

## NRDC's Battle Against the Navy

In *Natural Resources Defense Council, Inc. v. Winter*,<sup>1</sup> the Ninth Circuit Court of Appeals granted the United States Navy an emergency stay of the district court's preliminary injunction of Naval training activities that may harm marine life. At first glance, this appears to be a strike against protection of marine life. However, a closer reading shows that the Ninth Circuit decision is more clearly defining the standards of review rather than ruling against environmental interests; and the subsequent history of this case confirms this view.

### BACKGROUND

In its training exercises, the Navy uses medium frequency active (MFA) sonar to locate submerged submarines.<sup>2</sup> Active sonar works by emitting a loud noise that travels towards surrounding objects; the echoes that bounce back are analyzed to determine the location of these objects.<sup>3</sup> MFA sonar is considered the most effective means of detecting submarines.<sup>4</sup> However, evidence shows that these loud noises have adverse effects on marine life, particularly whales, and can result in permanent injury and even death.<sup>5</sup> As a result, the Navy has been clashing with environmental groups for years over its use of MFA sonar in training exercises.<sup>6</sup>

In 2006, the Navy and the Natural Resources Defense Council (NRDC) reached a settlement that allowed the training exercises to continue but stipulated certain conditions designed to mitigate the environmental impacts.<sup>7</sup> The "mitigation measures" included a requirement that the decibel level be reduced when whales were seen in the vicinity or when inclement weather prevented the sighting of whales.<sup>8</sup> Also, sailors were required to be on deck looking for whales before a sonar training exercise was initiated.<sup>9</sup>

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1. *Natural Res. Def. Council, Inc. v. Winter (NRDC I)*, 502 F.3d 859 (9th Cir. 2007).

2. *Id.* at 861.

3. *Id.*

4. *Id.*

5. *Id.*; *Natural Res. Def. Council v. Winter (NRDC I)*, No. cv-00335-FMC-FMOx, 2007 U.S. Dist. LEXIS 57909, at \*3-4 (C.D. Cal. Aug. 7, 2007), *stay granted*, 502 F.3d 859 (9th Cir. 2007), *stay vacated*, 508 F.3d 885 (9th Cir. 2007).

6. *NRDC II*, 502 F.3d at 861.

7. *Id.*

8. *Id.* (citing Settlement Agreement, *Natural Res. Def. Council, Inc. v. Winter*, No. CV-06-4131-FMC (C.D. Cal. July 7, 2006)).

9. *Id.*

In early 2007 the Navy made plans to complete fourteen large-scale training exercises over two years using MFA sonar off the coast of southern California.<sup>10</sup> Despite its own predictions that these tests would cause 170,000 incidents of harassment to marine mammals and over 450 permanent injuries to whales in particular, the Navy determined that there would be no significant impact on the environment and declined to prepare an Environmental Impact Statement (EIS).<sup>11</sup> Furthermore the Navy would not commit itself to any of the mitigation measures with which it had previously complied.<sup>12</sup>

On March 22, 2007, a coalition of environmental advocacy groups,<sup>13</sup> led by NRDC, filed suit against the Navy<sup>14</sup> seeking injunctive relief for its violations of the National Environmental Protection Act (NEPA),<sup>15</sup> the Coastal Zone Management Act (CZMA),<sup>16</sup> the Administrative Procedure Act (APA),<sup>17</sup> and the Endangered Species Act (ESA).<sup>18</sup> On June 22, 2007, NRDC filed a motion for a preliminary injunction against the Navy's use of MFA sonar in the Southern California Operating Area (SOCAL) until the Navy agreed to use "mitigation measures."<sup>19</sup> The Navy responded with a motion to dismiss or stay.<sup>20</sup>

The District Court for the Central District of California reviewed both motions in *Natural Resources Defense Council v. Winter (NRDC I)*, ultimately granting the plaintiffs' motion for a preliminary injunction.<sup>21</sup> In denying the motion to dismiss or stay, the district court rejected the defendant's argument that dismissal was necessary for "judicial economy" and that the plaintiffs' motion was an example of "vexatious litigation."<sup>22</sup>

In analyzing whether to grant the plaintiffs' motion, the district court held that a preliminary injunction may be granted when the party demonstrates either threat of irreparable injury and probable success on the merits, or that the issue raised is serious and the balance of hardships weighs on their side.<sup>23</sup> The district court continued, "these two options represent extremes on a single continuum: the less certain the district court is of the likelihood of success on

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10. *NRDC I*, 2007 U.S. Dist. LEXIS 57909, at \*4.

