Beyond Winter v. NRDC: A Decade of Litigating the Navy's Active SONAR Around the Environmental Exemptions

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Abstract: To find ultra-quiet modern submarines, the Navy uses high-powered active sonar. However, active sonar is also linked to marine mammal strandings and other types of harms to whales, dolphins, fish, and sea turtles. This connection has led to over a decade of challenges against the Navy’s active sonar training exercises in the Pacific, culminating in the U.S. Supreme Court’s November 2008 decision in Winter v. Natural Resources Defense Council. This Article suggests that the Supreme Court’s failure to reach the merits of the case—the actual legality of the Navy’s training exercises off the southern California coast—is the most troubling part of the Court’s somewhat cabined analysis of the lower courts’ preliminary injunctions. Specifically, this Article argues that the Navy sonar litigation represents a progressive elimination both of flexibility in the applicable environmental requirements and effective oversight of military actions that could ensure that neither national security nor environmental goals are unnecessarily sacrificed.

Introduction

In the murky world of the oceans’ depths, sound becomes an important means of enhancing survival, both for sea creatures such as whales and, according to the U.S. Navy, for Americans. Since the mid-1990s, the Navy has been working to employ lower-frequency sonar (“Sound Navigation and Ranging”) on its patrol ships to allow better detection of increasingly quiet submarines. Specifically, the Navy has been testing three types of active sonar systems that emit pulses of sound into the water and then detect the echoes as that sound pulse

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bounces off objects.\(^1\) Mid-Frequency Active Sonar (MFAS), which the Navy has been using since World War II, employs frequencies of one to ten kilohertz (kHz) and typically can detect objects one to ten nautical miles away.\(^2\) Low-Frequency Active Sonar (LFAS) uses sound frequencies of less than 1 kHz, which suffer less attenuation in seawater and hence allow the Navy to detect objects up to 100 nautical miles away.\(^3\) The Navy uses its Surveillance Towed Array Sensor System (SURTASS) LFAS system for long-range search and surveillance of submarines,\(^4\) and it would like to employ that system in at least 75\% of the world’s oceans.

The problem, however, is that these active sonar systems are loud. MFAS systems can emit continuous sound of more than 235 decibels (dB)—a noise level comparable to a rocket blastoff, according to the Natural Resources Defense Council (NRDC).\(^5\) While the Navy disputes that comparison, its own studies indicate that the sound pulse can still be 140 dB as far as 300 miles away from the source.\(^6\) Such sonar pulses are strongly correlated with adverse effects on marine organisms, including mass whale and dolphin strandings and physical trauma to and deaths of whales, dolphins, seals, sea lions, sea turtles, and even fish.

Using a variety of statutes and raising both substantive and procedural challenges to the Navy’s activities, environmental organizations and others have been seeking to stop or modify the Navy’s uses of MFAS and LFAS for over a decade now. Much of this litigation has been concentrated in Hawaii and California. Nevertheless, in 2008, the Navy began to implement an undersea warfare training range on the east coast of the United States, and sonar litigation efforts are already beginning there. Thus, Navy sonar litigation is about to become a nationwide phenomenon.

\(^1\) United States Navy, Ocean Stewardship: Understanding Sonar, http://www.navy.mil/oceans/sonar.html (last visited Mar. 17, 2009). In contrast, passive sonar systems merely use hydrophones to detect, amplify, and identify sounds from other sources. \(Id.\)

\(^2\) \(Id.\)

\(^3\) \(Id.\)

\(^4\) \(Id.\)


While a detailed review of all of this litigation would exceed the limitations of a symposium format, that litigation is summarized in the Appendix chart. Most important for this Article is the fact that, to date, three different federal district courts—the Northern District of California,7 the Central District of California,8 and the District of Hawaii9—have each issued a narrowly tailored injunction requiring that various of the Navy’s sonar training exercises employ mitigation measures designed to allow such training to proceed while minimizing potential harm to marine wildlife.

Nevertheless, on November 12, 2008, the U.S. Supreme Court decided Winter v. NRDC (Winter VII).10 The case involved the Navy’s use of MFAS in fourteen large-scale training exercises off the coast of southern California (SOCAL exercises) between February 2007 and January 2009.11 The Supreme Court vacated the challenged portions of the Central District of California’s preliminary injunction, holding that the Navy’s interest in effective training and the public interest in national defense tipped the balance of equities “strongly” in the Navy’s favor.12 Indeed, according to the Court, “the proper determination of where the public interest lies does not strike us as a close question.”13

Thus, despite the fact that it acknowledged the “seriousness” of the interests in marine mammals, and while the lower courts have engaged in complex balancing of public interests, the Supreme Court, like many discussions of the Navy sonar litigation and the Navy’s own litigation posture,14 essentially figured the controversy over Navy sonar solely in terms of a trade-off between two public policy objectives: marine biodiversity protection and national security.15 Strikingly absent from the ma-

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11 Id. at 371.
12 Id. at 377–78.
13 Id. at 378.
14 See, e.g., Ocean Mammal Inst. v. Cohen, No. 98-CV-160, 1998 WL 2017631, at *3 (D. Haw. Mar. 9, 1998) (noting the military defendants’ argument “that any delay in the study will also delay the decision to employ a low-frequency active sonar submarine detection system in coastal waters, thereby compromising the safety of Navy personnel and the nation as a whole.”).
15 See generally Carolyn M. Chopko, NRDC v. Evans: Northern District of California Delivers “Sound” Judgment in Protection of Marine Wildlife Under the MMPA, Restricting Navy’s Use of Sonar, 15 VILL. ENVT'L. L.J. 393 (2004); Nate Cihlar, The Navy and Low Frequency Active Sonar:
jority’s opinion was any discussion regarding the legality of the Navy’s exercises or of the legality of the environmental exemptions upon which it was relying, even though the Council on Environmental Quality’s (CEQ’s) “emergency circumstances” exemption from the National Environmental Policy Act (NEPA) was an issue presented to the Court.

While scholars and litigants will undoubtedly be debating the meaning of the Supreme Court’s preliminary injunction ruling for years to come—and for the record, I think that ruling is best explained in light of the Court’s long history of deciding that the military is different when it comes to environmental law—this Article instead suggests that the Court’s failure to reach the actual legality of the Navy’s activities and especially of the environmental law exemptions it relies upon is the far more troubling aspect of the case, especially in light of the decade-long progression of Navy sonar litigation. Specifically, this Article argues that the history of that litigation represents a progressive elimination of both the flexibility and effective oversight that could ensure that neither national security nor environmental goals are unnecessarily sacrificed, in favor of increasingly comprehensive environmental exemptions that generally neither require nor—especially in light of the Supreme Court’s decision—even allow for consideration of either the legitimacy of national security needs or the use of mitigation measures. It concludes that, at least in times of (relative) peace, the carefully tailored injunctions of the federal district courts are in fact more effective tools for balancing important federal interests than the binary national security exemptions in the relevant federal environmental statutes, particularly given the lack of procedural or substantive coordination among those exemptions.

