

**NRDC v. WINTER*: IS NEPA IMPEDING NATIONAL
SECURITY INTERESTS?**

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* This Article was composed prior to the United States Supreme Court’s decision on the case, but it was published subsequent to the issuance of the Court’s decision. *Winter v. NRDC*, 129 S. Ct. 365 (2008). In the majority opinion, Chief Justice Roberts held that environmental interests are outweighed by the Navy’s need to conduct training to ensure our nation’s safety. *Id.* at 382. The Court agreed with the Navy that delaying training to prepare an Environmental Impact Statement (EIS) would jeopardize national security. *Id.* at 381. Thus, the Court vacated the lower court’s preliminary injunctions but did not address the underlying merits of the case. *Id.* at 381-82. The Court had little to say about the Council on Environmental Quality (CEQ) and its emergency circumstances regulation, the focal point of this Article. However, the dissenting Justices Ginsburg and Souter strongly spoke out against CEQ’s actions in regard to the case. *Id.* at 391. The justices called the Navy’s appeal to CEQ an “extraordinary course” of action which undermined the National Environmental Protection Act (NEPA). *Id.* at 389. The dissent went on to say “CEQ lacks authority to absolve an agency of its statutory duty to prepare an EIS,” and while the Court recognized that “CEQ may play an important consultative role in emergency circumstances, [the Court] never suggested that CEQ could eliminate the statute’s command.” *Id.* at 391. The dissent found that an EIS is NEPA’s “core requirement,” and the Navy’s failure to publish an EIS defeated NEPA’s purpose. *Id.* at 387. Considering the balance of the equities, the dissent found that the district court did not abuse its discretion in issuing the injunction. *Id.* at 389.

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I. INTRODUCTION

The U.S. Navy fulfills its mission to have “combat-ready Naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas” through ongoing combat training.¹ Naval fleets must be ready for deployment to high-risk areas at all times.² Training is most effective under circumstances that closely resemble those that might be found in actual combat situations.³ For submarine warfare, the waters off the California coast are “uniquely suited” for naval training exercises.⁴ These exercises have included the use of mid-frequency active (MFA) sonar for over forty years.⁵

In 1998, MFA sonar was strongly linked to a strange phenomena happening on beaches around the world—the mass beaching of whales.⁶ Since that time, evidence has poured in that sonar has a

1. The US Navy Organization, Mission of the Navy, <http://www.navy.mil/navydata/organization/org-top.asp> (last visited June 13, 2009).

2. See *infra* note 50 and accompanying text (describing the Navy's responsibilities under U.S. Code).

3. *NRDC v. Winter (Winter V)*, 518 F.3d 658, 698 n.59 (9th Cir. 2008).

4. *Id.* at 702 n.69.

5. Gidget Fuentes, Sonar Ruling Lifts Key Training Restrictions, *Marine Corps Times*, Nov. 16, 2008, http://www.marinecorpstimes.com/news/2008/11/navy_sonar_111408w/. “Sonar is an acronym for ‘Sound Navigation and Ranging.’” Ocean Stewardship, Understanding Sonar, <http://www.navy.mil/oceans/sonar.html> (last visited June 13, 2009) [hereinafter Understanding Sonar].

6. Stephanie Siegel, Low-Frequency Sonar Raises Whale Advocates Hackles, CNN,

detrimental effect on marine life.⁷ The noise can rupture the ears of mammals and disorient them, leading to a variety of undesirable consequences including death of marine mammals such as blue whales, dolphins, and beaked Curvier's whales.⁸

Finding middle ground between naval and environmental needs and interests has been tricky.⁹ The Natural Resource Defense Council (NRDC) has led a fight against active sonar use since 2003.¹⁰ But in a world that has nearly silent submarines, which threaten the safety of sailors, soldiers, and the United States, MFA sonar is a powerful and necessary tool.¹¹ With this tension between naval and environmental needs well known, the Navy proposed training exercises off the California coast from February 2007 to January 2009.¹²

The proposed training set off a flurry of litigation, markedly accentuated by a mid-litigation administrative agency decision exempting the Navy from the procedural requirements under the National Environmental Protection Act (NEPA).¹³ The Council on Environmental Quality (CEQ), an administrative agency, characterized the Navy's training needs as an "emergency" which allowed the Navy to proceed with its training and sonar use under "alternatives arrangements."¹⁴ While *NRDC v. Winter*¹⁵ is noteworthy

June 30, 1999, <http://www.cnn.com/NATURE/9906/30/sea.noise.part1/>. The study, published in *Nature*, established a causal link between MFA sonar usage and whales beaching themselves and was able to determine that a specific instance of mass beaching had a more than ninety-nine percent likelihood of being caused by MFA use. *See id.*

7. *Winter V*, 518 F.3d at 665-70.

8. *Id.*

9. Finding middle ground may not have to be as difficult as it is often made out to be, as "[d]efending our national security and protecting our environment are closely linked and share the goals of ensuring our well being and preserving our rich national heritage." Paul C. Kiamos, *National Security and Wildlife Protection: Maintaining an Effective Balance*, 8 ENVTL. LAW. 457, 461 (2002).

10. *See* NRDC, Protecting Whales from Dangerous Sonar, <http://www.nrdc.org/wildlife/marine/protectingwhales.asp> (last visited June 13, 2009) [hereinafter Protecting Whales].

11. Modern submarines are diesel powered making them incredibly silent and thus a menacing threat. *See* Senior Navy Officer, Remarks at the Press Roundtable: Navy Sonar Training Off California Coast (Jan. 16, 2008) [hereinafter Press Roundtable], available at www.navy.mil/navco/Sonar/Transcript%20%20Media%20Roundtable%2016%20Jan%2008.doc.

12. *NRDC v. Winter (Winter I)*, No. 8:07-cv-00335-FMC-FMOx, 2007 WL 2481037, at *1 (C.D. Cal. Aug. 7, 2007). The fourteen scheduled exercises consisted of seven Composite Training Unit Exercises (COMPTUEXs) that last three to four weeks each and seven Joint Tactical Force Exercises (JTTFEXs) that last about ten days each. *Winter V*, 518 F.3d at 663. The exercises involved the use of surface ships, aircraft, and submarines as an integrated training phase "in which individual naval units-ships, submarines and aviation squadrons learn and demonstrate skills as members of a strike group." *Id.*

13. *See infra* Part III.A-F (detailing the circuitous course of the case).

14. Decision Memorandum Accepting Alternative Arrangements for the Southern California Composite Training Unit Exercises (COMPTUEXs) and Joint Task Force Exercises (JTTFEXs) Scheduled To Occur Between Today and January 2009, 73 Fed. Reg. 4189, 4189-91 (Jan. 24, 2008) [hereinafter Decision Memorandum].

15. *Winter I*, 2007 WL 2481037; *see also infra* Part V.A.1-3. One reason the case is noteworthy is because it was a great victory for environmental groups. ACOEL, NRDC v.

for many reasons, this Article seeks only to understand whether planned military training constitutes an emergency under the emergency circumstances regulation. This Article also explores whether the regulation adequately considers important national security needs that do not rise to the level of an emergency and whether NEPA should be amended to exempt certain national security related activities.¹⁶

This Article argues that the Ninth Circuit Court of Appeals correctly determined that an emergency cannot refer to pre-planned, long-term training exercises as part of a military policy that has no foreseeable end.¹⁷ The intent behind the adoption of the emergency circumstances regulation and prior case law demonstrate that the regulation only contemplates unexpected, unplanned circumstances that arise independent of agency action.¹⁸ This Article then argues that NEPA should be amended to add a national security exception.¹⁹ A national security exception would not be contrary to NEPA's purpose and would reflect a more appropriate balance between national security and environmental interests in a time when both are of national importance.²⁰ Lastly, this Article presents *Winter* as an example of why NEPA should have a national security exception.²¹

II. STATEMENT OF THE PROBLEM

The National Environmental Policy Act established a national policy requiring all federal agencies to fully consider the effects its actions may have on the environment *before* the action is taken.²² The NEPA requirements can be time consuming, and in situations where action cannot be harmlessly delayed, it can frustrate other important national policies.²³ It has the potential to be a particularly onerous impediment in meeting and furthering national security objectives.²⁴ The *Winter* litigation over MFA sonar usage in

Winter—Green Trumps the Blue and Gold—National Security Takes a Back Seat to National Resources, Jan. 22, 2008, <http://www.acoel.org/2008/01/articles/nepa/nrdc-v-winter-green-trumps-the-blue-and-gold-national-security-takes-a-back-seat-to-natural-resources>. Additionally, the case raised, but did not resolve, constitutional and separation of powers issues. *Winter V*, 518 F.3d 658, 686 n.47 (9th Cir. 2008).

