

**FEATURE ARTICLE**

**FEDERAL WATERS, NAVY NOISE AND  
THE REACH OF NATIONAL SECURITY**

By Suzanne M. Piluso and Karen M. Hansen

Recent court rulings have raised the stakes in an ongoing saga about the effects of the Navy's sonar testing on marine mammals and the federal government's obligations to assess and mitigate the impacts of military activities in Clean Water Act jurisdictional waters. Federal courts have recently ruled that the Navy violated several federal laws designed to protect the environment by forging ahead with sonar testing in coastal and U.S. territorial waters without properly completing required studies and undertaking appropriate mitigation measures. An injunction against the planned naval training exercises has issued, requiring a variety of actions. In response, the Bush Administration is seeking review of the case in the Supreme Court. The latest developments in the Navy sonar case are occurring amidst efforts by the Administration to bypass environmental requirements in the name of national security in this case and in other contexts (most notably, the "immigration fence" along the United States-Mexico border).

And in what may be the latest chapter in this story, on March 31, 2008, the Bush Administration asked the Supreme Court to review a lower court decision that the Navy's sonar training exercises must comply with environmental laws. The Justice Department alleges that the recent Ninth Circuit Court of Appeals' decision upholding environmental restrictions on naval training exercises in an attempt to protect marine mammals "poses substantial harm to national security" and improperly overrides the judgments of the defense department. The Natural Resources Defense Council (NRDC) and other conservation groups, which sued the Navy over its sonar training exercises off the coast of Southern California

and in more remote federal territorial waters, have 30 days to respond to the administration's petition, and the Supreme Court can take or decline the case any time after receiving NRDC's response until its next term begins in October.

Concurrently, the Navy issued an almost 2,000-page draft environmental impact statement (EIS) evaluating the challenged training exercises. NRDC and other environmental groups assert that the EIS is a "step in the right direction," but that it is "woefully inadequate" and could lead to further challenge if not significantly improved.

This article summarizes the Navy sonar case and the implications for federal actions in U.S. jurisdictional waters given the Bush Administration's attempted use of national security concerns to waive environmental laws.

**The Navy's Sonar Training Exercises  
and Effects on Marine Mammals**

According to the Navy, sonar testing is necessary to execute anti-submarine warfare, which is critical to national security because of the proliferation of extremely quiet submarines throughout the world. An important part this training is the use of active sonar, by which a vessel or other sonar source emits a loud noise underwater and then listens for a return signal. The Navy asserts that it must conduct regular training under realistic conditions and in a variety of situations, and, as such, scheduled fourteen large training exercises to be conducted in the waters off the coast of southern California between February 2007 and 2009 (SOCAL exercises).

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Challengers to the Navy's plan asserted, and the court ultimately concurred, that the SOCAL exercises are in biologically rich and diverse waters. At least 37 species of marine mammals are found there, nine of which are listed as threatened or endangered under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et. seq.*: the blue whale, fin whale, humpback whale, Northern Pacific right whale, sei whale, sperm whale, sea otter, Stellar sea lion, and Guadalupe fur seal. One key challenger to the Navy's current uses of sonar, The Natural Resources Defense Council states on its website:

NRDC's goal is to encourage the military to use sonar responsibly, not to stop its use altogether. Necessary safety measures include putting rich marine mammal habitat off-limits; avoiding migration routes and feeding or breeding areas when marine mammals are present; and turning off active sonar when marine mammals and endangered species are spotted near by.

Both high and low-intensity sonar has been shown to affect whales and other marine mammals. Though the Navy and wildlife advocates differ on the extent of the effects, the loud blasts produced during sonar exercises can have physical effects on ocean mammals, including hearing loss, and impairment to visual and vestibular systems and internal organs. Behaviorally, the use of sonar may impair marine mammals' foraging ability and ability to detect predators or communicate, and studies have shown that the noise has caused whales to move away from feeding and mating grounds and migration routes and to change their calls. In some reported cases, the use of sonar has been linked to strandings and deaths of marine mammals in various parts of the world.