I. THE NAVY’S SONAR AND MARINE LIFE

Marine mammal strandings were one of the first indications that LFAS and MFAS may cause serious harm to marine life. Strandings oc-
cur when marine animals swim or float to shore and become trapped on beaches or in shallow water.\textsuperscript{17} By 2007, “[m]ass strandings of several species of whales following naval exercises ha[d] been documented in the Bahamas, the Canary Islands, Hawaii, North Carolina, Japan, Greece, Spain, Taiwan, the Madeira Archipelago, and the U.S. Virgin Islands.”\textsuperscript{18} The International Whaling Commission’s Scientific Committee concluded that the evidence establishes that the Navy’s MFAS is associated with these strandings; similarly, the Navy’s Office of Naval Research has concluded that the evidence that active sonar causes strandings is “completely convincing.”\textsuperscript{19}

Post-mortem studies of the whales stranded in the Bahamas revealed that they had suffered “hemorrhages in the inner ear, in some tissues adjacent to the ear, and in the fluid spaces surrounding the brain, as well as clotting in the cerebral ventricles . . . .”\textsuperscript{20} Later studies have also suggested that when whales dive rapidly to avoid active sonar, “injuries such as hemorrhaging around the brain, ears, kidneys, and acoustic fats, acute spongiotic changes in the central nervous system, and gas/fat emboli and lesions in the liver, lungs, and other vital organs” can occur.\textsuperscript{21} In addition, evidence indicates that “MFA sonar disrupts activities critical to marine mammals’ survival, such as food foraging and mating . . . .”\textsuperscript{22} Scientific uncertainty over the decibel levels required to cause such injuries and behavioral responses has been the source of intense debate in the Navy sonar litigation.\textsuperscript{23}

The Navy’s active sonar potentially affects other marine species, as well. In the Northern District of California, litigation has raised issues regarding the effects of active sonar on endangered and threatened species of sea turtles, Chinook salmon, Coho salmon, chum salmon, and steelhead.\textsuperscript{24} In scientific studies, fish exposed to low-frequency so-

\textsuperscript{19} Gates, 546 F. Supp. 2d at 977.
\textsuperscript{20} Evans I, 232 F. Supp. 2d 1003, 1015 (N.D. Cal. 2002).
\textsuperscript{21} Winter I, 2007 WL 2481037, at *5; see also Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 665–67 (9th Cir. 2008) [Winter VI] (summarizing the studies).
\textsuperscript{22} Winter I, 2007 WL 2481037, at *6.
\textsuperscript{23} See, e.g., Gates, 546 F. Supp. 2d at 973–75; Evans I, 232 F. Supp. 2d at 1014–17.
\textsuperscript{24} See, e.g., Evans I, 232 F. Supp. 2d at 1049.
nar “suffered internal injuries at 160 dB, eye damage at 170 dB, auditory damage at 180 dB, and transient stunning at 190 dB.” Moreover, such studies indicate that fish begin to show avoidance behavior at sonar levels as low as 128 dB, with significant reactions at 150 dB.

II. THE RELEVANT STATUTES AND THEIR NATIONAL SECURITY EXEMPTIONS

A plethora of federal environmental statutes are potentially relevant to the Navy’s use of LFAS and MFAS. Some of these statutory provisions, notably NEPA’s Environmental Impact Statement (EIS) requirement, apply to every use of Navy sonar by virtue of the Navy’s status as a federal agency. Application of others, such as the Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), and Fur Seal Act, depend on the presence of particular marine species. Finally, other statutes become relevant based on independent marine regulations and policies. These statutes include the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the relevance of which depends largely on the prior existence of fishery management plans; the Coastal Zone Management Act (CZMA), application of which depends on the relevant state’s coastal zone management plan; and the National Marine Sanctuary Act, which becomes relevant only if the federal government has already created a national marine sanctuary in the area of LFAS and MFAS activity.

A. National Environmental Policy Act (NEPA)

NEPA has been the most influential federal environmental statute in the Navy sonar litigation, as the Winter v. NRDC line of cases suggests. The operative provision of NEPA is its Environmental Impact Statement (EIS) requirement—specifically, that “all agencies of the Federal Government shall” draft an EIS for “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment” that addresses five elements, including reasonable alternatives to the action proposed.

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26 Id.
28 Id. § 4332(2)(C). The five elements of an EIS are: (1) “the environmental impact of the proposed action”; (2) “any adverse environmental effects which cannot be avoided should the proposal be implemented”; (3) “alternatives to the proposed action”; (4) “the relationship between local short-term uses of man’s environment and the maintenance
Case law has clarified that NEPA’s EIS requirement is purely a procedural requirement—while the federal agency must perform the environmental evaluation, NEPA does not compel that agency to choose the least environmentally damaging alternative. Nevertheless, case law and the CEQ’s regulations require that federal agencies perform the environmental impact analysis as early in the decision-making process as possible, in order to allow the agency to identify unintended environmental consequences and potentially less damaging alternatives before it has committed itself to a particular course of action. Failure to comply with NEPA is grounds for reversing the agency’s final decision.

The CEQ regulations define “federal agency” to be “all agencies of the Federal Government,” excluding Congress, the judiciary, and the president. Thus, the Navy is generally subject to NEPA’s requirements. Moreover, NEPA itself contains no express exemptions from its EIS requirement. Similarly, the CEQ’s regulations state most broadly that “[a]ll agencies of the Federal Government shall comply with these regulations.” However, the CEQ also expresses an intent to “allow each agency flexibility” in implementing NEPA, and its regulations anticipate variations in how NEPA applies.

Two such CEQ-allowed variations are relevant to the Navy sonar litigation. In Winter v. NRDC, the CEQ invoked its “emergency circum-

and enhancement of long-term productivity”; and (5) “any irreversible and irreplaceable commitments of resources which would be involved in the proposed action should it be implemented.”

Id. § 1502.16.
Id. § 1502.14.
Id. § 1500.1(c) (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”); id. § 1502.1 (“The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.”).
Id. § 1508.12.
See 42 U.S.C. § 4333 (2000); see also 40 C.F.R. § 1500.2(a) (“Federal agencies shall to the fullest extent possible . . . interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.”); 40 C.F.R. § 1500.6 (repeating 42 U.S.C. § 4333 and adding that “[t]he phrase ‘to the fullest extent possible’ in [42 U.S.C. § 4332] means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency’s operations expressly prohibits or makes compliance impossible.” (emphasis added)).
40 C.F.R. § 1507.1.
Id.
stances” regulations. Under these regulations, “[w]here emergency circumstances make it necessary to take an action with significant environmental impact without observing” normal NEPA procedures, “the Federal agency taking the action should consult with the Council about alternative arrangements.” Both the Central District of California and the Ninth Circuit determined that no emergency circumstances existed to justify alternative NEPA compliance measures. As noted, although the Supreme Court granted certiorari in part to address the propriety of this exception, the majority never reached the issue.

Second, the CEQ has more specifically addressed the particular needs of national security in the NEPA EIS process. However, the Navy has not invoked this NEPA national security exemption, probably because that exemption focuses on maintaining the secrecy of classified information and projects—not on shortcutting the required environmental analysis or eliminating the potential need for mitigation measures.

B. Marine Mammal Protection Act of 1972 (MMPA)

The MMPA protects all marine mammals under U.S. jurisdiction through a general moratorium on the “taking” of such species. As defined in the Act, “[t]he term ‘take’ means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”

The Navy’s use of its LFAS and MFAS can both “kill” and “harass” marine mammals, creating a prima facie violation of the MMPA. The definition of “kill” is perhaps obvious. The National Marine Fisheries

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38 See Decision Memorandum Accepting Alternative Arrangements for the U.S. Navy’s Southern California Operating Area Composite Training Unit Exercises (COMPTUEXs) and Joint Task Force Exercises (JTFEXs) Scheduled to Occur Between Today and January 2009, 73 Fed. Reg. 4189, 4189 (Jan. 24, 2008) (accepting the CEQ’s alternative procedures).

39 40 C.F.R. § 1506.11.