16. See *infra* Part V.B.1-3 (arguing that NEPA should have a national security exception).

17. See *infra* Part V.A.1-3 (discussing *Winter V*, 518 F.3d 658).

18. See *infra* Part V.A.1 (discussing the intent behind the regulation).

19. See *infra* Part V.B.1-3.

20. See *infra* Part V.B.1 (discussing the proposed exception and NEPA's purpose).

21. See *infra* Part V.B.3. (discussing *Winter V*, 518 F.3d 658).

22. FREDERICK R. ANDERSON, ENVTL. LAW INST., NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT, at vii (Ruth B. Haas ed., 1973).

23. See *infra* note 36 and accompanying text (noting the time for an EIS completion).

24. See *infra* Part V.B.1. (discussing how NEPA procedural requirements may jeopardize national security).

training is offered as a case illustration of the need to amend NEPA to allow exceptions to its time consuming procedural requirements when a compelling national security issue must be addressed without delay.²⁵ First, however, this Article will discuss the basics of NEPA, including an overview of the agency responsible for issuing NEPA regulations.²⁶ This Article will then discuss what is primarily at stake in *Winter* by discussing the military necessity of MFA sonar and the effects it has on marine life.²⁷

A. National Environmental Protection Act

On New Year's Day 1970, President Nixon signed the National Environmental Policy Act.²⁸ The Act provides a procedural framework that federal agencies must work within to ensure the policies of the Act are implemented, but the Act does not mandate any particular substantive outcome.²⁹ Agencies must use all practical means and measures to fulfill NEPA requirements.³⁰ It has a broad scope, touching upon federal agency actions of all types, which is in accordance with the purpose of NEPA: "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations."³¹ Despite its lofty purpose and broad scope, NEPA's reach is limited to "major Federal actions significantly affecting the quality of the human environment."³²

If an agency's proposed act is found to have a substantial effect that cannot be completely mitigated, the agency must prepare an environmental impact statement (EIS).³³ The statement is the heart of NEPA's procedural requirements, and there is no exception to the requirement within the statutory framework.³⁴ Essen-

25. See *infra* Part V.B.3.

26. See *infra* Part II.A-B (explaining NEPA and CEQ).

27. See *infra* Part II.C-D (explaining sonar usage and how it affects whales and other marine animals).

28. See generally National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370).

29. See *id.*; see also *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979) (describing NEPA). The Act is one of *policy*, not of regulation. ANDERSON, *supra* note 22, at 4.

30. 42 U.S.C. § 4331(b) (2000).

31. *Id.* § 4331(a).

32. *Id.* § 4332(c).

33. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT §§ 8:01, 8:55 (Supp. 1991).

34. *Id.* § 5:06. While NEPA does not have any express exceptions, Congress can pass legislation to specifically exempt an agency project from NEPA. See *id.* § 5:07. For example, Congress has exempted the Environmental Protection Agency's (EPA) actions under the Clean Air Act from NEPA compliance and has enacted legislation to exempt other specific agency projects or programs. *Id.* § 5:06. Additionally, if there is "clear conflict" of statutory authority, action may be exempt from the EIS requirement. *Id.*

tially, NEPA requires agencies to take a “hard look” at proposed actions to consider the environmental impact (the adverse environmental effects) and to provide the public with information about such action and to allow public comment.³⁵ It is a multi-step process that can take anywhere from months to years to complete depending on the agency, complexity of the project, and experience of the personnel preparing the EIS.³⁶ Once the EIS is completed, there is a record of decision that is enforceable by agencies and private parties.³⁷ If an EIS is not completed before agency action substantially affecting the environment is taken or if the EIS is inadequate, injured parties may sue for injunctive relief.³⁸

B. Council on Environmental Quality

NEPA created the Council on Environmental Quality (CEQ) to serve in an advisory capacity to the executive branch of government.³⁹ CEQ provides guidance and advice on environmental policy.⁴⁰ In this role, CEQ mainly exerts influence through “informal discussion and criticism.”⁴¹ CEQ interprets NEPA and “has played an aggressive role in promulgating guidelines for agency implemen-

35. See 42 U.S.C. § 4331(a)-(b); see also *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1076 (E.D. Cal. 2004) (describing NEPA and EIS requirements).

36. The EIS process is initiated when a federal agency publishes a notice of intent to prepare an EIS in the Federal Register. VALERIE M. FOGLEMAN, *GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT: INTERPRETATIONS, APPLICATIONS, AND COMPLIANCE* 118 (1990). The agency then engages in “scoping” to identify important issues for consideration during the EIS study. *Id.* Scoping is a public process where public, state, and federal agency participation is invited. *Id.* After scoping, the agency refines its proposed action and prepares a draft EIS. Nat’l Oceanic & Atmospheric Association, U.S. Dep’t of Commerce, NEPA/EIS Factsheet, www.nmfs.noaa.gov/pr/pdfs/permits/nepa.pdf (last visited June 13, 2009). A notice of the draft’s availability is then published, and there is a time period allowed for public information meetings and comments. *Id.* A final draft is then prepared, and a notice of the final draft is published. *Id.* After either a thirty or ninety day waiting period, depending on the notice published, there is a record of the EIS decision, and the agency can then move forward with its proposed action. FOGLEMAN, *supra*, 35 at 117. The waiting periods “allow interested persons, organizations, and agencies to comment on the agency’s compliance with NEPA and give the agency time to consider the comments.” *Id.* The necessary time to complete all these steps can vary greatly, but the United States Supreme Court has noted in a case involving the Department of the Interior that “[i]t is inconceivable that an environmental impact statement could, in 30 days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments.” *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 788-89 (1976). Instead, the court suggests that the proper time for EIS preparation varies between three and eighteen months depending on project complexity and the preparers’ experience. *Id.* at 789 n.10.

37. FOGLEMAN, *supra* note 36, at 122.

38. *Id.* at 185-89.

39. 42 U.S.C. § 4342.

40. James E. Landis, *The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States’ Overseas Environmental Policies*, 49 NAVAL L. REV. 99, 103 (2002).

41. ANDERSON, *supra* note 22, at 3.

tation of NEPA.”⁴² The regulations are binding on federal agencies and they must comply.⁴³ The only exception is one which allows an agency to act without preparing an EIS due to an “emergency.”⁴⁴

Under the emergency circumstances regulation, CEQ may approve “alternative arrangements” to NEPA compliance.⁴⁵ An agency may only obtain such approval where an emergency “make[s] it necessary to take an action with significant environmental impact without observing the provisions of [NEPA].”⁴⁶ Any alternative arrangements approved must be limited to “control the immediate impacts of the emergency.”⁴⁷ Since the emergency circumstances regulation took effect in 1978, CEQ has only received forty-one requests for an alternative arrangement.⁴⁸ Of the forty-one requests, only three have led to published decisions.⁴⁹

C. Submarine Warfare and Sonar

The U.S. Navy has a responsibility under the U.S. Code to be readily prepared for combat at sea.⁵⁰ Real life combat at sea re-

42. *Id.*

43. *Id.* at 2-3.

44. Council on Environmental Quality, 40 C.F.R. § 1506.11 (2008). The author feels compelled to point out that the legality of CEQ and its promulgated regulations, particularly the emergency circumstances regulation, is a contested issue. See Robert Orsi, *Emergency Exceptions from NEPA: Who Should Decide?*, 14 B.C. ENVTL. AFF. L. REV. 481, 499-507 (1987) (discussing an argument that CEQ acted outside of its statutorily given authority by enacting the emergency exception); see also *NRDC v. Winter (Winter IV)*, 527 F. Supp. 2d 1216, 1232 (C.D. Cal. 2008) (“[T]here is a serious question as to whether CEQ, an executive body, is sitting in review of a decision of the judicial branch . . . [A]ctivity of this nature raises serious constitutional concerns under the Separation of Powers doctrine.”). While it is not a particularly pertinent point for purposes of this Article, it is an important issue when discussing NEPA and one that has yet to be decided in the courts.

45. 40 C.F.R. § 1506.11.

46. *Id.* This regulation reflects that due to the length of time some NEPA requirements take to prepare, there will be some instances where there simply is not enough time to complete the requirement before agency action must be taken. See KRISTINA ALEXANDER, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, WHALES AND SONAR: EXEMPTIONS FOR THE NAVY’S MID-FREQUENCY ACTIVE SONAR TRAINING 5 (2008).

47. ALEXANDER, *supra* note 46, at 5.

48. *Id.* (citing information received via written communication with CEQ from January 22, 2008). For example, CEQ has invoked its emergency authority under circumstances in which it was necessary to (1) stop an outbreak of encephalitis in Arizona; (2) prevent the collapse of a historic building and remove hazardous asbestos; (3) stop the spread of an incurable disease among steelhead trout in a fishery; (4) remove unexploded ordnance exposed by natural wave process in a beach community; and (5) accept delivery of spent nuclear fuel rods which, if sent elsewhere, could be used to make nuclear weapons. Letter from Henry A. Waxman, Chairman, Comm. on Oversight and Gov’t Reform, to James L. Connaughton, Chairman, Council on Env’tl. Quality (Jan. 25, 2008), available at <http://oversight.house.gov/documents/20080125104813.pdf>.