The Navy acknowledges that its sonar training exercises can harm wildlife, but has maintained that its use of sonar has little effect on marine mammals because the Navy implements sufficient mitigation measures. These include monitoring for marine mammals and establishing "safety zones" where the level of sonar is reduced if a marine mammal is detected within a certain distance from a Navy vessel (the formulation rejected in the pending litigation provided for sonar to be reduced by certain levels when marine mammals approached within 1,000 and 500 yards,

and to be completely shut down at 200 yards). In any case, the Navy argues, national security concerns override the potential effects on marine mammals.

### **The SOCAL Exercises Injunctions**

The Navy's petition to the Supreme Court comes after a series of defeats in the SOCAL litigation. NRDC and other environmental groups filed suit against the Navy, alleging that the SOCAL plan violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et. seq.*, because the Navy failed to prepare a full environmental impact statement (EIS). Additionally, NRDC alleged that the Navy violated the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 *et. seq.*, by submitting a consistency determination that did not take into account the planned use of sonar and by failing to adopt mitigation measures that the California Coastal Commission had determined to be necessary to comply with the state law.

The District Court issued injunctions on August 7, 2007 and January 3, 2008, holding that the Navy violated NEPA by failing to prepare an EIS and establishing additional mitigation measures for the remaining SOCAL exercises. The District Court also found that the Navy and NMFS had violated the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361-1421, by failing to put off-limits areas of the ocean known to be particularly rich in marine mammal life, including endangered species. The MMPA requires the National Marine Fisheries Service (NOAA Fisheries or NMFS) to proscribe the "least practicable adverse impact" on marine mammals, after considering military needs. 1371(a)(5)(A). NMFS had issued restricted zones in a final rule authorizing the Navy to five years of "takings" of marine mammal life incident to military sonar operations. The District Court found that the restricted areas designated by NMFS to be arbitrary and capricious because they excluded areas known to have rich marine mammal life beyond the coastal zones of the United States.

### **Bush Administration Approve of 'Alternative Arrangements' Permitting**

On January 15, 2008, the Bush Administration, through the Council on Environmental Quality (CEQ), approved "alternative arrangements" essen-

tially constituting a waiver of NEPA as these would permit the Navy to continue the SOCAL exercises without first completing an EIS. On the same day, President Bush exempted the SOCAL exercises from the requirements of CZMA.

### **Federal District Court/Ninth Circuit Strike Down 'NEPA Waiver'**

On February 4, 2008, the District Court upheld the injunction and struck down the NEPA waiver, also expressing concerns about the constitutionality of the President's CZMA exemption. (See, *Natural Resources Defense Council, et al. v. Winter*, 527 F.Supp.2d 1216 (C.D. 2008).

On review, the Ninth U.S. Circuit Court of Appeals upheld the decision, finding that "emergency" arrangements were not warranted by law and modifying the restrictions on the SOCAL exercises. (See, *Natural Resources Defense Council v. Winters*, \_\_\_ F.3d \_\_\_, Case No. No. 08-55054 (9th Cir. Feb. 29, 2008)).

The Navy urges that the risk to national security created by the preliminary injunction falls squarely within the legal definition of 'emergency circumstances.' However, the Navy has been on notice of its possible legal obligations to prepare an EIS for the SOCAL exercises from the moment it first planned those exercises. In addition, NRDC filed its complaint almost a year ago, and on August 7, 2007, the district court held that the Navy was likely to lose on the merits of NRDC's claims. We affirmed that ruling in November of 2007. Still, the Navy waited until January 10, 2008, to raise a cry of 'emergency' and request the NEPA and CZMA waivers it relies on here, in order to continue its routine, planned training exercises. We find no abuse of discretion in the district court's determination that such a series of events gives rise to a predictable outcome, not an unforeseeable one demanding 'unusual or immediate action.' (Ibid)

The Bush Administration has petitioned the Supreme Court to review the case, seeking a reversal of the court-imposed restrictions and concurrence with the Executive assertion of authority to declare

emergency exemptions to federal environmental laws. Of particular concern to the Navy is a restriction that requires ships to stop all sonar use within 2,200 yards of a marine mammal.

