance with NEPA's mandates.[38] In order for a court to issue a preliminary injunction, plaintiffs must establish (1) the likelihood of success on the merits of their claim, (2) irreparable harm in the absence of injunctive relief, (3) that the balance of hardships tips in the plaintiffs' favor, and (4) that a preliminary injunction is in the best interest of the public.[39] The Ninth Circuit has held that plaintiffs who establish a "strong likelihood" of success on the merits of their claim may be granted a preliminary injunction if they prove a "possibility" of irreparable harm.[40]

The Supreme Court has considered the appropriateness of injunctive relief as a remedy for procedural violations of environmental protection statutes.[41] In *Weinberger v. Romero-Barcelo*, for example, the Court vacated an injunction that enjoined the Navy from conducting training exercises on an island off the Puerto Rican coast because, the Court reasoned, the Navy's violation of the permit process mandated by the Federal Water Pollution Control Act (FWPCA) did not threaten to undermine the substantive purpose of the Act.[42] In violation of the FWPCA's procedural requirements, the Navy failed to obtain a permit from the EPA prior to discharging ordnance into the waters surrounding the island.[43] Despite the fact that there was no evidence tending to show that the discharge of ordnance had any appreciable effect on water quality, the United States Court of Appeals for the First Circuit issued an injunction barring the Navy from discharging any pollutants until it complied with the permit process under the FWPCA.[44]

Explaining its decision to vacate the First Circuit's injunction, the majority in *Romero-Barcelo* first expounded upon the standards for

---

38. *E.g.*, Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1124 (9th Cir. 2005); Massachusetts v. Watt, 716 F.2d 946, 951-52 (1st Cir. 1983); Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1222 (D. Haw. 2001).

39. *See* Munaf v. Geren, 128 S. Ct. 2207, 2219 (2008) (requiring a likelihood of success on the merits); Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987) (requiring irreparable harm and balancing of hardships); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (stating that particular attention should be paid to the public interest in determining injunctive relief).

40. *E.g.*, Faith Ctr. Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007), *abrogated by* Winter v. Natural Res. Def. Council, 129 S. Ct. 365 (2008); Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006), *abrogated by* Winter v. Natural Res. Def. Council, 129 S. Ct. 365 (2008).

41. *E.g.*, *Amoco*, 480 U.S. at 542; *Romero-Barcelo*, 456 U.S. at 312-13.

42. *Romero-Barcelo*, 456 U.S. at 311, 314.

43. *Id.* at 308.

44. *Id.* at 310, 311.

issuing an injunction.[45] An injunction, the Court explained, does not issue as a matter of course, and must not be used to enjoin an action in which the "injurious consequences . . . are merely trifling."[46] To that end, courts deciding whether to issue an injunction must balance the competing interests of both parties, paying particular attention to the public interest in granting such an "extraordinary remedy."[47] In light of the fact that the Navy's discharge of ordnance had not polluted the waters off the coast of Puerto Rico, the Court held that the Navy's failure to comply with the Act's technical requirements did not undermine the primary purpose of the FWPCA—maintaining the integrity of the nation's waters.[48]

Five years later, in *Amoco Production Co. v. Village of Gambell*, the Supreme Court applied its reasoning in *Romero-Barcelo* to vacate a preliminary injunction issued by the Ninth Circuit enjoining the Secretary of the Interior from granting oil and gas leases to oil companies.[49] In violation of the Alaska National Interest Lands Conservation Act (ANILCA), the Secretary failed to evaluate potential effects of the leases on natural subsistence resources before issuing the leases.[50] Finding that injury to subsistence resources due to oil exploration was improbable, that the balance of hardships favored the oil companies, and that oil exploration advanced the public interest, the Court held that a preliminary injunction was unwarranted.[51] The Court analogized the Secretary of the Interior's noncompliance with ANILCA's procedural requirements with the Navy's failure to obtain a permit in *Romero-Barcelo*, reasoning that the Secretary's failure to complete evaluations prior to leasing land for oil exploration did not undercut ANILCA's primary goal of protecting Alaskan resources.[52]

Because the Secretary's ANILCA violation did not threaten destruction of Alaskan subsistence resources, the Court reasoned, a preliminary injunction was unnecessary.[53] The Court rejected the Ninth Circuit's arguments that a presumption of irreparable harm arises whenever an agency fails to evaluate environmental consequences of its actions thoroughly and that injunctive relief is appropriate for any