41 But see Winter VII, 129 S. Ct. 365, 390–91 (2008) (Ginsburg, J., dissenting) (agreeing with the lower courts that use of the “emergency circumstances” exception was inappropriate).

42 40 C.F.R. § 1507.3(c).

43 Id.


45 See id. § 1362(6) (defining “marine mammal”).

46 Id. § 1371(a).

47 Id. § 1362(13).
Service’s (NMFS’s) definitions of “harass” create two kinds of harassment:

*Level A Harassment* means any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild.

*Level B Harassment* means any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering but which does not have the potential to injure a marine mammal or marine mammal stock in the wild.48

Notably, these definitions count as “harassment” any action “which has the potential” to interfere with marine mammals, effectively placing the burden on the actor to protect marine mammals.

The MMPA establishes a number of exceptions to its taking moratorium. Most relevant to the Navy sonar litigation, the Act allows for incidental take permits (ITPs).49 For activities other than commercial fishing, NMFS may issue an ITP only for a “specified activity” taking place within “a specified geographical region,” where the activity might result in an “incidental, but not intentional” take of “small numbers of marine mammals of a species or population stock. . . .”50 In addition, the total take must “have a negligible impact on such species or stock,” and NMFS must promulgate regulations specifying both “permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance” and “requirements pertaining to the monitoring and reporting of such taking.”51 ITPs can last up to five years, but NMFS must withdraw the permit if either the regulations are inadequate or the incidental take is having more than a negligible impact on the species or stock.52

Significantly, perhaps, the Navy has treated its LFAS and MFAS differently for purposes of the MMPA. For its SURTASS LFAS system, the

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50 Id.
51 Id.
52 Id. § 1371(a)(2)(B).
Navy sought—and in 2002 NMFS granted—an ITP.\textsuperscript{53} NMFS’s 2002 LFAS incidental take regulation\textsuperscript{54} divided the world into 15 biomes\textsuperscript{55} and allowed “incidental take by Level A and Level B harassment” of eleven species of baleen whales, twenty-two species of toothed whales and dolphins, and fifteen species of seals and sea lions.\textsuperscript{56} The actual ITP consisted of a yearly “Letter of Authorization” for specific activities, and authorized activities had to “be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals, their habitat, and the availability of marine mammals for subsistence uses.”\textsuperscript{57} The regulations also established: (1) a series of mitigation measures designed to ensure that no marine mammals were subjected to sounds of greater than 180 dB;\textsuperscript{58} and (2) extensive monitoring requirements.\textsuperscript{59} The 2002 regulation also established four “offshore areas of critical biological importance for marine mammals”\textsuperscript{60} and allowed proponents to petition NMFS to designate additional Biologically Important Marine Mammal Areas.\textsuperscript{61}

Despite successful challenges in court, the 2002 regulation remained effective through August 15, 2007.\textsuperscript{62} Nevertheless, the Northern District of California’s 2002 preliminary injunction required the Navy to mitigate its use of LFAS beyond what was required in the regulation,\textsuperscript{63} a conclusion it confirmed in response to the parties’ later cross-motions for summary judgment.\textsuperscript{64}

Responding to this litigation, in 2003 Congress amended the MMPA’s ITP requirements for military readiness activities.\textsuperscript{65} As a result of these amendments, the MMPA now provides that:

\begin{itemize}
  \item \textsuperscript{54}Id.
  \item \textsuperscript{55}50 C.F.R. § 216.180(a) (2002).
  \item \textsuperscript{56}Id. § 216.180(b).
  \item \textsuperscript{57}Id. § 216.182.
  \item \textsuperscript{58}Id. § 216.184.
  \item \textsuperscript{59}Id. § 216.185.
  \item \textsuperscript{60}Id. § 216.184(f).
  \item \textsuperscript{61}50 C.F.R. § 216.191 (2002).
  \item \textsuperscript{62}Id. § 216.181.
  \item \textsuperscript{63}Evans I, 232 F. Supp. 2d 1003, 1033 (N.D. Cal. 2002).
  \item \textsuperscript{64}Evans II, 279 F. Supp. 2d 1129, 1164 (N.D. Cal. 2003). For a more detailed discussion of the regulation and the litigation, see Karpinsky, supra note 15, at 397–407.
For a military readiness activity . . . a determination of “least practicable adverse impact on such species or stock” . . . shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.\(^\text{66}\)

The amendments also changed the definition of “harassment.” For military readiness activities, “harassment” means:

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or

(ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered.\(^\text{67}\)

Acts that fit within subparagraph (i) qualify as Level A harassment, while those that fall within subparagraph (ii) are Level B harassment.\(^\text{68}\)

Thus, in the 2003 amendments, Congress effectively granted the military greater freedom to injure marine mammals or to disrupt their behavior than the MMPA would otherwise allow. For the SOCAL exercises at issue in *Winter v. NRDC*, the Navy concluded that Level A harassments would occur if whales and dolphins were exposed to sonar levels of 215 dB or greater, while Level B harassment events would occur when such cetaceans were exposed to sonar levels between 173 dB and 215 dB.\(^\text{69}\)

Congress also added a general national defense exception to the MMPA through the 2003 amendments.\(^\text{70}\) Under this exemption:

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\(^{67}\) Id. § 1362(18)(B).

\(^{68}\) Id. § 1362(18)(C)–(D).

\(^{69}\) See *Winter VI*, 518 F.3d 658, 668 (9th Cir. 2008).

The Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, as appropriate, may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this chapter, if the Secretary determines that it is necessary for national defense.\(^{71}\)

The exemption cannot last longer than two years,\(^{72}\) and the Secretary must fairly immediately report the exemption to the Committees on Armed Services in both the House and the Senate.\(^{73}\)

The Navy first invoked this new exemption for its 2006 Pacific Rim war games.\(^{74}\) Moreover, in January of 2007, the Navy again invoked this exemption, this time for all MFAS training activities for two years.\(^{75}\) As a result, from January 2007 through January 2009, the MMPA became irrelevant in the MFAS-focused litigation, including *Winter v. NRDC* and MFAS litigation in the Hawaii District Court.\(^{76}\)

However, LFAS remains governed by the ITP, and hence the MMPA remains a live issue in the *Natural Resources Defense Council, Inc. v. Gutierrez* LFAS litigation in the Northern District of California.\(^{77}\) NMFS finalized its new SURTASS LFAS regulations in August 2007,\(^{78}\) and these regulations are intended to remain in effect until August 15, 2012.\(^{79}\) The 2007 regulations are very similar to the 2002 regulations, except that NMFS eliminated the biome approach\(^{80}\) and has now designated ten Biologically Important Marine Mammal Areas.\(^{81}\)

**C. Endangered Species Act of 1973 (ESA)**

To date, the ESA has been most relevant in the Northern District of California litigation, which explicitly reviewed the effects of the


\(^{72}\) *Id.* § 1371(f)(2)(B).

\(^{73}\) *Id.* § 1371(f)(4).


\(^{75}\) Decision Memorandum, *supra* note 38, at 4190.


\(^{80}\) *See id.* § 216.180(a).

\(^{81}\) *Id.* § 216.184(f).
Navy’s LFAS on sea turtles and fish as well as marine mammals. In order to qualify for protection under the ESA, a species must be “listed” by either the U.S. Fish & Wildlife Service (terrestrial species) or NMFS (marine and anadromous species). Moreover, with the listing, the relevant agency is supposed to designate the species’ critical habitat.