49. ALEXANDER, *supra* note 46, at 10.

50. Marine Mammals and Sound, Understanding Sonar, <http://www.navy.mil/oceans/sound.html> (last visited June 13, 2009). Part of the Navy’s responsibility is to “have the capacity to act in . . . a fluid and unpredictable environment.” DONALD C. WINTER, THE SECRETARY OF THE NAVY’S FY 2009 POSTURE STATEMENT 2 (2008), available at www.navy.mil/

quires the use of sonar for both offensive and defensive tactics.⁵¹ Sonar is a tool primarily used underwater and utilizes sound to help ships and submarines navigate and communicate. It also helps to determine water depths, presence of vessels, and the location of mines.⁵² There are two kinds of sonar: passive and active.⁵³ Passive sonar simply receives transmissions of sound and is primarily used to detect the presence of submarines and other objects.⁵⁴ Active sonar both receives and transmits sound.⁵⁵

Active sonar sends out “pulses of sound” that bounce off an object.⁵⁶ The sonar operator listens for the echo of the sound, and the information from the echo allows the operator to measure the size of the object from which the sound bounced and to measure the distance between the operator and the object.⁵⁷ The intensity of the pulse of sound, or the “ping,” and the distance the ping travels varies depending on the frequency of sonar.⁵⁸ MFA sonar can generally travel up to ten nautical miles.⁵⁹ The exact decibel (dB) range is disputed, with the high end topping 215 dBs—the sound equivalent to that of a twin-engine fighter jet at takeoff.⁶⁰

navydata/people/secnav/winter/2008_posture_statement2.pdf. Additionally, fundamental elements of the Navy and Marine Corps strategic posture is to have a worldwide presence, maintain credible deterrence and dissuasion, project power from naval platforms anywhere on the globe, and have the ability to prevail at sea. *Id.* at 3. For at least one naval strike group, “war-fighting” is a top priority. *Winter V*, 518 F.3d 658, 664 (9th Cir. 2008) (internal quotation marks omitted).

51. An important part of naval warfare is submarine and anti-submarine warfare. Submarines are essential in sea combat because their underwater concealment gives them the serious advantage of stealth. J. WARREN HORTON, *FUNDAMENTALS OF SONAR* 3 (2d ed. 1959). Submarines can be offensively used to attack enemy submarines and ships and can be used to launch torpedoes and missiles to land targets. *Understanding Sonar*, *supra* note 5. Submarines can also be used defensively in reconnaissance activities and in underwater surveillance. *Id.* Without sonar, submarines could travel underwater unnoticed posing a serious threat to ships and military fleets. *Id.* Thus, sonar operators, both on ships and in submarines, are constantly listening with passive sonar for the presence of hostile submarines. *Id.* Submarines are operated by navies worldwide, including potential U.S. adversaries in the Asia-Pacific and Middle East areas. Decision Memorandum, *supra* note 14, at 4189-4201. They are also an important part of the naval forces that support ground troops in Iraq as part of “OPERATION ENDURING FREEDOM (OEF) and OPERATION IRAQI FREEDOM (OIF)”. WINTER, *supra* note 50, at 5.

52. *Understanding Sonar*, *supra* note 5.

53. *Id.*

54. *Id.*

55. HORTON, *supra* note 51, at 325. Active sonar is used to more accurately locate a submarine, measure the proximity of a detected submarine, and track a submarine. *Understanding Sonar*, *supra* note 5.

56. *Understanding Sonar*, *supra* note 5.

57. HORTON, *supra* note 51, at 325-38.

58. *See id.* at 325-338 (discussing pulses and reverberations).

59. ALEXANDER, *supra* note 46, at 1.

60. *See Protecting Whales*, *supra* note 10. It is generally agreed that MFA sonar is at least eight to ten times the decibel level at which hearing protection for humans is advised. ALEXANDER, *supra* note 46, at 2; *see also Winter I*, No. 8:07-cv-00335-FMC-FMOx, 2007 WL 2481037, at *1 n.2 (C.D. Cal. Aug. 7, 2007).

Sonar and human made noises from ships and submarines are not the only sounds in the ocean. The ocean is filled with natural sounds, often making it difficult for sonar operators to distinguish between natural and unnatural noises and between pings off harmless and harmful objects.⁶¹ A sonar operator must be able to properly distinguish between these and determine what constitutes a threat. This takes “considerable skill.”⁶² Additionally, because it is so complex, and therefore difficult to do, sonar operators must be highly trained and very competent, making it a perishable skill.⁶³ In order to maintain a navy with the requisite skills, the Navy plans training exercises to ensure combat ready Strike Groups.⁶⁴

D. Sonar Effect on Marine Life

MFA sonar emits a range of sound that can be excruciating to marine mammals. Although the decibel level of sonar is disputed, it has been shown that whales will change migration routes to avoid sonar’s piercing noise when decibel levels reach 120dB.⁶⁵ While such extreme noise can be damaging to nearly any animal, marine mammals are particularly sensitive to the noise because it interferes with their own biological sonar.

Echolocation is used by marine mammals to navigate, communicate, and identify food sources and possible threats.⁶⁶ Mammals exposed to MFA sonar can become confused and surface too quickly trying to avoid the sound which results in decompression sickness, commonly known as “the bends.”⁶⁷ When mammals such as whales and dolphins surface too quickly, gas bubbles are created in the blood stream which can lead to fatal hemorrhaging and lesions

61. The deep of the sea is not silent as is popularly believed. HORTON, *supra* note 51, at 57. It has the noise level similar to that of a “quiet garden.” *Id.* Sea life, such as snapping shrimp, can also greatly contribute to noise level of the ocean. *Id.* at 63-64.

62. Understanding Sonar, *supra* note 5.

63. *Spotlight on Rear Admiral James A. Symonds: New Director of Environmental Readiness Division Shares His Perspectives on the State of the Navy’s Environmental Program*, CURRENTS, Spring 2006, at 12, 15, available at www.enviro-navair.navy.mil/currents/spring2006/spr06_Spotlight.pdf. The perishable nature of sonar operation skills is due to both the tendency for competency of learned skills to diminish over periods of non-use and the turnover rate within the Navy.

64. Strike groups must be proficient in MFA sonar to be combat ready; it allows strike groups to detect and defend themselves against any submarine that may come within range of U.S. military ship in group. Decision Memorandum, *supra* note 14, at 4190.

65. Seigel, *supra* note 6.

66. Understanding Sonar, *supra* note 5. Echolocation is a complex system of sonar that is extremely sensitive. See DOROTHY HINSHAW PATENT, DOLPHINS AND PORPOISES 12-13 (1987). For example, a dolphin can use echolocation to find objects as small as BBs and can distinguish between a piece of copper and a piece of aluminum of the same size and thickness. *Id.*

67. ALEXANDER, *supra* note 46, at 2; see also *Winter V.*, 518 F.3d 658, 664-66 (9th Cir. 2008) (discussing sonar’s effect on marine mammals).

in the organs.⁶⁸ Disorientation or panicked sonar evasion attempts can also cause marine mammals to stray off their usual navigation course which then leads to starvation, beaching, mating and birthing disruptions and has even been suggested as a cause of the odd occurrence of marine life in inland freshwater.⁶⁹

III. STATEMENT OF THE CASE

On March 22, 2007, the Natural Resources Defense Council (NRDC) filed suit against the U.S. Navy over scheduled training exercises in the waters off the Southern California Coast (“SOCAL training”).⁷⁰ This suit, *NRDC v. Winter*, would mark the beginning of a litigation journey that ended, at least for now, with “Green Trump[ing] the Blue and Gold.”⁷¹ At the center of the litigation was the Navy’s use of MFA sonar and the potential harm it has on marine life. *Winter*’s foray up and down the court is cumbersome, packed with factual issues, legal issues, and legal maneuvers.⁷² For purposes of this Article, only issues related to NEPA and CEQ’s emergency circumstance regulation will be discussed in detail.

Important to understanding the implications of *Winter* is an understanding of how the case evolved. The case ping-ponged back and forth between the California District Court and the Ninth Circuit Court of Appeals.⁷³ This Article summarizes the court decisions most relevant for this paper, as well as a critical CEQ determination directly relevant to the case.⁷⁵

68. *Winter V*, 518 F.3d at 665; see also John Roach, Military Sonar May Given Whales the Bends, Study Says, Nat’l Geographic News, Oct 8, 2003, http://news.nationalgeographic.com/news/2003/10/1008_031008_whalebends.html. In one instance involving a mass beaching of Curvier’s beaked whales, researchers concluded that after the whales were exposed to sonar, they experienced hemorrhages in vital organs which led to the whales stranding themselves on the beach in a disorientated state. *Id.* “After beaching, their situation was worse due to the well-known stress stranding syndrome that did more severity to the lesions, resulting in cardiovascular collapse and death.” *Id.* (internal quotation marks omitted).