45. *Id.* at 311-13.
46. *Id.* at 311.
47. *Id.* at 312.
48. *Id.* at 314-15.
49. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 534 (1987).
50. *Id.* at 535.
51. *Id.* at 545-46.
52. *Id.* at 544.
53. *Id.*

violation of an environmental statute.[54] Nevertheless, the Court observed that "[e]nvironmental 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."[55] However, because the facts in *Amoco* did not tend to prove that any significant harm to the environment would result from the oil exploration at issue, the Court reasoned, a preliminary injunction was an inappropriate means of ensuring compliance with ANILCA's procedural requirements.[56]

III. THE COURT'S DECISION

In the noted case, the Court reversed the Ninth Circuit's decision to uphold the district court's injunction against the Navy, finding that the balance of the equities favored vacating the injunction.[57] The Court first addressed the Navy's contention that the Ninth Circuit's standard for issuing a preliminary injunction in cases where a plaintiff establishes a "possibility" of irreparable harm coupled with a "strong likelihood" of success on the merits was too lenient.[58] Agreeing with the Navy that the "possibility" standard applied by the Ninth Circuit was too lax, the Court held that in order for a preliminary injunction to issue a plaintiff must demonstrate that irreparable harm is *probable* in the absence of injunctive relief.[59] Further, the Court found that, even if the plaintiffs had established a sufficient threat of irreparable harm, the balance of the equities tipped in favor of the Navy's interest in realistic training of its sailors and the public's interest in maintaining a strong national defense.[60] Therefore, the Court held that the injunction should be vacated with respect to the two contested conditions.[61]

The Court conceded that the Ninth Circuit's application of an incorrect standard may not have affected its analysis of irreparable harm.[62] The Ninth Circuit agreed with the district court's finding that the plaintiffs in the noted case established a "near certainty" of irreparable

---

54. *Id.* at 545.
55. *Id.*
56. *Id.* at 545-46.
57. Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 370, 376 (2008).
58. *Id.* at 375.
59. *Id.*
60. *Id.* at 376.
61. *Id.*
62. *Id.*

harm in the absence of an injunction.[63] Scientific studies, expert opinion, and other evidence in the record, including the Navy's own EA, convinced the district court and the Ninth Circuit that plaintiffs established the threat of irreparable harm to the environment to a degree sufficient to justify the issuance and upholding of a preliminary injunction designed to mitigate that harm.[64]

However, while the Court implied that a "near certainty" of irreparable harm meets the probability standard, it stated that the "nature of the District Court's conclusion is itself unclear."[65] First, the Court noted, the district court did not consider whether irreparable harm was likely to result if the two contested conditions were vacated and the four uncontested conditions remained intact.[66] Second, the Court highlighted the fact that the Navy's training exercises had been going on for forty years.[67] In its brief discussion of NEPA, the Court reasoned that the Act does not require particular results, but only imposes procedural obligations to ensure that an agency will have sufficiently detailed information about significant environmental impacts available in its decision-making process.[68] The Court reasoned that because the Navy had been conducting its exercises for forty years, the harm that NEPA intended to prevent—lack of information about potential environmental harm and possible mitigation methods—may not have been at issue here.[69] Further, contrary to the district court's and Ninth Circuit's findings, the Court concluded that the Navy took the requisite "hard look at environmental consequences" before approving the new round of exercises, as shown by its publication of an EA.[70]

Ultimately, the Supreme Court did not rule conclusively on whether the plaintiffs established a probability of irreparable harm, or whether they established a likelihood of success on the merits, because the Navy's interest in realistic training and the adverse effect the injunction would have on the public's interest in national security outweighed either

---

63. *Id.*
64. *Id.* at 373, 392 (Ginsburg, J., dissenting).
65. *Id.* at 376.
66. *Id.*
67. *Id.*
68. *Id.* (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 350 (1989)).
69. *Id.*
70. *Id.* (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976)); Natural Res. Def. Council v. Winter, 518 F.3d 658, 693 (9th Cir.) (finding that the reasons listed in the EA in support of the Navy's conclusion that an EIS was unnecessary were "cursory, unsupported by cited evidence, or unconvincing"), *rev'd*, 129 S. Ct. 365 (2008); Natural Resources Defense Council v. Winter, 530 F. Supp. 2d 1110, 1116-17 (C.D. Cal.), *rev'd*, 129 S. Ct. 365 (2008).

