

## ***Winter v. Natural Resources Defense Council, Inc.*: Supreme Court Heightens Standard for Obtaining a Preliminary Injunction in Environmental Litigation**

By Rachel E. Mascorro

In its first decision of the 2008-09 term, the United States Supreme Court held in *Winter v. Natural Resources Defense Council, Inc., et al.*, 129 S. Ct. 365 (2008), that a California district court abused its discretion when it entered an injunction requiring the United States Navy to modify its training activities before preparation of a full Environmental Impact Statement in accordance with the National Environmental Policy Act ("NEPA"). The Court's decision could substantially limit the availability of preliminary injunctions in environmental litigation.

The controversy in *Winter* arose out of the Navy's announcement of its intent to prepare an Environmental Impact Statement ("EIS") to address the effects of its naval readiness activities in Southern California. The Navy's activities included the use of mid-frequency active ("MFA") sonar, which had been shown to negatively impact marine mammals inhabiting the Southern California coast. The Natural Resources Defense Council, along with other environmental organizations (hereinafter collectively referred to as "NRDC" or "plaintiffs"), sought injunctive relief based on the Navy's violations of NEPA. The district court entered a preliminary injunction which, while permitting the Navy to continue to conduct its exercises pending the completion of the EIS, required the Navy to take six mitigation measures to limit the impact the MFA sonar would have on marine mammals, including shutting down MFA sonar when a marine mammal was spotted within 2,200 yards of a vessel, and powering down MFA sonar by 6 decibels during significant surface ducting conditions. It is these two mitigation measures that the Navy challenged on appeal to the Court of Appeals for the Ninth Circuit and, after that court affirmed the injunction in its entirety, on certiorari to the Supreme Court.

The Court began its discussion by laying out the four elements a plaintiff must establish in order to be entitled to a preliminary injunction:

1. a likelihood of success on the merits;
2. a likelihood of suffering irreparable harm in the absence of preliminary relief;
3. that the balance of equities tips in plaintiff's favor; and
4. that an injunction is in the public interest.

Both the District Court and the Ninth Circuit had applied a "continuum" approach to the injunction standard, holding that, because NRDC had demonstrated a strong likelihood of prevailing on the merits of their NEPA claim, NRDC could obtain a preliminary injunction by showing only a "possibility" of irreparable harm. The Court rejected this standard, calling it "too lenient." *Winter*, 129 S. Ct. at 375. The Court reiterated that the preliminary injunction standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* at 376. While the Court did not define "likely," the Court recognized that the district court concluded the NRDC had established a "near certainty" of irreparable harm, a conclusion which the Ninth Circuit affirmed. *Id.*

The Court did not consider whether NRDC had actually established a "near certainty" of irreparable harm because the Court ultimately concluded that, even if plaintiffs *had* shown irreparable injury, any such injury was outweighed by the public interest in the effective and realistic training of the Navy's sailors. The Court found that the lower courts had not properly deferred to the views of several Navy officers, who testified that the mitigation measures would impose significant burdens on the Navy and negatively impact the training's effectiveness. The Court stated: "Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security." *Id.* at 381.

Thus, despite expressly rejecting the Ninth Circuit's "continuum" approach to the preliminary injunction standard, the Court ultimately only fully discussed the "public interest" prong of the preliminary injunction standard, concluding: "We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines." *Winter*, 129 S. Ct. at 382.

It is important to note that the issue as presented to the Court in *Winter* was not whether the Navy needed to prepare a full EIS – indeed, the Navy was in the process of preparing one – but, rather, whether the district court abused its discretion in entering an injunction requiring modification of the Navy's sonar activity before preparation of the EIS. The Court held that a district court should not use its injunction power to require modification of Navy activity absent more evidence that such a remedy is in the public interest. Stated differently, regardless of a plaintiff's likelihood of prevailing on the merits of the ultimate legal claim, a plaintiff must still satisfy a court that the public interest supports granting the extraordinary relief requested – an injunction preserving the status quo until such time as the ultimate legal claim can be heard. This is a burden which, as *Winter* proves, can be difficult in environmental litigation.

For example, in *Greater Yellowstone Coalition v. Timchak*, 2008 WL 5101754 (D. Idaho Nov. 26, 2008), plaintiffs sought to enjoin new phosphate mining accompanying expansion of a mine in the Caribou-Targhee National Forest. The District of Idaho declined to enter an injunction, stating: "The public interest involves not only preservation of environmental resources, but also factors such as

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the impact on the local economy." *Timchack*, 2008 WL 5101754, at \*6. In contrast, in *Animal Welfare Institute v. Martin*, 588 F. Supp. 2d 70 (D. Me. 2008), the District of Maine granted plaintiffs' request for a preliminary injunction to require the State to amend its trapping regulations after at least ten Canada lynx, a threatened species, had been captured and one had been killed. Although the State acknowledged it should amend its trapping regulations, it sought to promulgate the rules for the next trapping season instead of issuing emergency regulations. But the district court granted the injunction, holding that the plaintiffs "quite reasonably question why an emergency regulation should not be promulgated to avoid similar takes for the rest of this trapping season." 588 F. Supp. 2d at 108.

The full effect of *Winter* remains to be seen, but environmental lawyers seeking preliminary injunctions should glean the following from *Winter* and its progeny: (1) it is not enough to show a "possibility" of irreparable harm: irreparable injury must be "likely" in the absence of the relief sought; and (2) regardless of whether irreparable injury is likely or even certain, injunctive relief is not available unless the balance of equities and public interest considerations weigh heavily in plaintiff's favor. Post-*Winter* case law indicates that the public interest may tip in plaintiff's favor when there is concrete evidence that harm has occurred, the relief requested is reasonably tied to the elimination of future harm, and the injunction will not impose significant burdens on the defendant.

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