A number of marine and anadromous species have been listed for protection under the ESA. Once listed, a species receives two sets of protections, both of which are relevant to the Navy’s sonar activities. First, section 7 imposes duties on federal agencies, which the Act defines as “any department, agency, or instrumentality of the United States.” Pursuant to section 7(a)(1), federal agencies must “carry[] out programs for the conservation of endangered species and threatened species” listed under the Act, while under section 7(a)(2) every federal agency must “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of” its critical habitat.

Second, section 9 prohibits “any person subject to the jurisdiction of the United States” from taking endangered species “within the United States or the territorial sea of the United States” or “upon the high seas.” In addition, it is illegal for any such person to violate any regulation governing any listed species, which generally serves to extend the “take” prohibition to threatened species as well. The ESA’s definition of “person” explicitly includes “any officer, employee, agent, department, or instrumentality of the Federal Government,” and hence these prohibitions also apply to the Navy.

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84 Id. §§ 1532(15), 1533(a)(1)–(2).
85 Id. § 1533(a)(3)(A).
88 Id. § 1536(a)(1)–(2).
89 Id. § 1538(a)(1)(B)–(C).
90 Id. § 1538(a)(1)(G).
91 50 C.F.R. § 17.31(a) (2007).
Under the ESA, “[t]he term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”\textsuperscript{93} According to NOAA’s regulations:

\textit{Harass} in the definition of “take” in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.\textsuperscript{94}

“Harm,” in contrast, is “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”\textsuperscript{95}

The ESA also defines its relationship to the MMPA. In general, “no provision of [the ESA] shall take precedence over any more restrictive conflicting provision of the [MMPA].”\textsuperscript{96} As a result, dually protected species like the North Atlantic right whale enjoy the benefit of the most protective provisions in either Act.

In 2003, Congress amended the ESA to provide the Department of Defense with exemptions from critical habitat designations.\textsuperscript{97} However, very few marine and anadromous species have critical habitat designated at all, and Congress explicitly preserved the requirements that the military comply with the section 7(a)(2) “consultation” requirement and the section 9 “take” prohibition.\textsuperscript{98} Thus, this Department of Defense exemption has not been relevant—and is unlikely to become relevant—to the Navy’s use of active sonar.

Nevertheless, since 1978, any federal agency may seek an exemption from the requirements of section 7(a)(2) from the Endangered Species Committee.\textsuperscript{99} While this “God Squad” has only rarely allowed such exemptions, the ESA explicitly provides that the Committee must “grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national secu-
rity.” However, given that NMFS has not yet found that the Navy’s active sonar jeopardizes a listed species, the Navy has not yet invoked this exemption procedure.

The ESA provides a number of exemptions from the section 9 “take” prohibition. Of these, the section 7 incidental take statement (ITS) has been most relevant to the Navy sonar litigation. In connection with formal consultation pursuant to section 7(a)(2), NMFS will issue a formal Biological Opinion, and this Biological Opinion may contain an ITS that exempts the acting federal agency from section 9 “take” liability. However, if the species concerned is a marine mammal, the taking must also be authorized under the MMPA’s incidental take provisions and comply with those MMPA requirements.

In February 2007, the Navy completed its section 7 formal consultation with NMFS regarding MFAS training activities. NMFS issued its Biological Opinion on February 9, 2007, and included a blanket ITS that exempted MFAS activities from section 9 liability through January 2009. Notably, the lower courts in Winter v. NRDC found that the plaintiffs had not shown likely violations of the ESA with respect to MFAS training. However, the ESA ITS covers only MFAS, and in 2008 the Northern District of California still found likely violations of the ESA with respect to SURTASS LFAS.

D. Fur Seal Act

The Fur Seal Act of 1966, implements the Convention on the Conservation of North Pacific Fur Seals. Although limited in scope, it has been raised (unsuccessfully) in at least two rounds of Navy sonar litigation.

The heart of the Fur Seal Act is its prohibition on the taking of the North Pacific Fur seal in the North Pacific Ocean, which the Act

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100 Id. § 1536(j).
104 Decision Memorandum, supra note 38, at 4190.
105 Id.
109 See id. § 1151(b) (defining “Convention”).
110 Id. § 1152.
defines rather specifically as “the waters of the Pacific Ocean north of the thirtieth parallel of north latitude, including the Bering, Okhotsk, and Japan Seas.” Nevertheless, given the Navy’s far-ranging use of LFAS and MFAS, this geographic restriction will be met at least some of the time, and the Fur Seal Act’s definition of “person” explicitly includes “any officer, employee, agent, department, or instrumentality of the Federal Government . . . .” “Take” and “taking” mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill.” Therefore, if the Navy operated its active sonar in the North Pacific Ocean and harassed or killed fur seals, it could “take” those seals in violation of the Act.

The Fur Seal Act has limited exceptions. The two most important allow Indians, Aleuts, and Eskimos to take fur seals for subsistence purposes and takings for scientific research purposes. Unlike the MMPA, Congress has not amended the Fur Seal Act to provide exceptions or lower burdens of proof for national security, national defense, or the military.

E. Magnuson-Stevens Fishery Conservation and Management Act (MSA)

The MSA seeks to conserve and manage commercially important fish stocks by establishing eight regional fishery management councils (FMCs). FMCs regulate important fish stocks through fishery management plans (FMPs), which they must promulgate in accordance with a series of national standards. The Secretary of Commerce, acting through NMFS (NOAA Fisheries), reviews the Councils’ FMPs.

Much of the MSA regulates foreign and domestic fishing activities and hence would seem inapplicable to the Navy’s use of MFAS and LFAS. However, the MSA prohibits “any person” from “violat[ing] any provision of this chapter or any regulation or permit issued pursuant to

111 Id. § 1151(d).
112 Id. § 1151(g).
113 Id. § 1151(i).
114 16 U.S.C. § 1151(m).
115 Id. § 1153.
116 Id. § 1154.
118 Id. § 1801(b)(1).
119 Id. § 1852(a)(1).
120 Id. §§ 1852(h)(1), 1853.
121 Id. § 1851(a).
122 Id. § 1802(39).
this chapter."\textsuperscript{124} and generally prohibits fishing in state or federal waters except as in compliance with applicable law.\textsuperscript{125} Moreover, the MSA defines “fishing” to be:

\begin{itemize}
  \item (A) the catching, \textit{taking}, or harvesting of fish;
  \item (B) the attempted catching, \textit{taking}, or harvesting of fish;
  \item (C) any other activity which can reasonably be expected to result in the catching, \textit{taking}, or harvesting of fish; or
  \item (D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).\textsuperscript{126}
\end{itemize}

While the Act itself does not define “take,” NOAA’s regulations broadly provide that “\textit{catch, take, or harvest} includes, but is not limited to, \textit{any activity} that results in killing any fish . . . .”\textsuperscript{127} Finally, the “persons” subject to the Act explicitly include the federal government and “any entity of any such government.”\textsuperscript{128} Thus, if the Navy’s SONAR kills fish in violation of an FMP or conservation-related regulations, the Navy could violate the MSA.

The MSA contains no general exemptions for national security, national defense, or the military. Moreover, the MSA’s prohibitions on violating the Act, its implementing regulations, or permits issued under the Act apply without exception to all “persons.”