consideration in determining whether to uphold the injunction.[71] The Court devoted the bulk of its discussion to considerations of the injury the Navy would sustain in the event the injunction was upheld, looking exclusively to declarations from senior Navy officials for guidance in determining the extent of that harm.[72] Citing to *Amoco*'s balancing test and *Romero-Barcelo*'s directive that close attention be paid to the public interest when determining whether to issue an injunction, the Court stated that the district court and the Ninth Circuit "significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises" and inadequately assessed the public interest in effective national defense in their determination that the balancing of the equities favored issuing the injunction.[73]

Looking to precedent, the Court noted that, traditionally, great deference is given to military expertise in resolving complex military matters and in determining the importance of certain military interests.[74] In the noted case, the Court explained, senior Navy officials emphasized the importance of sonar in realistic and effective training of sailors to defend against the threat of enemy submarines.[75] Naval officers alleged that the use of MFA sonar is "mission-critical" and the ability to use it effectively is a "highly perishable skill."[76] The officials further claimed that the two contested conditions in the district court's injunction seriously handicapped the Navy's efforts to provide realistic conditions for its training exercises.[77] Rejecting the lower courts' finding that the Navy would not undergo a substantial burden if the injunction remained intact, the Court found that the district court and the Ninth Circuit failed to defer to the Navy's judgment properly and did not give sufficient weight to its specific predictions as to how the contested conditions would negatively affect its ability to train.[78]

The Court acknowledged the legitimacy of the plaintiffs' claims and noted the importance of their interests, but concluded, after weighing the competing interests and deferring to the naval officials' assessments, that

---

71. *Winter*, 129 S. Ct. at 376-77.
72. *Id.* at 377-80.
73. *Id.* at 377-78.
74. *Id.* at 377 (citing Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding that military needs justified restrictions on wearing religious attire while in uniform)); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (holding that evaluation of "complex, subtle, and professional decisions" are "essentially professional military judgments" beyond judicial review).
75. *Winter*, 129 S. Ct. at 377.
76. *Id.*
77. *Id.*
78. *Id.* at 378.

the potential injury threatened by upholding the injunction outweighed the potential environmental injury that could result from vacating it.[79] In a brief discussion of the public's interest in vacating the injunction, the Court stated that military interests do not always outweigh other considerations but that, in the noted case, the question of whether the public interest favored the Navy's unimpeded training exercises did not "strike [the Court] as a close question."[80] Because the Court concluded that the public interest in national defense and the Navy's correlative interest in realistic training of its sailors so strongly outweighed any potential harm to the environment or any public interest in protecting against that harm, it reversed the Ninth Circuit's decision and vacated the injunction to the extent it was contested by the Navy.[81]

In his concurrence, Justice Breyer questioned whether the district court properly balanced the equities in issuing its injunction, but diverged from the majority opinion in his acknowledgement that there was a strong argument favoring an injunction.[82] Paying close attention to NEPA's objectives in requiring the publication of an EIS, Justice Breyer observed that when an agency takes action that should have been preceded by an EIS, "much of the harm that NEPA seeks to prevent has already taken place."[83] Applying this reasoning to the facts of the noted case, he commented that the absence of an injunction would enable the Navy to conduct its exercises without taking into account the environmental considerations that an EIS ensures, thereby threatening to cause substantial harm that an EIS might have convinced the Navy to mitigate or avoid.[84]

Justice Ginsburg's dissent echoed and expanded on Justice Breyer's reservations, noting that the Navy's publication of an EIS, scheduled to occur after the completion of all fourteen exercises, completely defeats NEPA's dual informational and participatory purposes, as previously articulated by the Supreme Court.[85] Further, Justice Ginsburg took issue with the majority's insistence on a "probability" of irreparable harm.[86] Under the majority's standard, she argued, environmental plaintiffs with claims predicated on an agency's unjustified failure to prepare an EIS

---

79. *Id.*
80. *Id.*
81. *Id.* at 378, 382.
82. *Id.* at 382 (Breyer, J., concurring).
83. *Id.* at 383.
84. *Id.*
85. *Id.* at 390 (Ginsburg, J., dissenting); Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983).
86. *Winter*, 129 S. Ct. at 392 (Ginsburg, J., dissenting).

will necessarily have a difficult time proving a "near certainty" of harm because the very purpose of an EIS is to reveal environmental harm.[87] Without an EIS, environmental plaintiffs may need to rely on the likelihood of success on the merits of their claim that an EIS should have been completed, rather than on any concrete prediction of resulting harm.[88]