### **The Navy's EIS**

On April 4, 2008, as required by the injunction, the Navy released a draft EIS for the SOCAL exercises. Under the "preferred alternative," the Navy's sonar training could expose 94,370 marine mammals each year to potentially harmful sonar, and could injure or kill 30 species of marine mammals, including two whales protected under the ESA.

Though issuance of the EIS is a new step for the Navy, NRDC responded that the draft EIS is "woefully inadequate." Specifically, NRDC contends that the predicted number of harmed species and the extent of potential harm is greatly understated and that the proposed mitigation measures are insufficient.

### **Discussion and Analysis**

Besides raising provocative constitutional issues of federalism, the implications of the Navy sonar case include the applicability of NEPA, ESA and MMPA in CWA jurisdictional waters including coastal waters with shared state jurisdiction and the U.S. territorial seas. In addition, sonar technology is being implemented by other nations, implicating issues of international law. Mass strandings of whales, linked by many reports at least in part to sonar exercises, have occurred in recent years in the U.S Virgin Islands, the Canary Islands, eastern U.S. coastal waters, and in the Pacific coast of Japan. Acknowledging this reach, the District Court's February 6, 2008 injunction placed off limits to routine Navy sonar training additional areas such as the Davidson Seamount, the Northwestern Hawaiian Island Marine National Monument, the Galapagos Islands, the Great Barrier Reef, and the Pelagos in the Mediterranean. In addition, other nations are addressing the issue. In October 2004, for example, the European Parliament called on its 25 member states to stop deploying high-intensity active sonar until more is known about its effects on marine life. The following month the World Conservation Congress of the International Union of Concerned Scientists approved a resolution calling for international action to address issues relating to ocean noise, including military sonar.

The SOCAL cases demonstrate, thus far, that federal courts are rejecting the assertion that national security concerns—even in the absence of an emergency—can trump the Navy’s obligations under federal environmental laws. Because no real emergency exists, according to the courts, there is no basis for waiving the federal government’s obligations under the environmental laws at issue in the SOCAL case. Indeed, the February 4 District Court decision stated that accepting the Navy’s arguments would produce:

the absurd result of permitting agencies to avoid their NEPA obligations by re-characterizing ordinary, planned activities as ‘emergencies’ in the interest of national security, economic stability, or other long-term policy goals.

*NRDC v. Winter*, 527 F.Supp.2d 1216, 1231 (D. Cal. 2008).

A parallel but separate effort is occurring with the Administration’s plans for completing construction of a fence along one-third of the 2,100-mile U.S. border with Mexico. In early April, 2008, the Department of Homeland Security (DHS) announced that it is issuing waivers of environmental laws “in their entirety” for large stretches of the project, including NEPA, the CZMA, the ESA, the Migratory Bird Treaty Act, the Clean Water Act, the Clean Air Act, and the National Historic Preservation Act. Not surprisingly, environmental groups are critical of the waivers, arguing that the project will destroy federally protected wild lands and cause irreversible effects to protected species. Last year, the Sierra Club and

Defenders of Wildlife filed a federal lawsuit challenging the construction of fencing on the San Pedro Riparian National Conservation Area in Arizona. The court issued an injunction against the construction in October, but DHS nullified the injunction by waiving the environmental restrictions. Last month the environmental groups asked the Supreme Court to hear their case that the waivers are unconstitutional. The controversy is unlikely to dissipate anytime soon, while the Court determines whether to accept either or both cases for review.

### Conclusion and Implications

The Navy’s petition to the U.S. Supreme Court seeks, in essence, permission to move forward with its plan for conducting sonar testing activities in U.S. waters—with vast coastal and territorial reach—without complying with federal environmental and species protection laws. While the petition seeks to raise constitutional issues of separation of powers between the executive and judicial branches, the federal courts’ SOCAL rulings to date are fundamentally grounded on the basics of what is required for federal actions under NEPA, CZMA and the MMPA and the lack of a factual and legal predicate to justify a different course of action. What the Supreme Court does with the petition may reflect much about the Court’s stance on the executive’s power to override environmental laws under certain circumstances, and has important implications for the strength of environmental laws in the face of potential or real threats to national security.

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