69. See Geoffrey Lean, Cole Moreton & Jonathan Owen, *Sonar Threat to World’s Whales*, INDEPENDENT, Jan. 22, 2006, available at <http://www.independent.co.uk/environment/sonar-threat-to-worlds-whales-524093.html>.

70. *Winter I*, No. 8:07-cv-00335-FMC-FMOx, 2007 WL 2481037, at *2 (C.D. Cal. Aug. 7, 2007); see also Press Release, NRDC, Navy Hit with Lawsuits After Rejecting Coastal Commission Safeguards for Massive High-Intensity Sonar Exercises Off Southern California Coast (Mar. 22, 2007), <http://www.nrdc.org/media/2007/070322a.asp>.

71. ACOEL, *supra* note 15. The headline is a reference to the official colors of the U.S. Navy. Navy Traditions and Customs, <http://www.history.navy.mil/trivia/trivia01.htm> (last visited June 13, 2009). It also refers to the Naval Academy’s alma mater, “Navy Blue and Gold.” U.S. Naval Academy Band, FAQ, <http://www.usna.edu/USNABand/FAQ/Lyrics.htm> (last visited June 13, 2009).

72. See *infra* Part III.A-F (describing some of the procedural background behind *NRDC v. Winter*).

73. See *infra* Part III.A-F.

75. See *infra* Part III.A-F.

*A. District Court Opinion*⁷⁴

NRDC sought injunctive relief, arguing that the Navy violated NEPA by failing to prepare an EIS prior to using MFA sonar as part of naval training.⁷⁵ The Navy responded that it did not have to prepare an EIS because the training exercises would not have a *significant* impact on the environment.⁷⁶ The district court found this contrary to the Navy's own findings that the exercises would disturb or injure nearly thirty species of marine life.⁷⁷ The court concluded that the NRDC was able to meet its burden and granted an absolute injunction against the use of MFA sonar for nearly two years.⁷⁸ The Navy then sought and was granted an emergency stay of the injunction pending its appeal to the Ninth Circuit.⁷⁹

*B. Ninth Circuit Court of Appeals*⁸⁰

The Ninth Circuit reversed the absolute injunction against naval use of MFA sonar for being overbroad. "[T]he district court did not explain why a broad, absolute injunction against the use of the medium frequency active sonar in these complex training exercises for two years was necessary to avoid irreparable harm to the environment."⁸¹ The Navy had previously used mitigation measures to reduce the harmful effects of sonar, and the court found that mitigation measures were similarly appropriate for the training exercises at hand.⁸² The Ninth Circuit remanded the case to the district court for appropriate tailoring of the injunction.⁸³

*C. District Court Opinion Upon Remand*⁸⁴

Faced with an injunction tailored with mitigation measures, the Navy proposed its own measures to the district court.⁸⁵ The

74. *Winter I*, 2007 WL 2481037, at *1.

75. *Id.* at *2. The lawsuit also alleged the Navy had violated the Endangered Species Act, the Administrative Procedures Act, and the Coastal Zone Management Act. *Id.* While the Navy failed to complete an EIS, the Navy did start the EIS process around January 2007. See Press Roundtable, *supra* note 11, at 2. The Navy continued to work on the EIS through at least January 2008. *Id.*

76. *Winter I*, 2007 WL 2481037, at *4.

77. *Id.* at *5.

78. *Id.* at *1.

79. NRDC v. Winter, 502 F.3d 859, 859 (9th Cir. 2007).

80. NRDC v. Winter (*Winter II*), 508 F.3d 885 (9th Cir. 2007).

81. *Id.* at 886.

82. *Id.* at 887.

83. *Id.*

84. NRDC v. Winter (*Winter III*), 530 F. Supp. 2d 1110 (C.D. Cal. 2008).

85. *Id.* at 1115. These measures were largely mitigation measures the Navy was already taking on its own accord. *Id.*

Navy suggested that the National Defense Exemption mitigation measures it adopted in a prior litigation would sufficiently mitigate the harms of MFA sonar in the instant litigation.⁸⁶ The court agreed that the Navy should continue to employ the prior mitigation measures, but found the Navy's proposal insufficient and therefore imposed mitigation measures to properly address both parties' needs.⁸⁷ The court issued an injunction allowing the Navy to continue training, but only if the Navy (1) maintained a twelve nautical mile exclusion zone from the California coastline at all times; (2) ceased MFA sonar use when marine mammals are spotted within 2200 yards; (3) monitored for the presence of marine mammals for sixty minutes before employing MFA sonar; (4) utilized trained lookouts, including aerial lookout, when MFA sonar is used; (5) powered down sonar when conditions permit; (6) refrained from MFA sonar use in the Catalina basin; and (7) continued the mitigation measures listed in the 2007 National Defense Exemption.⁸⁸

The court found that the injunction provided for a proper balance of the harms. The naval training could not be prohibited, but "the harm to the environment, Plaintiffs, and public interest outweighs the harm that [the Navy] would incur (or the public interest would suffer) if [the Navy] were prevented from using MFA sonar, absent the use of effective mitigation measures."⁸⁹

86. *Id.* at 1118 n.6. In addition to the National Defense Exemption measures, the Navy did propose a few additional, minor mitigation measures:

[The Navy], by contrast, proposed to continue employing the mitigation measures outlined in the 2007 National Defense Exemption ("NDE II") as well as several additional measures, including: (1) powering down MFA sonar by 6 dB at 1,000 meters; powering down an additional 4 dB at 500 meters; and shutting off ("securing") MFA sonar at 200 meters; (2) employing two dedicated, and 3 non-dedicated, marine mammal lookouts at all times when MFA sonar is being used, and providing such lookouts with binoculars, night vision goggles, and infrared sensors; (3) staying outside the Channel Islands National Marine Sanctuary, and remaining 5 nautical miles from San Clemente Island's western shore, and 3 nm from its other shores; (4) aerial monitoring for at least 60 minutes before MFA sonar exercises along the Tanner and Cortez Banks during blue whale migration (July to September 2008); and (5) pre-exercise monitoring of gray whale off-shore migration patterns during March 7-21, 2008 and April 15-May 15, 2008.

Id. at 1118-19 n.6.

87. *Id.* at 1115-16.

88. *Id.* at 1119-21.

89. *Id.* at 1118.

*D. CEQ Ruling*⁹⁰

Following the district court's order for tailored injunctive relief, the Navy sought CEQ's exemption from the EIS requirement pursuant to the emergency circumstances regulation.⁹¹

CEQ noted that the Navy's request was based on its need for realistic and effective military training.⁹² The SOCAL training was critical to military preparedness, and an inability to conduct the training would have significant consequences to the national security of the United States.⁹³ CEQ found that the location of the SOCAL training was particularly important because "it contains all of the land, air, and at-sea bases necessary for conducting the exercises, and the shallow coastal areas . . . realistically simulate areas where the Navy is likely to encounter hostile submarines."⁹⁴ CEQ noted the particular training exercises at issue in *NRDC v. Winter* were the only opportunities for a particular fleet of Strike Groups, constituting thousands of individuals, to achieve required combat training.⁹⁵

Based on the necessity of constant training for combat preparedness and the risk that ill-trained Strike Groups pose to thousands of soldiers and sailors, CEQ concluded that an emergency existed.⁹⁶ CEQ approved alternative arrangements in accordance with the emergency circumstances regulation which would allow the Navy to continue training with MFA sonar.⁹⁷

This new development in the *Winter* litigation prompted the Navy to file an emergency motion to vacate the district court injunction, which was granted based on what the Navy contended was now a moot issue of a NEPA violation.⁹⁸ The Ninth Circuit remanded the case back to the district court to determine the effect of CEQ's action on the preliminary injunction order.⁹⁹

90. Decision Memorandum, *supra* note 14.

91. *Id.* at 4189.

92. *Id.*

93. *Id.* at 4190.

94. *Id.*

95. *Id.* The SOCAL training was to prepare two strike groups for deployment. *See* WINTER, *supra* note 50, at 11.

96. Decision Memorandum, *supra* note 14 at 4191.

97. *Id.* at 4191-92. Accordingly, the Navy would just have to comply with the alternative arrangements. Most importantly, the Navy would have to abide by the National Defense Exemption mitigation measures, providing notice to the public regarding ongoing EIS preparation and continuing to research the effects of MFA sonar on marine mammals. *Id.*; *see also* 40 C.F.R. § 1506.11 (2008); *Winter IV*, 527 F. Supp. 2d 1216, 1224 (C.D. Cal 2008).

98. *NRDC v. Winter*, 513 F.3d 920, 921 (9th Cir. 2008).

99. *Id.* at 922.

