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U.S. Supreme Court Decision Balances National Security and Environment

On November 12, in *Winter v. Natural Resources Defense Council*, the U.S. Supreme Court held in favor of the Navy in a closely watched dispute over the effects of active sonar on marine mammals. In a case seen as balancing national security against environmental protection, the Supreme Court rejected the Ninth Circuit's "possibility of harm" standard for preliminary injunctions in environmental litigation. The decision can be found at <http://www.supremecourtus.gov/opinions/08pdf/07-1239.pdf>.

The Decision

The Navy uses active sonar, which transmits sound waves and analyzes their echo off underwater objects, to detect and track enemy submarines. Plaintiffs sued the Navy over its use of active sonar during training exercises in the Pacific, alleging that the sonar harms whales and other marine mammals and that the Navy should have prepared an Environmental Impact Statement (EIS) rather than an Environmental Assessment (EA) to analyze the effects of use of the sonar on marine mammals. The district court preliminarily enjoined the Navy's use of active sonar unless the Navy followed several conditions, including shutting down the sonar when a marine mammal is spotted within 2,200 yards and powering the sonar down during certain water

conditions. In holding that the plaintiffs had established a basis for a preliminary injunction, the district court concluded that the plaintiffs had demonstrated a likelihood of success on their National Environmental Policy Act (NEPA) claims, "at least a possibility of irreparable harm," and that the balance of equities favored an injunction. The U.S. Court of Appeals for the Ninth Circuit affirmed. The Supreme Court reversed, limiting its decision to the proper standard for issuing preliminary (and permanent) injunctions.

The Supreme Court held that a showing of "likely" rather than "possible" irreparable injury is required under long-established precedent in light of the extraordinary nature of an injunction. The Court noted that the district court failed to consider whether irreparable injury remained likely even though the Navy agreed to comply with several of the injunction conditions (such as a 12-mile exclusion zone along the coastline), the training exercises had been taking place for 40 years with no documented sonar-related injury to a marine mammal in the southern California region, and the training exercises had already been evaluated in a 293-page, detailed EA. The Court further held that the public interest in effective, realistic antisubmarine training by the Navy to protect national security "plainly out-

weighs” possible harm to the ecological, scientific and recreational interests asserted by the plaintiffs (including whale watching, scientific research and photography). Finally, the Court held that the same factors considered for purposes of a preliminary injunction would be pertinent to a permanent injunction if the lower courts conclude that an EIS is required, and that a permanent injunction “does not follow from success on the merits as a matter of course.”

Chief Justice Roberts authored the majority opinion, in which Justices Scalia, Kennedy, Thomas and Alito joined. Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justice Stevens joined. Justice Ginsberg filed a dissenting opinion in which Justice Souter joined.

Implications

While there are many implications of the decision, the Supreme Court’s rejection of the Ninth Circuit’s “possibility of irreparable harm to the environment” standard is probably the most sweeping, as the Ninth Circuit is not the only federal circuit to employ less than a “likelihood of irreparable injury” standard for preliminary injunctions in environmental litigation. Additionally, the Court contrasted cases (such as this) involving longstanding and well-studied activities with those involving new activities posing completely unknown environmental effects, indicating that demonstrating a likelihood of irreparable harm generally will be more difficult in the former category of environmental litigation. Finally, the Court’s balancing of the

public interest in favor of protection of national security provides guidance to lower courts and litigants, and some indication of how the Supreme Court may view similar cases in the future.

Our Practice

Hunton & Williams’ Regulatory, Resources and Environmental law practice professionals have extensive experience providing guidance to clients on all aspects of the National Environmental Policy Act and other federal and state environmental, maritime, energy and security laws affecting the regulated community. If you have questions about the substance or applicability of the Supreme Court’s decision, or any other regulatory issue, please contact us.

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