Noting that the Navy's own EA predicted serious harm to marine mammals in the SOCAL waters, including 170,000 behavioral disturbances and 564 physical injuries, Ginsburg concluded that the district court was correct in its determination that a preliminary injunction was warranted.[89] She conceded that the Navy's interests in realistic training were important, but argued that such interests do not give the Navy carte blanche to ignore completely a "statutory command."[90] Closing with the sentiments expressed in *Amoco*—that environmental injury is often irreparable and, as such, a preliminary injunction should issue when such injury is likely to occur—Justice Ginsburg stated that she would affirm the Ninth Circuit's decision to uphold the district court's injunction against the Navy.[91]

IV. ANALYSIS

The Court's decision in the noted case has troubling implications for the future of environmental litigation. Presented with a case firmly founded upon a NEPA violation, the Court barely acknowledged the statute's procedural mandates and substantive policies and chose instead to rely exclusively on the judgments of high-ranking Navy officers. Opting not to address the plaintiffs' likelihood of success on the merits of their NEPA claim, which would have required a more thorough analysis of the statute, the Court depended on the Navy's largely unsubstantiated allegations of irreparable harm to find that the balance of equities tipped in its favor.[92] By focusing on potential injury to the Navy, rather than the probability of substantial environmental harm alleged by the plaintiffs, the majority essentially approached the violation of an environmental protection statute as a national security issue.[93]

---

87. *Id.*
88. *Id.*
89. *Id.* at 393.
90. *Id.*
91. *Id.*
92. *Id.* at 376-81.
93. William S. Eubanks II, *Damage Done? The Status of NEPA After* Winter v. NRDC *and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 649 (2009).

As the Ninth Circuit pointed out in its decision to issue a stay pending the district court's revision of its original injunction, "We are currently engaged in war, in two countries."[94] In issuing its stay, the court acknowledged the competing public interest in environmental preservation and in national defense.[95] Determining that a new injunction balancing these two interests should be issued, the Ninth Circuit further noted that "[t]here is no 'national security trump card' that allows the Navy to ignore NEPA to achieve other objectives. By declining to write a national security exemption into NEPA, Congress has evidently concluded that it does not jeopardize national security to require the military to comply with NEPA."[96]

The Supreme Court stated that its holding was not intended to imply that military considerations always trump other considerations.[97] However, in light of the negligible attention it paid to the probability of substantial environmental harm, which was forecasted in the Navy's own EA and bolstered by scientific evidence, the Court's decision may set a dangerous precedent for that very result. In the name of national security and deference to military authority, the Court drew attention away from the Navy's violation of NEPA's statutory requirements and the subsequent harm that could result by focusing almost exclusively on alleged injuries to military interests, thereby implicitly devaluing the importance of both environmental protection and compliance with congressional orders. Taking at face value the assertions of agency officials with a lot at stake in vacating the injunction, and paying mere lip service to the significant environmental harm predicted by scientific studies, expert opinion, and the Navy's EA, the Court provided military interests with a "trump card" over environmental concerns and placed the military at a great advantage in defending against future environmental violations.

Furthermore, the Court paid no attention to the nonenvironmental harm that most certainly resulted from the Navy's failure to complete an EIS. As Justice Breyer noted in his concurrence, the "very point" of NEPA's EIS requirement is to force agencies to consider environmental consequences of its actions while at the same time assuring the public that such considerations have been taken into account.[98] As previously articulated by the Supreme Court, these two requirements are the "twin

94. Natural Res. Def. Council v. Winter, 502 F.3d 859, 863 (9th Cir. 2007).
95. *Id.*
96. *Id.* at 868.
97. *Winter*, 129 S. Ct. at 378.
98. *Id.* at 382 (Breyer, J., concurring).

aims" of NEPA.[99] If, as Justice Ginsburg notes in her dissent, an agency proceeds without completing an EIS under circumstances that demand one, both purposes are defeated.[100]