Nevertheless, the Navy is entitled to some relief from the more specific requirement that vessels fish in accordance with state and federal law. This requirement applies only to vessels “other than a vessel of the United States,” and owners or operators of vessels “other than a vessel of the United States.”\textsuperscript{129} Vessels of the United States, in contrast, are prohibited only from transferring fish illegally to foreign vessels within the United States’ exclusive economic zone and from illegally fishing in foreign waters.\textsuperscript{130} Thus, the MSA makes it difficult for the Navy’s sonar operations to create liability in domestic waters for fishing without a permit.

\begin{flushleft}
\textsuperscript{124} Id. § 1857(1)(A).
\textsuperscript{125} Id. § 1857(2).
\textsuperscript{126} Id. § 1802(16) (emphasis added).
\textsuperscript{127} 50 C.F.R. § 600.10 (2007) (emphasis added).
\textsuperscript{128} 16 U.S.C. § 1802(36).
\textsuperscript{129} Id. § 1857(2).
\textsuperscript{130} Id. § 1857(3), (5).
\end{flushleft}
F. Coastal Zone Management Act (CZMA)

Both the California and the Hawaii litigation have raised issues under the CZMA. The CZMA\(^{131}\) encourages states to protect their coastal zones\(^{132}\) by providing federal incentives—financial and otherwise—to states that enact Coastal Zone Management Plans (CZMPs).\(^{133}\) From the Navy’s perspective, the most important incentive that Congress created was the federal consistency provision, which requires that “[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.”\(^{134}\)

Under the Act, the “coastal zone” can be a rather limited area—“the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states . . . .”\(^{135}\) Nevertheless, the consistency requirement applies to federal activities occurring within or outside of the coastal zone, so long as those activities could affect resources within the state’s coastal zone. Given that active sonar sound waves travel far underwater, MFAS and LFAS can trigger (and have triggered) the CZMA’s consistency requirement. Of course, what “consistency” actually requires depends on the details of each state’s CZMP.

The CZMA empowers the President to exempt any federal activity from the consistency requirement.\(^{136}\) However, the President’s exemption authority is not unbridled. First, the President must wait until there is an appealable judgment that the federal activity will violate the consistency requirement.\(^{137}\) Second, the Secretary of Commerce must certify that mediation is unlikely to result in compliance.\(^{138}\) Third, the Secretary of Commerce must request an exemption from the President in writing.\(^{139}\) Fourth, the President must “determine[] that the activity is in the paramount interest of the United States” before granting the ex-

\(^{132}\) Id. § 1452(2).
\(^{133}\) Id. §§ 1454–1455b, 1456a–1456c, 1460.
\(^{134}\) Id. § 1456(c)(1)(A).
\(^{135}\) Id. § 1453(1).
\(^{136}\) Id. § 1456(c)(1)(B).
\(^{138}\) Id.
\(^{139}\) Id.
emission.\footnote{Id.} Finally, “[n]o such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.”\footnote{Id.}

President George W. Bush invoked this exemption for the first time during the \textit{Winters v. NRDC} litigation, but the validity of the presidential order was not at issue before the U.S. Supreme Court. However, the Central District of California raised concerns about the constitutionality of the CZMA exemption procedure that may become important in future litigation.\footnote{See \textit{Winter V}, 527 F. Supp. 2d 1216, 1232–38 (C.D. Cal. 2008).}

\section*{G. National Marine Sanctuary Act (NMSA)}

The NMSA\footnote{16 U.S.C. §§ 1431–1445c-1 (2006).} allows the Secretary of Commerce (acting through NOAA) to designate “any discrete area of the marine environment as a national marine sanctuary” if: (1) “the area is of special national significance”; (2) the area needs protection; and (3) the area is manageable.\footnote{See id. § 1433(a).} Once designated, each sanctuary is managed according to a federal management plan.\footnote{Id. § 1434(a) (2) (C).}

The NMSA makes it illegal for “any person to . . . destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary.”\footnote{Id. § 1436(1).} Moreover, “[a]ny person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for an amount equal to the sum of . . . the amount of response costs and damages resulting from the destruction, loss, or injury,” plus interest.\footnote{Id. § 1443(a)(1).} A “sanctuary resource” is “any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary.”\footnote{Id. § 1432(8).} The Act does not define “person,” but NOAA’s implementing regulations provide that “persons” include “any officer, employee, agent, department,
agency or instrumentality of the Federal government . . .”

Thus, the Navy is subject to the NMSA.

In addition, once a sanctuary is designated, federal agencies must consult with the Secretary of Commerce when their activities could affect sanctuary resources; thus, the Navy’s sonar could be subject to this consultation requirement. The Secretary “shall . . . recommend reasonable and prudent alternatives, which may include conduct of the action elsewhere,” in order to protect sanctuary resources. If the acting agency declines to follow the Secretary’s recommendations, the agency head must explain the reasons for refusing in writing. Moreover:

If the head of a Federal agency takes an action other than an alternative recommended by the Secretary and such action results in the destruction of, loss of, or injury to a sanctuary resource, the head of the agency shall promptly prevent and mitigate further damage and restore or replace the sanctuary resource in a manner approved by the Secretary.

Of course, the NMSA’s requirements apply only if the Navy’s operations could affect a designated National Marine Sanctuary. There are only thirteen National Marine Sanctuaries, plus the Papahānaumokuākea Marine National Monument in the northwest Hawaiian Islands. To date, therefore, the NMSA has been most relevant to Navy operations off of Hawaii and California, although it may become relevant in the future to the Navy’s planned sonar operations in the Atlantic Ocean and around Florida.

The NMSA contains no explicit exemption for national defense, military, or national security activities. However, NOAA can issue special use permits to allow certain activities to occur in a National Marine Sanctuary that would otherwise be prohibited. In order to issue the permit, NOAA must “determine[] such authorization is necessary . . . to establish conditions of access to and use of any sanctuary resource; or . . . to promote public use and understanding of a sanctuary re-
source.”\textsuperscript{156} These conditions are unlikely to apply to the Navy’s use of LFAS and MFAS, although individual sanctuary management plans could well exempt certain military activities.

The NMSA does create defenses to liability for the destruction of sanctuary resources that might apply to the Navy’s use of active sonar near a National Marine Sanctuary. Specifically, a person is not liable if “the destruction or loss of, or injury to, the sanctuary resource was caused solely by . . . an act of war, . . . and the person acted with due care”; if “the destruction, loss, or injury was caused by an activity authorized by Federal or State law”; or if “the destruction, loss, or injury was negligible.”\textsuperscript{157} The first defense might be relevant if the Navy operates its sonar in exact compliance with a federal court order or NOAA’s recommendations after the NMSA consultation. Moreover, because military readiness training is also generally authorized under federal law, the second defense might also be generally available to the Navy.

III. ENVI RONMENTAL EXEMPTIONS AND WINTER V. NRDC

Although the Supreme Court did not reach these issues, Winter v. NRDC highlights many of the complications that can result from military activities, multiple federal environmental statutes, and multiple exemption requirements and procedures.