*E. District Court Opinion on Second Remand*¹⁰⁰

The district court addressed whether CEQ's ruling mandated a reversal of the court's injunction.¹⁰¹ Courts typically afford deference to an agency's interpretation of its own regulations, but if the interpretation is contrary to the plain language of the regulation or if it is contrary to the agency's intent at the time of the regulation's promulgation, then a court will not defer to the agency.¹⁰²

The court noted that NEPA does not have a national security or defense exemption.¹⁰³ Thus the Navy would only be exempted from the EIS requirement if Congress specifically exempted the SOCAL training through legislation or if training needs rose to the level of an "emergency."¹⁰⁴ The fact that NEPA statutorily does not provide *any* exemption to its requirements strongly informed the court that the emergency regulation must be read narrowly.¹⁰⁵

The court distinguished prior cases where CEQ ruled that an emergency existed.¹⁰⁶ In *Valley Citizens for a Safe Environment v. Vest*, there was a change in Air Force needs due to increased hostilities in a specific area of the world.¹⁰⁷ In contrast, the Navy had no change in military needs in its SOCAL training.¹⁰⁸ Additionally, the court noted that the Navy had plenty of notice of the need of an EIS, unlike the Air Force in *Valley Citizen*. The *Winter* litigation had been lengthy which provided ample time for the Navy to prepare an EIS.¹⁰⁹ The court found that "[t]he Navy's current 'emergency' [was] simply a creature of its own making, *i.e.*, its failure to prepare adequate environmental documentation in a timely fashion, via the traditional EIS process or otherwise."¹¹⁰ Two other cases the court summarily addressed had "legitimate crises [that] [stood] in stark contrast to the Navy's routine training exercises

100. *Winter IV*, 527 F. Supp. 2d 1216 (C.D. Cal 2008).

101. *Id.* at 1225. The court both considered whether training was an emergency and whether the injunction was an emergency. *Id.* at 1216-33. The Navy considered the injunction to create an emergency because it kept the Navy from implementing the EIS procedures. See Press Roundtable, *supra* note 11, at 2, 15.

102. *Winter IV*, 527 F. Supp. 2d at 1230 n.13.

103. *Id.* at 1230.

104. *Id.*

105. *Id.* The court discussed a basic principle of statutory construction: a presumption that there are not exemptions to a statute unless such exemption is specifically authorized. *Id.* "The Navy, just like any federal agency, must carry out its NEPA mandate to the fullest extent possible and this mandate includes weighing the environmental costs of the [project] even though the project has serious security implications." *Id.* (quoting *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1035 (9th Cir. 2006)) (internal quotation marks omitted).

106. *Id.* at 1227-28.

107. *Id.*

108. *Id.* at 1228.

109. *Id.*

110. *Id.*

and [were] consistent with an ordinary understanding of what constitutes an ‘emergency.’”¹¹¹

The court then turned its focus to the agency’s intent in drafting and adopting the regulation.¹¹² Although the regulatory history is limited, the court found support for a narrow interpretation in defining an emergency.¹¹³ In adopting the final regulation, the drafters took care to eliminate any inference that an agency must consult with CEQ before acting because “such a requirement might be impractical in emergency circumstances.”¹¹⁴ The court reasoned that the drafters did not intend emergency circumstances to refer to events that are “the unfavorable consequences of protracted litigation.”¹¹⁵

Finally, the court found if CEQ could define an emergency, as it did in *Winter*, such action would be in direct conflict with NEPA’s directive that agencies comply with NEPA “to the fullest extent possible.”¹¹⁶ Statutory principles of construction do not allow for interpretations which create an absurd result.¹¹⁷ Thus the court concluded it would be contrary to NEPA’s intent to allow agencies to avoid NEPA simply by characterizing an ordinary, planned activity as an emergency.¹¹⁸ Accordingly, the court held that CEQ’s action was invalid, and therefore the Navy was not exempted from the EIS requirement or the preliminary injunction.¹¹⁹ The Navy appealed.¹²⁰

*F. Ninth Circuit Court of Appeals Opinion*¹²¹

The Ninth Circuit Court of Appeals affirmed the district court’s decision that the Navy was not exempt from NEPA’s EIS requirement.

The Navy argued the SOCAL training was properly an emergency, and therefore the district court erred in not deferring to CEQ’s ruling.¹²² The Navy cited to declarations, including one by the Chief of Naval Operations, that said the inability to train Strike Groups for deployment impacts national security at a time

111. *Id.*

112. *Id.*

113. *Id.* at 1229.

114. *Id.* (emphasis omitted) (quoting Implementation of Procedural Provisions, Final Regulations, 43 Fed. Reg. 55988 (Nov. 29, 1978)) (internal quotation marks omitted).

115. *Id.*

116. *Id.* at 1231 (quoting 42 U.S.C. § 4332) (internal quotation marks omitted).

117. *Id.*

118. *Id.* at 1232.

119. *Id.* at 1219.

120. See generally *Winter V*, 518 F. 3d 658 (9th. Cir. 2008).

121. See generally *id.*

122. *Id.* at 678.

when the country is engaged in war in two countries.¹²³ Thus the Navy argued that risks to national security at such a time constitute an emergency within the scope of the regulation.¹²⁴

The court found the Navy's argument untenable. It noted that the Navy was on notice of the EIS requirement from the moment it first planned the training exercises. Further, the Navy had been on notice since the August 7, 2007 district court decision that it would likely lose on the merits of NRDC's claim. Yet, "the Navy waited until January 10, 2008, to raise a cry of 'emergency.'"¹²⁵ The court found no error in the finding that the *Winter* litigation was not an unforeseeable event requiring immediate action, and it further concluded that the Navy had sufficient time to follow the NEPA procedures but chose instead not to prepare an EIS.¹²⁶ The court affirmed the district court's decision and upheld the preliminary injunction.¹²⁷

IV. BACKGROUND

A. Invocation of "Emergency Circumstances" Regulation

1. *Crosby v. Young*¹²⁸

In an apparent plan to revitalize the economy of Detroit, the Detroit City Council approved the condemnation of property to allow the building of a new automobile plant.¹²⁹ Under the mandate of NEPA, the City of Detroit ("Detroit") was required to complete an EIS before going forward with the condemnation and prior to being granted federal loan approval for the project.¹³⁰ However, before Detroit completed an EIS, Detroit realized it needed an advance on the loan in order to keep the project afloat and sought alternative arrangements under the emergency circumstances regulation.¹³¹ CEQ applied the regulation because it determined that if loan approval was delayed, the project could not be completed which would be detrimental to the city and its citizens.¹³² Without

123. *Id.* at 681. Presumably, this statement was referring to Operation Enduring Freedom, Afghanistan, and Operation Iraqi Freedom.

124. *See id.* at 680-81.

125. *Id.* at 681-82.

126. *Id.* at 682.

127. *Id.* at 703.

128. *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981).

129. *Id.* at 1365.

130. *Id.* at 1384.

131. *Id.* at 1380. Detroit's situation changed, and it needed an advance on loan money, which it requested on August 29, 1980. *Id.* If Detroit did not receive this federal financial assistance by October 1, 1980, the project could not go forward. *Id.* Accordingly, the preparation of an EIS was all that stood between Detroit and the federal loan approval.

132. *Id.* at 1386.

immediate federal funding there would be problems with the relocation of residents during the winter months, a particular concern for the elderly.¹³³ Additionally, a cancellation of the project meant Detroit would face increased unemployment and crime problems, a decreasing tax base, and a decrease in bond rating to below investment grade.¹³⁴ CEQ found the deadline crisis to be imminent and granted Detroit's alternative arrangements as allowed under the emergency regulation.¹³⁵

2. *National Audubon Society v. Hester*¹³⁶

CEQ certified an emergency existed relating to California condors that exempted the U.S. Fish and Wildlife Service ("Service") from the NEPA EIS requirement.¹³⁷ The Service had implemented a plan to maintain a wild flock of condors. As part of the plan, the Service prepared an environmental assessment (EA) that embraced the policy of a wild flock but noted a possibility that wild condors might be recaptured if the population continued to decrease.¹³⁸ After several events further jeopardized the wild condors, the Service announced it would bring all remaining wild condors into captivity.¹³⁹ CEQ found the change of circumstances constituted an emergency and exempted the Service from the EIS requirement.¹⁴⁰

The District of Columbia Court of Appeals agreed with CEQ and refused to make a finding of a nonemergency.¹⁴¹ The court noted that given the urgent nature of the Service's concern with the condors' mortality, CEQ was within its discretion to find an emergency.¹⁴²

133. *Id.*

134. *Id.*

135. *Id.*

136. *Nat'l Audubon Soc. v. Hester*, 801 F.2d 405 (D.C. Cir. 1986).

137. *Id.* at 406. The California condor is the largest winged inhabitant of North America. *Id.* at 405. At the time of the *Hester* decision, only twenty-six members of the species remained in existence, and all but six birds were kept in zoos as part of a program to avert extinction of the remaining condors. *Id.* at 405-06. As of this writing, there are 326 condors in existence, both in captivity and in the wild. Arizona Game & Fish Dep't, California Condor Recovery, http://www.azgfd.gov/w_c/california_condor.shtml (last visited June 13, 2009).