11. *Id.* at \*4-5.

12. *Id.* at \*5.

13. The plaintiffs include NRDC, International Fund for Animal Welfare, Cetacean Society International, League for Coastal Protection, Ocean Futures Society, and an individual, Jean-Michel Cousteau. *Id.*

14. *NRDC I*, 2007 U.S. Dist. LEXIS 57909, at \*6.

15. 42 U.S.C. §§ 4321-4347 (2006).

16. 16 U.S.C. §§ 1451-1465 (2006).

17. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

18. 16 U.S.C. § 1531-1544 (2006).

19. *NRDC I*, 2007 U.S. Dist. LEXIS 57909, at \*6.

20. *Id.* at \*6-7.

21. *Id.* at \*3.

22. *Id.* at \*6-7.

23. *Id.* at \*7 (citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007)).

the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.”<sup>24</sup>

After a thorough analysis of the plaintiffs’ likelihood to succeed on the merits, the court concluded that they have a high probability of success on every count except the ESA claim.<sup>25</sup> It also concluded that there is “near certainty that use of MFA sonar during the planned SOCAL exercises will cause irreparable harm to the environment and Plaintiffs.”<sup>26</sup> Without providing detailed analysis of its balancing test, the court concluded that the potential harm to the environment, the plaintiffs, and the public outweighed the harm that the defendant would suffer if unable to use MFA sonar.<sup>27</sup>

#### THE DECISION

After losing in the district court, the Navy filed an emergency motion for stay of the injunction pending appeal, which the Ninth Circuit granted a little over three weeks after *NRDC I* was decided.<sup>28</sup> In *NRDC II*, the circuit court critiqued the analysis in *NRDC I*, stating “the district court must consider not only the possibility of irreparable harm, but also, in appropriate cases, the public interest.”<sup>29</sup> The court emphasized that “the public interest is not the same thing as the hardship to the party against whom the injunction was issued.... They are separate.”<sup>30</sup> Therefore it is not enough to consider the “balance of hardships” between the plaintiffs and the Navy; the court must also take into account the “public interest” in having an effective Navy.<sup>31</sup> The circuit court was not convinced that the district court gave this factor full consideration.<sup>32</sup> It pointed out that there is no explicit mention of the public interest in an effective Navy in the case and that “the reference to ‘public interest’ by the district court extends only to the interest in protecting marine animals not the interest in national defense.”<sup>33</sup> Although the public has a “considerable interest in preserving our natural environment and especially relatively scarce whales,” the Ninth Circuit concluded that this interest must be weighed against the safety of U.S. soldiers and national defense.<sup>34</sup>

The dissenting opinion argued that the interest in national security was indeed “carefully weighed” by the district court, which reviewed all the

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24. *Id.* at \*8 (quoting *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007) (internal quotation omitted)).

25. *Id.* at \*9–32.

26. *Id.* at \*33.

27. *Id.* at \*33–34.

28. *NRDC II*, 502 F.3d 859, 862 (9th Cir. 2007).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 863.