Originally, in January 2006, plaintiffs sought a temporary restraining order (TRO) against the Navy’s use of active sonar in its Pacific Rim war games, filing the related complaint in June of 2006.\textsuperscript{158} As then filed, the plaintiffs would have raised challenges under the MMPA as well as other statutes. However, two days after NRDC filed the lawsuit, the Department of Defense invoked the MMPA’s new national defense exemption.\textsuperscript{159} Nevertheless, the district court issued a TRO on July 3, 2006, prompting a settlement among the parties.\textsuperscript{160} The court then dismissed the case with prejudice but retained jurisdiction to ensure that the Navy implemented the mitigation measures that the settlement required.\textsuperscript{161} Five environmental groups and Jean-Michel Cousteau then filed a new action on March 22, 2007, alleging claims under NEPA, the ESA, and the CZMA in response to the Navy’s determination to conduct the

\textsuperscript{156} Id. § 1441(a)(1).
\textsuperscript{157} Id. § 1443(a)(3).
\textsuperscript{158} Natural Res. Def. Council, Inc. v. Winter, 513 F.3d 920, 921 n.2 (9th Cir. 2008) [Winter IV].
\textsuperscript{159} DoD Press Release, supra note 74.
\textsuperscript{160} Winter IV, 513 F.3d at 921 n.2.
\textsuperscript{161} Id.
SOCAL exercises *without* mitigation. In response to the plaintiffs’ motion for a preliminary injunction, the Central District of California concluded that NMFS’s February 2007 Biological Opinion and ITS complied with section 7 of the ESA and hence denied an injunction on ESA grounds, despite the fact that the Navy predicted that its SOCAL exercises would result in 710 takes of blue whales, fin whales, humpback whales, sei whales, and sperm whales, all of which are listed for protection under the ESA.

The CZMA issue, however, became more interesting. The Navy concluded that it did not have to discuss its use of MFAS in its federal consistency determination submitted to the California Coastal Commission (CCC), on grounds that MFAS use would occur outside California’s coastal zone and hence would not affect the state’s coastal resources. In addition, it failed to implement the CCC’s proposed mitigation measures. Both the Central District of California and Ninth Circuit disagreed with the Navy’s logic, emphasizing that MFAS would send potentially damaging sound into California’s coastal waters. In response to these courts’ injunctions, on January 15, 2008, President George W. Bush exempted the SOCAL exercises from the CZMA’s consistency requirements. As a result, the CZMA compliance dropped out of the lawsuit at the Supreme Court—although the Central District of California expressed “significant concerns about the constitutionality” of that presidential exemption.

In its Environmental Assessment under NEPA, the Navy predicted that its SOCAL exercises would result in “approximately 170,000 instances of Level B harassment” under the MMPA, including permanent injury to 436 of the estimated 1211 remaining Cuvier’s beaked whales. Nevertheless, and especially in light of the Department of Defense’s 2007 invocation of the MMPA national security exemption

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164 Id. at *5.
165 Id. at *8.
166 Id.
167 Winter III, 530 F. Supp. 2d 1110, 1117–18 (C.D. Cal. 2008); remanded, 513 F.3d 920 (9th Cir. 2008), reissued, 527 F. Supp. 2d 1216 (C.D. Cal. 2008), aff’d, 518 F.3d 658 (9th Cir. 2008), cert. granted, 128 S. Ct. 2964 (2008); Winter I, 2007 WL 2481037, at *8–*9; see Natural Res. Def. Council v. Winter, 508 F.3d 885, 886 (9th Cir. 2007) [Winter II].
169 Id. at 1219–20, 1232–38.
170 Winter I, 2007 WL 2481037, at *5; see Winter VI, 518 F.3d 658, 668–69 (9th Cir. 2008).
for all Navy MFAS activities, the Navy concluded that a full EIS was unnecessary and issued a Finding of No Significant Impact instead.\textsuperscript{171}

In 2007 and very early 2008, both the Central District of California and the Ninth Circuit concluded that the plaintiffs were likely to prevail on their claims that the Navy violated NEPA.\textsuperscript{172} In response, on January 15, 2008, the CEQ found, pursuant to its regulations, that “emergency circumstances” existed, allowing the Navy to proceed through abbreviated NEPA procedures.\textsuperscript{173} The Ninth Circuit remanded the case for reconsideration,\textsuperscript{174} but the Central District of California concluded that no emergency circumstances existed to justify the CEQ’s alternative arrangements under NEPA\textsuperscript{175} and that a preliminary injunction was still warranted even in the absence of the CZMA claim.\textsuperscript{176} Ten days later, the Ninth Circuit affirmed.\textsuperscript{177}

The U.S. Supreme Court granted \textit{certiorari} on June 23, 2008.\textsuperscript{178} As framed by the Navy petitioners, the two issues that the Court would address were: (1) “Whether CEQ permissibly construed its own regulation in finding ‘emergency circumstances’”; and (2) “Whether, in any event, the preliminary injunction, based on a preliminary finding that the Navy had not satisfied NEPA’s procedural requirements, is inconsistent with established equitable principles limiting discretionary injunctive relief.”\textsuperscript{179}

Thus, by the time the case reached the Supreme Court, only the most procedural of the myriad of potential environmental statutes that might have informed the Navy’s conduct of its MFAS exercises—NEPA—was still at issue (although, of course, the Navy was found to have probably complied with the ESA). As noted, the Supreme Court did not even reach that issue, deciding the case instead on the propriety of injunctive relief.\textsuperscript{180} The validity of the many environmental exemptions upon which the Navy relied received different levels of judicial review, and the Navy completed its training exercises without any decision

\textsuperscript{173} Winter \textit{V}, 527 F. Supp. 2d at 1224–25.
\textsuperscript{174} Winter \textit{IV}, 513 F.3d 920, 922 (9th Cir. 2008).
\textsuperscript{175} Winter \textit{V}, 527 F. Supp. 2d at 1225–32.
\textsuperscript{176} Id. at 1238–39.
\textsuperscript{180} \textit{See} Winter \textit{VII}, 129 S.Ct. 365, 381 (2008).
on the merits of the litigation, in potential derogation of both federal environmental law and Congress’s recognition of states’ interests in their coastal zones. Because the SOCAL exercises ended in January 2009, many of the remaining challenges are arguably now moot, calling into question the courts’ abilities to police such national security activities.

CONCLUSION: THE PROCEDURAL COMPONENT OF BALANCING NATIONAL SECURITY AND ENVIRONMENTAL POLICIES

In issuing the first permanent injunction against the Navy’s unmitigated use of LFAS in 2003, the Northern District of California recognized both that “the public interest in military preparedness and protection against enemy submarine attacks through early detection is of grave importance” and that “the public interest in protecting the world’s oceans and the sea creatures that depend upon the oceanic environment to survive is also of the highest importance.”181 It and the two other district courts that have handled Navy sonar litigation so far have balanced these two important public interests by issuing narrowly tailored rather than blanket injunctions against the use of LFAS and MFAS, and by imposing mitigation measures upon rather than stopping the Navy’s activities entirely. Thus, the courts so far have tended to agree with NRDC policy analyst Michael Jasny, who declared in settling the most recent Hawaii litigation: “We don’t have to choose between national security and protecting the environment . . . .”182

As the use of environmental exemptions in the Winter v. NRDC line of cases makes clear, however, there is no uniform national standard for determining exactly when and how national defense activities must comply with environmental requirements, and the Navy wants to engage in active sonar training without mitigation. With the exception of the ESA’s ITS and the MMPA’s national defense exemption, the exemptions it has invoked in the Winter cases, unlike the equitable power of the courts, are inherently binary: the activity is either subject to the environmental requirements or it is not. Moreover, in this litigation, the ITS as well has been employed in a binary fashion, completely exempting MFAS activities from section 9. By its very nature, therefore, the

181 Evans II, 279 F. Supp. 2d 1129, 1138 (9th Cir. 2003).
182 Carolyn Whetzel, Navy Department Agrees to Limit Use of Low-Frequency Sonar in Pacific Ocean, 157 Daily Env’t Rep. (BNA) A–5 (Aug. 14, 2008); see also Reynolds, supra note 15, at 801–02 (emphasizing that the court injunctions have underscored NRDC’s position that balancing is possible).
Winter litigation suggests that most of the existing national security exemptions in the environmental statutes are excessively blunt instruments that do not allow adequate balancing of two important public policies, especially during peacetime.