Without Supreme Court precedent to guide it in the context of a NEPA violation resulting in the issuance of a preliminary injunction,[101] the Court turned to its holdings in *Amoco* and *Romero-Barcelo*, in which the Court vacated preliminary injunctions predicated on violations of ANILCA and the FWCPA, to elucidate the traditional test for granting a preliminary injunction in an environmental context.[102] The Court touched briefly on these two cases to describe the balancing test used when weighing competing interests and the importance of weighing the public interest when determining whether to issue a preliminary injunction.[103] In both *Amoco* and *Romero-Barcelo*, the Court vacated preliminary injunctions resulting from procedural violations because neither violation threatened to undermine the substantive purposes of the statutes.[104] In neither case was irreparable harm to the environment likely to result from the violations.[105] Further, the Court found that the First Circuit in *Romero-Barcelo* and the Ninth Circuit in *Amoco* focused on procedural requirements when they should have focused on the substantive *policy* the statutory procedure was intended to promote.[106]

In the noted case, the Court emphasized the fact that NEPA does not require particular substantive results.[107] Instead, NEPA only mandates procedural requirements to ensure that agencies fully consider all aspects of environmental harm before acting.[108] The EIS is the "heart of NEPA."[109] Unlike the statutory procedural violations in *Amoco* and *Romero-Barcelo*, the Navy's violation in the noted case struck the very core of NEPA, undermining its informational purposes by ignoring its procedural cornerstone, all the while threatening substantial environmental harm that was absent from the latter two cases. Although the Court dealt with violations of statutes with explicit substantive

---

99. Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983).

100. *Winter*, 129 S. Ct. at 390 (Ginsburg, J., dissenting).

101. *See* Eubanks, *supra* note 93, at 652 (discussing lack of Supreme Court precedent to guide circuit courts in issuing injunctions based on NEPA violations).

102. *Winter*, 129 S. Ct. at 376-77.

103. *Id.*

104. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 534 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

105. *Amoco*, 480 U.S. at 545; *Romero-Barcelo*, 456 U.S. at 315.

106. *Amoco*, 480 U.S. at 544.

107. *Winter*, 129 S. Ct. at 376.

108. *Id.*

109. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 757 (2004).

requirements in *Amoco* and *Romero-Barcelo*, the harm that the Court found missing in both cases—undermining the purpose of the statutes—is the very harm inflicted by the Navy's failure to complete an EIS prior to engaging in its training exercises. Further, although NEPA does not impose substantive obligations on agencies, it does have a substantive *policy* that an agency's failure to account for all the environmental consequences of its actions seriously undermines.[110] By the very language of the statute, NEPA's purpose is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment [and] to promote efforts which will prevent or eliminate damage to the environment."[111] NEPA's EIS requirement is critical to furthering these substantive goals. *Amoco* and *Romero-Barcelo* provide compelling guidance that the Supreme Court in the noted case chose not to follow. Although NEPA only demands compliance with procedural requirements, those requirements are crucial to upholding the statute's purposes and goals. The fact that the Navy's actions threatened to seriously undercut both the procedural requirements and the substantive goals of a well-established congressional mandate argues strongly for a more thorough analysis of the harm caused by vacating the injunction by the Court.

V. CONCLUSION

Twenty-two years ago, the Supreme Court in *Amoco* stated, "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."[112] Currently, as the Ninth Circuit pointed out, the United States is at war with two countries.[113] In his article, Professor Stephen Dycus argues that national security interests may sometimes outweigh environmental concerns.[114] Sacrifices must sometimes be made in the name of national defense.[115] This may be particularly true today. However, as Dycus notes, it is difficult to know when these environmental sacrifices are really necessary.[116] In the noted case, the

110. *See* Eubanks, *supra* note 93, at 651-52.
111. 42 U.S.C. § 4321 (2006).
112. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 534 (1987).
113. Natural Res. Def. Council v. Winter, 502 F.3d 859, 863 (9th Cir. 2007).
114. Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 4 (2005).
115. *Id.*
116. *Id.*

Court deferred without exception to the Navy's assessment of the harm it would incur if the district court's injunction stayed intact.[117] Paying little attention to the likelihood that the Navy did, in fact, violate NEPA and that substantial harm would, in fact, be inflicted on the environment, the Supreme Court placed military interests on a pedestal that appears very difficult to reach. At a time when the United States is mired in two wars with no end in sight, the Court's holding in the noted case provides little comfort, or incentive, to potential environmental plaintiffs seeking to challenge military actions in the future.

Caroline Milne*

117. Winter v. Natural Res. Def. Council, 129 S. Ct 365, 377-78 (2008).

 J.D. candidate 2011, Tulane University Law School; B.A. 2004, New York University. The author would like to thank her editor for his guidance, and her mother, father, and brother for their love and support.