33. *Id.*

34. *Id.* at 863–64.

pertinent documents *in camera*.<sup>35</sup> Citing court transcripts, the dissent argued that the district court *did* consider the public interest in national security, evidenced by its statement that MFA sonar testing is “critical to national security.”<sup>36</sup> The majority, however, was not persuaded, dismissing the quoted language as an “oblique reference.”<sup>37</sup> The majority opinion emphasized the lack of explicit reference in the district court’s order and concluded that the remarks concerning the harm to be suffered by the defendant as conclusory.<sup>38</sup>

The majority relied on *Hilton v Braunskill*<sup>39</sup> for the standard to apply to a motion for a stay pending appeal.<sup>40</sup> The factors were (1) demonstration of probable success on the merits, (2) threat of irreparable injury absent the stay, (3) whether a stay would cause substantial injury to the other parties, and (4) the public interest.<sup>41</sup> According to the court, *Hilton* stresses that a party seeking a stay can succeed by establishing merely a “substantial case on the merits” and that “the second and fourth factors militate in its favor.”<sup>42</sup>

In its analysis, the court held that the Navy presented a “substantial” case on appeal, because of both the “breadth of the injunction” and the district court’s failure to consider the “public interest” in a broader way that included national security.<sup>43</sup> Further, the second and fourth factors also weighed in their favor.<sup>44</sup> The opinion does not, however, discuss how a stay might affect the plaintiffs and their interest in protecting marine life. The court granted a stay pending appeal of the preliminary injunction, admitting that it was not the ideal solution but rather the only possible outcome, as it could not order mitigating measures because the district court had not addressed them.<sup>45</sup> As such, the court ordered an expedited appeal, stating that “expeditious determination of this appeal can eliminate a great deal of the risk to both our country and to marine wildlife.”<sup>46</sup>

#### ANALYSIS

The immediate environmental consequences of this decision were minimized by the expedited appeal. However, this opinion may have lasting doctrinal effects on courts’ analyses of similar situations.

In granting the stay pending appeal, the Ninth Circuit pointed to two large errors in the district court decision. The first is the failure to consider military

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35. *Id.* at 868–69 (Smith, J., dissenting in part, concurring in part).

36. *Id.* at 869.

37. *Id.* at 863 (majority opinion).

38. *Id.*

39. 481 U.S. 770 (1987).

40. *NRDC II*, 502 F.3d 859, 863 (9th Cir. 2007).

41. *Id.*

42. *Id.*

43. *Id.* at 864.

44. *Id.*

45. *Id.*

46. *Id.* at 865.

preparedness in terms of a public interest.<sup>47</sup> The circuit court is concerned about what it sees as a complete disregard of the public interest in maintaining a well-trained Navy. The circuit court did not rule on whether the use of MFA sonar is necessary to achieve this, but rather on the district court's error in failing to consider the factor. However, the court did not assign a specific value to this factor; it only insisted that it be part of the equation. Therefore, while future courts may be more likely to include military preparedness as an explicit factor in their balancing test, they will still have a great deal of discretion as to how it should be weighed.

The second error was the "breadth of the injunction."<sup>48</sup> The circuit court indicated that the injunction should have included mitigation measures,<sup>49</sup> even though the Navy did not address them and neglected to provide an argument as to why they would not consider them at that point.<sup>50</sup> The court emphasized the district court's background with the case and previous involvement with settlement agreements between the parties that included mitigation measures, which suggested a heightened requirement to order an injunction that was tailored to the facts and promotes an overall public interest.<sup>51</sup> Accordingly, in this case it was the district court's responsibility to raise the issue of mitigation measures, not the Navy's. However, it is unclear if an appellate court would demand such a tailored injunction in future cases that lack the same lengthy history.

Thus, the enduring doctrinal effect of this case will likely be to encourage the district courts within the Ninth Circuit to be more thorough when balancing interests in preliminary injunction motions, and to explicitly acknowledge the public interest inherent to military activities.

#### SUBSEQUENT HISTORY

In November of 2007, *NRDC I* was heard on appeal on its merits.<sup>52</sup> The Ninth Circuit appeal panel agreed with the decision of the motion panel in *NRDC II*, reasoning that because "[i]njunctive relief must be tailored to remedy the specific harm alleged an overbroad preliminary injunction is an abuse of discretion."<sup>53</sup> The court went on to acknowledge that "[t]he motions panel was faced, however, with the all-or-nothing choice of staying the district court's blanket injunction... or denying the request for a stay entirely."<sup>54</sup> Accordingly, the circuit court then used its power to vacate the stay and remanded the case

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47. *Id.* at 864.