Perhaps more importantly, there is also no necessary coordination or oversight of the military’s invocation of national security exemptions. Exemptions from the MMPA are entirely within the discretion of the Department of Defense, while exemptions from the CZMA rest solely with the President—but only after a court has found that the military is violating the federal consistency requirement and the military refuses to compromise. Thus, a CZMA exemption becomes available only after the military has been found to be actually violating federal law. NEPA contains no real national security exemption at all, leading to the stretching of the CEQ’s emergency circumstances exception in the Winter decisions. Finally, in the national security context, the ESA’s normally rigorous Endangered Species Committee process is subject to the Secretary of Defense’s determination that the exemption is necessary for reasons of national security. Whether the Committee members can or would challenge the Secretary’s determination of necessity remains an untested but intriguing question. That question, however, underscores a more basic one for these national security exemptions: Who watches the watchmen?

One would think that if a military activity—such as the Navy’s training exercises involving MFAS and LFAS—were a candidate for exemption from the various national environmental policies, comprehensive evaluation of the potential exemptions from specific environmental statutes would be of benefit to both the military and to the public. In addition, a more centralized and comprehensive exemption review process could allow a more nuanced approach to the balancing of national security and environmental interests than the binary exemption provisions currently allow, avoiding blanket prohibitions on important military training exercises while at the same time producing closer analysis of what mitigation measures are feasible and advisable rather than allowing unbridled military discretion to inflict environmental harms in peacetime.

To be sure, the MMPA ITP and ESA ITS exemptions already allow for the imposition of mitigation measures. Moreover, an active balancing approach is messy, complex, and subject to trial-and-error revisions, such as when the Hawaii District Court revised its preliminary injunction in May 2008 in response to the Navy’s actual experiences with the
mitigation restrictions in its March 2008 training exercises.\textsuperscript{183} Nevertheless, allowing for such adaptive management and oversight can force both the military and the environmental community to figure out when exactly—if ever—environmental policies and national security are irrefutably and unavoidably in conflict. Taking its cue from the district courts, Congress should therefore adopt exemption procedures that require the acquisition of such information \textit{before} a binary choice is made to sacrifice either national security or marine biodiversity. Such comprehensive review and flexibility would best serve both public policies at stake as well as the overall public interest in the oceans.

## Appendix: Navy Sonar Litigation

<table>
<thead>
<tr>
<th>Name of Litigation, Opinion(s), and Court(s)</th>
<th>Claim(s)/Cause(s) of Action &amp; Resolution(s)</th>
<th>Type, Purpose, and Location of Sonar Use</th>
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<tbody>
<tr>
<td><strong>Ocean Mammal Inst. v. Cohen</strong></td>
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<tr>
<td>164 F.3d 631 (9th Cir. 1998)</td>
<td>The Court of Appeals affirmed, plus noted that the issues were now moot because testing was complete.</td>
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<td><strong>Kanoa Inc. v. Clinton</strong></td>
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<tr>
<td>1 F. Supp. 2d 1088 (D. Haw. 1998)</td>
<td>NEPA, MMPA, ESA, Fur Seal Act Plaintiff whale watching tour company lacked standing under the Administrative Procedure Act to bring NEPA, ESA, and MMPA claims, and the Fur Seal Act did not provide a cause of action.</td>
<td>Use of LFAS about 10 miles off the island of Hawaii to test its effects on humpback and sperm whales (Phase III testing by Navy).</td>
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<tr>
<td><strong>Haw. County Green Party v. Clinton</strong></td>
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<tr>
<td>14 F. Supp. 2d 1198 (D. Haw. 1998)</td>
<td>MMPA, ESA Case was moot because the Navy finished its testing in March 1998 and its permits expired in July 1998.</td>
<td>Use of LFAS off the Kona coast of the island of Hawaii to test its effects on whales (Phase III testing by Navy).</td>
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</table>
reopening the prior litigation was not warranted. Plaintiffs’ ESA claims failed for failure to comply with the citizen suit notice requirement. Their MMPA claims, based on the Navy’s incidental take permit application, were not ripe. Their NEPA claims were not yet actionable because the Navy’s commitments of resources were not “final agency actions” under the APA and the EIS was not finalized. The groups lacked standing to challenge the Navy’s use of SURTASS LFAS elsewhere in the world.

| **Natural Res. Def. Council v. U.S. Dep’t of the Navy** |
While the district court denied the Navy’s motion for summary judgment arguing that neither NEPA nor the ESA applies extraterritorially, it agreed with the Navy that LWAD is not a “program” requiring either a programmatic EIS under NEPA or programmatic consultation and review under the ESA. | The Navy’s Littoral Warfare Advanced Development (LWAD) program, which had supported or overseen at least 17 sea tests of advanced anti-submarine technology since 1996, including active SONAR. |

| **Natural Res. Def. Council v. Evans** |
| 232 F. Supp. 2d 1003 (N.D. Cal. 2002) | MMPA, ESA, NEPA  
Plaintiffs were entitled to a “carefully tailored” preliminary injunction because they were likely to succeed in showing that: (1) authorization of harassment of up to 12% of marine mammals violates the MMPA’s “small numbers” limitation; | The Navy’s peacetime use of SURTASS LFAS for training, testing, and routine operations in the world’s oceans under the 2002 Final Rule. |
| 279 F. Supp. 2d 1129 (N.D. Cal. 2003) | (2) NMFS impermissibly narrowed the definition of “harassment” under the MMPA; (3) NMFS violated NEPA by arbitrarily postponing the designation of additional "off limits" areas; (4) NMFS violated NEPA by not sufficiently analyzing alternatives; (5) NMFS violated the ESA by illegally defining “adverse modification”; and (6) NMFS violated the ESA by not including proper incidental take statements in its Biological Opinions. Court entered permanent “carefully tailored” injunction and summary judgment for plaintiffs on 10 grounds, the above 6 plus: (7) NMFS improperly scoped final rule on permissible take under MMPA; (8) final rule failed to adequately mitigate adverse impacts; (9) defendants violated NEPA by failing to take “hard look” at impacts on fish; and (10) Navy failed use best available science when consulting under ESA. |

| Cetacean Cmty. v. Bush | ESA, MMPA, NEPA, Whale and dolphin plaintiffs were not "persons" under the Acts and therefore lacked standing to bring their claims. Moreover, the claims relating to the special system of deployment were not ripe, and President Bush was not amenable to suit. Navy’s deployment of SURTASS LFAS world-wide during times of heightened threat. |