138. *Hester*, 801 F.2d at 406.

139. *Id.* Endangerments to the condors included the courting of two birds—one of which was slated for capture and the other slated for remaining in the wild; the taming of birds scheduled for release into the wild; and lead poisoning of one bird. *Id.*

140. *Id.*

141. *Id.* at 408-09.

142. *Id.* at 408.

3. *Valley Citizens for a Safe Environment v. Vest*¹⁴³

In accordance with NEPA's EIS requirement, the U.S. Air Force prepared an EIS prior to the commencement of transport plane operations at Westover Air Force Base ("Westover").¹⁴⁴ In the terms of the EIS, the Air Force provided that "[n]o military activity would be routinely scheduled between the hours of 10:00 pm and 7:00 am."¹⁴⁵ Three years after the EIS was prepared and one year after the First Circuit Court of Appeals found the operation of transport planes were in accordance with the EIS and did not violate NEPA, the Air Force began operating planes during those particular nighttime hours.¹⁴⁶

A nonprofit citizen association, Valley Citizens, complained to the Air Force, but the Air Force refused to re-evaluate the impact its actions had on the environment.¹⁴⁷ Instead, the Air Force received approval for "alternative arrangements" from CEQ under the NEPA "emergency circumstances" regulation.¹⁴⁸ Valley Citizens filed suit seeking injunctive and declaratory relief, arguing that CEQ acted arbitrarily and capriciously in its finding that an emergency existed.¹⁴⁹

The Air Force argued that an emergency did exist due to the developing situation in the Middle East.¹⁵⁰ Affidavits submitted by various Air Force officials demonstrated a "complex, global flight schedule" that relied on Westover as a crucial element in schedule maintenance.¹⁵¹ The operations "furnish fuel, tools, spare parts, and other critical supplies to American and international troops in the troubled Middle East . . . [and] bring back to the United States . . . equipment and personnel essential to the maintenance of military readiness at home and abroad."¹⁵²

The court found that the Middle East situation properly constituted an "emergency" under NEPA.¹⁵³ Noting that the Air Force was able to point to specific military concerns, rather than speak "vaguely of national security or world peace," the court concluded

143. *Valley Citizens for a Safe Env't v. Vest*, No. 91-30077-F, 1991 WL 330963 *1 (D. Mass. May 30, 1991).

144. *Id.*

145. *Id.*

146. *Id.* at *2.

147. *Id.* at *1.

148. *Id.* at *2, *6.

149. *Id.* at *2.

150. *See id.* at *2. This was during the Persian Gulf War after Iraq invaded Kuwait. Naval Historical Ctr., Desert Storm: The War With Iraq, <http://www.history.navy.mil/wars/dstorm/ds5.htm>. (last visited June 13, 2009).

151. *Vest*, 1991 WL 330963. at *5.

152. *Id.*

153. *Id.*

that “given the military’s operational and scheduling difficulties and the hostile and unpredictable nature of the Persian Gulf Region” it could not find CEQ acted arbitrarily and capriciously.¹⁵⁴ The court denied Valley Citizens’ request for a preliminary injunction.¹⁵⁵

B. ESA’s National Security Exception

The Endangered Species Act of 1973 was enacted after years of efforts to create meaningful protection for endangered species.¹⁵⁶ As enacted, it offered sweeping substantive protection for listed species.¹⁵⁷ Five years later, Congress amended the Act to limit its broad scope.¹⁵⁸ One 1978 amendment created a national security exception to the Act.¹⁵⁹

The exception requires the Endangered Species Committee to relieve an agency from ESA requirements when the Secretary of Defense requests such relief for national security reasons.¹⁶⁰ The language of the exception is broad and seemingly unequivocal: “[T]he Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.”¹⁶¹ The exception’s enactment created alarm and heated controversy due to the unmitigated mandate to exempt agencies for national security reasons.¹⁶²

However, the alarm over the exception has turned out to be unwarranted, at least to date. The Secretary of Defense has never asked for a national security exemption under ESA.¹⁶³ This, however, has not eliminated the controversy. In fact, its non-use has only added to the debate. Without any legislative, judicial, or pub-

154. *Id.*

155. *Id.* at *6. The court did warn, however, that if the Air Force continued its night-time flight schedule longer than the few months it predicted it would last, the court would “not hesitate to invoke, where necessary, all of the equitable powers at its disposal to protect Valley Citizens.” *Id.*

156. Jason C. Wells, *National Security and the Endangered Species Act: A Fresh Look at the Exemption Process and the Evolution of Army Environmental Policy*, 31 WM. & MARY ENVTL. L. & POLY REV. 255, 255 (2006).

157. *Id.* at 255.

158. *Id.*

159. *Id.*

160. *Id.* at 263. The Endangered Species Committee was also created in the 1978 amendments. *Id.* It is a seven-member, cabinet-level committee that is given the authority to hold hearings and to promulgate rules, regulations, and procedures related to the ESA. 16 U.S.C. § 1536(e) (2000); see also Lawrence R. Liebesman & Rafe Peterson, *Federal Agency Consultation and Recovery Planning Under the Endangered Species Act – A Significant Factor in the CWA Section 404 Program*, SM 094 ALI-ABA *295 (2007) (Westlaw). The Committee has apparent authority to decide the fate of a species through its statutorily given authority, giving rise to the Committee commonly being called “The God Squad.” Liebesman & Peterson, *supra*, at *329 (internal quotation marks omitted).

161. 16 U.S.C. § 1536(j).

162. Wells, *supra* note 156, at 255.

163. *Id.*

lic scrutiny, commentators can only speculate on what the Secretary's authority is to ask for the exemption.¹⁶⁴ Further, ESA is the only major substantive environmental act with a national security exemption.¹⁶⁵

Instead of relying on the national security exemption, the Secretary of Defense has sought other avenues to get out from under ESA requirements.¹⁶⁶ The reasons the Secretary of Defense has not utilized an ESA exception that is favorable to the Department of Defense in times of national security are unclear. One commentator has noted that the Army understands the exception to apply only during "wartime," and as such, "the exemption process has simply not been necessary for the military to achieve its training and operational objectives."¹⁶⁷ In contrast, another commentator has argued that the mere fact that environmental exemptions have rarely been used by the Secretary of Defense does not mean the exemptions should be reserved for only wartime and emergency situations.¹⁶⁸ That commentator argues that "the bottom line is that [the military] must be able to train the way [it] fight[s], and [the military] must be able to operate to defend the country and its interests."¹⁶⁹ Hence, military training is an invaluable piece of national security and cannot be defeated by exemptions that make training for indispensable readiness activities unlawful.¹⁷⁰

V. ANALYSIS

The broad scope of NEPA leaves very little room to deviate from the lengthy EIS process. The Navy requested flexibility under the very narrow emergency circumstances exception, but unless a situation is unplanned, imminent, and requires immediate action, the exception does not apply.¹⁷¹ Thus, the Ninth Circuit Court of Appeals was correct in *Winter* to deny deference to CEQ's ruling.¹⁷²

164. *Id.* at 255.

165. *Id.* at 265 (citing E.G. Willard, Tom Zimmerman & 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, 65-68 (2004)).

166. *Id.* at 272-73.

167. *Id.* at 272.

168. See Willard, Zimmerman & Bee, *supra* note 165, at 87-88.

169. *Id.* at 87. The commentator elaborates that the emergency circumstances regulation cannot be the basis for the nation's everyday readiness training. *Id.* The regulation is not broad enough, and its limited scope renders most training unlawful. *Id.* The commentator argues that military training is an ongoing need separate from an emergency under NEPA or a national security exception under ESA. See *id.* It is a thing of its own which should be exempted from environmental laws. See *id.*

170. See *id.* at 87-88.

171. See *infra* Part V.A.1-3 (explaining when emergency circumstances apply).

172. See *infra* Part V.A.1-3.

The case, however, brings attention to the suffocating nature of NEPA on important national security activities that do not rise to the level of an emergency but which require action as a preventative measure. In a time when national security is a top priority, this Article calls for a statutory change to NEPA to give the military flexibility in achieving and maintaining national security objectives.¹⁷³

A. Emergency Circumstances Regulation

The Ninth Circuit Court of Appeals correctly determined that CEQ improperly excused the Navy from the EIS requirement under the emergency circumstances regulation.¹⁷⁴ The policy behind NEPA and CEQ's intent in establishing the regulation does not support the finding of an emergency unless a situation arises unexpectedly and requires immediate attention to either forestall or mitigate imminent, grave harm.¹⁷⁵ Additionally, prior case law establishes that the regulation contemplates only the rare situation where there has been an unexpected change in circumstance that arose due to no fault of the agency.¹⁷⁶ Thus, the SOCAL training was not an emergency under the regulation because the training was expected and planned.¹⁷⁷ Similarly, the court injunction was not an emergency because the Navy had notice that an EIS would be required.¹⁷⁸

1. Policy and Intent Behind the Emergency Circumstances Regulation

At the time the regulation was drafted and adopted, CEQ did not intend the emergency circumstances regulation to extend to pre-planned and ongoing activities. "Emergency," as originally contemplated, only included situations which emerged suddenly and without notice.¹⁷⁹ If CEQ believed that the regulation could reach planned activities, it would not have changed the initial version to eliminate the inference that an agency *must* consult with CEQ prior to taking agency action where consultation would be impracticable or impossible.¹⁸⁰

173. See *infra* Part V.B.1-2 (arguing the case for a national security exception to NEPA).

174. See *infra* Part V.A.3.

175. See *infra* Part V.A.1-2.

176. See *infra* Part V.A.2 (discussing past case history).

177. See *supra* notes 175-76; *infra* notes 178-81 and accompanying text.

178. See *infra* notes 190-94 and accompanying text.

179. See *supra* Part III.E (discussing the district court's interpretation of CEQ's intent in enacting the emergency circumstances regulation).