48. *Id.*

49. *Id.* at 861.

50. *See id.*

51. *Id.*

52. *Natural Res. Def. Council v. Winter*, 508 F.3d 885 (9th Cir. 2007).

53. *Id.* at 886 (citing *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)).

54. *Id.*

back to the district court, ordering it to narrow the injunction so that it includes appropriate mitigation measures that would allow the Navy to conduct training exercises while limiting the environmental impact.<sup>55</sup>

In January 2008, the district court granted a preliminary injunction (pending outcome of the NEPA, APA, and CZMA causes of action) with mitigation measures similar to those in the 2006 settlement agreement.<sup>56</sup> The Navy made an emergency motion to stay the preliminary injunction, which the district court subsequently denied on January 14.<sup>57</sup> The next day, President George W. Bush signed an Executive Order exempting the Navy from the CZMA and the Council on Environmental Quality (CEQ)—the White House agency responsible for implementation of NEPA—declared that “emergency circumstances” excused the Navy’s requirement to complete an EIS.<sup>58</sup> On January 16, the Ninth Circuit ordered the district court to reconsider the injunction in light of these new developments.<sup>59</sup> On February 4 the district court denied the validity of the CEQ’s declaration, finding that the Navy was not exempt from NEPA’s requirements.<sup>60</sup> The court found the Presidential declaration of the Navy’s exemption to the CZMA to be disconcerting on constitutional grounds, but declined to address it, holding only that the plaintiffs’ NEPA claim was strong enough to uphold the preliminary injunction.<sup>61</sup> On February 29, the Ninth Circuit affirmed the decision, citing with approval both the “narrowly-tailored mitigation measures” as well as the district court’s careful balancing of the public interests.<sup>62</sup> It seemed as though the matter of a preliminary injunction had finally come to an end. Then, on June 23, 2008, the Supreme Court granted the Navy’s petition for writ of certiorari on the case.<sup>63</sup>

#### CONCLUSION

The Ninth Circuit’s decision in *NRDC II* to grant the Navy a stay on the district court’s preliminary injunction appears to be a defeat for the environment, but it was actually a short-lived setback. Ultimately, the Ninth Circuit required the Navy to implement mitigation measures and this injunctive relief survived an executive exemption from the President, another motion for

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55. *Id.* at 887.

56. *Natural Res. Def. Council v. Winter*, 530 F. Supp. 2d 1110 (C.D. Cal. 2008), *stay denied*, 516 F.3d 1103 (9th Cir. 2008).

57. *See* *Natural Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1229 (C.D. Cal. 2008).

58. *See id.* at 1223–24.

59. *Natural Res. Def. Council v. Winter*, 513 F.3d 920 (9th Cir. 2008), *remanded*, 527 F. Supp. 2d 1216 (C.D. Cal. 2008).

60. *Id.*

61. *Id.* at 1219–20, 1232.

62. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658 (9th Cir. 2008) *cert. granted*, 76 U.S.L.W. 3539 (June 23, 2008).

63. *Winter v. Natural Res. Def. Council*, No. 07-1239, 76 U.S.L.W. 3539 (June 23, 2008).

an emergency stay, and further appeals to the Ninth Circuit Court.<sup>64</sup> However, as the case proceeds to the Supreme Court, it is unclear whether these mitigation measures will be upheld. There is one battle remaining between NRDC and the Navy.

—Catherine Mongeon

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64. Marc Kaufman, *White House Went Too Far in Sonar Case, Judge Rules*, WASH. POST, February 5, 2008 at A02; *Natural Res. Def. Council v. Winter*, No. 08-55054, 2008 WL 565680, (9th Cir. February 29, 2008).