| 249 F. Supp. 2d 1206 (D. Haw. 2003) | }
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<tr>
<th>Case</th>
<th>Facts</th>
<th>Conclusion</th>
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<tr>
<td><strong>386 F.3d 1169 (9th Cir. 2004)</strong></td>
<td>The Court of Appeals affirmed that the marine mammals lacked standing to bring their claims.</td>
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<tr>
<td><strong>Haw. County Green Party v. Evans</strong></td>
<td>MMPA, ESA After permanently enjoining NMFS’s permits on January 24, on grounds that NMFS improperly relied on NEPA categorical exclusions, the district court granted NMFS’s motion for entry of judgment.</td>
<td>Scientific experimentation in the northern Pacific Ocean to test whale-finding high-frequency SONAR on gray whales.</td>
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<tr>
<td><strong>Australians for Animals v. Evans</strong></td>
<td>NEPA, MMPA NMFS did not violate either NEPA or the MMPA in issuing the scientific research permits.</td>
<td>Scientific experimentation off the coast of California to test whale-finding high-frequency SONAR on gray whales.</td>
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<td>301 F. Supp. 2d 1114 (N.D. Cal. 2004)</td>
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<tr>
<td><strong>Natural Res. Def. Council, Inc. v. Winter I</strong></td>
<td>NEPA, APA, ESA No decisions yet.</td>
<td>All Navy uses of MFAS.</td>
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<td>January 2006</td>
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<td>Date</td>
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<tr>
<td>June 28, 2006</td>
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<td>Plaintiffs file complaint.</td>
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<td>June 30, 2006</td>
<td>Navy invoked MMPA’s national defense exemption.</td>
<td>Exempted all relevant MFAS activities from compliance with that Act.</td>
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<tr>
<td>July 3, 2006</td>
<td>TRO issued.</td>
<td>The parties negotiated a settlement requiring the Navy to use mitigation. The district court dismissed the case with prejudice but retained jurisdiction to oversee the Navy’s employment of the required mitigation.</td>
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<tr>
<td>July 7, 2006</td>
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<td>Fourteen large-scale MFAS training exercises—both Composite Training Unit Exercises (COMPTUEX) and Joint Task Force Exercises (JTFEX)—collectively referred to as RIMPAC or the SOCAL exercises, occurring off the coast of southern California between February 2007 and January 2009.</td>
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<tr>
<td>March 22, 2007</td>
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<td>NEPA, ESA, CZMA</td>
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<tr>
<td>No. 8:07-cv-00335-FMC-FMx, 2007 WL 2481037 (C.D. Cal. Aug. 7, 2007)</td>
<td>Current complaint filed.</td>
<td>District court issued a blanket preliminary injunction because it was likely that: (1) the Navy violated NEPA by failing to prepare an EIS; (2) the Navy violated NEPA by using inadequate mitigation; (3) the Navy violated NEPA by not considering adequate alternatives or cumulative impacts in its EA; (4) the Navy violated the CZMA by not adopting the mitigation measures that the California Coastal Commission deemed necessary to render the MFAS exercises consistent with California’s Coastal Zone Management Plan; and (5) irreparable harm would occur. However, NMFS had likely</td>
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<tr>
<td>Case No.</td>
<td>Citation</td>
<td>Summary</td>
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<tr>
<td>502 F.3d 859 (9th Cir. 2007)</td>
<td>Navy is entitled to a stay of the injunction pending appeal because the district court did not consider the public interest in having a trained and effective Navy when it issued the injunction.</td>
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<tr>
<td>508 F.3d 885 (9th Cir. 2007)</td>
<td>Court of Appeals vacated its own stay of the injunction on a showing that a more narrowly tailored injunction was warranted and that the district court could effectively issue it.</td>
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<tr>
<td>530 F. Supp. 2d 1110 (C.D. Cal. 2008)</td>
<td>The district court issued a narrowly tailored injunction that required the Navy to use specific mitigation measures in its MFAS operations off the California coast.</td>
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<tr>
<td>513 F.3d 920 (9th Cir. 2008)</td>
<td>The Court of Appeals remanded so the district court could consider two January 15, 2008, legal events: (1) President Bush exempted the Navy’s MFAS training in southern California from the CZMA’s consistency requirement; and (2) the CEQ found “emergency circumstances” existed and provided the Navy with “alternative arrangements” for complying with NEPA.</td>
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<tr>
<td>Case Citation</td>
<td>Summary</td>
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<td>516 F.3d 1103 (9th Cir. 2008)</td>
<td>Stay of injunction pending appeal was not necessary in light of Court of Appeals' sua sponte order expediting appeal.</td>
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<td>518 F.3d 658 (9th Cir. 2008)</td>
<td>The Court of Appeals affirmed the district court in finding that the Navy's need for long-planned training exercises without mitigation did not constitute “emergency circumstances” under NEPA, and that the plaintiffs had demonstrated probable success on the merits. The district court also had properly balanced the public interest factors, and hence the preliminary injunction was upheld.</td>
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<td>518 F.3d 704 (9th Cir. 2008)</td>
<td>The Court of Appeals partially stayed two of the mitigation measures required in the preliminary injunction for 30 days, unless the Navy petitioned the Supreme Court for review, at which point the partial stay would remain in effect until final resolution by that Court.</td>
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| 128 S. Ct. 2964 (2008) | Petition for writ of certiorari granted (as
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<th>Case</th>
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<td><em>Cal. Coastal Comm’n v. U.S. Dep’t of the Navy</em>&lt;br&gt;Complaint, No. 2:2007cv01899, (C.D. Cal. Mar. 22, 2007)</td>
<td>(1) Whether CEQ permissibly construed its own regulation in finding ‘emergency circumstances’; and (2) Whether, in any event, the preliminary injunction, based on a preliminary finding that the Navy had not satisfied NEPA’s procedural requirements, is inconsistent with established equitable principles limiting discretionary injunctive relief.</td>
<td>Supreme Court reverses lower courts, finding that the public interest in national security and the Navy’s need to train clearly outweigh the potential harm to marine mammals, vacating the challenged mitigation measures.</td>
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543 F.3d 1152 (9th Cir. 2008)<br>October 8, 2008<br>129 S. Ct. 365 (2008). | District court’s award of $437,584.24 in attorneys’ fees vacated for reconsideration because fee enhancement was not justified under the Equal Access to Justice Act. | Oral Argument |
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<td>The district court ordered the continuation of the carefully tailored injunction issued under the 2002 Final Rule, requiring additional mitigation measures, on the grounds that the plaintiffs had shown likely violations of all three statutes.</td>
<td>Navy’s use of MFAS in 12 undersea warfare training exercises (USWEX) in the Hawaiian Islands Operating Area between January 2007 and January 2009.</td>
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<td>The U.S. Navy settled this litigation. “Terms of the settlement mirror those” in the Northern District of California’s February 2008 preliminary injunction. Like the injunction, the settlement allows the Navy to test its sonar in the western and eastern Pacific Ocean but limits those operations to defined areas not likely to harm marine mammals. Testing must be conducted more than fifty nautical miles away from the main islands and is prohibited in both the Hawaii Humpback Whale Marine Sanctuary and Papahanaumokuakea Marine National Monument. In addition, the Navy must reduce decibel levels when near coastlines in the western Pacific.</td>
<td>Navy’s peacetime use of SURTASS LFAS throughout the world pursuant to the 2007 Final Rule.</td>
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**MMPA, NEPA, ESA**


**NEPA, CZMA, NMSA, [ESA]**
show that: (1) the Navy violated NEPA by failing to provide for public comment; (2) the Navy arbitrarily relied on NMFS’s scientifically unsupported noise thresholds in the EAs; (3) the Navy’s alternatives analysis violated NEPA; (4) the Navy acted arbitrarily in failing to prepare an EIS; (5) the Navy violated the CZMA by submitting its negative determinations after the statutory deadline; (6) the Navy arbitrarily relied on its flawed NEPA analysis in issuing its negative determinations under the CZMA; and (7) irreparable harm would occur. However, the court held that the plaintiffs were unlikely to succeed in their NMSA claim because the Navy’s use of MFAS was fully disclosed and considered during the consultation process.

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<td>2008 WL 2020406 (D. Haw. May 9, 2008)</td>
<td>The district court modified the original preliminary injunction in part in light of the Navy’s experiences with its March 2008 USWEX.</td>
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<td>2008 WL 2185180 (D. Haw. May 27, 2008)</td>
<td>The district court partially granted the plaintiffs’ motion that NMFS and the Navy be compelled to complete their administrative records.</td>
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