180. See *supra* Part III.E (explaining the district court's interpretation of a CEQ draft-

2. Prior Case Law

Prior case law establishes that an emergency under the emergency circumstances regulation must be an unexpected circumstance that arises independent of any agency action and which requires immediate action.¹⁸¹ Agencies seldom ask for alternative arrangements under the regulation, but there have been three cases that have led to published decisions which shed light on what constitutes an emergency.¹⁸² Notably, the limited requests are telling of how exigent a situation must be before agencies will even contemplate it as an emergency.

The City of Detroit in *Crosby v. Young* faced a serious economic and social crisis if a city project were to be delayed until the completion of an EIS.¹⁸³ The situation was held to be an emergency because there was imminent harm due to a looming deadline for loan approval.¹⁸⁴ The situation required immediate action because without it the project could not move forward, resulting in a devastating loss to the city and its citizens.¹⁸⁵ Importantly, the harms were articulable and specific.¹⁸⁶ Additionally, there was no time to complete an EIS before the deadline.¹⁸⁷ Arguably, the city could have avoided the crisis of the loan deadline had the city realized sooner that it would need a loan advance.¹⁸⁸ However, the deadline was a federal requirement beyond the agency's control.¹⁸⁹ The court opinion does not indicate why the loan advance was necessary, but it was evidently a change in circumstances that the city could not anticipate.

The Navy underwent no change of circumstances with respect to its SOCAL training. Unlike in *Crosby*—where the city was attempting to complete a single, if rather large, project—training is an ongoing naval and military necessity as part of the bigger policies of national security and military preparedness.¹⁹⁰ The Navy

ing change to the emergency circumstances regulation).

181. See *supra* Part IV.A.1-3 (detailing past case law).

182. See *supra* notes 48-49 and accompanying text; *supra* Part IV.A.1-3 (noting the infrequency of alternative arrangement requests).

183. See *supra* Part IV.A.1 (describing the crisis the city faced).

184. See *supra* Part IV.A.1 (noting the CEQ decision and the reasons CEQ granted alternative arrangements).

185. See *supra* Part IV.A.1 (describing the harms of delaying federal funds).

186. See *supra* Part IV.A.1 (describing the specific harms).

187. See *supra* note 36 and accompanying text (noting the time necessary to prepare an EIS and the steps involved in the preparation); *supra* Part IV.A.1 (discussing the city's loan approval deadline).

188. See *supra* Part IV.A.1 (explaining that the city needed a loan advance due to the city's changed needs).

189. See *supra* Part IV.A.1 (discussing the loan approval deadline).

190. See *supra* note 50 and accompanying text (discussing policies of national security and military preparedness).

could have avoided the injunction by completing the EIS. While the Navy and Detroit both had deadlines, the Navy's indeterminate deadline for certifying the Strike Groups before there was turnover or competency loss was not unexpected or outside of the Navy's control. The Navy should have been able to project that this training would need to occur well before that Strike Group was ever formed. The most distinguishing difference between the situations under *Crosby* and *Winter* is that the City of Detroit in *Crosby* was able to point to very specific harms it would suffer if it was not granted alternative arrangements, while the Navy was only able to speak about vague harms it might suffer to its military preparedness.¹⁹¹

The Service in *Hester* had a legitimate emergency under the emergency regulations because it was faced with a grave situation that arose independent of the agency.¹⁹² The Service could not fully predict the calamities that befell its wild flock of condors, unlike the Navy which routinely predicts training needs. While the Service did speculate in its EA that it may be necessary to bring the wild flock in, it was only noted as a possibility. The Service did not *plan* to bring the flock in.¹⁹³ Moreover, the fact the Service had noted that there was a possibility of recapture helped show that there was a crisis in need of imminent attention.¹⁹⁴ The notation established the Service's reluctance to recapture the wild flock and showed that it only did so due to an unexpected change of circumstances that had the consequence of changing the Service's position on the issue.

A third situation where CEQ took action under the emergency circumstances regulation further established the extent to which a situation must be unplanned and outside of the agency's control in order to be an emergency.¹⁹⁵ The Air Force in *Valley Citizens* had prepared an EIS, but three years later the climate of world politics had changed.¹⁹⁶ The Air Force could not predict that the United States would become involved in a war in the Middle East after Iraq invaded Kuwait.¹⁹⁷ This was clearly beyond the Air Force's control, was not planned, and was not part of a larger policy initiative. It

191. Compare *supra* Part IV.A.1 (describing the specific harms the city pointed to) with notes 123-25 and accompanying text (describing the harms the Navy cited it would suffer by placing impediments on its sonar training).

192. See *supra* Part IV.A.2.

193. See *supra* Part IV.A.2.

194. See *supra* Part IV.A.2.

195. See *supra* Part IV.A.3 (discussing *Valley Citizens for a Safe Env't v. Vest*, No. 91-30077-F, 1991 WL 330963 *1 (D. Mass. May 30, 1991)).

196. See *supra* Part IV.A.3 (explaining the circumstances that changed the military's needs relating to transport plane operations).

197. See *supra* note 150 (noting the Iraqi invasion of Kuwait).

was truly an unexpected change of circumstance that gave rise to the need for immediate action.

In contrast, the Navy's training needs in *Winter* did not change but were planned and part of a larger policy of military preparedness.¹⁹⁸ The need for training was not unexpected, and the Navy's failure to prepare to follow the mandates of the law should not be rewarded by giving it an exception for which it does not qualify.

3. The Injunction Was Not an Emergency

The Navy argued it was not the training that was the emergency, but rather it was the district court's injunction that was the emergency. But the Navy's argument still fails because the injunction was foreseeable and occurred due to the Navy's own inaction.¹⁹⁹ The situation does not fit the requirements of an emergency.

First, it is not an emergency because the Navy was put on notice nearly ten months prior to the injunction that it may not be able to escape NEPA's requirement.²⁰⁰ Even if the filing of the suit by the NRDC was not sufficient to put the Navy on notice, then surely the August preliminary injunction was sufficient.²⁰¹ Second, the Navy itself created the situation by not completing the EIS.²⁰² Despite the Navy's contention that it was working on the EIS and had been since before NRDC filed suit, the situation was not an emergency due to the Navy's knowledge that sonar training must be ongoing, as it is a perishable skill.²⁰³

B. NEPA Should Be Amended to Add a National Security Exception

NEPA, as currently enacted and administrated, does not adequately consider national security interests. Effective national security entails a military that has the capability to act swiftly and to respond decisively to matters of national importance anywhere in the world whenever the need arises.²⁰⁴ The military must be prepared to respond to unexpected and sudden changes in the se-

198. See *supra* note 50 and accompanying text (discussing policies of national security and military preparedness).

199. See *supra* Part III.E. (discussing the district court's finding that the Navy's "emergency" was of its own making).

200. See *supra* note 70 and accompanying text (noting the date NRDC filed suit).

201. See *supra* Part III.A (detailing the district court opinion).

202. See *supra* Part III.F (providing the Ninth Circuit Court of Appeal's recitation of the lengthy time the Navy had to prepare an EIS).

203. See *supra* Part II.C; *supra* notes 62-64 and accompanying text.

204. See *supra* note 50 (describing military protocol).

curity environment.²⁰⁵ Past security changes, such as the invasion of Kuwait in 1990 and the September 11, 2001 terrorist attacks, demonstrate the need for highly trained and combat ready military forces. NEPA's lengthy EIS requirement can impair and delay military training and activities and does not provide an adequate balance between national security and environmental interests.

Environmental interests are closely linked to national security objectives.²⁰⁶ However, if the two interests compete, a practical balancing approach must be taken. Currently, the military may only seek relief from NEPA's requirements under two limited courses of actions: it may either seek an exception from Congress through legislation or seek alternative arrangements from CEQ under the emergency circumstances regulation.²⁰⁷ The former is a lengthy process and not a real alternative when time is of the essence, while the latter is too limited to properly address pressing military needs that are not unexpected or sudden.²⁰⁸ The choice between these courses of action is neither appropriate nor practical when confronted with a situation where military action is needed and cannot be delayed by the legislative process but is not so unexpected or imminent so as to be labeled an emergency.

To seek CEQ relief, the military must try to force critical non-emergencies into the narrow emergency circumstances exception. It is reminiscent of putting a square peg in a round hole. It does not work, and if it did, it would be damaging to the structure in which it is contained. Notwithstanding how compelling or important a nonemergency may be, it cannot be made to fit into the narrow emergency circumstances regulation. As a result of the impossible fit, essential military activities are frustrated thereby destabilizing national security. Even if a nonemergency could be characterized as meeting the exception, it would damage the integrity of NEPA. Statutory sidesteps undermine the Act as a whole and open a Pandora's box where the emergency circumstances exception is extended to situations that are neither emergencies nor matters of national security.

A national security exception would properly address national security needs and would provide clearer guidelines for which types of circumstances should be relieved from NEPA's procedural requirements. Unlike the emergency circumstances regulation, it would be limited to only one type of circumstance—national securi-

205. See *supra* note 50 (explaining the Navy's responsibility to act in changing security environments).

206. See *supra* note 9.

207. Mandelker, *supra* note 33, §§ 5:06-07; see also *supra* Part II.B (describing the emergency circumstances regulation).

208. See *supra* note 36 (describing the lengthy EIS process).

ty.²⁰⁹ Agency action that is necessary to further any other policy objective would still be constrained under NEPA's current requirements.²¹⁰ Admittedly, national security is a broad category and does not provide much limitation within that category. However, the broadness of a national security exception is important to allow the military the flexibility it needs to protect this nation.

1. A National Security Exception Is Consistent With the Policy Behind NEPA

NEPA's purpose is to promote harmony between humans and nature.²¹¹ It seeks to fulfill "the social, economic, and other requirements of present and future generations."²¹² While NEPA has a broad scope, its purpose is not to promote environmental interests to the detriment of other important interests.²¹³ Rather, its purpose is to balance interests. At the time NEPA was enacted, the events of September 11, 2001 could not have been imagined.²¹⁴ Terrorism has changed the way the United States thinks about national security and is a major issue facing today's generation. NEPA should be amended to reflect this growing concern and to further its purpose of promoting harmony between humans and nature.

2. ESA's National Security Exception Is a Starting Point but Not an Answer

The Endangered Species Act has a rarely used national security exception.²¹⁵ ESA, like NEPA, was overly broad as originally enacted and consequently Congress amended ESA within a few years to better account for the realities of national security interests.²¹⁶ The national security exception mitigated concerns that security objectives would be defeated by environmental interests under ESA.²¹⁷

A NEPA national security exemption must properly account for the realities of military preparedness. A response to a national se-

209. *See supra* Part II.B (describing the emergency circumstances regulation).

210. *See supra* Part II.A (describing NEPA requirements and the EIS process).

211. *See supra* Part II.A (noting NEPA's purpose).

212. *See supra* Part II.A.

213. *See supra* Part II.A (explaining that NEPA should foster environments where humans and nature can have a productive coexistence).

214. *See supra* Part II.A (providing brief history of NEPA and when it was enacted).

215. *See supra* Part IV.B (discussing the ESA and its national security exception).

216. *See supra* Part IV.B (discussing ESA's original scope and scope after the national security amendment).

217. *See supra* Part IV.B (explaining the exception limited ESA's sweeping protections for endangered species).

curity threat cannot be delayed simply because soldiers and sailors need to be properly trained.²¹⁸ The military has a responsibility to be combat-ready at all times.²¹⁹ One event or sequence of events can change military needs, and there must be an ever-ready military that is capable of swiftly responding. NEPA currently has the capacity to frustrate military activities which impairs our nation's security.

Congress amended ESA to balance environmental interests and national security objectives, and NEPA should similarly be amended.²²⁰ The amendment should be carefully drafted in order to obtain a workable balance that is harmonious with the purpose of NEPA.²²¹ The drafters of the proposed amendment should look to the ESA exception as a starting point. However, while the ESA exception may serve as a guide, such reliance should likely be limited; as at least one commentator has suggested, if the NEPA exception only applies in wartime—similar to the ESA exception—it will not properly accommodate important military activities.²²² Military activities, such as critical training, that are neither engaged in during wartime nor unplanned and urgent, so as to be characterized as an emergency, would continue to be frustrated.²²³ Thus, a NEPA national security exception would need to contemplate compelling activities that are vital to the United States's security for reasons of military preparedness.

Military preparedness is a national security interest. Although one commentator argues that this preparedness is a need separate from national security, such an approach might trample environmental interests.²²⁴ Instead, it should be seen as part of national security, and a NEPA amendment should clarify that military training may be included in a national security exception. To provide some limitation on the exception, the proposed amendment should require any requested NEPA national security exemption to meet certain requirements, such as an approval from a review committee.²²⁵

218. *See supra* notes 1-3 and accompanying text and Part II.C (discussing some of the reasons submarine warfare and sonar training is particularly important).

219. *See supra* note 50 and accompanying text (discussing naval responsibilities and strategic posture).

220. *See supra* Part IV.B (discussing the ESA amendment).

221. *See supra* Part II.A (providing the purpose of NEPA).

222. *See supra* Part IV.B (noting commentators' ideas of when the ESA national security exception applies).

223. *See supra* Part II.F (providing an example of a frustrated military need).

224. *See supra* Part IV.B.

225. *See supra* Part IV.B (illustrating a review committee that could be the model for the proposed committee).

3. Case Illustration: *NRDC v. Winter*

The *NRDC v. Winter* litigation showcases just how difficult it can be to find a balance between environmental and national security interests. If this case is any indication, courts trying to find that balance will often find parties involved in protracted litigation where neither party will be fully satisfied by the case's resolution.²²⁶ In *Winter*, the SOCAL training was a vital component of a fully combat-ready Navy and hence a fully combat-ready military.²²⁷ MFA sonar usage during the training, however, has harmful effects on marine mammals.²²⁸ The environmental and national security interests collided, litigation ensued, and after many twists and turns in the legal system, both interests were compromised: the Navy could use sonar to the environment's detriment but not to the level necessary for it to fully and effectively train.

The court restriction on the SOCAL training affects an entire Strike Group and imposes conditions that can make training difficult or can shut it down completely.²²⁹ The training cannot be delayed without jeopardizing national security.²³⁰ The threat of submarine warfare is not a dim or unlikely prospect.²³¹ Submarines are nearly silent and just the uncertainty of knowing whether or not a hostile submarine may be lurking in the waters can be enough to destabilize military forces and undermine U.S. national security policy and international relations.²³²

This is a situation where an application of a national security exception in NEPA would not only be appropriate but would be necessary for the safety of the U.S. military and its citizens. Environmental interests would not have to be abandoned. In *Winter*, the Navy was already taking measures to mitigate the harmful effects of MFA sonar prior to the court injunction.²³³ Ideally, parties with competing environmental and national security interests should try to find a way to accommodate both needs. With that said, military training is critical and should not be unnecessarily hampered by the procedural requirements of NEPA.

226. See *supra* Part III.A-F (discussing the litigation in *NRDC v. Winter*).

227. See *supra* notes 1-3 and accompanying text.

228. See *supra* Part II.D (discussing the harmful effects of MFA sonar on marine mammals).

229. See *supra* Part III.F. (noting the Navy's arguments against the court injunction).

230. See *supra* Part II.C.

231. See *supra* note 50 (discussing submarine and sonar use and its relation to warfare).

232. See *supra* note 11 and accompanying text.

233. See *supra* Part III.C (noting the Navy's proposal to continue using mitigation measures it was already taking).

VI. CONCLUSION

The emergency circumstances regulation does not encompass on-going, planned activities. Thus, the *Winter* court had no choice but to find that CEQ improperly applied the regulation. To better address compelling national interests that are planned but cannot be delayed, such as the case in *Winter*, NEPA should be amended to include a national security exception.

This is not to say the military should have a “free pass,” but there must be some sort of exception for military training that cannot be delayed, especially after the military makes reasonable attempts to comply with NEPA. In *Winter*, the Navy attempted to comply with NEPA, but due to the lengthy and complex EIS process, it was not able to complete an EIS after over a year of efforts.²³⁴ The Navy could not delay training until the EIS was completed without jeopardizing the security of the nation and should not have had such a demand placed on them by a procedural environmental law.

A national security exception to NEPA is necessary to achieve important national security objectives. As NEPA stands currently, the scope is so broad that it is not practical in an era of terrorism. A well-tailored amendment could address the needs of today’s security environment while still embracing NEPA’s purpose. The result would be a better balance between environmental and national security needs.

234. See *supra* note 75 (noting that the Navy was unable to complete an EIS).